

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 OREGON DEPARTMENT OF LAND  
5 CONSERVATION AND DEVELOPMENT,

6 *Petitioner,*

7  
8 vs.

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10 CITY OF GOLD BEACH,

11 *Respondent,*

12  
13 and

14  
15 GARY KINCAID,

16 *Intervenor-Respondent.*

17  
18 LUBA No. 2002-078

19  
20 DAVE SNAZUK,

21 *Petitioner,*

22  
23 vs.

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25 CITY OF GOLD BEACH,

26 *Respondent,*

27  
28 and

29  
30 GARY KINCAID,

31 *Intervenor-Respondent.*

32  
33 LUBA No. 2002-079

34  
35 FINAL OPINION

36 AND ORDER

37  
38 Appeal from the City of Gold Beach.

39  
40 Steven E. Shipsey, Assistant Attorney General, Salem, filed the petition for review  
41 and argued on behalf of petitioner Department of Land Conservation and Development. With  
42 him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor  
43 General.  
44

1 Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of  
2 petitioner David Snazuk. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr  
3 and Sherlock, PC.

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5 No appearance by City of Gold Beach.

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7 David B. Smith, Tigard, filed the response brief and argued on behalf of intervenor-  
8 respondent.

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

12  
13 REMANDED

11/26/2002

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

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**NATURE OF THE DECISION**

Petitioners appeal a city council decision that locates a zoning boundary line on a 26-acre parcel.

**MOTION TO INTERVENE**

Gary Kincaid (intervenor), the applicant below, moves to intervene in these appeals on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

The 26-acre subject property is a roughly triangular-shaped parcel located at the south end of the city limits of the City of Gold Beach. It is bordered by Highway 101 to the east, petitioner Snazuk’s property to the north, and the ocean shore to the west. From 1982 until 1994, the subject property was located within the city’s urban growth boundary (UGB). Pursuant to the city’s UGB Management Agreement with the county, the county adopted the provisions of the Gold Beach Comprehensive Plan (GBCP) that applied to property within the UGB. Gold Beach Ordinance No. 374, Exhibit B, 1 (1982); Curry County Comprehensive Plan (CCCP) 15.5.1. The property is designated Residential and Conservation on the city’s comprehensive plan map. GBCP 173, 175. The county applied its zoning designations to the subject property and zoned it Light Commercial (C-1), Beaches and Dunes Conservation (CON) and Shorelands Overlay (SO).<sup>1</sup>

In 1994, the city annexed the subject property. However, the city has yet to rezone the property to reflect city zoning designations. In accordance with Gold Beach Zoning

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<sup>1</sup> The city has supplied a large-scale map of the city and its UGB that shows the property includes CON and C-1 zoning designations. None of the parties have identified a county map that depicts the county’s zoning and overlay designations. Nor have the parties identified the area on the property that is subject to the county’s coastal shoreland overlay zone.

1 Ordinance (GBZO) 9.010 and ORS 215.130(2)(a), the county’s zoning regulations continue  
2 to govern the area until the city rezones the property.<sup>2</sup>

3 In May 1999, the city amended its comprehensive plan provisions pertaining to  
4 coastal shorelands. The amendments adopted Federal Emergency Management Act (FEMA)  
5 maps that depicted areas subject to ocean flooding as the boundary for coastal shorelands  
6 within the city limits, including the subject property.<sup>3</sup> Also in 1999, intervenor applied for  
7 and received from the city a conditional use permit to fill part of the C-1 zoned portion of the  
8 property and to create a wetland area in the CON zoned area to mitigate for the fill.

9 In 2001, intervenor applied for a conditional use permit to fill the newly created  
10 wetland, and requested a determination regarding the location of the CON/C-1 boundary. In

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<sup>2</sup> GBZO 9.010 provides, in relevant part:

“Where an area is zoned by Curry County at the time of annexation to the city, the Curry County zoning regulations applicable to the annexed area shall continue to apply until the City Council enacts City of Gold Beach zoning in the annexed area. \* \* \*”

ORS 215.130(2) provides, in relevant part:

“An ordinance designed to carry out a county comprehensive plan \* \* \* shall apply to:

“(a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city \* \* \* unless, or until the city has by ordinance or other provision provided otherwise[.]”

