

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Petitioner appeals denial of his application for a
4 comprehensive plan map amendment and zone change for five
5 acres.

6 FACTS

7 This is the second time proceedings concerning this
8 property have been before LUBA. The county approved the plan
9 map and zone change as requested in 1982, but the decision was
10 reviewed by this Board and remanded. John v. Umatilla County,
11 7 Or LUBA 161 (1983). After additional hearings, the county
12 commissioners denied the application on August 24, 1983.¹
13 This appeal followed.

14 Petitioner's property is designated on the county's plan
15 map as Rural Residential and is zoned R-1A, 2 acre
16 residential. Petitioner seeks a commercial designation on the
17 plan and zoning maps. Further description of the property may
18 be found in our prior order and will not be repeated here.

19 FIRST ASSIGNMENT OF ERROR

20 In the 1982 hearings before the county commission, one
21 commissioner withdrew from participation. The failure of the
22 same commissioner to excuse himself in the 1983 proceedings is
23 assigned as error by petitioner.²

24 The record shows Commissioner Draper stated in 1983 that
25 his previous withdrawal was the result of his relationship as a
26 personal friend and patient of Dr. John, a neighbor opposing

1 the plan and zone change. When challenged by petitioner in the
2 1983 hearing, Commissioner Draper declined to withdraw from
3 participation, insisting he was not prejudiced. The
4 commissioner admitted, however, he had withdrawn in the earlier
5 1982 hearing because he believed then that he could not make an
6 unbiased decision.

7 Petitioner argues the admission by Commissioner Draper
8 establishes that he is disqualified to serve as an impartial
9 decisionmaker regarding the application. According to
10 petitioner, once a disqualifying bias was declared, the burden
11 was on the commissioner "to demonstrate * * * why the bias no
12 longer exists or perhaps that his earlier disqualification had
13 been in error." Petition at 5.

14 The right to an impartial tribunal in quasi-judicial land
15 use proceedings was stated in Fasano v. Washington Co. Comm.,
16 264 Or 574, 507 P2d 23 (1973):

17 "Parties at the hearing before the county governing
18 body are entitled...to a tribunal which is impartial
19 in the matter - i.e., having had no prehearing or ex
20 parte contacts concerning the question at issue...."
21 Fasano, supra, at 588.

22 Subsequent to Fasano, the Court of Appeals noted a tribunal
23 may be partial in ways other than having ex parte contacts.
24 Tierney v. Duris, PayLess Properties, 21 Or App 613, 629, 536
25 P2d 435 (1975). However, the courts and this Board have been
26 reluctant to disqualify public officials on this ground. See,
e.g., Miller v. City of Portland, 55 Or App 633, 639 P2d 680
(1982) (parks commissioner voted on proposal affecting city

1 parkway); Gregg v. Racing Commission, 38 Or App 19, 588 P2d
2 1290 (1979) (commission members combined investigative and
3 adjudicatory functions); Eastgate Theater v. Board of County
4 Commissioners, 37 Or 745, 588 P2d 640 (1978) (commissioners
5 also were members of other governmental bodies interested in
6 the decision); Peterson v. Lake Oswego, 32 Or App 181, 574 P2d
7 326 (1978)) (city council met with library board and planning
8 commission before meeting at which variances granted to library
9 development); Tierney v. Duris, PayLess Properties, 21 Or App
10 613, 536 P2d 435 (1975) (city council members made personal
11 survey of attitude in the community before taking action);
12 Gearhard v. Klamath Co., 7 Or LUBA 27 (1982) (one commissioner
13 hostile to land use process and another believed denial of a
14 permit would be an unconstitutional taking); Christie v.
15 Tillamook Cty., 5 Or LUBA 256 (1982) (members of same family
16 served on different governmental commissions having interests
17 in the decision); and Northeast Neighborhood Assoc. v. Salem, 4
18 Or LUBA 221 (1981) (city council member performed an audit for
19 applicant/church two years previously and another council
20 member was a member of the church).

21 We understand from these precedents that personal bias
22 sufficiently strong to disqualify a public official must be
23 demonstrated in a clear and unmistakable manner. Inferences of
24 favoritism toward one side or another are insufficient. The
25 burden is to show clearly that a public official is incapable
26 of making a decision on the basis of evidence and argument. We

1 do not view the evidence in the record sufficient to meet this
2 standard.

3 Although Commissioner Draper stated in clear terms he was
4 unable to make an unbiased decision at the earlier hearing, he
5 also contradicted the statement a few minutes later. In an
6 exchange with petitioner, the commissioner declared he was not
7 prejudiced at the prior hearing. Transcript of July 6, 1983
8 hearing at 10. In addition to this inconsistency in the
9 commissioner's statements, we note Commissioner Draper's sole
10 reason for the earlier withdrawal was his personal relationship
11 with an opponent of the application. While such relationships
12 may, under some circumstances, engender a mind incapable of
13 reasoned judgment, the record here does not support that
14 conclusion.³ The commissioner's inconsistent actions and
15 statements do not clearly and unmistakably show he was
16 incapable of considering the case on the merits.

