

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 JOAN E. SMITH and CHARLES L. SMITH,)
5)
6 Petitioners,)
7) LUBA No. 94-150
8 vs.)
9) FINAL OPINION
10 CITY OF PHOENIX,) AND ORDER
11)
12 Respondent.)

13
14
15 Appeal from City of Phoenix.

16
17 Joan E. Smith and Charles L. Smith, Phoenix, filed the
18 petition for review. Joan E. Smith and Charles L. Smith
19 argued on their own behalf.

20
21 Larry Kerr, Medford, filed the response brief and
22 argued on behalf of respondent.

23
24 HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,
25 Referee, participated in the decision.

26
27 REMANDED 01/12/95

28
29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a city council decision approving
4 a conditional use permit allowing several specified types of
5 businesses, with up to 80 employees, to occupy an existing
6 industrial complex.

7 **FACTS**

8 The city planning commission considered the disputed
9 conditional use permit at a public hearing held on May 9,
10 1994. Prior to the planning commission's action in this
11 matter, three of the seven members of the city council
12 signed a letter dated May 24, 1994, requesting that a
13 special planning commission meeting be held on June 8, 1994
14 to expedite planning commission action on the disputed
15 conditional use permit. The city recorder determined the
16 city council did not have authority to request that the
17 planning commission hold a special meeting, and the letter
18 was not given to the planning commission.

19 The planning commission conducted a second public
20 hearing and, on July 11, 1994, approved the challenged
21 conditional use permit with conditions. The planning
22 commission's decision was appealed to the city council. The
23 city council conducted a public hearing on August 1, 1994
24 and approved the conditional use permit with modified
25 conditions at the conclusion of that hearing. This appeal
26 followed.

1 **INTRODUCTION**

2 Petitioners contend the city council engaged in ex
3 parte contacts which were not disclosed in the manner
4 required by ORS 227.180(3).¹ As the Court of Appeals
5 explained in Horizon Construction, Inc. v. City of Newberg,
6 114 Or App 249, 253, 834 P2d 523 (1992), "[t]he purpose of
7 [ORS 227.180(3)] is to protect the substantive rights of the
8 parties to know the evidence that the deciding body may
9 consider and to present and respond to evidence." (Footnote
10 omitted.) If city council members had ex parte contacts
11 that were not disclosed in the manner required by ORS
12 227.180(3), the city's decision must be remanded. Id.

13 **FIRST ASSIGNMENT OF ERROR**

14 As explained above, three city councilors signed a May
15 24, 1994 letter requesting a special planning commission
16 meeting be held on June 8, 1994 to expedite planning

¹ORS 227.180(3) provides:

"No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

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

"(b) Has a public announcement of the content of the communications and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

1 commission action on the disputed conditional use permit.²
2 Petitioners contend in their first assignment of error that
3 this letter constitutes an improper ex parte contact and
4 shows the city council's bias.

5 The May 24, 1994 letter was never given to the planning
6 commission, so it was not a contact of any kind.³ Moreover,
7 we do not agree the letter is sufficient to demonstrate
8 those who signed it were biased in this matter. See 1000
9 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 80-85, 742
10 P2d 39 (1987).

11 The first assignment of error is denied.

12 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

13 In their second and third assignments of error,
14 petitioners allege that during the city council hearing in
15 this matter, at least two city council members made
16 statements that they had visited the applicant's existing
17 facility and had discussions with the applicant.

18 In responding to these assignments of error, respondent
19 does not dispute the alleged ex parte contacts occurred.
20 Rather, respondent relies on allegations that the
21 petitioners in this appeal did not themselves sufficiently

²A fourth city council member's name appears at the bottom of the letter, but he did not sign the letter.

³We therefore need not consider whether the May 24, 1994 letter would have constituted an ex parte contact had the letter been given to the planning commission, or whether the city council's disclosure of that letter was sufficient to comply with ORS 227.180(3).

1 raise ex parte contact issues below. In view of the Court
2 of Appeals' decision in Horizon Construction, Inc. v. City
3 of Newberg, supra, it is doubtful that issues concerning
4 undisclosed ex parte contacts need be raised below to
5 preserve the right to raise such issues at LUBA. In any
6 event, the first person speaking in opposition to the
7 conditional use permit application accurately described to
8 the city council the obligation to disclose fully the
9 substance of any ex parte contacts and provide an
10 opportunity for rebuttal of information obtained through
11 such contacts. In addition, this person requested that the
12 city council make such disclosure and provide an opportunity
13 for rebuttal. The city council members failed to do so
14 following this request, even though discussion by one city
15 council member later in the public hearing, and by a second
16 city council member after the public hearing was closed,
17 established there had been ex parte contacts. The right to
18 raise the ex parte contact issues raised in the second and
19 third assignments of error was adequately preserved, if
20 preservation of those issues is required.

21 Although the full extent of any ex parte contacts the
22 participating city council members may have had with the
23 applicant is somewhat unclear, it is clear that numerous ex
24 parte contacts occurred.⁴ We agree with petitioners that

⁴The main concerns expressed during the local proceedings addressed the potential for offsite impacts from the businesses that will be allowed to

1 remand of the decision is warranted. The members of the
2 city council must make full disclosure of all ex parte
3 contacts each participating member may have had regarding
4 the subject application prior to the August 1, 1994 city
5 council meeting and provide the statutorily required
6 opportunity to rebut such contacts.

7 The second and third assignments of error are
8 sustained.

9 The city's decision is remanded.

occupy the subject property under the disputed conditional use permit. Shortly before the public hearing was closed, in questioning an opponent of the application, one city council member mentioned that he made two visits to the applicant's current facility in Ashland. He stated that he was impressed with the operation and that the adjoining property owners did not have problems with offsite impacts. Supplemental Record 5. However, no opportunity was provided for parties to inquire into the information this city council member gathered during his site visits and no opportunity was provided to rebut that information. To the contrary, the city council member's statements apparently were made to rebut the testimony that had just been presented by the opponent.

After the public hearing was closed, a second city council member mentioned that he had visited the applicant's current facility in Ashland and related that there was no problem with noise from printing presses. Again there was no attempt to disclose the ex parte contacts or provide an opportunity for rebuttal.