BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID L. DAVIS, Petitioner, vs. CITY OF BANDON, Respondent.	)	
INDUSTRIAL SUPPLIES CO. PROFIT SHARING TRUST, CHARLES F. LARSON, and REX ROBERTS, Petitioners, vs. CITY OF BANDON, Respondent.	)	FINAL OPINION AND ORDER LUBA No. 89-159

Appeal from City of Bandon.

Dan Neal, Eugene, filed a petition for review and argued on behalf of petitioner Davis. With him on the brief was Neal & Eng.

Bill Kloos, Eugene, filed a petition for review and argued on behalf of petitioners Industrial Supplies Co. Profit Sharing Trust, et al. With him on the brief was Johnson & Kloos.

Mark J. Greenfield, Portland, filed a response brief and argued on behalf of respondent. With him on the brief was Mitchell, Lang & Smith.

HOLSTUN, Referee; SHERTON, Chief Referee, KELLINGTON, Referee, participated in the decision.

REVERSED 7/13/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners challenge Ordinance No. 1256, "AN ORDINANCE ADOPTING A MORATORIUM ON CONSTRUCTION AND LAND DEVELOPMENT IN CERTAIN AREAS WITHIN THE CITY OF BANDON * * *." Record 4.

FACTS

In this consolidated appeal, petitioners challenge the first of four moratoria adopted by the City of Bandon. The challenged moratorium was adopted on December 5, 1989, and expired 35 days later on January 9, 1990. Petitioners own land affected by the moratorium, and under the terms of the moratorium they may not develop their properties. Petitioners in LUBA No. 89-159 submitted a request for development approval on December 19, 1989. Petitioner in LUBA No. 89-153 has not requested development approval.

A second moratorium was adopted January 9, 1990 and expired February 16, 1990. A third moratorium was adopted February 13, 1990, effective through June 16, 1990. A fourth moratorium, adopted June 9, 1990, extended the moratorium through December 16, 1990.[1]

[1]Separate appeals have been filed challenging each of the three moratoria adopted following the expiration of the moratorium challenged in this appeal. Davis v. City of Bandon, LUBA No. 90-009; Davis v. City of Bandon, LUBA Nos. 90-030 and 90-038; Davis v. City of Bandon, LUBA Nos. 90-086 and 90-087.

INTRODUCTION

A. Motion to Dismiss

Respondent earlier moved to dismiss this appeal proceeding, arguing that the appeal is moot. Respondent pointed out that at the time of its motion to dismiss, the moratorium appealed in this proceeding had been replaced by the third moratorium adopted on February 13, 1990 and that the third moratorium was based on an expanded evidentiary record and additional findings.[2] We denied respondent's motion to dismiss. We concluded that in the unique circumstances presented by this case (i.e. multiple short term moratoria which expire before a decision on the merits can be rendered by LUBA) our decision could have practical effect and the appeal is, therefore, not moot. Davis v. City of Bandon, ___ Or LUBA ___ (LUBA No. 90-009, Order on Motion to Dismiss, May 2, 1990), slip op 4.[3] We also concluded that if this appeal is properly viewed as moot, the exception for cases capable of repetition yet avoiding review applies and a decision in this appeal is proper.

Finally, we concluded that in LUBA No. 89-159 there

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[2]The fourth moratorium, which is now in effect, extended the third moratorium.

[3]The reasoning expressed in our order denying the motion to dismiss LUBA No. 90-009 was adopted by reference in our order denying the motion to dismiss in this appeal. Davis v. City of Bandon, ___ Or LUBA ___ (LUBA Nos. 89-153 and 89-159, Order on Motion to Dismiss, May 2, 1990), slip op 2.

exists another reason for denying respondent's contention that the appeal is moot. Petitioners in that appeal alleged their application for development approval filed on December 19, 1990 was an application for a "permit" as that term is defined in ORS 227.160(2). We noted that

> "[p]etitioners reason that if they are successful in invalidating Moratorium I in this appeal, by virtue of ORS 227.178(3) their application must be judged by the city in accordance with the regulations in effect when Moratorium I was adopted, notwithstanding the subsequently adopted moratoria. See Kirpal Light Satsang v. Douglas County, 96 Or App 207, 212, 772 P2d 944, modified on reconsideration 97 Or App 614, rev den 308 Or 382 (1989)." Davis v. City of Bandon, ___ Or LUBA ___ (LUBA Nos. 89-153 and 89-159, Order on Motion to Dismiss, May 2, 1990), slip op 3.

