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

WILLIAM D. YOST, WALTER )  
HOWARD, JR. and BILL C. )  
KANRICH, )  
Petitioners, )  
vs. )  
CITY OF ONTARIO, )  
Respondent. )

LUBA NO. 80-036

FINAL OPINION  
AND ORDER

Appeal from City of Ontario.

W. F. Schroeder, Vale, filed a brief and argued the cause for Petitioners. With him on the brief were Schroeder & Hutchens.

Gary J. Ebert, Ontario, filed a brief and argued the cause for Respondent. With him on the brief were Yturri, Rose, Burnham & Ebert.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

REMANDED

11/14/80

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioners seek reversal of Respondent's decision denying  
4 petitioners' application for a zone change for their property  
5 from Residential to Commercial. This zone change request also  
6 involved a single tract amendment to the Ontario Comprehensive  
7 Plan which designates the property in question as suitable for  
8 residential use.

9 STANDING

10 Respondent does not contest petitioners' standing.

11 ALLEGATIONS OF ERROR

12 Petitioners set forth the following as their assignment of  
13 error:

14 "A quasi-judicial decision was not properly  
15 reached because:

16 "(a) a Commission member who abstained  
17 nevertheless participated significantly in the hearing  
and decision making process;

18 "(b) the Commission made no Findings which  
19 adequately addressed an application for a zoning  
amendment;

20 "(c) the Council adopted nothing by adopting the  
21 Findings of the Commission which were not made or not  
adequately made;

22 "(d) the Council denied the petitioner the right  
23 to speak; and petitioners were substantially  
prejudiced thereby."

24 FACTS

25 Petitioners filed a zone change request for three separate  
26 parcels of land from residential to C-1 (Neighborhood

1 Commercial). The parcel described as Block 4, Lots 8 and 9 had  
2 a zoning designation of R-1 (Low Density Residential). The  
3 parcel described as Block 4, Lots 6 and 7 had a zoning  
4 designation of R-2 (Mixed Residential) and the parcel described  
5 as Block 3, Lots 24 and 25 had a zoning designation of R-3  
6 (High Density Residential). The subject property is surrounded  
7 by a Neighborhood Commercial zone to the north, General  
8 Commercial zone to the west (this land is presently occupied by  
9 a shopping center), Low Density Residential zone to the south  
10 and a combination of residential zones (R-1, R-2 and R-3) to  
11 the east. The property sought to be rezoned was designated by  
12 the comprehensive plan for residential use.

13 The Planning Commission of the City of Ontario held its  
14 initial hearing on February 11, 1980. The matter was then  
15 continued until March 10, 1980 whereupon a second hearing was  
16 held on the proposed zone change. At this second hearing a  
17 Planning Commissioner (Nielsen) who had participated fully at  
18 the February 11, 1980 hearing indicated that he preferred to  
19 abstain from voting. His basis for abstention is not entirely  
20 clear from the record but appears to be based on the fact he  
21 had discussed the proposed zone change with various third  
22 parties in the neighborhood. As occurred during the February  
23 11 hearing, the only person appearing on behalf of petitioners  
24 at the March 10, 1980 hearing was Petitioner Yost. There  
25 appears in the record opposition from various neighbors to the  
26 zone change. Their testimony varied, but centered on perceived

1 conflict with the residential nature of the neighborhood,  
2 decreased housing availability, insufficient parking, other  
3 available sites, traffic problems and lack of need.

4 After deliberation, the Planning Commission voted to deny  
5 the zone change request by a unanimous vote with Mr. Nielsen  
6 abstaining. The record indicates, however, that Mr. Nielsen  
7 did take part in some of the deliberations even though he had  
8 announced his intention to abstain.

9 According to minutes of the hearing, the Planning  
10 Commission did not make any written findings at the time of the  
11 vote. However, general statements called "findings" were  
12 announced. Thereafter, the Chairman of the Planning Commission  
13 prepared written findings concerning the zone change request  
14 which were then forwarded to the City Council. The entire  
15 Planning Commission did not review the written findings  
16 prepared by the Planning Commission Chairman. In addition to  
17 the findings prepared by the Planning Commission Chairman, the  
18 City Manager proposed additions to the findings and the two  
19 documents were presented to the City Council for its  
20 consideration. The document submitted by the Chairman of the  
21 Planning Commission was referred to at the City Council meeting  
22 as "findings of fact by the Planning Commission." On March 17,  
23 1980, the Ontario City Council considered the zone change  
24 request and voted unanimously to deny the request and to adopt  
25 with modifications the "findings of the Planning Commission."  
26

