

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An *ex parte* contact provides no basis for reversal or remand where the contact is disclosed as soon as possible after the contact occurs, the record is reopened, the parties are given an opportunity to request an opportunity to rebut or further explore the contact, and no one takes advantage of that opportunity. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A local government decision maker only has a “conflict of interest,” as ORS 244.020(1) defines that term, if the decision would result in a “pecuniary benefit” to the decision maker. Any economic benefit a decision maker might indirectly realize for her accounting and financial planning business by voting in favor of a non-profit organization’s permit application to curry favor among the organization’s members is too indirect to constitute a “pecuniary benefit,” as that term is used in ORS 244.020(1). *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish that a land use decision maker is biased, petitioners must establish that the decision maker’s decision was a product of positive or negative bias rather than a product of independent view of the facts and law. Any inferences that might be drawn from the fact that a decision maker previously served on a permit applicant non-profit organization’s board of directors falls substantially short of establishing the decision maker is biased. *Rosenzweig v. City of McMinnville*, 64 Or LUBA 402 (2011).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** LUBA will deny a record objection asserting that a newspaper clipping in the record was not placed before the city council, where the minutes of the city council hearing reflect that a city council member read from the clipping as part of her disclosure of *ex parte* communications, which supports the city’s position that the clipping was placed into the record. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Failure to provide hearing participants an adequate opportunity to rebut an *ex parte* communication may not warrant remand, if the communication includes no factual or legal assertions relating to a basis for approval or denial. However, remand is necessary to provide an adequate opportunity for rebuttal where the *ex parte* communication concerns disputed testimony regarding whether and how many neighborhood associations oppose the project, and the decision makers believe such testimony to be relevant to an approval criterion that requires the project to meet the overall needs of the community. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To provide a meaningful opportunity for hearings participants to rebut a disclosed *ex parte* communication, the decision-maker must (1) consider any objections that the initial disclosure was inadequate and (2) make some response to specific requests for additional information or clarifications that are reasonably necessary for participants to develop

rebuttal to material factual and legal assertions in the communication. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Remand is necessary where a city’s code requires that the city council “shall” vote on a valid challenge to the impartiality of a council member, but the city council ignores a valid challenge and does not vote. That the code provisions governing the required vote state that the city council “may” disqualify the challenged member is properly read in context as authorizing disqualification, and not as granting the city council the discretion to vote or not, as it sees fit. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Failure of a city council to vote on a valid challenge to the impartiality of a city council member, as required by city code, prejudices the substantial rights of the challenger, regardless of whether the vote would result in the disqualification of the city council member or whether the member’s alleged bias influenced other decision makers. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Communications between a staff person and the decision maker, and between a staff person and a party, are not ex parte contacts. However, a decision maker could potentially receive an ex parte contact where a staff person conveys a communication from a party to the decision maker that concerns the land use decision under consideration. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An affidavit indicating that one week after issuing the final decision a decision maker knew that the applicant had agreed to the proposed conditions is an insufficient showing that an ex parte contact might have occurred during the hearing to warrant depositions under OAR 661-010-0045, where there is no indication when or how the decision maker acquired that knowledge. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Even assuming that a staff member conveyed to a decision maker during the proceedings below that the applicant had agreed to proposed conditions, that communication is not the kind of communication that requires the decision maker to disclose and offer other parties the opportunity to rebut. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To constitute an ex parte communication that obligates a local government to provide an opportunity for rebuttal, the content of the communication must include something concerning the land use decision at issue that is capable of rebuttal. Where the only content of the

alleged communication is that the applicant has agreed to city-proposed conditions, there is simply nothing to rebut or respond to. *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 539 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A letter objecting that a county commissioner is biased and should not participate in the appeal is not an *ex parte* contact, where county code does not require that documents submitted in the land use matter be served on the other parties in the appeal and the letter is submitted to the board of county commissioners in the same way many other documents in the appeal were submitted. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a county code requires that bias challenges be filed at least 48 hours before the public hearing on a quasi-judicial matter, and there is no reason why the challenge could not have been filed before or during that hearing, petitioner’s challenge filed three days before board of commissioners meeting where the board approved the written decision and findings comes too late. *Warren v. Josephine County*, 67 Or LUBA 74 (2013).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Bias on the part of a decision maker in a quasi-judicial land use proceeding may be a basis for remand. However, in a LUBA appeal of a city council decision that followed *de novo* review of a planning commission decision, allegations of bias on the part of a single planning commissioner will provide a basis for remand only if the petitioner shows the alleged bias of the planning commissioner tainted the record that was reviewed by the city council. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A petitioner’s motion for an evidentiary hearing to establish bias on the part of a planning commissioner will be denied where (1) the decision on review is a city council decision that followed a *de novo* review of a planning commission decision, (2) the only claim of impropriety on the part of the planning commission that might have tainted the record on review was a planning commission majority vote to refuse to consider evidence offered by petitioner, and (3) the allegedly biased planning commissioner voted with the planning commission minority to accept the evidence offered by petitioner. *Friends of the Hood River Waterfront v. City of Hood River*, 66 Or LUBA 474 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a county commissioner writes a newspaper editorial criticizing petitioner as a “terrorist” because petitioner appeals a land use decision before the county commission, the editorial is evidence of a strong emotional bias that obligates the commissioner to recuse himself. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a county commissioner who is biased against the petitioner correctly recuses himself from participating in the decision, but nonetheless makes brief comments in favor of denying

