

1 **NATURE OF THE DECISION**

2 Petitioner appeals a decision by the county hearings officer approving a conditional
3 use permit, design review, and a variance for improvements to water supply facilities in the
4 county.

5 **MOTION TO DISMISS**

6 The Notice of Intent to Appeal was jointly filed by petitioner and Scott Fernandez.
7 On April 14, 2012, petitioner Scott Fernandez moved to dismiss his appeal. Petitioner
8 Fernandez's appeal is dismissed.

9 **MOTION TO INTERVENE**

10 The City of Portland (intervenor), the applicant below, moves to intervene on the side
11 of the county in the appeal. There is no opposition to the motion and it is granted.

12 **REPLY BRIEF**

13 Petitioner moves for permission to file a reply brief to respond to alleged new matters
14 raised in the response briefs. The county moves to strike an attachment to the reply brief that
15 is not part of the record and that it argues is not subject to official notice. We agree with the
16 county that the attachment is not part of the record and that it is improperly included in the
17 reply brief. Accordingly, we do not consider the attachment to the reply brief. The reply
18 brief is otherwise allowed.

19 **FACTS**

20 The Bureau of Water Services, a department of intervenor City of Portland, applied to
21 the county for a conditional use permit, design review and a variance to construct
22 improvements to its water supply facilities located in the county. The hearings officer held a
23 hearing on the application. During the hearing, the hearings officer explained that he
24 provides contract hearings officer services for land use matters for the City of Portland, the
25 applicant. During the open record period after the hearing, petitioner submitted a letter
26 asserting that the hearings officer's contract with the City of Portland to provide land use

1 hearings officer services creates a conflict of interest and that for that reason, the hearings
2 officer should recuse himself and the county should hold a new hearing with a different
3 hearings officer. The hearings officer declined to do so, and issued a decision that approves
4 the application. This appeal followed.

5 **ASSIGNMENT OF ERROR**

6 **A. Fourteenth Amendment to the US Constitution**

7 In her assignment of error and in three arguments in support of her assignment of
8 error, petitioner argues that the county violated her rights under the Fourteenth Amendment
9 to the United States Constitution by allowing the hearings officer to be the decision maker on
10 the application.¹ According to petitioner, the hearings officer’s personal interest in
11 maintaining his contract employment with the City of Portland created a bias in favor of
12 approving the city’s application. We understand petitioner to argue that the hearings officer
13 should have recused himself from the decision and his failure to do so violated petitioner’s
14 Fourteenth Amendment rights to due process.

15 The county and intervenor (respondents) respond that petitioner failed to raise an
16 issue below that the county’s procedure violates her Fourteenth Amendment due process
17 rights and is now precluded from raising the issue under ORS 197.763(1) and ORS
18 197.835(3). ORS 197.763(1) provides:

19 “An issue which may be the basis for an appeal to the Land Use Board of
20 Appeals shall be raised not later than the close of the record at or following
21 the final evidentiary hearing on the proposal before the local government.
22 Such issues shall be raised and accompanied by statements or evidence
23 sufficient to afford the governing body, planning commission, hearings body
24 or hearings officer, and the parties an adequate opportunity to respond to each
25 issue.”

¹ The Fourteenth Amendment to the United States Constitution provides, in relevant part that no State shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

1 ORS 197.835(3) provides that “[i]ssues shall be limited to those raised by any participant
2 before the local hearings body as provided by ORS 197.195 or 197.763, whichever is
3 applicable.” See *Boldt v. Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991) (the
4 purpose of the “raise it or waive it” requirement at ORS 197.763(1) is to provide “fair notice”
5 of the issue to the decision maker and other parties, so they have an adequate opportunity to
6 respond and address the issue). According to respondents, petitioner never cited to or
7 presented any argument that the county’s actions violated her Fourteenth Amendment right to
8 due process. Rather, they argue, petitioner alleged that the hearings officer had a conflict of
9 interest and that his participating in the decision violated his professional obligations as a
10 member of the Oregon State Bar.²

11 In the reply brief, petitioner responds and cites our decisions in *Waite v. Marion*
12 *County*, 16 Or LUBA 353 (1987), and *Miller v. City of Ashland*, 17 Or LUBA 147 (1988), as
13 standing for the proposition that constitutional claims are exempt from the requirements of
14 ORS 197.763(1). In *Waite* and *Miller*, we found that under the particular circumstances
15 presented, the petitioners had not waived their right to argue that the county’s procedure
16 violated their right to due process under the Fourteenth Amendment, and we subsequently
17 denied the assignments of error that argued that the county violated the Fourteenth
18 Amendment. *Waite* and *Miller* were decided prior to the enactment of ORS 197.763(1).³ In

² The hearings officer is an active member of the Oregon State Bar.

