BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HALVORSON-MASON CORPORATION,
Petitioner,

vs.

CITY OF DEPOE BAY,
Respondent.

LUBA No. 2000-118

FINAL OPINION
AND ORDER

Appeal from City of Depoe Bay.

D. Daniel Chandler and Sarah E. Kamman, Vancouver, Washington, filed the petition for review. With them on the brief was Schwabe, Williamson & Wyatt. D. Daniel Chandler argued on behalf of petitioner.

Jeannette M. Launer, Pacific City, filed the response brief and argued on behalf of respondent.

BRIGGS, Board Chair, and BASSHAM, Board Member, participated in the decision.

HOLSTUN, Board Member, concurring.

REMANDED 04/19/01

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a city decision denying a business license modification to operate a real estate sales office within a residential planned unit development (PUD).

FACTS

Little Whale Cove is an inlet located on the Oregon coast in the city limits of the City of Depoe Bay. In 1975, the project developer, Halvorson-Mason Corporation (petitioner) submitted plans for a new PUD, to be known as Little Whale Cove. The Little Whale Cove PUD superseded a prior condominium project that was approved for the property in 1973. The Little Whale Cove PUD proposed 150 single-family residences, 150 condominiums, and 12 ancillary dwelling units. The amenities of the Little Whale Cove PUD include a recreation center.

When the Little Whale Cove PUD application was submitted in 1975, both the county and the city reviewed and approved the application because the subject property was located within both the city and the unincorporated area of the county. At that time, the city did not have its own zoning code and both the city and the county applied the Lincoln County Zoning Code (LCZC) to the Little Whale Cove application. Also at that time, LCZC 3.090(2)(a) authorized any permitted or conditional use in any zone to be allowed in a PUD zone.[1] The county's pertinent zoning ordinance provision permitted a "[t]emporary real estate sales office in a legally recorded subdivision." LCZC 3.010(2)(f). When the city's zoning ordinance was adopted in 1976, the portion of the property located within city limits was zoned R-4 PD. The R-4 PD zone permits uses, including commercial uses, that have

[1] LCZC 3.090(2)(a) provided:

> "A planned development may include any uses and conditional uses permitted in any zone except uses and conditional uses permitted only in an M-1 zone. Standards governing area, density, yards, off-street parking, or other requirements shall be guided by the standards that most nearly portray the character of the zone in which the planned development is proposed."

been approved as part of the development plan for the PUD. After 1976, the remaining unincorporated portion of Little Whale Cove was annexed to the city.

In 2000, petitioner applied for a modification of its business license to allow it to employ a licensed realtor in the Little Whale Cove real estate sales office. In the course of the proceedings before the city, it was determined that the city files did not contain a map or plan for the 1976 approval of Little Whale Cove. Under the ordinance in effect in 1976, a map or plan would have been required. On April 28, 2000, the city recorder denied the business license modification, basing her denial in part on a finding that the city's files contained a building permit application for the real estate sales office, but no approved building permit. Petitioner appealed the city recorder's decision to the city council. While the appeal was pending, petitioner found the building permit approval and the planning commission meeting minutes acknowledging approval of the permit in 1977.[2]

The city council held a hearing on petitioner's appeal on July 5, 2000. The record was kept open for seven days to allow petitioner time to respond to new material submitted during the hearing. The following week, the council deliberated on the matter and voted 5-1 to affirm the city recorder's decision to deny the modification application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that two city councilors should have recused themselves from the proceedings below because (1) they are both residents of Little Whale Cove and have a partial ownership interest in the recreation center where the sales office is located, and (2) in the case of one of the councilors, his personal bias and prejudgment of the matter rendered

[2]While the parties dispute the legality of the permit for the real estate sales office, no one disputes that petitioner or its agents have used an office within the recreation center to conduct real estate sales for a majority of the time the Little Whale Cove PUD has existed.

him incapable of participating as an impartial decision maker.[3]

A. Conflict of Interest

During the proceedings below, two councilors who reside within Little Whale Cove announced that they lived within the development. Both councilors also indicated that the mere fact that they were residents of Little Whale Cove did not, in their minds, prevent them from participating in the appeal proceedings. The July 5, 2000 minutes of the proceedings before the city council state that one councilor remarked

> "that she is a homeowner in Little Whale Cove and as a member of that significantly large class, she has at most a minor potential conflict of interest relating to this issue. [She] continued that she has deliberately and consistently made effort to avoid any ex parte contact and intends to consider the evidence presented in an impartial and fair manner." Record 40.