petitioner's appeal during the commissioners' deliberations, remand may be necessary if it is impossible for LUBA to determine whether or not the biased commissioner's limited participation influenced the votes or deliberations of the other decision makers. *Oregon Natural Desert Assoc. v. Harney County*, 65 Or LUBA 246 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The failure by a member of the decision making body to disclose ex parte contacts that occurred after the hearing at which the decision making body initially voted to deny an application and before the next meeting at which the decision making body adopted the order denying the application violates ORS 227.180(3). *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The remedy for violation of ORS 227.180 is not to require an entire rehearing on an application. An adequate remedy is a remand to the city that allows interested persons the opportunity to prepare and present evidence and argument in response to the substance of the ex parte contact. *Housing Authority of Jackson County v. City of Medford*, 65 Or LUBA 295 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A hearings officer's existing contractual relationship as an independent part time hearings officer for a local government who is an applicant for a permit from a different jurisdiction, and his participation as an independent hearings officer for the decision-making jurisdiction does not create an appearance that he was biased in the proceedings on the applications. *Newell v. Clackamas County*, 65 Or LUBA 384 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** LUBA will not infer bias based on an argument that a hearings officer's decision did not modify any conditions of approval that the county's planning staff suggested or add any additional conditions. *Newell v. Clackamas County*, 65 Or LUBA 384 (2012).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** City council members are not required under ORS 227.180(3) to disclose receipt of an e-mail chain that was forwarded to them by one of the opponents to the application, where the substance of the e-mail chain was placed into the record and the only portion not placed in the record includes nothing related to any issue before the city council that could possibly be rebutted. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Even though the challenged decision did not involve an application, similar to ex parte communications before an application is filed, any communications that occurred before a county initiated proceedings to sell park property under ORS 275.330 are not ex parte communications that may run afoul of ORS 215.422(3). *Kaye v. Marion County*, 62 Or LUBA 57 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Failure of city council members to disclose that they sit on the board of the city’s urban renewal agency, an independent body that earlier had approved modifications to a land sale contract between the agency and the applicant for a planned unit development on the same property sold to the applicant is not a basis for remand under ORS 227.180(3), where the petitioner identifies no “ex parte” communications that occurred between the applicant and city council members sitting on the urban renewal agency board. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A mayor’s pre-hearing statements of general support for a proposed planned unit development are not sufficient to demonstrate bias in favor of the proposal or that the mayor was unable to engage in the necessary fact-finding and application of law to the facts. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Claiming that a hearings officer is biased because he is paid by the local government is far from sufficient to demonstrate that the hearings officer is biased. *West v. City of Salem*, 61 Or LUBA 166 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A hearings officer’s reference to a separate enforcement proceeding against petitioner for conducting wedding events on his property is not sufficient to demonstrate bias on the part of the hearing s officer. *Reed v. Jackson County*, 61 Or LUBA 253 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** LUBA will deny a motion to consider extra-record evidence of the minutes of an urban renewal agency meeting at which the agency’s board of directors, made up of the city council members, considered amendments to a sale agreement between the urban renewal agency and the applicant for a land use application then pending before the city planning commission, where the petitioner fails to demonstrate that the minutes include anything that constitutes evidence of bias or an *ex parte* communication between the applicant and city council members concerning the land use application. *Claus v. City of Sherwood*, 61 Or LUBA 520 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Allegations that the planning staff, who were not the final decision makers, were biased in favor of an application are insufficient, even if true, to demonstrate that the final decision makers were biased. *Hoskinson v. City of Corvallis*, 60 Or LUBA 93 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A one-way communication from a decision maker to a party is probably not an *ex parte* communication requiring disclosure under ORS 215.422(3). While such a communication might be some evidence of bias or predisposition, and might be an indication that a meeting subsequently occurred at which *ex parte* communications were

made, the communication itself is not an *ex parte* communication that requires disclosure. *Grubaugh v. Gilliam County*, 60 Or LUBA 124 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** When *ex parte* contacts are not disclosed until after the close of the record and public hearing, the failure to object to the *ex parte* contacts does not preclude a petitioner from raising an issue concerning the *ex parte* contact at LUBA. *Grubaugh v. Gilliam County*, 60 Or LUBA 124 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A county commissioner’s ownership of nearby property and a residence 1.2 miles away from a proposed church office, without more, is not enough to establish an actual conflict of interest. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A county commissioner’s attendance at a planning commission hearing with his wife who opposed an application for a church office falls far short of the evidence that LUBA has required to support an allegation of bias. To establish bias, LUBA has generally required evidence of a strong emotional commitment by a decision maker to approve or to defeat an application for land use approval. *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Parties in a quasi-judicial land use proceeding have a right to a decision by a “tribunal which is impartial in the matter \* \* \*.” *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). However, there is no authority for the propositions that planning staff may not assist applicants for land use permit approval or that planning staff—as opposed to the ultimate local government decision maker—must be impartial in their dealings with applicants for land use permit approval and opponents of such permits. *Lulay v. Linn County*, 60 Or LUBA 432 (2010).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Failure to disclose *ex parte* communications that have no bearing on applicable approval criteria or to issues material to approving or denying a land use application does not necessarily warrant remand. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** General expressions of support or opposition to a proposed annexation are not *ex parte* contacts within the meaning of ORS 227.180(3), because they include no factual or legal assertions that bear on approval criteria or on any issue material to approval of the annexation that could possibly be rebutted. *Link v. City of Florence*, 58 Or LUBA 348 (2009).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** When a petitioner is able to submit all of her evidence into the record and discuss the evidence with the decision maker, the fact that the hearing was contentious and some decision

makers were hostile to the petitioner does not mean that the petitioner was denied the opportunity to present her case or failed to receive a full and fair hearing. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Because a city council meeting to deliberate on a land use application is a “hearing” for purposes of ORS 227.180(3) and code provisions requiring declaration of ex parte contacts at a hearing and the right of the participants to rebut the substance of such contacts, it is also a “hearing” for purposes of a code provision allowing the participants to challenge the qualifications of any city councilor for bias. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A city’s position that bias challenges can be made under the city code only at ORS 197.763 evidentiary hearings and cannot be advanced at deliberative meetings is inconsistent with the purpose of that code provision, to ensure that the city’s quasi-judicial decision-making is as free from bias as possible. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Allegations that two city councilors were biased because their close relatives were parties to the land use proceeding were sufficient to invoke city procedures to resolve bias challenges, and the city’s failure to follow those procedures requires remand. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An isolated statement by a design review commission member that an application is “a poster-child for floor-area transfer” is not sufficient to show he prejudged an application for permit approval. And even if it was, it would provide no basis for reversal or remand where (1) the design review commissioner did not participate in the decision on the permit, and (2) the decision on appeal to LUBA is a city council decision that affirmed the design review commission decision and there is no basis for imputing any prejudgment by the design review commissioner to the city council. *Trinkaus v. City of Portland*, 56 Or LUBA 771 (2008).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where evidence was introduced at a city council hearing by the mayor and a city councilor, but that evidence was not directed at any approval criterion and the city did not deny the application on any grounds that were based on or related to the improperly generated evidence, their actions did not demonstrate that they were incapable of making a decision based on the evidence before them. *Taylor v. City of Canyonville*, 55 Or LUBA 658 (2008).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Actions or statements by a city council member supporting a land use application pending before the county is not indication of bias with respect to a related land use proposal that later comes

