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

SUSAN GARRETT CROWLEY,
Petitioner,

vs.

CITY OF HOOD RIVER,
Respondent,

and

MID-COLUMBIA HOUSING AUTHORITY and
COLUMBIA CASCADE HOUSING CORPORATION,
Intervenors-Respondents.

LUBA No. 2019-054

ORDER

MOTION TO INTERVENE

Mid-Columbia Housing Authority and Columbia Cascade Housing Corporation (intervenors) move to intervene on the side of respondent. No party opposes the motions and they are allowed.

BACKGROUND

The subject property is a single five-acre tax lot (the property) that is a part of Morrison Park, a city park that consists of approximately 10.83 acres, all of which are largely undeveloped. This is the second time that the dispute in this appeal has been before LUBA. In *Crowley v. City of Hood River*, 77 Or LUBA 117, *rev'd and rem'd*, 294 Or App 240, 430 P3d 1113 (2018) (*Crowley I*), we affirmed the city's decision to approve a comprehensive plan and zoning map

amendment for the property from Open Space/Public (OS/PF) to Urban High Density Residential (R-3). The Court of Appeals reversed and remanded our decision, holding that city's decision was inconsistent with the stated purpose of its public park policy that "[e]xisting park sites will be protected from incompatible uses." Hood River Comprehensive Plan Goal 8, Policy 1; *Crowley*, 294 Or App 240, 245, 247–48. On remand from the Court of Appeals, we remanded the city's decision for further proceedings to allow the city to adopt "a sustainable interpretation" of Goal 8, Policy 1. *Crowley v. City of Hood River*, ___ Or LUBA ___ (LUBA No. 2017-071, Jan 24, 2019).

On remand, the city again approved by Ordinance No. 2048 a quasi-judicial zone change and map amendment of the property from OS/PF to R-3. The decision includes conditions of approval that (1) a maximum of 2.76 acres of the five-acre property may be developed as affordable housing and (2) the city shall work with intervenors Mid-Columbia Housing Authority and Columbia Cascade Housing Corporation, or a successor agency, to develop affordable housing on the property. Motion for Stay, Appendix A, Exhibit A, 1.[1] Petitioner challenges that decision in this appeal.

As of the date of this order, there are multiple pleadings and responses pending in this appeal. On June 10, 2019, LUBA received the original record

[1] The record has not been settled in this appeal. We refer to the copy of the challenged decision attached as Appendix A to petitioner's motion for stay.

transmittal. On June 21, 2019, LUBA received intervenors' joint record objection. On June 26, 2019 LUBA received petitioner's record objections, "request for record remand," and motion to take evidence not in the record. On July 8, 2019, LUBA received petitioner's response to intervenors' joint record objection. 4. On July 15, 2019, LUBA received the city's response to intervenors' and petitioner's record objections. On July 22, 2019 LUBA received petitioner's motion to exclude as untimely the city's response to petitioner's record objections. On July 25, 2019, LUBA received the city's response to petitioner's motion to exclude the city's response to record objections. The time limits for all events are currently suspended due to petitioner's motion to take evidence. *See* OAR 661-010-0045(9) ("Unless the Board orders otherwise, the filing of a motion to take evidence shall suspend the time limits for all other events in the review proceeding, including the issuance of the Board's final order.").

On July 31, 2019, petitioner filed a motion to stay the challenged decision and a second motion to take evidence not in the record. On August 9, 2019, the city filed a response in opposition to those motions. We resolve only those two motions in this order. For the reasons explained below, we allow in part and deny in part the motion to take evidence not in the record in support of the motion for stay and deny the motion for stay.

MOTION TO TAKE EVIDENCE NOT IN THE RECORD

Our review is generally limited to material included in the local record. *See* ORS 197.835(2)(a) ("Review of a decision under ORS 197.830 to 197.845 shall

be confined to the record."). However, LUBA may take evidence to resolve requests for stays. OAR 661-010-0045(1).[2] A motion to take evidence must include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). It is the movant's burden to demonstrate a sufficient basis for LUBA to take evidence outside the record.

