

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HALVORSON MASON CORPORATION,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF DEPOE BAY,
10 *Respondent.*

11
12 LUBA No. 2000-118

13 ORDER ON MOTION TO TAKE EVIDENCE NOT IN THE RECORD

14 Petitioner, the applicant below, moves for an order to take evidence not in the record,
15 pursuant to OAR 661-010-0045. Attached to the motion are two documents that, according
16 to petitioner, set forth the facts petitioner seeks to establish. The two documents consist of a
17 July 11, 2000 fax from a city council member to the Real Estate Agency of the State of
18 Oregon (state agency), and a reply to that fax from the agency, also dated July 11, 2000.

19 The challenged decision in this case is the city's denial of petitioner's application for
20 a business license to operate a real estate sales office in a recreation center within petitioner's
21 subdivision, which is zoned residential. The city council conducted a hearing on July 5,
22 2000, and left the record open for seven days, until July 12, 2000. The July 11, 2000 fax
23 from the city council member refers to petitioner's pending application, and then asks the
24 agency to provide information to the city council regarding a recent action by the agency
25 with respect to a sales office in a model home within petitioner's subdivision.¹ The

¹The July 11, 2000 fax from the city council member states in relevant part:

"The City of Depoe Bay has had applications from two business entities for business license permits to operate real estate sales offices in residential zones. Both applications have been denied and both denials have been appealed. The second appeal is currently a matter in the condition of being an open hearing.

"It has come to my attention that your agency may have recently taken action with respect to the operation of a sales office from a model home located on Cormorant Street in [petitioner's] subdivision of Depoe Bay. Can you please confirm for me if that action did take

1 responding state agency fax states that the agency has not taken recent action to license such
2 a branch office in the subdivision, and then details the agency's recent communications with
3 a real estate broker regarding the operation of branch real estate offices within homes located
4 within petitioner's development. The real estate broker sent a copy of both faxes to
5 petitioner's attorney on July 12, 2000. On July 18, 2000, the city council conducted its
6 deliberations on the application and then rendered its decision denying the application.

7 Petitioner argues that the two documents demonstrate that an improper *ex parte*
8 communication occurred between a member of the city council, the decision making body
9 below, and a state agency regarding matters related to the challenged decision, in violation of
10 ORS 227.180(3).² Petitioner contends that this communication was not disclosed at the first
11 available opportunity and, therefore, petitioner was not able to rebut the evidence contained
12 in the communication. Petitioner further argues that this failure to disclose an *ex parte*
13 communication is a basis for reversal or remand. *Horizon Construction, Inc. v. City of*
14 *Newberg*, 114 Or App 249, 253-54, 834 P2d 523 (1992).

15 The city does not dispute that communication occurred between the city council
16 member and the state agency, or the content of that communication. Instead, the city argues
17 that the communication does not constitute an *ex parte* communication, because the
18 substance of the communication is not directed at the decision or action that was before the

place and provide the particulars so that the information can be made available to the City Council." Motion to Take Evidence Not in the Record, Exhibit C.

²ORS 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:

- "(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."

1 city council. According to the city, the city council member's inquiry concerned a real estate
2 office in a model home, albeit in the same subdivision, and the application before the city
3 council concerned a different real estate office in a recreation center. Even if the
4 communication constitutes an *ex parte* communication, the city contends, the failure to
5 disclose the substance of that communication cannot result in a reversal or remand, because
6 petitioner knew of the *ex parte* communication prior to the city council's final deliberations
7 on July 18, 2000, and did not challenge the city council member's failure to disclose prior to
8 or during those deliberations. Accordingly, the city argues that petitioner's motion to take
9 evidence should be denied, because petitioner cannot establish that a violation of
10 ORS 227.180(3) occurred or, if so, that such violation would warrant reversal or remand.

11 In a reply memorandum, petitioner argues that the city council member's July 11,
12 2000 fax sought information regarding a real estate office in a model home, in order to apply
13 that information to petitioner's pending application for a real estate office in a recreation
14 center. Petitioner argues that, as evidenced by the city council member's fax, at least one
15 city council member believed that the sought-after information had some bearing on the
16 application before the city. With respect to the city's waiver argument, petitioner argues that
17 its failure to object to nondisclosure at the July 18, 2000 meeting, at which no evidence was
18 or could be introduced, does not cure the city's violation of ORS 227.180(3). *Horizon*
19 *Construction, Inc.*, 114 Or App at 254.

20 OAR 661-010-0045(1) provides in relevant part that:

21 "[t]he Board may, upon written motion, take evidence not in the record in the
22 case of disputed factual allegations in the parties' briefs concerning * * * *ex*
23 *parte* contacts, * * * which, if proved, would warrant reversal or remand of the
24 decision."

25 Further, OAR 661-010-0045(2)(a) requires that a motion to take evidence:

26 "*** shall contain a statement explaining with particularity what facts the
27 moving party seeks to establish, how those facts pertain to the grounds to take
28 evidence specified in section (1) of this rule, and how those facts will affect
29 the outcome of the review proceeding."

1 The “disputed factual allegation” here, if any, is whether the communication between
2 the city council member and the state agency was related to the “decision or action” before
3 the city council. Petitioner argues that the city council member sought the information
4 regarding the real estate office in the model home in order to apply that information to decide
5 petitioner’s application for a real estate office in the recreation center. The city seems to
6 dispute that information regarding the sales office in the model home could have any bearing
7 on petitioner’s application.

8 In *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550, 561 (1991), we
9 expressed a strong preference for resolving motions under OAR 661-010-0045 once the
10 parties have submitted briefs challenging and defending the local government’s decision.
11 *See also* OAR 661-010-0045(1) (“The Board may * * * take evidence not in the record in the
12 case of disputed factual allegations *in the parties’ briefs* * * *”) (emphasis added). We stated
13 in *Citizens Concerned* that, in most cases, the appropriate posture in which to file a motion
14 under OAR 661-010-0045 is once the briefs are filed, when the respective parties’ legal
15 contentions are presented in sufficient detail, and any disputed allegations of fact are more
16 clearly identified. 20 Or LUBA at 561. In that posture, the Board is in a better position to
17 resolve a motion under OAR 661-010-0045 consistently with the statutory mandate for
18 timely resolution of land use disputes.

19 Similarly, we cannot resolve petitioner’s motion under OAR 661-010-0045 in the
20 current posture of this case. For example, because no briefs have been submitted, we have
21 no idea what criteria applied to the city’s decision on petitioner’s application, and whether
22 the information the city council member sought from the state agency has any relationship,
23 evidentiary or otherwise, to those criteria. In other words, petitioner has not given us
24 sufficient information to determine whether the communication is related to the subject of the

1 city's action or decision in this case, and thus whether it is an undisclosed *ex parte*
2 communication in violation of ORS 227.180(3).³

3 Petitioner's motion to take evidence not in the record is denied.

4 The petition for review is due 21 days from the date of this order. The response brief
5 is due 42 days from the date of this order.

6 Dated this 26th day of October, 2000.

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Anne Corcoran Briggs
Board Member

³We do not understand the city to object to the Board's consideration of the communication between the city council member and the state agency, in resolving any assignment of error alleging a violation of ORS 227.180(3). If that is the case, we see no reason why petitioner cannot assign error to the alleged statutory violation, attach copies of the two faxes to the petition for review, and refer to those faxes in its legal argument. If the city's response brief objects to our consideration of the two faxes in resolving such an assignment of error, petitioner may move to take evidence not in the record under OAR 661-010-0045.