BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KEITH L. WALKER, BARBARA WALKER, ROY DANCER, MARY DANCER, MARK SCHWEITZER, KELLY TRUE, ARDEN TRUE, GABRIEL KALMANEK, ANNA KALMANEK, JOANNE DUNACHIK, and BRIAN KIERNAN,	)	
Petitioners,	)	
vs.	)	
CITY OF BEAVERTON,	)	
Respondent,	)	LUBA No. 89-077
and	)	
BERT FARRAR, LARRY BAUER, MOISES HERNANDEZ, HENRY HSU, MARIAN HSU, HELEN MELANDER, AUDREY NURMI, GEORGE NURMI, DIANE STEPHENSON, CAROL TROMMLER, HERB TROMMLER SUSAN FRANICH, PAUL FRANICH, FLORENCE SORENSEN, KEN LEAHY, BRUCE PETERSON, ANNE THISTLETHWAITE, and PORTLAND FIXTURE LIMITED PARTNERSHIP,	)	FINAL OPINION AND ORDER
Intervenors-Respondent.	)	

Appeal from City of Beaverton.

Keith L. Walker, Tigard, filed the petition for review and argued on behalf of petitioners.

Pamela J. Beery, Beaverton, filed a response brief and argued on behalf of respondent.

Timothy V. Ramis, Portland, filed a response brief and

argued on behalf of intervenor-respondent Portland Fixture Limited Partnership. With him on the brief was O'Donnell, Ramis, Elliott and Crew.

Jeffrey L. Kleinman, Portland, filed a response brief and argued on behalf of intervenors-respondent Farrar, et al.

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

AFFIRMED 02/01/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal two city ordinances, one amending the city's zoning map designation and one amending the comprehensive plan map designation, for 3.82 acres of land.

MOTIONS TO INTERVENE

Bert Farrar, Larry Bauer, Moises Hernandez, Henry Hsu, Marian Hsu, Helen Melander, Audrey Nurmi, George Nurmi, Diane Stephenson, Carol Trommler, Herb Trommler, Susan Franich, Paul Franich, Florence Sorensen, Ken Leahy, Bruce Peterson, and Anne Thistlethwaite and Portland Fixture Limited Partnership move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

On February 15, 1989, intervenor-respondent Portland Fixture Limited Partnership (intervenor) requested that the plan and zoning map designations for 3.82 acres of a 9.86 acre parcel be changed from Single Family Residential (R-7) to Community Service Commercial (CS) to allow construction of a shopping center, Murray Crossing Phase II. The entire 9.86 acre parcel (subject parcel) is currently planned and zoned R-7. The subject parcel is located west of Murray Boulevard, at the intersection of Murray and Allen Boulevards. The subject parcel is bounded on the north and west by property planned and zoned R-7 and developed with

single family houses. Murray Crossing Phase I adjoins the property on the east.

City planning staff recommended 3.08 acres of the subject parcel be rezoned and replanned CS, but recommended that .74 acres be planned and zoned Office Commercial (OC), rather than CS. The planning staff's recommendation that the .74 acres be planned and zoned OC rather than CS was based on the staff's view that the office uses allowed in the OC zone were less intensive, would have less of an impact on adjoining residential uses and would "allow a transition between residential and commercial uses."[1] Record 25.

Three public hearings on the proposal were held before the city planning commission, which voted to recommend to the city council that the application be denied.

After the public hearing before the city council was closed, a motion was made to accept the planning commission's recommendation and deny the application. This motion failed on a two-two vote, the mayor abstaining. The mayor then disclosed contacts he had with the applicant that he had not disclosed earlier in the proceeding, and also disclosed that there were individuals supporting the

[1]The city council adopted the planning staff report as findings in support of its decision. Record 1, 9.

application who had supported him in previous elections.[2] Following these disclosures, the mayor invited objections to his participation in a decision on the appplication. No one objected to the mayor's participation. Thereafter a motion was made to approve the application. This motion passed on a three-two vote, with the mayor voting in the majority.

