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

NATURE OF THE DECISION

In LUBA No. 2021-072, petitioner appeals a decision by the city council denying its application for a conditional use permit for a 28-room hotel. In LUBA No. 2021-073, petitioner appeals a city council decision denying its application for a conditional use permit for a commercial building to include seafood retail, wholesale, and storage; a restaurant on the first floor; and four apartments on the second floor.

FACTS

Petitioner owns vacant land adjacent to Nehalem Bay that is zoned Water-Related Commercial (WRC). The parcel is accessed from Hemlock Street, which intersects with Highway 101 approximately 30 feet to the east at a controlled intersection with eastbound and westbound stop signage. In 2019, petitioner submitted applications for two conditional use permits to construct and operate (1) a 28-room hotel and (2) a commercial building with wholesale and retail seafood sales, a restaurant on the ground floor, and four apartments on the second floor. “Retail/wholesale fish and shellfish sales” facilities are permitted outright in the WRC zone, while restaurant, hotel, and above-street-level residential uses are conditionally allowed in the zone. Wheeler Zoning Ordinance (WZO) 2.020(7); WZO 2.030(9), (10), (12).

In 2020, the city council approved the applications. That decision was appealed to LUBA. In *Oregon Coast Alliance v. City of Wheeler*, ___ Or LUBA

1 ____ (LUBA Nos 2020-064/065, Mar 9, 2021) (*OCA*), we sustained the
2 petitioners’ first assignment of error that argued that the city’s findings were
3 inadequate to explain why the city council concluded that the applications met
4 the applicable provisions of the 2011 Wheeler Vision Plan (Vision Plan). We also
5 sustained petitioners’ fourth subassignment of error under the second assignment
6 of error that argued that the city’s conclusion that “the use will not create traffic
7 congestion on” the intersection of Highway 101 and Hemlock Street was met was
8 not supported by substantial evidence in the record. We remanded the decision
9 to the city.

10 On March 11, 2021, petitioner requested that the city begin remand
11 proceedings. ORS 227.181(2). We discuss the subsequent proceedings that the
12 city council conducted in our resolution of the first assignment of error. At the
13 conclusion of the remand proceedings, a majority of the participating members
14 of the city council voted to deny the applications. This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 ORS 197.835(9)(a)(B) authorizes LUBA to reverse or remand a decision
17 where a local government fails “to follow the procedures applicable to the matter
18 before it in a manner that prejudiced the substantial rights” of the parties. The
19 substantial rights of the parties include “the rights to an adequate opportunity to
20 prepare and submit their case and a full and fair hearing.” *Muller v. Polk County*,
21 16 Or LUBA 771, 775 (1988). In four subassignments of error under its first
22 assignment of error, petitioner argues that the city committed procedural errors

1 that prejudiced its substantial rights to present its case and to a full and fair
2 hearing by (1) failing to provide notice of hearings on the applications required
3 by *former* ORS 197.763 (2019), *renumbered as* ORS 197.797 (2021); (2)
4 allowing a biased councilor to participate in the proceedings on remand and
5 failing to require that councilor to disclose *ex parte* contacts, as required by ORS
6 227.180(3); and (3) allowing a councilor with a conflict of interest under ORS
7 chapter 244 and Section IV.A of the “Final Bylaws for the City of Wheeler
8 Planning Commission” (Bylaws) to fail to disclose that conflict and to participate
9 in the proceedings in violation of the Bylaws. We begin by describing the city
10 council’s proceedings on remand before turning to the subassignments of error.

11 **A. The City’s Proceedings on Remand**

12 As noted, on March 11, 2021, petitioner requested that the city proceed
13 with the applications on remand. Thereafter, on March 31, 2021, petitioner
14 requested that two city councilors recuse themselves from “participation in any
15 City decision related to these applications.” Record 396-97. Petitioner objected
16 that two newly elected councilors, Glowa and Taylor, were biased against the
17 application. Glowa was one of the petitioners in *OCA*, and they submitted
18 testimony opposing the applications during the proceedings that led to the city
19 council’s decision that was appealed in *OCA*. Taylor also submitted testimony
20 opposing the applications during the proceedings that led to the city council’s
21 decision that was appealed in *OCA*.

