

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

3  
4                   SAVE EWEB FOREST, SAMUEL SCHMIEDING,  
5                   and SANDRA BISHOP,  
6                   *Petitioners,*

7  
8                   vs.

9  
10                  CITY OF EUGENE,  
11                  *Respondent,*

12  
13                  and

14  
15                  EUGENE WATER AND ELECTRIC BOARD,  
16                  *Intervenor-Respondent.*

17  
18                  LUBA No. 2021-076

19  
20                  ORDER

21   **MOTION TO INTERVENE**

22                  Eugene Water and Electric Board (EWEB), the applicant below, moves to  
23   intervene on the side of the city. There is no opposition to the motion and it is  
24   allowed.

25   **MOTION FOR STAY**

26                  The record has not been filed in this appeal. We take the facts relevant to  
27   the motion for stay from the parties' pleadings and evidence in support of those  
28   pleadings. *See* OAR 661-010-0045(1) (providing that the Board may take  
29   evidence outside the record to resolve disputes regarding requests for stays).

1           The challenged decision is an erosion prevention permit, issued by the city  
2 to EWEB on July 30, 2021, for construction of two new 7.5-million-gallon round  
3 water storage tanks intended to provide drinking water to the city of Eugene. The  
4 subject property is approximately 10.74 acres and is zoned low-density  
5 residential. The two reservoirs will occupy about 2.5 acres. The tanks will each  
6 be 212 feet in diameter and will be partially buried with the top 15 feet exposed.  
7 The area within the footprint of the new reservoirs must be cleared of trees. Site  
8 preparation activities will include tree felling, clearing the fallen timber, and  
9 removing most of the tree stumps.

10           The city issued the erosion prevention permit administratively, without  
11 notice or a hearing, on Friday, July 30, 2021. The permit was issued under the  
12 provisions of Eugene Code (EC) chapter 6, Environment and Health, Erosion  
13 Prevention, EC 6.625 to 6.645 (erosion prevention standards). Those provisions  
14 apply to all construction activities that result in “[l]and disturbance, including,  
15 but not limited to clearing, grading, grubbing, logging, excavating, filling, and  
16 storing of materials.” EC 6.630(1)(a).

17           On Monday, August 2, 2021, petitioners filed their notice of intent to  
18 appeal the erosion prevention permit along with a motion to stay the challenged  
19 decision. That same day, we issued an interim stay and ordered the city and any  
20 intervenor-respondent to deliver to LUBA any response to the motion for stay by  
21 August 9, 2021, and to provide LUBA and all parties courtesy copies via email  
22 of all pleadings related to the stay. OAR 661-010-0068(3). On August 9, 2021,

1 LUBA received the city’s response in opposition to the stay. On August 10,  
2 LUBA received EWEB’s motion to intervene and response in opposition to the  
3 stay.<sup>1</sup>

4 LUBA has statutory authority to grant a stay of a challenged land use  
5 decision or limited land use decision during the pendency of the LUBA appeal,  
6 if LUBA determines in its discretion that the requirements for a stay are satisfied.  
7 ORS 197.845(1).<sup>2</sup> The movant has the burden to satisfy the requirements for a

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<sup>1</sup> On August 10, 2021, EWEB filed a motion to accept its response in opposition to the stay, despite the fact that filing was delivered to the Board on August 10, one day after the interim stay order instructed. On August 12, petitioners filed a pleading arguing that LUBA should not consider EWEB’s response in opposition to the stay because it was received one day late.

EWEB’s late filing is a technical violation. OAR 661-010-0005. We will consider EWEB’s response in opposition to the stay. We do not agree with petitioners that EWEB’s late filing deprived petitioners an opportunity to respond. Petitioners had an opportunity to respond to EWEB’s response in opposition to the stay, as is evidenced by petitioners’ pleading in response to EWEB’s later-filed motion to accept its response to the stay.

<sup>2</sup> 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.”

1 stay. A motion for a stay of a land use decision or limited land use decision must  
2 include, among other things, (1) an explanation of LUBA’s jurisdiction; (2) an  
3 assertion of a colorable claim of error in the decision; and (3) an explanation of  
4 how the movant will suffer irreparable injury if a stay is not granted. OAR 661-  
5 010-0068(1).

