

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

DOUGLAS ZIRKER and VIVIANN ZIRKER,
Petitioners,

and

PAT NIPPERT,
Intervenor-Petitioner,

vs.

CITY OF BEND,
Respondent,

and

STEIDL ROAD, LLC,
Intervenor-Respondent.

LUBA No. 2007-114

DEBRA J. TALLMAN,
Petitioner,

and

PAT NIPPERT,
Intervenor-Petitioner,

vs.

CITY OF BEND,
Respondent,

and

STEIDL ROAD, LLC,
Intervenor-Respondent.

LUBA No. 2007-119

ORDER

1 **INTRODUCTION**

2 In LUBA No. 2007-114 petitioners appeal a city decision that segregates one tax lot
3 (tax lot 1800) into two tax lots (tax lots 1800 and 1802). Prior to the disputed tax lot
4 segregation, tax lot 1800 was made up of a portion of a vacated alley and lots 6 and 7 and
5 portions of lots 11 and 12 of River Terrace Subdivision. The tax lot segregation leaves lot 6
6 as tax lot 1802 and the remaining property as tax lot 1800. Contrary to petitioners’
7 understanding of the decision challenged in LUBA No. 2007-114, the city does not appear to
8 have approved a lot line adjustment.

9 In LUBA No. 2007-119, petitioners challenge a city decision that grants intervenor
10 approval to construct a triplex on the recently segregated tax lot 1800. Intervenor previously
11 sought approval for a six-lot subdivision of the property that made up former tax lot 1800,
12 but that application was denied by the city, in part, due to expected increased traffic impacts
13 on Steidl Road. Steidl Road is a substandard city street that lacks sidewalks and provides
14 access to the property. Construction has begun on the triplex, and petitioners move for a stay
15 to halt construction of the triplex, pending completion of this appeal.¹

16 **MOTION FOR STAY**

17 **A. Irreparable Injury**

18 One of the required demonstrations that a petitioner must make before LUBA may
19 stay a decision pending appeal is “[t]hat petitioner will suffer irreparable injury if the stay is
20 not granted.” ORS 197.845(1)(b).² In determining whether a petitioner has adequately

¹ In their July 19, 2007 motion for stay, petitioners request a telephonic hearing on the motion. We do not believe a telephonic hearing is needed, and we deny that request.

² 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:

1 demonstrated he or she will suffer irreparable injury in the absence of a stay, LUBA
2 considers whether (1) petitioner has adequately specified the injury; (2) the identified injury
3 is one that cannot be compensated adequately in money damages; (3) the injury is substantial
4 and unreasonable; (4) the conduct petitioner seeks to bar through the stay is probable rather
5 than merely threatened or feared; and (5) if the conduct is probable, the resulting injury is
6 probable rather than merely threatened or feared. *City of Oregon City v. Clackamas County*,
7 17 Or LUBA 1032, 1042-43 (1988). As we stated in *Roberts v. Clatsop County*, 43 Or
8 LUBA 577, 583 (2002):

9 “Generally, the cases in which we find that the petitioner has demonstrated
10 irreparable injury if a stay is not granted involve proposals that destroy or
11 injure unique historic or natural resources, or other interests that cannot be
12 practicably restored or adequately compensated for once destroyed. *See Save*
13 *Amazon Coalition v. City of Eugene*, 29 Or LUBA 565, 568-69 (1995)
14 (demolition of historic structures); *ONRC v. City of Seaside*, 27 Or LUBA
15 679, 682-83 (1994) (construction of bridge across marsh and wildlife habitat);
16 *Barr v. City of Portland*, 20 Or LUBA 511, 515 (1990) (decision shutting
17 down the petitioner’s long-standing business, causing irreparable loss of
18 business reputation and goodwill); *Thurston Hills Neigh. Assoc. v. City of*
19 *Springfield*, 19 Or LUBA 591, 594-96 (1990) (proposal to log 2,250 mature
20 trees, affecting neighborhood viewshed); *Rhodewalt v. Linn County*, 16 Or
21 LUBA 1001 (1987) (removal of historic bridge); *Dames v. City of Medford*, 9
22 Or LUBA 433, 440 (1983) (road project removing historically significant
23 trees). * * *”

24 Petitioners’ allegations of irreparable injury include the following:

25 “[I]ntervenor has cleared portions of the subject property with heavy
26 machinery, poured concrete foundations, and begun installation of certain
27 utilities and infrastructure. The construction requires a constant barrage of
28 vehicles, including delivery and concrete trucks and trucks belonging to
29 construction workers, who use the substandard Steidl Road. The road,
30 however, cannot safely handle this increased level and intensity of
31 traffic.* * *” Motion for Stay 9.

