

LAND USE  
BOARD OF APPEALS

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

MAR 14 1 31 PM '86

1000 FRIENDS OF OREGON, )  
the assumed name of Oregon )  
Land Use Project, Inc., an )  
Oregon nonprofit corporation, )  
KELLY MCGREER, ROSEMARY )  
MCGREER, JAMES G. PERKINS, )  
SHIRLEE PERKINS, DAVID )  
DICKSON, and MELINDA DICKSON, )  
Petitioners, )

LUBA No. 81-132  
FINAL OPINION  
AND ORDER ON REMAND  
FROM SUPREME COURT

vs. )

WASCO COUNTY COURT, )  
Respondent, )

and )

DAVID KNAPP, RICHARD DENNIS )  
SMITH, KENT BULLOCK, SAMADHI )  
MATTHEWS and CHIDVILAS )  
RAJNEESH MEDITATION CENTER, )  
Respondents. )

Appeal from Wasco County Court.

Kenneth J. Novack and Mark J. Greenfield, Portland, filed briefs and argued on behalf of petitioners. With them on the briefs was Robert E. Stacey, Jr.

Wilford Carey, Hood River, filed a brief and argued on behalf of Respondent Wasco County Court.

Swami Premasukh, Rajneeshpuram, and Allen Johnson, Eugene, filed briefs and argued for Respondent-Participant City of Rajneeshpuram and private respondents. Ma Prem Sangeet, Rajneeshpuram, filed briefs and argued on behalf of City of Rajneeshpuram.

BAGG, Referee; DUBAY, Referee, participated in the decision.

KRESSEL, Chief Referee, Dissenting.

REMANDED 03/14/86

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION AND PROCEDURAL HISTORY

3 Petitioners appeal a decision of the Wasco County Court  
4 approving a petition for incorporation and setting an  
5 election. The decision was issued on November 4, 1981 and was  
6 reviewed by this Board in 1000 Friends of Oregon v. Wasco  
7 County Court, 5 Or LUBA 133 (1982). An appeal to the Court of  
8 Appeals resulted in a remand to the Board in 1000 Friends of  
9 Oregon v. Wasco County Court, 62 Or App 75, 659 P2d 1001, rev  
10 den 295 Or 259 (1983). After further hearings, this Board  
11 issued a second opinion, 1000 Friends of Oregon v. Wasco County  
12 Court, \_\_\_ Or LUBA \_\_\_, (LUBA No. 81-132, September 30, 1983).  
13 This second decision was appealed and resulted in the present  
14 remand. 1000 Friends of Oregon v. Wasco County Court, 299 Or  
15 344, 703 P3d 207 (1985).

16 The petition for review included six assignments of error.  
17 The assignments of error alleged (1) violations of several  
18 statewide planning goals, (2) procedural error, and (3) that  
19 the evidence was insufficient to support the county's  
20 decision.<sup>1</sup>

21 The Supreme Court disposed of all except two of  
22 petitioners' challenges. The court framed two issues on  
23 remand:

24 "(1) Whether the county court's Goal 3 suitability  
25 determination that 'the area proposed for  
26 incorporation is not suitable for farm use' is  
supported by substantial evidence in the whole  
record; and

1           "(2) Whether the Wasco County judge acted improperly,  
2           with prejudice of substantial rights, rendering  
3           the Wasco County Court order invalid?"<sup>2</sup> 1000  
              Friends v. Wasco County Court, 299 Or at 376.

4           Our review is therefore limited to these two issues.

5           AGRICULTURAL LANDS ISSUE

6           The county found the 2,135 acres to be incorporated  
7           consists predominantly of Class VII and VIII soils.<sup>3</sup>  
8           Approximately 35 percent of the land was found to be Class VI  
9           soil. A small percentage of the land was found to be Class II  
10          through IV soils. The county found that all Class II through  
11          IV soils would be preserved for agricultural production.  
12          Record 10.<sup>4</sup>

13          The county went on to find that the area proposed for  
14          incorporation was not suitable for farm use because (1) the  
15          predominant soil types were Class VII and VIII and (2) the bulk  
16          of the ranch has been "over-grazed and will not support grazing  
17          uses without extensive reformation and land management  
18          activities." Record 10-11. The county found the land to be  
19          inside the proposed city is not now in farm use and is not  
20          necessary "to the continuation of existing farm activities now  
21          undertaken on other portions of the ranch."<sup>5</sup> Record 11.

22          In sum, the land does not fit the definition of  
23          agricultural land found in Statewide Planning Goal 3,<sup>6</sup>  
24          according to the county.

25          The Wasco County Soil and Water Conservation District filed  
26          a report with the county board stating the site has a high clay

1 content. Record 227. This soil composition encourages  
2 "undesirable grasses as Medusa Head and Cheatgrass" which are  
3 competitive with native grasses. Id. The district considered  
4 reseedings but said it was "doubtful" that "small grain can be  
5 grown because of soil limitations (i.e., shallow, rocky, or  
6 clay-filled soils) and the Soil Classification Classes." Id.<sup>7</sup>

7 Petitioners dispute the county's conclusion about  
8 agricultural capability, pointing to evidence that the area has  
9 been used for agricultural purposes. Record 70, 73, 227.

10 Petitioners claim this past agricultural use creates a  
11 presumption that the property is presently suitable for  
12 agricultural activity. See Nemi v. Clatsop County, 6 Or LUBA  
13 147 (1982).

14 In Nemi v. Clackamas County, 9 Or LUBA 152 (1983), this  
15 Board stated that land is not necessarily suitable for farm use  
16 simply because it could be reclaimed with extensive  
17 fertilization or other management techniques. Nemi, 9 Or LUBA  
18 at 160. This holding is consistent with Still v. Marion  
19 County, 5 Or LUBA 206 (1982) in which we rejected the argument  
20 that agricultural potential of a parcel of property  
21 automatically qualifies it as "other lands suitable for farm  
22 use" as defined in Goal 3.

