

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

3  
4 GOOSE HOLLOW FOOTHILLS LEAGUE    )  
5 ASSOCIATION,                        )

6                                        )  
7                    Petitioner,        )

8                                        )  
9                    vs.                 )

10                                     )  
11 CITY OF PORTLAND,                    )

12                                     )  
13                    Respondent,        )

14                                     )  
15                    and                 )

16                                     )  
17 TRI-COUNTY METROPOLITAN            )  
18 TRANSPORTATION DISTRICT OF        )  
19 OREGON, a municipal corporation,    )

20                                     )  
21                    Intervenor-Respondent.    )

LUBA No. 91-051

FINAL OPINION  
AND ORDER

22  
23  
24            Appeal from City of Portland.

25  
26            Henry Kane, Beaverton, represented petitioner.

27  
28            Ruth Spetter, Portland, represented respondent.

29  
30            Mark J. Greenfield, Portland, represented intervenor-  
31 respondent.

32  
33            HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON,  
34 Referee, participated in the decision.

35  
36                            DISMISSED                            07/05/91

37  
38            You are entitled to judicial review of this Order.  
39 Judicial review is governed by the provisions of ORS  
40 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a resolution in which the city makes  
4 certain recommendations to the Tri-County Metropolitan  
5 Transportation District (Tri-Met) concerning a proposal to  
6 construct a light rail transportation facility and highway  
7 improvements between downtown Portland and suburban  
8 Washington County. Following adoption of the challenged  
9 resolution, Tri-Met adopted a final order selecting a light  
10 rail route and alignment, related facilities and highway  
11 improvements between downtown Portland and Southwest 185th  
12 Avenue in Hillsboro (the Westside Corridor Project).<sup>1</sup> Tri-  
13 Met's final order was appealed to this Board, and review of  
14 that order is pending before the Supreme Court. Seto v.  
15 Tri-Met, \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-045, May 21, 1991).<sup>2</sup>

16 The challenged city resolution first recognizes that a  
17 Westside Corridor Project Steering Group conducted  
18 evaluations of the project and made recommendations  
19 concerning the project. The challenged resolution states,  
20 in part:

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<sup>1</sup>Tri-Met's final order was adopted pursuant to Oregon Laws 1991, chapter 3 (SB 573). Under Oregon Laws 1991, chapter 3, the Westside Corridor Project includes two parts. The first part is the portion between downtown Portland and Southwest 185th in Hillsboro. The second part is the portion between Southwest 185th and downtown Hillsboro. Tri-Met's final order concerned only the first part, and all references to the Westside Corridor Project in this opinion are to the first part of the project.

<sup>2</sup>Oregon Laws 1991, chapter 3 includes provisions for expedited appellate review of Tri-Met's final order.

1           "\* \* \* the City of Portland endorse[s] the  
2           recommendations of the Project Steering Group and  
3           recommends that the Tri-Met Board of Directors  
4           adopt the recommendation as the region's Locally  
5           Preferred Alternative and as the region's action  
6           on the matters to be covered by the consolidated  
7           land use action \* \* \*." Notice of Intent to  
8           Appeal.

9           **MOTION TO INTERVENE**

10           Tri-Met moves to intervene in this proceeding on the  
11           side of respondent. There is no objection to the motion,  
12           and it is allowed.

13           **MOTION TO DISMISS**

14           Intervenor moves to dismiss, alleging that because the  
15           challenged decision is only a recommendation by the city to  
16           Tri-Met, it is not a final decision and, therefore, is not a  
17           land use decision. Intervenor also contends that with  
18           inapplicable exceptions, under Oregon Laws 1991, chapter 3,  
19           Tri-Met renders the sole land use decision regarding the  
20           Westside Corridor Project. Intervenor contends that under  
21           Oregon Laws 1991, chapter 3 the challenged resolution is  
22           therefore not a land use decision subject to our review.  
23           Respondent joins in intervenor's motion to dismiss.

