BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUSAN CLAUS, ROBERT JAMES CLAUS,
and SANFORD M. ROME,
Petitioners,

vs.

CITY OF SHERWOOD,
Respondent,

and

CAPSTONE PARTNERS, LLC,
Intervenor-Respondent.

LUBA No. 2010-017

SUSAN CLAUS, ROBERT JAMES CLAUS,
and SANFORD M. ROME,
Petitioners,

vs.

CITY OF SHERWOOD,
Respondent.

LUBA No. 2010-023

FINAL OPINION
AND ORDER

Appeal from City of Sherwood.

Susan Claus, Robert James Claus, and Stanford Rome, filed the petition for review and argued on their own behalf.

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

Steven P. Hultberg, Bend, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Ball Janik, LLP.

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

AFFIRMED 09/10/2010

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 a city council decision approving a planned unit development (PUD), comprehensive plan map and zoning map amendments, a 10-lot subdivision, and an amendment to the city's transportation system plan (TSP).

FACTS

This appeal involves the proposed redevelopment of a former industrial site into a mixed-use PUD known as Cannery Square. The subject 6.4-acre site is owned by the Sherwood Urban Renewal Agency (SURA). The SURA board consists of the seven city council members, although the city council and SURA are legally distinct entities. In 2008, intervenor-respondent Capstone Partners, LLC (intervenor) signed a purchase and sale agreement with SURA to redevelop the site. The agreement obligates intervenor to use commercially reasonable efforts to obtain necessary zoning, planned unit development and subdivision approvals from the city.

On August 7, 2009, intervenor filed an application with the city seeking PUD approval for 101 residential units, application of a PUD overlay to the comprehensive plan map and zoning maps, a 10-lot subdivision, and an amendment to the city TSP to change the functional classification of an adjoining street. The planning commission held hearings on November 10, 2009 and December 12, 2009, at which petitioners testified and submitted written materials in opposition. On January 26, 2010, the planning commission forwarded a recommendation to the city council that the council approve the application with a number of conditions, including reduced residential density.

The city council held a public hearing on the application on February 2, 2010, at which petitioners testified. At the beginning of the February 2, 2010 hearing, city staff announced that proponent and opponent testimony would be limited to three minutes per person. Petitioner Robert Claus spoke for three minutes, was interrupted by the mayor, and

objected to the city's failure to allow him five minutes of oral testimony. At the end of the February 2, 2010 hearing, the mayor closed the proponent/opponent testimony phase, and continued the hearing to February 16, 2010, for applicant rebuttal and council deliberations. Petitioners requested in writing that the city council allow additional public testimony, oral and written, but the city council took no action on that request. At the February 16, 2010 continued hearing, intervenor's representative submitted rebuttal testimony, and the evidentiary record was closed. The city council entered into deliberations, and voted 6-1 to approve the application, with modified conditions of approval. At a March 2, 2010 meeting, the city council adopted a revised ordinance approving the application, including 101 residential units. This appeal followed.

MOTION TO STRIKE

At oral argument on August 19, 2010, petitioner Robert James Claus submitted to the Board a 39-page document consisting of pages copied from a PowerPoint presentation that petitioners had prepared for oral argument. Petitioner Sandford Rome submitted a six-page document consisting of his proposed oral argument to LUBA. The Board received both documents, subject to respondents' objections. Both petitioners then presented oral argument.

The city and intervenor move to strike portions of the written documents and oral argument petitioners presented at the August 19, 2010 hearing. With respect to the written documents, respondents argue that LUBA's rules do not authorize parties to present written argument or documents to the Board at oral argument, with the limited exception of copies of materials already in the record or materials created during oral argument (such as drawings on a whiteboard). OAR 661-010-0040(5).[1] Specifically, respondents object to pages 1-4, 9,

[1] OAR 660-010-0040(5) provides:

10-13, 15-17, 19-31, 34-39 of petitioner Claus' submittal, and all six pages of petitioner Rome's submittal, as not consisting of documents copied from the record.

We agree with respondents that pages 1-4, 9, 10-13, 15-17, 19-31, 34-39 of petitioner Claus' submittal, and all six pages of petitioner Rome's submittal are extra-record documents that we may not consider under our rules. The remaining pages of petitioner Claus' submittal appear to be copies of documents from the record, and those pages are accepted.

With respect to petitioners' oral argument, respondents argue that some of their testimony raised new issues not raised in the petition for review and recited facts outside the record. OAR 661-010-0040(1) (LUBA shall not consider issues raised for the first time at oral argument); ORS 197.835(2)(a) (LUBA's review is confined to the record). Petitioners dispute that characterization of their oral testimony. Given the difficulty in resolving that dispute, and the difficulty in "striking" portions of oral testimony, we consider respondents' motion to simply request that LUBA focus its review on the issues framed in the petition for review, the evidence cited in the record, and the portions of the oral argument that discuss those issues and evidence. *NAAVE v. Washington County*, 59 Or LUBA 153, 156 (2009). That request is granted.

