

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

3
4 BARBARA JOSEPH DION,
5 *Petitioner,*

6
7 vs.

8
9 BAKER COUNTY,
10 *Respondent,*

11
12 and

13
14 KERRY GULICK and LINDA McEWAN,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2015-052

18 ORDER

19 **MOTION TO INTERVENE**

20 Kerry Gulick and Linda McEwan (intervenors), the applicants below,
21 move to intervene on the side of the county. There is no opposition to the
22 motion, and it is allowed.

23 **MOTION TO STAY**

24 The challenged decision in this appeal is a county decision that approves,
25 following a LUBA remand, an application for a conditional use permit to
26 expand an existing aggregate operation. For background, see *Dion v. Baker*
27 *County*, __ Or LUBA __ (LUBA No. 2014-021, December 9, 2014). On the
28 same date that petitioners filed the appeal of the decision on remand, petitioner
29 filed a motion for stay of the challenged decision, pursuant to OAR 661-010-

1 0068.¹ Intervenors filed a response, to which petitioner filed a reply. We now
2 resolve the motion for stay.

¹ OAR 661-010-0068 provides, in relevant part:

“(1) A motion for a stay of a land use decision or limited land use decision shall include:

“(a) A statement setting forth movant’s right to standing to appeal the decision;

“(b) A statement explaining why the challenged decision is subject to the Board’s jurisdiction;

“(c) A statement of facts and reasons for issuing a stay, demonstrating a colorable claim of error in the decision and specifying how the movant will suffer irreparable injury if a stay is not granted;

“* * * * *

“* * * * *

“(3) Unless otherwise ordered by the Board, a response to a motion for a stay of a land use decision or limited land use decision shall be filed within 14 days after the date of service of the motion and shall set forth all matters in opposition to the motion and any facts showing any adverse effect, including an estimate of any monetary damages that will accrue if a stay is granted.

“* * * * *

“(5) The Board shall base its decision on the stay, including the right to a stay, amount of undertaking, or conditions of any stay order, upon evidence presented. Evidence may be attached to the motion in the form of affidavits, documents or other materials, or presented by means of a motion to take evidence outside the record. * * *.”

1 To obtain a stay, the petitioner must demonstrate both (1) a colorable
2 claim of error, and (2) irreparable injury to petitioner if the stay is not granted
3 during the pendency of the LUBA appeal. ORS 197.845; OAR 661-010-0068.
4 The “colorable claim of error” prong is relatively easy to demonstrate, and we
5 agree with petitioner that that prong is met. The “irreparable injury to
6 petitioner” prong, however, is difficult to demonstrate. Generally, a stay is
7 appropriate only if the movant demonstrates that the development will “destroy
8 or injure unique historic or natural resources, or other interests that cannot be
9 practicably restored or adequately compensated for once destroyed.” *Roberts*
10 *v. Clatsop County*, 43 Or LUBA 577, 583 (2002).

11 The challenged decision approves an intensified mining and batch
12 operation for a period of two years, after which the operation will largely return
13 to its former level of intensity. Petitioner owns an adjoining ranch. Her
14 dwelling is located approximately 800 feet southeast and downwind of the
15 active mining site. Petitioner alleges that the intensified operation will
16 generate as much as 76 tons of dust and particulate matter per year.

17 Many of petitioner’s allegations of injury concern noise impacts and
18 similar externalities and annoyances that, in our view, do not demonstrate
19 *irreparable* injury to petitioner from the temporarily intensified operation.
20 However, petitioner also alleges *permanent* harm to her health that presents a
21 closer question.

22 Petitioner alleges:

23 “I personally have a physical condition [which] predisposes me to
24 pneumonia [upon exposure to] particulate matter. The dust
25 discharged by the gravel operation and the asphalt plant has a
26 direct impact on my health. At the current time, I live [in]
27 Phoenix, Arizona, but I spend a substantial amount of time on the
28 Joseph ranch particularly in the summer when the asphalt plant

1 and operations on the site are going full speed ahead. The asphalt
2 plant creates a significant and compromising condition for my
3 health now and into the future.” Dion First Affidavit 3.

