BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROSE MARIE OPP,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2000-001

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Rose Marie Opp, Portland, filed the petition for review and argued on her own behalf.

Kathryn Beaumont, Senior Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 06/16/00

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals the city's remand regarding its 1996 decision to approve a conditional use permit for a community center and outdoor facilities.

FACTS

In November 1996, the city council approved a conditional use permit application for a community center and outdoor facilities on publicly owned park and school lands. Petitioner appealed the council's decision, arguing, *inter alia*, that the city had violated state law and its zoning code because a city commissioner did not disclose an *ex parte* contact and the council did not provide an opportunity to rebut the content of the *ex parte* contact. In *Opp v. City of Portland*, 33 Or LUBA 654 (1997) (*Opp I*), *aff'd* 153 Or App 10, 955 P2d 768, *rev den* 327 Or 620 (1998) (*Opp II*), the challenged decision was remanded in order to allow the city to interpret in the first instance a provision of its code regarding *ex parte* contacts. Many of the details of the alleged contact are discussed in our order on petitioner's motion for evidentiary hearing in the prior proceeding, *Opp v. City of Portland*, 33 Or LUBA 820, 820-21 (1997), and in the Court of Appeals' decision, *Opp II*, 153 Or App at 12. In addition, we provide the following summary from the city's decision on remand:

> "On November 6, 1996, the Portland City Council denied an appeal of the Mill Park Neighborhood Association and approved conditional uses for the East Portland Community Center * * *. The Council held two appeal hearings on October 2 and 16, 1996. At the conclusion of the October 16th appeal hearing, the Council took a tentative vote and continued the hearing until November 6th for the adoption of findings and a final vote.
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> "Shortly before the Council took a final vote on November 6th, the City Attorney informed the Council of a letter the Council Clerk received the previous day from C. David Schwabe. In his letter, Mr. Schwabe stated that he believed he witnessed an *ex parte* contact between an unnamed person who testified against the appeal and an unnamed City Council member. The Council declined to reopen the evidentiary record for purposes of considering the alleged *ex parte* contact and proceeded to take a final vote. Mayor [Vera] Katz and Commissioners Mike Lindberg, Charlie Hales and Gretchen

Kafoury voted in favor of approving the conditional uses and denying the Association's appeal.

"[Petitioner] appealed the Council's decision to [LUBA], arguing the Council's decision violated various provisions of the city code and the city's comprehensive plan. In her appeal, [petitioner] raised an issue concerning the alleged *ex parte* contact. She argued the City violated state law and the zoning code because Commissioner Lindberg never disclosed the contact and the Council provided no opportunity for rebuttal.

"At LUBA, [petitioner] presented affidavits from David Schwabe and Lawrence Hudetz asserting that they observed then-City Commissioner Mike Lindberg speak to Dick Cooley during a break in the appeal hearing before the Council on the proposed community center. Mr. Schwabe's affidavits asserted the two engaged in conversation concerning the center and the opponents' claims about the loss of park land in the City.[1T]

"The City submitted an affidavit from former Commissioner Lindberg in which he indicated he did not recall any conversation with Mr. Cooley. In supplemental papers, the City indicated that on further review Commissioner Lindberg recalled having a brief conversation with Mr. Cooley during a break in the appeal hearing, but is certain he did not discuss the merits of the community center or the Association's appeal with him." Record 5-6.

In LUBA's decision, the Board determined that the issue of whether an *ex parte* contact occurred turned on whether Cooley was a "person interested in the outcome" for purposes of Portland City Code (PCC) 33.730.110(A), and remanded the decision for the city to provide that interpretation.[2]

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[1]Schwabe's affidavit states, in relevant part:

> "The following statement by Mr. Lindberg (which I have paraphrased) is one I remember clearly. Mr. Lindberg said, 'I am concerned about the [accusation by the appellants] that East County is losing neighborhood park space [because of this land swap]. I and the Council need more testimony [from the applicant] refuting this claim to justify our votes for the project." Record 26.

[2]PCC 33.730.110(A) provides:

> "Prior to rendering a decision, a member of a review body may not communicate, directly or indirectly, with any person interested in the outcome. Should such communication occur, at the beginning of the hearing the member of the review body must:
>
> "1. Enter into the record the substance of the written or oral communication; and

On remand, the city held a hearing limited to four issues:

> "1. What does the phrase 'person interested in the outcome' as used in section 33.730.110 of the zoning code mean?
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> "2. Is Dick Cooley a 'person interested in the outcome' of the conditional use proceedings on the community center?
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> "3. If Mr. Cooley is a 'person interested in the outcome,' the Council should give former Commissioner Lindberg an opportunity to make a disclosure concerning his conversation with Mr. Cooley.
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> "4. The council should give Ms. Opp and others present an opportunity to rebut the substance of Commissioner Lindberg's disclosure." Record 7.

