

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a City of Jacksonville ordinance adopting a moratorium on new construction in all areas served by city water facilities.

MOTIONS

A. Motion to Supplement Exhibits to Petitioners' Brief or Take Official Notice

Petitioners request permission to supplement their petition for review with a United States Census Bureau form entitled "Oregon 1990 Population Totals," which they obtained on January 31, 1991. The form shows a figure for the "number of persons" in "Jacksonville city." In the petition for review, petitioners argue that the evidence in the record is insufficient to show a need for a moratorium because the record contains "no accurate population figures and no reliable estimates of future population * * *." Petition for Review 21. Petitioners contend the Census Bureau form shows the most timely and accurate population figure for the City of Jacksonville.

In the alternative, petitioners move, pursuant to ORS 183.450(4),¹ that this Board take official notice of the

¹ORS 183.450(4) provides, as relevant:

"Agencies may take notice of judicially cognizable facts, and they may take official notice of general, technical or scientific facts within their specialized knowledge. * * *"

Census Bureau form as judicially cognizable facts. According to petitioners, we may take official notice of the form because it is an official document released by the federal agency designated to compile the population information contained therein.

With exceptions not relevant here, our review is confined to the local record of the appealed decision. ORS 197.830(13)(a). The Census Bureau form which petitioners seek to add to their petition for review is not part of the local record, and was not placed before the local decision makers prior to their September 24, 1990 decision to adopt the challenged moratorium. Therefore, that form has no bearing on the issue raised by petitioners of whether there is sufficient evidence in the local record concerning the city's population to support the city's decision.

The Motion to Supplement Exhibits to Petitioners' Brief is denied.

ORS 183.450 governs procedures in state agency contested case hearings conducted pursuant to the Administrative Procedures Act, and is not applicable to review proceedings conducted by this Board. ORS 197.820(1). However, it is legislative policy that the Board's decisions be made consistently with sound principles governing judicial review. ORS 197.805. Therefore, it is within the Board's authority to take official notice of judicially cognizable law, as provided by Oregon Evidence Code (OEC)

Rule 202. McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 209 (1988), rev'd on other grounds 96 Or App 552 (1989); Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167, 170 (1982).

The Census Bureau form of which petitioners ask that we take official notice is not a federal rule, regulation or some other form of law applicable to the appealed decision, but rather simply states preliminary population figures for various Oregon cities. As noted above, our review of facts is confined to evidence which is in the local record or submitted through an evidentiary hearing under ORS 197.830(13).

Accordingly, we deny petitioners' alternative request that we take official notice of the Census Bureau form.

B. Motion to Strike Petitioners' Oral Argument, Submit Supplemental Response Brief or Hold Evidentiary Hearing

Respondent moves to strike the portion of petitioners' oral argument before this Board concerning prejudice to petitioners resulting from the city council's adoption of the challenged ordinance as an emergency measure. Respondent contends this portion of petitioners' oral argument was untimely, because the petition for review claims only that improper adoption of the emergency clause rendered the challenged ordinance invalid, not that adoption of the emergency clause prejudiced petitioners' rights. Respondent argues that it is prejudiced because it has not

had an opportunity to respond to petitioners' oral argument on this issue.

In the alternative, respondent moves for an evidentiary hearing on the issue of whether petitioners were prejudiced by adoption of the challenged ordinance as an emergency measure. Respondent also asks for an opportunity to supplement its response brief with written argument on this issue.

Petitioners' first assignment of error alleges the city council's adoption of the challenged ordinance failed to comply with requirements of ORS 221.310 and the city charter for adoption of an ordinance as an emergency measure. Respondent's alternative motions are concerned solely with the issue of whether petitioners' rights were prejudiced by the adoption of the challenged ordinance as an emergency measure. We determine infra, under the first assignment of error, that we do not have jurisdiction to review a moratorium ordinance for compliance with any requirements other than the provisions of ORS 197.505 to 197.530. Therefore, the validity of the adoption of the challenged ordinance as an emergency measure is outside our scope of review, and no purpose would be served by granting any of respondent's motions.

Respondent's Motion to Strike Petitioners' Oral Argument, Submit Supplemental Response Brief or Hold Evidentiary Hearing is denied.

FACTS

On July 10, 1990, the city council conducted a meeting to discuss a possible building moratorium due to water problems. A report on the city's water system prepared by a Water Committee appointed by the city council, dated April 10, 1990, and entitled "Water Report for the City of Jacksonville" (Water Committee report), was placed before the city council during that meeting. On August 7, 1990, the city council held a public hearing on the city's water problems and the proposed building moratorium. On August 15, 1990, the city council decided to hire an engineer to review the water report and update water-related engineering figures.

