

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
27
28

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF JACKSON

ART BULLOCK, Individually and)
as Trustee of 791 Glendower Trust)
Dated December 25, 2003,)
Petitioner, Pro Se,)
vs.)
THE CITY OF ASHLAND, a)
Municipal Corporation of the State)
of Oregon,)
Respondent.)

Case No. 04-3971Z3(7)

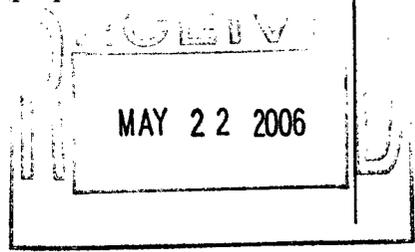
OPINION

This matter came before the court upon the Petition for Writ of Review filed on November 4, 2004, and the court having reviewed the Writ, the return of Writ and supplementary returns filed by the respondent City of Ashland, and the parties' memoranda, and having reviewed the oral and video record of the Ashland City Council meetings of August 3, 2004, August 17, 2004, September 7, 2004, September 21, 2004, and October 5, 2004, and further having conducted an oral hearing on said Writ on April 6, 2006, and having considered the argument of counsel Michael Franell on behalf of the City of Ashland and petitioner, acting pro se, and being otherwise fully advised in the premises, the court now sets forth its Opinion.

OPINION

Jurisdiction and Standing

The Court previously found that this matter is properly brought as a writ of review pursuant to ORS 34.020 ff. Petitioner Bullock alleges that he is the "trustee of real property ... inside the Nevada Street Local Improvement District No. 85 ('Nevada LID')" that is the subject of the Writ. Pet. ¶ 2. In that capacity, Bullock's property is among the properties to be



1 “benefitted” by the LID and will be assessed for a portion of the costs of the improvements.
2 Accordingly, he has standing to bring his petition.

3 The Standard and Scope of Review

4 The standards to be applied in a writ of review proceeding are set out in ORS 34.040.
5 Accordingly, the Court reviews the record before the agency making the decisions at issue, in this
6 case the Ashland City Council acting on August 3, 2004, and September 7, 2004, for one or more
7 of five statutory errors. It is well established law in Oregon that the scope of review under ORS
8 34.020 ff is limited. The court generally examines only the record established at the proceedings
9 in question and, with respect to the evidence before the agency, reviews only whether there was
10 substantial evidence in the whole record to support the agency’s decision. The court is
11 specifically prohibited from weighing the evidence.

12 The Absence of Findings

13 The record before the court is devoid of findings on the part of the Ashland City Council
14 indicating what evidence they relied upon in reaching their decisions on August 3, 2004, to set
15 the public hearing that is required before the Council may form an LID, and on September 7,
16 2004 to form the LID and to direct the Ashland city staff to complete the design and move
17 forward. Petitioner correctly points to the lack of findings (and related reasoning) as an error
18 warranting relief. “An agency must issue findings which explain the basis of its decision.” “If
19 there is to be any meaningful judicial review, an agency must demonstrate that it has considered
20 the factors prescribed by statute and its own regulations and has not acted in an arbitrary manner
21 or on an ad hoc basis.” Feitelson v. City of Salem 46 Or. App. 815, 820, 822 (1980). There are
22 two specific respects in which the record must be supplemented to include the findings that will
23 enable the court to determine whether any of the errors set out in ORS 34.040 are present in this
24 case:

25 (A). Although there is sufficient evidence in the record to support the Council’s overall
26 decision to institute a Local Improvement District in the area of Nevada Street, there are no
27
28

1 findings or reasoning about the Council's choice of boundaries for the Nevada LID,¹ specifically,
2 the inclusion of the Billings Ranch properties but not some other single-lot properties near
3 Nevada Street, the specific basis for Petitioner's objection. "Even though [the court] can trace
4 through the record a legitimate path by which the [City Council] could have reached [its]
5 conclusion[s] our task on judicial review is not to serve as a pathfinder." Salosha, Inc. V. Lane
6 County, 201 Or. App. 138, 145 (2005), *quoting* Green v. Hayward, 275 Or. 693, 706 (1976)
7 ("The chances of misunderstanding and of inconsistent * * * decisions are greatly enhanced
8 when the courts are forced, because of inadequacies in the record, to undertake a search for
9 evidence to support findings which were not made and reasons which were not given."). The
10 City Council is directed to enter findings on why the boundaries of the Nevada LID are where
11 they are.

