

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

3
4 JAPANESE AMERICAN MUSEUM
5 OF OREGON, RESTORE OREGON,
6 BOSCO-MILLIGAN FOUNDATION,
7 and CHISAO HATA,
8 *Petitioners,*

9
10 vs.

11
12 CITY OF PORTLAND,
13 *Respondent,*

14
15 and

16
17 340 NW GLISAN LLC,
18 *Intervenor-Respondent.*

19
20 LUBA No. 2021-084

21
22 ORDER

23 **MOTION TO INTERVENE**

24 340 NW Glisan LLC (intervenor), the applicant below, moves to intervene
25 on the side of the city. There is no opposition to the motion and it is allowed.

26 **BACKGROUND**

27 The challenged decision is a city council decision approving (1) demolition
28 review for a building that is a contributing resource in a historic district and (2)
29 adjustment review to modify the criteria for issuing a demolition permit for the
30 building.

1 Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas,
2 and Open Spaces) requires local governments to adopt programs to conserve
3 historic resources for present and future generations. OAR 660-015-0000(5);
4 OAR 660-023-0200 (procedures and requirements for complying with Goal 5
5 with respect to historic resources). The city’s 2035 Comprehensive Plan (CP)
6 Policies 4.46 to 4.58 support the identification, protection, and rehabilitation of
7 the city’s historic resources. Portland City Code (PCC) chapter 33.445 governs
8 the city’s historic resource overlay zone, implements the historic resource CP
9 policies, sets forth the types of local historic resource designations, and sets forth
10 the types of historic review that apply to each type of designation. In turn, PCC
11 chapter 33.846 governs historic resource reviews and sets forth the procedures
12 and criteria for each type of review.

13 Contributing resources in locally designated historic districts are protected,
14 in part, through mandatory demolition review. PCC 33.445.330(A)(1)(a).
15 Contributing resources are defined to include “an associated building, site,
16 structure, or object that adds to the historic associations, historic architectural
17 qualities, or archeological values that make a Historic Landmark, Conservation
18 Landmark, Historic District or Conservation District significant, as identified in
19 the documentation prepared for the listing or designation of the landmark or
20 district.” PCC 33.910.030.

21 In addition to the CP provisions and PCC regulations governing historic
22 resources, OAR 660-023-0200(8)(a) provides that local governments

1 “[m]ust protect National Register Resources, regardless of whether
2 the resources are designated in the local plan or land use regulations,
3 by review of demolition or relocation that includes, at minimum, a
4 public hearing process that results in approval, approval with
5 conditions, or denial and considers the following factors: condition,
6 historic integrity, age, historic significance, value to the community,
7 economic consequences, design or construction rarity, and
8 consistency with and consideration of other policy objectives in the
9 acknowledged comprehensive plan. Local jurisdictions may exclude
10 accessory structures and non-contributing resources within a
11 National Register nomination.”

12 **MOTION FOR STAY**

13 The New Chinatown/Japantown Historic District (the historic district) has
14 been designated as a historic district by the city and is listed on the National
15 Register of Historic Places. The challenged decision approves demolition review
16 for the Blanchet House, formerly known as the Yamaguchi Hotel, a contributing
17 resource within the historic district (the building). The building was built around
18 1905, and it is one of 14 buildings still standing in the historic district that were
19 built during the district’s first period of significance, 1880 to 1909. The building
20 is a contributing resource because of its Asian American cultural and
21 architectural significance.

22 PCC 33.445.330(A)(2) provides:

23 “If the review body for demolition review approves demolition of
24 the resources, a permit for demolition will not be issued until the
25 following are met:

26 “* * * * *

1 “c. A permit for a new building on the site has been issued. The
2 demolition and building permits may be issued
3 simultaneously.”

4 The challenged decision also approves adjustment review to modify PCC
5 33.445.330(A)(2)(c) and allow the city to issue a demolition permit for the
6 building *before* it issues a new building permit for the subject property.

