

1 The Board may stay a land use decision if the petitioner is
2 able to demonstrate:

3 "(a) A colorable claim of error in the land use
4 decision under review; and

5 "(b) That the petitioner will suffer irreparable
6 injury if the stay is not granted." 1983 Or Laws, ch
7 827, §34(1).

8 Petitioner argues this ordinance is a land use decision
9 because it implements part of the city's comprehensive plan.
10 Petitioners' filings include a document entitled "Findings of
11 Fact" which appears to support the decision to widen Crater
12 Lake Avenue. The document includes a statement of applicable
13 criteria, which includes provisions of the Medford
14 Comprehensive Plan. From the filings, the Board understands
15 the project proposes to widen a portion of a Medford city
16 street from two lanes to four lanes within the existing right
17 of way, and that such widening will require cutting several
18 trees now growing within the right of way. It is the Board's
19 understanding, at this early stage of the proceeding, and for
20 the purposes of this order only, that the city does not
21 challenge the assertion that this decision is a land use
22 decision.

23 STANDING

24 Respondent City has not challenged standing of Mr. Dames to
25 bring this review proceeding. At the conference call held
26 October 31, 1983, respondent did not know whether the city
would challenge the standing of the Roosevelt Neighborhood

1 Association. Because the claims of irreparable harm to members
2 of the association are different from the claims of harm to Mr.
3 Dames, the Board believes it must make some preliminary
4 determination as to the standing of the neighborhood
5 association.

6 To have standing, a petitioner or an intervenor must allege
7 facts showing petitioner is aggrieved or has interests that are
8 adversely affected by the decision. 1983 Or Laws, ch 827,
9 §31(2). If the decision appealed is a quasi-judicial decision,
10 the petitioner must show he appeared before the local
11 government and was either entitled as of right to notice and
12 hearing prior to the decision to be reviewed, or he is
13 aggrieved or has interests adversely affected by the decision.
14 Id. In this case, petitioner is claiming the decision is
15 quasi-judicial, and the Board must consider whether the
16 association has alleged all of the requisite criteria for
17 intervention.¹

18 The affidavit of the neighborhood association was prepared
19 by its President, William S. Dames. The affidavit alleges an
20 injury on behalf of the neighborhood association, but it does
21 not allege the neighborhood association or any of its members
22 appeared before the local governing body. However, the
23 affidavit does incorporate affidavits introduced in previous
24 court proceedings "as evidence." The Board, therefore,
25 believes it may look to the other affidavits to see whether the
26 association, or any of its members, appeared before the local

1 governing body.

2 In the affidavit of William S. Dames made on September 28,
3 1983, Mr. Dames states that "Mr. Morgan and I and other
4 neighbors have raised these points in at least three of the
5 last six city council meetings * * * *" The Board understands,
6 then, that Mr. Dames and Mr. Morgan, a member of the
7 association and a resident of Crater Lake Avenue, appeared
8 before the local governing body. The Board believes,
9 therefore, that the association has met the requirements for
10 standing of an intervenor for the limited purpose of requesting
11 a stay of the city's decision. The Board cautions that this
12 holding is not a final determination on standing under 1983 Or
13 Laws, ch 827, §31(5).

14 If the Board accepts the association as a party in this
15 proceeding under the theory of representational standing as
16 explained in 1000 Friends of Oregon v. Multnomah County, 39 Or
17 App 917, 593 P2d 1171 (1979), it is clear that the association
18 may seek a stay on behalf of its members. The Board notes, in
19 this regard, that Mr. Dames, one of the members, appears to
20 have standing in his own right. Also, the interest the
21 organization seeks to protect, the neighborhood, is germane to
22 the organization's purpose which is stated as "to help preserve
23 the livability of the area for those residing in single-family
24 residences." Additionally, the benefit sought, the prevention
25 of the widening of the street and the cutting of trees, does
26 not require the participation of individual members of the

1 association and is a benefit that will inure to the individual
2 members of the association. See Hunt v. Washington Apple
3 Advertising Commission, 432 US 333, 343, 97 S Ct 2434, 53 L Ed
4 2d 383, 394 (1977); Warth v. Seldon, 422 US 490, 45 L Ed 2d
5 343, 364, 95 S Ct 2197 (1975).

