BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON PIPELINE COMPANY, LLC,
Petitioner,

vs.

CLATSOP COUNTY,
Respondent,

and

COLUMBIA RIVERKEEPER and NW PROPERTY RIGHTS COALITION,
Intervenors-Respondents.

LUBA No. 2013-106

FINAL OPINION
AND ORDER

Appeal from Clatsop County.

E. Michael Connors, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hathaway Koback Connors LLP.

Jeffrey J. Bennett, Lake Oswego, filed a response brief and argued on behalf of respondent. With him on the brief were Timothy V. Ramis and Jordan Ramis PC.

Lauren Goldberg, Hood River, filed a response brief and argued on behalf of interveners-respondents. With her on the brief was Brett VandenHeuvel.

HOLSTUN, Board Member; Bassham, Board Member, participated in the decision.

RYAN, Board Chair, dissenting.

REMANDED 06/27/2014

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner Oregon Pipeline Company LLC (OPC) appeals a Clatsop County Board of Commissioners' (BOC's) decision that denies its application for land use approvals for a natural gas pipeline.

FACTS

On October 9, 2009, OPC filed a consolidated application for three county land use permits needed to construct a 41-mile segment of the pipeline necessary to connect a proposed liquefied natural gas (LNG) terminal in the City of Warrenton with an interstate pipeline. The disputed 41-mile segment would begin at the City of Warrenton urban growth boundary, cross a number of county zoning districts, and end at the southeast corner of Clatsop County. OPC's proposal is part of a larger project proposed by Oregon LNG, a company that is affiliated with OPC. Oregon LNG proposes to construct an LNG terminal in the City of Warrenton that, as originally proposed, would have off-loaded liquefied natural gas from ships, converted the liquefied natural gas into gas form, and then transmitted it via high pressure pipelines to users in this country. [1]

A county hearings officer approved OPC's application on August 23, 2010. OPC and pipeline opponents appealed that decision to the BOC. The BOC adopted a final decision approving the application on November 8, 2010, and pipeline opponents Columbia Riverkeeper and NW Property Rights Coalition appealed that decision to LUBA on November 24, 2010 (LUBA No.

[1] Land use approvals for the balance of the pipeline will be needed from other local governments.

2010-109). Under LUBA's rules, the record in that appeal was due December 15, 2010. On December 13, 2010, the county moved for an extension of time until January 14, 2011, to transmit the record to LUBA. In that motion, the county stated that the reason for the requested extension was "due to an unusually large and voluminous compilation of the Record." In that motion, the county also represented that no party objected to the motion. LUBA granted the motion on December 14, 2010.

On January 12, 2011, three new commissioners were sworn into office as Clatsop County Commissioners. On that date, with the three new commissioners voting in favor, the BOC voted 4-1 to withdraw the November 8, 2010 decision for reconsideration, pursuant to ORS 197.830(13)(b).[2] On January 13, 2011, the county filed a notice with LUBA that it was withdrawing the November 8, 2010 decision for reconsideration. OPC opposed the motion, but in a February 17, 2011 order, LUBA determined it had no basis for rejecting the January 13, 2011 withdrawal. Under LUBA's rules, the county's

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[2] ORS 197.830(13)(b) provides in part:

> "At any time subsequent to the filing of a notice of intent and prior to the date set for filing the record, * * * the local government or state agency may withdraw its decision for purposes of reconsideration. If a local government or state agency withdraws an order for purposes of reconsideration, it shall, within such time as [LUBA] may allow, affirm, modify or reverse its decision. If the petitioner is dissatisfied with the local government or agency action after withdrawal for purposes of reconsideration, the petitioner may refile the notice of intent and the review shall proceed upon the revised order. An amended notice of intent shall not be required if the local government or state agency, on reconsideration, affirms the order or modifies the order with only minor changes."

decision on reconsideration was due 90 days after the decision was withdrawn. OAR 661-010-0021.[3]

On February 14, 2011, the county provided notice of a public hearing to be held on March 9, 2011, at which the BOC would reconsider the November 8, 2010 decision. Five days before that hearing, on March 4, 2011, OPC filed a petition for writ of mandamus under ORS 215.429 with the Clatsop County Circuit Court, and the alternative writ issued on that date.[4] Under ORS

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[3] OAR 661-010-0021 provides in part:

> "(1) If a local government or state agency, pursuant to ORS 197.830(13)(b), withdraws a decision for the purposes of reconsideration, it shall file a notice of withdrawal with the Board on or before the date the record is due. A copy of the decision on reconsideration shall be filed with the Board within 90 days after the filing of the notice of withdrawal or within such other time as the Board may allow.
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> "(2) The filing of a notice of withdrawal under section (1) of this rule shall suspend proceedings on the appeal until a decision on reconsideration is filed with the Board, or the time designated therefor expires, unless otherwise ordered by the Board. If no decision on reconsideration is filed within the time designated therefor, the Board shall issue an order restarting the appeal."

[4] ORS 215.429(1) authorizes a permit applicant to file a petition for writ of mandamus in circuit court "to compel the governing body or its designee to issue the approval," if a local government fails to take action on a permit application within the applicable deadline specified in ORS 215.427. Upon the filing of such a petition, "jurisdiction for all decisions regarding the application" is with the circuit court. ORS 215.429(2). ORS 215.429(5) directs the circuit court to "issue a peremptory writ unless the governing body or any intervenor shows that the [permit] approval would violate a substantive provision of the county comprehensive plan or land use regulations * * *."

215.427, the county had 150 days from the date the application was deemed complete to issue its final decision on OPC's application. The BOC's November 8, 2010 decision was issued before that 150-day deadline expired. OPC's legal theory in the circuit court mandamus proceeding was that, upon the county's withdrawal of the November 8, 2010 decision on January 13, 2011 for reconsideration, the 150-day deadline began to run again and expired, leaving OPC entitled to county approval of its application under ORS 215.429(5), unless the county or an intervenor established that such approval would violate county land use laws under ORS 215.429(5). *See* n 4. On March 10, 2011, the county moved to dismiss OPC's circuit court mandamus proceeding, and on March 18, 2011, the circuit court vacated the alternative writ of mandamus.

Although OPC argued to the county that the county lacked jurisdiction to reconsider its November 8, 2010 decision while the circuit court mandamus proceeding was pending, the county proceeded with the March 9, 2011 public hearing and adopted a preliminary decision to deny the application and scheduled a meeting for March 30, 2011, to adopt a final written decision. On March 21, 2011, OPC filed a petition for writ of mandamus with the Oregon Supreme Court, and the Supreme Court issued a peremptory writ on March 29, 2011. In the peremptory writ, the Supreme Court ordered the circuit court to continue the ORS 215.429 mandamus proceeding and ordered the county to cease action on its reconsideration of the November 8, 2010 decision until the circuit court completed adjudication of the ORS 215.429 mandamus proceeding.

The circuit court entered a judgment dismissing the ORS 215.429 writ of mandamus on June 6, 2011. OPC appealed that judgment, and the Court of

Appeals affirmed the judgment on October 24, 2012. *State ex rel Oregon Pipeline Co., LLC v. Clatsop County*, 253 Or App 138, 288 P3d 1024 (2012). OPC petitioned for Supreme Court review of the Court of Appeals' decision, and the Supreme Court denied review on March 28, 2013. On August 29, 2013, LUBA issued an order giving the county 90 days to complete its deliberations on the withdrawn November 8, 2010 decision and file its decision on reconsideration. On October 9, 2013, the BOC held a public hearing and at the end of the hearing voted to deny the application. On October 16, 2013, the BOC adopted a resolution and order that made its decision on reconsideration final. Record A1-A396. LUBA received the decision on reconsideration on October 18, 2013.

Under ORS 197.830(13)(b) and OAR 661-010-0021(5), petitioners Columbia Riverkeeper and NW Property Rights Coalition were entitled to refile their notice of intent to appeal or file an amended notice of intent to appeal in LUBA No. 2010-109, within 21 days after LUBA received the county's decision on reconsideration on October 18, 2013. *See* ns 2 and 3. Petitioners Columbia Riverkeeper's and NW Property Rights Coalition's notice of intent to appeal in LUBA No. 2010-109 was not refiled. Petitioners also did not file an amended notice of intent to appeal, presumably because those petitioners do not oppose the county's October 16, 2013 decision on reconsideration.[5] On November 5, 2013, OPC filed its notice of intent to

[5] OAR 661-010-0021(5)(e) provides that if a notice of intent to appeal is not refiled or an amended notice of intent to appeal is not filed by petitioner within the 21 day deadline established by OAR 661-010-0021(5) "the appeal will be dismissed." No party moved to dismiss LUBA No. 2010-109. In a separate final opinion and order issued this date, we dismiss LUBA No. 2010-109.

appeal in this appeal (LUBA No. 2013-106) and Columbia Riverkeepers and NW Property Rights Coalition have intervened on the side of respondent in this appeal.

FIRST ASSIGNMENT OF ERROR

Under ORS 215.427(1), the county had 150 days after OPC's application was deemed complete to issue its final decision on that application.[6] As noted above, the BOC's November 8, 2010 decision complied with that ORS 215.427(1) 150-day deadline.

Under ORS 197.835(10)(a), LUBA is directed to reverse a decision that denies an application for development approval and order a local government to approve the application where LUBA finds "that the local government's *action* was for the purpose of avoiding the requirements of ORS 215.427 or 227.178." (Emphasis added.)[7] OPC contends the county's action on December 13, 2010, in seeking to extend the deadline for filing the record in LUBA No.

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[6] ORS 215.427(1) provides in relevant part that "[t]he governing body of a county or its designee shall take final action on * * * applications for a permit * * *, including resolution of all appeals under ORS 215.422, within 150 days after the application is deemed complete * * *."

[7] The relevant text of ORS 197.835(10)(a) is set out below:

> "(10)(a) The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> "* * * * *
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> "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178."

2010-109 and its decision on January 13, 2011 to withdraw its decision for reconsideration both qualify as an *action* that was taken to avoid the 150-day deadline established by ORS 215.427(1). OPC argues LUBA should therefore reverse the BOC's subsequent October 16, 2013 decision that denied its application, which is the decision that is the subject of this appeal, and order the county to approve the application under ORS 197.835(10)(a).[8]

On one point, we agree with OPC. The county contends that the word "action" in ORS 197.835(10)(a)(B) refers *only* to a decision to deny an application for development permit approval. *See* n 7. The county argues that petitioner does not contend that the October 16, 2013 decision to deny the application was an "action [taken] for the purpose of avoiding the requirements of ORS 215.427." Respondent's Response Brief 6 n1. The county contends that neither the December 13, 2010 motion to extend the deadline for transmitting the record to LUBA nor the January 13, 2011 withdrawal for reconsideration is a decision that denies an application for a development permit approval, and for that reason alone ORS 197.835(10)(a) simply does not apply in this case.

We agree with OPC that the word "action" could encompass interlocutory actions that lead to a decision to deny an application for permit approval, and the word "action" is not limited to the final act of adopting a decision that denies permit approval. Therefore, if either the decision to seek an extension of the deadline for filing the record in the prior appeal or the decision to withdraw the November 8, 2010 decision for reconsideration is

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[8] OPC argues "[s]ince [the] County approved the Application pursuant to the November 8, 2010 decision, LUBA can order the County to simply reinstate the November 8, 2010 decision." Petition for Review 23 n 13.

accurately characterized as an "action [taken] for the purpose of avoiding the requirements of ORS 215.427," OPC is entitled to the reversal of a resulting decision to deny the permit and the relief that is specified in ORS 197.835(10)(a).

