

1                           BEFORE THE LAND USE BOARD OF APPEALS  
2                           OF THE STATE OF OREGON

3  
4 JERRY H. DERRY,                           )  
5    )  
6                    Petitioner,            )  
7    )  
8            vs.                            )  
9    )            LUBA No. 93-055  
10 DOUGLAS COUNTY,                        )  
11    )            FINAL OPINION  
12                    Respondent,         )            AND ORDER  
13    )  
14            and                            )  
15    )  
16 STEVEN BUSCH,                           )  
17    )  
18                    Intervenor-Respondent.                            )

19  
20  
21            Appeal from Douglas County.

22  
23            Jerry H. Derry, Oakland, filed the petition for review  
24 and argued on his own behalf.

25  
26            No appearance by respondent.

27  
28            David A. Stoll, Roseburg, filed the response brief and  
29 argued on behalf of intervenor-respondent.

30  
31            KELLINGTON, Referee; SHERTON, Chief Referee; HOLSTUN,  
32 Referee, participated in the decision.

33  
34                           REMANDED                           09/15/93

35  
36            You are entitled to judicial review of this Order.  
37 Judicial review is governed by the provisions of ORS  
38 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county determination that the  
4 raising of large numbers of pigs in confined areas is a use  
5 similar to farm use and, therefore, is permitted in the  
6 Exclusive Farm Use (EFU) zone.

7 **MOTION TO INTERVENE**

8 Steven Busch filed a motion to intervene on the side of  
9 respondent in this appeal. There is no objection to the  
10 motion, and it is allowed.

11 **FACTS**

12 The subject property is zoned EFU. The subject  
13 property adjoins the city limits of the City of Oakland.  
14 Intervenor has conducted a pig operation on the subject  
15 property for some period of time. Intervenor submitted  
16 several "planning clearance" "worksheets" to the county  
17 planning department in order to secure approval to construct  
18 various buildings on the subject property in connection with  
19 his pig operation.

20 The planning director determined that intervenor's pig  
21 operation was a use similar to a farm use and not a feedlot  
22 and, therefore, is a permitted farm use. Petitioner<sup>1</sup>  
23 appealed the planning director's decision to the planning  
24 commission. The planning commission voted 3-2 to uphold the

---

<sup>1</sup>Other parties were also involved in the local appeals.

1 planning director's decision. Petitioner appealed to the  
2 board of commissioners. One member of the board of  
3 commissioners excused herself from participating in the  
4 appeal, on the basis of ex parte contacts. The remaining  
5 two members of the board of commissioners split on whether  
6 to uphold the planning commission's decision. The board of  
7 commissioners determined that under these circumstances, it  
8 should adopt findings allowing the planning commission's  
9 decision to stand.

10 **JURISDICTION**

11 The challenged decision is the decision of the board of  
12 commissioners allowing the planning commission's decision to  
13 stand. As a preliminary matter, however, we note the board  
14 of commissioners' decision goes further than simply allowing  
15 the lower decision to stand. As relevant here, it suggests  
16 the challenged decision is not a land use decision. It  
17 states:

18 "[Petitioner] argues that the Director made a  
19 site-specific 'land use decision' within the  
20 meaning of ORS 197.015(10) and that [intervenor]  
21 was thus an 'applicant' required to carry the  
22 burden of proof that his operation was not a  
23 'feedlot.'

24 "The Director and the [Planning Commission]  
25 determined that the Director's decision was not a  
26 'land use decision' but was a general interpretive  
27 matter affecting all of Douglas County. The  
28 [Planning Commission] thus held that there was no  
29 'applicant' and that [intervenor] had no burden of  
30 proof.

31 "The [Board of Commissioners] agrees with the

1 holding of the [Planning Commission] that the  
2 Director normally and usually \* \* \* makes a  
3 determination as to whether a use is similar to  
4 other uses in a particular zone and that the  
5 Director is so authorized by the [Douglas County  
6 Land Use and Development Ordinance (LUDO)]. Such  
7 'normal' daily determinations do not fall under  
8 the definition of 'land use decision.'  
9 Record 2-3.

10 To the extent this aspect of the challenged decision  
11 interprets the statutory authority of this Board to review  
12 the challenged decision under ORS 197.830 and  
13 ORS 197.015(10), we owe it no deference.

