BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON CHILD DEVELOPMENT COALITION
and HARA SCHICK ARCHITECTURE, P.C.,
Petitioners,

vs.

CITY OF MADRAS,
Respondent,

and

LARRY EASTER, MARIE EASTER,
GARY HARRIS, CAMILLE K. HARRIS, ED CHOTARD,
PATRICIA TAYLOR, LANGSTON FISHER, CHARLES
CAMPBELL, ROGER TATHWELL, CHUCK ANDERSON,
LINDA ANDERSON, DON VANDEWEGHE, BOB FORBES,
ELOISE THORNTON and ERNEST SIMPSON,
Intervenors-Respondent.

LUBA No. 2002-026

ORDER ON MOTION TO TAKE EVIDENCE
NOT IN THE RECORD

Petitioners request that we consider evidence not in the record to support an allegation in their petition for review that the city's decision unconstitutionally discriminates against a protected class, namely the children of migrant workers, who are predominantly Hispanic or Latino.[1] Respondent and intervenors-respondent (respondents) object to the motion.

[1]OAR 661-010-0045(1) provides, in relevant 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 [the] unconstitutionality of the [challenged] decision, * * * *ex parte* contacts * * * or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *"

BACKGROUND

In 1998, the city approved an application submitted by the Jefferson County Early Childhood Development Center (Juniper Junction) for a Head Start program to be located on property zoned Single-Family Residential (R-1).[2] None of the city's zoning designations specifically permit preschool or day care programs. The city approved the Juniper Junction application based on a finding that the Head Start program at issue fell within the definition of a "school."[3] Schools are a conditional use in the R-1 zone. *See* MZC 8-8.3.1(2)(C) (conditional uses include "[p]ublic buildings, such as * * * public or private schools").

In 2001, petitioner Oregon Child Development Coalition (OCDC) submitted an application to the city to construct a building to house a migrant worker Head Start program on a property located immediately to the south of the Juniper Junction building. The proposed migrant worker Head Start program differs from traditional Head Start programs in that it is geared to the farm worker season in central Oregon (April through October), and serves infants through kindergarten-aged youngsters. According to the testimony cited by petitioners, typical Head Start programs follow the academic calendar year (September through June) and serve three to four year olds.

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[2] The Head Start program is a federally funded early childhood education program for low-income children. The program provides education and health services, connects participants and their families to available social services and encourages parental involvement in child development programs. National Head Start Website (http://home3.inet.tele.dk/mjpeders/head.htm).

[3] The Madras Zoning Code (MZC) 8-8.1.3 defines "school" as:

> "A place for teaching, demonstration or learning. However, unless otherwise qualified, the word 'school' means a place for primarily academic instruction equivalent to what is commonly known as kindergarten, grade school, junior high school, college, or a combination of them."

The same code provision defines "Day Care Facility" as:

> "[A]ny facility that provides day care to children, including * * * those known under a descriptive name, such as nursery school, preschool, kindergarten, * * * [or] child development center, except for those facilities excluded by law. This term applies to the total day care operation. It includes the physical setting, equipment, staff, provider, program and care of children."

The subject property includes 4.8 acres, developed with a public park. Property within the vicinity is developed with single-family dwellings, an assisted living facility and a hospital. Petitioners propose to use a little over two acres for the migrant worker Head Start program, including an approximately 16,200 square foot building, a secure play area, landscaping and access. Petitioners anticipate that most children will arrive via school bus from surrounding areas, and will leave by 6 p.m. At times, the building will be open in the evenings to provide classes for the families of the students.

The city planning commission approved the application. Opponents appealed the planning commission decision to the city council. The city council upheld the appeal, and denied petitioners' application, concluding that the proposed migrant worker Head Start program is a day care facility, not a school, and is therefore not allowed in the R-1 zone.

