

**WEST LINN CITY COUNCIL
FINAL ORDER ON REMAND
FROM LAND USE BOARD OF APPEALS
AP-12-02**

**IN THE MATTER OF AN APPEAL OF A CONDITIONAL USE PERMIT AND CLASS II
DESIGN REVIEW FOR THE PROPOSED EXPANSION OF THE CITY OF LAKE OSWEGO
WATER TREATMENT PLANT AT 4260 KENTHORPE WAY.**

I. BACKGROUND FACTS

A. The City Council's Decision in AP 12-02 and 12-03

On December 10, 2012, the Partnership appealed the Planning Commission's decision to deny these applications. The City Council opened the public hearing on January 14, 2013, for public testimony. The matter was then continued until January 15, to give all parties an opportunity to submit further oral testimony. At the close of the hearing on January 15, the record was left open for all parties to submit additional written testimony until January 22. The record was then closed to all parties and the Partnership was given until January 25 to submit final written argument. The City Council reconvened on January 28 for the purpose of making a decision. As the City Council was deliberating, new evidence was presented that required the record to be reopened for an additional seven days to allow all parties to submit any additional written responses. The Council record consists of all materials submitted before the record was closed to all parties on February 4 and the Partnership's final written argument submitted on February 8. After discussion, on February 11, the Council voted to uphold the appeal and reverse the Planning Commission's decision. The Council adopted its Final Order on February 18, 2013.

B. The Land Use Board of Appeal's Decision and the City's Response

Lead petitioners Stop Tigard Oswego Project, LLC, (STOP) and William J. More, and their co-petitioners, filed notices of intent to appeal on March 11, 2013, creating Land Use Board of Appeals (LUBA) Case Nos. 2013-21, 2013-22, and 2013-23. LUBA issued its Final Opinion and Order (Opinion) regarding these consolidated cases on November 22, 2013. In LUBA's Opinion, LUBA remanded the case to the City and directed the City to:

1. Provide a meaningful opportunity for rebuttal of the Mayor's ex parte disclosure by having the Mayor provide additional information regarding the ex parte contacts. After the Mayor responds to certain requests for additional information in the record, the City must provide a reasonable opportunity for participants to rebut the substance of the disclosure.
2. Conduct the proceedings required by CDC 99.180(B) and adopt appropriate findings.

3. Adopt findings that either address the Wilkerson Report, or explain why no further consideration of the Wilkerson Report and economic impacts is necessary.

After providing notice to all parties who participating in the initial preceding, on January 13, 2014, the City held a hearing to consider these three matters. Responses to the procedural issues listed as items 1 and 2 above are contained in Section IV.

II. INCORPORATION OF FINAL ORDER

The West Linn City Council's Final Order for AP-12-02 (Order), adopted on February 18, 2013, is incorporated into this Final Order on Remand (Remand Order), and all such findings and determinations in that Order are adopted except where the findings in this Final Order on Remand conflict with that Order. Where there is a conflict with the Final Order, the findings in the Final Order on Remand shall govern.

III. IMPARTIALITY CHALLENGES RAISED AT HEARING ON JANUARY 13, 2014

A person may challenge a Councilor's impartiality under CDC 99.180(B). Similarly, the Council rules allow for a bias challenge, but the Council Rules require such challenges to be "made prior to the commencement of the public hearing." The City accepted submissions to the record until January 8, 2014 at 5:00 p.m., allowing participants ample opportunity to submit bias challenges regarding any of the Councilors prior to commencement of the hearing. Notably, the City did not receive challenges to any councilor except the Mayor before the record closed on January 8, 2014.

On January 13, 2014, the Mayor immediately opened the public hearing at the beginning of the agenda item addressing the remand of AP-12-02 and AP-12-03. Although the Council did not discuss the timeliness of the challenges, only the challenge submitted by Alice Richmond to Councilor Carson's bias was submitted in a timely manner, prior to the opening of the hearing. The other bias challengers failed to raise the challenges to Councilors Jones and Tan until *after* commencement of the public hearing, the Council nonetheless agreed to hear each challenge, give each challenged member of the Council an opportunity to respond, and hold a vote for each councilor to determine whether each one could continue to participate.

Three participants made generalized statements of impartiality that applied to each of the remaining councilors, without reference to specific facts or evidence they believed supported the claim. One of the participants argued that the way the Council was conducting the hearing by itself was sufficient to establish the Council's bias. Another asserted that the entire Council was biased because it restricted citizens' access to individual councilors prior to filing of the applications. Finally, a participant argued that the Mayor had a "motive" for calling the neighborhood association presidents and his disclosures were an attempt to "persuade [the Council's] decision."