The motion to strike is granted, in part.

FIRST AND SECOND ASSIGNMENTS OF ERROR

Petitioners argue that the city council erred in failing to disclose *ex parte* communications received when the city council members participated as the SURA board at meetings approving and modifying the purchase and sale agreement between SURA and intervenor. Further, petitioners argue that the existence of a contract between SURA and intervenor created conflicts of interest, and that the city council members were biased in

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> "Demonstrative exhibits presented at oral argument shall be limited to copies of materials already in the record, including reductions or enlargements, or materials created during the party's presentation at oral argument."

favor of the PUD application, and incapable of making a decision based on the evidence and testimony submitted during the land use proceeding on the PUD application.

A. Ex Parte Communications

Petitioners argue that the challenged decision must be reversed due to undisclosed *ex parte* communications.[2] Although petitioners do not cite it, their argument is presumably based on ORS 227.180(3), which 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."

Petitioners argue that at the first city council hearing on the PUD application the city council members failed to disclose that they sit on the SURA board, and that the SURA board had previously authorized SURA to enter into a purchase and sale agreement and memorandum of understanding for the Cannery Square property. However, petitioners do not explain why the presence of the city council members on the SURA board, or the SURA board's actions in authorizing a contract or contract modifications between SURA and intervenor, constitute *ex parte* communications that must be disclosed under ORS 227.180(3). Petitioners identify no communications whatsoever between intervenor

[2] Petitioners do not explain why reversal rather than remand would be the appropriate remedy for failure to disclose an *ex parte* communication. Generally, if LUBA concludes that a local government decision maker failed to disclose an *ex parte* communication in violation of ORS 227.180(3), the remedy is to remand the decision to the local government to provide disclosure, opportunity for rebuttal, and adoption of a new decision based on all evidence properly before the decision-makers. *Opp v. City of Portland*, 38 Or LUBA 251, *aff'd* 171 Or App 417, 16 P3d 520 (2000).

and the SURA board or any city council member that could be subject to ORS 227.180(3).[3] Absent a more developed argument, petitioners' contentions that the city council failed to disclose *ex parte* communications with intervenor do not provide a basis for reversal or remand.

B. Conflict of Interest

Petitioners next argue that the contract between intervenor and SURA represents a conflict of interest for the individual city council members who voted to approve the PUD application. We understand petitioners to argue that under the contract intervenor could seek damages against SURA if SURA breached its contractual obligations, the city council members sit on the SURA board and presumably are motivated to avoid lawsuits against SURA, and therefore city council approval of the PUD application represents a conflict of interest.

There are any number of problems with that theory, not the least of which is that petitioners identify nothing in the contract that would obligate either SURA or the city (which is not a party to the contract) to ensure that the PUD application is approved. The city points out that the contract places the burden on intervenor to obtain all required land use approvals, and nothing cited to us in the contract suggests that failure to obtain land use approvals could represent a breach of contract by SURA. Even more to the point, ORS 222.020(1) defines "conflict of interest" in relevant part as an action by a public official the effect of which is to provide some "private pecuniary benefit or detriment" to the official or a relative. Petitioners make no attempt to explain how approval of the PUD application could provide any *private* pecuniary benefit or detriment to any city council member.

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[3] LUBA previously denied petitioners' request to consider extra-record evidence, the minutes of a November 3, 2009 SURA board meeting in which the SURA board approved modifications to the 2008 contract to purchase the Cannery Square property from SURA. *Claus v. City of Sherwood*, __ Or LUBA __ (LUBA No. 2010-017/023, Order, July 14, 2010). As explained in our order, we denied the motion in part because petitioners identified nothing in the SURA minutes indicating that any communication occurred between intervenor and the SURA board.

C. Bias

Finally, petitioners argue that the city council members, and in particular the mayor, were biased in favor of the PUD application, and incapable of making a decision based on the evidence in the record.

To demonstrate bias, a party must show that the decision maker prejudged the application and did not reach a decision by applying relevant standards based on the evidence and argument presented during the proceedings. *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). With respect to the city council members in general, petitioners cite nothing suggesting that any city council member was biased, other than the fact that some current city council members were on the SURA board in 2008 when it authorized sale of the Cannery Square property to intervenor, and the current city council members were on the SURA board in November 2009 when it authorized a minor modification to the contract. Those circumstances fall far short of demonstrating bias on the part of any individual city council member or the city council as a whole.