14 Intervenor contends the challenged decision is not a  
15 land use decision because it was made under standards which  
16 do not require interpretation or the exercise of policy or  
17 legal judgment (ORS 197.015(10)(b)(A)) or approves a  
18 building permit issued under clear and objective standards  
19 (ORS 197.015(10)(b)(B)).

20 The primary interpretive question below was whether  
21 intervenor's activities, which include raising pigs in  
22 structures, constitutes a "feedlot" as defined by LUDO  
23 1.090, or whether that use is a "similar use" to a farm use  
24 under LUDO 3.3.050.1 and, therefore, is allowed as a  
25 permitted use in the EFU zone. A feedlot is a conditionally  
26 permitted use in the EFU zone. LUDO 3.3.100(15). In order  
27 to determine whether the proposed use is a feedlot, the  
28 county was required to determine whether the pigs are  
29 maintained in "close quarters" for the purpose of "fattening  
30 the livestock for shipping to market." LUDO 1.090.

1 We believe determinations of whether the proposed pig  
2 operation is "similar" to a farm use and whether it is a  
3 "feedlot" use, are not determinations made under clear and  
4 objective standards and require the exercise of policy or  
5 legal judgment. We conclude the challenged decision is a  
6 land use decision subject to our jurisdiction.

7 **FIRST ASSIGNMENT OF ERROR**

8 "By failing to deliberate the procedural issues  
9 raised by the appellant[,] the county board of  
10 commissioners did not exercise due diligence in  
11 hearing the appeal brought before it and thereby  
12 prejudiced the substantial rights of the  
13 petitioner."

14 Petitioner argues the challenged decision is erroneous  
15 because the oral deliberations of the decision maker differ  
16 from the challenged written order the decision maker  
17 adopted. Specifically, the deliberations of the board of  
18 commissioners resulted in one commissioner moving to affirm  
19 the decision of the planning commission and another  
20 commissioner refusing to second the motion. Apparently, the  
21 county determined the net result of these actions to be the  
22 planning commission decision stands because the board of  
23 commissioners was unable to take an action to overturn the  
24 planning commission.<sup>2</sup>

---

<sup>2</sup>In the absence of something in the local code to which we would be required to defer that specifically requires this result (Clark v. Jackson County, 313 Or 508, 515, 836 P2d 710 (1992)), we believe the county's determination concerning the effect of the board of commissioners' failure to act on the appealed planning commission decision was wrong. We have held that where a local government provides for de novo review of an

1           The findings that ultimately became the challenged  
2 decision, however, make certain determinations on procedural  
3 and other issues. At the public meeting at which those  
4 findings were signed by the board of commissioners, the  
5 minutes reflect the challenged decision was signed after a  
6 successful motion to that effect.

7           While this situation is somewhat unusual, we do not  
8 believe that it warrants departing from our well established  
9 rule that this Board reviews the local government's final  
10 written order. That the challenged decision may not be a  
11 reflection of oral comments made by the local decision maker  
12 during its deliberations, provides no basis for reversal or  
13 remand of the decision. Terra v. City of Newport, 24 Or  
14 LUBA 438, 441-42 (1993).

15           This assignment of error provides no basis for reversal  
16 or remand of the challenged decision.

17           The first assignment of error is denied.

18           **SECOND ASSIGNMENT OF ERROR**

19           "The declaration of an ex parte contact by a  
20 planning commissioner after the close of the  
21 evidentiary portion of the appeal hearing  
22 prevented the appellants from rebutting the

---

inferior tribunal's decision, as is the case here, the applicant retains the burden of proof before the appellate tribunal. Thus, if the local appellate tribunal is unable to agree on a decision, then the local applicant is deemed to have failed to carry its burden of proof, whether or not the applicant prevailed before the inferior tribunal. Strawn v. City of Albany, 20 Or LUBA 344, 349-52 (1990). We determine infra, that intervenor was the applicant below. Therefore, if, on remand, the county adopts the same or similar position, it should explain its reasoning in doing so.

1 substance of the communication and thereby  
2 prejudiced the substantial rights of the  
3 petitioner."