before the city council, because the council member's earlier actions and statements occurred when the councilor was not constrained by the obligation of a quasi-judicial decision maker. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Comments made by city council members during proceedings on an earlier application may be considered in determining whether the council members exhibited bias in a later, closely related application. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** City council members impermissibly departed from their roles as impartial quasi-judicial decision makers and exhibited animus towards opponents where the council members independently acted to obtain evidence outside the record that was inflammatory towards the opponents and where one council member co-signed a letter personally attacking one of the opponents. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Bias sufficient to disqualify a quasi-judicial decision maker was not shown where a mayor was present at but did not participate in the biased actions of other council members and further demonstrated the ability to decide the matter based on applicable laws and evidence properly before the decision maker. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Oral statements made by a decision maker in a public hearing that may conflict with a later vote do not provide a basis for reversal or remand. LUBA reviews the written findings made in support of a decision not statements made during public hearings. *Sommer v. Josephine County*, 52 Or LUBA 209 (2006).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Arguments that a planning commission member was biased do not provide a basis to reverse or remand a city council's decision, at least where the city council conducted its own evidentiary hearing, adopted its own written order and findings, and was the final decision maker on the application. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Under a code provision prohibiting *ex parte* contacts "in connection with any issue involved in the hearing," petitioner fails to demonstrate that communication between staff and the decision maker involving potential donation of land on the property is an indirect *ex parte* contact with the developer, where the remand hearing is limited to a single issue, and potential donation of land has nothing to do with that remand issue. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A petitioner fails to demonstrate that the decision maker is biased or improperly influenced to approve

a subdivision by the possibility that the developer may donate open space land to the city, where the decision maker twice voted to approve the subdivision prior to learning that the developer and staff had discussed donation. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An elected decision maker’s desire to please the voters by approving development that may lead to a donation of open space land to the city, combined with receipt of a stipend for service as an elected official, does not constitute a potential or actual financial conflict of interest that would prevent the decision maker from participating in a land use decision. *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where petitioner appeals the city council’s determination that a local appeal of a planning commission decision was untimely filed, petitioner’s allegation that members of the planning commission are biased does not provide a basis for reversal or remand. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Petitioner fails to demonstrate bias on the part of the decision maker where a member of county board of commissioners acknowledges that he has “some issues and conflicts” with petitioner, but then expresses his belief that those issues will not affect his ability to make a neutral decision. The Board member’s failure to address petitioner’s bias challenge in detail is not, in itself, sufficient to demonstrate bias. *Heiller v. Josephine County*, 50 Or LUBA 562 (2005).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Statements by city officials that they would prefer a privately funded convention center rather than a publicly financed one, do not demonstrate that the city decision makers are biased and incapable of making a decision on the merits. *O’Shea v. City of Bend*, 49 Or LUBA 498 (2005).

**25.6.5 Local Government Procedures - Hearings - Impartial Tribunal.** Local quasi-judicial decision makers are not expected to be free of bias but they are expected to (1) put whatever bias they may have aside when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The ORS 227.178(3) prohibition on “shifting the goal posts” and the prohibition described in *Alexanderson v. Clackamas County*, 126 Or App 549, 869 P2d 873 (1994), on reinterpretations of local provisions that are a “product of a design to act arbitrarily and inconsistently from case to case” are distinct and independent prohibitions, although

both may be invoked in particular circumstances. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Comments by city council members expressing frustration at being placed in a position of either having to reinterpret a code provision or apply a preexisting interpretation that the city council believed to be erroneous fall short of demonstrating that the city council’s decision to reinterpret the code provision and apply the new interpretation is a “product of a design to act arbitrarily and inconsistently from case to case,” where the record as a whole indicates that the city council was primarily motivated to make a legally correct decision rather than to act arbitrarily or inconsistently from case to case. *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A site visit is not in itself an *ex parte* contact subject to ORS 227.180(3) or ORS 215.422(3), unless it involves communication between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The case law requirement that a decision maker disclose information gained from a site visit and offer an opportunity to rebut that information serves a similar purpose to the statutory requirements regarding *ex parte* contacts: to ensure that land use decisions are based on information received during the public process, and not based on information received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** *Ex parte* contacts between the hearings officer and planning staff are likely to constitute reversible error, for purposes of determining whether evidentiary proceedings under OAR 661-010-0045 are warranted, only if those contacts involve discussion of the substance or merits of the decision. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A deposition of the decision maker to determine the content of *ex parte* contacts is warranted under OAR 661-010-0045, where the record and affidavits submitted by the parties demonstrate that such contacts occurred and may have involved discussion of the merits of the decision, but the record and affidavits do not include information necessary for LUBA to resolve anticipated assignments of error seeking to reverse the decision based on those *ex parte* contacts. *Grabhorn v. Washington County*, 48 Or LUBA 657 (2005).

