BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBIN JAQUA and JOHN JAQUA,
Petitioners,

vs.

CITY OF SPRINGFIELD,
Respondent,

and

PEACEHEALTH,
Intervenor-Respondent.

LUBA Nos. 2003-145, 2003-146 and 2003-147

ORDER

MOTION TO INTERVENE

PeaceHealth, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

MOTION FOR STAY

A. Introduction

The three city decisions that are the subject of this consolidated appeal apparently are related to two prior decisions and another city decision that has not yet been adopted. We discuss these related decisions briefly before turning to petitioners' motion for stay and the city's and intervenor's opposition to the motion for stay and jurisdictional challenges.

Intervenor owns property next to the McKenzie River in the Gateway area of the City of Springfield. Intervenor wishes to construct a hospital and related development on that site. On April 21, 2003, the city adopted Ordinances 6050 and 6051. Ordinance 6051 amends the Metro Area General Plan Diagram. Ordinance 6051 amends the city's Gateway Refinement Plan diagram and text. We understand that these plan amendments are necessary to allow intervenor's desired development of the property. Ordinances 6050 and 6051 are currently

pending before LUBA in a separate consolidated appeal. *Jaqua v. City of Springfield*, ___ Or LUBA ___ (LUBA Nos. 2003-072, 2003-073, 2003-077, 2003-078) (*Jaqua I*). The petitions for review in *Jaqua I* are due October 15, 2003.

On September 8, 2003, the city council voted to approve amendments to two annexation agreements.[1] As relevant, those annexation agreements both provide "no part of the Property may be developed prior to City approval of a Master Plan[.]" The amendment approved by the city council adds the following language: "except for grading activities authorized under a Land and Drainage Alternation permit approved by the City of Springfield." The city council's September 8, 2003 decision is the subject of LUBA No. 2003-145.

On September 10, 2003, the city Public Works Department issued a Land Drainange and Alteration Permit allowing intervenor "to excavate and grade approximately 67,000 cubic yards of earth on the property." On September 11, 2003, the city Development Services Department granted Floodplain Overlay Development approval for the grading that will occur in the McKenzie River floodplain. These city decisions are the subject of LUBA Nos. 2003-146 and 2003-147, respectively. These three appeals were filed on September 18, 2003. On September 23, 2003, LUBA issued an order consolidating the three appeals for LUBA review.

We understand from the documents submitted by the parties that an application for Master Plan approval is pending before the city and that a decision on that application is anticipated sometime next year. The decisions that are challenged in this appeal were adopted to allow intervenor to begin site preparation in advance of the city's decision on the pending application for Master Plan approval.

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[1] One of those annexation agreements is between the city and intervenor and the other is between the city and intervenor's predecessor. Among other things, those agreements set out the parties' respective obligations in providing urban services and facilities to the subject property when it is developed.

B. Petitioners' Motion for Stay

On September 19, 2003, petitioners filed a motion to stay the appealed decisions. Our authority to stay local government land use decisions is set out at ORS 197.845(1).[2] LUBA's rules elaborate on the required elements of a motion for stay.[3] For LUBA to grant a motion for stay, petitioners must demonstrate (1) that the challenged decisions are land use decisions, (2) a colorable claim of error in those decisions, and (3) that they will suffer irreparable injury if the stay is not granted. Among other things, intervenor and the city contend that the challenged decisions are not land use decisions and that petitioners have not demonstrated that they will suffer irreparable injury. We briefly consider the city's and intervenor's jurisdictional challenge before turning to the parties arguments concerning irreparable injury.

1. Jurisdiction

The city objects to our consolidation of the challenged decisions, contending that the three decisions are (1) rendered by different city decision makers, (2) governed by different

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[2] 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:
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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[.]"