As approved by the city council in accordance with the planning staff recommendation, 3.08 acres were planned and zoned CS, .74 acres were planned and zoned OC, and 6.04 acres remained planned and zoned R-7. In addition, a number of conditions were imposed, including conditions requiring that the applicant deed .35 acres to adjoining residential property owners to the north as a buffer and dedicate 3.57 acres as public open space.[3]

This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City Council committed error in the rezoning of the subject property in that this rezoning allows a Community Service District (CS zone) to directly abut a residential zone designated R7 and, thus, is in violation of the Comprehensive Plan for the City of Beaverton and the Development Code of the City of Beaverton and in contravention

---

[2]We discuss petitioners' allegations concerning bias and ex parte contacts under the third assignment of error.

[3]Other conditions required installation of plantings, walls and fences shown on the site plan, limited building heights, prohibited vehicular access around the rear of buildings, imposed a 20 foot building setback, and required that the design guidelines in the applicant's covenants, conditions and restrictions be recorded and adjoining property associations be made a party to the covenants, conditions and restrictions.

of ORS 197.835(2), ORS 197.835(3), ORS 197.835(8)(a)(D), and ORS 197.835(8)(b)."

Petitioners contend the plan and zoning map amendments adopted by the city must conform to the comprehensive plan. Petitioners are correct. South of Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 13, 569 P2d 1063 (1977); Allm v. Polk County, 13 Or LUBA 257 (1985); Wyatt v. City of Cannon Beach, 10 Or LUBA 217 (1984); ORS 197.835(4), (5)(a) and (6). Neither respondent nor intervenors-respondent dispute this point.

Petitioners argue the plan makes it clear that CS zones may not abut R-7 zones. In support of this argument, petitioners quote the plan's description of the CS District and a portion of the plan's narrative concerning commercial land uses generally. Petitioners also quote plan objectives and policies applicable to all commercial districts as well as policies applicable to the CS District specifically. Petitioners then attach the entire "Residential Areas" and "Commercial Land Uses" chapters of the plan.

Although petitioners quote extensively from the plan, they do not address any of the quoted plan provisions in their arguments. Instead, petitioners claim it is clear from the quoted plan provisions that it is inappropriate to take an action that results in CS planned and zoned property being located adjacent to R-7 planned and zoned property. Citing Fasano v. Washington County Comm., 264 Or 574, 584 P2d 23 (1973), petitioners contend the applicant's burden in

this case is particularly severe in view of the drastic difference between the uses allowed in the CS and OC zones and the R-7 zone.

We understand petitioners' first assignment of error to claim the quoted plan provisions either prohibit location of CS planned and zoned property adjacent to R-7 planned and zoned property or discourage such action and, therefore, require findings justifying a decision to do so. However, we disagree that the quoted plan provisions include such a prohibition or requirement. It is clear that none of the quoted plan provisions prohibit adjoining CS and R-7 designated property.[4] Although some of the quoted plan provisions express concern regarding the compatibility of commercial and residential uses, abutting commercial and residential designated property is not prohibited, and the quoted provisions do not require specific justification for adjoining CS and R-7 designations. Instead, the approach the plan appears to take is to impose requirements to mitigate impacts which may be generated by the proximity of commercial and residential uses.

Respondent goes on to point out the city adopted nine

---

[4]In fact, as respondent notes, several of the plan provisions specifically envision location of commercial uses in residential areas. Other policies state landscaping, screening, setback and other requirements should be imposed on commercial uses and areas, presumably to mitigate possible adverse impacts, and respondent notes such requirements were imposed on the applicant in this case. Petitioners do not challenge the adequacy of these conditions to address the plan policies.

pages of findings identifying and explaining how the application complies with plan requirements. In view of the detailed findings adopted by the city, respondent contends it is inappropriate for petitioners in this case to quote large sections of the plan and invite this Board to supply legal arguments explaining why the quoted plan provisions are violated.

