BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN GOOLEY,
Petitioner,

vs.

CITY OF MT. ANGEL,
Respondent,

and

MARLA BOEN, BECKI THOMAS,
MARIA SARA GANDARILLA, SUSAN M. LIEBIG,
DIANE SPARKS, KATHY HAUTH,
CAROL KESTELL and MAUREEN FARRIS,
Intervenor-Respondents.

LUBA No. 2007-206

FINAL OPINION
AND ORDER

Appeal from City of Mt. Angel.

Donald M. Kelley, Silverton, filed the petition for review and argued on behalf of petitioner. With him on the brief was Kelley ♦ Kelley.

Christopher D. Crean, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Beery, Elsner & Hammond, LLP.

Marla Boen, Becki Thomas, Maria Sara Gandarilla, Susan M. Liebig, Diane Sparks, Kathy Hauth, Carol Kestell and Maureen Farris, Mt. Angel, filed a response brief on their own behalf.

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

REMANDED 03/18/2008

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

Petitioner appeals a decision denying an application to amend the comprehensive plan and zoning map designation of a 7.69-acre property from Light Industrial (IL) to Residential Single-Family (RS).

MOTION TO INTERVENE

Marla Boen, Becki Thomas, Maria Sara Gandarilla, Susan M Liebig, Diane Sparks, Kathy Hauth, Carol Kestell, and Maureen Farris (intervenors) move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO STRIKE RESPONSE BRIEF; MOTION FOR ATTORNEY FEES

Petitioner moves to strike intervenors' response brief, arguing that intervenors' brief is unresponsive to the assignments of error, includes a large amount of irrelevant information, and asserts facts not in the record. In particular, petitioner argues that intervenors' brief alleges that two non-voting city council members and city staff were biased in favor of the application, but intervenors did not file a cross-petition for review or cross-assignment of error. Petitioner also argues that some of the exhibits attached to intervenors' brief are not in the record. Finally, petitioner moves for attorney fees against intervenors, under ORS 197.830(15)(b).

Intervenors respond that the arguments in their brief are responsive to the assignments of error, and that if LUBA decides that some of the arguments in the brief address irrelevant matters or are based on facts not in the record, LUBA should ignore those portions of the brief and consider the remainder. Intervenors state that their allegations of bias were not intended to challenge the city's decision, but simply to provide what intervenors perceive to be relevant background to petitioner's allegations of bias.

We agree with petitioner that the portions of intervenors' brief that allege the bias of two non-voting council members and city staff are not based on evidence in the record. In

addition, we agree with petitioner that the exhibits attached to intervenors' brief are not included in the record. Intervenors do not allege that any of the exhibits are from the record, move for the Board to take evidence not in the record, or explain why the Board can consider those exhibits. We shall disregard the exhibits attached to intervenors' brief. However, we decline to strike or disregard the entirety of intervenors' brief. Many portions appear to include appropriate responses to the assignments of error, and petitioner has not demonstrated that striking the entire brief is warranted.

With respect to petitioner's motion for attorney fees, petitioner appears to recognize that that motion is premature.

The motion to strike the response brief is granted, in part. The motion for attorney fees is denied, as premature.

FACTS

Petitioner initially applied to rezone the subject property from IL to Residential Multi-Family (RM), later amended to Residential – Single Family (RS). The city planning commission conducted a hearing, concluded that the more appropriate zoning is RS, and forwarded that recommendation to the city council. The city council held its first public hearing on September 5, 2006, at which a number of persons appeared in opposition. On October 6, 2006, the city council issued a decision denying the plan and zoning map amendments to allow single-family residential use.

Petitioner appealed the October 6, 2006 decision to LUBA. Several opponents, including Janet Donohue and Regina Schiedler, intervened on the side of the city. The parties agreed to a voluntary remand, and on June 15, 2007, LUBA entered a final opinion and order remanding the decision back to the city.

After the city's initial decision on the application, in November, 2006, a city election brought three new members to the city council. One of the new councilors is Michael Donohue, who is husband of Janet Donohue. Janet Donohue was the lead intervenor in the

1 prior LUBA appeal. Another new councilor, Richard Schiedler, is the son of Regina
2 Schiedler, another intervenor in the prior LUBA appeal.

