BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA J. ROBERTS,
MARY ANN DICKEY, WILLIAM J. FURNISH,
DEANNA MANCILL and PHIL MANCILL,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent,

and

M.K. DEVELOPMENT, INC.,
Intervenor-Respondent.

LUBA No. 2002-123

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Reeves Kahn & Hennessy.

No appearance by Clatsop County.

Michael C. Robinson, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Frank M. Flynn and Perkins Coie, LLP.

BRIGGS, Board Member; BASSHAM, Board Chair, participated in the decision. HOLSTUN, Board Member, did not participate in the decision.

REMANDED 03/11/2003

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

Petitioners appeal a county decision that rezones a 1.89-acre parcel from Parks and Open Space (P) to Multi-Family Residential (R-3) and a .98-acre parcel from General Commercial (C-2) to P.

FACTS

A. Characteristics of the Property

The property that is the subject of this appeal is located on the west side of the Gearhart Golf Course, a 100-year-old golf course located within the urban growth boundary of the City of Gearhart. Intervenor-respondent (intervenor) owns the golf course and applied to rezone approximately two percent of the golf course property to facilitate the development of 24 condominiums on a 1.89-acre portion of the golf course. The area to be rezoned from P to R-3 is currently part of the fairway to the first hole. As planned, the fairway will be reconfigured and will include a portion of the golf course currently devoted to a putting green. The .98-acre parcel to be rezoned from C-2 to P is currently used for a part of the 18th hole fairway and for lawn and parking purposes. Intervenor proposed the zone change to reflect the actual use of .98-acre portion. No changes in use are anticipated for that portion.

The area surrounding the portion of the golf course that is the subject of intervenor's application is a mix of property zoned low density residential (R-1), which allows 4 dwellings per acre, R-3, which allows up to 16 units per acre, and C-2.

B. The Local Proceedings

Land use decisions within the City of Gearhart's urban growth area are subject to the provisions of an Urban Growth Boundary Area Joint Management Agreement (JMA) between the city and Clatsop County. Pursuant to the JMA, plan amendments and zone changes within the urban growth area must be initiated with an application to the city. JMA 5(2)(a). The city planning commission and city council then review the application pursuant

to city land use provisions. JMA 5(2)(d). If the application is approved by the city council, the council adopts an ordinance to that effect, which is then forwarded to the county for review in accordance with county procedures. JMA 5(2)(j). If the city council chooses to deny the application, the application cannot proceed to the county and the city council's decision is the final, appealable decision. *Id.*

The city planning commission held a hearing and voted to recommend that the city council deny the application. The city council held its own evidentiary hearing. At the conclusion of the city council's evidentiary proceedings, five city councilors participated in the January 29, 2002 vote on the application. The final vote was 3-2 to approve the application. On February 6, 2002, the council reviewed findings drafted to support the tentative decision and held a first reading of the two ordinances that were necessary to effect the tentative decision. On February 12, 2002, the council adopted ordinances that reflected its tentative vote.

Gearhart Zoning Ordinance (GZO) 11.040 sets out the procedures the city follows to conduct quasi-judicial land use hearings. GZO 11.040(2)(B) establishes limitations on the participation of decision makers in certain circumstances. In particular, GZO 11.040(2)(B)(2) prohibits the participation of a decision maker if the decision maker "owns property within the area entitled to receive notice of the public hearing."[1]

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[1] GZO 11.040 provides, in relevant part:

> "1. Public hearings conducted under this Ordinance shall follow the procedures and requirements of this section.
>
> "2. The following procedural entitlement[s] shall be provided at the public hearing.
>
> "* * * * *
>
> "B. No member of a hearing body shall participate in a discussion of the proposal or vote on [the] proposal when any of the following conditions exist:
>
> "* * * * *

At some point during the proceedings before the city, opponents became aware that one of the city councilors (Councilor Shehane) had purchased a dwelling located within 200 feet of the golf course four months prior to the submission of the rezoning application. Councilor Shehane therefore resided within the city's notice area for the application. However, the councilor's ownership was not reflected in the tax rolls at the time the notice list was compiled and notice was sent to Councilor Shehane's predecessor in interest. Councilor Shehane cast one of the three votes to approve intervenor's application.

After the oral vote, but prior to adoption of the city's ordinances, opponents alleged that because Councilor Shehane lived within the notice area for the application, GZO 11.040(2)(B)(2) prohibited Councilor Shehane from participating in the rezoning decision. Despite requests by the opponents for the city to reconsider its decision, the application proceeded to the county for review.

The county planning commission held a hearing on the application, where opponents raised the issue of the Councilor Shehane's participation in the city's decision, and challenged the validity of the county proceedings that were based on the city's decision. After the hearing concluded, the county planning commission forwarded the application to the board of county commissioners without recommendation.

