

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RANDY COSSINS, ADAM AGATHAKIS,
5 MATTHEW AGATHAKIS, JIM HIMANEK,
6 AMANDA METZLER, TAMARA DEAN,
7 JUSTIN WAGNER, JILLIAN WAGNER,
8 JUDITH SCHARNS, JOSH EVANS,
9 JOHN SPRINGER, STEVEN FIELDS,
10 CRAIG WILLIAMS, MIKE ALBERS,
11 MIKE GIERKE, AARON GERK,
12 RICHARD LEWMAN, CHARLES BROOKS,
13 MIKE MILLER, JAMEY SIMKINS,
14 TONY RUSSO, MARK SELIGMAN,
15 DIANNE KIRKWOOD, AMBER GUIENT,
16 YUSEF GUIENT, DEL SHERIDAN,
17 MICHAEL SHANNON, RANDAL BROWN,
18 CEDAR GREY, HEATHER SUNDELL,
19 ROBERT SWEARINGEN, LISA ABELT,
20 KEVIN McCABE, WILLIAM TOBIN,
21 KATHRYN TOBIN, MATTHEW TURNER,
22 REX TURNER, STEPHEN HARPER,
23 TIMOTHY O'TOOLE, DAVID VENTURA,
24 CELENA DWYER, BRIAN DWYER,
25 MASON WALKER, MARY RIOS and BRYAN LONG,
26 *Petitioners,*

27
28 vs.

29
30 JOSEPHINE COUNTY,
31 *Respondent.*

32
33 LUBA No. 2017-122

34 ORDER
35

1 **BACKGROUND**

2 The challenged decision is Ordinance 2017-002 (Ordinance), which
3 amends the Josephine County Rural Land Development Code (RLDC) to prohibit
4 commercial production of marijuana in the Rural Residential (RR) zone on a
5 parcel five acres or less in size, and to limit the size of commercial production of
6 marijuana on an RR-zoned parcel greater than five acres. Prior to adoption of the
7 Ordinance, the RLDC allowed as permitted uses in the RR-5 zone “[a]griculture,
8 farming and farm use as defined in Section 11.030,” subject to meeting certain
9 other RLDC standards. RLDC 61.020(B)(2005).

10 On January 23, 2018, petitioners filed a motion to stay the legislative
11 decision challenged in this appeal, which we discuss in more detail below,
12 pursuant to OAR 661-010-0068 and ORS 197.845(1).¹ On January 31, 2018, the

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:

“ * * * * *

“(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;

“(d) A suggested expedited briefing schedule;

“(e) A copy of the decision under review and copies of all ordinances, resolutions, plans or other documents

1 county filed a response to the motion objecting to the stay for reasons we discuss
2 in more detail below. On February 2, 2018, petitioners filed a Supplemental
3 Memorandum in Support of Petitioners’ Motion for Stay (Supplemental
4 Memorandum). We discuss the Supplemental Memorandum in more detail
5 below.

6 The Ordinance takes effect ninety days after its adoption by the board of
7 county commissioners, which occurred on December 6, 2017. According to the
8 motion for stay, the county has informed petitioners’ counsel that the county
9 “intends to enforce the Ordinance the day the Ordinance is scheduled to take
10 effect.” Motion for Stay 15.

11 **MOTION FOR STAY**

12 The statutory standards under which LUBA may grant a request to stay a
13 decision that has been appealed to LUBA are set out at ORS 197.845(1), which
14 provides:

necessary to show the standards applicable to the
decision under review.

“ * * * * *

“(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 “Upon application of the petitioner, the board may grant a stay of a
2 land use decision or limited land use decision under review if the
3 petitioner demonstrates:

4 “(a) A colorable claim of error in the land use decision or limited
5 land use decision under review; and

6 “(b) That the petitioner will suffer irreparable injury if the stay is
7 not granted.”