We agree with respondent. We have consistently refused to supply arguments that are not included in the petition for review or to speculate whether approval standards are violated.[5] Dickas v. City of Beaverton, ___ Or LUBA ___ (LUBA No. 87-086, April 11, 1988), slip op 10-11, aff'd 92 Or App 168 (1988); Marshall v. City of Eugene, 16 Or LUBA 206, 210 (1987); Deschutes Development v. Deschutes County, 5 Or LUBA 218, 270 (1982). The only legal argument fairly presented in the first assignment of error is that the quoted plan provisions prohibit or disfavor adjoining CS and R-7 zoning districts. We reject that argument above. We

[5]Our responsibility is to review land use decisions "consistently with sound principles governing judicial review." ORS 197.805. Our rules require that petitioners set forth assignments of error and legal argument in their petition for review. OAR 661-10-030(3)(d). The purposes for requiring that petitioners set forth their legal arguments in the petition for review are (1) to allow respondent an opportunity to respond to those arguments in the respondent's brief and (2) to allow this Board to understand the issues and arguments on both sides of the issues. Neither of these purposes are furthered where legal theories that might be raised under the applicable standards, but are not developed in the petition for review, are supplied by the Board.

decline to speculate whether the quoted plan provisions might present bases for other legal arguments not presented in the petition for review.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City Council committed error in the rezoning of the subject property as there was insufficient public "need" shown for this particular development as required by the Comprehensive Plan for the City of Beaverton and the Development Code of the City of Beaverton and in contravention of ORS 197.835(2), ORS 197.835(3), ORS 197.835(8)(a)(C), ORS 197.835(8)(a)(D), and ORS 197.835(8)(b)."

The city's plan includes the following policy applicable to all commercial districts:

> "Zoning for additional or expanded commercial center areas should be allocated on a basis of apparent need and this need should be supported by current market analysis submitted by the applicant." Plan II-C-5, Policy l.

All parties agree "need" is an approval criterion for the challenged decisions. The city found that the applicant had not demonstrated there was a need for more than 3.82 acres of commercially designated property, as the applicant claimed, but found the applicant had shown a need for the 3.82 acres for which commercial plan and zoning designations were requested. In rejecting a higher acreage figure, the city found it had questions about how much weight to give to competing sites. On the basis that the applicant had demonstrated a need for 3.82 acres of additional

commercially designated property, the city found the "need" criterion was met. The city's finding relies upon a market study and public need analysis (market study) submitted by the applicant. Record 68-112.

Petitioners point to testimony by opponents that (1) the expected capture rate of business used in the market study is inflated, (2) the trade area used in the market study is too small and does not include some nearby shopping centers,[6] and (3) some nearby shopping centers (including Murray Crossing Phase 1, Hyland Hills, Murrayhill, and Summercrest Plaza) have high vacancy rates.[7]

As intervenors correctly note, the petitioners do not clearly identify their legal theory under this assignment of error. However, we believe petitioner's arguments, read as a whole, make it reasonably clear that petitioners contend the cited testimony by the opponents is sufficient to render the evidence the city relied upon, i.e. the market study, inadequate to constitute substantial evidence in support of the city's determination that the "need" criterion is met.

---

[6]Petitioners identify Summercrest Plaza and Murrayhill as improperly excluded from the trade area. Murrayhill is identified in the market study as "Outside Trade Area" and Summercrest Plaza is identified as "On Periphery of Trade Area." Record 94.

[7]Petitioners' first and second points are made only in the petitioners' statement of facts. In argument under the second assignment of error, petitioners only argue the city failed to accord appropriate weight to vacancy rates in nearby shopping centers. Petitioners allege vacancy rates of 60% for Summercrest Plaza and Murrayhill, 28% for Highland Hills, and 30% for Murray Crossing Phase I.

See Younger v. City of Portland, 305 Or 346, 359, 752 P2d 262 (1988). We understand petitioners' second assignment of error to be a substantial evidence challenge.[8] ORS 197.835(7)(a)(C).

The only citation to the record provided by any of the parties concerning the opponents' testimony is provided by intervenor. Intervenor's Brief 3. The minutes of the May 15, 1989 city council meeting show petitioner Mary Dancer "reviewed statistics concerning capture rates," noted nearby businesses had gone out of business, and "said the applicant had probably inflated their [sic] capture rate by at least 50%." Record 316. Petitioner Dancer went on to argue that the trade area used in the market study is too small and improperly excludes other nearby shopping centers. Petitioner Dancer then stated the vacancy rates in nearby shopping centers, noted previously in this opinion. See n 7, supra.

