

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals City of Brookings Ordinance
4 No. 91-0-471 (moratorium ordinance), which establishes a
5 moratorium on connections to the city's sewerage system.

6 **FACTS**

7 On December 11, 1986, the Oregon Department of
8 Environmental Quality (DEQ) issued a Notice of Violation and
9 Intent to Assess Civil Penalty (notice of violation) to the
10 City of Brookings. The notice of violation alleged the city
11 had violated the terms of its "National Pollutant Discharge
12 Elimination System Permit" by discharging:

13 "waste water containing concentrations and/or
14 amounts of biochemical oxygen demand, total
15 suspended solids and fecal coliform in excess of
16 [permissible] waste discharge limitations * * *."
17 Record 539.

18 The city responded to the notice of violation by
19 developing, and in April, 1988 adopting, a "Wastewater
20 Facilities Plan" (plan). The introduction to the plan
21 states, in part, the following:

22 "* * * There have been periods during which
23 partially treated sewage was bypassed to the ocean
24 because of hydraulic overloading with the system.
25 In addition to these bypassing problems, various
26 unit processes are experiencing problems because
27 of hydraulic overloading.* * *" Record 419.

28 The plan includes a two stage program for improving the
29 city's sewerage system. These stages are identified in the
30 plan as "stage I" and "stage II." Record 511-512.

1 On February 4, 1991, the city received a letter from
2 the city's engineering firm (hereinafter referred to as
3 engineering firm), which had participated in developing the
4 plan and had designed the improvements to the system.¹ This
5 letter states the design capacity of the city's sewerage
6 system has been reached, and that the engineering firm
7 estimates there is only enough reserve system capacity to
8 serve an additional 300 residential connections to the
9 system. The engineering firm sent this letter in response
10 to discoveries it made while working on "stage I of [the
11 city's] wastewater treatment plant reconstruction." Record
12 11.

13 The city thereafter initiated proceedings to adopt a
14 moratorium limiting connections to its sewerage system
15 pending a system upgrade. On February 11, 1991, the city
16 adopted a temporary moratorium on sewerage system
17 connections. On March 12, 1991, the city adopted the
18 challenged moratorium ordinance.

19 The challenged moratorium ordinance determines the
20 city's sewage disposal plant has reached its design
21 capacity. The ordinance further concludes the sewerage
22 system has a remaining reserve capacity which enables it to
23 accommodate an estimated 300 additional "Equivalent Dwelling
24 Unit" (EDU) sewerage system connections. An EDU is defined

¹This letter is unsigned. We discuss the significance of this feature of this letter under the second assignment of error.

1 as:

2 "* * * the load rate or equivalent for which
3 public utility systems are provided, calculated
4 under the provisions of Sections 3 and 4 of
5 Ordinance No. 87-0-418 [Ordinance No. 418] of the
6 City of Brookings (imposing Systems Development
7 Charges), based upon the character of the
8 structure." Moratorium ordinance, section 1(B).²

9 Ordinance No. 418, section 2(B) defines "Dwelling Unit

10 Load" as:

11 "The basic load placed on public utility systems
12 by a single family or group of less than six (6)
13 persons residing in or occupying transient or
14 permanent living accommodations."

15 Ordinance No. 418, section 4 determines certain EDU
16 equivalencies for nonresidential uses, e.g., a "Retail store
17 with public restroom" is determined to be the equivalent of
18 2 EDU's; an "Office/Commercial" use with public rest rooms
19 is determined to be the equivalent of 2 EDU's.

20 The moratorium ordinance divides the remaining 300 EDU
21 connection capacity as follows: (1) 186 EDU connections
22 allocated to the Harbor Sanitary District;³ (2) 75 EDU
23 connections allocated to existing development in the "Dawson

²Ordinance No. 418, section 2 defines an "EDU" as follows:

"The load rate or equivalent for which public utility systems services are provided to any non-residential building, structure or parcel of land." (Emphasis supplied.)

³The city's sewage disposal plant serves the needs of both the city and the Harbor Sanitary District. The Harbor Sanitary District serves the unincorporated Harbor community. Record 421.

1 Tract Local Improvement District" (Dawson Tract LID);⁴ (3)
2 89 EDU connections allocated to residential development
3 within the city; and (4) 22 EDU connections allocated to
4 commercial and industrial development within the city.

