BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BUTTE CONSERVANCY,
Petitioner,

vs.

CITY OF GRESHAM,
Respondent,

and

MIKE AGEE,
Intervenor-Respondent.

LUBA No. 2004-077

ORDER

MOTION TO INTERVENE

Mike Agee (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION FOR STAY

In 1998, the city approved intervenor's tentative plan for residential development on a 50-acre site on Hogan Butte, an undeveloped steep forested hill. In 1999, intervenor requested that the tentative plan be put on inactive status on the recommendation of the city, and the city granted the request.[1] The city apparently believes that it made a mistake in requiring the tentative plan be put on

[1] Gresham Development Code (GDC) 6.0411 provides:

> "(A) Prior to the expiration date of a tentative plan extension the Manager may, upon written request of the applicant, assign an inactive status to the tentative plan.
>
> "(B) An inactive plan may have its tentative plan approval status reinstated, under the Type II procedure, if the plan is found to be consistent with the following criteria:
>
> "(1) There have been no changes in the Community Development Code that would necessitate a modification of the tentative plan;

inactive status and later continued to process the application as if it had never been put on inactive status. In 2002, intervenor submitted a final plat application but later withdrew that application. In 2004, intervenor submitted another final plat application that was approved by the city, and has now been appealed by petitioner in this appeal.[2] On the same day that the city approved the final plat application, petitioner filed a motion to stay the challenged decision pursuant to OAR 661-010-0068 and ORS 197.845(1).[3]

"(2) The facts upon which the approval was based have not changed to an extent sufficient to warrant refiling of the tentative plan; and

"(3) There are no other development approvals that would be affected.

"(C) If the tentative plan approval status is reinstated the applicant shall comply with the City's final plan technical information requirements in effect at the time of reinstatement. A land division that has been reinstated shall be recorded with Multnomah County within three years from the date the inactive status was granted."

[2] Petitioner is a non-profit organization whose mission is "to ensure protection and conservation of the region's tree covered volcanic buttes that enhance the quality of life in our communities." Motion for Stay 5.

[3] ORS 197.845(1) 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:

"* * * * *

"(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.

LUBA is authorized to stay a land use decision pending review, if the petitioner demonstrates: (1) a colorable claim of error in the decision under review; and (2) that the petitioner will suffer irreparable injury if the requested stay is not granted. *Wissusik v. Yamhill County*, 19 Or LUBA 561 (1990).

A. Colorable Claim of Error

The requirements to demonstrate a colorable claim of error are not particularly demanding. *Rhodewalt v. Linn County*, 16 Or LUBA 1001, 1004 (1987). A petitioner need not establish that it will prevail on the merits. *Thurston Hills Neigh. Assoc. v. City of Springfield*, 19 Or LUBA 591, 592 (1990). Provided a petitioner's arguments are not devoid of legal merit, it is sufficient that the errors alleged, if sustained, would result in reversal or remand of the challenged decision. *Barr v. City of Portland*, 20 Or LUBA 511 (1990).

Petitioner asserts that the city misconstrued its code in allowing intervenor to file a final plat application when the tentative plan was on inactive status and had not been reactivated. GDC 6.0411 provides that an inactive plan may be reactivated pursuant to a Type II procedure if there have been no changes to the GDC requiring modification of the tentative plan, there are no changed facts that would warrant requiring that the tentative plan be refiled, and there are no other development approvals that would be affected. *See* n 1. According to petitioner, because the city

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"* * * * *

"(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.

"(4) An order granting a stay of a quasi-judicial land use decision or limited land use decision involving a specific development of land shall be conditional upon filing an undertaking in the principal amount of $5,000. * * *

"(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."

never initiated any Type II procedure to reactivate the tentative plan, let alone made any findings that the approval criteria for reactivating an inactive plan were satisfied, the city improperly approved the final plat. Petitioner further asserts that significant changes to the GDC have occurred that would require modification of the tentative plan. Finally, petitioner points out that GDC 6.0411(C) requires that a reinstated land division must be recorded with Multnomah County within three years from the date the inactive status was granted. Because three years have passed since the tentative plan was placed on inactive status, petitioner argues final plat approval may not be granted.