<sup>3</sup> Gold Beach Ordinance No. 547, Exhibit A, 3 (1999) provides, in relevant part:

“(4) South Gold Beach – Hunter Creek (Map D)

“The coastal shorelands boundary in this area is defined as a line which parallels U.S. 101 to the Hunter Creek estuary shorelands boundary. This segment of the coastal shorelands boundary is defined by the area subject to ocean flooding from the Curry County Fairgrounds to Hunter Creek. The area subject to ocean flooding is specifically defined as Zone VE on Flood Insurance Rate Maps #410054 0001D and #410054 0002D for the City of Gold Beach, Oregon. Base flood elevations within this area range from +15 feet to +22 feet above National Geodetic Vertical Datum of 1929. The area included in the boundary is an ocean beach which historically has been subject to erosion. \* \* \*”

Ordinance No. 547, Map D is a one inch = 800 foot scale map that identifies the coastal shoreland boundary and eight base flood elevation points.

1 the 2001 application, intervenor argued that the CON/C-1 boundary is located further to the  
2 west than had been earlier supposed and that the new wetland is actually located on C-1  
3 zoned land.

4 Petitioners appeared before the planning commission and the city council, arguing  
5 that the CON/C-1 boundary is adequately depicted on various city plan and zoning maps as  
6 being approximately 250 feet west of Highway 101 at the property's northern boundary.  
7 Therefore, petitioners argued, any action by the city that moved the boundary farther west  
8 was, in effect, an improper amendment of those maps. The city council adopted an  
9 interpretation of the maps that locates the boundary approximately 360 feet west of Highway  
10 101 at the northern boundary. This appeal followed.

11 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR (SNAZUK)**

12 **FIRST AND SECOND ASSIGNMENTS OF ERROR (DLCD)**

13 The city concluded in its findings that the CON/C-1 zoning boundary is the same as  
14 the city's coastal shorelands boundary. Record 22. The city then determined that the gross-  
15 scale map depicting the coastal shorelands (one inch = 800 feet) included in the city's  
16 comprehensive plan was not accurate enough to establish the exact boundary on the property.  
17 Record 23. The city then turned to its plan text to see if the coastal shorelands boundary  
18 could be determined from narrative in the plan. The city concluded, based on excerpts from  
19 the comprehensive plan text, that the coastal shorelands boundary on the property is located  
20 just east of the active and conditionally stable foredunes. Record 19, 23.<sup>4</sup>

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<sup>4</sup> The city's findings state, in relevant part:

"10. The City of Goal Beach Comprehensive Plan, Section II, Plan Section; Subsection D, Land Use Plan Map; Map D, and Section IV, Appendices; Subsection D, Coastal Shorelands/Estuary Inventory Maps; Appendix D, Map D both show the coastal shorelands boundary on the subject property, at its north end, to be about 250 feet west of the Highway 101 right-of-way. The maps have a scale of one inch equals 800 feet. Lines on the maps are between 25 and 50 feet wide." Record 22.

