

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

3
4 RIVERVIEW MEADOWS LLC, ALEX REVERMAN,
5 and VERN SCOVELL,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF NEHALEM,
11 *Respondent.*

12
13 LUBA No. 2021-124

14
15 DAVID VANDEHEY and
16 ROLL TIDE PROPERTIES CORP. 401K PSP TRUST,
17 *Petitioners,*

18
19 vs.

20
21 CITY OF NEHALEM,
22 *Respondent.*

23
24 LUBA No. 2021-125

25
26 CLAY SELLARS,
27 *Petitioner,*

28
29 vs.

30
31 CITY OF NEHALEM,
32 *Respondent.*

33
34 LUBA No. 2021-126

35
36 CAREY SHELDON,
37 *Petitioner,*

38

1 vs.

2
3 CITY OF NEHALEM,
4 *Respondent.*

5
6 LUBA No. 2021-127

7
8 FINAL OPINION
9 AND ORDER

10
11 Appeal from City of Nehalem.

12
13 Wendie L. Kellington filed the petition for review and argued on behalf of
14 petitioners. Also on the brief was Kellington Law Group PC.

15
16 No appearance by City of Nehalem.

17
18 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
19 Member, participated in the decision.

20
21 INVALIDATED 04/19/2022

22
23 You are entitled to judicial review of this Order. Judicial review is
24 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city resolution (Resolution) declaring a moratorium on new connections to the city's water system for areas located outside the city limits.

FACTS

Riverview Meadows is an approved subdivision that is located outside the city limits but inside the city's urban growth boundary (UGB) and that is owned, in part, by some of the petitioners. In 2010, the city accepted the installation of a water line in Riverview Meadows. Record 50.

Twin Lakes is an existing subdivision that is located outside the city's UGB and that is owned, in part, by some of the petitioners. In 2012, the city extended a six-inch water line approximately 2,500 linear feet from its then-existing terminus to provide water service to a new Nehalem Bay Fire and Rescue District substation located outside the city's UGB. As part of that extension, the city installed a water line in Twin Lakes pursuant to an easement granted by the subdivision owner to the city. Record 98-100. As consideration for that easement, the city allowed the subdivision owner to connect to the extended water line. *Id.* Both the water line in Riverview Meadows and the water line in Twin Lakes are depicted on the city's Water Management and Conservation Plan map. Record 161.

1 Problems with periodic low water pressure for some existing connections
2 to the city’s water system occurred.¹ In 2021, the city council adopted the
3 Resolution, which imposes a one-year moratorium on new connections to the
4 city’s water system for properties in an area identified on a map attached to the
5 Resolution (Moratorium Area). The Moratorium Area includes properties located

¹ OAR 333-061-0025(7) requires the city, as a “water supplier,” to maintain a pressure of “at least 20 pounds per square inch (psi) at all service connections at all times.” The Resolution recites:

“[T]he City of Nehalem has discovered certain areas along its water lines where this standard of 20 psi may not be maintained at all times for all service connections if additional water service connections are made, without additional improvements of water reservoirs, water pumps and other recognized tools to increase water pressure within an area, and

“* * * * *

“* * * the City has discovered that there are properties currently on the City water system where there may be periodic low water pressure below the required water pressure of 20 psi at all times at all properties. The City had additional testing of certain fire hydrants done, in the affected area, which resulted in a dramatic drop in water pressure at a hydrant at the elevation of 118’ within the proposed moratorium area. Allowing additional water service connections in the proposed moratorium area would exacerbate any low-pressure issue which may be periodically experienced at the higher elevations in the proposed moratorium area. These areas have been identified as those properties north/northeast of Bob’s Creek on North Fork Road and east of the intersection of North Fork Road and McDonald Road[.]” Record 9-10.

1 both inside the city's UGB (including Riverview Meadows) and outside the city's
2 UGB (including Twin Lakes).

