

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 HOME BUILDERS ASSOCIATION OF)
5 METROPOLITAN PORTLAND, and COMMON)
6 GROUND: URBAN LAND COUNCIL OF)
7 OREGON,)
8) LUBA No. 94-166
9 Petitioners,)
10) FINAL OPINION
11 vs.) AND ORDER
12)
13 CITY OF WILSONVILLE,)
14)
15 Respondent.)

16
17
18 Appeal from City of Wilsonville.
19

20 Jon A. Chandler, Lake Oswego, filed the petition for
21 review and argued on behalf of petitioners.
22

23 Michael E. Kohlhoff, City Attorney, Wilsonville, filed
24 the response brief and argued on behalf of respondent.
25

26 Celeste J. Doyle, Assistant Attorney General, Salem,
27 filed an Amicus brief on behalf of Department of Land
28 Conservation and Development. With her on the brief was
29 Theodore R. Kulongoski, Attorney General; Thomas A. Balmer,
30 Deputy Attorney General; and Virginia L. Linder, Solicitor
31 General.
32

33 GUSTAFSON, Referee; HANNA, Referee, participated in the
34 decision.
35

36 REVERSED 12/21/95
37

38 You are entitled to judicial review of this Order.
39 Judicial review is governed by the provisions of ORS
40 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's legislative adoption of a
4 Transportation Management Ordinance.

5 **MOTION TO PARTICIPATE AS AMICUS**

6 The Department of Land Conservation and Development
7 requests permission to participate as amicus. The motion is
8 allowed.

9 **FACTS**

10 Petitioners challenge the city's adoption of a Traffic
11 Management Ordinance (TMO), which the city established in
12 order to ration traffic increases through intersections at
13 and near the Wilsonville Road and I-5 interchange. As the
14 city describes the situation precipitating the adoption of
15 the TMO:

16 "Interstate 5 bridges over the Wilsonville Road
17 and the I-5 on and off ramps form an interchange
18 which feeds traffic into the resulting underpass
19 of Wilsonville Road. The bridge design causes the
20 Wilsonville Road underpass to be narrow and fails
21 to accommodate projected traffic growth. * * *
22 The bottleneck at the underpass and on and off
23 ramps results in backup and overflow. This is
24 currently causing the City's Boones Ferry Road and
25 Wilsonville Road intersection immediately to the
26 west of the interchange and the Town Center Loop
27 East Road and Wilsonville Road intersection
28 immediately to the east to operate at such
29 increased capacity that any further new traffic
30 generated by proposed new developments cannot be
31 accommodated safely and without congestion in
32 excess of Level of Service "D" defined in the
33 Highway Capacity manual." Response Brief 3-4.

1 For several years, the city has experienced significant
2 residential and commercial development. The city's efforts
3 to accommodate the resulting increased traffic are hindered
4 both by the physical layout of the I-5/Wilsonville
5 interchange, and by the number of jurisdictions with
6 authority over the streets surrounding the interchange.
7 However, through a series of financing arrangements between
8 the city, state and federal governments, the city now plans
9 street improvements to increase the capacity at the subject
10 intersections.

11 The city estimates that, when completed, the
12 improvements will accommodate 1,435 additional peak hour
13 trips through the subject intersections. The city estimates
14 completion of the improvements will take five years. In
15 order to accommodate development during those five years,
16 the city adopted a TMO to allocate the capacity resulting
17 from the improvements by rationing development that can
18 affect the subject intersections.

19 Under the TMO, the city divides the total capacity of
20 1,435 peak trips predicted from the improvements by five,
21 representing the number of years required to finish the
22 improvements. It thus allocates 287 trips to each of the
23 five years. The TMO further rations development by
24 providing that a developer can receive approval for a
25 project only when it will use 30% or less of the 287 trips
26 for any given year. If a project will use more than the

1 allocated amount, the project is deferred until it reserves
2 a sufficient allocation of trips. The TMO expires after
3 five years.

4 Petitioners appeal the city's TMO as a de facto
5 moratorium, adopted without adherence to the procedural or
6 substantive requirements of the state moratorium statute,
7 ORS 197.505 et seq.

