BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

vs.

CITY OF HOOD RIVER,
Respondent,

and

HOOD RIVER CITIZENS FOR A LOCAL ECONOMY,
BECKY BRUN and MARY ELLEN BARILOTTI,
Intervenors-Respondents.

LUBA No. 2013-009

FINAL OPINION
AND ORDER

Appeal from City of Hood River.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were E. Michael Connors and Hathaway Koback Connors LLP.

Daniel Kearns, City Attorney, Portland, filed a joint response brief. With him on the brief was Kenneth D. Helms.

Kenneth D. Helm, Beaverton, filed a joint response brief and argued on behalf of intervenors-respondents Hood River Citizens for a Local Economy and Becky Brun. With him on the brief was Daniel Kearns.

Mary Ellen Barilotti, Hood River, filed a response brief and argued on her own behalf.

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

REMANDED 05/21/2013

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Wal-Mart (hereafter petitioner) appeals a city council decision that applies nonconforming use standards in the city's zoning ordinance to determine that petitioner lost its vested right to expand its existing Wal-Mart store.

MOTION TO INTERVENE

Mary Ellen Barilotti and Hood River Citizens for a Local Economy and Becky Brun move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

REPLY BRIEF

Petitioner moves for permission to file a reply brief. The motion is granted.

FACTS

This matter has been before LUBA once before. *Hood River Citizens for a Local Economy v. City of Hood River*, ___ Or LUBA ___ (LUBA No. 2012-003, June 21, 2012) (*Hood River Citizens*). In 1991, petitioner was granted approval to construct a 72,000 square foot Wal-Mart store and a 30,000 square foot expansion. Petitioner constructed the 72,000 square foot store in 1992 but did not construct the 30,000 square foot expansion. In 1997, the city amended the text of its light industrial zone and the existing store became a nonconforming use. In 2011, petitioner sought site plan approval to construct the 30,000 square foot expansion. In a December 27, 2011 decision, the city council approved the request, concluding that petitioner had a vested right to construct that expansion, notwithstanding the intervening change in local law that would prevent approval of the expansion. That city council decision was appealed to LUBA, and LUBA remanded for the city to consider whether petitioner lost its vested right to complete its planned 102,000 square foot store, by constructing the 72,000 square foot store in 1992 and then taking no further

action to complete the 102,000 square foot store until 2011. We explained our remand as follows:

> "In our view, the discontinuance issue was adequately framed below * * * and a reasonable decision maker would have not only recognized the issue (as the city did), but would have adopted responsive findings addressing whether Wal-Mart's vested right had been lost through discontinuance. Instead, as explained, the city council expressly declined to address or resolve the discontinuance issue. The only relevant matter the city resolved was to observe (correctly) that ORS 215.130 does not apply to the city. But that only begs the question: what authority *does* govern the question of discontinuance of the vested right claimed by Wal-Mart in the present case? To evaluate Wal-Mart's claim for a vested right, the city relied exclusively upon the common law vested right created by [*Clackamas County v. Holmes*, *265 Or 193, 508 P2d 190 (1973)* (*Holmes*)] and its progeny. *Fountain Village* [*Development Co. v. Multnomah Cty.*, 176 Or App 213, 31 P3d 458 (2001)] and *Crosley [v. Columbia County*, __ Or LUBA __ (LUBA No. 2011-093, April 11, 2012), *aff'd* 251 Or App 653, 286 P3d 911, *rev den* 353 Or 127, 295 P3d 640 (2012)] are part of the *Holmes* lineage. Indeed, *Holmes* itself dealt with issues of abandonment and discontinuance. Thus, discontinuance is potentially an issue under any application of the *Holmes* common law vested rights doctrine, even if no other legislation applies. As a refinement of that doctrine, *Fountain Village* and *Crosley* indicate that if the local government has adopted legislation governing discontinuance of a nonconforming use, that legislation will also apply to discontinuance of a vested right. In the present case, as Wal-Mart noted below, the city has adopted legislation, at HRMC 17.05, which provides that a nonconforming use is lost if discontinued for any reason for more than 12 consecutive months.
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> "Remand is necessary for the city to address the discontinuance issue fairly raised below, and adopt findings, presumably based on HRMC 17.05, that determine in the first instance whether Wal-Mart's vested right was lost through discontinuance." *Hood River Citizens*, slip op at 24-25 (footnote omitted).

