BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WAL-MART STORES, INC.,
Petitioner,

and

ROCKY YOUNGER and JANICE YOUNGER,
Intervenors-Petitioner,

vs.

CITY OF OREGON CITY,
Respondent,

and

HILLTOP PROPERTIES, LLC,
Intervenor-Respondent.

LUBA No. 2004-124

ORDER

MOTIONS TO INTERVENE

Rocky Younger and Janice Younger (the Youngers), the owners of the subject property, move to intervene on the side of petitioner Wal-Mart Stores, Inc. (petitioner). Hilltop Properties, LLC moves to intervene on the side of respondent. There is no opposition to these motions, and they are allowed.

MOTION TO TAKE EVIDENCE

Petitioner moves to take evidence outside the record pursuant to OAR 661-010-0045.[1] Petitioner alleges that facts it seeks to establish through extra-record evidence will demonstrate that

[1] OAR 661-010-0045 provides, in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual

the decision maker denied petitioner's land use application "and took other actions that deprived Petitioner of a fair and impartial hearing thus, violating Petitioner's substantive rights." Petitioner's Motion to Take Evidence Not in the Record and For an Evidentiary Hearing 1. Before addressing the parties' arguments, we set out the pertinent facts.

A. Factual Background

In early 2002, petitioner began the process of seeking approval for the construction of a retail store in Oregon City on property owned by the Youngers. At that time, a majority of the

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allegations in the parties' briefs concerning unconstitutionality of the decision, standing, *ex parte* contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record * * *.

"(2) Motions to Take Evidence:

"(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.

"(b) A motion to take evidence shall be accompanied by:

"(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish; or

"(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.

"(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. Depositions under this rule shall be conducted in the same manner prescribed by law for depositions in civil actions (ORCP 38-40).

"(d) Subpoenas: the Board shall issue subpoenas to any party upon a showing that the witness or documents to be subpoenaed will provide evidence relevant and material to the grounds for the motion. * * *

"(3) Any party may file a response within 14 days of the date of service of the motion to take evidence. The response shall specifically state what facts alleged in the motion are contested, with references to where contrary facts are found in the record or in affidavits or documents appended to the response."

property was zoned General Commercial, and the proposed store was permitted outright in that zone, subject to site plan review. Petitioner proposed to construct parking on a portion of the property that was zoned for residential use, and the proposal therefore required approval of a comprehensive plan amendment and zone change. Sometime after March 6, 2002, petitioner submitted an application seeking site plan approval and approval of a comprehensive plan amendment and zone change. City staff recommended denial based on noncompliance with the comprehensive plan amendment and zone change criteria. The comprehensive plan amendment and zone change applications were bifurcated from the site plan review prior to any hearings, and on July 15, 2003, the planning commission voted to deny the comprehensive plan and zone change requests. Petitioner appealed, and the city commission, on November 23, 2003, denied the comprehensive plan amendment and zone change. The site plan portion of the bifurcated application never received a hearing.

On February 18, 2004, petitioner submitted a new application, the application that is the subject of this appeal, which proposed to locate 50% of the parking underneath the proposed building. Accordingly, the new proposal required only site plan approval. On June 2, 2004, the planning director denied the application for two reasons: (1) petitioner is precluded from filing the application because the second application is substantially similar to the initial application and (2) petitioner did not demonstrate compliance with certain transportation requirements in the city's code or with several of the code's site plan and design review requirements. Petitioner again appealed to the city commission, which denied the application for essentially the same reasons cited by the planning director. That denial is challenged in this appeal.

B. Petitioner's Motion

Petitioner alleges that after the challenged decision became final, its attorney became aware that the city had contacted the Youngers and inquired about purchasing the subject property. It was at that time that petitioner's attorney was provided with architectural drawings dated December 1, 2003, showing detailed plans for city buildings on the subject property. Petitioner alleges that

although the drawings were dated after a final decision was issued on petitioner's first application, on November 23, 2003, and before submittal of the second application, on February 18, 2004, the city must have requested the drawings at some point while the first application was pending.[2] It contends that the city had an interest in purchasing the property the entire time the second application was being processed locally, and that that fact was never disclosed.

The city does not attempt to clarify when those drawings were first requested or when negotiations with the property owner terminated. The city contends, however, that the subject property was but one of eleven different potential sites for the location of city buildings and that the plans were preliminary in nature. The architects sketched preliminary plans for locating the city buildings on all eleven potential sites, including the subject property.

