

IN THE COURT OF APPEALS OF THE STATE OF OREGON

CITY OF CORNELIUS, CITY OF FOREST GROVE, CITY OF GRANTS PASS, CITY OF HAPPY VALLEY, CITY OF HILLSBORO, CITY OF KEIZER, CITY OF MEDFORD, CITY OF OREGON CITY, CITY OF SHERWOOD, CITY OF SPRINGFIELD, CITY OF TROUTDALE, CITY OF TUALATIN, CITY OF WOOD VILLAGE, and MARION COUNTY,
Petitioners,

v.

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT and THE LAND CONSERVATION AND DEVELOPMENT COMMISSION,
Respondents.

Court of Appeals No. A180037

ORDER DENYING MOTION TO STAY CFEC RULES; EXPEDITING JUDICIAL REVIEW ON THE COURT'S OWN MOTION

Petitioners seek judicial review of a set of administrative rules set out in OAR Chapter 660, Divisions 8, 12, and 44, known as the Climate-Friendly and Equitable Communities Rules (CFEC rules), adopted by the Land Conversation and Development Commission (LCDC) on July 21, 2022.¹ See ORS 183.400(1) ("The validity of any rule

¹ The rules at issue include OAR 660-008-0010, 660-008-0050, 660-012-0000, 660-012-0005, 660-012-0011, 660-012-0012, 660-012-0015, 660-012-0016, 660-012-0035, 660-012-0045, 660-012-0060, 660-012-0100, 660-012-0105, 660-012-0110, 660-012-0115, 660-012-0120, 660-012-0125, 660-012-0130, 660-012-0135, 660-012-0140, 660-012-0145, 660-012-0150, 660-012-0155, 660-012-0160, 660-012-0170, 660-012-0180, 660-012-0190, 660-012-0200, 660-012-0210, 660-012-0215, 660-012-0300, 660-012-0310, 660-012-0315, 660-012-0320, 660-012-0325, 660-012-0330, 660-012-0340, 660-012-0350, 660-012-0360, 660-012-0400, 660-012-0405, 660-012-0410, 660-012-0415, 660-012-0420, 660-012-0425, 660-012-0430, 660-012-0435, 660-012-0440, 660-012-0445, 660-012-0450, 660-012-0500, 660-012-0505, 660-012-0510, 660-012-0520, 660-012-0600, 660-012-0605, 660-012-0610, 660-012-0620, 660-012-0630, 660-012-0700, 660-012-0705, 660-012-0710, 660-012-0720, 660-012-0800, 660-012-0805, 660-012-0810, 660-012-0820, 660-012-0830, 660-012-0900, 660-012-0905, 660-012-0910, 660-012-0915, 660-012-0920, 660-044-0000, 660-044-0005, 660-044-0015, 660-044-0020, 660-044-0025, 660-044-0030, 660-044-0035, 660-044-0040, 660-044-0045, 660-044-0050, 660-044-0055, 660-044-0060, 660-044-0100, 660-044-0110, 660-044-0120, and 660-044-0130.

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may be determined upon a petition by any person in the Court of Appeals in the manner provided for review of orders in contested cases."'). They move to stay the application of those rules pending judicial review, arguing that "[i]f a stay is not issued, most of Oregon's more populous cities and counties will be fundamentally changed for the worse." Respondents oppose the motion, arguing, in part, that petitioners "cannot demonstrate the requisite irreparable harm" required to warrant a stay. As explained below, the motion is denied.

This court has authority to stay enforcement of administrative rules pending completion of judicial review. *Northwestern Title Loans v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002).² Specifically, the court "may issue a stay in [a rule challenge] proceeding pursuant to its inherent authority." *Id.* at 12. However, before the court may exercise its inherent authority to stay enforcement of an administrative rule pending completion of rule-challenge proceedings, the petitioner must show that the failure to grant a stay "will result in irreparable harm."³ *Id.* at 13; see also *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 102, 55 P3d 546 (2002) (party seeking stay "must at least demonstrate that irreparable injury *probably* would result if a stay is denied." (Emphasis in original.)). "The purpose of a stay is to prevent harm to the party challenging the rule during the period of time that the court is considering the challenge." *Id.* at 12. Thus, in *Northwestern Title Loans*, the court denied a stay because the petitioner had not shown that "the failure to grant a stay w[ould] result in irreparable harm to its rights" where petitioner would "be able to continue business as [the] rule review proceeding progresses." *Id.* at 13. Here, the court likewise denies a stay because petitioners have not established the required irreparable injury necessary to justify a stay of the rules pending judicial review.