Petitioners come somewhat closer to the mark with respect to the mayor. Petitioners cite to a newspaper interview with the mayor dated December 4, 2009, in which the mayor discussed the November 2009 contract modification and stated "Yes, we'd like to be further along, but we are still very happy with Capstone and we're making progress." Record 993. In addition, petitioners argue that the mayor testified at a Metro Council meeting on January 20, 2010, just prior to the city council hearings on the PUD application, and reportedly indicated that the Cannery Square project "would soon begin." Petition for Review 24. Petitioners contend that these statements indicate that the mayor had prejudged the PUD application and was incapable of rendering a decision by applying relevant standards based on the evidence and argument presented during the proceedings.

In *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 178 (2007), we explained that:

> "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)."

Thus, that the mayor made pre-hearing public statements that could be construed as supporting the PUD application does not, by itself, suffice to demonstrate reversible bias. The question is whether petitioners have demonstrated that the mayor failed to engage in necessary fact-finding and apply the law to the facts, and instead based his vote on a predisposition in favor of the application. Petitioners cite to nothing in the record of the city council hearings or elsewhere suggesting that the mayor failed to base his vote on the facts found or on application of the city's land use regulations to those facts. Petitioners' allegations of bias do not provide a basis for reversal or remand.

The first and second assignments of error are denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR

Petitioners contend that the mayor violated petitioners' rights of free speech under the First Amendment to the United States Constitution, by limited petitioners' testimony before the city council and rejecting petitioners' request to re-open the record. Further, we understand petitioners to argue that the mayor's actions represent animus toward petitioners that resulted in a tribunal that was not impartial.

A. Three Minute Limit on Testimony

Under rules adopted by the city council, public testimony is generally limited to five minutes. However, at the beginning of the February 2, 2010 city council hearing, staff

announced that proponent and opponent testimony would be limited to three minutes per person, presumably due to the large number of persons who signed up to testify. Record 127. Part-way through the hearing petitioner Robert Claus was called to testify and first handed the city council copies of written documents. Claus then spoke for three minutes, at which point the mayor indicated that Claus had run out of time. Petitioner protested that the mayor had given other parties five minutes to testify. After further colloquoy, petitioner stepped down.[4]

On appeal, we do not understand petitioners to argue that the mayor in fact gave other parties five minutes to testify, or at least petitioners cite no evidence to that effect. Nor do petitioners argue that the city lacked the authority to limit testimony to three minutes. Instead, petitioners argue that the mayor cut petitioner Claus' testimony off at three minutes because the mayor wished to prevent Claus from testifying further about the contract between intervenor and SURA and about allegations of bias and conflict of interest.

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[4] Petitioners offer a transcription of that colloquoy, presumably based on the audio recording of the February 2, 2010 hearing:

[Claus]: "* * * I've still got two minutes.

[Mayor]: "Nope.

[Claus]: "What are you trying to tell me? You're cutting it off at what, Keith?

[Mayor]: "It was announced at three minutes."

[Claus]: "It's what?"

[Mayor]: "Three minutes."

[Claus]: "You've allowed everybody else five."

[Mayor]: "I show discretion, that's why I'm asking you to wrap it up."

[Claus]: "So you're cutting it off at three and I want it totally noted you're cutting me off at three because this is going to go to LUBA eventually I'm going to get the pleasure of seeing you in court and make no mistake about it Mays, that's where you're headed, cop or no cop."

[Mayor]: "Thank you." Petition for Review 26-27.

Petitioners contend that the mayor's action constitutes content-based censorship in violation of the First Amendment.

The city responds, and we agree, that petitioners have not demonstrated that the mayor treated petitioner Claus any differently from other parties with respect to time allocation, or that the mayor's attempt to hold Claus to the announced three-minute time limit was based on the content of Claus' testimony.

B. Request to Re-open the Record

Petitioners next argue that the mayor erred in rejecting petitioners' requests to re-open the evidentiary record to respond to "new evidence" that was submitted at the February 2, 2010 hearing. Petitioners first cite to evidence that *they* submitted at the February 2, 2010 hearing, and appear to argue that they are entitled to request that the record be left open so that petitioners can respond to their own testimony. If that is petitioners' position, we reject it.

Petitioners also argue that during intervenor's initial presentation at the February 2, 2010 hearing, intervenor submitted a Power Point presentation found at Record 249-88 that petitioners allege includes "new evidence" regarding parking standards and traffic impacts. Citing to Sherwood Municipal Code (SMC) 16.72.050(3), petitioners argue that if "new evidence" is submitted at a continued hearing they are entitled to request an opportunity to respond to that new evidence.[5] The city responds that SMC 16.72.050 implements

[5] SMC 16.72.050(3) provides, in relevant part:

> "A. Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence or testimony regarding the application. The local Hearing Authority shall grant such request by continuing the public hearing pursuant to paragraph (B) of this section or leaving the record open for additional written evidence or testimony pursuant to paragraph (C) of this section.
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> "B. If the hearing authority grants a continuance, the hearing shall be continued to a date, time and place certain at least seven (7) days from the date of the initial evidentiary hearing. An opportunity shall be provided at the continued hearing for persons to present and rebut new evidence and testimony. If new written evidence is

