

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 FRIENDS OF JACKSONVILLE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF JACKSONVILLE,
10 *Respondent,*

11 and

12
13
14 FIRST PRESBYTERIAN CHURCH
15 OF JACKSONVILLE,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2001-132

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Jacksonville.

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25 Tonia L. Moro, Medford, filed the petition for review and argued on behalf of
26 petitioner.

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28 No appearance by City of Jacksonville.

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30 John R. Hassen, Medford, filed the response brief. With him on the brief were Alan
31 D. B. Harper and Hornecker, Cowling, Hassen and Heysell, LLP. Alan D. B. Harper argued
32 on behalf of intervenor-respondent.

33
34 BRIGGS, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
35 participated in the decision.

36
37 REMANDED

05/14/2002

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

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NATURE OF THE DECISION

Petitioner appeals a city decision approving a conditional use permit to construct a church on a 10-acre parcel zoned Urban Reserve Overlay, five-acre minimum lot size (UR-5).

FACTS

The subject property is a vacant 10-acre parcel located in Phase II of the Pheasant Meadows subdivision. The conditions of approval for the subdivision provided that the subject property shall be subject to deed restrictions limiting subdivision of the property to two five-acre lots. However, the developer never proceeded with Phase II and the subject property was ultimately sold to the First Presbyterian Church of Jacksonville (First Presbyterian Church or intervenor). The subject property is located outside the city’s urban growth boundary, but within the eastern periphery of the city limits. It is bordered on the south and east by rural lands outside the city, on the north by developed residential lots, and on the west by Middle Street.

Intervenor currently conducts church functions in an historic church near the city center, with a capacity of 125 persons, and in a nearby high school gym. Current attendance often exceeds 300. In July 1999, intervenor applied to the city for a conditional use permit to construct an 18,000-square foot church on the subject property that would accommodate up to 448 persons. A staff report recommended approval with conditions. The city planning commission conducted hearings in September and October 1999 and, on November 15, 1999, the planning commission voted to deny the application. Intervenor appealed to the city council, which conducted a series of hearings. The city council initially voted to reverse the planning commission and approve the application, with additional conditions. However, the city council could not agree on the conditions and, on March 2, 2000, voted to affirm the

1 planning commission's decision, thus denying the application. The city council vote was 4-3
2 in favor of affirming the planning commission.

3 Intervenor then appealed the city's denial to LUBA. While the case was pending
4 before LUBA, the city held elections for city council. Two new city councilors were elected.
5 They replaced two city councilors who had voted in the majority to deny intervenor's
6 application. After the two new councilors took office, the city and intervenor requested that
7 the city's decision be remanded to the city for further proceedings. That request was granted
8 on February 21, 2001. *First Presbyterian Church v. City of Jacksonville*, __ Or LUBA __
9 (LUBA No. 2000-041, February 21, 2001).

10 On remand, the city council conducted a public hearing on April 3, 2001. At that
11 hearing, petitioner filed a "motion for recusal" with respect to three councilors, including one
12 of the newly elected councilors, on the grounds that each was a member of the First
13 Presbyterian Church and was biased in favor of the application.¹ Petitioner also requested
14 disclosure of *ex parte* contacts from all city councilors. Finally, petitioner filed a "motion to
15 dismiss," requesting that the city dismiss intervenor's application on the grounds that it was
16 inconsistent with the conditions of approval for the Pheasant Meadows subdivision.

17 The city council continued the April 3, 2001 hearing until May 15, 2001. At that
18 hearing, the mayor asked if any council members wished to recuse themselves; none did. The
19 council members disclosed *ex parte* contacts, and then heard arguments from petitioner and
20 intervenor. During deliberations, the council determined that petitioner's motions for recusal
21 and for *ex parte* disclosure had been resolved by the declarations earlier in the hearing. The
22 council denied petitioner's motion to dismiss. On the merits, the city adopted a motion to
23 approve the application, with specified conditions. The motion passed 5-2. The city council
24 adopted written findings approving the application on July 17, 2001. This appeal followed.

¹Petitioner withdrew the motion with respect to one councilor, after she clarified that she is not a member of the First Presbyterian Church.

1 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

2 In the first and third assignments of error, petitioner contends that the city’s decision
3 is tainted by the participation of two councilors, Schatz and Mathern. According to
4 petitioner, these councilors are members of the First Presbyterian Church which, in itself,
5 makes their participation suspect. In addition, petitioner contends that the councilors’ actions
6 during the proceedings before the city demonstrate that those councilors prejudged the
7 application in favor of the church. Petitioner argues that as a result of their participation, the
8 city’s proceedings violated its right to an impartial decision making body. *Fasano v.*
9 *Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973).