5 The challenged moratorium ordinance authorizes city
6 approval of individual requests for EDU connections only
7 under specific circumstances. To qualify for city approval
8 of an EDU connection, the applicant must (1) apply for a
9 building permit for the proposed development requiring the
10 EDU connection, and (2) pay all systems development charges
11 and "all other applicable" fees. Further, under the
12 moratorium ordinance, EDU connection approval is
13 specifically conditioned on two additional events. First,
14 construction of the unit(s) to be connected to the city's
15 sewerage system must begin within 120 days of city sewerage
16 system connection approval. Second, such construction must
17 be complete, and a certificate of occupancy issued, within
18 one year from the time of EDU connection approval. If
19 either of these requirements regarding construction is not
20 satisfied, then the EDU connection approval is
21 "automatically revoked," unless a timely and adequate
22 application for an extension of time is filed with the

⁴We understand the Dawson Tract is now located within the city limits. While there is some evidence to the contrary, it is out of date. Compare Record 11 and Respondent's Brief 12 with Record 421.

1 city.⁵

2 Essentially, petitioner's arguments regarding the
3 challenged moratorium dispute the validity of the manner in
4 which the city determined and allocated the reserve capacity
5 of the city's sewerage system. To understand the issues
6 raised by petitioner it is helpful to understand some of the
7 facts regarding petitioner's concern with, and interest in,
8 the challenged moratorium.

9 Petitioner's interest in the moratorium ordinance
10 relates to the fact that it has a prior city approval to
11 construct a planned unit development (PUD) on approximately
12 30 acres of land zoned for residential use. This approval
13 is impacted by the challenged moratorium ordinance. There
14 is no dispute that on August 7, 1990, several months prior
15 to adoption of the challenged moratorium, petitioner
16 received tentative subdivision plat and PUD approval for a
17 56 unit, duplex style, residential development.⁶ This
18 approval authorizes phased development of the PUD over a
19 five year period, subject to several conditions of approval.
20 Further, the order approving petitioner's PUD contains the
21 following findings:

⁵The moratorium ordinance does not state the period of time a timely and adequate request for an extension of time will delay the "automatic" revocation of a sewerage system connection approval.

⁶Petitioner has applied for and received all required building permits. However, it has neither paid the systems development and all "other" fees, nor completed construction of the units requiring the connections.

1 "Existing and proposed new facilities will
2 adequately provide * * * sewer service to the
3 site. The city has the capacity to provide * * *
4 sewer service to the site without negative impact
5 to the city facilities and capacities." Record
6 370.

7 On October 1990, petitioner began construction of the
8 PUD.⁷ Petitioner apparently made its financial arrangements
9 to construct the project based on its understanding that it
10 had approval to construct the PUD units on a five year
11 timetable. It is petitioner's position that by the time the
12 city adopted the challenged moratorium ordinance, it had
13 made substantial progress toward satisfying the conditions
14 of the PUD approval decision. Petitioner fears the 89 EDU
15 connections allocated to residential use by the ordinance
16 will be distributed to other applicants before it is in a
17 position to apply for the EDU connections it will require to
18 complete its development.⁸

19 Petitioner participated in the city proceedings leading
20 up to the challenged ordinance. After the city adopted the
21 challenged moratorium decision, petitioner appealed to this
22 Board.

23 **FIRST ASSIGNMENT OF ERROR**

24 "The City of Brookings failed to demonstrate that

⁷Petitioner alleges that as of March 7, 1991, it had expended \$2,393,261 of the expected \$12,864,459 cost of the PUD.

⁸We cannot tell under the city's definition of "EDU" how many EDU connections would be required to connect all of petitioner's proposed 56 unit duplex style residential development to the city's sewerage system.

1 the housing needs of the area affected had been
2 accommodated as much as possible in any program
3 for allocating any remaining key facility
4 capacity."

5 The challenged moratorium ordinance is based on a
6 shortage of key public facilities. ORS 197.520 provides the
7 following requirements applicable to the adoption of a
8 moratorium based on a shortage of key public facilities:

9 "(1) No city * * * may adopt a moratorium on
10 construction or land development unless it
11 first makes written findings justifying the
12 need for the moratorium in the manner
13 provided for in this section.