The dispositive issue in this appeal is not the discontinuance issue discussed in *Hood River Citizens* above, but rather whether remand of the city's most recent decision is required because one of the city councilors (city councilor McBride) failed to disclose ex parte contacts and the city failed to give all parties an adequate opportunity to rebut any such ex parte contacts. A related issue concerns whether McBride should have participated in the

city's decision following LUBA's remand under the "rule of necessity." We set out below the facts that are necessary to understand our resolution of those issues.

In the city proceedings leading to the initial city decision that led to our decision in *Hood River Citizens*, the planning commission held its first public hearing on the application on November 1, 2011. At that public hearing, the planning commission minutes indicate that McBride, who was then planning commission chair, announced that she would not be participating in the public hearing on petitioner's application:

> "Commissioner McBride stated that she will not be participating in the hearing tonight. She had extensive contact with the previous proposal for a Super Walmart and she has also had people contact her regarding this application when it was an administrative application. She feels she could possibly be bias[ed] so she is going to step down from her chair seat during this hearing process." First Record 510.[1]

McBride's reference to the "previous proposal for a Super Walmart" is a reference to a different application seeking approval from Hood River County for a Wal-Mart Superstore on property located near the existing city Wal-Mart store, but outside the city on a site located in Hood River County.[2] That 2004 county application ultimately was not successful. *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256 (2004).

Following the above declaration prior to the planning commission's initial hearing on the application to expand the existing Wal-Mart store in the city, McBride did not participate further as a planning commissioner in the city's initial decision in this matter. McBride did however participate as an individual in the planning commission's first decision in this matter and opposed the application. First Record 186-87. Although the planning

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[1] The record for the county's initial decision is incorporated as part of the record for the county's decision on remand. We refer to the record for the county's initial decision as "First Record" and refer to the record on remand as "Remand Record."

[2] Councilor McBride, then known as Kate Husby, was one of the co-chairs of Hood River Citizens for Responsible Growth, which opposed the Wal-Mart Superstore before the county. Petition for Review, Appendix 43-49.

commission denied the application, the city council approved it on appeal. As already noted, the city council's initial decision in this matter led to our decision in *Hood River Citizens* remanding the city council's initial decision.

Sometime prior to our remand of the city council's initial decision in *Hood River Citizens*, McBride was appointed to fill a vacancy on the city council. At its remand hearings on November 26, 2012 and December 10, 2012, city councilors were asked to disclose any ex parte contacts they may have had in this matter. Remand Record 12 and 36. In both cases McBride stated she would not participate in the hearing or decision as a city councilor, based on her prior opposition to the Wal-Mart Superstore proposed for the nearby site in the county. McBride did not disclose any ex parte contacts. All other city councilors either disclosed ex parte contacts or indicated that they had none to disclose. *Id*.

On November 19, 2012, prior to the November 26, 2012 and December 10, 2012 city council meetings at which she declared her non-participation, McBride submitted a memorandum in which she took the position that under applicable nonconforming use rules in the city zoning ordinance petitioner has lost any vested right it might have to expand its existing city store. Remand Record 125-26. On that same date, petitioner submitted its memorandum in which it took the position that it retains its vested right to expand the city store. Remand Record 76-81.

At the beginning of the December 10, 2012 city council hearing, the mayor stated "the record is closed, and we will not accept new evidence." Remand Record 12. After listening to final legal arguments, the city council began its deliberations. The six remaining city councilors voted unanimously that the city's zoning ordinance standards governing nonconforming uses, including the requirement that a nonconforming use not be resumed after it is discontinued for one year, apply to vested rights as well nonconforming uses. Remand Record 21. But on the issue of whether petitioner has lost its vested right to construct the expansion under those nonconforming use rules, the city council deadlocked 3-

3 on two separate motions (one to find that petitioner lost its vested rights; and one to find that petitioner has not lost its vested rights) with councilor McBride not participating. Remand Record 24-25. Because four votes are required under the city charter to take action, neither of those votes was sufficient to take action to respond to LUBA's remand in *Hood River Citizens*.

