

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 THUNDERBIRD HOTELS, LLC,

4 *Petitioner,*

5
6
7 vs.

8 CITY OF PORTLAND,

9 *Respondent.*

10 LUBA No. 2007-242

11 FINAL OPINION

12 AND ORDER

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17 Appeal from the City of Portland.

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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.

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

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

27
28 INVALIDATED

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. After adopting the original moratorium, and during the time the appeals of the original moratorium were pending before LUBA and the Court of Appeals, the city extended the original moratorium by ordinance on three separate occasions.

The city adopted the first extension in March, 2007 and extended the moratorium for three months until July 6, 2007. Petitioners appealed that decision to LUBA, and we issue an opinion this date dismissing the appeal of the first extension as moot. *Thunderbird Hotels, LLC v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2007-081, April 3, 2008). The city adopted the second extension in June, 2007 and extended the moratorium for approximately six months to January 1, 2008. In addition to extending the original moratorium, the second extension also amended the moratorium to allow work on replacement buildings in commercial and industrial zones if that work generates no additional traffic. The second extension was not appealed. The city adopted the third extension in November, 2007, and extended the moratorium for six months until July 1, 2008. Petitioners appealed the third extension to LUBA in this appeal.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner argues that the city did not have statutory authority to amend the
3 moratorium when it adopted the second extension of the original moratorium. The Court of
4 Appeals addressed this issue in resolving the appeals of our decision in *Thunderbird I*. In
5 *Thunderbird Hotels, LLC. v. City of Portland*, ___ Or App __, ___ P3d ___ (March 19,
6 2008) (*Thunderbird II*), the Court of Appeals dismissed the appeals of the original
7 moratorium as moot. In determining that the appeals of the original moratorium were moot,
8 the Court addressed whether a local government can amend a moratorium while extending
9 the moratorium under ORS 197.530(2). The Court stated:

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

19 The Court determined that a local government’s amendment of a moratorium while
20 adopting an extension to that moratorium causes the extension to be invalid as a matter of
21 law. According to petitioner, this is precisely what the city did, and therefore the Court of
22 Appeals’ decision controls.¹ The city does not dispute that the Court of Appeals’ holding
23 had the effect of invalidating the third extension, but argues that the third extension of the
24 moratorium was also the adoption of a new moratorium, and therefore does not run afoul of
25 the Court of Appeals’ decision. We do not agree with the city’s argument that the third
26 extension can be construed as a new moratorium.

¹ The Court of Appeals issued its decision the day before oral argument was scheduled in this appeal and after the briefs had been filed.

1 The preamble to the third extension states that the ordinance is to “[e]xtend
2 moratorium on development * * *.” Record 2. The challenged decision describes the first
3 and second extensions as actions that were taken to “extend the moratorium” originally
4 adopted. *Id.* The challenged decision states that it “is appropriate and necessary to extend
5 the moratorium imposed by [the original moratorium ordinance] for an additional six months
6 * * *.” Record 4. The challenged decision concludes that the original moratorium ordinance
7 “is amended to extend the moratorium imposed by that ordinance from January 1, 2008 to
8 and including July 1, 2008 * * *.” *Id.* Finally, the ordinance makes no attempt to adopt a
9 new moratorium under the provisions of ORS 197.520 for adopting original moratoria.

10 The challenged decision was an extension of the original moratorium, not the
11 adoption of a new moratorium. Therefore, under *Thunderbird II*, the city’s decision
12 extending the moratorium for a third time was invalid and prohibited as a matter of law.
13 *Thunderbird II*, slip op 16.

14 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

15 In the first assignment of error, petitioner argues that the city could not lawfully
16 extend a moratorium that had been invalidated by LUBA. In the second assignment of error,
17 petitioner argues the city lacks authority to modify a land use decision while the decision is
18 on appeal to LUBA and the Court of Appeals. Because of our resolution of the third
19 assignment of error, we need not reach the first or second assignments of error.

20 **CONCLUSION**

21 As we explained in *Thunderbird I*, ORS 197.540(2) provides:

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

25 The Court of Appeals’ decision in *Thunderbird II* concluded that the ordinance that adopted
26 the third extension of the original moratorium was invalid. Therefore, the ordinance that
27 adopted the third extension is invalidated.