

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

3  
4                   LEE SCHREPEL, BEN VAN DYKE, BJ MATTHEWS,  
5                   GORDON DROMGOOLE, JIM VAN DYKE, JULIE  
6                   VAN DYKE, JOHN VAN DYKE, ALICE PATRIDGE,  
7                   CELINE MCCARTHY, GREG MCCARTHY, CHRIS  
8                   MATTSON, CORY VAN DYKE, and TOM HAMMER,  
9                   *Petitioners,*

10  
11                   vs.

12  
13                   YAMHILL COUNTY,  
14                   *Respondent.*

15  
16                   LUBA No. 2020-066

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18                   JIM VAN DYKE, JULIE VAN DYKE, BEN VAN DYKE,  
19                   MARK VAN DYKE, VELMA VAN DYKE, JOHN WISER,  
20                   LYNNE WISER, JOHN VAN DYKE, SCOTT BERNARDS,  
21                   RICHARD CLOEPFIL, CHISTY CLOEPFIL, TOM HAMMER,  
22                   CHRIS MATTSON, KELSEY FREESE, MARK GAIBLER,  
23                   ERIC KUEHNE, HAROLD KUEHNE, JOLENE KUEHNE, B.J.  
24                   MATTHEWS, GORDON DROMGOOLE, GREG MCCARTHY,  
25                   CELINE MCCARTHY, MARYALICE PFEIFFER, TIM PFEIFFER,  
26                   BRYAN SCHMIDT, RUDIS LAC, LLC, LEE SCHREPEL,  
27                   ALLEN SITTON, BROOK SITTON, LESTER SITTON,  
28                   DARREN SUTHERLAND, KRIS WEINBENDER,  
29                   BRIAN COUSSENS, ROXANNE COUSSENS,  
30                   FRUITHILL, INC., and BEN VAN DYKE FARMS, INC.,  
31                   *Petitioners,*

32  
33                   vs.

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35                   YAMHILL COUNTY,  
36                   *Respondent.*

37  
38                   LUBA No. 2020-067

1 ORDER

2 **BACKGROUND**

3 This dispute involves county land use approval to develop a recreation trail  
4 (Yamhelas Westsider Trail or Trail) between the cities of Yamhill and Carlton,  
5 within a former railroad right of way. County action related to the Trail has been  
6 the subject of four prior LUBA decisions: *Van Dyke v. Yamhill County*, 78 Or  
7 LUBA 530 (2018) (*Van Dyke I*); *Van Dyke v. Yamhill County*, \_\_\_ Or LUBA \_\_\_  
8 (LUBA No 2019-047, Oct 11, 2019) (*Van Dyke II*); *Van Dyke v. Yamhill County*,  
9 \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2019-038/040, Oct 11, 2019) (*Van Dyke III*);  
10 *Van Dyke v. Yamhill County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2020-032/033, June  
11 1, 2020) (*Van Dyke IV*).

12 In *Van Dyke I*, we remanded a 2018 board of county commissioners’  
13 decision to adopt Ordinance 904, which amended the county’s comprehensive  
14 plan to acknowledge county ownership of a 12.48-mile segment of a former  
15 railroad right-of-way, and to authorize construction of a 2.82-mile segment of  
16 that right-of-way into the Trail. We concluded that constructing the Trail required  
17 conditional use permit approval, including application of land use approval  
18 standards implementing ORS 215.296 for sections of the Trail within lands zoned  
19 exclusive farm use (EFU).<sup>1</sup> The county instituted remand proceedings, and in

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<sup>1</sup> ORS 215.296 generally requires that the applicant seeking approval for certain non-farm uses in EFU zones demonstrate that the proposed use will not force a significant change in accepted farm practices on surrounding farm lands or significantly increase the cost of such practices.

1 March, 2019, the board of county commissioners approved a conditional use  
2 permit for the Trail. That decision was the subject of *Van Dyke II*.

