

1 upper bridge crossing, and cross between 3 and 5 feet under Tumalo Creek at the lower
2 bridge crossing; and (2) transmit water from the new intake facility 500 feet across federal
3 forest land to Skyliner's Road, a county-and-federal government-managed road that provides
4 access to the national forest. From that intersection, the new pipeline will be located in
5 Skyliner's Road and transmit water approximately 9.5 miles to the city's treatment facility.
6 Petitioner seeks to stay Ordinance 2185, with regard to the SWIP.

7 On July 10, 2012 the United States Forest Service (Forest Service) issued a permit
8 that allows the city to construct the SWIP on forest lands, and on September 18, 2012
9 petitioner's administrative appeal of that federal permit was denied.¹ The city has also
10 received a fill and removal permit from the Oregon Department of State Lands (DSL) that
11 allows construction in affected wetlands along Tumalo Creek.

12 Construction of the upper portion of the pipeline is required to occur during the in-
13 water work window for Tumalo Creek set by the Oregon Department of Fish and Wildlife
14 (ODFW) during low flow seasons, between July 1, 2012 and November 1, 2012.
15 Construction of a portion of the SWIP on federal forest land is scheduled to commence on
16 October 10, 2012.² That construction includes cutting of trees in wetlands along Tumalo
17 Creek, the installation of pipes encased in concrete in wetland areas, installation of a pipe
18 along Tumalo Creek at the upper Tumalo Creek bridge, installation of a pipe beneath Tumalo
19 Creek at the lower bridge, and removal of spruce trees and cottonwood trees in several
20 locations near the creek.

¹ Petitioner moved for an injunction in federal district court prohibiting implementation of the SWIP, and according to the city a hearing on that motion is scheduled for 9:00 a.m. on October 10, 2012.

² The city entered into a construction contract for design and construction of the SWIP in March, 2011 and in April, 2012, the city approved an amendment to the construction contract.

1 **JURISDICTION**

2 **A. LUBA Jurisdiction**

3 The statutory standards under which LUBA may grant a request to stay a decision that
4 has been appealed to LUBA are set out at ORS 197.845(1), which provides:

5 “Upon application of the petitioner, the board may grant a stay of a land use
6 decision or limited land use decision under review if the petitioner
7 demonstrates:

8 “(a) A colorable claim of error in the land use decision or limited land use
9 decision under review; and

10 “(b) That the petitioner will suffer irreparable injury if the stay is not
11 granted.”

12 In its response to the motion for stay, the city argues that LUBA does not have jurisdiction to
13 stay the portion of Ordinance 2185 that includes the SWIP because the Forest Service has
14 issued a permit for the portion of the SWIP that is occurring on federal land. According to
15 the city, where the Forest Service has determined that the project is allowed under federal
16 regulations governing forest land uses, LUBA does not have authority to issue a stay that
17 would have the effect of “invalidating” the Forest Service permit. Response to Motion for
18 Stay 7.

19 LUBA does not have the authority to stay a decision that is not the subject of an
20 appeal. *ODOT v. Douglas County*, 34 Or LUBA 720, 722-23 (1998); *Rhodewalt .v Linn*
21 *County*, 16 Or LUBA 1001, 1006 (1987). However, petitioner does not seek a stay of the
22 Forest Service permit or DSL permit, neither of which are before us in this appeal.
23 Petitioner seeks a stay of the portion of Ordinance 2185 that includes the SWIP. The fact that
24 the Forest Service has issued a special use permit for construction of the portions of the
25 SWIP that are on federal forest land, or the fact that DSL has issued a fill and removal permit
26 for work in wetlands, does not prevent LUBA from exercising the authority that the
27 legislature has given to LUBA to stay a land use decision, or specific portions of a land use
28 decision. While the practical effect of a stay could be to delay the portion of the project that

1 is allowed by the Forest Service permit or the DSL permit, that practical effect has no bearing
2 on whether LUBA has jurisdiction to grant a stay of Ordinance 2185 if the statutory standards
3 for granting a stay are met.

4 **B. Standing**

5 In another portion of its response, the city argues that petitioner does not have
6 standing to seek a stay because petitioner's allegation of irreparable injury set forth in the
7 affidavit attached to petitioner's motion for stay alleges only injury to the affiant, an
8 individual who is not a named petitioner, and not to petitioner as an organization.
9 Petitioner's supplemental affidavit, which we allow and consider, sufficiently alleges injury
10 to petitioner and to several of its members.

11 **IRREPARABLE INJURY**

12 One of the required demonstrations that a petitioner must make before LUBA may
13 stay a decision pending appeal is "[t]hat petitioner will suffer irreparable injury if the stay is
14 not granted." ORS 197.845(1)(b). In determining whether a petitioner has adequately
15 demonstrated he or she will suffer irreparable injury in the absence of a stay, LUBA considers
16 whether (1) petitioner has adequately specified the injury; (2) the identified injury is one that
17 cannot be compensated adequately in money damages; (3) the injury is substantial and
18 unreasonable; (4) the conduct petitioner seeks to bar through the stay is probable rather than
19 merely threatened or feared; and (5) if the conduct is probable, the resulting injury is probable
20 rather than merely threatened or feared. *City of Oregon City v. Clackamas County*, 17 Or
21 LUBA 1032, 1042-43 (1988).