7 Condition C of the challenged decision provides, in part:

8 “1. Prior to issuance of the demolition permit:

9 “(a) The property owner will request formation of a
10 stakeholder committee with the following
11 representative members: 1) Executive Director of
12 Japanese-American Museum of Oregon or board
13 member of Japanese-American Museum of Oregon; 2)
14 A representative from the Japanese American
15 community as selected by the Japanese-American
16 Museum of Oregon; 3) a member of the Old Town
17 Community Association as selected by its board; 4) a
18 historian/architect with knowledge of the District and
19 its history; 5) Executive Director of Blanchet House or
20 a member of the Blanchet House board; and 6) a
21 representative of the Harrington Health Clinic. The
22 property owner will consult with Historic Review Staff
23 at the Bureau of Development Services to invite the
24 historian/architect. If Blanchet House no longer owns
25 the property, representative members 5 through 6 will
26 be selected by the property owner.

27 “(b) The property owner shall invite participation in the
28 stakeholder committee in writing to each member
29 identified above by certified mail. The written
30 invitation shall include a request for an initial meeting
31 within 30 days of the final effective date of this
32 Decision and the stakeholder committee shall hold a
33 meeting within 45 days of the final effective date of this

1 Decision. The meeting can be held through remote
2 access. The stakeholder committee can meet more than
3 once for this purpose.

4 “(c) The stakeholder committee shall document the
5 structure through such methods as documentary,
6 physical or pictorial evidence and advise the property
7 owner on the retention of historical physical elements
8 prior to issuance of the demolition permit. In no case,
9 will this requirement be interpreted to restrict or
10 prohibit demolition of the building.

11 “(d) The committee shall complete, and the property owner
12 shall share the findings with the Historic Review staff
13 at the Bureau of Development Services, no later than
14 60 days after the initial meeting date.

15 “* * * * *

16 “3. No later than 120 days after the initial stakeholder meeting,
17 the stakeholder committee must review and summarize the
18 known written and oral history of the people who used the site
19 from its construction around 1905 to present, and its
20 relationship to the New Chinatown-Japantown Historic
21 District. The committee shall submit recommendations to the
22 Blanchet House and its partners on feasible and meaningful
23 ways to reflect, revive, and honor that human history in the
24 uses within the new building. Committee recommendations
25 must include meaningful, substantive efforts to convey
26 Japanese cultural heritage. Interpretive signage alone shall
27 not be deemed adequate.”

28 The Notice of Decision was signed, and the parties agree that the
29 challenged decision became final, on August 24, 2021. Thus, before the city may
30 issue a demolition permit, Condition C(1)(a) and (b) require intervenor to form a
31 stakeholder committee and require the committee to hold a meeting by October
32 8, 2021. The stakeholder committee has been formed and it held its first meeting

1 on September 24, 2021. Intervenor’s Response to Motion for Stay 4.
2 Consequently, Condition C(1)(c) requires the committee to document the
3 building and advise intervenor on how to retain the building’s historical physical
4 elements, and Condition C(1)(d) requires intervenor to share that information
5 with the city, no later than November 23, 2021. After that, Condition C(1) is
6 satisfied and requires nothing further from the committee in order for the city to
7 issue a demolition permit upon application by intervenor.

8 On September 14, 2021, petitioners filed both their notice of intent to
9 appeal and a motion to stay the challenged decision pursuant to ORS 197.845(1)
10 and OAR 661-010-0068. On September 27, 2021, the Board received both the
11 city’s and intervenor’s responses to the motion for stay. The city and intervenor
12 stipulate to a stay of the portion of the challenged decision that authorizes the city
13 to issue a demolition permit after Condition C(1) is satisfied. However, the city
14 and intervenor do not stipulate to a stay of the portion of the decision that
15 authorizes intervenor and the committee to implement Condition C(1).

16 In the motion for stay, petitioner does not propose an expedited briefing
17 schedule, as required by OAR 661-010-0068(1)(d). In their responses, intervenor
18 proposes and the city stipulates to an expedited briefing schedule. Petitioners
19 have not responded to the city’s or intervenor’s responses, nor have they
20 stipulated to the proposed partial stay or expedited briefing schedule.

