

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

3
4 KB TREES, LLC, and JOE KARAS,
5 *Petitioners,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11
12 and

13
14 POLYGON WLH, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-139

18
19 ORDER

20 **BACKGROUND**

21 The challenged decision is a county hearings officer decision approving
22 preliminary review of intervenor’s proposed planned subdivision, including a re-
23 plat to revise the subdivision’s street network. Motion for Stay (Motion), Exhibit
24 A, page 1. The subject property contains two wetlands and is located within the
25 North Bethany Subarea Plan (NBSP), a subarea identified in the county’s
26 comprehensive plan. Motion, Exhibit A, page 6, Exhibit C, page 6. When the
27 NBSP was adopted in 2009, it included the specific location of future roadways.
28 Motion, Exhibit C, page 5. In 2018, the county adopted an ordinance amending
29 the NBSP to realign one of those future roadways in order to minimize impacts
30 to the wetlands on the subject property. Motion, Exhibit C, pages 14-15. Under

1 that realignment, the smaller of the two wetlands would be completely filled so
2 that the roadway would avoid the larger wetland entirely. Motion, Exhibit C,
3 pages 10, 15.

4 A person who plans to remove or fill “any waters of this state” must first
5 obtain a permit from the Department of State Lands (DSL). ORS 196.810(1)(a).
6 In order to fill the smaller wetland, intervenor applied for and, on October 8,
7 2018, DSL approved a removal/fill permit. Motion, Exhibit C, page 17. On
8 October 26, 2018, petitioners requested a hearing on the DSL approval. Motion,
9 Exhibit C, page 1. On August 14, 2019, an Administrative Law Judge (ALJ)
10 issued a proposed order recommending that DSL affirm the issuance of the
11 permit. Motion, Exhibit C, pages 27, 29. On November 27, 2019, the Director of
12 DSL adopted the ALJ’s recommendation as DSL’s final order. Motion, Exhibit
13 E, page 4. On December 23, 2019, petitioners appealed DSL’s decision to the
14 Court of Appeals, where the matter is now pending. *KB Trees v. Department of*
15 *State Lands* (A173008); Motion, Exhibit E, pages 1-4.

16 On April 19, 2019, after the county amended the NBSP to realign the
17 roadway, intervenor submitted its land use application for preliminary review of
18 a subdivision, and re-plat. Record 231. During the local proceedings on
19 intervenor’s land use application, planning staff recommended that the hearings
20 officer impose the following condition of approval:

21 “If there is any activity within the [wetlands], the applicant shall
22 gain authorization for the project from the Oregon Department of
23 State Lands (DSL) * * *. The applicant shall provide Clean Water

1 Services or its designee (appropriate city) with copies of all DSL
2 * * * project authorization permits.” Motion, Exhibit A, pages 75-
3 76.

4 Under this condition, intervenor would be required to obtain approval from Clean
5 Water Services (CWS) prior to conducting any on-site or off-site work or
6 construction. Motion, Exhibit A, page 70. During the proceedings before the
7 hearings officer, petitioners requested that the hearings officer impose a condition
8 as follows:

9 ““If there is any activity within the [wetlands], the applicant shall
10 gain final authorization (‘Final Authorization’) for the project from
11 the Oregon Department of State Lands (DSL) * * *. The applicant
12 shall provide Clean Water Services or its designee (appropriate city)
13 with copies of all DSL * * * Final Project Authorization permits
14 prior to commencing any on-site improvements including grading.[]
15 *Final Authorization means the exhaustion of all appeals regarding*
16 *any contested case filed by [petitioners] challenging DSL’s issuance*
17 *of a wetland fill and removal permit for the proposed*
18 *development.”*” Motion, Exhibit B, page 3 (emphasis added).

19 The hearings officer concluded that he lacked authority to impose the condition
20 petitioners requested. Motion, Exhibit A, pages 70-71. On December 6, 2019, the
21 hearings officer approved the preliminary review and re-plat with the condition
22 proposed by county planning staff.

23 On December 23, 2019, petitioners filed their notice of intent to appeal.
24 On December 31, 2019, intervenor filed its motion to intervene. On February 11,
25 2020, the county transmitted the record. On February 28, 2020, petitioners filed
26 their motion for stay. On March 3, 2020, petitioners filed their petition for review.
27 On March 10, 2020, intervenor filed its response to petitioners’ motion for stay,

1 as well as a motion to dismiss. On March 13, 2020, petitioners filed their reply to
2 intervenor’s response to petitioners’ motion for stay.

3 **MOTION FOR STAY**

4 In order for LUBA to grant a stay of a land use decision, the petitioner
5 must demonstrate a “colorable claim of error” in the decision and that they will
6 suffer “irreparable injury if the stay is not granted.” ORS 197.845(1); *see also*
7 OAR 661-010-0068. For the reasons set forth below, the motion for stay is
8 denied.

9 **A. Colorable Claim of Error**

10 “In order to establish evidence of a colorable claim of error, it is not
11 necessary to show that a petitioner will prevail on the merits, but rather the errors
12 alleged must be sufficient to result in reversal or remand of the decision if found
13 to be correct.” *Dames v. City of Medford*, 9 Or LUBA 433, 438 (1983), *aff’d*, 69
14 Or App 675, 687 P2d 1111 (1984).

