

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 THUNDERBIRD HOTELS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2006-186

13
14 JANTZEN DYNAMIC CORPORATION,
15 *Petitioner,*

16
17 vs.

18
19 CITY OF PORTLAND,
20 *Respondent.*

21
22 LUBA No. 2006-187

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Portland.

28
29 Roger A. Alfred, Portland, filed a petition for review and argued on behalf of
30 petitioner Thunderbird Hotels, LLC. With him on the brief were Mark D. Whitlow and
31 Perkins Coie, LLP.

32
33 Steven W. Abel, Portland, filed a petition for review and argued on behalf of
34 petitioner Jantzen Dynamic Corporation. With him on the brief were Elaine R. Albrich and
35 Stoel Rives, LLP.

36
37 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed the response brief
38 and argued on behalf of respondent.

39
40 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM Board Member,
41 participated in the decision.

42
43 INVALIDATED 06/22/2007

44
45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

NATURE OF THE DECISION

Thunderbird Hotels, LLC and Jantzen Dynamic Corporation (Jantzen) (together, petitioners) appeal a decision by the City of Portland imposing a moratorium on new development in commercial and industrial zones on Hayden Island.

FACTS

On October 4, 2006, the city council held a public hearing on and unanimously adopted Ordinance No. 180475 (the moratorium ordinance), adopting a six-month moratorium on development on Commercial General (CG) and General Industrial 2 (IG2) zoned land on Hayden Island, pursuant to ORS 197.505 through 197.540 (the moratorium statute). The city based its justification for adopting the moratorium ordinance on the provisions set forth in ORS 197.520(2).¹

Hayden Island is located on the city’s northern boundary. Petitioner Thunderbird is the owner of a hotel located on Hayden Island adjacent to the Columbia River. The hotel is located on land zoned CG. Petitioner Jantzen is the owner of a shopping center located on

¹ ORS 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 Hayden Island, known as the Jantzen Beach Center. The shopping center is located on land
2 zoned CG.

3 The I-5 freeway provides the only connection between the island and downtown
4 Portland and Vancouver, Washington through a single set of on and off ramps on the east
5 leading northbound, and a single set of on and off ramps on the west leading southbound.
6 The city council concluded that there was a shortage of capacity in transportation facilities,
7 including freeway ramps, the freeway itself, and surface streets that prompted the need for
8 the moratorium.² Petitioners appeared at the council meeting during which the moratorium
9 was adopted, and now appeal its adoption.³

10 INTRODUCTION

11 ORS 197.510 acknowledges that moratoria may have negative effects on property
12 owners, housing, and economic development, and that therefore such decisions must be
13 adopted under clear standards that document the need for the moratorium and ensure that the
14 impacts of the moratorium are minimized. In general, under 197.520(2), a local government
15 must demonstrate the need for the moratorium by showing that without the moratorium, new
16 land development will cause public facility capacity to be exceeded. In adopting a
17 moratorium, a local government must establish how severely capacity will be exceeded, limit
18 the area affected by the moratorium, and fairly allocate any remaining capacity. ORS
19 197.520(2).

² ORS 197.505(1) defines “public facilities” as “those public facilities for which a public facilities plan is required under ORS 197.712.”

³ LUBA Nos. 2006-186 and 2006-187 are consolidated appeals of the moratorium ordinance. Subsequent to filing those appeals, the city adopted an ordinance extending the moratorium for an additional six-month period. Petitioners appealed that ordinance in LUBA Nos. 2007-079/081. The appeals of the ordinance extending the moratorium were suspended pending resolution of these appeals. When this opinion refers to the moratorium ordinance, it is to the ordinance that adopted the original moratorium and not the ordinance that extended the original moratorium.

