

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                                   Appeal from City of Portland.  
39

40                                   Jeffrey L. Kleinman and B.B. Bouneff, Portland, filed  
41 the petition for review. With them on the brief was Bouneff  
42 & Chally. Jeffrey L. Kleinman argued on behalf of  
43 petitioners.  
44

45                                   Michael Holstun, Senior Deputy City Attorney, Portland,

1 filed the response brief and argued on behalf of respondent.

2

3 SHERTON, Chief Referee; LIVINGSTON, Referee,  
4 participated in the decision.

5

6

REMANDED

07/18/95

7

8 You are entitled to judicial review of this Order.

9 Judicial review is governed by the provisions of ORS

10 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a resolution adopted by the Portland  
4 City Council requesting the Oregon Department of  
5 Transportation (ODOT) not to build the "Water Avenue Ramp"  
6 to provide southbound access to Interstate Highway 5 (I-5)  
7 from the city's central eastside industrial district and,  
8 instead, to apply the funding to transportation planning and  
9 other transportation alternatives.

10 **INTRODUCTION**

11 In response to the city's motion to dismiss, we issued  
12 a final opinion and order dismissing this appeal for lack of  
13 jurisdiction, on the ground that the challenged resolution  
14 is merely a "recommendation" and not a final land use  
15 decision, as required by ORS 197.015(10)(a)(A). Central  
16 Eastside Industrial Council v. Portland, 26 Or LUBA 540  
17 (1994).

18 Petitioners appealed to the Court of Appeals, and the  
19 court reversed and remanded our decision. Central Eastside  
20 Industrial Council v. City of Portland, 128 Or App 148, 875  
21 P2d 482 (1994). The court stated two questions must be  
22 answered before a determination can be made concerning  
23 whether the challenged decision is final:

24 \* \* \* Does the comprehensive plan require the  
25 building of the ramp, or contain other  
26 requirements to which the [challenged]  
27 recommendation is contrary or the substance of  
28 which applies to the recommendation? If so, are

1           there further actions by the city or other bodies  
2           that must occur before the ramp project is  
3           rejected or abandoned and that must culminate in a  
4           decision by the city to amend the plan or  
5           otherwise apply and demonstrate compliance with  
6           it? If the answer to the first question is 'yes'  
7           and the answer to the second is 'no,' the  
8           [challenged] decision is final and reviewable."  
9           (Footnote omitted; emphases in original.) Central  
10          Eastside, 128 Or App at 153-54.

11       After additional briefing and argument, we concluded the  
12       answer to the Court's first question is "yes" and the answer  
13       to its second is "no," and issued an order denying the  
14       city's motion to dismiss. Central Eastside Industrial  
15       Council v. Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-221,  
16       Order, March 3, 1995) (Central Eastside).

#### 17       **JURISDICTION**

18           In its brief, the city asks that we reconsider our  
19       ruling on jurisdiction, particularly our answer to the  
20       Court's first question. We have considered the parties'  
21       arguments, but adhere to the determination on jurisdiction  
22       expressed in our March 3, 1995 order.

#### 23       **THIRD ASSIGNMENT OF ERROR**

24           Petitioners contend the challenged resolution is  
25       inconsistent with Central City Plan (CCP) Policy 20 and  
26       Portland Comprehensive Plan Transportation Element Southeast  
27       District Policy No. 8.<sup>1</sup> Petitioners also argue the decision

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<sup>1</sup>CCP Policy 20, as well as certain other provisions of the CCP, have been adopted as part of the city's comprehensive plan. See Central Eastside, supra, slip op at 5 n4.

1 improperly fails to include findings addressing these  
2 policies, Statewide Planning Goal (Goal) 12 (Transportation)  
3 or OAR Chapter 660, Division 12 (Transportation Planning  
4 Rule - TPR).