4 Petitioner argues a member of the planning commission  
5 did not make timely disclosure of an ex parte contact that  
6 influenced the commissioner's decision unfavorably to  
7 petitioner. Specifically, petitioner cites the following  
8 statements of the planning commissioner, made after the  
9 evidentiary hearing was closed and during the deliberation  
10 phase of the hearing:

11 " \* \* \* As I understand this proceeding \* \* \* we're  
12 to determine if [the planning director] made an  
13 error in his determination that general animal  
14 breeding is an allowed farm activity versus a  
15 feedlot activity [which is conditionally allowed],  
16 and what is the distinction between [breeding  
17 operations and a feedlot.] I did some fact  
18 gathering and information gathering \* \* \* and I  
19 visited with cattle ranchers, dairy farmers and  
20 one man that has a combination of cattle ranching  
21 and raising of feed \* \* \*. And I asked them \* \* \*  
22 if they corralled or kept in close [confinement]  
23 animals on their farm operation and each said that  
24 they did and they did so all the way from 3 months  
25 [of age]. [O]ne man said [']I keep my bull in the  
26 pen 12 months out of the year.['] These pens were  
27 small enough, I saw them. [N]o natural food is  
28 really produced in those pens. They were close  
29 confined. And so they were confined, and they  
30 were fed and I said, alright now why aren't you a  
31 feedlot then? And their response was [']well, you  
32 have to understand the difference. We must pen  
33 our animals for various purposes such as  
34 vaccinating, branding, making steers out of bull  
35 calves, and so forth['. A]nd then they raise the  
36 [animals] up to where they could market them. And  
37 I said, [']well, where do you market them? Some  
38 go to other people [who] need the stock, some went  
39 to feedlots and I said what [is] the difference

1           between your operation and a feedlot?['] \* \* \*  
2           The difference was the market of a feedlot is the  
3           slaughterhouse going out to slaughter. I also  
4           described [intervenor's] operation to these men,  
5           because they were farmers, and asked them if they  
6           thought that [intervenor's operation] was a swine  
7           breeding operation and they said [']yes it was.[']  
8           \* \* \* I also asked what else they do at a feedlot  
9           and they finish off a product and here [is] part  
10          of the distinction [sic] between the market a  
11          farmer would be looking at and a market that a  
12          feedlot operator would be looking at. Usually,  
13          there [are] medicines and some other chemicals \* \*  
14          \* that are put into the animals as they are being  
15          raised for various purposes. [P]art of the  
16          finishing [process] at the feedlot is to make sure  
17          that those chemicals have worked out of the flesh  
18          before [the animals] are put out to slaughter \* \*  
19          \*. [I] spoke to an attorney friend of mine and  
20          [he said if] you have a definition under the  
21          ordinance \* \* \* then you have to look at that  
22          definition, and if you think something isn't quite  
23          clear[, then] you have to use common sense in  
24          deciding what it means[. A]nd so I came to the  
25          conclusion that there is a distinct difference in  
26          the market that the farm operation experiences or  
27          looks to and what the feedlot market looks to and  
28          that is the same distinction that our [planning]  
29          director pointed out in his decision. There are  
30          two different markets and two different groups of  
31          people \* \* \*. So, therefore, Mr. Chairman, as far  
32          as this hearing is concerned, I believe that the  
33          [planning] director is correct in his  
34          determination and interpretation of the  
35          definition, the difference and distinction  
36          [between a permitted farm use and a feedlot.] \* \*  
37          \*." (Emphasis supplied.) Second Supplemental  
38          Record 2-3.

39          Petitioner states the planning commission vote was 3-2 in  
40          favor of intervenor, and the planning commissioner quoted  
41          above cast the deciding vote on the basis of the above  
42          allegations, to which petitioner never had an opportunity to

1 respond.

2 ORS 227.180(3) provides:

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

8 "(a) Places on the record the substance of any  
9 written or oral ex parte communications  
10 concerning the decision or action; and

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

17 In Horizon Construction, Inc. v. City of Newberg, 114

18 Or App 249, 253-54, 834 P2d 523 (1992), the court of appeals

19 stated the following concerning ORS 227.180(3):

20 "ORS 227.180(3) does not simply establish a  
21 procedure by which a member of a deciding tribunal  
22 spreads a fact on the record. It requires that  
23 the disclosure be made at the earliest possible  
24 time. Implicit in that requirement is that the  
25 parties to the proceeding be given the greatest  
26 possible opportunity to prepare for and to present  
27 the rebuttal that ORS 227.180(3) requires that  
28 they be allowed to make. The purpose of the  
29 statute is to protect the substantive rights of  
30 the parties to know the evidence that the deciding  
31 body may consider and to present and respond to  
32 evidence.

