BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CITY OF OREGON CITY, Petitioner, vs. CLACKAMAS COUNTY, Respondent, VANCOUVER FEDERAL SAVINGS BANK, MICHAEL FINGERUT, C. JOSEPH VAN HAVERBEKE, and ELPH ENTERPRISES, Intervenors-Respondent.	LUBA No. 88-098 ORDER ON MOTION FOR STAY

Petitioner moves, pursuant to ORS 197.845(1) and OAR 661-10-068, for a stay of the county's decision granting design review approval for a mobile home park. The county's decision became final on November 14, 1988 and grants design review approval for Phase II of Country Village Mobile Home Park (Country Village). Phase I of Country Village has already been developed. As far as we can tell, the remaining portion of Country Village (Phase III) has not yet received design review approval.

Petitioner argues the county improperly granted design review approval without conditioning actual development of Phase II on prior annexation to Oregon City.

FACTS

In March, 1980, the city and county entered into an Urban Growth Management Agreement (UGMA) to coordinate their land use

planning for the unincorporated area adjacent to the city and inside the urban growth boundary (the unincorporated urban area).[1] Within the unincorporated urban area, the UGMA provided the city would be the sole provider of urban facilities and services. Section 6 of the UGMA provided the "[c]ity may require annexation prior to the provision of such urban facilities and services." Section 9 of the UGMA provided the city would provide further urban services

> "provided, however, that the provision of such services shall be preceeded by annexation to the city, unless the parties specifically agree otherwise. City and County further agree not to extend the Tri-City Sewerage System within the [urban area] without such extension being concurrent with city annexation."

In May, 1981, what the parties refer to as the First Addendum to the UGMA was executed. The First Addendum stated the city's support of a pending amendment to include the disputed property within the UGB and provided the property could be served by the Tri-City Sewerage District without prior annexation to the city. Under the First Addendum, the subject property was to be annexed when it became "contiguous to the city."

In January, 1982, the Metropolitan Service District (Metro) approved a UGB amendment (1) to include the area occupied by Country Village Estates and (2) to remove a similarly sized area in another location.

On March 4, 1982, the city and county entered into a revised UGMA. Paragraphs 6 and 9 in the revised UGMA contain

substantially identical provisions to those contained in paragraphs 6 and 9 of the March, 1980 UGMA, quoted supra.

Petitioner cites a May, 1982 Boundary Commission staff report, a June, 1982 letter from the city to the applicant, a July, 1984 letter from the city to the county and an October, 1984 letter to the applicant, all of which express a concern that nonremonstrance provisions be imposed on Country Village to avoid future resistance to annexation. Petitioner argues these documents demonstrate the county and city viewed a nonremonstrance agreement to be a condition of approval. Petitioner further argues

> "[t]he fact that the county and city viewed adoption and recordation by the developer of protective covenants, conditions, and restrictions (CC&R's) as an acceptable means of incorporating the nonremonstrance agreement does not render it any less a condition of approval." Motion for Stay 11.

In February, 1985, the Tri-City Sewerage District entered an agreement to provide sewer service to the disputed area. On this date the applicant recorded CC&R's in the deed records of Clackamas County. The CC&R's waived all remonstrance rights of future lessees, occupants and owners of Country Village.

In June, 1986, the county approved changes to previously imposed conditions of approval for Country Village. The county's order required that if the project was to be developed without annexation to Oregon City, the UGMA first be amended. Petitioner argues this requirement was imposed because the language in the First Addendum, discussed supra, was not

included in the 1982 revised UGMA.

On January, 1987, a Second Addendum to the UGMA was approved. This addendum provided in pertinent part:

> "The city and county agree that the * * * provisions which require annexation to the city will require annexation of this property when this property is contiguous to the city or when the city requires annexation."

In December, 1987, the county approved a conditional use permit to allow Country Village to develop as a mobile home park rather than a subdivision. The county's approval included a condition that:

> "The applicant shall comply with all previous conditions of approval except as previously modified by this Board."

In April, 1988, the developer revoked the CC&R's for Country Village. Petitioner argues neither the city nor the county approved this revocation.

On October 20, 1988, the Portland Metropolitan Area Local Government Boundary Commission (Boundary Commission) considered a petition by the city requesting annexation of all of Country Village except Phase I. The Boundary Commission, on October 20, 1988, issued a final order approving the requested annexation. The Boundary Commission's October 20, 1988 order was amended on November 9, 1988. Under ORS 199.505, unless remonstrances are filed with the Boundary Commission within 45 days after the date of the Boundary Commission's amended order, the annexation will become final, and all of Country Village (except Phase I) will become part of Oregon City.

