BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DONALD RHODEWALT and LINN COUNTY COVERED BRIDGE ASSOCIATION, an unincorporated organization,	)	LUBA No. 87-078
Petitioners,	)	ORDER ALLOWING STAY
vs.	)	
LINN COUNTY,	)	
Respondent.	)	

Petitioners move, pursuant to ORS 197.845, for an order staying Linn County's decision, dated August 24, 1987. The decision directs the Linn County Roadmaster to negotiate an emergency contract to demolish, by dismantling, the Weddle Bridge, which is a covered bridge spanning Thomas Creek in Linn County. The order directs the roadmaster to stockpile salvaged parts on county right-of-way adjacent to the bridge, remove salvaged parts and cleanup remaining debris. The order also provides that the Linn County Historic Resource Commission immediately be given notice of the county commissioners' decision.

The notice of intent to appeal was filed on September 4, 1987. Petitioners' motion for stay accompanied the notice of intent to appeal. At the petitioners' request, and with the agreement of the county, the Board conducted a telephone conference on September 4, 1987.

FACTS

The Weddle Bridge is an historic structure.[1] It is included on both the federal and Linn County registers of historic structures. The bridge has not carried vehicular traffic for several years and has been limited to pedestrian use. A new bridge located a short distance downstream carries vehicular traffic across Thomas Creek.

The Weddle Bridge is dilapidated and unsafe. Serious structural damage was discovered during the summer of 1987; and, to prevent the bridge from falling into Thomas Creek, the county installed emergency shoring which extends down into the bed of Thomas Creek.

On August 19, 1987, the county heard arguments in favor of restoring the bridge and arguments for destruction of the bridge. It appears that restoration would cost significantly more than removal, and the county elected to remove the structure. Whether the bridge is to be removed or restored, work must proceed quickly because the bridge and the emergency shoring will become even more dangerous when water levels in Thomas Creek rise this winter. The new vehicular bridge downstream is threatened; and, if the bridge collapses and creates a dam, adjoining properties could be flooded. In addition, repairs or removal will require working structures to be placed in the creek bed. To assure safe working conditions, these supporting structures must be removed from the creek bed before high water.

The county elected to remove the bridge. Following adoption of the county's resolution and order, the county proceeded to enter contracts for removal of the bridge. During the Board's conference with the parties on September 4, 1987, the county advised the Board that the county would begin removal of the bridge at 8:00 a.m. on September 8, 1987, unless the Board stays the county's decision.[2]

LEGAL REQUIREMENTS FOR A STAY OF A LAND USE DECISION

If the decision is a land use decision, ORS 197.845 grants the Board authority to issue a stay of the land use decision if the petitioner demonstrates:

> "(a) A colorable claim of error in the land use decision under review; and
>
> "(b) That the petitioner will suffer irreparable injury if the stay is not granted."

We find petitioners have demonstrated that these criteria are met and grant the stay.

Definition of Land Use Decision

A land use decision, as defined in ORS 197.015(10), is a

> "final decision...by a local government...that concerns the...application of (a) land use regulation...." ORS 197.015(10)(a).

A zoning ordinance is a land use regulation. ORS 197.015(11).

The order at issue in this case expressly provides:

> "Having further considered the provisions of Article 25 of the Linn County Zoning Ordinance relating to the preservation of structures listed in the Linn County Register of Historic Resources, and specifically of Section 25.030(3) of said Article 25, providing certain unsafe or dangerous conditions may be removed or demolished after notification to the

> Historic Resource Commission upon determination by the building official that said emergency action is required for the public safety...."

If a decision falls within the statutory definition of a land use decision in ORS 197.015(10), it is a land use decision. Billington v. Polk County, 299 Or 471, 703 P2d 232 (1985).

In this case the county's order concerns application of a land use regulation, the zoning ordinance. The Linn County Zoning Ordinance establishes an Historic Resource Commission which is empowered to consider requests for demolition of historic structures.[3] The county apparently contends that Section 25.030(3) of its zoning ordinance allows it to proceed immediately with demolition of the Weddle Bridge upon notice to the Historic Resource Commission given the current circumstances. While the county may be correct in this contention, it is clear that the county applied its zoning ordinance in adopting the order. The decision is therefore a land use decision subject to the provisions for stay in ORS 197.845.

