

1 BEFORE THE LAND USE BOARD OF APPEALS

2  
3 OF THE STATE OF OREGON

4  
5 BERNADETTE NIEDERER,  
6 *Petitioner,*

7  
8 vs.

9  
10 CITY OF ALBANY,  
11 *Respondent,*

12  
13 and

14  
15 MARK SIEGNER,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2018-133

19  
20 ORDER

21 **BACKGROUND**

22 Statewide Planning Goal 5 requires local governments to adopt programs  
23 to conserve historic resources for present and future generations. OAR 660-015-  
24 0000(5); OAR 660-023-0200 (procedures and requirements for complying with  
25 Goal 5 historic resources). Albany Comprehensive Plan (Comprehensive Plan),  
26 Chapter 2, recognizes the city's interest in adopting Goal 5 protections for  
27 historic resources. Albany Development Code (ADC) Article 7 protects the city's  
28 historic and architectural resources by designating historic landmarks and  
29 districts. The city's historic districts "provide a visual span of Albany's history  
30 from 1848 to 1915; from the time of its first settlement through its years of growth

1 as a river port and commercial trade center. More significant than the number of  
2 buildings, however, is the architectural quality of the structures in Albany  
3 representing virtually every style and type of house ever built in the Northwest.”  
4 Comprehensive Plan 2-11.

5 The character of a historic district is preserved, in part, through mandatory  
6 review for demolition or relocation of historic landmarks. ADC 7.310. All  
7 “historic contributing structures” are considered historic landmarks for purposes  
8 of the city’s historic overlay district. ADC 7.020. A “historic contributing  
9 structure” is “[a] building or structure originally constructed before 1946 that  
10 retains and exhibits sufficient integrity (materials, design, and setting) to convey  
11 a sense of history. These properties strengthen the historic character of the  
12 district.” ADC 7.020.<sup>1</sup>

13 In addition to the city’s comprehensive plan and historic overlay district  
14 regulations, OAR 660-023-0200(8)(a) provides that a local government:

15 “Must protect National Register Resources, regardless of whether  
16 the resources are designated in the local plan or land use regulations,  
17 by review of demolition or relocation that includes, at minimum, a  
18 public hearing process that results in approval, approval with  
19 conditions, or denial and considers the following factors: condition,  
20 historic integrity, age, historic significance, value to the community,  
21 economic consequences, design or construction rarity, and

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<sup>1</sup> In contrast, a historic non-contributing structure is “[a] building or structure originally constructed before 1946 that retains but does not exhibit sufficient historic features to convey a sense of history. These properties do not strengthen the historic character of the district in their current condition.” ADC 7.020.

1 consistency with and consideration of other policy objectives in the  
2 acknowledged comprehensive plan. Local jurisdictions may exclude  
3 accessory structures and non-contributing resources within a  
4 National Register nomination[.]”

## 5 **MOTION FOR STAY**

6 The Monteith Historic District (the historic district) has been designated as  
7 a historic district by the city and is listed on the National Register of Historic  
8 Places, a national list of cultural resources worthy of preservation. The  
9 challenged city decision approves demolition of three historic contributing  
10 structures within the historic district on the corner of 4<sup>th</sup> Avenue and Calapooia  
11 Street. One structure was constructed around 1858 and is believed to be the  
12 second oldest residence still standing in Albany. The two other structures were  
13 constructed around 1890. The three structures are examples of vernacular houses  
14 of the early statehood era and western farmhouse construction.

15 The challenged decision includes a condition that “[t]he subject buildings  
16 shall not be demolished for at least 90 days from the date the Notice of Decision  
17 is signed.” Record 82. The Notice of Decision was signed on October 11, 2018.  
18 On January 2, 2019, petitioner filed a motion to stay the challenged decision  
19 pursuant to ORS 197.845(1) and OAR 661-010-0068, which authorize LUBA to  
20 grant a stay of an appealed land use decision where a petitioner demonstrates (1)  
21 a “colorable claim of error,” and (2) that it will suffer “irreparable injury” if the  
22 requested stay is not granted.

23 On January 7, 2019, the Board granted an interim stay based on evidence  
24 that the city could issue a demolition permit within days at any time after January

1 9, 2019, and demolition could occur as soon as a permit was obtained. On January  
2 14, 2019, the Board received intervenor’s objection to the motion for stay. The  
3 city did not file a response to the motion for stay.