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- “11. The Council first finds that the coastal shorelands boundary, within the City limits, and on annexed property, that has not had City zoning applied to it, is defined by the City’s Comprehensive Plan. The C-1/CON boundary on the subject property is that coastal shorelands boundary. That is the plain meaning of the text of Segment 12 of Section 15.3 of the County’s Comprehensive Plan. The Council disagrees with staff that the boundary should be established based on Segment 13, Hunter Creek Estuary. Staff contends the County intended Segment 12, City of Gold Beach to be limited to the city limits at the time the County’s Plan was adopted. The Council finds no evidence in the county’s Plan of that intent, and relies on the plain text of Segment 12: ‘The coastal shorelands boundary within the City of Gold Beach is defined by the City of Gold Beach Comprehensive Plan.’” Record 22-23.
- “12. The Council finds that the City’s Comprehensive Plan is ambiguous as to where the coastal shorelands boundary is identified on the subject property. The Land Use Plan Map and Map D, Appendix D both show the boundary about 250 feet west of Highway 101 at the north end of the property—with a scale of one inch equals 800 feet. The goals and policies of Goals 17 and 18 in the Plan suggest the boundary should be identified based on active and conditionally stable foredunes. Policy ‘f’ prohibits residential, commercial and industrial development on those foredunes. And, the Natural Resources Inventories of the Plan, addressing shorelands, states that land bordered by the boundary has been given a conservation designation that limits most developmental uses. That provision also states the boundary is shown on Appendix D maps, but says it was determined using information about known geological hazards, vegetation, habitat and existing land use. The beaches and dunes Natural Resources Inventory states the maps at Appendix D do not show the location of actual dune structures—implying that the maps don’t show the boundary described in Goals 17 and 18. The inventory also says all beach and dune areas have been given a conservation designation, suggesting the boundary is at the base of the coastal terrace. Thus, read together, the text and maps are ambiguous as to where the coastal shorelands boundary should be identified.
- “13. The Council interprets the text of the Plan to mean the coastal shorelands boundary on the subject property is described by that line of active and conditionally stable foredunes on the property. That is the boundary between the C-1 and CON zones. The land west of that line has a conservation designation, which prohibits residential, commercial and industrial development.
- “14. The Council concludes that location is consistent with available information regarding the maximum extent of ocean flooding, known geological hazards, vegetation, habitat and existing land use. The Record shows these were the criteria used to identify the boundary on the Snazuk property to the north of the subject property, and the boundary for the City park north of the Snazuk property. The Council concludes Appendix D, Map D, and the Land Use Plan Map have too large a scale to accurately show the location of the boundary on the ground, and that neither map shows the physical location of actual dune structures. The boundary location has been established taking the actual dune structures into consideration in order that the Plan corresponds with the geography and topography of the area.” Record 23.
- “18. The Council also finds there is substantial evidence in the Record for it to conclude the C-1/CON boundary is located on the subject property just east of the line of active and conditionally stable foredunes. Ralph Christensen, RPG, Senior

1           Petitioners challenge (1) the conclusion that the city’s coastal shorelands boundary is  
2 coterminous with the CON/C-1 boundary; and (2) the conclusion that the coastal shorelands  
3 boundary and, hence the CON/C-1 boundary, are more than 250 feet west of Highway 101.  
4 Petitioners also argue that the city erred in relying on city maps to establish *county* zoning  
5 boundaries. According to petitioners, the city manufactured an ambiguity in its  
6 comprehensive plan and zoning maps in order to move the zoning line without amending the  
7 zoning map.

8           There is no dispute in this case that county zoning applies to the subject property.  
9 Under nearly any circumstance we can imagine, the question of where the boundary between  
10 the CON and C-1 zones is located on the subject property would be answered by examining  
11 the county zoning map. As explained earlier, no party has supplied us with the county zoning  
12 map, and the county has ignored our request for that map. However, the city has supplied us  
13 with the city zoning map. The parties appear to agree that the city’s zoning map accurately  
14 reflects the county’s zoning map. The city zoning map is at a scale of one inch equals 800  
15 feet, and shows the subject property transected by a small dotted line, representing the  
16 CON/C-1 boundary.

17           For some reason, however, the city did not examine either the county zoning map or  
18 the city zoning map to resolve the question of where the CON/C-1 boundary is located.  
19 Instead, the city examined two city comprehensive plan maps, one that appears to depict

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Geologist, and former Lane County Hydrogeologist, testified to the Council that he located ‘where the active and conditionally stable foredunes were located on the subject property.’ In his written report in the Record, he stated that the coastal shorelands boundary should be just east of that dune line, and that would make the boundary consistent with the western edge of the fill on the Snazuk property to the north.