During the proceedings before the board of county commissioners, opponents again challenged the validity of the city council decision. Opponents also challenged the participation of one of the county commissioners. According to opponents, the county commissioner had prejudged the application and had publicly declared that he would vote for the application prior to the proceedings before the board of county commissioners. The board of county commissioners declined to remand the application to the city for further proceedings in light of petitioners' jurisdictional challenge or to require that the challenged

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> "2. The member owns property within the area entitled to receive notice of the public hearing."

commissioner recuse himself from participating in the county's decision. At the close of the county's evidentiary record, the board of county commissioners deliberated and voted to approve the application. This appeal followed.

PENDING MOTIONS

A. Motions Pertaining to References to Writ of Review Proceedings

In their notice of intent to appeal, petitioners named both the city and the county as respondents. Intervenor moved to remove the city as a respondent, arguing that the county made the final land use decision challenged in this appeal. Petitioners objected to the motion, arguing that under the JMA, both the city and the county were decision makers. Petitioners' pleading in opposition made reference to a writ of review proceeding that was commenced in the Clatsop County Circuit Court challenging the city's decision. Attached to petitioners' pleading was a partial transcript of the circuit court's proceedings in that matter. We granted intervenor's motion to revise the caption in an order dated September 25, 2002. *Roberts v. Clatsop County*, __ Or LUBA __ (LUBA No. 2002-123, Order, September 25, 2002).

On November 5, 2002, after we issued our order on the motion to revise the caption, intervenor moved to strike from petitioner's pleading in opposition the reference to the circuit court proceedings and the partial transcript, arguing that those proceeding were not part of the local record and that petitioners had failed to establish a basis to allow LUBA to consider documents pertaining to those proceedings. Petitioners responded to intervenor's motion to strike with a request that LUBA take official notice of the circuit court proceedings and, more specifically, the partial transcript of those proceedings.

Intervenor's motion is moot to the extent it pertains to our consideration of the existence of the circuit court proceedings in our order striking the city from the caption of the LUBA appeal. As far as we can tell, the circuit court proceedings have no bearing on any remaining matter in this appeal. Nonetheless, to the extent intervenor's motion pertains to references to the writ of review proceedings in the petition for review, we agree with

intervenor that petitioners have not demonstrated that a transcript from a circuit court proceeding is an "official act" that may be the subject of official notice pursuant to Oregon Evidence Code 202.[2]

Accordingly, intervenor's motion to strike is granted in part. We shall not consider any arguments contained in the petition for review that are based on the writ of review proceedings before the Clatsop County Circuit Court.

B. Motions Pertaining to the Reply Brief

1. Objections to the Reply Brief

Petitioners move to file a five-page reply brief and attach a copy of the reply brief to their motion. Intervenor argues that the portions of the reply brief that respond to intervenor's waiver arguments should not be considered even though waiver was raised for the first time in intervenor's response brief. According to intervenor, the issue of whether petitioners preserved their right to argue about the participation of Councilor Shehane was an obvious issue below, and petitioners should have anticipated that issue in their petition for review rather than provide additional arguments to support their position in their reply brief.

It is not entirely clear to us what objection intervenor has to arguments in petitioner's reply brief that address intervenor's waiver arguments. The reply brief responds to the issue raised in intervenor's response brief that petitioner failed to timely object to the city's procedural error. The reply brief also responds to arguments in the response brief that Councilor Shehane's vote was not prejudicial to petitioners' interests. We believe that those responses are appropriate in a reply brief.

Intervenor also objects to those portions of the reply brief that refer to the writ of review proceedings before the Clatsop County Circuit Court and to conversations between

[2] In the event that we granted petitioners' request to take official notice of a transcript of the circuit court proceedings, intervenor moved for LUBA to take official notice of the circuit court's judgment in the writ of review proceedings. Because we decline to take official notice of the transcript, we decline to take corresponding notice of the circuit court judgment. Intervenor's request to take official notice is denied.

petitioners' attorney and the city attorney. Intervenor argues that the referenced material is not part of record before LUBA.

We have denied petitioners' request to take official notice of the circuit court transcript, and ruled that we shall disregard any references to the circuit court proceedings. That ruling is extended to the reply brief. With respect to conversations petitioners' attorney is alleged to have had with the city attorney prior to the city's ordinance being forwarded to the county, that evidence is likewise not in the record of the local proceedings and we will not consider that evidence over the objection of intervenor, in the absence of a motion to take evidence not in the record. *Horizon Construction v. City of Newberg*, 25 Or LUBA 656, 662 (1993).

Petitioners' reply brief is allowed in part. Intervenor's motion to strike is granted in part.