14 "(2) A moratorium may be justified by
15 demonstration of a need to prevent a shortage
16 of key facilities * * * which would otherwise
17 occur during the effective period of the
18 moratorium. Such a demonstration shall be
19 based upon reasonably available information
20 and shall include, but need not be limited
21 to, findings:

22 " * * * * *

23 "(c) That the housing needs of the area
24 affected have been accommodated as much
25 as possible in any program for
26 allocating any remaining key facility
27 capacity.

28 " * * * * * "

29 Petitioner argues the city's findings are inadequate to
30 establish compliance with ORS 197.520(2)(c) because they
31 fail to identify what the housing needs of the sewerage
32 system's service area are. Petitioner also contends the
33 city failed to accommodate housing needs "as much as
34 possible." We address these contentions separately below.

1 **A. Identification of Housing Needs in the Service**
2 **Area**

3 Petitioner argues the findings supporting the
4 challenged moratorium fail to establish what the housing
5 needs of the sewerage system service area are. Petitioner
6 argues that before the city may establish a program
7 allocating the reserve sewerage system capacity, and thereby
8 "accommodate" the "housing needs" of the area to be served
9 "as much as possible," the city must first determine what
10 the housing needs of the area are. ORS 197.520(2)(c).

11 The city argues it did adopt findings establishing the
12 housing needs of the area served by the sewerage system. It
13 cites findings identifying the Harbor Sanitary District and
14 the City of Brookings as the sewerage system's service area.
15 Record 10. Next, the city cites the following finding as
16 establishing the extent of the housing needs in the
17 identified service area:

18 "The City of Brookings and the Harbor Sanitary
19 District, whose sewage is received by the City,
20 currently have more lots available for development
21 than can be served by th[e] anticipated reserve
22 capacity." Record 11.

23 We agree with petitioner that ORS 197.520(2)(c)
24 requires the city to identify the housing needs of the
25 service area, and that the city failed to adopt such
26 findings. The city's findings simply state there are more
27 lots available for development in the service area than can
28 be served by the reserve capacity of the sewerage system.

1 This says nothing about what the housing needs of the
2 service area are.

3 This subassignment of error is sustained.

4 **B. Accommodation of Housing Needs**

5 Our determination that the city adopted no findings
6 identifying the housing needs of the affected area requires
7 invalidation of the challenged moratorium. ORS 197.540(2).
8 However, to the extent that it may be helpful to the
9 parties, we resolve this subassignment of error, as well as
10 the subsequent assignments of error where appropriate.

11 Petitioner argues that under ORS 197.520(2)(c), in
12 order to accommodate the housing needs of the service area
13 "as much as possible," the city must give "priority" to
14 identified service area housing needs. Petitioner contends
15 the city failed to give any priority to housing needs of the
16 service area. Petitioner argues the 75 EDU's allocated to
17 the Dawson Tract LID are unrelated to any need for housing
18 and may be used to serve industrial or commercial uses as
19 well as residential uses.⁹ Petitioner further argues the
20 city simply allocated the remaining 111 EDU's of sewerage
21 system reserve capacity according to the percentage of land
22 zoned residential and the percentage of land zoned
23 industrial or commercial.

⁹Petitioner also suggests that the 114 connections allocated to the Harbor Sanitary District (sanitary district), are also unrelated to any need for housing.

1 The city does not dispute that the requirement of
2 ORS 197.520(2)(c) that housing needs be "accommodated as
3 much as possible," requires the city to give priority to
4 housing needs in the sewerage system's service area.
5 However, the city argues its findings establish that it did
6 give priority to the housing needs of the sewerage system
7 service area. The city cites the following findings:

8 "For purposes of allocating remaining reserve
9 capacity of the City's wastewater treatment plant
10 * * * an intergovernmental agreement * * *
11 allocat[es] * * * reserve capacity as follows:
12 186 EDU's to the City of Brookings and 114 EDU's
13 to the Harbor Sanitary District.

14 "The allocation of the remaining capacity by the
15 city of Brookings under the provisions of this
16 Ordinance gives priority to accommodating the
17 housing needs of the City of Brookings."
18 (Emphasis supplied.) Record 11.

19 The city explains it allocated 114 EDU connections to
20 the sanitary district pursuant to the above mentioned
21 intergovernmental agreement,¹⁰ and that thereafter it only
22 had 186 EDU connections to allocate within city limits. The
23 city explains it allocated 75 EDU's to the Dawson Tract LID
24 because that development is nearly complete and the city has
25 undertaken to expend in excess of 3 million dollars toward
26 extending city services to it. The city concedes it
27 "generally" allocated the remaining 111 EDU connections

¹⁰This intergovernmental agreement is not in the record, and nothing to which we are cited in the record establishes whether any priority was given to the housing needs in the sanitary district service area.