The city first determined that "interested person" under PCC 33.730.110(A) means "a person who has some concern or interest in or relationship to a quasi-judicial land use matter pending before the Council." Record 8. Applying that definition to Cooley in the present case, the city determined he was an "interested person" with whom Lindberg had had an *ex parte* contact under the city's code. Record 8-9.

Lindberg then made a disclosure regarding the substance of the *ex parte* conversation with Cooley. Lindberg testified that he did not recall the nature of his discussion with Cooley, although he did not think he obtained information from Cooley that influenced his vote or the votes of the council.[3] Following Lindberg's disclosure testimony, the council

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> "2. Publicly announce the content of the communication and provide any person an opportunity to rebut the substance of the contact."

[3]The parties provided a transcript of Lindberg's disclosure, which we quote in pertinent part:

> "We were having a hearing at City Council on the Eastside Community Center, ah, during a break from that hearing, ah, there was some additional information that I wanted the park bureau to present, ah, I went out into the audience and as my recollection is, I saw [parks department employees] David Judd and John Sewell, ah, and I had asked them to go back to parks, get some information about trends in terms of the amount of acreage that we had in the Portland Park's system, ah, as I recollect there was an allegation made by the opponents to the center that overall we were having a decline in the amount of acreage that we had in the parks, this is my recollection, and that my own feeling was that we had added quite a bit to the parks system with new parks and expansions, ah, and so I went back and asked if they could go over and get that and come back and present that to the Council.

offered the parties an opportunity to rebut that testimony. The parties offered no rebuttal, on the grounds that Lindberg's statement had failed to disclose the substance of the communication, and there was nothing that could be rebutted. The parties then requested a plenary rehearing of the conditional use permit application. The council denied the request for a plenary rehearing, concluding that it "heard nothing at the remand hearing that would lead the Council to question or reconsider the correctness of its earlier decision." Record 11. The council's decision then adopts the following order: "Based on the above findings and conclusions, the Council has fully complied with LUBA's and the Court of Appeals' remand

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> "As I was out in the audience discussing that very issue, ah, in close proximity, ah, was Mr. Dick Cooley, who actually was the chair of the citizens committee who had made the recommendation [to proceed with the conditional use permit for the proposed community center], ah, I did recollect having a conversation with him, ah, and the reason that I did that is that he was a friend and acquaintance, someone I socialized with, I'd actually gone to his wedding and I saw him in the Portland Building or city hall sometime about once a month or every two months, and we'd stop and reminisce and talk about things, um, socially really rather than having to do with business, ah ---
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> "I did try to go back and determine what did we talk about in that conversation and frankly, I could not recollect, ah, what we talked about in that conversation, ah, I though that it was really more of a social one that we usually did, sort of catching up with each other of what things were happening, but it did follow just almost immediately thirty seconds or a minute right after I talked about the parks people about getting more information about park plans.
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> "The one thing I can say officially for this testimony, ah, is that I do know, ah, that I absolutely did not, um, ah, convey anything to Mr. Cooley about how I was going to vote on this issue. I know I did not get any facts from him, ah, about, ah, how do you feel about this issue, what are the facts about the amount of park land, the work that you did on that committee, ah, I know I did not go back, ah, and have anything that was based on that conversation enter into the decision that was made that day, and I also know that I didn't go back and use any information from his conversation to communicate to other Council members or go back and say I just learned something about it, or try to influence anybody's vote.
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> "So that is the best recollection, ah, that I have. I have gone over all the materials from the, ah, the appellants, I guess you'd say in this case, ah, and the allegations, and I frankly cannot remember the nature of the conversation.
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> "* * * * *
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> "* * * I don't recall on that day a substantive discussion [with Mr. Cooley] about the issue. But even if there was something that was made of a reference, I absolutely can say that there was no facts that were provided that influenced any decision. I didn't go back and bring those facts into play. I didn't visit with any other council members about anything that he or I had talked about." Respondent's brief App 5-8.

in *Opp v. City of Portland*, LUBA No. 96-236 (11/10/97), CA A100209 (3/11/98) and the proceedings on the East Portland Community Center, LUR 96-00 430 CU, are hereby concluded." Record 11.