8 **A. Colorable Claim of Error**

9 “In order to establish evidence of a colorable claim of error, it is not
10 necessary to show the petitioner will prevail on the merits.” *Dames v. City of*
11 *Medford*, 9 Or LUBA 433, 438 (1983), *aff’d* 69 Or App 675, 687 P2d 1111
12 (1984). Rather, a petitioner must merely show that “the errors alleged are
13 sufficient to result in reversal or remand of the decision if found to be correct.”
14 *Id.*

15 Petitioners contend the Ordinance is inconsistent with ORS 215.130,
16 which applies to county regulation of non-conforming uses and provides in
17 relevant part that “the lawful use of any building, structure or land at the time of
18 the enactment or amendment of any zoning ordinance or regulation may be
19 continued.” ORS 215.130(5). Petitioners also contend that the county failed to
20 comply with the requirements in ORS 215.503, which requires the county to give
21 “written individual notice” to property owners when the county takes certain
22 actions to “limit[] or prohibit[] land uses previously allowed in the affected
23 zone.” ORS 215.503(4) and (9)(b). Petitioners also contend that the Ordinance is

1 contrary to ORS 475B.340, which authorizes the county to adopt “reasonable
2 regulations” governing marijuana production.

3 Petitioners’ arguments are, if correct, sufficient to warrant reversal or
4 remand of the decision and are sufficient to satisfy the colorable claim of error
5 prong of ORS 197.845(1).

6 **B. Irreparable Injury**

7 In order to satisfy the irreparable injury prong of ORS 197.845(1),
8 petitioners must, among other things, adequately specify the claimed irreparable
9 injury to the petitioner. The movant must specify the following five factors:

- 10 (1) the movant must adequately specify the injury that he or she
11 will suffer;
- 12 (2) the injury must be one that cannot be compensated adequately
13 in money damages;
- 14 (3) the injury must be substantial and unreasonable;
- 15 (4) the conduct the movant seeks to bar must be probable rather
16 than merely threatened or feared; and
- 17 (5) if the conduct is probable, the resulting injury must be
18 probable rather than merely threatened or feared.

19 *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004) (describing
20 five factors to be considered in determining whether irreparable injury has been
21 demonstrated); *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032,
22 1042-43 (1988).

23 Petitioners’ motion for stay states that petitioners are all marijuana farmers
24 whose farms are located on land zoned rural residential. The motion includes

1 affidavits from many of the petitioners detailing the operation of their
2 commercial marijuana businesses on their land. Those affidavits generally
3 explain that each of the petitioners have spent several years establishing the
4 unique strains of cannabis that are grown on their properties and establishing
5 business goodwill with buyers of their cannabis strains. The motion for stay takes
6 the position that on average each of the petitioners have invested roughly
7 \$500,000 in their farming operations. Motion for Stay 12.

8 Regarding the first factor, petitioners maintain that if the Ordinance takes
9 effect and the county enforces the Ordinance as it has stated to petitioners'
10 counsel that it will, petitioners will be forced to cease operations, and as a
11 consequence lose both their crops and business goodwill developed over many
12 years. Regarding the second and third factors, petitioners maintain that the injury
13 to their unique strain of cannabis and the business good will they have developed
14 cannot be compensated by money damages. Petitioners maintain that such an
15 injury is both substantial and unreasonable, because when petitioners established
16 their uses and petitioners invested large sums into developing their businesses,
17 the use was allowed by the RLDC.

18 Regarding the first three factors, we conclude petitioners have adequately
19 specified the injury they might suffer — the loss of a valuable crop and loss of
20 business goodwill established over several years of business operations — if they
21 are forced to stop operating when the Ordinance takes effect. We also conclude
22 it is not an injury that could be compensated adequately in money damages. *See*

1 *Barr v. City of Portland*, 20 Or LUBA 511 (1990) (harm to business reputation
2 and loss of business goodwill not losses which can be adequately compensated
3 by money damages). Petitioners will almost certainly have no legal right to
4 continue to operate if the county requires petitioners to stop farming during the
5 pendency of LUBA’s review of petitioners’ challenges to the Ordinance. Finally,
6 assuming, as we must, that petitioners ultimately prevail in this appeal, the costs
7 that would be incurred if petitioners are forced to cease operations are substantial
8 and unreasonable.

