

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

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

RON MANNING,)
)
Petitioner,)
) LUBA No. 97-011
vs.)
) FINAL OPINION
CITY OF ST. PAUL,) AND ORDER
)
Respondent.)

Appeal from City of St. Paul.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioner.

David Grau, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 05/02/97

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 THE DECISION**

3 Petitioner appeals a city ordinance extending a
4 moratorium.

5 **FACTS**

6 In June, 1995, the city adopted a moratorium on new
7 construction pursuant to ORS 197.520(2).¹ In its findings
8 adopting the moratorium, the city found that there were
9 numerous shortages related to its public facilities. There
10 was no opposition to the moratorium adoption, and it was not
11 appealed. The city extended the moratorium in January,

¹ORS 197.520(2) identifies the requirements for adoption of moratoria as follows:

"For urban or urbanizable land, a moratorium may be justified by demonstration of a need to prevent a shortage of public facilities which would otherwise occur during the effective period of the moratorium. Such a demonstration shall be based upon reasonably available information, and shall include, but need not be limited to, findings:

"(a) Showing the extent of need beyond the estimated capacity of existing public facilities expected to result from new land development, including identification of any public facilities currently operating beyond capacity, and the portion of such capacity already committed to development;

"(b) That the moratorium is reasonably limited to those areas of the city, county or special district where a shortage of key public facilities would otherwise occur; and

"(c) That the housing and economic development needs of the area affected have been accommodated as much as possible in any program for allocating any remaining public facility capacity.

1 1996, and again in June, 1996 pursuant to ORS 197.530(2).²
2 Neither of those extensions was appealed. In January, 1997,
3 the city adopted the challenged ordinance, extending the
4 moratorium for a third and final time.³ Through his
5 attorney, petitioner argued against the extension.

6 Petitioner appeals the approval of the third extension,
7 requesting that this Board find the moratorium invalid.

8 **SCOPE OF REVIEW**

9 The city challenges petitioner's requested relief,
10 asserting that this Board does not have authority to
11 invalidate the moratorium. The city agrees that we have
12 jurisdiction to review the challenged moratorium extension.
13 The city argues, however, that our authority to review the

²ORS 197.530(2) sets forth the criteria for extension of a moratorium:

"No moratorium adopted under ORS 197.520(2) shall be effective for a period longer than six months from the date on which the corrective program is adopted, but such a moratorium may be extended provided the city * * * adopting the moratorium holds a public hearing on the proposed extension and adopts written findings that:

- "(a) Verify that the problem giving rise to the moratorium still exists;
- "(b) Demonstrate that reasonable progress is being made to alleviate the problem giving rise to the moratorium; and
- "(c) Set a specific duration for the renewal of the moratorium."

³ORS 197.530(3) provides:

"No single extension under [ORS 197.530(2)] may be for a period longer than six months, and no moratorium shall be extended more than three times."

1 moratorium extension does not allow us to invalidate the
2 moratorium itself.

3 ORS 197.540 describes our review authority, in part, as
4 follows:

5 "(1) In the manner provided in ORS 197.830 to
6 197.845, the Land Use Board of Appeals shall
7 review upon petition by a county, city or
8 special district governing body or state
9 agency or a person or group of persons whose
10 interests are substantially affected, any
11 moratorium on construction of land
12 development or a corrective program alleged
13 to have been adopted in violation of the
14 provisions of ORS 197.505 to 197.530.

15 "(2) If the board determines that a moratorium or
16 corrective program was not adopted in
17 compliance with the provisions of ORS 197.505
18 to 197.530, the board shall issue an order
19 invalidating the moratorium." (Emphasis
20 added.)

21 ORS 197.540(2) specifies that if this Board determines
22 that any moratorium or corrective program was not adopted in
23 compliance with ORS 197.505 to 197.530 (the moratorium
24 statute), we must invalidate the moratorium. We read the
25 term "moratorium" to encompass the entire duration of a
26 moratorium, including both the six-month period following
27 the initial adoption under ORS 197.520(2) and any additional
28 six-month periods during which the moratorium is extended
29 under ORS 197.530(2). Thus, if this Board determines that a
30 moratorium extension does not comply with ORS 197.530(2),
31 ORS 197.540(2) requires this Board to "issue an order
32 invalidating the moratorium" at the point at which it was

1 improperly extended. We, therefore, disagree with the city
2 that we lack authority under ORS 197.540(2) to invalidate
3 the moratorium. Rather, if we determine that the city did
4 not comply with ORS 197.530(2) when it extended the
5 moratorium, the moratorium itself will end.

