

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

3 CITIZENS FOR BETTER TRANSIT,)
4 ARDENWALD NEIGHBORHOOD ASSO-)
5 CIATION, DOUGLAS R. ALLEN,)
6 RICHARD CAYO, DOUGLAS J.)
7 COLEMAN, KASCH'S GARDEN)
8 CENTERS AND NURSERIES, INC.,)

LUBA No. 86-012

Petitioners,)

FINAL OPINION
AND ORDER OF DISMISSAL

vs.)

9 CITY OF PORTLAND, METROPOLI-)
10 TAN SERVICE DISTRICT and)
11 OREGON DEPARTMENT OF)
12 TRANSPORTATION,)

Respondents.)

13 Appeal from City of Portland.

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23 DuBAY, Chief Referee; BAGG, Referee; KRESSEL, Referee;
24 participated in the decision.

DISMISSED

02/13/87

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

1 DuBay, Chief Referee.

2 The City of Portland's Motion to Dismiss claims the
3 challenged decision is not a land use decision within our
4 jurisdiction to review.

5 Resolution No. 34033 was adopted by the Portland City
6 Council on February 12, 1986. The resolution, in part,
7 "recommends the adoption of the McLoughlin Corridor Improvement
8 Program" described in an attachment. The attachment, proposed
9 by the Metropolitan Service District (Metro) in 1985, is the
10 same attachment adopted by Resolution of Milwaukie described in
11 Kasch's Gardens v. City of Milwaukie/Portland, 14 Or LUBA 406
12 (1986).

13 In Kasch's Gardens, supra, our opinion describes the steps
14 taken by Metro to plan for transportation improvements in the
15 McLoughlin Corridor and Metro's efforts to obtain the
16 endorsement by affected jurisdictions of the improvement
17 program. Our opinion described the resolution as follows:

18 "Part one states that all jurisdictions endorse
19 construction of the 'full McLoughlin Boulevard highway
20 improvement.' The four phases of the improvement,
21 including the Tacoma Overpass, are then outlined. The
22 resolution also endorses certain allocations to the
23 project from the McLoughlin Corridor Reserve Account.

24 "In the second part of the resolution, all
25 jurisdictions endorse 'bus service and capital
26 improvements as part of a comprehensive transportation
27 improvement strategy for the McLoughlin Corridor.
28 Inclusion of light rail transit in Metro's Regional
29 Transportation Plan for the corridor is also endorsed.

30 "The third part of the resolution endorses 'a policy
31 intent to discourage through traffic on Johnson Creek
32 Boulevard between McLoughlin Boulevard and SE 45th

1 Avenue.' Record at 9. This part of the resolution
2 also endorses other policy objectives for traffic
3 improvements in that area (e.g., 'to design
4 connections to Johnson Creek Boulevard to match the 25
5 mph design speed on existing street improvements').
6 Id. Part three also endorses 'identification of
7 east-west traffic problems in this area as an
8 outstanding issue in the Regional Transportation
9 Plan.' The municipalities agree 'to participate with
10 Metro on an intergovernmental effort to resolve these
11 issues.' Record at 10.

12 "Finally, in the fourth part of the resolution, all
13 jurisdictions endorse funding allocations for the
14 recommended improvements and others that are
15 'consistent with the McLoughlin Corridor Improvement
16 Program.' Id." Kasch's Gardens v. City of
17 Milwaukie/Portland, 3 Or LUBA 408-409 (1986).

18 We found Milwaukie's resolution expressed the city's
19 position on a matter assigned by law to other levels of
20 government. We said the resolution had no legal effect and was
21 not, therefore, a final decision or determination reviewable by
22 LUBA. See ORS 197.015(10).

23 Respondent relies on our opinion in Kasch's Gardens in its
24 Motion to Dismiss. Because Portland's endorsement of the
25 McLoughlin Corridor Improvement Program only makes a
26 recommendation to Metro, the actual decisionmaker, the city
27 argues the decision is not a final land use decision. See ORS
28 197.015(10).