2. Objection to Intervenor's Response to the Motion to File the Reply Brief

Petitioners object to Sections IV through VIII of intervenor's January 24, 2003 response to petitioners' motion to file a reply brief. According to petitioners, those sections improperly set out additional arguments responding to the merits of the reply brief and do not address the propriety of the reply brief itself. Petitioners argue that intervenor should not have an opportunity for additional argument in the guise of an objection to the reply brief itself. We agree. Accordingly, we shall disregard Sections IV through VIII of the January 24, 2003 response.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county does not have jurisdiction over the application that is the subject of this appeal because the city decision that resulted in county review was improperly made. Petitioners allege that GZO 11.040(2)(B)(2) prohibits Councilor Shehane from participating in the rezoning decision. *See* n 1. According to petitioners, the city charter,

the county code and the JMA are clear: (1) a city councilor who lives within the notice area of a proposed land use action may not participate in any decision on that action; (2) the city council had to have three votes at the January 29, 2002 council meeting in order to approve the rezoning application; and (3) applications to rezone property within the Gearhart UGB may be heard by the county only if the city adopts an ordinance that recommends that the rezoning application be granted.[3] Petitioners contend that the improper participation of the city councilor resulted in an ordinance void *ab initio*, because without the disputed city councilor's vote, the rezoning application would never have been forwarded to the board of county commissioners.

Intervenor responds that GZO 11.040(2)(B)(2) does not require the recusal of Councilor Shehane because she was not entitled to notice under ORS 197.763(2).[4]

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[3] Gearhart City Charter Section 20 provides:

> "[T]he concurrence of a majority of a quorum present at/and voting at a Council meeting will be necessary to decide any question before the Council."

JMA Section 5.2 provides, in relevant part:

> "Amendments to the Urban Growth Boundary Comprehensive Plan, including the Urban Growth Boundary and Plan Map, [and] CITY Urban Growth Boundary Zoning Ordinance map and text * * * shall be adopted by Ordinance by both CITY and CLATSOP COUNTY according to the following procedure:
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> "* * * * *
>
> "h. If the CITY Council approves [a rezoning] application, it shall do so by Ordinance. If the CITY Council denies the application, the decision may be appealed to the Land Use Board of Appeals."
>
> "* * * * *
>
> "j. Clatsop COUNTY shall hold a public hearing, on applications approved by CITY, according to procedures established in Clatsop County Comprehensive Plan or Clatsop County Land and Water Development and Use Ordinance." (Capitalization in original.)

[4] ORS 197.763 provides, in relevant part:

Intervenors explain that the notice list was compiled from tax assessment rolls dated February 14, 2001, and Councilor Shehane did not move into the notice area until June 2001. According to intervenors, the trigger for the application of GZO 11.040(2)(B)(2) must be the receipt of notice in order to be consistent with ORS 197.763(2)(a). Otherwise, intervenors argue, the decision maker and participants in the proceedings would not be informed that the decision maker must refrain from participating in the decision.

Intervenors also contend that because Councilor Shehane's participation, even if it was error, did not unduly prejudice petitioner's interests. Intervenor argues that there is no evidence that Councilor Shehane was biased in favor of or against the proposal.

Intervenor further argues that even if Councilor Shehane should not have participated in the city's decision, her participation did not affect the outcome of the city's decision and was harmless error. According to intervenor, the city council's decision to approve the proposal occurred over the course of three different city council meetings. Intervenor argues that in two of those meetings, the February 6, 2002 and the February 12, 2002 meetings, a least two more councilors voted in favor of motions to approve the application than voted against them. Because the motion to adopt the ordinances that effected the council's January 29, 2002 tentative decision received more than the necessary number of votes to pass, intervenor argues that petitioners have not demonstrated that the removal of Councilor Shehane's vote would have affected the ultimate outcome of the city's proceedings.

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body * * * on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations:
>
> "* * * * *
>
> "(2)(a) Notice of the hearings governed by [ORS 197.763] shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located[.] * * *"

Finally, intervenor argues that if Councilor Shehane's participation was improper, the error was a procedural one, and the procedural error does not provide a basis for reversal or remand at LUBA because (1) the proceedings before the county cured any error; and (2) petitioners failed to object to Councilor Shehane's participation during the city's proceedings. Intervenor argues that the county considered a facially valid ordinance, conducted a full and fair hearing and made a decision on the merits, after finding that Councilor Shehane's participation in the city council proceedings did not affect the county's jurisdiction over the application. Intervenor argues that petitioners do not challenge those findings and, therefore, those findings are assumed to be adequate to support the county's decision.[5]

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[5] The county's findings state, in relevant part:

