BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN A. PETERSEN,
Petitioner,

vs.

COLUMBIA COUNTY,
Respondent,

and

BRUCE HUGO,
Intervenor-respondent.

LUBA No. 2000-145

ORDER

Before the Board are a motion to intervene, a motion for summary reversal of the county's decision, and a motion and supplemental motion for stay of the county's decision.

MOTION TO INTERVENE

Bruce Hugo (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION FOR SUMMARY REVERSAL

The challenged decision is a decision by the board of commissioners partially approving petitioner's application for renewal of a limited exemption permit for an existing aggregate mining operation on a 160-acre tract composed of five tax lots. A limited exemption permit allows continued mining of lands that were mined prior to July 1, 1972, without the necessity of obtaining an operating permit under the county's Surface Mining Ordinance (SMO). Petitioner explains that the commissioners approved the limited exemption permit only with respect to ten acres of the subject property, rather than the requested 160 acres. Paragraph C of the decision requires petitioner to submit a survey within 60 days of the decision identifying the boundaries of the ten-acre site for which the

limited exemption is granted.[1] Paragraphs D and E provide that within 120 days of the decision petitioner must cease and desist any mining operations on the area outside of the ten acre portion subject to the limited exemption permit, until petitioner applies for an operating permit and other approvals under the SMO for those additional lands.[2] The commissioners' decision became final on October 4, 2000, and petitioner filed a timely notice of intent to

[1]Paragraph C states in relevant part:

> "The Board grants * * * a Limited Exemption Certificate to the Applicant for approximately ten acres * * * for a surface mine and surface mining site in that portion of [tax lot or TL 500] zoned Surface Mining. * * * The Limited Exemption Certificate shall be issued upon the submission by the Applicant, and approval by the Surface Mining Administrator, of a survey identifying this surface mine and surface mining site with specificity within 60 days of the issuance of this order. * * *" Motion for Stay, Exhibit 4.

[2]Paragraphs D and E state:

> "D. Within 120 days of this order Applicant shall cease and desist from any mining operations on TL 500 outside of the area set forth in the Limited Exemption Certificate described in Paragraph C above until such time that Applicant has applied for an Operating Permit pursuant to Article V of the [SMO] for those additional lands.
>
> "E. Within 120 days of the date of this Order Applicant shall either comply with the provisions of subparagraphs 1 below, or comply with the provisions of both subparagraphs 2 and 3 below:
>
> "1. Cease and desist from conducting surface mining operations on [tax lots 100, 600, 900 and 1000], or
>
> "2. Apply for either:
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> "a. Zone changes and/or conditional use permits to bring Applicant's surface mining operations on TL 100, TL 600, TL 900 and TL 1000 into conformance with the [county's zoning ordinance]; or
>
> "b. Nonconforming use approvals for mining operations on TL 100, TL 600, TL 900 and TL 1000 pursuant to the [county's zoning ordinance]; and
>
> "3. Apply for a surface mining permit to bring Applicant's surface mining operations on TL 100, TL 600, TL 900 and TL 1000 into conformation with the [SMO] on each such tax lot." Motion for Stay, Exhibit 4.

appeal on October 13, 2000.[3] Under LUBA's rules, the record is due 21 days after the date petitioner serves the amended or refiled original notice of intent to appeal (NITA) on the local government. OAR 661-010-0021(6).[4] However, to date the county has neither filed the record nor requested an extension of the deadline for filing the record.

Petitioner moves for summary reversal of the decision. Petitioner argues that the county's violation of OAR 661-010-0021(6) and its delay in filing the record has substantially prejudiced petitioner's rights, because the delay jeopardizes the possibility of obtaining resolution of petitioner's appeal without incurring economic harm in complying with the 120-day deadline in paragraphs D and E of the decision. Petitioner cites *McCrystal v. Polk County*, 8 Or LUBA 436, 437 (1983), for the proposition that delay in filing the record as required by LUBA's rules may warrant summary reversal of the decision, if the delay prejudices the substantial rights of a party.

