BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL MEYER and KRISTEN MEYER,
*Petitioners,*

vs.

JACKSON COUNTY,
*Respondent,*

and

ROGUE ADVOCATES,
*Intervenor-Respondent.*

LUBA No. 2015-073

ORDER

**MOTION TO INTERVENE**

Rogue Advocates moves to intervene on the side of the respondent in this appeal. The motion is allowed.

**MOTION FOR STAY**

Petitioners move to stay a county hearings officer decision that denies their application to alter a nonconforming use, pending a final opinion by LUBA in this appeal. For the reasons set out below we grant the motion.

**INTRODUCTION**

The asphalt batch plant that is the subject of this appeal has a long and contentious history. We limit our discussion to the parts of that history that are necessary to establish the background required to rule on the motion for stay.

### A. The Hearings Officer's Decision and the LUBA Appeal

In *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (2014) we determined that petitioners' conversion of a concrete batch plant to an asphalt batch plant in 2001 constituted an alteration of the concrete batch plant. The concrete batch plant is a legal, nonconforming use, but petitioners did not seek county approval for the alteration. Thus, since April 22, 2014, petitioners and all parties to this appeal have been aware that operation of an asphalt batch plant on the subject property required that the county issue a permit approving the nonconforming use alteration, and that no such permit had issued. Petitioners continued to operate the asphalt batch plant after April 22, 2014, and as far as we are informed, the county initiated no enforcement action after our decision on April 22, 2014, to require that petitioners cease operation of the asphalt batch plant, pending county approval of the alteration after-the-fact.

On January 29, 2015, petitioners filed an application seeking county approval of an alteration of the nonconforming concrete batch plant. On March 19, 2015, planning staff issued a tentative decision approving the application. That planning staff decision was appealed to the county hearings officer on March 31, 2015. On September 24, 2015, the hearings officer issued a decision in which he found the application did not comply with applicable criteria for approval of the proposed alteration and denied the application. That September 24, 2015 hearings officer's decision is the subject of this appeal, which was filed on October 13, 2015.

Under the current schedule for this appeal, the record is due to be transmitted by the county on November 3, 2015. Assuming no record objections are filed, the deadlines for filing the petition for review and response briefs are November 24, 2015 and December 15, 2015 respectively. Our final opinion and order is due January 19, 2016. Through the motion for stay, petitioner seeks to stay the hearings officer's September 24, 2015 decision during the pendency of this LUBA appeal.

**B. The County Enforcement Action**

On September 28, 2015, four days after the hearings officer's September 24, 2015 decision, the county issued a "Warning of Violation." Motion for Stay App D-5. The warning states:

> "CONTINUED OPERATION OF THE ASPHALT PLANT WITHOUT APPROVAL WILL BE A $10,000.00 FINE FOR EACH OFFENSE FOR A TOTAL OF $40,000.00. The calendar for the continuing offense started on the date of the hearings officer's order which was September 24, 2015. A citation will be issued for a continuing offense on November 15, 2015. This will reflect a $200.00 per day fine on each count (4 counts) for a total of 50 days."

As clarified by county staff in a September 29, 2015 e-mail message, the $800 per day fine ($200 per day for each of four violations) began on September 24, 2015 and will continue as long as the asphalt plant is in operation. Motion for Stay App D-7. Once the asphalt plant has ceased business, the county will collect $800 per day for the number of days the asphalt plant was in business following the September 24, 2015 hearings officer's decision. *Id*. The 50-day

citation mechanism apparently is an administrative convenience, used by the county to avoid having to send daily warnings and collect daily fines for continuing violations. *Id*.

Petitioners are also facing enforcement actions on other fronts. When the county failed to require petitioners to cease operation of the asphalt batch plant following LUBA's April 22, 2014 decision, on September 12, 2014, intervenor filed a complaint for injunctive and declaratory relief in Jackson County Circuit Court, which was denied by the circuit court. The circuit's court's judgment was appealed the Court of Appeals, and we are advised that oral argument in that appeal is set for December 3, 2015 at the Court of Appeals.

Shortly after the hearings officer's September 24, 2015 decision, on October 7, 2015, the Oregon Department of Environmental Quality (DEQ) advised petitioners that the county advised DEQ that the asphalt batch plant does "not have land use approval." Motion for Stay App D-9. According to DEQ, the county took that position based on the hearings officer's September 24, 2015 decision. *Id*. DEQ advised petitioners that if the asphalt plant is still operating on October 31, 2015, "this matter may be referred to the Department's Office of Compliance and Enforcement for formal enforcement action, including assessment of civil penalties and/or a Department Order." *Id*.