24           LUBA's review jurisdiction is limited to land use  
25           decisions. ORS 197.825. Land use decisions must be "final"  
26           decisions.<sup>3</sup> Sensible Transportation v. Metro Service Dist.,

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<sup>3</sup>As defined by ORS 197.015(10), a land use decision must be a "final" decision. The requirement for finality also applies to decisions subject to our review jurisdiction as decisions having significant impacts on present or future land use. Hemstreet v. Seaside Improvement Comm., 16 Or

1 100 Or App 564, 787 P2d 498 (1990) (decision adopting  
2 regional transportation plan amendments not a final decision  
3 where the amendments are contingent on subsequent county  
4 decision concerning statewide planning goal compliance);  
5 McKenzie River Guides v. Lane County, \_\_\_ Or LUBA \_\_\_ (LUBA  
6 No. 90-020, May 23, 1990) (decision by county commissioners  
7 selecting preferred bridge location and directing county  
8 staff to prepare necessary permit applications not a final  
9 decision). A "recommendation" from one governing body to a  
10 second governing body concerning an action within the  
11 authority of the second governing body is not a "final"  
12 decision subject to our review. Vancouver Federal Savings  
13 v. City of Oregon City, 17 Or LUBA 348 (1989); Citizens for  
14 Better Transit v. City of Portland, 15 Or LUBA 278 (1987);  
15 Kasch's Gardens v. City of Milwaukie/Portland, 14 Or LUBA  
16 406 (1986).

17 The challenged city resolution is only a recommendation  
18 to Tri-Met. As we explained in our decision in Seto v. Tri-  
19 Met, supra, Tri-Met's land use decision concerning the light  
20 rail route and location of associated light rail and highway  
21 improvements is governed by standards adopted by the Land  
22 Conservation and Development Commission (LCDC), pursuant to  
23 Oregon Laws 1991, chapter 3, section 4. Id., slip op at 4.  
24 Tri-Met's separate decision selecting the Locally Preferred

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LUBA 748, 752 (1987), aff'd 93 Or App 73 (1988); CBH Company v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988).

1 Alternative Report is governed by federal law, as are  
2 certain other decisions that Tri-Met may be required to  
3 adopt in the future to complete the Federal Environmental  
4 Impact Statement process for the Westside Corridor Project.<sup>4</sup>  
5 Id. slip op at 20. In adopting its land use decision under  
6 Oregon Laws 1991, chapter 3, Tri-Met was free to accept the  
7 city's recommendation in whole or in part, or reject the  
8 city's recommendation altogether. Such city recommendations  
9 are not final decisions subject to our review.

10 Petitioner argues the above cited cases concerning  
11 recommendations from one governing body to another are  
12 inapposite because the city's recommendations are "part of a  
13 process that leads to a final order issued by Tri-Met that  
14 must be obeyed by affected cities and counties \* \* \*."  
15 Petitioners' Brief in Opposition to Motion to Dismiss 1.

16 Petitioner is correct that Oregon Laws 1991, chapter 3  
17 creates a process whereby Tri-Met renders a single land use  
18 decision concerning the Westside Corridor Project.  
19 Petitioner is also correct that, if necessary, city and  
20 county comprehensive plans and land use regulations must be  
21 amended to comply with Tri-Met's final order.<sup>5</sup> However,

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<sup>4</sup>Tri-Met adopted both the final land use decision challenged in Seto,  
and the decision adopting the Locally Preferred Alternative Report, on  
April 12, 1991. Copies of both decisions are attached to intervenor's  
motion to dismiss.

<sup>5</sup>Oregon Laws 1991, chapter 3, section 7 provides as relevant:

1 these aspects of Oregon Laws 1991, chapter 3 do not make  
2 what is clearly a recommendation from one governing body to  
3 another a final land use decision subject to our review.

4 In Oregon Laws 1991, chapter 3, section 1(1) the  
5 legislature states that in order to make timely decisions  
6 necessary to secure maximum federal funding for the Westside  
7 Corridor Project, it is necessary:

8 "(a) To consolidate the land use decisions  
9 regarding the light rail route, the location  
10 of associated light rail facilities and the  
11 highway improvements to be included in the

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"(1) The state and all counties, cities, special districts and  
political subdivision[s] shall:

"(a) Amend their comprehensive or functional plans,  
including public facility plans, and their land use  
regulations to the extent necessary to make them  
consistent with [Tri-Met's] final order; and

"(b) Issue the appropriate permits, licenses and  
certificates necessary for the construction of the  
project or project extension consistent with a  
final order. Permits, licenses and certificates  
may be subject to reasonable and necessary  
conditions of approval, but may not, either by  
themselves or cumulatively, prevent the  
implementation of a final order.