3 The new city council held a meeting on remand on August 6, 2007.[1] The notice of
4 the meeting stated that no public testimony would be heard. Prior to the meeting, petitioner's
5 attorney submitted a letter dated August 6, 2007, challenging the qualifications of councilors
6 Donohue and Schiedler to participate in the decision on remand, based on bias and conflict of
7 interest. The mayor forwarded the letter unread to the city attorney for advice, and the letter
8 was apparently not given to the city council members until after the meeting.

9 At the August 6, 2007 meeting, the staff planner asked council members to declare
10 any conflicts of interest or ex parte contacts. One council member (Riedman) declared a
11 conflict of interest and recused herself. The mayor, who votes in case of a tie, also recused
12 himself from voting based on a potential conflict of interest. Another member (Cuff)
13 disclosed ex parte contacts from Janet Donohue. Councilor Donohue noted that "his wife is
14 one of the Intervenors[,]" but stated that he does not have a statutory conflict of interest.
15 Record 71. Councilor Schiedler noted that his mother is one of the intervenors in the matter,
16 but stated that there is no conflict of interest. The city attorney asked if any councilor had
17 conflicts or contacts that would make it impossible to participate in a fair and impartial
18 manner. Hearing no reply, the city attorney stated that "then there is no problem." Record
19 72.

20 The council proceeded to discuss whether or not to hold a public hearing on remand,
21 but ultimately acquiesced in the staff recommendation not to hold a hearing. After
22 discussion of the merits, the five voting council members voted 3-2 to deny the application,
23 with councilors Donohue, Schiedler and Eder voting to deny. The matter was continued to a
24 September 20, 2007 meeting for adoption of findings.

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[1] As discussed below, there is some dispute regarding how to characterize the August 6, 2007 proceeding. For convenience, we describe that proceeding as a "meeting."

At the next regularly scheduled city council meeting on September 4, 2007, petitioner spoke and repeated his earlier written request that the city council address his claims of bias, and further requested that the city take up the question of bias on its own initiative. Petitioner requested that the city re-open the public hearing to allow public testimony and to "clear the air" regarding the bias issue. The mayor expressed disappointment that "certain members" of the council had not recused themselves. Councilor Reidman opined that, had the council known of petitioner's letter at the August 6, 2007 meeting, the council decision not to hold a public hearing might have gone differently. Councilor Reidman asked how the issue could be brought to the council for discussion. The city administrator advised that the city can reconsider the vote to deny the application, and then consider whether to hold a public hearing, if one of the three councilors who prevailed in the August 6, 2007 vote moved to reconsider the decision. The three prevailing councilors were polled, and each declined to move to reconsider the decision.

Following that meeting, petitioner submitted a letter requesting that the council consider a motion to "rescind" the August 6, 2007 vote, to allow the council to consider a motion for a new hearing. Petitioner argued that, unlike a motion for reconsideration, any councilor could move to rescind the decision, under Robert's Rules of Order. At the following September 20, 2007 meeting, each councilor was polled and declined to move to rescind the August 6, 2007 vote. The city council then voted to adopt its final written decision denying the plan and zoning amendments. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

City of Mt. Angel Resolution 1056, Section 16, sets out rules governing challenges to participation in a quasi-judicial matter based on bias and conflicts of interest.[2] Section 16.1

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[2] Resolution 1056, Section 16 is entitled "Bias and Disqualification," and provides in relevant part:

> "16.1 Any proponent, opponent or other party interested in a quasi-judicial matter to be heard by Council may challenge the qualification of any Councilor to participate in

1 provides that any party to the proceeding may challenge the qualification of any councilor to
2 participate in the hearing and decision. Such a challenge must state the facts relied upon by
3 the party and "must be made prior to the commencement of the public hearing."

4 Petitioner argues that the city erred in failing to (1) address petitioner's challenges to
5 councilors Donohue and Schiedler, under Section 16.1, and (2) raise its own challenge to
6 those councilors' participation in the decision on remand, under Section 16.3. We address
7 each contention in turn.

8 **A. Section 16.1**

9 Petitioner argues that the city council chose to ignore his bias challenge under Section
10 16.1, based apparently on the advice of the city attorney. According to petitioner, the city
11 attorney advised the city council that because (1) the August 6, 2007 meeting on remand was
12 not a "public hearing" that allowed public testimony, but rather only a "meeting" at which
13 the city council would deliberate and vote on the decision on remand, and (2) Section 16.1
14 required that the challenge "must be made prior to the commencement of the public hearing,"

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such hearing and decision. Such challenge must state any fact(s) relied upon by the party relating to a Councilor's bias, pre-judgment, personal interest or other factor from which the party has concluded the Councilor cannot participate and make an impartial manner. Such challenges must be made prior to the commencement of the public hearing. The Mayor shall give the challenged member an opportunity to respond. A motion to accept or deny the challenge will be accepted and voted upon by the Council. Such challenges and the Council's decision shall be incorporated into the record of the hearing.