In challenging Councilor Jones' and Councilor Carson's lack of bias, Ms. Cummings submitted an email that Councilor Jones sent in February 2013 to Chris Jordan, copying Councilor Carson, that discussed proposed conditions of approval for the applications. Ms.

Cummings argued that this email demonstrated bias on behalf of the Council. Ms. Cummings also read various definitions of “bias” and “ex parte” from Webster’s Dictionary and argued that those definitions should apply.

As a general matter, the Council finds that the hearing procedures implemented during the City’s initial review and on remand were consistent with state law and local requirements. Allegations of bias resulting from activities occurring or not occurring during the Council’s initial review or before the applications were filed should have been made during the initial review of the application by the City Council. Thus, such allegations are not timely and cannot be used to challenge the bias or impartiality of councilors now.

As further described below, the Council expressly adopted the LUBA standard for bias as its standard for evaluating bias under the Council Rules and impartiality in the City Development Code. The City Attorney explained that the LUBA standard does not require the absence of all bias; rather, it requires that the decision-maker be able to set aside any bias and objectively apply the evidence in the record to the applicable criteria. The legal question is whether the decision-maker has prejudged the application such that the resulting decision is not based on the evidence or criteria.

None of the challengers described any facts or evidence that can reasonably support a claim that any of the Councilors were biased. For the following reasons, the City Council rejects each challenge.

A. Challenge to Councilor Carson’s Participation

Two citizens specifically challenged Councilor Carson’s ability to remain unbiased based on her service and involvement on regional boards such as the Water Provider Consortium. Specifically, one of the citizens appeared to claim that Councilor Carson was using West Linn’s cooperation with regional water providers to increase her standing on regional boards. As mentioned previously, another citizen claimed that the email Councilor Carson was copied on from Councilor Jones, indicated bias.

Councilor Carson responded to the challenge stating that she has not discussed the projects with the Regional Water Providers Consortium beyond what is already in the record. In addition, she stated that being a member of that board does not provide her with any reason to be biased with regards to these projects. None of the disclosed ex parte contacts in the record involving the Consortium have anything to do with the Wilkerson report, alleged bias or ex parte contacts of the Mayor. In addition, she stated that the particular neighborhood association meetings that were discussed as a result of the Mayor’s ex parte contacts did not impact her decision on these applications.

After evaluating all of the evidence in the record and voting as required by Council Rules, the Council finds that Councilor Carson was not biased; therefore, she could continue to participate in the proceedings.

B. Challenge to Councilor Tan’s Participation

There were no individualized challenges to Councilor Tan’s participation. In response to the generalized challenges citizens made to her participation, Councilor Tan

responded that with regard to Wilkerson report and the Mayor's impartiality, she was not biased or prejudiced, and she was impartial and could be fair.

After evaluating all of the evidence in the record and voting as required by Council Rules, the Council finds that Councilor Tan was not biased; therefore, she could continue to participate in the proceedings.

C. Challenge to Councilor Jones' Participation

In response to the challenges citizens made to his participation, Councilor Jones stated that with regards to Wilkerson, the Mayor's ex parte contacts, and impartiality, which were the subjects of the hearing, he was not biased and could make a fair decision.

After evaluating all of the evidence in the record and voting as required by Council Rules, the Council finds that Councilor Jones was not biased; therefore, he could continue to participate in the proceedings.

IV. RESPONSE TO LUBA'S RULINGS ON PROCEDURAL CHALLENGES

A number of procedural challenges were raised during the Council's hearings in January and February of 2013. LUBA ruled on two procedural issues: A) ex parte contacts, and B) compliance with CDC 99.180(B). In order to comply with LUBA's rulings, additional findings are provided below.

A. Ex Parte Contacts

1. Background

STOP and others asserted that Mayor Kovash's statement at the January 28 hearing regarding discussions with two neighborhood association representatives outside the record does not comport with the disclosure requirements of ORS 227.180(3); therefore, he must recuse himself from participating in the decision. During the initial proceedings on review, the Council elected to respond to the Mayor's ex parte contact by leaving the record open for response. The Council finds that is exactly what the law requires. ORS 227.180(3) provides:

No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

- (a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
- (b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.

The substance of the contact was placed in the record¹ and rebuttal was offered in the 7 day period provided.² During the open comment period, several parties objected that the Mayor's disclosure was inadequate and asked for more information.³ In addition, several parties requested that the Mayor be disqualified from voting on the project due to his alleged lack of impartiality. LUBA Rec. 429; 466; 472.