10 Our recent decision in *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA
11 702 (2001) and a 1981 Oregon Attorney General opinion include discussion of the analysis
12 to be used in evaluating claims that a quasi-judicial land use decision maker is biased. In
13 *Halvorson-Mason Corp.*, we explained:

14 “ORS 197.835(9)(a)(B) permits this Board to reverse or remand a decision
15 where a local government fails ‘to follow the procedures applicable to the
16 matter before it in a manner that prejudiced the substantial rights’ of the
17 parties. The substantial rights of the parties include ‘the rights to an adequate
18 opportunity to prepare and submit their case and a full and fair hearing.’
19 *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). An allegation of
20 decision maker bias, accompanied by evidence of that bias, may be the basis
21 of a remand under ORS 197.835(9)(a)(B). *Torgeson v. City of Canby*, 19 Or
22 LUBA 511, 520 (1990).

23 “Actual bias sufficiently strong to disqualify a decision maker must be
24 demonstrated in a clear and unmistakable manner. Petitioner has the burden of
25 showing that a decision maker was incapable of making a decision based on
26 the evidence and argument before him. *Lovejoy v. City of Depoe Bay*, 17 Or
27 LUBA 51, 66 (1988). * * *” 39 Or LUBA at 710.

28 In *Halvorson-Mason Corp.*, the petitioner applied for a permit to allow a real estate
29 office to be operated within a recreation center located within a residential planned unit
30 development. The real estate office was the subject of much controversy among the residents
31 of the development, and generated a great deal of testimony before the city. Two of the city

1 councilors who were called upon to render a decision on the matter were residents of the
2 development, and one of those councilors worked actively to oppose the real estate office. In
3 that case, we concluded that the fact that two of the councilors were residents of the
4 development was not, in itself, sufficient to demonstrate that the councilors were biased
5 against the petitioner. However, we did conclude that one councilor was biased against the
6 petitioner, when in addition to his status as a resident of the development, the councilor
7 actively opposed the real estate office before and during his tenure as councilor and wrote
8 letters to other councilors advocating his position and providing his legal conclusions about
9 the application prior to the application being brought before the council. 39 Or LUBA at 711.

10 The Attorney General has been asked whether an individual demonstrates bias that
11 must result in recusal from decision making when the individual acts in a professional
12 capacity as a land use consultant for a church in a land use matter and testifies before the
13 governing body in that capacity, and the individual later becomes a voting member of the
14 governing body. 41 Op Atty Gen 490 (1981). The Attorney General concluded that in those
15 circumstances, the individual did not, as a matter of law, have to recuse himself. In the same
16 opinion, the Attorney General stated that where an individual testifies in an individual
17 capacity in a land use matter and later becomes a voting member of the governing body, the
18 prior testimony may be evidence of bias. The Attorney General concluded that the existence
19 of bias must be deduced from the totality of the circumstances, and that in some situations
20 recusal may be required. 41 Op Atty Gen at 491.

21 The Attorney General opinion identifies several factors to be considered in
22 determining whether the elected official must refrain from decision making as a result of
23 bias. Those factors include: (1) whether the decision maker's participation is necessary in
24 order for a valid decision to be made; (2) whether the actions that gave rise to the accusation
25 of bias were the result of actions by the elected official in a public capacity or whether those
26 actions were in the elected official's individual capacity; and (3) evidence of a strong

1 emotional commitment on the part of the elected official. In the face of evidence that an
2 elected decision maker is biased, a statement by the elected official that he or she can
3 nevertheless render an impartial decision based on the evidence and law may not be
4 sufficient to overcome that bias.

