BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GERALD A. SCHATZ, NETTIE J. SCHATZ, CHRIS GALPIN, SUE GALPIN, RAY KNAPP, BARCLAY BROWN, MARK RYAN, JR., and SILVERWOOD INVESTMENT GROUP,	)	LUBA No. 90-153
Petitioners,	)	FINAL OPINION AND ORDER
vs.	)	
CITY OF JACKSONVILLE,	)	
Respondent.	)	

Appeal from City of Jacksonville.

Leo B. Frank, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Rieke, Geil & Savage, P.C.

Tonia Moro, Medford, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 05/31/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a City of Jacksonville resolution adopting a "Water Key Facilities Shortage Correction Program" (Corrective Program).

FACTS

On September 18, 1990, pursuant to ORS 197.520(1) and (2), the city adopted an ordinance imposing an immediate moratorium on new construction in all areas served by city water facilities (hereafter "Moratorium Ordinance").[1] ORS 197.530 provides that a city adopting such a moratorium shall, within 60 days after the effective date of the moratorium, hold a public hearing and adopt "a program which seeks to correct the problem creating the moratorium."

On November 6, 1990, the city council held a public hearing on a proposed corrective program. At the request of petitioner Gerald A. Schatz, the hearing was continued to November 13, 1990. On November 13, 1990, after concluding the public hearing, the city council adopted the challenged resolution adopting the Corrective Program.

MOTIONS

A. Respondent's Motion to Strike Exhibit to Petition for Review

Respondent moves to strike Exhibit 5 to the petition

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[1]This ordinance was affirmed in Schatz v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-126, May 13, 1991) (Schatz I).

for review, a document titled "Impact of Ballot Measure #5 on Local Government Debt Management," prepared by the Municipal Debt Advisory Commission and dated January 1991. Respondent objects to Exhibit 5 because it is not part of the local record and under ORS 197.540 and 197.830(13)(a), the Board's review is limited to the local record. Respondent contends the Board is not authorized to take official notice of "facts" outside the local record. Respondent also argues that Exhibit 5 is not subject to official notice by the Board under Faye Wright Neighborhood Planning Council v. Salem, 6 Or LUBA 167 (1982), and subsequent decisions, because it is not part of the city's "organic law."

Petitioners argue that Ballot Measure 5 was adopted by the voters of Oregon and became part of the Oregon Constitution on November 6, 1990. Or Const Art XVII, § 1. Petitioners therefore contend this Board may take official notice of the text of Ballot Measure 5, which is found at pages 32-34 of Exhibit 5. With regard to the remainder of Exhibit 5, petitioners argue this report was the only published material petitioners were able to find concerning the effects of Ballot Measure 5. According to petitioners, the report is akin to a law review article analyzing a new law, and is appended to the petition for review for the sole purpose of apprising the Board of the possible ramifications of Ballot Measure 5.

Petitioners do not contend that Exhibit 5 itself, or facts stated therein, was before or should have been before the city council when it adopted the Corrective Program. Rather, the report is cited in the petition for review only as authority supporting petitioners' arguments concerning possible implications of Ballot Measure 5 on implementation of the Corrective Program. We agree with petitioners that this is similar to citing and attaching to the petition for review a law review article or excerpt from a treatise in support of their legal argument. The Board may consider such support for legal argument in briefs without taking official notice of the documents cited. We further agree with petitioners that we may take official notice of the adopted text of Ballot Measure 5 at pages 32-34 of Exhibit 5.

Accordingly, respondent's motion to strike Exhibit 5 to the petition for review is denied.

B. Petitioners' Motion to Strike Exhibit to Respondent's Brief

Petitioners move to strike Exhibit 1 to the respondent's brief, and any material in that brief's Summary of Material Facts derived from Exhibit 1, because the contents of Exhibit 1 are not part of the local record in this appeal. Exhibit 1 consists of the September 18, 1990 Moratorium Ordinance, including supporting findings, and the first page of the minutes of the September 18, 1990 city council meeting. Petitioners argue this Board previously

determined that the record of the proceedings leading to adoption of the Corrective Program did not include the Moratorium Ordinance proceedings. 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 2-4. Petitioners further argue that even if the Board can take official notice of the Moratorium Ordinance itself, as part of the city's "organic law," such notice cannot extend to the Amended Findings of Fact and city council minutes included in Exhibit 1.

Respondent concedes that the minutes of the September 18, 1990 city council meeting included as page 17 of Exhibit 1 should be stricken. However, respondent contends this Board may take official notice of the Moratorium Ordinance as part of the city's "organic law." Faye Wright Neighborhood Planning Council v. Salem, supra. Respondent further contends the Amended Findings of Fact included as pages 4-16 of Exhibit 1 were adopted by reference as part of the Moratorium Ordinance and, therefore, are also subject to official notice.