1 **FIRST ASSIGNMENT OF ERROR (JANTZEN)/SECOND ASSIGNMENT OF**
2 **ERROR (THUNDERBIRD)**

3 Jantzen’s first assignment of error and Thunderbird’s second assignment of error
4 assert that the city erred in failing to follow the procedures for legislative decisions and
5 quasi-judicial decisions set forth in state statute and the Portland City Code (PCC) Title 33 in
6 adopting the moratorium ordinance. The city does not dispute that it failed to follow the
7 procedures set forth in the PCC for quasi-judicial or legislative decisions, and responds that
8 the moratorium ordinance was adopted in compliance with the procedures set forth in ORS
9 197.505 through ORS 197.540.

10 ORS 197.540(4) provides:

11 “Notwithstanding any provision of ORS Chapters 195, 196 and 197 to the
12 contrary, the sole standard of review of a moratorium on construction or land
13 development or a corrective program is under the provisions of this section,
14 and such a moratorium shall not be reviewed for compliance with the
15 statewide planning goals adopted under ORS chapters 195, 196 and 197.”

16 ORS 197.540(1) provides in relevant part:

17 *“In the manner provided in ORS 197.830 to 197.845, [LUBA] shall review*
18 **** any moratorium on construction or land development *** alleged to*
19 *have been adopted in violation of the provisions of ORS 197.505 to 197.540.”*
20 (Emphasis added).

21 Petitioners argue that the italicized phrase above that references ORS 197.830 to 197.845
22 creates an internal inconsistency in the moratorium statute when read in conjunction with
23 ORS 197.540(4), and that under ORS 197.835(1) we must reverse or remand a moratorium if
24 the city failed to follow proper procedure.

25 In *Schatz v. City of Jacksonville*, 21 Or LUBA 149, 155-158 (1991), *aff’d* 113 Or App
26 675 (1992), we rejected a nearly identical argument made by the petitioners in that case. We
27 reviewed the history of the moratorium statute, and concluded that the function of the
28 language in ORS 197.540(1) is to specify that appeals of moratoriums are to be conducted

1 according to the procedures set forth in ORS 197.830 to 197.845.⁴ We then concluded that
2 in reviewing a moratorium, our scope of review is limited under ORS 197.540(4) to
3 determining whether the moratorium was adopted in violation of ORS 197.505 to 197.530.
4 *Id.* at 158.

5 We reject petitioners’ contention that the city was required to follow the procedures
6 set forth in PCC Title 33 and state statutes other than the moratorium statute. The
7 moratorium statute requires the city to (1) provide written notice of the proposed moratorium
8 to the Department of Land Conservation and Development (DLCD) at least 45 days prior to
9 the final public hearing on the moratorium, (2) make written findings in support of the
10 moratorium, and (3) hold a public hearing on the moratorium and the findings justifying it.
11 *See* ORS 197.520(1).

12 Petitioners’ only argument that resembles a challenge to the city’s compliance with
13 the procedures set forth in ORS 197.520(1) is that the city only held one public hearing when
14 adopting the moratorium. Petitioners argue that that the use of the phrase “final public
15 hearing” implies that more than one public hearing is required when a jurisdiction is adopting
16 a moratorium. However, we do not understand the statute’s use of the phrase “final public
17 hearing” as imposing an *obligation* on a local government to hold multiple public hearings
18 on a moratorium prior to its adoption, only that a local government must provide notice to
19 DLCD prior to the final public hearing on the moratorium. It may well be, as in this case,
20 that the local government might hold only one public hearing on the moratorium, and that
21 hearing would necessarily be the “final public hearing.”

22 Petitioners do not argue that the city failed to follow any other procedures set forth in
23 ORS 197.520. Jantzen’s first assignment of error and Thunderbird’s second assignment of
24 error are denied.

⁴ ORS 197.830 to 197.845 generally describe the procedures for appeals to LUBA, the burden on appeal, LUBA’s scope of review, LUBA’s ability to adopt rules, and deadlines for final decisions.

1 **SECOND AND THIRD ASSIGNMENTS OF ERROR (JANTZEN)/FIRST**
2 **ASSIGNMENT OF ERROR (THUNDERBIRD)**

3 In these assignments of error, petitioners advance various arguments under several
4 subassignments of error challenging the findings that the city adopted under ORS
5 197.520(2)(a) and (b). We address the various subassignments of error and arguments
6 together.