5 Once a city's comprehensive plan and land use  
6 regulations are acknowledged under ORS 197.251, as the City  
7 of Portland's are, the Statewide Planning Goals no longer  
8 apply directly to its land use decisions, other than to  
9 those decisions which amend the acknowledged plan or  
10 regulations. Friends of the Metolius v. Jefferson County,  
11 25 Or LUBA 411, 418-19, aff'd 123 Or App 256, adhered to 125  
12 Or App 122 (1993). Here, the challenged resolution does not  
13 purport to amend the city's acknowledged plan or  
14 regulations. Other than their argument that the resolution  
15 constitutes a de facto plan amendment, which we address  
16 under the first and second assignments of error, infra,  
17 petitioners offer no explanation concerning why or how  
18 Goal 12 or the TPR is applicable to the challenged decision.  
19 Petitioners fail to establish any reason why the city erred  
20 by failing to address Goal 12 or the TPR.

21 ORS 197.175(2)(d) requires the city to make land use  
22 decisions in compliance with its acknowledged comprehensive  
23 plan and land use regulations. CCP Policy 20 provides:

24 "Preserve the Central Eastside as an industrial  
25 sanctuary while improving freeway access and  
26 expanding the area devoted to the Eastbank  
27 Esplanade." (Emphasis added.)

1 Southeast District Policy No. 8 provides:

2 **"Central Eastside Industrial District**

3 "Implement transportation improvements identified  
4 in the Central Eastside Transportation Study.

5 **"Explanation:** The Central Eastside Industrial  
6 District study calls for transportation projects  
7 to improve circulation and access to existing  
8 commercial development and future commercial and  
9 cultural facilities."<sup>2</sup> (Emphasis added.)

10 The parties agree that the challenged resolution is  
11 legislative, rather than quasi-judicial, in nature.<sup>3</sup> The  
12 city argues that a legislative decision may not be reversed  
13 or remanded solely because it lacks findings addressing  
14 arguably relevant plan provisions. Rather, the city  
15 contends it should be given the opportunity to demonstrate,  
16 through argument in its brief and citation to the record,  
17 that the challenged resolution does not violate the above-  
18 quoted plan policies. With regard to Southeast District  
19 Policy No. 8, the city specifically argues that the Water  
20 Avenue Ramp is not "identified" as a recommended  
21 transportation improvement; it is simply referred to in the

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<sup>2</sup>In Central Eastside, slip op at 2-3, we determined the only portions of the Central Eastside Transportation Study (CETS) that the city adopted by resolution or ordinance, and of which we therefore may take official notice, are the Executive Summary and Project Description Summary. These sections of the CETS include lists of recommended transportation improvements, as referred to in Southeast District Policy No. 8.

<sup>3</sup>At Petition for Review 5, petitioners concede the challenged decision is legislative in nature, and we agree. We do not address the arguments petitioners made in the alternative, on the chance this Board might decide the challenged decision is quasi-judicial.

1 description of other, listed improvements.

2       There is no statutory or administrative law requirement  
3 that all legislative land use decisions be supported by  
4 findings. Redland/Viola/Fischer's Mill CPO v. Clackamas  
5 County, 27 Or LUBA 560, 563 (1994); Riverbend Landfill  
6 Company v. Yamhill County, 24 Or LUBA 466, 472 (1993); Von  
7 Lubken v. Hood River County, 22 Or LUBA 307, 313 (1991). We  
8 have previously stated that for this Board to perform its  
9 review function, it is generally necessary either that (1) a  
10 challenged legislative land use decision be supported by  
11 findings demonstrating compliance with applicable legal  
12 standards, or (2) respondents provide in their briefs  
13 argument and citations to facts in the record adequate to  
14 demonstrate that the challenged legislative decision  
15 complies with applicable legal standards. Id. at 314; see  
16 Gruber v. Lincoln County, 2 Or LUBA 180, 187 (1981).

17       However, where the challenged legislative land use  
18 decision was made by the local governing body and the  
19 apparently applicable legal standards in question are local  
20 comprehensive plan provisions, we are required to defer to  
21 the governing body's interpretation of its own comprehensive  
22 plan, unless that interpretation is contrary to the express  
23 words, purpose or policy of the plan or to a state statute,  
24 statewide planning goal or administrative rule which the  
25 plan implements. ORS 197.829; Gage v. City of Portland, 319  
26 Or 308, 316-17, 877 P2d 1187 (1994); Clark v. Jackson

