

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3 STANDARD INSURANCE COMPANY, an)
4 Oregon Corporation,)
5 Petitioner,)
6 vs.)
7 WASHINGTON COUNTY,)
8 Respondent,)
9 and)
10 LLOYD POWELL and ASSOCIATES,)
11 Intervenor-Respondent.)

LUBA No. 88-109
ORDER ON
MOTION FOR STAY

12 Petitioner moves, pursuant to ORS 197.845(1) and
13 OAR 661-10-068, for a stay of a county decision approving a
14 comprehensive plan map amendment from Industrial (IND) to
15 Neighborhood Commercial (NC) for a ten acre tract at the
16 intersection of Walker Road and 185th Avenue.

17 FACTS

18 This is the third time a plan map amendment from IND to NC
19 for the subject property has been appealed to LUBA. Our first
20 two reviews resulted in decisions remanding the amendment.

21 Standard Insurance Company v. Washington County, ___

22 Or LUBA ___ (LUBA No. 87-020, September 1, 1987) (Standard I);

23 Standard Insurance Company v. Washington County, ___

24 Or LUBA ___ (LUBA No. 88-005, June 7, 1988) (Standard II).

25 Our decision in Standard II was appealed to the Court of
26 Appeals, which issued an opinion affirming our decision on

1 October 5, 1988. Standard Insurance Company v. Washington
2 County, 93 Or App 276, ___ P2d ___ (1988). A petition for
3 review of the Court of Appeals decision was filed with the
4 Oregon Supreme Court. The Supreme Court issued an order
5 acknowledging withdrawal of the petition for review on
6 January 10, 1989.

7 On November 8, 1988, the Washington County Board of
8 Commissioners (board of commissioners) adopted a resolution and
9 order approving the plan change. Petitions for reconsideration
10 of that decision were filed on November 8 and 9, 1988. Under
11 the Washington County Community Development Code (CDC), if a
12 petition for reconsideration of a decision of the board of
13 commissioners is timely filed, that decision does not become
14 final until either reconsideration is denied or a reconsidered
15 decision is adopted.¹ On November 9, 1988, the subject
16 property was annexed by the City of Hillsboro. On November 15,
17 1988, the board of commissioners denied the petitions for
18 reconsideration.²

19 REQUIREMENTS FOR STAYING A LAND USE DECISION

20 Under ORS 197.845(1), this Board may grant a stay of a land
21 use decision if the applicant for a stay demonstrates:

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

24 "(b) That the petitioner will suffer irreparable
injury if the stay is not granted."

25 A. Colorable Claim of Error

26 Petitioner contends that the county did not have

1 jurisdiction to enter the order appealed from because the
2 matter was still within the jurisdiction of the Court of
3 Appeals. Petitioner maintains that when a case is in the Court
4 of Appeals, jurisdiction cannot be simultaneously in the
5 tribunal from which the appeal is taken. Murray Well-Drilling
6 v. Deisch, 75 Or App 1, 704 P2d 1159 (1985), rev denied 300 Or
7 545 (1986) (jurisdiction over a matter cannot be simultaneously
8 with the trial court and the Court of Appeals).

9 Petitioner asserts that one ground for remand in both
10 Standard I and Standard II was that the county's analysis of
11 traffic impacts due to the approved plan amendment was
12 inadequate. According to petitioner, the county once again
13 approved the plan amendment without an adequate analysis of
14 traffic impacts. Petitioner argues the record shows that the
15 traffic impact analysis submitted by intervenor-respondent
16 (intervenor) at the November 1, 1988 hearing before the board
17 of commissioners was not intended by its author to be used as a
18 traffic impact study of the 185th Avenue corridor.

19 Intervenor replies that the county did not lose its
20 regulatory authority over the subject property simply because
21 an appeal from a previous county decision was filed. See
22 DeWolfe v. Clackamas County, 6 Or LUBA 56 (1982) (decision made
23 by county on reconsideration, after an appeal to LUBA was
24 filed, mooted that appeal). Intervenor argues petitioner's
25 jurisdictional claim of error has no merit on its face and,
26 therefore, is not sufficient to support a stay.

1 Intervenor also contends that petitioner's claim of an
2 inadequate traffic impacts analysis is insufficient to
3 constitute a colorable claim of error. According to
4 intervenor, petitioner did not identify the applicable
5 standards governing the county's traffic impact analysis or
6 explain why the county's analysis is inadequate. Intervenor
7 further argues the county's decision reflects the traffic
8 impact analyses performed and the record includes these
9 analyses. Intervenor contends that because petitioner's claim
10 of error lacks citation to legal authority and explanation of
11 pertinent facts, it provides no assurance that the claim of
12 error has any validity. Larson v. Portland Historical
13 Landmarks Commission, 12 Or LUBA 421 (1984).

