

1 LUBA'S AUTHORITY

2 Under ORS 197.845(2), the Board is required to order
3 petitioner to give an undertaking of \$5,000 "[i]f the Board
4 grants a stay of a quasi-judicial land use decision approving a
5 specific development of land...."¹ At the time we ordered
6 the stay and required the bond, we were uncertain whether the
7 land use decision under review should be characterized as a
8 quasi-judicial or legislative decision.²

9 In affirming the city, we dissolved the stay. We also
10 characterized the decision as having a more legislative quality
11 than quasi-judicial quality. Dames v. Medford, supra (Slip
12 Opinion, Footnote 5, p. 19, 2/24/84). We reasoned that because
13 the city had no permit application before it but was entitled
14 to proceed or not proceed as it saw fit, the decision was
15 administrative or legislative and not quasi-judicial. See,
16 Strawberry Hills Fourwheelers v. Benton County Board of
17 Commissioners, 287 Or 591, 601 P2d 769 (1979); Neuberger v.
18 City of Portland, 288 Or 155, 603 P2d 771 (1979).³

19 Because the city's decision was legislative, we have
20 considerable discretion in the award of damages. See footnote
21 3, supra. Our discretion must be exercised carefully. An
22 award of attorneys fees and damages must be measured against
23 the possible chilling effect such awards might have on the
24 public's right to appeal legislative decisions and to request
25 they be stayed pending review.

26 At a minimum, we believe proof of damages claimed must be

1 clear and must show the moving jurisdiction actually suffered
2 the damages claimed because of the stay. The public right,
3 granted by statute, to challenge the exercise of legislative
4 power should not be hindered by money awards which are not
5 justified considering all the circumstances of a particular
6 case. We add the power afforded us under these circumstances
7 includes the power to award no damages.⁴

8 THE CITY'S CLAIM

9 In support of its claim for the full amount of \$5,000, the
10 city lists damages it has incurred as a result of the delay
11 occasioned by this review proceeding. The city points to a
12 portion of its contract for street improvement providing that
13 where work is suspended but the construction contract is not
14 terminated,

15 "the contractor is entitled to a reasonable extension
16 of the contract time and reasonable compensation for
17 all costs resulting from the suspension plus a
reasonable allowance for overhead with respect to such
costs."⁵

18 The city includes the affidavit of the city engineer stating
19 the contractor has submitted evidence of increased costs in the
20 amount of \$14,011, and the city advises it has executed a
21 change order allowing for this amount.

22 In a recent memorandum to the Board, the city includes a
23 statement from the prime contractor, M.C. Lininger and Sons,
24 Inc., stating that delays have been experienced and asking for
25 a change order to compensate for the delay. The amounts
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1 claimed by each subcontractor (and the prime contractor)
2 together total \$15,155. Except for an additional "15% prime
3 contractor markup," the amounts listed exactly compare with
4 amounts estimated in December of 1983. The estimates were
5 prepared to show cost of delay should the project be
6 suspended.⁶ The city also states there will be an increase
7 of 8 percent in labor costs after June 1, 1984. This amount
8 also exactly mirrors an estimated amount projected by one of
9 the subcontractors, J. "Gus" Picollo, in a letter to the prime
10 contractor on December 9, 1983.⁷

11 Because the city's claim about damages exactly echoes the
12 estimate of damages made six months earlier, it would appear
13 the amounts claimed represent not actual damages, but estimated
14 damages. No convincing proof has been submitted that the
15 damages suffered have been measured by any standard other than
16 the estimate prepared in December of last year. We do not
17 believe this measure of damages constitutes clear evidence of
18 actual damages.

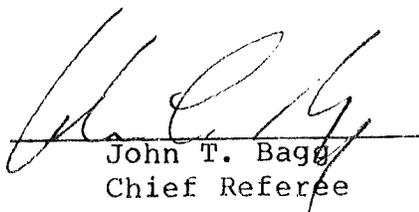
19 CONCLUSION

20 In sum, we do not find a statutory mandate to require a
21 bond and to award money for attorneys fees and damages in stays
22 of legislative decisions. We do not find the city has given
23 proof that the damages it suffered are actual damages. For
24 these reasons, we deny the motion.