5 We address the allegations against each councilor separately, below.

6 **A. Councilor Schatz**

7 Councilor Schatz (Schatz) is a member of intervenor's congregation, and has been a
8 member of the city council throughout the pendency of intervenor's application. She voted in
9 favor of the church's application each time it was before the council. Schatz also voted in
10 favor of requesting a remand of the city's decision from LUBA to provide the city another
11 opportunity to review the matter. During 2000, she ran for reelection and on several
12 occasions was asked her opinion regarding the church's application and the city's initial
13 decision to deny the application. One account in the record described a candidate meeting
14 held in mid-October 2000, where all of the candidates were asked their opinions about the
15 First Presbyterian Church issue:

16 “* * * Schatz, a member of the Presbyterian Church, was quite open about her
17 dilemma of being in the middle. She was analytical and diplomatic in her
18 explanation of how difficult it was for her to make the right decision. She
19 explained that the only way for her was to be honest, looking at every aspect
20 of the issue and then basing her decision on what her conscience dictated.
21 * * *” Record II 398.²

22 In other statements, Schatz stated that the existing church facilities were inadequate,
23 and that she was concerned about the impact certain proposed conditions of approval would
24 have on church operations. For example, she opposed a proposal to limit weddings and
25 funerals to the old church, arguing that some people may prefer to hold those services in a
26 facility that could seat more people. Nevertheless, when asked by the church's attorney

²The city's record in this matter contains two volumes, each beginning with page 1. We therefore refer to items in the first volume of the record as Record I, and items in the second volume as Record II.

1 whether she believed she could decide the matter on the facts and the law before her, she
2 indicated that she could do so.

3 We believe Schatz' actions and statements do not rise to the level of a showing of
4 bias or prejudice in favor of the church. To the extent her actions and statements can be
5 read to suggest a predisposition toward the church, that suggestion alone is insufficient to
6 disqualify her. *See Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 588 P2d 640
7 (1978) (unlike a judge, an elected official is elected because of his political predisposition,
8 therefore, provided the official can review a matter on its merits, a predisposition does not
9 require recusal). Consequently, Schatz' participation in the challenged decision was not
10 error.

11 **B. Councilor Mathern**

12 Councilor Mathern (Mathern) is a member of intervenor's congregation and, until his
13 election in November 2000, his wife was an employee of intervenor. Mathern appeared
14 before the planning commission in 1999 as an advocate of intervenor's application. In a
15 candidates' forum held in October 2000, during the pendency of the appeal to LUBA of the
16 city's earlier denial, Mathern stated that he did not feel the need to be objective regarding the
17 First Presbyterian Church, and further stated that "we [the church] will fight this even if we
18 have to fight all the way to the Supreme Court." Record II 397.

19 Following his election to the city council, the city council considered a request by
20 intervenor to seek voluntary remand of the decision pending before LUBA. Mathern made
21 the motion to grant intervenor's request to seek remand, and the city council voted to
22 approve the request. After the vote, Mathern told a reporter that he wanted to "bring it back
23 to the council and try to work out our differences on a local level," and that if complaints
24 regarding noise and traffic are dealt with, "the case might avoid another trip [to] LUBA, this
25 time on appeal from neighbors." Record II 400.

1 During the proceedings before the city council after the remand, a petition supporting
2 the church’s request was submitted into the record.³ That petition was signed by Mathern and
3 at least 250 others. In addition, prior to the council’s deliberations, Mathern entered into the
4 record a document explaining why he believed intervenor’s application met applicable
5 approval criteria, with specified conditions.⁴ Mathern made the motion to approve the
6 application, with those specified conditions as modified after discussion with the council.

³The petition stated, in relevant part:

“We the undersigned citizens of Jacksonville, do not support the City Council’s decision to [deny] the Jacksonville First Presbyterian Church’s conditional use permit to build a church in Pheasant Meadows. We request reconsideration of the matter in hope that you will grant the Conditional Use Permit.

“We understand and agree that our names may be used in promotional activities, including advertisements in local newspapers.” Record II 167.

⁴The document addresses criteria Mathern considered relevant and states, in relevant part:

“Criteria #1 compliance with comprehensive plan.

“Goal #1. Citizen Involvement, yes, had a public hearing and the vote of 840 shows me the citizens say it’s okay to build.

“* * * * *

“Social and Population #3. A new church is ready to provide for the growth to the year 2015 and its public facilities are capable of handling it. Why can the city grow and not the church[?]”

