

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

3
4 JOHN GRUBAUGH,
5 *Petitioner,*

6
7 vs.

8
9 GILLIAM COUNTY,
10 *Respondent,*

11 and

12
13 WALSH TRUCKING CO., LTD.,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2009-065

17
18 FINAL OPINION
19 AND ORDER

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22 Appeal from Gilliam County.

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24 Roger A. Alfred, Portland, filed the petition for review and argued on behalf of
25 petitioner. With him on the brief was Perkins Coie LLP.

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27 No appearance by Gilliam County.

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29 Douglas E. Hojem, Pendleton, filed the response brief and argued on behalf of
30 intervenor-respondent. With him on the brief was Corey, Byler, Rew, Lorenzen & Hojem,
31 LLP.

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33 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

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35 RYAN, Board Member, did not participate in the decision.

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37 REMANDED

11/23/2009

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

NATURE OF THE DECISION

Petitioner appeals a county decision approving a conditional use permit for the location of an operations headquarters for a solid waste transportation company.

FACTS

Intervenor-respondent (intervenor) hauls solid waste from the Portland metropolitan area to a landfill near the City of Arlington in Gilliam County. Intervenor seeks a conditional use permit to locate its operational headquarters on 11 acres adjacent to Highway 19 that is zoned Limited Industrial (M-L). The subject property is bordered on three sides by residential uses, including petitioner’s residence. The proposed use will involve truck and trailer parking maintenance, repair, washing, dispatch, and other administrative activities. The use will operate 24 hours per day, Monday through Friday.

The planning commission denied the application. After the planning commission denied the application, one of the judges on the county court sent a letter to intervenor offering to assist in the establishment of the operations headquarters in Gilliam County. Intervenor subsequently appealed the planning commission’s decision to the county court. One of the three members of the county court (not the member who wrote the letter to intervenor) recused himself, because he is one of intervenor’s employees. The two remaining members of the court held a hearing on the appeal, and ultimately reversed the planning commission and approved the conditional use permit. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county judge who sent the letter to intervenor failed to disclose *ex parte* contacts with intervenor, as required by ORS 215.422(3), which provides:

“No decision or action of a planning commission or county 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:

1 “(a) Places on the record the substance of any written or oral *ex parte*
2 communications concerning the decision or action; and

3 “(b) Has a public announcement of the content of the communication and
4 of the parties’ right to rebut the substance of the communication made
5 at the first hearing following the communication where action will be
6 considered or taken on the subject to which the communication
7 related.”

8 Petitioner argues that the county judge’s letter to intervenor was itself an *ex parte*
9 contact, or at least evidence that *ex parte* contacts likely occurred. The letter states:

10 “The Gilliam County Court has been following the planning process of your
11 effort to establish a maintenance facility in Gilliam County. We would like to
12 extend an invitation for you to meet with us to discuss options for locating
13 your facility. We look forward to building a relationship with your company
14 and are eager to assist in any way we might be able to help.

15 “The County Court meets the first and third Wednesday of each month. If
16 necessary, we could hold a special meeting for this purpose. If you would like
17 to schedule a time to meet with us please give me a call.” Record 165.

18 Intervenor raises three defenses to petitioner’s claim that the county judge failed to
19 disclose *ex parte* contacts with intervenor: 1) the letter is not an *ex parte* contact because it is
20 from the county judge to a party, not to the judge, and one-way communications from a
21 decision maker to a party are not *ex parte* contacts; 2) the letter does not concern the merits
22 of the matter before the county court; and 3) in any case, petitioner failed to object below to
23 inadequate disclosure of contacts, despite being given an opportunity to do so.

24 We agree with intervenor that a one-way communication from a decision maker to a
25 party is probably not an *ex parte* communication requiring disclosure under ORS 215.422(3).
26 The purpose of that statute is to ensure that information the decision maker considers in
27 rendering a land use decision is submitted through a public process open to all parties. It is
28 difficult to see how a letter inviting a meeting between the decision maker and a party to
29 discuss a matter related to a pending land use application could, *in itself*, transmit
30 information to the decision maker. While such a letter might be some evidence of bias or
31 predisposition, and might be an indication that a meeting subsequently occurred at which *ex*

1 *parte* communications were made, the letter itself is not an *ex parte* communication that
2 requires disclosure under ORS 215.422(3).