This appeal followed.

ASSIGNMENT OF ERROR

Petitioner contends that Lindberg's inability to recall the substance of the *ex parte* contact amounts to a failure to disclose, thereby denying petitioner her substantive right to a full and fair hearing. Petitioner argues that the city's conduct in this case violates ORS 227.180(3), because the city failed to disclose the substance of the *ex parte* contact at the first hearing following the communication, as the statute requires, or at any time thereafter.[4] Accordingly, petitioner argues, the city erred in refusing petitioner's request for a plenary rehearing of the application, as required by *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 834 P2d 523 (1992).[5]

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[4]ORS 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:
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> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
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> "(b) Has a public announcement of the content of the communication 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."

[5]As an initial matter, it is necessary to clarify the role *Horizon Construction, Inc.* and ORS 227.180(3) play in our analysis. Petitioner's brief in *Opp I* argued that the alleged *ex parte* contact violated ORS 227.180(3), as well as PCC 33.730.110(A). Our opinion in *Opp I* did not address ORS 227.180(3), but instead remanded the decision to the city for a necessary interpretation of PCC 33.730.110(A). In our earlier order in that case, we denied petitioner's motion for an evidentiary hearing, which sought to resolve disputed allegations regarding the content of the alleged *ex parte* communication, because under the broader terms of the city's code any communication with a person interested in the outcome, no matter what the content, was an *ex parte* contact. 33 Or LUBA at 822. Neither our order nor our opinion resolved the disputed allegations regarding the content of the communication. Thus, depending on the content of that communication, it is possible that the city's conduct in this case violated the code but not the statute. If that is in fact the case, then it is arguable that the remedy for that violation is not dictated by *Horizon Construction, Inc.*

In *Horizon Construction, Inc*, the petitioner appealed the denial of a conditional use permit on the grounds that a member of the city council did not make a timely disclosure of an *ex parte* contact that was unfavorable to the application. The untimely disclosure occurred at the meeting at which the council took final action on the application, after the evidentiary record was closed, and two months after the *ex parte* contact took place. The council had met at least once between the time of the *ex parte* contact and the time of the final action on the application. LUBA concluded that the petitioner could not assign error to the city's failure to comply with the timely disclosure requirements of ORS 227.180(3), because the petitioner had failed to object to the timing of the disclosure or the lack of opportunity for rebuttal. The Court of Appeals reversed LUBA's decision on that point, holding that a violation of ORS 227.180(3) is a deprivation of rights under a remedial statute and not subject to the requirement, generally applicable to allegations of procedural error, that the petitioner object to that violation before the local government. The court reasoned:

> "Petitioner contends that its supposed opportunity to object was ephemeral, given that the record was closed and no introduction of evidence or public participation was contemplated for the December 17 meeting. It also argues that the failure to disclose in accordance with ORS 227.180(3) deprived it of the opportunity to learn the facts about the *ex parte* communication and to prepare, much less present, any rebuttal showing. Relying on *Angel v. City of Portland*, [21 Or LUBA 1, 8 (1991)], petitioner asserts that providing the opportunity to present rebuttal is among the principal reasons for the timely disclosure requirement. Finally, petitioner argues, LUBA was wrong in characterizing the error as merely 'procedural.' We agree with each of the points that petitioner makes.
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> "ORS 227.180(3) does not simply establish a procedure by which a member of a deciding tribunal spreads a fact on the record. It requires that the disclosure be made at the earliest possible time. Implicit in that requirement

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However, as explained elsewhere in this opinion, the content of the communication remains unknown or, at best, disputed. Moreover, the city does not take the position in its brief or the decision that the remedy for conduct that violates the code but not the statute should differ from that described in *Horizon Construction, Inc.* As explained below, the city's position is that its proceedings on remand satisfied the Board's and the Court of Appeals' remand instructions. The city appears to accept that its remand proceedings are governed by and must be consistent with the requirements of ORS 227.180(3) and *Horizon Construction, Inc.* Our analysis also proceeds on that basis.