23 Our difficulty in this appeal is that the record does not  
24 detail how expensive or difficult reclamation of the land for  
25 agricultural use might be. The report of the Soil and Water  
26 Conservation District says reclamation would be "difficult."

1 Testimony in the record echoes this conclusion, as do the  
2 county's findings. However, there is nothing against which to  
3 measure the difficulty. The county does not say that  
4 reclamation efforts would require more in resources than can  
5 reasonably be expected to be returned from the land if  
6 reclamation is successful. See Nemi, 9 Or LUBA, supra. The  
7 county does not cite us to any evidence in the record which  
8 might shed light on the severity of this difficulty.

9 The record lacks evidence (and findings) explaining how the  
10 difficulty in reclaiming the land for agricultural use  
11 precludes the reclamation effort. Therefore, we find the  
12 county's conclusion that the property is not suitable for farm  
13 use is not substantiated. City of Roseburg v. Roseburg City  
14 Firefighters, 292 Or 266, 639 P2d 90 (1981).

15 WHETHER THE WASCO COUNTY JUDGE ACTED IMPROPERLY

16 Former Wasco County Judge Richard Cantrell sold cattle to  
17 representatives of Rancho Rajneesh prior to the hearing on the  
18 petition for incorporation. The transaction was not publically  
19 disclosed. Cantrell's vote to approve the petition was crucial  
20 to the county's 2-1 decision in favor of the petition. The  
21 questions on remand are whether Cantrell's action was improper,  
22 resulted in prejudice to petitioners' substantial rights, and  
23 requires invalidation of the county's decision. 1000 Friends  
24 of Oregon v. Wasco County Court, 299 Or at 326.

25 Petitioners insist that Judge Cantrell's conduct was  
26 improper in several respects. Petitioners assert the payment

1 for the cattle was a pay-off for a favorable vote on the  
2 petition for incorporation. Petitioners explain that the mere  
3 existence of business dealings (even without a pay-off in fact)  
4 is sufficient to disqualify Judge Cantrell's participation.  
5 They say Judge Cantrell's failure to publicly disclose his  
6 business transactions was improper and should result in  
7 reversal of the county's decision. Petitioners argue that  
8 public officials with pecuniary interests in proceedings before  
9 them should not take part in those proceedings. Petition for  
10 Review at 17-18.

11 Petitioners say the circumstances of the cattle sale and  
12 the vote on the incorporation denied them an impartial  
13 tribunal, thereby violating the due process guarantee of the  
14 fourteenth amendment of the United States Constitution.  
15 Petitioners assert that Fasano v. Washington County Commission,  
16 264 Or 574, 507 P2d 23 (1973) requires an impartial tribunal in  
17 decisions such as the one before us in this proceeding.

18 In addition, petitioners argue that official actions,  
19 whether or not unfair in fact, must be accompanied by the  
20 appearance of fairness. Petitioners claim that appearance of  
21 bias or unfairness is at odds with due process principles.  
22 They insist that Cantrell compromised these principles by  
23 taking part in the vote after dealing privately with interested  
24 parties.

25 We will discuss this last point first. The fairness  
26 doctrine has been articulated by the courts of Washington

1 State. In Smith v. Skagit Co., 75 Wash 2nd 715, 453 P2d 832  
2 (1969) the Washington Supreme Court overturned a county zoning  
3 decision in part because the decision lacked an appearance of  
4 fairness.<sup>9</sup> The court noted

5 "when the law which calls for public hearings gives  
6 the public not only the right to attend but to be  
7 heard as well, the hearings must not only be fair but  
8 must appear to be so. It is a situation where  
9 appearances are quite as important as substance." 75  
10 Wash 2nd at 739.

11 The Washington Court will overturn a decision where  
12 circumstances make the decision appear to be the result of  
13 improper conduct. This conduct can include an ex parte contact  
14 on the merits of the matter between officials and interested  
15 parties. Smith v. Skagit Co., supra. Impropriety may also  
16 exist simply because of a business association between the  
17 official and the interested party. Swift v. Island County, 87  
18 Wash 2d 348, 552 P2d 175 (1976).<sup>10</sup>

19 In Campbell v. Board of Medical Examiners, 16 Or App 381,  
20 518 P2d 1042 (1974) the Oregon Court of Appeals stated that  
21 where

22 "an administrative body is charged with the duty to  
23 render a quasi-judicial decision, it should do so with  
24 the outward indicia of fairness as well as the  
25 actuality thereof." Campbell, 16 Or App at 395.

26 No Oregon court has overturned a decision on the ground of  
appearances alone, however. So far, the Oregon Supreme Court  
has required that the proceeding be fair and free of actual  
bias. See Neuberger v. City of Portland, 288 Or 585, 590, 607  
P2d 722 (1980). We conclude the applicable standard is whether

1 actual bias exists. See Boughan v. Board of Engineering  
2 Examiners, 46 Or App 287, 290, 611 P2d 670 (1980). We  
3 therefore reject petitioners view that the decision must be  
4 overturned because the circumstances of this incorporation  
5 proceeding lacked an appearance of fairness.<sup>11</sup>

6 The Oregon Supreme Court has held bias exists when a  
7 decisionmaker is predisposed to interpret the law in a  
8 particular fashion and either prejudices the facts, is  
9 personally biased against a party, or has substantial pecuniary  
10 interests in the proceedings. Davidson v. Oregon Government  
11 Ethics Commission, 300 Or 415, \_\_\_ P2d \_\_\_ (1985). See also  
12 Samuel v. Board of Chiropractic Examiners, 77 Or App 53, \_\_\_  
13 P2d \_\_\_ (1985).<sup>12</sup> In Fasano, supra, the Supreme Court stated:

14 "Parties at the hearing before the county governing  
15 board are entitled to an opportunity to be heard, to  
16 an opportunity to present and rebut evidence to a  
17 tribunal which is impartial in the matter - i.e.,  
18 having had no pre-hearing or ex parte contacts  
19 concerning the question at issue...." 264 Or at 588.

