

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

3 LEAGUE OF WOMEN VOTERS OF WEST)
4 CLACKAMAS COUNTY, an Oregon)
5 nonprofit organization, CAROL)
6 and WILLIAM ATHERTON, PAUL R.)
7 ASH, MIKE BRANAM, KENNETH E.)
8 FINK, SCOTT FOELKER, STAN)
9 JEWETT III, RICHARD H. KLOOR,)
10 DICK MORAN, RICHARD NOBLE, AL)
11 PATCHETT and LEONARD G. STARK,)
12) Petitioners,)
13) vs.)
14 METROPOLITAN SERVICE DISTRICT,)
15) Respondent,)
16) and)
17 BLAZER HOMES, INC.,)
18) Intervenor-Respondent.)

LUBA No. 88-102
ORDER ON MOTION
REQUESTING RECUSAL

19 Intervenor-respondent Blazer Homes, Inc. (intervenor) moves
20 that referee Corinne Sherton recuse herself from consideration
21 of this appeal. Referees Sherton and Holstun are the only
22 referees currently serving on the Board, and referee Holstun is
23 not participating in this proceeding.¹ Intervenor's request
24 is based on my past associations with the attorneys for
25 petitioners and intervenor in this case.

26 Intervenor points out that attorney for petitioners, Edward
J. Sullivan, and attorneys for intervenor, Frank Josselson and
Leslie M. Roberts, were formerly partners in the firm of
Sullivan, Josselson, Roberts, Johnson & Kloos (SJRJK), and that
I was employed as an associate in that firm. Intervenor also

1 states that the 1986 dissolution of that firm resulted in a
2 successor firm, Josselson, Potter & Roberts, attorneys for
3 intervenor in this case, and a second firm headed by Mr.
4 Sullivan, in which I was a partner.

5 Intervenor claims that there were issues related to the
6 1986 dissolution of SJRJK in dispute between Mr. Sullivan and
7 his former partners, and the resolution of those issues had
8 some actual or potential impact on the interests of the
9 successor firm in which I was a partner. Intervenor asserts
10 that a dispute concerning fees owed to SJRJK from a case
11 continued by the successor firm in which I was a partner was
12 never resolved. Intervenor expresses concern that based on my
13 then partnership and long friendship with Mr. Sullivan, my
14 sympathies may have been enlisted on his side of the disputes
15 between him and his former partners, now attorneys for
16 intervenor. However, intervenor notes that it has no direct
17 information that these disputes were ever discussed with me.

18 Intervenor expresses concern "that subconscious factors
19 might affect a judge [sic] with such long standing and recent
20 association with one counsel, and particularly in view of the
21 differences which arose in the firm in which [attorney for
22 petitioners, attorneys for intervenor and referee Sherton] all
23 practiced together." Motion Requesting Recusal, Exhibit 1,
24 page 2.²

25 Petitioners request that the Motion for Recusal be denied.
26 Petitioners argue that intervenor has shown no basis for its

1 assertion that I have a bias or conflict which precludes my
2 participation in this case.³ Petitioners assert that no law
3 is cited or legal theory put forward by intervenor in support
4 of its motion. Petitioners argue that for this reason alone,
5 the motion should be denied, citing Deschutes Development Co.
6 v. Deschutes County, 5 Or LUBA 218 (1982).

7 Regarding the "fee dispute" issue, petitioners contend it
8 is not clear whether intervenor is requesting recusal based on
9 bias or conflict of interest. If bias is the underlying basis,
10 petitioners argue that I have stated that the dispute was never
11 discussed with me. See n 2, supra. If intervenor's theory is
12 conflict of interest, petitioners assert that intervenor has
13 not shown there is any relationship between the outcome of this
14 case and my financial well being.

15 Regarding the issue of my former partnership with Mr.
16 Sullivan, petitioners state that I already informed the parties
17 that this prior partnership does not influence me in this
18 case. See n 2, supra. Petitioners point out that this case
19 does not involve parties who were represented by any of the
20 firms in which I was an associate or partner. Petitioners
21 further assert that there is no claim or demonstration that I
22 have any extra-record knowledge of the case at hand.