7 **1. ORS 197.520(2)(a)**

8 As explained by the city in its response brief, ORS 197.520(2)(a) requires the city to:

- 9 “1. Identify the [public] facilities on which the moratorium is based;
- 10 “2. Describe the *estimated* capacity of these facilities and identify any of
11 these facilities that are currently operating beyond capacity; and
- 12 “3. Describe the transportation capacity needs that are *expected to result*
13 from new development and how much of that capacity cannot be met
14 by the identified transportation facilities.” Response Brief 12
15 (emphasis in original).

16 *See* n 1. Thus, the first step under the statute is for the city to identify the public facilities on
17 which the moratorium is based.

18 Petitioners argue that the city failed to adequately define the “public facilities” that
19 the moratorium seeks to address. Petitioners assert that the city does not have a
20 transportation plan for Hayden Island, and maintain that it was incorrect for the city to
21 consider transportation facilities that are within the jurisdiction of the Oregon Department of
22 Transportation (ODOT), such as I-5 and the ramps leading to it. Petitioner Jantzen argues:

23 “Because the (c)ity does not have a public facilities plan specifically for
24 Hayden Island, because the (c)ity did not clearly define the specific
25 transportation components on which it was basing its capacity analysis, and
26 because the (c)ity fails to distinguish between state-controlled and local-
27 controlled facilities, public facilities under ORS 197.520(2) are inadequately
28 defined.” Petitioner Jantzen’s Petition for Review 17.

29 The city responds that the city’s transportation plan for the “North Transportation
30 District” as set forth in the city’s adopted Transportation System Plan (TSP) is the public

1 facilities plan for transportation facilities on and adjacent to Hayden Island. The TSP
2 identifies and classifies the I-5 freeway, the ramps leading to the freeway, and several surface
3 streets, and identifies projects for improvement. Other than to point out that ODOT has
4 jurisdiction over the I-5 freeway and ramps, petitioners do not explain why it was improper
5 for the city to include those facilities in its analysis, and we think it was proper for the city to
6 do so, especially considering that those facilities are identified and classified in the city's
7 TSP. We agree with the city that it adequately identified the public facilities on which the
8 moratorium is based as freeway and internal transportation facilities set forth in the city's
9 TSP.

10 The next step under ORS 197.520(2)(a) is for the city to determine the capacity of the
11 transportation facilities that are needed to serve current planned development on Hayden
12 Island. This capacity can be shown through consideration of a public facilities plan
13 established under ORS 197.712. *See* n 2.

14 The city maintains that it identified the estimated capacity of the I-5 freeway, ramps,
15 and internal street system on Hayden Island, and that those facilities are operating beyond
16 capacity during at least some of the peak morning and evening hours. The city relied on an
17 analysis prepared by the city's traffic consultant, which showed that I-5 in the vicinity of
18 Hayden Island, including its on and off ramps, currently exceeds capacity thresholds
19 identified in the TSP. The freeway exceeds capacity for at least 3 hours in the morning peak
20 and 4 hours in the afternoon peak, in violation of the performance standards in the TSP. The
21 city also found that during these times many of the intersections on the island's surface
22 streets exceed their available storage capacity, at times by up to 500 percent. Record 22-26.
23 The city also evaluated crash data for a 6.4 mile portion of I-5 in the vicinity of Hayden
24 Island, including a one-half mile segment known as the Oregon Bridge Influence Area
25 (OBIA). That data discloses a disproportionately high number of crashes in the OBIA.
26 Finally, the city noted that the one bus line serving Hayden Island operates at below average

1 reliability compared to all bus lines in the city. All of that data led the city to conclude that
2 the transportation facilities on and in the vicinity of the island are operating at or beyond
3 acceptable capacity set forth in the TSP at certain times of day.