1        DECISION

2            Nielsen's Involvement

3            Petitioners first allege that notwithstanding the fact that  
4        Commissioner Nielsen abstained at the commencement of the March  
5        10 hearing, he thereafter expressed an opinion about an issue  
6        that preoccupied the commission. The petitioners also allege  
7        that Commissioner Nielsen contributed the findings of his own  
8        ex parte contacts, expressed his conclusion as to the matter at  
9        issue and his judgment as to the manner in which the matter at  
10       issue should be resolved. Petitioners further contend that  
11       during the decision-making phase of the commission's  
12       activities, Commissioner Nielsen advocated the making of the  
13       decision, expressed his judgment concerning the most  
14       significant criteria for the making of the decision, advocated  
15       the adverse significance of allowing the application, expressed  
16       his judgment as to the relevancy of certain facts and added  
17       momentum to a particular view of the evidence adverse to the  
18       applicant. Petitioner then argues that as a result of this  
19       involvement by the abstaining voter, he has been prejudiced.

20           Respondent responds basically that the type of contacts  
21       that Mr. Nielsen was discussing were not, in fact, grounds for  
22       him to have disqualified himself in the first place so his  
23       continued participation was not improper. Respondent cites  
24       this Board to the case of Tierney v. Duris, Payless Properties,  
25       21 Or App 613, 536 P2d 435 (1975) for support of its argument.  
26       Respondents basically say that it is apparent that Commissioner

1 Nielsen was not required to abstain from voting due to the  
2 contacts he had had with various persons in the neighborhood of  
3 the property for which the proposed zone change was sought.

4 In addition, respondent argues in the alternative that  
5 based on the case of Gregg v. Oregon Racing Commission, 38 Or  
6 App 19, 588 P2d 1290 (1979) petitioner has failed to show any  
7 actual prejudice or bias by the Planning Commission. Quoting  
8 Gregg, respondent asserts that the court held:

9 "\*\*\*\*Petitioner relies on the statement in Fasano  
10 v. Washington County Commission, 264 Or 574, 588, 507  
11 P2d 23 (1973), that one has a right to an impartial  
12 tribunal, for the proposition that ex parte contacts  
13 are per se violations of due process. We specifically  
14 rejected this contention in Tierney v. Duris, Payless  
15 Properties, 2 Or App 613, 628, 536 P2d 435 (1975),  
16 following Withrow v. Larkin, 421 US 35, 95 S Ct 1456,  
17 43 L Ed2d 712 (1975).

18 "\*\*\*\*Here petitioner had made no showing of actual  
19 prejudice or bias by the agency members charged with  
20 adjudication and has therefore shown no cause for  
21 relief." Gregg, supra, 38 Or App at 24-25.

22 In regards to this argument, respondent says there is no  
23 showing of actual prejudice and further points to the fact that  
24 the Planning Commission voted unanimously to deny the proposed  
25 zone change. In addition, it points out that the decision of  
26 the Planning Commission constituted a recommendation only and  
27 that the Ontario City Council based upon their de novo review  
28 of the record unanimously decided to deny the requested zone  
29 change.

30 Our review of the record indicates that the comments of  
31 Planning Commissioner Nielsen were neither per se based upon

1 prohibited ex parte contacts nor prejudicial to the  
2 petitioner. In addition, we find no grounds upon which a  
3 holding of prejudice against petitioners can be substantiated.  
4 Therefore, based on the foregoing, we deny petitioners' first  
5 assertion of error.

6 Sufficiency of Findings

7 Petitioners next argue that the Planning Commission made no  
8 adequate findings addressing a zoning amendment. This  
9 assertion of error is best considered in conjunction with  
10 petitioners' third allegation of error that the decision was  
11 not properly reached. Read together, the petitioners seem to  
12 be alleging that the Planning Commission made no adequate  
13 findings addressing the issue before it. Petitioners argue  
14 that the findings submitted to the City Council were  
15 inoperative because they were not made or adopted by the  
16 Planning Commission as a body since they were written by the  
17 Chairman of the Planning Commission after the fact. Further,  
18 petitioners allege they were prejudiced because not only were  
19 the findings written by the Planning Commission Chairman not  
20 reviewed and adopted by the full Planning Commission, they were  
21 represented to be the findings of the Planning Commission to  
22 the City Council. Petitioners contend this representation or  
23 misrepresentation gave more credence to the document drafted by  
24 the Planning Commission Chairman, than it would otherwise have  
25 received. Section 10B-16-1(F) of respondent's zoning ordinance  
26 states in pertinent part:

1 "1. The Planning Commission shall, at the close  
2 of the hearing, deliberate the question and reach a  
3 decision, or continue the matter for decision only, to  
4 a time and place then announced.