3 Petitioner next argues that in fact a meeting occurred between intervenor's
4 representatives and the county judge, at which *ex parte* communications likely occurred. At
5 the beginning of the hearing when decision makers are required to disclose any *ex parte*
6 contacts, the county judge appeared to disclaim any *ex parte* contacts "with anybody in this
7 room," which presumably included intervenor's representatives. The judge stated:

8 "I also feel that I've had a small amount of *ex parte* contact not necessarily
9 with anybody in this room but early, very, very early on in this project * * * I
10 read a couple of letters that were written I believe to the planning department.
11 However, at this time I don't even remember who they were from or what
12 they said. I quickly put them out of my mind, and I do not believe that it
13 preclude[s] me from making a fair and impartial decision based on what I hear
14 today and what's on the record." Response Brief 2.

15 However, at the conclusion of the public hearing, the county judge stated:

16 "Ok, we'll close the public hearing and deliberate. I don't know whether I
17 should have stated this before, but when I was went through my documents
18 there were several things that I wanted to, because we're on the record, I
19 wanted to make comment to. The most important one is that several county
20 commissioner members stated that the court dropped the ball and there was a
21 lack of action from the court. *I want it on the record that this court has had*
22 *several communications with [intervenor].* They are fully aware of all the
23 options that are available. They have been offered to them. We wouldn't tell
24 any one of you where to build your house or where to buy property. We also
25 will not tell any business where they can build if it is agreeable. I mean, we
26 can't say you have to build on Gilliam County property or you have to put on
27 uh Waste Management. That's not saying we don't have a decision to make
28 here. That's just saying that during the time of the process that was not our
29 job to tell them that they have to place their property on Gilliam County. We
30 did offer, we offered very well, the very good circumstances. It was made and
31 so the statement from the planning commission members and other members
32 of the county that we dropped the ball or did not do our job is incorrect."
33 Response Brief 3.

34 Intervenor argues that petitioner waived the opportunity to raise the issue of
35 undisclosed *ex parte* contacts by failing to raise the issue below, or object to any inadequacy
36 or inaccuracy in the disclosure. According to intervenor, the county judge disclosed at the

1 beginning of the public hearing that there had been *ex parte* contacts, and petitioner failed to
2 object at that point. However, the *ex parte* contacts that the county judge disclosed at that
3 point were not with intervenor.¹ As the county judge’s statements illustrate, the *ex parte*
4 contacts disclosed at the beginning of the public hearing were “not necessarily with anybody
5 in this room but early, very, very early on in this project.” Intervenor’s representatives were
6 present in the room during the public hearing. The county judge clearly was not referring to
7 any *ex parte* contacts with intervenor. Petitioner cannot be faulted for not objecting to the
8 adequacy of the disclosure at that point of the proceedings.

9 Intervenor also argues that petitioner failed to object after the county judge disclosed
10 the existence of *ex parte* contacts following the close the hearing. At that point, however, the
11 record and public hearing had been closed and the county was beginning its deliberations.
12 Intervenor has not demonstrated that at that point in the proceedings there was any
13 opportunity to object. *See Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249,
14 834 P2d 523 (1992) (petitioner’s failure to object to the timing and lack of opportunity to
15 rebut late disclosure made after the close of the evidentiary hearing is not a basis to reject
16 petitioner’s claim under city analogue to ORS 215.422(3)). The argument is not waived.

17 Based on the county judge’s statement following the close of the record, petitioner
18 appears to be correct that at least one meeting occurred between intervenor’s representatives
19 and one or more members of the county court. Whether *ex parte* communications
20 concerning the land use application before the county occurred at such meeting(s) is less
21 clear. The above statements suggests that at least one topic of discussion was the location of
22 the facility at issue in the pending conditional use application. Under ORS 215.422(3), an
23 “*ex parte* communication must be disclosed only if it concerns the decision or action at issue
24 in a land use proceeding.” *Crook v. Curry County*, 38 Or LUBA 677, 687 (2000).

¹ Petitioner was not aware of the letter from the county judge to intervenor at this point of the proceedings.