However, we reject OPC's contention that either of those actions is accurately characterized as an "action [taken] for the purpose of avoiding the requirements of ORS 215.427[.]" The Court of Appeals reasoning in *State ex rel Pipeline* clearly supports the county's position that neither of those actions constitutes an "action [taken] for the purpose of avoiding the requirements of ORS 215.427[.]"

There is arguably some tension between the legislature's decision to establish a 150-day deadline in ORS 215.427(1) for counties to adopt final decisions on development permit applications, and the legislature's separate decision in ORS 197.830(13)(b) to allow local governments an unqualified right to withdraw decisions (including permit approval or denial decisions) for reconsideration after they are appealed to LUBA, so long as the withdrawal is accomplished before the deadline for transmitting the record expires. If a local government is entitled to take the full 150 days allowed by ORS 215.427(1) to render its initial decision on an application for development permit approval, and then withdraw the decision in the event of an appeal and take the full 90 days allowed by ORS 197.830(13)(b) and OAR 661-010-0021(1) to reconsider the withdrawn decision, it is certainly possible to argue the 150-day deadline for a county's "final action" in ORS 215.427(1) effectively becomes a 240-day deadline in that circumstance. OPC apparently argued to the Court of Appeals that the "final action" that is required by ORS 215.427(1) to be taken within 150 days after the application is deemed complete also encompasses any final

action on a decision that is withdrawn for reconsideration under ORS 197.830(13)(b) and OAR 661-010-0021. Under that view of the statutes and LUBA's rule, a county would only be entitled to the full 90 days that is authorized by ORS 197.830(13)(b) and OAR 661-010-0021, if the county rendered its initial decision that led to the LUBA appeal in 60 days, leaving 90 days for withdrawal and reconsideration. The Court of Appeals flatly rejected OPC's argument that the ORS 197.830(13)(b) and OAR 661-010-0021 reconsideration process is also subject to the ORS 215.427(1) 150 day deadline for final action:

> "[OPC]'s argument is not persuasive. * * * [H]ere, the county did *not* fail to comply with the time limits prescribed by the mandamus statute [ORS 215.427(1)]. As explained, the county took 'final action' within the 150–day time limit; the circumstance that LUBA review of that decision, including the withdrawal and reconsideration process set out in ORS 197.830(13)(b), was available thereafter does not alter that conclusion.
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> "* * * * *
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> "LUBA's administrative rule, OAR 661–010–0021, implements its jurisdictional authority under ORS 197.830(13)(b) over the withdrawal and reconsideration process.[9] * * *
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> "The rule imposes safeguards against indefinite delay or obstruction in the withdrawal and reconsideration process by authorizing LUBA to 'restart[ ] the appeal' if the local government fails to file a decision on reconsideration within the time limit established by LUBA. The rule thus contemplates a monolithic process in which an appeal from an initial final decision remains in suspense during the reconsideration process. If the local government fails to issue a decision on reconsideration within 90

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[9] *See* n 3.

> days or such other time as LUBA may allow, the appeal is to proceed. * * *." 253 Or App at 147-49.

In short, the Court of Appeals concluded that when the county rendered its initial decision on OPC's application, OPC received the "final action" within 150 days after the application was deemed complete that it was entitled to under ORS 215.427(1). The Court of Appeals concluded the fact that there could be further delay to resolve a LUBA appeal of that decision, and additional delay if the county withdrew that decision for reconsideration, does not alter its conclusion that the county's initial decision on November 8, 2010 gave OPC the final action on the permit application that it was entitled to within the deadline specified in ORS 215.427(1). The additional delay is authorized by and governed by different statutes and LUBA's rules. The Court of Appeals concluded the additional delay that was caused when the November 8, 2010 decision was appealed to LUBA and withdrawn for reconsideration was not subject to the 150-day deadline specified in ORS 215.427(1), which only applies to the November 8, 2010 decision that was appealed to LUBA.

Because OPC received the final action within 150 days after its application was deemed complete that it was entitled to under ORS 215.427(1), it necessarily follows that neither the action the county subsequently took to seek an extension of the deadline for filing the record nor the action it took to withdraw the decision for reconsideration can be accurately characterized as an "action [taken] for the purpose of avoiding the requirements of ORS 215.427[.]" Both of those actions may have prolonged the uncertainty OPC may otherwise have avoided if the November 8, 2010 decision had not been appealed to LUBA, but those actions were not taken "for the purpose of avoiding the requirements of ORS 215.427(1)[.] At most, they were actions

taken to take advantage of the statutory right the county is granted by ORS 197.830(13)(b) and OAR 661-010-0021 to withdraw its November 8, 2010 decision for reconsideration. Taking an action in furtherance of that statutory right is not accurately characterized as an action taken "for the purpose of avoiding" the county's separate obligation under ORS 215.427(1).

Finally, OPC makes two additional arguments under the first assignment of error that we address briefly. First, OPC suggests that the real reason the county moved for an extension of time to file the record on December 13, 2010, was to allow time for the recently elected commissioners to be seated as county commissioners, and that the county and its attorney immediately began exploring that possibility after the extension was granted. In retrospect, the December 13, 2010 motion to extend the deadline for transmitting the record until January 14, 2011, a date two days after the new county commissioners would take office, would be consistent with a county intent to allow the new BOC to take action to withdraw the decision for reconsideration. The fact that the record shows the county was exploring its options regarding withdrawal of the decision for reconsideration later in December 2010 also makes it clear that at least by then the county was considering the possibility of withdrawing the decision for reconsideration. But there was no dispute in LUBA No. 2010-109 that the record was 11,754 pages long and that the county experienced a staff shortage when the development services manager left county employment on November 12, 2010. Compiling and transmitting a record of that size could easily take more than the 21 days authorized by our rules. In our February 17, 2011 Order in LUBA No. 2010-109, we concluded that the record was not sufficient to establish that the county's motive in seeking the record extension on December 13, 2010, was something other than what the county represented

in its motion. The record in this appeal similarly fails to establish that the county filed the December 13, 2010 motion, not to allow adequate time to compile and transmit an 11,754 page record, but rather to allow time for the new BOC to vote to withdraw the November 8, 2010 decision for reconsideration. Moreover, even if the record did establish that the county was not entirely forthcoming about its motives in seeking the extension of time to file the record, at most that might provide a basis for concluding that LUBA erred in its February 17, 2011 Order in LUBA No. 2010-109 that the county must be allowed to withdraw its decision under ORS 197.830(13)(b) and OAR 661-010-0021. It would not convert that request for an extension of time to transmit the record into an action taken "for the purpose of avoiding the requirements of ORS 215.427(1)[,]" since the requirements of ORS 215.427 had already been satisfied on November 8, 2010, well before the December 13, 2010 motion was filed.

OPC also argues that under ORS 197.830(13)(b), the county is limited to correcting any legal defects there might be in the November 8, 2010 decision, and the statute is not available to allow a new BOC to adopt an entirely new decision because it disagreed politically with the decision of the prior BOC. Petition for Review 13-16.

We address OPC's contention that the new members of the BOC were biased and should not have participated in reconsideration of the November 8, 2010 decision under the second assignment of error below. But putting aside the bias question, we do not see the limit in ORS 197.830(13)(b) that petitioner argues is present in the statute. As relevant, the statute simply provides that a county "may withdraw its decision for reconsideration," and if it withdraws the decision, it may "affirm, modify or reverse its decision." Petitioner seems to

take the position that under these words in ORS 197.830(13)(b), the county is limited to making any changes to the November 8, 2010 decision that it believed were necessary for the county to be able to successfully defend that decision.

We do not read the statute as narrowly as petitioner. There is certainly no language in the statute that supports OPC's contention that it limits the county to correcting perceived errors in the withdrawn decision so that the originally adopted decision can be defended at LUBA. One of the options ORS 197.830(13)(b) expressly gives the county is to "reverse" the withdrawn decision. An accurate description of the county's October 16, 2013 decision is that it reversed the November 8, 2010 decision and adopted a new decision to deny the application in its place. We do not agree that the county exceeded its authority under ORS 197.830(13)(b) in adopting its decision on reconsideration.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The legal requirement that quasi-judicial land use decision makers must be "impartial" was first set out explicitly in *Fasano v. Washington Co. Comm*, 264 Or 574, 588, 507 P2d 23 (1973), and the nature and scope of that right has been clarified in a number of cases over the 41 years since that decision. Petitioner contends that three of the members of the BOC are biased in this matter, and prejudged the application, and therefore were not "impartial" and should not have participated in the decision to withdraw the county's first decision for reconsideration or the county's subsequent decision to deny the application. We first examine the *Fasano* impartiality requirement, before discussing the actions of the three county commissioners and determining

whether those actions are such that their claims to be impartial in this matter are not credible.

A. The *Fasano* Requirement that Quasi-Judicial Land Use Decision Makers be Impartial

In its 1973 decision, the Oregon Supreme Court identified a number of procedural rights that parties in a quasi-judicial land use proceeding are entitled to. One of those rights is the right to "a tribunal which is impartial in the matter—i.e., having no pre-hearing or ex parte contacts concerning the question at issue * * *." Subsequent cases have established that despite the above language in *Fasano*, ex parte contacts do not necessarily mean a decision maker is partial. *Tierney v. Duris, Pay Less Properties*, 21 Or App 613, 629, 536 P2d 435 (1975). Additional factors, other than ex parte contacts, also can destroy the required impartiality. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 81, 742 P2d 39 (1987). The correct inquiry is "whether the evidence shows that the tribunal or its members were biased." *Neuberger v. City of Portland*, 288 Or 585, 590, 607 P2d 722 (1980).

1. *Eastgate Theatre v. Bd. Of County Comm's*, 37 Or App 745, 754, 588 P2d 640 (1978)

The Court of Appeals decision in *Eastgate Theatre* identified several important principles that have shaped LUBA's approach in resolving bias claims. That case concerned an application for a comprehensive plan map amendment where three votes of the five-member board of county commissioners in favor of a motion was required to act. Two of the commissioners disqualified themselves as biased.[10] The board of

[10] One of the commissioners was chair of a community planning organization that had strongly supported the proposed amendment. The

commissioners then split 2-1, with the result that there was no decision and a conflict between the comprehensive plan map and zoning map designations for the property at issue remained unresolved.

In remanding the decision to the county, the Court of Appeals made a number of points, two of which are particularly relevant in this appeal. First, the court observed that county commissioners, in their quasi-judicial capacity, are similar to but not the same as judicial branch judges. They are not as easily replaced as judges in the event of bias, so that nonparticipation can prevent a decision on the merits, as it had in *Eastgate*. Therefore, nonparticipation by a county commissioner is a "drastic step." 37 Or App at 751. The court observed that unlike a judge, a county commissioner is not expected to be neutral, rather "[h]e is elected because of his political predisposition * * *." 37 Or App 752. Similarly, in rejecting arguments that county commissioners should be held to an "appearance of fairness" standard, the Oregon Supreme Court explained its view of the different roles served by county commissioners and judges:

> "[County commissioners] are politically elected to positions that do not separate legislative from executive and judicial power on

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commissioner stated that he believed it was "obvious" that the amendment should be approved and that he was "afraid [he] would become an advocate for that use rather than a judicial officer." 37 Or App at 748 n 2. He also stated that he "adamantly expressed [his] views" in support of the proposal at the community planning organization meeting and that "those views have not changed * * *."