1 according to the "percentage of land zoned for residential,
2 commercial and industrial use * * *" within the city.
3 Respondent's Brief 12; Record 15. The city maintains that
4 as a result of its EDU connection allocation program, the
5 challenged moratorium specifically allocates only 22 EDU
6 connections to industrial and commercial development within
7 the city. The city argues that because more EDU connections
8 were allocated overall to residential development than to
9 other kinds of development, the housing needs of the city
10 were accommodated "as much as possible," as required by
11 ORS 197.520(2)(c).

12 We disagree with the city. Under ORS 197.520(2)(c),
13 any program to allocate scarce key public facility capacity
14 requires accommodating identified housing needs in the
15 service area "as much as possible," over other kinds of
16 development needs. The proposed allocation program
17 allocates 114 EDU's to the sanitary district and 75 EDU's to
18 the Dawson Tract LID without any limitation on use by
19 nonresidential users, and allocates the city's remaining
20 reserve sewerage system capacity according to the proportion
21 of land zoned residential, commercial and industrial.
22 Absent an explanation of why this manner of allocation
23 provides the statutorily required priority to housing needs
24 of the affected area, we do not believe such a program for
25 allocating key public facilities is the equivalent of giving
26 priority to the housing needs of the identified service

1 area. The city's ordinance fails to demonstrate compliance
2 with ORS 197.520(2)(c).

3 This subassignment of error is sustained.

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 "The adoption of Ordinance No. 91-0-471 is not
7 justified and is not supported by substantial
8 evidence in the record as a whole."

9 ORS 197.520(2)(a) requires that the adoption of a
10 moratorium based on a shortage of key public facilities be
11 supported by findings:

12 "Showing the extent of need beyond the estimated
13 capacity of existing key facilities expected to
14 result from new land development, including
15 identification of any key facilities currently
16 operating beyond capacity, and the portion of such
17 capacity already committed to development[.]"

18 Under this assignment of error, petitioner contends the
19 challenged ordinance fails to comply with ORS 197.520(2)(a).
20 Specifically, petitioner contends the city's findings
21 estimating the reserve capacity of the sewerage system as
22 being only 300 EDU's are not supported by substantial
23 evidence in the whole record. Petitioner also argues the
24 city's decision lacks findings regarding the portion of the
25 reserve capacity committed to development and is not
26 supported by substantial evidence in the whole record.¹¹

¹¹Petitioner also argues the city's findings that there are more lots available for development than can be served by the remaining reserve capacity of the city's system, are not supported by substantial evidence. However, we determined under the first assignment of error that these

1 We address these contentions separately below.

2 **A. Evidentiary Support for City's Determination**
3 **Regarding Reserve Capacity of Sewerage System**

4 The city relied upon two letters from the engineering
5 firm to determine that the sewerage system had a reserve
6 capacity of 300 EDU connections.¹² The March 7, 1991 letter
7 from the engineering firm states in relevant part the
8 following:

9 " * * * the sizing of process units for Stage [I]
10 was based upon the loadings expected at the time
11 of start-up through 1993. Table I compares the
12 wastewater treatment Stage [I] design data with
13 recent flow and load information. It is clear
14 that while flows have been somewhat lower than
15 projected, the present organic loading is close to
16 design levels.

17 "We believe there may be sufficient conservatism
18 included in our treatment process calculations to
19 accommodate 300 additional residential
20 connections. However, until the new plant is
21 actually operated this summer, we cannot
22 accurately determine the amount of treatment
23 capacity remaining. Each increment of organic
24 load which is added beyond the design limit
25 increases the potential for exceeding your current
26 250 pound per day BOD^[13] mass discharge limit.

findings are inadequate to satisfy the requirement of ORS 197.520(2)(c) that the city identify the housing needs of the service area. No purpose is served in reviewing the evidentiary support for inadequate findings.

¹²These letters state exactly the same thing. However, the letter dated February 4, 1991 is unsigned, and the letter dated March 7, 1991 is signed. The fact that the February 4, 1991 letter is unsigned does not reduce the evidentiary weight of the March 7, 1991 letter, which was signed before the challenged moratorium was adopted. When we refer to the engineering firm's "letter" in this opinion, we are referring to the March 7, 1991 letter.