Petitioner seeks to introduce into the record those architectural drawings and certain discoverable internal communications and to take depositions of the planning director, one or more planning staff, members of the city council and the architect who prepared the architectural drawings. It seeks evidence relating to (1) the extent of the city's interest in the subject property, (2) time periods when the city developed its interest in the property and when it began developing its plans, (3) the full extent of the city's plans for the property, and (4) the extent to which decision makers were involved in or aware of the city's plans. Petitioner alleges that the extra-record evidence on these issues will prove that the decision maker, "the City Council of Oregon City, was biased and prejudged [petitioner's] request to build a store in Oregon City based on its own proprietary self-interest." Petitioner's Motion to Take Evidence Not in the Record and For an Evidentiary Hearing 9.

[2] The city asserts that any allegation of bias related to the first application is irrelevant because it is only the decision on the second application that is on appeal. While we agree with the city on that point, petitioner's rendition of the facts surrounding the first application is relevant to its allegation of bias regarding the second application.

The city argues that the motion should be denied because (1) the motion is premature, (2) petitioner has failed to establish "actual bias" based on "clear and unmistakable evidence," and (3) the city's interest in the property is insufficient to establish bias.

C. Discussion

1. Timeliness

Petitioner urges us to rule on the motion to take evidence now, notwithstanding that LUBA generally addresses motions under OAR 661-010-0045 after the parties have submitted briefs on the merits. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 662 (1993); *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550, 555-56 (1991). *See Grabhorn v. Washington County*, ___ Or LUBA ___ (LUBA Nos. 2004-065, 2004-125, Order, February 16, 2005) slip op 8 (where "parties have filed hundreds of pages of pleadings exhaustively detailing the legal contentions," and "the factual disputes between the parties are relatively clear," a motion to take evidence will be entertained before briefing on the merits). As in *Grabhorn*, the legal and factual issues are adequately briefed in this case, and we agree with petitioner that no purpose is served in this case by delaying a determination on the motion until after submittal of the briefs on the merits.

2. Evidentiary Hearing Threshold

In order to introduce extra-record evidence under OAR 661-010-0045(1), petitioner must demonstrate disputed factual allegations concerning procedural irregularities "not shown in the record and which, if proved, would warrant reversal or remand of the decision." Although bias is not a procedural irregularity specifically listed in OAR 661-010-0045(1), we have recognized that demonstration of actual bias on the part of the decision maker would warrant reversal or remand and have treated motions to take evidence regarding alleged bias or prejudgment the same as such motions alleging improper *ex parte* contacts. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577, 580-81 (2001).

Petitioner points out, we believe correctly, that it does not need to demonstrate bias in order to succeed in its motion to take evidence. Petitioner merely seeks additional evidence in an attempt to prove that the decision maker was biased. While petitioner need not demonstrate bias at this juncture, we require that a party make a sufficient showing before we will grant a motion to take evidence outside the record. We have addressed this threshold with regard to a motion to take evidence on *ex parte* contacts as follows:

> "We believe the statute and our rules on evidentiary hearings should be read liberally, so as not to stifle the presentation of legitimate issues to LUBA. However, the statute and rules do not authorize fishing expeditions for *possible* ex parte contacts.
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> "A threshold must be crossed to justify an evidentiary hearing and the procedures (e.g., depositions) that could accompany such a hearing. The motion must allege that an ex parte contact actually took place, or that there is a reasonable basis to believe that such contact probably took place. The allegations must be substantial, i.e., the facts that serve as the basis for the motion must also be alleged. *See* [OAR 661-010-0045(2)(a)]. The motion must also show, with supporting legal authority, that proof of the alleged ex parte contact would warrant remand or reversal. *See* [ORS 197.835(2)]. Once the requisite allegations are made, the petitioner is entitled to an evidentiary hearing to prove them. Under our rules, allowance of the motion would set the stage for depositions designed to produce proof justifying the ultimate relief sought. [OAR 661-010-0045(6)]." *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 608, 609-10 (1986) (emphasis in original; footnote omitted).

In order to prevail ultimately on a bias claim, petitioner must establish that the decision makers "prejudged the application, and did not reach a decision by applying relevant standards based on the evidence and argument presented." *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). Although petitioner need not make that demonstration in order to succeed in its motion to take evidence, as noted above, its motion must include substantial allegations that the decision maker was biased or that there is a reasonable basis to believe the decision maker was biased. *Space Age Fuels*, 40 Or LUBA at 581 (citing *Lane County School Dist. 71*, 15 Or LUBA at 609-10). Mere speculation is not sufficient. *Tri-River Investment Co. v. Clatsop County*, 36 Or

LUBA 743, 746 (1999). We must determine whether the threshold has been crossed in this case. For the following reasons, we conclude that it has not.

