

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. 2007-081

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from the City of Portland.

18
19 Roger A. Alfred, Portland, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Perkins Coie LLP.

21
22 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed the response brief
23 and argued on behalf of respondent.

24
25 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
26 participated in the decision

27
28 DISMISSED

04/03/2008

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city ordinance extending a moratorium on development within commercial and industrial zones on Hayden Island.

FACTS

In October of 2006, the city adopted a moratorium on all development within commercial and industrial zones on Hayden Island, an island in the Columbia River that I-5 crosses before entering the State of Washington. Petitioner appealed the moratorium to LUBA. In *Thunderbird Hotels, LLC v. City of Portland*, 54 Or LUBA 487 (2007) (*Thunderbird I*), we invalidated the moratorium. Both petitioner and the city appealed our decision in *Thunderbird I* to the Court of Appeals. While the appeal of the moratorium was pending before LUBA and the Court of Appeals, the city adopted three extensions to the moratorium. This appeal involves the first extension to the moratorium, which the city adopted in March 2007. Petitioner also appealed the third extension to LUBA, and we issue an opinion this date invalidating the city’s decision. *Thunderbird Hotels, LLC v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2007-242, April 3, 2008).¹

MOOTNESS

While this appeal was pending before LUBA, the parties’ appeals of our decision in *Thunderbird I* were pending before the Court of Appeals. While this appeal was pending, the first extension of the moratorium expired, and the city adopted subsequent extensions. Because the challenged decision had expired, we requested that the parties brief the issue of whether this appeal was moot. While we did not decide the issue while the parties’ appeals were pending before the Court of Appeals, we believe the Court’s subsequent opinion now provides an answer.

¹ For a more detailed description of the facts involved in this appeal, see our decisions in *Thunderbird I* and LUBA No. 2007-242.

1 In *Thunderbird Hotels, LLC v. City of Portland*, ___ Or App ___, ___ P3d ___
2 (March 19, 2008) (*Thunderbird II*), petitioner argued that the city did not have statutory
3 authority to amend the moratorium through an extension of the original moratorium.² The
4 Court of Appeals dismissed the appeals of the original moratorium as moot. In determining
5 that the appeals of the original moratorium were moot, the Court addressed whether a local
6 government could amend a moratorium while extending the moratorium. The Court stated:

7 “* * * we conclude that the city was not authorized to amend the moratorium
8 as an adjunct to extending it pursuant to ORS 197.520 and ORS 197.530. It
9 follows that the purported second and third extensions of the moratorium – the
10 substantive validity of which are not before us and which we expressly do not
11 decide – failed, as a matter of both fact and law, to constitute lawful
12 extensions of the moratorium originally declared by Ordinance No. 180475.
13 From that fact, it also unavoidably follows that the original moratorium
14 expired on the expiration date of its first and only lawful extension * * *.”
15 Slip op 15.

16 The Court further stated:

17 “Finally, because the moratorium that is the subject of our judicial review
18 expired on that date, it necessarily follows that the exercise of our judicial
19 review function in regard to that moratorium would have no practical effect
20 on the rights of the parties to this proceeding. * * *

21 “In sum, not merely the parties’ dispute [about whether the city could amend
22 the moratorium while extending it], but this entire proceeding, is moot.” Slip
23 op 16.

24 We are not subject to the same mootness restrictions on our jurisdiction as the Court
25 of Appeals. *See Just v. City of Lebanon*, 193 Or App 132, 137-47, 88 P3d 312 (2004)
26 (constitutional justiciability principles, including mootness, that apply to courts do not apply
27 to LUBA). Nevertheless, we generally dismiss appeals as moot where our review would
28 have no practical effect. *Mobile Crushing Company v. Lane County*, 13 Or LUBA 97, 99
29 (1985). In the present appeal, petitioner seeks review of the first extension of a moratorium

² Unlike the first extension, in the second extension of the moratorium the city amended certain provisions of the moratorium while extending the moratorium.

1 that has been invalidated. The Court of Appeals has ruled that the second and third
2 extensions were unlawful and on that basis has dismissed as moot the city's appeal of
3 LUBA's decision invalidating the original moratorium. In dismissing that appeal as moot,
4 the Court of Appeals stated that reviewing the merits of the original moratorium would have
5 no practical effect because the moratorium expired when the first extension expired on July
6 6, 2007. Based on that ruling, we do not see how our review of the expired first extension of
7 an invalidated moratorium would have any practical effect. We further do not see any other
8 reason to review the merits of the first extension. Therefore, this appeal is moot.

9 This appeal is dismissed.