33 \* \* \* \* \*

34 "Failure to comply with ORS 227.180(3) requires a  
35 remand to the [deciding body] and a plenary  
36 rehearing on the application. \* \* \*"

37 Similarly, here, by the time the planning commission

1 member made the disclosure the evidentiary record was  
2 closed, and opportunities for public input had ended.  
3 Further, the board of commissioner's review, while de novo,  
4 was based on the record developed at the planning commission  
5 level. LUDO 2.700. In other words, no new evidence was  
6 allowed to be presented to the board of commissioners.  
7 Finally, the board of commissioners' review could not have  
8 cured the improper ex parte contact at the planning  
9 commission level in any event, because the board of  
10 commissioners treated its inability to agree on the  
11 substance of the appeal as automatically allowing the  
12 planning commission's decision to stand.

13 The second assignment of error is sustained.

14 **THIRD ASSIGNMENT OF ERROR**

15 "The county board of commissioners and the  
16 planning commission incorrectly took the position  
17 that there was no applicant in this case, there  
18 were no site specific issues, and no land use  
19 decision was made. By doing so[, ] the appellant  
20 was forced to bear the burden of proof rather than  
21 the applicant and as a result the substantial  
22 rights of petitioner were prejudiced."

23 The challenged decision determines "the [Planning  
24 Commission's] decision shall stand \* \* \*." Record 4. The  
25 planning commission determined that the intervenor is not  
26 the "applicant" and had no burden to carry in the local  
27 proceedings. Reading the challenged decision as a whole, it  
28 appears the decision improperly shifts the burden of proof  
29 to the local appellants.

1           Intervenor sought county approval for the construction  
2 of buildings on the subject property.     The planning  
3 commission's determination that intervenor is not an  
4 applicant and had no burden of proof in the local  
5 quasi-judicial proceedings is clearly wrong.     Forest Park  
6 Estate v. Multnomah County, 20 Or LUBA 319 (1990); Strawn v.  
7 City of Albany, supra, at 349-52 (1990).

8           The third assignment of error is sustained.

9     **FOURTH ASSIGNMENT OF ERROR**

10           "The county erred in not finding that Busch's  
11 operation is a feedlot, or sufficiently similar to  
12 a feedlot, to require a conditional use permit  
13 under LUDO Sec. 3.3.100 (15). By not making this  
14 finding and requiring that Mr. Busch apply for a  
15 conditional use permit, the substantial rights of  
16 the petitioner were prejudiced."

17     **FIFTH ASSIGNMENT OF ERROR**

18           "The county erred in giving no notice, defective  
19 notice, and insufficient notice at various points  
20 during processing of the Busch application and the  
21 appeal of the planning director's determination.  
22 These notice faults prejudiced and substantial  
23 rights of the petitioner and other parties to the  
24 appeal."

25           We determine above that the ex parte contacts of a  
26 planning commission member require remand of the challenged  
27 decision below. This will require a "plenary rehearing" of  
28 the matter, which will include an opportunity for petitioner  
29 to rebut the substance of the ex parte contacts.     Horizon  
30 Construction, Inc., supra. Further, we determine above that  
31 both the planning commission and the board of commissioners

1 improperly shifted the burden of proof. This requires the  
2 local decision maker to reweigh the evidence in light of the  
3 applicant's burden to establish that his operation is a  
4 similar use to a farm use rather than a feedlot. Both of  
5 these defects will require the county to conduct new  
6 hearings. Under these circumstances, no purpose is served  
7 by reviewing petitioner's contentions under these  
8 assignments of error.

9 To the extent it may be helpful to the parties,  
10 however, we agree the county's decision concerning whether  
11 intervenor's operation is a similar use to a farm use or a  
12 feedlot does not adequately explain the basis for the  
13 county's interpretation and application of relevant LUDO  
14 terms. On remand, the county must explain its  
15 interpretation and application of relevant LUDO terms, make  
16 findings concerning relevant facts regarding intervenor's  
17 operation and explain the result of applying the LUDO  
18 standards to those facts.

19 The fourth and fifth assignments of error are denied.

20 The county's decision is remanded.