**25.6.5 Local Government Procedures - Hearings - Impartial Tribunal.** An ambiguous statement that could be understood to refer to *ex parte* contacts, but could also be understood to refer to contacts that were not *ex parte* contacts might be sufficient to warrant an evidentiary hearing to clarify the meaning of the reference, but is not

sufficient to support a conclusion that there were improper undisclosed *ex parte* contacts. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** ORS 215.422(4), which excludes certain contacts between planning staff and the local decision maker from the definition of *ex parte* contacts, does not authorize a decision maker to rely on evidence provided by planning staff that it specifically refuses to include in the record, after the close of the record, without providing an opportunity for rebuttal. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where petitioner alleges bias of a planning commissioner who was not the final decision maker, petitioner must show that the record before the final decision is somehow tainted by the involvement of the allegedly biased planning commissioner. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a decision maker discloses that he had participated in a newspaper interview that dealt with development on marginal farmland in general, but that he had not made up his mind with respect to a pending application for a partition and nonfarm dwellings on allegedly marginal farmland, that disclosure does not demonstrate that the decision maker could not make a decision based on the facts and applicable approval standards and, therefore, the decision maker was not obliged to recuse himself from participating in the decision regarding the pending application. *Knoche v. Crook County*, 46 Or LUBA 85 (2003).

**25.6.5 Local Government Procedures - Hearings - Impartial Tribunal.** Viewed in context with other evidence of tension between a city councilor and an applicant, the councilor's refusal to withdraw her motion to deny the applicant's appeal of a planning commission decision that denied a request for lot line adjustment, after the city attorney explained that the motion was premature because the city council had not yet conducted the required hearing on the appeal, makes the issue of the city councilor's impartiality an exceedingly close one. However, LUBA will not conclude the city councilor was biased against the applicant, where the councilor's statements suggest it is possible that the city councilor made her premature motion based on her review of the planning commission record and did not understand that an on-the-record hearing was required before the city council could make its final decision. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Alleged statements made by a decision maker at a social function that the decision maker would listen to the evidence and testimony regarding an application for a plan amendment and zone change, but would nevertheless vote to approve the application are not sufficient to establish prejudgment bias where the accuracy of those statements were disputed and the decision maker stated that he had considered the testimony and evidence and was prepared to make a decision based on that testimony and evidence. *Roberts v. Clatsop County*, 44 Or LUBA 178 (2003).

**25.6.5 Local Government Procedures - Hearings - Impartial Tribunal.** LUBA will deny an assignment of error alleging a subdivision approval should be remanded because a decision maker had a potential conflict of interest where (1) the statements that petitioners rely on to establish a potential conflict do not appear to do so, and (2) the petitioner made no attempt to question the decision maker below about the statements. *McFall v. City of Sherwood*, 44 Or LUBA 493 (2003).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Contacts between a local government and its attorney regarding a pending rezoning proceeding are not *ex parte* contacts, even where the local government is the applicant. *Dimone v. City of Hillsboro*, 44 Or LUBA 805 (2003).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where evidence relating to an approved application for a Head Start program might lend support to petitioners’ allegation that denial of their subsequent application for a migrant worker Head Start program was based on improper discrimination, LUBA will grant a motion to take evidence not in the record to compare the two applications. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Newspaper articles reflecting community members’ bias against an application for a migrant worker Head Start program are not properly attributable to the decision makers, and LUBA will deny a motion to consider the newspaper articles in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A proposed city comprehensive plan amendment that could have the effect of preventing the establishment of a Head Start program in the proposed amendment area does not demonstrate that the city’s denial of an earlier, unrelated application for a migrant worker Head Start program in that area was based on racial prejudice or discrimination, and LUBA will deny a motion to take evidence related to the comprehensive plan amendment in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The fact that an application for a migrant worker Head Start program was hotly debated at the local level does not demonstrate that the decision makers engaged in undisclosed *ex parte* contacts, and LUBA will deny a motion to take evidence relating to the local debate in an appeal of the denial of the Head Start application. *Oregon Child Devel. Coalition v. City of Madras*, 43 Or LUBA 567 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Decision maker bias in a land use matter must be deduced from the totality of the circumstances. Where a decision maker is a member of a church congregation and the church is an applicant for a land use permit, the decision maker’s church membership does not, in

itself, require the decision maker's recusal for bias. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137.

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has expressed concern regarding the impact proposed conditions of approval would have on church operations but nevertheless declares that she is able to render a decision regarding the church's application based on the facts and law before her, that decision maker has not impermissibly prejudged the application. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137.

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a land use decision maker is a member of a church congregation and the church has applied for a land use permit, and the decision maker has (1) testified as an individual in favor of the application prior to his election to the decision making body; and (2) stated that he did not believe he had to be objective regarding the application and would support the application "all the way to the Supreme Court," the decision maker has impermissibly prejudged the church's application and, absent some need for his participation in order to reach a decision, recusal is required. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137.

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Statements by a decision maker that he is "kinda prejudged" are insufficient to demonstrate bias or prejudgment where, read in context, it is clear that the decision maker was capable of and did make his decision based on the evidence and argument before him. *Potts v. Clackamas County*, 42 Or LUBA 1.

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** LUBA will deny a motion to take evidence not in the record to consider the affidavits of three county commissioners explaining that they are biased against the applicant and cannot impartially hear a local appeal involving the applicant, where the commissioners' declaration of bias is stated in the challenged decision, the assignment of error directed at the commissioners' bias presents a legal question not dependent on the facts stated in the affidavits, and the proponent fails to demonstrate to LUBA that the affidavits are necessary to resolve that assignment of error. *Hiebenthal v. Polk County*, 41 Or LUBA 573 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a board of commissioners declares that it is biased, recuses itself from an appeal of a hearings officer's land use decision, and designates a hearings officer's decision as the county's final decision, the hearings officer's decision may be appealed to LUBA, notwithstanding local code provisions that grant a party a right to a local appeal before the board of commissioners. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The right to an impartial tribunal in quasi-judicial land use proceedings, as first articulated in *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), permits a board of