1 The agenda for the city council’s regularly scheduled meeting on April 20,
2 2021, included a “New Business” item for “Verification of Process” for the
3 remand proceedings, including recommendations from the city’s attorney and
4 time for councilor comments. Record 330. During that meeting, the city’s
5 attorney advised the city council that councilors Glowa and Taylor should not
6 participate in the proceedings on remand. Record 320, 323, 388-89. The city’s
7 attorney also advised the council that the city council did not need to take new
8 evidence or allow testimony on the applications as it was not necessary to resolve
9 the issue on remand, and that notice of a public hearing on the applications needed
10 to be provided ahead of May 18, 2021. Record 390; Audio Recording, Wheeler
11 City Council, Apr 20, 2021, at 23:20 (comments of City Attorney David
12 Doughman). However, at the meeting, the city council allowed at least eight
13 members of the public to testify in opposition to the applications, including
14 testifying regarding whether the applicable criteria in the WZO were met. Glowa
15 and Taylor also participated in the discussion about the potential process on
16 remand. Glowa stated they did not intend to recuse themselves from participating
17 in the remand proceedings. At the conclusion of that portion of the regular
18 meeting, the mayor announced that the city council would continue discussions
19 at a previously scheduled “workshop” the following morning.¹

¹ The mayor and city council sometimes refer to this April 21, 2021 event as a workshop or a work session. As explained below, this was in fact an unnoticed public hearing that we refer to as a hearing or a meeting throughout this opinion.

1 At the April 21, 2021 work session, after stating that city council work
2 sessions did not generally involve public testimony, the mayor proceeded to
3 allow opponents of the applications to provide oral and written evidence and
4 testimony to the city council. Petitioner, through its counsel, objected to the
5 presentation of testimony and evidence during the work session because it had
6 not been noticed as a public hearing on the applications. Again, councilors Glowa
7 and Taylor participated in the discussions of the procedure on remand, and of the
8 merits of the applications, and neither recused themselves from participating in
9 the proceedings.

10 The next public meeting on the matter occurred at a special meeting on
11 April 28, 2021. The agenda for the meeting included as items under “Old
12 Business” (1) “LUBA Remand process;” (2) “Review voluntary recusal or action
13 by the city council;” and (3) “Determination of process for evaluating Vision
14 2011 and traffic congestion criteria.” Record 295. The city council allowed one
15 member of the public to testify regarding the issue of bias that petitioner had
16 previously raised. Councilors Glowa and Taylor participated in the meeting and
17 neither recused themselves. At the conclusion of the special meeting, the city
18 council, with Glowa and Taylor voting, voted to allow public testimony on the
19 two remand issues at a future noticed public hearing but to keep the record closed
20 to new evidence.

21 On May 10, 2021, the city provided notice that the city would hold a public
22 hearing on the applications on May 18, 2021. Record 293. At the beginning of

1 the May 18, 2021 city council hearing, councilors Glowa and Taylor recused
2 themselves from voting on the applications. At the conclusion of the hearing, the
3 remaining city councilors voted two to one to deny the applications.

4 **B. Failure to Follow Statutory Requirements for Notice and**
5 **Conduct of Quasi-Judicial Hearings**

6 *Former* ORS 197.763 sets out the procedures that govern the conduct of
7 quasi-judicial land use hearings. A “hearing” “refers to a proceeding held to
8 consider a pending application.” *Friends of Jacksonville v. City of Jacksonville*,
9 189 Or App 283, 291, 76 P3d 121 (2003). ORS 227.175(5) provides that hearings
10 on an application for a permit may be held “only after notice to the applicant and
11 other interested persons and shall otherwise be conducted in conformance with
12 the provisions of [*former* ORS 197.763].” *Former* ORS 197.763(5) requires the
13 city, at the commencement of a hearing, to list the applicable approval criteria
14 and state that testimony must be directed toward the criteria and that failure to
15 raise an issue precludes appeal to LUBA based on that issue. The notice
16 requirements in *former* ORS 197.763(3) for quasi-judicial land use hearings on
17 remand are the same as for the initial hearing. *Hausam v. City of Salem*, 178 Or
18 App 417, 423, 37 P3d 1039 (2001) (*former* ORS 197.763(3)(f)(A) requires the
19 city to mail notice of a quasi-judicial land use hearing on remand at least 20 days
20 before the hearing).