We agree with respondent and intervenor that this evidence is not sufficient to undermine the reasonably detailed market study relied upon by the city. The market study defines a market area, identifies shopping centers within and outside that market area, and includes the assumptions that led to its conclusion that there is a need for more commercially planned and zoned land than the 3.82

[8]Petitioners do not challenge the adequacy of the city's findings addressing the need criterion.

acres proposed.

There is no way to tell from the portions of the record to which we are cited why petitioner Dancer believed the capture rate was inflated, the trade area was too small, shopping centers were improperly excluded from consideration, or how she arrived at the vacancy rates she cited.[9] In addition, petitioners do not attempt in their brief to explain why the cited evidence undercuts the market study or the assumptions on which it is based, other than to suggest that the existence of shopping centers with vacancies shows there cannot be a need for additional commercially planned and zoned land. In these circumstances, we conclude the market study is evidence a reasonable person would rely upon to determine there is a need for 3.82 additional acres of commercially planned and zoned land.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The City Council committed error in the rezoning of the subject property as they failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of petitioners in refusing to allow rebuttal argument by petitioners, in refusing to allow consideration of alternative but conforming R7 zone uses, in refusing to follow guidelines established for the hearing, and by the Mayor's

[9]The applicant's consultant disputed petitioner Dancer's claims. Record 326, 333; Respondent's Brief App 1-14 (partial transcript of May 14, 1989 public hearing).

bias and ex parte contacts in violation of ORS 197.835(8)(a)(B) and ORS 197.835(12)."

Before considering petitioners' arguments under this assignment of error, we first consider an issue raised by respondent and intervenors concerning the petitioners' submittal, at oral argument, of partial transcripts of the May 22, 1989 city council meeting. At that meeting, the city council adopted the ordinances challenged in this proceeding. Prior to the city council's action, several of the petitioners testified that the city should reconsider the action it took at the conclusion of the May 15, 1989 public hearing. Respondent and intervenors object to our consideration of the partial transcripts submitted by petitioners.

The record filed by the city in this proceeding includes minutes of the May 22, 1989 city council meeting, but does not include transcripts of that meeting. Our rules do not require the city to submit verbatim transcripts of its hearings as part of the record. OAR 661-10-025(1)(c). Petitioners filed no objection to the completeness or accuracy of the minutes provided by the city. See OAR 661-10-026(2)(c).

Although we do not require verbatim transcripts, it is this Board's practice to allow parties to prepare partial or complete transcripts of local hearings and to attach those transcripts to their briefs, subject to the right of other parties to object to their accuracy or context. Sunburst

Homeowners Association v. City of West Linn, ___ Or LUBA ___ (LUBA No. 89-130, January 26, 1990), slip op 15-16, n 10; Hammack v. Washington County, 16 Or LUBA 75, 99, n 2, aff'd 89 Or App 40 (1987). However, in this case petitioners did not attach the disputed partial transcripts to their petition for review; and, therefore, respondent and intervenors did not have an opportunity to contest either the accuracy or context of these partial transcripts before oral argument in this matter.

If we were to allow partial transcripts to be submitted for the first time at oral argument, there would be a significant possibility of delay to allow other parties to object or prepare partial transcripts of their own. We believe allowing such action would be inconsistent with our statutory charge to decide cases quickly, observing "sound principles of judicial review." ORS 197.805. This is particularly the case where, as here, petitioners offer no explanation for why they could not have submitted the partial transcripts earlier. We do not consider the partial transcripts submitted by petitioners in reaching our decision in this matter.[10]

[10]We note that respondent did attach partial transcripts of portions of the local proceedings to its brief. Our view of the partial transcripts submitted by petitioners might be different if they were submitted to correct or place in context the partial transcripts submitted by respondent. However, petitioners do not argue their partial transcripts were submitted for that purpose.

