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

ST. JOHNS NEIGHBORHOOD ASSN., )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CITY OF PORTLAND, )  
 )  
Respondent, )  
 )  
and )  
 )  
HOST DEVELOPMENT, )  
 )  
Intervenor-Respondent. )

LUBA No. 97-015

FINAL OPINION  
AND ORDER

\_\_\_\_\_  
ANTHONY BOUTARD and LAWRENCE )  
WATTERS, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CITY OF PORTLAND, )  
 )  
Respondent, )  
 )  
and )  
 )  
HOST DEVELOPMENT, )  
 )  
Intervenor-Respondent. )

LUBA No. 97-020

Appeal from City of Portland.

Gregory P. Barton, Portland, filed a petition for review and argued on behalf of petitioner St. Johns Neighborhood Assn.

Anthony Boutard and Lawrence Watters, Portland, filed a petition for review on their own behalf. Anthony Boutard and Lawrence Watters argued on their own behalf.

Ruth Spetter, Senior Deputy City Attorney, Portland, filed response briefs and argued on behalf of respondent.

1 Timothy V. Ramis, G. Frank Hammond, and D. Daniel  
2 Chandler, Portland, filed a response brief on behalf of  
3 intervenor-respondent. With them on the brief was O'Donnell  
4 Ramis Crew Corrigan & Bachrach. D. Daniel Chandler argued on  
5 behalf of intervenor-respondent.

6  
7 GUSTAFSON, Chief Administrative Law Judge; HANNA,  
8 Administrative Law Judge, participated in the decision.

9  
10 AFFIRMED 01/15/98

11  
12 You are entitled to judicial review of this Order.  
13 Judicial review is governed by the provisions of ORS 197.850.

14

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners in this consolidated case appeal the city's  
4 approval of a comprehensive plan amendment and zone change.

5 **MOTION TO INTERVENE**

6 Host Development (intervenor), the applicant below, moves  
7 to intervene on the side of respondent. There is no  
8 opposition to the motion, and it is allowed.

9 **FACTS**

10 Intervenor is a nonprofit organization that develops  
11 owner-occupied, low-income housing. Intervenor approached the  
12 city with a proposal to develop a vacant tract of publicly-  
13 owned land in north Portland into a 103-lot subdivision. The  
14 tract is comprised of a vacant, five-acre lot owned by  
15 Portland Public Schools (PPS) and a vacant, eight-acre lot  
16 owned by the city. The five-acre lot is zoned R-5  
17 (Residential, 5,000 square foot minimum), and the eight-acre  
18 lot is zoned OS (Open Space). At one time the city had  
19 planned to develop a neighborhood park and PPS had planned to  
20 build a school on their respective lots, but by the time of  
21 this application, both public bodies considered their lots  
22 surplus and not needed for those purposes.

23 After preliminary discussions with the city and  
24 interested parties, including petitioner St. Johns  
25 Neighborhood Association (SJNA), intervenor applied to the  
26 city for a comprehensive plan map and zoning map amendment to

1 change the zoning of both lots

1 to R-2 (Residential, 2,000 square foot minimum). In July  
2 1996, a city hearings officer recommended approval.

3 The city council held hearings in September and December  
4 1996. During the September 1996 hearings, Commissioner  
5 Kafoury disclosed that her staff person, Sten, served on  
6 intervenor's board of directors, that she had had a vague  
7 briefing about the project months earlier when planning was in  
8 the formative stages, but that she had not been contacted  
9 about this specific application. In November 1996, Sten was  
10 elected city commissioner and resigned from intervenor's  
11 board. At the commencement of the December 1996 hearing,  
12 Commissioner Sten announced that he would not be voting on the  
13 application because he had not been involved in the earlier  
14 hearings and because of his prior position on intervenor's  
15 board. Commissioner Kafoury again disclosed that when  
16 Commissioner Sten was a member of her staff, she had discussed  
17 intervenor's activities with him. She stated, however, that  
18 she had not had any ex parte contacts regarding this  
19 application, and did not consider her knowledge of intervenor  
20 to preclude her from participating in the proceedings. No  
21 other commissioner disclosed any statement of interest or ex  
22 parte contact.

23 Following additional public hearings, those city  
24 commissioners participating voted unanimously to approve the  
25 application.