¹³Biochemical oxygen demand ("BOD") is defined by the plan as follows:

1 "We suggest that if up to 300 additional
2 residential connections are to be made, the city
3 should make provisions to install a chemical feed
4 system to the primary and secondary clarifiers.* *
5 *[14]

6 " * * * * *

7 "We recommend no more than 300 additional units be
8 connected to the Stage [I] wastewater treatment
9 system, even if chemical addition is used.
10 Further additional connections should not be made
11 until one of the following steps occurs:

12 "1. The ongoing facility plan update determines
13 if the [DEQ] will relax the current 250
14 pounds per day BOD mass discharge limit
15 during the winter months.

16 "2. Operating data is available this summer from
17 the Stage [I] treatment plant expansion.

"[A] parameter [which] is a measure of wastewater strength in terms of the quantity of oxygen required for biological oxidation of the organic matter contained in the wastewater. The BOD loading imposed on a treatment plant influences both the type and degree of treatment that must be provided to produce the required effluent quality. * * *" Record 454.

¹⁴The challenged decision contains the following findings:

"The addition of a chemical feed system to the city's wastewater treatment facility is an interim method to maximize plant capacity.

"No funds are available within the current budget to fund anticipated costs of a chemical feed system." Record 12.

Apparently, the city interpreted the engineering firm's recommendation to be that a chemical treatment system was only required if the connections to the city's sewerage system exceeded the estimated 300 residential connections available. No party challenges this interpretation of the engineering firm's letter. However, it is not at all clear to us that the engineering firm determined that the system's reserve capacity could accommodate 300 EDU connections if the city did not add a chemical feed system as an interim measure.

1 "3. The Stage [III] treatment plant expansion is
2 complete.

3 "* * * * *." Record 47-49.

4 Petitioner cites a letter from DEQ, a letter from
5 Fetrow Engineering, Inc. to petitioner's attorney (Fetrow
6 letter), and a letter from T.J. Bossard and Associates to
7 the city manager (Bossard letter), as evidence which
8 undermines the letter from the engineering firm.

9 The letter from DEQ is dated January 29, 1988. As far
10 as we can tell, the DEQ letter responds to a prior version
11 of the wastewater facilities plan the city ultimately
12 adopted in April, 1988, that the city submitted to DEQ for
13 its review. The portion of the DEQ letter cited by
14 petitioner states the following:

15 "The Stage I design data presented in Appendix I
16 indicate an organic capacity that will accommodate
17 approximately 10 years of growth (population
18 7310), but that the plant (or major portions of
19 it) will be at hydraulic capacity immediately.
20 That is, the grit removal facilities, primary
21 clarifiers, and chlorine contact chamber will be
22 at capacity when completed. Given that Stage I
23 design appears to be limited by the hydraulic
24 capacity, what overall design population can be
25 served by the Stage I plant? At what year is the
26 entire Stage I plant expected to 'reach capacity,'
27 and no longer be able to meet discharge limits?"
28 (Emphasis in original.) Record 100.

29 This letter provides no basis for concluding that the city's
30 sewage disposal system has any particular capacity. Rather,
31 what the system's capacity is, is precisely the question the
32 DEQ letter asks.

1 Regarding the Fetrow letter, it states in relevant part
2 the following:

3 **"2. RESERVE CAPACITY:**

4 "The information you provided indicates that there
5 is 10% reserve capacity in the treatment plant,
6 and this is the basis for limiting the hookups to
7 300 equivalent residential dwelling units (EDU).
8 The plant is rated at 1 [million gallons per day
9 (MGD)] so the remaining capacity is estimated at
10 100,000 gallons.