3 In *Van Dyke II*, we remanded the county’s decision to approve a  
4 conditional use permit for the Trail for further proceedings. In a related set of  
5 appeals resolved in *Van Dyke III*, we dismissed two appeals of a board of county  
6 commissioners’ order authorizing the county to enter into an agreement for  
7 design and consulting services, and the agreement itself, related to the three  
8 proposed bridges along the Trail. In *Van Dyke III*, we agreed with the county that  
9 the agreement for design and consulting services was not a land use decision  
10 because it did not authorize “the use or development of land.” *Van Dyke III*, \_\_\_  
11 Or LUBA at \_\_\_ (LUBA Nos 2019-038/040, Oct 11, 2019) (slip op at 15). For  
12 that reason, we also concluded that the agreement did not have any significant  
13 impacts on land use and therefore did not qualify as a significant impacts land  
14 use decision under *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982).  
15 *Id.*, \_\_\_Or LUBA \_\_\_ (LUBA Nos 2019-038/040, Oct 11, 2019) (slip op at 17-  
16 19).

17 In *Van Dyke IV*, we remanded Board Order 20-25, which authorized the  
18 county to enter into a construction agreement, and the construction agreement,  
19 for the construction of a bridge over Stag Hollow Creek (Stag Hollow Bridge)  
20 and related approaches on county-owned property zoned EFU.

1 On May 28, 2020, the county issued Board Order 20-164, approving a  
2 conditional use permit (CUP) for the Trail after proceedings on remand from *Van*  
3 *Dyke II*. Petitioners challenge the CUP in LUBA No. 2020-067.

4 On June 11, 2020 the county issued Board Order 20-178, which  
5 “rescind[s]” Board Order 20-25 and reauthorizes the contract for the construction  
6 of the Stag Hollow Bridge (Bridge Decision). Documents in Support of Motion  
7 for Stay, Exhibit 1, page 1. In the Bridge Decision, the county refers to and relies  
8 on the CUP for land use approval and required land use review. In the Bridge  
9 Decision the county concludes that the CUP proceeding “provided all of the  
10 process, and addressed all of the statutory and ordinance standards, required by  
11 LUBA’s remand” in *Van Dyke IV. Id.* Petitioners challenge the Bridge Decision  
12 in LUBA No. 2020-066.

### 13 **CONSOLIDATION**

14 Under OAR 661-010-0055, LUBA “may consolidate two or more  
15 proceedings, provided the proceedings seek review of the same or closely related  
16 land use decision(s) or limited land use decision(s).” LUBA Nos. 2020-066 and  
17 2020-067 seek review of closely related decisions. Accordingly, LUBA Nos.  
18 2020-066 and 2020-067 shall be consolidated for LUBA review.

### 19 **JURISDICTION**

20 In the notice of intent to appeal (NITA) the Bridge Decision, petitioners  
21 assert that the Bridge Decision is a “land use, limited land use or significant  
22 impacts land use decision.” NITA 1, LUBA No. 2020-066. In response to

1 petitioners' motion for stay, discussed and resolved immediately below, the  
2 county responds that LUBA lacks jurisdiction to review the Bridge Decision  
3 because, according to the county the Bridge Decision is not a land use decision  
4 and that the development authorized in the Bridge Decision was approved by the  
5 CUP. For their part, petitioners argue that the county lacked jurisdiction to issue  
6 the CUP while *Van Dyke IV* was pending.<sup>2</sup>

7         The parties have not fully briefed complex and interrelated jurisdictional  
8 disputes related to the Bridge Decision and the CUP. The jurisdictional issues are  
9 obviously intertwined with the parties' arguments on the merits. For purposes of  
10 this order, we assume that we have jurisdiction over the Bridge Decision and do  
11 not express any opinion on the merits of the parties' jurisdictional disputes in  
12 these consolidated appeals. For reasons explained below, we grant petitioners'  
13 motion for stay pending our resolution of the consolidated appeals. We impose  
14 an expedited record period and will impose an expedited briefing schedule. The  
15 parties shall address jurisdiction in their briefs on the merits.

16 **MOTION FOR STAY**

17         On June 12, 2020, petitioners filed a motion for stay of the Bridge Decision  
18 via certified mail. On June 15, 2020, petitioners filed a courtesy copy of that

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<sup>2</sup> On October 11, 2019, we remanded the county's prior approval of a CUP for the Trail in *Van Dyke II*. On January 16, 2020, the county authorized the construction contract for the Stag Hollow Bridge that petitioners challenged and we remanded on June 1, 2020 in *Van Dyke IV*. Meanwhile, the county proceeded on remand from *Van Dyke II* and approved the CUP on May 28, 2020.

