

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

OREGON COAST ALLIANCE, JEFF BRYNER,
CANDACE CHURCHLEY, DAVID CHURCHLEY,
TOM ROGERS, PATRICIA ROGERS,
DON OLSON, JOANN OLSON,
MARIE COOK, TED MINSHALL,
MARY VOBORIL, KURT LEIPZIG, JACKIE LEIPZIG,
ED RUTTLEDGE, LYNNAE RUTTLEDGE,
MIKE SEARS, RON BOURKE, GERRIE BOURKE,
ELIZABETH STURTEVANT, LYNDA STEINER,
RON BAKER, LISA MACY-BAKER,
JIM SPRING, and RITA SPRING,
Petitioners,

VS.

TILLAMOOK COUNTY,
Respondent,

and

EDGE CABLE HOLDINGS USA, LLC,
Intervenor-Respondent.

LUBA No. 2020-014

ORDER

MOTION TO INTERVENE

Edge Cable Holdings USA, LLC (intervenor), the applicant below, moves to intervene on the side of the county. No party opposes the motion, and it is granted.

1 **BACKGROUND**

2 The challenged decision is a board of commissioners’ decision approving
3 a conditional use permit and similar use determination for an underground fiber-
4 optic cable and buried beach manhole on property that is comprised of
5 approximately 0.67 acres and zoned Rural Residential 2-Acre (RR-2) (subject
6 property). As the decision explains, the subject property is bordered by residential
7 properties to the north and south and the Pacific Ocean to the west, and is
8 vegetated with dune grass, shrubs, and trees. Motion for Stay, Exhibit A at 3.

9 **MOTION FOR STAY**

10 On February 11, 2020, petitioners filed a motion to stay the decision
11 challenged in this appeal, pursuant to ORS 197.845(1) and OAR 661-010-0068.¹
12 For the reasons set forth below, the motion for stay is denied.

¹ ORS 197.845(1) 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 **A. Colorable Claim of Error**

2 “In order to establish evidence of a colorable claim of error, it is not
3 necessary to show that a petitioner will prevail on the merits, but rather the errors
4 alleged must be sufficient to result in reversal or remand of the decision if found
5 to be correct.” *Dames v. City of Medford*, 9 Or LUBA 433, 438 (1983), *aff’d*, 69
6 Or App 675, 687 P2d 1111 (1984). Here, petitioners intend to argue the county
7 erred in concluding that the proposed fiber-optic cable and manhole constitute a
8 “public utility facility, including substations and transmission lines[,]” and
9 therefore qualify as a conditional use in the RR-2 zone under Tillamook County

“ * * * * *

“(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;

“ * * * * *

“(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 Land Use Ordinance (LUO) 3.010(3)(n). Motion for Stay 3. Petitioners also
2 intend to argue the county erred in alternatively concluding that the proposed use
3 is “similar” to a public utility facility and may therefore be approved under the
4 same criteria pursuant to LUO 1.060(1) and 2.040. *Id.* Finally, petitioners intend
5 to argue the county erred in concluding that the proposed use satisfies various
6 approval criteria for conditional use permits under LUO 6.040(1)-(6). *Id.* at 4.
7 Should petitioners prevail on any of these arguments, the result would be reversal
8 or remand of the county’s decision. Petitioners have satisfied the colorable claim
9 of error prong of ORS 197.845(1).

10 **B. Irreparable Injury**

11 In order to satisfy the irreparable injury prong of ORS 197.845(1), the
12 following five requirements must be met:

- 13 (1) the movant must adequately specify the injury that he or she
14 will suffer;
- 15 (2) the injury must be one that cannot be compensated adequately
16 in money damages;
- 17 (3) the injury must be substantial and unreasonable;
- 18 (4) the conduct the movant seeks to bar must be probable rather
19 than merely threatened or feared; and
- 20 (5) if the conduct is probable, the resulting injury must be
21 probable rather than merely threatened or feared.

22 *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004) (citing *City*
23 *of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988)).

24 Generally, a movant may meet these requirements only by demonstrating that the

1 development will “destroy or injure unique historic or natural resources, or other
2 interests that cannot be practicably restored or adequately compensated for once
3 destroyed.” *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002).