Finally, shortly after the hearings officer's September 24, 2015 decision, on September 30, 2015, petitioners filed a complaint for declaratory and injunctive relief and for civil penalties in U.S. District Court, under the federal

Clean Air Act. In that action intervenor asks the Federal District Court to (1) rule that operation of the asphalt batch plant without the required county alteration approval violates the Clean Air Act, (2) enjoin further discharge of air contaminants, and (3) assess civil penalties of $37,500 per day.

**PETITIONERS' MOTION FOR STAY**

**A. The Standards for Granting a Motion to Stay**

LUBA is authorized to stay a land use decision pending LUBA's review if a petitioner demonstrates (1) a colorable claim of error in the appealed decision, and (2) that petitioner will suffer irreparable injury if the stay is not granted. ORS 197.845(1); OAR 661-010-0068(1)(c).[1]

**B. Colorable Claim of Error**

The requirement to demonstrate a colorable claim of error is 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

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[1] The text of ORS 197.845(1) is set out below;

> "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:
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> "(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."

(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 contend the hearings officer erred by applying the judicial rule of strict construction against nonconforming uses that the Court of Appeals applied in *Parks v. Tillamook County*, 11 Or App 177, 196-97, 501 P2d 85 (1972). Petitioners also contend the hearings officer misconstrued ORS 215.130 by failing to consider whether, with conditions of approval, the proposed alteration would not have greater adverse impacts on the neighborhood. Finally, petitioners contend a number of material findings of fact that the hearings officer adopted in concluding that the requested alteration will have greater adverse impacts on the neighborhood are not supported by substantial evidence.

Without commenting on whether any of those arguments present a basis for reversing or remanding the challenged decision, they are sufficient to satisfy the colorable claim of error prong of ORS 197.845(1).

**C. Irreparable Injury**

In *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988), we explained that to qualify as an irreparable injury under ORS 197.845(1), an alleged irreparable injury must satisfy five tests:

> "[W]e have stated on numerous occasions that a request for a stay must be decided on the particular facts presented. We understand

our prior decisions effectively to require that we answer all of the following questions in the affirmative, based on the particular facts presented:

> "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?" (Citations omitted.)

**1. Threshold Issue**

As intervenor correctly points out, petitioners have faced the possibility of enforcement action against the asphalt batch plant at least since LUBA's April 22, 2014 decision that the conversion of petitioners' concrete batch plant to an asphalt batch plant in 2001 required county approval of an alteration of the nonconforming concrete batch plant use.[2] There is no dispute that petitioners lacked such approval until the planning staff tentatively granted approval on March 19, 2015 and no longer have such approval by virtue of

[2] Prior to that date, a county hearings officer had ruled that the conversion to an asphalt batch plant did not require approval as an alteration of the nonconforming concrete batch plant.

local appeal of that tentative decision and the hearings officer's September 24, 2015 decision. Intervenor argues:

> "As an initial matter, the conduct that Petitioners seek to bar through a stay is entirely independent of the challenged decision. Petitioners essentially ask this Board to issue a stay on county, state, and private citizen enforcement actions by freezing the effect of a denial of a land use application to allow Petitioners to continue to operate their unpermitted asphalt batch plant operation outside the bounds of law. Setting aside the fact that such a bar on third-party enforcement is outside the Board's authority, it is also completely outside the scope of the challenged decision. In other words, the feared conduct—enforcement of state and local law—could occur regardless of whether or not the decision is stayed." Intervenor-Respondent's Opposition to Petitioner's Motion to Stay 7.

Intervenor is correct that LUBA does not have authority to stay the county, circuit court or federal court enforcement actions. A stay of the hearings officer's September 24, 2015 decision might have no effect whatsoever on any of those enforcement actions. However, the county did not immediately demand that petitioners cease operation of the asphalt batch plant following LUBA's April 22, 2014 decision. Rather, the county allowed petitioners to continue operating the asphalt batch plant, while seeking approval of a nonconforming use alteration, which was granted by planning staff on March 19, 2015. Only when the hearings officer overruled planning staff and denied that application on September 24, 2015, did the county begin imposing an $800 per day fine until the asphalt batch plant ceases to operate on the property. Petitioners' motion for stay is predicated on petitioners' anticipation that the county might suspend or terminate its enforcement action

if the hearings officer's September 24, 2015 decision is stayed, pending a LUBA decision on the merits in its appeal of the hearings officer's September 24, 2015 decision. Petitioners may or may not be correct about that. But since the county appears to have relied on the September 24, 2015 hearings officer's decision in making its decision to begin imposing fines designed to terminate the asphalt batch plant use, we believe petitioners are entitled to the requested stay of that decision pending resolution of their appeal on the merits, if they can demonstrate a colorable claim of error and that failure to issue the stay will result in irreparable injury. We have already concluded that petitioners have established a colorable claim of error. For the reasons set out below, we believe petitioners have made a sufficient demonstration of irreparable injury