17 We therefore deny this assignment of error.

18 SECOND ASSIGNMENT OF ERROR

19 Petitioner faults the county's order for failure to
20 identify the criteria applicable to the requested zone change.
21 Further, petitioner claims the order fails to explain how the
22 facts justify the decision.

23 The order recites the criteria deemed relevant by the
24 county in three categories:

- 25 (1) The necessity to show a significant change in the
26 neighborhood (The order cites Fasano v.
Washington County, 264 Or 574, 507 P2d 23 (1973))

1 for this criterion);

2 (2) Compliance with statewide land use goals;

3 (3) Criteria in the form of three questions
4 considered necessary by LUBA's final order of
remand in John v. Umatilla County, supra.

5 The county made findings regarding compliance with
6 statewide land use goals, but made no findings or conclusions
7 regarding past or present off-site uses in the neighborhood.
8 The last group of criteria, referring to the order of remand in
9 John v. Umatilla County, supra, are stated as three questions.

10 They are:

11 "1. Does the proposed comprehensive plan amendment
12 comport with the comprehensive plan's policy that
13 redesignation from residential to commercial
14 adequately protect adjacent residential areas
from encroachment by incompatible land uses which
would result in unpleasant living conditions and
lowering of property values?

15 "2. Does the proposed comprehensive plan amendment
16 comport with the comprehensive plan's policy that
17 residential areas shall be restricted to
residential uses and uses that are commonly found
in connection with residential areas.

18 "3. Does the proposed comprehensive plan amendment
19 comport with the comprehensive plan policy that a
20 general commercial zone shall be developed to
21 accommodate most of the existing commercial
development in the unincorporated areas of
Umatilla County and that the establishment of new
general commercial zones will be discouraged?

22 Petitioner claims the order is defective because these
23 questions fail to identify any comprehensive plan goal or
24 policy by number or page number of the plan.

25 The three questions above quoted were apparently derived
26 from the following portion of our prior opinion in John v.

1 Umatilla County, supra:

2 "First of all, the county failed to address some basic
3 policies in the comprehensive plan. The county's
4 comprehensive plan, as amended, designated the subject
5 and surrounding property as 2 acre residential. Under
6 the residential designation, the plan established as a
7 goal the desire:

8 "3. To protect residential areas from encroachment by
9 land uses such as intensive commercial or
10 industrial use that would be incompatible and
11 result in unpleasant living conditions and
12 lowering of property values.

13 "Furthermore, the plan provides that it is the policy
14 for residential land use that:

15 "2. Residential areas shall be restricted to
16 residential uses and uses that are commonly found
17 in connection with residences such as churches,
18 parks, schools and utilities necessary for public
19 service.

20 "The comprehensive plan also addresses commercial land
21 and sets forth as a policy:

22 "1. A general commercial zone shall be developed to
23 accommodate most of the existing commercial
24 development in the unincorporated areas of
25 Umatilla County. However, as a general rule, the
26 county planning commission will discourage the
establishment of new general commercial zones,
but will instead encourage this type of
commercial establishment to locate in existing
commercial zones, existing rural centers, or in
incorporated cities."

27 The county's order was remanded in part for failure to address
28 these plan goals and policies. John v. Umatilla County, supra,
29 at 64. We take notice the plan goals and policies quoted from
30 our prior opinion were in the county's plan adopted in 1972 and
31 amended in 1978. The three questions in the county's order are
32 the interrogatory form of the plan provisions quoted in our
33 prior opinion. Petitioner was informed prior to the planning

1 commission's hearing that the three questions were the criteria
2 to be considered. See Record at 76-77. Therefore, we do not
3 accept petitioner's argument that applicable criteria were not
4 adequately identified prior to the county's hearings and in the
5 final order.

6 Neither can we accept petitioner's claim the county failed
7 to adequately explain reasons for its denial of the requested
8 plan change. The county found (1) the property is outside the
9 urban growth boundary, (2) is presently zoned Rural
10 Residential, and (3) other sites are available to accommodate
11 new commercial uses. As noted above, and in John v. Umatilla
12 County, supra, Goal 1 of the Commercial Lands Section of the
13 comprehensive plan states new commercial zones will be
14 discouraged outside existing commercial zones, rural centers
15 and cities. The county concluded petitioner did not present
16 sufficient evidence or argument to make a case for changing the
17 plan and zone designation to commercial in the face of this
18 specific plan provision. In addition, the county commissioners
19 gave a further reason why the commercial lands goal should not
20 be ignored, i.e., a commercial zone would allow uses having a
21 detrimental effect on nearby residences. In denying
22 applications for comprehensive plan map changes, findings like
23 these are adequate. See Weyerhaeuser Real Estate Company v.
24 Lane County et al, 7 Or LUBA 40 (1982).

25 This assignment of error is denied.

26 AFFIRMED.

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1

The time between the decision date and this opinion is the result of extensions jointly requested by the parties.

2

The application was denied by a 2 to 1 vote. The commissioner who had excused himself in the prior proceedings voted with the majority for denial.

3

The record of the 1983 hearings do suggest Commissioner Draper believes personal friendship with a participant in matters before the county do not automatically disqualify a board member. Transcript of July 6, 1983 hearing at 11.