\*\* \* \* \* \*

"(3) Plan and land use regulation amendments, to the extent  
required under paragraph (a) of subsection (1) of this  
section, shall not be reviewable by any court or agency.

"(4) Permit, license and certificate decisions under paragraph  
(b) of subsection (1) of this section may be the subject  
of administrative and judicial review as provided by law.  
However, determinations on review shall not prevent the  
implementation of [Tri-Met's] final order.

\*\* \* \* \* \*."

1 Westside Corridor Project into a single land  
2 use decision;

3 "(b) To expedite the process for any appellate  
4 review of the single land use decision; and

5 "(c) To establish an exclusive process for  
6 appellate review of the single land use  
7 decision."

8 The above expression of legislative purpose is reflected in  
9 subsequent sections of the 1991 Act. For example, Oregon  
10 Laws 1991, chapter 3, section 3 states the provisions of the  
11 1991 Act "shall be the only land use procedures and  
12 requirements" to which light rail route and alignment, light  
13 rail facility and related highway improvements shall be  
14 subject. Oregon Laws 1991, chapter 3, section 4 requires  
15 that LCDC adopt "criteria to be used by [Tri-Met] in making  
16 decisions in a final order on light rail alignments, station  
17 and lot locations and highway improvements." Oregon Laws  
18 1991, chapter 3, section 5 establishes an exclusive  
19 expedited procedure for judicial review of the LCDC  
20 criteria. Oregon Laws 1991, chapter 3, section 6 requires  
21 that Tri-Met apply the LCDC criteria "in making decisions in  
22 a final order on light rail alignments, station and lot  
23 locations and highway improvements." With the limited and  
24 inapplicable exceptions provided by Oregon Laws 1991,  
25 chapter 3, section 7, see n 5, supra, Oregon Laws 1991,  
26 chapter 3 makes it clear that appellate review of Tri-Met's  
27 final order is the only administrative or judicial review  
28 envisioned concerning application of state land use planning

1 requirements to the Westside Corridor Project.

2         Petitioner argues that because the city and other  
3 political subdivisions may be required to amend their plans  
4 and land use regulations to conform to Tri-Met's final  
5 order, and because Oregon Laws 1991, chapter 3, section 7(3)  
6 may exempt such amendments from administrative or judicial  
7 review, the city's recommendation to Tri-Met must be a  
8 reviewable land use decision. Petitioner's argument appears  
9 to be founded on a premise that the legislature did not  
10 intend to consolidate into Tri-Met's land use final order  
11 adopted pursuant to Oregon Laws 1991, chapter 3 essentially  
12 all prospective land use decision making concerning the  
13 Westside Corridor Project, or on a premise that the  
14 legislature cannot do so.

15         To the extent petitioner relies on the first premise,  
16 it is inconsistent with the language of Oregon Laws 1991,  
17 chapter 3, as explained above. With the exceptions provided  
18 under Oregon Laws 1991, chapter 3, section 7, which do not  
19 apply to the challenged resolution, the legislature clearly  
20 intended to consolidate land use decision making concerning  
21 the Westside Corridor Project into Tri-Met's decision  
22 adopting the land use final order. To the extent petitioner  
23 relies on the second premise, that question is not yet  
24 resolved and is properly presented in Seto v. Tri-Met,  
25 supra, not in this appeal. Even if the second premise were  
26 correct, it would simply mean that Oregon Laws 1991, chapter

1 3 improperly limits city decision making authority. It  
2 would not convert what is a recommendation into a final land  
3 use decision subject to our review.<sup>6</sup>

4 The motion to dismiss is allowed, and this appeal is  
5 dismissed.

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<sup>6</sup>Petitioner requested and was given an opportunity to submit legislative history in support of its argument that the challenged resolution is correctly characterized as a land use decision subject to our review. Even if we agreed Oregon Laws 1991, chapter 3 is ambiguous, making resort to legislative history permissible, the legislative history submitted by petitioner does not support its argument.