**2. Petitioners Allegations Regarding Irreparable Injury**

We limit our consideration to the county's September 28, 2015 enforcement action. Again, petitioners' request for a stay is a bit odd, because the September 28, 2015 enforcement decision is not before us. But the September 28, 2015 enforcement action appears to be predicated on the September 24, 2015 hearings officer's decision, which is before us. Petitioners contend that if the county enforces that fine pending this appeal they "will be forced to shut down before the merits of their appeal of the Decision can be resolved by [LUBA]." Motion for Stay 7. We understand petitioners to contend the daily $800 fine is sufficiently onerous that they will not be able to remain in business if they incur the daily fine during the pendency of this appeal.

Petitioners contend that if they are forced to close pending this appeal, even if they ultimately prevail in this appeal, they will lose approximately $180,000 "per month in gross profits." Motion for Stay 9. Petitioners further allege there is no site where the asphalt plant could be moved and remain in operation pending this appeal, and even if there were such a site available it would cost approximately $4,000 to lease such a site and $130,000 to move the asphalt batch plant. If petitioners' asphalt batch plant is forced to close, permanently or while a new site is located, petitioners contend their business good will with current customers will be lost, their employees would be required to seek jobs elsewhere and the Southern Oregon and Northern California customer base that the business serves will lose the only regionally available source of cold mix asphalt. That customer base includes both public and private customers. Petitioners contend that the hearings officer's findings regarding any risk of fire and explosion at the plant is based on an erroneous assumption by the hearings officer concerning the equipment used at the asphalt batch plant, which apparently has operated for 14 years without any fires or explosions.

Turning to the first three of the five factors set out above, we conclude petitioners have adequately specified the injury they will suffer. We also conclude it is not an injury that could be compensated adequately in money damages, because petitioners almost certainly have no legal right to continue to operate while they seek the permit LUBA's April 22, 2014 decision determined is necessary. Assuming, as we must, that petitioners may ultimately prevail in

this appeal, the fines and costs that would be incurred if petitioners must close or are forced to move are substantial and unreasonable.

Finally we turn to the last two of the five factors. We set those factors out again below:

> "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?"

Our formulation of the fourth and fifth factors in *City of Oregon City* presents some difficulties in this case. Again, that is because the conduct petitioners actually seek to bar or avoid (the county's enforcement action) is not the decision that is before us. As we have already explained, we lack authority to bar the county's enforcement action, because that decision is not before us. In that regard this case is unlike *Barr v. City of Portland*, a case that is otherwise very similar to this case. In *Barr* the city's decision both ordered that a flea market shut down, because it was not an allowed use, and determined that the operator had no preexisting right to operate the disputed flea market. 20 Or LUBA at 512. The petitioner in *Barr* alleged that if it was forced to close during the Christmas shopping season, it would incur losses that would keep it from reopening, even if it were to prevail in its appeal of the city's decision. We granted the stay.[3]

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[3] In an unpublished opinion we affirmed the city's decision and lifted the stay. *Barr v. City of Portland*, ___ Or LUBA ___ (LUBA No. 90-142, April 30,

Although the county's decision to commence enforcement action is not before us, and we therefore cannot bar that action, we can stay the hearings officer's September 24, 2015 decision so that petitioners can request that the county suspend its enforcement action pending a final resolution of this appeal of the September 24, 2015 decision. Given the apparently causative relationship between the hearings officer's September 24, 2015 decision and the county's September 28, 2015 decision to commence enforcement action, we conclude the fourth and fifth irreparable injury factors set out in *City of Oregon City* are satisfied, in the unusual circumstances presented in this case, even though our stay may not necessarily lead the county to suspend its enforcement proceedings and petitioners may suffer the irreparable harm they seek to avoid through this stay despite the stay.