26 This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR (SJNA)**

2 SJNA alleges the city violated several procedural and  
3 substantive standards required by Fasano v. Washington County,  
4 264 Or 574, 507 P2d 23 (1973). However, that case provides no  
5 substantive approval criteria for the challenged decision; nor  
6 does it establish procedural requirements independent of those  
7 required by state statute or local ordinance. See Neuberger  
8 v. City of Portland, 288 Or 155, 170, 603 P2d 771 (1979);  
9 Friends of Cedar Mills v. Washington County, 28 Or LUBA 477,  
10 485 (1995). SJNA cites no violations of any mandatory  
11 approval criteria to which this application is subject.

12 SJNA's first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR (SJNA)**

14 SJNA generally alleges violations of Statewide Planning  
15 Goals 10 (Housing) and 14 (Urbanization). Petitioners'  
16 superficial allegations regarding these goals do not merit  
17 discussion. Goals 10 and 14 are inapplicable to approval of  
18 this application.

19 SJNA's second assignment of error is denied.

20 **THIRD ASSIGNMENT OF ERROR (SJNA)**

21 SJNA alleges that because the city council did not  
22 consider the issue of whether the park property was surplus in  
23 conjunction with this application, the city's process violates  
24 petitioner's procedural rights required by Fasano, Goal 9  
25 (citizen involvement) of the city's comprehensive plan, and  
26 the due process clause of the United States Constitution.

1 SJNA does not cite to any requirement that the city  
2 consider whether the property is surplus at the same time it  
3 considers the rezoning application. The issue of whether the  
4 park property is surplus, an issue relevant to whether the  
5 city should sell the property, was not part of the subject  
6 application. SJNA's argument appears to be that the city's  
7 decision to rezone the property predisposes it to consider the  
8 property surplus, making that eventual decision, if it is ever  
9 made, an empty procedural exercise, thus depriving SJNA of a  
10 meaningful opportunity to argue that the property is not  
11 surplus.

12 As the city points out, nothing in the challenged  
13 decision to rezone the property forces the city to declare the  
14 property surplus or to sell it. SJNA's desire that the city  
15 consider the two independent issues at the same time does not  
16 establish that the city violated any procedural rights by its  
17 failure to do so.

18 SJNA's third assignment of error is denied.

19 **FOURTH ASSIGNMENT OF ERROR (SJNA)**

20 SJNA alleges the city's decision violates the federal  
21 Fair Housing Act and the federal constitutional guarantee of  
22 equal protection. SJNA cites to statistical data attached to  
23 its petition for review, but not in the record, that SJNA  
24 claims will establish that the city and intervenor have a  
25 policy of building low-income housing in North Portland with  
26 the knowledge that doing so will cause minorities to live

1 there, creating, according to SJNA, segregated communities.

2 The city responds, first and dispositively, that the  
3 issues of whether the decision to rezone violates the federal  
4 Fair Housing Act or the equal protection clause were never  
5 raised below. The city argues that, under ORS 197.763(1),  
6 failure to raise those issues precludes their basis as an  
7 appeal to LUBA.<sup>1</sup>

8 SJNA appears to concede that the issue of whether the  
9 decision violates the law as alleged was never explicitly  
10 raised below. SJNA appears to argue, however, that the broad  
11 issue of segregation was raised below, and that the city  
12 should have intuited thereby that its decision might implicate  
13 the Fair Housing Act or the equal protection clause. SJNA  
14 cites to complaints by neighbors that the proposed subdivision  
15 would lead to more low-income residents, that the neighborhood  
16 already had too many low-income residents, and that the  
17 project would cause "more crime and less English speaking  
18 children" in schools. Record 775.

19 We agree with the city that comments of this type do not  
20 adequately raise the issue of unlawful segregation, much less

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<sup>1</sup>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."

ORS 197.835(3) limits our review to those issues raised during the local proceedings as provided by ORS 197.763.



1 that of whether the rezoning violates the Fair Housing Act and  
2 the equal protection clause. ORS 197.763(1) requires that  
3 issues be raised and accompanied by statements or evidence  
4 sufficient to afford the city an adequate opportunity to  
5 respond. The comments, at most, express the speakers' own  
6 biases and resentment against low-income and minority  
7 residents. Such comments do not raise any issue that the city  
8 could conceivably respond to, much less the particular issue  
9 SJNA seeks to raise on appeal.

10 SJNA's fourth assignment of error is denied.

11 **FIRST ASSIGNMENT OF ERROR (BOUTARD)**

12 Petitioners Boutard and Watters (Boutard) argue that the  
13 challenged zone change with respect to the eight-acre lot  
14 zoned OS fails to preserve open space and thus is inconsistent  
15 with policies in the city's comprehensive plan (plan) that,  
16 according to Boutard, mandate preservation of open spaces.  
17 Boutard interprets those policies as requiring that once a  
18 property is zoned OS, it cannot be rezoned.