4 Petitioners dispute the city's traffic consultant's analysis and argue that evidence in
5 the record from their traffic consultants shows that certain *surface streets* on the island are
6 operating within capacity and would continue to operating within capacity even assuming a
7 worst case scenario build-out on the island. However, that evidence and analysis excludes
8 the I-5 freeway and ramps, which, as noted above, are properly identified as transportation
9 facilities by the city. Petitioners do not dispute that those facilities are operating beyond
10 capacity. We think that the city adequately described the estimated capacity of the
11 transportation facilities on the island, and identified the facilities that are currently operating
12 beyond capacity.

13 The third step under ORS 197.520(2)(a) requires the city to describe the
14 transportation capacity needs that are expected to result from new development and how
15 much of that capacity cannot be met by the identified transportation facilities. Petitioners
16 argue that because the city improperly defined and quantified the public facilities the
17 moratorium sought to address, the city did not and could not make findings showing the need
18 for new transportation facilities expected to result from new land development. The city
19 responds that it evaluated two development scenarios for development of underdeveloped
20 and vacant parcels on the island. The first scenario projected an additional 1.6 million square
21 feet of new buildings with the city-required minimum parking spaces. The second, more
22 conservative scenario projected an additional 529,000 square feet of buildings and the city-
23 required maximum parking spaces. Both scenarios yielded new vehicle trips that are higher
24 than that which could be absorbed by the current transportation facilities. Petitioners do not
25 explain why the city's findings described above regarding capacity needs expected to result

1 from new land development are inadequate. The city adequately described the transportation
2 needs expected to result from new development on the island.

3 **2. ORS 197.520(2)(b)**

4 ORS 197.520(2)(b) requires the city to demonstrate through findings:

5 “That the moratorium is reasonably limited to those areas of the city * * *
6 where a shortage of key public facilities would otherwise occur* * *.”

7 Petitioner Thunderbird asserts that the moratorium violates ORS 197.520(2)(b) because the
8 city did not adopt findings that the moratorium is reasonably limited to areas of the city
9 where a shortage of facilities would otherwise occur. The city responds that it limited the
10 moratorium to the areas of Hayden Island with significant redevelopment and development
11 potential, and limited the moratorium to only the CG and IG2 zoning district, and that, taken
12 together, the city’s findings are adequate to explain the geographic scope of the moratorium.
13 We agree with the city that its findings are adequate to demonstrate that the moratorium is
14 reasonably limited to the area of the city, Hayden Island, where a shortage would otherwise
15 occur.

16 Jantzen’s second and third assignments of error, and Thunderbird’s first assignment
17 of error are denied.

18 **FOURTH ASSIGNMENT OF ERROR (JANTZEN)**

19 In its fourth assignment of error, petitioner Jantzen argues that the city failed to fulfill
20 the requirements of ORS 197.520(2)(c), which requires the city to demonstrate through
21 findings:

22 “That the housing and economic development needs of the area affected have
23 been accommodated as much as possible in any program for allocating any
24 remaining public facility capacity.”

25 The city responds first that the moratorium did not adopt a “program for allocating any
26 remaining [transportation] facility capacity,” because capacity was already exceeded and
27 therefore, there was no remaining unused capacity to allocate. Jantzen responds that the

1 city’s six exemptions from the development moratorium, and the general exemption of
2 residentially zoned land from the moratorium, are in fact a “program” that allocates
3 remaining public facility capacity, and that the city has not shown through findings that the
4 economic development needs of the affected area have been accommodated “as much as
5 possible” in that program.