#### 4 **A. Sufficiency of the Motion for Stay**

5 Intervenor opposes the motion for stay, arguing, first, that the motion is  
6 deficient because petitioner did not include with her motion “[a] copy of the  
7 decision under review and copies of all ordinances, resolutions, plans or other  
8 documents necessary to show the standards applicable to the decision under  
9 review,” as required by OAR 661-010-0068(e). Petitioner attached a copy of the  
10 notice of the challenged decision to her notice of intent to appeal and we  
11 understand that the city council did not issue a written decision. Accordingly,  
12 there is no written decision petitioner could have attached to her motion for stay.  
13 Petitioner’s motion for stay clearly states the standards that petitioner believes  
14 are applicable to the challenged decision. Her failure to attach copies of those  
15 standards is a technical violation. OAR 661-010-0005. The motion for stay is  
16 sufficient for our consideration.

#### 17 **B. Colorable Claim of Error**

18 To establish a colorable claim of error for purposes of obtaining a stay,  
19 petitioner must demonstrate that the alleged errors, if sustained, would result in  
20 reversal or remand of the challenged decision. *Barr v. City of Portland*, 20 Or  
21 LUBA 511, 511 (1990). Petitioner need not establish that she will prevail on the  
22 merits. *Id.*; *see also City of Oregon City v. Clackamas County*, 17 Or LUBA

1 1032, 1039 (1988) (“colorable claim of error” is not a demanding standard);  
2 *Rhodewalt v. Linn County*, 16 Or LUBA 1001, 1004 (1987) (same).

3       Petitioner argues that the city erred by failing to adopt a written decision  
4 (1) indicating that the city considered the list of factors that the city was required  
5 to consider before approving the demolition of a historic resource under OAR  
6 660-023-0200(8)(a) and ADC 7.330, and (2) specifying the basis for the decision,  
7 as required by ADC 7.360, 1.360, and 1.370. Petitioner argues that the city’s  
8 failure to consider the required factors and issue a decision with findings of fact  
9 and conclusions of law requires remand. Intervenor does not dispute that  
10 petitioner has presented a colorable claim of error. We conclude that petitioner’s  
11 claim of error, if sustained, would require remand of the challenged decision and,  
12 thus, petitioner has established a colorable claim of error.

### 13       **C. Irreparable Injury**

14       “[T]he cases in which we find that the petitioner has demonstrated  
15 irreparable injury if a stay is not granted generally involve proposals that destroy  
16 or injure unique historic or natural resources, or other interests that cannot be  
17 practicably restored or adequately compensated for once destroyed.” *Bryant v.*  
18 *Umatilla County*, 45 Or LUBA 700, 702 (2003) (citing *Roberts v. Clatsop*  
19 *County*, 43 Or LUBA 577, 583 (2002)). Petitioner must specify the claimed  
20 irreparable injury according to the following five factors:

21       (1) the movant must adequately specify the injury that he or she will suffer;

1           (2) the injury must be one that cannot be compensated adequately in money  
2 damages;

3           (3) the injury must be substantial and unreasonable;

4           (4) the conduct the movant seeks to bar must be probable rather than  
5 merely threatened or feared; and

6           (5) if the conduct is probable, the resulting injury must be probable rather  
7 than merely threatened or feared.

8       *Cossins v. Josephine County*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2017-122, Order,  
9 Feb 5, 2018) (citing *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604,  
10 609 (2004) (describing five factors to be considered in determining whether  
11 irreparable injury has been demonstrated)).

12           Petitioner is a historic preservation consultant who lives in Albany. She  
13 routinely hosts walking tours of the historic district, including the neighborhood  
14 in which the contributing structures are located. Petitioner explains that  
15 destruction of contributing resources compromises the continuity of the district  
16 because the “buildings work together to tell a story about a different era and the  
17 loss of even one building diminishes the district as a whole.” Motion for Stay 10–  
18 11, 13. Intervenor responds that petitioner was required to prove irreparable  
19 injury to herself, and not the historic structures or district. Intervenor argues that  
20 the historic structures are merely a part of a larger district, and petitioner failed  
21 to establish that the specific contributing structures are unique or that their  
22 removal will injure the historic district when considered as a whole.