1 motion by hand delivery to LUBA. On June 16, 2020, the county filed a response  
2 opposing the motion for stay. On June 17, 2020, petitioners filed an amended  
3 motion for stay.<sup>3</sup> For the reasons explained below, we grant a stay of the Bridge  
4 Decision pending our resolution of the consolidated appeals.

5 LUBA is authorized to stay a land use decision pending LUBA’s review if  
6 a petitioner demonstrates (1) a colorable claim of error in the appealed decision,  
7 and (2) that petitioner will suffer irreparable injury if the stay is not granted. ORS  
8 197.845(1); OAR 661-010-0068.<sup>4</sup>

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<sup>3</sup> The amended motion for stay does not include additional legal arguments that were not presented in the original motion for stay.

<sup>4</sup> 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:

“\* \* \* \* \*

“(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; [and]

“(d) A suggested expedited briefing schedule;”

“\* \* \* \* \*

“(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

1           **A.     Colorable Claim of Error**

2           The requirement to demonstrate a colorable claim of error is not  
3 particularly demanding. *Rhodewalt v. Linn County*, 16 Or LUBA 1001, 1004  
4 (1987). A petitioner need not establish that it will prevail on the merits. *Thurston*  
5 *Hills Neigh. Assoc. v. City of Springfield*, 19 Or LUBA 591, 592 (1990). Provided  
6 a petitioner’s arguments are not devoid of legal merit, it is sufficient that the  
7 errors alleged, if sustained, would result in reversal or remand of the challenged  
8 decision. *Barr v. City of Portland*, 20 Or LUBA 511 (1990). “In order to establish  
9 evidence of a colorable claim of error, it is not necessary to show that the  
10 petitioner will prevail on the merits. It is necessary to show the errors alleged are  
11 sufficient to result in reversal or remand of the decision if found to be correct.”  
12 *Dames v. City of Medford*, 9 Or LUBA 433, 438 (1983), *aff’d*, 69 Or App 675,  
13 687 P2d 1111 (1984).

14           Petitioners intend to argue that the Bridge Decision violates LUBA’s  
15 remands in *Van Dyke IV* and *Van Dyke II*, ORS 215.416, ORS 197.763, ORS  
16 215.283(3), and county procedural requirements in the Yamhill County Zoning  
17 Ordinance (YCZO). Petitioners intend to argue that the county provided no public  
18 process and did not apply applicable land use standards or make required findings  
19 in approving the Bridge Decision. Petitioners will further argue that the county’s  
20 reliance on the CUP does not remedy the alleged substantive and procedural

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other materials, or presented by means of a motion to take  
evidence outside the record. See OAR 661-010-0045.”

1 errors in the Bridge Decision because the CUP decision was procedurally flawed.  
2 Petitioners will also argue that the CUP relies on future master plan approval  
3 prior to construction of trail components, but excepts from that master planning  
4 process “non-general public property access improvements” including the Stag  
5 Hollow Bridge construction. Amended Motion for Stay 11; Documents in  
6 Support of Motion for Stay, Exhibit 2, page 72.

7 If, in authorizing development of the Stag Hollow Bridge, the county failed  
8 to apply required land use standards and make necessary findings, or if the county  
9 failed to follow required procedures and denied petitioners a public process to  
10 which they were entitled, those alleged errors would be sufficient to result in  
11 reversal or remand. ORS 197.835(9). Accordingly, petitioners’ arguments are not  
12 devoid of legal merit. Petitioners’ have demonstrated a colorable claim of error.

13 **B. Irreparable Injury**

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

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

1 *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004); *City of*  
2 *Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988).  
3 Generally, a movant may meet these requirements only by demonstrating that the  
4 development will “destroy or injure unique historic or natural resources, or other  
5 interests that cannot be practicably restored or adequately compensated for once  
6 destroyed.” *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002).