6 COLORABLE CLAIM OF ERROR

7 Petitioner's assertion of a colorable claim of error in the
8 decision is based in part on petitioner's belief the city made
9 no findings of fact to support the decision. The city denies
10 this claim, stating the minutes (which are not before the
11 Board) will clearly show the city council to have adopted the
12 findings as part of the ordinance. The city further points to
13 the findings themselves which appear on their face to be made
14 in support of the decision under review.

15 Petitioner further alleges the city failed to adequately
16 consider petitioner's complaints about compliance with certain
17 portions of the Medford comprehensive plan, especially policies
18 favoring preservation of neighborhoods. Implicit in
19 petitioner's argument about the findings is the view this
20 decision is a quasi-judicial decision which requires findings
21 of fact and conclusions of law. From the very limited filings
22 made at this stage, the Board is unable to determine with any
23 certainty whether the decision is quasi-judicial or
24 legislative, or whether the decision is supported by
25 substantial evidence in the record. See Gruber v. Lincoln
26 County, 2 Or LUBA 180 (1980); Fasano v. Washington County Board

1 of Comm'rs., 265 Or 574, 507 P2d 23 (1973); Green v. Hayward,
2 275 Or 693, 552 P2d 815 (1976).

3 The city characterizes the decision as legislative, and
4 argues the record will show compliance with all applicable
5 criteria.

6 In order to establish evidence of a colorable claim of
7 error, it is not necessary to show the petitioner will prevail
8 on the merits. It is necessary to show the errors alleged are
9 sufficient to result in reversal or remand of the decision if
10 found to be correct. See Van Weidlein Int'l, Inc. v. OLCC, 16
11 Or App 81, 514 P2d 560, 515 P2d 936, 517 P2d 295, rev den
12 (1973). Petitioner has made claims which could result in
13 reversal or remand of the decision if found to be correct.
14 Because the claims are not frivolous, and because the Board can
15 not tell from the present filings whether the city's claim of
16 compliance with applicable criteria is correct, the Board
17 believes petitioners have shown a colorable claim of error.
18 Van Weidlein, supra.

19 IRREPARABLE INJURY

20 Petitioner Dames' claim of irreparable injury is as follows:

21 "The damage to the value of my property will be
22 immense, since we will have increased traffic on our
23 street, and the value of our property will decline, if
24 the road is widened. Since the contract has already
been signed with the person to do the work, it is
necessary to stop that work until further hearing can
be had before the Land Use Board of Appeals."

25 Mr. Dames further alleges that he lives one house away from
26 Crater Lake Avenue. Petitioner gives no facts to support the

1 claim the traffic will increase and no facts to support the
2 value of his property will decline.

3 The affidavit filed by Mr. Dames as president of the
4 Roosevelt Neighborhood Association includes a statement that

5 "Several of our members, such as Richard Morgan at 31
6 Crater Lake Ave., Mike Swanson at 35 Crater Lake Ave.,
7 and Ron Varholdt at 201 Crater Lake Ave., live on
8 Crater Lake Ave., and more than 20 members all
together live within sight and sound of Crater Lake
Ave." Affidavit of William S. Dames of 28 October,
1983 on behalf of Roosevelt Neighborhood Association.

9 Additionally, this affidavit alleges there will be increased
10 traffic which will make it less desirable for residents. There
11 is also claim that widening the street will cause the value of
12 the homes of the members to decline. Perhaps the most
13 important allegation, however, in this affidavit is as follows:

14 "If the street is widened and the trees are removed,
15 the whole setting will be drastically changed,
16 seriously destroying the whole historical setting of
the area. Many of these trees were planted by
pioneers and are significant in and of themselves."

