BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BERNADETTE NIEDERER,
Petitioner,

vs.

CITY OF ALBANY,
Respondent,

and

MARK SIEGNER,
Intervenor-Respondent.

LUBA No. 2018-133

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Carrie A. Richter, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Bateman Seidel, P.C.

No appearance by City of Albany.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board Member, participated in the decision.

REMANDED 04/11/2019

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioner challenges a decision by the city council approving demolition of three historic contributing structures.

FACTS

On July 9, 2018, intervenor-respondent (intervenor) submitted a request to the city for approval to demolish three historic contributing structures within the Monteith National Register Historic District in Albany. Record 844.[1] Requests to move or demolish historic contributing structures are reviewed by the Landmark Advisory Commission (LAC). Albany Development Code (ADC) 7.310(2). LAC must find that the demolition or relocation request meets the following applicable criteria:

> "(1) No prudent or feasible alternative exists, or
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> "(2) The building or structure is deteriorated beyond repair and cannot be economically rehabilitated on the site to provide a reasonable income or residential environment compared to other structures in the general area, or
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> "(3) There is a demonstrated public need for the new use that outweighs any public benefit that might be gained by preserving the subject buildings on the site.

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[1] The Board received the original record transmittal on November 26, 2018. On December 28, 2018, the Board received the replacement record. On January 14, 2019, the Board received the supplemental record. All citations to the record in this opinion are to the replacement record, or supplemental record, as indicated.

"(4) The proposed development, if any, is compatible with the surrounding area considering such factors as location, use, bulk, landscaping, and exterior design.

"(5) If the building or structure is proposed to be moved, moving to a site within the same historic district is preferred to moving it outside the district." ADC 7.330.

On September 5, 2018, the LAC held a public hearing to consider intervenor's demolition request. Under ADC 7.360, LAC may approve the demolition request or may stay the demolition for up to 365 days to allow LAC to notify the owner of rehabilitation programs and encourage public or private entities to acquire or restore the structures.[2] City planning staff concluded that intervenor had not demonstrated that no feasible or prudent alternative to demolition exists or that the structures could not be repaired or economically rehabilitated. Record 64–68. However, staff advised LAC that it was not permitted to deny the demolition request. Record 60–61. LAC voted to approve the demolition request and impose a 365-day stay. Record 60.

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[2] ADC 7.360 provides:

"Decisions/Appeals. Following a public hearing, the [LAC] may either approve the request or invoke a stay to the demolition. During the stay, the [LAC] will notify the owner of potential rehabilitation programs and benefits and encourage public or private acquisition and restoration of the landmark. The length of the stay will be no more than 365 days from the date a complete application was received by the City. All decisions to approve, approve with conditions, or stay shall specify the basis for the decision. Decisions of the [LAC] can be appealed to the City Council."

The day after the LAC hearing, City Councilor Kellum posted the following statement in the comment section of an online blog article criticizing the LAC decision:

> "This WILL come up next Wed at the regular Council meeting at 715 [*sic*] pm, I have spoken to 2 other Councilors, (sunshine laws keep me from speaking to any others about this) the 3 of us are in agreement that the houses should be torn down ... So I will bring it up during business from the Council and we will discuss getting this particular monkey off of [intervenor's] back. * * *" Supplemental Record 29.

On September 12, 2018, the city council on its own motion voted to review the LAC decision, thereby relieving intervenor from filing an appeal or paying an appeal fee. Record 77. On October 10, 2018, the city council held a *de novo* public hearing on intervenor's demolition request. At the outset of the hearing, the mayor and serval city councilors disclosed site visits and *ex parte* contacts.

Petitioner challenged Councilor Kellum for prejudgment bias, arguing that his public blog comment established that he had prejudged the matter and could not be impartial in rendering a decision based on the evidence and argument presented at the hearing. Record 2; Video Recording, City of Albany, Oregon, City Council Meeting, Oct 10, 2018, at 17:10 to 18:18, 19:40 to 20:00. In response to the bias challenge, the city attorney advised the city council that "it was up to Councilor Kellum to decide if he could be fair and impartial." Video Recording, City of Albany, Oregon, City Council Meeting, Oct 10, 2018, at

18:30. The mayor asked Kellum, "Do you feel like you would be biased towards making a decision?" Kellum responded:

> "I don't think that I can...um... I don't have to worry about being biased about it. The information is there, and you look and see what the evidence is and that is what I am looking at. So, if that's bias, then everyone has bias, including everyone on this dais. You come to a conclusion based on the information that you get." Video Recording, City of Albany, Oregon, City Council Meeting, Oct 10, 2018, at 20:18 to 20:52.