"16.2 In the case of a quasi-judicial matter that is heard by the Council, a Councilor must disclose his or her participation in a prior decision or action on the matter that is before the Council. Common examples include when a Planning Commission member is elected or appointed to the City Council or when a Councilor testifies at a Planning Commission meeting. The Councilor shall state whether he/she can participate in the hearing with complete disregard for the prior decision made. If the Councilor is unable to be impartial, the Councilor has a duty to disqualify him or herself from participating in the proceedings and leave the room.

"16.3 If the City Council believes that the member is actually biased, it may disqualify the member by majority vote from participating in a decision on the matter. A Councilor who has been disqualified from participating in a decision may participate in the proceeding as a private citizen if the Councilor is a party with standing."

1 Section 16.1 therefore did not entitle petitioner to challenge the participation of councilors
2 Donohoe and Schiedler.

3 Petitioner argues that that literal reading of Section 16.1 fails to take into account that
4 petitioner could not possibly challenge the participation of councilors Donohoe and Schiedler
5 prior to the "public hearing" held during the initial proceedings, because those councilors
6 were not on the council at the time.

7 The city responds that by its terms Section 16.1 applies only to a public "hearing,"
8 and the August 6, 2007 meeting was a "meeting," not a "hearing." According to the city, a
9 "hearing" necessarily includes the opportunity for public participation and the taking of
10 testimony, evidence or argument, while a "meeting" need not. Because at the August 6, 2007
11 meeting the city council chose not to allow public participation, the city argues, it was not a
12 hearing and therefore Section 16.1 is inapplicable.

13 As noted, the city council apparently did not know of petitioner's August 6, 2007
14 letter challenging the participation of councilors Donohue and Schiedler until after the
15 August 6, 2007 meeting. It is not clear at what point the city attorney rendered advice
16 regarding the letter, or exactly what that advice was.[3] It is difficult to know how the city's
17 subsequent responses to petitioner's renewed challenges at the September 4, 2007 meeting
18 were shaped by that advice. The city council adopted no findings regarding the bias
19 challenge, and did not explicitly rule on petitioner's bias challenge under Section 16.1.
20 Instead, the debate at the September 4, 2007 meeting turned on whether one of the three
21 prevailing members in the August 6, 2007 vote would move to reconsider the vote, which
22 was apparently considered a procedural necessity to re-opening the hearing to address the
23 bias challenge.

[3] If that advice was reduced to writing and placed in the record, the parties do not cite it to us. However, the city does not characterize the city attorney's advice differently than petitioner, or dispute that at some point the city attorney communicated that advice to the city council.

1 To the extent the city council relied on the distinction drawn in the response brief
2 between a "hearing" and a "meeting" for purposes of Section 16.1, that distinction is
3 unpersuasive. Nothing cited to us in Section 16.1 or elsewhere in Resolution 1056 suggests
4 that a proceeding to deliberate on a quasi-judicial land use permit application is not a
5 "hearing" for purposes of Section 16.1. We note that Section 17 of Resolution 1056 governs
6 disclosure of ex parte contacts and appears to directly implement ORS 227.180(3).[4] Like
7 Section 16.1, the provisions of Section 17 refer to quasi-judicial "hearings."[5] The city does
8 not dispute that the August 6, 2007 proceeding was subject to Section 17 and therefore was a
9 quasi-judicial "hearing" for purposes of that section. Because both Section 16 and 17 apply

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[4] ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
>
> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
>
> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

[5] Section 17 provides:

> "17.1 For quasi-judicial hearings, Councilors should refrain from having *ex parte* contacts relating to any issue of the hearing. *Ex parte* contacts are those contacts by a party on a fact in issue under circumstances that do not involve all parties to the proceeding. *Ex parte* contacts can be made orally when the other side is not present, or they can be in the form of written information that the other side does not receive.
>
> "17.2 If a Councilor has *ex parte* contact prior to a hearing, the Councilor must reveal the contact at the meeting and prior to the hearing. The Councilor shall describe the substance of the contact and the presiding officer shall announce the right of interested persons to rebut the substance of the communication. The Councilor also will state whether such contact affects the Councilor's impartiality or ability to vote in the matter. The Councilor must state whether he or she will participate or abstain.
>
> "17.3 For quasi-judicial hearings, a Councilor who was absent during the presentation of evidence cannot participate in any deliberations or decision regarding the matter unless the Councilor has reviewed **<u>all</u>** the evidence and testimony received." (Bold and underline in original).