> "The opponents argue the City Councilor Shehane should not have voted on the application before the Gearhart City Council and that her participation in the vote meant that the City Council had not made a valid decision. The Board [of County Commissioners] relies on the advice of its County Counsel * * * in his May 2, 2002 letter, in which [the county counsel] advised the attorney for the opponents that the City's action was facially valid and that the County had no authority pursuant to the JMA or the [County zoning ordinance] to over-rule the City Council's decision. The Board [of County Commissioners] finds that its action, pursuant to the JMA, is made according to [county] procedural requirements while the City's action was taken pursuant [to the GZO]. Nothing in either the JMA or [the county zoning ordinance] allows the Board [of County Commissioners] to consider the City's procedure or its procedural standards.
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> "The Board [of County Commissioners] rejects the argument that City Councilor Shehane's participation in the City decision was either invalid or inappropriate. First, the Board finds that the JMA does not require a 'valid' ordinance. The JMA simply requires that the City adopt by ordinance a recommendation on a UGA Comprehensive Plan map or zoning map amendment to the County. The Gearhart City Council did this and this is all that the JMA requires.
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> "Second, the County relies on the letter from Gearhart City Administrator Dennis McNally. Mr. McNally's office was responsible for preparation of the notices of public hearing before the City Planning Commission and the City Council. Mr. McNally's April 8, 2002 memoranda notes that at the time the notices for the City public hearings were prepared, the property on which City Councilor Shehane resided was shown in the map index dated February 14, 2001, not to be owned by City Councilor Shehane and the City did not provide City Councilor Shehane with notice. Accordingly, and assuming for the purposes of discussion only that this issue has been raised and preserved, the Board [of commissioners] finds that City Councilor Shehane was not entitled to receive notice of the public hearing

We need not address the merits of the parties' arguments with respect to the propriety of the city councilor's participation, because the county's first finding is dispositive. *See* n 5. The challenged decision is the county's decision to approve the subject application. The county adopted findings that interpret the JMA to allow the county to consider facially valid ordinances forwarded to it by the city, and to preclude the county from questioning the validity of those ordinances. Indeed, the findings conclude that a "valid" city ordinance is not necessary for the county to be able to consider an application to rezone under the JMA.

Petitioners do not challenge these findings, even though an argument could be made that the county's interpretation has the effect of shielding the alleged violation of GZO 11.040(2)(B) from LUBA's review. Even if petitioners are correct that the county erred in its conclusions with respect to the participation of Councilor Shehane, the county's interpretation that it does not look beyond the existence of a facially valid ordinance under the JMA provides an alternative basis for the county's conclusion that it had jurisdiction over the challenged decision. Absent a focused challenge to that conclusion from petitioners, we have no basis to reverse or remand the county's decision.

In addition, petitioners do not directly challenge the county's finding that opponents knew the location of Councilor Shehane's dwelling during the city's proceedings. If we assume, as we must, that that unchallenged finding is correct, then we agree with intervenor that petitioner's failure to raise a timely objection to Councilor Shehane's participation

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> because she was not on the County list of property owners used for the public hearing, so the City did not violate its requirements concerning Council[or] Shehane's participation.
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> "Further, the Board [of County Commissioners] finds that the opponents failed to raise the issue before the Gearhart City Council. The Board notes that LUBA has held that failure to object to a decision maker's participation in a first local government proceeding means that the petitioner has waved its right to object to that decision maker's participation in a later hearing. *Lovejoy v. City of Depoe Bay*, 17 Or LUBA 51, 65 (1988) * * *. The Board [of County Commissioners] finds that in this case, the opponents could have raised, but failed to do so, the issue of City Councilor Shehane's participation in the City Council hearing. The opponents were certainly aware of City Councilor Shehane's residence and their failure to object at any of the four (4) City Council hearings or meetings * * * means that they have waived the issue before the Board [of County Commissioners]." Record 28-29.

during the proceedings before the city precludes our review of that issue. *Woods v. Grant County*, 36 Or LUBA 456, 469 (1999); *Mason v. Linn County*, 15 Or LUBA 1, 4 (1984), *aff'd in part, rev'd in part on other grounds*, 73 Or App 334, 698 P2d 529 (1985).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In order to approve the zone change, the applicant had to demonstrate that the proposal is consistent with the Gearhart Comprehensive Plan (GCP). GZO 10.040(2)(A). GCP Residential Development Policy 3 provides that "[t]he City will maintain the present residential density levels in established neighborhoods."

The county concluded that the policy contained a mandatory standard, and that the applicant had demonstrated that the policy was satisfied. The county interpreted "established neighborhood" to connote the existence of a neighborhood surrounding the property to be rezoned. Because the area to be rezoned is located adjacent to the golf course and across the street from R-1 zoned property, the county concluded the area to be rezoned is not within an established neighborhood within the meaning of the policy.[6]

In the alternative, the county identified a particular area as encompassing the "established neighborhood," and concluded that the existing residential density would be maintained because the new zoning designation would not allow greater densities than could

[6] The relevant county finding states:

> "[GCP Residential Development Policy 3] requires that the City maintain present residential density levels in established neighborhoods. First, the Board [of Commissioners] must determine what constitutes an 'established neighborhood.' The Board finds that the phrase 'established neighborhoods' applies to development within an existing residential development area because the phrase is intended to describe residential area subject to density increases. The Board [of Commissioners] finds for this reason that the proposed Comprehensive Plan map and zoning map amendment from P to R-3 is not within an established neighborhood since the site to be zoned R-3 is located on the east side of Marion Avenue within the existing Golf Course and not within an existing residential area." Record 39-40.

be allowed in the most intensive residential zone located within the neighborhood as the boundaries of the neighborhood were defined in the decision.[7]

Petitioners challenge the county's (1) alternative interpretations of the phrase "established neighborhood;" (2) the county's delineation of the "established neighborhood;" and (3) the county's conclusion that "present residential density levels" will be maintained by permitting dwelling densities as high as the maximum density that exists or is allowed in the most intensive residential zone within the neighborhood boundaries.

