BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CARLTON WOODARD, LARRY OKRAY,
KRISTIN OKRAY and MARTIN KILMER,
Petitioners,

vs.

CITY OF COTTAGE GROVE,
Respondent,

and

RUSSELL LEACH and LORI LEACH,
Intervenors-Respondent.

LUBA Nos. 2006-055, 2006-056 and 2006-057

FINAL OPINION
AND ORDER

Appeal from City of Cottage Grove.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr, & Sherlock, PC.

Gary R. Ackley, Cottage Grove, filed a response brief and argued on behalf of respondent. With him on the brief was Ackley Melendy & Kelly, LLP.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REMANDED 05/03/2007

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal three city ordinances that (1) rezone property that includes the Cottage Grove Speedway and an adjoining fairgrounds, and (2) adopt mixed use master plans for the speedway and fairgrounds.

FACTS

The subject property includes the Cottage Grove Speedway, which has been the direct or indirect subject of two previous LUBA appeals, *Leach v. Lane County*, 45 Or LUBA 580 (2003) and *Okray v. City of Cottage Grove*, 47 Or LUBA 297 (2004). The speedway operated for many years outside city limits as a nonconforming use, on a 17-acre parcel adjoining the Willamette River. In 2003, the city annexed the site, and subsequently conducted legislative proceedings to adopt a new Parks & Recreation (PR) Zone intended for the speedway. Under the PR zone, a speedway is allowed subject to approval of a Mixed Use Master Plan (MUMP), which applies as an overlay zone. The ordinances challenged in the present appeals apply the PR zone and adopt MUMPs for the speedway site and an adjoining site that includes the Western Oregon Exposition center. The MUMPs propose that the exposition site be used to provide additional parking for speedway events.

Ordinance 2927 applies the PR zone to the speedway and adjoining exposition site, and is the subject of LUBA No. 2006-055. Ordinance 2928 approves a MUMP overlay zone for the speedway site, and is the subject of LUBA No. 2006-056. Ordinance 2929 approves a MUMP overlay zone for the exposition site, and is subject to LUBA No. 2006-057.

FIRST ASSIGNMENTS OF ERROR (LUBA Nos. 2006-055/56/57)[1]

Petitioners argue that the challenged ordinances should be remanded due to bias or prejudgment exhibited by two members of the city council and the city mayor, bias both *for* the speedway operation and *against* several of the named petitioners, who oppose the speedway. According to petitioners, various actions taken and statements made by councilors Haskell and Patterson, and by mayor Williams, exhibit a strong emotional commitment to the speedway to the extent that the councilors and mayor were incapable of rendering an impartial decision on the rezone and MUMP applications.

A. Standard for Bias

Local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. To the contrary, local officials frequently are elected or appointed in part because they generally favor or oppose certain types of development. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987); *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978). Local decision makers are expected, however, to (1) put whatever bias they may have to the side when deciding individual permit applications, and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 709-10 (2005).[2]

---

[1] Petitioners filed two petitions for review, one in LUBA No. 2006-055 challenging the rezoning decision and another in LUBA Nos. 2006-056/57, challenging the MUMP approvals. The first assignment of error in each petition for review is identical, and we address the first assignments of error together.

[2] Our decision in *Wal-Mart Stores, Inc.* was appealed to the Court of Appeals, and the court dismissed the appeal for reasons not relevant here. The Oregon Supreme Court allowed review and affirmed that dismissal. *Wal-Mart Stores, Inc. v. City of Central Point*, 341 Or 393, 144 P3d 914 (2006).

In two recent cases, LUBA remanded land use decisions after concluding that one of the final decision makers should have refrained from voting on the decision due to bias or prejudgment. In *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001), three city councilors were residents of a subdivision in which a controversial real estate office was proposed. We concluded that the mere fact that two councilors were residents of the subdivision in which the office was proposed was not, in itself, sufficient to demonstrate that the councilors were biased. However, we held that one councilor, also a resident of the subdivision, should have recused himself from voting on the proposed development, based on evidence that the councilor actively opposed the real estate office before and during his tenure as councilor, including writing letters that verged on personal attacks on petitioners, who were the applicants.