1 Intervenor argues that there is no evidence in the record that any communication that may
2 have occurred between intervenor and the county court outside the public process concerned
3 the merits of the application before the county. That is true, but largely because the county
4 judge belatedly disclosed the existence of communications between intervenor and the
5 county court only after the record had closed, after initially appearing to disclaim any *ex*
6 *parte* contacts with intervenor. Further, that disclosure did not relate the substance of those
7 communications, so it is impossible on this record to confirm whether or not those
8 undisclosed communications concerned the pending land use application.

9 Among the issues apparently raised below was the alleged unsuitability of the
10 location and whether there are more suitable alternative sites available for the facility. The
11 county responded in part by adopting a finding that “[t]he availability or lack of availability
12 of alternate sites for the proposed facility is not a criterion for review.” Record 11. The
13 county is correct that the county’s conditional use standards do not require an alternative
14 sites analysis or a demonstration that the preferred site is more suitable than other sites. But
15 the conditional use standards do include a number of provisions concerned with the
16 suitability of the proposed location for the proposed use, and the compatibility of that use
17 with adjoining uses, and the issues raised below certainly included concerns regarding the
18 suitability of the proposed site. Even if the sole topic of discussion at any meetings between
19 intervenor and the county court concerned *alternative* locations for the facility, something
20 that is not at all clear, it is possible that such communications may have been intended, or
21 have had the effect of, influencing the county court’s decision with respect to the suitability
22 of the subject property for the proposed facility. Without an adequate disclosure of the
23 content of such communications, however, it is impossible to say.

24 In our view, the county court members involved in communications with the
25 applicant regarding sites for the proposed facility should have disclosed the existence and
26 content of those communications at the first opportunity during the evidentiary proceedings.

1 It is possible that those contacts were strictly limited to exploring the possibility of
2 identifying suitable alternative sites and that all parties involved with those communications
3 were careful to ensure that those communications included no discussion of the pending
4 conditional use permit application or any matters that might have some bearing on the
5 conditional use permit approval criteria. If so, there likely would be nothing to rebut.
6 However, we see nothing in the record that suggests those communications were so narrowly
7 tailored, and those communications easily could have included matters that have some
8 bearing on the merits of the pending conditional use permit application. If so, the parties in
9 this appeal have a right to know the substance of those communications and they must be
10 given an opportunity to rebut those communications.

11 Accordingly, we conclude that remand is necessary for the county court members to
12 disclose the substance of communications between the court and intervenor that occurred
13 outside the public process and that concern the proposed facility, and if necessary offer the
14 parties an opportunity to rebut the substance of those communications.

15 The first assignment of error is sustained.²

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues that the letter from the county judge to intervenor demonstrates that
18 the county judge was biased in favor of the applicant. Intervenor responds that the letter
19 itself falls far short of constituting sufficient evidence of bias to support reversal or remand.
20 *See Woodard v. City of Cottage Grove*, 54 Or LUA 176, 178 (2007) (elected local decision
21 makers are not expected to be entirely free of bias, and may have been elected in part
22 because they generally favor or oppose certain types of development).

² After the briefs had been filed in this appeal, petitioner filed a motion to take evidence outside of the record in order to depose members of the county court and representatives of intervenor regarding the contacts between intervenor and the county court. Because we remand the decision to the county to disclose any *ex parte* contacts with intervenor, there is no need to take evidence outside of the record for purposes of this appeal, and the motion is denied as moot.

1 We tend to agree with intervenor. However, we do not reach or resolve this
2 assignment of error, because on remand under the first assignment of error there will be
3 additional disclosures regarding contacts between intervenor and county court members, and
4 it is possible, if unlikely, that such disclosures may have a bearing on petitioner's claim of
5 bias. Accordingly, we do not reach the second assignment of error.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner challenges the adequacy of the findings and their evidentiary support with
8 respect to (1) adverse traffic impacts on public facilities and (2) water availability and
9 potential adverse impacts on groundwater resources. Because the additional evidentiary
10 proceedings that will likely be required to respond to our resolution of the first assignment of
11 error could have some bearing on the traffic and water related issues presented in the third
12 assignment of error, we do not reach the third assignment of error. However, were we to
13 reach this assignment of error, we likely would agree with petitioner that the issues presented
14 in this assignment of error were not waived, and the challenged findings are in some cases
15 conclusory and lacking in evidentiary support. On remand under the first assignment of error,
16 the county would be advised to consider the issues raised under this assignment of error.

17 We do not reach the third assignment of error.

18 The county's decision is remanded.