The county responds that petitioner has not yet served a copy of the NITA on the county, as required by OAR 661-010-0021(5). The county argues that it has no obligation to file the local record with LUBA until it is served with the amended or refiled original NITA. The county attaches to its response affidavits from four county employees averring that the county has not yet been received the NITA filed in this case. One of the affidavits states that on October 18, 2000, the county received a letter from LUBA dated October 17, 2000, advising the county that LUBA had received the NITA. The affidavit states that, on advice

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[3]The county initially adopted the decision on August 24, 2000, and petitioner timely appealed that decision to LUBA. On September 21, 2000, the county withdrew that decision for reconsideration pursuant to OAR 661-010-0021. On October 4, 2000, the county issued its decision on reconsideration.

[4]OAR 661-010-0021(6) provides:

> "The local government or state agency shall, within 21 days after service of the amended notice of intent to appeal or refiled original notice of intent to appeal under subsection (5)(a) of this rule, transmit to the Board the original or a certified copy of the record of the proceeding under review in accordance with OAR 661-010-0025. The record submitted by the local government or state agency in an appeal of a decision on reconsideration shall include the record of the original decision and the decision on reconsideration."

of county counsel, the county chose to wait until it received the NITA before filing the record.

Service of the notice of intent to appeal may be in person or by first-class mail. OAR 661-010-0075(2)(b)(B). Mail service is complete on deposit in the mail. *Id.* The certificate of service attached to the NITA filed in this case states that petitioner served a copy of the NITA on the county counsel by first-class mail on October 13, 2000. Thus, under LUBA's rules petitioner completed service of the NITA on October 13, 2000, notwithstanding that the county did not receive the NITA.[5] The county erred in assuming it had no obligation to file the record with LUBA under these circumstances, particularly when it had actual knowledge that a NITA had been filed with LUBA.

Nonetheless, petitioner has not demonstrated a basis for summary reversal of the county's decision. Assuming without deciding that summary reversal is a potential remedy for violation of OAR 661-010-0025(2) or 661-010-0021(6) where that violation substantially prejudices a party's rights, petitioner has not demonstrated such prejudice. The parties' substantial rights to which the rules refer are rights to (1) the speediest practicable review; (2) a reasonable opportunity to prepare and submit argument; and (3) a full and fair hearing. *Markham v. Coos County*, 31 Or LUBA 529, 530 (1996). The county's lengthy delay in filing the record has, arguably, affected petitioner's rights to the speediest practicable review. However, petitioner also bears some responsibility for that delay. According to petitioner, the record was due on November 3, 2000. Petitioner does not indicate that he contacted the county after that date to discover the reason for the delay, or took any action to bring the county's noncompliance to LUBA's attention until January 22, 2001, when petitioner filed this motion for summary reversal. The expedited nature of LUBA review requires the active cooperation of all parties. *See* OAR 661-010-0026(1) and (2) (requiring parties to attempt to

[5]We do not understand the county to dispute that petitioner mailed a copy of the NITA to the county on October 13, 2000; the county only argues that it never received the NITA.

resolve record objections with the local government prior to and after filing record objections with LUBA). We conclude that petitioner bears some responsibility for the delay, and that petitioner has not demonstrated that the county's part in that delay prejudiced his substantial rights.

The motion for summary reversal is denied.

MOTION FOR STAY

On January 22, 2001, petitioner filed a motion to stay the county's decision pursuant to ORS 197.845.[6] To obtain a stay under the statute, petitioner must establish (1) a colorable claim of error and (2) irreparable injury if the stay is not granted. OAR 661-010-0068.[7]

The motion for stay asserts, as a colorable claim of error, that the county is barred by issue preclusion from reducing the area subject to the limited exemption permit from that

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[6]ORS 197.845(1) provides:

> "Upon application of the petitioner, [LUBA] may grant a stay of a land use decision or limited land use decision under review if the petitioner demonstrates:
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> "(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."

