BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THAN EXAMILOTIS and NICOLE EXAMILOTIS,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

COOS COUNTY STEP COMMISSION,
Intervenor-Respondent.

LUBA No. 2006-205

ORDER

MOTION FOR STAY

Petitioners lease land to intervenor for the operation of a fish hatchery. In 2006, intervenor applied for land use authorization to develop an accessory building that would include new classrooms and bathrooms. Intervenor also sought authorization to site two "watch person" dwelling structures for use in conjunction with the fish hatchery operation. The county issued a zoning compliance letter approving the accessory building and two watch person dwellings. Based upon the zoning compliance letter, intervenor obtained building permits to construct the approved structures.

The zoning compliance letter was issued administratively and no notice of the application or the decision was provided to petitioners. Petitioners learned of the decision after construction began and appealed the zoning compliance letter to LUBA. Petitioners now move LUBA to stay the decision pending their appeal to LUBA.

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).

Petitioners do not develop any arguments regarding a colorable claim of error other than to rely on their petition for review, which has already been filed. In the petition for review, petitioners argue that the county's decision is not supported by adequate findings or substantial evidence. Because the decision does not include any findings, petitioners' arguments are adequate to demonstrate 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 a petitioner will suffer irreparable injury if the 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?
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> "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' only argument in support of their claim of irreparable injury is that construction has already begun within sight, sound, and smell of their property and "is already causing significant and irreparable harm to the Petitioners' present use and enjoyment of their residence and real property as a result of all the adverse noise, dust, sounds and smell associated with this unlawful development." Motion for Stay 2. Petitioners make no effort to address the five factors necessary to demonstrate that petitioners will suffer irreparable injury in the absence of a stay.

As stated above, two of the factors a petitioner must demonstrate in order to demonstrate irreparable injury are that the injury is substantial and unreasonable and the identified injury is one that cannot be compensated adequately in money damages. We have stated that in order to demonstrate such an injury the proposed development generally must 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. *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002). Petitioners do not attempt to explain how any unique or natural resources will be destroyed or how any damage done cannot be removed or otherwise compensated for. The noise, dust, and unpleasant sounds and smells that petitioners mention do not rise to the level of irreparable injury. Petitioners have not demonstrated that they are entitled to a stay.

Petitioners' motion for stay is denied.

MOTION TO DISMISS

Intervenor moves to dismiss this appeal as moot. We will dismiss an appeal as moot if our review will have no practical effect. *Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990). Intervenor argues that our review will have no practical effect because the challenged decision, the zoning compliance letter, has expired.

The Coos County Zoning and Land Development Ordinance (LDO) requires that an applicant first request and receive a zoning verification letter from the planning department

before applying for a building permit. LDO 3.1.200.[1] Once a zoning compliance letter is obtained, it is valid for one year. *Id*. In the present case, the zoning compliance letter was issued on April 28, 2006. Under the terms of the LDO, intervenor had one year to apply for building permits based upon the approval granted by the zoning compliance letter. Intervenor did that and obtained building permits for the accessory and watch person structures. Petitioners did not appeal those building permit decisions. The one-year period for which the zoning compliance letter was valid has now expired. Intervenor argues that because that one-year period has expired, the zoning clearance letter has also expired, and any appeal of the challenged decision is moot. According to intervenor, the only existing permits are the building permits, and because petitioners did not appeal the building permit decisions, there is nothing left for petitioners to challenge.

Intervenor cites *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231 (2003) for the proposition that once a permit that is only valid for a limited time expires, any appeal of that permit becomes moot. In *Rest Haven*, the city issued a tree-cutting permit with conditions that the petitioners objected to. The tree-cutting permit expired one year from the date of its issuance. The parties suspended the appeal in an attempt to negotiate a settlement, but were eventually unable to settle the case. By the time the appeal had been reactivated the one-year period had expired and the permit was no longer valid. The city argued that the

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[1] LDO 3.1.200 provides:

> "To obtain a building permit, the applicant shall first request and receive a zoning verification letter from the Coos County Planning Department. This verification letter is valid for one year from the date it is issued.
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> "If the request otherwise requires review (site plan, conditional use, variance, partitioning, et.), a verification letter shall not be issued unless the request is approved through any required applicable process. If a process results in a conditional approval, said conditions shall be fulfilled prior to a verification letter issuance, or shall be so indicated on the verification letter.
>
> "A zoning verification letter shall only be issued for a development proposal found to be in compliance with this Ordinance and the Comprehensive Plan."

appeal was moot because the permit was no longer valid, and review of the permit by LUBA would merely be an advisory opinion. We agreed with the city, finding that because our review of the decision would have no effect on the rights and obligations of the parties under the permit that the appeal was moot. *Id*. at 238.

In *Rest Haven* no actions had been taken based on the tree-cutting permit and no further actions could be taken based on the tree-cutting permit once it expired. In the present case, building permits were issued based on the zoning compliance letter. The zoning compliance letter was the county's decision that the requested accessory and watch person structures are permitted uses under the county zoning ordinance. Petitioners are not challenging the structures based on violations of the building code, they are disputing intervenor's right to build the structures in the first place. There was no consideration of whether the requested uses were permitted uses under the county zoning ordinance when the building permits were issued – that decision was made in the zoning compliance letter.

While the challenged decision only grants intervenor a year to take further action based on the county's decision that the requested uses are permitted uses, the challenged decision remains as the county's only decision approving the uses. If that zoning compliance letter was erroneously issued, then even if intervenor's structures are built to code they are not approved uses. Therefore, our review of the challenged decision will have a practical effect on the parties and will not merely be an advisory opinion.[2]

Intervenor's motion to dismiss is denied.

MOTION TO TAKE EVIDENCE OUTSIDE OF THE RECORD

Petitioners move the Board to take evidence outside of the record to establish that the challenged decision is not moot, because the county and intervenor are relying on the zoning compliance letter to justify the current construction as well as any future construction.

[2] No party argues that the zoning clearance letter qualifies as a decision that is exempt from the statutory definition of "land use decision" under ORS 197.015(11)(b)(A), and we do not consider that question here.

Because we have already denied intervenor's motion to dismiss, there is no need to consider the extra-record evidence in order to resolve the motion to dismiss.

We do not further consider petitioners' motion to take evidence outside of the record.

BRIEFING SCHEDULE

In an earlier order, we suspended the deadlines in this appeal pending resolution of the evidentiary issues. We now reestablish the briefing schedule. The petition for review has already been filed. The response briefs are due 21 days from the date of this order. The Board's final opinion and order is due 56 days from the date of this order.

Dated this 19th day of October, 2007.

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Melissa M. Ryan
Board Member