Petitioner titled her motion "Motion for Stay and Motion to Take Documentary Evidence Not in the Record." Petitioner attached to her motion voluminous documents in five appendices, which we describe briefly:

> Appendix A – a copy of the challenged decision on appeal;
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> Appendix B – affidavits of petitioner and others regarding the character of the trees and other vegetation on the property; documents related to a separate site plan review proceeding on the

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[2] OAR 661-010-0045(1) provides:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

subject property, City Case No 18-48 SPR Mid-Columbia Housing, including a site plan map, proposed tree removal plan map, and staff spreadsheet dated March 6, 2019 including a notation that "Active land use application[] * * * 18-48 SPR Mid-Columbia Housing (complete, additional info needed prior to scheduling hearing)"; Oregon Housing and Community Services spreadsheets listing projects and applicants; Hood River News article dated July 20, 2019, stating that an anticipated affordable housing project on the subject property had been denied federal Low Income Housing Tax Credits, "a key funding piece to the project"; Purchase Option Agreement between the city and intervenor Columbia Cascade Housing Corporation for the subject property dated March 6, 2018; partial transcript of a July 22, 2019 city council meeting; and city council agendas for June 24, 2019 and July 22, 2019, noting executive sessions to conduct deliberations regarding negotiations for real property transactions.

Appendix C –a copy of the Court of Appeals' decision *Crowley v. City of Hood River*, 294 Or App 240, 430 P3d 1113 (2018);

Appendix D – materials petitioner submitted to the city during the remand proceeding;

Appendix E – local ordinances and other documents that petitioner relies on to argue colorable claims of error; and

Appendix F – "an excerpted version [of] other local documents and ordinances previously filed as supplementary appendices in the 2017 appeal of this matter." Motion for Stay 45 (describing appendices).

With exception of Appendices A and B, it is not clear to us which of the documents in petitioner's appendices are included in the record in this appeal, and which contain evidence outside the record. Appendix A is the challenged decision, which must be included in the record. OAR 661-010-0025(1)(a) (providing that the record shall include "[t]he final decision including any

findings of fact and conclusions of law"). It appears to us that at least some of the documents are subject to the parties' pending record objections and the city's response to those objections. It is also not clear to us whether all the documents in the appendices are the subject of petitioner's motion to take evidence in support of her motion for stay. Petitioner did not include a statement "explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in [OAR 661-010-0045(1)], and how those facts will affect the outcome of the review proceeding." OAR 661-010-0045(2)(a). We will not endeavor to supply argument that is expressly required by our rules, but that petitioner has not included in her motion.

Appendix B includes affidavits of a civil engineer, arborist, restoration ecologist, and petitioner. In her motion, petitioner explains that "[t]he facts and professional judgments contained in these affidavits and their attachments are not otherwise [in] this record[] and are essential to substantiate the factual basis for this Motion for Stay, which if successful will preserve the tree canopy and on the park site during the pendency of this appeal." Motion for Stay 2. It is reasonably clear to us that Appendix B is meant to provide evidence to support petitioner's factual assertions regarding the character and quality of the trees on the subject property and that a site plan review to develop the property is pending and could be approved before this appeal is decided on the merits.

The motion to take evidence is allowed with respect to the documents in Appendix B. We will consider those documents at this stage for the limited

purpose of resolving the request for stay. The motion to take evidence is denied with respect to Appendices C, D, E, and F, and the Board will not consider those documents in deciding the motion for stay or subsequent issues in this appeal.[3]

MOTION FOR STAY

ORS 197.845(1) and OAR 661-010-0068 govern motions for stay and require the movant to demonstrate (1) a colorable claim of error in the decision under review, and (2) that the movant will suffer irreparable injury if the stay is not granted. 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." *McGreer v. City of Rajneeshpuram*, 7 Or LUBA 415, 418 (1983).

A. 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 (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

[3] Some of the documents attached to the motion for stay may be included in the record in this appeal. Some of the documents attached to the motion for stay may be subject to official notice. However, petitioner has not requested we take official notice of any documents, and we do not do so on our own motion.

decision. *Barr v. City of Portland*, 20 Or LUBA 511 (1990). Petitioner contends, among other things, that the city again erred in interpreting Hood River Comprehensive Plan Goal 8, Policy 1. That argument is sufficient to demonstrate a colorable claim of error.

