

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 denying an application for an amendment to the city's urban
5 growth boundary (UGB), annexation of the subject property to
6 the city, a comprehensive plan map amendment from
7 Agricultural to Commercial, and a zone change from
8 Agricultural Conservation-County to General Commercial-City.

9 **FACTS**

10 The subject property comprises approximately one half
11 of a larger parcel. The remainder of the larger parcel is
12 within the city limits and the UGB, and is developed with a
13 lumber business.¹

14 In 1990, petitioner submitted an application seeking
15 approvals identical to those sought here. The city denied
16 that application. In 1992, petitioner submitted the subject
17 application to the city. The planning department and the
18 planning commission recommended approval. After a public
19 hearing, the city council denied the application. This
20 appeal followed.

21 **FIRST ASSIGNMENT OF ERROR**

22 "The council was influenced by ex parte contacts
23 which were not disclosed in a manner that gave
24 petitioner an opportunity to respond and which
25 prejudiced petitioner's substantial rights.

¹The city limits and UGB which divide the subject property follow a section line.

1 **SECOND ASSIGNMENT OF ERROR**

2 "The council showed actual bias or prejudice,
3 denying petitioner the impartial tribunal to which
4 she was entitled."

5 ORS 227.180(3) provides:

6 "No decision or action of a * * * city governing
7 body shall be invalid due to ex parte contact or
8 bias resulting from ex parte contact with a member
9 of the decision-making body, if the member of the
10 decision-making body receiving the contact:

11 "(a) Places on the record the substance of any
12 written or oral ex parte communications
13 concerning the decision or action; and

14 "(b) Has a public announcement of the content of
15 the communication and of the parties' right
16 to rebut the substance of the communication
17 where action will be considered or taken on
18 the subject to which the communication
19 related."

20 Petitioner argues the following dialogue, reflected in
21 the minutes of the city council's final deliberations,
22 establishes a city council member had ex parte contacts, and
23 did not make the disclosure required by ORS 227.180(3):

24 "[City Council member] - Well, I heard from some
25 neighbors there that after [petitioner] bought it,
26 [petitioner was] illegally dumping in there with
27 the idea of just going ahead and using it without
28 ever going to anybody. So that turned me off to
29 the whole deal." Record 34.

30 There is no dispute that there was no opportunity for
31 rebuttal afforded to any party during the deliberation stage
32 of the proceedings when this statement was made. The
33 proposal was denied 4-3 by the city council, and the city
34 councilor to whom the above quoted statement is attributable

1 cast the deciding vote.

2 The city contends the above quoted statement does not
3 establish that the city council member had ex parte
4 contacts. The city argues the record in this appeal
5 contains testimony, as well as some documents, from which
6 this statement may have been derived. The city cites
7 minutes from the February 5, 1991 planning commission
8 meeting (concerning the first application) at which
9 neighbors, through an attorney, testified that unauthorized
10 landfill activities had occurred on the property. In
11 addition, the city cites documents which also indicate that
12 fill occurred on the subject property, but that petitioner's
13 fill activities were legal.

14 However, the city cites no evidence in the record to
15 support the latter part of the above quoted statement
16 ("[illegally dump] with the idea of just going ahead and
17 using [the property] without ever going to anybody"), and we
18 are aware of nothing in the record from which such a
19 statement could have been inferred. Accordingly, we
20 conclude the above quoted statement evidences that during
21 the final deliberations, an ex parte contact with the
22 decision maker was disclosed without providing an
23 opportunity for exploration or rebuttal.

24 In Horizon Construction, Inc. v. City of Newberg, 114
25 Or App 249, 834 P2d 523 (1992), the court of appeals made it
26 clear that an ex parte contact with a decision maker must be

1 disclosed by the decision maker at the earliest possible
2 time following the contact. Further, the court made it
3 clear that the failure of a decision maker to timely
4 disclose an ex parte contact(s) constitutes substantive
5 error justifying remand of a challenged decision. While the
6 record does not disclose when the contact(s) at issue here
7 occurred, the city erred by failing to provide an
8 opportunity for petitioner to explore the nature of the
9 contact(s) and for rebuttal.²

10 The first assignment of error is sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 "The council erred in making conclusory findings
13 which are not supported by any evidence at all."

14 **FOURTH ASSIGNMENT OF ERROR**

15 "When making findings, the council either did not
16 state appropriate standards or improperly
17 construed the applicable law in stating
18 inappropriate standards."

19 **FIFTH ASSIGNMENT OF ERROR**

20 "The council erred in making a decision not
21 supported by substantial evidence in the whole
22 record."

23 Our disposition of the first assignment of error means
24 that no purpose is served in disposing of the remaining

²Because we sustain the first assignment of error, the above quoted council member will be required on remand to disclose the nature of the contact(s) and provide an opportunity for rebuttal. Consequently, no purpose is served in reviewing petitioner's second assignment of error alleging that the council member was biased against the application as a result of the ex parte contact.

1 assignments of error. This is because the evidentiary
2 record will be reopened on remand and, conceivably, the
3 decision on petitioner's application may change once the
4 nature of the contact is disclosed, and petitioner is
5 provided with an opportunity for rebuttal. However, we note
6 that if the city should choose to deny the proposal on
7 remand, then under ORS 227.173(1) the city must identify the
8 applicable criteria and provide, in its decision, reasons
9 supported by substantial evidence explaining why the
10 proposal fails to comply with particular applicable
11 standards.

12 The second and third assignments of error are denied.

13 The city's decision is remanded.