3 The Resolution explains that the city has sufficient water to serve
4 properties "along its water lines" but that there are "an estimated potential 122
5 properties within the proposed moratorium area" that could request new water
6 connections that could result in the city being unable to maintain sufficient water
7 pressure at all times, that some areas outside the city limits have experienced low
8 water pressure, and that allowing new connections in the Moratorium Area would
9 exacerbate low pressure issues. Record 9. The Resolution posits:

10 "[T]he proposed moratorium area's water pressure issue has several
11 solutions available to property owners in the area. The City would
12 encourage property owners in the affected area to arrive at a
13 comprehensive solution for the area which would include a reservoir
14 and a looped system, which will provide higher water pressure and
15 more stable water pressure in the proposed moratorium area. For any
16 remedies that will ultimately be connected to the City water system,
17 the City will have to approve the solution. Without a comprehensive
18 solution, if properties in the proposed moratorium area are allowed
19 to connect to the City water system, it may adversely affect many
20 existing users along the water line by lowering the water pressure of
21 existing users. Further, if booster pumps were allowed, then at some
22 point in the future, the pump usage would likely cause a vacuum in
23 the system and negative pressure, thereby collapsing the line or
24 adversely affecting existing users[.]" Record 10.

25 The Resolution "declares an immediate moratorium for new service connections
26 to the City water system for [the Moratorium Area]" and states that the city will
27 rescind the moratorium "[u]pon satisfactory resolution of the low water pressure
28 problem in [the Moratorium Area]." Record 10. The Resolution provides that the

1 moratorium can be renewed for successive one-year periods “until such time as
2 there are one or more water system improvements which resolves the low water
3 pressure problem in the [Moratorium Area].” Record 11. These appeals followed.

4 **MOTION TO DISMISS**

5 After the petition for review was filed, on February 24, 2022, the city filed
6 a motion to dismiss these appeals, arguing that the Resolution is not a moratorium
7 over which LUBA has jurisdiction pursuant to ORS 197.505 to 197.540.
8 Petitioners addressed jurisdiction in their petition for review and filed a response
9 to the city’s motion to dismiss. For the reasons explained below, we conclude
10 that the Resolution is a moratorium that is subject to ORS 197.505 to 197.540.

11 ORS 197.520(1) provides, in relevant part:

12 “No city, county or special district may adopt a moratorium on
13 construction or land development unless it first:

14 “(a) Provides written notice to the Department of Land
15 Conservation and Development [(DLCD)] at least 45 days
16 prior to the final public hearing to be held to consider the
17 adoption of the moratorium;

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

20 “(c) Holds a public hearing on the adoption of the moratorium and
21 the findings which support the moratorium.”²

² There is no dispute that the city did not provide notice of its consideration of the adoption of the moratorium to any of the referenced 122 property owners or to DLCD.

1 ORS 197.520(2) provides that, “[f]or urban *or urbanizable* land, a moratorium
2 may be justified by demonstration of a need to prevent a shortage of public
3 facilities which would otherwise occur during the effective period of the
4 moratorium,” and the statute requires findings to support a demonstration of the
5 need to prevent a shortage.³ (Emphasis added.)

6 ORS 197.524(1) provides:

7 “When a local government engages in a pattern or practice of
8 delaying or stopping the issuance of permits, authorizations or

³ ORS 197.505(1) defines “public facilities” to mean “those public facilities for which a public facilities plan is required under ORS 197.712.” “Urbanizable land” is not defined in ORS chapter 197, but it is generally defined by the statewide planning goals as follows:

“Urban land that, due to the present unavailability of urban facilities and services, or for other reasons, either:

- “a) Retains the zone designations assigned prior to inclusion in the [UGB], or
- “b) Is subject to interim zone designations intended to maintain the land’s potential for planned urban development until appropriate public facilities and services are available or planned.”

