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

WELLS L. MARVIN, MARVIN)
INVESTMENTS, INC. and IRVING)
MEADOWS PARTNERS,)
Petitioners,) LUBA Nos. 96-195 and 96-196
vs.) FINAL OPINION
EUGENE WATER AND ELECTRIC BOARD) AND ORDER
and CITY OF EUGENE,)
Respondents.)

Appeal from Eugene Water and Electric Board and City of Eugene.

Allen L. Johnson, Eugene, represented petitioners.

Win Calkins, and Josephine Mooney, Eugene, represented respondent Eugene Water and Electric Board.

Glenn Klein, Eugene, represented respondent City of Eugene.

GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON, Referee, participated in the decision.

DISMISSED 11/14/96

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Gustafson.

2 **NATURE OF DECISION**

3 Petitioners appeal a July 16, 1996 internal office
4 memorandum from the director of the Eugene Water and
5 Electric Board (EWEB) to the EWEB customer service personnel
6 (memorandum) (LUBA No. 96-195); and the denial of
7 petitioners' request for installation of 50 water meters
8 (LUBA No. 96-196). Petitioners argue the "policy" stated in
9 the memorandum and EWEB's denial of petitioners'
10 installation request constitute or are part of a moratorium
11 on construction or land development in violation of ORS
12 197.505 to 197.540.

13 **MOTION TO DISMISS**

14 EWEB moves to dismiss these appeals, contending neither
15 the internal office memorandum nor the denial of the
16 installation request constitute a land use decision over
17 which this Board has jurisdiction.

18 **A. Background**

19 In July, 1996, EWEB proposed to adopt a water systems
20 development charge (SDC). On July 16, 1996, the EWEB
21 director issued an interoffice memo to EWEB Customer Service
22 Personnel, which states, in part:

23 "On Monday, July 8, the EWEB Commissioners were
24 briefed on a proposed Water Systems Development
25 Charge (SDC). This new charge is being
26 recommended as a means to fund investments in
27 water system capacity to serve development and
28 future community growth. A final proposal will be
29 presented to the Board for formal action in

1 October, following customer outreach and
2 opportunity for public comment. If approved, the
3 proposed water SDC would become effective on
4 January 1, 1997.

5 "Under EWEB's existing Water Main Extension
6 Policy, developers currently pay for installation
7 of water mains and services required to serve
8 their proposal. However, until now, investments
9 in water treatment, pump station, reservoir
10 storage, and transmission capacity have been
11 financed and paid for through the rates charged to
12 all customers. The proposed SDC would recover
13 these costs directly from those who place
14 increased water demands on the system, and would
15 be assessed when a meter is set on a new water
16 service. The charge varies by meter size, in
17 proportion to the customer's potential water
18 demand and flow requirements.

19 "* * * Customers and developers are likely to ask
20 how this will impact their active or pending
21 projects. We would appreciate your assistance in
22 informing them about the proposal and responding
23 to related inquiries.

24 "It is also possible that some individuals may
25 seek to avoid the pending SDC by ordering new
26 water services prior to January 1, in advance of
27 need or any actual development or construction
28 effort. It is not in EWEB's interest to
29 facilitate premature installation of water
30 services simply as a means to avoid this charge.
31 **Between now and December 31, please be advised**
32 **that no new water service/meter set order should**
33 **be taken, payment accepted, or installation made**
34 **without evidence of an approved building permit.**
35 Assuming Board approval, customers with building
36 permits issued before January 1 will not be
37 required to pay the SDC. All customers with
38 permits dated on or after January 1 will pay the
39 charge." Appendix, Petitioners' Response to
40 Respondent EWEB's Motions to Dismiss. (Bold in
41 original.)

42 On September 23, 1996, petitioners sent two letters to

1 the EWEB customer service department, requesting
2 installation of water meters for two platted subdivisions,
3 one of 47 lots and one of three lots. No evidence of
4 approved building permits was provided with the request, and
5 petitioners acknowledge they have neither requested nor
6 obtained building permits for any of the 50 affected lots.
7 On September 26, 1996, EWEB orally denied the water meter
8 installation request because petitioners had not obtained
9 building permits.¹

10 **B. Discussion**

11 ORS 197.540 gives this Board jurisdiction to review a
12 moratorium on construction challenged by a "person or group
13 of persons whose interests are substantially affected."²
14 "Moratorium on construction" is defined in ORS 197.505(1),

¹In a September 26, 1996 letter to the Lane County Homebuilders Association, petitioner Marvin explains:

"I recently applied to have a number of water meters installed in my Shasta Commons First Additions and Irving Meadows subdivision. * * * Of course, my reason for doing this is that it is my understanding that EWEB may impose an SCD [sic] of up to \$2,200 per service starting January 1st. Since the subdivision is completed and the water meter boxes are already installed and water service has been completed to the subdivision, I thought I might as well be safe than sorry and pay the \$60.00 per meter plus the \$5.50 service charge per month on each meter and have them installed now rather than wait to see if they impose the much larger fee later. Today we were informed by EWEB that they refuse to install these meters because they we [sic] did not have an active building permit pending. * * *" Attachment, Notice of Intent to Appeal.

²If the memorandum constitutes a moratorium, there is no dispute petitioners have been adversely affected by it by virtue of the denial of their meter installation requests.