In *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd* 183 Or App 581, 54 P3d 636 (2002), two city councilors were members of a church that had filed an application with the city. We held that one councilor was not biased simply by virtue of her membership in the church, and that her statements indicating a general predisposition toward the church was insufficient evidence of bias or prejudgment. However, we held that the second councilor should have recused himself, based on evidence that (1) prior to his election as city councilor the councilor had advocated in favor of the development proposal before the planning commission, (2) the councilor had stated prior to his election that he did not feel the need to be objective about the proposal and that supporters of the proposal would fight a denial "all the way to the Supreme Court," (3) the councilor had signed a petition in favor of the development when it was pending before the city council, and (4) during the city council deliberations the councilor submitted a document explaining why he believed the application met the approval criteria, with specified conditions he proposed. We concluded that, based on the totality of the evidence, the councilor believed he was elected on a mandate to approve the application, and the only question to be decided was what conditions

to impose. We found that the evidence was sufficient to establish that councilor was incapable of impartially deciding the application based on the evidence and arguments before him. Accordingly, we remanded the decision for the city council to consider the application without that councilor's participation.

We analyzed the bias claims in *Friends of Jacksonville* in light of a 1981 Attorney General opinion that set out several factors to be considered in determining whether an elected official must refrain from decision-making due to bias. Those factors included: (1) whether the decision maker's participation is necessary in order for a valid decision to be made; (2) whether the actions that gave rise to the accusation of bias were the result of actions by the elected official in a public capacity or whether those actions were in the elected official's individual capacity; and (3) evidence of a strong emotional commitment on the part of the elected official. 42 Or LUBA at 142, citing 41 Op Atty Gen 490 (1981).

With that review of relevant case law and the standard for bias, we turn to the parties' arguments regarding the individual decision-makers at issue here.

B. Councilor Haskell

Petitioners cite to a number of statements and actions taken by councilor Haskell, as evidence that Haskell was biased, both in favor of the speedway and against the opponents. Some of those statements or actions occurred during the time when the county was considering a nonconforming use verification application for the speedway, prior to the city's annexation of the speedway site in August 2003. During that pre-annexation period, councilor Haskell allegedly spoke at local rallies and attended fundraisers to support the speedway, and made statements indicating that he "strongly supported" the speedway. Record 688. As an initial matter, the city argues that it is immaterial what statements or actions Councilor Haskell made prior to the date the applications for the challenged ordinances were filed, for purposes of determining whether Haskell was biased and should have recused himself from voting on the three ordinances at issue in this appeal.

We agree with the city that Haskell's actions or statements made when the speedway was subject to a pending application before the county hearings officer are not particularly probative in determining whether Haskell should have recused himself from participating in the city's decision on the current applications. At that time (2002) there was no quasi-judicial application involving the speedway pending before the city, so Haskell was not constrained by the obligations of a quasi-judicial decision maker.[3] In any case, even if we considered the cited actions and statements in support of the speedway in 2002, those actions and statements appear to be nothing more than an example of the kind of economic boosterism that is commonly expected from elected officials. Such boosterism, in itself, is not an indication that Haskell was incapable of reaching an impartial decision on any future land use applications to the city involving the speedway.

It is a closer question whether we may consider statements Haskell made during the period the city council was considering the annexation proposal in 2003, in determining whether Haskell should have recused himself from deciding the present zoning and MUMP applications filed in 2005. The annexation application and zoning/MUMP applications involved the same property, but were different quasi-judicial applications. Nonetheless, we believe it is appropriate in the present case to consider statements and actions Haskell made while the city council was considering the annexation proposal in 2003. It seems reasonably clear, and no party disputes, that the purpose and intent in seeking annexation of the speedway site in 2003 was to allow the city council to rezone the site to allow the speedway

