

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's decision to approve a
4 conditional use for a community center and outdoor
5 facilities.

6 **FACTS**

7 Petitioner appeals the city's approval of a conditional
8 use for a community center in which a number of community
9 services and activities would take place, the installation
10 of new outdoor recreation facilities and the relocation of a
11 track and football field. The proposal followed an earlier
12 exchange of a portion of a city park for a portion of
13 undeveloped school district property adjacent to the park.
14 The park property at issue is protected by open space
15 zoning. The earlier transfer of park property to the school
16 district did not affect the open space zoning designation.
17 The former park property, which continues to be zoned open
18 space, will be improved with a portion of a relocated track
19 and football field, and informal sports fields. This will
20 allow the community center to be built on former school
21 district property that continues to be zoned for residential
22 use, under which community centers are allowed as
23 conditional uses.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioner assigns as error the failure of a city
26 commissioner to disclose an ex parte contact and the city's

1 refusal to allow for an opportunity to object to that
2 contact. Petitioner argues:

3 "October 16, 1996, during a break at the city
4 Council hearing, commissioner Lindberg had an ex
5 parte conversation concerning this case with
6 Richard Cooley. On November 6, 1996, before City
7 Council, opponent, Mr. David Schwabe asked for an
8 opportunity to object to an ex parte contact by a
9 City Commissioner, to which he was a witness. The
10 City Council made a decision to refuse to hear the
11 objection" (citations omitted) Petition for
12 Review 3.

13 Prior to the filing of the briefs in this appeal,
14 petitioner sought an evidentiary hearing to establish that
15 an ex parte contact had occurred between the commissioner
16 and Mr. Cooley. On September 5, 1997, LUBA issued an order
17 in response to petitioners motion. We concluded, based on
18 affidavits submitted by the parties, that:

19 "There is no dispute that the commissioner
20 communicated with the individual in the hearings
21 room prior to making a decision on the application
22 in question. The city's contention that the
23 commissioner did not discuss any 'facts or
24 specifics' of the appeal during that conversation
25 is irrelevant under the city code, which flatly
26 prohibits the commissioner from 'communicating,
27 directly or indirectly, with any person interested
28 in the outcome.' Under the unambiguous language
29 of the code, the content of the communication is
30 inconsequential, and there is no reason to hold an
31 evidentiary hearing to determine exactly what was
32 said.

33 "However, this conclusion does not necessarily
34 compel a determination that an impermissible ex
35 parte contact occurred. The prohibition set forth
36 in PCC 33.730.110(A) extends only to 'person[s]
37 interested in the outcome' of the city's
38 proceeding. Petitioner's motion describes the

1 individual with whom the commissioner spoke as 'a
2 professional land developer and property owner,'
3 who 'chaired a citizens' advisory committee on the
4 siting of the East Portland community center.'
5 Petitioner's Answer to City's Response 1-2.

6 "The city does not dispute petitioner's
7 description. However, these facts do not
8 establish that the individual was a 'person
9 interested in the outcome' of the proceeding that
10 led to the challenged decision. For example,
11 petitioner does not explain the role of citizens'
12 advisory committees in city decision-making, or
13 the significance of serving on such a committee.
14 Nor has petitioner established what, if any, role
15 the particular citizens' advisory committee had
16 with regard to the challenged decision. Unless
17 petitioner establishes the subject individual's
18 interest in the outcome of the proceeding, we can
19 make no determination as to whether the
20 conversation at issue violated PCC
21 33.730.110(A).²"

22 _____
23 ²Although we do not believe an evidentiary hearing
24 is warranted on the issue of ex parte contacts,
25 petitioner may include in her petition for review
26 an assignment of error on this issue. (Citation
27 omitted.) Opp v. City of Portland, ___ Or LUBA ___
28 (LUBA No. 96-236, Order on Motion for Evidentiary
29 Hearing, September 5, 1997), slip op 3-5.

30 In her petition for review, petitioner describes three
31 bases for her contention that Mr. Cooley is an interested
32 party as described in PCC 33.730.110(A). Petitioner points
33 to evidence in the record that demonstrates that Mr. Cooley
34 owns property across the street from the proposed center, he
35 received notice of a related approval proceeding, and he was
36 chair of the site selection task force. Petitioner points
37 to a place in the record that includes minutes of a October

1 2, 1996 meeting that state:

2 "Dick Cooley, Chair, Citizens Site Selection Task
3 Force, said the 15-member task force spent 18
4 months on the selection process. He said this
5 site best meets the criteria and Council should
6 support the Hearings Officer's decision." Record
7 219.

8 Petitioner's general statement regarding Mr. Cooley's
9 relationship to the proposed action, and in particular, the
10 statement in the October 2, 1996 minutes, indicates that Mr.
11 Cooley, indeed, may be a person interested in the outcome of
12 the city's proceeding under PCC 33.730.110(A). However, the
13 challenged decision does not provide an interpretation of
14 the PCC 33.730.110(A) phrase "person interested in the
15 outcome" of the proceeding. Although this Board may, we are
16 not required, to make this interpretation. Marcott
17 Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122
18 (1995). It is for the county to interpret PCC 33.730.110(A)
19 in the first instance. If the city determines that Mr.
20 Cooley is a person interested in the outcome of the city's
21 proceeding under PCC 33.730.110(A), the city must allow
22 petitioner an opportunity to rebut the substance of the
23 commissioner's communication with Mr. Cooley as described in
24 Mr. Scwabe's affidavit. Garrigus v. City of Lincoln City,
25 25 Or LUBA 754 (1993).

26 The first assignment of error is sustained.

27 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

28 Petitioner contends that the challenged decision does

1 not comply with two provisions of PCC 33.815.100 pertaining
2 to the city's open space zone.

3 To the extent either of these assignments of error
4 assert any legally cognizable error, neither of them
5 establishes any legal basis upon which the challenged
6 decision is subject to remand or reversal.¹ ORS
7 197.835(16).

8 The second and third assignments of error are denied.

9 The city's decision is remanded.

¹The affidavits submitted by petitioner allege that the substance of the commissioner's remarks to Mr. Cooley included a request that Mr. Cooley arrange to refute earlier testimony regarding the loss of park land in the area. These remarks do not relate to the city's compliance with specific provisions of PCC 33.815.100, the substance of these two assignments of error. Accordingly, any evidence presented by petitioner would have no bearing on the merits of these assignments of error.