20 Some of the land use cases about bias in Oregon have arisen  
21 because of allegations of ex parte contacts by officials. See,  
22 e.g., Tierney v. Duris, 21 Or App 613, 536 P2d 435 (1975);  
23 Eastgate Theater v. Board of County Commissioners, 37 Or App  
24 745, 588 P2d 640 (1979); Peterson v. Lake Oswego, 32 Or App  
25 181, 574 P2d 326 (1978); Neuberger, supra.

26 In this context, ex parte contact includes all information  
relevant to the matter at hand gained outside the formal  
proceedings and not in the record. While ex parte contacts may

1 affect the tribunal's partiality, the risk to the integrity of  
2 quasi-judicial proceedings from ex parte contacts is that the  
3 decision may be made on the basis of facts not disclosed in the  
4 record. Tierney, supra. See also Samuel, supra.<sup>13</sup> The risk  
5 is reduced when information gained ex parte is made part of the  
6 record by disclosure in the proceeding. The function of  
7 disclosure is therefore corrective. Eastgate Theater, supra.  
8 Failure to disclose information gathered ex parte, on the other  
9 hand, will invalidate the decision. Samuel, supra.

10 The circumstances involving ex parte contacts is different  
11 from that in which the official is charged with bias because of  
12 contact with the proponent not concerning the merits of the  
13 official matter. When the decisionmaker is biased, for  
14 whatever reason, as distinguished from merely having gained  
15 relevant facts outside the record, we believe the appropriate  
16 corrective action is abstention from participation in the  
17 process, not disclosure. Failure to abstain in these  
18 circumstances will affect the right to an impartial tribunal.

19 In this proceeding, petitioners not only claim the facts  
20 show that Judge Cantrell was biased because of his dealings  
21 with the incorporators, but petitioners also claim that Judge  
22 Cantrell's failure to disclose his business dealings must  
23 result in invalidation of his vote and, consequently, reversal  
24 of the Wasco County decision.

25 In order to prove their claim of bias, petitioners  
26 requested and we granted an evidentiary hearing. Our power to

1 do so is found in ORS 197.835(a)(B) which provides:

2 "the Board shall reverse or remand the land use  
3 decision under review if the board finds:

4 "(a) The local government or special district:

5 \* \* \*

6 "(B) Failed to follow the procedures applicable  
7 to the matter before it in manner that  
8 prejudiced the substantial rights of the  
9 petitioner...."

10 Our review of the depositions, exhibits, testimony and  
11 other evidence submitted to us in the course of this proceeding  
12 leads us to make the findings of fact listed below.

13 The Cattle Sale

14 On August 12, 1981, commissioners from Wasco and Jefferson  
15 County Courts (including Judge Cantrell) visited Rancho  
16 Rajneesh. During that visit, representatives of the  
17 petitioners for incorporation (residents of the Ranch) advised  
18 Judge Cantrell that they were interested in purchasing cattle.  
19 This expression of interest was repeated on October 4, 1981 by  
20 John Shelfer (later Swami Jayananda), when Cantrell and his  
21 wife dined at the Ranch. Mr. Cantrell suggested that Mr.  
22 Shelfer obtain "hamburger grade" cattle, a grade sold by  
23 Cantrell.

24 On October 7, 1981, Shelfer, Sheila Silverman (later Ma  
25 Anand Sheila) and David Knapp (later Swami Krishna Deva)  
26 appeared before the Wasco County Court to present a petition  
for incorporation. The petition was deficient, and a second

1 was submitted on October 14, 1981.

2 Also on October 7, 1981, Cantrell privately advised his  
3 fellow commissioners that he intended to sell cattle to Rancho  
4 Rajneesh. However, prior to action on the petition, Cantrell  
5 did not make a public disclosure of his business dealings with  
6 representatives of Rancho Rajneesh.

7 On October 13, 1981, Cantrell mailed a letter to Shelfer  
8 offering cattle for sale at the following prices:

9 Cows, bulls, and heifers \$ .50 per pound  
10 Steer calves \$ .60 per pound<sup>14</sup>

11 Included in the letter was a statement that Cantrell wanted to  
12 sell cattle because "the wheat crop wasn't large enough to pay  
13 my bank loan the first of November."

14 Shelfer wrote a note to the Ranch foreman (Harvey) urging  
15 purchase of Judge Cantrell's cattle. The note stated:

16 "Keep low-key so not to embarasse (sic) Rick." ARUP  
Exhibit 11.

17 On October 22, 1981, Shelfer, Harvey, and others visited Cantrell  
18 and examined his cattle. Before the visit, Ma Anand Sheila  
19 (Sheila Silverman) advised Harvey to pay the price proposed by  
20 Judge Cantrell because "we needed him." Transcript 285.<sup>15</sup>

21 During the October 22 visit, Shelfer agreed to purchase the  
22 cattle at the asking price. There is disagreement between  
23 petitioners and responent as to whether this agreement  
24 constituted a final sale. Cantrell believed the deal was  
25 closed by a handshake, a common means of closing business deals  
26 in eastern Oregon.<sup>16</sup>

1 On October 25, 1981, Harvey visited Cantrell's property to  
2 reject unwanted cattle. On November 9, 1981, the cattle were  
3 delivered to the Ranch. Payment was made on November 15,  
4 1981.

5 The Cattle, Their Price, Quality  
6 and Other Related Issues

7 The price paid for the cattle was higher than market  
8 value. Cantrell received \$5,625 for 9 "pairs" (a cow and her  
9 calf). He also received \$11,915 for 23,830 pounds of cattle  
10 sold by weight. There is substantial evidence in the record to  
11 show that the price for the pairs exceeded general market value  
12 by approximately \$150 per pair. The other cattle, even if sold  
13 as "mixed," would have brought several cents less per pound at  
14 the nearest auction than they did in this sale.