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[7] The county's findings state, in relevant part:

> "[A]n established neighborhood is not defined by walking distance or by notice distance. An established neighborhood in this case means those residential areas around the R-3 site to the southwest, west, and north, *i.e.*, an area bounded by the ocean on the west, the proposed R-3 site on the east, 10th Street on the south and the extent of residential development in the UGA to the north. The Board [of Commissioners] finds that the purpose of this policy is to maintain residential levels consistent with those densities around the site to be amended to R-3. The [above definition of 'established neighborhood'] is consistent with this analysis because it is based on a discernable area (the area is clearly delineated by the ocean, the Golf Course and the Urban Growth Boundary) that encompasses residential development around the area subject to this application. This established neighborhood includes density levels in the R-3 district permitting up to sixteen (16) units per acre.
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> "The Board [of Commissioners] must also determine what 'present residential density levels' means. * * * A reasonable interpretation is that present residential density levels means that a proposed development should not exceed the greatest residential density level in an established neighborhood, either developed density or the maximum allowed in a zoning district.
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> "Based on this interpretation, and assuming that the site is in an established neighborhood, the Applicant has proposed a residential density level *below* that of existing residential density levels in the neighborhood. Assuming that the established residential neighborhood includes the residential development to the southwest, west and north, the area already contains 288 condominium units in three (3) R-3 developments. The proposed density on this site is 12.6 dwelling units per acre, which is less than the 16 dwelling units per acre maximum allowed in the R-3 zoning district. It is also less dense than the density of the existing condominium developments." Record 40-41 (emphasis in original).
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> "The Board [of Commissioners] finds that because the proposed density is less than the density of the established residential neighborhood, this application satisfies this policy by maintaining the present residential density level * * *." Record 42.

A. "Established Neighborhood"

Petitioners argue that the county's first interpretation gives no effect to the phase "established neighborhood" because it does not recognize residential property located immediately across the street from the subject property. Petitioners argue that this defeats the intent of the policy, which is to recognize and ensure development compatibility with surrounding residential uses. Intervenor responds that the county's interpretation is within its interpretive discretion and is not reversible under ORS 197.829(1).

ORS 197.829(1) requires, in relevant part, that LUBA affirm

> "a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

The parties do not dispute that both the city and the county have adopted the GCP as the plan and the substantive criteria of the GZO to govern development within the UGB. Therefore, the board of county commissioners' interpretations of the GCP and the GZO for property within the urban growth area are "interpretation[s] of its comprehensive plan" within the meaning of ORS 197.829(1) and are subject to the deferential standard established in that statute and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *Trademark Construction, Inc. v. Marion County*, 155 Or App 84, 89, 962 P2d 272 (1998).[8]

[8] However, we note that the county's first interpretation of "established neighborhood" is inconsistent with the interpretation adopted by the county council in its findings supporting its decision. Record 612.

GCP Residential Development Policy 3 requires that the city "maintain existing residential density levels in established neighborhoods." "Neighborhood" is defined in GZO 1.030 as

> "An area whose size is such that all parts are within walking distance of most residents and it is smaller than the total city area."

The parties offer no reason why the term "neighborhood" as used in GCP Residential Development Policy 3 should mean something different that the definition of the term set out in GZO 1.030. The county does not address the code definition and its first interpretation seems flatly inconsistent with it. The county's first interpretation is also inconsistent with the dictionary definition of the term.[9]

The area described in the county's first interpretation is limited to the subject property: "the site to be zoned R-3 is located on the east side of Marion Avenue within the existing Golf Course." Record 40. Under the zoning ordinance and any reasonable definition, the word "neighborhood" connotes something more than the subject property itself. We therefore agree with petitioners that the county's interpretation of neighborhood to be limited to the subject property is "contrary to the express language of the comprehensive plan."

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[9] The dictionary definition of the word "neighborhood" includes:

> "a number of people forming a loosely cohesive community within a larger unit (as [in] a city or town) and living close or fairly close together in more or less familiar association with each other within a relatively small section or district of [usually] somewhat indefinite boundaries and [usually] having some common or fairly common identifying feature (as approximate equality of economic condition, similar social status, similar national origins or religion, similar interests) * * *
>
> "* * * the particular section or district that is lived in by these people and that is marked by individual features (as type of homes and public establishments) that together establish a distinctive appearance and atmosphere * * *
>
> "an area or region of [usually] vague limits that is [usually] marked by some fairly distinctive feature of the inhabitants or terrain * * *" *Webster's Third New Int'l Dictionary*, 1514 (unabridged ed 1981).