6 However, invalidation of a moratorium for failure to
7 comply with ORS 197.530(2) does not invalidate the adoption
8 of the moratorium. ORS 197.540(1) specifies that our review
9 must be in the manner provided in ORS 197.830 to ORS
10 197.845. ORS 197.830(8) requires that "[a] notice of intent
11 to appeal a land use decision * * * shall be filed not later
12 than 21 days after the date the decision sought to be
13 reviewed becomes final." We find nothing in ORS 197.540 or
14 elsewhere in the moratorium statute that would supersede
15 this requirement or otherwise allow an untimely challenge to
16 the adoption of a moratorium through a challenge to a
17 moratorium extension.

18 The 1995 moratorium adoption is not at issue in this
19 case. At issue here is an extension of that moratorium,
20 which is subject to compliance with ORS 197.530(2).

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioner argues the city's decision to extend the
23 moratorium violates the moratorium statute because there is
24 not substantial evidence to support the conclusion that the
25 shortages which gave rise to the moratorium still exist, as
26 required by ORS 197.530(2)(a).

1 Petitioner challenges the city's finding that "the
2 City's shortage of public facilities, as set forth in
3 Ordinance 1995-167, which gave rise to the moratorium still
4 exists." Record 4. However, the substance of his challenge
5 is that the shortages do not continue to exist because they
6 did not exist when the moratorium was enacted. Petitioner
7 argues:

8 "For the City to make a finding that the public
9 facility shortage still exists, there needed to be
10 a demonstrated problem in the first place.

11 "Ordinance No. 1995-167 [adopted in 1995] declared
12 a moratorium on new construction within the City
13 of St. Paul. The City made several findings of
14 fact relating to the shortage of public facilities
15 giving rise to the moratorium. The findings are
16 not supported by substantial evidence in the
17 record that the shortages existed when the Board
18 adopted Ordinance 1995-167. Therefore a finding
19 that the shortages giving rise to moratorium still
20 exist cannot rely on Ordinance 1995-167 for
21 support. The City cannot find the problem still
22 exists because it failed to demonstrate a problem
23 in the first place." (Record citations omitted.)
24 Petition for Review 7.

25 Thus, in his petition for review, and at oral argument,
26 petitioner's argument that the shortages do not continue to
27 exist is confined to his allegation that the shortages did
28 not exist when the moratorium was adopted in 1995.
29 Petitioner makes numerous evidentiary challenges to the
30 findings adopted in 1995. He does not, however,
31 independently challenge the findings made in 1997 that the
32 shortages identified in 1995 continue to exist. Rather,
33 following individual challenges to the findings adopted in

1 1995, petitioner concludes:

2 "The above analysis demonstrates the findings of
3 fact in Ordinance No. 1995-167 are not supported
4 by substantial evidence in the record before the
5 City Council when it passed the moratorium. The
6 City never justified the moratorium through
7 evidence that supports the existence of shortages.
8 Nothing that a reasonable person would have relied
9 on in the record demonstrated the existence of the
10 problem. Without properly demonstrating the
11 existence of the alleged problem, a finding that
12 the problem still exists cannot be supported.
13 Therefore, the findings in Ordinance No. 1997-167
14 [the challenged extension] that the shortage
15 declared in Ordinance No. 1995-167 still exist is
16 not supported by substantial evidence in the whole
17 record." Petition for Review 22.

18 The city correctly responds that the time for
19 challenging the 1995 adoption of the moratorium has long
20 expired, and that petitioner cannot challenge a two-year old
21 adoption of the moratorium through a challenge to a third
22 extension of it. Whether there was substantial evidence to
23 justify the city's 1995 findings regarding the shortages in
24 public facilities is not relevant to this review.
25 Petitioner had the opportunity in 1995 to challenge those
26 findings. He did not.

27 The substantial evidence question relevant here, under
28 ORS 197.530(2)(a), is whether there is evidence in the
29 record to substantiate that the shortages identified in 1995
30 still exist. Petitioner's argument does not directly
31 address this question.