Before LUBA, More restated these same objections and asserted that Mayor Kovash's statement at the January 28 hearing regarding discussions with two neighborhood association representatives outside the record did not comport with the disclosure requirements of ORS 227.180(3), and More requested that the Mayor "fully disclose the substance of his ex parte communications, followed by an opportunity for interested parties to respond to the ex parte communications...and [for the Council] to issue an appropriate new decision based upon all the evidence." More Petition for Review, 31. LUBA declined to go that far and only required that the Mayor provide a more detailed disclosure of his ex parte contacts and "provide a reasonable opportunity for participants to rebut the disclosure in light of that additional information." *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 13.

¹ The Mayor, according to his statement in the record of this case, said that he spoke with two people - One was concerned that "LOT treat WL citizens right" and the other "knew nothing about LOT." Mayor Kovash email dated February 5, 2013, LUBA Rec. 366. The Council finds that this disclosure is sufficient.

² Mr. Froode took advantage of this opportunity in his email of February 4, 2013 to say that one of the supposed opposition neighborhood associations did not, in fact, oppose and that those who did, did so "in one form or another" (such as, perhaps, to urge further discussions). Moreover, he suggests that not all such associations "had quorums or are active" as well. The Mayor's point appears to be well-taken.

³Footnote 3 of LUBA's decision sets out these additional questions as they were summarized by the More Petitioners:

1. With whom (by name) did these conversations occur?
2. When did the conversations occur, how and where?
3. Who initiated the conversations?
4. What confirmation existed indicating that those speaking with the Mayor represented a neighborhood group?
5. What persons were included in any such group?
6. What were the specifics of the conversations—who said what?
7. What was the sequence of questions, answers and comments?
8. At any point, did the Mayor inform the other participants that such conversations were ex parte contacts, improperly occurring while the Council was actively considering land use appeals on the very topic to which the conversations related?
9. Were the group representatives asked to submit their comments to the record in some documented form?
10. Were any written communications or emails provided to or from these groups or their representative? If so, where are the copies available for public review?

2. Discussion.

These findings respond to ex parte issues raised by LUBA in two ways. First, the findings respond to LUBA's concerns about the Mayor's ex parte contacts. Second, these findings address the effect of the Mayor's recusal on the remand proceedings.

A) *LUBA's response to the Mayor's ex parte contacts.*

LUBA's response was twofold; LUBA interpreted: 1) the Council's discussion of neighborhood opposition to be relevant to CDC 60.070(A)(3), and 2) ORS 227.180(3) to require the decision-maker to respond to specific requests for additional information that are "reasonably necessary" for participants to rebut the disclosure.

First, while the Council did not believe that neighborhood association opposition or support was applicable to any criteria, LUBA mentioned that "Councilor Jones was prepared to vote against the project, based in part on testimony that seven neighborhood associations opposed it" and that "for whatever reason, the final decision-makers appeared to consider [it] to be relevant to the approval criteria," specifically CDC 60.070(A)(3). *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 11.

CDC 60.070(A)(3) requires that the "granting of the proposal will provide for a facility that is consistent with the overall needs of the community." The Council interpreted that criterion to mean that "community" is not limited to the citizens of West Linn, and LUBA sustained the City's interpretation. *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __ (2013); Slip op. 18. The Council properly explained its interpretation of CDC 60.070(A)(3) as part of its previous Order, and LUBA denied all assignments of error challenging that interpretation. The Council does not wish to alter its previous interpretation of CDC 60.070(A)(3) or its evaluation of the evidence presented. Rather, the Council further clarifies its interpretation to respond to LUBA's discussion of the relevancy of neighborhood opposition or support.

The Council finds that broad, generalized statements of support or opposition by neighborhood associations, civic groups, individual citizens, or others to a development proposal are not relevant under any of the applicable code criteria, including CDC 60.070(A)(3). The Council interprets CDC 60.070(A)(3) to require more than a poll gauging whether public opinion generally supports or opposes a particular development project in the community. To interpret CDC 60.070(A)(3), even in part, on such generalized opposition or support to a project would relegate application of this criterion to nothing more than a popularity contest for every conditional use permit within the City. The Council rejects such an approach.

Thus, information in the record regarding the number of neighborhood associations that support, oppose, or were undecided on the project at the time of the hearing was not considered, and any such evidence submitted during the remand proceedings is specifically rejected from the record of this application. Specifically, the information that was disclosed by the Mayor due to his ex parte contacts was not relevant to this CDC 60.070(A)(3) and is also specifically rejected as part of the remand record.