³ As we explained in *Wuester v. Clackamas County*, 25 Or LUBA 425, 428-29 (1993):

“The ‘raise it or waive it’ provisions of ORS 197.763 replaced ORS 197.762, which provided a more limited ‘raise it or waive it’ requirement. Or Laws 1989, ch 761, Sec. 10(a). ORS 197.762 was adopted in 1987 to partially displace statutory provisions which this Board and the Oregon Court of Appeals construed as providing that issues could be raised in an appeal at LUBA, without regard to whether those issues were first raised during the local proceedings leading to the challenged land use decision. *Lane County v. City of Eugene*, 54 Or App 26, 33, 633 P2d 1306 (1981); *McNulty v. City of Lake Oswego*, 14 Or LUBA 366, 370 (1986).” (footnote omitted).

1 decisions subsequent to *Waite* and *Miller*, however, we have found that a challenge that a
2 decision violated the equal protection clause of the Fourteenth Amendment was waived
3 under ORS 197.763(1) where the issue was not “accompanied by statements or evidence
4 sufficient to afford the governing body and the parties an adequate opportunity to respond to
5 each issue.” *Yontz v. Multnomah County*, 34 Or LUBA 367, 372-3 (1998); *see also Craven*
6 *v. Jackson County*, 29 Or LUBA 125 (1995) (petitioner was precluded from raising an issue
7 regarding a violation of the Equal Protection Clause was where the issue was not raised
8 below with sufficient specificity to afford the decision maker an opportunity to respond to it.)
9 Accordingly, to the extent *Waite* and *Miller* suggest a broad principle that claims under the
10 Fourteenth Amendment right to due process are not subject to ORS 197.763(1), we now
11 disavow that suggestion. Absent any citation to any place in the record that demonstrates that
12 petitioner raised an issue prior to the close of the record following the initial evidentiary
13 hearing on the application regarding a violation of her Fourteenth Amendment right to due
14 process, we agree with respondents that the issues that are presented in petitioner’s first three
15 arguments under the assignment of error are waived.

16 **B. Bias**

17 **1. Appearance of Bias**

18 ORS 197.835(9)(a)(B) allows LUBA to reverse or remand a decision where a local
19 government fails “to follow the procedures applicable to the matter before it in a manner that
20 prejudiced the substantial rights” of the parties. The substantial rights of the parties include a
21 right to a decision by a “tribunal which is impartial in the matter.” *Fasano v. Washington Co.*
22 *Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). An allegation of decision maker bias,
23 accompanied by evidence of that bias, may be the basis of a remand under ORS
24 197.835(9)(a)(B). *Torgeson v. City of Canby*, 19 Or LUBA 511, 520 (1990).

25 In *1000 Friends of Oregon v. Wasco County Court*, 304 Or 76, 84, 742 P2d 39 (1987)
26 (*Wasco County*), the Supreme Court concluded that where bias is alleged based on a personal

1 financial interest of a quasi-judicial land use decision maker, reversible bias requires an
2 *actual* personal interest in the outcome. The Court rejected an argument that the mere
3 appearance of a personal financial interest is a sufficient basis to reverse or remand the
4 decision for bias. The burden is on petitioners to demonstrate the decision maker was biased
5 and did not reach its decision by applying applicable standards to the evidence and arguments
6 presented. *Heiller v. Josephine County*, 23 Or LUBA 551, 554 (1992). In an argument that
7 appears on pages 14 through 17 of the petition for review, we understand petitioner to argue
8 that the hearings officer’s contractual relationship with the City of Portland is sufficient to
9 create the *appearance* that he has a personal financial interest in the outcome of the
10 proceedings on the application, and that *appearance* means that the hearings officer should
11 not have participated in the decision.⁴ Petitioner argues that the holding in *Wasco County*
12 should be limited to members of a governing body, and should not apply where the decision
13 maker is a hearings officer appointed by the governing body to reach a decision in a quasi-
14 judicial matter. Petitioner contends that an “appearance of personal interest,” and not an

⁴ ORS Chapter 244, Government Ethics, sets out a Code of Ethics for public officials. “Potential conflict of interest” is defined in ORS 244.020(12) as

“[A]ny action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative is associated, unless the pecuniary benefit or detriment arises out of the following:

- “(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
- “(b) Any action in the person’s official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person’s relative or business with which the person or the person’s relative is associated, is a member or is engaged.
- “(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.”