12 (B). Similarly, although there is evidence in the record to support the Council's choice to
13 proceed with the formation of the Nevada LID on September 7, 2004, notwithstanding the orally
14 disclosed conflicts of interest of Paula Brown and the memorandum provided to the Council at or
15 before the September 7, 2004 meeting, there are no findings to indicate why the Council decided
16 to proceed, despite the identified conflicts. The City Council is directed to enter such findings.

17 The City Council is directed to enter the findings called for by this Order within 45 days
18 of the entry of this Order and to provide such findings to the Court within 10 days thereafter.
19 Once the Court has received the City's findings, the Court will enter its further Order regarding
20 Petitioner's allegations of error concerning the Nevada LID boundary and Ms. Brown's conflicts
21 of interest.

22
23
24 ¹ Petitioner's Allegation of Error # 1 asserts that the City acted "arbitrarily" when it
25 chose the properties to include in the Nevada LID in violation of AMC 13.20.040(C)(1)(c) and
26 Ashland Municipal Resolution 1999-09(2) concerning "benefitted" properties. Petitioner further
27 alleges (#2) that nearby property owners should have received individual notice of the September
28 7, 2004, hearing. These allegations will be addressed after the Court receives the findings called
for in this order.

1 **The Remaining Allegations of Error**

2 Alleged Error #3 concerning 30-day review is without merit. Ashland Municipal Code
3 (“AMC”) 13.20.040(A) does not require providing copies of the design along with the notice of
4 hearing. It only requires giving 30 days’ notice of the hearing.

5 Alleged Error #4 concerning the adequacy of the improvement description is without
6 merit. AMC 13.020.040(C)(1)(a) requires only that the notice of hearing contain a “general
7 description” of the improvement, not a detailed design. The City’s notice made interested
8 citizens aware of a project involving sidewalk and traffic calming improvements, which is
9 adequate to inform the public of the nature of the project, and to invite further inquiry.

10 Error #5 concerning the adequacy of the cost estimate is without merit. The cited
11 ordinance, AMC 13.20.030(A)(6) requires the cost estimate to be included in the improvement
12 resolution. In this case, section 2 of the resolution forming the Council’s decision on September
13 7, 2004, (Exhibit 1, page 15-16 of the return of the writ) states the cost estimate, the total amount
14 to be paid by special assessment, and the total assessment for each tax lot in the LID.

15 Alleged Error #6 asserts the City violated Resolution 1999-09 (1)(A) by not paying “the
16 required 75% City share” on storm drainage improvements. Petitioner is correct that the City did
17 not follow the formula set out in the Resolution and the Court notes the language of the
18 Resolution is mandatory. The City was not at liberty to stray from the formula. However,
19 Petitioner’s assessment was reduced by the City’s decision, and thus he has not been financially
20 harmed. Petitioner raises non-financial damages he has allegedly suffered as a result of the
21 decisions but even if the court were able to find a direct link between the City’s decision to
22 reduce the assessment per lot with Petitioner’s concerns with “public safety tradeoffs”, the
23 possibility of a future exchange of water rights, open and transparent government and alleged
24 design flaws, these would not give rise to a determination that the Council’s decision to form the
25 LID in the first instance was flawed and must be voided, as Petitioner requests. Accordingly,
26 Petitioner is not entitled to a remedy for the City’s error.

27 Alleged Error #7, alleging the Council violated AMC 13.20.020(B) when it “ignored”
28 petitions from certain Ashland residents, is without merit. Under the ordinance, the LID could

1 be, and was, initiated by City Council action pursuant to AMC 13.20.020(A), as Petitioner
2 conceded in his Memorandum in Support of Motion to Expand the Record, filed October 26,
3 2005: "Council began Nevada LID." This was a proper alternative for the Council to follow.
4 Had the council failed to act, AMC13.020.020(B) provided an alternative method whereby the
5 benefitted parties could have initiated the LID process. Because the City did act, that alternative
6 method was unnecessary.

7 Alleged Error #8 concerning charges to the Billings Ranch developer, is without merit.
8 There is nothing in the record to indicate that the City Council took any action on August 3,
9 2004, or September 7, 2004, regarding charges to the developer and accordingly there is no
10 decision for the Court to review pursuant to this Writ.