23 Regarding the issue of my friendship with Mr. Sullivan,
24 petitioners point out that I have stated that my personal
25 friendships do not influence me in carrying out my duties as a
26 referee. See n 2, supra. Petitioners argue intervenor does

1 not dispute this statement.

2 I understand intervenor to argue that I should recuse
3 myself from this case because I may be biased due to my past
4 associations with attorneys for petitioners and intervenor.
5 Intervenor does not cite any provision of constitution,
6 statute, rule or other legal authority in support of its
7 request. However, the Oregon Supreme Court has suggested the
8 following formulation for determining when the due process
9 clause of the 14th amendment to the U.S. Constitution requires
10 a decision maker to disqualify herself for bias:

11 "The cases do not easily yield a single, simple rule,
12 but it seems that 14th amendment standards for
13 disqualification tighten with three separate
14 variables: first, the more the officer or agency
15 purports to act as a court; second, the closer the
16 issues and interests at stake resemble those in
17 traditional adjudications; and third, as the
18 disqualifying element moves from appearances through
19 possible temptation and generic self-interest to
20 actual personal interest in the outcome of the
21 decision. * * * " (Citations omitted). 1000 Friends
of Oregon v. Wasco County Court, 304 Or 76, 88, 742
22 P2d 39 (1987).

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19 The first two variables of the above analysis will fall at
20 the high end of the scale in any LUBA proceeding. LUBA is
21 similar to a court. With limited exceptions, LUBA has replaced
22 circuit courts as the body with exclusive jurisdiction to
23 review land use decisions made by local governments and state
24 agencies. ORS 197.825. The substance and procedures of LUBA's
25 review process are similar to judicial review under the
26 Administrative Procedures Act. Compare

1 ORS 183.482 to 183.484 with ORS 197.830 to 197.845. LUBA's
2 function is generally limited to reviewing the decisions of
3 other governmental bodies for compliance with legal standards.
4 LUBA referees are not elected, and do not have a policy making
5 role as do the decision makers in some tribunals.

6 However, in this case the third variable in the Supreme
7 Court's analysis falls at the extreme low end of the scale.
8 Intervenor does not allege that I have any actual or potential
9 personal interest in the outcome of this appeal proceeding.
10 Intervenor does not present any evidence that I have prejudged
11 the facts of this case or that I allow my professional
12 associations or social relationships to interfere with my
13 professional judgment and responsibilities. The fact that a
14 LUBA referee has past associations with, or past or present
15 social contacts with, other professionals in the land use field
16 is not sufficient to establish bias. Otherwise, LUBA referees
17 would constantly have to disqualify themselves.

18 I conclude that the due process clause of the 14th
19 amendment to the U.S. Constitution does not require that I
20 recuse myself.

21 As previously pointed out, intervenor does not cite any
22 statutory or other legal basis for its motion for recusal.
23 However, I note that as public officials, LUBA referees are
24 subject to the provisions of ORS ch 244 concerning government
25 ethics. That chapter includes a "code of ethics" which
26 prohibits certain actions by public officials. ORS 244.040.

1 Under this "code," a public official is prohibited from using
2 her official position to obtain financial gain.
3 ORS 244.040(1). However, intervenor does not allege or explain
4 how my participation in this case could result in my financial
5 gain. There is no provision in ORS ch 244 which prohibits me
6 from taking part in an appeal proceeding because of past
7 associations or social contacts with attorneys for the
8 parties.⁴

9 The motion for recusal is denied. Pursuant to our Order
10 Suspending Briefing Schedule of February 16, 1989, respondents'
11 briefs shall be due on or before the eighth day after the date
12 this order is issued.

13 Dated this 8th day of May, 1989.

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17 Corinne C. Sherton
18 Referee
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1 FOOTNOTES

2 1

3 On February 2, 1989, Referee Michael A. Holstun informed
4 the parties to this proceeding that due to his prior legal
5 representation of respondent Metropolitan Service District, and
6 his involvement in that capacity in the drafting and
acknowledgment of its Urban Growth Boundary Locational
Adjustment Rules, which are challenged in this appeal, he would
not participate in this review proceeding.

