

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 BENJAMIN HATHAWAY
5 and MARY LOU HATHAWAY,
6 *Petitioners,*

7
8 vs.

9
10 TILLAMOOK COUNTY,
11 *Respondent,*

12
13 and

14
15 THE NATURE CONSERVANCY,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2015-041

19 ORDER

20 **MOTION TO INTERVENE**

21 The Nature Conservancy (intervenor), the applicant below, moves to
22 intervene on the side of the county. There is no opposition to the motion and it
23 is allowed.

24 **MOTION FOR STAY**

25 Petitioners move for a stay of the county's decision granting intervenor's
26 development permit for construction of a restoration project along the Kilchis
27 River. The county's decision, which became final on May 13, 2015, permits
28 the removal of dikes and filling of drainage ditches, among other things, in
29 order to recreate and realign certain tidal channels and restore native vegetation.

30 On May 28, 2015, petitioners appealed the county's decision. That
31 appeal was accompanied by a motion to stay the challenged decision pursuant

1 to ORS 197.845(1)¹ and OAR 661-010-0068.² Under ORS 197.845(1), a
2 petitioner seeking a stay at LUBA must demonstrate a “colorable claim of
3 error” in the appealed decision. ORS 197.845(1) additionally requires that a
4 petitioner demonstrate that the petitioner will “suffer irreparable injury if the
5 stay is not granted.”

6 For the reasons explained below, we find that petitioners have
7 demonstrated colorable claims of error, but have not adequately demonstrated
8 that they will suffer irreparable injury if the stay is not granted.

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.”

² OAR 661-010-0068(1) provides, in part:

“A motion for a stay of a land use decision or limited land use decision shall include:

- “(a) A statement setting forth movant’s right to standing to appeal the decision;
- “(b) A statement explaining why the challenged decision is subject to the Board’s jurisdiction;
- “(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[.]”

1 **A. Colorable Claim of Error**

2 “In order to establish evidence of a colorable claim of error, it is not
3 necessary to show the petitioner will prevail on the merits.” *Dames v. City of*
4 *Medford*, 9 Or LUBA 433, 438 (1982). Rather, a petitioner must merely show
5 that “the errors alleged are sufficient to result in reversal or remand of the
6 decision if found to be correct.” *Id.*

7 In their motion for stay, petitioners allege five claims of error regarding
8 the county’s decision approving the restoration project. First, petitioners claim
9 that the county’s conclusion that the Flood Hazard Overlay Zone requirements
10 of Tillamook County Land Use Ordinance (LUO) 3.060(12)(b)(5) are satisfied
11 is not supported by substantial evidence in the record. Motion for Stay 3.
12 Second, petitioners claim that the county did not have authority to approve
13 activities affecting Hathaway Slough Culvert, which is identified as part of the
14 project but which is not located within the defined geographic boundaries of the
15 project. Motion for Stay 3-4. Third, petitioners claim that the record does not
16 include substantial evidence, as required by LUO 3.090(6)(e), regarding to the
17 productivity of prime farm land that will be taken out of production by the
18 restoration project. Motion for Stay 4. Fourth, petitioners claim that the record
19 does not include a Resource Capability Determination, as required by LUO
20 3.120(6) and 3.140(15)(f) for restoration projects. Motion for Stay 4. Finally,
21 petitioners claim that the Board erred in concluding that LUO 3.140(15)(d) is
22 satisfied because the record includes no evidence that the restoration project
23 “will result in an overall improvement in the cultural, historic, or economic
24 features of an estuary which will outweigh any adverse impacts.” Motion for
25 Stay 5.

26 The evidentiary and other deficiencies that petitioners allege, if sustained,

1 would result in remand of the decision, and are thus sufficient to meet the
2 colorable claim of error prong of ORS 197.845(1)(a). However, in order to
3 prevail on their motion for stay, petitioners must also make the more difficult
4 demonstration that they will suffer irreparable injury from failure to grant a
5 stay.

6 **B. Irreparable Injury**

7 In order to satisfy the irreparable injury prong of ORS 197.845(1),
8 petitioners must, among other things, adequately specify the claimed irreparable
9 injury to the petitioner. *See Butte Conservancy v. City of Gresham*, 47 Or
10 LUBA 604, 609 (2004) (describing five factors to be considered in determining
11 whether irreparable injury has been demonstrated).³

12 Petitioners' only argument with respect to the irreparable injury prong is
13 that the evidentiary and other deficiencies identified above as colorable claims
14 of error mean that the decision, if not stayed, may have a "potential adverse
15 impact on Petitioners." Motion to Stay 6. We understand petitioners to argue
16 that if the restoration project commences construction pursuant to a decision
17 and record that fails to demonstrate compliance with county code standards, as
18 petitioners alleged above, that petitioners will suffer irreparable injury.

19 However, that argument conflates the colorable claim of error and the
20 irreparable injury prongs of ORS 197.845(1). Petitioners' allegations that the

³ The five factors are (1) the movant must adequately specify the injury that he or she will suffer, (2) the injury must be one that cannot be compensated adequately in money damages, (3) the injury must be substantial and unreasonable, (4) the conduct the movant seeks to bar must be probable rather than merely threatened or feared, and (5) if the conduct is probable, the resulting injury must be probable rather than merely threatened or feared.

1 county's decision must be remanded to correct deficiencies in the application or
2 record do not demonstrate "injury" to petitioners, much less an "irreparable"
3 injury. If that were the case, it would be a relatively easy burden to satisfy
4 simply by alleging a colorable claim of error. The irreparably injury prong is
5 more demanding. Our cases demonstrate that a stay is generally granted only
6 when the proposed development would destroy or injure unique historic or
7 natural resources, or other interests that cannot be practicably restored or
8 adequately compensated for once destroyed. *See Roberts v. Clatsop County*, 43
9 Or LUBA 577, 583 (2002) (summarizing cases). Petitioners' argument falls far
10 short of demonstrating that not staying the county's decision would injure or
11 destroy unique or unrestorable resources.

12 In a reply, petitioners argue that they cannot specifically identify how the
13 decision will cause them irreparable injury until intervenor submits evidence
14 regarding the adverse impacts of the project, as petitioners argue is required
15 under the applicable county code standards. We understand petitioners to refer
16 to LUO 3.140(15)(d), which as noted above requires a finding that the
17 restoration project "will result in an overall improvement in the cultural,
18 historic, or economic features of an estuary which will outweigh any adverse
19 impacts." Petitioners contend that they "can only assert that [the decision] *may*
20 *have* a potential adverse impact until [intervenor] conducts an impact analysis
21 on remand from LUBA." Reply 3 (emphasis added).

22 However, it is petitioners' burden to demonstrate that the decision will
23 cause them irreparable injury unless the decision is stayed. That demonstration
24 cannot be waived or avoided. Moreover, even if the record does not include
25 substantial evidence regarding the comparison of improvements versus adverse
26 impacts required by LUO 3.140(15)(d), as petitioners allege, that should not

1 prevent petitioners from advancing specific allegations regarding how the
2 approved restoration project, the elements of which are known, will injure or
3 destroy unique resources or other interests that cannot be practicably restored or
4 adequately compensated for once destroyed. Petitioners offer nothing, not even
5 speculation, on that point. Accordingly, petitioners have not demonstrated that
6 the decision, if not stayed, will result in irreparable harm to petitioners.

7 The motion for stay is denied.

8 Dated this 11th day of June, 2015.

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Tod A. Bassham
Board Chair