commissioners to refuse to hear an appeal where the board of commissioners determines it is biased and there is a hearings officer decision that may be designated as the final decision of the county on the merits. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The right to an impartial tribunal will supersede petitioners’ right to a local appeal, where denying the local appeal will not deprive petitioners of an opportunity to have a local decision reviewed on the merits. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where the only evidence of decision maker bias is a transcript of a recorded telephone conversation between petitioner and a former city councilor 10 months after the challenged decision was made, and the context and content of the conversation make it relatively clear that the councilor based his decision on the evidence and testimony provided during the proceedings leading up to the challenged decision, petitioner fails to demonstrate that the councilor prejudged petitioner’s application merely because the councilor did not make any comments during the city proceedings, and made the motion to deny petitioner’s appeal. *Howard v. City of Madras*, 41 Or LUBA 122 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An allegation that a city councilor told a city planning commissioner that he “did not want any new service stations” in the city is not sufficient to establish a reasonable basis to believe that the city councilor was biased, and a motion to take evidence not in the record will be denied. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Evidence that a county has approved all prior applications for telecommunications towers does not, by itself, demonstrate that the county is biased in favor of siting telecommunications towers. *Jordan v. Douglas County*, 40 Or LUBA 192 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A county governing body’s decision to enter a settlement agreement that includes an agreement that the governing body will adopt certain ordinances does not render the public hearings that are subsequently held prior to adopting such ordinances something other than the kind of public hearing required by ORS 215.060, where the county counsel advised the governing body that it was free not to adopt the settlement ordinances and a transcript of the local proceedings shows the governing body did not believe it was legally bound to adopt the settlement ordinances without modification. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The requirement imposed by *Fasano v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973) for a fair and impartial tribunal does not apply to legislative land use proceedings. *Waibel v. Crook County*, 40 Or LUBA 67 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A city councilor has prejudged an application and must recuse himself from participating in a decision on the application where the councilor, prior to the time a land use matter came before the city council, actively opposed an application, and sent correspondence to the other city councilors in which he advocated in opposition to the application, stating that the law and evidence point to denial of the application. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The bias of one decision maker may warrant reversal or remand of a land use decision pursuant to ORS 197.835(9)(a)(B), where participation of that decision maker prevented petitioner from receiving a full and fair hearing, one of petitioner's substantial rights. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** It is error for a member of a local governing body to announce that he is close friends with the parties and will not participate in the decision on a variance request, but nevertheless later make the motion to approve the written decision and vote on the written decision. However, the error is harmless where the member of the governing body does not participate in the evidentiary hearing or the 4-0 oral vote at the conclusion of the evidentiary hearing to approve the variance. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The speculative possibility that a part-time hearings officer with a private legal practice might, in the future, represent developers of a lot within a subdivision approved by that hearings officer does not constitute a potential conflict of interest that would preclude that hearings officer from approving or denying the application. *Mitchell v. Washington County*, 39 Or LUBA 240 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That a local government is both the applicant and decision maker does not, in itself, mean the local government decision maker is biased, and does not preclude the local government from making a decision on its own application. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An *ex parte* communication must be disclosed only if it concerns the decision or action at issue in a land use decision. When the complaint about contact with the local government does not contain an assertion that the contact concerned issues material to the land use proceeding, the alleged communication does not provide a basis for invalidating the decision. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A mayor's and city councilor's statements that they personally disliked an applicant's business are not sufficient to demonstrate the city council was biased or denied the applicant a fair and impartial hearing, where other statements by the mayor and city council make it clear that

they put aside their personal feelings about the applicant's business in making their decision. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Debatable reasoning in a land use decision is not sufficient to demonstrate the decision maker is biased. *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A local government decision on an application for land use approval that is made without disclosing or offering an opportunity to rebut an *ex parte* communication must be remanded for a plenary rehearing on the application. *Opp v. City of Portland*, 38 Or LUBA 251 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Because ORS 227.180(3) protects participants' right to a decision free of undisclosed *ex parte* contacts, redressing a violation of the statute on remand requires more than reopening the record to disclose and offer an opportunity to rebut the substance of those communications. Although the city need not repeat the evidentiary proceedings leading up to the initial decision, the city must adopt a new decision approving or denying the application based on the record as a whole, including any evidence submitted in rebuttal. *Opp v. City of Portland*, 38 Or LUBA 251 (2000).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a decision maker discloses *ex parte* contacts at the beginning of the local proceedings, petitioners must request clarification of the *ex parte* contacts or otherwise object to the adequacy of the disclosure during the local proceedings. Because petitioner failed to object below, petitioner's assignment of error does not provide a basis for reversal or remand. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A petitioner moving to present evidence of *ex parte* contacts or bias must offer some substantial reason to believe that evidence of such *ex parte* contacts or bias can be established and that such *ex parte* contacts or bias would lead to reversal or remand. This burden is not carried where petitioner simply speculates that the decision maker's and a local opponent's membership in an animal rights organization may have led to improper *ex parte* contacts or bias during local proceedings on petitioner's dog kennel. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Council members have a duty to disclose whether the proximity of their residences to the subject property causes a potential or actual conflict of interest. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Bias or prejudice sufficient to disqualify a public official must be demonstrated by clear and unmistakable evidence. Evidence that the city council adopted a resolution reserving a site for a proposed memorial and comments by one city council member that he intended