1 **A. Colorable Claim of Error**

2 ORS 197.845(1) and OAR 661-010-0068 authorize LUBA to grant a stay
3 of an appealed land use decision where a petitioner demonstrates (1) a “colorable
4 claim of error” and (2) that it will suffer “irreparable injury” if the stay is not
5 granted. To establish a colorable claim of error for purposes of obtaining a stay,
6 a petitioner need not establish that they will prevail on the merits. Rather, they
7 must demonstrate that the alleged errors, if sustained, would result in reversal or
8 remand of the challenged decision. *Dames v. City of Medford*, 9 Or LUBA 433,
9 438 (1983) (citing *Von Weidlein/N.W. Bottling v. OLCC*, 16 Or App 81, 515 P2d
10 936 (1973)). That is not a demanding standard. *Rhodewalt v. Linn County*, 16 Or
11 LUBA 1001, 1004 (1987).

12 Petitioners argue that, in approving the demolition review, the city erred
13 by failing to “consider” a list of factors required by OAR 660-023-0200(8)(a).
14 Petitioners also argue that the city misinterpreted PCC 33.846.080(C)(1), one of
15 the approval criteria for demolition review, in a variety of respects. PCC
16 33.805.040(A), one of the approval criteria for adjustment review, requires that
17 the adjustment “equally or better meet the purpose of the regulation to be
18 modified.” Petitioners argue that the city erred in relying on Condition C(3) and
19 the fact that the landmarks commission will review any proposed new
20 development on the subject property to conclude that the adjustment will “better
21 meet” the purpose of PCC 33.445.330(A)(2)(c). In addressing the approval
22 criteria for adjustment review, the city concluded that demolition of the building

1 would not “remove” the “cultural heritage reflected in the historic uses of th[e]
2 site.” Petitioners argue that that conclusion (1) does not demonstrate how the
3 adjustment will “equally or better meet” the purpose of PCC 33.445.330(A)(2)(c)
4 and (2) is not supported by substantial evidence.

5 Intervenor responds that petitioners’ arguments are not supported by the
6 record and states that “one cannot assert a colorable claim of error if the facts
7 upon which the assertion is based are not accurate.” Intervenor’s Response to
8 Motion for Stay 12. However, whether petitioners’ arguments are supported by
9 the record relates to the merits of those arguments—that is, it relates to *whether*
10 those arguments should be sustained. As we have explained, to establish a
11 colorable claim of error, petitioners need not establish that they will prevail on
12 the merits. Instead, they must demonstrate that their arguments—assuming that
13 they are sustained—require reversal or remand of the challenged decision.

14 We understand petitioners to argue that the city misconstrued the
15 applicable law and made a decision that is supported by neither substantial
16 evidence nor adequate findings. Those alleged errors, if sustained, would result
17 in reversal or remand of the challenged decision. ORS 197.835(9)(a)(C) - (D)
18 (providing that LUBA shall reverse or remand a decision where the local
19 government “[m]ade a decision not supported by substantial evidence in the
20 whole record” or “[i]mproperly construed the applicable law”); ORS 227.173(3)
21 (requiring that statutory permit decisions be based upon and accompanied by
22 findings); *Kopacek v. City of Garibaldi*, ___ Or LUBA ___, ___ (LUBA No

1 2020-094, Feb 11, 2021) (slip op at 8-12) (remanding a statutory permit decision,
2 in part, for failure to comply with ORS 227.173(3)); *Sunnyside Neighborhood v.*
3 *Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977) (tracing the legal
4 requirement that quasi-judicial decisions in general be supported by adequate
5 findings). Accordingly, petitioners have established a colorable claim of error.

6 **B. Irreparable Injury**

7 “[T]he cases in which we find that the petitioner has demonstrated
8 irreparable injury if a stay is not granted generally involve proposals that destroy
9 or injure unique historic or natural resources, or other interests that cannot be
10 practicably restored or adequately compensated for once destroyed.” *Roberts v.*
11 *Clatsop County*, 43 Or LUBA 577, 583 (2002). Whether a petitioner has
12 established irreparable injury depends on the following five factors:

- 13 “1. Has the petitioner adequately specified the injury he or she
14 will suffer?”
- 15 “2. Is the identified injury one that cannot be compensated
16 adequately in money damages?”
- 17 “3. Is the injury substantial and unreasonable?”
- 18 “4. Is the conduct petitioner seeks to bar through the stay
19 probable rather than merely threatened or feared?”
- 20 “5. If the conduct is probable, is the resulting injury probable
21 rather than merely threatened or feared?”