9 Regarding the fourth and fifth factors, petitioners’ counsel includes an
10 affidavit that states that the county’s counsel “confirm[ed] the respondent intends
11 to enforce the challenged ordinance when the ordinance is scheduled to go into
12 effect.” Motion for Stay 15; Affidavit of Ross Day, Exhibit 1. Petitioners argue
13 that the county’s position demonstrates that the county’s enforcement of the
14 Ordinance during the pendency of the LUBA proceeding and the resulting injury
15 to petitioners is probable, rather than merely threatened or feared.

16 In its response, the county does not dispute that it intends to enforce the
17 Ordinance “on or around March 6, 2018.” Response to Motion for Stay 12.
18 However, the county relies on provisions in the Ordinance for the county code
19 enforcement administrator to provide a “Compliance Plan” as defined in the
20 Ordinance, that includes “a written strategy” to “help a property owner rectify
21 violations” of the RLDC within 90 days. Motion for Stay, Exhibit 1, page 2. The
22 county states:

1 “For farmers who have a prior non-conforming use, this may
2 involve the time necessary to process and approve a non-conforming
3 use application. * * * All of this is to say that Respondent is more
4 than willing to work with Petitioners to help them achieve
5 compliance, *and is unwilling and unable to enforce immediate*
6 *cessation of marijuana farming operations* especially of farmers
7 who are engaging in good will with Respondent.” Response to
8 Motion for Stay 10 (emphasis added; footnote omitted).

9 The county also takes the position that petitioners

10 “will have a choice to meet with Respondent’s Code Enforcement
11 Administrator to set up a plan to reach compliance, whether that
12 involves getting a non-conforming use permit (as is surely the case
13 for most Petitioners), a dimensional variance, or some other action
14 to make the property comply with the Ordinance. Accordingly, a
15 loss of a substantial investment, specialized marijuana strains, and
16 business goodwill will be lost only if Petitioners have non-compliant
17 properties and do not engage with Respondent in working towards
18 compliance.” Response to Motion for Stay 12.

19 If the *county* conduct that petitioners seek to bar was probable, we would agree
20 with petitioners that the resulting injury to petitioners is also probable. However,
21 given the county’s position in its response that the county is “unwilling” to
22 enforce immediate cessation of marijuana farming operations of farmers who are
23 working with the county on a compliance plan, we conclude that the conduct by
24 the county that petitioners seek to bar with the stay is not probable, but rather is
25 more feared.

26 However, in the Supplemental Memorandum, petitioners additionally
27 argue that the injury to petitioners that is described above if the Ordinance takes
28 effect is probable. According to petitioners, if the Ordinance takes effect, it will
29 mean that some petitioners will be unable to secure renewals of their existing

1 licenses from the Oregon Liquor Control Commission (OLCC), the agency in
2 charge of licensing marijuana businesses operating in the state. According to the
3 Supplemental Memorandum and an affidavit from one of the petitioners that is
4 attached to the Supplemental Memorandum, an employee of the OLCC has
5 informed one of the petitioners that the OLCC will refuse to renew OLCC
6 licenses for license holders in the county if the license renewal will take effect
7 after March 6, 2018, unless the renewals are accompanied by a new Land Use
8 Compatibility Statement (LUCS) issued by the county. Given the time it will
9 take for property owners to enter into a Compliance Plan with the county and, at
10 the conclusion, secure a LUCS from the county, we understand petitioners to
11 argue that securing a new LUCS prior to the effective date is not possible and
12 therefore it is probable that OLCC will not renew their licenses without that new
13 LUCS. Petitioners argue that without an OLCC license, they will be unable to
14 operate their existing businesses in the county.

15 Based on the Supplemental Memorandum, we agree with petitioners that
16 if the Ordinance takes effect, the resulting injury to petitioners — the loss of the
17 ability to legally operate their existing businesses pursuant to a valid OLCC
18 license — is probable. Accordingly, the fourth and fifth factors are met.

19 For that reason, petitioners’ motion to stay Ordinance 2017-002 is granted,
20 and Ordinance 2017-002 is stayed.

21 Dated this 5th day of February, 2018.

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Melissa M. Ryan
Board Chair