“(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.”

1 Petitioners go on to quote from the city’s decision that denied intervenor’s subdivision
2 application, a decision that listed concerns about the impact six new residential units would
3 have on substandard Steidl Road.

4 The injury that petitioners allege is not an injury to “unique historic or natural
5 resources, or other interests that cannot be practicably restored or adequately compensated
6 for once destroyed.” Although petitioners cite property clearing, concrete foundations and
7 utilities, we do not understand petitioners to seek the stay to avoid injury to tax lot 1800,
8 which is zoned Urban Medium Density Residential (RM). The RM zone allows triplex
9 development outright. Rather, the injury petitioners seek to avoid is the traffic associated
10 with construction of the triplex. That impact will only be temporary if petitioners are
11 successful in this appeal. *See Greenlees v. Yamhill County*, 22 Or LUBA 815, 816-17 (1991)
12 (visual impacts of a 130 foot cell tower during an appeal found not to be substantial and
13 unreasonable injury). While we have no reason to doubt the sincerity of petitioners’ concern
14 about the impacts of construction traffic, petitioners have not established that any injury that
15 construction traffic might cause is substantial and unreasonable. Indeed, as intervenor points
16 out, petitioners have not even attempted to establish how much traffic is being generated by
17 construction on the property.³ Intervenor contends “there are only approximately 3-5
18 additional construction related vehicle trips to the site twice a day as a result of the
19 construction.” Intervenor-Respondent’s Response to Petitioner’s Motion to Stay 4.

20 Petitioners have not established how much additional traffic construction of the
21 triplex can be expected to generate while this appeal is pending, and petitioners have not
22 established whether that additional traffic represents a significant or trivial increase in the
23 traffic that already uses Seidl Road. Petitioners have not established that any injury that

³ In a July 17, 2007 affidavit attached to the motion for stay, petitioner Douglas Zirker simply claims that “construction of the challenged triplex has resulted in a constant barrage of delivery trucks and construction workers vehicles along Steidl Road.”

1 might be attributable to that construction traffic is “substantial and unreasonable.” *City of*
2 *Oregon City v. Clackamas County*, 17 Or LUBA at 1043. We therefore deny petitioners’
3 motion for stay.⁴

4 **B. The Parties’ Remaining Arguments**

5 Intervenor also disputes petitioners’ standing to bring this appeal and whether
6 petitioners have adequately established colorable error in the challenged decision. Intervenor
7 also challenges petitioners’ allegations that the challenged decisions are land use or limited
8 land use decisions and petitioners’ allegations that LUBA has jurisdiction to review the
9 disputed decisions. We need not and do not consider those arguments in ruling on
10 petitioners’ motion for stay, and we limit our ruling on the motion to stay to our conclusion
11 that petitioners have not established that a stay is necessary to avoid irreparable harm.

12 On July 27, 2007, intervenor moved to dismiss this appeal. Petitioners shall have the
13 time provided by our rules to file a written response to that motion. Under OAR 661-010-
14 0067, LUBA may extend the deadline for filing the petition for review to allow time to rule
15 on a pending motion to dismiss. However, no party has moved to suspend the deadline for
16 filing the petition for review pending our ruling on the motion to dismiss. Given petitioners’
17 motion for stay, we do not suspend that deadline on our own motion.

18 Petitioners’ motion for stay is denied.

19 Dated this 1st day of August, 2007.
20
21

22 _____
23 Michael A. Holstun
24 Board Chair

⁴ Petitioners cite and rely on *Hallberg v. Clackamas County*, 31 Or LUBA 577 (1996) in arguing that construction traffic will result in irreparable harm while this appeal is pending. We do not believe *Hallberg* requires that we reach a different decision in this appeal regarding irreparable injury. While it is true that the allegations of irreparable harm in *Hallberg* were also short on specifics and largely undeveloped, they included allegations that the approved construction would reduce property values and “ruin scenic views.” 31 Or LUBA at 579. We also note the motion for stay in that case was unopposed.