A. Refusal to Allow Surrebuttal

Petitioners contend that at the May 15, 1989 city council hearing the applicant presented approximately one minute of testimony concerning public need. Following the opponents' testimony that there was no need for additional commercial land, petitioners argue "the applicant spent eighteen minutes of * * * rebuttal time misstating, misquoting and presenting new material and exhibits." Petition for Review 32. Petitioners contend that although they were promised the right to rebut new evidence at the beginning of the hearing, and were prepared to do so, they were improperly denied an opportunity for rebuttal.

Under the rules adopted by the city council for conduct of hearings, proponents and opponents in land use proceedings are entitled to present rebuttal evidence as follows:

> "* * * The presiding officer shall allow the proponent to offer rebuttal evidence and testimony and, if provided, allow the opponent or other interested party to rebut the new evidence or testimony offered by proponent's rebuttal." City Council Rules of Procedure 2.11.020(G)(6)(h); Respondent's Brief Exhibit C-21.

We understand the above quoted rule to provide opponents the opportunity to submit rebuttal evidence only if the proponent offers new evidence or new evidentiary testimony during the proponent's rebuttal. As long as the proponent limits rebuttal to argument (i.e. non evidentiary testimony) concerning evidence already in the record, opponents are not

entitled to submit surrebuttal testimony. See Urquhart v. LCOG and City of Eugene, 14 Or LUBA 335, 339 (1986) ("right to present and rebut evidence does not include the right to have the final word * * *"). We believe the city's limitation on opponents' right of rebuttal is consistent with Fasano v. Washington County, supra, which recognizes only parties' rights to rebut evidence.

Respondent contends the opponents testified for over four hours before the planning commission and presented lengthy testimony before the city council. Respondent correctly notes that, under the city's procedures, the evidence submitted to the planning commission is also before the city council. Therefore, it is the entire record (including the record before the planning commission) that must be considered to determine whether new evidence has been submitted, requiring an opportunity for rebuttal. Respondent argues no new evidence was submitted during the proponent's rebuttal, and the city correctly found that the opponents had no right to further rebuttal under the city's rules.

If the city improperly denied the opponents an opportunity to rebut new evidence, the error would be procedural. We are empowered to reverse or remand for procedural errors, only if a party's substantial rights are prejudiced. ORS 197.835(7)(a)(B). Where, as here, petitioners make no attempt to identify the evidence they

believe is new evidence, we cannot tell whether the city erred in determining that no new evidence was submitted during the proponent's rebuttal, and, if so, whether the city's denial of an opportunity to rebut that evidence prejudiced petitioners' substantial rights.[11] See Hightower v. Curry County, 15 Or LUBA 159, 163 (1987).

This subassignment of error is denied.

B. Refusal to Allow Testimony Concerning Alternative Uses For the Property

Petitioners contend the city's refusal to allow testimony offered by petitioner Kelly True concerning other possible uses for the subject property was improper.

Respondent points out the city rejected the offered testimony because it determined the testimony did not relate to any of the applicable approval criteria. Respondent argues it is entirely appropriate for the city to refuse to accept irrelevant evidence. Respondent contends there is no approval standard in the city's plan or development code requiring that alternative uses of the subject property be considered in acting on a request for changes of planning and zoning map designations.

The city commits no error by refusing to accept irrelevant evidence. Orr v. City of Eugene, 6 Or LUBA 206,

[11]For example, even if new evidence was submitted during the proponent's rebuttal, but that evidence was irrelevant or was not relied upon by the decision maker, there may be no prejudice to petitioners' substantial rights. See Urquhart v. LCOG and City of Eugene, supra.

218 (1982). The city council's rules specifically prohibit "irrelevant, immaterial or unduly repetitious testimony or evidence * * *." City Council Rules of Procedure 2.11.020(G)(2)(d); Respondent's Brief Exhibit C-17. As the city rejected the offered testimony because it did not relate to the approval criteria, petitioners are obligated to show that determination was erroneous. Petitioners make no attempt to do so other than to argue that Neuberger v. City of Portland, 288 Or 155, 603 P2d 771 (1979) (Neuberger) held consideration of alternatives is required. As respondent correctly notes, the language petitioners apparently rely upon in Neuberger actually concerns a very different issue, i.e., whether the rezoning of alternative properties must be considered in approving a request for rezoning. In fact, Neuberger supports respondent's argument that it need not consider alternative uses for the property unless applicable criteria in its plan or elsewhere require such consideration.[12]

This subassignment of error is denied.