11 Alleged Errors #9-18, 36, 37, 47-48, although asserted under a variety of labels
12 ("conflict," "financial benefit," "abuse of power"), all concern the alleged conflicts of interest of
13 city employee Paula Brown. The Court notes at the outset that Petitioner makes no allegation
14 that any member of the City Council had a conflict of interest. Accordingly, the only issue
15 before the Court on writ of review is whether the employee's conflicts were disclosed to the City
16 Council at or before it made its decisions on September 7, 2004, and the reasoning behind the
17 Council's decision to proceed in the face of the disclosed conflict. To the extent the errors allege
18 a failure of findings on the part of the City Council, they will be addressed when the findings are
19 provided to the Court. To the extent the errors allege a failure to disclose, the record reflects that
20 Brown's conflicts were disclosed orally at the September 7, 2004, meeting and that they were
21 disclosed in further detail to the Council in the form of a memorandum from city attorney
22 Franell.²

23 To the extent the errors about conflicts of interest concern Brown's actions and status
24 other than the fact (or absence) of disclosure, Petitioner has failed to exhaust his administrative
25

26 ² Even if the Court determines that there was inadequate disclosure of Paula
27 Brown's conflicts at or before the September 7, 2004, meeting, the Court cannot void the City's
28 actions solely because of that inadequacy. ORS 244.130(2).

1 remedies and his recourse is to the appropriate enforcement agency pursuant to ORS 244.260.

2 Alleged Error #19, which alleges an improper delegation of legislative authority, is
3 without merit. Petitioner fails to specify any respect in which the requirements of the statutes
4 and resolutions on which he relies were violated by the City Council's actions. AMC 13.20.030
5 specifically contemplates that the initial resolution creating the LID will be based upon
6 "estimated" costs. To the extent Petitioner intended to allege that the impropriety was in
7 allowing Brown, rather than someone else from the department, to make these determinations,
8 Petitioner failed to exhaust his administrative remedies. To the extent Petitioner intended to
9 allege that the impropriety was in allowing Brown to make further determinations after
10 disclosure of any conflicts of interest, that will be addressed when the findings are provided to
11 the court.

12 Alleged Errors #20-23 concerning documentation are without merit. These alleged
13 failures have been addressed either by the order requiring findings, or by the document
14 submissions and prior court orders in this writ of review proceeding.

15 Alleged Errors 24-27 concerning employee Mark Knox are without merit. There is no
16 evidence in the record that Mr. Knox played any role that improperly influenced the City Council
17 in its September 7, 2004, deliberations. To the extent the allegations concern Mr. Knox's actions
18 related to the Nevada LID apart from the City Council's deliberations, they must be addressed, if
19 at all, pursuant to ORS 244.260.

20 Alleged Errors 28-30 concerning city employee Barbara Christensen are without merit.
21 Allegations #28 and 29 concern actions taken after the September 7, 2004 meeting at which the
22 City Council decision at issue in this proceeding was taken. The issue of the accuracy of the
23 City Council minutes (#30) was resolved by prior orders of this court.

24 Alleged Errors 31-35, 45-46, all concern design issues and each is without merit. First,
25 there is no evidence that the City Council acted on any of these design issues at the September 7,
26 2004 meeting. As far as the record appears, the decisions about these design aspects were
27 finalized after the September 7, 2004 meeting and never were the subject of a quasi-judicial
28 decision by the City Council. Moreover, certain of the design issues, including delayed

1 emergency response time and the pros and cons of textured crosswalks, were specifically
2 addressed and discussed at the public hearing on September 7, 2004, and to the extent Petitioner
3 reaches different conclusions about the import of that evidence than the City does, the Court is
4 not allowed to weigh and “vote” on this evidence. To the extent there are aspects of the sidewalk
5 improvement design that may violate federal or state laws, that is not a matter properly before the
6 Court on writ of review. To the extent the references to Brown in allegations in #45 and 46 are
7 intended to suggest conflicts of interest, they have been addressed elsewhere in this opinion.

8 Alleged Errors #38-41, each of which alleges a failure on the part of the City to
9 adequately take into account the “majority” viewpoint at various meetings, is without merit.
10 Neither AMC 13.20.020(B) nor Resolution 1999-09 (4) requires the City to take the actions
11 urged by Petitioner. Moreover, the record is replete with evidence of community involvement in
12 meetings, presentations, and other activities related to the formulation of the ideas and plans that
13 preceded the resolution forming the Nevada LID. To the extent the focus on Paula Brown’s
14 actions in these alleged errors is another way of alleging conflict of interest, it is without merit
15 for the reasons previously stated.