15 There is conflicting testimony about the quality of the  
16 cattle and the actual price Cantrell received for them. The  
17 cattle were not of prime quality.<sup>17</sup> The majority were of  
18 "dairy quality," i.e., the product of beef cattle cross-bred  
19 with dairy cattle. Typically, dairy-quality cattle bring a  
20 lower price than do beef cattle. The deal included a few  
21 cattle of good quality, however.

22 Although a brand inspection normally occurs earlier, the  
23 cattle were examined by a brand inspector on December 21, 1981,  
24 after delivery to the Ranch. The cattle were only in fair  
25 condition when inspected. Petitioners maintain the cattle were  
26 sold in poor condition. Respondents contend the poor condition

1 was simply the result of the cattle being introduced to a new  
2 environment, unfamiliar grasses and other feed, and inadequate  
3 water. There is substantial evidence that as of the date of  
4 inspection, the cattle were in worse condition than when they  
5 left Cantrell's ranch.

6 Petitioners argue other aspects of the sale were  
7 irregular. One such irregularity concerns the pricing method.  
8 Typically, cattle are segregated as to sex, age, color, size  
9 and weight. Prices vary according to these factors. In this  
10 transaction, the pairs were sold at \$625 a pair, but the rest  
11 of the cattle were also sold at \$.50 per pound. This pricing  
12 was somewhat unusual, but one which occasionally occurred in the  
13 area. We attach no particular significance to this pricing  
14 scheme.

15 The cattle were hauled in four loads from the Cantrell  
16 Ranch to the elevator at Dufur, a trip of about 15 minutes.  
17 After weighing, they were loaded onto another truck for  
18 delivery to Rancho Rajneesh. On the day of the sale, Cantrell  
19 obtained an empty weight ("light" weight) for his truck from  
20 the main scale at the Dufur elevator. Late in the afternoon of  
21 the same day, three loads of cattle were weighed at the North  
22 Annex scale. The weights were recorded by Cantrell and  
23 Harvey. The weight slip for the North Annex scale is not in  
24 evidence.

25 Cantrell did not "light weight" the truck following each  
26 delivery. Petitioners claim this was a departure from normal

1 practice.<sup>18</sup> There is credible evidence, however, that a  
2 light weight is not considered important where, as here, the  
3 cattle do not spend more than a few minutes (15) inside the  
4 truck prior to being weighed. The weighing method used does  
5 not demonstrate a significant departure from the usual  
6 practice.

7 There are irregularities in the transportation records  
8 pertaining to the sale. There was no detailed transportation  
9 slip made out for the cattle on November 9, 1981. Bob Harvey  
10 wrote a transportation slip for 50 mixed cattle on the date of  
11 sale, but it did not include detail as to the kind of cattle  
12 transported. On December 22, 1981, Cantrell gave brand  
13 inspector Hodges a transportation slip for 48 cattle which  
14 Cantrell claimed to be the original. On December 26, 1981,  
15 Cantrell wrote Shelfer enclosing a copy of this same  
16 transportation slip and stating that the original was kept by  
17 the brand inspector.

18 There is some disparity between the transportation slip  
19 provided by Cantrell and an earlier one written by Harvey on  
20 the day of the transfer of the cattle to the Ranch. The  
21 significance of the discrepancy is unclear. There is not  
22 sufficient evidence to show an attempt by Cantrell to overstate  
23 the number of cattle sold or their weight.

#### 24 The County Court Decision

25 On November 4, 1981, the Wasco County Court held a public  
26 hearing on the incorporation petition according to ORS

1 221.040. The court accepted evidence about the boundaries of  
2 the proposed city and heard arguments about compliance with  
3 land use laws. The commissioners voted two to one to approve  
4 the petition. Cantrell voted for approval.

5 The District Attorney advised the county court that it  
6 could not deny the petition for incorporation, but that it  
7 could alter the proposed boundaries. One member of the county  
8 commission ignored this advice and voted against the  
9 incorporation. Later, after a dispute with the District  
10 Attorney over the issue, the commissioner resigned. Judge  
11 Cantrell believed he had no choice but to vote for the  
12 incorporation petition.

#### 13 Conclusion on the Bias Claim

14 In sum, the evidence is that the sale was irregular in some  
15 respects. Overall, the sale reflects an eager buyer, i.e., one  
16 who was less concerned with obtaining the best bargain possible  
17 than with meeting the requirements of the seller. The buyers  
18 and their associates may have believed this transaction would  
19 improve their chances of favorable treatment concerning the  
20 incorporation and related proceedings. There is no proof,  
21 however, that the transaction was expressly contingent on  
22 Cantrell's vote of November 4, 1981. Indeed, the evidence does  
23 not show any discussion at all between Cantrell and the cattle  
24 purchasers about the incorporation petition then pending before  
25 the county. Nor do we find that the transaction was so  
26 one-sided as to constitute a sham or an implicit "pay-off" for

1 his vote. Thus, we conclude petitioners have not carried the  
2 burden of proving disqualifying bias.

3 DISCLOSURE

4 What emerges from the evidence is a series of contacts  
5 between Judge Cantrell and representatives of the  
6 incorporators. The contacts are not ex parte contacts going to  
7 the merits of the matter pending before the Wasco County Court,  
8 but are rather contacts about a cattle sale.

9 As discussed above, the need to disclose ex parte contacts  
10 arises out of the need to make decisions on a public record.  
11 Samuel, supra; Fasano, supra. We are aware of no case law or  
12 constitutional provision requiring disclosure of the business  
13 relationship that existed between the petitioners for  
14 incorporation and Judge Cantrell. Because we find no evidence  
15 that Judge Cantrell conferred ex parte about the incorporation  
16 proceeding with the cattle purchasers or otherwise obtained  
17 relevant information on the incorporation outside the record,  
18 disclosure of the business relationship was not required under  
19 the doctrine announced in Fasano and the cases following.