Pursuant to the legislative policy of ORS 197.805 that LUBA's decisions be made consistent with sound principles governing judicial review, LUBA has authority to take official notice of judicially cognizable law, as set out in Oregon Evidence Code (OEC) Rule 202. McCaw Communications, Inc. v. Marion County, 17 Or LUBA 206, 209 (1988), rev'd

other grounds 96 Or App 552 (1989); see Byrnes v. City of Hillsboro, 104 Or App 95, 97-98, ___ P2d ___ (1990). OEC Rule 202(7) provides that judicially cognizable law includes "[a]n ordinance, comprehensive plan or enactment of any county or incorporated city in this state * * *." We therefore have authority to take official notice of the Moratorium Ordinance. We also agree with respondent that the Moratorium Ordinance includes the Amended Findings of Fact at pages 4-16 of Exhibit 1, because they are incorporated by reference as part of the Moratorium Ordinance. Therefore, the Amended Findings of Fact are part of the judicially cognizable law of which we may take official notice.

Petitioners' motion to strike is granted with regard to page 17 of Exhibit 1 to the respondent's brief, and is denied with regard to the remainder of Exhibit 1.

PETITIONERS' STANDING

Respondent challenges petitioners' standing. In our February 6, 1991 Order on Objection to Record and Motion to Dismiss, slip op at 8-9, we determined that an "appearance" is not a requirement for standing to appeal adoption of a corrective program. Respondent asks us to reconsider that ruling. Respondent also contends petitioners fail to allege in their petition for review that their interests are substantially affected by the Corrective Program, as required by ORS 197.540(1). Respondent argues that even if

petitioners make such an allegation in their answer to respondent's motion to dismiss, the appeal should nevertheless be dismissed because OAR 661-10-030(3)(a) requires such allegations to be included in the petition for review. Respondent finally argues that even if the Board is willing to consider the allegations in petitioners' answer to the motion to dismiss, those allegations are insufficient because they refer only to how petitioners' interests are affected by adoption of the moratorium, and do not explain how the adoption of the Corrective Program affects petitioners' interests.

We adhere to our determination in the Order on Objection to Record and Motion to Dismiss that an "appearance" is not a requirement for standing to appeal the adoption of a corrective program to this Board. Therefore, the only requirement for standing to appeal the adoption of a corrective program pursuant to ORS 197.530 is that the petitioner have "interests [which] are substantially affected" by the corrective program. ORS 197.540(1).[2]

Respondent is correct that petitioners' allegations of having interests substantially affected by the Corrective Program are found in their answer to the motion to dismiss,

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[2]As in n 4 of that order, however, we note that because we conclude that ORS 197.830(2) does not impose an additional "appearance" requirement for standing to appeal a corrective program, we do not determine whether petitioner Gerald Schatz's request for a continuance at the city council's November 6, 1990 hearing constituted an "appearance."

rather than in the petition for review, as required by OAR 661-10-030(3)(a).[3] However, technical violations of the Board's rules which do not affect the substantial rights of the parties do not interfere with the Board's review. OAR 661-10-005. Here, petitioners' allegations of standing being in their answer to the motion to dismiss did not interfere with respondent's substantial right to prepare and submit its arguments, as the answer to the motion to dismiss was submitted well before the petition for review, and respondent had a full opportunity to respond to petitioners' allegations in its brief.

Petitioners' allegations in the answer to the motion to dismiss state that petitioners all have ownership interests in tracts of land which they are unable to develop during the pendency of the moratorium. Petitioners further allege that their interests in developing their property are substantially impaired by respondent's adoption of an unworkable corrective program which will not correct the city's alleged water supply problem, and will create a situation in which there is no foreseeable end to the moratorium. These statements adequately allege that

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[3]OAR 661-10-030(3) provides in relevant part:

"(3) Contents of Petition: The petition for review shall:

"(a) State the facts that establish petitioner's standing[.]

"* * * * *"

petitioners have interests which are substantially affected by the Corrective Program.

Petitioners have standing to seek review of the Corrective Program.

FIRST ASSIGNMENT OF ERROR

> "The city's findings in adopting the correction program are both minimal and conclusory."

A. Minimal Findings

Petitioners assert the only findings adopted by the city to support its resolution adopting the Corrective Program are the statements in the prefatory clauses of the resolution:

> "[T]he City of Jacksonville, on September 18, 1990, adopted amended findings and the Jacksonville Key Water Facilities Moratorium Ordinance #358; and
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> "[O]n November 6, 1990, the City of Jacksonville adopted a formal Request for Proposal for a Water Systems Master Plan[.]" Record 1.

