BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGER GRAHN,
Petitioner,

and

MONTE BOWLIN,
Intervenor-Petitioner,

vs.

CITY OF NEWBERG,
Respondent.

LUBA No. 2005-080

ORDER

MOTION TO INTERVENE

The notice of intent to appeal in this matter was filed May 25, 2005. The challenged decision adopts the city's Transportation System Plan (TSP), and includes provisions authorizing a project by the Oregon Department of Transportation (ODOT). On June 14, 2005, shortly before the record was due, the parties submitted a request to extend the deadline for filing the record to June 28, 2005. All parties signed the request, including ODOT. On June 21, 2005, ODOT filed a motion to intervene in this appeal.

Petitioner and intervenor-petitioner (hereafter, petitioners) oppose the motion to intervene, arguing that it was filed more than 21 days after the date the notice of intent to appeal was filed, and is therefore untimely under ORS 197.830(7)(c) and OAR 661-010-0050(2).[1] Consequently,

[1] ORS 197.830(7) provides:

> "(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

petitioners argue, ODOT may participate in these appeals only by filing an agency brief, pursuant to OAR 661-010-0038.

ODOT responds in relevant part that its motion should be allowed, notwithstanding that it was filed six days late, because prior to the last date for filing motions to intervene the parties agreed to extend the time to file the record until June 28, 2005. Pursuant to OAR 661-010-0067(5):

> "Any agreement by the parties allowing an extension of time shall automatically extend the time for subsequent filings, as well as the issuance of the Board's final order by an amount of time equal to the extension agreed to by the parties."

According to ODOT, the parties' agreement to extend the time for filing the record thus had the effect of extending the time for all "subsequent filings," including the deadline for filing motions to intervene, to June 28, 2005. Therefore, ODOT argues, its June 21, 2005 motion to intervene was timely filed.

Petitioners respond that the 21-day deadline imposed by ORS 197.830(7)(a) and (c) is absolute, and LUBA's rules cannot operate to extend that deadline. In any case, petitioners argue, OAR 661-010-0067(5) extends only the time for "subsequent filings." According to petitioners, both the record and motions to intervene were due on June 15, 2005. OAR 661-010-0067(5)

> "(b) Notwithstanding the provisions of paragraph (a) of this subsection, persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:
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> > "(A) The applicant who initiated the action before the local government, special district or state agency; or
> >
> > "(B) Persons who appeared before the local government, special district or state agency, orally or in writing.
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> "(c) Failure to comply with the deadline set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene."

OAR 661-010-0050(2) provides, in relevant part:

> "A motion to intervene shall be filed within 21 days of the date the notice of intent to appeal is filed pursuant to OAR 661-010-0015, or the amended notice of intent to appeal is filed or original notice of intent to appeal is refiled pursuant to OAR 661-010-0021. * * *"

does not automatically extend deadlines that fall on the same day as the deadline being extended, petitioners contend.

To address the last point first, we do not construe OAR 661-010-0067(5) as narrowly as petitioners do, to automatically extend only those deadlines that fall chronologically after the date of the deadline being extended. In our view, "subsequent filings" under OAR 661-010-0067(5) includes all deadlines that, as of the date of extension, have not yet passed. In other words, deadlines that have not yet passed when another deadline is extended are "subsequent" to the deadline being extended.[2] Here, the June 15, 2005 deadline for filing motions to intervene had not yet passed when the stipulated extension of the deadline to file the record became effective on June 14, 2005. As far as LUBA's rules are concerned, therefore, the deadline for filing motions to intervene was extended and ODOT's motion was timely.

The more difficult question, however, is whether ORS 197.830(7)(c) compels a different result in the present case. ORS 197.830(7)(c) is expressed in unequivocal language, mandating that failure to comply with the 21-day deadline set out in ORS 197.830(7)(a) "shall result in denial of the motion to intervene." *See Rose v. City of Corvallis*, ___ Or LUBA ___ (LUBA Nos. 2004-221/222, April 15, 2005) (a petitioner's belated objection to an untimely motion to intervene is not a basis to allow the intervention).[3] For the reasons that follow, we do not believe we have authority to apply OAR 661-010-0067(5) in a manner that contravenes that express statutory command.