On September 4, 1990, the city council conducted another public hearing on the city's water problems and the proposed building moratorium. The hearing was continued to September 6, 1990, for discussion of and rebuttal to the engineer's report. The engineer submitted a report (Blanton report), dated September 4, 1990, and a clarifying follow-up report (Blanton supplemental report), dated September 6, 1990. On September 18, 1990, the city council adopted the challenged ordinance imposing a moratorium on new construction in all areas served by city water facilities. The ordinance includes an emergency clause.

PETITIONERS' STANDING

ORS 197.540(1) authorizes this Board to review a

moratorium on construction or land development adopted pursuant to ORS 197.505 to 197.530 "upon petition by * * * a person or group of persons whose interests are substantially affected."

Petitioners allege they:

"* * * are substantially affected because they all have ownership interests in numerous tracts of land, all at various stages of development, within the City of Jacksonville and its proposed urban growth boundary. Due to the city's action adopting a key facilities moratorium based on [an] alleged water supply problem, Petitioners' ability to use their land for the purpose which it is currently zoned has been substantially affected. * * *" Petition for Review 1.

Respondent challenges petitioners' standing. Respondent contends petitioners have not demonstrated their interests are substantially affected by the moratorium, because they fail to explain specifically how the moratorium affects them economically or personally. Respondent does not contest petitioner's allegation that they own land subject to the moratorium. However, respondent argues the moratorium imposes only a temporary halt to development activities until the city can correct its water service deficiencies. According to respondent, land owned by petitioners in the city will, therefore, benefit from the moratorium.

Allegations that (1) petitioners have ownership interests in land which is subject to an adopted moratorium on new construction, and (2) the moratorium prevents

petitioners from developing such land for purposes for which it is zoned, are sufficient to demonstrate that petitioners' interests are substantially affected by the moratorium. That the moratorium and the ultimate correction of the problems generating the moratorium might eventually benefit petitioners' property, does not alter the fact that petitioners' interests are substantially affected by a decision which prevents them from developing their property as otherwise allowed under the city's comprehensive plan and land use regulations.

Petitioners have standing to seek review of the moratorium.

FIRST ASSIGNMENT OF ERROR

"The City Council's passage of the moratorium ordinance is procedurally flawed."

Petitioners contend (1) the city's charter violates ORS 221.310 because it permits passage of an ordinance containing an emergency clause with fewer affirmative votes than required by the statute, (2) the city's adoption of the challenged ordinance containing an emergency clause failed to meet the requirements of either the charter or the statute, and (3) the challenged ordinance does not comply with city charter requirements that it be signed by the mayor within three days after passage and be signed by the city recorder. Petitioners argue LUBA has authority to review these alleged errors under ORS 197.835(7)(a)(B), which provides that the Board may reverse or remand a land

use decision if the local government committed procedural errors which prejudiced petitioners' substantial rights.²

The city argues that under ORS 197.540, LUBA has authority to review a moratorium only to determine whether its adoption violates ORS 197.505 to 197.530.

ORS 197.540 provides, in relevant part:

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

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

* * * * *

"(4) Notwithstanding any provisions of ORS chapters 196 and 197 to the contrary, the sole standard for review of a moratorium on construction or land development * * * is under the provisions of this section, and

²ORS 197.835(7)(a)(B) provides, as relevant:

* * * the board shall reverse or remand the land use decision under review if the board finds:

"(a) The local government * * *:

* * * * *

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

* * * * *

such a moratorium shall not be reviewed for compliance with the statewide planning goals adopted under ORS chapters 196 and 197.

"* * * * *" (Emphasis added.)

The provisions emphasized above support the city's contention that our authority to review a moratorium is limited to determining whether its adoption complies with ORS 195.505 to 197.530. Petitioners' argument is based on the contention that the phrase "in the manner provided in ORS 197.830 to 197.845," used in ORS 197.540(1), makes the scope of review provisions of ORS 197.835 applicable to our review of a moratorium. The city contends this phrase incorporates by reference only procedural requirements for conduct of appeals to LUBA.

In Schatz v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-153, Order on Objection to Record and Motion to Dismiss, February 6, 1991), slip op 6-9, we considered the similar issue of whether the phrase "in the manner provided in ORS 197.830 to 197.845," makes the standing requirements of ORS 197.830(2) applicable to appeals of moratoria pursuant to ORS 197.540:

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

"In the manner provided in ORS 197.305 to 197.315, the Land Conservation and Development Commission shall review upon petition by a county, city or special district governing body or state agency or a person or group of persons whose

interests are substantially affected,
any moratorium on construction or land
development or a corrective program
alleged to have been adopted in
violation of the provisions of sections
1 to 4 of this Act.' (Emphasis added.)
Or Laws 1980, ch 2, § 5(1).