21 In its fourth subassignment of error, petitioner argues that the city council
22 conducted quasi-judicial land use hearings on April 20, 21, and 28, 2021, at

1 which it accepted “argument” and “evidence,” as defined in *former* ORS
2 197.763(9), without providing the notice of hearing required by *former* ORS
3 197.763(2) and (3), and without satisfying the procedural requirements for
4 hearings in *former* ORS 197.763(5) and, by extension, ORS 227.175(5).² Those
5 procedural errors, petitioner argues, prejudiced petitioner’s right to prepare and
6 submit its case and to a full and fair hearing because the absence of notice resulted
7 in petitioner being unable to respond to argument and evidence that was presented
8 or to present its own argument and evidence to rebut the opponents’ argument
9 and evidence.

10 Intervenor-respondent (intervenor) responds that the April 20, 21, and 28,
11 2021 meetings were not hearings subject to *former* ORS 197.763 because the city
12 council did not intend to conduct them as such. Although the city council may
13 have intended to discuss and decide only the procedure to be employed to address

² *Former* ORS 197.763(9) provides:

“For purposes of this section:

“(a) ‘Argument’ means assertions and analysis regarding the satisfaction or violation of legal standards or policy believed relevant by the proponent to a decision. ‘Argument’ does not include facts.

“(b) ‘Evidence’ means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision.”

1 the applications on remand during its April 20, 21, and 28, 2021 meetings, its
2 best intentions were not borne out in the actual proceedings that occurred. We
3 have reviewed the audio recordings of the April 20, 21, and 28, 2021 meetings,
4 and we agree with petitioner that those meetings were quasi-judicial “hearings.”
5 The city council allowed and accepted argument and evidence regarding the
6 applications from opponents during those meetings without providing the notice
7 required under *former* ORS 197.763(2) and (3) for quasi-judicial land use
8 hearings and without conducting the meetings in accordance with *former* ORS
9 197.763(5). The city’s failure to follow those procedures prejudiced petitioner’s
10 substantial right to prepare and present its case to the city council. *Muller*, 16 Or
11 LUBA at 775; *Hausam*, 178 Or App at 425.

12 The fourth subassignment of error is sustained.

13 **C. Bias**

14 A party in a quasi-judicial land use proceeding has a substantial right to an
15 impartial decision-maker. *Fasano v. Washington Co. Comm.*, 264 Or 574, 588,
16 507 P2d 23 (1973). “An allegation of decision maker bias, accompanied by
17 evidence of that bias, may be the basis of a remand under ORS 197.835(9)(a)(B).”
18 *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001).

19 In its first subassignment of error, petitioner argues that Glow’s
20 participation in the April 20, 21, and 28, 2021 meetings, at which argument and
21 evidence regarding whether its applications satisfied the applicable criteria was
22 presented by opponents, prejudiced petitioner’s substantial right to a fair hearing

1 before an impartial decision-maker. As evidence of Glowa's bias, petitioner
2 points to Glowa's statements during the prior proceedings that led to *OCA* and
3 their participation as a petitioner in *OCA*. Petitioner alleges that Glowa's eventual
4 recusal from voting on the applications at the commencement of the only actually
5 noticed city council hearing on the applications on May 18, 2021, came too late
6 and that their participation during the April 20, 21, and 28, 2021 meetings, at
7 which argument and evidence was presented, prejudiced petitioner's substantial
8 right to a fair hearing before an impartial decision-maker.

9 Provided that an official can review a matter on its merits, a predisposition
10 does not automatically require recusal. *Eastgate Theatre v. Bd of County*
11 *Comm'rs*, 37 Or App 745, 588 P2d 640 (1978). The bar for bias disqualification
12 is high, as the Court of Appeals explained in *Columbia Riverkeeper v. Clatsop*
13 *County*, 267 Or App 578, 602, 341 P3d 790 (2014):

14 "An elected local official's 'intense involvement in the affairs of the
15 community' or 'political predisposition' is not grounds for
16 disqualification. Involvement with other governmental
17 organizations that may have an interest in the decision does not
18 require disqualification. An elected local official is not expected to
19 have no appearance of having views on matters of community
20 interest when a decision on the matter is to be made by an
21 adjudicatory procedure.