At the December 10, 2012 city council hearing, the city council was advised that the ORS 227.181 deadline for the city to take action to respond to LUBA's remand would expire on "December 28th or 29th." Remand Record 23. Among the solutions to respond to the failure of the city council to achieve four votes to adopt a remand decision was the possibility of invoking the rule of necessity to allow McBride to participate in the decision. In discussing that possibility, all parties appear to have proceeded under the assumption that McBride's participation under the rule of necessity was only appropriate if she could do so as an unbiased decision maker.[3] McBride offered the following explanation for her decision to participate in the city council's remand decision:

> "Councilor McBride stated she will sit on Council and she can make an unbiased decision. She stated she didn't want a perception of bias because she was involved with the [county] Super Store decision. She felt there might be some perception of bias because of that. She stated she has all of the materials and commented on the materials she has read." Remand Record 25.

Petitioner's attorney objected to McBride's participation in the decision. Petitioner's attorney explained if he had known city councilor McBride was intending to participate in this matter as a decision maker, he would have filed a motion that she recuse herself and would have supported that motion with evidence that would demonstrate that McBride is incapable of making an unbiased decision in this matter. Petitioner's attorney requested that he be allowed a one-week continuance to prepare and submit that evidence. Remand Record

[3] As we explain later, that is a misunderstanding of the rule of necessity. If McBride could participate as an unbiased decision maker, there would be no need to invoke the rule of necessity.

27. A motion to grant that continuance did not receive a second and died for lack of a second. *Id*. There followed a motion to decide that petitioner no longer has a viable vested right to construct the desired expansion, because progress toward construction of that expansion was discontinued for more than one year. Prior to voting on the motion, McBride orally reviewed the position she previously took in her November 19, 2012 memorandum, in which she argued that under a correct application of the city zoning ordinance nonconforming use rules, petitioner lost its vested right by discontinuing construction for more than one year. Remand Record 29. The motion passed 4-3 with McBride casting the deciding vote with the 4-3 majority. *Id.*

FIRST ASSIGNMENT OF ERROR

Under the first assignment of error, petitioner argues the city was obliged to require city councilor McBride to disclose her ex parte communications in this matter and to afford petitioner a reasonable opportunity to inquire about those communications and to respond to and rebut those communications. We address the rule of necessity issue under the second assignment of error. For purposes of resolving the first assignment of error, we assume city councilor McBride properly participated in the city council's remand decision, under the rule of necessity.

Under Hood River Municipal Code (HRMC) 17.09.060(A)(2)(c), a section of the city's zoning ordinance, the mayor was required to ask that all city councilors disclose any ex parte contacts.[4] Under HRMC 17.09.060(A)(2)(d), the mayor was then required to give all parties an opportunity to respond to those disclosures.[5] Under ORS 227.180(3):

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[4] HRMC 17.09.060(A)(2)(c) provides:

> "The Chair shall * * * request that all hearing body members disclose any significant pre-hearing or ex parte contact regarding the application. No member shall participate in any proceeding in which the member has an actual conflict of interest or in which the member, or those persons or businesses described in ORS 244.135, has a direct or substantial financial interest. If the member refuses to disqualify him or /herself for conflict of interest, ex parte

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."

In explaining her decision not to participate in the planning commission's initial consideration of this matter, then planning commissioner McBride seemed to indicate that she had ex parte communications concerning this matter prior to the planning commission hearing. In view of her subsequent participation in this matter as an individual before both the planning commission and the city council, it seems quite likely that she subsequently had additional ex parte communications regarding petitioner's application to expand its existing city store. But McBride did not disclose any ex parte communications either when she was a planning commissioner or when she was a city councilor. That failure is undoubtedly explained by her initial decisions as planning commission chair and a city councilor to recuse herself based on her prior participation in opposition to petitioner's application to the county for approval of a Super Store and the bias (either actual or perceived) that prior participation might reasonably suggest. Had city councilor McBride adhered to her initial decisions not to

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contact, or bias, the hearing body shall have the power to disqualify the member by majority vote of those present for that proceeding."

[5] HRMC 17.09.060(A)(2)(c) was quoted earlier in part at n 4. HRMC 17.09.060(A)(2)(d) provides:

"The Chair shall * * * provide an opportunity for questioning of the hearing body members by interested persons as to a hearing body member's qualifications to hear the application or appeal. Based upon the disclosures of the hearing body members or any challenges by interested persons, the Chair shall then entertain motions by any member of the hearing body to disqualify any of its members. A member may be disqualified if a majority of the hearing body determines that a member is biased in favor of or against the applicant or proposal."

participate in this matter as a decision maker, her failure to disclose ex parte contacts would not have been error. Petitioner argues that McBride was required to disclose her ex parte contacts even if she had not participated as a decision maker in this matter. We reject that argument.