We pointed out that we had been provided no basis upon which to reject petitioners' arguments and concluded that if those arguments were correct, our decision in LUBA No. 89-159 would not be moot because it would have practical effect.

B. Request for Summary Invalidation

The petitions for review in this appeal were filed on May 16, 1989. In a May 25, 1989 letter to the Board, respondent stated in relevant part:

> "The City disagrees with many of the arguments set forth in [the petitions for review]. It firmly believes that the underlying basis for the moratoria is supportive of the land use goals, consistent with the policy in ORS 197.510(2), and justified by a compelling need. However, upon review of the arguments set forth in those briefs, the City acknowledges that some of its findings did not fully address all the relevant criteria in ORS 197.520(3), and for some of its findings, the

> record lacks substantial evidence to support the decisions.
>
> "Under normal circumstances, the City would move to remand the decisions in order to cure the technical defects in its findings and record. However, because ORS 197.540(2) establishes invalidation, rather than reversal or remand, as the only form of remedy in moratoria proceedings, this option is not available. Accordingly, the City will not file briefs in defense of those decisions, and hereby stipulates to the Board issuing orders invalidating the two moratoria which are the subject of the above-captioned proceedings."

Respondent clarified during a conference call with the parties that it desired a summary opinion of the Board invalidating the challenged moratorium but not addressing the assignments of error contained in the petitions for review.

Petitioners objected, arguing that summary invalidation, without addressing the merits of the arguments in the petitions for review, is improper in the situation presented in this appeal. Petitioners pointed out the Board refused to dismiss the appeal as moot, partially because it agreed the city's action was capable of repetition yet avoiding review. Petitioners argue that it similarly is inappropriate to invalidate the moratorium in a summary manner since, as the city's letter makes clear, disputes concerning whether and how the city's decision is flawed remain unresolved. We understand petitioners to contend there is no way to determine whether the causes of these

disputes are present in subsequent moratoria that have been or may be adopted by the city.

During a June 5, 1990 conference call, the Board agreed that summary invalidation was inappropriate and agreed that it would issue an opinion on the merits, to the extent such an opinion is warranted. Respondent was given an opportunity to file a response brief, and oral argument was held on June 20, 1990.

In its brief, respondent renews its objection to the Board's decision not to issue a summary order. Respondent contends:

> "It has always been the Board's policy to issue a summary order, not an opinion on the merits, where a local government admits error and requests a remand. In City of Eugene v. Lane County, 12 Or LUBA 68 (1984), a petitioner objected to a voluntary remand requested by respondent. The petitioner wanted an opinion on the merits. The Board held:
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> > "'The Board understands from the county that it wishes its decision to be remanded and, as a consequence, no longer enforceable. Where the maker of a challenged land use decision believes its decision is in error, or somehow defective, it is ordinarily not appropriate to force it to continue to defend the decision. To do so would be to control the county's legislative process. We therefore grant the request for remand.'" (Respondent's emphases deleted.) Respondent's Brief 1-2.

Respondent goes on to argue any opinion issued in this appeal would be an advisory opinion. Respondent contends

such an advisory opinion would be particularly inappropriate in this case since its agreement that the moratorium should be invalidated gives petitioners "a complete victory * * *." Respondent's Brief 2. Respondent also argues that since subsequent moratoria must be judged on the basis of the records supporting those moratoria, the decision in this appeal will have no res judicata effect and will be of little value, in that the findings and evidentiary records are "considerably different and the decision under review is a different land use decision." Respondent's Brief 3.

Respondent appears to be correct that because the moratorium decisions adopted by the city differ somewhat and are supported by different evidentiary records, a decision in this appeal is unlikely to have a preclusive effect in the appeals challenging subsequent moratoria. See Nelson v. Clackamas County, ___ Or LUBA ___ (LUBA No. 89-151, April 30, 1990); Douglas v. Multnomah County, ___ Or LUBA ___ (LUBA No. 89-086, January 12, 1990). Respondent may also be correct that the posture in which this case comes to the Board makes a decision in this appeal of very limited value in resolving subsequent appeals. However, we disagree with respondent that a summary remand gives petitioners "a complete victory." As petitioners point out and the briefs make clear, the parties interpret the controlling statutory criteria somewhat differently. We address the issues upon which the parties disagree, to the extent a decision on the

merits may provide guidance to the city in any decision to further extend the moratorium.