22 "In addition to those general observations, there are three salient
23 principles from the case law that define and drive our analysis in this
24 case. *First*, the scope of the 'matter' and 'question at issue' is
25 narrowly limited to the specific decision that is before the tribunal.
26 *Second*, because of the nature of elected local officials making
27 decisions in quasi-judicial proceedings, the bias must be actual, not

1 merely apparent. And *third*, the substantive standard for actual bias
2 is that the decision maker has so prejudged the particular matter as
3 to be incapable of determining its merits on the basis of the evidence
4 and arguments presented.” (Emphases in original.)

5 In order to prevail on a bias challenge, petitioner must demonstrate that the
6 challenged decision-maker was actually biased, as opposed to apparently biased.
7 “[A]ctual bias can be established, where prejudgment has been alleged, by
8 explicit statements, pledges, or commitments that the elected local official has
9 prejudged the specific matter before the tribunal.” *Columbia Riverkeeper*, 267 Or
10 App at 609-10.

11 We have held on a number of occasions that recusal is almost always
12 required where the person who is being asked to decide an application for quasi-
13 judicial land use approval has taken a position for or against the same application.
14 *Woodard v. City of Cottage Grove*, 54 Or LUBA 176, 190 (2007); *Friends of*
15 *Jacksonville v. City of Jacksonville*, 42 Or LUBA 137, 141-46, *aff’d*, 183 Or App
16 581, 54 P3d 636 (2002); *Halvorson Mason Corp*, 39 Or LUBA at 710-11. We
17 conclude that petitioner satisfied the high bar for bias disqualification, and has
18 demonstrated that Glowa was actually biased and prejudged the applications.
19 Glowa’s (1) statements in opposition to the applications during the proceedings
20 that led to the city council’s initial decision to approve the applications; (2)
21 participation as a petitioner in *OCA*, challenging the city’s initial decision to
22 approve the applications; and (3) statements during the April 21, 2021 work
23 session that the Vision Plan criteria were not met are all evidence that Glowa so
24 prejudged the particular matter as to be incapable of determining its merits on the

1 basis of the evidence and arguments presented. Audio Recording, Wheeler City
2 Council, Apr 21, 2021, at 52:30 (comments of City Councilor Michael Glowa).

3 We do not understand intervenor to dispute that Glowa was biased. Rather,
4 intervenor responds that any procedural error in participation by Glowa in the
5 proceedings was cured by their recusal from participating at the May 18, 2021
6 hearing. We disagree. We have rejected such a “no harm, no foul” approach to
7 participation by biased decision-makers. *Woodard*, 54 Or LUBA at 190
8 (remanding the decision for new deliberations and a new decision because we
9 could not tell from the record whether the biased decision-maker’s participation
10 might have influenced the remaining decision-makers’ deliberations or votes).
11 Although Glowa eventually recused themselves at the May 18, 2021 hearing,
12 Glowa participated in the April 20, 21, and 28 city council meetings and heard
13 argument and evidence opposed to the applications. Further, at the April 21
14 meeting, Glowa expressed their opinion in opposition to the city council’s
15 previous decision to approve the applications and their opinion that the criteria
16 of the Vision Plan were not met. Glowa’s recusal after participating in the April
17 20, 21, and 28, 2021 meetings, during which they heard argument and evidence
18 regarding the approval criteria and expressed their opinion that the applications
19 did not satisfy the Vision Plan, did not ensure that petitioner would receive a
20 decision from an impartial tribunal. We do not know whether and to what extent
21 Glowa’s participation during the previous three meetings influenced the city
22 council’s decision regarding what procedure to follow on remand and whether

1 and to what extent their participation influenced the actual vote of the city council
2 to deny the applications. *Id.*; *see also Halvorson Mason Corp.*, 39 Or LUBA at
3 711 (finding disqualifying bias where a city councilor wrote letters to other
4 councilors opposing the development and providing their legal conclusions about
5 the application prior to the application being brought before the council).
6 Therefore, remand is appropriate to allow the council to consider the applications
7 without Glowa’s participation in the remand proceedings in any way.

8 The first subassignment of error is sustained.

9 **D. Conflict of Interest**

10 In the second subassignment of error, petitioner argues that the city
11 committed a procedural error in allowing councilor Taylor to participate in the
12 remand proceedings. We understand petitioner to argue that Taylor has a
13 “potential conflict of interest,” as that term is used in Section IV.A of the Bylaws,
14 and that that section required the city to provide petitioner with, as relevant here,
15 an “impartial review as free from potential conflicts of interest * * * as is
16 reasonably possible.”³ We also understand petitioner to argue that Taylor failed
17 to disclose a conflict of interest, as required by ORS 244.120(2).