The minutes reflect that the second councilor announced that he was of the "same class of persons as described by" the first councilor. *Id.*

When an elected official is "met with a potential conflict of interest," ORS 244.120(2)(a) requires that the elected official "announce publicly the nature of the potential conflict prior to taking any action." If an elected official is met with an "actual conflict of interest," the elected official must "refrain from participating as a public official in any discussion or debate on the issues out of which the actual conflict arises or from voting on the issue." ORS 244.120(2)(b)(A). ORS 244.020(1) defines "actual conflict of interest" as:

> "* * * any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person * * * unless the pecuniary benefit or detriment arises out of * * *:
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> "[An] action in the person's official capacity [that] would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class

[3]In support of the latter contention, petitioner seeks to present evidence outside of the record to demonstrate the councilor's bias. We address the motion to take evidence outside of the record in our discussion of petitioner's bias argument.

> consisting of an industry, occupation or other group including one of which or in which the person * * * is a member * * *."

We do not believe that the status of the councilors as residents of Little Whale Cove is an actual conflict of interest that would require those councilors to refrain from participating in a decision involving uses of property within the development. Therefore, the councilors were required only to disclose their interest at some point during the proceedings, and declare whether, as a result, they believed that the interest prevented them from participating in the decision. *ODOT v. City of Mosier*, 36 Or LUBA 666, 680 (1999). We believe that the councilors adequately expressed their status as residents of Little Whale Cove, and explained why that status alone did not affect their ability to render an impartial decision.

B. Bias

Petitioner also argues that one of the councilors should have recused himself from participating as a decision maker in the matter because he demonstrated a bias against petitioner and Carl Halvorson, one of petitioner's principals. Petitioner moves to consider evidence not in the record to demonstrate the bias of that councilor.

OAR 661-010-0045(1) provides, in relevant part:

> "The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, * * * ex parte contacts, * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision."

Petitioner submits two documents not in the record to show the bias of the city councilor. The first is a letter from the city councilor to the mayor and other members of the city council. The letter is dated April 6, 2000, prior to the date of the city recorder's decision denying the modification application. In the April 6, 2000 letter, the city councilor describes

the application, applies the city's code to the application, and concludes that petitioner does not have the right to use the recreational building within Little Whale Cove.[4]

The second document is a memorandum dated July 1, 2000, from the same city councilor to the mayor, asking the mayor to consider recusing himself from the appeal proceedings. According to the memorandum, the mayor made statements during city council meetings indicating his desire for the residents of Little Whale Cove to resolve the matter of the sales office without involving the city. The councilor stated his belief that the mayor's statements meant two things:

> "(1) that it would be your desire to exclude Little Whale Cove from any benefit of zoning code enforcement by the City, and (2) that you would condone a potentially illegal agreement to subvert a zoning ordinance." Petition for Review, Appendix E.

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[4]The letter states:

> "It has been documented in the proceedings pertaining to the * * * denial [of the real estate sales office in Little Whale Cove] that in the original application for the [Little Whale Cove] Planned Unit Subdivision the developer stated in writing that 'no commercial activity is planned.' The applicable county zoning ordinance provided for a 'temporary sales office' as a conditional use in an R4 zone. No conditional use permit was ever applied for or issued. The ordinance language for a Planned Unit Subdivision allows the combining of different zones but nowhere does the language state (as contended by [petitioner]) that all conditional [uses] become outright uses when a Planned Unit Subdivision is created. There is, therefore, no legally based conditional or nonconforming use established for such an office.
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> "Ordinance 111, (which has been deemed by legal counsel and the Planning Commission to be applicable to the [Little Whale Cove PUD]) Section 3.180, Phase Development, Paragraph 3 states: 'If the subdivision is a planned unit subdivision, each phase must be able to qualify for approval independently from the balance of the approved tentative plan.' This would seem to mean that a second, or any subsequent phase of an older planned unit subdivision could not carry with it any 'grandfathered' special condition (if one existed) that was provided for in the tentative approval. [Petitioner's] application for a permit to operate a commercial real estate sales office in [Little Whale Cove] is for the purpose of selling properties in phases developed within the last ten years. Under the applicable City zoning ordinance only a transparent home occupation is permissible in an R4 zone.
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> "[Petitioner] has the same unfettered ability to sell [its] properties as any other owner in the City through the engagement of a professional real estate sales firm * * * by establishing an off premis[es] office in a commercial zone, or through the use of 'For sale by owner' signs and advertising." Petition for Review, Appendix D.