C. Ex Parte Contacts and Bias

Under ORS 197.835(12):

> "[LUBA] may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of

[12]In Neuberger, the Supreme Court explained that unless statutes or LCDC goals or rules require a showing of "public need or a comparison with other available property," such standards need not be addressed. Id. at 170.

> the decision-making body, only if the member of the decision-making body did not comply with ORS 215.422(3) or 227.180(3), whichever is applicable."

The ex parte contact disclosure requirements for city land use proceedings are contained in ORS 227.180(3) which provides as follows:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the 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."[13]

At the beginning of the May 15, 1989 city council

---

[13]The city council's rules of procedure similarly provide:

> "The general public has a right to have councilors free from pre-hearing or ex parte contacts on matters heard by them. It is recognized that a countervailing public right is free access to public officials on any matter. Therefore, councilors shall reveal any significant pre-hearing or ex parte contacts with regard to any matter as early as possible under the circumstances in the hearing on the matter. If such contacts have impaired the councilor's impartiality or ability to vote on the matter, the councilor shall so state and shall abstain therefrom." City Council Rules of Procedure 2.11.020(G)(3)(d); Respondent's Brief Exhibit C-18.

hearing in this matter, the mayor made the following disclosure in response to petitioner Roy Dancer's question concerning activities by the city in general, and the mayor in particular, in support of the application:

> "Well, when this project was being conceptualized before [the application] was even submitted, members of the applicant's staff * * * came to see me about what I thought about the project and what [I thought] about the park, would the park be an attribute to the community and I responded to that and also offered suggestions as to if there were a park what could happen in the park." Transcript May 15, 1989 Public Hearing, Respondent's Brief App 1-3.

Petitioner Dancer then inquired whether the dialogue between the mayor and the applicant was recent, as he had been led to believe, and the mayor responded the dialogue was not recent.

Later in the May 15, 1989 city council meeting, after the public hearing had been closed and the city council had split two-two in its vote on the motion to deny the application, the record shows the mayor made a further disclosure:

> "Mayor Cole said he had a declaration to make before he voted on the matter. He said he had not made the declaration earlier in the meeting because he did not usually vote.
>
> "Mayor Cole said the applicant had visited his office and asked for his opinion of the project, especially regarding the park concept. He said his position with the City was such that he frequently met with developers. He said in this instance, his opinions were related to the park and the developer's ability to work things out

with the neighborhood.

"Mayor Cole said there were individuals supporting the project who had supported him in previous election issues. He said he felt he could make a decision without bias, but was concerned about perceptions. He said he would accept any challenge at this time.

"Coun. Drake said he did not challenge Mayor Cole's right to vote in this matter. He said he had only carried out the duties of his position as administrative head of the City. He said Mayor Cole had a right to vote on this issue.

"No one present challenged Mayor Cole's ability to vote on this matter.

"* * * * *" Record 328-329.[14]

Petitioners contend the persons the mayor admitted having contacts with were former close associates and the contacts admittedly had to do with the requested land use approval. Although we do not understand petitioners to question the adequacy of the substance of the mayor's second disclosure, petitioners do object that a complete disclosure was not made initially. Petitioners further object that the latter disclosure was made late in the evening, after the public hearing had been closed. Petitioners contend the mayor's second disclosure came too late, violates ORS 227.180(3) and shows the mayor was not an impartial decision

[14]The quotation is from the minutes of the May 15, 1989 city council public hearing. Respondent attaches to its brief a partial transcript containing the mayor's disclosure. The partial transcript and the quoted minutes are consistent.

maker in this matter.[15]

Respondent concedes the mayor's initial disclosure early in the public hearing was not complete. However, respondent contends the second disclosure was complete, and petitioners failed to request an opportunity to submit evidence or testimony to rebut the ex parte contacts or to challenge the mayor's ability to participate objectively in the decision.