6 The adopted moratorium generally exempts residentially zoned land from the
7 moratorium because it applies only to land zoned CG and IG2, and also contains six specific
8 exemptions from the moratorium.⁵ The city explains that the council exempted residential

⁵ The city’s decision sets out the following exemptions:

“d. Exemptions. For purposes of this ordinance ‘development’ shall not include:

- “1. An application for a Type I, II, IIx, III or IV land use review that has been submitted and deemed complete prior to the effective date of this ordinance, except as provided in paragraph d.5 below. The application must contain all of the applicable submittal requirements listed in PCC 33.730.606.C (Required information for land use reviews except land divisions) or PCC 33.730.060.D (Required information for land divisions) as appropriate.
- “2. An application for a building permit under the Oregon Structural Specialty Code 2004 Edition, or any subsequently adopted editions of this code, that includes all submittal requirements, for which an intake fee has been paid and that has been accepted for review prior to the effective date of this ordinance.
- “3. An application for a permit of a permit for work performed under the Oregon Mechanical Specialty Code 2004 Edition, the Oregon Plumbing Specialty Code 2005 Edition or the Oregon Electrical Specialty Code 2005 Edition, or under any subsequently adopted editions of these codes.
- “4. An application for a permit that is subject to the Oregon Structural Specialty Code 2004 Edition, or any subsequently adopted editions of this code, for work on an existing building if the applicant demonstrates and the City Engineer determines the use of the building after completion of the work will not add more parking spaces and will not generate more vehicle trips than the prior use. The City Engineer shall use the Institute of Traffic Engineers Trip Generation Manual (ITE Manual) 7th Edition to make this determination.
- “5. An application for a Type I, IIx or III land use review for a land division under PCC Chapter 33.600. If the land division is approved, no development shall be permitted on any lot or parcel unless such development qualifies under one of the exemptions in paragraphs d.1 through d.4 above.

1 land and certain other types of development in the CG and IG2 zones from the moratorium in
2 an attempt to minimize the moratorium’s impact on housing and economic development, and
3 that the exemptions exclude development activities that are already accounted for in the
4 transportation system as existing uses.

5 The first three specific exemptions allow development to continue on building permit
6 and land use review applications that have been submitted prior to the effective date of the
7 moratorium ordinance. Evidence in the record shows that some residential development, and
8 some of the applications exempted in Exemptions 1 through 3, would include development
9 that will require additional capacity that is not available because, as the city has shown,
10 capacity is already exceeded.⁶ Record 53-54, Response Brief 18. Exemption 4, however,
11 allows redevelopment of an existing building only if the redevelopment will not require
12 additional transportation capacity, measured by additional parking spaces and more vehicle
13 trips generated than the number of trips generated by the building’s previous use.

14 Prior to the hearing, and again at the hearing, petitioner Jantzen submitted a proposed
15 amendment to Exemption 4 to allow for redevelopment of existing structures, and
16 development of replacement structures, so long as the development did not generate a net
17 increase in weekday am or pm peak hour vehicle trips on certain segments of the freeway.⁷

“6. An application for a final plat approval under PCC Chapter 33.600 for a land division that has received preliminary subdivision or partition approval prior to the effective date of this ordinance. If the final plat is approved, no development shall be permitted on any lot or parcel unless such development qualifies under one of the exemptions in paragraphs d.1 through d.4 above.”

⁶ Exemptions 5 and 6 exempt applications for land divisions and applications for final plat approval but prohibit development of lots or parcels approved under those applications, so that those applications presumably would not generate additional traffic.

⁷ Jantzen’s amendment proposed the following changes to Exemption 4 (additional language is shown in double underline, and deleted language is stricken through):

“An application for a permit that is subject to the Oregon Structural Specialty Code 2004 Edition, or any subsequently adopted editions of this code; or for any Type I, II, Ix, III or IV land use review; for work on an existing building or replacement building or buildings if the

1 Jantzen argued before and during the hearing that, without the proposed amendment, it and
2 other property owners would not be permitted to engage in remodeling of their properties,
3 even if such remodeling would not result in new vehicle trips and have no worse impact on
4 the transportation capacity. Jantzen argues that the city’s failure to consider its proposed
5 amendment to allow for business activities such as remodeling means that the economic
6 development activities on the island have not been accommodated as much as possible as
7 required by ORS 197.520(2)(c).