The dissent makes the point that DEQ's enforcement action at this point is merely "threatened" rather than "probable." We agree. This stay is based solely on the county's enforcement action. While the county apparently does not intend to issue a citation that demands payment of $40,000 until November 15, 2015, we see no reason to doubt that the county intends to do so, now that the county has a decision that denies the needed nonconforming use alteration. There is certainly nothing in the September 28, 2015 warning itself or the September 29, 2015 message to petitioners' attorney that suggests the county

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1991). That decision was later vacated when the appeal became moot and was dismissed. *Barr v. City of Portland*, 22 Or LUBA 504 (1991).

does not intend to issue a citation for $40,000 of accumulated fines on November 15, 2015, and collect those fines, as the dissent suggests might be the case.

And the dissent's reliance on ORS 197.845(2) and (3) is misplaced.[4] ORS 197.845(2) and (3) apply to a particular type of stay, *i.e.*, stays that concern appeals of a "land use decision or limited land use decision approving a specific development of land." The undertaking required by ORS 197.845(2), and the award of damages and attorney fees required by ORS

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[4] ORS 197.845(1) was set out earlier at n 1. ORS 197.845(2) and (3) provide:

> "(2) If the board grants a stay of a quasi-judicial land use decision or limited land use decision approving a specific development of land, it shall require the petitioner requesting the stay to give an undertaking in the amount of $5,000. The undertaking shall be in addition to the filing fee and deposit for costs required under ORS 197.830 (9). The board may impose other reasonable conditions such as requiring the petitioner to file all documents necessary to bring the matter to issue within specified reasonable periods of time.
>
> "(3) If the board affirms a quasi-judicial land use decision or limited land use decision for which a stay was granted under subsections (1) and (2) of this section, the board shall award reasonable attorney fees and actual damages resulting from the stay to the person who requested the land use decision or limited land use decision from the local government, special district or state agency, against the person requesting the stay in an amount not to exceed the amount of the undertaking."

197.845(3), only apply in stays of that type of decision. ORS 197.845(2) and (3) do not support a conclusion that stays of other kinds of decisions, for example permit denial decisions, are not authorized under ORS 197.845(1).

Because we have concluded that petitioners have established both a colorable claim of error and that they will suffer irreparable injury if the motion for stay is not granted, we grant the motion.

It is ordered that the September 24, 2015 hearings officer's decision in this matter is stayed. The stay is effective immediately.

As required by OAR 661-010-0068(1)(d) petitioners suggested an expedited briefing schedule in the event the stay was granted. The petition for review shall be due 14 days, and the response briefs shall be due 28 days, following LUBA's receipt of the record. The Board's final opinion and order shall be due 63 days following LUBA's receipt of the record. If record objections are filed, these deadline shall be measured from the date the record is settled.

Dated this 20th day of October, 2015.

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Michael A. Holstun[5]
Board Member

[5] Board Chair Bassham joins in this Order.

RYAN, Board Member, dissenting.

I respectfully dissent from the majority's grant of petitioners' motion for stay. As LUBA has acknowledged in resolving motions for stay, granting a stay is an "extraordinary remedy." *McGreer v. City of Rajneeshpuram*, 7 Or LUBA 415, 418 (1983) (a stay is an extraordinary remedy that will only be granted on clear and convincing proof that the alleged irreparable injury is in fact real or there is a high probability it will take place). In my view, petitioners have not established that that extraordinary remedy is warranted.

I disagree with the majority that petitioners have established that the requirement in ORS 197.845(1)(b) that "the petitioner will suffer irreparable injury if the stay is not granted" is satisfied here. First, I disagree with the majority that the stay is necessary to, or can even, prevent "irreparable injury." Petitioners allege that "the Decision" subjects petitioners to "immediate, ongoing, and irreparable harm." Motion for Stay 1. But nothing in the challenged land use decision that denies petitioners' application for alteration of the concrete batch plant to an asphalt batch plant requires petitioners to take any action, and the decision certainly does not order petitioners to stop their operations on the property or to do anything at all. That is a significant difference from *Barr v. City of Portland*, 20 Or LUBA 511 (1990), which ordered the petitioner to cease all operations on the property in the same decision in which it concluded that the use was not permitted in the zone. The challenged decision does not alter the "status quo" in any way; before the

county's decision petitioners were operating an asphalt batch plant in the absence of any county approval, and a stay of the decision will not result in an approval of the asphalt batch plant. Stated differently, and as the majority apparently recognizes, LUBA's stay of the challenged decision will do nothing to prevent any injury that petitioners may suffer, because the injury that petitioners may suffer does not result from the decision. Rather, the alleged injury results from separate county enforcement proceedings and DEQ permit revocation proceedings that have not yet formally commenced, and may not ever formally commence, particularly given the now-pending LUBA appeal of the county's decision that had not yet been filed when the warning letters were first issued.