6 The city and EWEB (together, respondents) argue that the challenged  
7 erosion prevention permit is not a land use decision and, thus, is not subject to  
8 LUBA’s jurisdiction. Respondents also argue that petitioners have not  
9 established a colorable claim of error or irreparable injury.

10 **A. Jurisdiction**

11 We start with the threshold jurisdictional issue. LUBA is authorized to  
12 review land use decisions and limited land use decisions. ORS 197.825(1).  
13 Petitioners have the burden of proof to show that LUBA has jurisdiction over the  
14 subject matter. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985).  
15 ORS 197.015(10)(a)(A) defines “land use decision” as a final decision of a local  
16 government that “concerns” the application of a statewide planning goal,  
17 comprehensive plan provision, or land use regulation. “A decision ‘concerns’ the  
18 application of a goal, plan provision or land use regulation if the local government  
19 applied, or should have applied, the goal, provision or regulation in making the  
20 decision.” *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162, 167 (2013)  
21 (citing *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004)). In turn, ORS  
22 197.015(11) provides that “[l]and use regulation’ means any local government

1 zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046  
2 or similar general ordinance establishing standards for implementing a  
3 comprehensive plan.”

4 Petitioners argue that the erosion prevention standards implement the  
5 city’s comprehensive plan. The Eugene-Springfield Metropolitan Area General  
6 Plan (Metro Plan) has been adopted by the cities of Springfield and Eugene and  
7 by Lane County, and it is an acknowledged comprehensive plan. ORS  
8 197.015(5); *Stotter v. City of Eugene*, 18 Or LUBA 135, 138 n 1 (1989). Metro  
9 Plan Policy G.14 requires the city to

10 “[i]mprove surface and groundwater quality and quantity in the  
11 metropolitan area by developing regulations or instituting programs  
12 for stormwater to:

13 “\* \* \* \* \*

14 “b. Regulate site planning for new development and construction  
15 to better manage pre- and post-construction storm runoff,  
16 including erosion, velocity, pollutant loading and drainage[.]”

17 The city’s Comprehensive Stormwater Management Plan (SMP), which is  
18 an adopted refinement to the Metro Plan, requires the city to “[r]educe  
19 stormwater pollution associated with new construction and development, soil  
20 erosion, improper use of stormwater facilities, and City operations and  
21 maintenance practices.” SMP Policy 3.3. Petitioners argue that city’s erosion  
22 prevention standards implement those comprehensive plan policies and, thus, are  
23 land use regulations under ORS 197.015(11). Accordingly, because the erosion

1 prevention permit involves the application of those regulations, it is a land use  
2 decision subject to the Board’s jurisdiction under ORS 197.015(10)(a)(A)(iii).

3 The city responds, without elaboration, that the city was not required to  
4 and did not apply any land use regulations in issuing the erosion prevention  
5 permit, citing EC 6.635(1)(d) and R-6.645-F(8), an administrative rule adopted  
6 by the city manager. EC 6.635(1)(d) provides:

7 “*Review and Issuance.* The application for the erosion prevention  
8 permit shall be reviewed by the city and approved, approved with  
9 conditions, or denied, based on criteria set forth in rules adopted by  
10 the city manager. The criteria to be adopted shall be designed to  
11 achieve the objectives listed in section 6.625. Issuance of an erosion  
12 prevention permit may be subject to conditions imposed by the city  
13 including, but not limited to, specific erosion and sedimentation  
14 prevention measures and schedules.”<sup>3</sup> (Italics in original.)

15 R-6.645-F(8) provides:

16 “**Review Criteria and Approval.** The City shall review the Erosion

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<sup>3</sup> EC 6.625 provides:

“Sections 6.625 to 6.645, and the rules issued thereunder, are intended to restrict the discharge of sediments or other construction related materials, including hazardous substances as defined in section 6.340, into the city’s stormwater system in order to[:]

“(a) Prevent or minimize, to the maximum extent practicable, negative impacts to adjacent properties, water quality, and stormwater related natural resource areas resulting from construction activities; and

“(b) Maintain the capacity of the city’s stormwater system by minimizing sedimentation[.]”

