

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

3 MIKE BYRNES, SUE ORLASKE,)
4 TSAI Y. CHENG and FRIENDS)
5 OF IMBRIE FARMSTEAD, a)
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1 applicant reserves the right to request demolition in
2 the event that it is not feasible to alter or move a
3 structure or if the structure cannot be made safe
4 through a reasonable expenditure for refurbishment,
5 repair or renovation."

6 On April 11, 1989, the city planning commission voted to
7 delay approval of the request until June 11, 1989, and adopted
8 five conditions of approval. On May 9, 1989, the planning
9 commission adopted findings to support its April 11, 1989
10 decision, and on May 11, 1989, interested parties were provided
11 notice of the planning commission's decision.

12 The planning commission's decision was appealed to the city
13 council. A hearing before the city council was held on June 6,
14 1989, and the city council voted to uphold the planning
15 commission's decision. On June 7, 1989, interested parties
16 were given notice of the city council's decision.

17 MOTION FOR STAY

18 On June 8, 1989, petitioners filed with this Board a notice
19 of intent to appeal and a motion for stay, characterizing the
20 city's decision as follows:

21 "The decision grants a permit to Prendergast &
22 Associates to demolish, by dismantling, three
23 historical structures, a house, a mill and a granary,
24 * * *." Motion for Stay 1.

25 Petitioners contend the city's decision (1) is inconsistent
26 with the city's comprehensive plan, (2) is not supported by
substantial evidence, and (3) is based on an incorrect
interpretation of the city's zoning ordinance. Petitioners
further contend they will suffer irreparable harm if the city's

1 decision is not stayed because

2 "the applicant can proceed at any time after June 11,
3 1989, to demolish the historic structures by
4 dismantling and moving. The applicant has the right
5 under the City's decision to dismantle the structures
6 prior to completion of review of this matter by
7 LUBA." Motion for Stay 5.

8 Petitioners argue the city did not impose a requirement
9 that dismantled pieces be marked or stockpiled to allow proper
10 reconstruction. Further, petitioners contend it is the
11 "historic site and relationship of the structures to each other
12 [that] is vitally important to the cultural resource." Motion
13 for Stay 5. Petitioners explain:

14 "The fact that these buildings constitute a relatively
15 complete farmsite, that they show the evolution of
16 farming over a period of fifty to sixty years * * *,
17 that the buildings contain distinct architectural
18 styles within the site, that the buildings are laid
19 out in the style of the principal landscaping
20 aesthetic of their time and that mature trees exist
21 which were planted to highlight the buildings and
22 define the site show that it is the historical site,
23 not just the buildings, that constitute an important
24 cultural resource. Therefore, even if the buildings
25 are dismantled and can be rebuilt, the destruction of
26 the site will cause irreparable harm to the
petitioners."² Motion for Stay 5-6.

19 LEGAL REQUIREMENTS FOR A STAY OF A LAND USE DECISION

20 ORS 197.845(1) grants LUBA authority to stay a land use
21 decision if petitioners demonstrate:

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

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

25 A. Colorable Claim of Error

26 In demonstrating a colorable claim of error, petitioners

1 need not demonstrate they will prevail on the merits. As long
2 as petitioners show errors that are sufficient to result in
3 reversal or remand of the decision, and we conclude the claim
4 of error is not frivolous, petitioners satisfy the requirement
5 to demonstrate a colorable claim of error. City of Oregon City
6 v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-098, December
7 16, 1988, Order on Motion for Stay); Dames v. City of Medford,
8 9 Or LUBA 433, 438 (1984).

9 Hillsboro Zoning Ordinance (HZO) Section 132(5)(g) provides
10 as follows:

11 "Applications for alteration, demolition, or moving
12 permits for a designated cultural resource^[3] which
13 are complete and are in compliance with all other city
14 regulations and ordinances shall not be denied
15 outright. If no action on an application has been
16 taken by the planning commission within sixty days of
17 submission of the completed application, the
18 application shall be considered approved." (Emphasis
19 added.)

20 Petitioners argue

21 "[T]he City improperly construed the applicable law.
22 The City found that Section 132(5)(g) prevented it
23 from denying the permit to dismantle and remove the
24 cultural resource. The City accepted the opinion of
25 the city attorney that, 'the ordinance is designed to
26 delay the alteration or demolition of cultural
resources but is not designed to out-and-out deny
them. It is, in effect, a cooperative ordinance.'" Motion for Stay 4.

27 Petitioners contend this interpretation conflicts with
28 provisions in the city's comprehensive plan requiring
29 protection of historic sites and structures.

