ORDINANCE NO. 56

AN ORDINANCE PROHIBITING PUBLIC NUDITY WITHIN DUNES CITY, OREGON.

WHEREAS, the City of Dunes City has, adjacent or within its boundaries, Siltcoos Lake and Woahink Lake, and;

WHEREAS, the City Council is of the opinion that the majority of citizens who reside within or visit Dunes City would find offensive the display of male or female genitals or buttocks, or female pectoral nudity,

THE CITY OF DUNES CITY, does ordain as follows:

1. Definitions.

   (a) Female nudity is defined as substantially exposing to public view the entire female buttock, and/or female breasts, and/or female genital area;

   (b) Male nudity is defined as substantial exposure of the entire male genital area, and/or male buttock;

   (c) Public view is defined as that which can be viewed from a public highway, easement, or right-of-way, or from adjoining property.

2. It is declared unlawful within the boundaries of the City of Dunes City, for any person to appear in public view, nude.

   (a) Excluded from the provisions of this ordinance are females under the age of eight (8) years, who appear with their entire breasts substantially exposed to public view.

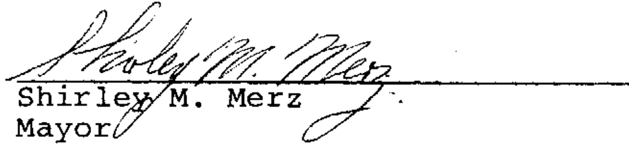
3. Any person violating any provision of this Ordinance shall, upon conviction thereof, be punished by imprisonment in jail for a period not to exceed thirty (30) days, and/or a fine not to exceed Five Hundred ($500.00) Dollars, or both

4. Each day's violation of the provision of this Ordinance constitutes a separate offense.

PASSED BY THE COUNCIL OF DUNES CITY, OREGON, this 8th day of March, 1979.

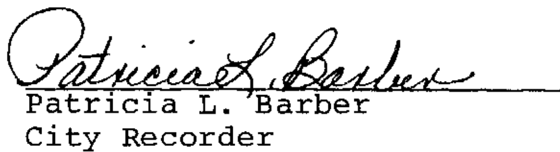
APPROVED BY THE MAYOR this 9th day of March, 1979.

THIS ORDINANCE WILL TAKE EFFECT on the 7th day of April, 1979.



Shirley M. Merz
Mayor

ATTEST:



Patricia L. Barber
City Recorder

denial by 1 to 2 vote and the failure to support the denial with findings and conclusions.

Reasoned Order

It is well established that commission action on an application for a plan change is quasi-judicial in nature, *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973), and that the determination of the governmental body must be by a reasoned order based upon supported findings, *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 1, 20, — P2d —— (1977). Although orders denying land-use changes are often less extensive than orders allowing change, they must nevertheless have an explicit factual and rational basis, *Marracci v. City of Scappoose*, 26 Or App 131, 135, 552 P2d 552 *rev den* (1976); *Dickinson v. Bd. of County Comm.*, 21 Or App 98, 102, 533 P2d 1395 (1975); *Wes Linn Land Co. v. Bd. of County Comm'rs*, — Or App ——, — P2d —— (1978); *cf.*, *Commonwealth Properties v. Washington County*, 35 Or App 387, — P2d —— (1978). The rule seems no less applicable here where the plan and the zone differ and petitioners have offered extensive evidence that the plan should be harmonized with the zone. Accordingly, the absence of a proper order invalidates the Board action in this case and it must be remanded for entry of such an order.

Impartial Tribunal

The Board argues that if we deem the action to be a denial, and we do, remand for entry of a proper order would be futile because the lone commissioner who opposed the change would have no authority to promulgate an order. We are not persuaded, however, that the Board's action on remand will necessarily be the same because the refusals to vote appear to have been based upon a misinterpretation of law by the two abstaining commissioners which, after this opinion, may not be repeated.

Two commissioners abstained for the sole apparent reason that they believed themselves to be required as a matter of law to disqualify themselves by the statement in *Fasano* that the parties to a quasi-judicial land-use hearing

> "* * * are entitled to * * * a tribunal which is impartial in the matter—i.e., having no prehearing or ex parte contacts concerning the question at issue * * *." 264 Or at 588.

Their error of law results from having read the statement too literally.

The *Fasano* analogy between land-use hearings and court hearings is not complete; commissioners need not conduct themselves in all respects as judges or the proceedings in all respects as trials. The Supreme Court characterized particular land-use proceedings as "quasi-judicial," which means they have many, but not all, of the attributes of actual judicial proceedings. In this developmental period of land-use procedure, it is difficult for any county commissioner to determine which attributes of judicial procedure apply to land-use adjudications by virtue of *Fasano* and which do not. Therefore, we shall review some of the differences between judicial and quasi-judicial land-use proceedings in order to identify the nature of practical differences which should be accommodated by procedure. Then we shall demonstrate that the interests for which the commissioners disqualified themselves in this case are not of a nature or magnitude for which *Fasano* requires disqualification.