1 to quasi-judicial "hearings," and Section 17 applied to the August 6, 2007 proceeding, it
2 would seem to follow that the August 6, 2007 proceeding was also a "hearing" for purposes
3 of Section 16.

4 To be sure, the city is correct that the August 6, 2007 meeting was not a full-blown
5 evidentiary hearing subject to the requirements of ORS 197.763. However, at least for
6 purposes of ORS 227.180(3) and Section 17, the August 6, 2007 meeting was clearly a
7 "hearing," at which the public had the right to participate to the extent of exercising the right
8 to rebut the substance of any written or oral *ex parte* communication. *See Friends of*
9 *Jacksonville v. City of Jacksonville*, 189 Or App 283, 76 P3d 121 (2003) (a proceeding on
10 remand from LUBA to deliberate on a permit application was a "hearing" for purposes of
11 ORS 197.830(3), because the city council provided a forum for a public declaration of *ex*
12 *parte* contacts by council members, and invited the public to offer rebuttal evidence
13 regarding any such contact, as required by ORS 227.180(3)).

14 Moreover, limiting bias challenges under Section 16 to full-blown evidentiary
15 hearings and precluding such challenges during deliberative proceedings on quasi-judicial
16 permit applications seems inconsistent with what appears to be the function of Section 16: to
17 allow challenges to the qualifications of any councilor to participate in the "hearing and
18 decision." Under the city's narrow view of what constitutes a "hearing," the city may ignore
19 possibly valid challenges to a councilor's participation in the decision that could not have
20 been raised during earlier evidentiary proceedings, and that were in fact raised at the earliest
21 practicable opportunity. That result seems inconsistent with a provision that is apparently
22 intended to ensure that the city's quasi-judicial decisions are as free as possible from bias.

23 The city next responds that, even if Section 16.1 applied, petitioner failed to state
24 sufficient "facts relied upon by the party relating to a Councilor's bias." *See* n 2. The city
25 argues that petitioner's letter does not state facts sufficient to demonstrate that either

1 Councilor Donohue or Schiedler were biased, and it is clear that even if that challenge had
2 been addressed it would have failed, allowing both councilors to participate in the decision.
3 However, petitioner's letter and subsequent testimony clearly stated that he believed
4 Councilor Donohue's and Schiedler's matrimonial and filial relationships with persons who
5 were parties to the quasi-judicial action before the council gave some basis to doubt those
6 councilors' ability to participate in the decision in an impartial manner.[6] The city appears to
7 believe that Section 16.1 requires a challenger to actually *demonstrate* that a councilor is
8 biased, in order to invoke the procedures in Section 16.1. However, we do not understand
9 Section 16.1 to impose that initial burden. Section 16.1 clearly requires some kind of initial
10 or *prima facie* showing, but it is also provides for the challenged councilor to respond to the
11 allegations, after which the council may entertain a motion to accept or deny the challenge.
12 Any subsequent vote is based on both the initial allegation and the response.[7] Because the
13 council made no determinations regarding petitioner's challenge and did not require that the
14 challenged councilors respond, we have no basis to conclude that petitioner's challenge
15 necessarily would have been rejected.

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[6] It is not clear to what extent Councilor Donohue's wife and Councilor Schiedler's mother were active participants in the proceedings on remand, but it is seems undisputed that they were both parties to the appeal to LUBA and active participants in the earlier proceedings before the city and on appeal. The proceedings on remand were essentially a continuation of the earlier proceedings. *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992). Generally, the parties to a LUBA appeal are also parties with respect to the proceedings on remand. *Siporen v. City of Medford*, __ Or LUBA __ (LUBA No. 2006-124, September 7, 2007) slip op 22. As far as we know, the councilors' relatives did not withdraw their party status from the proceedings on remand, and continued to be parties to the proceedings on remand. Although we express no opinion on whether the two councilors in fact were biased, even the most conscientious and fair-minded decision maker is likely to have some difficulty deciding a quasi-judicial matter based solely on the applicable criteria, when a very close relative is a party to the matter. In our view, those circumstances, on their face, are sufficient to raise a legitimate question regarding potential bias or inability to reach an impartial decision based on the applicable criteria. Moreover, although petitioners do not argue this point, the degree of consanguinity involved also suggests that *ex parte* contacts were possible. Neither Councilor Donohue nor Councilor Schiedler disclosed any *ex parte* contacts at the August 6, 2007 proceeding, or affirmed that no *ex parte* contacts occurred.