As noted above, petitioners on judicial review challenge all of the CFEC rules (which, as petitioners point out, "fill 136 pages"). In support of their request for a stay pending the court's decision on the merits, petitioners argue that "the full impact of the Rules is not yet fully known," but they are "the most impactful and overly prescriptive set of requirements levied on local jurisdictions by [LCDC] since * * * the creation of Oregon's planning system in 1973." They assert that, while the rules have worthy underlying goals, petitioners "cannot accept [LCDC's] improper dictation of prescriptive

² Although *Northwest Title Loans* was vacated as moot by unpublished order, the court has continued to apply the portions of that case that remain persuasive. See *Lovelace v. Board of Parole*, 183 Or App 283, 288 n 3, 51 P3d 1269 (2002).

³ The court also considers, in determining whether to exercise its authority to grant a stay pending completion of a rule challenge proceeding, the likelihood that the petitioner will prevail on judicial review. However, here, because the court determines that petitioners have not made requisite showing of irreparable harm, it is not necessary to decide whether petitioners are likely to prevail on judicial review.

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measures that will have negative impacts on their communities by making it impossible for local planners to balance unique circumstances." With respect to irreparable harm in particular, petitioners argue that significant time and resources have been invested by each petitioner "to smartly develop into the community that their residents want to call home;" however, those "community visions, and all of the work that has gone into them, [are] suddenly in jeopardy as a result of the CFEC Rules." In petitioners' view, application of the rules, even for just a year or two, "is likely to create massive problems within planning departments that will profoundly change the future of Oregon." Petitioners attach over 60 pages of declarations to the motion to support their argument regarding irreparable harm. In their view, those declarations "tell a story of planning departments being forced to refocus their efforts as a result of the Rules, cities being forced to abandon core projects, and planners being stuck trying to apply rules that simply do not work in their communities." The court will not recount all of the potential results of application of the CFEC Rules identified by petitioners here, but will summarize some examples included in the body of the motion:

- The City of Cornelius has been working to improve walkability and plans to spend significant funds to put in sidewalks in certain areas, but the CFEC Rules will "significantly delay, if not block entirely, the ability of the city to carry out those plans."
- Happy Valley needs to extend roads to develop a downtown area and industrial park to create employment opportunities but, as a result of the rules, is "uncertain if it can extend roads into these areas or provide sufficient parking necessary to serve new commercial hubs" and, therefore, those "critical projects" will be delayed or possibly "upend[ed]," resulting in the city "being largely unable to reduce vehicle commuting for years to come."
- The City of Troutdale will be unable to require sufficient on-site parking in an affordable housing project under consideration, which will exacerbate a parking problem in the area, which, in turn, will have "significant effects on businesses in the area, police response times will suffer as officers will be required to maneuver around congested streets when leaving the Sheriff's office that neighbors the project, and residents will be further subjected to overcrowded streets."
- The City of Springfield has been working to expand a development area necessary to meet its needs for employment lands under Goal 9 and received a project plan that took 15 months to complete from a firm with which it contracted, but the rules "will render this plan effectively meaningless, and Springfield will not be able to perform the work identified by the plan" because, for example, "it is unclear if Springfield will be able to build new roads into the areas, which is critical because there are currently no existing public streets in the area."

Respondents, for their part, argue that the harms identified are not cognizable

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"irreparable harm[s]" for the purposes of a stay because they are inherent incidents of the statewide land-use planning system created by the legislature. In respondents view, "[b]oiled down to its essence, the harm identified by petitioners is the displacement of local decision-making by the Rules," but if that amounts to a harm justifying a stay of the rules, then the availability of a facial rule challenge can be used to effectively frustrate the statewide land-use planning process. Respondents further argue that the harms identified are speculative and will "only accrue, if at all, months or years into the future," and, accordingly, cannot meet the required showing of irreparable harm.