18 **1. ORS chapter 244**

19 Petitioner cites ORS 244.120(2), which provides:

³ During the proceedings before the city council, the city took the position that the Bylaws apply to city council hearings on quasi-judicial applications. Record 291.

1 “An elected public official, other than a member of the Legislative
2 Assembly, or an appointed public official serving on a board or
3 commission, shall:

4 “(a) When met with a potential conflict of interest, announce
5 publicly the nature of the potential conflict prior to taking any
6 action thereon in the capacity of a public official; or

7 “(b) When met with an actual conflict of interest, announce
8 publicly the nature of the actual conflict and:

9 “(A) Except as provided in subparagraph (B) of this
10 paragraph, refrain from participating as a public
11 official in any discussion or debate on the issue out of
12 which the actual conflict arises or from voting on the
13 issue.

14 “(B) If any public official’s vote is necessary to meet a
15 requirement of a minimum number of votes to take
16 official action, be eligible to vote, but not to participate
17 as a public official in any discussion or debate on the
18 issue out of which the actual conflict arises.”⁴

⁴ ORS 244.020(1) defines “actual conflict of interest” to mean

“[a]ny action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (13) of this section.”

ORS 244.020(13) defines “potential conflict of interest” to mean

“[a]ny action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative

1 Petitioner argues that, prior to their election to the city council, and during
2 the initial city proceedings that led to our decision in *OCA*, Taylor submitted
3 testimony opposed to the applications on the basis that the proposed hotel would
4 “siphon[] * * * business” from their existing hotel, the Wheeler on the Bay
5 Lodge. Petition for Review 17. We understand petitioner to argue that that
6 undisputed evidence demonstrates a conflict of interest that Taylor failed to
7 disclose.

8 Petitioner does not develop an argument under ORS 244.120(2) that Taylor
9 has a “conflict of interest,” as that phrase is defined in the statute, and,
10 problematically, does not specify whether Taylor’s conflict of interest under the

is associated, unless the pecuniary benefit or detriment arises out of the following:

- “(a) An interest or membership in a particular business, industry, occupation or other class required by law as a prerequisite to the holding by the person of the office or position.
- “(b) Any action in the person's official capacity which would affect to the same degree a class consisting of all inhabitants of the state, or a smaller class consisting of an industry, occupation or other group including one of which or in which the person, or the person’s relative or business with which the person or the person's relative is associated, is a member or is engaged.
- “(c) Membership in or membership on the board of directors of a nonprofit corporation that is tax-exempt under section 501(c) of the Internal Revenue Code.”

1 statute is “actual” or “potential.”⁵ See n 4. Both types of conflicts of interest
2 require disclosure, but the limitations on participation in an official capacity
3 apply only when a conflict is “actual.” Absent any developed argument regarding
4 whether Taylor’s conflict is a “potential conflict of interest” that required Taylor
5 to disclose it or an “actual conflict of interest” that required Taylor to disclose it
6 *and* refrain from participating “in any discussion or debate on the issue out of
7 which the actual conflict arises or from voting on the issue,” petitioner’s
8 arguments under this subassignment of error provide no basis for reversal or
9 remand of the decision.⁶ ORS 244.120(2)(b)(A).

10 **2. Section IV.A of the Bylaws**

11 Section IV.A of the Bylaws requires the city to provide petitioner with, as
12 relevant here, an “impartial review as free from potential conflicts of interest
13 * * * as is reasonably possible.” We also understand petitioner to argue that

⁵ Intervenor does not specifically respond to petitioner’s argument that Taylor’s participation without disclosure of a conflict of interest violated ORS 244.120(2) but responds that Taylor’s recusal from participating in the May 18, 2021 city council hearing on the applications cured any procedural errors that the city made prior to that point. Response Brief 13-14.

⁶ ORS 244.130(2) provides:

“A decision or action of any public official or any board or commission on which the public official serves or agency by which the public official is employed may not be voided by any court *solely by reason of* the failure of the public official to disclose an actual or potential conflict of interest.” (Emphasis added.)