DECISION

In 1980 the legislature adopted comprehensive legislation setting forth the circumstances in which a moratorium may be appropriate, the standards by which a local government is to determine whether those circumstances exist, and the manner in which this Board is to review moratoria. Or Laws 1980, ch 2; codified at ORS 197.505 to 197.540. The findings adopted by the legislature concerning moratoria are as follows:

> "The Legislative Assembly finds and declares that:
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> "(1) The declaration of moratoria on construction and land development by cities, counties and special districts may have a negative effect on the housing policies and goals of other local governments within the state, and therefore, is a matter of state-wide concern.
>
> "(2) Such moratoria, particularly when limited in duration and scope, and adopted pursuant to growth management systems that further the state-wide planning goals and local comprehensive plans may be both necessary and desirable.
>
> "(3) Clear state standards should be established to assure that the need for moratoria is considered and documented, the impact on housing is minimized, and necessary and properly enacted moratoria are not subjected to undue litigation." ORS 197.510.

ORS 197.520 distinguishes between moratoria that are needed "to prevent a shortage of key facilities" and moratoria that are "not based on a shortage of key facilities." The

parties agree that the moratorium challenged in this proceeding is of the latter type. ORS 197.520(4) provides that moratoria not based on a shortage of key facilities may not be longer than 120 days.

ORS 197.540 limits this Board's scope of review in considering appeals of moratoria. The Board is to review moratoria based on the record made during the local government proceedings, and is to invalidate the moratorium if the local government has failed to adopt findings, supported by substantial evidence, that demonstrate that the relevant standards in ORS 197.520(2) and (3) are satisfied. The standards relevant to the moratorium challenged in this appeal appear at ORS 197.520(3).

> "A moratorium not based on a shortage of key facilities under subsection (2) of this section may be justified only by a demonstration of compelling need. Such a demonstration shall be based upon reasonably available information, and shall include, but need not be limited to, findings:
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> "(a) That application of existing development ordinances or regulations and other applicable law is inadequate to prevent irrevocable public harm from residential development in affected geographical areas;
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> "(b) That the moratorium is sufficiently limited to insure that a needed supply of affected housing types within or in proximity to the city, county or special district is not unreasonably restricted by the adoption of the moratorium;
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> "(c) Stating the reasons alternative methods of achieving the objectives of the moratorium

are unsatisfactory;

"(d) That the city, county or special district has determined that the public harm which would be caused by failure to impose a moratorium outweighs the adverse effects on other affected local governments, including shifts in demand for housing, public facilities and services and buildable lands, and the overall impacts of the moratorium on population distribution; and

"(e) That the city, county or special district proposing the moratorium has determined that sufficient resources are available to complete the development of needed interim or permanent changes in plans, regulations or procedures within the period of effectiveness of the moratorium." (Emphasis added.)

Respondent, in large part, concedes that its findings are inadequate to demonstrate compliance with the above quoted standards of ORS 197.520(3), or are unsupported by substantial evidence. However, respondent contends the defective findings and lack of evidentiary support in the record of this proceeding do not mean there are not underlying bases adequate to support the moratorium. We believe no purpose would be served by addressing the inadequacies identified by petitioners with which respondent apparently agrees.[4] We also do not address petitioner

[4]For example, petitioners complain that the city's findings fail to address, except in an impermissibly conclusory manner, the requirement of 197.520(3)(a) to demonstrate that existing regulations are not adequate "to prevent irrevocable public harm from residential development in affected geographical areas." Petitioners also complain that the city's findings show the moratorium, rather than being based on findings of compliance with the statutory standards, was based on findings that time was needed to determine whether a moratorium was warranted. Petitioners'

Davis's contention that the short notice he received of the city's December 5, 1989 hearing in this matter violated his right to due process. In his challenge of the second moratorium in LUBA No. 90-009, petitioner does not allege the notice was improper. Neither does petitioner Davis contend that improperly short notice was given in the proceedings to adopt moratoria three and four.[5] However, we address briefly the apparently different views of the standard imposed by ORS 197.520(3) expressed by petitioners and respondent.

Petitioners contend our review in this matter should follow the two step approach taken in 1000 Friends of Oregon v. Clackamas Cty, 3 Or LUBA 281 (1981), applying the former Statewide Planning Goal 2 exception standard which required that a goal exception be supported by "compelling reasons and facts."[6] In that case we explained that in applying the "compelling reasons and facts" requirement, we first considered whether appropriate findings addressing all relevant factors were adopted and then asked whether "a

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characterization of the challenged findings is accurate and the findings are clearly inadequate to satisfy the requirements of ORS 197.520(3)(a).

[5]Respondent contends there is no statutory or other legal requirement for a hearing in advance of a decision to adopt a moratorium and therefore no requirement for individualized notice to petitioner Davis.