[3] We do not mean to suggest that statements or actions that predate applications to a local government can never be relevant, for purposes of determining bias or prejudgment in the decision makers who approve or deny such applications. For example, if a city councilor stated shortly before applications were filed with the city that he intended to vote to approve or deny them regardless of the law or facts submitted during the proceedings on the applications, that statement would seem to be highly probative of bias, if consistent with his subsequent actions or statements. However, in that circumstance the councilor's statement would clearly be in anticipation of a quasi-judicial application to be filed with the city, in which the councilor would likely act in a quasi-judicial capacity. Here, Haskell's actions and statements prior to 2003 were apparently aimed at supporting the nonconforming use application before the county, not in anticipation of any applications to be filed with the city. We are cited to no indication that Haskell or other city decision makers anticipated in 2002 that the city would annex the site in 2003 in order to rezone it to allow for the speedway as a permitted use.

as a permitted, rather than a non-conforming, use, and to approve the speedway use at issue in the present appeals. In that sense, the two sets of applications can be viewed as a series of related applications necessary to approve a single development proposal. We do not see why Haskell's actions and statements during the first application cannot be considered as part of the totality of the evidence in determining whether Haskell was biased and should not have participated in the second set of applications.

1. 2003 Letter to the Editor

Turning now to the parties' arguments, petitioners first cite to evidence that councilor Haskell co-signed a letter to the local newspaper editor in July 2003, while the annexation proposal was pending before the city council, that supported a decision by a local business owner to refuse service to petitioner Kilmer due to his opposition to the speedway. The letter urges Kilmer to relocate to a different town.[4] At a subsequent hearing on the annexation

[4] The July 23, 2003 letter was co-signed by 116 persons, including Haskell individually, as well as on behalf of CG Vacuum & Sewing, a business that Haskell owns. The letter states:

> "We the undersigned are writing in regard to Martin Kilmer's letter of July 9. We do not profess to know which business refused service to sell Mr. Kilmer the sand that he needed (though we can easily guess), but we say 'Good for them.'
>
> "Mr. Kilmer whined that he felt deliberately punished for his views on the racetrack issue.
>
> "However, he seems to feel no qualms about deliberately punishing the citizens of our town for supporting a business that produces revenue, jobs and tourism in our city. Some of us are race fans. Some are not. Nevertheless, we do support the racetrack. We support the track because we support our town, the businesses here, and the people that live in and depend on our local economy.
>
> "You, Mr. Kilmer, have shown your contempt for our views and our community. You seem unable to grasp the fact that your personal vendetta does not mean squat to us, and we believe that most of the people in our town agree with that sentiment.
>
> "Therefore, we say 'Good for them.' Good for that establishment that stood up to you and said, 'No, we don't want your patronage.'
>
> "If more businesses here in Cottage Grove would follow their lead and do the same, you and others like you might finally realize that trying to strangle the life out of our community just isn't the wise thing to do.

proposal, councilor Haskell defended the letter, stating that he signed it after hearing that someone, who Haskell presumed to be an opponent of the raceway, had threatened the business owner who refused service to petitioner Kilmer. Record 707. Petitioners argue that Haskell's willingness to sign onto a personal attack on petitioner Kilmer, one of the most-outspoken opponents of the speedway, based on an alleged threat from an unknown source that Haskell attributed to the opponents, demonstrates Haskell's emotional commitment to the speedway application and a powerful emotional animus against the opponents.

The city responds to these allegations by noting that Haskell stated at the July 2003 hearing that he signed the letter in his individual capacity, not as a city councilor. *Id*. The city also emphasizes Haskell's explanation that he signed the letter in reaction to what he believed to be threats made by opponents to the business owner.