17 The affidavit explains that the association is attempting to
18 have the area designated as an historic district and to be
19 placed on the national register of historic places.² More
20 importantly, additional affidavits filed on October 31, 1983
21 explain that retaining the old trees is an important part of
22 the integrity or "setting" of the neighborhood. See Affidavit
23 of Kay Atwood. Further, the affidavit of Scott Clay, who
24 received a degree in architecture, states the trees help define
25 a setting for the homes. See Affidavit of Scott Clay. The
26 Board takes the claim of the association, then, as a claim,

1 supported by affidavits from other proceedings, that the
2 neighborhood and Crater Lake Ave. and the properties on the
3 avenue have a particular historic quality which is enhanced by
4 the trees. If the street is widened and the trees cut down,
5 that quality will be lost.

6 An irreparable injury is one which can not be adequately
7 compensated in damages or a condition where there is no certain
8 pecuniary standard for measurement of damages because of the
9 nature of the injury. Winslow v. Fleischner, 110 Or 554, 233
10 P2d 924 (1924). The Board believes the stay is in the nature
11 of an injunction, and an injunction will not be granted simply
12 to allay fears or apprehensions. McCombs, et al v. McClelland,
13 223 Or 475, 354 P2d 311 (1960). Further, the alleged injury
14 much be shown to be both substantial and unreasonable. McGreer
15 v. Rajneeshpuram, 7 Or LUBA 416 (1983); 8 Or LUBA 401 (1983).

16 In this case, Petitioner Dames alleges he lives within one
17 house distance from Crater Lake Ave. He alleges injury he will
18 suffer is a decline in the property value. Included as a
19 reason for the decline in property value is a claim of
20 increased traffic on his street. He does not make clear how
21 increased traffic on his street is an injury to him. During
22 the conference call, the Board understood the petitioner to say
23 that the increased traffic poses a danger.³

24 Petitioner gives no facts to support the claim the traffic
25 will increase and no facts to support the claim the value of
26 his property will decline. The Board believes, therefore, that

1 the loss of property value is a potential loss only, and one
2 for which there is no support in the record that presently
3 exists before the Board. An irreparable injury is one which
4 must be established by "clear and convincing proof." Oregon
5 State Bar v. Fowler, 278 Or 169, 563 P2d 674 (1977). The Board
6 believes it is useful to compare this claimed injury to the one
7 in Jewett v. Dearhorn Enterprises, Inc., 281 Or 469, 575 P2d
8 154 (1978). In that case, the harm consisted of nauseating
9 odors, swarms of flies and noise. The plaintiffs in that case
10 had to change their living habits, keep their doors and windows
11 closed and curtail normal activities. Similarly, in Bither v.
12 Baker Rock Crushing Company, 249 Or 640, 438 P2d 988 (1968),
13 the injury consisted of dust, smoke and noise invading
14 residences as well as the shocks of explosions interfering with
15 plaintiffs ability to enjoy their homes. The court granted
16 injunctions in both cases. Here, no such serious injury is
17 alleged, even if one assumes that increased traffic will
18 produce noise, dust and danger.⁴

19 The Board concludes, therefore, Mr. Dames has failed to
20 show an "irreparable injury" within the meaning of 1983 Or
21 Laws, ch 827, §34(1)(b).

22 However, the injury claimed by the association in support
23 of its members, several of whom live along Crater Lake Avenue,
24 is different. It includes a claim of increased noise and dust
25 and it includes a claim of loss of a significant element of the
26 character and quality of the neighborhood. This later

1 loss is not measureable in dollars and is not repairable.
2 Together, these losses are significant, at least for those
3 living along Crater Lake Avenue. Therefore, to the extent the
4 association has standing to assert this loss of neighborhood
5 character as an injury to members of the association, living
6 along Crater Lake Avenue, the association has shown an
7 irreparable injury.

