

1 LUBA is authorized to stay a land use decision pending review, if a petitioner demonstrates:
2 (1) a colorable claim of error in the decision under review; and (2) that the petitioner will suffer
3 irreparable injury if the requested stay is not granted. *Wissusik v. Yamhill County*, 19 Or LUBA
4 561 (1990).

5 **A. Colorable Claim of Error**

6 The requirement to demonstrate a colorable claim of error is not particularly demanding.
7 *Rhodewalt v. Linn County*, 16 Or LUBA 1001, 1004 (1987). A petitioner need not establish that
8 it will prevail on the merits. *Thurston Hills Neigh. Assoc. v. City of Springfield*, 19 Or LUBA
9 591, 592 (1990). Provided a petitioner's arguments are not devoid of legal merit, it is sufficient that

“(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.

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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.”

1 the errors alleged, if sustained, would result in reversal or remand of the challenged decision. *Barr*
2 *v. City of Portland*, 20 Or LUBA 511 (1990).

3 The districts filed their petition for review concurrently with their motion for stay, and rely on
4 the assignments of error to demonstrate a colorable claim of error. The districts allege that the
5 ordinance violates the city’s comprehensive plan, state statute, and the Oregon Constitution. The
6 city does not respond to petitioners’ assertion of a colorable claim of error. The districts’
7 allegations, if sustained, would result in reversal or remand of the decision, and the city provides no
8 argument that would support a conclusion that those allegations are devoid of legal merit. We do
9 not see that they are. The districts have demonstrated a colorable claim of error.

10 **B. Irreparable Injury**

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

- 14 “1. Has the petitioner adequately specified the injury he or she will suffer?
15 “2. Is the identified injury one that cannot be compensated adequately in money
16 damages?
17 “3. Is the injury substantial and unreasonable?
18 “4. Is the conduct petitioner seeks to bar through the stay probable rather than
19 merely threatened or feared?
20 “5. If the conduct is probable, is the resulting injury probable rather than merely
21 threatened or feared?” (Citations omitted.)

22 The districts do not address the factors to be considered in determining whether a stay
23 should be granted. The districts devote most of their argument to the proposition that individual
24 property owners within the districts’ boundaries will be forced to waive their right to object to
25 annexation to avoid termination of their water and sewer services. Even if the districts are correct,
26 any resulting injury would be to the individual property owners rather than to the districts. The
27 districts may not assert potential injury to nonparties as a basis for demonstrating their own

1 irreparable injury. *Bauer v. City of Portland*, 38 Or LUBA 432, 438-39 (2000).

2 The only argument the districts provide as to their potential irreparable injury is:

3 “By coercing ‘votes’ in this manner, and contrary to the provisions of law, [the
4 districts] face the distinct possibility that consents to annexation of property within
5 the Districts will occur at an accelerated rate, despite surveys which show
6 annexation is actually opposed by a majority of the electors in the districts. Hence,
7 when a majority of ‘coerced consents’ is secured, annexation occurs, the Districts
8 cease to exist, all without the benefit of an election, and despite majority
9 opposition.” Motion for Stay 4.

10 The basis for this argument, however, is not entirely correct. Annexation does not occur
11 when a majority of consents is obtained. A city must take the further action of adopting an
12 annexation resolution or ordinance. ORS 222.170(3). In addition, should the city attempt to annex
13 areas currently located within the districts’ boundaries at some time in the future, the city’s use of the
14 disputed consents would be subject to challenge. Furthermore, should the districts prevail in this
15 appeal in establishing that any such consents are invalid, the city will not be able to rely upon those
16 consents to annex areas within the districts. As we stated in *Roberts v. Clatsop County*, 43 Or
17 LUBA 577, 583 (2002):

18 “Generally, the cases in which we find that the petitioner has demonstrated
19 irreparable injury if a stay is not granted involve proposals that destroy or injure
20 unique historic or natural resources, or other interests that cannot be practicably
21 restored or adequately compensated for once destroyed. *See Save Amazon*
22 *Coalition v. City of Eugene*, 29 Or LUBA 565, 568-69 (1995) (demolition of
23 historic structures); *ONRC v. City of Seaside*, 27 Or LUBA 679, 682-83 (1994)
24 (construction of bridge across marsh and wildlife habitat); *Barr v. City of*
25 *Portland*, 20 Or LUBA 511, 515 (1990) (decision shutting down the petitioner’s
26 long-standing business, causing irreparable loss of business reputation and
27 goodwill); *Thurston Hills Neigh. Assoc. v. City of Springfield*, 19 Or LUBA
28 591, 594-96 (1990) (proposal to log 2,250 mature trees, affecting neighborhood
29 viewshed); *Rhodewalt v. Linn County*, 16 Or LUBA 1001 (1987) (removal of
30 historic bridge); *Dames v. City of Medford*, 9 Or LUBA 433, 440 (1983) (road
31 project removing historically significant trees).”

32 In the present case, there are no unique historic or natural resources under attack. The
33 challenged decision does not mean the districts necessarily will cease to exist. The districts have not
34 demonstrated that they will suffer irreparable injury if the requested stay is not granted.

1 The districts' motion for stay is denied.

2 Dated this 29th day of July, 2004.

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Tod A. Bassham

9 Board Member

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