BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRAD TAYLOR,
Petitioner,

vs.

CITY OF CANYONVILLE,
Respondent,

LUBA Nos. 2007-059 and 2007-127

FINAL OPINION
AND ORDER

Appeal from City of Canyonville.

William Hugh Sherlock, Eugene, filed the petition for review. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, P.C. Brad Taylor, Canyonville, argued on his own behalf.

Milo R. Mecham, Eugene, filed the response brief and argued on behalf of respondent.

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

BASSHAM, Board Member did not participate in the decision.

AFFIRMED 01/30/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a city decision denying his proposed comprehensive plan amendment and zone change.

FACTS

Petitioner owns four adjoining lots in downtown Canyonville, located approximately a half-mile from the southernmost I-5 exit to the city. Petitioner sought a comprehensive plan amendment and zone change from (1) Retail Commercial to Travel Commercial (C-2) for two of the lots and one-half of a split-zoned third lot, (2) Multi-Family Residential to C-2 on the other half of the split-zoned third lot, and (3) Single-Family Commercial to C-2 on a fourth lot. Petitioner intends to redevelop the existing seven residential units located on the property, most of which are currently nonconforming uses of the commercially zoned parcels, into motel units. Petitioner also intends to convert the existing dwelling on the lot planned and zoned Single-Family Residential into a combined manager's residence/motel office.

City planning staff originally recommended approval of the application. The planning commission, however, denied the application. Petitioner appealed the denial to the city council, which also denied the application. Petitioner then appealed to LUBA, and the city subsequently withdrew the decision for reconsideration. On reconsideration, the city council held another hearing and subsequently again denied the application.[1] This appeal followed.

[1] After the city made its decision on reconsideration in LUBA No. 2007-059, it did not file that decision with LUBA as required by our rules. Petitioner, therefore, separately appealed the decision in LUBA No. 2007-127. After LUBA realized that the decision on reconsideration had not been filed, the Board directed the city to file the decision on reconsideration in LUBA No. 2007-059, which the city did. Petitioner then appealed the decision on reconsideration. LUBA subsequently consolidated the appeals. Therefore, both LUBA Nos. 2007-059 and 2007-127 challenge the same decision.

FIRST ASSIGNMENT OF ERROR

At the city's hearing on reconsideration, the city council heard testimony from petitioner and his attorney in support of the application. There was no other testimony in favor or in opposition to the proposals. The mayor and another city councilor, however, discussed and passed out to the other city councilors a document that summarized their independent investigation into existing vacancy rates for other motels in the city. The mayor and city councilor argued that there was no existing need for petitioner's proposed motel units and that allowing the proposals would create unnecessary competition for existing motels.[2] Petitioner argues that the actions of the mayor and city councilor demonstrate bias and that the decision should be remanded.

ORS 197.835(9)(a)(B) requires LUBA to reverse or remand a decision when the 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 a basis for remand under ORS 197.835(9)(a)(B). *Torgeson v. City of Canby*, 19 Or LUBA 511, 520 (1990). A petitioner must show that decision makers were incapable of making a decision based on the evidence and argument before them. *Lovejoy v. City of Depoe Bay*, 17 Or LUBA 51, 66 (1988).

Petitioner argues that this case is similar to our decision in *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, *aff'd* 183 Or App 581, 54 P3d 636 (2002), where we found that a city councilor was biased. One of the reasons we found that city was biased in that case was because he submitted a document explaining why he believed the application met the approval criteria. *Id*. at 144-45. According to petitioner, just as it was biased for the

[2] While petitioner and the city council discussed whether there was a need for additional motel units, it is undisputed that neither need nor economic viability is an applicable approval criterion.

decision maker to act as a fact finder and submit evidence in support of an application in *Friends of Jacksonville*, it was biased for the mayor and city councilor to submit evidence in opposition to petitioner's application in the present appeal.

While we agree with petitioner that it was improper for the mayor and city councilor to take on fact-finding duties, that impropriety does not necessarily also establish bias. Although the mayor and city councilor accumulated evidence on their own, we do not see that the evidence was collected to support a predisposition to deny the application. We believe the evidence was generated more out of curiosity and genuine interest rather than any directed animus against petitioner. More importantly, the evidence was not directed at any approval criterion, and the city did not deny the application on any grounds that were based on or related to the improperly generated evidence. While it is true that we said in *Friends of Jacksonville* and *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 186 (2007) that it is potentially improper for a decision maker to independently seek out or obtain additional evidence outside the scope of a public hearing, in both cases there were additional factors that led to our conclusion that the decision makers in question were biased. In the present case, given the totality of the circumstances, although the mayor and city councilor committed a procedural error, we cannot say that their actions demonstrated that they were incapable of making a decision based on the evidence and argument before them. [3]

The first assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioner raises five additional assignments of error regarding the city's decision to deny his application. Because the city denied the application, however, the city need only

[3] Petitioner does not argue in his petition for review that the city committed a procedural error which violated his substantial rights in producing and submitting the evidence regarding the motel occupancies. Petitioner only argues that this conduct demonstrates that the mayor and city councilor were biased.

establish the existence of one adequate basis for denial. *Horizon Construction, Inc. v. City of Newberg*, 28 Or LUBA 632, 635 (1995). We address only the sixth assignment of error.