B. Irreparable Injury

Demonstration of irreparable injury generally requires a showing that, if a stay is not granted, the decision will authorize destruction or injury of unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once injured or destroyed. *Roberts v. Clatsop County*, 43 Or LUBA 577 (2002). In *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042–43 (1988), we set out the factors to be considered in whether a movant has adequately demonstrated that irreparable injury will be suffered if the stay is not granted:

> "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?" *Id.* (Citations omitted.)

The movant must establish a causative link between the decision on appeal and the asserted irreparable injury. In other words, the movant must establish that a stay of the challenged decision will likely prevent the conduct that causes the injury. *See, e.g.*, *Meyer v. Jackson County*, 72 Or LUBA 462 (2015) (allowing stay where the Board found a causative relationship between the challenged decision and the alleged injury); *see also Ott v. Lake County*, 53 Or LUBA 633 (2007) (denying stay where movant for a stay failed to demonstrate that grading and scraping activity approved by the challenged decision will cause irreparable injury to archeological objects that may be found on the property, where such objects are protected under other applicable law); *Keudell v. Union County*, 19 Or LUBA 588 (1990) (denying motion for stay in the absence of any causal connection between the feared injury and the challenged approval).

Petitioner argues that we should stay the city's decision to rezone the property, "to preserve from imminent destruction approximately 175 trees, including irreplaceable old growth Oregon white oaks and Ponderosa pines, during the pendency of this appeal proceeding." Motion for Stay 1–2. Petitioner argues that the protection of the trees is an "urgent matter." Motion for Stay 7. Petitioner acknowledges that, "[b]efore a high-density housing development can be approved for construction, the Hood River Municipal Code [HRMC] requires completion of a site plan review process by Respondent. HRMC 17.16.010 and 17.16.020." Motion for Stay 7. Petitioner observes that the city must take final action on an application within 120 days after the application is deemed

complete, unless the applicant requests or consents to an extension of that timeline. ORS 227.178. Petitioner argues that the site plan in City Case No 18-48 SPR Mid-Columbia Housing could be approved as early as September 20, 2019. Motion for Stay, Appendix B, Petitioner's Affidavit 4. Petitioner argues that destruction of the trees could occur immediately after the site plan is approved, and that the trees could be destroyed in a matter of days. Motion for Stay 9. Petitioner argues that her concerns are not speculative, because intervenors conducted preliminary site study and survey work in October 2017, when the county's prior approval was pending appeal. In March 2018, the city and intervenors entered into a purchase option agreement, conditioned on intervenor's satisfaction that the "intended development" is feasible. Motion for Stay, Appendix B, Petitioner's Affidavit, Attachment F. Petitioner argues that a stay of the rezoning decision would protect the park from sale and destruction of the trees.

The city responds that it has no intention of developing the subject property "any time soon" nor does it intend to remove any of the trees unless and until a development proposal obtains site plan approval. The city informs us that the development proposal petitioner assumes will be built is "no longer viable." We assume that the development proposal to which the city refers is Case No 18-48 SPR Mid-Columbia Housing. However, the city does not include any evidence with its response to establish that the application in Case No 18-48 SPR Mid-Columbia Housing is no longer pending before the city at this time.

We assume for the sake of resolving the motion for stay that (1) the property contains irreplaceable trees and natural resources and (2) a site plan review application is pending before the city that would allow development of housing on the subject property, including the removal of trees. Even assuming those facts, petitioner cannot establish that she "will suffer irreparable injury if the stay of the challenged decision is not granted." OAR 661-010-0068(1)(c).

Destruction of mature trees is a type of activity that can constitute irreparable injury.[4] *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604 (2004). We conclude that petitioner adequately specified the injury she will suffer, and that the identified injury is one that cannot be compensated adequately in money damages. We assume for purposes of this order that the asserted injury is substantial and unreasonable. Thus, the first three factors required to obtain a stay are satisfied.