"Thus, it is clear that under the initial
moratorium statute, the only standing requirement
for a person or group to appeal a moratorium or
corrective program was that the person or group
have 'interests [which] are substantially
affected.' Such appeals were to be conducted by
LCDC according to the procedures of ORS 197.305 to
197.310.^[3]

"In 1983, authority to hear appeals of moratoria
and corrective programs was transferred to this
Board. Or Laws 1983, ch 827, § 45. The
amendments made to ORS 197.540(1) only changed
'Land Conservation and Development Commission' to
'Land Use Board of Appeals' and replaced
'ORS 197.305 to 197.315 (1977 Replacement Part)'
with 'ORS 197.830 to 197.845.' No other
provisions of ORS 197.540(1), including the
requirement that persons or groups of persons
petitioning for review have "interests [which] are
substantially affected," were changed.

"In replacing the phrase 'in the manner provided
by ORS 197.305 to 197.315' with the phrase 'in the
manner provided by ORS 197.830 to 197.845,' the
legislature simply replaced the procedures for
LCDC appeals found in ORS 197.305 to 197.315 with
the procedures for LUBA appeals found in ORS
197.830 to 197.845. We do not believe the
legislature intended by this change to impose
additional standing requirements on appeals of
moratoria and corrective programs. * * *"

³We explain elsewhere in the quoted order that ORS 197.305 to 197.315
set out the procedures for LCDC's conduct of appeals, but contained no
provisions regarding standing, and that standing to initiate appeals to
LCDC was controlled solely by ORS 197.300(1).

(Emphasis in original; footnotes omitted.)

We believe the above reasoning applies equally to LUBA's scope of review under ORS 197.540. ORS 197.305 to 197.315 (1977 Replacement Part), the provisions governing LCDC appeals referred to when the moratorium statute was initially adopted in 1980, did not contain scope of review provisions.⁴ Thus, it is clear that under the initial moratorium statute, appeals were to be conducted by LCDC according to the procedures of ORS 197.305 to 197.315, and LCDC's scope of review was limited to determining whether a challenged moratorium was adopted in violation of ORS 197.505 to 197.530. In 1983, when authority to hear appeals of moratoria was transferred from LCDC to LUBA, amendments made to ORS 197.540 only changed "Land Conservation and Development Commission" to "Land Use Board of Appeals" and replaced "ORS 197.305 to 197.315 (1977 Replacement Part)" with "ORS 197.830 to 197.845."

As we stated in the order quoted above, by replacing the phrase "in the manner provided by ORS 197.305 to 197.315" with the phrase "in the manner provided by ORS 197.830 to 197.845," the legislature simply replaced the procedures for LCDC appeals found in ORS 197.305 to 197.315 with the procedures for LUBA appeals found in ORS 197.830 to 197.845. We do not believe the legislature intended by this

⁴LCDC's scope of review in appeals initiated pursuant to ORS 197.300 to 197.315 (1977 Replacement Part) was established by ORS 197.300(1).

change to alter the previously established scope of review for appeals of moratoria. Therefore, in reviewing a decision adopting a moratorium, our scope of review is limited to determining whether the moratorium was adopted in violation of ORS 197.505 to 197.530.

The first assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners argue the record shows that the city has more than an adequate supply of water available from the City of Medford. Therefore, according to petitioners, the adoption of the moratorium violates the requirement of ORS 197.520(2)(a) that the city demonstrate there is a need beyond the capacity of its existing water facilities.

The city concedes that there is adequate water available from the Medford system, but contends the city's inadequate storage and delivery system makes it impossible for the city to rely on this available water. The city argues it complied with ORS 197.520(2)(a) by adopting findings which demonstrate that it is unable to utilize the additional water capacity available from the City of Medford.

ORS 197.520(2) provides in relevant part:

"A moratorium may be justified by demonstration of a need to prevent a shortage of key facilities as defined in the statewide planning goals which would otherwise occur during the effective period of the moratorium. Such a demonstration * * * shall include * * * findings:

"(a) Showing the extent of need beyond the estimated capacity of existing key facilities expected to result from new land development
* * *;

"* * * * *"

"Key facilities" are defined in the Statewide Planning Goals as:

"Basic facilities that are primarily planned for by local government but which also may be provided by private enterprise and are essential to the support of more intensive development, including public schools, transportation, water supply, sewage and solid waste disposal." (Emphasis added.)