[6]The provisions allowing exceptions to the statewide planning goals originally adopted by the Land Conservation and Development Commission as part of Goal 2, subsequently were adopted in amended form by the legislature in 1983. Or Laws 1983, ch 827, sec 19(a). Those statutory exception standards are codified at ORS 197.732, and Goal 2 has been amended to incorporate the statutory standards.

reasonable person faced with the same findings [would] be compelled (obliged or forced) to conclude as the local government did." Id. at 297.

We agree with petitioners, and respondent does not appear to dispute, that the city's decision must be supported by findings addressing all the relevant standards, that those findings must be supported by substantial evidence and that the ultimate standard to be met ("compelling need") is a "stringent standard." Petition for Review (LUBA No. 89-159) 12; Respondent's Brief 9. However, like respondent, we see no particular reason to apply the two step analysis noted above simply because ORS 197.520(3) and the prior Goal 2 exception standard happen to share the adjective "compelling."

Under the prior Goal 2 exception standard, the ultimate legal standard to be satisfied was that "it is not possible to apply the appropriate goal to specific properties or situations * * *." In meeting that standard, the reasons and facts relied upon have to be "compelling." In other words, under the prior Goal 2 exception standard, "compelling" modified the type of findings and evidence to be relied upon, not the ultimate legal standard. Under ORS 197.520(3) "compelling" modifies "need," the ultimate legal standard.

In addition, as respondent correctly notes, there are significant differences between the Goal 2 exception process

(which allows actions inconsistent with the goals) and the statutes governing moratoria which explicitly recognize that moratoria may, in appropriate circumstances, further the statewide planning goals and comprehensive plans. More importantly, the ORS 197.520(3) "compelling need" standard is accompanied by a list of very specific determinations that must be made to demonstrate that standard is met.[7] Therefore, while we agree with all the parties that the "compelling need" standard is a stringent one, we believe the proper focus of our review is on the requirements of the statute, in particular the five findings required by ORS 197.520(3)(a) through (e), quoted supra.

In its brief, respondent suggests that a moratorium might be justified under ORS 197.520(3) if it is "linked to purposes that further the statewide planning goals and

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[7]The findings required to support an exception under Goal 2, prior to amendments adopted following 1983 legislation concerning goal exceptions, were much more general.

> "(a) Why these other uses should be provided for;
>
> "(b) What alternative locations within the area could be used for the proposed uses;
>
> "(c) What are the long term environmental, economic, social and energy consequences to the locality, the region or the state from not applying the goal or permitting the alternative use;
>
> "(d) A finding that the proposed uses will be compatible with other adjacent uses."

The Land Conservation and Development Commission, following the legislature's direction in 1983, adopted rules setting forth the kinds of reasons that may justify an exception. ORS 197.732(3); OAR 660-04-022.

comprehensive plans." Respondent's Brief 10. While the case for establishing the existence of a threatened "irrevocable public harm" under ORS 197.520(3)(a) likely would be strengthened by the existence of such a link, the standards of ORS 197.520 require much more.

The statutory scheme demonstrates a clear legislative preference for proceeding by way of normal planning processes, not by way of moratoria. Before existing development ordinances and regulations are suspended by way of a moratorium, they must be shown to be inadequate. ORS 197.520(3)(a). Even if the ordinances and regulations are inadequate, alternative methods of achieving the objectives of the moratorium must be unsatisfactory. ORS 197.520(3)(c). The moratorium must be limited to avoid unreasonable restriction of needed housing. ORS 197.520(3)(b). The nature and scope of the irrevocable public harm must be such that it outweighs the adverse effects on other affected local governments that may result from the moratorium. ORS 197.520(3)(d). Finally, the city must determine that it has the resources to develop needed plans or regulations within the term of the moratorium. ORS 197.520(3)(e). ORS 197.520(3) states that all of these determinations must be part of the determination of compelling need.[8]

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[8]ORS 197.520(3) also makes it clear that findings may be adopted addressing factors in addition to those identified at ORS 197.520(3).

Under the statutory standards governing moratoria, identification of a threatened public harm to a resource protected by the statewide planning goals is not enough. Unless the nature and magnitude of the threatened public harm is sufficient to allow the determinations required by ORS 197.520(3) to be made, damage to or even loss of a resource subject to the protection of one or more statewide planning goals does not justify a moratorium under ORS 197.520(3). In each case, the particular facts will determine whether there is a compelling need for a moratorium.

Because the city's findings fall substantially short of demonstrating compliance with ORS 197.520(3), the city's decision is reversed, and the moratorium challenged in this proceeding is invalidated.