The court is not persuaded that the harms identified by petitioners meet the standard warranting the grant of a stay. Indeed, despite petitioners' assertion that what they face is "a textbook example of irreparable harm," the potential harms identified by petitioners do not align with the type of harm for which the court has stayed enforcement of administrative rules in the past. First, as petitioners acknowledge, "planning is a long game." To the extent that petitioners believe that the CFEC rules will change the direction of their communities, that is also a long-term potential effect of the rules. However, a stay is intended to prevent immediate harm while the court considers and decides the rule-challenge case. Further, to the extent that the harms identified are that planning departments will be immediately "forced to refocus their efforts" or redirect financial resources or that cities will be "forced to abandon core projects," those do not appear to the court to be the type of harm that a stay is intended to remedy. Indeed, being required to shift focus or change land development plans would appear to be a natural result of any major shift in land use policy and, to the extent that petitioners' complaints are centered around their view that the CFEC rules are bad policy, it is LCDC--not the courts--that is the primary policymaker with respect to land use. See *Willamette University v. LCDC*, 45 Or App 355, 373, 608 P2d 1178 (1980). Although statewide land use policy may shift priorities away from what a particular city or community had planned, or would prefer to focus on, it is not clear that that is harm, much less the type of harm to which a stay, granted under the court's inherent authority, would be directed. In addition, as respondents correctly point out, because the full effect of the rules is uncertain, as is how those rules will be implemented in particular communities, many of the purported harms identified by petitioners are speculative.

Petitioners take issue with respondents distinguishing this case from those in which irreparable harm was shown in the form of private businesses being unable to function as a result of the rule at issue. In petitioners' view, "it is offensive for [respondents] to make such a comparison," as it "reduces local governments to private companies who are worried about financial profits" when they are in actuality "public bodies with the best interests of their citizens in mind." Regardless of how inapt petitioners find the comparison to be, the cases cited by respondents are nonetheless instructive. As noted, in *Northwestern Title Loans*, the court denied a stay where the petitioner might "become unprofitable," but "would not cease to exist and [would] be able to continue business as the rule proceeding" progressed. 180 Or App at 13. In *Herban Industries OR, LLC v. Oregon Liquor Control Commission* (A172546), the court

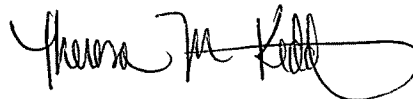
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determined that irreparable harm was shown where the petitioners asserted--and the agency did not dispute--that, in the absence of a stay, it was likely to be forced out of business. And, in *Vapor Technology Association v. Oregon Health Authority* (A172419), the petitioners demonstrated irreparable harm where, as a result of enforcement of the rule, the petitioners would have lost their businesses entirely within weeks and the entire industry in Oregon, subject to those rules, would have been destroyed. In those cases, the court granted a stay where catastrophic results were likely to occur during the pendency of the rule-challenge proceeding but denied a stay where the business entity in question could continue while the judicial review progressed. Here, the local governments will be able to continue functioning as they are designed to function, notwithstanding the CFEC rules. Although the CFEC rules will undoubtedly significantly impact petitioners and may--indeed, are apparently intended to--require petitioners to change their development plans, there is no allegation that petitioners will be unable to function or fulfill their core obligations as local government bodies while this judicial review progresses. That is so despite petitioners' assertions that the CFEC rules will frustrate petitioners' current development plans and that the goals of the CFEC rules would be better alternatively achieved.

For all of the reasons set forth above, the court is not persuaded that petitioners have demonstrated irreparable harm such that a stay of the CFEC rules is appropriate pending judicial review. Accordingly, the motion for stay is denied. However, given all the circumstances, including that the rules in question relate to land use, the court, on its own motion, determines that it is appropriate to expedite this judicial review for purposes of briefing and submission. Therefore, petitioners' opening brief will become due 28 days from the date that the agency record settles. Respondents' answering brief will become due 28 days thereafter, and petitioners' reply brief will be due seven days from the filing of the answering brief. The court will not allow any extension of time to file the briefs absent a showing of extraordinary circumstances. Further, the court waives ORAP 7.30 such that no motion filed by the parties will toll the due date for the briefs.

The Appellate Court Administrator is directed to set the judicial review for submission to a department of the court as soon as practicable.



THERESA M. KIDD
APPELLATE COMMISSIONER
12/29/2022 11:42 AM

c: David O Bechtold
Greg A Hibbard
Robert M Wilsey
Denise G Fjordbeck

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