Petitioner seeks a stay in this proceeding to prevent mobile homes from being legally placed on Phase II of Country Village. With one possible exception, noted infra, there are no residents within the area petitioner currently is seeking to annex. Through the requested stay, petitioner seeks to avoid a repeat of its unsuccessful attempt to annex Phase I of Country Village.

Petitioner's earlier unsuccessful attempt to annex Phase I began with the Boundary Commission's approval of the city's petition to annex Phase I in June 1988. Following the Boundary Commission's approval, remonstrances were filed by residents of Phase I pursuant to ORS 199.505, and the annexation was defeated in the election that followed by a vote of 25-3.

If petitioner is successful in preventing any new residents from legally moving into Phase II and Phase III, no remonstrances will be filed, no election will be held and Country Village (except for Phase I) will automatically become a part of Oregon City on December 26, 1988.

In addition to requesting a stay of the county's design review approval for Phase II of Country Village, petitioner brought an action against the respondents in this appeal in circuit court, "alleging breach of contract and seeking a declaratory judgment, injunctive relief, monetary damages and specific performance." Intervenor-Respondent's response to Motion for Stay 4. The circuit court issued a temporary restraining order on November 15, and a preliminary injunction

hearing is scheduled for December 19 and 20, 1988. The temporary restraining order was modified on December 7, 1988 but the modified order continues to restrain any approval or action to place mobile homes onto Phase II or Phase III of Country Village Estates.

Additional relevant facts are set forth later in this order.

INTERVENOR'S MOOTNESS ARGUMENT

On December 7, 1988, the day after oral argument on the motion for stay, intervenor filed a letter with the Board in which it argues the request for stay is moot. Intervenor's mootness argument is based on the fact Jef Heath filed a remonstrance, dated December 6, 1988, with the Boundary Commission requesting an election on the city's annexation request. Documents attached to intervenor's letter state Mr. Heath is the only registered voter in the area to be annexed. According to intervenor, these documents show there will now be an election on the proposed annexation no matter how LUBA decides petitioner's request for stay.

Petitioner responded on December 8, 1988, that Jef Heath is intervenor's "watchman" and his residence on the property was illegally established. Attached to petitioner's memorandum opposing intervenor's allegations of mootness is a December 7, 1988 letter to Mr. Heath from the county denying permission to place a "travel trailer as temporary residence for a watchman" on the property. Petitioner also states in its memorandum

"Petitioner is preparing a complaint for filing in

> Clackamas County Circuit Court. The complaint will seek relief to enforce the county's zoning ordinance, to remove the illegal structure from the site, and to invalidate both the registration and the remonstrance as in violation of both land use and election laws. Petitioner notes that the registration violates election laws set forth in ORS 247.035 because the registrant cannot establish the requisite intent to reside on this property. Because the registration is unlawful, the registrant was without legal right to remonstrate, and any election would be nullified." Petitioner's Memorandum on Intervenor's Allegation of Mootness 2.

On December 12, 1988, the Board received a copy of petitioner's petition for alternative writ of mandamus and complaint for injunction and declaratory relief as described in the above-quoted portion of petitioner's memorandum. We, of course, have no way to know how this dispute between the parties ultimately will be resolved. Accordingly, the filing of the remonstrance by Mr. Heath does not, in our judgment, moot petitioner's request for stay and we deny intervenor's request that the motion for stay be denied on that basis.

INTRODUCTION

In considering whether to grant a stay, this Board performs a role similar to that performed by a court in deciding requests for injunction. See 1000 Friends v. Wasco County, 10 Or LUBA 433, 437 (1984). Assuming the statutory tests in ORS 197.845(1) are met, our authority to grant a stay serves to preserve the land use status quo while the merits of a case before this Board are decided. Id. If a stay is viewed in this way, this case presents something of an anomaly. As far as we can tell, timing aside, both the city and the intervenor

are interested in having Phase II fully and completely developed as approved by the county. Neither party wishes to preserve the property in its current state or have the property used for purposes other than those approved by the county. Intervenor-respondent seeks, or at least has never disputed that it seeks, to place mobile homes on the property as quickly as possible so that remonstrances can be filed and the approved annexation defeated at an election. Petitioner, on the other hand, simply wishes to delay the approved development for a short period of time so that its pending annexation request will become an accomplished fact without an election.