Under this assignment of error, petitioners argue only that compliance with ORS 197.520(2)(a) requires a demonstration that the moratorium is necessitated by an inadequate source of water. However, the use of the term "water supply" in the above quoted definition of "key facilities" does not mean it is only the source of water which is considered a key facility. A water supply system adequate to support development includes not only a source of water, but also facilities for treatment, storage and distribution of water.⁵ Therefore, water treatment, storage

⁵In the administrative rules adopted by LCDC to implement the Statewide Planning Goals, water "public facility systems" are defined as including:

- "(A) Sources of water;
- "(B) Treatment system;
- "(C) Storage system;

and distribution facilities are also "key facilities" as that term is used in ORS 197.520(2).⁶ Petitioners' argument provides no basis for concluding the challenged decision fails to comply with ORS 197.520(2)(a).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

"Rather than plan for growth, Jacksonville has relied on moratoria to halt construction within the city."

Petitioners argue the city has a historical pattern of relying on moratoria to "solve" planning and development problems. Petitioners cite examples of previous moratorium ordinances adopted in 1972, 1986, 1987 and 1989. Petitioners further contend the record in this appeal demonstrates city residents have "anti-development sentiments," and the true reason for adoption of the moratorium is "to stop building." Petition for Review 20. According to petitioners, the appealed moratorium is "the culmination of a pattern of abuse of moratoria by the city * * *, using moratoria to stop development within the city limits, in areas where the land is already zoned for housing." Id.

"(D) Pumping system;

"(E) Primary distribution system." OAR 660-11-005(7)(a).

⁶We note the findings adopted in support of the challenged ordinance explain that the moratorium is necessitated by the existence of inadequate water storage capacity and pumping capacity. Record 13-18.

The city argues that the legality of any previously enacted moratorium is not relevant to whether the challenged moratorium was adopted in compliance with ORS 197.505 to 197.530. The city further argues the intent of city residents who testified in support of adopting the moratorium is irrelevant as well. According to the city, the only issue properly before this Board is whether the city's findings are adequate to comply with ORS 197.520.

We agree with the city that neither the city's adoption of prior moratoria nor the intent of individual residents testifying in support of the challenged moratorium provides a basis for finding the challenged moratorium was adopted in violation of ORS 197.505 to 197.530.

The fourth assignment of error is denied.⁷

SECOND ASSIGNMENT OF ERROR

"The City Council's finding that the water shortage in the City of Jacksonville is extreme is conclusory and not supported by the record."

FIFTH ASSIGNMENT OF ERROR

"The water supply problems claimed by the city are not at a critical stage and could be controlled through less onerous means than the establishment of a complete building moratorium for the entire

⁷In part D of their fifth assignment of error, petitioners argue the city's failure to enforce a systems development fee ordinance adopted in 1973, and to use the fees therefrom to maintain and improve its water facilities, shows the city "failed to comply with the prerequisites of a key facilities moratorium." Petition for Review 24. As stated in the text with regard to the city's past adoption of other moratoria, we fail to see how the city's past actions are relevant to whether its adoption of the challenged moratorium complies with ORS 197.505 to 197.530.

city."

SIXTH ASSIGNMENT OF ERROR

"The City has failed to accommodate the housing needs of the area affected."

Under these assignments of error, petitioners contend the findings and evidence supporting the moratorium are inadequate to demonstrate (1) new development would generate a need exceeding the capacity of existing city water facilities, (2) housing needs of the city have been accommodated as much as possible when allocating any remaining water facility capacity, and (3) there is a need to adopt the moratorium to prevent a shortage of key water facilities.

A. Exceeding Capacity of Existing Water Facilities

ORS 197.520(2)(a) requires that adoption of a moratorium be supported by findings:

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

The city adopted findings addressing ORS 197.520(2)(a). Record 12-18. The findings conclude the city's water storage and pumping facilities have inadequate capacity to meet current needs, are currently operating beyond capacity and, therefore, there is no uncommitted capacity in the city water system to accommodate needs resulting from new development. Petitioners make several challenges to the

city's conclusion that its water storage and pumping facilities are currently operating beyond capacity.

1. Storage Facilities

The city's findings on storage capacity state that the city relied on the Blanton report and supplemental report, and on the Water Committee report, subject only to the deficiencies noted in the Blanton report. Record 13. The findings describe the three existing storage reservoirs, and go on to state:

"* * * The theoretical total current storage [in the three reservoirs] is [1,260,000] gallons. The actual total storage capacity of the city of Jacksonville is closer to [1,089,000] gallons due to the structural limitations of the existing failing reservoirs.