19 The decision states on this point:

20 "Mr. Boutard argued that the open space policies in  
21 the plan are absolute requirements that cannot be  
22 balanced as required by the zoning code. The  
23 Council does not accept Mr. Boutard's  
24 interpretation.

25 "Mr. Boutard would have this Council agree that all  
26 open space designations, once made, are locked in  
27 concrete forever after. But such an interpretation  
28 is inconsistent with the plan's own recognition that  
29 its provisions and map designations are subject to  
30 appropriate change as necessary over time. We  
31 interpret the plan as necessarily retaining elements  
32 of flexibility, lest it become irrelevant or inflict

1 hardship as circumstances change over time." Record  
2 67.

3 The decision interprets PCC 33.810.050(A)(1) to permit  
4 the city council to balance comprehensive plan policies with  
5 respect to open space and housing in determining whether a  
6 proposed redesignation complies with the plan.<sup>2</sup> Record 67.  
7 We are required to affirm the city's interpretation of its  
8 land use regulations unless that interpretation is  
9 inconsistent with the express language, purpose or policies  
10 underlying its plan or land use regulations. ORS  
11 197.829(1)(a)-(c). We agree with intervenor that the  
12 council's interpretation, permitting it to balance competing  
13 plan policies and thus change the OS designation, is not  
14 inconsistent with the city's plan or land use regulations.  
15 Accordingly, we affirm that interpretation.

16 Boutard's first assignment of error is denied.

17 **SECOND ASSIGNMENT OF ERROR (BOUTARD)**

18 Boutard challenges the decision's finding that the area  
19 is adequately served by other parks and the property is not  
20 needed as park land, as not supported by substantial evidence.

21 The decision relies on evidence that Pier Park is three  
22 blocks away from the subject property, that the subject  
23 property is vacant and has not been developed or maintained as

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<sup>2</sup>PCC 33.810.050(A)(1) provides:

"The requested designation for the site has been evaluated against the relevant Comprehensive Plan policies and on balance has been found to be equally or more supportive of the plan as a whole than the old designation."

1 a park, and that the city Parks Bureau considers the property  
2 to be surplus for parks purposes. Boutard cites to evidence  
3 that the property has been considered a park at various times  
4 in the past, and that it is suitable for a park. The evidence  
5 upon which Boutard relies does not undermine the city's  
6 conclusion that the area is adequately served by parks and the  
7 property is not needed for park purposes. The city's finding  
8 is supported by substantial evidence.

9 Boutard's second assignment of error is denied.

10 **THIRD ASSIGNMENT OF ERROR (BOUTARD)**

11 Boutard argues that the decision was made in a manner  
12 that was unfair and biased, because (1) Commissioner Sten made  
13 a comment on the record about the proposed subdivision,  
14 although he had recused himself from the vote; (2)  
15 Commissioner Kafoury did not fully disclose discussions with  
16 Sten about intervenor when Sten was on her staff, or recuse  
17 herself on that basis; and (3) Commissioner Hales expressed  
18 support for intervenor's proposed subdivision before  
19 considering the application and was thus "predisposed" to  
20 approve the project.<sup>3</sup>

21 With respect to Commissioner Sten's alleged

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<sup>3</sup>Boutard at several places in his brief refers to the alleged impartiality of the three commissioners as constituting "personal interest." However, a "personal interest" in this context means a financial or similar interest in the outcome of the decision. See 1000 Friends v. Wasco County Court, 304 Or 76, 82-83, 742 P2d 39 (1987). Boutard does not allege that any of the commissioners has a financial interest in this application. To the extent Boutard argues that a policy interest in the subject of affordable housing disqualifies the three commissioners, Boutard is incorrect. 304 Or at 82-83.

1 participation, the record shows that, in response to a  
2 statement by Commissioner Kafoury that she believes the  
3 project will enhance the neighborhood, Commissioner Sten  
4 "agreed that well-designed projects help a neighborhood."  
5 Record 154. Both remarks were in response to a specific  
6 request by a citizen that Commissioners Kafoury and Sten  
7 address the development's impact on neighborhood livability.  
8 Commissioner Sten did not make further remarks on the record  
9 or participate in the voting.

10 The decision finds that Commissioner Sten's "past  
11 association with [intervenor] has not been and is not a factor  
12 in our decision." Record 75. Under these circumstances, we  
13 conclude that Boutard has not established that Commissioner  
14 Sten's noncommittal remark had any effect on the decision,  
15 much less that it resulted in a biased or partial decision.