29 Petitioners contend our decision in Kasch's Gardens fails
30 to consider the effect Portland's resolution has on the later
31 decision by the Oregon Department of Transportation (ODOT) to
32 approve construction of improvements. Petitioners' logic may
33 be summarized as follows:

1 1. Construction of the improvement affecting a major
2 highway is a program or activity affecting land use.

3 2. As a state agency, ODOT must carry out its
4 planning responsibilities and take actions that are
5 authorized by law with respect to programs affecting
6 land use in compliance with statewide goals and
7 acknowledged comprehensive plans and land use
8 regulations. See ORS 197.180(1).

9 3. In order to find compliance with local
10 comprehensive plans and regulations, ODOT may rely
11 upon a determination of compliance made by an affected
12 city or county.

13 4. Resolution 3044 includes a finding that the
14 program complies with the city's comprehensive plan.
15 The only occasion to review whether the program is in
16 compliance with its planning regulations is when the
17 city makes that finding.

18 This rationale emphasizes the finding that the program
19 conforms with local plans and regulations rather than the
20 endorsement of the improvement program described in the
21 attachments. No similar issue was presented in Kasch's
22 Gardens, supra.

23 For the reasons set forth below, we do not agree with
24 petitioners that Resolution 3044 is a land use decision.

25 The approval of projects in the McLoughlin Corridor
26 Improvement Program requires participation of ODOT, Metro and
the city. In addition to state and local regulations, federal
requirements must also be considered because construction will
be funded with federal monies.

The final selection of projects for construction with
federal funds is by the Federal Highway Administrator. 48 CFR,
Section 450.212. That selection is in part dependent on the

1 Environmental Impact Statement (EIS) required by the National
2 Environmental Protection Act, 42 USC Section 4331, et seq.

3 ODOT is responsible for the engineering development and
4 construction of the corridor improvements. As a state agency,
5 ODOT must "take actions that are authorized by law with respect
6 to programs affecting land use...in compliance with...comprehensive
7 plans and land use regulations initially acknowledged under ORS
8 197.251." ORS 197.180(1). ODOT's state agency coordinating
9 program explains that major highway project proposals are
10 reviewed for conformity with acknowledged comprehensive plans.
11 The reviews are conducted in conjunction with preparation of an
12 EIS.¹

13 Petitioners argue that whenever ODOT determines the
14 McLoughlin projects conform to the city's comprehensive plan
15 and regulations, Resolution 3044 may be relied upon by ODOT.
16 This argument would have more weight if either state or federal
17 law required ODOT to rely on the city's finding. Petitioners
18 do not cite to any regulations to this effect, and we are aware
19 of none. Petitioners rely on Schreiners Garden v DEQ, 71 Or
20 App 381, 692 P2d 660 (1984) to support their assertion that the
21 appropriate time for reviewing a determination of plan
22 conformity is when the local government makes it, not when the
23 state agency relies on it.

24 Schreiners Garden is inapposite for two reasons. First,
25 DEQ's decision in that case was made according to an LCDC
26 regulation then in effect, OAR 660-31-035, requiring state

1 agencies to rely on local determinations of plan compliance.
2 No similar rule controls ODOT's determination of local plan
3 conformity of the McLoughlin Corridor Improvements. Second,
4 the county's findings of plan conformity relied upon by DEQ was
5 made in conjunction with a siting permit issued by the county.
6 The permit approval was a final land use decision. In
7 contrast, Resolution 3044 does not grant final approval to any
8 land use activity. As stated, it is an endorsement of a
9 project planned and undertaken by other agencies.

10 For the reasons set forth in Kasch's Gardens, supra, the
11 resolution is advisory only. It only endorses Metro's
12 Improvement Program. We therefore reject petitioners' claim
13 that the finding of compliance with the city's plan is a land
14 use decision. The fact that ODOT might rely on the city's
15 finding in preparing the EIS does not endow the decision with
16 sufficient legal force to constitute a final land use
17 decision. See Allen Associates v. City of Beaverton, 11 Or
18 LUBA 140 (1984).

19 The motion to dismiss is granted.
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FOOTNOTES

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Under federal laws, state agencies may be authorized to prepare the EIS. 42 USC, (4332) (D). By this authority ODOT has the responsibility to prepare the EIS for projects to be built with federal aid such as the McLoughlin Corridor Improvements.