4 Petitioners, many of whom live adjacent to or near the subject property,
5 allege three types of injuries: loss of residential character/loss of an oceanfront
6 property, removal of trees, and impacts of construction. Petitioners argue that the
7 nature of the proposed use will injure their interest in both the residential
8 character of the neighborhood and the unique, ocean-front nature of their
9 properties. Motion for Stay 5-7, 9. In addition, petitioners argue that construction
10 of the proposed use will require the demolition of 50+ year old trees on the
11 subject property, which will injure petitioners’ interest in the trees for aesthetic
12 purposes as well as for protection from wind and erosion. *Id.* at 8-9. Finally,
13 petitioners argue that they will be injured by noise, vibrations, fumes, and traffic
14 resulting from construction of the proposed use, some of which could damage the
15 foundation, septic system, or walls of neighboring properties. *Id.* at 9-10.

16 Petitioners argue that these injuries are substantial and unreasonable
17 because the subject property will be put to “industrial” use for the life of the fiber-
18 optic cable, because the residents appreciate and rely on the trees for views and
19 shade as well as protection against wind and erosion, and because injuries
20 resulting from construction of the proposed use may cause long-term harm. *Id.* at
21 11. They argue that the foregoing injuries cannot be compensated adequately by

1 money damages because there is no pecuniary standard with which to measure
2 them. *Id.* at 10-11.

3 Intervenor responds, and we agree, that petitioners have failed to satisfy
4 the irreparable injury prong of ORS 197.845(1). First, petitioners have not
5 established that the injuries they have identified with respect to the character of
6 the neighborhood and nature of their properties are substantial and unreasonable.
7 Petitioners have failed to establish that the cable will have a greater impact on the
8 residential character of the area than the existing underground fiber optic cables
9 and above-ground power lines running under and along Sand Lake Road. In
10 addition, petitioners' argument that focuses on construction activities merely
11 speculates that 35 days of construction "may cause long-term * * * harm," but
12 does not explain how the construction activities in connection with the cable
13 differ from any other construction activity that would occur in connection with
14 the development of the RR-2 zoned-property. Motion for Stay 11. Moreover,
15 construction-related impacts are generally not the type of alleged injury that
16 LUBA considers sufficient to stay. *Roberts*, 43 Or LUBA at 583. Finally,
17 petitioners do not explain why the construction mitigation that the county's
18 decision imposes will not mitigate any harm from the construction activities.

19 Second, petitioners have not established that the trees on the subject
20 property are a "unique * * * natural resource[], or other interest[]that cannot be
21 practicably restored or adequately compensated for" once removed. *Roberts*, 43
22 Or LUBA at 583. In concluding that the parcel is suitable for the proposed use,

1 the county found that “[n]o Goal 5 natural or historic resources have been
2 identified on site.” Motion for Stay, Exhibit A at 17. Petitioners do not dispute
3 that finding or otherwise argue that any protected viewsheds are visible from the
4 site, nor do they argue that removal of the trees will affect any protected
5 viewsheds. In addition, intervenor’s testimony also included the statement that,
6 “[w]hen they’re all done, I’m certain [the property] will be restored with native
7 vegetation[.]” *Id.* at 18; Intervenor’s Response, Appendix 8, Appendix 10 at 4
8 (Construction Management Plan). To the extent petitioners assert an interest in
9 the trees for aesthetic purposes, they have not established that removing the
10 mature trees and replacing them with younger trees is a substantial and
11 unreasonable injury. However, in concluding that the parcel is suitable for the
12 proposed use, the county also relied on a geotechnical report submitted by
13 intervenor that included recommendations to reduce erosion potential. *Id.* Thus,
14 to the extent petitioners assert an interest in the trees for erosion control purposes,
15 they have not established that an increased risk of erosion is probable, rather than
16 merely threatened or feared.

17 Finally, petitioners have not established that the injuries they have
18 identified with respect to noise, vibrations, fumes, and traffic resulting from
19 construction are substantial and unreasonable. The county found that the duration
20 of construction will be approximately 35 days. Motion for Stay, Exhibit A at 18.
21 We have held that noise, dust, and unpleasant sounds and smells from temporary
22 construction activities do not rise to the level of irreparable injury. *Examilotis v.*

1 *Coos County*, 55 Or LUBA 675, 677 (2007). Moreover, the applicant's
2 geotechnical report found that "[t]he risk of vibratory damage to adjacent
3 buildings and infrastructure located 50 feet or more from the drill rig in the center
4 of the property should be considered low." Motion for Stay, Exhibit A at 17.
5 Thus, petitioners have not established that property damage resulting from
6 vibration from drilling is probable, rather than threatened or feared. Moreover,
7 petitioners have not established that such injuries cannot be compensated
8 adequately in money damages.

9 For the above reasons, petitioners' motion for stay is denied.

10 **RECORD**

11 The county shall transmit the record to the Board and the parties within 14
12 days of the date of this order.

13 Dated this 27th day of February 2020.

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Melissa M. Ryan
Board Member