11 "In order to determine how this reserve capacity
12 related to 300 hookups, we reviewed the [city's
13 April 1988 Wastewater Facilities Plan], which
14 estimated the residential flow at 55
15 gallons/capita/day (GPCD). For EPA purposes, the
16 plan also projected residential flow at 70 GPCD.
17 Using these numbers and the remaining capacity we
18 can calculate the population density of EDU's as
19 follows:

20 "a. $100,000/300 = 330$ gallons/unit/day (GUD)

21 "b. $330 \text{ GUD}/55 \text{ GPCD} = 6.0$ people/unit

22 "c. $330 \text{ GUD}/70 \text{ GPCD} = 4.7$ people/unit

23 "d. $330 \text{ GUD}/100 \text{ GPCD} = 3.3$ people/unit

24 "The above densities are higher than we would
25 expect for the Brookings area and more than the
26 accepted density average of 2.7 people/unit.
27 Using this average, the number of EDU available is
28 as follows:

29 "a. $100,000/55 = 1,818/2.7 = 678$ EDU

30 "b. $100,000/70 = 1,429/2.7 = 529$ EDU

31 "c. $100,000/100 = 1,000/2.7 = 370$ EDU

32 **"3. PLANT RECORDS:**

33 "The charts you provided, illustrate the plant
34 effluent loadings from January 1989 through

1 December 1990, show unusually high peak BOD levels
2 in January and September 1990. Since these peak
3 levels do not seem to correlate with flow or TSS
4 levels or with similar peaks in 1989, we question
5 if this data is accurate. Given that these high
6 levels are based on a single data point, they do
7 not necessarily indicate a trend or recurring
8 problem. The September levels may be related to
9 an industrial discharge (i.e. fish processing
10 etc.).

11 " * * * * " Record 279-280.

12 This letter does not so undermine the engineering
13 firm's letter that it is unreasonable to rely upon the
14 engineering firm's letter. Rather, the Fetrow letter
15 calculates what the author believes to be the reserve
16 capacity of the sewerage system based on an assumption that
17 all EDU connections will be distributed by the city on the
18 basis of one EDU per "2.7 people" per "unit." As far as we
19 can tell, this assumption in the Fetrow letter does not
20 account for the city's definition of "EDU," which appears to
21 contemplate for a residence the same basic system load that
22 is defined as one "Dwelling Unit Load." As stated in our
23 discussion of the facts, supra, under Ordinance No. 418, one
24 "Dwelling Unit Load" is the load on the sewerage system
25 placed by up to six people residing in a particular
26 household. In other words, the residential EDU connections
27 allocated under the proposed program are not based on the
28 load placed on the system by "2.7 people/unit." Rather, the
29 EDU connection allocation program is based on what is
30 defined by ordinance as an "EDU" load. Further, even if the

1 city's definition of "EDU" could be interpreted to authorize
2 EDU connections based on a residential density average of
3 "2.7 people/unit," the Fetrow letter does not explain the
4 basis for its stated "expected" density average of "2.7
5 people/unit."

6 Regarding the statements in the Fetrow letter regarding
7 "PLANT RECORDS," they similarly do not undermine the city's
8 engineering firm's letter. The Fetrow letter simply
9 speculates that the high levels of effluent loading in
10 January and September 1990 do not "necessarily" indicate a
11 "trend" and "may be related to "industrial discharge."
12 While this portion of the Fetrow letter speculates as to
13 reasons why the city's sewerage system overloaded in January
14 and September, it does not dispute that the city's sewerage
15 system did overload at least twice in 1990.

16 We conclude that the Fetrow letter does not undermine
17 the engineering firm's letter.

18 Finally, with regard to the Bossard letter, it states
19 substantially identical information to that contained in the
20 Fetrow letter. For reasons similar to those explained above
21 regarding the Fetrow letter, we do not believe that it
22 undermines the engineering firm's letter such that it was
23 unreasonable for the city to rely upon the engineering
24 firm's letter.

25 We conclude the city's determination that its sewerage
26 system has sufficient reserve capacity to accommodate 300

1 EDU connections is not undermined by the evidence cited by
2 the petitioner, and that a reasonable person would rely upon
3 the March 7, 1991 letter from the engineering firm.

4 This subassignment of error is denied.

5 **B. Adequacy of Findings Regarding Committed Reserve**
6 **Capacity**

7 As we understand it, the city takes the position that
8 certain numbers of EDU connections were allocated to the
9 sanitary district and Dawson Tract LID because they are
10 "already committed to development" under ORS 197.520(2)(a).
11 However, the only findings addressing the requirement of ORS
12 197.520(2)(a) regarding the extent of capacity committed to
13 development are those which state the city has entered into
14 an intergovernmental agreement to allocate 114 EDU's to the
15 sanitary district, and those findings that state the city
16 will allocate 75 EDU's to the Dawson Tract LID. These
17 findings do not explain why the city believes these
18 connections are "already committed" due to development in
19 the sanitary district and the Dawson Tract LID. Because the
20 city adopted no findings in this regard, this subassignment
21 of error is sustained.¹⁵