4 In a second affidavit, petitioner alleges:

5 * * * I estimate that I have spent at least 31 days on the property
6 during some form of operations at the quarry in the last 6 months.
7 * * * I will spend at least an additional 30 days on the ranch
8 during the next 90 days. The ranch is my home. During the time I
9 am on the ranch, I avoid the eastern portion of my property
10 because of the dust generated by the crusher, asphalt batch plant,
11 staging operations and truck traffic. I also cannot stay at the house
12 on Buchanan Lane because of its proximity to dust from the quarry
13 and the adverse effects on my health. Since intensified operations
14 have been underway, dust has been accumulating in our home on
15 Buchanan Lane and even with the doors and windows shut, we
16 have been unable to keep it out.” Dion Second Affidavit 1.

17 Intervenors respond that petitioner’s allegations are insufficient to
18 demonstrate irreparable injury to her health from dust generated by the
19 intensified mining operation, if a stay is not granted for the pendency of the
20 LUBA appeal. Although it is a reasonably close question, we agree with
21 intervenor.

22 Petitioner states that she plans to be present in her house on Buchanan
23 Road approximately 30 days over the next 90 days, during the likely pendency
24 of this appeal, and at other times will presumably reside at her other home in
25 Phoenix, Arizona.² So the question becomes whether petitioner has adequately
26 demonstrated *irreparable* injury to her health from 30 days exposure to dust

² The LUBA appeal process typically is resolved within 77 days of the date the record is filed. The record has been filed in the present case and, absent record objections or other delays, this appeal will likely be resolved within the next 90 days.

1 from the mining operation during the likely pendency of this appeal.³ We
2 conclude that petitioner has not.

3 Petitioner bears the burden of demonstrating that a stay is warranted, and
4 that irreparable injury will result to petitioner if the stay is not granted. OAR
5 661-010-0068(5) provides that LUBA shall base its decision on whether to
6 grant a stay on the evidence presented. Petitioner’s bare allegations, in her
7 affidavits, of permanent injury to her health are not, in themselves, sufficient
8 evidence to warrant a stay.

9 Petitioner attaches to her pleadings a copy of an article published in the
10 New England Journal of Medicine, and several internet-based documents on
11 the health impacts of exposure to pollution and particulate matter. The article
12 and the other documents leave no doubt that excessive or long-term exposure
13 to pollution and particulate matter can have serious impacts on respiratory
14 health. However, the article and other documents do not provide support for an
15 allegation that 30 days of exposure to dust and particulate matter generated by
16 the proposed mining operation is likely to result in *irreparable* injury to
17 petitioner’s health. The main conclusion of the article is that “[r]elatively small
18 reductions in exposure to [fine-grained particulate matter] have measurable
19 benefits for lung function, suggesting that a decline in air pollution, even from
20 low levels, may have positive consequences for public health.” Exhibits to
21 Reply Affidavit, 9. Assuming we correctly understand the article and the other

³ OAR 661-010-0068(5) allows LUBA to impose conditions on the stay. If a stay were granted in the present case, we would likely impose it only for the 30 days that petitioner states she would be in residence near the mining operation, rather than for the pendency of the LUBA appeal. Petitioner has not, however, specified which 30-day period she plans to be in residence.

1 documents (a large assumption), it is long-term exposure that is most damaging
2 to respiratory health, and reducing exposure results in improved respiratory
3 function. The article and other documents do not suggest that 30 days
4 exposure alone will result in permanent injury, and if anything suggest that any
5 injury caused by exposure of any duration may be improved when petitioner
6 returns to Arizona and is not exposed to dust from the mining operation.

7 As noted, the irreparable injury standard for granting a stay under ORS
8 197.845 and OAR 661-010-0068 is a difficult standard to meet. Petitioner has
9 not demonstrated that any injury to her health caused by 30 days of exposure to
10 dust and particulate matter during the pendency of this appeal is likely to be
11 permanent or irreparable. Accordingly, the motion for stay must be denied.

12 **BRIEFING SCHEDULE**

13 The record in this appeal was received on August 10, 2015. The briefing
14 deadlines in this appeal remain those announced in our letter dated August 10,
15 2015, *i.e.*, the petition for review is due 21 days, and the response brief due 42
16 days, from the date LUBA received the record.

17 Dated this 19th day of August, 2015.
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23 _____
24 Tod A. Bassham
25 Board Chair