"* * * Pursuant to Resolution 501 the city adopted a storage policy of 3-5 days of average water use plus fire storage of no less than 1,500 gallons per minute for duration of 6 hours based on a population of 2,000+.^[8] The city council finds

⁸Resolution 501 ("A Resolution Adopting a Policy on Water Storage and Development of a Water System Master Plan") was adopted by the city on March 6, 1990. The resolution states that the city adopts, as "guidelines [for] use in development of water storage capacity standards," the recommendations set out by the Health Division of the Oregon Department of Human Resources attached thereto. The Health Division recommendation states in relevant part:

"* * * we recommend storage equal to 3-5 days of average water use. This is consistent with good engineering practice and is designed to allow at least minimum system function in the event of power failure, main line rupture, or severe contamination of the water source.

"This minimal system function would also include provision for fire protection. The National Board of Fire Underwriters has established fire flow rates for communities of various sizes.

that the average day's use based upon master meter readings between July 1, 1988 and June 30, 1989, was 159,545,000 gallons in 365 days or 474,110 [sic 437,110] gallons per day. Blanton's supplemental report, page 2. Three times the average day['s use] is 1,311,330 gallons per day. Fire storage of 1,500 gallons for 6 hours is 540,000 gallons. Total storage required per Resolution 501 is 1,331,330 + 540,000 [=] 1,851,330 [gallons]. Total required storage needs exceed present storage capacity by 591,330 gallons over (theoretical) capacity. Blanton Supplemental Report, p.2.

"* * * The city council finds that the city currently has an inadequate storage capacity to supply its population of greater than 2,000 residents." (Emphasis in original.) Record 14-15.

Petitioners make four challenges to the city's determination that its storage capacity is inadequate to meet present needs. First, petitioners challenge the evidentiary support for findings, not quoted above, concerning deterioration of and water loss from the three existing city reservoirs. Second, petitioners contend the city cannot accurately determine current city water usage, as opposed to water loss, and cannot determine whether conservation measures are working, because the city does not have records detailing actual daily water consumption. Third, petitioners contend there is insufficient evidence to support the city's determination because there is no accurate population figure in the record. According to

For a population of approximately 2000, the required fire flow is 1500 gallons per minute for a duration of 6 hours, for a total of 540,000 gallons." Resolution 501, Exhibit A-1.

petitioners, various estimates of current city population in the record are 2,195, 2,210 and 2,300. Record 43, 321, 338.

Finally, petitioners contend the Blanton reports and Water Committee report relied on by the city do not provide substantial evidence to support the city's decision. Petitioners argue the Blanton report indicates that much of the Water Committee report is not credible because it relied on unsubstantiated allegations and unsound engineering. Petitioners further argue the Water Committee report and Blanton supplemental report contain unreliable conclusory personal opinions. Petitioners also contend that the Blanton report and supplemental report contradict each other and, therefore, the Blanton supplemental report cannot be relied upon as being professional, credible and unrefuted.

With regard to petitioners' first challenge, the city's findings do describe deterioration of and water loss from the city reservoirs, and state these problems reduce storage capacity from a theoretical 1,260,000 gallons to an actual 1,089,000 gallons. Record 14. However, in demonstrating that storage capacity is inadequate to meet current needs, the findings rely on the theoretical storage capacity, not on a lesser actual storage capacity. Id. Therefore, the findings on reservoir deterioration and consequent reduction in actual storage capacity are not essential to the decision that there is inadequate storage capacity, and it is not necessary to determine whether those findings are supported

by substantial evidence in the record. Moorefield v. City of Corvallis, ___ Or LUBA ___ (LUBA No. 89-045, September 28, 1989), slip op 32; Bonner v. City of Portland, 11 Or LUBA 40 (1984).

With regard to petitioners' second challenge, both Resolution 501 and the challenged decision state that the city needs a storage capacity equal to at least three days of "average water use" plus required fire flow storage. The city determined "average day's use" by dividing the difference between the master meter readings on July 1, 1988 and June 30, 1989, by 365. Record 39. Petitioners do not argue this is an inaccurate means of determining the amount of water consumed by the city's system on an average day. Neither do petitioners challenge the city standard of requiring storage capacity equal to a minimum of three days average use plus required fire flow. Rather, we understand petitioners to contend the city has no way of determining how much of the water consumed daily is actually used for beneficial purposes and how much is lost through system leaks and inefficiencies. However, even if true, this argument provides no basis for questioning the city's determination of currently needed storage capacity.