30 Although petitioners' argument appears to be at odds with
31 the language in the zoning ordinance stating that application

1 "shall not be denied outright," we are unable to tell from the
2 present filings in this appeal whether the interpretation the
3 city adopted is incorrect when read in context with other
4 related zoning ordinance and plan provisions. We find
5 petitioners have adequately demonstrated a colorable claim of
6 error.⁴

7 B. Irreparable Injury

8 The burden petitioners must carry to demonstrate
9 irreparable injury is described in detail in Oregon City v.
10 Clackamas County, supra, slip op at 11-13. In that opinion we
11 explained:

12 "[W]e have stated on numerous occasions that a request
13 for a stay must be decided on the particular facts
14 presented. See e.g., McGreer v. City of
15 Rajneeshpuram, 8 Or LUBA 402 (1983). We understand
16 our prior decisions effectively to require that we
17 answer all of the following questions in the
18 affirmative, based on the particular facts presented:

- 19 "1. Has the petitioner adequately specified the
20 injury he or she will suffer? * * *
- 21 "2. Is the identified injury one that cannot be
22 compensated adequately in money damages? * * *
- 23 "3. Is the injury substantial and unreasonable? * * *
- 24 "4. Is the conduct petitioner seeks to bar through
25 the stay probable rather than merely threatened
26 or feared? * * *
- 27 "5. If the conduct is probable, is the resulting
28 injury probable rather than merely threatened or
29 feared?" (Citations omitted.)

30 As explained below, we find petitioners have failed to
31 demonstrate the fourth of the above factors, i.e., that the
32 conduct petitioners seek to bar through the stay is probable.

1 In opposing the motion for stay, intervenor contends it
2 "has no plan to take any action concerning the site or the
3 structures on the site pending good faith discussions and
4 negotiations with petitioners, the Trust for Public Lands and
5 other interested groups." Intervenor-Respondent's Response to
6 Petitioners' Motion for Stay 5. Attached to intervenor's
7 response is an affidavit in which intervenor's representative
8 states:

9 "* * * I have consistently informed [petitioners] that
10 I am quite willing to meet to discuss sale of the
11 property. In fact, I have had a series of meetings
12 with the Trust for Public Lands, which has expressed
13 an interest in acquiring the site. Those discussions
14 have not generated a specific proposal from the Trust
15 for Public Lands. However, it is my intention to
16 pursue those discussions with Bowen Blair,
17 representing the Trust for Public Lands, to some
18 conclusion.

19 "* * * other than the improvements to the farm house,
20 [intervenor] has undertaken no steps which would
21 jeopardize the current location and condition of the
22 structures on the property. I have consistently
23 informed the City of Hillsboro that we did not intend
24 to make any alteration of the site until discussions
25 with Friends of Imbrie Farmstead, Trust for Public
26 Lands, the Hillsboro Chamber of Commerce, the
Washington County Historical Museum and the Oregon
Historical Society, concerning the structures on the
site, had reached their conclusion. I reiterated this
commitment to the Hillsboro City Council, on the
record, at the June 6, 1989 appeal hearing, even
though at this hearing, the planning commission's
action for a sixty day delay in the alteration of the
site was upheld.

27 "* * * * *

28 "* * * [B]ased upon my statements to the City of
29 Hillsboro, none of the structures is any imminent
30 jeopardy of destruction, demolition or irreparable
31 alteration. In fact, the farmhouse remains open to
32 the public under the McMenimin families' management as

1 a microbrewery and roadhouse. While I am willing to
2 work cooperatively with any interested group
3 concerning acquisition of the site for preservation of
4 the structures, [intervenor] believes a stay in
5 dealing with the property and structures is both
6 unfair and unjustified. I have committed to pursue
7 the present discussions with the Trust for Public
8 Lands to their conclusion. I remain willing to
negotiate with Friends of Imbrie Farmstead. By the
same token, [intervenor] does not wish to be placed in
a position where the property is 'tied up,' the pace
of such negotiations slows or is discontinued, and
[intervenor] then is unable to examine and implement
other legal alternatives for use of the property."
Affidavit of John Carroll 5-7.

9 At oral argument on the motion for stay, respondent city
10 advised the Board that although the city has granted intervenor
11 a permit to alter a cultural resource, intervenor must also
12 secure a permit under the city's Structural Speciality Code
13 before the structures could actually be altered or demolished.
14 During the same conference with the parties, intervenor and
15 respondent advised the Board that intervenor has neither
16 applied for nor been issued the structural permits that are
17 required for alteration or demolition.