8 **JURISDICTION**

9 The city does not contest petitioners' standing to
10 challenge the TMO as a city regulation. However, the city
11 does contest petitioners' standing to challenge the TMO as a
12 moratorium. The city argues that, if the TMO is a
13 moratorium under ORS 197.505 et seq., then even though the
14 city did not follow the procedural or substantive
15 requirements for establishing a moratorium, under ORS
16 197.540 the TMO is not yet ripe for review because none of
17 petitioners' members has been denied a building permit as a
18 result of the TMO. See Schatz v. City of Jacksonville, 21
19 Or LUBA 149 (1991); Schatz v. City of Jacksonville, 20 Or
20 LUBA 565 (1990).¹

¹The city also contested petitioners' standing to challenge the TMO as a moratorium because petitioners failed to establish any of their members live in Wilsonville. In a motion for evidentiary hearing, submitted after the briefs were filed, petitioners offered an affidavit establishing at least one of their members live in Wilsonville. In an order responding to that and other motions, we did not respond to the merits of the case, but took notice of that affidavit, and determined that petitioners would, in fact, have standing to challenge the TMO as a moratorium. Based on the merits of the case, we now find that petitioners need not have established the residency of one of their members in order to challenge the TMO as a

1 Based on the city's argument, if we determine that the
2 TMO is a moratorium in contravention of the state's
3 moratorium statute, then, notwithstanding its illegality,
4 under the moratorium statute we must dismiss the appeal
5 because it is not yet ripe for review. The city's position
6 is not well founded.

7 Had the city purported to adopt the moratorium
8 pursuant to ORS 197.505 et seq., petitioners would have to
9 establish that their interests were substantially affected
10 by the moratorium before they could challenge it. ORS
11 197.540. However, the city made no effort to properly
12 establish a moratorium pursuant to ORS 197.505 et seq. It
13 cannot now assume the benefits of the standing requirements
14 for a moratorium established pursuant to the statutory
15 requirements. Petitioners need not show they have been
16 denied a development permit before they can challenge the
17 TMO as being a de facto moratorium.

18 **FIRST ASSIGNMENT OF ERROR**

19 Petitioners contend the TMO is an illegal moratorium,
20 in violation of ORS 197.505 et seq., the moratorium statute.
21 That statute authorizes moratoria on construction or
22 development of land in certain, limited and regulated
23 situations.² It defines a "moratorium on construction or

moratorium, because the city did not purport to adopt the TMO as a
moratorium under ORS 197.505 et seq.

²ORS 197.510 authorizes moratorium as follows:

1 land development" to mean:

2 "engaging in a pattern or practice of delaying or
3 stopping issuance of permits, authorizations or
4 approvals necessary for the subdivision and
5 partitioning of, or construction on, urban and
6 urbanizable land. It does not include actions
7 engaged in or practices in accordance with a
8 comprehensive plan or implementing ordinances
9 acknowledged by the Land Conservation and
10 Development Commission under ORS 197.251, nor does
11 it include the denial or delay of permits or
12 authorizations because they are inconsistent with
13 applicable zoning or other laws or ordinances."
14 ORS 197.505(1) (Emphasis added).

15 The city makes several, apparently alternative,
16 arguments to support its TMO. First, the city does not
17 purport to have adopted a moratorium under ORS 197.505 et
18 seq.³ Rather, the city contends the TMO is a growth

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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 and economic development policies and goals of other local governments within the state, and therefore, is a matter of statewide concern.
 - (2) Such moratoria, particularly when limited in duration and scope, and adopted pursuant to growth management systems that further the statewide planing 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 and economic development is minimized, and necessary and properly enacted moratoria are not subjected to undue litigation.

³ORS 197.520 states the requirements for adopting a moratorium based on a shortage of public facilities, as follows:

- "(1) No city, county or special district may adopt a moratorium on construction or land development unless it first:

1 management ordinance authorized by its comprehensive plan.
2 The city also argues that, because the TMO is not otherwise
3 a moratorium under ORS 197.520, it is not subject to the
4 exclusion requirements of ORS 197.505. Alternatively, the
5 city argues that the TMO is excluded under ORS 197.505
6 because it implements several comprehensive plan policies.

"(a) Provides written notice to the department at least 45 days prior to the final public hearing to be held to consider the adoption of the moratorium;

"(b) Makes written findings justifying the need for the moratorium in the manner provided for in this section; and

"(c) Holds a public hearing on the adoption of the moratorium and the findings which support the findings which support the moratorium.