After that statement, the city council moved on to the substantive hearing and Kellum participated in the hearing and deliberations. The city council voted four to two to approve the demolition request with a condition of approval that the "subject buildings shall not be demolished for at least 90 days from the date the Notice of Decision is signed." Record 82.

On October 11, 2018, the mayor signed a one-page "Notice of Decision" approving the demolition request, which is the city's final decision and the decision challenged on appeal. *Id.* The decision states that "[t]he City based its decision on the project's conformance with the review criteria listed in the Albany Development Code," and that the "supporting documentation relied upon by the City in making this decision is available for review at the Community Development Department * * *." *Id.* The decision does not identify the approval criteria and does not contain any findings or conclusions. Petitioner appealed the city council's notice of decision to LUBA in this appeal.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioner argues that the city's decision was tainted by the participation of city councilors who were biased in that they had prejudged the application in favor of demolition prior to the city council hearing, deliberation, and decision on intervenor's demolition request. In her petition for review, petitioner argues that councilors Kellum, Johnson, and unnamed "others" were biased. Intervenor responds, and we agree, that petitioner waived her right to argue that other councilors were biased because she did not direct her bias challenge to any other specific councilors during the local proceeding. Our review of the city council hearing shows that petitioner specifically challenged only Kellum. Video Recording, City of Albany, Oregon, City Council Meeting, Oct 10, 2018, at 17:10 to 18:18, 19:40 to 20:00. Any bias challenge other than petitioner's challenge addressed at Kellum was not specific enough to allow the city council or particular parties to respond. *See* ORS 197.763(1).[3] Moreover, petitioner's bias challenges to unnamed "others" in her

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[3] ORS 197.763(1) provides:

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

petition for review are not sufficiently developed for our review and provide no basis for reversal or remand. *Deschutes Development Co. v. Deschutes County*, 5 Or LUBA 218, 220 (1982). We review only petitioner's challenge to Kellum's participation. As explained below, we ultimately agree with petitioner that Kellum was biased and should not have participated in the decision.

An interested party in a quasi-judicial land use proceeding has a substantial right to an impartial decision maker. *Fasano v. Washington County*, 264 Or 574, 588, 507 P2d 23 (1973). "An allegation of decision maker bias, accompanied by evidence of that bias, may be the basis of a remand under ORS 197.835(9)(a)(B)." *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001). The bar for bias disqualification is high, as the Court of Appeals explained in *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 602, 341 P3d 790 (2014):

> "An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.
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> "In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First*, the scope of the 'matter' and 'question at issue' is narrowly limited to the specific decision that is before the tribunal. *Second*, because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not

> merely apparent. And *third*, the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented." (Emphases in original.)

In order to prevail on a bias challenge, the petitioner must demonstrate that the challenged decisionmaker was actually biased, as opposed to apparently biased. "[A]ctual bias can be established, where prejudgment has been alleged, by explicit statements, pledges, or commitments that the elected local official has prejudged the specific matter before the tribunal." *Columbia Riverkeeper*, 267 Or App at 609–10.

This case is similar to *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd*, 183 Or App 581, 54 P3d 636 (2002), which involved the siting of a church, and in which we found disqualifying bias. Newly elected City Councilor Mathern had stated during his campaign "that he did not feel the need to be objective regarding the [church], and further stated that 'we [the church] will fight this even if we have to fight all the way to the Supreme Court.'" *Id.* at 144. Mathern signed a petition supporting the church's request that was submitted into the record before the city council. In addition, prior to the council's deliberations, Mathern entered into the record a document explaining why he believed the church's application met applicable approval criteria, with specified conditions. Mathern made the motion to approve the application, with those specified conditions as modified after discussion with the council. We concluded that Mathern had prejudged the matter to approve the church's application and that he should have recused himself from participating in the challenged decision.

Id. at 145–46; *see also Halvorson-Mason*, 39 Or LUBA at 711 (finding disqualifying bias where a city councilor wrote letters to other councilors opposing the development and providing his legal conclusions about the application prior to the application being brought before the council).