14 We have said the requirement of ORS 197.845(1)(a) that
15 petitioner demonstrate a colorable claim of error is not a
16 demanding requirement. Rhodewalt v. Linn County, ___ Or
17 LUBA ___ (LUBA No. 87-078, September 8, 1987, Order Allowing
18 Stay). In Dames v. City of Medford, 9 Or LUBA 433, 438 (1984),
19 we explained:

20 "In order to establish evidence of a colorable claim
21 of error, it is not necessary to show the petitioner
22 will prevail on the merits. It is necessary to show
23 the errors alleged are sufficient to result in
24 reversal or remand of the decision if found to be
25 correct. See Von Weidlein Int'l. v. Young, 16 Or App
26 81, 514 P2d 560, 515 P2d 936, 517 P2d 295, rev den
(1973). * * * "

25 To date, neither this Board nor the appellate courts have
26 squarely addressed the issue of whether a local government has

1 jurisdiction to act on a quasi-judicial matter while an appeal
2 of its decision in the matter is pending before us or before
3 the appellate courts. The case cited by petitioner in support
4 of its argument that the county lacks such authority, Murray
5 Well-Drilling v. Deisch, supra, concerns the allocation of
6 jurisdiction between a circuit court and the Court of Appeals
7 when an appeal of the circuit court decision is filed pursuant
8 to ORS ch 19. Furthermore, in the case cited by intervenor in
9 support of its argument that the county has such authority,
10 DeWolfe v. Clackamas County, supra, the question of whether the
11 county had jurisdiction to issue a new decision in the matter
12 while its previous decision was on appeal to us was not raised
13 before LUBA.

14 Thus, petitioner's claim of error raises a legal issue not
15 heretofore decided by us or the appellate courts. Although we
16 express no opinion on whether petitioner will ultimately
17 prevail in its argument that the appealed decision should be
18 reversed because the county lacked jurisdiction over the
19 matter, we cannot at this point say that petitioner's claim is
20 frivolous or so lacking in merit that petitioner failed to
21 carry its burden to show colorable claim of error. City of
22 Oregon City v. Clackamas County, ___ Or LUBA ___ (LUBA
23 No. 88-098, December 16, 1988, Order on Motion for Stay), slip
24 op 11. Petitioner's motion for stay demonstrates a colorable
25 claim of error.³

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1 B. Irreparable Injury

2 Petitioner claims it is the owner of a nearby site
3 designated Community Business District (CBD). Petitioner
4 asserts the county found that petitioner's site is the only
5 site in the vicinity which is suitable and appropriately
6 designated to be considered an alternative to intervenor's
7 proposed shopping center site. Record 49. Petitioner argues
8 it will be irreparably harmed by the creation of a second
9 shopping center site nearby because the value of its property
10 will be reduced. In addition, petitioner argues that if
11 construction of a shopping center on intervenor's site is begun
12 while this appeal is pending, "that construction will be a fait
13 accompli" and "[t]he effect may be to deny [petitioner] the
14 right to an effective appeal given to it by law." Reply to
15 Response to Motion for Stay 5.

16 Intervenor argues that petitioner has not adequately
17 specified the injury it will suffer if the county's decision is
18 not stayed, as it has not quantified the losses it claims it
19 will suffer and has not supported its claims with affidavits or
20 other evidence. Intervenor argues petitioner's claim of
21 irreparable injury falls far short of the requirement that
22 proof of such harm be "clear and convincing." Larson v.
23 Portland Historical Landmarks Commission, 12 Or LUBA at 422.

24 Intervenor also argues that the conduct feared by
25 petitioner is speculative, not probable. Intervenor
26 acknowledges that the owners of the subject property intend to

1 proceed with construction of a shopping center when building
2 permits can be obtained. However, intervenor contends that
3 issuance of such building permits is dependent on development
4 review approval by the City of Hillsboro. According to
5 intervenor, petitioner's appeal of such approval is currently
6 pending before the Hillsboro City Council, and until the city
7 council acts to deny petitioner's appeal, building permits for
8 a shopping center on the subject property cannot be issued.

9 In City of Oregon City v. Clackamas County, supra, we cited
10 with approval the following explanation of our view of the
11 irreparable injury criterion:

12 "In order to find irreparable injury, the Board * * *
13 must find there is no pecuniary standard with which to
14 measure damages, and the conduct complained of must be
15 unlawful and probable and not simply threatened or
16 feared. Winston v. Fleischner, 110 Or 554, 233 P2d
17 924 (1924); Bates v. Dept. of Motor Vehicles, 30 Or
App 791, 568 P2d 686 (1977). The injury must also be
substantial and unreasonable. Jewett v. Dearhorn
Enterprises, Inc., 281 Or 469, 575 P2d 154 (1978)."
McGreer v. City of Rajneeshpuram, 9 Or LUBA 406, 410
(1983).