But once city councilor McBride changed her position and elected to participate as a decision maker, she was obligated to (1) disclose the substance of any ex parte communications she had in this matter as soon as possible after making that election and (2) give all parties an adequate opportunity to respond to and rebut the substance of those communications. *Horizon Construction, Inc. v. City of Newberg*, 114 Or App 249, 253, 834 P2d 523 (1992).

The city and intervenors Hood River Citizens for a Local Economy and Becky Brun respond that this assignment of error should be denied because petitioner had an opportunity to object to McBride's failure to disclose her ex parte contacts, and failed to do so:

> "* * * Admittedly, when Councilor McBride rejoined the council, she did not make any formal disclosure of ex parte contacts, even though she may have had some. She was not instructed to make such a disclosure by the city attorney or the mayor. That much may have been a procedural error.
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> "* * * Petitioner's attorney in particular, had a full and unfettered opportunity to question Councilor McBride about her potential biases and any ex parte contact (in addition to her prior Wal-Mart opposition efforts) and took advantage of that opportunity. However, petitioner's attorney did not question her about ex parte contacts, and was exclusively fixated on Councilor McBride's possible biases. Significantly, Wal-Mart's attorney failed to object that Councilor McBride did not make an express disclosure of ex parte contacts as he does now for the first time in this appeal. The record was clearly open at the time to all manner of procedural and substantive objections, and if petitioner wanted to preserve for appeal the procedural objection that Councilor McBride failed to disclose her ex parte contacts, he was obliged to raise that objection while he had the chance. Had he done that at the time, the City Council would have required Councilor McBride to disclose all ex parte contacts she may have had. Petitioner's failure to raise or preserve the objection at the time when it had the chance, however, precludes its ability to raise it now for the first time on appeal." Joint Response Brief 9-10.

We understand the city and intervenors to attempt to distinguish this case from *Horizon* where the petitioner described the opportunity it had to object to the belated ex parte communication disclosure as "ephemeral." 114 Or App at 252. We understand the city and intervenors to argue there was nothing ephemeral about the opportunity Wal-Mart was given to question McBride.

Where a decision maker discloses ex parte contacts and a petitioner has an opportunity to object to the adequacy of disclosure but fails to do so, we have held that the petitioner waives the right to challenge the adequacy of the disclosure for the first time at LUBA. *Housing Authority of Jackson County v. City of Medford*, ___ Or LUBA ___ (LUBA No. 2011-089, May 24, 2012), slip op 19; *Mulford v. Town of Lakeview*, 36 Or LUBA 715, 721-22 (1999); *Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995). But those cases are inapposite here; McBride disclosed no ex parte contacts.[6] We agree that given her decision to participate as a party before both the planning commission and city council, it is highly unlikely there were no ex parte communications to disclose. But even if that is the case, a statement to that effect was required under HRMC 17.09.060(A)(2)(c). *See* n 4.

The city and intervenors are quite correct that petitioner and the other parties were "fixated" on the bias issue. Until the city council deadlocked at the very end of its deliberations, and immediately before its final decision in this matter, all parties had been advised that because of the potential that McBride is biased in this matter she would not be participating in the city council's decision. Indeed since McBride had participated before both the planning commission and city council as a party opponent after recusing herself, all parties understandably assumed McBride would not be participating in this matter. Given that all parties assumed that the rule of necessity could only be invoked if city councilor

[6] As noted earlier, McBride did make a vague reference to possible ex parte communications over one year earlier, when she withdrew from participation as a planning commissioner. But McBride made no disclosure of ex parte communications at the December 10, 2012 city council meeting.

McBride was capable of participating as an *unbiased* decision maker, it is entirely understandable that all parties, including petitioner, were "fixated" on the bias issue. Unless city councilor McBride was unbiased, all parties assumed she could not participate as a decision maker, and there would be no reason to provide the parties with an opportunity to rebut ex parte- communications.