20 However, there is a statutory obligation to disclose  
21 certain matters outside the record which do not go to the  
22 merits of the question before the local official. ORS  
23 244.120(1)(a) requires a public official to disclose the nature  
24 of a potential conflict of interest:

25 "When involved in the potential conflict of interest,  
26 a public official shall:

1           "(a) If the public official is an elected public  
2           official, other than a member of the  
3           Legislative Assembly or an appointed public  
4           official serving on a board or commission,  
          announce publicly the nature of the  
          potential conflict prior to taking any  
          official action thereon." ORS 244.120(1)(a).

5           A potential conflict of interest is:

6           "(4) 'Potential conflict of interest' means any  
7           transaction where a person acting in a capacity  
8           as a public official takes any action or makes any  
9           decision or recommendation, the effect of which  
          would be to the private pecuniary benefit or  
          detriment of the person or a member of the  
          persons's household,...." ORS 244.020(4).

10          This statutory requirement is distinct from the right to an  
11          impartial tribunal as a concomitant of due process. The  
12          relationship between Judge Cantrell and the incorporation  
13          suggests a "potential conflict of interest" requiring  
14          disclosure. However, the statutory definition supposes a  
15          direct link between the official act and the pecuniary  
16          benefit. Our review shows no such direct link.

17          Even if Judge Cantrell's action did result in a potential  
18          conflict of interest giving rise to a duty to disclose the  
19          conflict, breach of this duty need not result in  
20          disqualification of the decision. ORS 244.130(2) provides:

21                 "No decision or action of any public official or any  
22                 board or commission on which he serves or any agency  
23                 by which he is employed shall be voided by any court  
               solely by reason of his failure to disclose a  
               potential conflict of interest."

24          In short, failure to disclose a potential conflict of  
25          interest as exists in the case before us does not result in  
26          invalidation of the action. In contrast, failure to disclose

1 ex parte contacts on the merits of the controversy or matter  
2 before the local official will result in invalidation.

3 Samuels, supra.

4 We conclude that we are prohibited from voiding the  
5 decision solely because of Judge Cantrell's failure to disclose  
6 a potential conflict of interest.

7 CONCLUSION

8 In summary, we find Judge Cantrell engaged in business  
9 dealings with the incorporators. These dealings do not show  
10 the vote on the incorporation was a direct result of the  
11 business dealings or that Judge Cantrell had prejudiced his  
12 decision as a result of his relationship with the cattle  
13 purchasers. We therefore find that Judge Cantrell did not  
14 suffer bias as a result of his business dealings. Because we  
15 do not find bias, we do not find prejudice to petitioners'  
16 substantial rights.

17 Further, because we find no requirement for appearance of  
18 fairness, we do not find we have independent authority to void  
19 his vote and remand or reverse the decision. Therefore, we are  
20 unable to sustain this assignment of error.<sup>19</sup>

21 The decision of Wasco County Court is remanded.  
22  
23  
24  
25  
26

1 Kressel, Chief Referee, Dissenting

2 I dissent from the Board's holding on the second issue  
3 remanded by the Supreme Court. The majority concludes that it  
4 was legally proper for Judge Cantrell to take part in the county  
5 court's vote on the petition to incorporate Rajneeshpuram,  
6 notwithstanding that an undisclosed and highly advantageous  
7 commercial transaction was then pending between Cantrell and  
8 representatives of Rancho Rajneesh.

9 In my view, the majority's conclusion is wrong. The  
10 circumstances justify disqualification of Judge Cantrell's vote  
11 on grounds of bias.

12 In the fall of 1981, the leadership at Rancho Rajneesh bought  
13 48 cattle from Judge Cantrell. Although most of the cattle were  
14 of poor or fair quality, the buyers paid considerably more than  
15 the market price. Little or none of the customary bargaining  
16 over price and other terms preceded the sale. Indeed, as the  
17 majority opinion says, the buyers showed more interest in  
18 satisfying Judge Cantrell than in getting good livestock at a  
19 fair price.

20 The cattle sale was closed by a handshake on October 22,  
21 1981. Several weeks passed between the handshake and delivery of  
22 the cattle to Rancho Rajneesh and the payment to Judge Cantrell.  
23 In the interim, Cantrell and the other two members of the Wasco  
24 County Court took up the petition for incorporation of the City  
25 of Rajneeshpuram. None of the incorporation petitioners were  
26 directly involved in the cattle deal with Cantrell, but they were

1 closely affiliated with persons who were.

2 At a public hearing on November 4, 1981, the petition was  
3 contested by persons who alleged that the proposed incorporation  
4 would violate statewide planning goals. Judge Cantrell did not  
5 publicly disclose the pending cattle sale. At the conclusion of  
6 the hearing, the county court approved the petition by a  
7 two-to-one margin. Judge Cantrell voted with the majority.

8 The Supreme Court has put the question as follows:

9 "2. Whether the Wasco County judge acted improperly,  
10 with prejudice of substantial rights, rendering  
11 the Wasco county Court order invalid?" 299 Or at  
12 376.

13 The question deserves an affirmative answer.

14 No Oregon land use case addresses the propriety of an  
15 elected official's vote under the circumstances at issue here.  
16 However, assuming, as my colleagues do, that the county's  
17 decision was quasi-judicial in nature,<sup>20</sup> the controlling  
18 legal principle is well established. A fair hearing by an  
19 impartial tribunal is a basic requirement of due process under  
20 the federal constitution. That principle is at considerable  
21 risk where the factfinding/decisionmaking functions and the  
22 opportunity for private gain stand as close together as they do  
23 in this case. The U.S. Supreme Court has stated:

24 "Not only is a biased decisionmaker constitutionally  
25 unacceptable, but 'our system of law has always  
26 endeavored to prevent even the probability of  
27 unfairness'. In pursuit of this end, various  
28 situations have been identified in which experience  
29 teaches that the probability of actual bias on the  
30 part of the judge or decisionmaker is too high to be  
31 constitutionally tolerable. Among these cases are  
32 those in which the adjudicator has a pecuniary

1 interest in the outcome, and in which he as been the  
2 target of personal abuse or criticism from the party  
before him." Withrow v. Larkin, 421 US 35, 46-47  
(1975) (citations omitted).