7 We granted a stay in *Van Dyke IV* after concluding that construction of the  
8 Stag Hollow Bridge would probably, substantially, and unreasonably injure  
9 regulated wetlands and/or regulated habitat and farm-related interests of  
10 petitioner Ben Van Dyke. *Van Dyke v. Yamhill County*, \_\_\_ Or LUBA \_\_\_  
11 (LUBA No 2020-032/033, Order, April 24, 2020). Petitioners argue that the same  
12 irreparable harm will result if the Bridge Decision is not stayed. Petitioners  
13 resubmitted essentially the same evidence supporting their motion for stay in *Van*  
14 *Dyke IV*.

### 15 **1. Alleged Irreparable Injury to Natural Resources**

16 Petitioners allege that the County is constructing a bridge in a regulated  
17 wetland and/or regulated habitat adhering to no required standards. Petitioners do  
18 not specify where the regulated wetlands and/or regulated habitat are located in  
19 relationship to the bridge or allege how bridge construction will irreparably injure  
20 those natural resources. Petitioners do not allege that the wetlands and habitat are  
21 unique natural resources that cannot be practicably restored if destroyed.

1 Petitioners have not adequately specified the injury or established that an injury  
2 to regulated wetlands and/or habitat is substantial, unreasonable, and probable.

3 To the extent petitioners intend to rely on LUBA’s reasoning supporting  
4 the stay in *Van Dyke IV*, the county has responded with evidence that  
5 demonstrates that no bridge construction work will occur in regulated wetlands  
6 and that the bridge construction contract will comply with applicable  
7 environmental regulations. Petitioners’ natural resources argument provides no  
8 basis for a stay.

9 **2. Irreparable Injury to Van Dyke’s Farm Interests**

10 In granting a stay of the Stag Hollow Bridge construction agreement in  
11 *Van Dyke IV*, we concluded that petitioner Ben Van Dyke had established that,  
12 absent a stay, it was probable that he would lose his filbert crop because, due to  
13 the presence of construction crews, he would be hindered or prohibited from  
14 spraying the herbicides and pesticides required to protect that crop. We reasoned:

15 “Although it is a reasonably close question, we conclude that  
16 petitioners have established for purposes of the motion for stay only,  
17 through the Declarations, that Van Dyke’s farm is close enough to  
18 the construction site that the presence of construction workers  
19 prevents him from applying certain pesticides and fungicides to his  
20 trees when construction workers are engaging in construction of the  
21 bridge.” *Van Dyke*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2020-032/033,  
22 Order, April 24, 2020) (slip op at 12).

23 Van Dyke explained that filbert trees should live 75 years or more and that,  
24 if he was unable to spray his filbert trees, those trees could die due to Eastern

1 Filbert Blight.<sup>5</sup> Documents in Support of Motion for Stay, Exhibit 3, page 2. Van  
2 Dyke explained that spraying is necessary from April through August. *Id.* Given  
3 the long-lived nature of the filbert trees and the potential for protracted crop and  
4 yield loss if spraying cannot occur, we conclude that the injury Van Dyke  
5 specified is not an injury that could be adequately compensated in money  
6 damages. We also concluded that it was probable that Van Dyke would lose his  
7 food safety certifications if litter and debris from the construction site enter his  
8 hazelnut orchard, and that injury supported a stay. *Van Dyke v. Yamhill County*,  
9 \_\_\_ Or LUBA \_\_\_ (LUBA Nos 2020-032/033, Order, April 24, 2020) (slip op at  
10 15).

11 The county responds that “petitioners have no right to use the county’s  
12 property as a spray buffer, whether or not a construction crew or other county  
13 employees or invitees are present.” Response to Motion for Stay 13. The county  
14 argues that the stay that LUBA issued in *Van Dyke IV* misconstrued the law and  
15 violated the county’s constitutionally protected property rights by imposing “a  
16 nonconsensual spray buffer” on the county’s property. *Id.*

17 The county misapprehends LUBA’s role with respect to the parties’  
18 property rights. LUBA has not ruled, implicitly or otherwise, that Van Dyke has  
19 a right to use the county’s property for any purpose. As the county correctly

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<sup>5</sup> In the CUP, the board recounted testimony that Eastern Filbert Blight kills trees three years to ten years after it first appears. Documents in Support of Motion for Stay, Exhibit 2, page 26.

