

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

3
4 1ST JOHN 2:17, LLC and JONATHAN TALLMAN,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF BOARDMAN,
10 *Respondent.*

11
12 LUBA No. 2021-086

13
14 ORDER

15 The challenged decision is a contract between the city and a construction
16 company (Contract) for the construction of road improvements located south of
17 the Port of Morrow Interchange at I-84 (Port Interchange) that are included as
18 part of the city’s Port of Morrow Interchange Area Management Plan. On
19 September 21, 2021, petitioners filed a notice of intent to appeal the Contract. In
20 an order dated October 5, 2021, we suspended the appeal based on the parties’
21 stipulation. On April 25, 2022, we received petitioners’ motion to reactivate the
22 appeal and, on April 26, 2022, we issued an order reactivating the appeal and
23 establishing a deadline for filing the record.

24 **MOTION TO DISMISS**

25 On May 3, 2022, the city filed a motion to dismiss the appeal on the basis
26 that (1) petitioners lack standing to appeal the decision and (2) the Contract is not
27 a “land use decision,” as described in ORS 197.015(10)(a), because it is a
28 decision “[t]hat determines final engineering design, construction, operation,

1 maintenance, repair or preservation of a transportation facility that is otherwise
2 authorized by and consistent with the comprehensive plan and land use
3 regulations[]” under ORS 197.015(10)(b)(D). All deadlines in this appeal are
4 suspended, including the deadline for transmitting the record set out in our April
5 26, 2022 order reactivating the appeal, except that petitioners shall have the time
6 set forth in our rules to respond to the motion to dismiss. OAR 661-010-0065(4).

7 **MOTION FOR STAY**

8 On April 25, 2022, LUBA received petitioners’ motion for stay of the
9 Contract pursuant to ORS 197.845(1) and OAR 661-010-0068.¹ For the reasons

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

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

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

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

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;

1 set forth below, the motion for stay is denied.²

2 **A. Background**

3 The Port Interchange provides access to Laurel Lane, a road running
4 generally south from the Interchange. Petitioners own property that is located
5 south of the Port Interchange and west of Laurel Lane that is accessed from two
6 points on Laurel Lane. Motion for Stay Ex 3, at 2. Petitioners operate a drive-

“(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;

“(d) A suggested expedited briefing schedule;

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

² As noted, the city has moved to dismiss the appeal. In resolving the motion for stay, we express no opinion about whether LUBA has jurisdiction over the appeal.

1 through coffee stand on the property that is open Monday through Friday between
2 5:00 a.m. and 5:00 p.m., and Saturday between 6:00 a.m. and 12:00 p.m. Motion
3 for Stay Ex 3, at 2.

4 The Contract authorizes construction of a road surface for the eastern half
5 of a loop road east of Laurel Lane, consisting of Yates Lane and Devin Loop, and
6 improvements to the intersection of Laurel Lane and Yates Lane, at the
7 northeastern corner of petitioners' property. The Contract provides that
8 improvements to the intersection of Laurel Lane and Yates Lane will occur
9 intermittently between May 3 and May 6, 2022.

10 **B. Colorable Claim of Error**

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

17 We understand petitioners to argue that the city failed to follow applicable
18 procedures when the city approved the Contract. Because we conclude below that
19 petitioners have failed to establish irreparable injury, we need not address
20 whether petitioners have established a colorable claim for error.

1 **C. Irreparable Injury**

2 The “irreparable injury to petitioner” prong is difficult to demonstrate.
3 Generally, a stay is appropriate only if the movant demonstrates that the
4 development will “destroy or injure unique historic or natural resources, or other
5 interests that cannot be practicably restored or adequately compensated for once
6 destroyed.” *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002). In order
7 to satisfy the irreparable injury prong of ORS 197.845(1), petitioners must,
8 among other things, adequately specify the claimed irreparable injury to the
9 petitioners. 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 Here, petitioners argue that the closure of the intersection of Laurel Lane
24 and Yates Lane for up to four days on which the coffee stand is normally open

1 will cause the coffee stand located on petitioners' property to suffer financial
2 losses of "approximately \$8,000," as well as harm to their business reputation
3 and goodwill. Motion for Stay Ex 3, at 3.

4 The city responds that a detour around the construction at the intersection
5 will allow customers' vehicles to reach petitioners' property and that, therefore,
6 petitioners have not demonstrated that the harm they will suffer is probable. In
7 addition, the city points out that petitioners have not provided any evidence to
8 support their allegation of harm to their business reputation and goodwill, given
9 that the total closure period will be approximately four days on which the
10 business is open. Response to Motion for Stay 6.

11 For the reasons explained by the city, we conclude that petitioners have
12 failed to satisfy the irreparable injury prong of ORS 197.845(1). Petitioners have
13 not established that (1) the injury is one that cannot be compensated adequately
14 in money damages, given that petitioners have quantified the projected losses in
15 revenue resulting from the closure of the intersection and detour, and given that
16 petitioners have not established a loss of goodwill or injury to business reputation
17 for a brief, four-day closure; (2) the injury is substantial and unreasonable, given
18 that the projected loss is four days of revenue for a business that operates
19 approximately 300 days a year; and that (3) the injury is probable, rather than
20 merely threatened or feared, given that a detour will be in place to provide
21 vehicular access to petitioners' property.

22 The motion for stay is denied.

1 Dated this 6th day of May 2022.

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Melissa M. Ryan

7 Board Member