2. Confidential Police Logs on Petitioners

The second set of allegations involves proceedings on the subject applications in 2005. Petitioners allege that councilor Haskell requested that the city police chief provide to the city council "Departmental Fact Files" or so-called "police logs" on three of the named petitioners, Martin Kilmer, Larry Okray and Kristin Okray, dated November 5, 2005. The police logs list every contact city police have had with those petitioners since the early 1990s. Record 871-80. Some of the police contacts involve noise complaints related to the speedway, but most do not. According to petitioners, the police chief presented the logs to Haskell and several other city councilors, including the mayor, at a meeting at Haskell's residence. Subsequently, councilor Patterson requested that the city manager make the police logs part of the public record of the land use proceedings. The city manager attached the police logs to a memorandum dated November 9, 2005. The memorandum states:

> "So, here's hoping that for the sake of all concerned, you can joyfully celebrate next Fourth of July in a new town. Perhaps then you can purchase that truckload of sand for your new patio there." Record 706.

> "The attached police log information was collected by Councilor Patterson and he requested that every Councilor receive a copy of the information. He will also be requesting that the information be included in the record for the Public Hearing on the Speedway MUM.
>
> "The information shows the documented contacts that the Police Department has had with Martin Kilmer, Kris and Larry Okray since the early 1990s." Record 871.

At a subsequent November 21, 2005 hearing, petitioners objected to council's consideration of the police logs. The city attorney responded that the logs had been submitted without his review, and that the logs had been withdrawn from the record. The city attorney further commented that the police logs are "not relevant to this proceeding." Record 554. Petitioners quoted an electronic message from the city attorney to the city manager, in which the city attorney characterized the police logs as "inflammatory since they relate only to the two most vocal opponents." *Id.* Petitioners subsequently re-submitted the November 21, 2005 memorandum and attached police logs into the record.

Later during the same November 21, 2005 hearing, the mayor asked councilors Haskell and Patterson if they had any bias in the matter or wished to recuse themselves. Both answered no. Councilor Haskell explained that he requested the police logs from the police chief because he wanted to know if the frequency of noise complaints had changed in recent years.[5]

---

[5] A portion of the minutes of the city council November 21, 2005 hearing is set out below:

> "[Mayor Williams]: And Councilor Haskell, do you have any intention of recusing yourself or [providing an] explanation[?].
>
> "[Councilor Haskell]: No, I don't, but I will abide by what this Council decides after I have my little say. * * * [A]s far as the police log I used it as a stat[istics] tool. * * * When this was in Lane County I requested to see how many noise complaints were called in. I wanted to know what the difference was from two and one-half years today to whether they had dropped off or increased. That's why I requested the information. I requested the information on a one-on-one basis with the Chief of Police. There was no meeting [where] we all got together and decided to get it. I requested it and I had it for some time before Mr. Patterson saw it. I've been a hot rodder and a racer my whole life. I drive a big truck with a big motor. If that means I'm bias[ed], if that means I can't make a decision for the voters I represent in this community, so be it. * * *" Record 557.

Petitioners argue that police contact logs are the kind of confidential information that is not usually released to the public. According to petitioners, councilor Haskell's efforts to collect this confidential information on three of the most vocal opponents to the applications, and provide that information to the full city council to consider in making a decision on the applications, is a clear demonstration of Haskell's emotional commitment to the speedway and animus toward the opponents.

The city responds that the police logs are simply police contact information, not criminal background checks, and that there is nothing inherently wrong with considering such information for the purpose councilor Haskell stated, to determine if the frequency of noise complaints had changed in recent years. In any case, the city argues, the police logs were withdrawn from the record and the city council did not consider them in reaching a decision. The city submits that the evidence in the record falls short of demonstrating that councilor Haskell was biased or incapable of reaching a decision based on the applicable laws and the facts presented.

We agree with petitioners that, considering the totality of the evidence, the actions and statements of councilor Haskell indicate that he was biased and incapable of reaching an impartial decision. First, it is highly unusual and at least potentially improper for a decision maker to independently seek out or attempt to obtain additional evidence outside the scope of a public hearing with respect to a quasi-judicial application pending before that decision maker. The role of the local government decision maker is not to *develop* evidence to be considered in deciding a quasi-judicial application, but to impartially consider the evidence that the participants and city planning staff submit to the decision maker in the course of the public proceedings. The fact that councilor Haskell felt called upon to develop additional evidence not submitted during the public proceedings, and to cause that evidence to be presented to his fellow decision makers, is an indication that Haskell had departed somewhat from his obligatory role as an impartial quasi-judicial decision maker.