> is that the parties to the proceeding must be given the greatest possible opportunity to prepare for and to present the rebuttal that ORS 227.180(3)(b) requires that they be allowed to make. The purpose of the statute is to protect the substantive rights of the parties to know the evidence that the deciding body may consider and to present and respond to evidence.
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> "[A]n objection by petitioner here would not have been likely to cure the prejudice that it suffered from the disclosure violation. An objection to the timeliness of the disclosure at the December 17 meeting, at which the council made its decision, could not have cured the city's antecedent failure to follow the statutorily required procedures to assure that petitioners have the opportunity to respond to the *ex parte* communication while evidence was still being prepared and presented. Moreover, the error did not occur on December 17; it occurred at the earlier meeting when the council member was required and failed to make the disclosure, and no objection could have been made at that time to an error of which petitioner could not have been aware.
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> "* * * * *
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> "*Failure to comply with ORS 227.180(3) requires a remand to the city council and a plenary rehearing on the application.* * * *" 114 Or App at 252-54 (emphasis added; footnotes omitted).

The city responds, first, that LUBA and the Court of Appeals rejected petitioner's claim that she is entitled to a "plenary rehearing" in *Opp I* and *Opp II*. The city contends that under the "law of the case" doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), petitioner is precluded from arguing that a plenary hearing is required to remedy the *ex parte* contact in this instance. The city argues that "LUBA has already decided that if Commissioner Lindberg had an *ex parte* contact, providing an opportunity for disclosure and rebuttal is the appropriate remedy, not rehearing." Respondent's Brief 9.

The city misreads the decisions of LUBA and the court. The Board concluded in *Opp I*, 33 Or LUBA at 657:

> "[T]he challenged decision does not provide an interpretation of the PCC 33.730.110(A) phrase 'person interested in the outcome' of the proceeding. Although this Board may, we are not required to make this interpretation. *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). It is for the city to interpret PCC 33.730.110(A) in the first instance. If the city determines that Mr. Cooley is a person interested in the outcome of the city's proceeding under PCC 33.730.110(A), the city must allow petitioner an opportunity to rebut the substance of the commissioner's communication with

> Mr. Cooley as described in Mr. Schwabe's affidavit. *Garrigus v. City of Lincoln City*, 25 Or LUBA 754 (1993)."

The foregoing does not determine that it is sufficient to allow petitioner an opportunity to rebut the substance of the communication, nor does it preclude a determination that a plenary rehearing is necessary in order to provide petitioner with a full and fair hearing. *See Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973) ("Parties at the hearing before the county governing body are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—*i.e.*, having had no pre-existing or *ex parte* contacts concerning the question at issue—and to a record made and adequate findings executed."). LUBA's decision in *Opp I* remanded the city's decision in order that the city could interpret in the first instance the meaning of the term "person interested in the outcome" under PCC 33.730.110(A). Absent that interpretation by the city, neither LUBA nor the court could determine if an *ex parte* contact had occurred under PCC 33.730.110(A). Without such a determination, neither LUBA nor the court could reach the issue of whether or not a plenary rehearing was required under *Horizon Construction, Inc.* Thus, the issue of whether a plenary rehearing is the proper remedy for the *ex parte* contact that the city has decided occurred under PCC 33.730.110(A) is not a resolved issue that the "law of the case" doctrine precludes petitioner from raising here. *Beck*, 313 Or at 153.

The city argues next that LUBA and the Court of Appeals have decided that, contrary to petitioner's argument, *Horizon Construction, Inc.* does not require that a full rehearing is the automatic legal consequence for a decision maker's failure to disclose an *ex parte* contact prior to adopting a land use decision. The city cites our decisions in *Garrigus v. City of Lincoln City*, 25 Or LUBA 754 (1993) and *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995). Again, the city misreads those decisions. In *Smith*, LUBA remanded for the city to provide the statutorily required opportunity to rebut *ex parte* communications, without

indicating whether doing so satisfies the city's obligations under the statute. In *Garrigus*, LUBA stated:

> "[T]he evidentiary record will be reopened on remand and, conceivably, the decision on petitioner's application may change once the nature of the contact is disclosed, and petitioner is provided with an opportunity for rebuttal." 25 Or LUBA at 757.