The other commissioner was a director of the Metropolitan Service District, which was interested in acquiring the subject property for a solid waste transfer station. The other commissioner stated "as the matter focused more and more closely upon [the Metropolitan Service District] involvement with the site, [the other commissioner] felt he had to abstain." 37 Or App at 748 n 3.

> the state or federal model; characteristically they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure. Also, the members of most governing bodies in this state serve part-time and without pay, making their livings from the ordinary pursuits and private transactions of their communities. Restrictions on permissible business activities and sources of outside income imposed on judges for the sake of appearance do not apply by analogy to such board members." 304 Or at 82-83.

In sum, while bias can be disqualifying, some bias on the part of county commissioners is both unavoidable and expected, even if that bias might be disqualifying for a judicial branch judge.

The second relevant point the court made was to emphasize the Supreme Court's characterization of the danger that the *Fasano* impartiality requirement is intended to address—"'the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government.' 264 Or at 588." The court concluded that "official involvement in community planning and related governmental activities * * * are not of the kind [of interests] which *Fasano* was intended to guard against."

On its face, *Eastgate* sets a very high bar for disqualification of a county commissioner for bias.[11] In a 1981 Attorney General Opinion that relied

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[11] *Eastgate* is probably at least partially explained by the fact that nonparticipation in that case did not ensure an impartial decision maker; it prevented a decision.

> "The abstention in this case did not prevent partiality; instead, it prevented the decision itself. *Fasano* cannot be applied so

heavily on *Eastgate*, the Attorney General observed that where a person becomes a member of a tribunal, and that new tribunal member earlier participated as an advocate before the same tribunal on the same matter he or she is asked to decide as a new member of the tribunal, that person should normally not participate in that matter. 41 Or Op Atty Gen 490, ___ (Westlaw page 11). But the Attorney General, relying largely on *Eastgate*, ultimately concluded that where a new member of a local governing body was a member of a church and had represented the church as a consultant in seeking land use approval, his participation as a local government decision maker in the very same matter was not a per se violation of the *Fasano* impartiality requirement.

> "* * * Oregon courts will disqualify members of quasi-judicial tribunals for bias, but * * * such a remedy is a drastic step to be taken only where there is a clear showing of *actual* prejudice or bias. Mere prior advocacy of a position for or against a land-use application which will come before such a tribunal by a member of the tribunal will not, per se, result in disqualification, at least where the member's advocacy was in behalf of another governmental organization." *Id*. at 11 (emphasis in original).

2. LUBA Cases

Despite the high bar set for disqualification under *Eastgate*, LUBA has found in a number of cases, where recusal did not appear to prevent the local governing body from making a decision, that the local government decision maker's claim that it could decide a matter impartially was not credible, given

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> literally that the decision-making system is aborted because an official charged with the public duty of adjudication fears that his motivation might possibly be suspect. The * * * commissioners' refusal to vote here effectively denied the petitioners their entitlement to any tribunal at all; if there is no tribunal, partiality and impartiality become irrelevant."

the nature and extent of the actions of the decision maker in those cases. We discuss those cases below, before turning to petitioners arguments regarding the three commissioners.

a. *Halvorson Mason v. City of Depoe Bay*, 39 Or LUBA 702 (2001)

In *Halvorson Mason*, a real estate developer sought a business license modification from the city to allow continued operation of a real estate sales office within a PUD. Whether the real estate sales office had been constructed legally was disputed. The city recorder denied the application, and that decision was appealed to the city council.

With regard to a bias claim against one of the commissioners, the record and extra-record evidence showed that one city councilor had engaged in a long running personal dispute with the developer and homeowners association over what he called "Tijuana street vendor-style sales tactics" at the sales office and "scare tactics" to influence the homeowners association. 39 Or LUBA at 708-09 n 5. The councilor had also challenged the mayor's impartiality and asked that he consider recusing himself. Given the councilor's ongoing personal dispute and leadership role in opposing the same real estate sales office that was the subject of the business license modification, LUBA concluded his claim that he could be an impartial decision maker and decide the case based strictly on its merits and the official record was not believable. 39 Or LUBA 711.

The key in our decision in *Halverson Mason v. City of Depoe Bay* was the personal animosity between the city councilor and the applicant and his personal opposition to the real estate sales office, both before and after the

application to modify the business license had been submitted to the city for review and approval.

b. *Friends of Jacksonville v. City of Jacksonville*, 42 Or LUBA 137 (2002), *aff'd* 183 Or App 581, 54 P3d 636 (2002)

Friends of Jacksonville is a case with a number of similarities to the present case. A church whose existing facilities were too small to accommodate the expanding congregation sought a conditional use permit to construct an 18,000-square foot church. The planning commission voted to deny the application, and the city council voted 4-3 to uphold the planning commission's denial. The city council decision was appealed to LUBA and while that appeal was pending at LUBA two new city councilors were elected. The city and the applicant filed a motion asking LUBA to remand the decision to the city for further consideration without considering the merits of the appeal, and LUBA granted the motion. Following that remand, the city council voted to approve the application with the two newly elected councilors (both members of the church) voting to approve the application. In the second appeal to LUBA, LUBA first discussed its decision in *Halvorson Mason* and the 1981 Attorney General Opinion discussed above. LUBA then concluded that one of the new city councilors had not been shown to be biased.

> "'[The first councilor], a member of the Presbyterian Church, was quite open about her dilemma of being in the middle. She was analytical and diplomatic in her explanation of how difficult it was for her to make the right decision. She explained that the only way for her was to be honest, looking at every aspect of the issue and then basing her decision on what her conscience dictated.'

> "In other statements, [the first councilor] stated that the existing church facilities were inadequate, and that she was concerned about the impact certain proposed conditions of approval would have on church operations. For example, she opposed a proposal to limit weddings and funerals to the old church, arguing that some people may prefer to hold those services in a facility that could seat more people. Nevertheless, when asked by the church's attorney whether she believed she could decide the matter on the facts and the law before her, she indicated that she could do so." *Friends of Jacksonville*, 42 Or LUBA at 143 (record citation and footnote omitted).

Citing *Eastgate*, LUBA concluded that whatever bias that councilor's actions and statements might show did not rise to a level that would render implausible her contention that she could put that bias aside and decide the case on its merits.

But LUBA reached a different conclusion regarding a second councilor. That councilor had appeared before the planning commission as an advocate for the application, prior to the city council's first decision. In a candidates' forum before the city council election at which he was elected, the councilor stated "he did not feel the need to be objective regarding the First Presbyterian Church, and further stated that 'we [the church] will fight this even if we have to fight all the way to the Supreme Court.'" 42 Or LUBA at 144. Following his election to the city council he voted to seek remand of the initial denial decision. After doing so, he "told a reporter that he wanted to 'bring it back to the council and try to work out our differences on a local level,' and that if complaints regarding noise and traffic are dealt with, 'the case might avoid another trip [to] LUBA, this time on appeal from neighbors.'" *Id*. While the remand proceedings were pending before the city council, the second councilor signed a petition supporting the proposal and submitted a written document

that explained in detail why the second councilor believed the application satisfied all legal requirements. Based on these actions, LUBA concluded the second councilor was biased and should not have participated in the decision on remand:

> "We believe the totality of the circumstances demonstrate that [the second councilor] believed he was elected on a mandate to support the proposed siting of the church and that for him, the only question was what conditions were necessary to mitigate the impacts the church would cause. As a result, we agree with petitioner that absent evidence that [the second councilor's] participation was necessary in order for the council to reach a decision, [the second councilor] should have recused himself from participating in the challenged decision." 42 Or LUBA at 146.

As was the case in *Halvorson Mason*, the second councilor who was found to be biased was personally involved in the matter that was before the city council. Moreover, the second councilor in *Friends of Jacksonville* arguably was an even clearer case of bias, since he also made statements that showed he had already decided the application should be approved and stated he did not feel that he needed to be objective in the matter.

c. *Woodard v. City of Cottage Grove*, 54 Or LUBA 176 (2007)

This appeal concerned city decisions that granted rezoning and master plans for a speedway. The speedway was formerly a nonconforming use located outside the city. But in 2003, the city annexed the speedway and subsequently adopted the challenged rezoning and master plan decision. Petitioners contended that the mayor and two city councilors were biased and should not have participated in the decision.

The first councilor made statements in support of the raceway and spoke in favor of the speedway at rallies, saying he "strongly supported" the raceway.

However, these statements were made a number of years earlier when the county was considering whether the speedway qualified as a nonconforming use, before the speedway was annexed and before the application for rezoning and master plan had been submitted. LUBA dismissed these statements and found they were "not particularly probative in determining" whether the first council was biased in the subsequent rezoning and master plan proceedings. 54 Or LUBA at 181.

LUBA then considered statements the first councilor made while the 2003 annexation proposal was pending, and found they should be considered because the annexation was sought in furtherance of the rezoning and master plan. While the 2003 annexation was pending, the first councilor co-signed a letter supporting a local business owner's refusal to serve Kilmer (one of the opponents and one of the petitioners in the LUBA appeal challenging the rezoning and master plan) due to his opposition to the speedway and suggesting the petitioner should move somewhere else. After the application for rezoning and master plan approval had been filed, the first councilor requested from the police department police logs detailing contacts by three of the petitioners with the police. Some of those contact were complaints about the speedway, others were unrelated to the speedway. The first councilor met with several other councilors (including the second councilor discussed below) and the second councilor requested that the city manager make those police logs part of the city's proceedings on the rezoning and master plan. Based on all these actions, LUBA ultimately found the first councilor was biased and concluded his statement that he could participate objectively was not believable:

> "[T]he record as a whole demonstrates [the first councilor's] animus toward the opponents to the application, in particular petitioner Kilmer. It is significant that in seeking additional evidence to submit into the record, [the first councilor] asked the police chief for confidential information on three of the most vocal opponents, including Kilmer, and not just general information on noise complaints in the area. The police logs include personal information, as well as a considerable amount of information on police contacts with petitioners not related to noise complaints regarding the speedway. As the city attorney commented, the selective use of such police contact information on opponents to the application is simply inflammatory, and [the first councilor's] apparent willingness to obtain and rely on that information is, in our view, a strong indication of bias.
>
> "In addition, the fact that [the first] councilor * * * co-signed a letter during the 2003 speedway annexation proceeding personally attacking Kilmer and urging him to leave the city is a further indication of [the first councilor's] animus toward Kilmer and the opponents in general, and that that animus rendered him incapable of deciding the rezoning and [master plan] applications in an impartial manner. * * *" *Woodard*, 54 Or LUBA at 186.

With regard to the second councilor who instructed the city manager to make the police logs available to the full city council, LUBA concluded "the most obvious inference is that [the second] councilor * * * believed that disclosure of the police logs would discredit the opponents in the eyes of the city council and the public." 54 Or LUBA at 188. Although LUBA said the question was closer with the second councilor, his lead role in disseminating the police logs showed "an impermissible degree of bias and animus toward petitioners" such that he should have recused himself. *Id*.