In this situation, the only real dispute between the parties, i.e., whether the property should be annexed to Oregon City prior to development, apparently will be decided by our decision on the stay. It is in this unusual circumstance that we turn to the statutory standards that must be met for us to grant a stay.

LEGAL REQUIREMENTS FOR A STAY OF A LAND USE DECISION

The parties in this proceeding do not dispute that the county's decision granting design review approval for Phase II is a land use decision as defined in ORS 197.015(10). ORS 197.845 (1) grants LUBA authority to issue a stay of a land use decision if the petitioner demonstrates:

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

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

For the reasons explained below we find petitioner has demonstrated colorable claim of error, but has failed to demonstrate adequately that it will suffer irreparable injury if the stay is not granted.

A. Colorable Claim of Error

The statutory requirement in ORS 197.845(1)(a) that petitioner demonstrate a colorable claim of error is not a demanding requirement. Rhodewalt v. Linn County, ___ Or LUBA ___ (LUBA No. 87-078, September 8, 1987, Order Allowing Stay). In Dames v. City of Medford, 9 Or LUBA 433, 438 (1984) we explained:

> "In order to establish evidence of a colorable claim of error, it is not necessary to show the petitioner will prevail on the merits. It is necessary to show the errors alleged are sufficient to result in reversal or remand of the decision if found to be correct. See Von Weidlein Int'l., Inc. v. Young, 16 Or App 81, 514 P2d 560, 515 P2d 936, 517 P2d 295, rev den (1973). Petitioner has made claims which could result in reversal or remand of the decision if found to be correct. Because the claims are not frivolous and because the Board cannot tell from the present filings whether the city's claim of compliance with applicable criteria is correct, the Board believes petitioners have shown a colorable claim of error." Id. at 438.

Petitioner asked the county to include in its design review approval decision a condition to prevent "the issuance of permits allowing the placement and occupancy of mobile homes within Phase II of Country Village prior to annexation of Phase II to Oregon City * * *." Motion for Stay 15. The county refused to include the requested condition, concluding it had

no authority under the standards applicable to design review to do so. Petitioner claims the county's decision violates Clackamas County Zoning and Development Ordinance (ZDO) Sections 1102.04 and 1102.05.[2] Petitioner argues ZDO Sections 1102.04 and 1102.05

> "require design review to comply with county ordinances, comprehensive plan and other applicable regulations, and further require that any conflicts between regulations 'shall be identified and resolved.'" Motion for Stay 15-16.

Petitioner argues the UGMA is "an applicable regulation which must be complied with during design review." Motion for Stay 16. The UGMA requires annexation "when the city requires annexation" and thus the county was required to impose the requested condition, according to petitioners. Id.

Petitioner also argues ZDO Section 1102.05(B)(2)(c) requires compliance with prior conditions of approval. Petitioner argues the CC&R's unilaterally revoked by the applicant are such conditions of approval and the county erred in its design review decision by not imposing "a condition equally effective toward assuring that Oregon City could annex this property when it required annexation." Motion for Stay 16.

Intervenor argues the county clearly found it lacked authority to impose any annexation conditions as a part of its design review decision. Intervenor also argues it is readily apparent by reading the sections of the ZDO cited by petitioner that they do not impose the legal obligation on the county petitioner argues. Intervenor states petitioner simply

disagrees with the county's decision without explaining why the county erred. Intervenor then suggests that LUBA should review the applicable ZDO sections and decide whether the county correctly concluded it lacked authority to oppose the requested condition.

We decline intervenor's request that we now decide the question of the county's authority to impose the requested condition. Although we do not express any position on whether petitioner ultimately will prevail in his argument on the merits, we are in no position at this point to say petitioner's arguments are frivilous or so lacking in merit that petitioner has failed to carry his burden to show colorable claim of error. Petitioner's allegations of error are far more detailed than those we rejected in Larson v. Portland Historical Landmarks Commission, 12 Or LUBA 421 (1984). They are sufficient to demonstrate a colorable claim of error.

B. Irreparable Injury

In McGreer v. City of Rajneeshpurham, 9 Or LUBA 406 (1983) we explain our view of the irreparable injury criterion as follows:

> "In order to find irreparable injury, the Board * * * must find there is no pecuniary standard with which to measure damages, and the conduct complained of must be unlawful and probable and not simply threatened or feared. Winston v. Fleischner, 110 Or 554, 233 P2d 924 (1924); Bates v. Dept. of Motor Vehicles, 30 Or App 791, 568 P2d 686 (1977). The injury must also be substantial and unreasonable. Jewett v. Dearhorn Enterprises, Inc., 281 Or 469, 575 P2d 154 (1978). Id. at 410.