The remand instructions in *Garrigus* and *Smith* presume that the nature of the contact will be disclosed in full and a meaningful opportunity for rebuttal provided. The decisions do not speak to the appropriate remedy in the event that the substance of the *ex parte* contact is not disclosed, and thus no meaningful opportunity for rebuttal is provided. More importantly, as the above-quoted passage from *Garrigus* suggests, the city's obligations in remedying a violation of ORS 227.180(3) do not end with disclosure of *ex parte* communications and providing an opportunity for rebuttal. The remedial purpose of the statute is not satisfied by performing an empty procedural exercise that under no circumstances can result in a different decision. For the reasons explained below, we believe that ORS 227.180(3) and hence PCC 33.730.110(A) require that the city, after disclosing all undisclosed *ex parte* contacts and providing an opportunity for rebuttal, make a new decision on the application based on all the evidence in the record, including any new evidence submitted in rebuttal.

By negative implication, ORS 227.180(3) provides that a decision made after receiving undisclosed *ex parte* communications is invalid. A city may avoid that consequence prior to adopting its decision by ensuring that all such communications are disclosed and opportunity for rebuttal provided. If the city adopts its decision without complying with the statute, however, the remedial consequence is more severe. As *Horizon Construction, Inc.* indicates, the consequence is that the city must conduct "a plenary rehearing on the application." 114 Or App at 254.

That said, we do not agree with petitioner that the "plenary rehearing" required under the present circumstances necessarily means that the city must begin *ab initio* and repeat the full gamut of evidentiary proceedings leading up to the initial decision. As a general principle, the minimum scope of the proceedings on remand depends on the terms of the remand. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 78 (1999); *O'Rourke v. Union County*, 31 Or LUBA 174, 177 (1996); *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106, 127, *aff'd* 129 Or App 33, 877 P2d 1205 (1994). In the absence of instructions from LUBA or code provisions to the contrary, when a local government decision is remanded by LUBA, the local government need not repeat the procedures applicable to the initial proceedings. *Fraley v. Deschutes County*, 32 Or LUBA 27, 36, *aff'd* 145 Or App 484, 930 P2d 902 (1996); *Sanchez v. Clatsop County*, 29 Or LUBA 26, 30 (1995); *Wentland v. City of Portland*, 23 Or LUBA 321 (1992). On remand, the city need not address issues or adduce additional evidence on points that have been resolved or were unchallenged in the initial appeal. *See Beck*, 313 Or at 153 (on remand, parties may not raise old, resolved issues). As an adjunct of the foregoing, it is well-established that the proceedings on remand are generally considered a continuation of the initial proceeding. *DLCD v. Klamath* County, 25 Or LUBA 355, 361 (1993) (citing to *Beck*, 313 Or at 151) Consequently, unless the terms of the remand are to the contrary, the city can consider evidence submitted in the initial proceeding in making its decision on remand. Thus, where the remand is based solely on a violation of ORS 227.180(3), the city may properly limit its evidentiary proceedings on remand to remedying that violation. The first step in remedying that violation is to disclose all undisclosed *ex parte* communications and provide an opportunity for rebuttal. But doing so is not sufficient. Because the initial decision is invalid, and because the parties have a right under *Fasano* and ORS 227.180(3) to a decision by a tribunal that is free of any undisclosed and unrebutted *ex parte* contacts, the city must

adopt a new decision based on the record as a whole, including any evidence submitted in rebuttal.[6]

A recent set of decisions illustrates, in our view, the correct approach to remedying violations of statutes such as ORS 227.180(3). In *Brome v. City of Corvallis*, 36 Or LUBA 225, *aff'd sub nom Schwerdt v. City of Corvallis*, 163 Or App 211, 987 P2d 1243 (1999), the Board held that the city erred in accepting new evidence into the record in a manner that violated ORS 197.763(6) without providing the petitioners an opportunity to rebut that new evidence. The Board also addressed and denied several assignments of error challenging the city's findings of compliance with certain criteria, findings that were based in part on that improperly accepted evidence. On appeal to the Court of Appeals, the petitioners argued that the Board erred in reaching the substantive issues, because doing so rendered remand to allow the petitioners to rebut the improperly accepted evidence a meaningless exercise. The Court of Appeals disagreed, stating

> "[P]etitioners are incorrect in their view that LUBA's disposition of the substantive issues makes its remand purposeless. Any new material that is presented to the city in the proceedings on remand must be considered by the city, reflected in its findings if indicated, and included in the record that would be reviewable in any later appeals that may be taken. LUBA's rejection of petitioners' arguments based on the existing record does not make an empty exercise out of the further proceedings that LUBA has ordered, unless petitioners have nothing of substance to offer in those proceedings." 163 Or App at 216.

