

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SPACE AGE FUELS, INC.,
5 *Petitioner,*

6
7 vs.

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9 CITY OF SHERWOOD,
10 *Respondent,*

11 and

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14 ROB NASHIF, ENSERV, INC., GEORGE
15 JOHNSTON and MARIJO JOHNSTON,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2001-064

19 ORDER

20 **MOTION TO INTERVENE**

21 Rob Nashif, Enserv, Inc., George Johnston and Marijo Johnston move to intervene on
22 the side of respondent. There is no opposition to the motion and it is allowed.

23 **MOTIONS TO TAKE EVIDENCE NOT IN THE RECORD**

24 This case concerns the city’s denial of petitioner’s application for permits to construct
25 a gas station in the City of Sherwood. Petitioner has filed two motions to take evidence not in
26 the record to prove that a city councilor was biased and improperly prejudged the application.

27 **A. First Motion**

28 Petitioner’s first motion sought to produce evidence confirming an alleged
29 conversation between another attorney (Robinson) and a city councilor. That conversation
30 allegedly occurred at a time when petitioner’s application was still pending before the city
31 council. The first motion was supported by an affidavit signed by petitioner’s attorney
32 (Rask). Rask’s affidavit alleged that Robinson told Rask that a city council member told
33 Robinson that “no new gasoline service station would be approved in the City of Sherwood.”

1 Affidavit of Raymond M. Rask in Support of Petitioner’s Motion to Take Evidence Not in
2 the Record 1-2. Petitioner stated that it had been unable to get an affidavit from Robinson
3 confirming Robinson’s conversation with the city councilor, and petitioner requested that
4 LUBA authorize it to depose Robinson to confirm that conversation.

5 **B. Amended Motion**

6 Before LUBA issued an order on the first motion, petitioner filed an amended motion.
7 Attached to the amended motion is an affidavit signed by Robinson. As relevant the affidavit
8 states:

9 “I, Michael C. Robinson, being first duly sworn, depose and say:

10 “1. I am an attorney with the firm of Stoel Rives LLP in Portland, Oregon.
11 While I am making this Affidavit in support of petitioner’s Motion to
12 Take Evidence Not in the Record Pursuant to OAR 661-010-0045, I do
13 not represent [petitioner].

14 “2. I am one of the attorneys who applied to the City of Sherwood for
15 Conditional Use Approval to Construct a Fuel Service Station.

16 “3. On or about February 27, 2001, I spoke with [a] member of the City of
17 Sherwood Planning Commission. In that conversation, [the planning
18 commissioner] told me that [a city council member] told [the planning
19 commissioner] that [the city council member] did not want any new
20 service stations in the City of Sherwood.” Affidavit of Michael C.
21 Robinson in Support of Petitioner’s Amended Motion to Take
22 Evidence Not in the Record 1-2.

23 As described in the Robinson affidavit, the comments the city councilor allegedly made are
24 somewhat different than the ones described in the Rask affidavit, and those comments were
25 made to a planning commissioner rather than directly to Robinson.

26 In its amended motion, petitioner states its first motion and request for deposition is
27 now unnecessary. However, in its amended motion, petitioner now seeks to depose the
28 planning commissioner and to present any evidence of bias that deposition might lead to.
29 Petitioner explains that the planning commissioner’s deposition is necessary, “because
30 Petitioner’s attorney has been unsuccessful in trying to obtain an affidavit from [the planning

1 commissioner] confirming that the City of Sherwood City Council prejudged Petitioner’s
2 application.” Petitioner’s Amended Motion To Take Evidence 2.

3 In response to both motions, the city argues that, even assuming that the alleged
4 statements were made, they do not meet the standard for taking evidence outside of the
5 record. Under OAR 661-010-0045(1), the standard for taking evidence outside of the record
6 is whether the disputed factual allegations, if proved, would warrant reversal or remand of
7 the decision.¹

8 **C. Discussion**

9 Under ORS 197.835(9)(a)(B), LUBA will reverse or remand a decision where a local
10 government fails “to follow the procedures applicable to the matter before it in a manner that
11 prejudged the substantial rights” of the parties. A party’s substantial rights include “the
12 rights to an adequate opportunity to prepare and submit their case and a full and fair
13 hearing.” *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). A biased decision maker
14 substantially impairs a petitioner’s ability to receive a full and fair hearing. *1000 Friends of*
15 *Oregon v. Wasco Co. Court*, 304 Or 76, 742 P2d 39 (1987). A demonstration of actual bias
16 on the part of a decision maker will generally result in reversal or remand of the decision.
17 *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710-11 (2001).

18 The standard for determining actual bias is whether the decision maker
19 “prejudged the application, and did not reach a decision by applying relevant
20 standards based on the evidence and argument presented [during quasi-
21 judicial proceedings].” *Oregon Entertainment Corp. v. City of Beaverton*, 38
22 Or LUBA 440, 445 (2000), *aff’d* 172 Or App 361, 19 P3d 918 (2001) (*quoting*
23 *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993)).

¹ OAR 661-010-0045(1) provides in pertinent part:

“The Board may, upon written motion, take evidence not in the record in the case of disputed
factual allegations in the parties’ briefs concerning * * * other procedural irregularities not
shown in the record and which, if proved, would warrant reversal or remand of the decision.
* * *”

1 The burden of proof that a party must satisfy to demonstrate prejudice by a local decision
2 maker is substantial. See *Schneider v. Umatilla County*, 13 Or LUBA 281, 284 (1985) and
3 cases cited therein.