¹⁵Petitioner also argues the city should have explained why it did not determine the city's reserve system capacity is "already committed to" petitioner's PUD development. ORS 197.520(2)(a). We state above that the city's findings are inadequate to show the reserve capacity of the city's sewerage system "already committed to development," as required by ORS 197.520(2)(a). If the city chooses to enact another moratorium, its findings must demonstrate compliance with ORS 197.520(2)(a), and that will necessarily include providing an explanation of why it believes any portion

1 The second assignment of error is sustained, in part.

2 **THIRD ASSIGNMENT OF ERROR**

3 "Respondent failed to properly recognize
4 petitioner's vested right to continue its
5 development pursuant to the terms and conditions
6 of the final order of tentative plat and PUD
7 approval of August 7, 1990."

8 **FOURTH ASSIGNMENT OF ERROR**

9 "Respondent should be estopped from taking any
10 action under Ordinance No. 91-0-471 in abridgement
11 or derogation of the rights of petitioner as
12 established by respondent's final order of August
13 7, 1990."

14 **FIFTH ASSIGNMENT OF ERROR**

15 "Respondent's adoption of time restrictions
16 applicable to the construction of buildings and
17 providing for forfeiture of right to complete
18 construction and financial penalties is an
19 exercise of zoning and planning authority which
20 substantially impacts the present and future
21 development of petitioner's property and thereby
22 constitutes a reviewable land use decision made
23 final at the time of the adoption of Ordinance No.
24 91-0-471 on March 12, 1991; as a land use
25 decision, it is subject to reversal or remand."

26 ORS 197.540 provides, in relevant part:

27 "(1) In the manner provided in ORS 197.830 to
28 197.845, [LUBA] shall review * * * any
29 moratorium on construction or land
30 development * * * alleged to have been
31 adopted in violation of the provisions of ORS
32 197.505 to 197.530.

of sewerage system capacity is committed to any development. Petitioner's argument that the system's reserve capacity is "already committed," as those terms are used in ORS 197.520(2)(a), to providing services to its PUD development is based on petitioner's contentions that it has a vested right to complete development of the PUD, which we address in the following section.

1 "(2) If the board determines that a moratorium or
2 corrective program was not adopted in
3 compliance with the provisions of ORS 197.505
4 to 197.530, the board shall issue an order
5 invalidating the moratorium.

6 "* * * * *

7 "(4) Notwithstanding any provisions of ORS
8 chapters 196 and 197 to the contrary, the
9 sole standard for review of a moratorium on
10 construction or land development * * * is
11 under the provisions of this section, and
12 such a moratorium shall not be reviewed for
13 compliance with the statewide planning goals
14 adopted under ORS chapters 196 and 197.

15 "* * * * *"

16 We have determined that this statute limits our scope
17 of review over a challenged decision adopting a moratorium,
18 to whether the moratorium complies with ORS 197.505 to
19 197.530. In Schatz v. City of Jacksonville, ___ Or LUBA ___
20 (LUBA No. 90-126, May 13, 1991), slip op 9-12, we stated the
21 following regarding our limited scope of review:

22 "* * * Our authority to review a moratorium is
23 limited to determining whether its adoption
24 complies with ORS 195.505 to 197.530.
25 Petitioners' argument is based on the contention
26 that the phrase 'in the manner provided in ORS
27 197.830 to 197.845,' used in ORS 197.540(1), makes
28 the scope of review provisions of ORS 197.835
29 applicable to our review of a moratorium. The
30 city contends this phrase incorporates by
31 reference only procedural requirements for conduct
32 of appeals to LUBA.

33 "In Schatz v. City of Jacksonville, ___ Or LUBA
34 ___ (LUBA No. 90-153, Order on Objection to Record
35 and Motion to Dismiss, February 6, 1991), slip op
36 6-9, we considered the similar issue of whether
37 the phrase 'in the manner provided in ORS 197.830

1 to 197.845,' makes the standing requirements of
2 ORS 197.830(2) applicable to appeals of moratoria
3 pursuant to ORS 197.540:

4 "When the moratorium statute was
5 initially adopted by the legislature at
6 a 1980 special session, it provided:

7 "In the manner provided in
8 ORS 197.305 to 197.315, the Land
9 Conservation and Development
10 Commission shall review upon
11 petition by a county, city or
12 special district governing body or
13 state agency or a person or group
14 of persons whose interests are
15 substantially affected, any
16 moratorium on construction or land
17 development or a corrective
18 program alleged to have been
19 adopted in violation of the
20 provisions of sections 1 to 4 of
21 this Act.' (Emphasis deleted.)
22 Or Laws 1980, ch 2, § 5(1).

