

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 STANDARD INSURANCE COMPANY, an)
Oregon Corporation,)

4 Petitioner,)

5 vs.)

6 CITY OF HILLSBORO,)

7 Respondent,)

8 and)

9 HILLMAN POWELL COMPANY and)
10 ALBERTSON'S, INC.,)

11 Intervenors-Respondent.)

LUBA No. 88-120

ORDER ON
MOTION FOR STAY

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

18 FACTS

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

22 Standard Insurance Company v. Washington County, ___

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

24 Standard Insurance Company v. Washington County, ___

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

26 third appeal of the plan amendment is pending before LUBA in

1 Standard Insurance Company v. Washington County, LUBA

2 No. 88-109. See n 2, infra.

3 Our decision in Standard II was appealed to the Court of
4 Appeals, which issued an opinion affirming our decision on
5 October 5, 1988. Standard Insurance Company v. Washington
6 County, 93 Or App 276, ___ P2d ___ (1988). A petition for
7 review of the Court of Appeals decision was filed with the
8 Oregon Supreme Court. The Supreme Court issued an order
9 acknowledging withdrawal of the petition for review on
10 January 10, 1989.

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

20 On November 9, 1988, the subject property was annexed by
21 the City of Hillsboro. On December 20, 1988, the Hillsboro
22 City Council (city council) denied the petitions for
23 reconsideration filed with the board of commissioners on
24 November 8 and 9, 1989.² The city's December 22, 1988,
25 "Notice of Decision" states as follows:

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1 " * * * Because the properties were annexed
2 immediately after filing of the Petitions [for
3 reconsideration], and because the City has not yet
4 adopted City land use regulations for these
5 properties, the Washington County Community
Development Code remains effective on the site, and
the Petitions filed prior to annexation came under the
City's jurisdiction." Record 168.

6 CHALLENGES TO PETITIONER'S MOTION

7 A. Improper Service

8 The city and intervenors-respondent (intervenors) assert
9 that petitioner failed to serve a copy of its motion for stay
10 and supporting materials on the applicant³ on the same day it
11 filed its motion with the Board, as is required by
12 OAR 661-10-068(2). The city argues this failure to follow
13 LUBA's procedural rules is prejudicial to the applicant because
14 it may prevent it from filing a timely response to the motion
15 for stay. The city also argues that this failure prejudices
16 the city because it prevents the city from being able to rely
17 on the applicant's response. The city asks that petitioner's
18 motion for stay be denied because it is procedurally defective.

19 Petitioner concedes that its motion for stay should have
20 been served on the applicant on January 4, 1989, when
21 petitioner filed its motion with LUBA. However, petitioner
22 argues that its error was harmless because the motion has since
23 been served on the applicant and the applicant filed a motion
24 to intervene and a response to petitioner's motion to stay on
25 January 16, 1989. According to petitioner, the applicant has
26 not been prejudiced because it has notice and a full

1 opportunity to participate in the proceedings.

2 Our rules provide "[t]echnical violations not affecting the
3 substantial rights of parties shall not interfere with the
4 review of a land use decision." OAR 661-10-005. The
5 "substantial rights of parties" referred to in the quoted
6 provision are those identified elsewhere in the rule as "the
7 speediest practicable review" and "reasonable notice and
8 opportunity to intervene, reasonable time to prepare and submit
9 their cases, and a full and fair hearing." Kellogg Lake
10 Friends v. City of Milwaukie, ___ Or LUBA ___ (LUBA No. 88-022,
11 June 13, 1988, Order on Motion to File an Amended Statement of
12 Standing), slip op 4.

13 We view petitioner's failure to serve a copy of its motion
14 on the applicant on the same day it filed the motion with the
15 Board as a technical violation of our rules. Therefore, the
16 late service on the applicant is grounds for denying
17 petitioner's motion for stay only if the substantial rights of
18 the applicant or the city were prejudiced thereby. The
19 applicant was able to file a motion to intervene and a response
20 to the motion to stay in a timely manner. In these
21 circumstances, we conclude neither the applicant nor the city
22 were prejudiced by the late service of the motion on the
23 applicant.

24 B. Failure to Append Copies of Necessary Documents

25 The city claims that petitioner's motion fails to comply
26 with the following requirement of OAR 661-10-068(1)(e):

1 "(1) A motion for a stay of a land use decision shall
2 include:

3 " * * * * *

4 "(e) A copy of the land use decision under review
5 and copies of all ordinances, resolutions,
6 plans or other documents necessary to show
7 the standards applicable to the decision
8 under review."

9 The city argues that this rule is designed to enable LUBA
10 to understand quickly the basis for the motion for stay and to
11 aid opposing parties in forming their responses to the motion.
12 According to the city, petitioner's failure to append to its
13 motion the plans, ordinances or other documents on which the
14 motion is based made it difficult for the city to formulate its
15 response; and, therefore, the stay should be denied.