B. Delineation of the Established Neighborhood

As set forth in n 8, as an alternative to its conclusion that the subject property is not located within an established neighborhood, the county defined the "neighborhood" under consideration as:

> "an area bounded by the ocean on the west, the proposed R-3 site on the east, 10th Street on the south and the extent of residential development in the UGA to the north." Record 40.

Petitioners argue that, until the county's decision was reduced to writing, the parties to the proceedings understood "neighborhood" to mean property located within 500 feet of the site to be rezoned. The "neighborhood" defined in the decision is considerably larger than the property within 500 feet. Petitioners argue that, by announcing the relevant neighborhood area in its decision, petitioners were prevented from either challenging that area as defined or providing evidence and argument as to what the "present residential density level" is in that defined area.

Intervenor responds that the county could interpret the boundaries of the neighborhood to include a larger area than properties located within 500 feet of the site to be rezoned. Intervenor argues that this interpretation of the relevant neighborhood boundary is not clearly wrong and therefore must be affirmed.

In *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), the court addressed the circumstances where a local government would be obliged to provide an opportunity for a party to provide additional evidence and argument regarding an interpretation of a local code provision that was adopted for the first time in the local government's decision:

> "[I]n certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. * * * [H]owever, * * * *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change

> an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." 155 Or App at 373-374 (footnote and citation omitted; emphasis in original).

Under the standard set out in *Gutoski*, petitioners are not entitled to a remand to allow them to present evidence in response to the county's interpretation of "neighborhood." Petitioners have not demonstrated that they can produce specific evidence at the new hearing that differs from that previously submitted and that is "directly responsive" to the county's unanticipated intepretation.[10] Accordingly, this argument provides no basis for reversal or remand.

C. Interpretation of "Present Residential Density Levels"

The county interpreted the phrase "present residential density levels" as that term is used in GCP Residential Development Policy 3 to mean

> "that a proposed development should not exceed the greatest residential density level in an established neighborhood, either developed density or the maximum allowed in a zoning district." Record 40.

Petitioners argue that GCP Residential Development Policy 3 requires that the county analyze the maximum density level in each zoning district located within the neighborhood, and not limit the analysis to the maximum density allowed in the densest residential zoning district. According to petitioners, if GCP Residential Development Policy 3 is understood to allow development densities at the greatest levels allowed within the neighborhood, as the county's interpretation suggests, the "present" residential density levels will not be maintained. Petitioners explain that such a result is apparent in this case: almost two-thirds of the property within 500 feet of the area to be rezoned is designated R-1. That zoning district

[10] There does not seem to be any *evidentiary* dispute regarding the actual or permitted density in the county's defined neighborhood. Petitioners do dispute how that density is to be calculated, and that interpretational issue is addressed below.

allows 4 dwelling units per acre. Petitioners argue that if the maximum residential density level in the R-1 zone is averaged with the maximum residential densities in the C-1 zone (6 units per acre) and the R-3 zone (16 units per acre), the maximum residential density that could be permitted that would "maintain present residential densities" is 7.6 units per acre. We understand petitioner to argue that a similar result can be extrapolated to the county-determined "neighborhood." According to petitioners, the county erred in concluding that the proposed development, at more than 12 units per acre, satisfies GCP Residential Development Policy 3, as that policy is interpreted by the county.

Intervenor argues that petitioners seek to replace the county's interpretation of GCP Residential Development Policy 3 with their own, without establishing that the county's interpretation is clearly wrong. Intervenor argues that as interpreted by the county, the county is not required to determine the average density in all of the zones in the neighborhood in order to establish the maximum allowable density. According to intervenor, the R-3 zone allows up to 16 dwelling units per acre, and property zoned R-3 is located within the neighborhood. Intervenor argues that the county correctly concluded that the proposed 24 dwelling units fell within the maximum allowed residential density (16 units per acre times 1.93 acres) and, therefore, the proposed rezoning is consistent with GCP Residential Development Policy 3.

As shown by the parties' arguments and the county's interpretation, GCP Residential Development Policy 3 is susceptible to a number of interpretations, including the very narrow interpretation rejected by the county that would allow new residential development only if it replaces existing residential development within an established neighborhood at a 1:1 ratio. Petitioners offer a second interpretation that averages the different densities within a neighborhood and allows a development density that does not exceed overall averaged densities. Intervenor offers a third interpretation that limits density to the maximum allowed

by the highest-density zone in the neighborhood.[11] The county adopted intervenor's interpretation, plus an even more expansive interpretation, one that would not only allow dwelling densities that reflect the maximum allowed by the most intensive residential zone, but would also allow higher residential densities, if some properties within neighborhood are developed at densities higher than are permitted in any zone in the area, as appears to be the case here.