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[2] The foregoing interpretation of OAR 661-010-0067(5) is also consistent with OAR 661-010-0005, which requires that LUBA shall interpret its rules to carry out the objectives of promoting justice and "affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing." There are a number of deadlines under LUBA's rules, some serial and some contemporaneous, *i.e.*, that occur on the same date as other deadlines. An interpretation of OAR 661-010-0067 that limited automatic extensions to deadlines that fall chronologically after the deadline being extended and does not include unexpired deadlines could potentially cause procedural confusion and result in an injustice.

[3] On the other hand, we have held that ORS 197.830(7)(c) does not mandate denial of an untimely motion to intervene where the delay in filing the motion is attributable to the petitioner's violation of our rules. *Mountain West Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000) (LUBA will not deny the applicant's motion to intervene filed 53 days after the notice of intent to appeal is filed, where the petitioner failed to serve a copy of notice on the applicant as required under our rules). Although our order in *Mountain West Investment Corp.* does not elaborate on the basis for its ruling, presumably that basis is an extension of the principle described in *Flowers v. Klamath County*, 98 Or App 384, 780 P2d 227 (1989) (a local government's failure to

LUBA has general statutory authority to adopt rules governing its review proceedings, at ORS 197.820(4) and ORS 197.830(13)(a). That authority obviously does not allow LUBA to adopt rules that contravene a statutory mandate, or to interpret existing rules to have that effect. If ORS 197.830(7) simply provided a 21-day deadline for filing a motion to intervene, without more, a reasonable argument could be made that extension of that 21-day deadline pursuant to OAR 661-010-0067(5) is not inconsistent with the statute. *See Gordon v. City of Beaverton*, 292 Or 228, 637 P2d 125 (1981) and *Hoffman v. City of Portland*, 294 Or 150, 654 P2d 1106 (1982) (rejecting the Court of Appeals' conclusion that LUBA lacked authority to adopt or apply a rule allowing for stipulated extensions of time to file the petition for review beyond the 20-day deadline to file the petition for review imposed by the 1979 statutes in effect at the time).

However, ORS 197.830(7) does not merely prescribe a filing deadline, in the same manner as the 1979 statute at issue in *Gordon* and *Hoffman*. The statute goes further and, in ORS 197.830(7)(c), dictates the *consequences* of failing to meet that 21-day deadline. Filing a motion to intervene more than 21 days after the notice of intent to appeal is filed "shall result in denial of the motion to intervene." While that language is not necessarily inconsistent with a rule that allows automatic extension of the 21-day deadline under specified circumstances, thereby avoiding the prescribed consequence, it is strong evidence that the legislature wanted the deadline to be rigorously enforced and, by implication, that the legislature did not want that deadline to be extended.

It is also worth noting that the statutes governing LUBA's review provide express authority to extend *some* of the statutory deadlines set out in ORS 197.805 to 197.845, but not others. For example, ORS 197.830(14) requires LUBA to issue its final order within 77 days of the date the record is transmitted. ORS 197.840 sets out several exceptions that effectively authorize LUBA to

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abide by statutory procedures, a failure that bears directly on a petitioner's ability to appear, obviates the necessity for making a local appearance in order to have standing to appeal to LUBA). In the present case, ODOT does not allege that its delay in filing the motion to intervene is attributable to petitioners' violation of our rules, or even that ODOT relied upon the stipulated extension to delay filing its motion.

extend that 77-day deadline, including "[a]ny period of delay resulting from a motion * * *." ORS 197.840(1)(b).[4] The Court of Appeals in its decision in *Gordon v. City of Beaverton*, 52 Or App 937, 630 P2d 366 (1981), relied on the negative implication of such express grants of authority to extend *some* deadlines, to conclude that LUBA lacked authority to adopt rules extending *other* deadlines (in that case, the statutory 20-day deadline for filing the petition for review). As noted, the Supreme Court later rejected that view, obliquely in its *Gordon* decision and directly in *Hoffman*. Nonetheless, it seems to us that that context gives some support to our analysis of ORS 197.830(7)(a) and (c). Some statutory deadlines governing LUBA's review (the 77-day deadline to issue our final order, the 21-day deadline to file the notice of intent to appeal, the 21-day deadline to file the motion to intervene come to mind) are evidently more important to the legislature than other deadlines. The fact that the legislature carefully dictated the consequences for failure to comply with the 21-day deadline for filing the motion to intervene suggests that the legislature regards that deadline as a particularly important one. Whatever general authority LUBA may have to adopt rules extending less critical deadlines, it seems unlikely that the legislature intended LUBA to have the authority to adopt rules extending these seemingly more critical statutory deadlines.