to take into account the applicant's reliance on the resolution fails to demonstrate in a clear and unmistakable manner that the city council's subsequent decision to approve the memorial was biased or the result of prejudgment. *Carlsen v. City of Portland*, 36 Or LUBA 614 (1999).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Petitioner's speculations that *ex parte* communications regarding a proposed rezoning might have occurred between a local decision maker and the decision maker's spouse, who was a proponent of the rezoning, are insufficient to establish that such communications occurred, or that the decision maker has a personal interest in the proposal. *Herman v. City of Lincoln City*, 36 Or LUBA 521 (1999).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Failure by a hearings officer to comment on certain opposition testimony or adopt the legal interpretations offered in that testimony does not establish bias. *Cotter v. Clackamas County*, 36 Or LUBA 172 (1999).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An evidentiary hearing to establish decision makers' "personal interest" in a proposal due to their ownership of proximate property is not warranted because, even if true, such a "personal interest" could not provide a basis for reversing or remanding the decision. *ODOT v. City of Mosier*, 34 Or LUBA 797 (1998).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Communication between a local governing body or its staff and its insurance carrier are not *ex parte* contacts requiring disclosure under ORS 227.180(3). *Marshall v. City of Yachats*, 34 Or LUBA 724 (1998).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a challenged decision is a legislative decision, the statutory provision requiring disclosure of *ex parte* contacts does not apply. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Petitioner must show, in a clear and unmistakable manner, that a decision maker was incapable of reaching a decision based on the evidence and argument in order to establish a claim of personal bias against the decision maker. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a local code prohibits *ex parte* contacts between a decision maker and a "person interested in the outcome of the proceeding," a party moving for an evidentiary hearing to prove such *ex parte* contacts occurred must provide specific reasoning why that person qualifies as such an "interested" party. Merely describing the person as a professional land developer or community leader is not specific enough. *Opp v. City of Portland*, 33 Or LUBA 820 (1997).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** If a local government determines an ex parte contact that is prohibited by local code occurred during local proceedings, other parties must be allowed the opportunity to rebut the substance of the ex parte contact. *Opp v. City of Portland*, 33 Or LUBA 654 (1997).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The public meetings law, ORS 192.610 to 192.690, and a local ordinance that requires all evidence, deliberation, and decisions to be made before the public and on the record, do not prohibit the board of county commissioners from having an off-the-record consultation with legal counsel during the course of a public hearing. *Collins v. Klamath County*, 32 Or LUBA 338 (1997).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The county violates ORS 215.422 when it reopens the record to accept a report received by a commissioner from intervenor, but does not provide an opportunity for other parties to rebut the substance of the ex parte communication. *Brown v. Union County*, 32 Or LUBA 168 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Because the county's violation of ORS 215.422 is not a procedural error, petitioner is not required to show that his substantial rights were prejudiced by the county's error in order to obtain a remand. *Brown v. Union County*, 32 Or LUBA 168 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Petitioners' speculation concerning contacts that could have occurred between county staff and the board of commissioners and postulation regarding bias fails to establish that the city commissioners were incapable of making a decision based on the evidence and arguments before them due to bias or that the commissioners prejudged the application. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A single, unexplained reference to an earlier use in a nonconforming use determination hearing is not a reasonable basis for a belief that an undisclosed ex parte contact took place and would not justify granting a motion for an evidentiary hearing. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Waiver of fees, expressions of sympathy for the plight of the applicant and the postponement of a vote resulting in continuance of a hearing do not establish that the county commission did not reach its decision by applying relevant standards based on the evidence and arguments presented. *Moore v. Coos County*, 31 Or LUBA 347 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A memorandum from planning staff to the city council concerning interpretation of the city code is not evidence. Therefore, that petitioners had no opportunity to rebut the substance

of staff's memorandum at a continued hearing provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Under ORS 197.763(6)(b), oral evidence submitted at a continued hearing provides no basis for a request that the record be left open for a response. Therefore, that petitioners had no opportunity to rebut the substance of testimony given at a continued hearing provides no basis for reversal or remand of the challenged decision. *Sullivan v. City of Woodburn*, 31 Or LUBA 192 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A motion for evidentiary hearing will be denied where petitioners do not make the requisite threshold showing that there is a reasonable basis to believe that ex parte contacts probably took place, and offer no supporting legal authority indicating that such contacts would warrant reversal or remand of the county's decision. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A site visit attended by several of the petitioners, the applicant, and one of the county commissioners that occurred a month prior to the filing of the conditional use application at issue was not an ex parte contact between the applicant and the decision maker. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Because communication between a county commissioner and an attorney representing the county regarding a pending conditional use application is not an ex parte contact required to be disclosed under ORS 215.422(4), an evidentiary hearing is not warranted to determine if such communication occurred. *Richards-Kreitzberg v. Marion County*, 31 Or LUBA 540 (1996).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish bias, petitioners must establish that the decision maker was incapable of making a decision based on the evidence and arguments of the parties; petitioners' assertions and conjecture regarding the conclusions of one or more city councilors do not meet this standard. *Sparks v. City of Bandon*, 30 Or LUBA 69 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** In contending their right to an impartial tribunal was denied, petitioners have the burden of showing the local decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish bias, petitioner must show that the decision makers were either unable or unwilling to make a decision by applying relevant standards to the evidence and arguments before them. *Pend-Air Citizen's Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Under ORS 215.422(4), a communication between a member of the board of commissioners and county staff is not an ex parte contact required to be disclosed pursuant to ORS 215.422(3). Therefore, that the board chairman did not disclose in the local record the contents of his conversation with the county code compliance officer is not error. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish bias, petitioners must establish the decision maker was incapable of making a decision based on the evidence and arguments of the parties. *Nalette v. City of Klamath Falls*, 28 Or LUBA 709 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To demonstrate a decision maker is biased, petitioners must establish the decision maker was incapable of making a fair decision in the matter, considering all of the evidence and arguments presented. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A letter signed by three of seven city councilors requesting that the planning commission expedite its consideration of a permit, which was never given to the planning commission, is not an ex parte contact and does not show the city council was biased. *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where the record demonstrates that two city council members had numerous ex parte contacts with the applicant and failed to disclose those contacts and provide an opportunity for rebuttal, as required by ORS 227.180(3), remand is required. *Smith v. City of Phoenix*, 28 Or LUBA 517 (1995).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That a hearings officer, after withdrawal of the challenged decision pursuant to ORS 197.830(12)(b), accepted proposed findings from intervenors without notice to petitioners, and subsequently adopted those findings as his own, is insufficient to establish bias or prejudgment. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A petitioner may not assert his own ex parte contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A hearings officer's failure to disclose that his father and petitioner were teaching colleagues at the same junior high school and the hearings officer attended that junior high school as a student does not provide a basis for questioning the hearings officer's impartiality. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Neither language in a hearings officer's decision rejecting petitioners arguments as "groundless" or "without merit," nor the hearings officer's knowledge of county civil penalty proceedings against petitioner and petitioner's pending legal action against the county concerning the civil penalty proceedings, demonstrates the hearings officer lacked the requisite impartiality in reaching a decision. *Jones v. Lane County*, 28 Or LUBA 193 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Under ORS 215.422(3), parties in county permit proceedings are entitled to disclosure on the record of the substance of any ex parte communications and an opportunity to rebut the substance of the ex parte communication at the first hearing following the communication. *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That a local decision maker's two separate disclosures of an ex parte contact are inconsistent to some degree, does not mean they are insufficient to constitute the "public announcement of the content of the [ex parte] communication" required by ORS 215.422(3). *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where an ex parte contact occurs after close of the evidentiary hearing in a county permit proceeding, and the county reopens the evidentiary hearing, announces the ex parte contacts and allows the parties to rebut those ex parte contacts, the county's action satisfies the ORS 215.422(3) requirement that the "announcement of the content of the communication and of the parties' right to rebut the substance of the communication [be] made at the first hearing following the communication where the action will be considered[.]" *Cole v. Columbia County*, 28 Or LUBA 62 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That a local government owns certain property and is the applicant for plan and zone map amendments for that property does not, in itself, mean the local government decision maker is biased, and does not preclude the local government decision maker from making a decision on its own application. *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Correspondence and conversations between parties to a local land use proceeding and local government staff are not unlawful ex parte contacts. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The existence of a "potential" conflict of interest does not disqualify an elected local government official from voting on a legislative land use decision. *Rea v. City of Seaside*, 27 Or LUBA 443 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** An adjustment committee's vote to adopt a tentative decision on an application for an adjustment prior to close of the evidentiary record does not demonstrate bias, where the adjustment committee subsequently considered, and its final decision addresses, evidence and arguments submitted after its tentative decision was adopted. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To demonstrate the local government decision maker was biased, petitioner must establish the decision maker exhibited personal bias or was incapable of making a decision by applying relevant standards to the facts and argument presented. *Stern v. City of Portland*, 26 Or LUBA 544 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Allegations that the local decision maker failed to disclose ex parte contacts, as required by ORS 215.422(3), provide no basis for reversal or remand where there is no admission by the decision maker or other evidence, either in the record or offered through a motion for evidentiary hearing pursuant to ORS 197.830(13)(b), that an ex parte contact occurred. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish actual bias or prejudice on the part of a local decision maker, petitioners have the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** LUBA will not presume that a letter influenced subsequent decisions of a local decision maker. In order to support a claim of bias, petitioner must establish that the decision maker was incapable of making a decision based on the evidence and argument presented. *Poddar v. City of Cannon Beach*, 26 Or LUBA 429 (1994).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** There is no prohibition against decision makers consulting with staff during quasi-judicial land use proceedings and no requirement that such consultation occur in the presence of other parties. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a member of a decision making body fails to disclose an ex parte contact until after the evidentiary record is closed, ORS 227.180(3) is violated, and LUBA must remand the decision. *Derry v. Douglas County*, 26 Or LUBA 25 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a local decision maker discloses an ex parte contact during local deliberations on a proposal, and provides no opportunity for rebuttal, LUBA will remand the decision for the local