16 The burden to demonstrate that the statutory requirements
17 for a stay of a land use decision are satisfied is on the
18 petitioner for a stay. Larson v. Portland Historical Landmarks
19 Commission, 12 Or LUBA 421, 422 (1984). If a petitioner for a
20 stay neglects to append to its motion plans, ordinances or
21 other documents necessary to an understanding of the bases it
22 asserts for granting a stay, the risk the petitioner runs is
23 that the stay will be denied because the petitioner failed to
24 carry its burden of demonstrating that the standards for a stay
25 were met, not that the stay will be denied for failure to
26 comply with OAR 661-10-068(1)(e).

27 REQUIREMENTS FOR STAYING A LAND USE DECISION

28 Under ORS 197.845(1), this Board may grant a stay of a land

1 use decision if the petitioner for a stay demonstrates:

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

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

5 A. Colorable Claim of Error

6 Petitioner contends that the city did not have jurisdiction
7 to make the appealed decision because the matter was still
8 within the jurisdiction of the Court of Appeals. Petitioner
9 maintains that when a case is in the Court of Appeals,
10 jurisdiction cannot be simultaneously in the tribunal from
11 which the appeal is taken. Murray Well-Drilling v. Deisch, 75
12 Or App 1, 704 P2d 1159 (1985), rev denied 300 Or 545 (1986)
13 (jurisdiction over a matter cannot be simultaneously with the
14 trial court and the Court of Appeals).

15 Petitioner asserts that one ground for remand in both
16 Standard I and Standard II was that the county's analysis of
17 traffic impacts due to the approved plan amendment was
18 inadequate. According to petitioner, the county board of
19 commissioners once again approved the plan amendment without an
20 adequate analysis of traffic impacts.

21 Intervenors reply that the city was not without regulatory
22 authority over the subject property simply because an appeal
23 from a previous county decision was filed. See DeWolfe v.
24 Clackamas County, 6 Or LUBA 56 (1982) (decision made by county
25 on reconsideration, after an appeal to LUBA was filed, mooted
26 that appeal). The city argues that the pendency of an appeal

1 of a land use decision does not remove jurisdiction from a
2 local government to make a new land use decision concerning the
3 same property. Both the city and intervenors argue
4 petitioner's jurisdictional claim of error has no merit on its
5 face and, therefore, is inadequate to support a stay.

6 The city argues that petitioner's claim of an inadequate
7 traffic impacts analysis is not a colorable claim of error
8 because petitioner alleges only that the county board of
9 commissioners, not the city council, failed to consider traffic
10 impacts adequately. Intervenors also contend that petitioner's
11 claim of an inadequate traffic impacts analysis is insufficient
12 to constitute a colorable claim of error. According to
13 intervenors, petitioner did not identify the applicable
14 standards governing the city's traffic impact analysis or
15 explain why the city's analysis is inadequate. Intervenors
16 further argue the city's decision reflects the traffic impact
17 analyses performed, and the record includes these analyses.
18 Intervenors contend that because petitioner's claim of error
19 lacks citation to legal authority and explanation of pertinent
20 facts, it provides no assurance that the claim of error has any
21 validity. Larson v. Portland Historical Landmarks Commission,
22 supra.

23 Finally, intervenors point out that petitioner's notice of
24 intent to appeal in this case identified the land use decision
25 appealed from only as the city council's decision to deny
26 reconsideration, and did not identify as a subject of the

1 appeal the underlying decision to approve the proposed plan
2 designation change made by the board of commissioners on
3 November 8, 1988. Intervenors argue that petitioner has made
4 no attempt to demonstrate error in the city's decision to deny
5 reconsideration. According to intervenors, such an effort
6 would necessarily fail because there are no standards which
7 govern the city's decision to grant or deny reconsideration.

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

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

19 To date, neither this Board nor the appellate courts have
20 squarely addressed the issue of whether a local government has
21 jurisdiction to act on a quasi-judicial matter while an appeal
22 of its prior decision in the matter is pending before us or
23 before the appellate courts. The case cited by petitioner in
24 support of its argument that the county lacks such authority,
25 Murray Well-Drilling v. Deisch, supra, concerns the allocation
26 of jurisdiction between a circuit court and the Court of

1 Appeals when an appeal of the circuit court decision is filed
2 pursuant to ORS ch 19. Furthermore, in the case cited by
3 intervenor in support of its argument that the county has such
4 jurisdiction, DeWolfe v. Clackamas County, supra, the question
5 of whether the county had jurisdiction to issue a new decision
6 in the matter while its earlier decision was on appeal to us
7 was not raised. The cases cited by the city deal with whether
8 a subsequent legislative decision by a local government made a
9 pending appeal of a prior quasi-judicial decision moot.