18 In these circumstances, we conclude petitioners have not
19 adequately demonstrated that without a stay their interests
20 will be irreparably harmed. In reaching this conclusion, we
21 rely largely on the lack of evidence that intervenor currently
22 intends to pursue the course of action petitioners fear and the
23 fact that intervenor has neither received nor sought the
24 structural code permits that are required for alteration or
25 demolition. If, during the course of this appeal, intervenor
26 does seek structural code permits for demolition or alteration

1 of the buildings, or takes other action which demonstrates that
2 alteration or demolition is probable, petitioners may move for
3 reconsideration of the motion for stay.⁵

4 As explained above, we conclude petitioners demonstrate a
5 colorable claim of error, but fail to demonstrate they will
6 suffer irreparable injury if the stay is not granted.⁶

7 Petitioners' motion for stay is denied.

8 Dated this 19th day of July, 1989.

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Michael A. Holstun
Chief Referee

FOOTNOTES

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4 The city's findings include the following description of
the Imbrie Farmstead:

5 "The Imbrie Farmstead complex, which is listed on the
6 National Register of Historic Places, includes three
7 primary structures: The Imbrie House, built circa
8 1866; an Octagonal Barn built circa 1913; a granary
9 built circa 1855. Also included in the complex are
the orchard trees at the northeast corner of the site
and the mature deciduous trees surrounding the Imbrie
House. The site is predominately flat. The Imbrie
House is currently occupied by the Cornelius Pass
Roadhouse Tavern, * * *."

10
11 As the record has not been filed in this appeal, we rely on
12 documents submitted by the parties with their memoranda in
13 support of and in opposition to the motion for stay, as well as
documents submitted by the city following oral argument on
petitioners' motion for stay.

14 2

15 Petitioners attach to their motion a letter to the planning
16 commission from a professor of architecture emeritus at the
University of Oregon which states in part:

17 "The early and continued importance of agriculture and
18 the development of the state gives some surviving
19 pioneer farm architecture particular value and
20 meaning. A very small number of relatively complete
21 19th century farm building groups now survives
throughout the state. It is difficult to think of
more than two or three in any one county where both
the house and barn or major outbuildings survives.
Most surviving historic farm buildings are in perilous
condition including even that handful which are on the
National Register of historic places. * * *

22 * * * * *

23 "The Robert Imbrie farm is important in both local and
24 state history. This farm building group is unusually
25 complete. The surviving buildings describe farm
26 development over a period of fifty to sixty years,
from a premechanized to a highly mechanized state.
Each of the three buildings is a good or excellent

1 piece of architecture and each is now rare in Oregon,
2 one of the few survivors of a building type or of
3 style of design. The site also has distinctive
4 planning and a commanding location. The
5 characteristics of these farm buildings indicate a
6 prosperous, intelligent and resourceful farming family.

7 * * * * *

8 "Each of the Imbrie buildings is a fine piece of
9 architecture. The combination, the three buildings
10 with the planting, with the uninterrupted spaces
11 between the buildings and the site, is a superb
12 surviving example of an Oregon farmstead and is of
13 inestimable historic value."

14 _____
15 3

16 The HZO defines "cultural resource" as follows:

17 "Any building, structure, site or object included in
18 the Cultural Resource Inventory and therefore subject
19 to the provisions of this ordinance."
20 HZO Section 132(2)(6).

21 There is no dispute that the Imbrie Farmstead is a cultural
22 resource as defined in the HZO. Accordingly, the Hillsboro
23 Cultural Resource Ordinance (which is Section 132 of the HZO)
24 applies to the city's decision in this matter.

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27 Because we conclude petitioners' contentions concerning
28 HZO Section 132 (5)(g) are sufficient to demonstrate a
29 colorable claim of error, we do not consider petitioners' other
30 allegations of error.

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33 In view of our conclusion that petitioners have failed to
34 demonstrate that alteration or demolition of the structures is
35 probable, we do not decide whether petitioners have adequately
36 demonstrated that the other four factors discussed in Oregon
City v. Clackamas County, supra, are satisfied.

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39 We can appreciate, as petitioners argue in a letter dated
40 July 15, 1989, that it is possible intervenor could secure "all
41 other necessary approvals from the City without notice to
42 interested persons or a hearing" and commence dismantling the

1 structures. However, in this case there simply is no
2 suggestion that intervenor intends to do so. Intervenor's
3 representation of its planned course of action is quite to the
4 contrary. In any event, the circumstances presented in this
5 case are significantly different from those presented in
Rhodewalt v. Linn County, _____ Or LUBA _____ (LUBA No. 87-078,
6 September 8, 1987, Order Allowing Stay), cited by petitioners,
7 where the removal of a historic bridge sought to be stopped by
8 staying the county's decision was in fact proceeding.
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