The city's only response to petitioner's allegations is that a letter from a city planner to petitioner's attorney that was incorporated into the findings of the challenged decision demonstrates by itself that petitioner's allegations are without merit:

> "City asserts that the claims of petitioner, when reviewed against the facts and law presented in the [letter] are frivolous and/or lack merit, and LUBA can tell from the [letter] that the city has complied with it's own standards * * *." Response to Motion to Stay 2-3.[4]

The letter takes the position that, although all parties involved at the time the original tentative plan was approved believed there was a one-year time limit for filing the final plat, in actuality there was a five-year limit. According to the letter, the city misapplied the GDC in advising intervenor that the tentative plan would expire and recommending that the project be placed on inactive status. The letter explains that the city eventually realized its error and subsequently treated the application as if it had never been placed on inactive status.

> "Early in 2000, the city became aware of the misapplication of [the time limit condition of approval] and [the GDC]. * * * Sometime in early 2000, a phone conversation occurred with [intervenor] in which the original approval time limit, as provided in [the condition of approval] was acknowledged as being the correct time limit. * * * Since the original 5-year approval time period had not been extended via the misapplied inactive status action, the applicant derived no benefit from the

[4] Intervenor objects to the motion for stay and joins in the city's arguments. Intervenor does not, however, raise any additional arguments regarding the existence of a colorable claim of error.

> [application] being considered inactive. Prior to this time, no action of any kind was taken assuming an 'inactive' status. Subsequent to this time, the city proceeded under the original 5-year time limit, as provided in [the condition of approval]." April 30, 2004 Letter from City Planner 2.

Petitioner has alleged that the tentative plan was placed on inactive status, the tentative plan was never properly removed from inactive status, the three year period for reactivating inactive tentative plans has long expired, a final plat may not be approved when the tentative plan is inactive, and therefore the city erred in approving the final plat. The city's response to that claim of error, as reflected in the city planner's letter, may or may not be correct. However, by itself, it hardly demonstrates that petitioner's arguments are frivolous and without merit. Petitioner has demonstrated a colorable claim of error.

B. Irreparable Injury

In *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988), we set out the factors to be considered in whether a petitioner has adequately demonstrated that irreparable injury will be suffered if the stay is not granted:

> "1. Has the petitioner adequately specified the injury he or she will suffer?
>
> "2. Is the identified injury one that cannot be compensated adequately in money damages?
>
> "3. Is the injury substantial and unreasonable?
>
> "4. Is the conduct petitioner seeks to bar through the stay probable rather than merely threatened or feared?
>
> "5. If the conduct is probable, is the resulting injury probable rather than merely threatened or feared?" (Citations omitted.)

Petitioner seeks to "prevent incompatible and unlawful development on Hogan Butte." Motion for Stay 5. According to petitioner:

> "Hogan Butte is characterized by undeveloped, steep, mature, forested slopes. It represents a unique natural resource, particular to the region. The butte fosters community pride, provides recreational activities, soil stability, wildlife habitat, as well as improves water and air quality.

"* * * * *

> "Once the mature trees are cut, they cannot be replaced. Once the steep slopes are cleared and graded, the character of the land will be forever changed. The community asset will be lost. The injuries will be permanent and irreparable. The probable loss of mature trees and vegetation, and damage to steep slopes cannot be simply restored or fixed. This is not a case where a building can simply be removed or dirt replaced." *id*. At 5-6.

1. The City's Response

The city's response to the motion for stay mischaracterizes petitioner's argument regarding irreparable injury. The city asserts that "petitioner claims [it] will be injured because [it] has some right for the subject property to remain in open space * * * petitioner's stated interest is in preserving the entire property for open space." Response to Motion for Stay 3. Contrary to the city's repeated assertions, petitioner does not claim that Hogan Butte must remain open space. As petitioner explains, it seeks to enforce the procedural and substantive requirements in the GDC. According to petitioner, this will result in the development being altered to comply with new development standards. In other words, petitioner does not argue that no development should be permitted, only that any development that could be approved under current regulations would be different from that approved in the challenged decision.

The current GDC closely regulates the location and degree of development that can occur on steep and sensitive hillsides such as Hogan Butte. According to petitioner, Hogan Butte is now in a protective overlay, the Hillside Physical Constraint District, and contains regulated trees. Among other things, such regulated trees receive greater protections under the protective overlay than under the code provisions applicable to the tentative plan and to the final plat in the challenged decision. The city has provided an affidavit from the city planner who authored the April 30, 2004 letter that asserts that:

> "* * * In my opinion, current regulations with respect to tree cutting and the regulations of the Hillside Physical Constraint District would be unlikely to have any significant impact on the development as already approved." Affidavit of James Wheeler 1-2.