More importantly, the record as a whole demonstrates Haskell's animus toward the opponents to the application, in particular petitioner Kilmer. It is significant that in seeking additional evidence to submit into the record, Haskell asked the police chief for confidential information on three of the most vocal opponents, including Kilmer, and not just general information on noise complaints in the area. The police logs include personal information, as well as a considerable amount of information on police contacts with petitioners not related to noise complaints regarding the speedway. As the city attorney commented, the selective use of such police contact information on opponents to the application is simply inflammatory, and Haskell's apparent willingness to obtain and rely on that information is, in our view, a strong indication of bias.

In addition, the fact that councilor Haskell co-signed a letter during the 2003 speedway annexation proceeding personally attacking Kilmer and urging him to leave the city is a further indication of Haskell's animus toward Kilmer and the opponents in general, and that that animus rendered him incapable of deciding the rezoning and MUMP applications in an impartial manner. It is true, as the city notes, that Haskell did not explicitly sign the letter as a city councilor. However, it seems disingenuous to pretend that a public official who signs onto a public letter that personally attacks the most vocal opponent of a land use proposal that is currently pending before that official is speaking merely as a private citizen. And it may be true, as the city argues, that Haskell signed the letter urging Kilmer to leave town as an emotional reaction to what he perceived to be improper actions by unknown opponents to the application. However, the question is not whether Haskell's animus toward Kilmer is a reasonable reaction to actions that may have been taken by opponents. It is the animus itself, without regard to the justification for that animus, that prevents Haskell from performing his role as a unbiased decision maker. In our view Haskell's explanation simply underscores the extent of Haskell's loss of objectivity regarding the opponents and the speedway issue.

C. Councilor Patterson

Petitioners argue that councilor Patterson, also a strong supporter of the speedway, took the lead in instructing the city manager to release petitioners' confidential police logs to the full city council and the public. For that reason, petitioners argue, councilor Patterson like councilor Haskell is also biased and should have recused himself.[6]

When asked at the November 21, 2005 public hearing to declare any bias or whether he wished to recuse himself based on the police log allegations, councilor Patterson did not attempt to explain why he instructed the city manager to make the police logs on petitioners available to the full city council and part of the public record, or respond to that issue at all. The city manager's memorandum does not explain why councilor Patterson wished that information submitted to the council; it simply relates that information on "documented contacts that the Police Department has had with Martin Kilmer, Kris and Larry Okray since the early 1990s" is submitted at councilor Patterson's request. Given the apparent lack of relevance and the potentially inflammatory nature of the police logs, the most obvious inference is that councilor Patterson believed that disclosure of the police logs would discredit the opponents in the eyes of the city council and the public. Although it is a closer question, absent some other explanation for his conduct, we agree with petitioners that councilor Patterson's lead role in disseminating the police logs that Haskell requested demonstrates an impermissible degree of bias and animus toward petitioners, and that Patterson should have recused himself from participating in the challenged decisions.

---

[6] Petitioners also cite to several instances in 2002 and 2003 when councilor Patterson, like councilor Haskell, attended rallies and fundraisers and made statements in support of the speedway, including listing his name on a website as a supporter. As explained, we do not believe city officials' actions and statements made at the time the county exercised jurisdiction over the speedway site are particularly probative of any bias or prejudgment by those city officials in later proceedings before the city.

D. Mayor Williams

Petitioners' allegations regarding mayor Williams are much less substantial than those regarding the two councilors. Petitioners argue that mayor Williams was a vocal supporter of the speedway, for example writing letters to the county in 2002 stating that the issue of speedway noise is, for many in the city, the sound of "cash registers ringing." Record 692. As explained, this type of economic boosterism is not in itself evidence of bias or prejudgment. The primary allegation petitioners make is that the mayor was present when the confidential police logs on petitioners were provided to some council members, and the mayor apparently acquiesced in the proposal to submit the logs to the full council and the public.