16 Alleged Error #42 alleges a violation of AMC 13.20.020(B) for Brown’s use of a post
17 card survey. This allegation is without merit. Irrespective of how the City has surveyed its
18 residents in the past, there is nothing in 13.20.020(B) which requires the use of formal petitions
19 to determine residents’ views for a project which the City itself initiated pursuant to AMC
20 13.20.020(A).

21 Alleged Error #43 asserts that the “City’s last-minute change gave Developer 69 of 125
22 votes” and thus deprived Petitioner and others of a majority vote, is without merit. The only
23 effect of a majority vote against the project (called “remonstrance” in the ordinances) would have
24 been to effect a six-month delay in action on the improvement. AMC 13.02.050(C). The flaw in
25 Petitioner’s argument is that even if the developer had not been given a vote, Petitioner and his
26 colleagues would not have been able to produce votes against the project by “two-thirds of the
27 property *to be specially assessed.*” Whether or not the developer voted, the most votes Petitioner
28 could muster against the improvement would be 53 out of the 125 lots to be assessed. The

1 ordinance says nothing about two-thirds of the properties *actually voting* on the improvement.
2 Additionally, assuming *arguendo* that the 30 petitions Petitioner presented to the City Council at
3 the September 7th public hearing were in fact proper remonstrances³ and assuming, further, that
4 the Developer was given only one remonstrance vote, instead of 69, petitioners 30 remonstrances
5 still did not constitute 2/3 of the eligible “votes”. By any definition, those affected by the LID
6 were given their opportunity for remonstrance, as set out in the ordinances, but failed to muster
7 the required number of remonstrances to suspend the project, regardless of the Developer’s
8 involvement in the process.

9 Alleged Errors #44, 49 concern allegations of “intimidation” and “penalizing” by city
10 employees, and are without merit. These allegations are not properly the subject of this writ of
11 review proceeding. To the extent they are another way of alleging Paula Brown’s conflict of
12 interest, they have been dealt with elsewhere in this opinion. Petitioner’s remedy, if at all, is
13 through the disciplinary arm of the human resources department of the City of Ashland.

14 **Petitioner’s Requests for Relief**

15 The relief available to a petitioner upon writ of review is set out in the governing statute,
16 ORS 34.100. As set forth elsewhere in this order, the court has ordered one such form of relief,
17 direction to the agency to enter findings on certain issues in the case. Petitioner’s remaining
18 requests for relief are disposed of as follows:

- 19
- 20 1. Petitioner asks that the City provide him with certain transcripts and other
21 documents. As to these requests, the documents have been made part of the
22 record and/or the Court has disposed of them by prior orders in the case.

23 ///

24 ///

25
26 ³At the September hearing, City Attorney Franell stated that the petitions constituted
27 remonstrances. The Mayor questioned that determination, at that same hearing. The court’s
28 review of the petitions raises serious doubts as to their validity as “remonstrances”, but the court
will accept the City Attorney’s public statement that they were, for purposes of the practical point
being made here.

1 2. Petitioner asks that the Court declare “that City improperly created the Nevada
2 LID and to declare it void” and to “order Respondent to make no assessment” on
3 the LID or to “void any assessment heretofore made.” Although the Court cannot
4 finally determine these requests until it receives the City Council’s findings, to the
5 extent the remaining errors have been dealt with in this order, petitioner’s requests
6 are denied.

7 3. Petitioner previously asked the Court to enjoin further work on the project and his
8 request was denied by prior order of the Court.

9
10 DATED this 17 day of May, 2006

11
12
13 
14 MARK SCHIVELEY
15 Circuit Court Judge

16
17
18
19
20
21
22
23
24 cc: Mr. Art Bullock
25 Mr. Michael Franell
26
27
28

9 OPINION

1
2
3 IN THE CIRCUIT COURT OF THE STATE OF OREGON
4 FOR THE COUNTY OF JACKSON

5 ART BULLOCK, Individually and)
as Trustee of 791 Glendower Trust)
6 Dated December 25, 2003,)
7 Petitioner, Pro Se,)
vs.)
8 THE CITY OF ASHLAND, a)
9 Municipal Corporation of the State)
of Oregon,)
10 Respondent.)

