BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PATRICIA J. ROBERTS,
MARY ANN DICKEY, WILLIAM J. FURNISH,
DEANNA MANCILL and PHIL MANCILL,
Petitioners,

vs.

CLATSOP COUNTY,
Respondent,

and

M.K. DEVELOPMENT, INC.,
Intervenor-Respondent.

LUBA No. 2002-123

ORDER

Before the Board are a motion to intervene, a motion to revise the caption, and petitioners' motion to stay.

MOTION TO INTERVENE

M.K. Development, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO REVISE CAPTION

Intervenor moves to revise the caption in this matter, to remove the City of Gearhart. According to intervenor, the challenged decision is a final decision made by the Clatsop County Board of Commissioners, which adopts amendments to the City of Gearhart Urban Growth Boundary Combined Plan and Zoning Map (Combined Map). Pursuant to Section 5(2) of an intergovernmental agreement between the city and county, the city first considers an application to amend the Combined Map.[1] If the city council denies the application, the

[1] Section 5(2) of the Urban Growth Boundary Area Joint Management Agreement provides, in relevant part:

city's decision is final and may be appealed to LUBA. If the city council approves the application, it adopts an ordinance to that effect, and then notifies the county, which conducts a hearing and renders a final decision. Here, intervenor argues, the city council voted to approve the application, and sent the matter to the county. The county rendered the final decision approving the requested UGB amendment. Therefore, intervenor argues, the city made no final appealable decision, and it should not be listed in the caption as a respondent in an appeal of the county's decision.

Petitioners object, arguing that it is a motion to dismiss a necessary party in the guise of motion to revise the caption. According to petitioners, their first assignment of error will challenge the city's invalid adoption of the ordinance recommending approval of the

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"Amendments to the [UGB] Comprehensive Plan, including the [UGB] and Plan Map [and] CITY [UGB] Zoning Ordinance map and text * * * shall be adopted by Ordinance by both CITY and CLATSOP COUNTY according to the following procedure:

"a. Application shall be submitted to the CITY on forms provided by the CITY.

"* * * * *

"d. The application shall be reviewed by the CITY Planning Commission at a public hearing * * *.

"e. The CITY shall notify the COUNTY of the recommendation of the CITY Planning Commission within five (5) working days of the recommendation.

"f. The CITY Council shall hold a public hearing on the application * * *.

"* * * * *

"h. If the CITY Council approves the application, it shall do so by Ordinance. If the CITY Council denies the application, the decision may be appealed to [LUBA].

"i. The CITY shall notify the COUNTY of its final action within five (5) working days of adoption of an Ordinance or denial of the application.

"j. Clatsop COUNTY shall hold a public hearing, on applications approved by the CITY * * *.

"k. Clatsop COUNTY shall notify CITY of its final decision within five (5) working days of its decision."

application.[2] Under Section 5(2)(j) of the intergovernmental agreement, petitioners argue, the city's recommendation of approval is a mandatory prerequisite to county consideration of the proposed map amendment and zone change. Petitioners further argue that intervenor's motion appears to be an attempt to set the stage for an argument that the city council vote leading to the city's recommendation is not reviewable by LUBA. Petitioners explain that, in anticipation of this position, two of the petitioners attempted to challenge the city's vote before the county circuit court, by writ of review. According to petitioners, the court dismissed the writ based on arguments by intervenor that any issue regarding the city council's vote can be challenged only before LUBA.[3] Because the validity of the city's vote is a critical issue in this case, petitioners argue, the city is a proper party to this appeal, and intervenor's motion to dismiss the city should be denied.

There seems no question that the city's recommendation to the county is not a final land use decision subject to our jurisdiction, and petitioners do not argue otherwise. *Goose Hollow Foothills League Assoc. v. Portland*, 21 Or LUBA 358, 360 (1991); *Vancouver Federal Savings v. City of Oregon City*, 17 Or LUBA 348 (1989). Petitioners object to intervenor's motion, we understand, because they wish to challenge the county's decision on the grounds that the county lacked authority to proceed on the city's recommendation in the absence of a valid city council vote. What is missing is an explanation for why the city must remain as a respondent in this case, in order to reach that issue. The county's decision,

[2] Petitioners allege that the city council's vote was 3-2 in favor of the application, but that one of the city councilors voting in favor owns property within the notice area. According to petitioners, the city's zoning ordinance prohibits that councilor from voting. If that councilor had abstained, petitioners argue, the vote would have been a tie, and the city charter provides that a tie vote results in denial of the application.

[3] Petitioners attach to their objection a transcript of the proceedings before the circuit court, and cite to the court's direction to intervenor's attorney:

> "[Y]ou can submit an appropriate order [dismissing the writ] but put in that order the procedure issues from Gearhart, at least in my view by your argument that you made here today, [that] is [an] issue for LUBA so it gets up to there—LUBA, that they're aware of what we talked about here today and at least why I ruled the way I did, so if somebody wants to raise something different [before] LUBA, they can say, 'Wait a minute, you can't argue it both ways.'" Objection to Motion to Revise Caption, Exhibit A, 22-23.

attached to petitioners' motion to stay, contains findings addressing petitioners' allegations regarding the city council vote, and the county's authority to proceed. Motion to Stay, Exhibit 1, 10-11. It is not apparent to us why the city's presence in this appeal as a respondent is necessary to challenge those findings, or to reach the issue of the county's authority to proceed on the city's recommendation. Petitioners have not demonstrated any basis to retain the city as a respondent in this matter. Accordingly, intervenor's motion is granted.