[7] In addition, although Section 16.1 does not expressly provide for it, we see no reason why the city council could not authorize further inquiries or elicit further testimony if it deemed it necessary.

In sum, we agree with petitioner that Section 16.1 applied to the August 6, 2007 proceedings, and a timely challenge was made under that provision. The city has identified no lawful basis under which it was entitled to ignore petitioner's challenge. The city erred, therefore, in failing to address that challenge. Remand is necessary to address petitioner's challenge under Section 16.1 and to follow the procedures specified in that provision. Depending on the outcome of those procedures, a new vote on the proposed application by all qualified council members may be necessary.

B. Section 16.3

Section 16.3 provides that" "[i]f the City Council believes that the member is actually biased, it may disqualify the member by majority vote from participating in a decision on the matter." *See* n 2.

Petitioner argues that Section 16.3 authorizes the city council to challenge the qualifications of any councilor on its own motion, regardless of whether a challenge has been advanced or accepted under Section 16.1. Petitioner cites to comments made by the mayor and another councilor suggesting that at least some members of the council believed that councilors Donohue and Schiedler should have recused themselves. However, petitioner argues, the city council appeared to believe that it could take no action unless the prevailing councilors voted to reconsider the matter. According to petitioner, the council failed to appreciate that Section 16.3 grants specific authority for the council on its own motion to disqualify a councilor the majority believes is actually biased.

The city responds that Section 16.3 is permissive, and does not obligate the city council to disqualify a council member, even if a majority of the council is convinced the councilor is actually biased. In addition, the city argues, the reference in Section 16.3 to "the member" is a reference to a member who has participated in a prior decision and must make disclosures pursuant to Section 16.2, a circumstance that is not at issue here. *See* n 2. In

1 either case, the city contends, petitioner has not demonstrated any basis under Section 16.3 to
2 reverse or remand the challenged decision.

3 As the city notes, the use of the definitive article ("the member") in Section 16.3
4 certainly suggests an antecedent, which could be a council member who must disclose
5 participation in an earlier decision under Section 16.2 or, possibly, a council member whose
6 participation is challenged under Section 16.1, or both. Because the intended meaning of
7 Section 16.3 is unclear, and remand is necessary in any event to address petitioner's
8 challenge under Section 16.1, the city should on remand address the meaning and application
9 of Section 16.3 in the first instance, if necessary.

10 The first and second assignments of error are sustained.

11 **THIRD ASSIGNMENT OF ERROR**

12 Petitioner argues that the city erred in accepting on remand a supplemental staff
13 memorandum that proposed a new analysis of city approval standards, without re-opening
14 the record and allowing petitioner to rebut the new staff analysis. According to petitioner,
15 the staff memorandum proposed an interpretation of city standards that the city council
16 ultimately adopted to deny the application. Citing *Ploeg v. Tillamook County*, 50 Or LUBA
17 608, 617 (2005), petitioner argues that that new interpretation or analysis should be treated as
18 the introduction of new evidence into the record, and therefore the city was obligated to
19 either reject the new evidence as untimely or re-open the record to allow other participants an
20 opportunity to respond to the new evidence.

21 The city code requires the applicant to demonstrate that the proposed zone is
22 consistent with all applicable comprehensive plan policies. City of Mount Angel
23 Comprehensive Plan Industrial Land Use Policy 3 states that it is the city's policy to
24 "[p]rohibit the encroachment of non-industrial uses in lands reserved for industrial uses."
25 The original staff report concluded in relevant part that the application complied with Policy
26 3, because non-industrial land to the east of the subject property had already encroached on

1 the industrial area, separating the industrial land to the north from the industrial land to the
2 south. Following remand, staff submitted a memorandum dated August 1, 2007, that set
3 forth the history of the case and repeated its earlier analysis. In addition, however, the
4 August 1, 2007 memorandum articulated an alternative, opposite view that the subject
5 property could be seen as the central part of a larger industrial area that had not yet been
6 encroached upon by non-industrial uses.[8] The city council ultimately adopted that
7 alternative view:

