

Shroyer, Shauna

From: Rapp, Reagan S. (Perkins Coie) <RRapp@perkinscoie.com> on behalf of Robinson, Michael C. (Perkins Coie) <MRobinson@perkinscoie.com>
Sent: Tuesday, October 14, 2014 4:41 PM
To: Pelz, Zach
Cc: Robinson, Michael C. (Perkins Coie); King, Seth J. (Perkins Coie); Stephenson, Garrett H. (Perkins Coie); Kerr, Chris; mmahoney@conam.com; rmorgan@conam.com; jeff@parkerdev.com; 'bwb@johnson-reid.com'; bahrend@mcknze.com; Thornton, Megan; Shroyer, Shauna
Subject: City of West Linn File Nos. ZC-14-01/PLN-14-01; Request for Disqualification of Vice-Chair Russell Axelrod
Attachments: 2014.10.14 Ltr to Chair Steel re Disqualificaiton.PDF

Dear Zach,

Attached please find my letter to Chair Christine Steel regarding ConAm's request for disqualification of Vice-Chair Russell Axelrod. Please place this letter before the Planning Commission and in the official Community Development Department file before tomorrow's work session. Thank you.

Please confirm receipt of this email.

Thanks,

Mike

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October 14, 2014

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VIA EMAIL

Ms. Christine Steel, Chair
West Linn Planning Commission
c/o City of West Linn Planning Department
22500 Salamo Road #1000
West Linn, OR 97068

**Re: Applications by ConAm Properties for Plan and Zoning Map Amendments
City File Nos. ZC-14-01/PLN-14-01
Request for Disqualification of Vice-Chair Russell Axelrod**

Dear Chair Steel and Members of the West Linn Planning Commission:

This office represents ConAm Properties, LLC ("Applicant"), the applicant requesting approval of comprehensive plan map and zoning map amendments ("Applications") for approximately 11.41 acres of property located at the northwest corner of Blankenship Road and Tannler Drive. The Planning Commission is scheduled to consider the Applications at today's meeting (City File Nos. ZC-14-01/PLN-14-01).

The purpose of this letter is to respectfully request that Vice-Chair Russell Axelrod abstain, or be disqualified, from participating in the Planning Commission's consideration of the Applications on the grounds that he is biased against the Applications. Applicant is an "affected party" under West Linn Community Development Code ("CDC") 99.180.B.1 and has the right to make this request. This letter and its attachment concerns a procedural matter and thus may be accepted into the record pursuant to CDC 99.180.B.2.

1. Applicant is entitled to a decision made by an impartial decision-maker.

The Applications are quasi-judicial in nature. As a result, the Planning Commission is required to follow specific procedures under local and state law, including that the Planning Commission members are required to remain impartial and not prejudge an application. *See Fasano v. Board of County Commissioners*, 264 Or 574, 588, 507 P2d 23 (1973).

The City has incorporated this requirement into its local quasi-judicial procedures and precludes a member of the decision-making body from participating in a matter where that member cannot remain impartial. CDC 99.180.C.

In the event a biased hearing body member does not voluntarily disqualify him/herself from participating, an affected party may challenge that member's impartiality:

"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."

CDC 99.180.B. When a party challenges a member's impartiality, a majority of the members of the decision-making body may vote to disqualify that member from participating in the matter. CDC 99.180.E.

2. Vice-Chair Axelrod should not participate in this matter due to bias.

Applicant respectfully challenges Vice-Chair Axelrod's impartiality based upon email correspondence to other members of the Planning Commission dated September 30, 2014. In the email, Vice-Chair Axelrod expressed his "strong opposition" to the Applications. He also asked three different times in the message that the Planning Commission "deny" the Applications. A copy of the email is attached as Exhibit A.

Vice-Chair Axelrod's email was written before the public hearing in this matter occurred, before the various parties presented oral testimony and rebuttal, before the parties submitted post-hearing written testimony, and before the Planning Commission deliberated. The timing and distribution of Vice-Chair Axelrod's email demonstrates that

he predetermined that he would vote against the Applications and sought to lobby other members of the Planning Commission to the same point of view. As a result, Vice-Chair Axelrod cannot serve as an impartial decision-maker in this matter.

Although Vice-Chair Axelrod sent a second email on October 8, 2014 stating that he sent his first email because he thought it was his only opportunity to provide input before the Planning Commission reached a decision on the Applications, the second email does not undo the damage of the first email for two reasons. First, it does not change the fact that Vice-Chair Axelrod made a decision on the Applications and then communicated that decision to the other members of the Planning Commission before the presentation of all of the evidence. Second, Vice-Chair Axelrod cannot “unring the bell.” That is, he cannot take back his comments in opposition to the Applications and regain his impartiality. Under similar circumstances, after a decision-maker testified in opposition to a land use application and then sought to requalify herself for voting purposes, LUBA held that it was not reasonable to expect that decision-maker to be unbiased in making a decision on the application:

“A reasonable person would simply not believe that an individual could go through the time and effort of preparing and presenting opposition to an application for land use approval before local bodies, and then abandon his or her role as an advocate and make an unbiased decision on that same application.”

Wal-Mart v. City of Hood River, __ Or LUBA __ (LUBA No. 2013-009, May 21, 2013) (slip op. at 14). Therefore, Applicant requests that Vice-Chair Axelrod not participate in, or vote on, the Planning Commission’s consideration of the Applications.

If Vice-Chair Axelrod does not abstain or is not disqualified from participating in these proceedings, it will constitute a procedural error that prejudices Applicant’s substantial rights to a full and fair proceeding. Further, the error cannot be corrected by the City Council’s subsequent review because this review is not *de novo*. CDC 105.040.C. The City’s procedural error will be grounds for the Land Use Board of Appeals to reverse or remand the City’s final decision. ORS 197.835(9)(a)(B).

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3. Conclusion.

Applicant is mindful of the significant time, energy, and thoughtfulness that Planning Commission members give to their duties. As a result, Applicant does not make this request lightly. However, Applicant wants to ensure that it receives the fair proceeding that it, and all other parties, are entitled to under state and local law.

Thank you for your consideration of this request.

Very truly yours,



Michael C. Robinson

MCR

Encl.

cc: Mr. Chris Kerr (w/ encl.) (via email)
Client (w/encl.) (via email)

From: "Russell Axelrod"
Date: Sep 30, 2014 1:30 PM
Subject: RE: Testimony for 10/1/14 PC Meeting
To:

Cc:

Dear Planning Commission Members,

It is unfortunate that I am out of the country and unable to participate in the hearing regarding File No. ZC-14-01/PLN-14-01 for the proposal to rezone lands along Tannler in the Savanna Oakes/Willamette neighborhood areas.

I am not able to further review and comment in more detail at this time in my remote location; however, I wish to express officially my strong opposition to the rezoning proposal. I urge the planning commission to deny this request until further community planning for the area is performed.

The lands in question present physical challenges that might constrain their use for other more appropriate uses, including potentially open/green space land uses. The proposed rezoning to allow dense residential development also has the potential to significantly impact traffic and other aspects of the community and region of West Linn. Further community-based planning should first be performed for the area before piece-meal development is allowed as has been done in other areas of West Linn with adverse impacts to the community.

I urge you to deny the proposed zoning change until further community-based planning is performed to determine, at minimum, a preferred conceptual plan for future development of this area. Please enter my comments in the official record to deny this proposal at this time.

Respectfully,

Russ Axelrod

Sent from Yahoo Mail for iPad[overview.mail.yahoo.com]