"(2) 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 In advance of that argument, the city asserts that the TMO
2 is a less restrictive rationing system than an earlier, now
3 expired growth management ordinance acknowledged in 1982 by
4 the Land Conservation and Development Commission (LCDC). On
5 that basis, the city argues this TMO need not be separately
6 acknowledged. The city further argues that, as an
7 implementing ordinance, under ORS 197.835 the TMO need not
8 be acknowledged for goal compliance. Finally, as another
9 alternative, the city argues this TMO is deemed to be
10 acknowledged as in accordance with its comprehensive plan
11 because it was submitted to LCDC.

12 We address first the city's contention that the TMO
13 does not constitute a moratorium under the definition of ORS
14 197.505.

15 The city argues it need not apply the moratorium
16 statute in order to ration development under the TMO because
17 the city's comprehensive plan and implementing ordinances
18 sufficiently authorize the city's actions without the need
19 to resort to the statute. The city contends:

20 "the declaration of a facilities moratorium [under
21 ORS 197.505 et seq.] is intended to be an
22 exceptional tool, when a local government is
23 either unable to implement an adequate facilities
24 allocation management plan under its comprehensive
25 plan policies or the comprehensive plan policies
26 themselves provide inadequate guidance for
27 implementation of facilities allocation. See ORS
28 197.510. Where an acknowledged plan with an
29 acknowledged implementing capacity standard
30 provides a basis for facilities allocation, then
31 resorting to a moratorium is unnecessary as the

1 needed facility allocation can be implemented as a
2 functional plan." Response Brief 15.

3 Based upon its asserted authority to implement its
4 comprehensive plan, the city stated in the TMO:

5 "[t]he City of Wilsonville, by adoption of this
6 ordinance, does not intend to enact a moratorium
7 on construction or land development as defined in
8 ORS 197.505, but rather to enact a traffic growth
9 management plan pursuant to the City's
10 acknowledged Comprehensive Land Use Plan and
11 implementing ordinances which will equitably
12 permit controlled growth of traffic generated by
13 construction and land development to continue on a
14 pro rata, first application basis." Record 13.

15 The city found its TMO to comply with its comprehensive
16 plan and argues now that LUBA cannot substitute its judgment
17 for that of the city. Citing Clark v. Jackson County 313 Or
18 508, 836 P2d 710 (1992) and Cope v. City of Cannon Beach,
19 115 Or App 11 (1992) the City argues that we are bound by
20 its interpretation of its own comprehensive plan as
21 permitting the TMO.

22 The city's interpretation of its own comprehensive plan
23 is not the subject of this appeal. Rather, the issue here
24 is whether the city's TMO is a moratorium within the
25 definition of the state moratorium statute. We are not
26 bound by the city's interpretation of state statutes.
27 Whether the city believes its comprehensive plan
28 contemplates the rationing system adopted through the TMO
29 does not determine whether the TMO nonetheless violates the
30 state moratorium statute.

31 Subject to the exclusion in ORS 197.505(1), the TMO

1 meets the definition of a moratorium if it establishes "a
2 pattern or practice of delaying or stopping issuance of
3 permits, authorizations or approvals necessary for the
4 subdivision or partitioning of, or the construction on,
5 urban and urbanizable land." ORS 197.505(1). The city
6 concludes, summarily, that "the mere presence of an
7 allocation of trip traffic generation does not itself
8 establish either a practice or pattern of delaying or
9 denying development permits." Response Brief 16. The city
10 does not explain why, substantively, the TMO does not
11 establish such a pattern or practice.⁴

12 The statutory definition of moratorium does not require
13 a complete halt to the issuance of permits; rather, a
14 pattern of delay in the issuance of permits is sufficient to
15 constitute a moratorium under the statutory definition. We
16 find that the rationing system approved through the TMO
17 constitutes a moratorium under the statutory definition.
18 Regardless of how the city characterizes its TMO, the TMO
19 will create a practice whereby development permits will be

⁴The city states in its brief that it chose to adopt this TMO rather than a statutory moratorium, because use of the term "moratorium" taints a developer's ability to obtaining development financing. This rationale suggests that the label given to the TMO is related more to policy than to substance. However, the economic effects of the ordinance do not determine its definition. The city cannot fashion away a moratorium by calling it something else, in order to either make it sound more inviting or in order to avoid the statutory requirements. Unless there is a substantive difference between the TMO and a moratorium under ORS 197.505 et seq., the city cannot avoid the statutory requirements for implementation of a moratorium by calling it something else.