In *Butte Conservancy*, the city approved a final plat application for a residential development on a 50-acre site on an undeveloped, forested hill. We concluded that final plat approval allowed site preparations, including tree removal. The petitioner argued, and the intervenor did not dispute, that trees had been marked for cutting. We concluded in those circumstances that the petitioner

[4] The challenged decision explains that the subject property "has several clusters of mature trees, and portions have a well-developed understory, but no part of today's Morrison Park, including [the subject property], is an inventoried Goal 5 natural resource, habitat, scenic or open space resource." Appendix A 2.

had demonstrated it was probable that injury would occur absent a stay. 47 Or LUBA 604.

Differently, here, petitioner has not established that the imminent destruction of mature trees is probable, rather than merely threatened or feared. The challenged decision does not approve development of land and does not approve tree removal. In its decision, the city explained:

> "[E]ven though we limit our decision to developing the R-3 portion of the site with an affordable housing project, this rezone does not necessarily approve any particular use or development. A rezone is not a development approval or a 'permit,' which is the 'discretionary approval of a proposed development of land.' ORS 227.160(2). No such development is allowed in either the OS/PF or the R-3 zone without site plan approval. In support of our conclusion that a rezone is not a development, that it does not approve a particular development, and that R-3 zoning is compatible with TL 700's status as part of a park site, we note that city parks are conditionally allowed uses in all residential zones, including the R-3 zone." Motion for Stay, Appendix A, Exhibit A 6.

The challenged decision does not directly approve tree removal. However, the challenged decision need not directly approve conduct that causes irreparable injury to support a stay. For example, in *Meyer*, we allowed a stay of a county hearings officer's decision denying a nonconforming use verification for an asphalt batch plant because the county relied on the hearings officer's decision to impose daily fines for every continued day of operation while the LUBA appeal was pending. 72 Or LUBA at 468–71. In *Niederer v. City of Albany*, __ Or LUBA__ (LUBA No 2018-133, Order, Jan 7, 2019) we allowed a stay of a city

decision that approved demolition of three historic contributing structures, with a condition that the buildings not be demolished for at least 90 days from the date the decision was signed. Demolition also required a demolition permit, which an applicant may obtain from the city in two days to one week, with no notice to any other party. We agreed with the petition that the irreplaceable historic buildings could be demolished within days of the motion for stay, without adequate review, and thus the injury was probable to occur in the absence of a stay. *Id*.

We conclude that, here, petitioner cannot establish the requisite irreparable injury because petitioner has not established that destruction of any trees on the subject property is probable in the absence of a stay of the challenged decision. The decision rezones the subject property and limits the uses that may be approved on a portion of the property. The challenged decision does not approve any development. The decision before us in this appeal does not authorize any development or site preparation activities, including tree removal.

It is undisputed that development of the property requires site plan review approval, and that a site plan for development of the subject property has not yet been approved by the city. The pending site plan application may or may not be approved, and an approval may or may not allow destruction of the trees that petitioner seeks to protect through her motion for stay. We cannot prevent the city from approving the site plan by staying the decision in this appeal, even if that would be the practical result. *See Dept. of Transportation v. Douglas County*, 34 Or LUBA 720 (1998) (LUBA cannot preclude a local government from

making a land use decision, even when the anticipated decision will address issues that arise from a decision that is being challenged before the Board). Unlike the situation in *Niederer*, petitioner has not argued or established here that petitioner would not receive notice of a site plan review approval or an opportunity to appeal that decision to LUBA and seek a stay of that decision. Petitioner has not established that it is probable that irreplaceable trees will be removed in the absence of a stay of the decision challenged in this appeal. Thus, the final two factors required to obtain a stay are not satisfied.

Petitioner's motion for stay is denied.

Time limits for all further procedures in this appeal are currently suspended pending the Board's resolution of petitioner's June 26, 2019 motion to take evidence outside the record. In addition, as described above, the parties have filed record objections and responses. In the motion for stay, petitioner did not suggest an expedited briefing schedule, as required by OAR 661-010-0068(1)(d). Instead, petitioner states that a change in briefing schedule is not necessary. Motion for Stay 44. We will resolve the other outstanding objections and reset the briefing schedule in due course by separate order.

Dated this 13th day of August, 2019.

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H. M. Zamudio
Board Member