1 Prevention Permit application, including the Construction Site  
2 Management Plan, template, and such other documents as may be  
3 submitted, and approve, approve with special conditions, or deny  
4 the permit application. If the City finds that the construction related  
5 activities will result in sedimentation, visible or measurable erosion,  
6 or will otherwise violate the conditions specified in R-6.645-D.1,  
7 then the City shall deny the permit, or approve the permit with  
8 special conditions. In the absence of such an affirmative finding, the  
9 City shall approve the permit, with or without special conditions.  
10 Permit approval shall not be effective until a site inspection has  
11 occurred and the permit is endorsed with the approval of the site  
12 inspector, which approval may include additional conditions  
13 imposed as a result of the inspection.”<sup>4</sup> (Boldface and underscoring  
14 in original.)

15 The city does not dispute petitioners’ characterization of the erosion  
16 prevention standards as implementing the identified comprehensive plan  
17 provisions. Instead, the city appears to argue that the erosion prevention standards  
18 are not land use regulations because they are themselves implemented through  
19 rules adopted by the city manager. However, the city does not develop that  
20 argument and it is not clear to us that the implementation procedures compel a  
21 conclusion that the erosion prevention standards are not land use regulations.

22 EWEB contends that the fact that the erosion prevention standards “cover  
23 common ground with generally stated comprehensive plan policies” is  
24 insufficient in itself to establish that those standards are land use regulations and,  
25 thus, petitioners have not met their burden to establish LUBA’s jurisdiction.

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<sup>4</sup> R-6.645-D(1) specifies a number of outcomes intended to result from required erosion prevention and construction site management practices.

1 EWEB Response to Motion for Stay 5. EWEB points out that the city’s  
2 stormwater management standards implement the same comprehensive plan  
3 policies that petitioners cite and that the city has adopted stormwater standards  
4 as land use regulations at EC 9.6790 to 9.6797.<sup>5</sup>

5 We start by observing that the city’s erosion prevention standards are  
6 codified in EC chapter 6 and that the city’s “land use code” is codified at EC  
7 chapter 9. We have recognized that a regulation’s “location within a local code  
8 does not make a land use regulation something else.” *Home Builders Assoc. v.*  
9 *City of Eugene*, 41 Or LUBA 453, 457 (2002) (citing *Rest-Haven Memorial Park*  
10 *v. City of Eugene*, 39 Or LUBA 282, 284, *aff’d*, 175 Or App 419, 28 P3d 1229  
11 (2001)).

12 Next, we agree with EWEB that the fact that regulations address the same  
13 subject as a comprehensive plan policy does not alone compel a conclusion that  
14 those standards were adopted by the city “for implementing a comprehensive  
15 plan.” ORS 197.015(11). Comprehensive plans are broad and include policies for  
16 most activities that can occur within a city or county. *See* ORS 197.015(5)  
17 (“‘Comprehensive’ means all-inclusive, both in terms of the geographic area  
18 covered and functional and natural activities and systems occurring in the area

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<sup>5</sup> Petitioners do not contend that the city applied or should have applied the EC chapter 9 stormwater management regulations in connection with the logging and other site-preparation activities on the subject property.



1 covered by the plan.”).<sup>6</sup> However, we disagree with EWEB that the fact that other  
2 regulations in the city’s land use code, which are indisputably land use  
3 regulations, implement the same comprehensive plan policies means that the  
4 erosion prevention standards are not “for implementing a comprehensive plan.”  
5 Two cases cited by the parties help to illustrate “land use regulations” within the  
6 meaning of ORS 197.015(11).

7 In *Rest-Haven*, the petitioners appealed a city ordinance prohibiting the  
8 placement of foreign materials in open waterways and any construction in or over  
9 the channel of an open waterway (the open waterways standards). 39 Or LUBA

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<sup>6</sup> ORS 197.015(5) provides:

“‘Comprehensive plan’ means a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. ‘Comprehensive’ means all-inclusive, both in terms of the geographic area covered and functional and natural activities and systems occurring in the area covered by the plan. ‘General nature’ means a summary of policies and proposals in broad categories and does not necessarily indicate specific locations of any area, activity or use. A plan is ‘coordinated’ when the needs of all levels of governments, semipublic and private agencies and the citizens of Oregon have been considered and accommodated as much as possible. ‘Land’ includes water, both surface and subsurface, and the air.”