1 delayed or denied, based upon a rationing pattern, during
2 the TMO's five year duration. Based on its language, its
3 purpose and its effect, the TMO satisfies the definition of
4 a moratorium under ORS 197.505 et seq.

5 Even though the TMO otherwise satisfies the definition
6 of a moratorium, it is nonetheless excluded as a moratorium
7 if it constitutes an "action[] engaged in or practice[] in
8 accordance with a comprehensive plan or implementing
9 ordinance acknowledged by the Land Conservation and
10 Development Commission under ORS 197.251." ORS 197.505(1).
11 The city argues that the TMO satisfies the statutory
12 exclusion requirements.

13 The TMO relies on three general comprehensive plan
14 policies as follows:⁵

15 Comprehensive Land Use Plan Policy 3.3.15 states:

16 "If adequate regional transportation services,
17 including I-5 interchange modification or
18 additions, and high capacity public transportation
19 cannot be provided, then the City shall re-
20 evaluate and reduce the level of development
21 and/or timing of development anticipated by other
22 elements of this Plan. Such reductions shall be
23 consistent with the capacity of the transportation
24 system at the time of re-evaluation."

25 Comprehensive Land Use Plan Policy 2.2.2 states:

26 "To insure timely, orderly and efficient use of
27 public facilities and services, while maintaining

⁵The city also relies on paragraph 4.139(4) and subparagraph 4.139(4)(b) of the Wilsonville Code to support its TMO. The city does not assert that this ordinance has been acknowledged and we will not presume that it has.

1 livability within the community, the City shall
2 establish a Growth Management Program consistent
3 with the City's regional growth allocation and
4 coordinated with a Capital Improvements Plan.

5 "* * * * *."

6 Comprehensive Plan Land Use Plan Policy 3.3.3 states:

7 "Minimum street service levels shall be
8 established. Dedication of adequate right-of-way,
9 as established by the Street System Master Plan,
10 or as otherwise approved by the Planning
11 Commission, shall be required prior to actual site
12 development.

13 If the proposed development would cause an
14 existing street to exceed the minimum service
15 capacity, then appropriate improvements shall be
16 made prior to occupancy of the completed
17 development. Said improvements may be deferred if
18 they are scheduled and funding is confirmed
19 through the City's Capital Improvements Plan for
20 construction within two years of the date of
21 occupancy, provided that such a postponement of
22 improvements would not seriously endanger public
23 health and safety. In such cases, interim
24 improvements shall be required."

25 The essence of the city's argument is that these
26 comprehensive plan policies have already been determined to
27 be sufficient to justify a growth management ordinance such
28 as the TMO. The city acknowledges that, when first
29 submitted to LCDC for acknowledgment, its comprehensive plan
30 was found "lacking in implementing procedures for
31 urbanization and growth management policies." Response
32 Brief 20. In response to that deficiency, at the same time
33 the plan was acknowledged in 1982, the city also submitted
34 and had acknowledged Ordinance 211, "An Ordinance Adopting a

1 Growth Management Program and Procedures and Declaring an
2 Emergency." Ordinance 211 provided for an annual
3 residential permit rationing system which, according to the
4 city, was more restrictive than the TMO proposes to be.
5 Ordinance 211 expired in 1987.

6 The city asserts that the TMO "is patterned after
7 Ordinance 211 and the same acknowledged Comprehensive Plan
8 policies." Response Brief 22. The city argues that,
9 because LCDC acknowledged Ordinance 211 in 1982, and the
10 comprehensive plan policies have not been changed, the TMO
11 need not be acknowledged in order to satisfy the
12 requirements for an exclusion from the moratorium
13 requirements. Rather, the city argues "[i]t is reasonable
14 to conclude that Ordinance 431 [the TMO] should receive
15 similar growth management exemption treatment in light of
16 the specific exempting language of ORS 197.505(1)."
17 Response Brief 13.