10 Thus, petitioner's claim of error raises a legal issue not
11 heretofore decided by us or the appellate courts. Although we
12 express no opinion on whether petitioner will ultimately
13 prevail in its argument that the appealed decision should be
14 reversed because the city council lacked jurisdiction over the
15 matter, we cannot at this point say that petitioner's claim is
16 frivolous or so lacking in merit that petitioner failed to
17 carry its burden to show colorable claim of error.⁴ City of
18 Oregon City v. Clackamas County, ___ Or LUBA ___ (LUBA
19 No. 88-098, December 16, 1988, Order on Motion for Stay), slip
20 op 11. Petitioner's motion for stay demonstrates a colorable
21 claim of error.⁵

22 B. Irreparable Injury

23 Petitioner claims it is the owner of a nearby alternative
24 shopping center site designated Community Business District
25 (CBD). Petitioner argues it will be irreparably harmed if the
26 applicant begins construction of a shopping center on the

1 subject property because the value of its property will be
2 reduced. Petitioner argues that it has the right "to compete
3 in the open market under a fair and uniform application of land
4 use laws." Reply to Both Responses to Motion for Stay 4.
5 Petitioner further asserts that development permits for
6 intervenors' proposed shopping center have been
7 administratively approved by the city, and will be considered
8 on appeal before the city council on February 7, 1989.

9 The city and intervenors argue that petitioner has not
10 adequately specified the injury it will suffer if the county's
11 decision is not stayed, as it has not quantified the losses it
12 claims it will suffer and has not supported its claims with
13 affidavits or other evidence. Intervenors argue petitioner's
14 claim of irreparable injury falls far short of the requirement
15 that its proof of such harm be "clear and convincing." Larson
16 v. Portland Historical Landmarks Commission, 12 Or LUBA at 422.

17 The city also argues that ownership of nearby property does
18 not in itself establish that petitioner will suffer irreparable
19 harm from the construction of a shopping center on the subject
20 property, as petitioner does not have an exclusive right under
21 the preexisting plan designation to develop a shopping center
22 in this area. According to the city, the harm that petitioner
23 alleges, a competing shopping center, is not an unreasonable
24 harm.

25 Intervenors and the city also argue that the conduct feared
26 by petitioner is speculative, not probable. Intervenors

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

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

13 "In order to find irreparable injury, the Board * * *
14 must find there is no pecuniary standard with which to
15 measure damages, and the conduct complained of must be
16 unlawful and probable and not simply threatened or
17 feared. Winston v. Fleischner, 110 Or 554, 233 P2d
18 924 (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).

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

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

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

12 Petitioner has not offered proof that the decrease in property
13 value it fears will actually result from the city's decision if
14 the decision is not stayed.⁶ Petitioner has failed to
15 specify adequately the injury it will suffer; and, therefore,
16 has not adequately demonstrated irreparable harm.⁷

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

19 Dated this 6th day of February, 1989.

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22 
23 Corinne C. Sherton
24 Referee
25
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1 FOOTNOTES

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

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

8 "211-2.1 If no petition for reconsideration is timely
9 filed, the decision shall be deemed final on
10 the date notice of the decision was provided
11 to the parties;

12 "211-2.2 If a petition for reconsideration is filed
13 and denied, the decision shall be deemed
14 final on the date notice of the denial of
15 reconsideration is provided to the parties;

16 "211-2.3 If a petition is filed and reconsideration
17 granted, the decision shall be deemed final
18 on the date notice of decision on the
19 development, as reconsidered, is provided."

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22 On November 15, 1988, the board of commissioners made a
23 decision denying the same petitions for reconsideration. That
24 decision is on appeal in Standard Insurance Company v.
25 Washington County, LUBA No. 88-109. A separate order on
26 petitioner's motion for stay in that appeal is issued this date.

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29 The original applicant for a plan designation change for
30 the subject property was Lloyd Powell and Associates. Lloyd
31 Powell and Associates filed a motion to intervene on the side
32 of respondent in Standard Insurance Company v. Washington
33 County, LUBA No. 88-109, asserting that it is the applicant.
34 Intervenor-respondent in this appeal, Hillman Powell Company
35 and Albertson's, Inc. (intervenors), are successors in interest
36 to Lloyd Powell and Associates. According to intervenors,
37 petitioner did not serve a copy of its motion for stay on any
38 of the three. We note the parties have treated Hillman Powell
39 Company and Albertson's, Inc. as the applicants in this appeal
40 proceeding. We further note that counsel for intervenors in
41 the two appeals is the same.

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We note that whether petitioner in this proceeding appeals only the city's decision to deny reconsideration or also appeals the underlying decision initially made by the board of commissioners to approve the plan designation change has no bearing on petitioner's claim that the city council lacked jurisdiction to act on the petitions for reconsideration.

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 city'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.

We note that if petitioner claims that construction of a shopping center on the subject site would decrease the value of petitioner's property, petitioner must explain why success in this appeal would not remedy the harm suffered by petitioner. In Grindstaff v. Curry County, 15 Or LUBA 602, 603 (1986), we expressed doubt that potential costs petitioners might incur if forced to pursue litigation to remove illegal construction are the sort of harm referred to in ORS 197.845(1)(b).

We also note that petitioner's motion for stay is premature. As intervenors and the city point out, there is no possibility that building permits for a shopping center can be issued until the city council makes a final decision on the pending appeal of the approval of development permits for the shopping center. See Grindstaff v. Curry County, supra.