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1 Dated this 14th day of June, 1984.

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5 John T. Bagg
6 Chief Referee
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FOOTNOTES

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5 The undertaking is to cover the decisionmakers' costs from
6 delay should the Board uphold the decision.

7 "If the board affirms a quasi-judicial land use
8 decision for which a stay was granted under
9 subsections (1) and (2) of this section, the board
10 shall award reasonable attorney fees and actual
11 damages resulting from the stay to the person who
12 requested the land use decision from the local
13 government, special district or state agency, against
14 the person requesting the stay in an amount not to
15 exceed the amount of the undertaking." (Emphasis
16 added). ORS 197.945(3).

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19 The Board need not require an undertaking when
20 granting a stay of a legislative decision. We may impose
21 a bond requirement, among others, however.

22 "The board shall limit the effect of a stay of a
23 legislative land use decision to the geographic area
24 or to particular provisions of the legislative
25 decision for which the petitioner has demonstrated a
26 colorable claim of error and irreparable injury under
27 subsection (1) of this section. The Board may impose
28 reasonable conditions on a stay of a legislative
29 decision, such as the giving of a bond or other
30 undertaking or a requirement that the petitioner file
31 all documents necessary to bring the matter to issue
32 within a specified reasonable time period." ORS
33 197.845(4).

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36 Our characterization of the decision on review as
37 legislative does not control disposition of this request.
38 Because the Board may not know at the beginning of a case
39 whether the decision is legislative or quasi-judicial, it may
40 be obliged by ORS 197.845 to order a bond be furnished in case
41 the decision turns out on review to be quasi-judicial. A
42 requirement for a bond under such circumstances does not mean
43 the Board is not free to dissolve the requirement or decline to
44 award damages (or, in this case, grant the motion for
45 forfeiture) should we later conclude the decision was
46 legislative.

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2 4
3 One member of the Board believes we lack the authority to
4 make an award of attorneys fees and damages under ORS 197.845
5 where the decision is legislative. ORS 197.845(4) gives the
6 Board authority to order an undertaking when granting a stay of
7 a legislative decision, but there is no authority to award
8 attorneys fees or damages. The minority view is that the issue
9 of attorneys fees and damages under the bond is a matter for a
10 separate proceeding between the parties. While the majority
11 believes our authority includes power to make an award as
12 requested here, our view is not without doubt.

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15 This provision is part of the Oregon APWA Standard
16 Specifications for Public Works Construction, 1980. These
17 provisions are incorporated by reference in the city's
18 contract. See Record, Vol. 3, p. 2.

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21 We issued our stay of the decision, effectively halting the
22 project, on November 1, 1983.

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25 In this case, the decision involved the exercise of
26 the city's discretion to award a contract. Indeed, the
27 city recognized that an appeal of its decision might be
28 taken and included a provision in its contract allowing it
29 to cancel the contract should an appeal to this Board be
30 filed. We note no evidence has been introduced to suggest
31 that cancelling the contract and re-bidding the project
32 later would result in higher costs. We recognize that it
33 is also true that the contractor is entitled to
34 compensation for delays and extensions.

35 "108.6.00 Delays and Extensions

36 * * *

37 "If work under a contract is suspended pursuant to
38 subsection (1) of ORS 279.326, and is not the result
39 of a labor dispute but the contract is not terminated,
40 the contractor is entitled to a reasonable extension
41 of the contract time and reasonable compensation for
42 all costs resulting from the suspension plus a
43 reasonable allowance for overhead with respect to such
44 costs."

1 The city's contract for street improvement provides,
2 in part, as follows:

3 "1.16 Land Use Board of Appeals Provision

4 "This project may be subject to review by the Land Use
5 Board of Appeals (LUBA). Notice to proceed may be
6 delayed during the period when an appeal could be
7 filed with LUBA. If such an appeal is filed any time
8 prior to completion of the project, the city may
9 terminate the contract. If the contract is so
10 terminated prior to the notice to proceed, the
11 contractor will receive no payment. If the contract
12 is terminated after the notice to proceed, the
13 contractor will be paid only for work done prior to
14 receipt of the notice of termination."
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