

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

FRITZ and JOANN von LUBKEN)
 and von LUBKEN ORCHARDS, INC.,)
)
 Petitioners,)
)
 vs.)
)
 HOOD RIVER COUNTY,)
)
 Respondent,)
)
 and)
)
 BROOKSIDE, INC.,)
)
 Intervenor-Respondent.)

LUBA No. 89-023

ORDER ON
MOTION FOR STAY

Petitioners ask that we stay the county's decision approving a conditional use permit for a "169 acre golf course, club house, restaurant and lounge on lands zoned exclusive farm use in Hood River County." Motion for Stay 2. Petitioners own and operate an orchard on lands that are adjacent and in proximity to the proposed golf course.

The county's decision was final on March 6, 1989. Petitioners appealed that decision to this Board on March 24, 1989. Petitioners complain that construction of the golf course has begun, even though our final decision in this matter has not been rendered.¹ According to petitioners:

"The applicant has begun constructing the golf course as authorized by the county's order. As explained in the attached affidavit * * * and the June 1 letter from the Hood River County OSU Extension Agent * * *, Brookside has begun recontouring the land into a golf course, removing trees and striping top soil in the process. The outlines of fairways, tee boxes and

1 greens are unmistakably present. Petitioners seek a
2 stay of the county's order, prohibiting the applicant
3 from taking any further action to convert the land to
the nonfarm use of a golf course until the appeal is
resolved." Motion for Stay 5.

4 We may stay a land use decision pending our review of the
5 decision if petitioners demonstrate (1) a colorable claim of
6 error in the decision under review and (2) that petitioners
7 will suffer irreparable injury if the stay is not granted.
8 ORS 197.845(1); OAR 661-10-068(1)(c). See e.g., City of Oregon
9 City v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-098,
10 Order on Motion for Stay, December 16, 1988). We turn first to
11 petitioners' claim of irreparable injury and conclude
12 petitioners have failed to demonstrate such injury.

13 In arguing that they will be irreparably injured by
14 intervenor's actions, petitioners contend:

15 "* * * the applicant has begun constructing the golf
16 course, even though the order of approval is on
17 appeal. The construction includes removal of the
18 Class II and III soils as part of contouring. On the
19 site of a number of fairways, up to approximately 5
20 feet of Class II and III soils has been removed. * * *
21 In some areas, the sandy substrate, useful for
22 drainage but incapable of sustaining farming
23 practices, has been exposed. * * * The topsoil has
24 been placed in mounds on the property for later use as
25 greens and tees or pushed over the bank of Indian
26 Creek. * * * The removal of Class II and III soils and
the mounding of the topsoil will render the property
unfit for orchard and other farm use. * * *

"Hood River County prohibits development on lands
capable of sustaining accepted farming practices.
* * * If the applicant's ongoing construction is not
halted, the applicant's land will no longer be capable
of sustaining farming activities. As a consequence,
Hood River County's prohibition on development of
lands capable of sustaining accepted farming practices
will no longer apply to the applicant's property. The

1 result will be land that is suitable for nonfarm use
2 without significant restriction.

3 "Petitioners will be harmed both by the loss of
4 significant restrictions on nonfarm uses of the
5 applicant's land and by the resulting development of a
6 nonfarm use on the adjacent property. As owners and
7 managers of an orchard on land zoned for exclusive
8 farm use and, at present, surrounded by land similarly
9 zoned, petitioners are protected from development of
10 incompatible nonfarm uses on adjacent property. Loss
11 of this protection would be a significant detriment to
12 petitioners' continued use of their land for orchard
13 purposes." Motion for Stay 24-25.

14 Later in their motion for stay petitioners recognize that

15 "nothing in the EFU standards appears to prevent a
16 person from destroying the quality of their own farm
17 land, so long as they do not in the process convert it
18 to a nonfarm use without approval. Restoration may be
19 physically possible, but there may be no legal
20 authority to order it done.

21 "* * * * *

22 "It might be argued that issuing a stay of the
23 county's order at this point will not halt the
24 applicant's activities, if it is true that the owner
25 of farm land can take steps to destroy the quality of
26 his or her farm land while not violating the EFU zone
standards. However, the applicant is acting pursuant
to the county's order of approval and the alterations
of the land is serving to establish the nonfarm use.
A stay of the order will prevent the applicant from
taking further steps related to the construction of
the nonfarm use; random, pointless destruction of the
quality of the land could continue to take place, but
its seems likely not to be in anyone's interest."²
Motion for Stay 28-30.

27 Intervenor responds that the clearing and contouring
28 activities are permissible in the EFU zone. Intervenor also
29 disputes petitioners' contention that the land is being
30 destroyed or otherwise rendered unfit for agricultural purposes.

31 "No work requiring a building permit has commenced nor
32 is the golf course in any way near operation.

1 Further, * * * all removed topsoil is being replaced -
2 as planned from the beginnng. * * * The purpose of
3 moving the soil was not to 'scalp' the land, but to
allow contouring and leveling without damaging the
topsoil."³ Response to Motion for Stay 2.