For the foregoing reasons, we conclude that, while the best reading of the text of OAR 661-010-0067(5) would allow automatic extension of the deadline to file a motion to intervene in the present circumstances, in fact that interpretation of the rule would allow the rule to operate in a manner that contravenes ORS 197.830(7)(a) and (c). Accordingly, ODOT's motion to intervene is denied, as untimely.[5]

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[4] In our view, the quoted language from ORS 197.840(1)(b) is direct authority for the language in OAR 661-010-0067(5) providing that the agreement of the parties to extend a deadline automatically extends the 77-day deadline to issue the Board's final order.

[5] ODOT has not (yet) filed a request to file a state agency brief or to appear as amicus, under OAR 661-010-0038 or OAR 661-010-0052.

MOTION FOR STAY

Pursuant to OAR 197.845 and OAR 661-010-0068, petitioners move to stay those portions of the challenged decision that would allow the Springbrook/Highway 219 and Wilsonville Road/Highway 219 intersections to be moved to the vicinity of 8th street.[6] To obtain a stay, petitioners must demonstrate "a colorable claim of error" in the decision, and that "the petitioner will suffer irreparable injury if the stay is not granted." ORS 197.845(1); OAR 661-010-0068(1).

Petitioners explain that the challenged portion of the TSP adopted in the city's decision authorizes ODOT to relocate an admittedly dangerous five-way intersection. According to petitioners, the proposed project would require condemnation of petitioner Grahn's vacant, industrial-zoned 2.41-acre parcel, to allow for a new connector road. The new connector road would also adjoin intervenor-petitioner's residence. Petitioners argue that initiation of the project is

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[6] ORS 197.845 provides, in relevant part:

> "(1) Upon application of the petitioner, [LUBA] may grant a stay of a land use decision or limited land use decision under review if the petitioner demonstrates:
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> > "(a) A colorable claim of error in the land use decision or limited land use decision under review; and
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> > "(b) That the petitioner will suffer irreparable injury if the stay is not granted.
>
> "* * * * *
>
> "(4) [LUBA] shall limit the effect of a stay of a legislative land use decision to the geographic area or to particular provisions of the legislative decision for which the petitioner has demonstrated a colorable claim of error and irreparable injury under subsection (1) of this section. [LUBA] may impose reasonable conditions on a stay of a legislative decision, such as the giving of a bond or other undertaking or a requirement that the petitioner file all documents necessary to bring the matter to issue within a specified reasonable time period."

OAR 661-010-0068(1) provides, in relevant part:

> "A motion for a stay of a land use decision or limited land use decision shall include:
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> "* * * * *
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> "(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[.]"

imminent, citing a ODOT statement that the project must be completed prior to the end of 2006, due in part to the timing of federal financing.

A. Colorable Claim of Error

To demonstrate a "colorable claim of error," petitioners argue that the 2.41-acre parcel is the only "shovel-ready" industrial land in the city's UGB, and that the loss of that parcel to non-industrial transportation uses will impact the city's compliance with Statewide Planning Goal 9 (Economic Development) and its implementing rule.

Respondent argues that the Goal 9 rule applies outside the context of periodic review only when a post-acknowledgment plan amendment changes the plan designation of property to or from commercial or industrial use, in excess of two acres. *See* OAR 660-009-0010(4). According to respondent, the challenged decision does not change the plan designation to or from commercial or industrial use for any property, including petitioner's.

The requirement to demonstrate a colorable claim of error is not particularly demanding. *Rhodewalt v. Linn County*, 16 Or LUBA 1001, 1004 (1987). We tend to agree with respondent that petitioners have not adequately explained why Goal 9 or the Goal 9 rule are applicable to the portion of the decision challenged here. However, we need not and do not determine whether petitioners have demonstrated a colorable claim of error in this case, because we agree with respondent that petitioners have not satisfied the irreparable injury element.

B. Irreparable Injury

In *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988), LUBA set out five questions that must be answered in the affirmative in order to conclude that petitioner will suffer irreparable injury 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?