Concerning petitioners' third challenge, the challenged findings state that pursuant to Resolution 501, the required fire flow storage capacity is "based on a population of 2,000+." Record 14. Resolution 501 adopts a recommendation

of the Health Division stating:

"* * * For a population of approximately 2,000, the required fire flow is 1500 gallons per minute for a duration of 6 hours, for a total of 540,000 gallons." Resolution 501, Exhibit A-1.

Although petitioners are correct that slightly different figures for city population are found in the record, ranging from 2,195 to 2,300, these figures are not inconsistent with the "approximately 2,000" relied on by the city in determining the required fire flow storage capacity. In fact, to the extent they are higher than 2,000, they arguably could support a determination that even more storage capacity is currently required, but certainly do not provide a basis for arguing that required storage capacity is less than determined by the city.

Finally, as to petitioners' fourth challenge, we find there are no discrepancies or contradictions between the Water Committee report, Blanton report and Blanton supplemental report with regard to water storage capacity. The Water Committee report simply states that based on Resolution 501 and previous engineering reports, the city currently has inadequate water storage capacity. Record 337. The Blanton report states that Blanton, as a professional engineer, can support the statement on this issue in the Water Committee report. Record 73. Both the Blanton report and supplemental report further expand on this issue and explain the determination of required storage

capacity, based on Resolution 501 and a calculation of average daily use. Record 39, 75-76. There is no significant difference between the required storage capacity determined in the Blanton report and supplemental report. The supplemental report also compares the required storage capacity to the existing storage capacity and determines there is a deficiency of 591,330 gallons. Record 39. These reports are substantial evidence supporting the city's determination of a current need beyond existing water storage capacity.

This subassignment of error is denied.

2. Pumping Facilities

The city's findings on pumping capacity state:

"* * * The city council finds that the city's pumping capacity is also inadequate to meet current needs. The pumping time of the existing two primary pumps exceeded 45 pumping hours per day and averaged 98.8% maximum capacity between June 25, and July 31, 1990, when some conservation measures were in place. Blanton Supplemental Report, p.2.

"* * * The maximum pumping capacity of the two primary pumps is 680 gallons per minute and 979,200 gallon per day. Blanton supplemental report, page 2. Pumping capacity should exceed the maximum one day demand. Blanton supplemental report, page 2. The maximum one-day demand is 2.3 times the average day [use], $2.3 \times 437,110$ or 1,005,353 gallons [per day]. Blanton supplemental report, page 2. The maximum pumping capacity of the two primary pumps does not exceed maximum one day demand and is short of the recommended pumping capacity by 26,150 gallons per day. * * *"
Record 15.

Petitioners challenge the findings concerning pumping time of the two primary city pumps. Petitioners contend the city's records are inadequate to determine the actual running time of the pumps. According to petitioners, if a pump happens to be running at the time the daily log entry is made by the city Maintenance Supervisor, the city assumes it has run for 24 hours. Petitioners also argue the city improperly relied only on pump running times for June and July, two of the hottest months of the year.

Petitioners also challenge the evidentiary support for the city's calculation of pumping capacity. Petitioners argue that the Water Committee report is not credible because the Blanton report states it relied on unsubstantiated allegations and was not based on sound engineering practice. Petitioners further argue that the calculations in the Blanton supplemental report relied on by the city are not based on sound engineering practice, but instead on Blanton's personal conclusions and opinions. Petitioners also contend the pumping capacity determination in the Blanton supplemental report is undermined by the Blanton report, which states that "pumping, storage, distribution and fire flow requirements cannot be segregated and analyzed separately, but rather compliment each other." Record 75.

The city contends the Maintenance Supervisor's pump logs, at Record 281-292, are adequate to support the city's

findings concerning pump running times. However, the city also argues that its determination of inadequate pumping capacity is independent from pump running time. According to the city, the Blanton supplemental report indicates that determining needed pumping capacity from a calculated maximum one-day demand, obtained by multiplying average daily use by a regional standard of 2.3, is an accepted practice. Under such a calculation, the city argues, the city's water system has less than the recommended minimum pumping capacity, regardless of the time of the year or how many hours the pumps run each day.

We agree with the city that its determination of inadequate pumping capacity to meet current needs is based upon a comparison of existing pumping capacity to a projected maximum day demand. The city's findings concerning actual pump running time are not essential to its determination of inadequate pumping capacity and, therefore, it is not necessary to determine whether they are supported by substantial evidence in the record. Moorefield v. City of Corvallis, supra; Bonner v. City of Portland, supra.