1 County, 313 Or 508, 514-15, 836 P2d 710 (1992);  
2 Redland/Viola, supra, 27 Or LUBA at 568. Additionally,  
3 under Gage v. City of Portland, 123 Or App 269, 860 P2d 282,  
4 on reconsideration 125 Or App 119 (1993), rev'd on other  
5 grounds 319 Or 308 (1994), and Weeks v. City of Tillamook,  
6 117 Or App 449, 453, 844 P2d 914 (1992), we are required to  
7 review the governing body's interpretation of its enactment,  
8 as expressed in the challenged decision, and may not  
9 interpret the local enactment ourselves in the first  
10 instance. See Eskandarian v. City of Portland, 26 Or LUBA  
11 98, 109 (1993); Miller v. Washington County, 25 Or LUBA 169,  
12 179 (1993).

13 In Central Eastside, slip op at 4-5, we determined the  
14 substance of CCP Policy 20 applies to a city recommendation  
15 not to build the Water Avenue Ramp. However, the  
16 application of CCP Policy 20 to the challenged decision  
17 requires interpretation, and that interpretation must  
18 initially be made by the city council in its decision. We  
19 did not determine in Central Eastside whether or how  
20 Southeast District Policy No. 8 applies to a city  
21 recommendation not to build the Water Avenue Ramp. The  
22 application of this policy will require interpretation of  
23 the policy itself and of the provisions of the CETS referred  
24 to in the policy. Once again, such interpretation must be  
25 made by the city council in the first instance.

26 The third assignment of error is sustained, in part.



1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2           Petitioners contend the city erred by failing to follow  
3 the procedures of Portland City Code (PCC) Chapter 33.740  
4 (Legislative Procedure) in several respects. Petitioners  
5 argue PCC Chapter 33.740 is applicable either because the  
6 challenged decision is a de facto comprehensive plan  
7 amendment or because PCC Chapter 33.740 applies to all  
8 legislative land use decisions made by the city, regardless  
9 of whether such decisions are plan or land use regulation  
10 amendments. Petitioners also argue that under  
11 PCC 33.740.020(A) and (E), because the planning commission  
12 did not review the proposed resolution, the city council  
13 lacked jurisdiction to adopt the resolution.

14           The city does not contend the procedures of  
15 PCC Chapter 33.740 were followed in making the challenged  
16 decision. Rather, the city argues that PCC Chapter 33.740  
17 is inapplicable because the challenged decision is not an  
18 amendment to the city's comprehensive plan or land use  
19 regulations, de facto or otherwise.

20           We agree with the city that if the challenged  
21 resolution is not inconsistent with provisions of the city's  
22 comprehensive plan and land use regulations, it can be  
23 adopted without requiring a plan or regulation amendment.  
24 However, that does not answer the question of what  
25 procedures the city is required to follow in adopting such a  
26 legislative resolution. PCC 33.740.010 describes the

1 purpose of Chapter 33.740 as follows:

2 "Legislative actions provide for the establishment  
3 and modification of land use plans, policies,  
4 regulations and guidelines. The legislative  
5 procedure includes a public hearing by a  
6 designated commission. The hearings provide  
7 opportunities for public comment and input on  
8 actions which may effect large areas of the City."  
9 (Emphases added.)

10 We see nothing in PCC Chapter 33.740 itself that  
11 explicitly states the procedural requirements of that  
12 chapter apply only to legislative comprehensive plan and  
13 land use regulation amendments. The emphasized terms in the  
14 purpose statement of the chapter lend some support to  
15 petitioners' argument that PCC Chapter 33.740 is applicable  
16 to all legislative land use decisions. However, as  
17 explained in the previous assignment of error, under  
18 ORS 197.829, Gage and Clark, the city council has a great  
19 deal of discretion in interpreting its own enactments, and  
20 we cannot interpret those enactments in the first instance.

21 The challenged decision does not interpret or apply  
22 PCC Chapter 33.740. On remand, the city must determine  
23 whether the procedural requirements of PCC Chapter 33.740  
24 apply to a legislative decision to recommend to ODOT that it  
25 not build the Water Avenue Ramp, and proceed accordingly.

26 The first and second assignments of error are  
27 sustained.

28 The city's decision is remanded.