While we agree that the opportunity to object to city councilor McBride's ex parte communications may have been less ephemeral here than was the case in *Horizon*, we do not agree that petitioner waived its right to assign error to city councilor McBride's failure to disclose ex parte contacts by failing to inform McBride and the city that she was obligated to do so under local and state law at its December 10, 2012 hearing if she was going to change her mind and participate as a decision maker. McBride's decision to participate came at the very end of its deliberations, after the record was nominally closed. And while petitioner in theory could have requested that McBride disclose her ex parte contacts and that all parties be given an opportunity to rebut those contacts, all parties were focused below on the related but different issue, which all parties understood to be whether McBride's prior participation concerning the county Super Store application and the current application disqualified her from participating under the rule of necessity because she was biased. In that regard, petitioner requested a one-week continuance to more adequately respond to the bias question. In its reply brief petitioner contends it would have objected to city councilor McBride's failure to disclose ex parte contacts if the requested one-week continuance had been granted. Reply Brief 3-4.

Finally, it is true that LUBA has long required that petitioners who assert a procedural error as a basis for remand must establish that they objected below and that the error prejudiced their substantial rights. ORS 197.835(9)(a)(B); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529 (1985). However, it is clear from the Court of Appeals' decision in *Horizon*, that it does not

view a local government's failure to make timely disclosures of ex parte contacts as a mere procedural error. 114 Or App at 253-54. While we do not read *Horizon* necessarily to forgive a petitioner in all circumstances for neglecting to object to a failure to disclose ex parte contacts, in the circumstances presented in this appeal, we do not believe the Court of Appeals would fault petitioner for (1) not anticipating that its objections to city councilor's participation due to bias would be unsuccessful and (2) taking the precautionary step of entering an objection regarding her failure to disclose ex parte contacts.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Because we sustain the first assignment of error, remand is required. We therefore could remand without considering the second or third assignments of error. However, because the issue of McBride's participation in this matter may continue to be an issue, we address petitioner's contention that the record demonstrates that McBride is incapable of rendering an unbiased opinion in this matter, and thus must not participate. Moreover, if that non-participation has the legal effect of making it impossible for the city council to render a decision on remand, we do not entirely agree with any party's position regarding application of the rule of necessity, should it be necessary to invoke that rule to render a decision on remand. We therefore consider those issues in resolving petitioner's arguments under the second assignment of error.

A. Bias

The requirement in Oregon that quasi-judicial decision makers be "impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue"—was first set out explicitly in Fa*sano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973). The Supreme Court subsequently clarified that the proscription against ex parte contacts is not absolute and that the critical issue is whether the decision maker should not participate because he or she is "biased:"

> "* * * *Fasano* should not be read as adopting a mechanical rule that any ex parte contact touching on a matter before a tribunal acting quasi-judicially renders the tribunal, or its affected members, unable to act in that matter. To the extent that the language in that opinion can be so understood we disapprove it. The issue is not whether there were any ex parte contacts, but whether the evidence shows that the tribunal or its members were biased. * * *." *Neuberger v. City of Portland*, 288 Or 585, 590, 607 P2d 722, 725 (1980).

There are competing factors in play in determining whether a quasi-judicial land use decision maker is biased and should therefore recuse himself or herself. On the one hand, disqualification of a member of a tribunal can be a "drastic step," particularly where that disqualification might have the effect of denying the parties their "entitlement to any tribunal at all; if there is no tribunal, partiality and impartiality become irrelevant." *Eastgate Theatre v. Bd. of County Comm's*, 37 Or App 745, 754, 588 P2d 640 (1978).[7] For example disqualification of a member of the tribunal may result in the lack of the quorum necessary to do business or, as is potentially the case here, an inability to achieve the required number of votes that are necessary to take action. On the other hand, the issue of disqualifying bias under *Fasano* is not to be taken lightly, and where a member of a quasi-judicial tribunal has taken actions that demonstrate a level of bias that calls into question the member's ability to render an impartial decision (that is a decision based solely on the record and the merits of the parties' arguments) that member generally has a duty to disqualify himself or herself. As is particularly relevant in this appeal, we have held on a number of occasions where the person who is being asked to decide an application for quasi-judicial land use approval has taken a position for or against the same application, recusal is almost always required. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 190 (2007); *Friends of Jacksonville v.*

[7] In *Eastgate*, the Court of Appeals ultimately decided that the county commissioners did not have disqualifying bias and therefore were not required to disqualify themselves. That conclusion allowed the Court of Appeals to avoid having to confront in that case whether a biased county commissioner who otherwise would have to be disqualified might nevertheless be required to participate under the rule of necessity. *Eastgate Theater*, 37 Or App at 752, n 6. We return to that question in our discussion of the rule of necessity below.