At the outset, we note that petitioner nowhere alleges that any member of the city council had a personal financial interest in the subject property. Petitioner's allegation of bias is based solely on its belief that the city as a municipal entity was interested in purchasing the subject property for future development of city buildings and that the city commission denied petitioner's land use application to "make way" for that development.

The city cites to *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994) and *Waite v. Marion County*, 16 Or LUBA 353 (1987). In those cases, we concluded that a local government decision maker can make a decision on an application where the city is the applicant and owns the subject property. If a local decision maker can be "impartial" in those situations, the city argues, then certainly a local government decision maker can rule on an application where the city "may have expressed some interest in purchasing the property in the past." Further Response to Petitioner's Motion to Take Evidence Not in the Record 6.[3]

Petitioner's motion can only be granted if it alleges disputed facts not in the record that, if proven, would warrant reversal or remand. OAR 661-010-0045(1); *see* n 1. We do not see that petitioner has alleged any facts that if proven, would demonstrate bias, justifying remand in this case. The city, through an affidavit of the city engineer and public works director, explains why the subject property was chosen as a potential site (it was included on a local plan for potential city acquisition), that the city contacted the property owner regarding purchase of the property, and that upon

[3] The city also invokes the "rule of necessity" which allows an interested decision maker to participate in a case if there is no other judge available. Further Response to Petitioner's Motion to Take Evidence Not in the Record 6 (citing *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978)). Because we conclude that petitioner has not demonstrated a reasonable basis to believe the decision makers were biased, we do not address this argument.

notification of the "continuing agreement" with petitioner, discussions regarding the city's interest in the property terminated. February 24, 2005 Affidavit of Nancy Kraushnaar 1-2. [4]

Even if petitioner obtained evidence that the decision makers were aware of the city's interest in the site and that the discussions were conducted while the second application was pending, the architectural drawings included sketches for possible construction on eleven potential sites being studied. It is relatively clear that the city's plans for development of the subject property were preliminary. We agree with the city that the fact that some individual or agent of the local government may have expressed some interest in the subject property is not enough to justify allowing a motion to take evidence outside the record to allow petitioner an opportunity to prove bias on the part of the decision maker.[5] Because petitioner has not pointed to any evidence or

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[4] The affidavit states, in relevant part:

> "(4) The Younger Property was selected for inclusion in the preliminary site study because it had been identified for potential acquisition in the Hilltop Urban Renewal Plan, which had been adopted by the Oregon City Urban Renewal Agency and because it was a large undeveloped piece of property within the Urban Renewal Plan.
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> "* * * * *
>
> "(6) The results of the preliminary study were presented to the Urban Renewal Commission, but not to the City Commission. The Urban Renewal Commission has taken no action on the preliminary report and no further work has been done on the site study.
>
> "(7) After the preliminary report came out, there was no pending application for a Wal-Mart store on the site, so the City Manager and I contacted the property owner's attorney to discuss the status of the Younger Property.
>
> "* * * * *
>
> "(9) When the property owner's attorney informed us that the property owner had a continuing agreement with Wal-Mart, the City Manager and I did not discuss purchasing the property further."

[5] Petitioner also alleges that after the city's denial of the second application, the city "enacted specific legislation to exclude large retail stores on the property" in order to eliminate the competition. Petitioner's Motion to Take Evidence Not in the Record and for Evidentiary Hearing 7. The city clarifies that the legislation rezoned a "swath of property" to Mixed Use Corridor, not to Institutional. Institutional zoning would have been more appropriate if the city had concrete plans to develop the subject property with city buildings. Response to Petitioner's Motion to Take Evidence Not in the Record 10. We do not address this allegation further.

likelihood of uncovering evidence that the decision makers relied on anything other than the applicable approval criteria in issuing its decision, it has failed to demonstrate a reasonable basis to believe that the decision makers were biased.

Petitioner's motion to take evidence is denied.

RECORD

Prior to petitioner's filing of its motion to take evidence, we issued an order on record objections in which we ordered the city to submit a supplemental record. The city shall submit a supplemental record within 14 days of the date of this order.

Dated this 4th day of May, 2005.

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Anne C. Davies
Board Member