1 282.<sup>7</sup> We explained that, where there is no clear connection between the  
2 ordinance and the comprehensive plan, an ordinance “is not a land use regulation  
3 even though it may arguably further some comprehensive plan provisions in a  
4 general or indirect way.” *Id.* at 288. Nevertheless, we found that the open  
5 waterways standards constituted land use regulations within the meaning of ORS  
6 197.015(11). We referred to a Metro Plan policy that instructed the metro  
7 governments to consider developing regulations or programs to “regulate site  
8 planning for new development and construction to better control drainage and  
9 erosion and to manage storm runoff.” *Id.* at 286. We also referred to an SMP  
10 policy to “[m]aintain flood control, drainage, and water quality treatment  
11 capacities along the city’s stormwater conveyance corridors.” *Id.* We concluded  
12 that the open waterways ordinance established standards for implementing the  
13 referenced comprehensive plan provisions. Therefore, the open waterways  
14 standards were land use regulations.

15 *Angius v. Clean Water Services District*, 50 Or LUBA 154 (2005), is also  
16 illustrative. Clean Water Services (CWS) is a special district that provides  
17 sanitary sewer and stormwater management services to the majority of urbanized  
18 Washington County. CWS has adopted design and construction standards for  
19 sanitary sewer and surface water management. In *Angius*, CWS applied its design

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<sup>7</sup> Similar to the erosion prevention standards at issue in this appeal, the open waterways standards were codified in EC chapter 6, not in the city’s land use code at EC chapter 9.

1 and construction standards in issuing the challenged decisions, an erosion control  
2 permit and a pre-development site assessment. The petitioners appealed those  
3 decisions to LUBA, asserting that they were land use decisions. CWS moved to  
4 dismiss, arguing that the challenged decisions were not land use decisions. We  
5 concluded that the petitioner had not established a clear connection between  
6 CWS' design and construction standards and the county's comprehensive plan.

7 The petitioner asserted that the design and construction standards  
8 implemented an element of the county's comprehensive plan, the Comprehensive  
9 Framework Plan for the Urban Area, Policy 6, which provides: "It is the policy  
10 of Washington County to support efforts to preserve and improve the quality of  
11 water resources." The petitioner also cited the implementing strategies for Policy  
12 25, which identified CWS "as the agency with principal responsibility in the  
13 county for planning and operation of all sewage treatment facilities in the  
14 county." The petitioner also cited Policy 3, which explained:

15 "Planning in Washington County occurs within a larger context of  
16 regional, state and federal planning. Three levels of government and  
17 several agencies are involved in policy development, program  
18 management, and the provision of services for the urban portion of  
19 the county. All of these activities, together with the specific  
20 responsibilities of cities and special service districts, must be  
21 coordinated to ensure that their various plans and programs  
22 reinforce and are consistent with the County's Comprehensive  
23 Plan."

1 The petitioner argued that CWS’ design and construction standards implemented  
2 county-delegated obligations, including land use review authority for erosion,  
3 water quality, and storm sewer.

4 We rejected the petitioner’s assertion that there was a clear connection  
5 between the design and construction standards and any of the comprehensive plan  
6 provisions that the petitioner cited. With respect to Policy 3, we observed that the  
7 fact that CWS is among many entities “that take actions touching on the  
8 comprehensive plan,” and that CWS’ actions must be consistent with the  
9 comprehensive plan, does not mean that every action CWS takes applies or  
10 implements the comprehensive plan. *Angius*, 50 Or LUBA at 164. The fact that  
11 the duties that the county delegated to CWS may have furthered the objectives of  
12 the comprehensive plan is not enough to demonstrate a “clear connection”  
13 between the design and construction standards and the comprehensive plan.

14 As in *Rest-Haven* and *Angius*, the critical jurisdictional inquiry here is  
15 whether petitioners have demonstrated a clear connection between the erosion  
16 prevention standards and the comprehensive plan. We conclude that they have.  
17 As quoted above, the city’s comprehensive plan specifically directs the city to  
18 reduce soil erosion and stormwater pollution associated with new construction  
19 and development by adopting regulations governing construction activities,  
20 including controlling erosion. Petitioners have demonstrated a clear connection  
21 between the erosion prevention standards and the comprehensive plan provisions  
22 that the standards implement. The fact that other regulations also expressly

1 implement those same comprehensive plan provisions does not mean that the  
2 erosion prevention standards are not land use regulations. We conclude that  
3 petitioners have established that the erosion prevention permit is a land use  
4 decision over which we have review jurisdiction.

5 We have concluded that we have jurisdiction based on expedited pleadings  
6 in response to petitioners' motion for stay. The city and EWEB may submit  
7 additional briefing that seeks to have LUBA reconsider their jurisdictional  
8 challenges.