City of Jacksonville, 42 Or LUBA 137, 141-44, *aff'd* 183 Or App 581, 54 P3d 636 (2002); *Halverson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001). Where the person took a position on the matter he or she is being asked to decide, but took that position on behalf of a governmental organization, recusal for bias may not be required. 41 Or Op Atty Gen 490, ___ (Westlaw page 9) (citing *Eastgate Theater*). But where the potential decision maker participated as an advocate in his or her personal capacity in the very case that person is now being asked to decide, which is the case here, it is inappropriate for the former advocate to step forward and participate on the same panel he or she advocated a position before. *Id*. (citing *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P2d 670 (1980) and *Transworld Airlines, Inc. v. Civil Aeronautics Bd.*, 254 F2d 90 (DC Cir 1958). In the circumstances presented in this appeal, McBride's claim that she could decide the matter objectively is not supported by substantial evidence. *Friends of Jacksonville*, 42 Or LUBA at 142-46. A reasonable person would simply not believe that an individual could go through the time and effort of preparing and presenting opposition to an application for land use approval, and then abandon his or her role as an advocate and make an unbiased decision on that same application.

While the focus below seems to have been McBride's actions in opposition to the county Super Store application rather than her actions in opposition to the application that led to this appeal, her actions regarding the Super Store, alone, likely would not have been enough to require that she disqualify herself as a planning commissioner or city councilor. That she opposed the county Super Store does not necessarily mean she could not muster the impartiality required to judge a different application to expand the existing city Wal-Mart store. However, once she decided to recuse herself, she took the additional steps of advocating against the application to expand the city Wal-Mart store. In fact, she went so far as to reiterate to the other city councilors the legal arguments in the memorandum that she submitted as an advocate against the application, immediately before casting the deciding

vote that was consistent with the legal arguments in her legal memorandum. If the *Fasano* requirement for impartiality means anything, it does not permit a decision maker to claim to be a neutral or unbiased decision maker in that circumstance.

Finally, citing *Catholic Diocese of Baker v. Crook County*, 60 Or LUBA 157, 165-66 (2009); *Woodward*, *Friends of Jacksonville*, and *Halvorson-Mason*, the city and intervenors contend that the record does not show that McBride had the "emotional commitment" in opposing the proposed Wal-Mart store that LUBA described in considering bias claims in those cases. Joint Response Brief 16-17. To the extent those cases can be read to say disqualifying bias requires that opposition to a proposal must be emotional, we now clarify that it does not. The city and intervenor contend McBride's arguments based on nonconforming use standards in the city's zoning ordinance were "relatively analytical and unemotional." Joint Response Brief 18. We agree. But a party that expresses its opposition to a proposal in focused, unemotional and analytical terms can be just as dedicated in his or her opposition (just as biased) as a party who expresses that opposition emotionally.

Putting aside the issue of whether McBride may participate as a decision maker under the rule of necessity, an issue we address next below, the record does not include substantial evidence from which a reasonable person would conclude that McBride could impartially render a decision on the permit application that she had actively opposed. On this issue we agree with petitioner.

B. The Rule of Necessity

"The rule of necessity was a part of the English common law and has been traced back to 1430 * * *. The rule, simply stated, means that a judge is not disqualified to try a case because of his personal interest in the matter at issue if there is no other judge available to hear and decide the case." *Atkins v. United States*, 214 Ct. Cl. 186, 201 (1977). In Oregon, the rule of necessity has most commonly been invoked in cases where all available judges had an arguable financial interest in the outcome of the case. *Strunk v. PERB*, 338 Or

145, 151 n 5, 108 P3d 1058 (2005); *Hughes v. State of Oregon*, 314 Or 1, 5 n 2, 838 P2d 1018 (1992); *Oregon State Police Officers' Assn. v. State of Oregon*, 323 Or 356, 361, 918 P2d 765 (1996). The Oregon Attorney General has opined that the rule of necessity could be invoked in a local government quasi-judicial land use decision making context to avoid depriving the parties a forum for a decision. 36 Or Op Atty Gen 960, ___ (Westlaw page 10). LUBA has also indicated in dicta that the rule of necessity might be invoked to allow a decision maker to participate, in circumstances where a tie vote would preclude a final decision on a land use application. *Oregon Natural Desert Association v. Harney County*, ___ Or LUBA ___ (LUBA No. 2011-097, May 3, 2012), slip op 5; *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 146 (2002).

