

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

3
4 JILL WARREN,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11
12 and

13
14 VENTURE PROPERTIES, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-089

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Venture Properties, Inc., the applicant below (intervenor), moves to
22 intervene on the side of the respondent. There is no opposition to the motion
23 and it is allowed.

24 **MOTION FOR STAY**

25 **A. Background**

26 The challenged decision is a county hearings officer decision approving
27 a six-lot subdivision. Approximately the northern half of the subject property is
28 included on the Metzger-Progress Community Plan map of Significant Natural
29 Resources (SNR Map) as “Wildlife Habitat” and “Water Areas and Wetlands

1 and Fish and Wildlife Habitat.”¹ As the decision explains, the areas designated
2 Wildlife Habitat are generally heavily treed with Douglas fir, red alder and
3 bigleaf maple trees. Motion for Stay, Exhibit 1 at 56–57. The approved
4 preliminary plat allows removal of approximately 70 percent of the treed area,
5 subject to conditions of approval. Motion for Stay, Exhibit 1 at 61-62, 70–73.

6 **B. Motion for Stay**

7 On August 8, 2018, petitioner filed a motion to stay the decision
8 challenged in this appeal, pursuant to ORS 197.845(1) and OAR 661-010-
9 0068.² For the reasons set forth below, the motion for stay is denied.

¹ The SNR Map is part of the county’s Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) program.

² The statutory standards under which LUBA may grant a request to stay a decision that has been appealed to LUBA are set out at ORS 197.845(1), which 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.”

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 **1. 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 (1983), *aff’d* 69 Or App 675, 687 P2d 1111
5 (1984). Rather, a petitioner must merely show that “the errors alleged are
6 sufficient to result in reversal or remand of the decision if found to be correct.”
7 *Id.* Petitioner contends that the hearings officer erred in concluding that ORS
8 197.307(4) (2017) allows the county to apply only “clear and objective
9 standards, conditions and procedures” to the application because the
10 application qualifies as an application for “the development of housing.” ORS

 “(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;

 “(d) A suggested expedited briefing schedule;

 “(e) A copy of the decision under review and copies of all
 ordinances, resolutions, plans or other documents
 necessary to show the standards applicable to the
 decision under review.

 “ * * * * *

 “(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.”

1 197.307(4) (2017). The hearings officer found that ORS 197.307(4) (2017)
2 prohibits him from applying Washington County Community Development
3 Code (CDC) 422-3.6 to the application because it is not a “clear and objective
4 standard.”³ Motion for Stay, Exhibit 1 at 62-63. Petitioner’s argument is
5 sufficient to satisfy the colorable claim of error prong of ORS 197.845(1).

6 **2. Irreparable Injury**

7 The “irreparable injury to petitioner” prong is difficult to demonstrate.
8 Generally, a stay is appropriate only if the movant demonstrates that the
9 development will “destroy or injure unique historic or natural resources, or
10 other interests that cannot be practicably restored or adequately compensated
11 for once destroyed.” *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002).
12 In order to satisfy the irreparable injury prong of ORS 197.845(1), petitioner
13 must, among other things, adequately specify the claimed irreparable injury to
14 the petitioner. The movant must specify the following five factors:

- 15 (1) the movant must adequately specify the injury that he or she
16 will suffer;
- 17 (2) the injury must be one that cannot be compensated
18 adequately in money damages;

³ CDC 422-3.6 provides that:

“For any proposed use in a Significant Natural Resource Area, there shall be a finding that the proposed use will not seriously interfere with the preservation of fish and wildlife areas and habitat identified in the Washington County Comprehensive Plan, or how the interference can be mitigated. * * *”

- 1 (3) the injury must be substantial and unreasonable;
- 2 (4) the conduct the movant seeks to bar must be probable rather
3 than merely threatened or feared; and
- 4 (5) if the conduct is probable, the resulting injury must be
5 probable rather than merely threatened or feared.

6 *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004)
7 (describing five factors to be considered in determining whether irreparable
8 injury has been demonstrated); *City of Oregon City v. Clackamas County*, 17
9 Or LUBA 1032, 1042–43 (1988).

10 Petitioner’s entire argument regarding the “irreparable injury” prong is
11 set out below:

12 “In this case, the land use decision approved the removal of 70%
13 of a mature Douglas Fir grove in Petitioner’s neighborhood which
14 has been designated on the applicable county maps as SNR. Final
15 Decision at p. 61. No amount of monetary compensation can
16 undue [*sic*] the damage. Because the application at issue proposes
17 to destroy a unique natural feature of Petitioner’s neighborhood,
18 the irreparable harm requirement for issuing a stay is satisfied.”
19 Motion for Stay 8–9.

20 We conclude that petitioner has failed to satisfy the irreparable injury prong of
21 ORS 197.845(1). First, petitioner has not established that the Douglas fir trees
22 proposed for removal are a “unique * * * natural resource[] * * *.” *Roberts*, 43
23 Or LUBA at 583. Petitioner has not established that the trees are protected from
24 removal by virtue of the subject property’s inclusion on the SNR Map as
25 Wildlife Habitat. CDC 422-3.6 allows for interference with Wildlife Habitat as
26 long as the interference is “mitigated.” *See* n 3.

Second, petitioner has not established that the wildlife habitat value provided by the trees “cannot be practicably restored[.]” *Roberts*, 43 Or LUBA at 583. The decision approves intervenor’s proposed mitigation plan and requires replacement plantings of approximately 61 percent of the 70 percent of the Wildlife Habitat area that is proposed to be disturbed. The decision explains that the mitigation plan includes “densely planting native trees and a variety of native fruit-bearing shrubs * * * in the understory[.] Trees will be planted at a minimum required spacing of 6 to 8 feet[.]” Motion for Stay, Exhibit 1 at 60.

Finally, petitioner has not established that removal of the trees is “probable rather than merely threatened or feared[.]” *City of Oregon City*, 17 Or LUBA at 1043. The decision includes several conditions that are required to be satisfied “prior to commencing any on-site improvements, including grading, excavation and/or fill activities *or tree removal*[.]” Motion for Stay, Exhibit 1 at 70 (emphasis added). Petitioner does not allege that all, or any, of those conditions have been satisfied or that removal of the trees is “probable.” *Id.* Accordingly, the removal of the trees during the pendency of this proceeding is “merely * * * feared.” *Id.*

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

Dated this 17th day of August, 2018.

Melissa M. Ryan
Board Chair