9 For reasons explained below, we deny petitioners' motion for stay and lift  
10 the interim stay.

11 **B. Colorable Claim of Error**

12 To establish a colorable claim of error for purposes of obtaining a stay,  
13 petitioners must demonstrate that the alleged errors, if sustained, would result in  
14 reversal or remand of the challenged decision. *Barr v. City of Portland*, 20 Or  
15 LUBA 511, 513 (1990). Petitioners need not establish that they will prevail on  
16 the merits. *Id.*; *see also City of Oregon City v. Clackamas County*, 17 Or LUBA  
17 1032, 1039 (1988) ("colorable claim of error" is not a demanding standard);  
18 *Rhodewalt v. Linn County*, 16 Or LUBA 1001, 1004 (1987) (same). Provided that  
19 a petitioner's arguments are not devoid of legal merit, it is sufficient that the  
20 errors alleged, if sustained, would result in reversal or remand of the challenged  
21 decision. *Barr*, 20 Or LUBA at 513.

1 First, petitioners argue that the city’s decision approving an erosion  
2 prevention permit for the installation of two 7.5-million-gallon water reservoirs  
3 improperly construed the Eugene-Springfield Metropolitan Area Public Facilities  
4 and Services Plan (PFSP), a refinement plan of the Metro Plan, and Statewide  
5 Planning Goal 11 (Public Facilities and Services) and made a decision that is not  
6 supported by adequate findings because the PFSP expressly provides only for the  
7 development of one five-million-gallon reservoir on the site and the potential  
8 development of a second reservoir. Petitioners cite OAR 660-011-0045, which  
9 requires a city to develop a public facility plan and allows certain modifications  
10 to identified projects without amendment to the public facility plan. Other  
11 modifications that significantly impact a public facility project “are subject to the  
12 administrative procedures and review and appeal provisions accorded ‘land use  
13 decisions’ in ORS Chapter 197 and those set forth in OAR chapter 660 division  
14 18.” OAR 660-011-0045(4). Petitioners argue that the planned tank installations  
15 are the latter type of modification and that the city failed to follow the applicable  
16 procedures.

17 Second, petitioners assert that the city’s decision is an improper *de facto*  
18 post-acknowledgement plan amendment to the PFSP that did not comply with  
19 state or local procedures for post-acknowledgment plan amendments.

20 Third, and finally, petitioners contend that the city failed to follow the  
21 procedures applicable to the matter before it in a manner that prejudiced their  
22 substantial rights by failing to provide notice and an opportunity for a hearing on

1 the erosion prevention permit, as required by ORS 227.175 and applicable  
2 provisions of the EC.

3 Respondents respond that the erosion prevention permit does not approve  
4 the development of the water tanks or any other development. Instead, the erosion  
5 prevention permit establishes required erosion prevention measures and  
6 stormwater management techniques for site-preparation activities such as tree  
7 removal. The city argues that the installation of the two water tanks requires  
8 building permits. The city explains that, at the time the city filed its response to  
9 the motion for stay, EWEB had submitted some but not all applications for  
10 building permits and the city had not yet approved or denied the building permits.

11 We conclude that petitioners' three claims of error, if sustained, would  
12 require remand of the challenged decision and, thus, petitioners have established  
13 a colorable claim of error. We observe that the EC definition of "develop"  
14 includes "to make a physical change in the use or appearance of land" and the  
15 EC definition of "development" includes "any man-made change to improved or  
16 unimproved real estate." It is undisputed that an erosion prevention permit is  
17 required for EWEB to prepare the site to install the water tanks. It is also  
18 undisputed that the site-preparation activities include man-made physical  
19 changes to the subject property. Whether the installation of the water tanks  
20 requires a building permit does not control the issues that petitioners raise  
21 regarding whether the city-issued erosion prevention permit itself is consistent  
22 with the PFSP, Goal 11, post-acknowledgement plan amendment rules and

1 procedures, and city permit procedures. Again, petitioners are not required to  
2 establish that they will prevail on those arguments, only that the alleged errors, if  
3 sustained, would result in reversal or remand of the challenged decision. We  
4 conclude that petitioners have satisfied that undemanding standard.

