BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEREMY D. M. HOWARD,
Petitioner,

vs.

CITY OF MADRAS,
Respondent.

LUBA No. 2000-269

FINAL OPINION
AND ORDER

Appeal from City of Madras.

Jeremy D. M. Howard, Madras, filed the petition for review and argued on his own behalf.

Sharon R. Smith, Bend, filed the response brief and argued on behalf of respondent. With her on the brief were Robert S. Lovlien and Bryant, Lovlien & Jarvis.

BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 11/30/2001

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 revoking site plan approval for a tobacco shop.

FACTS

In January 2000, petitioner filed an application for a one-year temporary site plan approval for a tobacco shop to be operated out of a temporary modular building. The city approved the application subject to certain conditions, including landscaping and paving, and that a site plan application for a permanent structure be filed within one year. Petitioner also received approval for two reader board signs on the property.

In June 2000, the city notified petitioner that he was not in compliance with the conditions of approval of his site plan approval and set a revocation hearing before the city planning commission. In July 2000, the planning commission granted petitioner an extension of time to comply with the landscaping and paving conditions as well as to comply with the city's sign ordinance. In October 2000, the planning commission resumed the revocation hearing and found that petitioner was not in compliance with the landscaping and paving conditions of approval and not in compliance with the city's sign ordinance. The planning commission then revoked petitioner's site plan approval. Petitioner appealed the decision to the city council, which upheld the planning commission's revocation. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city committed a procedural error by allowing a city planning commissioner to testify before the city council in favor of revoking the site plan approval after the close of the scheduled evidentiary hearing and by refusing to allow petitioner to rebut the planning commissioner's testimony. The city responds that the planning commissioner's testimony was properly allowed as part of the staff comment portion of the hearing and that the comments did not address relevant criteria.

Madras Ordinance (MO) 9.15(1)(e) sets forth the order of presentation for public hearings, which concludes with staff comments.[1] The city contends that the planning commissioner's comments were properly allowed as part of the staff comments portion of the hearing. The planning commissioner, however, was not a staff member but a member of the public who was allowed to speak in favor of revoking petitioner's permit at the discretion of the city council. Record 72. Petitioner asked for the opportunity to rebut the planning commissioner's testimony, but the city refused his request. *Id*. We agree with petitioner that the planning commissioner's testimony was new evidence, and the city erred in determining that it was merely additional staff comment.

A local government's failure to follow the applicable procedures in a manner that prejudices a party's substantial rights is a basis for reversal or remand. ORS 197.835(9)(a)(B). A party's substantial rights include the opportunity to rebut evidence that is potentially relevant to applicable criteria. *Jackman v. City of Tillamook*, 29 Or LUBA 391, 402-03 (1995). The planning commissioner testified that petitioner's comparison of his business with three other businesses in the vicinity that were not required to build a permanent structure was inaccurate because those businesses were operating under conditional use permits that allow temporary structures. Record 72. Petitioner asserts that had

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[1] MO 9.15(1)(e) provides the following presentation order for public hearings:

"(1) Staff report;

"(2) Proponent's presentation;

"(3) Opponent's presentation;

"(4) Interested parties;

"(5) Proponent's rebuttal;

"(6) Staff comments;

"(7) Questions from or to the chair may be entertained at any time at the hearings body's discretion."

he been allowed to rebut the planning commissioner's testimony, he would have introduced evidence that the three other businesses were not operating under conditional use permits, but rather under site plan approvals like his own, yet they were not required to install permanent structures.

The bases for the city's revocation of petitioner's site plan permit, however, had nothing to do with the installation of a permanent structure. The bases for the revocation were petitioner's failure to comply with conditions of approval pertaining to landscaping, paving, and signage. Record 95-96. The planning commissioner's testimony did not concern criteria relevant to revocation of the site plan approval. Therefore, petitioner's substantial rights were not prejudiced by the city's error in accepting the testimony of the planning commissioner after the evidentiary portion of the hearing had closed. The city's procedural error does not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that one of the city councilors was biased when he considered petitioner's appeal. Petitioner's basis for this argument is a transcript of a telephone call between petitioner and the city councilor that occurred on September 27, 2001, approximately 10 months *after* the city adopted the challenged decision. The transcript is attached to the petition for review. The transcript allegedly demonstrates that the city councilor prejudged petitioner's appeal. The city objects to any consideration of the transcript on grounds that it is not part of the record and that even assuming the alleged statements were made, they do not demonstrate that the city councilor prejudged the matter. In response to the city's objections, petitioner filed a motion to take evidence not in the record to allow consideration of the transcript.[2]

[2] OAR 661-010-0045(1) provides:

Under ORS 197.835(9)(a)(B), LUBA will 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. A party's substantial rights 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). A biased decision maker substantially impairs a petitioner's ability to receive a full and fair hearing. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 742 P2d 39 (1987). A demonstration of actual bias on the part of a decision maker will generally result in reversal or remand of the decision. *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710-11 (2001).

The standard for determining actual 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 quasi-judicial proceedings]." *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445 (2000), *aff'd* 172 Or App 361, 19 P3d 918 (2001) (*quoting Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993)).