> 8 "The City Council found the request is not consistent with Comprehensive
> 9 Plan Industrial Land Use Policy 3, which states, 'Prohibit the encroachment of
> 10 non-industrial uses in lands reserved for industrial uses.'
>
> 11 "The memorandum by City Planner Suzanne Dufner, dated August 1, 2007,
> 12 identified two ways to interpret [Policy 3] as it applies to this request. The
> 13 interpretation recommended by staff and the Planning Commission, as stated
> 14 in the August 30, 2006 staff report, finds the industrial area encompassing the
> 15 subject property has already [been] encroached upon by non-industrial uses
> 16 due to the construction of a manufactured home park located directly east of
> 17 the subject property. The report also identified an alternative interpretation of
> 18 [Policy 3] that views the subject property and surrounding industrial land to
> 19 the north and the south and bounded by the railroad right-of-way to the east,
> 20 as one contiguous area reserved for industrial use that has not been
> 21 substantially encroached upon by non-industrial uses.
>
> 22 "The City Council relied upon the alternative interpretation provided in the
> 23 August 1, 2007 memorandum and determined that the request, if approved,
> 24 would violate [Policy 3] by allowing non-industrial uses to impermissibly
> 25 encroach on lands reserved for industrial use * * * by allowing residential
> 26 uses to divide the existing industrial area into two separate areas located to the
> 27 north and south of the subject property." Record 12.

28 The city responds, and we agree, that the petitioner has not demonstrated that the
29 August 1, 2007 staff report included any new evidence. Unlike the staff report at issue in

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[8] The August 1, 2007 staff memorandum stated, in relevant part:

> "* * * An alternate interpretation of this criterion may find the zoning of the subject property is physically suited for industrial use given the existing industrial uses located to the north and south of the subject property and the property's location adjacent to the railroad to the west." Record 92.

Ploeg, which presented a new and different factual study of the affected area after the evidentiary record had closed, the August 1, 2007 staff report simply recommends that the city council reach a particular conclusion based on evidence already in the record and, in the alternative, articulates an alternative conclusion the city council could reach, based on the same evidence. While the line between permissible staff advice and impermissible new evidence may frequently be unclear, in the present case it seems relatively clear that the August 1, 2007 staff report included no new evidence and consisted in relevant part only of staff advice regarding what conclusions the city council could draw from the evidence already in the record.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Section 17.3 of City of Mt. Angel Resolution 1056 provides:

> "For quasi-judicial hearings, a Councilor who was absent during the presentation of evidence cannot participate in any deliberations or decision regarding the matter unless the Councilor has reviewed **all** the evidence and testimony received." (Bold and underline in original).

Petitioner argues that councilors Donohue and Schiedler were not on the city council during the original evidentiary proceedings, and that neither councilor gave any indication during the proceedings on remand that they had "reviewed **all** the evidence and testimony received." Petitioner argues that there is no evidence in the record that councilors Donohue and Schiedler reviewed all (or any) of the evidence and testimony submitted in the earlier proceeding and, therefore, those councilors' votes must be disregarded. If so, petitioner contends, the vote would shift from 3-2 in favor of denial to 2-1 in favor of the application.

The city responds that petitioner cites no obligation for the councilors to expressly affirm that they have reviewed all the evidence and testimony received in prior proceedings that they did not attend. The city argues that the packets sent to the council for the August 6, 2007 meeting included the complete record of the testimony and evidence received during

1 the prior proceedings, and there is no indication in the record that would suggest that either
2 Councilor Donohue or Schiedler failed to review all of the evidence and testimony.

3 Section 17.3 is silent regarding whether a councilor who did not participate in prior
4 proceedings must affirmatively declare whether he or she reviewed all of the evidence and
5 testimony received. Given the explicit and serious consequences of failing to review all of
6 the evidence and testimony, it is easy to argue that such an obligation to declare is implicit in
7 Section 17.3, as otherwise Section 17.3 effectively becomes more of a hortatory rather than
8 mandatory requirement.

9 Because remand is necessary under the first and second assignments of error in any
10 event, it is appropriate for the city council to address Section 17.3 in the first instance and
11 adopt any necessary interpretative findings. If the city council concludes that Section 17.3
12 requires a declaration or inquiry into whether a councilor has reviewed all of the previously
13 submitted evidentiary record, the city council should act to ensure compliance with Section
14 17.3.

15 The fourth assignment of error is sustained.

16 The city's decision is remanded.