Respondent concedes that petitioners have demonstrated that the conduct petitioners seek to bar—relocation of the intersection—is probable, for purposes of criterion 4. However, respondent argues that petitioners have not demonstrated that the remaining criteria for a stay are satisfied.

Petitioners' specification of the "injury" petitioner Grahn will suffer is as follows:

> "If the stay is not granted, ODOT will build a road through the middle of Movant Roger Grahn's property, thus obliterating it for potential industrial use.
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> "In addition, the road ODOT seeks to build passes adjacent to Movant Monte Bowlin's house where Mr. Bowlin resides. This will add substantial new traffic adjacent to Mr. Bowlin's residence. Movants have adequately specified two separate types of injury, and therefore, the first factor of *City of Oregon City* is met." Motion for Stay 5 (citations omitted).

Continuing the theme of protecting industrial lands, petitioners' demonstration that the specified injury "cannot be compensated adequately in money damages" states that petitioner Grahn is

> "concerned about the City's industrial lands base. Once the road is built, the property will be forever lost for industrial purposes. Once ODOT builds a road, ODOT will not convert the road back to industrial uses. Mr. Grahn's 2.41 acres is the only shovel ready piece of vacant industrial property in Newberg. The loss of 2.41 acres of industrial land from the City's industrial lands inventory cannot be compensated adequately in money damages." *Id.* (citations omitted).

With respect to intervenor-petitioner, petitioners argue that "there is no monetary compensation that would be adequate to compensate Mr. Bowlin for the additional traffic he will have to endure adjacent to his home as a result of this decision." *Id.* at 6.

Petitioner Grahn does not allege that the proposed condemnation of his property is the injury. To the extent he advances that allegation, it would seem that that injury is one that can, and indeed must, be adequately compensated. Instead, petitioner Grahn relies on his professed concern

for the adequacy of the city's inventory of industrial sites. Respondent argues, and we agree, that the potential inadequacy of the city's industrial lands inventory is not an "injury" that "the petitioner will suffer" for purposes of ORS 197.845(1)(b). An "injury" under the statute and our rule must affect more than the movant's abstract interest in the public welfare. The perceived threat to petitioner's enjoyment in the adequacy of the city's industrial lands inventory is not an "injury" to petitioner.

With respect to intervenor-petitioner, he alleges only that the relocated intersection will "add substantial new traffic adjacent to" his residence.[7] No affidavit or other evidence is cited to support this allegation. Respondent cites evidence that intervenor-petitioner's property currently abuts Springbrook Road, and that the proposed new connector road will remove approximately 25 percent of the northbound traffic and 33 percent of the southbound traffic on Springbrook Road in front of intervenor's property. According to respondent, there will be no net increase of traffic on roads near intervenor's property, and roads in the vicinity will operate more safely than at present. We agree with respondent that, to the extent intervenor has adequately specified an injury, intervenor has not demonstrated that that injury is "substantial and unreasonable," or that it is "probable rather than merely threatened or feared."[8]

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[7] We note that ORS 197.845(1)(b) speaks only of injury to "the petitioner." *See* n 6. However, the corresponding provisions of OAR 661-010-0068 speak of the "movant," without limitation to the petitioner. *Id.* We assume, without deciding, that injury to a party other than a petitioner can be a basis for a stay under the statute and rule.

[8] Our conclusion on this point makes it unnecessary to address respondent's other contentions. It is worth noting, however, that respondent disputes petitioners' argument that the project is imminent. According to respondent, construction is scheduled to began in summer 2006, by which time this appeal and any appeals of our decision may well be resolved. We also tend to agree with respondent's contention that development of *vacant* land will rarely result in *irreparable* injury. *See Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002) (irreparable injury involves proposals that destroy or injure unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once destroyed); *Von Lubken v. Hood River County*, 17 Or LUBA 1150, 1153 (1989) (no irreparable injury when the property being developed for a golf course could be returned to farm use if petitioner prevailed). Finally, we note that respondent argues that the stay would delay preparations, such as condemnation and bid requests, necessary to meet the scheduled summer 2006 start, and that any delay in that start would result in hundreds of thousands of dollars of additional cost. For that reason, respondent requested that if a stay is granted the Board require an undertaking in the amount of $28,000.

The motion for stay is denied.

Dated this 15th day of July, 2005.

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Tod A. Bassham
Board Member