[3] As relevant to our resolution of petitioners' motion for stay, OAR 661-010-0068(1) sets out the following requirements for a motion for stay:

> "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;
>
> "(b) A statement explaining why the challenged decision is subject to the Board's jurisdiction;
>
> "(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[.]"

standards, and (3) supported by different evidentiary records. Moreover, the city and intervenor contend that none of the three appealed decisions are land use decisions subject to LUBA review and that LUBA should, for that reason alone, deny the motion for stay and dismiss these appeals.[4] The city's September 24, 2003 motion is captioned "Respondent City of Springfield's Motion to Bifurcate and Objection to Consolidation of Appeals." However, that motion and the city's and intervenor's responses to petitioners' motion for stay, which were filed on September 30, 2003, clearly challenge our jurisdiction and request that we dismiss all three of these consolidated appeals. *See* Respondent City of Springfield's Opposition to Petitioners' Motion for Stay 16 ("this Board should dismiss all three appeals"). We therefore treat the city's September 24, 2003 motion and the city's and intervenor's response to the motion to stay as presenting a motion to dismiss all three appeals.

Under our rules, petitioners have 14 days to respond to those jurisdictional challenges. However, the bulk of the grading and excavation activity that petitioners seek to stay will be completed by October 3, 2003. Intervenor's Response to Motion for Stay 2, n 1. In this circumstance, and because we agree with the city and intervenor that petitioners' have not demonstrated that they will be irreparably injured if the motion for stay is denied, we proceed directly to the irreparable injury question.[5]

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[4] We understand the city to argue that no comprehensive plan, land use regulation or other land use standard applies to the disputed decisions. If the city is correct in this argument, the challenged decisions are not statutory land use decisions under ORS 197.015(10). Petitioners also argue, and the city and intervenor dispute, that the challenged decisions are land use decisions under the significant impact test established by the Oregon Supreme Court in *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982).

[5] LUBA received a 3-page response via fax shortly before this order was issued. We have considered that response in deciding this order denying the motion for stay. Petitioners shall have until October 14, 2003 to file any additional written response they wish to file regarding our jurisdiction in this matter. We will issue a separate order on the motions to bifurcate and dismiss these appeals after we receive that response. To assist the parties, we have particular questions concerning the jurisdictional significance of Springfield Municipal Code (SMC) 8.328(1), which requires the public works department to "verify compliance with any applicable laws, ordinances, rules, and regulations" when issuing a LDAP, and GRP Residential Element Policy 13.0 and GRP Residential Element Implementation Action 13.3, which appear to require approval of a Master Plan before "urban development" or "development" is approved. If the grading and excavation that is approved by the LDAP is properly viewed as "urban development" or "development," it is not clear to us why those policies do not apply to the LDAP and thereby make that decision a land use decision subject to our jurisdiction.

2. Irreparable Injury

The precise nature of petitioners' alleged irreparable injury is not entirely clear. Petitioners' concern appears to be that intervenor's proposed excavation and grading will become an accomplished fact, before the city (1) provides the notice and hearing that petitioners believe are required for the challenged decisions under ORS 197.763(1) – (9) and 227.160 to 227.178, (2) successfully defends the decisions at issue in *Jaqua I*, (3) completes the Master Plan review process and demonstrates compliance with all the criteria that govern Master Plans, and (4) grants Master Plan approval. Based on intervenor's statement that the excavation and grading will largely be complete by October 3, 2003, that concern appears to be well-founded. However, the alleged irreparable injury that petitioners believe will result from that course of events is much less clear.

One of petitioners' argument is as follows:

> "Dirt can be put back. Predevelopment planning, participation, and decisionmaking cannot." Motion for Stay 8.

If petitioners are alleging that premature placement of excavated soil on the property will in and of itself cause irreparable injury because required procedures were not followed first, we do not agree. If petitioners prevail in this appeal, the city will be required to follow the procedures petitioners believe should have been followed before the city adopted the disputed decisions. If the city is unable to demonstrate compliance with the criteria that it must apply in such procedures, as petitioners recognize, the "[d]irt can be put back." In that event, petitioners would have been extended the procedural and substantive guarantees that they are entitled to and the erroneous excavation and storage of excavated material would have been corrected. We fail to see how petitioners would be irreparably injured in that circumstance.

A second argument that petitioners advance seems to be directed at the effect that the current excavation and grading may have on the city's review of the Master Plan, which is currently under way.