Colorable Claim of Error

The colorable claim of error standard is not a demanding one. In Mill Creek Sportmen's Association v. Umatilla Board of Commissioners, 14 Or LUBA 533 (1986) we said:

> "In order to establish a colorable claim of error, petitioners must allege error which, if sustained, would be sufficient to result in reversal or remand of the decision. Dames v. City of Medford, 9 Or LUBA 433, 438 (1984); See Von Weidlin Int'l v. Young, 16 Or

App 81, 514 P2d 560, 515 P2d 936, 517 P2d 295, rev den (1973)."

Petitioners allege a colorable claim of error exists because:

"(a) The findings in support of the decision are inadequate;

"(b) Respondent failed to follow applicable procedures to the prejudice of substantial rights of the petitioners."

We believe these allegations are sufficient to establish a colorable claim of error.

Irreparable Injury

Petitioners claim that "the order makes it clear that the county decided to proceed with the demolition by dismantling of the Weddle Bridge." According to petitioners, the order and the county's admitted plan to proceed on September 8, 1987, mean destruction of the bridge will occur before our review is completed if a stay is not granted. Petitioners claim review of the county's decision by the Historic Resource Commission, as required by the zoning ordinance, would thereby improperly be avoided.

The county stated that it plans to start removal of the bridge on September 8, 1987. During the September 4, 1987 conference, the county suggested that the bridge would be dismantled and stored. The county further suggested that it is incorrect to characterize its planned action as demolition.

Petitioners claim the county's plans show no reasonable basis for concluding that the bridge will be removed in a way

that would permit the bridge to be reconstructed in the event the petitioners are ultimately successful in their challenge.

The county advised the Board that there are no specific plans to mark the pieces of the bridge as they are removed or to protect the parts of the bridge as they are stockpiled.

Given these circumstances, we believe petitioners have demonstrated irreparable harm.

LEAVE TO FILE MOTION TO RECONSIDER

The county cooperated in expediting consideration of petitioners' motion for stay. As a result the county did not have an opportunity to file a written memorandum responding to the motion for stay or file any motions it may have felt were appropriate.

The Board is aware that a threat to public safety may be posed by failure to move expeditiously with this appeal. The Board intends to adhere strictly to an expedited schedule for review of this matter as set forth in a separate order. In addition, the county may file a motion to reconsider any of the conclusions the Board has reached above.

CONCLUSION

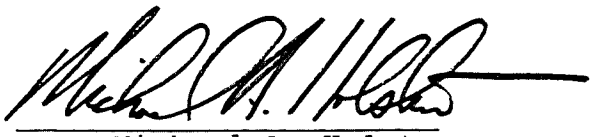
The county's resolution and order dated August 25, 1987 is stayed pending resolution of this appeal.

Pursuant to ORS 197.845, petitioners submitted an undertaking in the amount of $5,000. However, the undertaking is signed by one of the petitioners, as principal. No sureties signed the undertaking. The undertaking is not acceptable.

Petitioners must file an undertaking accompanied by proof the surety thereon is qualified by law to issue surety insurance as defined in ORS 731.186. The principal and surety shall undertake to pay all reasonable attorney's fees and actual damages which may be awarded by the Board in the event the land use decision under appeal shall be affirmed.

The stay shall be effective from the date the undertaking above-described is filed with the Board.

Dated this 8th day of September, 1987.



Michael A. Holstun
Referee

FOOTNOTES

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1 Some of the facts described in this order appear in the county's resolution and order. Other facts were established during the September 4, 1987 telephone conference. In Larson v. Portland, 12 Or LUBA 421 (1984) we rejected a motion for stay where the motion was accompanied by no supporting legal argument, affidavits or materials from the proceeding below. In this case, the order appealed specifies some facts, other facts were specified during the September 4, 1987 conference and legal argument was supplied orally by both parties.

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2 During the telephone conference the county suggested that this Board has no authority to stay or void the county's contracts for removal of the bridge. See Larson, supra, at 423, note 2. The Board agrees. The Board does, however, have authority to stay the county's land use decision. Here the land use decision was to order the county roadmaster to take affirmative steps to remove the Weddle Bridge. ORS 197.845 gives the Board authority to stay that order.

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3 We have not been provided a copy of the Linn County Zoning Ordinance. The parties advised the Board of the substance of the county's zoning ordinance requirements during the September 4, 1987 conference.