Finally, with regard to the mayor, LUBA found that his role in dissemination of the police logs was much more limited and LUBA found that the mayor's statements of support while the matter was before the county in

2002 were not sufficient by themselves to conclude that the mayor could not decide the case based on its merits.

The two councilors who were found to be biased in *Woodard* took actions that in LUBA's view clearly demonstrated a personal animosity against the parties opposing the raceway, sufficient to conclude they were incapable of deciding the rezoning and master plan applications impartially.

d. *Wal-Mart Stores, Inc. v. City of Hood River*, __ Or LUBA ___ (LUBA No. 2013-009, May 21, 2013)

In this case, Wal-Mart had been granted approval to construct a store in the City of Hood River, but that approval had expired, and Wal-Mart sought a determination from the city that it had a vested right to continue construction of the approved store despite the approval's expiration. In its initial decision, the city agreed with Wal-Mart, but in an appeal of that decision, LUBA remanded. In the local proceedings that led to that first city decision, the planning commission chair, citing her prior opposition to a different Wal-Mart store, which was proposed to be sited near the city in Hood River County, announced she would not participate in the city proceedings to determine if Wal-Mart had a vested right to continue construction of its city store. The planning commission chair then participated in the proceedings leading to the first decision as an individual and opposed the application. The planning commission chair was later appointed to fill a vacancy on the city council, and when the matter returned to the city council following LUBA's remand, the former planning commission chair (now a city councilor) again stated she would not participate based on her prior opposition to the proposed Wal-Mart in the county. The remaining city councilors deadlocked 3-3 on the vested

right question. Under the county charter, four votes are needed to take action, and the 3-3 vote resulted in no action.

Wal-Mart v. City of Hood River is a complicated case, because LUBA also considered the "rule of necessity" and concluded that a biased member of a city council could vote on the matter, if her vote was needed to obtain the fourth vote required under the city charter to take action on the application. But for purposes of this appeal, the case simply stands for a relatively straightforward principle. That is, where a decision maker has stepped down as a decision maker citing potential bias and then proceeds to participate as a party opposing that same application, before both the planning commission when the decision maker was a planning commissioner and before the city council, when that person was a member of the city council, that person may not then claim to be unbiased and participate in the decision, unless the rule of necessity is properly invoked.[12] LUBA found "[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*, slip op 14.

There are some common themes in the four cases we describe above. We list them below.

1. **The Participation of the Biased Decision Maker was Not Necessary for a Quorum or the Number of Votes Required to Make a Decision to be Rendered.** In three

[12] In *Wal-Mart v. City of Hood River*, LUBA concluded the rule of necessity had been invoked prematurely.

cases, recusal of the biased decision makers would not prevent a decision from being rendered. LUBA remanded in *Wal-Mart v. City of Hood River*, for the city to take additional measures to reach a decision before determining whether to invoke the rule of necessity. In the usual situation this factor is probably best viewed as a factor that makes non participation a more drastic measure because it will deny an applicant a decision at all. As explain below, this case is not the usual situation.

2. **At Least Some of the Actions Were Taken by the Biased Decision Maker as Part of the Same Matter the Biased Decision Maker was Being Asked to Decide**. In all four cases, at least some of the actions were taken with regard to the same matter the biased decision maker was asked to decide. Actions taken in other related or similar matters were not as important.

3. **Strong Personal Feelings Regarding a Party**. In all four cases, with the possible exception of *Wal-Mart v. City of Hood River*, the decision maker LUBA found to be biased exhibited strong personal feelings toward the applicant or an opponent (animosity or support) and the record suggested that the person's decision making would be guided by those strong feelings rather than the legal standards and evidence in the record.

4. **The Decision Maker Acted in a Personal Capacity**. The actions were taken by the decision maker personally, rather than as a member of an organization or on behalf of an organization.

B. The Three County Commissioners

The three county commissioners that petitioner contends are biased against petitioner are commissioners Huhtala, Birkby, and Lee.

1. Commissioners Birkby and Lee

Petitioner's contentions that commissioners Birkby and Lee are biased are based solely on statements that they made during their campaigns for county commissioner in 2010 and the fact that they voted to withdraw the decision for reconsideration upon becoming county commissioners. When asked if he had opposed LNG projects in the past, commissioner Birkby answered that he had opposed a different proposal at Bradwood Landing, and explained:

> "My thinking basically comes from a global picture as opposed to these individual projects that with the market price being extremely down on natural gas that in the big picture of the world, I saw no reason whatsoever for that resource to be imported into this country." Record A1609.

Petitioner cites commissioner Birkby's plural reference to "projects" as showing his opposition goes beyond the Bradwood Landing proposal.

Commissioner Lee was asked if he had stated opposition to OPC's proposal, and responded:

> "During the campaign for the election for the Board of County Commissioners last spring, I made public statements expressing my serious concerns about LNG proposals and the previous Board's rulings, so the answer is yes." Record A1610.

Commissioners Birkby's and Lee's statements express concerns about the wisdom of LNG facilities generally and the prior BOC's earlier approval decision for the OPC pipeline specifically, but fall well short of the kinds of actions that led LUBA to conclude in *Friends of Jacksonville* that one of the city councilors "did not feel the need to be objective" and "believed he was elected on a mandate to support the proposed siting of the church." 42 Or LUBA at 144 and 146. We believe isolated statements of concern or even

opposition to the BOC November 8, 2010 decision during their campaigns for county commissioner are not a sufficient basis for questioning their representations during the reconsideration proceeding that they could decide the matter impartially. Rather, they are the kinds of actions that the Oregon Supreme Court and Court of Appeals in *1000 Friends v. Wasco Co. Court* and *Eastgate* recognized are to be expected from elected officials that serve executive, legislative and quasi-judicial functions. Those actions do not amount to actions that are per se disqualifying bias without more.

Commissioners Birkby's and Lee's decisions one day after taking office to vote to withdraw the decision for reconsideration makes the question much closer, but even with that action, viewing all of commissioners Birkby's and Lee's actions, we do not agree they demonstrate that they were biased against petitioner.

2. Commissioner Huhtala

Commissioner Huhtala's actions go considerably beyond those of commissioners Birkby and Lee. We consider those actions in some detail below before attempting to reach a conclusion regarding his impartiality.

a. 2005 Campaign for Port Commissioner

In 2005, Huhtala campaigned for a position on the Port of Astoria. At that time, Calpine LNG was seeking land use approvals for the LNG terminal in Warrenton.[13] An April 27, 2005 newspaper article attached as an appendix

[13] We discuss Huhtala's appeal to LUBA of those land use approvals next. Calpine was the predecessor of Oregon LNG. As we noted earlier, Oregon LNG and OPC are affiliated companies. Calpine LNG secured a lease for the proposed site for the LNG terminal in Warrenton from the Port of Astoria,

to the petition for review describes candidate Huhtala and under "Issues and Goals" states "oppose any LNG terminal in the Columbia River estuary." Petition for Review App 125. The article goes on to say "Huhtala who is supporting fellow anti-LNG candidates * * * said that he hopes a new port commission could take a stand against the Calpine lease." The article also attributes the following statement to Huhtala: "It could become the policy of the Port of Astoria that we oppose the construction of a liquefied natural gas facility anywhere in the Columbia River Estuary and direct staff to do everything possible to make that happen * * *." *Id*.

Huhtala's Port of Astoria campaign statements, which were made over nine years ago, are also the kind of community policy positions or statements that the Court of Appeals and Supreme Court have indicated do not require recusal, in and of themselves. We consider those statements, however, later in considering the totality of Huhtala's activities.

b. 2006 LUBA Appeal of the Warrenton LNG Terminal

As noted earlier, OPC's proposed 41-mile pipeline in Clatsop County is part of the same project that would include the LNG terminal in the City of Warrenton. Approximately nine years ago, an application was filed for comprehensive plan and development code map and text amendments to facilitate approval of that LNG terminal in the City of Warrenton on the East Skipanon Peninsula. Commissioner Huhtala was one of three individual petitioners, along with two organizations (People for Responsible Prosperity and Columbia Riverkeeper) who opposed the proposal and appealed the

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which in turn had leased the land from the Oregon Department of State Lands. We discuss Huhtala's opposition to the Port's lease later in this opinion.

proposal to LUBA. LUBA affirmed the decision, and the Court of Appeals affirmed LUBA's decision without opinion. *People for Responsible Prosperity v. City of Warrenton*, 52 Or LUBA 181, *aff'd* 208 Or App 495, 143 P3d 775 (2006).

The city proceedings regarding the Oregon LNG terminal in Warrenton and the county proceedings regarding OPC's application for permits for the Clatsop County section of the pipeline necessary to make the terminal operational are technically different proceedings before different local governments. However, both the pipeline and the terminal are parts of the same overall project and proposal. It is undisputed that Huhtala participated as a party opponent in appeals to LUBA and the Court of appeals challenging comprehensive plan and land use regulation amendments that were needed to construct the Warrenton LNG terminal. If Huhtala had become a member of the Warrenton City Council while those appeals were pending, he almost certainly would not have been permitted to then claim to be unbiased and participate as a decision maker, if those decisions had been remanded to the Warrenton City Council for further action. That did not happen. But a land use permit for a different part of the same proposed project has now been requested and denied by the Clatsop County BOC with Huhtala participating as a decision maker and voting against the proposal. The question is whether that difference in the facts and posture of this case justifies a different conclusion regarding Huhtala's ability to claim to be impartial. We return below to Huhtala's participation in the 2006 appeal regarding Oregon LNG's terminal after we consider his other actions.

c. 2009 Letter Regarding the Warrenton Terminal Lease

The Oregon Department of State Lands leased the 92-acre Warrenton site to Oregon LNG's predecessor Calpine LNG for $38,000 per year. In a November 6, 2009 letter to the Governor of Oregon, Huhtala, as Executive Director of the Columbia River Business Alliance, took the position that the annual lease payment should be significantly higher, based on comparable leases for LNG terminals and other industrial uses. Record A1650-53.

We do not assign much significance to this letter, viewed in isolation. It was sent in Huhtala's capacity as executive director of the Columbia River Business Alliance, rather than in his personal capacity, and on its face it is only expressing concern that the state is not receiving full value for the land that would be leased for Calpine LNG's proposed Warrenton facility. Nevertheless, we consider it as part of the totality of Huhtala's activities in this matter.

d. 2009 LNG Public Protection Act

A 2009 newspaper article includes the following description of proposed LNG legislation:

> "The proposed 'LNG Public Protection Act' would allow state land leases, water rights, or wetland fill permits only if the Department of Energy determined there is a need for LNG, and the bill would set standards for permitting of LNG facilities * * *." Petition for Review Appendix 123.

Huhtala, in his capacities as a resident and director of the Columbia River Business Alliance praised a legislator who supported the proposed legislation for "leadership on the LNG issue," and was also quoted as saying:

> "We support finding ways to protect the Columbia River and its people because our businesses depend on the health of the River." *Id*.