1 Taylor has a “potential conflict of interest,” as that term is used in the Bylaws,
2 and that Taylor’s participation in the proceedings on its application violated
3 petitioner’s right under the Bylaws to impartial review.

4 The Bylaws do not define the phrase “conflict of interest” and no party
5 offers a definition for the phrase. Absent any guidance, we look to the plain,
6 ordinary meaning of the phrase. *PGE v. Bureau of Labor and Industries*, 317 Or
7 606, 611, 859 P2d 1143 (1993). *Black’s Law Dictionary* defines “conflict of
8 interest” as “**1. A real or seeming incompatibility between one’s private interests**
9 **and one’s public or fiduciary duties.**” *Black’s Law Dictionary* 341 (9th ed 2009)
10 (boldface in original). *Webster’s Third New Int’l Dictionary* defines “potential”
11 as “existing in possibility.” *Webster’s Third New Int’l Dictionary* 1775
12 (unabridged ed 2002).

13 Intervenor responds, again, that Taylor’s recusal from participating at the
14 commencement of the only noticed hearing on May 18, 2021, cured any
15 procedural error in failing to provide petitioner with an impartial review. For the
16 same reasons explained above, we reject that argument.

17 We agree with petitioner that, at a minimum, the evidence demonstrates
18 that Taylor had a “potential conflict of interest” under the Bylaws, based on the
19 definitions set out above. Taylor’s participation in the remand proceedings on
20 April 20, 21, and 28, 2021, violated the procedure in Section IV.A of the Bylaws
21 and prejudiced petitioner’s substantial right under the Bylaws to an “impartial
22 review.” For the same reasons explained above, recusal at the fourth and final

1 hearing at which the applications were discussed does not cure that procedural
2 error. Taylor’s recusal after participating in the April 20, 21, and 28, 2021
3 meetings, during which they heard argument and evidence regarding the approval
4 criteria, did not ensure that petitioner would receive impartial review. We do not
5 know whether and to what extent Taylor’s participation during the previous three
6 meetings influenced the city council’s decision regarding what procedure to
7 follow on remand and whether and to what extent their participation influenced
8 the actual vote of the city council to deny the applications. Therefore, remand is
9 appropriate to allow the city council to consider the applications without Taylor’s
10 participation in the remand proceedings in any way.

11 The second subassignment of error is sustained, in part.

12 **E. Ex Parte Communications**

13 In the third subassignment of error, petitioner argues that Glowa violated
14 ORS 227.180(3) in failing to disclose *ex parte* communications. ORS 227.180(3)
15 provides:

16 “No decision or action of a * * * city governing body shall be invalid
17 due to ex parte contact or bias resulting from ex parte contact with a
18 member of the decision-making body, if the member of the decision-
19 making body receiving the contact:

20 “(a) Places on the record the substance of any written or oral ex
21 parte communications concerning the decision or action; and

22 “(b) Has a public announcement of the content of the
23 communication and of the parties’ right to rebut the substance
24 of the communication made at the first hearing following the

1 communication where action will be considered or taken on
2 the subject to which the communication related.”

3 “Ex parte communication” is not defined in the statute. In *Horizon Construction,*
4 *Inc. v. City of Newberg*, we concluded that, under the definition of *ex parte*
5 communication found in the Attorney General’s Uniform and Model Rules of
6 Procedure, the term means “an oral or written communication to an agency
7 decision maker * * * not made in the presence of all parties to the hearing,
8 concerning a fact in issue in the proceeding.” 25 Or LUBA 656, 665 (1993).

9 “ORS 227.180(3) prohibits undisclosed *ex parte* communications, whether or not
10 those communications in fact influence the city’s original decision.” *Opp v. City*
11 *of Portland*, 38 Or LUBA 251, 264-65, *aff’d*, 171 Or App 417, 16 P3d 520
12 (2000), *rev den*, 332 Or 239 (2001).

13 According to petitioner, at the April 21, 2021 city council work session,
14 Glowa referenced several conversations that they had had with others about the
15 applications, and Glowa did not disclose the content of those communications at
16 “the first hearing following the communication[s] where action [was] considered
17 or taken on the subject to which the communication[s] related” on April 28, 2021,
18 or at any hearing where action on the application was considered. ORS
19 227.180(3)(b).