Second, according to LUBA, the law does not provide for cross-examination of a decision-maker; however, ORS 227.180(3) requires a decision-maker to respond to specific requests for additional information or clarifications that are “reasonably necessary” for participants to develop rebuttal to material factual and legal assertions in the initial disclosure. *Stop Lake Oswego Project, LLC et al. v. City of West Linn*, __ Or LUBA __, (2013); Slip op. 12. LUBA stated that “at least some of the 10 questions” that participants submitted to the Mayor regarding his ex parte disclosure require a response, but did not require a response to all of the questions or specify which questions require answers.

For purposes of complying with LUBA’s direction on remand, the Mayor responded to some of the questions posed by participants. He responded to questions 1, 6, and 10 described in LUBA’s Opinion because answers to those questions could be “reasonably necessary” for participants to rebut material facts and legal assertions in the Mayor’s original disclosure. The other questions requesting details about the timing, location, initiating party, and representational authorization were not answered because those questions would not lead to material facts and legal assertions that could be rebutted. The Mayor’s answers were made available to the public and some testimony was received that was related to the responses the Mayor provided. However, the Council finds that the Mayor’s responses and testimony received are not relevant to any of the criteria for the reasons stated above and because of the Mayor’s recusal, discussed below.

B) Effect of the Mayor’s recusal on remand proceedings.

By definition, an ex parte contact is a communication with a decision-maker made outside the record regarding a matter relevant to the decision. Thus, the Mayor’s recusal impacts the remand proceedings because the Mayor is no longer participating or voting on the matters associated with the applications. The Council finds that the Mayor is no longer a decision-maker; therefore, any communications that he had outside the hearings process no longer constitute ex parte contacts. In addition, as noted above, the Council has already determined that even if the Mayor were to continue to participate in these proceedings, the content of those communications did not address a matter relevant to the decision because it was not related to any applicable criteria.

The Mayor’s responses to the participants’ questions were attached to the December 23, 2013, Staff Report (Mayor’s Responses). Participants were allowed to submit written testimony addressing the Mayor’s Responses anytime thereafter through January 8, 2014, at 5:00 p.m. or at the hearing on January 13, 2014. The Council finds the Mayor’s responses are rejected and excluded from the record because those items are not relevant to any criteria. In addition, the Council finds that any testimony received, before or during the hearing, in rebuttal to the Mayor’s Responses is also irrelevant, and such testimony shall also be rejected and excluded from the record.

The remand hearing was noticed as a “limited hearing” in which the Council would only be accepting testimony “directed specifically to the substance of the Mayor’s responses to the questions as required by LUBA in its decision.” The Council stated it would not allow testimony on the vote regarding the Mayor’s impartiality or the Wilkerson

Report. The Council found that there was sufficient evidence in the record for it to make a findings responding to the Wilkerson Report and a final determination on remand. Additional material related to rebuttal of the Mayor's ex parte contacts was submitted to the Council, both before and during the remand proceedings; however, additional testimony unrelated to these two issues was also presented.

Therefore, the Council rejects all testimony received, both before and during the hearing, as irrelevant for the reasons stated above or because it is beyond the scope of the limited hearing. As such, the Council excludes all testimony submitted into the record, except for the written ex parte emails intended for the Council that were caught in the City's email filter and included in the January 9, 2014, testimony packet submitted to the Council; however, the filtered emails were not considered by the Council because they were irrelevant to the limited issues on appeal. The Council also excepts from the general rejection of testimony, the February 9, 2013, email submitted as part of the impartiality challenges to Councilors Jones and Carson. This email is allowed to become part of the record for the limited purpose of evaluating the impartiality challenges to Councilors Jones and Carson, which were addressed previously in another part of this Remand Order.

Further, the Council determines that the Jones email was part of its deliberative process, but that it does not support an allegation of bias, prejudice of the applications, or a disposition towards approval that was made regardless of the evidence. Moreover, the Council concludes that this email was not a prohibited ex parte contact because it was a communication with staff and another councilor as part of the deliberation process, dealt with policy and not new facts, and was made public as part of circuit court proceedings contemporaneous with the LUBA proceedings that resulted in the remand now before Council.

B. Impartiality pursuant to CDC 99.180(B).

On remand, the Council must vote on the Mayor's impartiality and adopt the appropriate findings. The Community Development Code 99.180(B) and 99.180(C) require:

B. Challenges to impartiality.

1. An affected party or a member of a hearing body may challenge the qualifications of a member of the hearing body to participate in the hearing and decision. The challenge shall state the facts relied upon by the challenger relating to a person's bias, pre-judgment, personal interest, or other facts from which the challenger has concluded that the member of the hearing body cannot participate in an impartial manner.
2. The challenged person shall have an opportunity to respond orally to the challenge. The challenge shall be incorporated into the record of the hearing.
3. Any challenge shall require that the hearing body vote on the challenge pursuant to subsection E of this section.