Evidence that would support "[i]nferences of favoritism toward one side or another are insufficient." *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985). A party alleging disqualifying bias must "show clearly that a public official is incapable of making a decision on the basis of evidence and argument [in the record]." *Id*.

The transcript of the telephone conversation indicates that petitioner called the city councilor in the evening approximately ten months after the final decision had been adopted.

> "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, standing, *ex parte* contacts, actions for the purpose of avoiding the requirements of ORS 215.428 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *"

For the reasons explained below in the text, we agree with the city that even if disputed statements in the transcript were made, *i.e.*, the *facts* are as petitioner alleges, those *facts* do not support petitioner's *legal* conclusion that the city councilor is biased. Because petitioner fails to demonstrate the disputed allegations of fact, "if proved, would warrant reversal or remand of the decision," a motion to take evidence under OAR 661-010-0045(1) is not warranted. For that reason the motion to consider evidence outside the record is denied.

Upon petitioner identifying himself and the status of his case, the city councilor had at best a vague recollection of petitioner's appeal and stated that he would have to check the minutes to recall any particulars about the hearing. Petitioner continued to press the city councilor regarding whether he had made up his mind prior to the appeal hearing. The city councilor finally responded affirmatively to petitioner's continued insistence that the councilor had decided to affirm the planning commission prior to the appeal hearing. Petitioner asserts that this demonstrates that the city councilor prejudged the matter.

We believe petitioner misconstrues the councilor's comments. When asked early in the conversation whether he had prejudged the matter, the city councilor responded that he had not, but rather had based his decision on the planning commission decision. The more likely explanation for the city councilor's ultimate agreement with petitioner is that his first impression of the planning commission's decision was that it was correct and that he heard nothing during the course of petitioner's appeal to cause him to decide otherwise. Local government decision makers are certainly permitted to review the record prior to a hearing and to draw preliminary conclusions, as long as they consider all evidence and argument presented during the hearing in making their final decision. Petitioner has not shown that the city councilor did anything more than form a preliminary conclusion. The transcript of the telephone conversation between petitioner and the city councilor does not demonstrate that the city councilor prejudged the application. Therefore, petitioner's substantial rights were not prejudiced by the councilor's participation during the city council proceedings.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city violated his equal protection rights under the 14th Amendment to the United States Constitution and Article 1, section 20, of the Oregon Constitution. According to petitioner, he belongs to a class of people who are proponents of tobacco use and his business was treated unequally because of his membership in this class.

Generally, LUBA will not consider constitutional claims that are not supported by legal argument. *Sparks v. Tillamook County*, 30 Or LUBA 325, 330 (1996). Petitioner's only support for his equal protection claim is his claim that he was required to obtain a permanent business structure while three drive-through coffee businesses that operate out of temporary structures similar to petitioner's have not been required to acquire permanent structures. Bare reference to tobacco users as a distinct class does not provide a legal argument sufficient to show why that class of persons merits particular consideration under either the federal or state constitution. We therefore reject petitioner's claim. Furthermore, even if petitioner had raised a cognizable equal protection claim, it would fail. The city revoked petitioner's site plan permit due to his failure to comply with landscaping, paving, and signage requirements. The revocation had nothing to do with whether or not petitioner would be required to eventually provide a permanent structure. Therefore, the treatment of a tobacco business in comparison to the treatment of the coffee businesses is irrelevant to the city's revocation of petitioner's site plan permit and cannot provide the basis for an equal protection claim.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioner alleges that the city's decision is not supported by substantial evidence. Petitioner attacks the evidentiary support for the city's finding that petitioner was in violation of the city's sign ordinance. In particular, petitioner asserts that he had already obtained approval for the reader board signs that were displayed on the property. The city acknowledges that some confusion may exist regarding the extent of petitioner's sign approvals, but insists that in addition to the approved signs, petitioner's business has other signs that are in violation of the sign ordinance. We need not address this issue because even if the city's decision regarding the sign ordinance violation is not supported by substantial evidence, that does not provide a basis for reversal or remand of the decision because petitioner has not challenged the city's alternate grounds for revocation.

Unlike approval of an application for development, where generally all of the approval criteria must be satisfied, a revocation of a permit is more analogous to a denial of an application in that any basis of denial is sufficient to support the revocation decision. Because the challenged decision is a revocation of a permit rather than an approval, the city need only adopt a single adequate basis for the revocation. *Gionet v. City of Tualatin*, 30 Or LUBA 96, 98 (1995) (failure to meet one applicable criterion sufficient to sustain a denial). When a petitioner fails to assign error to each of the adopted bases for revocation or denial of a permit, the challenged decision must be affirmed. *Garre v. Clackamas County*, 18 Or LUBA 877, *aff'd* 102 Or App 123, 792 P2d 117 (1990) (a petitioner must challenge all bases for a denial). In the present case, petitioner has not challenged the city's findings that he is in violation of his site plan approval regarding landscaping and paving. Moreover, there is substantial evidence in the whole record to support those findings. Record 64, 66. Therefore, the city's decision cannot be reversed or remanded on evidentiary grounds.

The fourth assignment of error is denied.

The city's decision is affirmed.