[7]OAR 661-010-0068(1) sets forth the pleading requirements for a motion under the standard at ORS 197.845(1), and provides in relevant part:

> "A motion for a stay of a land use decision or limited land use decision shall include:
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> "(a) A statement setting forth movant's right to standing to appeal the decision;
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> "(b) A statement explaining why the challenged decision is subject to the Board's jurisdiction;
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> "(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 harm if a stay is not granted;
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> "(d) A suggested expedited briefing schedule;
>
> "(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."

approved under previous limited exemption permits. To establish irreparable injury if the stay is not granted, petitioner contends that LUBA cannot resolve the merits of the appeal before the 120-day cease and desist order goes into effect. Petitioner argues that "[i]f a stay is not granted, petitioner will suffer irreparable harm by being forced to close his operation and losing the income it generates, or going to the expense of [filing] the applications [for an operating permit and either a zone change or nonconforming use determination]." Motion for Stay 6.

On January 26, 2001, petitioner filed a supplemental motion to stay a threatened enforcement action. Attached to the motion is a letter dated January 24, 2001, from the county stating that, because petitioner failed to submit the survey within 60 days of the October 4, 2000 decision, as required by paragraph C of that decision, continued mining on the 10-acre portion of the subject property is illegal. The letter states that if no response is received within 10 days of receipt of the letter, the county will initiate closure orders on the 10-acre limited exemption site. The letter also notes that after February 1, 2001, any mining on the remaining portion of the property without compliance with the terms of the October 4, 2000 decision is illegal.

A. Colorable Claim of Error

The requirement that petitioner demonstrate a colorable claim of error is not a demanding one. *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1039 (1989). Petitioner need only assert claims that, if found to be correct, would result in reversal or remand. *Id.* The county argues that petitioner's claim of error fails to meet that low threshold, because as a matter of law petitioner cannot demonstrate that the doctrine of issue preclusion applies in this case to potentially require reversal or remand of the county's decision. However, we cannot agree at this juncture that petitioner's claim of error is invalid as a matter of law.

B. Irreparable Injury

A determination of irreparable injury requires consideration of whether (1) petitioner has adequately specified the injury; (2) the identified injury is one that cannot be compensated adequately in money damages; (3) the injury is substantial and unreasonable; (4) the conduct petitioner seeks to bar through the stay is probable rather than merely threatened or feared; and (5) if the conduct is probable, the resulting injury is probable rather than merely threatened or feared. *City of Oregon City*, 17 Or LUBA at 1042-43.

The injuries identified here are loss of income if petitioner ceases operations on the bulk of the subject property under paragraphs D and E of the October 4, 2000 decision, or the expense of filing applications for an operating permit for lands other than the 10-acre portion subject to the limited exemption permit. In addition, we understand petitioner to argue that irreparable injury will occur if he must comply with paragraph C of the October 4, 2000 decision. *See* n 1.

Intervenor responds that neither alleged injury meets the requirements described in *City of Oregon City*. With respect to paragraph C, intervenor argues, and we agree, that petitioner offers no explanation why compliance with the survey requirement in paragraph C results in substantial and unreasonable injury, or an injury that cannot be compensated adequately in money damages. With respect to paragraphs D and E, the identified injuries are monetary in nature. Petitioner does not explain why such monetary damages cannot be compensated adequately. *Compare Barr v. City of Portland*, 20 Or LUBA 511, 515 (1990) (staying a decision that closes petitioner's retail business, where petitioner alleges loss of business reputation and good will that cannot be adequately compensated in money damages).

Petitioner's motion for stay and supplemental motion for stay are denied.

SCHEDULE

As explained above, the record in this case is long overdue. The county shall file the record in this case within 10 days of the date of this order.

Dated this 12th day of February, 2001.

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Tod A. Bassham
Board Member