In Larson v. Portland Historical Landmarks Commission, supra, we found that mere allegation that a proposed use would be out of character with the neighborhood was insufficient to identify irreparable harm under the statute. See also, McGreer v. Rajneeshpurham, 9 Or LUBA at 411 (loss of rural lifestyle not irreparable injury where it was not shown how the threatened action would result in such loss); Bright v. City of Yachats, 15 Or LUBA 641 (nonspecific general claims of damage that may occur if development proceeds are not sufficient to state irreparable injury).

In Grindstaff v. Curry County, 15 Or LUBA 602 (1986) we rejected a request for stay where the alleged injury was anticipated litigation costs to remove illegal construction that might occur during the appeal. We stated

> "We believe the statute refers to harm that would directly and immediately result from development, as, for example, where a landmark or irreplaceable natural resource is destroyed during construction. The harm petitioner alleges here relates to action they might take in response to development by the landowner. The alleged harm is indirect and speculative in nature." Id. at 603.

Finally, we have stated on numerous occasions that a request for a stay must be decided on the particular facts presented. See e.g., McGreer v. City of Rajneeshpurham, 8 Or LUBA 402 (1983). We understand our prior decisions effectively to require that we answer all of the following questions in the affirmative, based on the particular facts presented:

1. Has the petitioner adequately specified the injury he or she will suffer? Larson v. Portland

Historical Landmarks Commission, supra; Bright v. City of Yachats, supra.

2. Is the identified injury one that cannot be compensated adequately in money damages? McGreer v. City of Rajneeshpurham, 9 Or LUBA 406, 410 (1983).

3. Is the injury substantial and unreasonable? Jewett v. Dearhorn Enterprises, Inc., supra.

4. Is the conduct petitioner seeks to bar through the stay probable rather than merely threatened or feared? McGreer v. City of Rajneeshpurham, 9 Or LUBA 406, 410 (1983).

5. If the conduct is probable, is the resulting injury probable rather than merely threatened or feared?

We answer each of these questions in turn below.

1. Specification of the Injury

Petitioner alleges that if the disputed property is not annexed, the city will lose systems charge improvements valued at $360,000, user fees valued at $50,742 per year and lost property taxes valued at $210,000 per year. Petitioner also alleges it will be unable to finance adequately its sanitary sewer collection system.

The city further claims it would be subsidizing Country Village through storm drainage improvements which benefit Country Village, because without annexation Country Village will not have to pay a fair share of the cost of such improvements. The city argues it would be required to subsidize Country Village through police, fire and many other services which Country Village would receive without compensation to the city.

At full development, the city notes the population of Country Village would equal 10% of the city's current population. Petitioner argues it would be injured if Country Village is able to develop and receive the benefit of many city services, which are funded partially or totally through property tax revenues, without annexing to the city so that the city may assess Country Village's fair share of the cost of those services.

The city further notes it has a high tax rate due to the large number of tax-exempt properties within the city and failure to annex Country Village will further exacerbate its high tax rate problems.

The city points out that the UGMA clearly designates the city as the urban services provider to the unincorporated urban area. The failure to annex Country Village will undermine the city's ability to perform that function, according to the city.

Finally the city argues failure to annex Country Village may impede its ability to annex other unincorporated urban areas.

Recognizing that our initial inquiry under this subsection is simply to determine whether the city has adequately identified or specified the injuries it may incur, we conclude the city has adequately specified injury. Compare Larson v. City of Portland, supra and McGreer v. City of Rajneeshpurham, supra.

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2. Injury Not Compensable in Money Damages

Although some of the injuries the city alleges presumably could be compensated in money damages, some such as lost property taxes, impediment to other annexation efforts, interference with its ability to perform its obligation under the UGMA, etc., either are not subject to precise pecuniary quantification or would require repeated, ongoing and therefore impractical litigation to be recovered. Petitioner has adequately alleged injuries that are not compensable in money damages.

3. Injury Is Substantial and Unreasonable

We conclude the revenue impact as well as the impact the failure to annex would have on petitioner's ability to perform its duties under the UGMA would be substantial and unreasonable, assuming the city ultimately is unsuccessful in its efforts to annex the disputed property.

4. The Conduct Complained of Must Be Probable

As we noted earlier in this order, the intervenor has never denied that it would proceed to place mobile homes on the property as quickly as possible in order to permit remonstrances and ultimately to defeat the annexation in an election. Intervenor does not deny that it opposes annexation of Country Village to Oregon City.