We will consider the above statements concerning LNG related legislation as part of the totality of Huhtala's actions, but viewed in isolation they lend almost no support for petitioner's contention that Huhtala is biased in this matter to a degree that he should have disqualified himself in this matter.

e. 2009 Campaign for House of Representatives

In 2009, Huhtala ran for the Oregon House of Representatives. In doing so, Huhtala is quoted as having made the following statement about his opponent:

> "Unfortunately, Mr. Witt has been aiding and abetting LNG speculators with their plans to bring foreign fossil fuels to Oregon for shipment through massive pipelines to California. This is intolerable." Petition for Review Appendix 126.

As was the case with his statements about the 2009 proposed legislation, we will consider the above statement as part of the totality of Huhtala's actions. But viewed in isolation, these statements are the kind of policy positions that political candidates are expected to take and by themselves provide little or no support for petitioner's contention that Huhtala is biased to such a degree that he should have disqualified himself in this matter.

f. Bradwood Landing Appeals

Huhtala, another individual, Columbia Riverkeeper, and Columbia River Business Alliance and other organizations petitioned for LUBA review of a Clatsop County decision approving comprehensive plan and zoning ordinance amendments necessary to develop a different LNG facility at Bradwood Landing. Based on the arguments advanced on behalf of the petitioners, LUBA remanded. *Columbia Riverkeeper v. Clatsop County*, 61 Or LUBA 96 (2010). The applicant appealed, and Huhtala was among persons who intervened to defend LUBA's decision at the Court of Appeals, which affirmed LUBA's

decision. *Columbia Riverkeeper v. Clatsop County*, 238 Or App 439, 243 P3d 82 (2010).

While the proposed Bradwood Landing LNG facility is an entirely different proposal, we understand petitioner to contend that Huhtala's participation in that appeal is evidence of his consistent opposition to LNG facilities. We agree with petitioner. But while that consistent opposition in general, and opposition to the Bradwood proposal in particular, are relevant considerations in determining whether Huhtala has disqualifying bias in this proceeding concerning OPC's pipeline proposal, that opposition by itself would certainly not amount to disqualifying bias. We consider it, however, as part of the totality of Huhtala's actions.

g. 2010 Campaign for County Commissioner

Huhtala ran for one of three vacancies on the Clatsop County Board of Commissioners in 2010. During that campaign, he wrote the following in a letter to the Daily Astorian, concerning the proposed Bradwood Landing LNG facility:

> "It may not be time to celebrate victory in our struggle to stop liquefied natural gas. But I give a cheer on behalf of the people of the Lower Columbia when I heard that Oregon's Department of Environmental Quality refused to bow to Northstar's demands ('Bradwood dealt triple permit blow,' the Daily Astorian, Feb. 23)"
>
> "* * * * *
>
> "We're getting closer to the point when these LNG projects will be shut down. Then we can fully celebrate. In the meantime, let's take every opportunity to vote for leaders that will properly represent us. And let's give credit to agencies that do the right thing." Record A1654.

The Daily Astorian Newspaper gave the following account of an April 22, 2010 candidates' forum for the county commissioners candidates:

> "Question No. 1 asked the candidates what their stance was on building an LNG terminal in Clatsop County.
>
> "Those in favor: One. Dunzer. Although he clarified, he thinks the proposed Bradwood terminal is 'poorly designed.'
>
> "Those opposed: Three. Huhtala, Birkby and Lee with Huhtala proclaiming the projects a 'breathtakingly bad idea.'
>
> "Those on the fence: Three. Raichl, Hazen and Mushen, all current county commissioners who said they could not take a public stance, 'I have to obey the law,' Muchen said, while Hazen said that because the matter is under adjudication it would not be appropriate for him to offer an opinion." Record A1659.

We agree with petitioner that while the letter to the paper may have been in response to actions with regard to the proposed Bradwood facility, it appears to express broader opposition to LNG facilities generally. The statement at the candidate forum attributed to Huhtala appears to have been directed at all LNG proposals, including OPC's proposed pipeline. While we conclude that the letter to the paper and the statements made at the candidates' forum both come short of promising to vote with an anti-LNG bias and calling for voters to vote for candidates with such a bias, the statements come fairly close to doing so. The statements were made after the OPC application was submitted, while OPC's application was pending before the Clatsop County Board of Commissioners and appear to encompass OPC's proposal. That makes the statements harder to dismiss as mere campaign expressions of a community policy position that could be set aside in the event Huhtala was elected and required to serve as a quasi-judicial decision maker on OPC's application. While we do not agree that these statements, in and of themselves, are adequate

to show Huhtala has the kind of bias against OPC's proposal or LNG proposals in general that compel his recusal in this matter, they are sufficient to call his ability to be an impartial quasi-judicial decision maker on OPC's application into question.

h. Columbia Riverkeeper and Columbia River Business Alliance

Huhtala was executive director of Columbia River Business Alliance for a number of years and was also a board member for Columbia Riverkeeper and advisory board member with Columbia Riverkeeper. Both of those organizations have been active opponents of LNG facilities in Columbia County. On June 9, 2010, Columbia Riverkeeper submitted written testimony to Clatsop County opposing OPC's proposed pipeline, on behalf of itself, and a number of individuals and organizations. While that June 9, 2010 testimony was not submitted on behalf of Huhtala personally, it was submitted on behalf of Columbia Riverkeeper and Columbia River Business Alliance. Huhtala resigned his positions with Columbia Riverkeeper and Columbia River Business Alliance after he was elected in May 2010, but Petitioner contends Huhtala's resignations from those organizations were not final when the June 9, 2010 testimony was submitted.

For two reasons, we do not assign a great deal of significance to the fact that Huhtala held positions with Columbia Riverkeeper and Columbia River Business Alliance during time periods when those organizations were involved in appeals challenging the Warrenton LNG terminal, the proposed Bradwood facility or even the OPC pipeline proposal. First, while Huhtala presumably shared at least some of those organizations' views, we cannot infer that he entirely agreed with the opposing position taken in the June 9, 2010 letter even

if he was still a member of Columbia Riverkeeper and Columbia River Business Alliance on that date. Second, even if he was in full agreement with those organizations when he was a member, he took steps to resign from both organizations in June 2010 after he was elected to the BOC. The fact that there may have still been indications on webpages and other documents from those organizations that Huhtala remained a member of the organizations after June 2010 is not enough to call into question Huhtala's representation that he resigned from those organizations in June 2010.

i. Conclusion

In *Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697, 709-10 we described the obligation of local government officials regarding their biases when sitting in a quasi-judicial setting.

> "As we have explained on many occasions, local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. To the contrary, local officials frequently are elected or appointed in part *because* they favor or oppose certain types of development. Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process." (Citations omitted; emphasis in original.)

In *Schneider v. Umatilla County*, 13 Or LUBA 281 (1985) LUBA concluded that "personal bias sufficiently strong to disqualify a public official must be demonstrated in a clear and unmistakable manner." LUBA has cited *Schenider* in a number of subsequent decisions to require clear and unmistakable proof of disqualifying actual bias. *Woodard*, 54 Or LUBA at 189; *Carlsen v. City of*

Portland, 36 Or 614, 628 (1999); *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46, 55 (1998).

In responding to concerns that he could not participate in this matter impartially as a decision maker, Huhtala made the following statement:

> "It is clear that I've personally expressed many concerns about many aspects of LNG transport. You know, as I mentioned, tanker traffic, dredging issues, safety, the size of the facility in Bradwood, the road conditions – some of the same issues the applicant raised in the Bradwood situation. My reasonable concerns don't cause me to prejudge the situation. This is a complex application. There is nothing that prevents me from assessing the facts under review. I have the ability to set aside any personal views and to evaluate, discuss and vote on matters of fact. Of course I expressed personal opinions while campaigning. Citizens expect politicians to have opinions, but past association or articulation does not predict future decisions that will be based on the record of facts. I enter this hearing without preconception. I understand my responsibility in a quasi-judicial setting. I take it seriously that I need to remain unbiased during this process and set aside personal views. We all have personal views. One thing that I have been elected to do i[s] sit impartially in a quasi-judicial setting and make decisions based upon the facts." Record A1429.

In his statement quoted above, commissioner Huhtala represents that he can put his biases aside and participate as an impartial decision maker, consistent with the general expectations of quasi-judicial decision makers we described in *Wal-Mart v. City of Central Point*. Thus, unlike the city councilor in *Friends of Jacksonville* who never claimed he could make an unbiased decision, Huhtala claimed that he could. The issue for us in this appeal is whether that statement is credible, given the totality of Huhtala's actions in opposition to LNG facilities over a period of a number of years.

Most of the actions taken by Huhtala and described above simply show that as a matter of policy, Huhtala has been a strong and consistent opponent of

LNG development in Clatsop County in a number of settings and has been a member of organizations that similarly oppose LNG development. Nevertheless, of the four themes/factors in our cases finding bias that we identified earlier, one is clearly present, and two are arguably present. As we explain in more detail below, Huhtala's participation was not only unnecessary for a final county decision in this matter, the manner in which that participation came about is the strongest evidence of bias in our view. Two other themes/factors that we set out earlier are at least arguably implicated "At Least Some of the Actions Were Taken by the Biased Decision Maker as Part of the Same Matter the Biased Decision Maker was Being Asked to Decide" and "The Decision Maker Acted in a Personal Capacity." We first consider those arguably present factors.

Huhtala participated in his personal capacity as a party opponent in the LUBA appeal of legislative land use decisions that would be needed to approve Oregon LNG's Warrenton terminal. It is true that it is possible to argue that it was not the "same matter" as the matter that was before the BOC here, a pipeline to connect that facility with the interstate grid, the pipeline. However, the terminal and the pipeline are but different parts of the same larger proposal and therefore arguably are the same matter for purposes of the *Fasano* impartiality requirement. As we concluded in *Wal-Mart Stores v. City of Hood River*, if the *Fasano* right to an impartial decision maker means anything, it does not permit a person to change horses in midstream by beginning as a party opponent to an application for land use approval and then changing roles later to participate as a decision maker regarding the same application.[14]

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[14] Our reasoning in *Wal-Mart Stores v. City of Hood River* is set out below:

But the situation in this case is admittedly somewhat different, since the proposed facility affects many jurisdictions necessitating multiple land use applications and the LNG terminal that Huhtala personally opposed is only part of the larger LNG facility. Furthermore, the Warrenton facility was approved by the City of Warrenton, not Clatsop County. And finally, eight years has passed since that city decision was rendered. But there is simply no reason to believe Huhtala's opposition to the LNG facility in Warrenton that led him to participate as a petitioner at LUBA challenging the Warrenton LNG facility does not extend to OPC's pipeline, which with other pipeline segments is necessary to make the Warrenton LNG facility operational. And there is certainly nothing in Huhtala's actions in the past eight years that would support a conclusion that he feels any differently today about the larger LNG project

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> "While the focus below seems to have been McBride's actions in opposition to the county Super Store application rather than her actions in opposition to the application that led to this appeal, her actions regarding the Super Store, alone, likely would not have been enough to require that she disqualify herself as a planning commissioner or city councilor. That she opposed the county Super Store does not necessarily mean she could not muster the impartiality required to judge a different application to expand the existing city Wal-Mart store. However, once she decided to recuse herself, she took the additional steps of advocating against the application to expand the city Wal-Mart store. In fact, she went so far as to reiterate to the other city councilors the legal arguments in the memorandum that she submitted as an advocate against the application, immediately before casting the deciding vote that was consistent with the legal arguments in her legal memorandum. If the *Fasano* requirement for impartiality means anything, it does not permit a decision maker to claim to be a neutral or unbiased decision maker in that circumstance." Slip op at 14-15.

than he did eight years ago when he was a petitioner at LUBA opposing the Warrenton LNG terminal.[15] Nevertheless, the circumstances in this appeal and the circumstances in *Wal-Mart v. City of Hood River* are sufficiently different that it might be possible to overlook that prior personal participation in the appeal of the closely related decisions concerning the terminal, and conclude that Huhtala could nevertheless now participate as an impartial decision maker in an application for permits for the pipeline that is needed to make that terminal operational, if his participation in the appeal of the Warrenton LNG facility and his other actions prior to becoming a county commissioner were the only evidence of bias. Stated differently, if Huhtala had been a member of the BOC on November 8, 2010, and made the statement he made in this case and voted to deny the application, we likely would conclude that the evidence is not strong enough to conclude that, despite his statement to the contrary, the evidence in the record is such that it demonstrates in a clear and unmistakable manner that Huhtala cannot be objective in this matter. But Huhtala was not a member of the BOC on November 8, 2010.