18 Under the city's reasoning, once LCDC has acknowledged
19 any growth management program, all future growth management
20 programs are excluded under ORS 197.505 without LCDC
21 acknowledgment, and without regard to their content, so long
22 as the general comprehensive plan policies upon which the
23 initially acknowledged program is based, remain in place.
24 Such reasoning is inconsistent with the language of ORS
25 197.505

26 The city cannot presume that, since another ordinance

1 adopting a detailed rationing of building permits was
2 specifically acknowledged by LCDC in 1982, it either need
3 not have the subject rationing ordinance acknowledged, or
4 that, through its previous acknowledgment of Ordinance 211
5 LCDC determined that the city's comprehensive plan
6 sufficiently authorized its TMO so as to qualify under the
7 ORS 197.505 exclusion. The statute very specifically
8 requires that, to be excluded from the strict requirements
9 for moratoria, the action must be in accordance with an
10 acknowledged plan or ordinance provision. The city cannot
11 escape the requirements of the statute because it previously
12 had such an acknowledged ordinance.

13 The city's reliance on Ordinance 211 is not only
14 misplaced, it supports petitioners' point. If the
15 acknowledgment of Ordinance 211 has any significance in this
16 proceeding, it is that the general provisions of the
17 comprehensive plan lacked the necessary implementation
18 measures to justify the rationing system of Ordinance 211.
19 The acknowledgment of Ordinance 211 was necessary in order
20 for the city's rationing scheme to be acceptable as an
21 exclusion under ORS 197.505(1). As the city acknowledges,
22 the policies upon which Ordinance 211 were based have not
23 changed.

24 The city next argues that the TMO need not be
25 separately acknowledged because it is merely an implementing
26 ordinance. Under ORS 197.835, ordinances implementing

1 acknowledged comprehensive plan provisions need not be
2 acknowledged for goal compliance. However, implementation
3 measures must nonetheless comply with state statutes. Since
4 the effect of this implementation measure is to create a
5 moratorium under ORS 197.505 et seq., the city must either
6 follow the requirements of the moratorium statute, or have
7 the implementing ordinance acknowledged pursuant to ORS
8 197.615.

9 Finally, the city argues that the TMO was deemed to be
10 acknowledged because it was submitted to LCDC pursuant to
11 ORS 197.615. Under the moratorium statute, however, "deemed
12 acknowledgment" under ORS 197.615 is insufficient. ORS
13 197.505 specifically states that the implementing provision
14 upon which the city relies to justify an exemption to the
15 statute, must be acknowledged pursuant to ORS 197.251. The
16 TMO was not acknowledged pursuant to that statute.

17 Petitioners urge that, in order to fit within the
18 exclusion of ORS 197.505(1), the TMO itself must have been
19 acknowledged by LCDC. Petitioners' reading of the statute
20 goes too far. A growth management mechanism such as the TMO
21 could constitute an action engaged in or practice in
22 accordance with an acknowledged comprehensive plan provision
23 or implementing ordinance so long as the city has an
24 acknowledged provision that fully sets forth the essential
25 structure, form and requirements for such action or
26 practice. In order to fit within the exclusion of ORS

1 197.505(1), it must be clear on the face of the acknowledged
2 comprehensive plan or implementing ordinance that, when LCDC
3 acknowledged the provision, it was affirmatively
4 acknowledging local actions that fell within the ORS
5 197.505(1) exclusion.

6 The challenged ordinance was not acknowledged and,
7 therefore, does not itself satisfy the ORS 197.505(1)
8 exclusion. Moreover, none of the comprehensive plan
9 provisions upon which the city relies, singularly or
10 cumulatively, is sufficiently specific to justify the TMO as
11 an exclusion under ORS 197.505(1). As petitioners state,
12 "LCDC had no reason to consider whether a radical and
13 specific rationing scheme like the TMO would withstand
14 scrutiny under the goals when it acknowledged those general
15 provisions." Petition for Review 13. There is no evidence
16 in this case that LCDC intended, through the comprehensive
17 plan provisions upon which the city relies, to acknowledge
18 an exclusion to the moratorium statute.

19 The city's TMO is a moratorium, in violation of the
20 procedural and substantive requirements of ORS 197.505 et
21 seq.

22 The first assignment of error is sustained.

23 **ASSIGNMENTS OF ERROR TWO THROUGH SIX**

24 In their second assignment of error, petitioners
25 contend the TMO is unconstitutional. In their third through
26 six assignments of error, petitioners contend the TMO

1 violates several statewide planning goals. Because we find
2 that the TMO is a de facto moratorium, adopted in violation
3 of the procedural and substantive requirements of the state
4 moratorium statute, and reverse the city's adoption of it on
5 that basis, we need not reach those other issues.

6 The city's decision is reversed.