1 as follows:

2 "'Moratorium on construction or land development'
3 means engaging in a pattern or practice of
4 delaying or stopping issuance of permits,
5 authorizations or approvals necessary for the
6 subdivision and partitioning of, or construction
7 on, any land. It does not include denial or delay
8 of permits or authorizations because they are
9 inconsistent with applicable statutes, rules,
10 zoning or other laws or ordinances, or a public
11 facilities strategy that meets the provisions of
12 ORS 197.768."

13 Petitioners contend EWEB's policy to require evidence
14 of building permits prior to installing water service is a
15 new policy that has the effect of delaying or stopping
16 construction. Petitioners argue that the memorandum "is
17 announced and worded as a change in policy, practice, and
18 procedure" which suspends the "existing policy." Response
19 to Motion to Dismiss 6. Petitioners do not cite to a
20 specific existing policy that the "new" policy changes, but
21 rather argue that "the necessary implication is that there
22 is a different existing policy under which water
23 service/meter set orders are taken, payment is accepted, and
24 installation is made without evidence of an approved
25 building permit." Id.

26 It is not clear whether the "new" policy to which
27 petitioners refer is a policy to require that a building
28 permit be issued before water meter service is installed, or
29 a policy that EWEB personnel verify that a building permit
30 has been issued prior to installation. Either way, EWEB's
31 policy establishes a moratorium only if it has the effect of

1 denying or delaying construction.³

2 EWEB disputes that the memorandum contains a new
3 policy, let alone one that establishes a moratorium on
4 development. EWEB argues:

5 "The July 16, 1996, memo was issued as an internal
6 memorandum to staff concerning the proposed water
7 systems development charge. In the fourth
8 paragraph, EWEB staff is notified that persons
9 seeking to avoid the possible SDCs may try to
10 order water service connection before a living
11 unit exists or before a permit to build a living
12 unit has even been applied for. In light of this
13 new incentive for persons to apply early and avoid
14 the proposed SDC's, staff were directed to check
15 for building permits before approving installation
16 of water meters. This was to ensure compliance
17 with existing EWEB policies and procedures
18 requiring connection to a 'living unit.' Before
19 people were aware of the possibility of an SDC,
20 there was no incentive to seek connection to
21 vacant lots and people did not do so. It was only
22 in light of requests such as petitioners' that
23 EWEB staff needed to be notified of a new need to
24 be sure buildings would be present for water
25 connection.

26 "It is ironic that petitioners claim a moratorium
27 has been instituted. This is especially so since
28 petitioners apparently refused to get building

³We are unpersuaded by petitioners' argument that because the EWEB director specifically requested his staff to obtain evidence of a building permit, by "necessary implication" EWEB has instituted a new policy of requiring building permits prior to water meter installation. It is just as likely that prior to the proposed SDC, an existing requirement that a building permit precede water installation was never an issue. Petitioners have not established that EWEB's requirement for a building permit is a "new" policy. If there is any new policy involved, it is that the staff has been asked to verify the existence of a building permit, whereas in the past they could assume such a permit existed, since there is no reason to request water service to an undeveloped lot. We do not see how asking for evidence of a building permit prior to installing water meters in itself effects a moratorium on construction.

1 permits and begin construction. Rather than
2 preventing construction or land development, EWEB
3 has asked for proof that such construction or
4 development is imminent or in the process before
5 approving water service connection." Motion to
6 Dismiss 5-6.

7 Petitioners argue that EWEB's policy effects a
8 moratorium because it puts a "freeze" on water meter
9 installations pending the issuance of a building permit.
10 Petitioners explain that public water service "is a service
11 necessary for development of or construction upon
12 residential land," regardless of when proposed development
13 or construction is scheduled. Response to Motion to Dismiss
14 5. According to petitioners, the moratorium statute "does
15 not exempt from the definition of a moratorium the denial or
16 delay of facilities connection approvals for lots which are
17 not scheduled for immediate development." Id. at 4.

18 We disagree. By definition, a moratorium must deny or
19 delay development that could otherwise go forward. A policy
20 cannot delay, deny or "freeze" development if that
21 development has not been proposed. Only if a policy delays
22 or denies proposed development would the policy effect a
23 moratorium. In this case, EWEB's policy does not do so.

24 EWEB's requirement that a building permit be in place
25 before a water meter is installed does not preclude
26 petitioners from obtaining any construction permit,
27 authorization or approval. It is petitioners' decision not
28 to obtain building permits, and not the requirement that

1 petitioners provide evidence of building permits, that
2 precludes petitioners from commencing construction. As the
3 memorandum states, if petitioners provide evidence those
4 building permits are issued prior to January 1, 1997, water
5 meters will be installed without an SDC assessment. If they
6 are issued after January 1, 1997, and the SDC assessment
7 system is adopted, an SDC will be assessed when the service
8 is installed. The policy does not in any way "freeze" water
9 meter installation approvals.

10 The requirement that a building permit be issued before
11 water service is installed does not establish a "pattern or
12 practice of delaying or stopping issuance of permits,
13 authorizations or approvals necessary for * * * construction
14 on, any land," and therefore it is not a moratorium under
15 ORS 197.505.⁴

16 Petitioners' appeals are dismissed.

⁴We do not understand petitioners to argue that the denial of their request for water meter installation is in itself a land use decision subject to our jurisdiction, and in any event we find that it is not. ORS 197.015(10)(b).