We do not understand the city to dispute that if the development application were reviewed under current code provisions that significantly different approval criteria and development standards would apply. As petitioner asserts, once trees are cut down and slopes altered, they cannot be replaced. Although the city asserts that current development standards would not result in "significant impacts," the city does not dispute petitioner's allegations that at least some of the 1700 trees slated for felling under the approved final plat permit would be preserved under current regulations. For instance, petitioner alleges that the new regulations prevent driveway construction on slopes greater than 35%, but the currently approved final plat provides for driveways on slopes greater than 35%. The city planner's unexplained assertion that application of current regulations would not have any significant impact on the development as approved is insufficient to reject petitioner's claim of irreparable injury.

The city also asserts that the type of injury alleged is not the type generally found to be irreparable. The city is again mistaken. As we stated in *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002):

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

Contrary to the city's assertions, this is precisely the type of case in which we recognize the alleged injury to be irreparable.

2. Intervenor's Response

We quote intervenor's legal argument in its entirety:

> "Petitioner will not suffer substantial and unreasonable injury; the conduct petitioner seeks to bar is not even that proposed to occur, so it is not probable or even 'merely threatened,' but merely 'feared'; and, by the same token, the resulting injury alleged by petitioner is merely feared rather than probable or in any way threatened." Memorandum in Opposition to Motion for Stay 2.

Intervenor's response challenges petitioner's assertions regarding factors three through five quoted above from *City of Oregon City*. Petitioner has adequately asserted that the alleged injury is substantial and unreasonable, the conduct causing the injury is probable, and that the injury is probable. As petitioner explains, the conduct petitioner seeks to bar is any development activity pursuant to an improperly issued final plat approval. There is no dispute that that development would drastically alter the nature of Hogan Butte. The fact that some type of development is likely possible that would also involve removal of some trees does not make the alleged injury insubstantial or reasonable. It is clear that the conduct petitioner seeks to bar is probable. As petitioner explains, and intervenor does not dispute, trees have already been marked for cutting, and the property has been marked and staked for clearing and grading. Clearly, the conduct petitioner seeks to bar is probable and the resulting injury from that conduct is also probable. Petitioner has adequately demonstrated that absent a stay irreparable injury would occur.

Intervenor also provides an affidavit that asserts that he would not log as many trees as petitioner fears, that he would suffer great financial harm if the stay were granted, and that he would be willing to agree to temporary limits on development in order to avoid a stay. However, he final plat approval allows what it allows. That intervenor might not currently plan to exercise all of his rights under the final plat approval is irrelevant. Additionally, intervenor's allegations of financial harm are insufficient to avoid a stay. *Amazon Coalition v. City of Eugene*, 29 Or LUBA 581 (1995) (LUBA will not deny an otherwise meritorious stay of a challenged decision solely because the applicant alleges it will suffer economic harm due to delay). Finally, if intervenor and petitioner wish to enter into a stipulation regarding permissible development activities during the pending

appellate review, they are certainly encouraged to do so. Intervenor's offer, however, provides no basis to deny the motion for stay.

Petitioner has established a colorable claim of error and the threat of irreparable injury. Petitioner's motion for stay is granted.[5]

C. Expedited Schedule

Pursuant to discussions with the parties during a telephonic hearing, the expedited schedule is as follows:

(1) The record shall be filed not later than May 28, 2004 and shall be delivered to petitioner on that date;[6]

(2) Any record objections must be filed and served not later than June 4, 2004;

(3) Absent record objections, the petition for review shall be filed and served not later than June 11, 2004;[7]

(4) The response brief shall not be filed later than June 25, 2004;

(5) Oral argument will be scheduled between June 28, 2004 and July 9, 2004; and

(6) The final opinion and order will be due 21 days after oral argument.

Dated this 21st day of May, 2004.

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Tod A. Bassham

[5] Petitioner has already provided an undertaking on stay deposited with the Board.

[6] Due to the expedited schedule in this appeal, all documents filed and served in this appeal shall either be filed and served by personal delivery or, if filed by mail, transmitted to LUBA and the parties by facsimile or electronic mail on the same day they are filed and served by mail.

[7] All of the following deadlines are contingent upon no record objections being filed. Should record objections be filed, we will establish a new schedule upon settling the record.

1 Board Member