22 *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988)
23 (citations omitted).

1 Petitioner Japanese American Museum of Oregon is a museum that
2 features exhibits and hosts lectures on the history of early Japanese settlement in
3 the historic district, including the building. Petitioners Restore Oregon and
4 Bosco-Milligan Foundation are organizations that advocate for historic
5 preservation more generally, and Bosco-Milligan Foundation hosts walking tours
6 of the portion of the historic district in which the building is located. Petitioner
7 Hata is a descendant of Japanese immigrants who relies on contributing resources
8 within the historic district, including the building, to represent their cultural
9 heritage within the city and the state. Petitioners argue that “historic buildings
10 provide a community with a sense of time and place and cultural heritage. * * *
11 If this demolition goes forward, this community asset and the cultural heritage
12 that it represents will be lost.” Motion for Stay 11.

13 We recently explained:

14 “The demolition of historic landmarks is the type of irreparable
15 injury that a stay is intended to prevent. * * * Historic contributing
16 structures are designated and valued because of their historical
17 significance. A historic structure is irreplaceable, and its destruction
18 is irreversible and causes an injury that cannot be compensated
19 adequately in money damages.” *Niederer v. City of Albany*, 79 Or
20 LUBA 1016, 1021 (2019) (citing *Save Amazon Coalition v. City of*
21 *Eugene*, 29 Or LUBA 565, 568-69 (1995)).

22 We do not understand intervenor to argue that petitioners have not
23 adequately specified the injury that they will suffer if the building is demolished,
24 that that injury can be compensated adequately in money damages, or that that
25 injury is not substantial and unreasonable. Intervenor points out that the building

1 is “dangerous and unsafe,” that it “is deteriorating with bricks falling to the
2 sidewalk below,” and that it “is fenced off to avoid injury to the public while this
3 appeal is pending.” Response to Motion for Stay 13-14. Intervenor asserts that
4 “[t]here is great concern that demolition delay will further endanger the public,
5 which is why the City, in part, granted the Adjustment to the timing of the
6 demolition permit and constrained that timing under Condition of Approval C.”
7 *Id.* at 13. Intervenor does not explain how those facts inform any of the factors
8 for establishing irreparable injury. Instead, we understand intervenor to make
9 those observations to inform our decision on their request for expedited briefing.
10 To the extent that intervenor argues that the dangerous condition of the building
11 means that its demolition will not cause substantial and unreasonable harm to
12 petitioners, we rejected a similar argument in *Niederer*. 79 Or LUBA at 1021-22
13 (“The contributing structures’ [degenerated, derelict] condition and value to the
14 community are considerations under [local law] and OAR 660-023-0200(8)(a),
15 which goes to the merits of the city’s decision allowing the structures to be
16 demolished. However, the merits of the city’s decision do not bear on our
17 consideration of whether petitioner will suffer irreparable injury.”).

18 We understand intervenor to argue that the injury that petitioners will
19 suffer if the building is demolished while this appeal is pending is not probable.
20 That is so, intervenor argues, because, before the city may issue a demolition
21 permit, Condition C(1) requires intervenor to form a stakeholder committee,
22 requires the committee to hold at least one meeting, requires the committee to

1 document the building and advise intervenor on how to retain the building's
2 historical physical elements, and requires intervenor to share that information
3 with the city. Intervenor points out that the committee may hold more than one
4 meeting. Intervenor asserts that "the practical requirement of the Condition will
5 ensure that this extended timeline will exceed November 23, 2021." Response to
6 Motion for Stay 13.

7 This appeal will not be resolved by November 23, 2021, even under
8 intervenor's proposed expedited briefing schedule which, as explained below, we
9 do not accept. However, even if the Board issued its final opinion and order on
10 or before November 23, 2021, the problem with intervenor's argument is that,
11 while it is possible that intervenor and the committee will take until November
12 23, 2021, to complete their respective tasks, and while it is possible that
13 intervenor will thereafter require additional time to apply for, and the city will
14 require additional time to issue, a demolition permit, intervenor cites nothing in
15 the challenged decision that *requires* those results. Intervenor also does not
16 explain why it and the committee completing their respective tasks will, as a
17 practical matter, take until November 23, 2021. To the contrary, it seems to us
18 that (1) the fact that the committee held its first meeting on September 24, 2021,
19 well prior to the October 8, 2021 deadline set out in Condition C(1)(b), and (2)
20 the fact that the city and intervenor have incentives to proceed with demolition
21 as soon as possible due to the building's dangerous condition, make it more likely
22 than not that Condition C(1) will be satisfied before November 23, 2021. We are