Petitioners challenge the city's reliance on the method of comparing existing pump capacity to projected maximum day demand to determine adequacy of pumping capacity only by challenging the credibility of the Blanton and Water

Committee reports upon which the city relies.⁹ As described in the previous section, petitioners contend the Blanton report refuted the Water Committee report, and the Blanton report and supplemental report are contradictory.

With regard to pumping capacity, the Water Committee report states "[w]ith the current population of 2,300 (approx), the maximum demand day has been near 1,000,000 gallons * * *." Record 338. Based on this, the Water Committee report calculates what the maximum day demand for a population of 3,350 would be, and compares this to a projected daily pumping capacity, based on pending improvements to the city's pumping station. Id.

The Blanton report states that the Water Committee report fails to cite supporting studies or information to validate its current maximum day demand figure, not that the Water Committee report's maximum day demand figure is incorrect. Record 74. The Blanton report does state the Water Committee report's "determination of pumping capacity is not based on sound engineering practice." Id. However, the Blanton report also provides:

"* * * It is not apparent how [the maximum day

⁹Petitioners do not challenge the evidentiary support for the existing pump capacity figure relied on by the city. Further, petitioners question the average daily use figure used by the city only with regard to the city's lack of knowledge concerning how much of this water is "lost," an argument we rejected in the previous section. Finally, petitioners do not specifically challenge the city's use of a factor of 2.3 in calculating maximum day demand from average daily demand.

demand figure in the Water Committee report] was determined, but based on a brief investigation of the water system, it appears that this demand rate is an estimate rather than an actual measured flow. There are several methods for estimating the historical maximum day demand, each with a different degree of confidence.

"One method would be to apply a regional peaking factor to the average annual daily demand or to the average daily demand of the maximum month, depending on the availability of acceptable factors. Wilbur Warren, in the March, 1967, Engineering Report for the City of Jacksonville, recommended a maximum day peaking factor of 2.3 times the average daily flow. Assuming the current average daily demand to be 437,000 gal[lons], the maximum day [demand] would be 1,005,100 gallons. The Medford Water Commission estimated Jacksonville's maximum day demand for 1985 to be 0.85 MGD, and the year 2000, 1.26 MGD. Using a linear relationship the 1990 maximum day demand would be 1.0 MGD (MWC - Water System Plan, 1987)." Record 77.

The Blanton supplemental report also provides Blanton's "personal conclusions, and [his] opinions resulting from [his] review of the information received from the Water Committee," with regard to the comparison of pumping capacity to maximum day demand, as follows:

* * * The maximum capacity of [the two primary] pumps is 680 gallons per minute, and the maximum pumping capacity is 979,200 gallons per day.
* * *

"It is an accepted standard that pumping capacity should exceed the maximum one-day demand. The criteria for estimating the maximum one-day demand, as set forth by the Medford Water Commission is 2.3 times the average day, or $2.3 \times 437,110$ gallons = 1,005,353 gallons, based on 1988-1989 usage.

"[Current] maximum capacity is 26,150 gallons per day short of minimum recommended capacity." (Emphasis in original.) Record 39.

We see no contradiction between the Blanton report and supplemental report with regard to determination of adequacy of pumping capacity. Both reports state that maximum day demand can be calculated to be around 1,005,000 gallons, using accepted techniques.¹⁰ The supplemental report also states (1) it is an accepted water system standard that pumping capacity should exceed the maximum day demand, and (2) the city's maximum pumping capacity is currently 979,200 gallons per day. Petitioners do not challenge these points, nor do petitioners question Blanton's engineering qualifications. The Blanton report and supplemental report constitute expert opinion, upon which it is reasonable for the city to rely. See Miller v. City of Ashland, 17 Or LUBA 147, 170 (1988). Accordingly, the city's determination of inadequate pumping capacity is supported by substantial evidence in the record.

This subassignment of error is denied.

B. Accommodation of Housing Needs

ORS 197.520(2)(c) requires that the adoption of a moratorium be supported by findings:

"That the housing needs of the area affected have been accommodated as much as possible in any

¹⁰In fact, the Water Committee report also concluded that current maximum day demand is "near 1,000,000 gallons." Record 338.

program for allocating any remaining key facility capacity."

With regard to this standard, the findings state:

"* * * the existing [water] facilities are inadequate to service the existing population. Therefore, there is no remaining key facility capacity to allocate in an allocation program. No mitigation of the effect [of the moratorium] on housing is possible because the capacity does not exist in the existing water facility to allow any connections." Record 19.

