BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AMBROSE PETER OTT, STEPHANIE RAE OTT, BOB ELDER and DIANE ELDER,
Petitioners,

vs.

LAKE COUNTY,
Respondent.

LUBA No. 2007-032

ORDER

Petitioners move for a stay of the challenged decision pursuant to ORS 197.845(1), which allows LUBA to stay a decision pending resolution of the merits of an appeal where the petitioner demonstrates (1) a colorable claim of error in the decision and (2) that the petitioner will suffer irreparable injury if the stay is not granted.[1] *Wissusik v. Yamhill*

[1] 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:
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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;
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> "(d) A suggested expedited briefing schedule;
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> "(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.

County, 19 Or LUBA 561, 562 (1990).

A. Background

The subject property is a 28.31-acre parcel zoned "A-1, Exclusive Farm Use," located in Lake County. The applicants applied for a conditional use permit for a non-farm dwelling and log cabin manufacturing facility. The board of commissioners approved the application. Petitioners timely appealed the board of commissioners' decision to LUBA, and now seek to stay of the effectiveness of the conditional use permit pending resolution of this appeal.

B. 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).

Petitioners assert that the Lake County Zoning Ordinance (LCZO) Section 24.20 prohibits siting a non-farm dwelling in an "A-1" or "A-2" agricultural zone if the soil in the zone is predominantly Class I through Class VI, and that the applicant's proposed home site

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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."

is located on Class VI soils in violation of LCZO Section 24.20. Petitioners also assert that the proposed log home kit manufacturing facility is not a "home occupation" as that term is used in LCZO Section 24.06 because it is geographically separate from the proposed dwelling. Petitioners have demonstrated a colorable claim of error.

C. Irreparable Injury

In *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004), we reiterated the factors to be considered in whether a petitioner has adequately demonstrated that irreparable injury will be suffered if a stay is not granted:

> "1. Has the petitioner adequately specified the injury he or she will suffer?
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> "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.)

Petitioners allege that the applicants have scraped and cleared portions of the property, piled and burned vegetation, and erected a sign on the property announcing the relocation of their log home manufacturing business, and that continuation of such activities will irreparably harm them and the public in several ways. First, petitioners assert that there is a high likelihood of significant archeological sites being present on the property, and that the grading and clearing activities could result in irreparable damage to any such archeological objects that are located on the property. Second, petitioners allege that a stay of further activities on the property is necessary to prevent soils from blowing onto other properties, disturbing neighboring residents and ranching activities, and impeding passing traffic. Third, petitioners allege that a stay of further activity is necessary to prevent the disruption of grazing and migration routes of wildlife such as deer and big horn sheep, which

allegedly reside on and cross the subject property. Finally, it appears that petitioners are alleging that a portion of the subject property abutting Highway 31 is part of petitioners Elders' Bureau of Land Management (BLM) grazing allotment, and that the proposed activity on the property will impair their ability to graze cattle on the subject property if the property is fenced, in addition to causing petitioners to incur significant fencing costs.

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)."

Evidence in the record indicates that the State Historic Preservation Office concluded that there is an extremely high probability that the property possesses archeological sites and possibly buried human remains. Record 71. However, we do not think that petitioners have established that a stay is necessary in order to protect archeological objects or human remains that may be discovered on the subject property. The protections afforded by ORS 358.920(1)(a) and ORS 97.740 *et seq* are intended to protect any resources found on the property. ORS 358.920(1)(a) provides:

> "A person may not excavate, injure, destroy or alter an archaeological site or object or remove an archaeological object located on public or private lands in Oregon unless that activity is authorized by a permit issued under ORS 390.235."

Similarly, ORS 97.745 provides in relevant part:

> "(1) Except as provided in ORS 97.750, no person shall willfully remove, mutilate, deface, injure or destroy any cairn, burial, human remains, funerary object, sacred object or object of cultural patrimony of any native Indian. Persons disturbing native Indian cairns or burials through inadvertence, including by construction, mining, logging or agricultural activity, shall at their own expense reinter the human remains or funerary object under the supervision of the appropriate Indian tribe.
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> "* * * * *
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> "(4) Any discovered human remains suspected to be native Indian shall be reported to the state police, the State Historic Preservation Officer, the appropriate Indian tribe and the Commission on Indian Services."

If the activities on the property lead to discovery of an archeological site or object or human remains, either a permit must be secured from the State Parks and Recreation Department under ORS 390.235(1)(a),[2] or the discovery must be reported to various agencies and the appropriate Indian tribe. Failure to comply with ORS 390.235(1)(a) is a Class B misdemeanor. ORS 390.235(7). The requirement to comply with ORS 358.920(1)(a) and ORS 390.235(7), and the penalties for failure to comply with such statutes are sufficient to protect any archeological resource that may be found on the subject property. Given those provisions, we do not think that a stay is necessary in order to protect any archeological sites or objects found on the subject property.

Similarly, we do not understand, and petitioners do not explain, how the allegation that blowing soil from the activities could disturb neighbors and impede traffic rises to the level of irreparable harm or injury. Petitioners have also failed to explain how the applicant's activities will irreparably harm migrating wildlife, in light of evidence in the record

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[2] ORS 390.235(1)(a) provides:

> "A person may not excavate or alter an archaeological site on public lands, make an exploratory excavation on public lands to determine the presence of an archaeological site or remove from public lands any material of an archaeological, historical, prehistorical or anthropological nature without first obtaining a permit issued by the State Parks and Recreation Department."

indicating that the Oregon Department of Fish and Wildlife found that approval of the proposed permit would comply with the LCZO's provisions protecting such wildlife under Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Record 75. We do not think that petitioners have proved that the continuation of grading and clearing and other development activities on the subject property will "destroy or injure unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once destroyed."

In addition, we note that even if the sign was erected in violation of a provision of the LCZO, an allegation which petitioners have not made, the sign could be removed if petitioners prevail, such that any injuries related to it are temporary and not irreparable. *See Von Lubken v. Hood River County*, 17 Or LUBA 1150, 1153 (1998) (no irreparable injury to the petitioner when the property being developed as a golf course could be returned to farm use if the petitioner prevails); *Roberts*, 43 Or LUBA at 583 (no irreparable injury to the petitioners when the property being developed with condominiums could be returned to use as a golf course and open space if petitioners prevail).

As a final matter, petitioners do not attempt to explain how the grading and clearing activities on the property are related to any dispute over the boundaries or extent of a BLM grazing allotment, and they do not allege that the applicants have erected a fence or plan to erect a fence along the boundary. More importantly, the dispute over the boundaries or extent of a BLM grazing allotment is not one that could be remedied by the grant of a stay in any event.

Petitioners have not established a threat of irreparable injury.

Petitioners' motion for a stay is denied.

Dated this 12th day of March, 2007.

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Melissa M. Ryan
Board Member