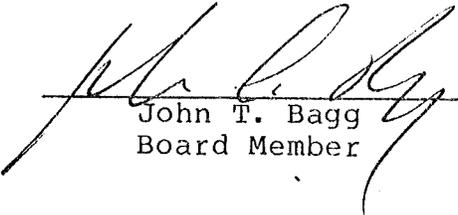
8 The Board wishes to stress its finding of irreparable
9 injury is based on all the evidence presented so far. Each
10 claim of irreparable injury must be considered individually and
11 no single allegation or set of facts may be said to amount to a
12 showing of irreparable injury. See Jewett, supra. Also, and
13 important to the Board's consideration today, is the fact there
14 has been no claim by the city that it or the public convenience
15 will suffer damage as a result of the issuance of this stay.
16 See Van Weidlien, supra, and Bennett v. City of Salem, 192 Or
17 531, 235 P2d 772 (1951); Fraser v. City of Portland, 81 Or 92,
18 158 P 514 (1916).

19 The Board concludes the land use decision may be stayed.
20 There remains the matter of an undertaking. The law requires
21 an undertaking in the amount of \$5,000 if the Board grants a
22 stay of a quasi-judicial land use decision. If a stay of a
23 legislative decision is granted, the Board may impose a
24 requirement for a bond or other undertaking. See 1983 Or Laws,
25 ch 827, §34. Because the matter of whether or not the decision
26 under review is a quasi-judicial or legislative decision is in

1 dispute, the Board will require an undertaking in the amount of
2 \$5,000.

3 The decision of the City of Medford entitled Ordinance No.
4 4982 is stayed until further order of this Board. The stay
5 shall be effective upon receipt by this Board of an undertaking
6 in the amount of \$5,000. The undertaking shall be in the form
7 of a security bond issued by a corporate surety qualified by
8 law to issue surety insurance as defined in ORS 731.186. The
9 undertaking will be to the effect petitioner shall pay whatever
10 costs, damages and attorneys' fees as may be ordered by this
11 Board should the Board dispose of this review proceeding in a
12 manner adverse to petitioner.

13 Dated this 1st day of November, 1983.

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John T. Bagg
Board Member

FOOTNOTES

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4 The Board wishes to stress that allegations of fact showing
5 a petitioner or intervenor has standing are normally made in
6 the petition for review. The petition or motion to intervene
7 must include such allegations, and a simple statement that the
8 record shows facts supporting a petitioner's claim of standing
9 is not sufficient. In this case, because the Board understands
10 the affidavit of the association to include as evidence other
11 affidavits filed earlier, the Board looks to all the affidavits
12 to determine whether the association has made a sufficient
13 claim of facts showing that it has standing. 1983 Or Laws, ch
14 827, §31(9) and OAR 661-10-030(3), OAR 661-10-050. The Board's
15 finding the association does have standing is limited to the
16 matter of this stay request and is not a final determination on
17 standing for any party to this review proceeding.

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12 The Board does not find the quest for an official
13 historical designation significant. What is significant is the
14 general claim of the "historic" quality or character of the
15 area and how this quality is impacted by the decision on review.

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16 The Board has previously held that damage resulting from
17 errant vehicles is compensable at law. McGreer v.
18 Rajneeshpuram, LUBA No. 82-085/86, Order on Motion for Stay,
19 August 23, 1983. ___ Or LUBA ___ (1983). The Board notes also
20 an "irreparable injury" is different from the impact on
21 petitioner required to show standing. All that is necessary to
22 show standing is "adverse affect or aggrievement." See Benton
23 County v. Friends of Benton County, 294 Or 79, 653 P2d 1249
24 (1982). Generally, a claim of increased traffic alone is not
25 sufficient to confer standing, let alone provide a showing of
26 irreparable injury. See McGreer, supra, and Parsons v.
Josephine Co., 2 Or LUBA 343 (1981).

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23 Indeed, in the Jewett case, the court commented on the
24 noise issue and stated:

24 "The noise from the farm is the least of plaintiffs'
25 complaints and if only the noise were proven we would
26 find it difficult to hold the defendant's farm
constituted a nuisance. This noise, described as

1 'high pitched squeals' and 'unnerving sound' did exist
2 and can be considered as part of the cumulative effect
3 of the pig farm on the neighborhood." Jewett, 281 Or
4 at 476.
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