

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 SCOTT DAHLEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEND,
10 *Respondent,*

11
12 and

13
14 BROKEN TOP COMMUNITY ASSOCIATION,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2007-251

18 ORDER

19 **MOTION TO INTERVENE**

20 Broken Top Community Association (BTCA), the applicant below, moves to
21 intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

22 **MOTION TO DISQUALIFY COUNSEL**

23 Petitioner moves to “disqualify” from this appeal Edward Fitch and the law firm of
24 Bryant, Emerson and Fitch, attorneys for intervenor-respondent BTCA. According to
25 petitioner, Fitch previously served as a Deschutes County hearings officer and, in 1991 and
26 1992, rendered decisions that were interpreted in the decision before us, which is a
27 declaratory ruling by the city hearings officer to determine whether certain property within
28 the Broken Top Planned Unit Development may be developed with uses other than a
29 landscaping buffer.

30 Oregon Rules of Professional Conduct (ORPC) 1.12 is entitled “Former Judge,
31 Arbitrator, Mediator or Other Third-Party Neutral,” and provides, in relevant part:

32 “(a) Except as stated in Rule 2.4(b) and in paragraph (d), a lawyer shall not
33 represent anyone in connection with a matter in which the lawyer
34 participated personally and substantially as a judge or other

1 adjudicative officer or law clerk to such a person or as an arbitrator,
2 mediator or other third-party neutral, unless all parties to the
3 proceeding give informed consent, confirmed in writing.

4 “* * * *

5 “(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with
6 which that lawyer is associated may knowingly undertake or continue
7 representation in the matter unless:

8 “(1) the disqualified lawyer is timely screened from any
9 participation in the matter substantially in accordance with the
10 procedures set forth in Rule 1.10(c); and

11 “(2) written notice is promptly given to the parties and any
12 appropriate tribunal to enable them to ascertain compliance
13 with the provisions of this rule.”

14 Petitioner contends that under ORPC 1.12, both Fitch and his law firm must be
15 disqualified from representing intervenor in this appeal.

16 While not conceding that Fitch must be disqualified under ORPC 1.12, BTCA
17 responds that a different lawyer in Fitch’s firm represents BTCA during the present
18 proceedings, and under ORPC 1.10(c), other lawyers in the firm may continue to represent
19 BTCA in this appeal as long as Fitch is timely screened from participation.¹ Attached to

¹ ORPC 1.10(c) provides, in relevant part:

“When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter. For purposes of this rule, screening requires that:

- (1) the personally disqualified lawyer shall serve on the lawyer’s former law firm an affidavit attesting that during the period of the lawyer’s disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer’s actual compliance with these undertakings promptly upon final disposition of the matter or representation;
- (2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the

1 BTCA's response are affidavits from Fitch and two attorneys in his firm stating that Fitch
2 will not participate in any manner in this matter.

3 Petitioner responds that ORPC 1.10(c) requires "timely" screening, and argues that it
4 is too late now to screen other lawyers in Fitch's firm from communication with Fitch
5 regarding the appeal of the hearings officer's declaratory ruling. According to petitioner, the
6 proposed belated screening procedures will do nothing to prevent any cross-contamination of
7 ideas, information, recollections and impressions of the 1991 and 1992 decisions that may
8 have already occurred prior to the date screening was imposed.

9 Neither party cites any authority for LUBA to issue an order on whether an attorney
10 or law firm is qualified under Oregon State Bar rules to represent a party to an appeal. In
11 *Burghardt v. City of Molalla*, 28 Or LUBA 788, 789 (1995), we denied a motion to
12 disqualify counsel based on an alleged conflict of interest, concluding:

13 "The dispute between the parties involves an ethical dispute and the
14 application of OSB [Oregon State Bar] ethics rules that have no bearing on the
15 merits of this appeal. The OSB has a comprehensive process, involving fact-
16 finding and the like, for resolving disputes such as the one at issue here.
17 Petitioner's concern may be referred to the OSB. We will not attempt to
18 resolve the dispute here." *Id.*

19 We are cited to nothing in the ORPC or elsewhere that authorizes LUBA to disqualify an
20 attorney from representing a party in an appeal before LUBA. LUBA is not a judicial forum,
21 but an administrative agency whose authority is defined and limited by our governing
22 statutes. Because we are not aware of authority to grant the motion, it is denied.

former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the personally disqualified lawyer promptly upon final disposition of the matter or representation; and

- (3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification."

1 **RECORD OBJECTIONS**

2 Petitioner objects to the omission of four documents, (1) a copy of the hearings
3 officer's June 13, 2006 lot of record decision, (2) the first three pages of a five-page October
4 26, 2005 memorandum, (3) several pages from a November 29, 2005 memorandum, and (4)
5 Exhibit 20A, referenced in the challenged hearings officer's decision.

6 The city responds that it agrees with the first two objections and will file a
7 supplemental record including those documents. The first and second objections are
8 sustained.

9 With respect to the third objection, the city argues that the record accurately reflects
10 what was submitted, and that the copy of the November 29, 2005 memorandum submitted
11 into the record by petitioner did not include the missing pages. Petitioner does not offer any
12 basis to conclude otherwise, other than to assert that the entire memorandum was
13 "presumably" placed before the hearings officer. This objection is denied.

14 Exhibit 20A, the subject of the fourth objection, is apparently an exhibit to an earlier
15 application that proposed a realignment of Mt. Washington Drive. Petitioner argues that the
16 hearings officer refers to the exhibit in her declaratory ruling and alleges that it forms the
17 principal basis for the challenged decision. Record 41. The city responds that Exhibit 20A
18 has been missing from the city's records for years, and was never submitted into the present
19 record or placed before the hearings officer.

20 While the hearings officer's decision does refer to Exhibit 20A, it is not clear from
21 the decision whether the hearings officer based her discussion on (1) review *of* Exhibit 20A
22 or (2) testimony *about* Exhibit 20A. Petitioner does not dispute the city's representation that
23 the Exhibit 20A has long been missing from the city's files and was never before the hearings
24 officer. Given that undisputed representation, this objection is denied.

1 The city shall submit a supplemental record that includes the documents identified in
2 the first and second objections. Following receipt of the supplemental record the Board will
3 issue an order setting forth the briefing schedule.

4 Dated this 29th day of February, 2008.
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11 _____
12 Tod A. Bassham
 Board Member