There is no dispute that the large majority of the neighborhood as defined by the county is composed of property that is zoned and developed to R-1 densities. Both of the county's adopted interpretations completely ignore the zoned and developed density of the majority of the defined neighborhood, and focus exclusively on the few properties within the neighborhood that are zoned R-3. We do not necessarily agree with petitioners the GCP Residential Development Policy 3 requires an averaging of residential density in the entire neighborhood, but we do agree that the policy requires that the residential density in the entire neighborhood be taken into account, not just a selected portion of it. The county's interpretation to the contrary is inconsistent with the text and apparent purpose of GCP Residential Development Policy 3.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the evidentiary support for the county's finding that residential density levels within the established neighborhood would be maintained. Because we have sustained petitioners' second assignment of error in part, we do not address petitioners' evidentiary challenge. *McNulty v. Lake Oswego*, 14 Or LUBA 366, 373 (1986) *aff'd* 83 Or App 275, 730 P2d 628 (1987).

[11] That interpretation generally follows the interpretation that the city adopted. Record 634-635.

FOURTH ASSIGNMENT OF ERROR

GZO 10.040(2)(B) requires that an application to rezone property demonstrate that the "amendment will meet a land use need." The "land use need" identified by the county is to assist the golf course in achieving economic stability.[12] Petitioners explain that intervenor intends to use the proceeds from the proposed condominium development to retire $1 million of a $3.65 million mortgage. Petitioners argue that such a need may provide private economic justification for the proposal, but is not sufficient to establish a need for the *city* to rezone property for high density residential use. Petitioners argue that

> "[t]his reasoning is analogous to saying that an applicant will meet a land use need by creating a subdivision on a small portion of the applicant's farm land to generate sufficient income to continue the farming operation on the remainder of the property. * * * [In this case, intervenor is buying] resource land at resource land prices ($36,500 per acre) and then [is applying to change] the zone to intensify the use, [making] a substantial profit of almost fifteen * * * times the purchase price per acre * * * at the public expense of an irretrievable loss of resource land." Petition for Review 22, footnote 6.

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[12] The county's findings state, in relevant part:

> "The Board [of County Commissioners] finds that the identified land use need is for the Plan and zoning map amendment to R-3 adjacent to the Golf Course that will allow the preservation of the Golf Course through economic stability achieved by the residential development. * * *
>
> "Substantial evidence before the Board [of County Commissioners] demonstrates that the Golf Course requires economic stability not only to be maintained but to be enhanced so that it can remain a viable recreational asset to the community. The Applicant has identified the means of accomplishing this as providing compatible residential development adjacent to the Golf Course. * * *
>
> "Residential development adjacent to the Golf Course will provide additional revenue for maintenance and enhancement of the Golf Course. The land use need of maintaining the Golf Course can be satisfied only by residential development on land owned by the Applicant that is adjacent to the Golf Course. Additionally, [testimony established] that there is no vacant buildable area in existing R-3 zoning districts within the City or [urban growth area.] For these reasons, the Board [of County Commissioners] finds that the Applicant has identified a land use need that is satisfied [by the] rezoning amendments.
>
> "The Board [of County Commissioners] also finds that the effect of maintaining the economic stability of the Golf Course is to provide for an outdoor recreation facility that is attractive and [will] maintain the Golf Course as a viable recreation resource, [consistent with GCP] Plan Goal 8, Policies 1 and 2." Record 42-43.

Intervenor responds that the county concluded that the proposed rezoning to R-3 would comply with GZO 10.040(2)(B) because not only would it ensure financial stability for an historic recreational resource within the urban growth area, but it would provide additional land for multi-family development. Intervenor argues that petitioners do not challenge those findings or their evidentiary support and, therefore, their argument provides no basis for reversal or remand.

The county interpreted the GZO 11.040(2)(B) "land use need" to include a need to provide adequate financial security to operate the Gearhart Golf Course. In addition, the county found that additional R-3 land satisfied a "land use need" because no available R-3 land exists within the UGB. *See* n 12. Petitioners do not challenge that latter finding, and offer no explanation for why that identified need is not sufficient to satisfy GZO 11.040(2)(B). Accordingly, petitioners' disagreement with the county's first rationale for finding compliance with GZO 11.040(2)(B) provides no basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

During the proceedings before the board of county commissioners, opponents challenged the participation of one of the county commissioners (Commissioner Earl). According to opponents, Commissioner Earl had prejudged the application and had publicly declared that he would vote for the application prior to the proceedings before the board of county commissioners. The board of county commissioners declined to require that Commissioner Earl recuse himself from participating in the county's decision.