4 Intervenor goes on to explain:

5 "Soils are indeed being moved; soils are not being
6 removed. The land is being prepared for growing
7 vegetation. This is hard to distinguish from any
8 other agricultural pursuit.

9 "* * * Even assuming applicant was not replacing the
10 topsoil [the county's] definition [of agricultural
11 land] would still apply to the property. As pointed
12 out by the extension agent * * *, even the minimal
13 area from which the topsoil has been removed 'will
14 probably grow grass.' In their worse case scenario
15 petitioners present no evidence any of this land would
16 be unsuitable for grazing and thus would remain as
17 agricultural land. In fact much of the area within
the golf course and much of the surrounding area was
in pasture or used for grazing at the time this permit
was granted. * * * If suitable for farm use, any
farm use, the lands remain agricultural lands.
Furthermore, if petitioners' broad claims are correct
that all land uses surrounding their several parcels
must be restricted to allow them to conduct farm
practices, these surrounding lands remain included
within the definition of agricultural lands regardless
of their characteristics.

18 "While petitioners seem to believe that 'sustaining
19 accepted farming practices' means orchards only, there
is no such wording in the definition of agricultural
20 lands or farming practices. [Emphasis in original.]
In any event, there is no reason to think orchards
21 could not be planted on this land when the topsoil is
replaced. The land would be subject to erosion and
22 much greater threat of injury if applicant's
activities are halted. [Emphasis added.] These lands
23 will remain agricultural land if the golf course is
not permitted. Because petitioners start off their
24 argument with a faulty premise, the remainder of their
chain of maybes has no reality. No injury to
25 petitioners has been specified. Nothing being done
will cause a 'loss of restrictions on development' as
asserted." Response to Motion for Stay 3-4.

1 We agree with intervenor that petitioners fail to show the
2 activities intervenor is pursuing on the property will result
3 in irreparable harm to petitioners. Although the recontouring
4 may result in agricultural lands of worse, or better, quality
5 than presently exist, agricultural lands will remain, and the
6 activity intervenor pursues is a permissible activity within
7 the EFU zone. We can see no basis upon which to find
8 petitioners are irreparably harmed.⁴

9 Petitioners' request for stay is denied.

10 Dated this 27th day of July, 1989.

11
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15 Michael A. Holstun
16 Chief Referee
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FOOTNOTES

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4 The briefing schedule and our final decision in this appeal
5 have been delayed by objections to the record.

6 2
7 Petitioners also suggest that intervenor's actions may
8 provide a basis for intervenor to claim a vested right to
9 continue construction of the golf course. We find petitioners'
10 fear that intervenor might in the future argue the improvements
11 it has made satisfy the multi-factor analysis required to
12 establish a vested right as set forth in Clackamas County v.
13 Holmes, 265 Or 193, 508 P2d 190 (1973), to be far too
14 hypothetical to constitute irreparable harm.

15 3
16 Intervenor also points out that petitioners waited 105 days
17 after intervenor began clearing and recontouring before filing
18 their motion for stay and contend that to "the extent there was
19 disruption of the soil it has been completed." Response to
20 Motion for Stay 2.

21 4
22 In an affidavit attached to intervenor's opposition to the
23 motion for stay, intervenor states:

24 "We have cleared land and are recontouring portions of
25 the property, and large parts to even out sharp slopes
26 which previously existed. * * * Even if the golf
course is eventually disallowed this activity should
improve the ability of the property to support
agricultural uses.

"Topsoil is not being scalped. Topsoil is important
to grow almost anything and the operation of a top
quality golf course requires top quality land
management practices to produce healthy grass and
vegetation. This is much like farming. Our course
superintendent * * * has B.S. degrees in crop science
and horticulture with an emphasis on turf management,
fruit production and pest management. Although a golf
course is classified as a nonfarm use its management
is an agricultural pursuit.

"The photos attached to petitioners' affidavit tell

1 only part of the story. Topsoil is much too valuable
2 to lose. We are moving and mounding topsoil to save
3 it while the underlying ground is contoured. The
4 topsoil will then be relayered at approximately the
5 same depth. We feel it will be more evenly
6 distributed than it was prior to undertaking this
7 work. Most of this work will be completed by the time
8 you read this affidavit.

9 "Our plans for the next three to four months are to
10 continue land preparation, install irrigation systems
11 and plant grass. No building construction or golf
12 course operation will occur until at least 1990 with
13 the possible exception of a temporary maintenance shed
14 (after any necessary permit is required). The
15 activities we have commenced and are planning for this
16 summer are all consistent with agricultural use of our
17 property.

18 "The summer months are the only months land
19 preparation and planting grass can be undertaken.
20 This work cannot be done in the winter. If we are
21 prevented from doing this work and our permit is
22 upheld we will lose an entire year of operation
23 because we could not then plant grass until the spring
24 or summer of 1990. * * *"