We previously denied petitioners' request for depositions and an evidentiary hearing in this matter to explore the alleged ex parte contacts, concluding that the petitioners' failure to make inquiries regarding the ex parte contacts before the city rendered its decision precluded petitioners from pursuing the ex parte contacts through an evidentiary hearing or depositions as part of a LUBA proceeding. We explained:

> "Before considering whether petitioners have demonstrated that the requirements in our rules for either an evidentiary hearing or an order allowing depositions are met, we first consider whether petitioners seek now, by way of deposition and evidentiary hearing, to make inquiries they had an opportunity to make, and should have made, during local proceedings in this matter. As we have explained on several occasions:

---

[15]We agree with respondent that petitioners' reference in the petition for review to "due process" rights, without any argument explaining how due process rights may have been violated by the city's action in this matter, is insufficient to state a basis upon which we may grant relief under this assignment of error. Constant v. City of Lake Oswego, 5 Or LUBA 311, 327 (1982).

> "'Where petitioners have reason to believe ex parte contacts occurred, but fail to inquire as to their nature and content before the local government, petitioners are barred from making such an inquiry during the course of our review proceedings. Younger v. City of Portland, 15 Or LUBA 616, 617 (1987); Union Station Business Community Assoc. v. City of Portland, 14 Or LUBA 556, 558-559 (1986).' Miller v. City of Ashland, [___ Or LUBA ___ (LUBA No. 88-038)] slip op at 8.

"In this proceeding, the mayor's disclosure of ex parte contacts perhaps did not contain the kind of detail that is required by ORS 227.180(3). See Union Station Business Community Assoc. v. City of Portland, 14 Or LUBA at 561, n 2. However, the mayor clearly disclosed that he had numerous contacts with persons on both sides of the matter. Further, he explicitly disclosed the fact that he had past professional and political ties with the applicants. More importantly for purposes of resolving the petition for depositions, after disclosure of his past close working and political relationship with the applicants and that numerous contacts had occurred, the mayor declared that he believed he could participate objectively and twice invited objections to his participation.

"Petitioners complain the disclosure came late in the proceedings and after the public hearing had been closed. However, we find nothing in the language of the partial transcript * * * or elsewhere in the record, to indicate the mayor would not have responded fully to requests for additional details concerning ex parte contacts or his relationship with the applicants. Neither does the transcript or the record support petitioners' argument that the mayor would not have considered challenges to his participation from the public in attendance. In fact, the transcript and record suggest to the contrary, that he was inviting anyone to challenge his participation.

> "In Union Station Business Community Assoc. v. City of Portland, 14 Or LUBA at 558-559, we explained that where ex parte contacts are disclosed and the parties are invited to inquire regarding those comments, a petitioner may not fail to make the invited inquiry and then seek to pursue the inquiry for the first time during an appeal at LUBA when the decision is adverse to petitioner's interests. Although here the mayor's disclosure was less detailed and he invited 'challenges to my participation,' rather than questions seeking additional details about the disclosed contacts, we believe the mayor's invitation was broad enough to encompass any inquiry concerning the propriety of his actions during the proceedings or his participation in the decision. Petitioners failed to make any challenge to the mayor's participation to ask for additional details concerning ex parte contacts or his relationship with the applicant. Having failed to do so, petitioners may not now pursue those questions through depositions or an evidentiary hearing." (Footnotes omitted.) Order on Petition for Depositions 5-7.

In one of the omitted footnotes, we stated we did not decide whether the record showed "inadequately disclosed ex parte contacts that might warrant reversal or remand," noting that the proper place to address that issue is in our final opinion. Id. at 7.

ORS 197.835(10) and 227.180(3) require that we reverse or remand the city's decision if ex parte contacts occur and are not disclosed as required by ORS 227.180(3). As we explained in 1000 Friends of Oregon v. Wasco Co., 14 Or LUBA 315, 321 (1986):

> "* * * ex parte contact includes all information relevant to the matter at hand gained outside the formal proceedings and not in the record. While ex parte contacts may affect the tribunal's

> partiality, the risk to the integrity of quasi-judicial proceedings from ex parte contacts is that the decision may be made on the basis of facts not disclosed in the record. The risk is reduced when information gained ex parte is made part of the record by disclosure in the proceeding. The function of disclosure is therefore corrective. Failure to disclose information gathered ex parte, on the other hand, will invalidate the decision." (Citations, footnotes and emphases in original omitted.)

