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

FRIENDS OF THE HOOD RIVER WATERFRONT,
CORIE LAHR and RICHARD DEREK BELL,
Petitioners,

vs.

CITY OF HOOD RIVER,
Respondent,

and

NBW HOOD RIVER, LLC,
Intervenor-Respondent.

LUBA No. 2012-050

ORDER

INTRODUCTION

On October 23, 2011, NBW Hood River, LLC (NBW) filed an application seeking site plan and conditional use approval for a hotel, commercial office building, and related parking on a site *adjacent to* the Nichols Boat Basin in the City of Hood River. That October 23, 2011 application also sought approval for what the parties refer to as a cable park, to be located *in* Nichols Boat Basin.

On April 25, 2012, NBW bifurcated the application. One application sought site plan and conditional use approval for the water-based development—the cable park. NBW requested that the city’s review of the cable park application be suspended and no decision concerning the cable park is before us in this appeal. The application for site plan and conditional use approval for the land-based development—the hotel, office building and parking—went forward and was approved by the city planning commission on May 24, 2012. Petitioners appealed that planning commission decision to the city council. On July

1 12, 2012, the city council adopted a decision that rejected petitioners’ appeal and granted site
2 plan and conditional use approval for the hotel, office building and parking. That July 12,
3 2012 city council decision is the subject of this LUBA appeal.

4 **MOTION TO CONSIDER EXTRA-RECORD EVIDENCE**

5 LUBA review is generally limited to the record compiled by the local government
6 that issued the decision on appeal. ORS 197.835(2)(a). However, under ORS 197.835(2)(b),
7 LUBA is authorized to consider extra-record evidence in some circumstances:

8 “In the case of disputed allegations of standing, unconstitutionality of the
9 decision, *ex parte* contacts, actions described in subsection (10)(a)(B) of this
10 section or other procedural irregularities not shown in the record that, if
11 proved, would *warrant reversal or remand*, the board may take evidence and
12 make findings of fact on those allegations. The board shall be bound by any
13 finding of fact of the local government, special district or state agency for
14 which there is substantial evidence in the whole record.” (Emphasis added.)

15 Petitioners argue that one member of the planning commission is a strong supporter
16 of the cable park and has had a number of *ex parte* contacts with NBW concerning the cable
17 park. Although the planning commission member disclosed a number of contacts with NBW
18 concerning the cable park that occurred before NBW submitted its application on October 23,
19 2011, petitioners contend those disclosures were inadequate and incomplete. Petitioners filed
20 a motion requesting that LUBA consider extra-record evidence under ORS 197.835(2)(b),
21 and seek to depose the planning commissioner to discover evidence that they believe will
22 establish that the planning commissioner is biased in favor of the proposal and should not
23 have participated in the decision. We understand petitioners to contend that the extra-record
24 evidence of *ex parte* contacts and bias that they wish to present will “warrant reversal or
25 remand” and thus justify petitioners’ request that LUBA consider the extra-record evidence
26 under ORS 197.835(2)(b).

27 There is an initial problem with petitioners’ request that LUBA consider extra-record
28 evidence to establish the planning commissioner’s bias in favor of the cable park. The

1 decision that is before LUBA in this appeal is a city decision approving the hotel, office and
2 parking land development. There is no city decision concerning the cable park before LUBA
3 in this appeal. That problem aside, the decision before LUBA is the *city council's* decision
4 following a *de novo* review of the *planning commission's* decision. Given that petitioners'
5 allegations of bias are directed solely at a single planning commissioner, and are not directed
6 at any member of the city council, petitioners' allegations of bias by the planning
7 commissioner do not "warrant reversal or remand," of the city council's decision, as required
8 by ORS 197.835(2)(b) for LUBA to consider extra-record evidence.