As we explained earlier, the factor that seems to have most heavily influenced the Court of Appeals' analysis and conclusions in *Eastgate* was the fact that without the participation of the nonparticipating commissioners in *Eastgate*, there would be no decision at all. With no decision at all, there would have been a stalemate in that case with inconsistent comprehensive plan and zoning map designations and no way to reach a final resolution on the

[15] Neither is there anything in this record to suggest, as the dissent does, that Huhtala's opposition to LNG is limited to concerns about dredging in the Columbia River.

merits. That factor is entirely absent here.[16] As a matter of fact, the situation in this appeal is exactly the opposite. A decision had already been rendered and that final decision was pending on appeal to LUBA. One day after taking office, Huhtala took affirmative action at the last possible moment to participate where his participation was not required, effectively undoing an already decided matter so that new proceedings could be conducted and a new decision could be adopted.

When Huhtala took office on January 12, 2011, the BOC had already rendered a final decision on November 8, 2010. That decision had been appealed to LUBA, and had the LUBA appeal been allowed to continue, the parties would have presented arguments and LUBA would have decided whether the decision was legally flawed. Given that posture of the case, Huhtala's decision to vote to withdraw the decision and to deny the application were not necessary, either to render a final decision in this matter or to insure a correct decision. Of course, despite the pending LUBA appeal, Huhtala could have been motivated entirely by a desire to ensure that the county's decision on OPC's application is legally sound, but it does mean that a reconsidered decision was not "necessary" to ensure that there was a final decision in this matter or that any such decision was reviewed for legal errors. And we believe it seriously undermines any ability to conclude consistently with this record

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[16] It is worth noting, that in the 36 years since *Eastgate* was decided, that decision has been cited and relied on by the Court of Appeals exactly once. *Miller v. City of Portland*, 55 Or App 633, 639 P2d 680 (1982). In *Miller* the Court of Appeals cited *Eastgate* without discussion in affirming LUBA's determination that one of the decision makers in that appeal had not been shown to have disqualifying bias. *Miller v. City of Portland*, 2 Or LUBA 363, 367-68 (1981).

that Huhtala was motivated solely by an interest in achieving a legally correct decision. We also believe the timing of the vote to withdraw the decision for reconsideration—one day after Huhtala and the other newly elected commissioners took office—also raises serious questions about their impartiality. Thus, even though Huhtala's participation in the reconsideration proceedings was active and extensive, not *pro forma*, the quick action to withdraw the decision on January 13, 2011, without any substantive discussion of the withdrawn decision, is most consistent with a view that Huhtala was driven more by his past opposition to LNG facilities and less by any concern he may have had regarding the legal merits of the withdrawn decision.[17]

To summarize, Huhtala's activities over the years as a persistent opponent of LNG generally and the Oregon LNG terminal and OPC pipeline proposal in particular leading up to the original November 8, 2010 BOC decision set him apart from commissioners Birkby and Lee. But while coming reasonably close, those activities, by themselves, are likely not strong enough evidence of bias to require Huhtala's disqualification as a decision maker for OPC's application. However, because the November 8, 2010 decision and LUBA appeal made his participation unnecessary, Huhtala's action to take the additional step of pulling that decision back for reconsideration, when viewed with all the other evidence that he is not capable of being impartial in this matter, is collectively clear and unmistakable evidence that Huhtala acted in

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[17] Contrary to the dissent's suggestion, we do not suggest that Huhtala acted in concert with others to deny the application. We only suggest that Huhtala's decision to withdraw the decision for reconsideration one day after taking office, viewed in context with the many other actions Huhtala has taken with regard to LNG, makes his claim to be merely acting in this matter as an impartial decision maker not believable.

this matter with actual bias and should instead have refrained from voting to withdraw the decision and voting to deny it. We do not reach the same conclusion regarding the other two new commissioners, even though they also participated in the hasty vote to withdraw the November 8, 2010 decision for reconsideration, because their other actions do not even approach the nature and extent of activity that Huhtala has engaged in in opposing LNG generally and this proposal in particular.

Petitioner's second assignment of error is sustained with regard to commissioner Huhtala and denied with regard to commissioners Birkby and Lee.

THIRD ASSIGNMENT OF ERROR

ORS 215.422(3) provides:

> "No decision or action of a planning commission or county 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."

In its third assignment of error, petitioner contends the three newly elected commissioners were required to disclose any contacts they may have had in this matter any time after the application was submitted on October 9,

2009, and the three commissioners improperly limited their ex parte contact disclosures to contacts that may have happened after they took office on January 12, 2011. The county attorney agreed with petitioner regard the scope of the ex parte contact disclosure obligation and advised the new county commissioners that they were required to disclose any contacts they may have had regarding OPC's application before or after they were sworn in as county commissioners on January 12, 2011.[18] The minutes of the February 9, 2011 BOC meeting include the following:

> "* * * Regarding the ex parte contact declarations, [petitioner's attorney] implied that he had specific incidents in mind, so [the county's attorney] encouraged the commissioners to reflect on what possible things may have occurred that they'd not previously disclosed so to make them known at the next meeting." Record A1436.

At the beginning of the March 9, 2011 hearing, the minutes reflect that the commission chair inquired have there "been any new ex parte contacts since the last meeting, and none were reported." Record A1045.

Relying in large part on the invitation regarding ex parte contacts at the beginning of the March 9, 2011 hearing, which only explicitly called for disclosure of contacts that post-dated the February 9, 2011 meeting, petitioner contends the new county commissioners improperly limited their disclosures to the time period after they were sworn in, on January 12, 2011.

Most of petitioner's concerns appear to be directed at commissioner Huhtala. However, in view of our resolution of the second assignment of error, commissioner Huhtala will not be participating in this matter on remand.

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[18] A partial transcript of the county attorney's advice to the commissioners is provided at page 37 of the petition for review.

Therefore, we need not resolve whether Huhtala may have had undisclosed ex parte contacts that pre-dated January 12, 2011.[19]

With regard to commissioner Birkby, in addition to the request to disclose any contacts since the February 9, 2011 meeting, petitioner relies on the following statement made by commissioner Birkby at the February 9, 2011 meeting:

> "Mr. Chairman, I don't believe I've had any ex parte comment since taking office and acting in the position of a member on this Board."[20]

However, later at that February 9, 2011 meeting, the minutes show Birkby stated she had never spoken about the application to anyone:

> "[Commissioner Birkby] added she'd never spoken to anyone about the application because she'd never read it until a couple days prior. * * *" Record A1430-31.

Given that unqualified disclaimer of any ex parte contacts, and the county attorney's clear statement to the BOC that any contacts regarding the application needed to be disclosed, we find petitioner's speculation that

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[19] Huhtala stated "he did not talk with either [Columbia Riverkeeper or Columbia River Business Alliance] about the application, further explaining he was exceptionally careful after the election in talking to others that were either opposed or in favor of the application * * *." Record A1430. While this statement does not expressly disclaim any contacts that may have occurred before the election, the statement expressly disclaims any contacts after the election in May 2010 and disclaims any contacts with Columbia Riverkeeper or Columbia River Business Alliance, the two organizations that petitioner expresses the most concern over regarding ex parte contacts.

[20] The quote is taken from a partial transcript on page 37 of the petition for review.

commissioner Birkby limited her disclosure to those that occurred after she was sworn in as a commissioner unpersuasive.

Finally, with regard to commissioner Lee, we similarly reject petitioner's speculation, based on the commission chair's invitation to disclose ex parte contacts that had occurred since the February 9, 2011 meeting, that commissioner Lee must have ignored the county attorney's advice that he must disclose any contacts regarding OPC's application, and limited his disclosure to those that may have occurred after he was sworn in as a county commissioner.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

At its February 9, 2011 meeting in this matter, the BOC determined that its proceedings on remand would be limited to the evidentiary record that was compiled for the original November 8, 2010 decision. The BOC considered four ways to go about its reconsideration:

> "[T]he Board Could: 1) Limit to [BOC] deliberations only with no new testimony; 2) Open it for the limited purposes of asking staff questions; 3) Open it solely for the Land Use Board of Appeals (LUBA) parties to make argument based on the existing record; or 4) open it for all interested parties in the prior proceedings to make argument based on the existing record. * * *" Record A1424.

All parties recommended option 3, and option 3 is the procedure the BOC elected at its February 9, 2011 meeting. Petitioner contends that despite its decision to limit its reconsideration proceedings to the evidentiary record compiled for the November 8, 2010 decision, the BOC nevertheless accepted new evidence and relied on that new evidence without giving petitioner an opportunity to rebut that evidence. Petitioner contends the BOC therefore committed a procedural error that prejudiced its substantial rights. ORS 197.835(9)(a)(B).

A. Hammond Testimony

Petitioner was not present at the BOC's March 9, 2011 hearing.[21] At that hearing, the BOC asked some questions of the county's consultant Hammond:

> "[Commissioner] Rhone invited questions from the [BOC] for the consultants. [Commissioner] Birkby asked Hammond, a geological engineer, what is involved in the consideration of HDD [Horizontal Directional Drilling] and incidence of frack out. Hammond said he'd never been personally involved in a HDD project, but explained that the process uses bentonite mud to keep the hole open as they're drilling the hole. During the process and because there is a balance between pressure, there is always a chance that mud could fracture out at the surface, hence the term 'frack out'. He added that the chances of fracturing out at soils are greater in more shallow areas. [Commissioner] Roberts said she didn't think it was a new technique and Hammond agreed that it was not. She asked how many pipes currently run beneath the Lewis and Clark River, and he said he didn't know.
>
> "[Commissioner] Huhtala said he wanted to understand better the geological hazard permit as it related to what would happen in the event of a subduction zone earthquake. [The county's lawyer] said he was concerned about getting outside the record, because evidence is considered 'new' unless the consultant's opinion on the matter was already part of the record. * * *" Record A1049.

At the October 9, 2013 reconsideration hearing, petitioner objected to the county's acceptance of the above testimony without giving petitioner an opportunity to rebut. Record A409. Petitioner argues:

> "* * * Mr. Hammond provided extensive testimony about HDD, frac-outs, geological issues and the impact of a subduction zone earthquake. (Rec. A1049). An expert's opinion testimony is

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[21] As noted earlier, petitioner took the position that the circuit court alternative writ of mandamus divested the county of jurisdiction over this matter.