MOTION TO TAKE EVIDENCE

Petitioners seek to introduce evidence that they claim supports the fourth assignment of error in their petition for review, where they argue that the city improperly discriminated against them and their clientele by denying their application.[4] Most of the proffered evidence is attached to petitioners' motion. First, petitioners seek to introduce the entire file from the 1998 approval of Juniper Junction. According to petitioners, the evidence in that file shows that the Juniper Junction application and the application at issue in this appeal are so similar that the *only* reason that explains the city council's decision to deny petitioners' application is that the city council is biased against migrant workers.

Second, petitioners seek to introduce a series of newspaper articles and editorials that discuss the proposed migrant worker Head Start program application. According to

[4] Petitioners' argument in their fourth assignment of error is based on Article 1, section 20, of the Oregon Constitution, which provides that "[n]o law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." In *Namba et al v. McCourt and Neuner*, 185 Or 579, 612, 204 P2d 569 (1949), the Oregon Supreme Court held that discrimination on the basis of national origin violates Article 1, section 20, absent a showing of a "real and substantial difference between the classes."

petitioners that evidence shows that at least some members of the community were opposed to the proposal because of the program's clientele.

Third, petitioners seek to introduce the file and documents relating to a proposed Mountain View–East Cascade Overlay Zone. According to petitioners, those documents will demonstrate a concerted effort by the city to ensure that (1) the existing Head Start program site is grandfathered as a permitted use, and (2) no migrant worker Head Start facility will be located within the vicinity of the present program.

Petitioners also argue that it is necessary that we consider the evidence because it demonstrates that the subject application was a matter of great interest and controversy within the local community and as a result, the city council members must have engaged in *ex parte* contacts that were not disclosed during the proceedings below.

Respondents argue that the proffered evidence should not be considered. According to respondents: (1) petitioners have not established that there are disputed facts that require consideration of evidence outside the record to prove or disprove them; (2) petitioners should have presented the evidence they seek to admit to the city council; (3) the generalized statements by non-decision makers that petitioners seek to admit do not demonstrate either unlawful discrimination or bias; and (4) the proposed amendments to the MZC are completely irrelevant to the challenged decision. Respondents also argue that the newspaper articles and editorials were initially included in the record, and that the parties previously stipulated that those documents are not to be considered. Respondents contend that petitioners cannot, at this point, seek to admit evidence that they stipulated is not properly before the Board.

OAR 661-010-0045(1) permits LUBA to consider evidence that is not in the record in order to resolve disputed factual allegations in the parties' briefs regarding, among other things, the unconstitutionality of the city's decision, *ex parte* contacts and bias. *See Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 711 (2001) (bias is a

procedural error that, if proved, warrants reversal or remand). Therefore, the fact that petitioners seek to introduce evidence that was not presented below does not necessarily bar our consideration of the extra-record evidence. If that evidence may demonstrate that the city's decision warrants reversal or remand because of one or more of the bases listed in OAR 661-010-0045(1), and there is a sufficient reason why that evidence was not submitted during the local proceedings, OAR 661-010-0045(1) allows us to consider that evidence.

A. Evidence Pertaining to Unconstitutional Discrimination

OAR 661-010-0045(2)(a) sets out the requirements for a motion that requests LUBA to consider evidence not in the record:

> "A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding."

As we stated above, petitioners allege that the city denied their application because of the ethnicity of the clientele petitioners seek to serve. Petitioners also allege that the Juniper Junction file supports their allegation, because of the similarity between the Juniper Junction Head Start program and petitioners' proposed Head Start program. Respondents dispute that the challenged decision was the result of improper discrimination against petitioners or their clientele. Petitioners' allegation and the response to that allegation are sufficient to establish that there are disputed facts about the basis for denying the challenged application. We further conclude that if petitioners' allegation is proved, it would provide a basis for reversal or remand of the city's decision.

This case is similar to *Wagner v. Marion County*, 15 Or LUBA 260, 277 n 12 (1987). There, the petitioners argued that the county improperly discriminated against them by refusing to issue an access permit to their property, when the county had issued similar access permits to neighboring property owners. We concluded in that case that petitioners did

not sustain their burden of showing purposeful discrimination because there was no evidence in the record that pertained to the circumstances surrounding those prior approvals.