government to provide petitioner with an opportunity to explore the nature of the contact and to provide rebuttal. *Garrigus v. City of Lincoln City*, 25 Or LUBA 754 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Local decision makers in quasi-judicial land use proceedings are not required to maintain the "appearance of impartiality" required of judges, but rather to have "actual impartiality," the ability to make a decision based on the argument and evidence before them, rather than on prejudgment or personal interest. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish actual bias or prejudgment on the part of a local decision maker, the petitioner has the burden of showing the decision maker was biased or prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** If the *contents* of an ex parte communication are not publicly announced and placed in the record, as required by ORS 227.180(3), a city official's request for responses to the ex parte communication does not provide the opportunity for rebuttal required by ORS 227.180(3)(b). *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A general objection to the record requesting that speakers in a transcript be identified, because it would be easier to prepare the petition for review, does not provide a sufficient basis to sustain the objection. A request that a particular speaker in a transcript in the record be identified, because that speaker was a decision maker below and his dialogue establishes the existence of impermissible ex parte contacts, provides a sufficient basis to sustain that aspect of the record objection. *Derry v. Douglas County*, 25 Or LUBA 790 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a local government's staff briefs an absentee decision maker concerning matters in the record and does not impermissibly advocate denial of the application, but rather simply provides administrative support to the decision maker, the fact that petitioners had no opportunity to rebut the substance of that staff briefing provides no basis for reversal or remand of the challenged decision. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A party's submission of proposed findings to a local decision maker does not constitute an ex parte contact warranting reversal or remand. In the absence of a local code provision to the contrary, there is no error in a local government's utilization of such a process. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a settlement agreement in a lawsuit previously filed by intervenor against a county simply

says the county will consider a rezoning application for intervenor's property, as it is required to do under ORS 215.416(2) in any case, the settlement agreement is irrelevant to an application for a replacement dwelling on the subject property, and does not establish bias or prejudice by the county decision maker. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A local government decision maker is entitled to consult with its attorney regarding evidence submitted during the evidentiary phase of the local proceeding and interpretive issues. Parties have no right to rebut the substance of a local government attorney's advice to the local government decision maker. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** In establishing actual bias or prejudice on the part of a local decision maker, the burden is on petitioner to show the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish actual bias or prejudice on the part of a local government decision maker, the burden is on petitioners to establish that the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Rath v. Hood River County*, 23 Or LUBA 200 (1992).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Delay in disclosing an ex parte contact until after the close of the public hearing, and failure to make an announcement of the right to rebut the substance of the ex parte communication, as required by ORS 227.180(3)(b), are at most procedural errors. *Horizon Construction, Inc. v. City of Newberg*, 23 Or LUBA 159 (1992).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a new city councilor discloses his prior participation in a quasi-judicial land use proceeding and declares that he can render an unbiased decision on the matter following a remand from LUBA, that the city councilor is a realtor who might benefit through sale of lots in the subdivision in the future is too speculative to support a determination that his decision is influenced by bias or self interest. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where the planning department is not the decision maker, contacts between the planning department and neighbors of the applicant need not be disclosed by the decision maker under ORS 215.422(3). *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Although under ORS 215.422(3) it may be error for a hearings officer to fail to disclose prior