4 In *Lane County School Dist. 71 v. Lane County*, 15 Or LUBA 608 (1986), we stated
5 that our rules regarding evidentiary hearings should be read liberally so as not to stifle the
6 presentation of legitimate issues, but not so liberally as to “authorize fishing expeditions for
7 possible *ex parte* contacts.” *Id.* at 609 (emphasis in original). We also said:

8 “A threshold must be crossed to justify an evidentiary hearing and the
9 procedures (*e.g.*, depositions) that could accompany such a hearing. The
10 motion must allege that an *ex parte* contact actually took place, or that there is
11 a reasonable basis to believe that such contact probably took place. The
12 allegations must be substantial, *i.e.*, the facts that serve as the basis for the
13 motion must also be alleged. The motion must also show, with supporting
14 legal authority, that proof of the alleged *ex parte* contact would warrant
15 remand or reversal. Once the requisite allegations are made, the petitioner is
16 entitled to an evidentiary hearing to prove them. Under our rules, allowance of
17 the motion would set the stage for depositions designed to produce proof
18 justifying the ultimate relief sought.” *Id.* at 609-10 (internal citations and
19 footnotes omitted).

20 The usual starting point in determining whether to allow a motion to consider
21 evidence outside the record is to determine whether there are “disputed factual allegations.”
22 OAR 661-010-0045(1). If the relevant facts are not disputed, the question of whether there
23 was prejudice in this case is a question of law based on the record and any facts outside
24 the record that the parties agree on. The county’s short response makes it somewhat unclear
25 what facts the parties dispute, beyond petitioner’s ultimate allegation that the city council
26 prejudged petitioner’s application. That problem noted, we see no reason why motions to
27 take evidence not in the record regarding alleged bias or prejudice should be treated
28 differently than those alleging improper *ex parte* contacts, as described in our decision in
29 *Lane County School Dist. 71*.

30 Petitioner has alleged bias or prejudice on the part of the city council. If proved,
31 bias or prejudice would require reversal or remand of the challenged decision. However,

1 to pass the threshold described in *Lane County School Dist. 71*, and thereby authorize LUBA
2 to (1) consider evidence outside the record and (2) allow depositions and subpoenas to
3 produce that evidence, petitioner must “allege * * * a reasonable basis to believe that [the
4 city council prejudged this matter and those] allegations must be substantial * * *.” *Id.* at
5 609-10. As noted earlier, petitioner’s amended motion relies on an allegation that a city
6 councilor stated to a planning commissioner that he “did not want any new service stations in
7 the City of Sherwood.” Affidavit of Michael C. Robinson in Support of Petitioner’s
8 Amended Motion to Take Evidence Not in the Record 2.

9 The allegation petitioner relies on is insubstantial and is insufficient to establish a
10 reasonable basis to believe that the city councilor prejudged petitioner’s pending application.
11 In *Halvorson Mason Corp.*, 39 Or LUBA at 710, we granted the petitioner’s motion to
12 present evidence outside the record to consider the petitioner’s allegation that a city councilor
13 was biased and prejudged the petitioner’s application for approval of a real estate office.
14 However, in *Halvorson Mason Corp.*, the petitioner alleged that the city councilor wrote
15 letters outside the official proceedings to the mayor and other city council members
16 expressing his longstanding opposition to a real estate office and urging its denial, while the
17 petitioner’s application for approval of the real estate office was pending before the city. In
18 contrast, the statement that petitioner relies on in this appeal makes no reference to
19 petitioner’s application and, on its face, only expresses the city councilor’s personal feelings
20 about new service stations in the city. While it is certainly *possible* that a city councilor who
21 expresses such generalized expressions of opinion is also unable to put those feelings aside
22 and judge particular applications for gas stations on their merits, the opposite inference is
23 equally possible. The alleged statement that petitioner relies on in support of its amended
24 motion does not provide a reasonable basis for believing that the city councilor had
25 prejudged petitioner’s application and was incapable of judging petitioner’s application on its
26 merits.

1 We note that the city councilor statement as alleged in the first motion for evidentiary
2 hearing, set out earlier in this order, is far more troubling than the statement that petitioner
3 now relies on in the amended motion. If petitioner had a reasonable basis for alleging that the
4 city councilor made that statement, and the city denied that the statement was made, an order
5 allowing petitioner to present evidence outside the record might well be warranted. The
6 statement described in the first motion can reasonably be understood to express a position
7 that the city council had already decided not to approve any new gas stations, including
8 petitioner's, without regard to whether any such applications for service stations satisfy the
9 applicable approval criteria. However, as the alleged statement is described in the Robinson
10 affidavit, it is much more difficult to construe as being more than a generalized expression of
11 opinion regarding new gas stations in the city. We conclude it is not reasonable to infer from
12 petitioner's allegations in the amended motion that the city councilor prejudged its
13 application. Accordingly, those allegations are not sufficient to authorize petitioner to seek
14 and present extra-record evidence under OAR 661-010-0045(1).

15 Petitioner's motion to take evidence outside of the record is denied. The petition for
16 review is due 21 days from the date of this order. The response briefs are due 42 days from
17 the date of this order. The Board's final opinion and order is due 77 days from the date of this
18 order.

19 Dated this 2nd day of August, 2001.

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Anne Corcoran Briggs
Board Chair