9 The city council conducted a *de novo* review of the planning commission's decision
10 and adopted its own final decision. In that circumstance, LUBA requires that a petitioner
11 demonstrate that the alleged bias of the lower level decision maker (here the planning
12 commissioner) somehow tainted the decision of the body that ultimately rendered the final
13 decision on appeal (here the city council). Our most recent discussion of that requirement
14 was in *Smith v. Shady Cove*, 63 Or LUBA 543, 544 (2011):

15 "We have recognized that bias on the part a decision maker, if proven, may
16 warrant reversal or remand, and is a proper subject for a motion to take
17 evidence. *Space Age Fuels, Inc. v. City of Sherwood*, 40 Or LUBA 577, 580-
18 81 (2001). However, it is not enough that a lower-level decision maker was
19 biased in some way; to warrant a reversal or remand of a decision a petitioner
20 must show that the record before the final decision maker was somehow
21 tainted by the bias of the lower level decision maker. *Nez Perce Tribe v.*
22 *Wallowa County*, 47 Or LUBA 419, 432, *aff'd* 196 Or App 787, 106 P3d 699
23 (2004); *Utah Int'l v. Wallowa County*, 7 Or LUBA 77, 83 (1982) (it is
24 necessary to show a 'fatal link' between the alleged lack of fairness at the
25 planning commission level and the decision of the final decision maker). The
26 city council was the final decision maker in the present appeal, and petitioner
27 has made no showing that any alleged bias or *ex parte* communications by the
28 planning commissioner in any way tainted the record reviewed by the city
29 council or the decision of the city council."

30 Petitioners' attempt to show the planning commission record that the city council
31 reviewed in making its *de novo* decision was tainted by the allegedly biased planning
32 commissioner is limited to their contentions that (1) the planning commission violated local

1 and state law in refusing to consider the additional argument and evidence that they offered
2 for the record after the record had closed and (2) the planning commission's decision to
3 reject their request to reopen the record and accept additional evidence was the product of the
4 biased planning commissioner's bias.

5 Regarding petitioner's first point, any legal error the city may have committed in
6 refusing the proffered evidence may provide a basis for an assignment of error in the petition
7 for review. But any such legal error is not a reason for LUBA to consider extra-record
8 evidence regarding the alleged bias of the planning commissioner. With regard to
9 petitioners' claim that the planning commission's decision to reject the evidence that
10 petitioners offered after the record had closed was a product of the planning commissioner's
11 bias, petitioner offers no argument in support of that claim. And the record lends no support
12 for the claim.

13 The planning commission record closed on April 23, 2012. The planning commission
14 met to deliberate and adopt a final decision at a May 7, 2012 public hearing. At that May 7,
15 2012 hearing, petitioners requested that the record be reopened and that the city supplement
16 the record with additional evidence regarding potential impacts of the proposal on fish. The
17 planning commission sought advice from its legal counsel regarding the request to reopen the
18 record, and was advised that under state and local law it was not required to grant the request.
19 Record 188. After additional discussion regarding petitioners' request, the planning
20 commission ultimately voted 3-2 to deny petitioners' request. But the planning
21 commissioner that petitioners claim is biased in favor of the applicant voted with the
22 minority of 2 to *approve* petitioners' request. Record 192. The planning commissioner that
23 petitioners claim was biased in favor of the application voted a second time with the losing
24 minority of 2 to allow petitioners to present additional legal argument. *Id.* In both cases the
25 allegedly biased planning commissioner voted in favor of petitioners' position and was
26 opposed by a majority of the other planning commissioners that petitioners do not claim were

1 biased. The planning commission's decision to deny petitioners' request to reopen the record
2 and accept additional evidence was not the product the alleged bias of the planning
3 commissioner, who supported petitioners' request.

4 Petitioners have not established that there are grounds under ORS 197.835(2)(b) to
5 consider extra-record evidence or allow petitioners to depose the allegedly biased planning
6 commissioner. Petitioners' motions are denied.

7 Petitioners' motions suspended the briefing schedule. OAR 661-010-0045(9).
8 Petitioners shall have 21 days from the date of this order to file their petition for review.
9 Respondent and intervenor-respondent shall have 42 days from the date of this order to file
10 their response briefs. The Board shall have 77 days from the date of this order to issue its
11 final opinion and order.

12 Dated this 14th day of December, 2012.

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Michael A. Holstun
Board Member