> evidence. * * * Mr. Hammond's expert opinion was clearly new evidence since he had not previously provided this testimony. Since the Board denied the Application in part on the grounds that HDD did not adequately mitigate the impacts to the estuary, the Board clearly was or might have been influenced by this expert testimony. * * *" Petition for Review 40-41.

The county attorney cautioned Hammond about giving testimony that might constitute evidence beyond the evidence already in the record, with regard to the geological hazard permit and subduction zone earthquakes. We see no testimony from Hammond on either of those subjects at Record A1049.

Hammond did give a general description of how Horizontal Directional Drilling (HDD) works using Bentonite mud, how pressure can cause a "frack out" and that fracturing is more likely in shallow areas. The county responds that none of this is new evidence. Although some of the pages cited by the county do not include the information the county says it does, Section 8 of Appendix F of petitioner's application appears at Record 11145-48, and is entitled "Horizontal Directional Drilling Frac-Out Contingency Plan." Record 11145 includes the following discussion:

> "* * * HDD operations potentially pose a risk to wetlands and water bodies through frac-outs. A frac-out occurs when the drilling fluid is released through fractured bedrock and sands. Drilling fluid typically consists of a mixture of bentonite, water, and soil cuttings. This mixture is not hazardous or toxic, but it could potentially affect the water quality of any waterbody if it were introduced.
>
> "Frac-outs can occur at any place along any point of an HDD installation, although they are more likely to be observed at the entry and exit points (locations where the drilling bit or head is shallow). * * *"

The application goes on to explain how petitioner plans to monitor the HDD and explains "[t]he bentonite mixture will be adjusted to match the conditions

of the subsurface. The pressure levels will be set as low as possible, and they will be closely monitored to ensure that the pressure on the drilling fluid is set to match the formation." Record 11146.

We agree with the county that Hammond's testimony did not include new evidence that would give rise to a right to rebut. Hammond's testimony is entirely consistent with statements petitioner made in the application.

B. Category 2 Shorelands

During the proceedings that led to the November 8, 2010 decision, the county concluded that the proposed pipeline does not cross any Category 2 Shorelands. During the reconsideration proceedings, the county concluded that it does cross Category 2 Shorelands and that the proposed pipeline is not allowed in those Category 2 Shorelands. Record A558. The county's conclusions that the pipeline crosses Category 2 Shorelands and that those Category 2 Shorelands do not permit the proposed pipeline relied on a planning staff PowerPoint presentation. Record A463-73. That PowerPoint presentation sets out text from the Clatsop County Land and Water Development and Use Ordinance (LWDUO), the Clatsop County Comprehensive Plan, the Goal 17 – Findings and Policies for Rural Shorelands and the Columbia River Resource Base Maps. We do not understand petitioner to contend that the Clatsop County Comprehensive Plan or the LWDUO are new evidence or that the county may not take official notice of those documents, which presumably were adopted by ordinance. However, petitioner does contend that the Columbia River Resource Base Maps and the Goal 17 – Findings and Policies for Rural Shorelands are new evidence and are not properly the subject of official notice.

The county takes the position that the documents it relied on in the PowerPoint presentation are all subject to judicial notice under Oregon Evidence Code (OEC) 202(7). OEC 202(7) authorizes judicial notice of "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state * * *.' We understand petitioner to contend that neither the Columbia River Resource Base Maps nor the Goal 17 – Findings and Policies for Rural Shorelands qualify as "[a]n ordinance, comprehensive plan or enactment" of the county.

Turning first to the Goal 17 – Findings and Policies for Rural Shorelands, the PowerPoint presentation takes the position that the findings and policies were adopted by Ordinance 83-17. Record A472. The challenged decision takes the same position. Record A403. Petitioner offers no reason to believe the findings and policies were not adopted by Ordinance 83-17 except its unsupported contention that they were not. We reject petitioner's challenge with regard to the Goal 17 – Findings and Policies for Rural Shorelands.

With regard to the Columbia River Resource Base Maps, the county contends that those maps are "referred to in Goal 17 of the [Clatsop County Comprehensive Plan]," and "[t]hus the map is part of a county land use ordinance." Respondent's Brief 37. The county neither provides us with a copy of the plan reference to the maps nor explains why that reference might make those maps part of the comprehensive plan or the Clatsop County LWDUO. Those maps appear to have played a key role in the staff's analysis. Unless those maps are part of the Clatsop County Comprehensive Plan, the LWDUO or some other ordinance, they are not subject to official notice and the county should not have considered them in the reconsideration proceedings

without giving petitioner an opportunity to comment on those maps and rebut the staff conclusions based on those maps.

Petitioner's argument regarding the county's reliance on the Columbia River Base Maps is sustained. On remand, if the county wishes to rely on those maps, it must give petitioner an opportunity to comment on those maps and rebut the planning staffs' conclusions based on those maps.

C. Zoning Map Error

Petitioner's final objection under this assignment of error is based on a misunderstanding of the identity of the County's Official zoning maps. As planning staff explained at the October 9, 2013 hearing, one of the parcels the pipeline crosses was zoned Forest 38 in 1980. The county adopted comprehensive changes to its comprehensive plan and zoning ordinance in 1983, and that parcel should have been zoned Forest 80, which was the corresponding zone, but instead was mistakenly zoned Open Space Parks and Recreation (OSPR). While it apparently was a mistake, the ordinance that amended the county's official zoning map designation for the property designated the parcel OSPR. The county's GIS map, which is not the county's official zoning map but is intended to be consistent with the official zoning map, erroneously shows that the parcel is zoned Forest 80. In short, the county's official zoning map erroneously shows the property zoned OSPR while the unofficial GIS map shows the parcel zoned Forest 80, which is the designation the county's official zoning map should show for the property. The pipeline is allowed in the Forest 80 zone but is not allowed in the OSPR zone. When petitioner submitted its application for the pipeline, it used the county GIS mapping to determine zoning.

The county's solution for the zoning map problem was to impose a condition of approval that before the pipeline could commence construction, the zoning for the parcel would have to be changed to Forest 80. The county represents that it initiated action to correct the zoning map error and an ordinance adopted on February 26, 2014, changed the zoning designation for the parcel to Forest 80.

Based on the above, we conclude the county committed no error by referring to (taking official notice of) its official zoning maps to identify the correct zoning for the parcel. Given that the county has now taken steps to have the property rezoned to the Forest 80 zoning that petitioners understood it to be zoned all along, any error the county may have committed also appears to be harmless.

The fourth assignment of error is sustained with regard to the county's consideration of the Columbia River Resource Base Maps. The fourth assignment of error is otherwise denied.

CONCLUSION

Our resolution of the second and fourth assignments of error requires remand. That decision on remand may or may not deny petitioner's application. Even if it again denies the application, that decision may or may not adopt all of the many reasons the decision before us adopts in support of the denial decision. We therefore do not consider petitioner's remaining nine assignments of error which challenge findings that may not be readopted on remand.

Although the vote to deny petitioner's application on October 9, 2013 was unanimous, it was adopted with the active participation of commissioner Huhtala, who we have determined was not impartial in this matter and should

not have participated. Accordingly, remand is required. *Woodard* 54 Or LUBA 190; *Halverson Mason* 39 Or LUBA 711. The county will need to render its decision on remand, without the participation of commissioner Huhtala, unless he is required on remand to achieve a quorum or achieve the number of votes needed to act under applicable local law. *Wal-Mart v. City of Hood River*, slip op 18-19. In that event he may vote, but must fully disclose any ex parte contacts that preceded his election to the BOC and refrain from participating in the deliberations.

We finally address one remaining and frankly odd aspect of this case. Petitioner contends that because commissioner Huhtala is biased he should not have participated in the January 13, 2011 decision to withdraw the November 8, 2010 decision for reconsideration. We agree with petitioner. However, given the course of events following the county's January 13, 2011 decision to withdraw the November 8, 2010 decision, nothing can be done at this point to rectify that erroneous decision beyond insuring that the county's final reconsidered decision on petitioner's application is rendered by unbiased decision makers.

The November 8, 2010 decision was appealed to LUBA in LUBA No. 2010-109 and was withdrawn pursuant to ORS 197.830(13)(b). That decision has now been replaced with the county's October 16, 2013 decision. As a result of our resolution of this appeal, that October 16, 2013 decision will now be replaced by the county's decision following our remand. However, while it is possible that the county will readopt the substance of its November 8, 2010 decision without change—and if it does so that decision will be subject to appeal to LUBA—the November 8, 2010 decision no longer exists and the county's January 13, 2011 decision to withdraw that now-nonexistent decision

cannot be undone given the actions that have been taken following the January 13, 2011 withdrawal. Accordingly, in a separate final opinion issued this date, the appeal of the November 8, 2010 decision is dismissed.

The county's decision is remanded.

Ryan, Board Chair, dissenting.

The majority concludes that petitioner has demonstrated that Huhtala was biased and should not have been allowed to participate in the decision. For the reasons set forth below, I respectfully disagree with the majority's resolution of the second assignment of error. I would deny the assignment of error and proceed to reach the merits of the appeal.

In *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 82-83, 742 P2d 39 (1987), the Oregon Supreme Court explained its view of the role elected officials play in their positions, and that view is worth repeating here:

> "[County commissioners] are politically elected to positions that do not separate legislative from executive and judicial power on the state or federal model; characteristically they combine lawmaking with administration that is sometimes executive and sometimes adjudicative. The combination leaves little room to demand that an elected board member who actively pursues a particular view of the community's interest in his policymaking role must maintain an appearance of having no such view when the decision is to be made by an adjudicatory procedure."

As the Court explained later in the opinion, an elected official's action is not invalid for bias merely because an elected official takes a particular position on an issue of interest to the community and later makes a decision on that same issue in an adjudicatory procedure. Rather, it is only actual bias that will invalidate an official's action in an adjudicatory procedure. In order to successfully challenge a decision maker's participation on grounds of bias, petitioner must demonstrate "prejudgment of facts to such an extent that an

official is incapable of rendering a fair judgment." 41 Op Atty Gen 490, 491 (1981). Actual bias sufficiently strong to disqualify a decision maker must be demonstrated in a "clear and unmistakable manner." *Halvorson Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702, 710 (2001). That is so because disqualification is a "drastic step to be taken only when there is a clear showing of actual prejudice or bias. * * *" *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978).

The majority concludes Huhtala was biased based on (1) some or all of Huhtala's actions and statements opposing LNG projects prior to being elected to the county commission and (2) his action after becoming a county commissioner to vote in favor of withdrawing the November 8, 2010 decision for reconsideration. But in my view, at best, Huhtala's actions and statements prior to being elected to the county commission demonstrate a predisposition to oppose LNG projects, or an appearance that Huhtala was biased. The Oregon Supreme Court has rejected disqualification of an elected quasi-judicial decision maker based on an appearance or inference of bias. *1000 Friends*, 304 Or at 85.