Petitioners argue the city has failed to accommodate housing needs when allocating remaining key facility capacity, as required by ORS 197.520(2)(c). Petitioners challenge the above quoted finding on the ground the city "does not really know at what level of capacity the water system is operating." Petitioners contend the above finding is contradicted by the city's next finding, which states that a report by John Jensen concluded water service was available for a specific subdivision.

The city argues that it is not possible for it to accommodate housing needs in allocating remaining water facility capacity because the city lacks sufficient capacity to allow any additional burdening of the system. The city also contends its finding concerning the 1989 Jensen report simply indicates what that report concluded.

In the previous section, we rejected petitioners' challenges to the city's determinations that the storage and pumping capacity of its water system are inadequate to serve current needs. Accordingly, we agree with the city that

there is no remaining water facility capacity to be allocated and, therefore, no way for the city to accommodate housing needs in making such allocations.¹¹

This subassignment of error is denied.

C. Need to Prevent a Shortage of Key Facilities

Petitioners present several arguments which are not directed at specific findings required by ORS 197.520(2)(a)-(c), but rather contend generally that the city's water facility problems are not critical enough to justify a moratorium or that there are means other than a moratorium which would alleviate the city's problems. First petitioners argue the city failed to consider that some proposed developments would actually improve the city's water system by allowing conversion of dead end distribution pipes to loops. Second, petitioners argue the city should have considered the effect of voluntary or mandatory water conservation measures on system capacity. Finally, petitioners argue that only if there is an extremely unlikely series of events, would the city actually experience a water shortage.¹² According to petitioners,

¹¹We note the city's finding concerning the 1989 Jensen report does not endorse that report's conclusion, but rather refutes it, stating the report's methodology did not take into account all relevant variables. Thus, there is no conflict between this finding and the finding stating it is not possible for the city to accommodate housing needs because there is no remaining water facility capacity.

¹²Petitioners argue the city's determination of inadequate water capacity relies on the following worst case scenario:

relying on such an unlikely occurrence is not sufficient to show the city has a shortage of water facilities serious enough to warrant adoption of a moratorium under ORS 197.520(2).

With regard to petitioners' first argument, we agree with the city that the type of water distribution improvement petitioners describe would do nothing to alleviate the water storage and pumping capacity shortages identified by the city as the basis for adoption of the moratorium. With regard to petitioners' second argument, we also agree with the city that at least where a current shortage of key facilities is demonstrated, there is no requirement in ORS 197.505 to 197.530 that a city must demonstrate it has exhausted all possible alternatives before adopting a moratorium.

Petitioners' final argument reaches the crux of the issue of whether the city's water facility problems are serious enough to justify the adoption of a moratorium on new construction. ORS 197.520(2) requires a moratorium to be justified by demonstration of "a need to prevent a shortage of key facilities." The city's findings state in

"* * * (1) a major fire (using 540,000 gal. of water); (2) additional city water usage so high that such usage is greater than the replacement level provided by the existing pumps; (3) a major mechanical breakdown to the supply system (i.e., pump failure or power failure) such that it cannot be repaired within 2-3 days; and (4) citizen refusal to reduce water usage during the emergency to less than the average.
* * *" Petition for Review 15-16.

this regard:

"[S]hortages exist in the city's key water facilities in storage, pumping and delivery. Such shortages are an inconvenience to the public and a danger to the health, safety and welfare of the city's citizens. These facilities are currently operating beyond capacity.

"* * * * *

"[A]ny new development would only cause the city's shortages to increase and become more acute, presenting an even greater danger to the health, safety and welfare of the city's citizens." Record 17-18.

Petitioners' argument is premised on the belief that in order to demonstrate "a need to prevent a [water] shortage," the city must show that it is reasonably probable that a situation will occur in which city residents will be without water. Admittedly, the city has not shown that without a moratorium, such a situation is likely to occur. Rather, the city has relied on accepted minimum water system standards for adequate water storage and pumping capacity to demonstrate that (1) its system currently does not have adequate capacity to serve existing needs, and (2) any additional construction would make the city further exceed its water system's capacity, posing a greater danger to the health, safety and welfare of the city's residents.¹³ We

¹³We emphasize that the standards relied on by the city to determine required water system storage and pumping capacity are described as allowing for "minimum system function" and providing for "minimum recommended capacity." Resolution 501, Exhibit A-1; Record 39. They are not standards for ideal water systems.

believe this is sufficient to satisfy the requirement of ORS 197.520.

This subassignment of error is denied.

The second, fifth and sixth assignments of error are denied.

The city's decision is affirmed.