contacts with the planning department, it is a procedural error. LUBA may not reverse or remand on the basis of procedural error unless such error prejudices petitioner's substantial rights. Petitioner's substantial rights are not prejudiced by such error where petitioner was aware of and had an opportunity to respond to the substance of the contacts with the planning department. *Marson v. Clackamas County*, 22 Or LUBA 497 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A board of county commissioners need not provide parties an opportunity to rebut a memorandum in which the county counsel provides legal advice concerning a pending local land use appeal. Such communications are not ex parte contacts. ORS 215.422(4). *Toth v. Curry County*, 22 Or LUBA 488 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A petitioner may not assert the occurrence of his own ex parte contacts with the decision maker as a basis for reversal or remand, where the contacts were disclosed and petitioner did not object to the adequacy or completeness of the disclosure of such ex parte contacts. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** LUBA will not presume a local government decision maker is partial simply because the local government is the applicant for land use approval. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** In establishing actual bias or prejudgment on the part of a local government decision maker, the burden is on petitioner to show the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards based on the evidence and argument presented. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That the initial administrative decision maker was not impartial would be insufficient grounds to reverse or remand a challenged decision, where petitioner was afforded a *de novo* review of the administrative decision, including a public hearing, by a hearings officer. *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 452 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** To establish a claim of bias sufficient to result in reversal or remand of a challenged decision, a petitioner is required to clearly demonstrate that the public officials charged with bias are incapable of making a decision on the basis of the evidence and argument presented. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Personal bias sufficiently strong to disqualify a public official must be clearly demonstrated. A petitioner has the burden of demonstrating that the public official was incapable of

making a decision based on the evidence and argument before him. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Contacts between city decision makers and planning staff are by definition not ex parte contacts. ORS 227.180(3) and (4). *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** While the requirement that local governments carrying out public land development projects grant land use approvals to themselves presents inherent appearance of bias problems, such appearance problems, in and of themselves, present no basis for reversal or remand. *Holladay Investors, Ltd. v. City of Portland*, 22 Or LUBA 90 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A city attorney's statement at the beginning of the city council hearing, to the effect that parties are welcome to rebut ex parte communications, satisfies the requirement of ORS 227.180(3)(b) that a public announcement of the parties' right to rebut the substance of an ex parte communication be made at the first hearing following the communication. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That a decision maker may have interpreted the local plan and code incorrectly in some respects does not establish that the decision maker was biased or had undisclosed ex parte contacts. *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Read in context, a hearings officer's findings and conclusions describing a commercial development as "garish" do not demonstrate bias or prejudgment. *Carsey v. Deschutes County*, 21 Or LUBA 118 (1991).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** In order to establish bias on the part of the decision maker, petitioner must show that the decision maker either has a personal stake in the outcome of the proceeding or has prejudged the matter. LUBA will not infer the existence of bias on the part of a decision maker. *Kittleson v. Lane County*, 20 Or LUBA 286 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where the city council conducted a *de novo* review of the planning commission's decision, only the city council members are the *decision makers*, and actions by the city planner and planning commission members do not demonstrate bias on the part of the city *decision makers*. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Allegations that the city council misinterpreted plan and code provisions and overlooked items in the record, even if true, would simply demonstrate error in the decision made by the city

council, not that the council members had prejudged the matter and were incapable of making an objective decision on petitioners' subdivision application based on the evidence and argument before them. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** It is not error for a governing body to provide a lower local tribunal with a memorandum in the nature of a declaratory ruling interpreting certain code provisions while an application to which those code provisions apply is pending before the lower tribunal. Even if it were a procedural error, there would be no prejudice if petitioners had an adequate opportunity in a local appeal to address the interpretation and applicability of the code provisions in question before the governing body. *Hoffman v. City of Lake Oswego*, 20 Or LUBA 64 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Even if the planning commission chairman's participation in the planning commission proceedings on a proposed comprehensive plan amendment were improper, *de novo* review of the proposed plan amendment by the city council cured any such impropriety. *Burk v. Umatilla County*, 20 Or LUBA 54 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** That a member of the county counsel's office acts as hearings officer does not, itself, deny the petitioner an unbiased decision maker, nor does it necessarily imply that improper ex parte contacts occurred between the hearings officer and the board of commissioners. *McNulty v. Marion County*, 19 Or LUBA 367 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** The planning commission's error in failing to consider the propriety of a commissioner's participation in the decision on the subject application, where the issue was raised before the commission, is procedural and, therefore, petitioner must establish the error caused prejudice to his substantial rights. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** If the governing body holds a *de novo* hearing on an appeal of the planning commission's decision on the subject application, such hearing cures any prejudice due to a planning commissioner's allegedly improper participation in the planning commission proceedings. *Murphey v. City of Ashland*, 19 Or LUBA 182 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where a mayor's ex parte contacts were completely disclosed, although late in the deliberations and after an incomplete disclosure earlier in the proceedings, and the mayor invited challenges and inquiries, the remedial purpose of ORS 227.180(3) is nevertheless served. Where petitioners did not object to the timing and manner of the disclosure, and do not show their substantial rights were violated, there is no basis for remand. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** A mayor's disclosure of ex parte contacts with former associates and political supporters at most creates an appearance of impropriety and does not show actual bias. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Where the record shows the ex parte contacts alleged by petitioner were disclosed during local hearings, such ex parte contacts provide no basis for reversal or remand. *Douglas v. Multnomah County*, 18 Or LUBA 607 (1990).

**25.6.5 Local Government Procedures – Hearings – Impartial Tribunal.** Standing alone, the fact that a city council approved a federal block grant for a homeless shelter does not disqualify the city council on the basis of bias from considering a subsequent land use application for the homeless shelter. *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990).