Case No. 06-1000-Z4(7)

OPINION AND ORDER

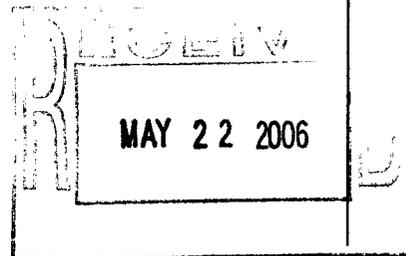
11
12 This matter came before the court upon Respondent City of Ashland's Motion to Dismiss
13 (hereinafter, "the City") filed on April 28, 2006, and the court having reviewed the motion, the
14 underlying Amended Petition for Writ of Review, the Return on the Writ and the parties'
15 memoranda, and further having conducted an oral hearing on said Motion on May 15, 2006, and
16 having considered the argument of counsel Michael Franell on behalf of the City of Ashland and
17 petitioner, acting pro se, and being otherwise fully advised in the premises, the court now sets
18 forth its Opinion and Order.

19 OPINION

20 The statutes pertaining to Writs of Review (ORS 34.010-34.102) do not set forth the
21 required method for a party to attack the filing of the writ itself. Petitioner correctly points out
22 that the proper method is by way of a motion to quash. N.W. Env. Def. Center v. City Council,
23 20 Or App 234, 240 (1975). Since the City's "Motion to Dismiss" serves the same purpose, the
24 court chooses to treat it as a motion to quash.

25 The City alleges three grounds for dismissing the Amended Petition for Writ of Review.
26 At oral argument, the court indicated that Petitioner need not argue he is a proper party to this
27 proceeding, the City's first basis. The court does not accept the City's narrow reading of ORS

28 1 - OPINION AND ORDER



1 34.020. Because the City's third basis disposes of this matter, the Court need not reach the
2 City's second argument for dismissal, regarding service on "opposing parties".

3 The City argues that the two City Council decisions to award a construction contract
4 associated with the "Nevada LID" in Ashland, one taken on January 17, 2006 and the other taken
5 on February 7, 2006, were not quasi-judicial and accordingly are not properly the subject of a
6 writ of review. This portion of the City's motion is well taken.

7 It appears from the record that the Ashland City Council, rather than the city
8 administrator or other city employee, was required to make the decision whether to approve the
9 contract solely because the amount in question was in excess of \$75,000. AMC 2.50.030 and
10 AMC 2.050.060 govern the issue and are not part of the requirements of that portion of the
11 Ashland Municipal Code dealing with the formation of local improvement districts and related
12 assessments. In deciding to award the contract even though the bid exceeded the engineer's
13 estimates, the City Council acted in either its legislative or its executive capacity, but not in a
14 judicial or quasi-judicial capacity. Although the Ashland Municipal Code, AMC 13.20.180,
15 addresses generally the possibility of third-party vendors conducting the LID work, the Code
16 does not lay out the kind of particularized, preexisting criteria for awarding third-party contracts
17 that are the hallmark of a quasi-judicial decision, nor does it establish a set of notice and hearing
18 requirements for approving such contracts.¹ By contrast, the portions of the Code dealing with
19 the formation of an LID (AMC 13.20.020-.050) do form the type of "statutory design" that
20 "sufficiently channels discretion by factfinding procedures and broadly stated criteria to qualify
21 as ... a 'quasi-judicial' function." Strawberry Hills 4-Wheelers v. Benton County Board Of
22 Commissioners., 287 Or. 591, 606 (1979).

23 The City Council made no decisions on either January 17, 2006 or February 7, 2006
24

25 ¹ At most, the Code allows the City Council, in its discretion, to hold an additional
26 hearing when a bid for LID work comes in at more than 10% above the engineer's estimate, for
27 the purpose of considering objections to proceeding with the improvement because of the
increased cost. AMC 13.20.180.

1 concerning the dollar amount of any assessment to be levied against the benefitted property
2 owners, nor did the Council decide to exceed the 10% overage allowed without a new round of
3 notices and resolutions (AMC 13.20.050). In short, there are no quasi-judicial decisions in the
4 Amended Petition for Review that were not addressed and disposed of in the Court's opinions
5 and orders in Case No. 04-3971-Z3(7).

6 **ORDER**

7 Based upon the above and foregoing and good cause appearing therefore, it is hereby
8 ORDERED that the City's Motion to Dismiss (motion to quash) is granted and this
9 matter is dismissed with prejudice, and it is;

10 FURTHER ORDERED that both parties are responsible for their own costs and fees
11 incurred with these motions.

12
13 DATED this 17 day of May, 2006

14
15 
16 **MARK SCHIVELEY**
17 Circuit Court Judge

18
19
20
21 cc: Mr. Michael Franell
22 Mr. Art Bullock

23
24
25
26
27
28 3 - OPINION AND ORDER