

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

3
4 JEFF SMITH,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SHADY COVE,
10 *Respondent.*

11
12 LUBA No. 2010-081

13 ORDER ON MOTION TO TAKE EVIDENCE

14 The challenged decision is a decision by the city approving with conditions a
15 conditional use permit to operate a mini-storage facility. The planning commission approved
16 the application with several conditions of approval. One of the conditions of approval,
17 condition 10, provided that the conditional use permit would expire after two years, with a
18 one year extension available. Record 38. Petitioner appealed the imposition of condition 10
19 to the city council, which voted to affirm the planning commission’s decision and condition
20 10.¹

¹ The record in this appeal has been settled. The record includes minutes of the August 5, 2010 city council hearing that summarize the city council’s vote on petitioner’s appeal of the planning commission’s imposition of condition 10, as follows:

“Motion: ‘I move that the Council uphold the Planning Commission’s decision that the conditional use permit shall expire after two (2) years, with the opportunity for the Planning Commission to approve a one (1) year extension and that the Council deny Mr. Smith’s appeal.’

“Motion by Councilor Hughes. Second by Councilor Hayes.

“Roll call: 3 Ayes. 1 Nay. (Councilor Bradburn) The motion passed 3-1.” Record 15. (underlining in original).

The record apparently does not contain any other writing that memorializes the city council’s vote or otherwise setting forth the city council’s decision to uphold condition 10.

1 Petitioner moves to take evidence not in the record under OAR 661-010-0045. OAR
2 661-010-0045(1) provides in relevant part:

3 “The Board may, upon written motion, take evidence not in the record in the
4 case of disputed factual allegations in the parties' briefs concerning
5 unconstitutionality of the decision, standing, *ex parte* contacts, actions for the
6 purpose of avoiding the requirements of ORS 215.427 or 227.178, or other
7 procedural irregularities not shown in the record and which, if proved, would
8 warrant reversal or remand of the decision.”

9 In his motion, petitioner seeks to depose a person who lives in a residence across the street
10 from the approved mini-storage facility. According to petitioner, that person is the tenant of
11 one of the planning commissioners, and that planning commissioner/landlord encouraged his
12 tenant to attend the planning commission hearing on the application and testify in opposition
13 to it. We understand petitioner to allege that if the planning commissioner in fact encouraged
14 such testimony, it would demonstrate that the planning commissioner was biased in
15 considering the application. We also understand petitioner to argue that such encouragement
16 would constitute an *ex parte* contact, which was not disclosed. Respondent answers that
17 even if petitioner’s allegations regarding the planning commissioner’s actions were true, the
18 planning commission was not the city’s final decision maker on the application and thus any
19 bias or *ex parte* contacts that might be attributed to the planning commissioner not provide a
20 basis for reversal or remand of the city council decision that is before us in this appeal.

21 We have recognized that bias on the part a decision maker, if proven, may warrant
22 reversal or remand, and is a proper subject for a motion to take evidence. *Space Age Fuels,*
23 *Inc. v. City of Sherwood*, 40 Or LUBA 577, 580-81 (2001). However, it is not enough that a
24 lower-level decision maker was biased in some way; to warrant a reversal or remand of a
25 decision a petitioner must show that the record before the final decision maker was somehow
26 tainted by the bias of the lower level decision maker. *Nez Perce Tribe v. Wallowa County*, 47
27 Or LUBA 419, 432, *aff’d* 196 Or App 787, 106 P3d 699 (2004); *Utah Int’l v. Wallowa*
28 *County*, 7 Or LUBA 77, 83 (1982) (it is necessary to show a “fatal link” between the alleged

1 lack of fairness at the planning commission level and the decision of the final decision
2 maker). The city council was the final decision maker in the present appeal, and petitioner
3 has made no showing that any alleged bias or *ex parte* communications by the planning
4 commissioner in any way tainted the record reviewed by the city council or the decision of
5 the city council.

6 Petitioner next alleges in his motion and in an affidavit attached to his motion that a
7 city councilor made certain statements in 2008 to petitioner regarding the appearance of
8 petitioner's property, and those statements indicate that he was biased against the
9 application. Respondent responds that petitioner has failed to demonstrate that any
10 statements made in 2008 regarding the appearance of petitioner's property indicate bias on
11 the city councilor's part in approving petitioner's application and upholding condition 10.

12 In order to prevail ultimately on a bias claim, petitioner must establish that the
13 decision makers "prejudged the application, and did not reach a decision by applying
14 relevant standards based on the evidence and argument presented." *Spiering v. Yamhill*
15 *County*, 25 Or LUBA 695, 702 (1993). Although petitioner need not make that
16 demonstration in order to succeed in its motion to take evidence, its motion to take evidence
17 must include substantial allegations that the decision maker was biased or that there is a
18 reasonable basis to believe the decision maker was biased. *Space Age Fuels*, 40 Or LUBA at
19 581 (*citing Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 608, 609-10 (1986)).
20 We do not see that the extra-record evidence that petitioner seeks to introduce regarding the
21 alleged statements made in 2008 by a city councilor regarding the appearance of petitioner's
22 property demonstrates a reasonable basis to believe that the city councilor was biased.
23 Petitioner does not suggest any possible connection between the alleged 2008 conversation
24 regarding the appearance of petitioner's property and the conditional use application, much
25 less any connection between that conversation and the condition imposing a two-year
26 expiration date that petitioner apparently wishes to challenge in this appeal. OAR 661-010-

1 0045(2)(a) requires a motion to take evidence to demonstrate how the facts the moving party
2 seeks to establish (here, that in 2008 the city councilor criticized the appearance of
3 petitioner’s property) “will affect the outcome of the review proceeding.” Petitioner has not
4 adequately demonstrated that the alleged 2008 conversation between the city councilor and
5 petitioner is relevant or material to petitioner’s claim that the city council was biased against
6 petitioner’s conditional use application in voting to approve the application with the
7 condition imposing a two-year expiration date.

8 Petitioner’s motion to take evidence is denied.

9 **BRIEFING SCHEDULE**

10 The filing of petitioner’s motion suspended the deadline for filing the petition for
11 review. OAR 661-010-0045(9). With the issuance of this order, the briefing schedule is
12 restarted. The petition for review shall be due 21 days from the date of this order. The
13 response brief shall be due 42 days from the date of this order. The Board’s final opinion
14 and order shall be due 77 days from the date of this order.

15 Dated this 3rd day of May, 2011.

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Melissa M. Ryan
Board Member