MOTION FOR STAY

Petitioners move for a stay of the challenged decision pursuant to ORS 197.845(1), which allows LUBA to stay a decision pending resolution of the merits of an appeal where the petitioner demonstrates (1) a colorable claim of error in the decision and (2) that the petitioner will suffer irreparable injury if the stay is not granted.

A. Background

The subject property is a 1.89-acre portion of a 100-acre golf course. The 1.89-acre portion is currently part of the fairway of the first hole, landscaped and planted in grass. The 1.89-acre portion, along with most of the golf course, is zoned P (Open Space/Park Use). The portion is bordered on the west by Marion Avenue, which is lined with a row of shore pines. Further west, across the street from Marion Avenue, is a residential neighborhood in which at least one petitioner lives. Intervenor proposes to rezone the 1.89-acre portion to R-3 (High Density Residential Use) to allow development of 24 condominium units in six buildings, with an adjacent parking lot with two off-street spaces per unit. Thirty percent of the site will be landscaped. Intervenor also proposes to rezone a nearby .98-acre portion of the golf course from a commercial zone to P, with the result that the net reduction in lands zoned P on the golf course will be less than one acre.

B. Colorable Claim of Error

Petitioners advance several claims of error in the county's decision. Intervenor does not dispute that petitioners have established at least one colorable claim of error. Accordingly, this element of ORS 197.845(1) is met.

C. Irreparable Injury

In *City of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988), we set forth the factors we consider in determining whether the petitioner had demonstrated irreparable injury if the stay is not granted:

1. Has the petitioner adequately specified the injury he or she will suffer?
2. Is the identified injury one that cannot be compensated adequately in money damages?
3. Is the injury substantial and unreasonable?
4. Is the conduct petitioner seeks to bar through the stay probable rather than merely threatened or feared?
5. If the conduct is probable, is the resulting injury probable rather than merely threatened or feared?

Petitioners argue that they will suffer the following irreparable injuries if the stay is not granted: (1) permanent loss of open space; (2) increased residential traffic; (3) additional on-street parking problems; (4) increased noise; (5) ruined scenic views; (6) reduced property values; and (7) loss of habitat for songbirds and other species. Petitioners attach to their motion the affidavit of petitioner Dickey, which states that Dickey owns a single-family dwelling in the neighborhood across the street from the proposed development, that she currently enjoys an unobstructed view eastward of the coast range from her property, and that she believes the proposed development would cause noise and traffic, and reduce the value of her property.

Intervenor responds, and we agree, that petitioners have failed to demonstrate that they will suffer irreparable injury if the stay is not granted. Intervenor disputes that the

alleged injuries will occur. Even if they do occur, intervenor disputes that those injuries would be substantial and unreasonable. Intervenor argues, supported by an affidavit from its project manager, that the alleged injuries are neither permanent nor physically irreparable, and are capable of being cured through restoration of the site to its predevelopment use, should petitioners' appeal succeed. According to intervenor, should petitioners succeed in this appeal, the subject site can be easily restored to a golf course fairway.

We agree with intervenor that petitioners have not established that the alleged injuries are substantial and unreasonable, or that they cannot be compensated adequately in money damages. Generally, the cases in which we find that the petitioner has demonstrated irreparable injury if a stay is not granted involve proposals that destroy or injure unique historic or natural resources, or other interests that cannot be practicably restored or adequately compensated for once destroyed. *See Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 565, 568-69 (1995) (demolition of historic structures); *ONRC v. City of Seaside*, 27 Or LUBA 679, 682-83 (1994) (construction of bridge across marsh and wildlife habitat); *Barr v. City of Portland*, 20 Or LUBA 511, 515 (1990) (decision shutting down the petitioner's long-standing business, causing irreparable loss of business reputation and goodwill); *Thurston Hills Neigh. Assoc. v. City of Springfield*, 19 Or LUBA 591, 594-96 (1990) (proposal to log 2,250 mature trees, affecting neighborhood viewshed); *Rhodewalt v. Linn County*, 16 Or LUBA 1001 (1987) (removal of historic bridge); *Dames v. City of Medford*, 9 Or LUBA 433, 440 (1983) (road project removing historically significant trees). Temporary injuries during the pendency of the appeal are not irreparable. *Greenlees v. Yamhill County*, 22 Or LUBA 815, 817 (1991) (visual impacts of 130-foot tower are not irreparable, because the tower can be removed if petitioner prevails).

Here, the alleged injuries involving traffic, parking, noise, scenic views and reduced property values are related only to the construction of the proposed condominiums. Intervenor cites to evidence that, if petitioners prevail, any construction on the site can be

removed. Therefore, any injuries related to such construction are only temporary and not irreparable. *See Von Lubken v. Hood River County*, 17 Or LUBA 1150, 1153 (1989) (no irreparable injury to the petitioner when the property being developed as a golf course could be returned to farm use if the petitioner prevails). Petitioners come closer to the mark in alleging that the proposed construction will entail loss of open space and songbird habitat. However, intervenors cite to evidence that the subject site is currently a golf course fairway, planted in grass, and that, if petitioners prevail, the site can be easily regraded and replanted in grass to restore the fairway, and whatever open space or habitat value is present on the fairway. We agree with intervenor that petitioners have not established that they will suffer irreparable injury if the stay is not granted.

The motion for a stay is denied.

Dated this 25th day of September, 2002.

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Tod A. Bassham
Board Member