15 Under Washington County Community Development Code (CDC) 207-
16 5.1, a “Review Authority may impose conditions on any Type II or III
17 development approval. Such conditions shall be designed to protect the public
18 from potential adverse impacts of the proposed use or development * * *.”
19 Petitioners argue that the hearings officer misconstrued CDC 207-5.1 in
20 concluding that he lacked authority to impose the condition as requested.
21 Specifically, petitioners argue that, without the condition requested by
22 petitioners, the county’s decision approving preliminary subdivision review and

1 a replat makes it possible that the Court of Appeals will issue a decision reversing
2 DLS's final order that has the effect of invalidating the DSL permit *after*
3 intervenor has already obtained CWS approval and filled the wetland. Thus, by
4 failing to impose the condition as petitioners requested, petitioners argue, the
5 hearings officer violated CDC 207-5.1 in refusing to impose conditions "to
6 protect the public from potential adverse impacts of the proposed use or
7 development." Petition for Review 8.

8 In response, intervenor argues that the hearings officer did not misconstrue
9 CDC 207-5.1 because he concluded that he lacked authority, under *any* code
10 provision, "to require CWS to administer the condition in the way Petitioners
11 desire." Response to Motion for Stay 10. Intervenor misunderstands our analysis
12 under the colorable claim of error prong. The question is not whether petitioners'
13 interpretation of CDC 207-5.1 is correct. The question is whether, assuming that
14 petitioners *are* correct, the result would be reversal or remand of the decision.
15 *Dames*, 9 Or LUBA at 437. LUBA must reverse or remand a land use decision if
16 it finds that the local government improperly construed applicable law. ORS
17 197.835(9)(a)(D). Thus, should petitioners prevail on their argument that the
18 hearings officer misconstrued CDC 207-5.1, the result would be reversal or
19 remand of the county's decision. Petitioners have therefore satisfied the colorable
20 claim of error prong.

1 **B. Irreparable Injury**

2 In order to satisfy the irreparable injury prong of ORS 197.845(1), the
3 following five requirements must be met:

- 4 (1) the movant must adequately specify the injury that he or she
5 will suffer;
- 6 (2) the injury must be one that cannot be compensated adequately
7 in money damages;
- 8 (3) the injury must be substantial and unreasonable;
- 9 (4) the conduct the movant seeks to bar must be probable rather
10 than merely threatened or feared; and
- 11 (5) if the conduct is probable, the resulting injury must be
12 probable rather than merely threatened or feared.

13 *Butte Conservancy v. City of Gresham*, 47 Or LUBA 604, 609 (2004) (citing *City*
14 *of Oregon City v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988)).
15 Generally, a movant may meet these requirements only by demonstrating that the
16 decision will authorize the destruction or injury of “unique historic or natural
17 resources, or other interests that cannot be practicably restored or adequately
18 compensated for once destroyed.” *Roberts v. Clatsop County*, 43 Or LUBA 577,
19 582-83 (2002) (citations omitted).

20 As we understand petitioners’ argument, it is that if LUBA does not stay
21 the county’s decision approving preliminary subdivision review and a replat
22 without the condition petitioners sought, intervenor could cause irreparable
23 injury to petitioners by filling the wetland pursuant to a not-yet-issued CWS
24 permit, and the Court of Appeals could subsequently reverse DSL’s decision to

1 issue the permit on which CWS relied in issuing its own permit. We agree with
2 intervenor that petitioners have failed to show irreparable injury for the simple
3 reason that the challenged decision does not actually authorize the destruction or
4 injury of any wetlands. *Roberts*, 43 Or LUBA at 582-83; Response to Motion for
5 Stay 11. The county’s decision approved only preliminary review of a planned
6 subdivision, including a re-plat to revise the subdivision’s street network. The
7 decision itself authorizes no fill activities and the condition recognizes that other
8 agencies have authority over fill activities. A land use decision does not cause
9 “irreparable injury” merely because the decisionmaker fails to condition the
10 decision’s effectiveness on the outcome of other agencies’ activities.

11 In the alternative, we conclude petitioners have not established that the
12 conduct they seek to bar is probable, rather than merely threatened or feared.
13 *Butte Conservancy*, 47 Or LUBA at 609. Petitioners do not seek to prevent
14 intervenor from filling the wetland as a general matter. Rather, they seek to
15 prevent intervenor from filling the wetland *prior to the conclusion of the pending*
16 *appeal before the Court of Appeals*. The gravamen of petitioners’ argument is
17 that, without the condition, intervenor may proceed to fill the wetland and their
18 removal/fill permit will *subsequently* become invalid if the Court of Appeals
19 reverses the DSL decision.

20 We reject petitioners’ argument for two reasons, First, because that result
21 is merely feared, it cannot support a stay of the county’s decision. 47 Or LUBA
22 at 609. More importantly, the county’s decision approving a preliminary

1 subdivision and a replat does not *authorize* any fill activities, and a stay of that
2 county decision, even if it included petitioners' requested condition, would not
3 prohibit any other agencies with regulatory authority from taking action on a
4 separate permit application, because the county has no authority to regulate
5 CWS' or DSL's activities. In other words, LUBA's stay of the challenged
6 decision would do nothing to prevent any injury that petitioners may suffer,
7 because the injury that petitioners may suffer does not result from the county's
8 decision. Rather, the feared alleged injury would result from separate CWS, DSL,
9 and judicial proceedings regarding DSL's proceedings to authorize filling the
10 smaller wetland.

11 For the above reasons, petitioners' motion for stay is denied.

12 Dated this 20th day of March 2020.

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Michelle Gates Rudd
Board Chair