3 Concededly, Judge Cantrell would not gain directly from his  
4 vote on the incorporation petition. A direct connection would  
5 remove nearly all doubt on the bias issue. See Tumey v. Ohio,  
6 273 US 510 (1927); Gibson v. Berryhill, 411 US 564, 579  
7 (1972). See Generally, Annot., Disqualification for Bias or  
8 Interest of Administrative Officer Sitting in Zoning  
9 Proceedings, 10 ALR 3d 694 (1966). However, the due process  
10 principle extends beyond situations where there is a direct  
11 link between the decisionmaking function and the potential for  
12 private gain. Even an indirect link is sufficient to  
13 disqualify a government decisionmaker for bias if the situation  
14 is one which would tempt the average man to forget the burden  
15 of proof. See Ward v. Village of Monroeville, 409 US 57, 60  
16 (1972). The principle takes into account human nature as well  
17 as the presumption of official honesty. One who claims that a  
18 decisionmaker is biased has a heavy burden. The challenger  
19 must demonstrate that the surrounding factual circumstances  
20 reveal unfairness or the "probability of unfairness" Withrow v.  
21 Larkin supra, 421 US 35 at 47.

22 The majority opinion does not acknowledge the scope of the  
23 due process principle. The opinion seems to say that a finding  
24 of impropriety should be made only where there is a direct  
25 connection between the official action (here, the vote) and  
26 private gain or where the decisionmaker receives a transparent

1 "pay-off" for the official action. This approach is too  
2 narrow. It does not realistically preserve the fairness of the  
3 factfinding process.

4 Oregon courts have taken a more realistic view of the  
5 problem. For example, in Samuel v. Board of Chiropractic  
6 Examiners, 77 Or App 53, \_\_\_ P2d \_\_\_ (1985), the Court of  
7 Appeals held that a member of a state licensing board should  
8 have disqualified himself from a revocation proceeding where  
9 litigation between the member and the licensee indicated  
10 personal animosity between them. The court stated:

11 "The possibility of personal animosity and the  
12 appearance of a substantial basis for bias is sufficient  
13 that, under the circumstances, he should have disquali-  
14 fied himself." 77 Or App at 61 (emphasis added).

15 Another Oregon case endorses the idea that where the  
16 surrounding circumstances logically impair a factfinder's  
17 neutrality, the proper course is disqualification. Boughan v.  
18 Board of Engineering Examiners, 46 Or App 287, 611 P2d, 670 rev  
19 den (1980).

20 Although this is a land use case and involves a charge of  
21 favoritism rather than animosity, I see no reason to ignore the  
22 principle recognized in prior cases. More than a decade ago,  
23 the Oregon Supreme Court observed that the land use  
24 decisionmaking process can be contaminated by "...the almost  
25 irresistible pressures that can be exerted by private economic  
26 interests on local government." Fasano v. Board of  
Commissioners of Washington County, 264 Or 574, \_\_\_ 507 P2d 23  
(1973). See also, Eastgate Theatre Inc. v. Board of

1 Commissioners of Washington County, 37 Or App 745, 754 588 P2d  
2 640 (1978). The record in this appeal shows an attempt by  
3 close allies of the incorporation petition to economically  
4 pressure Judge Cantrell. The cattle deal was never expressly  
5 linked to the pending incorporation petition. However,  
6 Cantrell's acceptance of the bargain is sufficient, in my view,  
7 to disqualify him from taking part in the incorporation  
8 proceeding. The probability that his vote was influenced by  
9 his private interests is too high to be constitutionally  
10 tolerated. Withro v. Larkin, supra.

11 Petitioners' rights were prejudiced by Judge Cantrell's  
12 failure to publicly disclose the cattle sale and to disqualify  
13 himself from the incorporation proceeding. Petitioners were  
14 entitled to, but did not have the benefit of an impartial  
15 factfinder.<sup>21</sup> Fasano v. Board of Commissioners of Washington  
16 County, supra, Neuberger v. City of Portland, 288 Or 585, 588,  
17 607 P2d 722 (1980).

18 Judge Cantrell's decisive vote should not be counted. The  
19 county's approval of the incorporation petition should  
20 therefore be reversed.

21  
22  
23  
24  
25  
26

FOOTNOTES

1  
2  
3  
4 \_\_\_\_\_  
5 1  
6 Specifically, the challenges were to Statewide Planning  
7 Goals 2, 3, and 14.

8  
9 \_\_\_\_\_  
10 2  
11 The issues as framed by the Supreme Court coincide with the  
12 Fourth and Sixth Assignments of Error in the original petition  
13 for review. The Fourth Assignment of Error stated:

14 "The County Court Improperly Concluded that Goal 3 is  
15 in- applicable in this proceeding." Petition for  
16 Review at 18.

17 The Sixth Assignment of Error stated:

18 "The County Court's order is invalid because  
19 petitioners were denied an impartial tribunal. Judge  
20 Cantrell's failure to disclose ex parte contacts and  
21 conflicts of interest, and his failure to withdraw  
22 from this proceeding, violated Fasano safeguards and  
23 the Fourteenth Amendment Due Process Requirements."  
24 Petition for Review at 23.

25  
26 Petitioners have moved to amend the Sixth Assignment of Error  
to add detail about the alleged impropriety of Cantrell's  
participation in the vote. The motion is denied. The Supreme  
Court has framed the issues for our review, and we believe the  
Court directed that our inquiry be sufficiently broad to include  
all matters relevant to the propriety of the county court's  
decision given Judge Cantrell's participation in it.