18 We went on to analyze our other decisions on motions for
19 stay and set out five questions which must be answered in the
20 affirmative in order for us to find that the irreparable injury
21 criterion for a stay is satisfied. The first of these
22 questions is "has the petitioner adequately specified the
23 injury he or she will suffer?" City of Oregon City v.
24 Clackamas County, supra, slip op at 12. In Larson v. Portland
25 Historical Landmarks Commission, 12 Or LUBA at 423, we said
26 that an allegation of irreparable harm must be "supported by

1 facts demonstrating the validity of the claim." (Emphasis in
2 original.) In McGreer v. City of Rajneeshpuram, 7 Or LUBA 416,
3 417 (1983), we stated that petitioners must present "clear and
4 convincing proof that the alleged injury is in fact real or
5 there is a high probability it will take place."

6 In this case, petitioner has not supported its claim with
7 affidavits or citations to facts in the record showing that
8 amending the plan map designation of the subject property to NC
9 or constructing a shopping center on the subject property will
10 decrease the value of its nearby CBD designated site.

11 Petitioner has not offered us proof that the decrease in
12 property value it fears will actually result from the county's
13 decision if the decision is not stayed.⁴ Petitioner has
14 failed to specify adequately the injury it will suffer; and,
15 therefore, has not adequately demonstrated irreparable harm.⁵

16 Because petitioner has not demonstrated it will suffer
17 irreparable injury, we deny the motion for stay.

18 Dated this 6th day of February, 1989.

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Corinne C. Sherton
Referee

FOOTNOTES

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Washington County Community Development Code (CDC) 211-2 provides:

"Decisions of the Board on an application shall be deemed final as follows:

"211-2.1 If no petition for reconsideration is timely filed, the decision shall be deemed final on the date notice of the decision was provided to the parties;

"211-2.2 If a petition for reconsideration is filed and denied, the decision shall be deemed final on the date notice of the denial of reconsideration is provided to the parties;

"211-2.3 If a petition is filed and reconsideration granted, the decision shall be deemed final on the date notice of decision on the development, as reconsidered, is provided."

14 2

On December 20, 1988, the Hillsboro City Council made a decision denying the same petitions for reconsideration. That decision is on appeal in Standard Insurance Company v. City of Hillsboro, LUBA No. 88-120. A separate order on petitioner's motion for stay in that appeal is issued this date.

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Because we find that petitioner's jurisdictional claim constitutes a colorable claim of error, we need not determine whether petitioner's claim of lack of an adequate traffic impacts analysis also constitutes a colorable claim of error. However, we note that although petitioner's allegation may have merit, in that lack of an adequate traffic impacts analysis was one basis for remand in Standard I and Standard II, petitioner does not explain in its motion in what way the county's decision is inadequate with regard to analysis of traffic impacts or cite in its motion any legal authority for its claim. See Larson v. Portland Historical Landmarks Commission, 12 Or LUBA at 423. After intervenor pointed to reports on traffic impacts in the record, petitioner pointed to evidence in the record which it claims demonstrates that one traffic study relied on by the county was inapplicable. However, petitioner does not explain why its view of the traffic report

1 in question would result in our reversal or remand of the
2 county's decision.

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4 To the extent petitioner claims that the plan designation
5 change itself decreases the value of petitioner's property, we
6 note that in order to show irreparable harm, petitioner would
7 have to show why obtaining reversal or remand of the county's
8 plan change on the merits of this appeal would not repair any
9 damage petitioner suffered during the pendency of the appeal.
10 To the extent petitioner claims that construction of a shopping
11 center on the subject site would decrease the value of
12 petitioner's property, petitioner would still have to explain
13 why success in this appeal would not remedy any harm suffered
14 by petitioner. In Grindstaff v. Curry County, 15 Or LUBA 602,
15 603 (1986), we expressed doubt that potential costs petitioners
16 might incur if forced to pursue litigation to remove illegal
17 construction are the sort of harm referred to in
18 ORS 197.845(1)(b).

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13 We also note that insofar as petitioner's claim of
14 irreparable harm is based upon construction of a shopping
15 center occurring on the subject property, as opposed to the plan
16 change itself, petitioner's motion for stay is premature. As
17 intervenor points out, there is no possibility that building
18 permits for a shopping center can be issued until the City of
19 Hillsboro makes a final decision on the pending appeal of the
20 approval of development permits for the shopping center. See
21 Grindstaff v. Curry County, supra.