“\* \* \* \* \*

“20. Thus, there is undisputed evidence in the Record that the correct resolution of the ambiguity between the language of the Comprehensive Plan and the Land Use Plan Map and Appendix D, Map D places the zoning boundary at the east side of the active and conditionally stable foredunes, about 360 feet west of Highway 101, at the north end of the subject property.” Record 25.

1 comprehensive plan map designations (plan map), and one that depicts the coastal shorelands  
2 boundary (shorelands map). Both maps are at a scale of one inch equals 800 feet. The plan  
3 map, attached to petitioner Snazuk’s petition for review at App 84, shows a boundary line on  
4 the subject property between the conservation designation and a residential designation that  
5 appears to correspond to the CON/C-1 boundary on the city’s, and presumably the county’s,  
6 zoning map.<sup>5</sup> The shorelands map, attached to petitioner Snazuk’s petition for review at App  
7 80, depicts a hand-drawn area marked “Dunes” on the westward portion of the subject  
8 property, and a hand-drawn line parallel to and eastward of the Dunes marked “Coastal  
9 Shorelands Boundary.” In findings 10 and 12, the city finds that the plan map and shorelands  
10 map both show the coastal shorelands boundary on the subject property to be about 250 feet  
11 west of Highway 101, at the north end of the property. *See* n 4.

12 In finding 11, the city concludes that the CON/C-1 boundary on the subject property  
13 is the coastal shorelands boundary depicted on the plan map and shorelands map. *See* n 4.  
14 The only explanation for that conclusion is the city’s reading of language in the county’s  
15 comprehensive plan. Specifically, the city relies on the text of segment 12 of Section 15.3 of  
16 the county’s comprehensive plan, which states in full that “[t]he coastal shoreland boundary  
17 within the City of Gold Beach is defined by the City of Gold Beach Comprehensive Plan.”<sup>6</sup>  
18 However, that statement does nothing to indicate any connection between the coastal  
19 shorelands boundary within the city and the county CON zone on the subject property.

20 Based on that unexplained premise, the city proceeded to answer the question of  
21 where the CON/C-1 boundary on the subject property is located, by determining where the

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<sup>5</sup> No party offers an explanation for why the portion of the property designated for residential uses is zoned C-1.

<sup>6</sup> DLCD argues that segment 12 of Section 15.3 in the county comprehensive plan is talking about portions of the city prior to annexation of the subject property, and that a different part of the county’s comprehensive plan, specifically segment 13 of Section 15.3, discusses the area including the subject property. We need not resolve that contention.



1 city coastal shorelands boundary is located. The city chose not to rely on the shorelands map,  
2 which shows the coastal shorelands boundary to be located approximately 250 feet west of  
3 Highway 101 at the north end of the property, and instead examined the text of its  
4 comprehensive plan. As noted above, the city amended its coastal shorelands plan provisions  
5 in 1999. The city found that the comprehensive plan text suggests that the coastal shorelands  
6 boundary “should be identified based on active and conditionally stable foredunes.” Record  
7 23. The city therefore determined that the coastal shorelands boundary on the subject  
8 property corresponds with the location of any active and conditionally stable foredunes. The  
9 city then examined a report commissioned by intervenor that determines the current location  
10 of the foredunes on the property, apparently in the approximate area marked “Dunes” on the  
11 shorelands map. Accordingly, the city located the CON/C-1 boundary just east of the  
12 foredunes, approximately 360 feet west of Highway 101 at the north end of the property.

13 As stated above, the county zoning map is the immediate, and perhaps only, source of  
14 authority for locating the CON/C-1 boundary on the subject property. If examination of that  
15 map provides an unambiguous answer to the question posed here, it is difficult to imagine  
16 what justification the city would have for looking elsewhere. We understand intervenor to  
17 argue that the county and city zoning maps, the plan map and the shorelands map are all  
18 ambiguous, because at a scale of one inch equals 800 feet the width of the pertinent boundary  
19 lines covers anywhere from 25 to 50 feet of ground. Intervenor cites *Larson v. Wallowa*  
20 *County*, 23 Or LUBA 527, *aff'd in part, rev'd and rem'd in part* 116 Or App 96, 840 P2d  
21 1350 (1992), for the proposition that large-scale maps are representational and therefore the  
22 city council did not err in its conclusion that it could rely on its comprehensive plan text to  
23 identify the relevant zoning boundary because the zoning map was of too great a scale to  
24 apply to individual properties.