5 **C. Irreparable Injury**

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

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.” *Cossins v.*  
22 *Josephine County*, 77 Or LUBA 564, 567 (2018) (citing *Butte*  
23 *Conservancy v. City of Gresham*, 47 Or LUBA 604, 609  
24 (2004) (describing five factors to be considered in  
25 determining whether irreparable injury has been



1 demonstrated); *City of Oregon City*, 17 Or LUBA at 1042-  
2 43).

3 Petitioners assert that the city’s decision approves the removal of mature  
4 trees within sight and sound of several of petitioner Save EWEB Forest’s  
5 members and that the cutting of large trees will irreparably injure the character  
6 of the neighborhood, viewshed, property values, and wildlife habitat.

7 Respondents argue that petitioners have not established that they will  
8 suffer irreparable injury if a stay is not granted because the erosion prevention  
9 permit itself does not approve the disputed tree felling and removal. The city  
10 explains that an erosion prevention permit is a secondary requirement for any  
11 “land disturbance.” EC 6.630(1)(a). According to respondents, because the  
12 subject property is publicly owned, EWEB can fell trees without any city  
13 approval and could fell and remove trees without an erosion prevention permit,  
14 if it could do so without disturbing the soil.<sup>8</sup> Respondents do not dispute that the  
15 city’s approval of the erosion prevention permit in fact allows the property to be  
16 logged because EWEB has and will complete the logging in a manner that  
17 disturbs the soil.

18 It is undisputed that “the conduct the movant seeks to bar” is not only  
19 probable but is actual, rather than merely threatened or feared. Respondents  
20 explain that the subject property was substantially logged on Monday, August 2,

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<sup>8</sup> The city explains that the trees could be removed without an erosion control permit if EWEB removed them without using heavy machinery.

1 2021, after the city issued the challenged decision on Friday, July 30, 2021, and  
2 before we issued the interim stay on Monday afternoon. According to EWEB, the  
3 reservoir development requires removal of 263 of the 1,150 trees that it counted  
4 on the site. Prior to our issuance of the interim stay, all but 16 of those trees had  
5 been felled. Four of the remaining 16 trees to be removed for the project are  
6 located between petitioner Bishop’s residence and the proposed location for the  
7 water tanks. According to EWEB, three of those four trees are large and in poor  
8 health and pose a risk to petitioner Bishop’s dwelling from windfall. The  
9 remaining 12 trees to be removed are elsewhere in the forested area. According  
10 to EWEB, those trees are also in poor condition and are not expected to survive  
11 a windstorm.

12 We conclude that petitioners have not adequately specified the claimed  
13 irreparable injury because petitioners have not established that the trees to be  
14 removed by EWEB are a unique natural resource. In *Warren v Washington*  
15 *County*, 78 Or LUBA 1011 (2018), the petitioner alleged that the challenged  
16 subdivision approval would have allowed for the removal of 70 percent of a  
17 mature grove of trees in the petitioner’s neighborhood. The subject property was  
18 included on a map of significant natural resources. We concluded that the  
19 petitioner failed to establish an irreparable injury and denied the petitioner’s  
20 motion for stay because the petitioner had not demonstrated that the trees  
21 proposed for removal were a unique natural resource or that the wildlife habitat  
22 provided by the trees could not have been “practicably restored.” *Warren*, 78 Or

1 LUBA at 1014-15 (quoting *Roberts*, 43 Or LUBA at 583); *see also Central*  
2 *Oregon Landwatch v. City of Bend*, 66 Or LUBA 448 (2012) (concluding that a  
3 movant for a stay does not demonstrate that an injury from the cutting of trees  
4 would be “irreparable” where the movant does not argue that there is anything  
5 special about the trees that would be cut down or that their replacement by  
6 younger trees would result in irreparable injury to a protected natural resource).

7 Here, petitioners have alleged only that the trees to be removed by EWEB  
8 are part of a mature forest and provide neighborhood benefits and wildlife habitat.  
9 Petitioners have not established that the trees at issue are unique or protected or  
10 that the values and benefits provided by the trees cannot be practicably restored.

11 Petitioners’ motion for stay is denied. The interim stay is lifted. Petitioners’  
12 cashier’s check filed with their motion for stay will be returned to petitioners.  
13 Petitioners’ counsel shall contact LUBA staff to arrange for that return.

14 **RECORD**

15 The city shall transmit and serve the record in this matter no later than  
16 September 8, 2021.

17 Dated this 18th day of August 2021.

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H. M. Zamudio  
Board Chair