Second, in my view, petitioners have not established that any injury that they will suffer is "probable." *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 102, 55 P3d 546 (2002) (under nearly identically worded statutory requirement at ORS 183.482(3)(a), "a 'showing' must at least demonstrate that irreparable injury *probably* would result if a stay is denied") (emphasis in original). On September 28, 2015, the county code enforcement officer sent petitioners a "Warning of Violation" that takes the position that the county will issue a formal citation and impose fines if petitioners do not cease operations before November 15, 2015. On October 6, 2015, the county code enforcement officer issued an amended "Warning of Violation" that threatens additional fines. The county's Warning of Violation and Amended Warning

were issued prior to petitioners' filing of the appeal of the challenged decision with LUBA on October 13, 2015. At this point, the threatened fines are included only in "warnings" and no formal enforcement proceeding has commenced. It may be that, as has apparently been the county's past practice, the county intends to take no action to initiate a formal enforcement proceeding until all appeals have concluded.

The Jackson County Codified Ordinance (JCCO) Chapter 203 contains the county's code enforcement procedures, and JCCO 203.15 makes the decision to initiate enforcement proceedings "permissive and not mandatory." As intervenor points out, since 2011 the county has issued several "Warnings of Violations" like the one it issued on September 28, 2015. Based on that past practice and the timing of the Warnings of Violation, petitioners have failed to demonstrate that the county intends to exercise its discretion to issue a *formal* citation pursuant to JCCO 203.03, as opposed to a warning, and commence any formal action for violation under JCCO 203.04.

Similarly DEQ's "Warning Letter" sent on October 7, 2015 takes the position that the alleged violation of a condition of petitioners' air quality permit "may be referred to [DEQ's] Office of Compliance and Enforcement for formal enforcement action, including assessment of civil penalties and/or a Department Order." Motion for Stay App D-9. Such statement hardly constitutes a "probable" injury. Moreover, the October 7, 2015 Warning Letter is nearly identical to a March, 2015 warning letter sent by DEQ that has not yet

resulted in any formal enforcement action, civil penalties and/or a DEQ order. And as with the county's warnings, it was sent prior to the filing of the notice of intent to appeal the challenged decision to LUBA.

Finally, and perhaps most importantly, even if the county code enforcement department exercises its discretion to issue a citation and commence formal enforcement proceedings pending LUBA's decision on petitioners' appeal, that citation is appealable under the procedures in JCCO Chapter 203, and petitioners will have the opportunity to contest the validity of the citation and any fines imposed by it during that enforcement proceeding. They will also presumably have the opportunity to appeal any negative decision to circuit court or the Court of Appeals, and to seek an injunction in circuit court to stay that formal enforcement action while the LUBA appeal of the land use decision is pending. With respect to any formal proceeding commenced by DEQ in the future, petitioners would presumably have similar rights to contest action by DEQ under its rules for contesting revocations, and seek a stay of any proceeding pending the conclusion of the proceeding. In short, there are other adequate forums in which petitioners' alleged injuries can be redressed. LUBA is, ironically, the only forum where petitioners' alleged injuries cannot be redressed.

Finally, I note that ORS 197.845(3) provides:

> "If the board affirms a quasi-judicial land use decision or limited land use decision for which a stay was granted under subsections (1) and (2) of this section, the board shall award reasonable attorney fees and actual damages resulting from the stay to the

> person who requested the land use decision or limited land use decision from the local government, special district or state agency, against the person requesting the stay in an amount not to exceed the amount of the undertaking." (Emphasis added.)

The language of the statute contemplates, at least, that the party seeking a stay is not the party who requested the land use decision, *i.e.* not the party whose application was denied, because if LUBA affirms the denial, then the statute does not provide for award of attorney fees and actual damages (not to exceed the amount of undertaking). The statute at least suggests that the legislature did not envision a circumstance under which LUBA would grant a request for a stay from an applicant who requested a land use decision that was denied.

For the above reasons, I dissent from the majority's order. I would deny the motion for stay, because the challenged decision causes no injury, the stay cannot prevent the alleged irreparable injury, and other forums are available to petitioners to redress the alleged irreparable injury that may or may not occur. A stay is an extraordinary remedy not warranted in the present circumstances.