Under the city's charter, four affirmative votes are needed for the city council to take action. As noted earlier in this opinion, the city council took two votes, one that would have resulted in approval of petitioner's application and one that would have resulted in denial. Both votes resulted in 3-3 tie votes. It was at that point that the city council invoked the rule of necessity. Absent the availability of an additional or alternative decision maker, that action would appear to be sufficient to establish the *necessity* required to invoke the rule of necessity, unless there is some reason to believe continued deliberations might have resulted in a majority vote without invoking the rule of necessity.

1. Continued Deliberations

It appears from a partial transcript attached to the petition for review that at least one city councilor was extremely concerned about invoking the rule of necessity and that invocation of that rule placed McBride into very a difficult position.

> "Weathers: I just want to say something to Kate [McBride]. I don't question [your] sincerity at all in this issue. I feel * * * horrible in this situation. And if you are in any way trying [to help] this group as a whole to fix this, don't * * * if you really feel that you need to recuse yourself and you do not want to be put in this situation. I support you 100 percent and don't feel like you need

> to weigh in on this matter because of a necessity." Petition for Review, Appendix 19.

The mayor then immediately stated "I second that." *Id*.

Given the above, we think there is a reasonable possibility that further deliberations by the six city councilors might have resulted in a four vote majority without McBride's vote and without invoking the rule of necessity. We therefore conclude that the city council invoked the rule of necessity prematurely. On remand the city council must first ensure that the tie vote, which prevented the required four affirmative votes, cannot be avoided.

2. Availability of an Alternative Decision Maker

One of the essential prerequisites for invoking the rule of necessity, so that an otherwise disqualified decision maker may participate as a decision maker, is that there not be an alternative decision maker. Petitioner suggests the decision could be referred to the planning commission for a final decision. However, petitioner cites no local authority for the city council to refer a matter that has been appealed to the city council from the planning commission back to the planning commission for a decision in these circumstances. Even if it could, any planning commission decision that might be rendered in that circumstance would be appealable to the city council, which would likely result in yet another deadlock. We reject petitioner's suggestion that the city must refer the matter to the planning commission before invoking the rule of necessity. .

3. Disqualifying Bias

Even if the 3-3 deadlock cannot be broken with further deliberations, we understand petitioner to argue the rule of necessity simply may not be invoked where the reason for disqualification is bias, as is the case here.

Although we may be missing something, if the city council is disabled from taking action following LUBA's remand, there would appear to be several possible legal consequences—all of them potentially adverse to petitioner's interests. First, since the city

council's initial decision granting petitioner's application for site plan approval has been remanded by LUBA, it is no longer effective to grant approval. *Turner v. Jackson County*, 62 Or LUBA 199, 210 (2010); *NWDA v. City of Portland*, 58 Or LUBA 533, 541-42 (2009); *Western States v. Multnomah County*, 37 Or LUBA 835, 842-43 (2000). That would leave petitioner with no decision on its application and no decision to appeal. Second, if for some reason the city council's inability to take action following LUBA's remand has the legal effect of reviving the planning commission's decision in this matter, as we have already noted that decision predates and does not respond to LUBA's remand; and, in any event, the planning commission denied petitioner's application. It may be that petitioner anticipates filing a petition for writ of mandamus under ORS 227.182 after 90 days, if the city council is unable to render a decision on LUBA's remand due to McBride's bias. But that mandamus statute does not mandate approval of the application. Rather ORS 227.182(2) authorizes the court to "order the governing body of the city or its designee to make a final determination on the application." That might place the circuit court in the position of ordering McBride to participate notwithstanding her bias. While ORS 227.182(2) also authorizes the circuit court to "order such remedy as the court determines appropriate" the circuit court may be reluctant to effectively act as decision maker where the city council is unable to act.