27  
28 \_\_\_\_\_  
29 3  
30 United States Soil Conservation Service (SCS) Class I through  
31 IV (in western Oregon) and I through VI (in eastern Oregon) soils  
32 are presumed to be "agricultural lands" as provided by Statewide  
33 Planning Goal 3.

34  
35 \_\_\_\_\_  
36 4  
37 This finding was apparently based on the expressed intention  
38 of the incorporators. The finding states "The limited amount of  
39 Class II-IV soils included within the proposed boundary have been,  
40 and will continue to be, cultural and otherwise preserved for farm  
41 use." Record 11.

1  
2 These findings are sufficient to establish that the property  
3 is not "other lands which are suitable for farm use," and,  
4 therefore, agricultural land within the meaning of Statewide  
5 Planning Goal 3. Additionally, the findings are adequate to show  
6 that the property does not fall within the definition of lands in  
7 other classes which may be needed to support farming activities on  
8 adjacent land. See the definition of agricultural land in Goal  
3. We reject, as did the Supreme Court, petitioners' view that  
the entirety of the Big Muddy Ranch must be considered in deciding  
whether or not the particular area for incorporation is  
agricultural land and defined by Goal 3. Flurry v. Land Use  
Board, 50 Or App 263, 623 P2d 671 (1981). See also 1000 Friends  
of Oregon v. Wasco, 299 Or at 372.

9 If the findings are adequately supported by substantial  
10 evidence, we must affirm the county on the question of  
inapplicability of Statewide Planning Goal 3.

11 We note the Supreme Court found that while statewide land use  
12 planning goals apply to incorporation proceedings, the test for  
13 goal compliance is whether it is "reasonably likely that the newly  
14 incorporated city can and will comply with the goals...." 299 Or  
15 at 360. In this case, we can assume the county was aware of the  
16 city's intention to plan and zone the incorporated area for urban  
17 uses (with the exception of the SCS Class II and III soils which  
18 were to be saved for agricultural use). Because the incorporators  
19 apparently intended that urban uses would be placed on the land,  
20 the county was obliged to make findings on Goals 3 and 14.

21 Agricultural land is defined in Goal 3 as:

22 "Agricultural Land - in western Oregon is land of  
23 predominately Class I, II, III and IV soils and in  
24 eastern Oregon is land of predominantly Class I, II,  
25 III, IV, V and VI soils as identified in the Soil  
26 Capability Classification System of the United States  
Soil Conservation Service, and other lands which are  
suitable for farm use taking into consideration soil  
fertility, suitability for grazing, climatic  
conditions, existing and future availability of water  
for farm irrigation purposes, existing land use  
patterns, technological and energy inputs required, or  
accepted farming practices. Lands in other classes  
which are necessary to permit farm practices to be  
undertaken on adjacent or nearby lands, shall be  
included as agricultural land in any event."

1  
7

2 The Oregon State Water Resources Board said the shallow soil  
3 types limit irrigability. Exhibit 7, p. 28. See also the report  
4 of the Trout Creek-Shaniko Soil Survey (Exhibit 8) providing maps  
5 showing soil types in the area with notations on suitability for  
6 agricultural use.

5  
8

6 We understand petitioners to read the county findings to say  
7 that the 61 percent of the total acreage composed of Class VII and  
8 VIII soils is not agricultural land simply because it does not  
9 meet the first definition of agricultural land containing Goal 3.  
10 Petitioners read the county order to ignore these soils from  
11 consideration as to whether the land is otherwise suitable for  
12 farm use notwithstanding its soil classification.

10 We disagree. While somewhat ambiguous, we understand the  
11 county to have examined all of the soil for suitability for farm  
12 use notwithstanding its soil classification. The order discusses  
13 soils and the suitability of the "area" for farm use. The  
14 following is illustrative of the county's consideration of the  
15 whole property:

13 "Since at least 61 percent of the area proposed for  
14 incorporation is comprised of Class VII and VIII  
15 soils, which are otherwise unsuitable for farm uses,  
16 the lands in question are not predominantly  
17 agricultural lands as defined by Goal 3. Furthermore,  
18 these nonfarm lands are not now in farm use. Over-  
19 grazing and the slope and fertility limitations of the  
20 lesser amount of Class VI soils render these lands  
21 unsuitable for agricultural use as well." Record 11.

18  
19  
9

19 In this case, advocates of a rezoning met with the planning  
20 commission in an executive session. The statute under which the  
21 P.C. operated called for a "public hearing". The court reasoned  
22 the plaintiffs were denied a fair hearing both in appearance and  
23 reality.

22  
23  
10

23 The Washington Supreme Court applies the doctrine only to  
24 quasi-judicial actions. Swift v. Island County, supra.  
25 Petitioners assert that the decision on review here is quasi-  
26 judicial in nature. Respondents disagree. Respondents argue that  
quasi-judicial safeguards announced in Fasano are not applicable  
in a legislative proceeding.

1 We conclude the proceeding is quasi-judicial. This action is  
2 directed at a relatively small number of identifiable persons, it  
3 involves the application of existing policy to a particular fact  
4 situation, and the filing for a petition for incorporation  
5 requires the governing body to act. The governing body is not  
6 free to ignore the petition as it might elect not to proceed with  
7 legislation. See Strawberry Hill Four-Wheelers v. Benton County  
8 Bd Comm., 287 Or 591, 588 P2d 65 (1977); Neuberger v. City of  
9 Portland, 288 Or 585, 607 P2d 722 (1979).

10  
11 \_\_\_\_\_  
12 11

13 Were the doctrine alive in Oregon, our opinion might be  
14 different. The facts recited below suggest unfairness as a result  
15 of the sale and the contemporaneous vote on the incorporation  
16 petition.