The mayor's failure to disclose all of his ex parte contacts at the beginning of the May 15, 1989 hearing is not excused by the fact he might not have to participate in the final vote on the matter. The occurrence of a tie vote, triggering the mayor's responsibility under the city's charter to cast a vote, is always a possibility. However, the mayor did make a complete disclosure later in the proceeding. Whether or not that disclosure satisfied the requirements of ORS 227.180(3) in all particulars, it was clearly sufficient to advise all in attendance that ex parte contacts, including recent contacts, occurred. We believe the disclosure was sufficient to provide a basis for petitioners to make further inquiries concerning the contacts or to challenge the mayor's ability to objectively participate in the decision.

At most the delay in disclosing the more recent meetings and the lack of specificity in the disclosure are procedural irregularities. Other than complaining that the disclosure came late in the evening, after the public hearing was closed, petitioners do not argue their

substantial rights were violated by the timing and manner of the disclosure.[16]

Although we have some concern that the second disclosure came after the close of the public hearing and late in the evening, we adhere to our conclusion in the order on petition for depositions that the record shows the mayor invited challenges and inquiries from anyone and would have responded to any inquires. We, therefore, conclude the remedial purpose of ORS 227.180(3) was served by the mayor's disclosures. Any procedural errors that were committed in the timing and manner of the disclosure were not objected to by petitioners, and petitioners do not demonstrate how their substantial rights were prejudiced by any such errors. Accordingly, even if procedural errors occurred, they provide no basis for reversal or remand.[17]

---

[16]Petitioners do not claim any of the petitioners were not present for the mayor's second disclosure and that they should, on that basis, be excused from failing to inquire as to ex parte contacts or bias.

[17]We agree with respondent that petitioners' heavy reliance on Tierney v. Duris, Pay Less Properties, 21 Or App 613, 536 P2d 435 (1975) is misplaced. In that case the Court of Appeals stated that the Fasano rights of parties in quasi-judicial land use hearings to an impartial tribunal "having had no pre-hearing or ex parte contacts concerning the question at issue," Fasano, 264 Or at 588, are not violated where:

> "(l) the 'ex parte contacts' were not with the proponents of change or their agents, but, rather, with relatively disinterested persons; (2) the contact only amounted to an investigation of the merits or demerits of a proposed change and, most importantly, (3) the occurrence and nature of the contacts were made a matter of record during quasi-judicial hearing so that parties to the hearing then had an opportunity to respond." 21 Or App at 629.

Finally, we turn to petitioners' contentions that the record demonstrates the mayor was improperly biased against their position and, therefore, should not have participated in this matter. We conclude the ex parte contacts in this case, the mayor's manner of disclosing those ex parte contacts and the fact the contacts were with persons with whom he was close politically, at most create an appearance of impropriety. They fall far short of the actual bias standard required under 1000 Friends of Oregon v. Wasco County Court, 304 Or 76, 82, 742 P2d 39 (1987).[18] See Oatfield Ridge Residents Rights v. Clackamas Co., 14 Or LUBA 766, 768 (1986).

This subassignment of error is denied.

The third assignment of error is denied.

The city's decision is affirmed.

In the above quoted language, the Court of Appeals did not purport to establish a generally applicable analysis that must be applied in all cases where ex parte contacts occur. In addition, statutory provisions codified at ORS 227.180(3), which govern city decision makers' obligation to disclose ex parte contacts, were adopted several years after the Court of Appeals decision. Oregon Laws 1983, ch 656, sec 2. As ORS 197.835((10) makes clear, the primary focus of our inquiry where ex parte contacts occur during city quasi-judicial land use proceedings is on ORS 227.180(3), not cases that predate that statute.

[18]As respondent correctly notes, the requirement that decision makers be impartial is tempered by the reality that local official, particularly local officials who also perform administrative functions, are likely to be exposed to specific views on matters that will ultimately come before them as decision makers. Id. at 82-83.