BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAYMOND A. WEST,
*Petitioner,*

vs.

CITY OF SALEM,
*Respondent.*

LUBA No. 2010-013

FINAL OPINION
AND ORDER

Appeal from Salem.

Raymond A. West, Salem, filed the petition for review and argued on his own behalf.

Daniel B. Atchinson, Assistant City Attorney, Salem, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 05/06/2010

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

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioner appeals a city hearings officer's decision denying petitioner's request to retroactively authorize replacement of windows on a historic house located within a historic district.

**FACTS**

Petitioner owns a single-family residence within a historic district that he purchased in 2009. When the previous owner of the house purchased the property in 2005, many of the original wood double-hung windows on the house were in a state of disrepair. The previous owner stated that she tried to contact the city about regulations regarding window repair or replacement on a dwelling in the historic district, but was unable to obtain information on the matter. The previous owner chose to go ahead and replace all 23 of the original wood windows on the house with double-hung vinyl windows, and completed the replacements in 2005.

In 2009, based on a complaint filed by neighbors, the city code enforcement officer issued a citation to the previous owner for replacing the windows without applying for a required city permit and showing that the vinyl windows comply with the historic district standards. In response to the citation, the previous owner filed an application with the city Historic Landmarks Commission (HLC) to approve installation of the vinyl windows. Petitioner purchased the property during the pendency of the HLC proceedings and appeared before the HLC in support of the application. The HLC found that the request did not comply with historic district standards, and denied the application. Petitioner appealed to the city's hearings officer. The hearings officer affirmed the HLC decision, and this appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioner argues that by inaction the city gave *de facto* approval to the replacement windows, and that the city is therefore estopped from denying the window replacement application. Petitioner cites to testimony from the previous owner that she attempted to contact the city on numerous occasions prior to installation of the windows, but was unable to obtain information regarding historic district requirements. Petitioner also notes that after installation of the windows the previous owner wrote a letter in support of a neighbor also proposing to install vinyl windows, in which the previous owner informed the city that she also had installed vinyl windows on her dwelling. The city took no action against the previous owner after receiving this letter admitting installation of the vinyl windows, and petitioner argues that the city's failure to take action constituted an implied approval of the windows. Finally, petitioner notes that an HLC commissioner commented at the HLC hearing that it was only since 2006 that the HLC began efforts to educate citizens about historic district building and renovation requirements. We understand petitioner to argue that the city's failure to sufficiently educate citizens regarding historic district requirements prior to 2006 means that the city cannot retroactively apply those requirements to deny the window replacement application.

The city disputes that it failed to respond to the previous owner's attempts to contact the city or that any actions or inactions by city officials constituted *de facto* approval or could possibly result in estoppel against the city. We tend to agree with the city that petitioner has not demonstrated that prior to installation the previous owner made reasonable attempts to contact the appropriate city department. In any case, even if the previous owner in fact attempted to contact the appropriate city officials, and the city failed to respond, petitioner has not demonstrated that such failure constitutes a *de facto* approval or estops the city from applying the historic district standards to deny the requested permit. Petitioner does not dispute that, under the Salem Revised Code (SRC), replacing the windows of a

historic house in the district requires an application for a type III permit, and a hearing before the HLC, which approves or denies the permit application pursuant to discretionary historic district guidelines. SRC 120A.060(b)(3) and 120A.100. The alleged failure of unspecified city staff to respond to the previous owner's inquiries, or staff's alleged knowledge of the previous owner's unauthorized replacement, cannot possibly substitute for that process or constitute a *de facto* approval of the requirement permit. Similarly, the HLC's initiation of a public education effort regarding historic district requirements in 2006 does not mean the HLC cannot apply historic design guidelines to approve or deny an application for retroactive authorization to replace windows that occurred in 2005 without the required HLC permit.

With respect to petitioner's estoppel argument, estoppel cannot arise from an action of a city official who purports to waive the provisions of a mandatory law or otherwise exceeds his authority. *Solberg v. City of Newberg*, 56 Or App 23, 28, 641 P2d 44 (1982); *City of Mosier v. Hood River Sand*, 206 Or App 292, 319, 136 P3d 1160 (2006). By their alleged inactions, city staff did not purport to waive the historic design requirements. Even if city staff had taken action to waive the mandatory requirements, they would have exceeded their authority, and thus a claim of estoppel cannot be made against the city.[1]

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

Petitioner argues that the previous owner submitted a letter in which she claimed that she had a 2009 conversation with an HLC staff person in which the staff person verbally

[1] Even if petitioner had a valid estoppel claim, there is some question whether LUBA has authority to reverse or remand a decision based on an equitable estoppel argument. *See Sparks v. City of Bandon*, 30 Or LUBA 69, 73 (1995) (questioning whether LUBA has authority to reverse a land use decision based on equitable estoppel); *Pesznecker v. City of Portland*, 25 Or LUBA 463, 466 (1993) (same); *Lemke v. Lane County*, 3 Or LUBA 11, 15, n 2 (1981) (same).

approved the new windows. Because of that verbal approval, petitioner argues, the city is estopped from denying the replacement window application.

However, the staff person who allegedly gave verbal approval testified to the hearings officer that she did not grant verbal approval, and the hearings officer specifically found based on that testimony that the staff person did *not* purport to give verbal approval to the previous owner. Record 3. Petitioner does not acknowledge or challenge that finding. That alone is a sufficient basis to deny the assignment of error. Furthermore, as we explained in denying the first assignment of error, even if HLC staff had purported to grant verbal approval, staff would have no authority to do so, and therefore the city cannot be estopped from denying the application.