ORS 197.763(6)(a)-(c), and applies only to hearings continued from the initial evidentiary hearing, in this case the first planning commission hearing. The city argues that the February 2, 2010 city council hearing was neither the initial evidentiary hearing nor a hearing continued from the initial evidentiary hearing, and the city council hearing was therefore not subject to SMC 16.72.050. We agree with the city that petitioners have not established the February 2, 2010 city council hearing was a hearing to which SMC 16.72.050 applies. It might well be that, even where SMC 16.72.050 does not govern, the city would commit procedural error in accepting into the record late in the proceedings what is indisputably new evidence without providing other parties an opportunity to respond to that new evidence, under *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973); *see also* ORS 197.763(6)(e) (applicant's final written argument shall not include new evidence). However, the city argues, and we agree, that petitioners have not demonstrated that anything in intervenor's written presentation during the February 2, 2010 hearing constitutes "new evidence."

The third and fourth assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners argue that the decision adopting the PUD zone overlay must be reversed, because the city's action is not consistent with Statewide Planning Goal 1 (Citizen Involvement). Goal 1 is to "develop a citizen involvement program that insures the

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> submitted at the continued hearing, any person may request, prior to the conclusion of the continued hearing, that the record be left open for at least seven (7) days to submit additional written evidence or testimony for the purpose of responding to the new written evidence.
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> "C. If the Hearing Authority leaves the record open for additional written evidence or testimony, the record shall be left open for at least seven (7) days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the Hearing Authority shall reopen the record pursuant to subsection F of this Section."

opportunity for citizens to be involved in all phases of the planning process." Under Goal 1, the city must adopt a citizen involvement program, or CIP.

Petitioners argue that "Goal 1 was not met in this Cannery application," but do not explain why. The city argues, and we agree, that because the city's decision does not amend the city's acknowledged CIP, the only way petitioners can demonstrate that the decision violates Goal 1 is to demonstrate that the city failed to comply with the acknowledged CIP. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998). Petitioners make no effort to explain why the procedures followed in the present case violate the city's CIP.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners request reversal under the first five assignments of error. The sixth assignment of error is styled as an alternative, and briefly sets out six arguments for remand. The third, fourth and fifth arguments simply repeat arguments made under the preceding assignments of error and are rejected for the same reasons set out above. We address the first, second and sixth arguments.

Petitioners argue first that the city erred in failing to notify participants to the planning commission hearing that testimony submitted to the planning commission would not necessarily be made part of the record before the city council. However, petitioners cite no local or statutory requirements that local governments provide such notice.

Next, petitioners argue that under SMC 16.40.060(C)(7)(a), a commercial PUD must consist of at least five acres.[6] According to petitioners, SURA owns the 6.4-acre PUD site,

[6] SMC 16.40.060(C)(7)(a) provides:

> "Minimum area for a Commercial PUD shall be five (5) acres. Development of a Commercial PUD of less than five (5) acres may be allowed if the PUD can be developed consistent with the intent and standards of this Chapter, as determined by the Commission."

but under the contract between SURA and intervenor, the portion that intervenor can eventually acquire if it exercises all its options will not exceed five acres. Petitioners argue that "SURA should be a co-applicant for the PUD." Petition for Review 38. However, SMC 16.40.060(C)(7)(a) is not concerned with ownership, and there is no dispute that the proposed PUD exceeds five acres in size. We do not understand petitioners' arguments on this point.

Finally, petitioners argue that "[s]ome of the conditions of approval for the Cannery PUD are fundamentally reversible including the Applicant's lack of meeting its burden of proof for the property's underlying zoning to be considered for a PUD." Petition for Review 40. However, the subsequent argument does not mention, or challenge, any conditions of approval. Instead, petitioners appear to dispute the city's finding of compliance with SMC 16.040.020(C)(6), which requires a finding that "the PUD will have a beneficial effect on the area which could not be achieved using the underlying zoning district." The city adopted findings, at Record 15, explaining why it believed the PUD complies with SMC 16.040.020(C)(6). Petitioners appear to disagree with that conclusion, but do not challenge the findings or the evidence supporting it. Petitioners' particular arguments are difficult to understand, and bear no obvious relationship to the question posed by SMC 16.040.020(C)(6). The closest petitioners come is to argue that the underlying zoning would not allow 101 apartment units, but petitioners do not explain what that has to do with whether "the PUD will have a beneficial effect on the area which could not be achieved using the underlying zoning district." Petitioners' arguments are simply too inadequately developed to address. *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

The sixth assignment of error is denied.

The city's decision is affirmed.