Regardless of the practical problems that are inherent in petitioner's argument that the rule of necessity cannot be invoked to allow a disqualified decision maker to participate in a circumstance where it would not otherwise be possible to render a decision, simply because the disqualification is for bias, petitioner is incorrect. Indeed McBride's recusal for actual or potential bias is what makes it necessary to invoke the rule of necessity. If she were not biased, she could participate in the decision and there would be no reason to invoke the rule of necessity. In the administrative law context, it is not unusual to invoke the rule of necessity to allow a decision maker with a personal stake in the matter to decide the matter if no alternative exists. For example, in *Barker v. Secretary of State's Office of Missouri*, 752

SW 2d 437 (1988), the employer of a worker who filed a disputed worker's compensation claim was represented by an attorney before an administrative law judge, who ruled in the employer's favor. The employer's lawyer was subsequently appointed to the state's Labor and Industrial Relations Commission. In the unsuccessful claimant's appeal of the administrative law judge's decision to that commission, the employer's former attorney at first did not participate as a decision maker in the appeal, due to her prior representation of the claimant's employer. But when the other two commissioners deadlocked 1-1, the employer's former attorney voted to break the deadlock, voting to deny the claim. On appeal, the Missouri Court of Appeals affirmed, observing that the rule of necessity "operates on the principle that a biased judge is better than no judge at all. Disqualification cannot be allowed to bar the doors to justice or to destroy the only tribunal vested with the power to act." *Id*. at 449. We apply that same reasoning here to conclude that if the city must invoke the rule of necessity to reach a decision concerning LUBA's remand, the fact that McBride's disqualification is for bias does not preclude the city from invoking the rule of necessity.

Finally, if it becomes necessary to invoke the rule of necessity so that McBride can participate in adopting a decision that responds to LUBA's remand, an issue may arise again about the permissible scope of McBride's participation. Petitioner contends that even if the rule of necessity must be invoked to permit McBride to supply the fourth vote needed for action, her participation in the *deliberations* toward a decision is not necessary, and the city should not have permitted her to participate in those deliberations. We agree with petitioner.

While not directly applicable in this case, under ORS 244.120(2)(b)(A) when public officials have an "actual conflict of interest," with one exception they must "refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue." The exception is set out in ORS 244.120(2)(b)(B), which provides that the public official may nevertheless vote in that circumstance if the "public official's vote is necessary to meet a requirement of a minimum

number of votes to take official action." However, ORS 244.120(2)(b)(B) also provides that in that circumstance, the public official's participation must be limited to the vote and the public official must not "participate as a public official in any discussion or debate on the issue out of which the actual conflict arises." We believe that limitation should also apply where the rule of necessity is required to enable the decision making body to achieve the requisite number of votes to act. The biased decision maker's *vote* may be necessary, but that biased decision maker's participation in the deliberations is not needed. Indeed if the biased decision maker's contribution to the deliberations persuaded one of the deadlocked councilor's to change his or her vote, the biased decision maker's vote would no longer be unnecessary under the rule of necessity.

The second assignment of error is sustained in part.

THIRD ASSIGNMENT OF ERROR

In this assignment of error, petitioner assigns error to the city council's interpretation and application of HRMC 17.05.020(2), which provides in part that " [i]f a nonconforming use is discontinued for any reason for more than twelve (12) consecutive months, any subsequent use shall conform to all of the regulations of the subject zone." Because our disposition of the first two assignments of error require remand, and the city's decision following this remand concerning the interpretation and application of HRMC 17.05.020(2) may or may not be the same as in the decision before us in this appeal, we need not and do not consider petitioner's third assignment of error.

CONCLUSION

On remand, the city council will first need to determine whether it has the required number of votes necessary to adopt a decision that responds to LUBA's remand in *Hood River Citizens*, without McBride's participation. If it does, it may simply adopt that decision.

But if the city lacks the requisite votes without McBride's participation, the city council must make reasonable efforts to deliberate further to achieve the requisite votes. If

the deadlock cannot be avoided, the city council may invoke the rule of necessity. In that event, councilor McBride may participate by voting to break the 3-3 deadlock, but she must do so without otherwise participating in the deliberations regarding the decision.

If councilor McBride's vote is required by the rule of necessity, she must first disclose all her "significant pre-hearing or ex parte contact regarding the application," and give all parties an opportunity to rebut and question her about those ex parte contacts, as required by HRMC 17.09.060(A)(2)(c) and (d). *See* ns 4 and 5. Although HRMC 17.09.060(A)(2)(d) would also permit parties to question councilor McBride about her bias, such questioning would appear to be pointless, since we have already determined that she is biased and but for the rule of necessity should not cast a vote in this matter. But if councilor McBride must participate due to the rule of necessity despite her bias, the parties must be allowed to rebut any ex parte contacts that she may be relying on to cast her vote. That opportunity to rebut ex parte communications may also be of questionable value given McBride' prior advocacy opposing the permit application in this matter, but the parties must be given that opportunity.

The city's decision is remanded.