32 Substantial evidence is evidence a reasonable person
33 would rely on in reaching a decision. City of Portland v.

1 Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475
2 (1984). In reviewing the evidence, we must consider and
3 weigh all the evidence in the record to which we are
4 directed, and determine whether, based on that evidence, the
5 local decisionmaker's conclusion is supported by substantial
6 evidence. Younger v. City of Portland, 305 Or 346, 358-60,
7 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County,
8 116 Or App 584, 588, 842 P2d 441 (1992). If there is
9 substantial evidence in the whole record to support the
10 city's decision, LUBA will defer to it, notwithstanding that
11 reasonable people could draw different conclusions from the
12 evidence. Adler v. City of Portland, 25 Or LUBA 546, 554
13 (1993).

14 In making an evidentiary challenge petitioner may argue
15 that there is no evidence to support the local government's
16 conclusion, that the evidence upon which the local
17 government relies is not substantial or does not in fact
18 support its conclusion, or both. Canfield v. Yamhill
19 County, 142 Or App 12, 920 P2d 588 (1996). While his
20 argument is indirect, and therefore unclear, we understand
21 petitioner to argue here that there is both no evidence to
22 support the city's decision, and that the evidence upon
23 which the city relies does not support its conclusion, or is
24 unsubstantial.

25 The city cites to evidence in the record to
26 substantiate its conclusion that the shortages that existed

1 when the moratorium was adopted in 1995 continue to exist.
2 Based upon the evidence in the record to which we have been
3 directed, we conclude both that there is evidence upon which
4 the city could rely in reaching its conclusion, and that a
5 reasonable person could reach the decision the city made in
6 finding that the shortages continue to exist.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Petitioner alleges the moratorium extension violates
10 the moratorium statute because there is not substantial
11 evidence to support the conclusion that reasonable progress
12 is being made to alleviate the problems giving rise to the
13 moratorium, as required by ORS 197.530(2)(b). ORS
14 197.530(2)(b) requires that the city "[d]emonstrate that
15 reasonable progress is being made to alleviate the problem
16 giving rise to the moratorium."

17 In finding compliance with ORS 197.530(2)(b), the city
18 found:

19 "Reasonable progress is being made to alleviate
20 the problem giving rise to the moratorium,
21 including installation of a water treatment system
22 to correct water quality problems; installation of
23 water meters on all existing connections;
24 repairing or upgrading sanitary sewer lift
25 stations; application for and receipt of grants to
26 finance preparation of a master plan for the
27 development, repair or upgrade of the storm sewer
28 system and street system." Record 4.

29 Petitioner disagrees that the city has made "reasonable
30 progress." He argues with respect to several corrective

1 program measures that the limited progress made to date is
2 unreasonable, and that there is no evidence in the record to
3 support the county's conclusion that the progress is
4 reasonable. He further asserts that evidence upon which the
5 city relied to support its findings does not support its
6 conclusion.

7 Petitioner offers no contrary, conflicting evidence to
8 support his argument. However, it appears that petitioner
9 argues here that there is no evidence to support the city's
10 decision that reasonable progress has been made, and that
11 the evidence upon which the city relied to reach its
12 decision is not substantial in that it does not in fact
13 support that decision.

14 In response to petitioner's evidentiary challenge, the
15 city cites to testimony and evidence from several
16 individuals within the city who have been assigned
17 responsibility for implementing the corrective program, and
18 from individuals contracted by the city to perform specified
19 tasks to implement the program. While there is obviously
20 some dispute between petitioner and the city as to what
21 constitutes "reasonable" progress, each of these individuals
22 reported to the city regarding the progress that has been
23 made, and that which is yet to be made.

24 We find that there is evidence in the record related to
25 the city's finding that reasonable progress has been made.
26 We also find that the evidence upon which the city relied is

1 such that a reasonable person could reach the decision that
2 the city did when it found that the city has made reasonable
3 progress in alleviating the shortages identified when the
4 moratorium was adopted.

5 The second assignment of error is denied.

6 The city's decision is affirmed.⁴

⁴At oral argument petitioner moved to either supplement the record or have this Board take official notice of April 3, 1995 city council minutes, on the basis that the city should have and failed to include them in the record of this proceeding. A challenge to the contents of the local record must be made through a record objection filed within 10 days after the record is filed with LUBA. OAR 661-10-026. Petitioner's motion is denied.