“#4 Housing and urbanization element. If we are to maintain safe and sanitary housing opportunities for our increasing population of Jacksonville, we will need to provide social services to meet the condition. The [First Presbyterian Church] has not increased its size since the 1930s, but the town has, so to meet the charter of the comprehensive plan[, the First Presbyterian Church] should be allowed to build and this council should support it and help it to be a vital part of the city as the [First Presbyterian Church] has been for the past 140 years.
* * *

“Transportation #5. * * * The [First Presbyterian Church] has the property to provide as many parking spaces as are needed for future as well as present use. The traffic study shows that the streets are wide enough to accommodate the traffic the church will cause. By opening up Middle Street almost all [of] the traffic would be eliminated on Beverly Way[.] And most [traffic will be diverted off of] Singler Lane. * * *

“#6. If the city is to provide for and enhance economic visibility and vitality it should help the church, not hinder it. Churches are needed to balance our economic base. It cost[s] \$784.00] to

1 We believe the totality of the circumstances demonstrate that Mathern believed he
2 was elected on a mandate to support the proposed siting of the church and that for him, the
3 only question was what conditions were necessary to mitigate the impacts the church would
4 cause. As a result, we agree with petitioner that absent evidence that Mathern’s participation
5 was necessary in order for the council to reach a decision, Mathern should have recused
6 himself from participating in the challenged decision.

7 Because Mathern was an active participant in the decision making, we do not know
8 whether and to what extent his participation influenced the vote of the city council.
9 Therefore, remand is appropriate to allow the council to consider the application without his
10 participation. *Halvorson-Mason Corp.*, 39 Or LUBA at 711.

11 The first and third assignments of error are sustained, in part.

12 **SECOND ASSIGNMENT OF ERROR**

13 Petitioner argues that both Mathern and Schatz violated ORS 244.040(1)(a) because
14 they, as members of the First Presbyterian Church, received a pecuniary benefit from the
15 city’s decision to request a voluntary remand from LUBA.⁵ As stated above, Mathern made
16 the motion for voluntary remand, and Schatz was one of the five councilors who voted in
17 favor of that motion. According to petitioner, the pecuniary benefit was the avoidance of
18 legal fees connected with the LUBA appeal. Petitioner argues that this benefit is reflected in

house one juvenile delinquent [for eight days] and a church can keep hundreds out of juvenile centers. * * *

“* * * * *

“Environment #8. Environmental Setting: The City of Page, AZ * * * set aside one whole street, several blocks long, and named it Church Street. The City of Page donated this property to churches. If we are going to have a high quality of living we need to provide space for those who want to worship. * * *” Record II 92-93.

⁵ORS 244.040(1)(a) provides, in relevant part:

“No public official shall use or attempt to use [his or her] official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official’s holding of the official position or office[.] * * *”

1 Mathern's statements that he favored a voluntary remand because it would save the church
2 the costs of proceeding with an appeal.

3 Mere membership in the First Presbyterian Church's congregation does not establish
4 that the councilors personally received a pecuniary benefit or avoided a pecuniary loss as a
5 result of the voluntary remand. We agree with intervenor that the council's decision to
6 request a voluntary remand did not violate ORS 244.040(1)(a).

7 The second assignment of error is denied.

8 **FOURTH THROUGH ELEVENTH ASSIGNMENTS OF ERROR**

9 In the fourth assignment of error, petitioner contends that Schatz failed to disclose or
10 inadequately disclosed *ex parte* contacts, with the result that petitioner was unable to rebut
11 those contacts. In the fifth assignment of error, petitioner argues that the city's decision on
12 remand to approve the location of the church is inconsistent with the city's earlier decision
13 that the proposed location does not comply with applicable criteria. In the sixth and eighth
14 assignments of error, petitioner contends that the city unlawfully delegated decision making
15 authority to the city's historic architectural review committee. In the seventh and tenth
16 assignments of error, petitioner argues that the city's decision is not supported by substantial
17 evidence with respect to certain approval criteria. In the ninth assignment of error, petitioner
18 contends that the city erred in treating intervenor's revised application after the voluntary
19 remand as a modified version of the original application rather than an entirely new
20 application. In the eleventh and final assignment of error, petitioner argues that the city erred
21 in its conclusions that certain plan policies either did not apply or were satisfied by the
22 imposition of conditions.

23 Our disposition of the first and third assignments of error requires that we remand this
24 decision to afford the city the opportunity to review intervenor's application without
25 Mathern's participation. With respect to the fourth assignment of error, we do not decide
26 whether Schatz failed to disclose *ex parte* contacts. If Councilor Schatz did fail to disclose *ex*

1 *parte* contacts during the prior proceedings, then she must disclose those contacts during the
2 proceedings on remand and the city must allow petitioner an adequate opportunity to rebut
3 those contacts. *Opp v. City of Portland*, 171 Or App 417, 422-24, 16 P3d 520 (2000). The
4 remaining assignments of error go to the merits of the city's decision. Because the city must
5 issue a new decision on remand, it is premature to resolve those assignments of error at this
6 time.

7 The city's decision is remanded.