Elected officials are elected because of their expressed political predispositions, therefore, provided that an official can review a matter on its merits, a predisposition does not require recusal. *Eastgate Theatre v. Washington County*, 37 Or App 745, 588 P2d 640 (1978). For example, if Kellum had made general public statements critical of historic preservation or the LAC process, those statements alone would likely be insufficient to establish actual bias. However, Kellum's online statements are directed specifically to the decision whether to approve intervenor's demolition request and evidence his prior commitment to approve the application and "get[] this particular monkey off of the [intervenor's] back." Supplemental Record 29. Kellum's online statement demonstrates not simply a predisposition to approve the demolition request, but that he had prejudged the matter to the extent that he was incapable of making a decision based on the evidence and argument before him during the city council proceeding.

Kellum's statements during the hearing did not ameliorate his prior public comments or demonstrate that he in fact judged the demolition request fairly and impartially based on the evidence and argument presented to the city council. Kellum did not state that he was capable of making an unbiased decision based

on the evidence and argument presented to the city council. Instead, he said that he did not have to worry about being biased and that, if he was biased, then so were the mayor and other city council members. Kellum's lack of concern for his ability to serve as an impartial decision maker, and his imputation that other decision makers were also biased, does not demonstrate his ability to act as an impartial decision maker. Even if Kellum had stated that he would render an impartial decision, such a statement would not have cured his demonstrated actual bias. *See Friends of Jacksonville*, 42 Or LUBA at 142 ("In the face of evidence that an elected decision maker is biased, a statement by the elected official that he or she can nevertheless render an impartial decision based on the evidence and law may not be sufficient to overcome that bias.").

We do not know whether and to what extent Kellum's participation influenced the vote of the city council. Therefore, remand is appropriate to allow the council to consider the application without Kellum's participation.

The fourth assignment of error is sustained, in part.

FIRST ASSIGNMENT OF ERROR

We briefly set out the applicable law before turning to the first assignment of error.[4] Statewide Planning Goal 5 requires local governments to adopt

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[4] We summarized the city's historic preservation program in our prior order granting petitioner's motion to stay the city's decision pending the outcome of this appeal. *Niederer v. City of Albany*, __ Or LUBA __ (LUBA No 2018-133, Jan 17, 2019) (slip op at 1–3). We restate that summary here for context.

programs to conserve historic resources for present and future generations. OAR 660-015-0000(5); OAR 660-023-0200 (procedures and requirements for complying with Goal 5 historic resources). Albany Comprehensive Plan (Comprehensive Plan), Chapter 2, recognizes the city's interest in adopting Goal 5 protections for historic resources. Albany Development Code (ADC) Article 7 protects the city's historic and architectural resources by designating historic landmarks and districts. The character of a city historic district is preserved, in part, through mandatory review for demolition or relocation of historic landmarks. ADC 7.310. All "historic contributing structures" are considered historic landmarks for purposes of the city's historic overlay district. ADC 7.020. A "historic contributing structure" is "[a] building or structure originally constructed before 1946 that retains and exhibits sufficient integrity (materials, design, and setting) to convey a sense of history. These properties strengthen the historic character of the district." ADC 7.020. In contrast, a historic non-contributing structure is "[a] building or structure originally constructed before 1946 that retains but does not exhibit sufficient historic features to convey a sense of history. These properties do not strengthen the historic character of the district in their current condition." ADC 7.020.

In addition to the city's comprehensive plan and historic district regulations, OAR 660-023-0200(8)(a) provides that a local government:

> "Must protect National Register Resources, regardless of whether the resources are designated in the local plan or land use regulations, by review of demolition or relocation that includes, at minimum, a

> public hearing process that results in approval, approval with conditions, or denial and considers the following factors: condition, historic integrity, age, historic significance, value to the community, economic consequences, design or construction rarity, and consistency with and consideration of other policy objectives in the acknowledged comprehensive plan. Local jurisdictions may exclude accessory structures and non-contributing resources within a National Register nomination[.]"

In the first assignment of error, petitioner argues that the city failed to adopt written findings demonstrating that the city council considered the factors and criteria for a decision to demolish a historic contributing structure set out in OAR 660-023-0200(8)(a) and ADC 7.330. The city is required to amend its land use regulations to conform to OAR 660-023-0200(8)(a), and until those amendments are adopted, OAR 660-023-0200(8)(a) applies directly to review of requests to demolish or relocate historic resources. OAR 660-023-0200(8)(c). Petitioner argues, and we agree, that ADC Article 7 does not fully implement OAR 660-023-0200(8)(a) because the review criteria in ADC 7.330 do not include all of the factors in OAR 660-023-0200(8)(a). In addition, the potential dispositions differ. The city may *deny* a demolition request under OAR 660-023-0200(8)(a) but may only approve or approve and delay a demolition request under ADC 7.330. We conclude, as intervenor concedes, that OAR 660-023-0200(8)(a) applies directly to the city's decision.