17  
18 \_\_\_\_\_  
19 12

20 Professor Davis has identified five types of bias as follows:

21 "The concept of 'bias' has multiplicity of meanings.  
22 Five kinds of bias can be rather clearly identified.  
23 Some are and some are not a disqualification for  
24 making a decision in an adjudication, for a rulemaker,  
25 for an enforcer, or for a legislator. Although the  
26 five kinds shade into each other and although they  
27 come in various combinations, the main ideas about  
28 bias in an adjudication may be stated in five  
29 sentences, each of which deal with one kind of bias:  
30 (1) A prejudgment or point of view about a question of  
31 law or policy, even if so tenaciously held as to  
32 suggest a closed mind, is not, without more, a  
33 disqualification. (2) Similarly, a prejudgment about  
34 legislative facts that help answer a question of law  
35 or policy is not, without more, a disqualification.  
36 (3) Advance knowledge of adjudicative facts that are  
37 in issue is not alone a disqualification for finding  
38 those facts, but a prior commitment may be. (4) A  
39 personal bias or personal prejudice, that is, an  
40 attitude toward a person, as distinguished from an  
41 attitude about an issue, is a disqualification when it  
42 is strong enough; such partiality may be either  
43 animosity or favoritism. (5) One who stands to gain  
44 or lose by a decision either way an interest that may  
45 disqualify; even a legislator may be disqualified on  
46 account of conflict of interest."

47  
48 \_\_\_\_\_  
49 13

50 In Samuel v. Board of Chiropractic Examiners, a board of  
51 chiropractic examiners' decision was remanded because it was found  
52 that certain members of the board discussed the merits of

1 Petitioner Samuel's case outside of the record of the proceeding  
2 and further failed to disclose the communication on the record of  
the proceeding. The Court found the petitioner's right to a fair  
hearing was compromised and remand was required.

3  
4 

---

14

5 No price was given for pairs in this letter. A "pair" is a  
cow and her calf.

6  
7 

---

15

8 There is additional evidence that persons at the Ranch felt  
the cattle sale would provide a direct benefit to the community  
9 simply because the seller was Judge Cantrell. See Deposition of  
Swami Krishna Deva at 6, 24, 39-40. Even if true, this evidence  
does not show a connection between the sale and the vote on the  
incorporation petition.

10  
11 

---

16

12 According to the Wasco County District Attorney, a person  
failing to honor an agreement by handshake would be able to get  
away with dishonoring the agreement "only once."

13  
14 

---

17

15 Quality refers to the animal's conformation and size.  
Condition refers to the animal's health and appearance.

16  
17 

---

18

18 Petitioners argue that normal sale practice includes a "light  
weight" of the truck after each delivery. A "light weight" is  
obtained when the truck is weighed and cleaned of any waste  
19 products. The weight taken at this time is the weight used to  
compute the sale price. Without taking such a "light weight,"  
petitioners argue a purchaser pays for "shrinkage." This term  
refers to the loss of weight because of excreted waste products.  
20 Cattle typically excrete waste products when moved, according to  
petitioners. There is other credible evidence, however, that  
21 significant shrinkage does not occur on short trips, and that  
whether cattle have been watered and fed prior to shipment is of  
22 critical importance to whether shrinkage will occur.

23  
24 

---

19

25 ORS 197.835(11) inferentially permits us to reverse or remand  
a decision because of the county commissioner's ex parte  
26 contacts. This statute was not in force at the time of the vote  
on the incorporation. Further, the statute does not require  
reversal or remand because of ex parte contacts, and we conclude

1 the statute is more a direction to us as to when not to reverse  
because of ex parte contacts.

2 ORS 215.422 states:

3 "(3) No decision or action of a planning commission or  
4 county governing body shall be invalid due to ex  
5 parte contact or bias resulting from ex parte  
6 contact with a member of the decisionmaking body,  
if the member of the decisionmaking body  
receiving the contact:

7 "(a) Places on the record the substance of any  
8 written or oral ex parte communications  
concerning the decision or action; and

9 "(b) Has a public announcement of the content of  
10 the communication and of the parties' right  
11 to rebut the substance of the communication  
12 made at the first hearing following the  
communication where action will be  
considered or taken on the subject to which  
the communication related.

13 "(4) A communication between county staff and the  
14 planning commission or governing body shall not  
be considered an ex parte contact for the  
purposes of subsection (3) of this section.

15 "(5) Subsection (3) of this section does not apply to  
16 ex parte contact with a hearings officer approved  
under ORS 215.406(1)."

17 \_\_\_\_\_  
20

18 I confess doubt as to whether the county's decision should  
19 be characterized as quasi-judicial or legislative. To me,  
20 however, the critical point is that the proceeding necessarily  
involved adjudicative factfinding by the Wasco County Court.  
21 See 1000 Friends of Oregon v. Wasco County Court, 299 Or  
344, \_\_\_ P2d \_\_\_ (1985). Since factfinding was the task at  
22 hand, the basic elements of fair adjudicative procedure had to  
be employed. See Davis, Administrative Law Treatise, 2d,  
23 Section 14:4 (1980). A key procedural element is that of an  
impartial tribunal. Withrow v. Larkin, 421 US 35 (1975). As  
24 parties to the factfinding proceeding, petitioners were  
constitutionally intitled to an impartial tribunal. Neuberger  
v. City of Portland, 288 Or 585, 588, 607 P2d 722 (1980);  
25 Fasano v. Board of Commissioners of Washington County, 264 Or  
574, \_\_\_ 507 P2d 23 (1973).

2 The case for disqualification would be weaker if the county  
3 court's application of the statewide goals was subject to full  
4 de novo review here. See Davidson v. Oregon Government Ethics  
5 Commission, 300 Or 415, 428-29, \_\_\_ P2d \_\_\_ (1985) (substitution  
6 of hearings officer not improper where officer's findings of  
7 fact not binding); Fuentes v. Roher, 519 F2d 379, 389-90 (2d  
8 Cir. 1975); Lenz v. Coon Creek Watershed District, 152 NW2d 209  
9 (1967). However, our review of the county's decision is not de  
10 novo. We are bound to accept any finding of fact made by the  
11 county for which there is substantial evidence in the record  
12 ORS 197.830(11).  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26