> "Petitioners' loss is substantial because the excavation is massive and makes significant alterations to existing site conditions. It is also substantial because this entire 'development' project will be complete by the end of October, 2003, and master plan hearings are scheduled to begin in November, 2003, against the backdrop of a site which has just been graded and excavated at great cost and in a manner consistent with PeaceHealth's proposal. The massive size and location of the hospital close to the river have been major concerns of Petitioners. Without a stay, they are certain to lose the opportunity to address these and other concerns in a predevelopment master planning process as required by the applicable comprehensive plan. No bond or subsequent restoration can give that back." Motion for Stay 8-9 (footnote omitted).

Petitioners appear to be concerned that the city will be influenced to approve a master plan for the hospital in a location close to the river, consistent with the disputed excavation.

As an initial point, the procedures that the city must follow in reviewing intervenor's Master Plan, and the legal standards that must be satisfied to approve a Master Plan for a hospital in the location that is anticipated by the challenged excavation and grading do not appear to be affected at all by the excavation and grading. To the extent petitioners suggest otherwise, they fail to demonstrate that is the case.

Turning to petitioners' apparent concern that the excavation and fill may exert some informal influence on city decision makers in reviewing the Master Plan, we have no way to know whether that concern is well-founded.[6] However, we are not persuaded that completion of the disputed excavation and grading will necessarily have any influence on the Site Plan review process or on petitioners' ability to persuade the city to ignore that excavation and grading activity and either reject the Master Plan or require that the hospital set back further from the river than intervenor proposes. Other than petitioners' speculation

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[6] We understand intervenor to contend that it wishes to excavate and grade now to take advantage of the currently dry condition of the soils on the property. The excavated material will be covered to protect it from the approaching wet season. Intervenor notes that "[i]ntervenor has executed a hold harmless agreement which, in part, provides that the issuance of the LDAP in no way presumes or implies the approval or terms of approval of any future land use decision." Intervenor's Response to Motion for Stay 12, n 6. We understand both the intervenor and the city to contend that if the hospital is ultimately approved in a different location on the site or is not approved at all, there is no reason why the excavated fill cannot be replaced and the site returned to its approximate former condition. Petitioners contend that any claim that the excavation and grading will not affect the planning process is "disingenuous." Petitioners' Reply Memo re Stays & Consolidation 3.

that the excavation and grading will become a "backdrop" that will place them at a persuasive disadvantage in the Master Plan review proceedings, it does not appear that any of petitioners' participatory or procedural rights in the Master Plan review process are in any way affected by the current excavation and grading that is made possible by the challenged decisions. Petitioners fail to demonstrate that they will be irreparably injured if the challenged decisions are not stayed.[7]

The motion for stay is denied.

CONCLUSION

With a pending motion to dismiss, we could suspend this appeal until that jurisdictional challenge is resolved. *See* OAR 661-010-0067(2) (deadline for filing petition for review may be extended to rule on motion to dismiss). However, if we ultimately conclude that we have jurisdiction over one or more of the appealed decisions suspending the appeals will delay a final decision on the merits. We also can appreciate that the fate of the challenged excavation and grading is ultimately tied to the fate of the decisions that are before us in *Jaqua I* and the city's decision on the Master Plan, which may be appealed to LUBA. Given that dependence and our decision on petitioners' motion for stay, there may be reasons to suspend this appeal indefinitely until any appeals of those related decisions are resolved. Because we are not certain how the parties prefer to proceed, we do not suspend this appeal at this time.

In our September 23, 2003 order consolidating these appeals, we directed the city to "submit a single consolidated record." That was intended to simplify the city's job in compiling the record. In view of the city's position concerning the three decisions challenged in these consolidated appeals, and the fact that we have not yet ruled on the city's

[7] The city and intervenor make a number of additional arguments in support of their position that the motion for stay should be denied. We need not and do not consider those additional arguments.

motion to bifurcate these appeals, if the city prefers to submit separate records or a single record made up of separate volumes for each of the appealed decision, it may do so.

Dated this 1st day of October, 2003.

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Michael A. Holstun
Board Member