The majority relies on a number of Huhtala's statements and actions, some dating back almost ten years, to conclude that petitioner has demonstrated in a "clear and unmistakable manner" that Huhtala was incapable of rendering a fair judgment on the application based on the facts and the law. The way in which the majority opinion is structured and the number of pages the majority takes to set out various statements and actions of Huhtala dating back almost ten years seems to bolster the majority's conclusion. Slip Op 30-38. However, when looking beyond the sheer number of words and pages to the content, it does not support that conclusion.

The majority spends a great deal of time and ink to construct a "totality of circumstances" that quotes Huhtala's statements and describes actions taken in matters dating back nearly ten years that have only a tangential relationship to the present application for a conditional use permit for a pipeline. The common thread in the statements and actions is that Huhtala took positions on various aspects of two proposals to develop LNG terminals, one within the City of Warrenton and the second in the county, which would both require dredging of the Columbia River to allow transport of LNG tankers in the Columbia River to the terminal. Huhtala has been a county resident for nearly 50 years, and it is unsurprising that he has taken positions on issues of importance in his county.

I do not agree with the majority that Huhtala's statements and actions regarding the two LNG terminal proposals have much if any probative value in assessing whether he should be disqualified from participating in the adjudicatory procedure on the CUP application for a pipeline in 2013. In particular, I strongly disagree that statements that Huhtala made and actions he took in 2005 while campaigning for Port of Astoria Commissioner - more than eight years before the October, 2013 decision, and in 2009 while campaigning for the Oregon House of Representatives - more than 4 years before the 2013 decision, are probative in determining whether Huhtala was biased when he participated in the pipeline application decision in 2013. I also disagree with the majority that Huhtala's participation in a 2009 appeal to LUBA of the county's approval of a LNG terminal in a different location in the county (Bradwood Landing) is probative in determining whether Huhtala was able, in 2013, to render an impartial decision on the facts and the application before him for an entirely different proposal.

Further, the majority significantly extends LUBA's case law on bias by characterizing Huhtala's participation in a 2006 appeal to LUBA of a 2005 City of Warrenton decision to approve an LNG terminal in the Columbia River as participation in the "same matter" that was before the county, in disregard of the lengthy (6 to 8 year) temporal lapse between the city and the county actions and the differing criteria in the decision making jurisdictions. In my view, the 2005 city proceeding to rezone property from a conservation/recreation zone to an industrial zone to allow construction of a terminal on the river, and the 2010-2013 county proceedings on the CUP application for a pipeline are not the "same matter." The city of Warrenton's 2005 decision approved a map amendment and zone change to change a parcel zoned conservation and recreation to industrial, and applied entirely different criteria. The appeal of the 2005 City of Warrenton decision raised legal questions regarding whether the rezoning met the city's criteria for rezoning and map amendments. The present application seeks conditional use approval for a 41-mile pipeline that crosses eight different county zone and plan districts. The 2005 rezoning and map amendment decision, by the city, and the 2013 CUP decision, by the county, are not the "same matter." As the county succinctly puts it, "[t]o hold that a citizen's pursuit of legitimate legal remedies disqualif[ies] that person from subsequent land use duties as an elected official would have a chilling effect on those who follow the common career path from public advocacy to public office." Respondent's Response Brief 21.

The majority's conclusion that the city and county proceedings are the "same matter" is also inconsistent with our decisions in *Woodard* and in *Wal-Mart (Hood River)*. In *Woodard*, we concluded that a city councilor's actions in support of the same speedway when it was under consideration for

nonconforming use verification by the county were "not particularly probative" in determining whether a city councilor was biased in proceedings before the city that occurred several years after the county proceeding and after the speedway was annexed by the city. *Woodard*, 54 Or LUBA at 181. In *Wal-Mart (Hood River)*, we held that the biased councilor's previous action opposing a different Wal-Mart located within the county's planning jurisdiction did not necessarily mean that she could not render an impartial decision on a different application to expand the existing store located in the city. *Wal-Mart (Hood River)* __ Or LUBA __ (LUBA No. 2013-009, May 21, 2013, slip op 14).

The majority sets out the few cases in which LUBA has agreed that a petitioner met his or her burden of demonstrating bias. Slip Op 19-27. In all of those cases, the biased decision maker took prejudicial action during the course of the proceeding on the application that led to the challenged decision. *See Halvorson Mason* (councilor publicly opposed the application while it was pending before the city council); *Friends of Jacksonville* (while the application was pending before the city council, city councilor submitted a legal analysis supporting approval); *Woodard* (while the application was pending city councilors requested and publicized police logs detailing police contacts with a project opponent in order to discredit the opponent before the other councilors); *Wal-Mart (Hood River)* (while the application was pending, city councilor submitted a legal analysis to the city council detailing the reasons why the applicant did not possess a vested right to complete development). But contrary to the majority's unsupported assertion at Slip Op 44, the record includes no statements made or actions taken by Huhtala prior to (or after, for

that matter) the time he was elected that took a position on the legal issues or the merits of petitioner's application for the 41-mile pipeline.

Second, in my view, the majority's reliance on Huhtala's vote, along with three other commissioners, to withdraw the November 8, 2010 decision for reconsideration as clear and unmistakable evidence of bias is simply not supported by the record, and is contrary to applicable law allowing the county to unilaterally withdraw a decision for reconsideration. Whether Huhtala's participation in the decision to withdraw the November, 2010 decision for reconsideration was necessary to reach a decision, because the previous county commissioners had already reached a decision, is not relevant to determining whether Huhtala's vote to withdraw the decision is evidence of bias. Further, the majority's discussion implicates the concept of the "rule of necessity" that is not at issue in this appeal and conflates it with the threshold issue of whether an elected quasi-judicial decision maker is biased. Slip Op 43.

The majority also relies on the timing of the county commission's January 13, 2011 vote as strong evidence that Huhtala was biased on January 13, 2011, and again when he voted in October, 2013, to deny the application. But in order to reach that conclusion, the majority must engage in speculation that Huhtala was a participant in, and even the lead proponent of, some sort of concerted effort that apparently involved Huhtala, the county's counsel, county planning department, and other commissioners to withdraw the county's November, 2010 decision. On the contrary, in our February 17, 2011 order in LUBA No. 2010-109, we concluded the opposite.[22]

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[22] A sworn affidavit from the county's attorney in LUBA No. 2010-109 avers that the planning department sought a 30-day extension of the deadline for transmitting the record, to January 14, 2011, based on the county attorney's

In addition, commissioners Birkby, Lee, and Rohne also voted on January 13, 2011 in favor of withdrawing the decision. The majority fails to explain why Birkby's and Lee's votes to withdraw do not demonstrate similar bias in their 2013 decision making, given Birkby's and Lee's prior statements opposing LNG projects, other than to distinguish the "nature and extent" of Birkby's and Lee's opposition to LNG projects from Huhtala's opposition to LNG projects. Slip Op 45. That distinction is unpersuasive.

Finally, the majority further supports its conclusion that Huhtala was biased by characterizing the proceeding on January 13, 2011 as a "quick action * * * without any substantive discussion" of whether to withdraw the decision. Slip Op 44. But from the meeting minutes included in the record, it appears that the decision to withdraw may have been made after the commissioners conducted business in executive session on litigation matters, as they are entitled to do under ORS 192.660(1)(h). Record A1448. However, even if the decision was made during the regular business portion of the meeting, the majority points to no statutory or local code provision that requires the county commission to conduct "substantive discussion" - either during the public portion of the meeting or in executive session - about whether to withdraw a decision for reconsideration. As explained above, ORS 197.830(13)(b) gives the county the unilateral right to withdraw any decision for reconsideration as long as it is withdrawn before the deadline set for transmitting the record. In fact, the first public hearing on reconsideration in March, 2011 lasted five and one-half hours. That is hardly a "quick action."

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advice to seek a 30-day extension due to the size of the record and a staff shortage at the planning department.

During the proceedings on the application in 2010, the county's planning staff recommended denial of the application, both to the hearings officer, and then to the board of commissioners. It is possible, even likely, that the county's planning staff continued to take that position and took the position after the decision was rendered that the county's decision approving the application could more than likely result in reversal or remand by LUBA. That seems like exactly the circumstance that the legislature anticipated in giving local governments the right to unilaterally withdraw a decision. For all of the above reasons, I disagree with the majority that Huhtala's vote, along with three other commissioners, to withdraw the decision for reconsideration is evidence of bias.

Friends of Jacksonville is the only LUBA decision resolving a bias claim that was appealed to the Court of Appeals on that particular issue, and it was affirmed. For that reason, in my view it provides the most relevant precedent for resolving a claim of bias. In *Friends of Jacksonville*, LUBA found that the second councilor was biased based on statements that he made prior to being elected to the city council that "he did not feel the need to be objective regarding" the church's application, as well as actions he took after taking office that included signing a petition in favor of the application and submitting a document into the record that explained why he believed the church's application met the applicable approval criteria. 42 Or LUBA at 144-45.

But LUBA rejected a bias challenge to a different councilor's participation (the first councilor). LUBA found that her statements prior to being elected to the city council indicated at most a predisposition toward the church that did not require recusal, when LUBA took into account her indication upon questioning by the church's attorney that she could decide the

application on the facts and the law before her. 42 Or LUBA at 143. And unlike the second councilor, the first councilor took no further action after being elected to call into question her statement that she could decide the application on the facts and the law before her. The first councilor also ultimately voted to approve the church's application, which she was apparently predisposed to do. In my view, the claim of bias against Huhtala falls squarely within LUBA's disposition of the bias claim against the first councilor in *Friends of Jacksonville* and much further from the claim against the second councilor.

Huhtala's statement is quoted in the majority opinion and it is worth repeating here:

> "It is clear that I've personally expressed many concerns about many aspects of LNG transport. As I mentioned, tanker traffic, dredging issues, safety, the size of the facility in Bradwood, the road conditions – some of the same issues the applicant raised in the Bradwood situation. My reasonable concerns don't cause me to prejudge the situation. This is a complex application. There is nothing that prevents me from assessing the facts under review. I have the ability to set aside any personal views and to evaluate, discuss and vote on matters of fact. Of course I expressed personal opinions while I was campaigning. Citizens expect politicians to have opinions, but past association or articulation does not predict future decisions that will be based on a record of facts. I enter this hearing without preconception. I understand my responsibility in a quasi-judicial setting. I take it seriously that I need to remain unbiased during this process and set aside personal views. We all have personal views. One thing that I have been elected to do is to [sic] sit impartially in a quasi-judicial setting and make decisions based upon the facts." Record A1612.

In my view, the majority incorrectly discounts and dismisses Huhtala's statement as "not credible" based on a mere inference of bias. The majority simply doesn't believe him. But Huhtala's statement that he can make an

impartial decision is as convincing as the first councilor's statement in *Friends of Jacksonville* that LUBA concluded was enough to overcome her prior predisposition towards approving the church's application.

In my view petitioner has not demonstrated in a clear and unmistakable manner that Huhtala was actually biased, any more than a candidate for city council who engages in "economic boosterism" or emphatically and repeatedly states that she supports "bringing industry" or "bringing jobs" to her city is actually biased if she wins the election and later votes to approve a development application that brings in industry and provides jobs. Disqualification of an elected official in the circumstances here is not warranted.

For the reasons set forth above, I respectfully disagree with the majority's resolution of the second assignment of error. I would deny the second assignment of error and proceed to resolve the merits of the appeal.