

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

3
4 DAVID DODDS,
5 and SAVE OUR SUNSET PARK,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF WEST LINN,
11 *Respondent,*

12
13 and

14
15 WEST LINN-WILSONVILLE SCHOOL DISTRICT,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2016-071

19
20 ORDER

21 **MOTION TO INTERVENE**

22 The West Linn-Wilsonville School District (the District), the applicant
23 below, moves to intervene on the side of the city. There is no opposition, and it
24 is allowed.

25 **MOTION TO STAY**

26 The challenged decision approves a conditional use permit and two
27 variances to allow the District to replace an existing school building. The
28 proposed new school facility will involve construction of a stormwater
29 detention facility and a parking lot on an adjacent 1.6-acre lot that was formerly
30 owned and operated as a city park (Sunset Park). In 2010, city voters approved

1 selling Sunset Park to the District. The explanatory statement for the ballot
2 measure authorizing the sale stated that the terms of sale would “maximize
3 recreational opportunities while preserving significant trees at the site,” noting
4 that the city would use the proceeds of the sale to acquire and develop other
5 recreational sites. Motion for Stay, Exhibit 2. In the purchase agreement, the
6 District agreed to cooperate with the city to maximize recreational
7 opportunities while preserving significant trees to the extent practical while
8 meeting the District’s requirements to replace the Sunset Primary School.

9 The District submitted applications that in relevant part propose a
10 stormwater facility and parking on the 1.6-acre property adjoining the school.
11 The applications proposed to preserve 50 of 62 significant trees on the site. In
12 response to concerns raised about leaks and discharges from the stormwater
13 facility, the city council imposed a condition that required a reconfigured and
14 reduced size facility with impervious lining, and required the District to submit
15 to the city engineer an amended stormwater management plan. The city
16 council required preservation of seven or more of the 12 significant trees
17 otherwise proposed for removal.

18 On appeal, petitioners move to stay the challenged decision, pursuant to
19 ORS 197.845 and OAR 661-010-0068.¹ In relevant part, ORS 197.845(1)(b)

¹ 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:

1 and OAR 661-010-0068(1)(c) require the movant to demonstrate that the
2 decision, if not stayed, will cause the movant “irreparable injury.” Petitioners
3 argue that if the decision is not stayed, the District will remove some

“* * * * *

“(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;

“* * * * *

“* * * * *

“(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. * * * Any objections to the form of undertaking or the surety shall be filed within 14 days after the date of service of a copy of the undertaking on the objecting party.

“(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. See OAR 661-010-0045.”

1 significant trees and begin ground-disturbance activities toward construction of
2 the stormwater facility and parking lot. According to petitioners, “[t]his will
3 result in irreparable harm to Petitioners who enjoy the significant trees and
4 recreational open space that the City promised to preserve when it sold the City
5 parkland to the School District.” Motion for Stay 11. In addition, petitioners
6 argue that the condition of approval requiring the District to submit an
7 amended stormwater management plan to the city engineer “constitutes
8 irreparable harm because it deprives Petitioners of their right to participate in
9 the process.” *Id.* at 13. The motion is supported by the declaration of a
10 member of Petitioner Save our Sunset Park, which alleges that the District
11 plans to remove a large twin Douglas fir tree in front of her house, and faults
12 the District for failing to “honor the terms of the ballot measure which require
13 maximizing recreational opportunities and preserving significant trees.”
14 Declaration of Carrie Hansen, 1-2. The declaration states further that “[o]nce
15 those trees are gone, the playground replaced by a parking lot, and the storm
16 water drainage facility installed, it will change the character of my home
17 permanently. This constitutes irreparable harm.” *Id.* at 3.

18 The District responds, and we agree, that petitioners have not
19 demonstrated that the challenged decision, if not stayed, would cause
20 petitioners irreparable harm. With respect to the loss of significant trees, the
21 District argues, supported by the affidavit of its Director of Operations, that as
22 conditioned the decision requires the removal of only three of the 62 significant

1 trees on the site, and the three trees to be removed are all hazardous trees that
2 do not qualify for preservation. The affidavit states, supported by an attached
3 revised tree preservation plan, that the twin Douglas fir closest to the Hansen
4 property will now be preserved. Based on the affidavit and revised tree
5 preservation plan, we agree with the District that the removal of three
6 hazardous trees, while preserving 59 of 62 significant trees on the property,
7 does not constitute irreparable harm to petitioners.

8 With respect to the District’s alleged failure to honor voter expectations
9 based on the 2010 ballot measure that authorized sale of the property, the
10 District argues that the explanatory statement for the ballot measure is not an
11 approval standard or a binding promise by the District or the city. We need not
12 resolve that question here, because even if it were an approval standard or
13 binding promise, petitioners have not demonstrated that the decision causes
14 petitioners irreparable harm for purposes of ORS 197.845 and OAR 661-010-
15 0068.²

16 Finally, with respect to the condition requiring the District to submit an
17 amended stormwater management plan to the city engineer for approval,

² In its findings, the city council addressed a standard requiring a finding that the proposed conditional use “is consistent with the overall needs of the community,” and cited the extensive preservation of significant trees and recreational opportunities on the 1.6-acre property, and the provision of recreational and community facilities at the overall school site. Motion for Stay, Exhibit 1, page 5.

1 petitioners argue that the city committed procedural error by failing to require a
2 public process to approve the amended stormwater management plan. We
3 understand petitioners to argue if the city engineer approves the amended plan
4 during the pendency of the LUBA appeal, the District will move forward with
5 tree removal and ground-disturbance for the stormwater facility prior to
6 LUBA's resolution of the appeal. However, even if that is the case, petitioners
7 fail to establish that the decision causes petitioners to suffer irreparable harm.
8 We have already rejected petitioners' claims based on tree removal. Petitioners
9 make no attempt to establish that ground-disturbance or excavation for the
10 storm-water facility that might occur prior to LUBA's resolution of the appeal
11 will cause petitioners irreversible harm. Grading activities are generally
12 reversible. *See Roberts v. Clatsop County*, 43 Or LUBA 577, 583-84 (2002)
13 (denying motion to stay because, if the petitioners prevail, the subject golf
14 course fairway can be regraded and replanted to restore the fairway).

15 In sum, petitioners have not established a basis to grant a stay of the
16 decision.

17 In an order dated June 29, 2016, the Board granted an interim stay
18 conditioned upon filing of the undertaking required by OAR 661-010-0068(4),
19 and providing for an expedited briefing schedule on the motion. Petitioners
20 filed an undertaking on July 1, 2016, together with a check for \$5,000.

1 After briefing, LUBA has now denied the motion for stay. Accordingly,
2 the interim stay is dissolved. LUBA will return the undertaking to petitioner
3 and issue a refund check to petitioner in the amount of \$5,000.

4 The next event in this review proceeding is the transmittal of the local
5 record. The city shall transmit the local record to LUBA within the time
6 provided in our rules.

7 Dated this 11th day of July, 2016.

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Tod A. Bassham
Board Member