Petitioners argue that the board of county commissioners erred in permitting Commissioner Earl's participation in the challenged decision. According to petitioners, Commissioner Earl's participation prejudiced their substantial rights to a full and fair hearing and, therefore, the county's decision must be remanded to allow the board of county

commissioners to consider the challenged application without the presence of Commissioner Earl.

As we stated in *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001):

> "ORS 197.835(9)(a)(B) permits [LUBA] 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 for a remand under ORS 197.835(9)(a)(B). * * *"

In *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 445 (2000), *aff'd* 172 Or App 361, 19 P3d 918 (2001), we set out the standard for establishing decision maker bias:

> "To demonstrate actual bias, 'petitioner has the burden of showing the decision maker was biased, or 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].'" (*quoting Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993)).

Petitioners base their allegation of bias on an exchange between a Gearhart city councilor and Commissioner Earl during a social function. In an affidavit, the city councilor recounted her recollection of the exchange:

> "On February 22, 2002, I attended a birthday party at the Sandtrap Restaurant in Gearhart. I was approached by an acquaintance as I was leaving the party, who said that [Commissioner] Earl would like to meet me. As we were introduced I said to him — 'You know that I'm a Gearhart City Councilor and that we can not discuss the Golf Course issue because it will be coming before the County Commissioners and this would be *ex parte* contact.' He said that he was aware of this but that he just wanted to let me know that he had made up his mind and that he was going to vote to support the Gearhart City Council. I replied that there would be a lot of new evidence offered and that I hoped that he would listen with an open mind. He said that he would listen with an open mind but would still vote in favor of the Golf Course zone change." Record 256.

In response to the opponents' bias challenge, Commissioner Earl conceded that he had been at the party described in the city councilor's affidavit. However, Commissioner Earl stated he did not remember the conversation he had with the city councilor. According to Commissioner Earl, "he was at the party to have a good time, and could not 'honestly remember the situation.'" Record 116. In addition, other persons who attended other public functions with Commissioner Earl testified that the commissioner had refrained from making any public comment about the pending application, even when directly asked about it. Record 117. Commissioner Earl went on to say that he had "read the material and was ready to hear the testimony and would make a decision after that." Record 116.

Pursuant to county procedures, the board of commissioners voted to allow Commissioner Earl to participate in the challenged decision, based on his averments that he could make an unprejudiced and unbiased decision. Record 118. At the final vote on the application, Commissioner Earl voted to approve it.

We do not believe that petitioners have demonstrated in a "clear and unmistakable manner" that Commissioner Earl prejudged the application. *Lovejoy v. City of Depoe Bay*, 17 Or LUBA 51, 66 (1988). While the exchange recounted by the city councilor may indicate a certain predisposition on Commissioner Earl's part, that is not enough to provide a basis for reversal or remand, in light of his assertions that he would consider the application on its merits and vote with an open mind. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 143, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 588 P2d 640 (1978). Accordingly, this assignment of error provides no basis for reversal or remand.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

According to petitioners, there is *no* evidence in the record to contradict the testimony of the city councilor regarding the substance of the conversation she had with Commissioner

Earl on February 22, 2002. Therefore, petitioners argue, the findings in the county's decision that conclude that Commissioner Earl was capable of making a decision based on the evidence in the record are not supported by substantial evidence.

Intervenor responds that petitioners have the obligation to demonstrate that Commissioner Earl was biased, and the burden is to demonstrate that bias in a "clear and unmistakable manner." *Lovejoy*, 17 Or LUBA at 66. According to intervenor, petitioners have failed to establish bias according to that standard and, therefore, even if there is substantial evidence in the record to support a conclusion of bias, that evidence is not enough to sustain a bias challenge. Intervenor contends that there is no evidentiary obligation to disprove petitioners allegations.

We agree with intervenor that the county does not have an evidentiary burden to respond with evidence to disprove petitioners' allegations of bias. We have concluded in our resolution of petitioners' fifth assignment of error that petitioners had failed to demonstrate that Commissioner Earl's favorable predisposition towards the application had risen to a level of prejudgment bias. Because it is petitioners' burden to demonstrate bias in a "clear and unmistakable manner," and petitioners have failed to do so, their substantial evidence challenge must fail as well.

The sixth assignment of error is denied.

CONCLUSION

Petitioners request that, in the event we remand this decision to the county for further proceedings, that we also issue

> "an Order requiring restoration of the 1.89 acre parcel zoned [P] to a use that is permitted in the [P] zoning district." Petition for Review 28.

We do not have the authority under ORS 197.835 to issue such a remedial order. *Nehoda v. Coos County*, 29 Or LUBA 251, 256 (1995) (under ORS 197.835, LUBA's remedies are limited to reversal or remand, once it is demonstrated that the local government erred in its

decision); *Dack v. City of Canby*, 17 Or LUBA 265, 275 n 10 (1988) (questioning LUBA's authority to invoke equitable theory of laches as a basis to dismiss an appeal). Accordingly, petitioners' request is denied.

The county's decision is remanded.