Similarly, Statewide Planning Goal 14 (Urbanization) provides:

“Land within [UGBs] shall be considered available for urban development consistent with plans for the provision of urban facilities and services. Comprehensive plans and implementing measures shall manage the use and division of urbanizable land to maintain its potential for planned urban development until appropriate public facilities and services are available or planned.”

1 approvals necessary for the subdivision or partitioning of, or
2 construction on, any land, including delaying or stopping issuance
3 based on a shortage of public facilities, the local government shall:

4 “(a) Adopt a public facilities strategy under ORS 197.768; or

5 “(b) Adopt a moratorium on construction or land development
6 under ORS 197.505 to 197.540.”

7 In the petition for review, petitioners argue that, in adopting the Resolution, the
8 city has engaged in, or plans to engage in, a “practice of delaying or stopping the
9 issuance of permits, authorizations or approvals necessary for the subdivision or
10 partitioning of, or construction on, [land in the Moratorium Area] * * * based on
11 a shortage of public facilities” within the meaning of ORS 197.524(1).
12 Specifically, petitioners argue that subdivisions, partitions, and building permits
13 require proof of service by adequate public facilities, including public water.
14 Accordingly, petitioners argue, pursuant to ORS 197.524(1), the city is required
15 to either adopt a public facilities strategy or adopt a moratorium on construction
16 or land development by following the procedures and meeting the standards in
17 ORS 197.505 to 197.540. Petitioners argue that the city has done neither.

18 The city takes the position that the Resolution is not “a moratorium on
19 construction or land development” within the meaning of ORS 197.520(1)
20 because the city does not process or approve building permits or land use
21 applications for property *outside its UGB*. Motion to Dismiss 8. The moratorium
22 itself expressly recognizes that fact. Record 10. However, as noted, the
23 Moratorium Area includes land located inside the city’s UGB, and city water
24 lines extend to properties inside the city’s UGB. The city does not dispute that it

1 processes jointly with the county building permits and land use applications for
2 land outside the city limits but inside the city's UGB, or explain how its argument
3 withstands those undisputed facts.

4 We agree with petitioners that the Resolution is "a moratorium on
5 construction or land development" within the meaning of ORS 197.520(1) that
6 was not adopted under ORS 197.505 to 197.540.⁴ The Resolution explains that
7 the city is concerned about 122 properties located outside the city limits that may
8 request a new water connection in the future. Properties inside the city's UGB
9 cannot receive building permits or subdivision approval without confirmation
10 that public water will be supplied to the property. Record 106 (Intergovernmental
11 Agreement between the city and the county providing that the city is responsible
12 for determining and reporting whether public water is available to a proposed
13 structure by providing a Water Availability Letter to the county). A request for a
14 new water connection is almost certainly made in pursuit of "construction or land
15 development." Although it is not clear whether the intent of the Resolution is to

⁴ "Development" is not defined in ORS chapter 197, so we look to the plain, ordinary meaning of the word. *Webster's* defines "development" as follows:

1 : the act, process, or result of developing : the state of being developed : a gradual unfolding by which something (as a plan or method, an image upon a photographic plate, a living body) is developed <a new ~ in poetry> : gradual advance or growth through progressive changes : EVOLUTION <a stage of ~> : a making usable or available <well worth ~>." *Webster's Third New Int'l Dictionary* 618 (unabridged ed 2002) (boldface in original).

1 address an existing low water pressure problem or to prevent a future problem, it
2 is clear that the effect of the Resolution is to prevent construction on or
3 development of lands located in the Moratorium Area.

4 The city also argues that the Resolution is not a moratorium within the
5 meaning of ORS 197.524(1) because, according to the city, “[t]he City has no
6 legal duty or obligation to serve properties outside of the City limits.” Motion to
7 Dismiss 2. We reject that argument. The city’s water ordinance, at Nehalem City
8 Code (NCC) chapter 51, establishes rules and regulations governing the city’s
9 “water system.”⁵ NCC 51.02. NCC 51.04(A) provides that “[t]he city shall grant
10 an application of service,” subject to a priority scheme, if there is “sufficient
11 water supply to satisfy all the customers within the group described below to
12 which the customer belongs and all the customers within all groups having a
13 higher priority than the customer’s group.”⁶ The second-priority group is

⁵ “Water system” is defined as “[a]ll piping, reservoirs, filtration equipment, buildings, water intakes, water sources, main valves, hydrants, meters and all other equipment, materials or buildings used to produce, treat, store and deliver water to city customers.” NCC 51.03.