At the November 21, 2005 hearing the mayor confirmed that he was present when the police logs were provided to the city councilors, but does not describe any involvement in disseminating them. Petitioners do not cite to any evidence that the mayor played any role with the police logs, other than to be present when they were first provided to a majority of the city council. At the hearing, the mayor stated that the police logs would not "have any bearing on how I'm going to opine in this matter[.]" Record 558.[7]

---

[7] The mayor stated, in relevant part:

> "[Petitioners' attorney] had some concern about whether I was privy to a police phone in complaint log or not. Yes, I was and I'll tell you the context of that as best as I remember. * * * [T]hat very same police log that I received last week from when we all received that police log I recognized it as something I had seen back when [the county hearings officer] was working on this for the County and so yes I have seen that before. I saw it again last Saturday when I received it with all of the rest of the Councilors. The question is did I see it before that lately and that simply I do not recall seeing it, can't tell you. I have a stack of stuff, as we all have, this is what we've just read and you're asking me to remember a five page document, I don't know, you tell me. That's a lot of reading there; we did that in the last two [and] one-half to three weeks. Does it make a dime's dent in my opinion because certain people that are on one side of this issue have called the cops a lot and complained about stuff. I don't care about that. I've called the cops and complained about barking dogs and those kinds of things myself. So does it have any bearing on how I'm going to opine in this matter, absolutely not. That's I think ludicrous to assume that. Do I have a bias one way or another, I've lived in this community since 1954, Speedway came in 1956, can I make a clear judgment regarding this matter in a quasi-judicial fashion, I know I can and so I have no intention of recusing myself. I've got two years and a whole lot invested into this process. I

Bias sufficiently strong to disqualify a decision maker must be demonstrated in a "clear and unmistakable manner." *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985). In *Schneider* we reviewed a number of appellate court and LUBA decisions that considered whether the record was sufficient to demonstrate that a decision maker was biased, and explained::

> "We understand from these precedents that personal bias sufficiently strong to disqualify a public official must be demonstrated in a clear and unmistakable manner. Inferences of favoritism toward one side or another are insufficient. The burden is to show clearly that a public official is incapable of making a decision on the basis of evidence and argument. * * *" *Id.*

As far as petitioners have demonstrated, to the extent the mayor's limited involvement with the police logs is an indication of bias, the mayor was able to put aside whatever bias he may have had in this case and decide the matter based on the applicable laws and the evidence presented during the public proceedings. The evidence of bias on the mayor's part is insufficient to disqualify the mayor from participating in the decision.

E. Conclusion

For the foregoing reasons, we agree with petitioners that councilors Haskell and Patterson exhibited an impermissible degree of bias and animus toward the opponents, and should have recused themselves from participating in the rezoning and MUMP decisions. The city council has seven voting members, including the mayor, so it does not appear that the vote of either councilor is necessary in order to reach a decision on the applications. However, because both councilors were active participants in the decision making, we cannot know whether and to what extent their participation influenced the vote of the city council. Accordingly, remand is necessary to allow the council to consider the applications without their participation. *Friends of Jacksonville*, 42 Or LUBA at 146.

The first assignments of error in LUBA Nos. 2006-055/056/057 are sustained.

---

just read all of this stuff and if you think I'm going to step aside and say no, I'll take the easy way out, and not do this. That is not going to happen if I can help it * * *." Record 557-58.

SECOND AND THIRD ASSIGNMENTS OF ERROR (LUBA No. 2006-055)

SECOND THROUGH SIXTH ASSIGNMENTS OF ERROR (LUBA Nos. 2006-056/57)

These assignments of error challenge the merits of the rezoning and MUMP decisions. Because we must remand those decisions for re-consideration under the first assignments of error, it would be premature and advisory to address these assignments of error.

We do not reach the second and third assignments of error in LUBA No. 2006-055, or the second through sixth assignments of error in LUBA Nos. 2006-056-057.

The city's decisions are remanded.