Citing Davis v. City of Bandon, 105 Or App 425, ___ P2d ___ (1991), petitioners argue this Board "must hold the city to stringent standards in examining its actions regarding the correction program." Petition for Review 6. Petitioners contend the above quoted findings are inadequate because they do not demonstrate how the adoption of the Corrective Program meets statutory requirements. Petitioners further argue the city improperly failed to adopt findings regarding what the city will do if any of the steps set out in the

Corrective Program fail to occur or are ineffective.

Finally, petitioners argue there are no findings in the decision or evidence in the record to support a statement in the Corrective Program that "[i]t is presumed at this time that nothing short of an increase in reservoir capacity will increase [water] system capacity so that additional connections to the system may be made." Record 4. According to petitioners, city reliance on this unsupported assumption is an indicator of lack of good faith in developing, pursuant to ORS 197.530, a program appropriate to correct the alleged water supply problem.

The city argues that adoption of a corrective program is governed solely by ORS 197.530, which does not require findings to support a decision to adopt a corrective program. The city contends Davis v. City of Bandon, supra, concerned a decision to adopt a moratorium based on compelling need pursuant to ORS 197.520(3) and, therefore, has little if any applicability to a decision to adopt a corrective program pursuant to ORS 197.530. The city further argues that even if it were required to adopt findings in support of its decision to adopt a corrective program, adequate findings can be found in the resolution and in the Corrective Program, adopted by reference. The city contends petitioners have failed to identify any applicable standard with which these findings are inadequate to demonstrate compliance.

With regard to the presumption stated in the Corrective Program that only an increase in reservoir capacity will enable additional connections to the city's water system to be made, the city contends this statement is not an absolute presumption, but rather a suggestion. The city points out that the Corrective Program commits it to put into action interim measures "to improve the [water] system capacity or lessen the shortage impact * * * as soon as possible * * *." Record 4. Therefore, according to the city, the stated presumption is explicitly subject to further review.

We agree with the city that the adoption of a corrective program is governed solely by ORS 197.530, which provides:

> "A city, county or special district that adopts a moratorium on construction or land development in conformity with ORS 197.520(1) and (2) shall within 60 days after the effective date of the moratorium adopt a program which seeks to correct the problem creating the moratorium. The program shall be presented at a public hearing. The city, county or special district shall give advance notice of the time and date of the public hearing."

ORS 197.530 does not specifically require that findings be adopted to support adoption of a corrective program.[4] However, to the extent that findings are necessary to enable

[4]In contrast, ORS 197.520(1) provides that a city, county or special district may only adopt a moratorium on construction or land development if "it first makes written findings justifying the need for the moratorium in the manner provided for in this section."

this Board to determine whether a corrective program "seeks to correct the problem creating the moratorium," the sole substantive standard imposed by ORS 197.530, we also agree with the city that we may look for such findings in both the challenged resolution and the text of the Corrective Program, which the resolution adopts by reference.

Petitioners advance two specific contentions as to why the city's findings are inadequate. First, petitioners contend the findings fail to explain what the city will do if any of the steps set out in the Corrective Program fail to occur or are ineffective. However, ORS 197.530 requires only that a corrective program "seeks to correct" the problem justifying adoption of the moratorium, not that the city explain what it will do if elements of the Corrective Program do not have the intended effect.

Second, petitioners contend the findings fail to explain the basis for a presumption in the Corrective Program that only an increase in reservoir capacity will enable additional connections to the city's water system to be made. However, this presumption is not absolute, as the Corrective Program also envisions that the water system master plan required to be adopted may identify interim measures which the city can employ to increase water system capacity as soon as possible. Further, the Corrective Program establishes priorities for approving new connections to the water system "[s]hould limited additional capacity

become available in the water system and some new connections be allowed" prior to the construction of additional reservoir capacity. Record 4. We also note that the Moratorium Ordinance, of which we take official notice, identifies currently inadequate water storage capacity as a justification for adoption of the moratorium. Respondent's Brief App 1, pages 9-10, 13-14. Therefore, we do not find the challenged "presumption" to be without basis, or to indicate the city's Corrective Program does not seek to correct the problem justifying adoption of the Moratorium Ordinance.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Although a [corrective] program adopted under ORS 197.530 must seek to correct the problem creating the need for a building moratorium, the city's program fails to do so."