22 Petitioner describes the injury it will suffer as:

23 " * * the cutting of trees in wetlands along Tumalo Creek, the installation of
24 hundreds of feet of concrete in wetlands, the installation of a highly-visible
25 pipe along the Creek at the upper Tumalo Creek bridge, the cutting of large
26 spruce trees next to the Tumalo Falls parking lot, the cutting of a grove of
27 cottonwood trees at the west end of the upper Tumalo Creek bridge at the
28 entrance to the parking lot, and the cutting of a grove of spruce at the east end
29 of the lower Tumalo Creek bridge." Motion for Stay 3.

1 As we stated in *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002):

2 “Generally, the cases in which we find that the petitioner has demonstrated
3 irreparable injury if a stay is not granted involve proposals that destroy or
4 injure unique historic or natural resources, or other interests that cannot be
5 practicably restored or adequately compensated for once destroyed. *See Save*
6 *Amazon Coalition v. City of Eugene*, 29 Or LUBA 565, 568-69 (1995)
7 (demolition of historic structures); *ONRC v. City of Seaside*, 27 Or LUBA
8 679, 682-83 (1994) (construction of bridge across marsh and wildlife habitat);
9 *Barr v. City of Portland*, 20 Or LUBA 511, 515 (1990) (decision shutting
10 down the petitioner’s long-standing business, causing irreparable loss of
11 business reputation and goodwill); *Thurston Hills Neigh. Assoc. v. City of*
12 *Springfield*, 19 Or LUBA 591, 594-96 (1990) (proposal to log 2,250 mature
13 trees, affecting neighborhood viewshed); *Rhodewalt v. Linn County*, 16 Or
14 LUBA 1001 (1987) (removal of historic bridge); *Dames v. City of Medford*, 9
15 Or LUBA 433, 440 (1983) (road project removing historically significant
16 trees).”

17 The city responds that petitioner has failed to satisfy the requirement to demonstrate
18 irreparable injury. The city points out that the Forest Service and DSL have determined that
19 the project will require removal of the trees and will impact wetlands and that it can occur
20 without significant impact, and have required the city to replant trees as required by a
21 revegetation plan and to mitigate the effects on wetlands by restoration and payment to a
22 mitigation fund. We understand the city to argue that issuance of the Forest Service and DSL
23 permits should lead LUBA to conclude that there will be no “irreparable injury” under ORS
24 197.845(1).

25 In the cases in which LUBA has stayed the effectiveness of a decision in order to
26 protect a resource, the resource that is the subject of potentially irreparable injury has been
27 the subject of an officially designated protective status. For example, in *Butte Conservancy*
28 *v. City of Gresham*, 47 Or LUBA 604 (2004), LUBA granted a stay to prohibit the cutting of
29 trees that were located in a protective overlay zoning district that closely regulated the
30 location and degree of development within the district. In *Save Amazon Coalition v. City of*
31 *Eugene*, 29 Or LUBA 565, 568-69 (1995), LUBA stayed a decision to demolish a structure
32 that was officially designated by the city as historic landmark. In *Thurston Hills Neigh.*

1 *Assoc. v. City of Springfield*, 19 Or LUBA 591, 594-96 (1990), LUBA granted a stay to
2 prohibit the logging of trees on residentially zoned land that was designated in the regional
3 comprehensive plan as wildlife habitat. And in *Rhodewalt v. Linn County*, 16 Or LUBA
4 1001 (1987), LUBA stayed the demolition of a covered bridge that was included on the
5 federal and county registers of historic structures.

6 Petitioner argues that the trees and wetlands that will be removed by the SWIP are
7 “significant.” That allegation alone would not satisfy petitioner’s burden to show that the
8 injury is to a “unique natural resource.” However, in one sentence in the Motion for Stay,
9 petitioner also alleges that Tumalo Creek and its riparian areas are a Deschutes County Goal
10 5 resource. Motion for Stay 3. The city agrees that Tumalo Creek is a Deschutes County
11 Goal 5 resource. Response to Motion for Stay 24. It appears that at least some of the
12 construction work that is alleged to cause irreparable injury will occur in the riparian area of
13 Tumalo Creek, and in and under the creek itself, which the parties agree are county-
14 designated Goal 5 resources. Those Goal 5 resources are presumably “unique historic or
15 natural resources,” and indirect injury to such resources by, for example, cutting down trees
16 in a designated Goal 5 riparian area, could qualify as an injury warranting a stay, if that injury
17 is irreparable. *Roberts*, 43 Or LUBA at 583.

18 However, as noted, the city is required to implement a revegetation plan that includes
19 a requirement to replant about 270 trees along Bridge Creek and Tumalo Creek and restore
20 disturbed riparian areas. Petitioner does not argue that there is anything special about the
21 trees that would be cut down, or argue that their replacement by younger trees would result in
22 irreparable injury to the Goal 5 riparian resource. Accordingly, the injury that petitioner
23 alleges is not an injury “* * * that cannot be practicably restored or adequately compensated
24 for once destroyed.” Petitioner has not established that the trees and the wetlands that it
25 seeks to protect are resources that, if destroyed or injured “* * * cannot be practicably
26 restored * * *.” *Roberts*, 43 Or LUBA at 583.

1 For the reasons set forth above, petitioner's motion for stay is denied.

2 Dated this 9th day of October, 2012.

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Melissa M. Ryan
Board Member