C. Disqualification. No member of a hearing body may participate in a discussion of the proposal or vote on the proposal when any of the following conditions exist:

1. Any of the following have a direct or substantial financial interest in the proposal: the member or member's spouse, brother, sister, child, parent, father-in-law, mother-in-law, any business in which the member is then serving or has served within the previous two years, or any business with which the member is negotiating for or has an arrangement or understanding concerning prospective partnership or employment.
2. For any other valid reason, the member has determined that participation in the hearing and decision cannot be in an impartial manner.

To evaluate the Mayor's alleged impartiality under CDC 99.180(B), the Council finds that it is necessary to: 1) establish interpretations for the application of CDC 99.180(B), and 2) conduct a vote on the Mayor's impartiality under CDC 99.180(B).

1. Interpretations for application of CDC 99.180(B).

The Council determines that it would be beneficial to establish: 1) the meaning of impartiality, 2) that because the basis for the bias challenge is included in the challenge, no other public testimony is required, and 3) that CDC 99.180(B) does not require a vote of the Council when the challenged decision-maker recuses himself.

First, the Council finds that a member of the decision-making body is "impartial," as required under the CDC, if the member: A) has not prejudged the application, and B) does not have a personal interest in the application or outcome. The Council finds that the terms "bias" and "prejudgment" in CDC 99.180(B)(1) are functionally equivalent and require a demonstration that the member of the hearing body cannot set aside any bias or prejudgment and objectively review the evidence and apply the applicable criteria to the evidence in the record to reach a decision. To establish bias or prejudgment, the person challenging the decision-maker's impartiality has the burden of: 1) showing that the decision was not reached by applying the evidence presented to the applicable criteria, or 2) that the decision-maker exhibited personal bias. The standard for evaluating impartiality shall be the same standards that LUBA would apply in directly addressing a bias claim under LUBA precedent.

The Council also finds that the term "personal interest" in CDC 99.180(B)(1) requires a direct, not just potential, pecuniary benefit or detriment to a decision-maker or someone in the decision-maker's family. The Council finds that personal interest is equivalent to an "actual conflict of interest" under Oregon Government Ethics Statutes, and whether a decision-maker has an actual conflict of interest shall be determined by applying the Oregon Government Ethics Commission staff opinions, advisory opinions, and other applicable case law. Overall, the Council finds that the person challenging the member's participation due to impartiality must demonstrate the bias, prejudgment or personal interest is of sufficient magnitude that the member "cannot participate in an impartial manner."

Second, the Council determines that once the challenger states the facts relied upon for challenging the impartiality of the decision-maker under CDC 99.180(B)(1), no additional testimony is required. The CDC is clear that after the challenger states the facts relied upon for the challenge, the "*challenged person shall have an opportunity to respond orally to the challenge.*" CDC 99.180(B)(2) (emphasis added). Thus, there is no requirement to take testimony from the public before the Council votes on the challenge.

The Council finds that the facts relied upon for the challenge were sufficiently disclosed and included in the record. LUBA Rec. 428-429; 463-466; 467-472. Therefore, it is not necessary for the Council to take any additional testimony before resolving the challenge to the Mayor's impartiality.

Third, the Council determines that if the challenged decision-maker recuses himself after the challenge is made, a vote on the impartiality is not required because the member is no longer part of the decision-making body.

2. Impartiality vote pursuant to CDC 99.180.

The Council finds that it is not necessary to vote on the impartiality challenge to the Mayor because the Mayor has recused himself. Nonetheless, in an abundance of caution, and in order to comply with LUBA's Opinion, the Council deliberated and voted on whether the Mayor was impartial under CDC 99.180(B).

Participants raised challenges to Mayor Kovash's ability to participate in the hearing in an impartial manner because he called two neighborhood association presidents, received information that was not in the record, and did not disclose the ex parte contacts at the earliest possible time. LUBA Rec. 428-429; 463-466; 467-472.

After evaluating all of the evidence in the record, and voting as required by CDC 99.180(B) and (E), the Council finds that the Mayor is impartial. The Mayor was not biased, did not prejudge the application, and did not have a personal interest in the outcome. Accordingly, the Council finds that the Mayor is impartial and could have participated in the proceedings if he had not recused himself.

ON THE BASIS OF THE ABOVE FINDINGS, the Council approves this Remand Order. This decision may be appealed to the Land Use Board of Appeals under the applicable rules and statutes.

Jody Carson
Jody Carson, Council President

1/15/14
Date

This decision was mailed on January 16, 2014.