Petitioners argue ORS 197.530 requires local governments to quickly determine what steps must be taken to correct the problems requiring establishment of building moratoria. According to petitioners, legislative history of the moratorium statute indicates ORS 197.530 requires that the genesis of a program be outlined and a good faith attempt to solve the problem necessitating the moratorium be demonstrated. Minutes of Senate Committee on Housing and Urban Affairs, May 10, 1979, page 4. Petitioners contend the challenged Corrective Program fails to meet this

standard for two reasons.

First, petitioners argue the city's corrective program is inadequate because it does not specify what steps the city will take to correct its alleged water system problems. According to petitioners, the first nine months of the program are consumed by the production of yet another study of the city's water system. Petitioners argue that performing a study is inadequate to constitute a corrective program. Petitioners also contend the Corrective Program does not specify, apparently because the city does not know, what actions the city will take after the study is completed to correct its water system problems.

Second, petitioners argue the city failed to show a good faith attempt to solve the problem requiring establishment of the moratorium, as required by ORS 197.530, by failing to address adequately how it will fund proposed improvements to its water system. Petitioners contend a bare statement that the city "will take all action necessary to achieve alternate funding," should a proposed bond measure fail, is insufficient to demonstrate how the city will fund the Corrective Program. Record 3. Petitioners also contend the city erred by failing to consider the impacts of Ballot Measure 5, passed prior to the adoption of the Corrective Program, on implementation of that program. According to petitioners, Ballot Measure 5 could reduce state monies available to correct the city's water system

problems, and could impede the city's ability to finance improvements through systems development charges or municipal bonds.

The city argues that legislative history of the moratorium statute indicates ORS 197.530 requires the city to adopt a corrective program which demonstrates "a good faith initial attempt to begin to solve the problem." Transcript of Senate Committee on Housing and Urban Affairs, May 10, 1979, Respondent's Brief, Exhibit 2, page 10. The city contends it complied with ORS 197.530 by adopting, in good faith, a corrective program which sets forth an initial program for correcting the city's water facilities shortages. According to the city, it is logical that the first step in such a program would be preparation of an engineering report to provide the city with a plan for items such as construction of an additional reservoir, installation of an additional pumping station, replacement of existing pipes.

The city further argues the Corrective Program adequately addresses funding of proposed improvements. The city points out the Corrective Program provides that a bond measure targeting "the reservoir project" will be scheduled for a special election in August, 1991. Record 3. The city further argues that it could not have addressed the impacts of Ballot Measure 5 in the Corrective Program because the initial hearing on the program was held on the same day

Ballot Measure 5 was put before the voters, and was continued to November 13, 1990, solely at the request of petitioner Gerald Schatz. According to the city, no concerns regarding the effect of Ballot Measure 5 were raised at the continued hearing.

ORS 197.530 requires the city to adopt a program which "seeks to correct the problem creating the moratorium." At its May 10, 1979 hearing on SB 890, the Senate Housing and Urban Affairs Committee adopted the following statement by the chairman as its intent with regard to section 4 of that bill (now ORS 197.530):

> "So I will say that * * * the genesis of a program should be outlined, that it would be recognized by this committee, that the program could possibly involve short or long term capital dedication which might not be do-able at the moment * * *, within the 60 days, that this program was announced. It might involve ballot measures, it might involve excessive levies, it might involve bonding, so that [it] is not my construction that within 60 days you would have presented an entire plan which is a fait accompli, or the beginning of a fait accompli, [with] all the seeds of the needed capital * * * in it, <u>but you would have demonstrated a good faith initial attempt to begin to solve the problem</u>. * * * Hearing no objection, for the record, * * * the majority of the committee express [the above] interpretation of those words in section 4 [of SB890] as their * * * legislative intention. * * *" (Emphasis added.) Respondent's Brief, Exhibit 2, page 10.

The Corrective Program states that on November 6, 1990, the city adopted a Request for Proposal for a Water System

Master Plan (RFP).[5] The program further states that on December 18, 1990, the city council will award the water system master plan project to the successful bidder. The program provides that it is expected the project will be completed, and a Water System Master Plan adopted by the city, by June 1991. The program also projects the following "milestones" for solving the water system capacity problems necessitating the moratorium:

(1) July 1991 -- infrastructure upgrading program will be started.

(2) August 1991 -- proposed bonding measure for construction of reservoir will be scheduled in a special election.

(3) September 1991 -- if bond measure passes, RFP for reservoir construction will be sent out; if bond measure fails, RFP will be sent out within 30 days of obtaining alternate funding source.