16 With respect to Commissioner Kafoury, Boutard alleges  
17 that she received information about the project through an "ex  
18 parte" contact with Sten, who was then her staff member, and  
19 did not fully disclose that information or contact. During a  
20 September 1996 meeting, Commissioner Kafoury disclosed that:

21 "a member of her staff, Eric Sten, serves on the  
22 HOST Board and she has worked with HOST on a number  
23 of projects and had a vague briefing about this  
24 months ago when planning was in the formative  
25 stages. However she has not been contacted about  
26 this specific proposal." Record 410.

27 However, communication between city staff and the  
28 governing body is, by definition, not an "ex parte" contact.  
29 ORS 227.180(4); Holladay Investors Ltd. v. City of Portland,

1 22 Or LUBA 90, 94 (1991). This is true even when the staff  
2 member has a personal involvement in the subject of a  
3 subsequent land use application. Nehoda v. Coos County, 29 Or  
4 LUBA 251, 257 (1995) (conversation between commissioner and  
5 intervenor, then a county compliance officer, about property  
6 owned by intervenor that was later subject to a county  
7 decision, did not constitute ex parte contact that the  
8 commissioner was required to disclose). We conclude that  
9 Commissioner Kafoury was not required to disclose any  
10 communication between her and Sten, and thus, if there was any  
11 deficiency in her disclosure, it is not a basis for reversal  
12 or remand.

13 With respect to Commissioner Hales' "predisposition" to  
14 approve the project, Boutard cites a 1995 letter from the  
15 Parks Bureau director expressing his knowledge that  
16 Commissioner Hales (who oversees the Parks Bureau) is "very  
17 supportive" of intervenor's plans for the property. Record  
18 1230. In August 1996, Commissioner Hales wrote a letter in  
19 his capacity as Parks Bureau commissioner that expressed his  
20 "complete support and approval" of the project. Record 488.  
21 Boutard argues from this evidence that Commissioner Hales had  
22 "prejudged" the application and was incapable of making, and  
23 did not make, the decision by applying relevant standards  
24 based on the evidence and argument presented. Jackman v. City  
25 of Tillamook, 29 Or LUBA 391, 400 (1995); Knapp v. City of  
26 Jacksonville, 20 Or LUBA 189, 206 (1990).

1           We disagree. Petitioner has the burden of establishing  
2 personal bias in a decisionmaker in a "clear and unmistakable"  
3 manner. Knapp, 20 Or LUBA at 189 (quoting Schneider v.  
4 Umatilla County, 13 Or LUBA 281, 284 (1985)). The two letters  
5 Boutard cites do not establish that Commissioner Hales was  
6 incapable of reaching a decision based on the evidence and  
7 argument. The city council held four separate hearings,  
8 adopted 14 pages of supplemental findings addressing issues  
9 raised by opponents, and found that its unanimous decision was  
10 based on "the preponderance of evidence in the record."  
11 Record 75. The findings apply over 30 plan policies and  
12 numerous relevant provisions of the city code. Boutard has  
13 not established either that Commissioner Hales had prejudged  
14 the issue or that the city did not apply the relevant approval  
15 criteria and make the decision based on evidence and argument.

16           Boutard's third assignment of error is denied.

17 **FOURTH ASSIGNMENT OF ERROR (BOUTARD)**

18           Boutard contends that the decision violates a "trust  
19 obligation" to protect sensitive public resources for the  
20 benefit of all citizens. Boutard argues that there is no  
21 legal framework or formal process for transforming publicly  
22 owned land into development sites, and without such framework  
23 any decision by the council is arbitrary and ultra vires.

24           Intervenor correctly responds that any such argument is,  
25 at best, premature, as the decision merely rezones the  
26 property, and has not disposed of it in any way. Even if it

1 had, the city is permitted to dispose of property not needed  
2 for public use. ORS 271.310(1). In any case, it is not clear  
3 that mere public ownership of land imposes any "public trust"  
4 obligations that would prevent the city from disposing of land  
5 under these circumstances. Seafeldt v. Port of Astoria, 141  
6 Or 418, 423, 16 P2d 943 (1933) (until property is put to  
7 public use, no public trust is imposed). We agree with  
8 intervenor that Boutard has not established that any "public  
9 trust" obligations exist with respect to the property, or that  
10 the decision violates them.

11 Boutard's fourth assignment of error is denied.

12 The city's decision is affirmed.