Petitioner contends that these two letters, combined with other evidence in the record, demonstrate actual bias and prejudgment of the application by the city councilor.[5]

The city responds that the evidence petitioner seeks to introduce merely supplements evidence that is already in the record. According to the city, petitioner raised the issue of bias below, and the councilor responded to the allegation in writing, stating

> "* * * All of the [evidence demonstrating bias] deals with written and oral statements. I am a firm believer that actions are, in the long run, a more true indicator of fairness or bias. I believe also that the venue in which any action is taken or any statement made has great significance in evaluating the question of fairness or bias. It is a matter of public record that I have testified before the Depoe Bay Planning Commission in support of a Halvorson-Mason Corporation application." Record 39.

The city argues that it is not necessary to consider additional evidence outside the record to support petitioner's allegations of bias. According to the city, LUBA's consideration of

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[5]That other evidence includes a series of letters from December 1997 through March 2000 by the city councilor, where the councilor

(1) accuses petitioner and Carl Halvorson of "Tijuana street vendor-style sales tactics." Record 50. According to the councilor, he made that statement because of "(1) the practice of Carl Halvorson to sit in his car (parked outside of the security gate) for hours on end using his remote control device to open the gate for each and every car that turned into the entry road from Highway 101 and (2) the practice of [petitioner's] employees of standing in the entry road to stop entering vehicles for the purpose of interrogating the car's occupants with regard to their interest in properties for sale." Record 37-38.

(2) accuses the chairman of the Little Whale Cove Homeowners Association of "grasping at straws to protect Carl Halvorson (and [petitioner]) from the legal dilemma of having sought a criminal complaint against me for allegedly removing a paper sign that he had affixed to homeowner property without authorization to do so." Record 51.

(3) along with other residents of the development, urges residents of Little Whale Cove to vote against proposed amendments to the development's covenants, conditions and restrictions (CC&Rs). In that letter, the city councilor and other residents of the development point out that one of the amendments would allow petitioner to "operate a full-fledged real estate sales office in the heart of our residential community." Record 51.

(4) accuses petitioner of using "scare tactics" to influence homeowners to vote in favor of the proposed CC&Rs. Record 52.

petitioner's evidence in this case would set a new standard for receiving evidence, one that would allow evidence to supplement the evidence included in the record.[6]

ORS 197.835(9)(a)(B) permits this Board to reverse or remand a decision where a local government fails "to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights" of the parties. The substantial rights of the parties include "the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing." *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). 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). *Torgeson v. City of Canby*, 19 Or LUBA 511, 520 (1990).

Actual bias sufficiently strong to disqualify a decision maker must be demonstrated in a clear and unmistakable manner. Petitioner has the burden of showing that a decision maker was incapable of making a decision based on the evidence and argument before him. *Lovejoy v. City of Depoe Bay*, 17 Or LUBA 51, 66 (1988). In this case, the evidence in the record, although certainly persuasive, might not suffice to demonstrate "in a clear and unmistakable manner" that the city councilor prejudged petitioner's application, or that the councilor was so personally involved in matters closely related to the subject application that he could not render an impartial decision based on the criteria and the evidence before him. It is the evidence outside the record that petitioner seeks to introduce that squarely presents the question of prejudgment and bias. Therefore, it is appropriate to consider that evidence in our review of petitioner's first assignment of error.

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[6]In addition, the city argues that petitioner should not be allowed to submit evidence after the proceedings before the city have concluded, without a showing that petitioner was unable to obtain the evidence before the city's decision was final. In this case, the city argues that the two documents were created before the city's decision was made on July 18, 2000, and petitioner never requested that those documents or other documents that were generated by the city council and may have been relevant to the proceedings be disclosed prior to the time the city closed the record to new evidence. We have never required that a party to a land use proceeding, during the course of that proceeding, demand that the decision maker disclose any and all documents that may have been generated by the decision makers in the course of the land use proceedings, when the party is not aware that any documents had been so generated. The city has not shown that petitioner was aware of the disputed documents prior to the close of the proceedings, or otherwise sat on its rights, so as to warrant a denial of petitioner's motion.

The standard for determining bias is whether the decision maker

> "prejudged the application, and did not reach a decision by applying relevant standards based on the evidence and argument presented [during the quasi-judicial proceedings]." *Oregon Entertainment Corporation v. City of Beaverton*, 38 Or LUBA 440, 445 (2000), *aff'd* 172 Or App 417, __ P3d __ (2001) (*quoting Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993)).

We believe that the two documents and the other evidence discussed above clearly demonstrate that the city councilor had formed an opinion regarding the legality of the real estate sales office prior to receiving evidence during the course of the city council proceedings, and advocated his position to other members of the council. The contrary evidence proffered by the city to show that the city councilor considered the evidence from the record, and formed a decision based on it, is not believable when viewed in context with the contrary evidence. We conclude from the evidence that in this case, the city councilor prejudged the application before the city council. In view of his history of actively opposing the siting of a real estate sales office within the Little Whale Cove PUD, it is clear that he had prejudged the application and was incapable of rendering an impartial decision based on the application, evidence and argument submitted during the city's proceedings on the application.