1 aware of nothing that prohibits either intervenor from swiftly applying for a
2 demolition permit after Condition C(1) is satisfied or the city from swiftly
3 approving one. Intervenor does not take the position that it will not apply for a
4 demolition permit as soon as possible after Condition C(1) is satisfied. The city
5 does not take the position that it will not issue a demolition permit as soon as
6 possible after it receives an application. Accordingly, we conclude that, without
7 a stay, it is probable that the building will be demolished before the conclusion
8 of this appeal, resulting in the injury specified by petitioners.

9 Petitioners have established irreparable injury with respect to the portion
10 of the challenged decision that authorizes the city to issue a demolition permit
11 after Condition C(1) is satisfied. Accordingly, the motion for stay is granted with
12 respect to that portion of the decision. The portion of the challenged decision that
13 authorizes the city to issue a demolition permit after the committee and intervenor
14 complete their work (*i.e.*, after Condition C(1) is satisfied) shall remain stayed
15 while this appeal is pending.

16 However, petitioners have not established irreparable injury with respect
17 to the portion of the decision that authorizes intervenor and the committee to
18 implement Condition C(1). Accordingly, the motion for stay is denied with
19 respect to that portion of the decision. In other words, intervenor and the
20 committee may continue their work to satisfy Condition C(1) while the appeal is
21 pending. *See ONRC v. City of Seaside*, 27 Or LUBA 679, 683 (1994) (“[W]hile
22 [it is] not required to do so, [LUBA] may limit the effect of a stay of a quasi-

1 judicial land use decision to the particular geographic area and particular
2 provisions of the stayed decision for which colorable claim of error and
3 irreparable harm have been shown.”).

4 Petitioners have filed a cashier’s check in the amount of \$5,000, as
5 required by ORS 197.845(2) and OAR 661-010-0068(4). Therefore, the partial
6 stay shall take effect upon issuance of this order and shall remain in effect until
7 the Board issues its final opinion and order.

8 **EXPEDITED RECORD OBJECTION PERIOD/CONTINGENT**
9 **BRIEFING SCHEDULE**

10 The record in this appeal was received on October 6, 2021. No later than
11 October 15, 2021, petitioners and intervenor shall each either (1) file and serve
12 record objections or (2) file with the Board and serve on the other parties a writing
13 advising that they have no record objections. The city’s response to any record
14 objections, and any amended or supplemental record, shall be filed and served
15 within seven days of the date that the record objections are filed by petitioners or
16 intervenor.¹ On the date of filing, the parties shall also transmit courtesy copies
17 of their filings by email to (1) LUBA.Support@luba.oregon.gov and (2) the other
18 parties’ email addresses. If record objections are filed, then, after the expedited
19 record period closes, LUBA will issue a separate order resolving the record

¹ Due to the COVID-19 pandemic, LUBA is operating on an appointment-
only system for in-person filing. Appointments must be confirmed with LUBA
at least four hours before the requested appointment time.

1 objections and, if appropriate, settling the record, establishing an expedited
2 briefing schedule, and scheduling oral argument.

3 If no record objections are filed, then the petition for review shall be filed
4 no later than October 27, 2021; the response briefs shall be filed no later than
5 November 17, 2021; oral argument shall be held at 1:00 p.m. on November 30,
6 2021, by teleconference, with instructions to follow by separate letter; and the
7 Board's final opinion and order shall be issued no later than December 22, 2021.²

8 Dated this 8th day of October 2021.
9
10
11
12

13 _____
14 Melissa M. Ryan
Board Member

² The briefing schedule set out in this paragraph applies if the city files an amended record even though no objections are filed. In other words, due to the stay, the briefing schedule set out in this paragraph supersedes OAR 661-010-0025(5), which would otherwise reset the briefing schedule if the city files an amended record even though no objections are filed.