“Customer,” in turn, is defined as “[t]he owner of record of the property which is served by the city water system. Also, a person or persons purchasing property under contract, deed of trust, mortgage or other such instruments, will for the purposes of this subchapter, be deemed to be the CUSTOMER.” *Id.*

⁶ The phrase “sufficient water supply” is not defined. The city does not explain how the potential or occasional low water pressure at some areas served by city water means that there is not “sufficient water supply,” and we do not address that issue here.

1 “[i]ndividual service on existing lots and parcels, at this time, on existing
2 adequate mains outside of the incorporated city limits[.]” NCC 51.04(A)(2).
3 Water customers within Riverview Meadows and inside the city’s UGB fall
4 within the second-priority group. While NCC 51.05(F)(2) allows the city to
5 “*discontinue* service * * * where excessive demand by one customer may result
6 in inadequate service to others,” that provision does not allow the city to refuse a
7 service connection in the first instance if the connection is consistent with the
8 priority scheme. (Emphasis added.) That is because no “excessive demand” may
9 be established without initial service having first been provided. The NCC
10 demonstrates that the city is obligated to provide water service to properties
11 outside the city limits through the city’s water system if sufficient water supply
12 is available at the time of an application. Other sources of law may also require
13 the city to provide water service to properties outside the city limits.

14 In conclusion, we agree with petitioners that the Resolution is a
15 “moratorium” over which LUBA has jurisdiction because the effect of the
16 Resolution is a “practice” of stopping the issuance of authorizations—namely,
17 water service connection authorizations—necessary for construction on and
18 development of land that it is based on an alleged shortage of water. As such,
19 ORS 197.524(1) requires the city to either “[a]dopt a public facilities strategy” or
20 “[a]dopt a moratorium on construction or land development under ORS 197.505
21 to 197.540.” We do not understand the city to argue that it has adopted a public
22 facilities strategy.

1 The city’s motion to dismiss the appeals is denied.

2 **ASSIGNMENT OF ERROR**

3 The city did not file a response brief. In their assignment of error,
4 petitioners argue that the Resolution was not adopted in accordance with the
5 procedures in ORS 197.520(1) and does not include the findings required by ORS
6 197.520(1)(b) and 197.520(2).⁷ The city does not dispute that, if the Resolution
7 adopts a moratorium on construction or land development, the city did not
8 comply with the procedures in ORS 197.505 to 197.540. Motion to Dismiss 8.

9 The assignment of error is sustained.

⁷ ORS 197.530(1) requires a city, county, or special district that adopts a moratorium under ORS 197.520 to “adopt a program to correct the problem creating the moratorium” within 60 days after the effective date of the moratorium. ORS 197.530(2) further provides that a moratorium adopted under ORS 197.520(2) cannot be effective for longer than six months.

ORS 197.530(2) and (3) together provide that a moratorium can be extended three times, for up to six months each time, after the local government holds a public hearing on the extension and adopts written findings that:

- “(a) Verify that the problem giving rise to the moratorium still exists;
- “(b) Demonstrate that reasonable progress is being made to alleviate the problem giving rise to the moratorium; and
- “(c) Set a specific duration for the renewal of the moratorium.”

1 **DISPOSITION**

2 ORS 197.540(2) provides, “If the board determines that a moratorium or
3 corrective program was not adopted in compliance with the provisions of ORS
4 197.505 to 197.540, the board shall issue an order invalidating the moratorium.”

5 The moratorium is invalidated.