If there was any doubt on our part that intervenor would, if legally permitted, proceed exactly in the manner petitioner fears, the remonstrance filed by Jef Heath convinces us the

feared conduct by the intervenor is probable. Our only doubt on this point is with regard to the effect of the temporary restraining order now in place. As petitioner points out, there is no guarantee that the protection offered by the temporary restraining order will continue after the circuit court's preliminary injunction hearing on December 19 and 20. In these circumstances, we are not able to conclude the threatened conduct is not probable, simply because the circuit court may enter a preliminary injunction.

5. Assuming the Threatened Conduct Occurs the Injury to Petitioner is Probable

The final issue we must address is the most difficult. In our view, we can only find irreparable injury under the statute where the petitioner establishes a sufficient link between the likely probable conduct and the injury it identifies. In other words, we must also be satisfied the probable effect of the conduct is the injury petitioner describes.

We have little doubt that the injury petitioner fears could occur. However, the fact petitioner could be injured in the way it fears is not sufficient.

As intervenor correctly notes, the fact an election may be held does not mean petitioner will be injured in the way it alleges. Assuming the current annexation attempt is defeated in an election, the county certainly has reason to question its chances of successful annexation through subsequent attempts. However, we cannot say such subsequent attempts necessarily

would result in remonstrances and an election. Even if they do, we cannot assume that such annexation attempts would be defeated in an election.

In addition, as we noted supra, petitioner is seeking through circuit court action to have the remonstrance filed by Jef Heath invalidated and the requested election barred. As we also noted earlier, we have no way of knowing whether petitioner will be successful in that action. If the city is successful, our denial of the stay in this case may have little practical consequence. If petitioner is successful in that action and prevails on the merits in this appeal, it may be that petitioner similarly could bar remonstrances by "residents" who may move on to the property prior to our final decision in this case. If so, a subsequent annexation could be approved without an election and the injuries petitioner fears would not occur.

We are extremely reluctant to stay the county's order when the effect would be to deny the intervenor's grantees an election to which they might be legally entitled, absent a clearer showing that the injuries petitioner fears will in fact occur. In these circumstances, we find petitioner has not adequately demonstrated its injuries are probable. We therefore find the petitioner has not demonstrated it will suffer irreparable injury, and we deny the request for stay.

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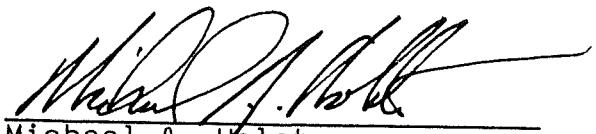
Dated this 16th day of December, 1988.



Michael A. Holstun
Chief Referee

FOOTNOTES

[1] The agreement also applied to certain areas outside the urban growth boundary (UGB), however, the UGB was amended in 1982 to include the area of concern in this appeal.

[2] Those sections provide in pertinent part:

"1102.04 DESIGN REVIEW PROCESS

"A. The staff shall be responsible for reviewing all development applications subject to review under this section of the ordinance. The procedure for staff review shall be as follows, except that staff may delete or combine steps when such steps are not necessary to insure compliance with the provisions of this ordinance: * * *

"* * * * *

"2. Site analysis, preliminary plan and application submittal: Within thirty (30) business days of receipt of site analysis, preliminary plan and application submittal, the staff shall inform the applicant in writing concerning compliance with applicable ordinance and development standards. Conditions may be attached outlining modifications or changes necessary for final plan approval.

"3. Within ten (10) business days of receipt of the final development plans, the staff shall inform the applicant in writing of action concerning approval, approval with conditions or denial. If development plans are denied, the letter of final action shall clearly indicate factual findings concerning noncompliance with applicable ordinances.

"* * * * *."

"1102.05 PRE-APPLICATION CONFERENCE

"A. All applicants are required to participate in a pre-application conference prior to submission of preliminary plans.

"The purpose of the pre-application conference is to provide the applicant with the opportunity to explain the proposed development concepts, and for the staff to explain all the policies, ordinances, standards, opportunities and constraints which may be applicable to the site and type of proposed development, before the applicant has invested substantial design time or become committed to particular design solutions.

"B. The following subjects shall be reviewed at the pre-application conference.

"* * * * *

"2. Proposed development concepts and requirements:

"* * * * *

"b. County ordinances, Comprehensive Plan and other applicable agency regulations. Any conflicts between regulations shall be identified and resolved.

"c. Conditions placed on previous approvals."