1 observes, LUBA has no authority to adjudicate real property rights. Instead,  
2 petitioners’ multiple appeals have engaged LUBA to review whether the county  
3 has properly approved development on and adjacent to EFU-zoned land.

4 We have previously explained that “applying pesticides in a manner that  
5 causes overspray or drift onto adjoining properties is not an accepted farming  
6 practice, for purposes of ORS 215.296(1).” *Van Dyke II*, \_\_\_ Or LUBA at \_\_\_  
7 (LUBA No 2019-047, Oct 11, 2019) (slip op at 26). As we understand it, Van  
8 Dyke does not argue that he has a right to overspray or allow drift on the county’s  
9 property. Instead, Van Dyke argues that county-approved non-farm use bridge  
10 construction activities occurring on EFU-zoned property adjacent to Van Dyke’s  
11 EFU-zoned property will require Van Dyke to alter the use of his own property  
12 by applying pesticides and herbicides to a smaller portion of his property to  
13 accommodate the required setback for pesticide application and, thus, force a  
14 significant and costly change to his farm practices.

15 The underlying legal issue in this case is not the parties’ respective  
16 property rights. Instead, the issue is whether the county properly assessed the  
17 impacts of non-farm development on accepted farming practices, including Van  
18 Dyke’s application of pesticides and herbicides. In ORS 197.845, the legislature  
19 delegated to LUBA the authority to stay a decision approving a specific  
20 development of land pending LUBA’s review. The county’s property rights  
21 related arguments provide no basis to deny the motion for stay where petitioners

1 demonstrate a colorable claim of error and irreparable harm if the challenged  
2 decision is not stayed.

3         Petitioners have established that irreparable injury is probable if the stay is  
4 not granted. The challenged Bridge Decision authorizes the construction  
5 agreement retroactively to January 16, 2020 and allows construction to resume  
6 immediately. Petitioners assert, and the county does not dispute, that construction  
7 of the Stag Hollow Bridge is currently ongoing. As of the date of this order, the  
8 facts that supported our finding of irreparable harm to Van Dyke in the absence  
9 of a stay of the county’s decision authorizing bridge construction in *Van Dyke IV*  
10 are unchanged. The county has not persuaded us that our stay in that appeal was  
11 issued in error or that a stay should not issue in this appeal.

12         Petitioners’ motion for stay is granted. The stay shall take effect  
13 immediately upon issuance of this order, conditioned on the Board’s receipt no  
14 later than 4:00 p.m. on Monday, June 22, 2020 of a cashier’s check or bank-  
15 certified check in the principal amount of \$5,000, as specified in ORS 197.845(2)  
16 and OAR 661-010-0068(4). If such undertaking is not received within the time  
17 set forth in this order, the stay shall automatically expire.

18 **EXPEDITED RECORD PERIOD**

19         These appeals were filed on June 12, 2020 and the county has not yet  
20 transmitted the records in these appeals as of the date of this order. The county  
21 shall transmit and serve a consolidated record in these appeals on or before  
22 Friday, June 26, 2020. No later than July 1, 2020, petitioners shall file and serve

1 record objections or advise in writing, filed with LUBA and served on the county,  
2 that petitioners have no record objections. The county’s response to any record  
3 objections shall be filed and served within three business days of the date that the  
4 county receives the objections. In addition, on the date of filing, parties shall also  
5 transmit a courtesy copy of their pleadings and briefs in this appeal by email to  
6 LUBA at LUBASupport@oregon.gov, and to the other parties’ email address.

7 **EXPEDITED BRIEFING SCHEDULE**

8 After the expedited record period closes, LUBA will issue a separate order  
9 settling the record, scheduling oral argument, and setting an expedited briefing  
10 schedule. Petitioners shall submit a single petition for review in these  
11 consolidated appeals, and respondent shall submit a single response brief in these  
12 consolidated appeals.

13 Dated this 19th day of June 2020.

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H. M. Zamudio  
Board Member