

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON  
3

4 CENTRAL EASTSIDE INDUSTRIAL COUNCIL,                                   )  
5 an Oregon non-profit corporation,                                   )  
6 BURNS BROTHERS, INC., an Oregon                                   )  
7 corporation, JACK BURNS, BRUCE                                   )  
8 BURNS, BOLLIGER & SONS, INC., an                                   )  
9 Oregon corporation, EARL BOLLIGER,                                   )  
10 SPEED'S AUTOMOTIVE AND TOWING,                                   )  
11 INC., an Oregon corporation,                                   )  
12 HAROLD COE, OREGON TRUCKING                                   )  
13 ASSOCIATIONS, INC., an Oregon                                   )  
14 non-profit corporation, WENTWORTH                                   )  
15 CHEVROLET, CO., an Oregon                                   )  
16 corporation, GREG WENTWORTH,                                   )  
17 MILCOR, INC. an Oregon corporation,                                   )     LUBA  
18 No. 93-221  
19 dba THE MOORE COMPANY, RANDY MILLER,                                   )  
20 KATHY GALBRAITH, ROBERT BUTLER,                                   )     FINAL OPINION  
21 FREIGHTLINER CORPORATION, a Delaware                                   )     AND  
22 ORDER  
23 corporation, NORTHWEST WHOLESALE                                   )  
24 DISTRIBUTORS, INC., an Oregon                                   )  
25 corporation, dba STARK'S VACUUM                                   )  
26 CLEANERS SALES & SERVICE, JIM STARK,                                   )  
27 RONALD GOULD, ED SAMONS, and                                   )  
28 BOB NAGEL, JR.,                                   )  
29                                   )  
30                                   Petitioners,                                   )  
31                                   )  
32                                   vs.                                   )  
33                                   )  
34 CITY OF PORTLAND,                                   )  
35                                   )  
36                                   Respondent.                                   )  
37  
38

39                   Appeal from City of Portland.

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41                   B. B. Bouneff and Jeffrey L. Kleinman, Portland,  
42 represented petitioners.

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44                   Kathryn Beaumont Imperati, Senior Deputy City Attorney,  
45 Portland, represented respondent.

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

DISMISSED 02/10/94

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council resolution concerning  
4 transportation improvements and planning for the Central  
5 Eastside area of the city.<sup>1</sup>

6 **JURISDICTION**

7 Under ORS 197.825(1), this Board has jurisdiction to  
8 review "land use decisions" that satisfy either (1) the  
9 statutory definition of land use decision in  
10 ORS 197.015(10); or (2) the significant impact test  
11 established by City of Pendleton v. Kerns, 294 Or 126,  
12 133-34, 653 P2d 996 (1982).<sup>2</sup> Billington v. Polk County, 299  
13 Or 471, 479, 703 P2d 232 (1985); City of Portland v.  
14 Multnomah County, 19 Or LUBA 468, 471 (1990). However,  
15 under either test, a land use decision must be a "final"  
16 decision. Pilling v. Crook County, 22 Or LUBA 188, 192  
17 (1991); Hemstreet v. Seaside Improvement Comm., 16 Or LUBA  
18 748, 751, aff'd 93 Or App 73 (1988); CBH v. City of  
19 Tualatin, 16 Or LUBA 399, 405 n 7 (1988).

20 The operative section of the challenged resolution  
21 states:

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<sup>1</sup>The Central Eastside area is comprised of the downtown portion of the city along the east bank of the Willamette River.

<sup>2</sup>This Board also has jurisdiction to review "limited land use decisions," as that term is defined in ORS 197.015(12). ORS 197.825(1). However, the parties do not contend the challenged resolution is a limited land use decision, and we do not see that it is.

1 "[T]he City requests that:  
2 "(A) the Oregon Department of Transportation  
3 [(ODOT)] not build Phase III of the East  
4 Marquam Project;<sup>[3]</sup> and  
5 "(B) [ODOT] and Metro (including the Joint Policy  
6 Advisory Committee on Transportation and the  
7 Metro Council) spend the funds allocated to  
8 Phase III of the East Marquam Project on:  
9 "(1) a transportation master plan for the  
10 Central Eastside that [integrates  
11 planning for different transportation  
12 modes and includes certain feasibility  
13 studies and analyses.]  
14 "\* \* \* \* \*  
15 "(2) alternative transportation modes \* \* \* ;  
16 and  
17 "(3) construction of southbound access to I-5  
18 as part of an integrated transportation  
19 master plan; and  
20 "(C) the transportation master plan for the  
21 Central Eastside shall be prepared by an  
22 integrated planning team involving all  
23 relevant city bureaus, and led by the city  
24 planning director." Record 4-5.