5 "2. The Planning Commission's decision shall be  
6 a recommendation to the City Council advising  
7 approval, disapproval or approval with modifications.

8 "3. The Planning Commission's recommendation  
9 shall include written findings of fact as to whether  
10 the proposal is in accord with the intent and  
11 requirements of the Comprehensive Plan and this  
12 Title. These findings shall be forwarded to the  
13 Council and be accompanied by a sound recording of the  
14 hearing. If it is determined necessary by the  
15 Planning Official or requested by the City Council, a  
16 written transcript of the hearing shall be prepared."  
17 (emphasis added)

18 Section 10B-16-2 states upon review of the Planning  
19 Commission's recommendation:

20 "The Council may affirm, reverse, or modify the  
21 recommendation of the Planning Commission, if in the  
22 view of the Council, there is sufficient evidence to  
23 support this action."

24 All parties agree that the "recommendation" which went to  
25 the City Council was not drafted by or acted upon by the entire  
26 Planning Commission. It was a document prepared by the  
27 Planning Commission Chairman. The City Council, however,  
28 treated the contested document as the findings of fact of the  
29 Planning Commission. The minutes of the City Council hearing  
30 indicate:

31 "The Council deemed the findings of fact by the  
32 Planning Commission adequate \* \* \* \* Bob Prahm moved,  
33 seconded by Paul Parker to uphold the Planning  
34 Commission's decision and approve the Planning's  
35 Commission's findings of fact and conclusions of law \*  
36 \* \* \* Motion carried unanimously."



1           The Planning Commission clearly violated Section  
2 10B-16-1(F) (3) of its zoning ordinance when it failed to  
3 present written findings to the City Council. This error must  
4 be considered in conjunction with petitioners' next assignment  
5 of error.

6           Right to Speak

7           Petitioners assert that they were denied the right to speak  
8 and were substantially prejudiced thereby. Petitioners contend  
9 that at the meeting of the City Council, Mr. Yost asked to  
10 point out that the findings presented to the City Council were  
11 not those of the Planning Commission but rather those of the  
12 Planning Commission Chairman, but was denied the right to do  
13 so. Petitioners allege that this directly violates ORS  
14 227.180(1).

15           Respondent denies that petitioners were not allowed to  
16 speak but instead argues that the petitioners were simply  
17 reminded that the evidence considered in a de novo review shall  
18 be confined to the record of the public hearing before the  
19 Planning Commission. The respondent takes the position that in  
20 so reminding petitioner, petitioner may have mistaken the  
21 cautionary language and decided not to speak, but petitioner  
22 was not, in fact, denied the right to speak.

23           According to minutes of the City Council hearing the  
24 following is what took place regarding this alleged refusal to  
25 allow the petitioner to speak:  
26

1 "Mr. Bill Yost was present at the meeting and asked  
2 that he might speak, but was reminded by legal counsel  
3 that the Council could not receive additional  
4 testimony under the present zoning procedure  
5 ordinance, which allows a 'de novo' review limited to  
6 materials received by the Planning Commission as  
7 evidence, materials submitted to the Planning Official  
with respect to the application, the transcript of the  
hearing, the findings and recommendations of the  
Planning Commission, and their judgment of the  
competency, relevancy, and materiality of the proposed  
testimony or other evidence."

8 The record does not indicate whatever respondent's legal  
9 counsel then attempted to determine if what Mr. Yost was  
10 attempting to say was "additional testimony" or a procedural  
11 matter.

12 CONCLUSION

13 Petitioners allege that the action of the Planning  
14 Commission Chairman in misrepresenting the source of the  
15 contested findings document combined with the failure to allow  
16 petitioner to inform the City Council of the misrepresentation  
17 resulted in substantial prejudice to petitioners.

18 This Board is empowered to remand land use decisions if we  
19 find the city:

20 "Failed to follow the procedure applicable to the  
21 matter before it in a manner that prejudiced the  
22 substantial rights of the petitioner." Oregon Laws  
1979, ch 772, sec 5(4)(a)(B)

23 On the surface the above set of procedural irregularities  
24 creates a prima facie case of prejudice. If we had before us a  
25 complete transcript of the proceedings before the City Council,  
26 we might have been able to conclude that the prima facie case

1 has no substance. All we were presented by Respondent,  
2 however, were the generalized minutes which create the  
3 atmosphere of prejudice. Petitioners had a right to a fair and  
4 open hearing on their request. We are unable to tell from the  
5 record before us if they received such a hearing. Therefore,  
6 we must remand this matter to the city for further proceedings  
7 consistent with this opinion.

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