The city's one-page decision does not set out the applicable criteria or contain any findings or conclusions. Adequate findings set out the applicable approval criteria and explain the facts relied upon to reach the conclusion whether

the applicable criteria are satisfied. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992). Findings need not take a particular form and "no magic words need be employed." *Sunnyside Neighborhood v. Clackamas County*, 280 Or 3, 21, 569 P2d 1063 (1977). Instead, to be sufficient for review, findings need only "establish the factual and legal basis for the particular conclusions drawn in a challenged decision." *Thormahlen v. City of Ashland*, 20 Or LUBA 218, 229–30 (1990). If the challenged decision does not contain adequate findings and conclusions, then we are unable to perform our review function and must remand the decision. *Cunningham v. City of Newport*, 15 Or LUBA 511, 513 (1987).

We agree with petitioner that the city's one-page decision does not contain adequate findings. It contains no findings and no conclusions beyond a bare assertion that the demolition approval is based on unspecified "review criteria listed in the [ADC]" and unspecified "supporting documentation relied upon." Record 82.

Intervenor argues that, in spite of the absence of any reference to it in the one-page decision, the city council relied on an October 1, 2018 staff report (staff report). Intervenor bases his argument on a city councilor's reference, during oral deliberations on the application, to the recommendation in the staff report. Intervenor argues that the staff report and city council oral deliberations constitute the required findings. Response Brief 9.

Petitioner argues, and we agree, that the city council did not adopt the staff report as findings or otherwise. The city councilor's motion to approve the

demolition request was "to accept staff's recommendation for a 90-day stay of demolition." Record 83. The city council did not orally approve or adopt the staff report, and the city council's final decision did not mention the staff report, let alone adopt or incorporate it into the city's final decision. We have consistently held that a local government that intends to incorporate another document into its decision must make that incorporation reasonably clear:

> "After all, the local government decision maker is in a unique position to *know* what it believes to be the facts and reasons supporting its decision. Therefore, we hold that if a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so,[5] and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself, would be able both to identify and to request the opportunity to review the specific document thus incorporated.
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> "[5] Stating in the decision that a particular document is 'incorporated by reference as findings' is certainly the clearest way of expressing such an intent. However, no particular language is required, so long as the words employed establish that the local government decision maker intends to adopt the contents of another document as a statement of what it believes to be the relevant facts upon which its decision is based. *Sunnyside*, *supra*." *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992) (emphasis in original).

We disagree with intervenor's assertion that the city council's oral deliberations make reasonably clear that the city council intended to adopt the

staff report as part of its final decision. Even if it would be possible, after reviewing the entire proceedings below, for a reasonable person to make an educated guess that the city council relied upon the staff report in reaching its decision, that does not satisfy the requirement that the decision itself identify the specific documents or portions of documents intended to be incorporated by reference as findings. *Gonzalez*, 24 Or LUBA at 259 n 6. LUBA reviews the decision maker's final written decision, not statements made during the proceedings leading to adoption of the challenged decision. Such statements are preliminary and subject to change in the final decision. *Toth v. Curry County*, 22 Or LUBA 488 (1991).

We conclude that the city did not adopt or incorporate the staff report into its final decision. The city's one-page decision does not include any findings in support of its decision to approve the application. Accordingly, remand is required for the city council to adopt findings and conclusions under OAR 660-023-0200(8)(a) and ADC 7.330, which the parties agree are the applicable approval standards.

The first assignment of error is sustained.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Petitioner's second and third assignments of error challenge the findings and conclusions included in the staff report. In our resolution of the first assignment of error, we concluded that the city's final decision did not incorporate the staff report by reference. Thus, any error or deficit in the staff

report provides no basis for reversal or remand and we express no opinion about whether the findings and conclusions in the staff report are adequate or supported by substantial evidence.

DISSOLUTION OF STAY

In an order dated January 17, 2019, we granted petitioner's motion requesting a stay of the city council's decision pending a final opinion by LUBA in this appeal. *Niederer v. City of Albany*, __ Or LUBA __ (LUBA No 2018-133, Jan 17, 2019). With the issuance of this final opinion and order, the stay is dissolved. *Meyer v. Jackson County*, 73 Or LUBA 1, 26 (2016); *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335, 342 (1995).

The city's decision is remanded.