The most obvious difference between judicial and most quasi-judicial proceedings is that the consequences of disqualification are greater in the latter. In judicial proceedings as in football, when a judge steps out, he can be replaced from the bench and the adjudication can be made; before a municipal governing body, as in rugby, however, there can be no substitution and the administrative adjudication may go unmade. Nonparticipation by a commissioner is therefore a drastic step.

Another difference becomes particularly problematical where a minimum number of limited votes is required for decision. Here, the absolute charter requirement of 3 concurring votes out of 5 gives to the action of each commissioner a significance which does not exist where the law requires only the concurrence of a majority of those who vote. By nonparticipation, a commissioner reduces the pool from which the requisite number of votes can be drawn. The Supreme Court in *State ex rel Roberts v. Gruber,* 231 Or 494, 498-99, 373 P2d 657 (1962), recognized that an abstention in such a case may have the same effect as a nay vote:

> "[Where the law requires] '* * * the *affirmative action of a majority of the entire board* or *a majority of the members present,* a refusal to vote may result in defeating the proposition because in such case *affirmative* action is required, and those who refuse to vote cannot be counted on the affirmative side under such a specific statutory requirement, and the proposal before the council may be defeated by lack of the affirmative majority required by the statute.' 2 Dillon, Municipal Corporations (5th ed) 854, §527." (Supreme Court emphasis.)

In reality, then, there can be no abstention in the sense of refraining from contributing to the result where a minimum vote is required for action because an abstention and a nay vote have exactly the same effect on the result.[6]

Another gap in the analogy arises from the nature of the office. A judge is expected to be detached, independent and nonpolitical. A county commissioner, on the other hand, is expected to be intensely involved in the affairs of the community. He is elected because of his political predisposition, not despite it, and he is expected to act with awareness of the needs of all elements of the county, including all government agencies charged with doing the business of the

[6] Whether there are circumstances in which a member of a legislative body may be judicially compelled to participate by voting is a question we need not and do not reach.

people. This difference is manifested in the statutory code of ethics embodied in ORS ch 244. Particularly, ORS 244.120(1) provides that a county commissioner must handle a conflict by declaration, but, in contrast, a judge must do so by either withdrawal or declaration:

> "(1) When involved in a potential conflict of interest, a public official shall:
>
> "(a) If he is an elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board of commission, announce publicly the nature of the potential conflict prior to taking any official action thereon.
>
> "* * * * *
>
> "(c) If he is a judge, remove himself from the case giving rise to the conflict or advise the parties of the nature of the conflict."[7]

It is clear for all these reasons that if the system is to work, impartiality must be defined and procedurally accommodated differently in quasi-judicial proceedings than in judicial proceedings.

The next question is whether the commissioners' interests in this case require withdrawal for disqualification under *Fasano.* In *Tierney v. Duris, Pay Less Properties,* 21 Or App 613, 627-29, 536 P2d 435 (1975), we applied the "impartial tribunal" requirement of *Fasano* as more hortatory than literal. Accordingly, we upheld an order invalidating an order where two city councilmen had discuseed with some local residents their attitudes toward a land development proposal and had declared the contacts.

The *Tierney v. Duris* approach is equally apt here. Both abstaining commissioners felt legally compelled by *Fasano* to abstain due to conflict of interest because of their involvement with other governmental bodies which were interested in the use to which petitioners' property was put. Neither situation posed the kind of

[7] *See also* Code of Judicial Conduct Canons 1, 2, 3, 5 and 7 (1970), which require withdrawal.

partiality which the Supreme Court intended in *Fasano* to prohibit. Indeed, abstention in this case, although it flowed from an abundance of good faith, was a corruption of the goal of *Fasano*.

The goal of the *Fasano* procedures is that land-use decisions should be made fairly. The abstention in this case did not prevent partiality; instead, it prevented the decision itself. *Fasano* cannot be applied so 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 court stated in *Fasano* that "[p]arties at the hearing before the county governing body are entitled * * * to a tribunal which is impartial," 264 Or at 588, but 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.

Moreover, official involvement in related governmental organizations and activities is not the sort of interest the *Fasano* procedures are designed to bar from influencing official action. The *Fasano* procedures are intended to counteract, as the Supreme Court said, "the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government." 264 Or at 588. The commissioners here did not withdraw to insulate the decision from private economic interests, but only because of their official involvement in community planning and related governmental activities. Thus, the conflicts which the commissioners declared as the basis for their refusal to vote are not of the kind which *Fasano* was intended to guard against.

Therefore, consistent with both *Fasano* and *Tierney*, we conclude that the refusal by two commissioners to vote was solely the result of a misinterpretation

of law, *i.e.*, a misinterpretation of the quasi-judicial procedural requirements mandated in *Fasano*.[8]

Reversed and remanded.

[8] We are aware that the composition of the Board varies from time to time and that the commissioners who voted before may not be the same commissioners who vote on remand. Nevertheless, it is better to dispose of the case on the law rather than upon the hope that, after sufficient litigational delay, different commissioners may act differently.