7 2

8 Intervenor's Motion Requesting Recusal was preceded by a
9 December 1, 1988 letter from Ms. Roberts informally suggesting
10 recusal for the same reasons as the subsequent motion. I
responded to that letter in a letter dated December 13, 1988,
in which I declined to recuse myself. In my letter, I stated:

11 " * * * I was an associate with Sullivan, Josselson,
12 Roberts, Johnson & Kloos at the time of that
partnership's dissolution in 1986, and I did enter
13 into a brief partnership with Mr. Sullivan (three
months duration) thereafter. I was aware that there
14 were disputed issues between Mr. Sullivan and Mr.
Josselson and [Ms. Roberts] related to that
15 dissolution. However, neither Mr. Sullivan nor any
other of the SJRJK partners ever discussed those
16 disputes with me. I am also unaware of any effect
those disputes had or might have had on my subsequent
partnership with Mr. Sullivan.

17 "I do have a long standing friendship with Mr.
18 Sullivan. In fact, having practiced almost
19 exclusively in the land use area for approximately
seven years with four different firms before being
20 appointed to LUBA, I have friendships with a number of
attorneys who practice in the land use area. These
21 friendships do not influence me in any way in carrying
out my duties as a LUBA referee.

22 "I assure you [Ms. Roberts] that I have no animosities
23 towards you or your present partners due to the
dissolution of SJRJK or any other reason. As far as I
24 know, I have never had any contact with your present
client, Blazer Homes, Inc., or with the matter at
25 dispute in this appeal. I have no actual bias or
conflict of interest that would prevent me from taking
26 part in this case. Therefore, I have a responsibility
to carry out my duties as a LUBA referee by

1 participating in the appeal." Motion for Recusal,
2 Exhibit 2.

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4 Petitioners argue, in the alternative, that even if bias or
5 conflict does exist, I am required to hear this case based on
6 the "rule of necessity." Intervenor moves to be allowed to
7 file a reply memorandum, submitted with its motion, concerning
8 reliance on the "rule of necessity" in this case. There is no
9 opposition to intervenor's motion, and it is granted. However,
10 because it is decided below that I am not required to recuse
11 myself from this case, I need not decide whether or how the
12 "rule of necessity" applies to LUBA proceedings.

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10 Although the Code of Judicial Conduct is not binding on
11 LUBA referees, it may be consulted for guidance on relevant
12 issues. The code states, in relevant part:

11 "CANON 2

12 "A Judge Should Avoid Impropriety and the Appearance
13 of Impropriety in All Activities

14 " * * * * *

15 "B. A judge should not allow family, social or other
16 relationships to influence judicial conduct or
17 judgment. * * * "

17 "CANON 3

18 " * * * * *

19 "C. Disqualification

20 "(1) A judge should disqualify himself or herself
21 in proceedings in which the judge's
22 impartiality might reasonably be questioned,
23 including but not limited to instances where:

24 " * * * * *

25 "(b) The judge served as a lawyer in the
26 matter in controversy, or a lawyer with
whom the judge previously was
associated served during such
association as a lawyer concerning the
matter * * * ;

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With regard to Canon 2B, I note that intervenor has merely expressed an unsubstantiated fear that I might subconsciously allow my professional and social relationships to influence my judgment. I have assured the parties to this case that will not occur. To require disqualification in such circumstances would make LUBA referees subject to disqualification whenever they have past professional associations or social relationships with attorneys for parties to a LUBA appeal.

With regard to Canon 3C(1), I note that paragraph (b) quoted above does not apply in this case. The lawyers with whom I was previously associated, attorneys for petitioners and intervenor in this case, did not serve during my association with them as lawyers concerning the matter on appeal in this case and, in fact, did not even represent the parties to the current case at all during that association. Intervenors have not established a reasonable basis for questioning my impartiality.