23 "Thus, it is clear that under the
24 initial moratorium statute, the only
25 standing requirement for a person or
26 group to appeal a moratorium or
27 corrective program was that the person
28 or group have 'interests [which] are
29 substantially affected.' Such appeals
30 were to be conducted by LCDC according
31 to the procedures of ORS 197.305 to
32 197.310.

33 "In 1983, authority to hear appeals of
34 moratoria and corrective programs was
35 transferred to this Board. Or Laws
36 1983, ch 827, § 45. The amendments made
37 to ORS 197.540(1) only changed 'Land
38 Conservation and Development Commission'
39 to 'Land Use Board of Appeals' and
40 replaced 'ORS 197.305 to 197.315 (1977
41 Replacement Part)' with 'ORS 197.830 to
42 197.845.' No other provisions of
43 ORS 197.540(1), including the

1 requirement that persons or groups of
2 persons petitioning for review have
3 'interests [which] are substantially
4 affected,' were changed.

5 "In replacing the phrase 'in the manner
6 provided by ORS 197.305 to 197.315' with
7 the phrase 'in the manner provided by
8 ORS 197.830 to 197.845,' the
9 legislature simply replaced the
10 procedures for LCDC appeals found in
11 ORS 197.305 to 197.315 with the
12 procedures for LUBA appeals found in ORS
13 197.830 to 197.845. We do not believe
14 the legislature intended by this change
15 to impose additional standing
16 requirements on appeals of moratoria and
17 corrective programs. * * * (Emphasis
18 in original; footnotes omitted.)

19 "We believe the above reasoning applies equally to
20 LUBA's scope of review under ORS 197.540. ORS
21 197.305 to 197.315 (1977 Replacement Part), the
22 provisions governing LCDC appeals referred to when
23 the moratorium statute was initially adopted in
24 1980, did not contain scope of review provisions.
25 Thus, it is clear that under the initial
26 moratorium statute, appeals were to be conducted
27 by LCDC according to the procedures of ORS 197.305
28 to 197.315, and LCDC's scope of review was limited
29 to determining whether a challenged moratorium was
30 adopted in violation of ORS 197.505 to 197.530.
31 In 1983, when authority to hear appeals of
32 moratoria was transferred from LCDC to LUBA,
33 amendments made to ORS 197.540 only changed 'Land
34 Conservation and Development Commission' to 'Land
35 Use Board of Appeals' and replaced 'ORS 197.305 to
36 197.315 (1977 Replacement Part)' with 'ORS 197.830
37 to 197.845.'

38 "As we stated in the order quoted above, by
39 replacing the phrase 'in the manner provided by
40 ORS 197.305 to 197.315' with the phrase 'in the
41 manner provided by ORS 197.830 to 197.845,' the
42 legislature simply replaced the procedures for
43 LCDC appeals found in ORS 197.305 to 197.315 with
44 the procedures for LUBA appeals found in ORS

1 197.830 to 197.845. We do not believe the
2 legislature intended by this change to alter the
3 previously established scope of review for appeals
4 of moratoria. Therefore, in reviewing a decision
5 adopting a moratorium, our scope of review is
6 limited to determining whether the moratorium was
7 adopted in violation of ORS 197.505 to 197.530."
8 (Emphasis supplied, footnote omitted.)

9 Accordingly, we believe the issues raised in these
10 assignments of error regarding the adoption of the
11 moratorium on sewerage connections are beyond our scope of
12 review.¹⁶

13 The third, fourth and fifth assignments of error are
14 denied.

15 The city's moratorium is invalidated.

¹⁶However, as we previously noted, it may be that we could review these issues in an appeal of a decision denying an application for an EDU connection approval. Western Pacific Development, Inc., v. City of Brookings, ___ Or LUBA ___ (LUBA No. 91-032, Order Denying Motion for Stay, April 29, 1991), slip op 7 n 5.