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

Petitioner argues that the HLC was biased because an HLC commissioner implied during the hearing that she might vote in favor of the application had the previous owner presented the application rather than petitioner.[2] Petitioner argues that it is legally irrelevant who presents the application. According to petitioner, it is possible that the comment influenced other HLC commissioners, and resulted in denial of the application for reasons unrelated to the approval criteria.

The city responds that the commissioner's comment merely responds to petitioner's arguments below, which were not directed at the applicable approval criteria, but instead

[2] The minutes of the October 22, 2009 HLC hearing reflect the following statements made during the HLC deliberations:

> "[Commissioner] commented that [petitioner] purchased the property with full knowledge of this problem and chose to move forward and accepted $5000 for compensation when he knew the replacement cost would be $50,000. He had the opportunity to renegotiate or extend the contract, but apparently declined to do so. The HLC is now dealing with the new owner; if the former owner was before the Commission, perhaps it would be a different case. However, [petitioner] accepted [the previous owner's] problems legally by closing in escrow." Record 119.

were based on equitable considerations affecting the previous owner. In any case, the city argues, even if the commissioner's comment reflected bias toward petitioner, which the city disputes, the decision before LUBA is not the HLC decision, but the hearings officer's *de novo* review of the HLC decision.

We agree with the city. Because the HLC was not the final decision maker, it is not enough to demonstrate that a particular HLC commissioner was biased or even that the entire HLC was biased. Petitioner must also demonstrate that the record before the hearings officer is tainted by the alleged bias of the lower body. *See Krishchenko v. City of Canby*, 52 Or LUBA 290, 298 (2006), *aff'd* 196 Or App 787, 106 P3d 699 (alleged bias of a lower body not sufficient to remand decision of final decision maker without evidence of tainted record); *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419, 432 (2004) (same); *Utah Int'l v. Wallowa County*, 7 Or LUBA 77, 83 (1982) (same). Petitioner does not attempt to argue that the alleged bias of the HLC commissioner tainted the record before the hearings officer, or affected the hearings officer's *de novo* review. Therefore, even if the HLC commissioner was biased, petitioner's arguments provide no basis for reversal or remand.

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

The hearings officer denied the application under three historic district guidelines, which we paraphrase as follows: (1) retain the distinguishing original qualities and character of the historic resource, (2) repair deteriorated features rather than replace, whenever possible, and (3) design and construct contemporary alterations and additions to existing properties such that they do not destroy significant historical, architectural or cultural material. Petitioner argues that the new vinyl windows look similar to the original double-hung wood windows and therefore should have been allowed.

Petitioner's argument is essentially a substantial evidence challenge to the hearings officer's conclusion that the new windows do not meet the historic district guidelines. It may

well be the case that the replacement windows are visually similar to the original double-hung wood windows. However, the city's decision is a denial. In challenging a denial based on evidentiary grounds, the applicant must establish that the burden of proof is met as a matter of law. *Jurgenson v. Union County Court*, 42 Or App 505, 510, 600 P2d 1241 (1979). In other words, petitioners must establish that no reasonable person could reach the conclusion the decision maker reached, based on the whole record. *Ehler v. Washington County*, 52 Or LUBA 663, 672 (2006). Petitioner does not discuss the three guidelines the hearings officer found the application did not satisfy, or challenge the hearings officer's findings that the guidelines are not satisfied. Those guidelines take more into account than mere visual similarity. Petitioner has not demonstrated that no reasonable person could reach the conclusion the hearings officer reached, that replacing the original wood windows with vinyl windows is inconsistent with the historic design guidelines.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR**

Prior to the hearing before the hearings officer, the city mailed out to neighbors the notice of hearing, attached to which was a copy of petitioner's written testimony in support of the application. However, due to a copying error, the attachment included only three pages of petitioner's four-page testimony. According to petitioner, this error made his arguments seem incoherent and could have created opposition to the application on the part of neighbors who later attended the hearing.

We note, initially, that there is no local requirement that petitioner's written testimony be included in the notice of hearing mailed to neighbors. Even if the city's failure to include all of petitioner's written testimony violated some procedural requirement, in order to provide a basis for reversal or remand petitioner must demonstrate that his substantial rights were prejudiced. ORS 197.835(9)(a)(B). Substantial rights include an adequate opportunity to prepare and submit a party's case and a full and fair hearing. There

is no dispute that petitioner's entire written testimony was provided to the hearings officer and was considered by the hearings officer in making his decision. Other than petitioner's speculation, there is no evidence that any hearing attendees were opposed to petitioner because of the missing page, and absolutely no evidence that any opposition generated by the missing page influenced the hearings officer. Even if the city had committed a procedural error, petitioner has not demonstrated that his substantial rights were prejudiced.

The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

Petitioner argues that because the hearings officer is paid by the city to act as hearings officer, he was necessarily biased to adopt the recommendation of city planning staff, who testified against the application.

In order to demonstrate bias, a party must show that the decision maker prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented during the proceedings. *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). Actual bias sufficiently strong to disqualify a decision maker must be demonstrated in a clear and unmistakable manner. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001); *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985).

Petitioner does not cite to any evidence that the hearings officer is biased, other than the fact that he is paid by the city to act as hearings officer. That the hearings officer is paid by the city to act as hearings officer is far from sufficient to demonstrate that the hearings officer is biased. Indeed, one of the reasons why local governments contract with independent hearings officers, rather than use city or county employees to act as hearings officers, is to avoid accusations of bias in favor of the local government. *Mitchell v. Washington County*, 39 Or LUBA 240, 246, n 8 (2000), *aff'd* 173 Or App 297, 21 P3d 664 (2001). Petitioner has not demonstrated that the hearings officer was biased.

The sixth assignment of error is denied.

The city's decision is affirmed.