25 The city argues the challenged resolution is not a  
26 "final" decision reviewable by this Board because it is  
27 advisory in nature.<sup>4</sup> According to the city, the challenged

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<sup>3</sup>Phase III of the East Marquam Project involves construction of southbound access from the Central Eastside Industrial District onto the I-5 freeway, by means of on-ramps referred to as the Water Avenue ramps.

<sup>4</sup>The city also contends the challenged resolution does not satisfy the statutory definition of a land use decision or the significant impact test for a land use decision, on additional grounds. However, because we agree with the city on the finality issue, as explained in the text infra, we do not address the city's other arguments.

1 resolution is simply the city council's recommendation to  
2 ODOT and Metro concerning construction of the Water Avenue  
3 ramp project and potential transportation planning for the  
4 Central Eastside. The city argues ODOT, not the city, is  
5 the final decision maker concerning funding for and  
6 construction of this project, and is not bound to accept the  
7 city council's recommendation. The city maintains its  
8 action in this case is of the same nature as its  
9 recommendations to other units of government concerning  
10 transportation projects that were at issue in Citizens for  
11 Better Transit v. City of Portland, 15 Or LUBA 278 (1987);  
12 and Kasch's Gardens v. City of Milwaukie/Portland, 14  
13 Or LUBA 406 (1986). The city points out this Board  
14 concluded the decisions challenged in Citizens and Kasch's  
15 Gardens were not "final" decisions.

16 Petitioners contend this case is distinguishable from  
17 Citizens and Kasch's Gardens, because the transportation  
18 project at issue in those cases (McLoughlin Corridor) was  
19 included only in Metro's Regional Transportation Plan.  
20 Petitioners argue there was no indication in Citizens and  
21 Kasch's Gardens that the city comprehensive plan contained  
22 provisions regarding the McLoughlin Corridor. In contrast,  
23 according to petitioners, here it is clear the Water Avenue  
24 ramps have been included in the city comprehensive plan.<sup>5</sup>

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<sup>5</sup>Petitioners also argue the substance of the challenged resolution is inconsistent with the city comprehensive plan. However, this argument

1           We have frequently stated that a "recommendation" from  
2 one governing body to a second governing body concerning an  
3 action within the authority of the second governing body is  
4 not a "final" decision subject to our review. Goose Hollow  
5 Foothills League Assoc. v. Portland, 21 Or LUBA 358, 360  
6 (1991); Vancouver Federal Savings v. City of Oregon City, 17  
7 Or LUBA 348 (1989); Citizens, supra; Kasch's Gardens, supra;  
8 see also Sensible Transportation v. Metro Service Dist., 100  
9 Or App 564, 787 P2d 498 (1990). Petitioners do not dispute  
10 that actions to construct the Water Avenue ramp project and  
11 to disburse funds allocated to that project are within the  
12 authority of ODOT or Metro, and not the city. Therefore,  
13 the challenged resolution's "requests" that ODOT not  
14 construct the Water Avenue ramps, and that ODOT and Metro  
15 spend the money allocated to that project in particular  
16 ways, are merely recommendations to those bodies.<sup>6</sup>  
17 Consequently, we agree with the city that the challenged  
18 resolution is not a "final" decision subject to our review.

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relates to the merits of the resolution, not to whether the resolution  
constitutes a "final" decision subject to our review.

<sup>6</sup>The challenged resolution also expresses a willingness on the part of  
the city to have its staff participate in a process of preparing a  
"transportation master plan" for the Central eastside area, using funds  
that it asks ODOT and Metro to disburse for that purpose. Record 5. To  
the extent this can be considered a city decision to initiate a  
transportation planning process that might eventually result in a final  
land use decision (e.g., comprehensive plan amendment, land use regulation  
amendment) being made, we note a decision to initiate a planning process is  
not itself a "final" land use decision. See Sensible Transportation v.  
Metro Service Dist., supra; McKenzie River Guides Assoc. v. Lane County, 19  
Or LUBA 207 (1990).

1        This appeal is dismissed.