1       The demolition of historic landmarks is the type of irreparable injury that  
2 a stay is intended to prevent. *See Save Amazon Coalition v. City of Eugene*, 29  
3 Or LUBA 565, 568–69 (1995) (granting a stay of city decision approving  
4 demolition of historic buildings). Petitioner has adequately specified her personal  
5 interest in maintenance of the integrity of the historic district, and we agree with  
6 petitioner that the district is the sum of its parts, including the disputed structures.  
7 Historic contributing structures are designated and valued because of their  
8 historical significance. A historic structure is irreplaceable, and its destruction is  
9 irreversible and causes an injury that cannot be compensated adequately in  
10 money damages.

11       Intervenor comments that the structures are “degenerated into derelicts”  
12 and have been categorized as “dangerous buildings” by the police department.  
13 Response to Motion for Stay 6. We understand intervenor to argue that the poor  
14 physical condition of the structures means that their demolition will not cause  
15 substantial and unreasonable harm to petitioner. As explained, the three structures  
16 are designated historic contributing structures, which necessarily means that they  
17 “convey a sense of history” and “strengthen the historic character of the district.”  
18 ADC 7.020. The contributing structures’ condition and value to the community  
19 are considerations under ADC 7.330 and OAR 660-023-0200(8)(a), which goes  
20 to the merits of the city’s decision allowing the structures to be demolished.  
21 However, the merits of the city’s decision do not bear on our consideration of  
22 whether petitioner will suffer irreparable injury. We conclude that the historic

1 character of the three structures, and their value to the historic district,  
2 demonstrates that the injury from their demolition during the pendency of the  
3 LUBA proceeding would be substantial and unreasonable. The historic district is  
4 the sum of its parts and the historic district is designed to preserve the “visual  
5 span” of the city’s history. The diversity of historic architecture as a whole is  
6 “more significant than the number of buildings.” Comprehensive Plan 2-11.  
7 Thus, we disagree with intervenor that the injury from the demolition of three  
8 structures is reasonable based on the hundreds of other historic structures that  
9 remain in the historic district.<sup>2</sup>

10         Petitioner has also established that irreparable injury is probable if the stay  
11 is not granted. The challenged decision approves demolition of the three  
12 structures and, now that the 90-day waiting period in the condition of approval  
13 has expired, intervenor may obtain a demolition permit at any time and in a matter  
14 of days. Intervenor does not dispute that without a stay demolition of the three  
15 buildings will begin immediately. Without a stay of the challenged decision it is  
16 probable that the structures will be demolished, which is irreversible.

17         The motion for stay is granted. Petitioner has previously filed a cashier’s  
18 check in the amount of \$5,000, as required by ORS 197.845(2) and OAR 661-

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<sup>2</sup> Intervenor also argues that the structures were for sale for \$1 each and that petitioner’s failure to purchase and relocate the structures undermines her argument about the unreasonableness of the injury. We disagree that a petitioner must undertake such extraordinary measures as personally purchasing and relocating a historic property in order to establish that a stay is warranted.



1 010-0068(4). Therefore, the stay shall take effect upon issuance of this order and  
2 shall remain in effect until the Board issues its final opinion and order.

3 **SUPPLEMENTAL RECORD**

4 In an order issued January 9, 2019, the Board sustained part of one of  
5 petitioner's record objections and ordered her to file and serve a supplemental  
6 record. On January 14, 2019, LUBA received the supplemental record and shall  
7 regard that supplemental record as part of the record of this proceeding. The  
8 record is settled as of the date of this order.

9 **BRIEFING SCHEDULE**

10 In the motion for stay, petitioner does not suggest an expedited briefing  
11 schedule, as required by OAR 661-010-0068(1)(d). Instead, petitioner suggests  
12 maintaining the regular briefing schedule. Intervenor does not suggest an  
13 expedited briefing schedule in his response to the motion to stay. Accordingly,  
14 briefing in this appeal shall proceed as established by the Board's rules.

15 The petition for review shall be due 21 days after the date of this order.  
16 The response briefs shall be due 42 days after the date of this order. The final  
17 opinion and order shall be due 77 days after the date of this order.

18 Dated this 17th day of January, 2019.  
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24 H. M. Zamudio  
Board Member