8 As noted above, Jantzen presented its proposed amendment to Exemption 4 to the
9 city prior to the hearing, and also raised it at the hearing. Record 68-74, 498, 504-505. The
10 amendment that Jantzen proposed appears to be almost identical in effect to Exemption 4, in
11 that it proposed to allow only development or redevelopment that did not create additional
12 traffic or require additional traffic capacity.⁸ The amendment was not adopted as part of the
13 moratorium ordinance, and the findings do not discuss the proposed amendment.⁹

14 We agree with Jantzen that the city’s argument that there is no remaining capacity to
15 allocate, and thus there is no program to allocate remaining capacity, is inconsistent with the
16 city’s rationale for at least some of the moratorium ordinance’s six specific exemptions and
17 the general exemption of residentially zoned land. Those exemptions make clear that in the
18 city’s view, some capacity exists to allow certain types of development (i.e. development of

applicant demonstrates and the City Engineer determines the use of the building or buildings
after completion of the work will not ~~add more parking spaces and will not generate more~~
~~vehicle trips than~~ cause a net increase in weekday morning or evening peak hour vehicle trips
on any critical segment of the Jantzen Beach/I-5 interchange over the prior use. The City
Engineer shall use the Institute of Traffic Engineers Trip Generation Manual (ITE Manual)
7th Edition to make this determination as supplemented by locally-collected data from similar
land uses.” Record 75.

⁸ The minutes reflect that at the hearing, prior to public testimony during which Jantzen’s representatives testified regarding the proposed amendment, the city attorney advised the city council that the effect of Jantzen’s proposed amendment could be to “potentially transform the transportation permitting process of the transportation staff level into a land use review.” Record 499.

⁹ As noted, the city’s findings do not address Jantzen’s request. The city now argues in its brief that the proposed amendment did not address *midday* vehicle queues that already exceed capacity, and characterizes this as a “significant omission.” Response Brief at 25.

1 residentially zoned land and commercial land already approved for development) that may in
2 fact exacerbate the existing facility shortage problem that the moratorium seeks to address.
3 That is in essence a program to allocate capacity.

4 The statute mandates that the city demonstrate through findings that the “economic
5 development needs of the area affected have been accommodated as much as possible in any
6 program for allocating any remaining public facility capacity.” As noted above, some of the
7 exemptions from the moratorium will undoubtedly allow development that will exacerbate
8 the existing shortage in the transportation facility, and other exemptions will not exacerbate
9 the existing shortage. Jantzen proposed a modification that appears to fall in the second
10 category of exemptions that would not exacerbate the existing facility shortage. Given the
11 moratorium statute’s mandate to ensure that the impacts of the moratorium are minimized,
12 we think that the city was obligated to explain in its findings why a proposal that appears to
13 allow economic development that will not require additional capacity, or exacerbate the
14 existing facility problems, was rejected. In failing to explain in its findings why Jantzen’s
15 proposal was rejected, the city failed to demonstrate through findings that its moratorium
16 complied with the statutory mandate that the city demonstrate that it is accommodating
17 economic development “as much as possible.”¹⁰

18 Jantzen’s fourth assignment of error is sustained.

19 **C. Remedy**

20 ORS 197.540(2) provides:

21 “If [LUBA] determines that a moratorium or corrective program was not
22 adopted in compliance with the provisions of ORS 197.505 to 197.540, the
23 board shall issue an order invalidating the moratorium.”

¹⁰ That explanation must appear in the city’s findings and cannot be advanced for the first time in the city’s brief following an appeal of the moratorium ordinance to LUBA.

1 The moratorium was not adopted in accordance with the provisions of ORS
2 197.520(2)(c). Therefore, the Ordinance is invalidated.¹¹

¹¹ At oral argument, the city requested that if only some portions of the ordinance were found to violate the moratorium statute, that those portions of the Ordinance be invalidated but the remainder of the Ordinance remain in effect. Under ORS 197.540(2)(c), we have no authority to invalidate only portions of the Ordinance.