A comparison of the evidence contained in the Juniper Junction file with the evidence in the record regarding the subject application may lead to the conclusion that the city's decision is based on improper discrimination. Therefore, we agree with petitioners that the evidence contained within the Juniper Junction application file may prove petitioners' allegation that the city's decision was the result of improper discrimination, and a review of that evidence is warranted to address the arguments in petitioners' fourth assignment of error.

However, with respect to the newspaper articles and the proposed comprehensive plan amendment, we do not agree that such a connection is so apparent. The newspaper articles certainly reflect that the newspaper's editorial staff, as well as members of the community, believe that the city council's decision was based on racial prejudice. But, we do not believe that such views expressed by non-decision makers are properly considered as evidence from which we might impute improper motives to the *decision makers*.

Further, we agree with respondents that the proposed comprehensive plan amendment does nothing to demonstrate that the city seeks to prohibit programs such as the proposed Head Start because of the clientele OCDC seeks to serve. Even if the proposed amendment does, in some way, have the effect of prohibiting the siting of the OCDC program on the subject property, we do not see how that decision reflects the city council's review of the evidence and criteria pertaining to the subject application. Petitioners' argument that the proposed amendment is just a continuation of the city's general prejudice against migrant workers is too tenuous to support petitioners' specific allegation that the city council improperly discriminated against petitioners in the subject appeal. We therefore decline to consider the newspaper articles or the proposed comprehensive plan amendment.

B. *Ex Parte* Contacts

Petitioners allege that the city council's decision must have involved undisclosed *ex parte* contacts because the proposed Head Start program generated a great deal of local publicity and some prominent members of the Madras community opposed the application. According to petitioners, some of those same persons actively promoted the Juniper Junction facility. Petitioners allege that the proffered evidence demonstrates that *ex parte* contacts must have occurred; otherwise, there is no justification for the city's approval of the Juniper Junction program and the denial of the OCDC program.

The fact that petitioners' evidence shows that the subject application was hotly debated at the local level does not mean that the city council engaged in *ex parte* contacts that should have been disclosed. The Juniper Junction application was filed more than two years before the challenged application. Petitioners have not demonstrated how the evidence in the Juniper Junction files could *prove* that *ex parte* contacts occurred during the course of the OCDC proceedings. Further, the newspaper articles petitioners seek to admit do not include quotations from individual decision makers that suggest that they discussed the pending application outside of the public hearing process. Nor does the proposed amendment suggest that there were *ex parte* contacts concerning the challenged decision. Without a more particularized explanation that demonstrates the connection between the evidence petitioners seek to admit and their allegation that *ex parte* contacts occurred, we will not consider that evidence.

C. Conclusion

Petitioners' motion to take evidence not in the record is allowed in part and denied in part. Petitioners shall submit a copy of the 1998 Juniper Junction file to the Board and the parties within 7 days of this order.

OTHER MATTERS

ORS 197.830(15)(b) permits the board to award attorney fees to a prevailing party in certain circumstances.[5] Intervenors move for an award of attorney fees against petitioners. According to intervenors, the award is justified because the motion to take evidence is untimely and frivolous.

We have allowed petitioners' motion in part. Therefore, even if we have authority to award attorney fees based on our interlocutory orders, intervenors would not be entitled to attorney fees in this case.[6]

The motion to take evidence was filed shortly before oral argument and on July 9, 2002, we issued an order suspending the appeal pending resolution of petitioners' motion and canceling oral argument. Oral argument is now rescheduled to October 3, 2002, at 9:00 a.m. in the Small Hearings Room, Salem, Oregon.

Dated this 16th day of September, 2002.

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Anne Corcoran Briggs
Board Member

[5] ORS 197.830(15) provides, in relevant part:

> "(a) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party * * *.
>
> "(b) The board shall also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

[6] We seriously question whether a party that "prevails" in an interlocutory order is properly considered a "prevailing party" for the purpose of attorney fee awards under ORS 197.830(15).