The city argues that, even if that councilor failed to judge the application on its merits, the city council as a whole considered the matter and applied the law to the facts. According to the city, petitioner has not demonstrated that bias on the part of one decision maker affected the votes cast by two other council members.

We disagree that petitioner must demonstrate that a majority of the decision makers were influenced by the bias of one of the decision makers, or were themselves biased, before a reversal or remand is warranted under ORS 197.835(9)(a)(B). Petitioner is entitled to a "full and fair hearing." *Muller*, 16 Or LUBA at 775. The bias of one city councilor, particularly one who is a longstanding active opponent of the idea of a real estate sales office within Little Whale Cove, prevented petitioner from receiving a full and fair hearing.

The first assignment of error is sustained, in part.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

In the second assignment of error, petitioner argues that the same city councilor who prejudged its application initiated *ex parte* contacts regarding the existence of real estate sales offices within the Little Whale Cove PUD. In the third assignment of error, petitioner asserts that the city's decision is not supported by substantial evidence. In the fourth assignment of error, petitioner contends that the city misconstrued its code and applicable rules of evidence to conclude that the existing real estate sales office was not legally operating within the recreation center.

Our disposition of the first assignment of error requires that we remand this decision to afford the city the opportunity to review the application without the participation of the biased commissioner. If the other councilors were made aware of the alleged *ex parte* contacts, then it may be prudent for these councilors to disclose the contacts during proceedings on remand and allow the parties an opportunity to rebut those contacts.[7] *Opp v. City of Portland*, 38 Or LUBA 251 (2000), *aff'd* 171 Or App 417, ___ P3d ___ (2001). The third and fourth assignments of error go to the merits of the city's decision. Because the city must issue a new decision on remand, it would be premature to resolve those assignments of error at this time.

The city's decision is remanded.

Holstun, Board Member, concurring.

I believe the letters described in footnote 5 of the majority opinion are sufficient, by themselves, to demonstrate "in a clear and unmistakable manner" that the city councilor who wrote those letters had become too involved with active community opposition to the disputed real estate office to participate objectively as a decision maker in this matter.

[7]Accordingly, we deny petitioner's corresponding request to consider evidence outside of the record regarding the city councilor's alleged *ex parte* contacts.

Therefore, although I entirely agree with the result reached by the majority, I do not believe it is necessary to grant petitioner's motion to take evidence that is not in the record. In my view, that evidence simply makes all the clearer what the evidence in the record already shows.

LUBA has consistently rejected bias claims based on generalized suspicions about the ability of a decision maker to put aside personal philosophies or friendly feelings or less than friendly feelings about a party and render a decision on a land use permit application on its merits. *Oregon Entertainment Corporation v. City of Beaverton*, 38 Or LUBA at 445; *Gearhard v. Klamath County*, 7 Or LUBA 27, 31 (1982); *Northeast Neighborhood Association v. City of Salem*, 4 Or LUBA 260, 261 (1981); *Miller v. City of Portland*, 2 Or LUBA 363, 367-68 (1981), *aff'd* 55 Or App 633, 639 P2d 680 (1982). This case presents a very different situation. The city councilor had every right as a citizen of the community to take a very active and personal interest in specifically opposing the disputed real estate office before and after the application at issue in this appeal was submitted. However, the nature and extent of the councilor's prior opposition to the disputed real estate office makes his statement that he could nevertheless render an impartial decision in this matter simply implausible. After taking such an active role in opposing the real estate sales office, I believe recusal was his only option.

Finally, I recognize that *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 588 P2d 640 (1978) might be read to support a conclusion contrary to the one that the majority and I reach here.[8] However, if the city councilor's longstanding leadership in opposing the disputed real estate sales office does not demonstrate the kind of bias and

[8]That case involved a comprehensive plan map amendment, which required action by the board of county commissioners. Two county commissioners disqualified themselves from voting, one of them doing so because he had participated as a member of a citizen planning organization in support of the application. 37 Or App at 748 n 2. The three remaining commissioners voted 2-1 in favor of the application, but under the county's charter three affirmative votes were required for any action. *Id.* at 749. The disqualifications therefore meant no action could be taken on the application.

prejudgment that disqualifies him as a decision maker in this case, I cannot imagine a set of circumstances that would. In addition, unlike *Eastgate Theatre*, it does not appear that the city councilor's disqualification in this matter would prevent a final decision on the application on remand.