20 Intervenor responds, and we agree, that Glowa’s *ex parte* communications
21 were disclosed and placed on the record during the April 21, 2021 work session,
22 which we have concluded above was a quasi-judicial land use hearing within the
23 meaning of *former* ORS 197.763. Petitioner has not established that it was not

1 permitted to inquire about the communications or otherwise challenge or rebut
2 the communications.⁷

3 The third subassignment of error is denied.

4 The first assignment of error is sustained, in part.

5 **SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR**

6 In its second assignment of error, petitioner argues that the city’s
7 conclusion that the applications are not consistent with the Vision Plan
8 improperly construes the Vision Plan. In the third assignment of error, petitioner
9 argues that the city’s conclusion that the applications do not satisfy WZO
10 15.090(5) is not supported by substantial evidence in the record.⁸ In the fourth
11 assignment of error, petitioner argues that the city’s failure to follow applicable
12 procedures amounts to an unconstitutional violation of petitioner’s right to due
13 process under the Fifth and Fourteenth Amendments to the United States
14 Constitution, and to a taking of its property without just compensation under

⁷ We note that the obligation to place on the record the substance of any written or oral *ex parte* communications is ongoing and will apply to the city’s proceedings on remand of the challenged decision.

⁸ WZO 15.090(5) provides:

“Before a conditional use is approved, findings will be made that the use will comply with the following standards:

“* * * * *

“5. The use will not create traffic congestion on nearby streets.”

1 those provisions and under Article 1, section 18, of the Oregon Constitution. For
2 the reasons explained below, we do not address these assignments of error.

3 We do not address the second, third, and fourth assignments of error.

4 **CONCLUSION**

5 Our resolution of the first assignment of error requires remand. That
6 decision on remand may or may not be to deny petitioner’s applications. Even if
7 the city again denies the applications, that decision may or may not adopt all of
8 the reasons that the decision before us adopts in support of the denial. We
9 therefore do not consider petitioner’s remaining three assignments of error.

10 The city’s decision is remanded.

11 Zamudio, Board Chair, concurring.

12 I agree that remand is the appropriate remedy in light of our resolution of
13 the first assignment of error. I write separately to emphasize a few points about
14 the requirements for a decision denying an application.

15 As we explained in *Bridge Street Partners v. City of Lafayette*, when a
16 local government denies a permit application, a “local government’s findings
17 must be sufficient to inform the applicant either what steps are necessary to obtain
18 approval or that it is unlikely that the application will be approved.” 56 Or LUBA
19 387, 394 (2008) (citing *Commonwealth Properties v. Washington County*, 35 Or
20 App 387, 400, 582 P2d 1384 (1978)). The findings must provide a coherent
21 explanation for why the city believes the proposal does not comply with the
22 criteria. *Caster v. City of Silverton*, 54 Or LUBA 441, 457 (2007).

1 Here, the findings do not give the applicant any indication of how
2 petitioner might go about satisfying the Vision Plan priorities and, in particular,
3 how it might go about satisfying priorities 1 (“Protect the Natural Beauty”) and
4 2 (“Preserve Small Town Atmosphere”). The findings merely lament the loss of
5 views of the bay and river that the city believes will occur as a result of
6 development on the currently vacant property, without really acknowledging that
7 any building constructed on the property in accordance with the height limits in
8 the WZO will, to some extent, obstruct existing views of the vacant property
9 because those views are currently unobstructed.

10 The WZO lists 13 conditional uses in the WRC zone, including “medium
11 or high intensity research and/or educational facilities” and “educational facilities
12 such as museums, interpretive centers and aquariums.” WZO 2.030(6), (11).
13 Such uses are fairly intensive uses and would presumably be developed at a level
14 of intensity and impact that is equal to or greater than petitioner’s proposed uses.
15 The city’s findings give no real indication as to how *any* conditional uses allowed
16 in the WRC zone could satisfy the priorities in the Vision Plan. In particular, if
17 the city denies a conditional use application for a building that otherwise satisfies
18 the height limit in the WZO because the city concludes the building fails to
19 “protect the natural beauty” of the city and that it fails to “preserve the small town
20 atmosphere,” it is hard to imagine how several of the conditional uses allowed in
21 the WRC zone could satisfy the Vision Plan priorities 1 and 2. If the city denies
22 the applications on remand, in my view, the city must give petitioner some

- 1 indication of how it could go about satisfying the Vision Plan priorities that it
- 2 found the applications did not satisfy.