(4) November 1991 -- award of reservoir construction

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[5]The RFP is attached to and incorporated by reference into the Corrective Program. Record 2. The RFP describes the nature of the city's water facilities problems, including increasing demand, lack of back-up water supply, obsolete piping, inadequate pump stations, reservoirs which are inadequate and in need of repair and lack of funding. Record 6. The RFP also describes the services requested as including (1) planning a water system that adequately provides for the needs of the future population estimated in the city's comprehensive plan, (2) investigating the feasibility of developing an alternative water source, (3) summarizing options for replacement of obsolete pipes, valves and other system components, (4) determining the best way to upgrade pump stations, (5) preparing a plan for replacing inadequate reservoirs, (6) investigating funding options (including estimating necessary water fee increases, drafting a systems development charge ordinance and identifying available government loan and grant programs), (7) dividing the overall water facilities improvement project into discrete tasks with timelines, and (8) presenting the results of the study to the city in a written report and oral presentation. Record 6-8.

project will be announced.

(5) April 1992 -- engineering plans will be completed and adopted by the city.

(6) April 1993 -- city will reach a fully operational water system level necessary to meet existing and future city needs. See Record 3.

We believe the above described steps, as set forth in the Corrective Program, are sufficient to constitute "a good faith initial attempt to begin to solve the [city's water] problem." We find nothing to indicate that spending approximately seven months in developing and adopting a water system master plan to guide subsequent corrective measures is not contemplated or allowed by the requirement of ORS 197.530 that a program "seek to correct the problem creating the moratorium." Furthermore, the Corrective Program addresses funding of corrective measures, in that it states the city will consider a proposal to increase water rates to fund infrastructure upgrading and will put a bond measure to fund reservoir construction before the voters in August, 1991. At least in the absence of any issue having been raised in the proceeding below regarding the effects of Ballot Measure 5 on potential funding of corrective measures, the city did not err by failing to specifically consider the effects of Ballot Measure 5 on the Corrective Program.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The correction program does not provide for review for almost two years, although some of the proposed 'repairs' should be completed well before that time."

FOURTH ASSIGNMENT OF ERROR

> "Although the city lists a priority for allocation of additional service, there are no guidelines within the correction program to determine how such additional capacity will be found, what guidelines the city will follow to determine this capacity or at what point during the correction program the city will review the system capacity."

Petitioners argue that although the Corrective Program envisions that interim improvements to the water system will be initiated by July 1991 and operational by April 1992, and includes priorities for new connections to the city water system should additional capacity become available while the moratorium is in place, the program does not establish what constitutes additional capacity or provide for interim reviews of the water system prior to May 1993 to determine whether excess capacity exists.[6] According to petitioners, by not requiring interim reviews of water system capacity, the city fails to meet statutory requirements that a key facilities moratorium be limited in scope. Petitioners

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[6]The Corrective Program calls for "a public hearing to consider extending, amending or repealing the Jacksonville Key Water Facilities Moratorium Ordinance * * * in May of 1993." Record 3. The Corrective Program also states that the "projected date for the moratorium to terminate, absent extension thereof, by city action is May of 1993." Record 4.

argue ORS 197.520(2)(b) requires that a moratorium be limited to those areas where a shortage of key facilities would otherwise occur. Petitioners also argue ORS 197.510(3) and 197.520(2)(c) require that a moratorium minimize impacts on housing and accommodate housing needs as much as possible.[7]

The city argues that although the Corrective Program requires interim improvements that may increase water system capacity to be made "as soon as possible," this is not mandated by statute. Record 4. According to the city, there is no statutory requirement that a corrective program include reviews to determine the existence of additional capacity prior to termination of the moratorium. The city argues that ORS 197.520(2) establishes standards only for the adoption of a key facilities moratorium, not a corrective program. The city further argues that ORS 197.510(3), also cited by petitioners, only sets out legislative findings concerning the adoption of moratoria.

We agree with the city that ORS 197.510(3) and

[7]Petitioners also point out the Corrective Program states that "approximately 80 new hookups have been grandfathered into the system [by the Moratorium Ordinance] and any analysis of additional capacity should evaluate this additional impact on the [water] system." Record 4. Petitioners argue there is nothing in the program or in the record to support this number of "grandfathered" hookups or identify how much system capacity they will use. According to petitioners, this uncertainty regarding how the city will allocate water system capacity among potential users also demonstrates the city has not complied with the requirement of ORS 197.520(2)(c) to accommodate the housing needs of the area when allocating any remaining key facility capacity.

ORS 197.520(2)(b) and (c) do not establish standards for the adoption of a corrective program. Petitioners' arguments under these assignments of error provide no basis for concluding that the Corrective Program does not "seek to correct the problem creating the moratorium," as required by ORS 197.530.

The third and fourth assignments of error are denied.

The city's decision is affirmed.