25 This case is distinguishable from *Larson*. First, the map in *Larson* was contained on  
26 an eight and one-half by 11 sheet of paper, with a scale of one inch equaling approximately

1 nine miles. Here, the city zoning map that was provided to us is considerably larger, and the  
2 scale is considerably smaller.<sup>7</sup> We do not believe that the zoning map in this case is of so  
3 gross a scale that it cannot be relied upon to establish the zoning boundary on the property.  
4 The city zoning map scale results in a boundary line that cuts a swath across the property, so  
5 that the CON/C-1 line is between 225 and 275 feet west of Highway 101. To the extent that  
6 that map is ambiguous, the width of the swath is the extent of the ambiguity. The city may  
7 rely on county zoning ordinance provisions to identify the zoning boundaries within that 25  
8 to 50-foot swath; it cannot interpret its comprehensive plan text to move the line at least 85  
9 feet farther to the west.<sup>8</sup>

10 Even if we agree with the city that the zoning map is of too gross a scale to resolve  
11 the parties' dispute regarding the location of the CON/C-1 zoning boundary line, the city's  
12 findings are inadequate to explain why it believes that the city's coastal shorelands boundary  
13 is the same as the CON/C-1 zoning boundary. It is relatively apparent that at the time the  
14 county applied its zoning to the subject property, the zoning line followed the city's  
15 comprehensive plan designation boundary line between the Conservation and Residential  
16 portions of the property. However, it is not at all clear that the zoning line on the property  
17 moved when the city adopted its coastal shorelands amendments in 1999. Because no party  
18 identifies any document that either the city or county adopted that amends the zoning on the  
19 property to ensure that it remains coterminous with the city's coastal shorelands boundary,  
20 and there is evidence that the city's coastal shorelands boundary has changed while the

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<sup>7</sup> As we explained earlier, no one has supplied the county's zoning map to us. However, the parties apparently agree that the city's zoning map accurately reflects the county's zoning for the property.

<sup>8</sup> *See, e.g.*, Curry County Zoning Ordinance (CCZO) 4.040:

“Where a zoning boundary divides a land parcel under a single ownership into two zones, the entire parcel shall be placed in the zone that accounts for the greater area of the lot by the adjustment of the boundaries, provided the boundary adjustment is less than 20 feet. If the adjustment involves a distance of more than 20 feet, the property shall be considered as having two separate zones.”

1 county's zoning map has not, we conclude that the city's determination that the coastal  
2 shorelands boundary is also the boundary between the CON/C-1 zones is error.

3 Finally, even if the coastal shorelands boundary is determinative of the CON/C-1  
4 zoning boundary, the city erred in its determination that the plan maps do not adequately  
5 identify the location of the coastal shorelands boundary. Ordinance 547, Exhibit A adopts  
6 FEMA maps, and also adopts a map that depicts the coastal shorelands boundary as being the  
7 area on the property subject to ocean flooding. The city's decision in this case interprets the  
8 comprehensive plan to state that the pertinent land forms that identify the coastal shorelands  
9 are the "line of active and conditionally stable foredunes on the property." Record 23. Absent  
10 some demonstration that the line of active and conditionally stable foredunes on the property  
11 is the same as the coastal shorelands boundary depicted on the 1999 coastal shorelands map  
12 and described in the 1999 amendments to the text of the comprehensive plan, the city's  
13 determination that the dune lines delineate the boundary is inconsistent with the plan.