On remand, the city conducted further proceedings and allowed the petitioners to submit evidence rebutting the improperly accepted evidence. The city then considered all of the evidence in the record, and adopted a new decision again approving the application, supported by additional findings. *Schwerdt v. City of Corvallis*, ___ Or LUBA ___ (LUBA No. 99-201, June 8, 2000). Although the foregoing cases involved a violation of

[6]Of course, on any appeal of that decision on remand, the principles described in *Beck* would govern review of any issues that had been resolved, or could have been raised, in the previous appeal.

ORS 197.763(6) rather than ORS 227.180(3), the two statutory provisions protect similar *Fasano* rights and we perceive no reason why the remedy for violation of those statutes should not be similar.[7]

In sum, the Court of Appeals' decision in *Horizon Construction, Inc.*, read in light of the Supreme Court's decision in *Fasano,* makes it clear that it is the party's right to a full and fair hearing that is protected under ORS 227.180(3) and hence PCC 33.730.110(A). Where the city makes a decision in violation of ORS 227.180(3), *Horizon Construction, Inc.* requires that the local government provide a plenary rehearing. As discussed above, the scope of that rehearing must be sufficient to ensure that the city makes a decision that is untainted by uncured *ex parte* communications or, stated more broadly, a decision based solely on publicly disclosed evidence and testimony that is subject to rebuttal or the opportunity for rebuttal.

What remains is to apply the foregoing to the city's decision on remand in the present case. We agree with petitioner that former Commissioner Lindberg's inability to recall the substance of his communication with Cooley effectively nullifies petitioner's right to an opportunity to rebut that communication or, stated differently, to a decision untainted by undisclosed *ex parte* communications. The city adopted findings concluding, essentially, that nothing that was known or could be surmised about that communication showed that it affected the city's decision.[8] However, the fact is that little, if anything, of the substance of

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[7]Indeed, in *Brome* we noted the complementary relationship between ORS 197.763(6) and 227.180(3), concluding that the improperly accepted evidence was not an *ex parte* contact because it was submitted, albeit improperly, pursuant to one of the provisions of ORS 197.763(6). *Cf. Brown v. Union County*, 32 Or LUBA 168, 171 (1996) (evidence faxed to the decision maker after the close of the record and outside the framework of ORS 197.763(6) constitutes an *ex parte* communication).

[8]The city concluded:

> "Even assuming Mr. Lindberg told Mr. Cooley he wanted to hear information about the potential loss of park land in east county (east Portland), the Council finds this information is not relevant to the approval criteria for the community center conditional uses. Mr. Schwabe's rebuttal statement and affidavits assert Mr. Lindberg made a statement to Mr. Cooley, and not that he received any factual information from Mr. Cooley. In short, the

that communication is known, which belies the city's confidence that it did not affect the city's original decision. More importantly, ORS 227.180(3) prohibits undisclosed *ex parte* communications, whether or not those communications in fact influence the city's original decision. Even more to the point, the integrity of the city's *original* decision is not the issue. As stated above, to comply with or remedy a violation of ORS 227.180(3), the city must make a decision based solely on publicly disclosed evidence and testimony that is subject to rebuttal or the opportunity for rebuttal. The city's original decision did not meet that standard at the time it was adopted, and its integrity cannot be restored by undertaking a procedural exercise on remand. The city's only recourse on remand is to adopt a new decision on the application that is based solely on publicly disclosed evidence and testimony that is, or was, subject to rebuttal or the opportunity for rebuttal. However, the city failed to do so. It simply concluded that what was known or could be surmised about the *ex parte* communication gave it no reason to revisit its original decision, and then ended the proceedings. That is insufficient to satisfy the remedial purpose of ORS 227.180(3) or *Horizon Construction, Inc.*

Petitioner's assignment of error is sustained.

The city's decision is remanded.

October 14, 1999 remand proceeding yielded no relevant facts applicable to the approval criteria that would lead the Council to reconsider or alter its earlier land use approvals for the East Portland Community Center.

"* * * * *

"* * * The Council heard no facts that suggest Mr. Lindberg's conversation with Mr. Cooley affected the other Council members or tainted their votes on the community center. Mr. Lindberg's disclosure specifically rejects that suggestion. And, as discussed previously, the statement Mr. Schwabe asserts he heard Mr. Lindberg make to Mr. Cooley is simply not relevant to the approval criteria or factual issues before the Council in hearing the community center appeals. * * * To reiterate, the Council heard nothing at the remand hearing that would lead the Council to question or reconsider the correctness of its earlier decision." Record 10-11.