Petitioner argues that the city misconstrued the comprehensive plan and adopted findings not supported by substantial evidence in finding that that application does not comply with Goal 1, Policy 2 of the Land Use and Urbanization goal of the Canyonville Comprehensive Plan (CCP). The purpose of Goal 1 is "[t]o ensure that future development enhances our community's quality of life and proceeds in an orderly manner." Goal 1, Policy 2 directs the city to:

> "*Concentrate* commercial activity in the downtown and *tourist commercial at the freeway exits*." (Emphasis added.)[4]

The city's findings regarding Goal 1 Policy 2 state:

> "Goal 1 Policy 2 of the [CCP] directs that Travel Commercial (C-2) developments should be concentrated at the freeway exits. Applicant argues that his application for a Travel Commercial use downtown, *well away from the freeway exits*, should be approved because the property near the northern freeway exit has been taken over by the [Cow Creek Band of the Umpqua Tribe] and is therefore no longer subject to the restrictions of the [CCP].
>
> "A. Applicant has not applied for a text change to the Comprehensive Plan, nor has applicant provided any evidence that would support such a change in the acknowledged Comprehensive Plan. Applicant cannot ask the City of Canyonville to make a *de facto* amendment to the Comprehensive Plan so that the applicant can show compliance with the Comprehensive Plan requirements.
>
> "B. While the acquisition of land near the north freeway exit by the tribe has removed this land from the jurisdiction of the [CCP], that acquisition has not resulted in development different than contemplated by the Comprehensive Plan. In the absence of an analysis measuring Canyonville's present circumstances and future needs, the anecdotal arguments put forward by the applicant do not show compliance. Applicant's arguments for a change in the Comprehensive Plan without providing any evidence to support such a

[4] The city explains that the reference in the CCP to "tourist commercial" became C-2 (Travel Commercial) in the zoning code. The intent of C-2 zoning is "to provide for uses and facilities serving primarily the tourist and other transient highway users." Canyonville Code 18.44.010.

change do not show compliance with Comprehensive Plan Goal 1." Record 4-5 (Emphasis added).

We understand the city to have found that because petitioner's property is not located at or relatively near a freeway exit, the application did not meet the requirements of CCP Goal 1, Policy 2. Petitioner argues that the city misconstrued the CCP in finding that it could not approve petitioner's zone change because C-2 zoning is allowed only near the freeway exits. According to petitioner, because the city used the word "should" in its decision in describing where C-2 zoning is required to be located, the city was not required to restrict *all* C-2 zoning to the vicinity of freeway exits. Petitioner also argues that the phrase "concentrate [travel] commercial at the freeway exits" does not mean the C-2 zoning must be exclusively located at freeway exits.

Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may overturn a local government's interpretation of its comprehensive plan only if it is inconsistent with the express language, purpose, or policy of the ordinance.[5] Although the city perhaps could have adopted petitioner's preferred interpretation of the language in Goal 1, Policy 2, it was certainly within its discretion not to adopt petitioner's interpretation. The city did not misconstrue the CCP by restricting C-2 zoning to properties that are located at freeway exits.

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[5] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(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[.]"

Petitioner also argues that there is not substantial evidence to support the city's decision that although the tribe has acquired much if not all of the property near freeway exits that is appropriate for travel commercial zoning, that acquisition has not resulted in development different than that contemplated by the comprehensive plan.

In general, to successfully overcome a denial of a permit on evidentiary grounds, a petitioner must demonstrate that the burden of proof was met as a matter of law. *Adams v. Jackson County*, 54 Or LUBA 103, 107 (2007). While we do not believe petitioner has demonstrated as a matter of law that the city's evidentiary finding is incorrect, it also is immaterial. Even if petitioner is correct that the tribe's acquisition of land in the proximity of the freeway exits prevents any land under the city's jurisdiction from being available for C-2 zoning, that would merely be a reason to amend the comprehensive plan to either designate more C-2 zoned land near the freeway exits or amend CCP Goal 1, Policy 2 to remove the current requirement that C-2 zoning be concentrated near freeway exits. It would not provide a basis for approving an application that is inconsistent with CCP Goal 1, Policy 2.

The sixth assignment of error is denied.

The city's decision is affirmed.