1 actual conflict of interest or actual bias, is a sufficient basis to remand the decision to the
2 county for a different hearings officer to act as decision-maker.

3 Because we conclude that no appearance of bias exists, we need not address
4 petitioner's contention that the holding in *Wasco County* should not apply to consideration of
5 bias in the context of a hearings officer decision.⁵ We have no trouble concluding that the
6 hearings officer's existing contractual relationship with the City of Portland as an
7 independent part time hearings officer and his participation as an independent hearings
8 officer for respondent in making a decision on the applications by the City of Portland to
9 improve its water system does not create an appearance that he was biased in the proceedings
10 on the applications. In *West v. City of Salem*, 61 Or LUBA 166, 172 (2010), in similar
11 circumstances we rejected an argument that bias was present where a hearings officer was
12 employed and paid by the city and heard testimony and accepted recommendations on a land
13 use application from the city's planning department. See also *Mitchell v. Washington County*,
14 39 Or LUBA 240, 246 n 8 (2000), *aff'd* 173 Or App 297, 21 P3d 664 (2001) (no bias on the
15 part of an independent hearings officer who also represented clients in private practice based
16 on mere speculation about that hearings officer's future clients in private practice);
17 *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742, 745-46 (1992) (no
18 bias where there was no evidence of a direct or substantial connection between a city
19 councilor who was a realtor and a proposed subdivision). We see no reason to find the
20 appearance of bias or personal interest in the present circumstances where an independent

⁵ In *Wasco County*, the Supreme Court pointed out the legislature's policy choice against an "appearance of bias" standard. *Wasco County*, 304 Or at 85 ("[t]he contrary choice of policy toward appearances alone is implied by the provision in Oregon's governmental ethics law against invalidating actions for failure to disclose a potential conflict of interest, ORS 244.130(2)"). The current version of ORS Chapter 244 requires an appointed public official who has either a potential or actual conflict of interest to disclose that conflict of interest in writing to the appointing authority, at which point the appointing authority must decide how to proceed. ORS 244.120(1)(c). But that public official's decision may not be voided solely because of a lack of disclosure. ORS 244.130(2) ("[a] decision or action of any public official * * * may not be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest.")

1 hearings officer contracts with multiple local governments to provide land use hearings
2 officer services, and one of the local governments with which he contracts is the applicant for
3 adevelopment in a jurisdiction with which he also contracts.

4 Accordingly, for the reasons set forth above, the arguments set forth in pages 14
5 through 17 of the petition for review that argue that the hearings officer *appears to* have a
6 personal interest in the outcome of the proceedings do not provide a basis for reversal or
7 remand.

8 **2. Actual Bias**

9 In petitioner’s fourth argument under the assignment of error, we understand
10 petitioner to assert that the hearings officer has an actual personal interest or commitment
11 that led him to be biased in favor of approving the application.⁶ Petitioner argues that the
12 hearings officer’s bias is demonstrated by the fact that the hearings officer’s decision did not
13 modify any conditions that the county’s planning staff suggested or add any additional
14 conditions. Petitioner also argues that the hearings officer’s bias is demonstrated by “the
15 deferential nature of involving the applicant in the creating conditions with staff before
16 disclosing his alleged conflict of interest * * *.” Petition for Review 18.

17 LUBA does not lightly infer bias on the part of local government land use decision
18 makers. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445 (2000).
19 Petitioner’s arguments fall far short of demonstrating that the hearings officer was actually
20 biased in this matter. *Cotter v. Clackamas County*, 36 Or LUBA 172, 184 (1999).

21 The county’s decision is affirmed.

⁶ Because we conclude that petitioner has not demonstrated that the hearings officer was biased, we need not address the county’s alternative response that petitioner is precluded from raising the issue because she failed to challenge the hearings officer in accordance with the procedure set out in Clackamas County Zoning and Development Ordinance 1303.07, which requires in relevant part that a challenge that a hearings officer has a “legal conflict of interest” be made in writing “by personal service to the Planning Director and the Hearings Officer not less than 3 days preceding the time set for public hearing.”