14 We conclude that the city erred in its location of the CON/C-1 boundary. Therefore,  
15 there is no need to address the remaining arguments in petitioners' briefs that challenge other  
16 findings and the evidentiary basis for the city's decision. Petitioner Snazuk's first, second  
17 and third assignments of error are sustained in part. Petitioner DLCD's first and second  
18 assignments of error are sustained in part.

19 **FOURTH ASSIGNMENT OF ERROR (SNAZUK)**

20 In a break during the city council proceedings below, one of the city councilors  
21 conversed with intervenor, who is a principal in the applicant corporation. When the council  
22 reconvened, the councilor asked intervenor to repeat the substance of the conversation for the  
23 benefit of the council and the audience. Intervenor then related that he had discussed with the  
24 councilor the significance of the width of the line on the map. Record 39.

25 Petitioner Snazuk argues that it is not clear from the record that that was the extent of  
26 the discussion between intervenor and the councilor. Petitioner also argues that there is no

1 indication in the record that opponents were informed of their right to rebut the substance of  
2 that conversation, as is required by ORS 227.180(3)(b).<sup>9</sup> Petitioner Snazuk argues that his  
3 substantial rights were prejudiced by the city’s failure to inform him of his right to rebut  
4 intervenor’s testimony.

5 Intervenor responds that when the council proceedings resumed after the *ex parte*  
6 contact occurred, the city councilor disclosed that he had an *ex parte* contact and asked that  
7 intervenor relate the substance of the conversation. After intervenor recounted the substance  
8 of the conversation, intervenor contends that petitioner Snazuk had opportunities to  
9 challenge the substance of the *ex parte* contact, and to rebut it. According to intervenor,  
10 petitioner Snazuk provided testimony and evidence regarding the application on two  
11 occasions after the *ex parte* contact occurred and neither requested more information about  
12 the *ex parte* contact nor identified evidence that refuted intervenor’s estimate about the width  
13 of the boundary line as scaled on the map. Intervenor argues that the city’s failure to  
14 specifically inform petitioner of the right to rebut that contact is a procedural error, which  
15 requires petitioner to object to the adequacy of the disclosure before petitioner can allege  
16 prejudice to his substantial rights. Because petitioner Snazuk failed to object to the adequacy  
17 of the disclosure during the proceedings below, intervenor argues that petitioner Snazuk may  
18 not challenge it here.

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<sup>9</sup> ORS 227.180(3) provides, in relevant part:

“No decision or action of a \* \* \* 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 \* \* \* oral *ex parte* communications concerning the decision or action; and
- “(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.”

1           An *ex parte* contact that is not timely disclosed or is disclosed after all meaningful  
2 opportunity to request additional disclosure about the content of the disclosure or to rebut the  
3 disclosure has passed may provide a basis for reversal or remand. *Horizon Construction v.*  
4 *City of Newburg*, 114 Or App 249, 834 P2d 523 (1992); *Opp v. City of Portland*, 171 Or App  
5 417, 16 P3d 520 (2000), *rev den* 332 Or 239 (2001). Petitioner’s challenge under this  
6 assignment of error is twofold: (1) that the disclosure was arguably incomplete; and (2) that,  
7 as a result of the city’s failure to inform him of his right to rebut the content of the disclosure,  
8 pursuant to ORS 227.180(3)(b), he did not rebut intervenor’s statements regarding the impact  
9 the scale of the map has on the location of the CON/C-1 boundary line.

10           In this case, the disputed disclosure was made almost immediately after the *ex parte*  
11 contact occurred. Petitioner Snazuk had an opportunity to challenge the adequacy of the  
12 disclosure and provide argument contesting the factual nature of the disclosure. However,  
13 petitioner Snazuk did not do so. Given that there appears to be no dispute that the CON/C-1  
14 boundary line, when measured to scale, results in a 25-50 foot swath across the subject  
15 property, we do not believe that the city’s failure to inform petitioner Snazuk of his right to  
16 rebut the content of the *ex parte* disclosure that describes the impact of the line provides a  
17 basis for reversal or remand in this case.

18           Petitioner Snazuk’s fourth assignment of error is denied.

19           The city’s decision is remanded.