

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

3  
4 ANN M. ADLER and STEVEN D. ADLER,                                    )  
5    )  
6                                   Petitioners,                                    )  
7    )  
8                    vs.    )  
9    )                    LUBA No. 92-041  
10 CITY OF PORTLAND,    )  
11    )                    FINAL OPINION  
12                                   Respondent,                                    )                    AND ORDER  
13    )  
14                    and    )  
15    )  
16 ARDIS MANGELS, WILLIAM MANGELS,                                    )  
17 LOIS JANZER, NORMAN JANZER and                                    )  
18 TERWILLIGER NEIGHBORS COALITION,                                    )  
19    )  
20                                   Intervenors-Respondent.                        )

21  
22  
23                    Appeal from City of Portland.

24  
25                    J. Richard Forester, Portland, filed the petition for  
26 review and argued on behalf of petitioners. With him on the  
27 brief was Grenley, Rotenberg, Laskowski, Evans & Bragg.

28  
29                    Adrienne Brockman and Edward J. Sullivan, Portland,  
30 filed a response brief on behalf of respondent and  
31 intervenors-respondent. With them on the brief was Preston,  
32 Thorgrimson, Shidler, Gates & Ellis. Adrienne Brockman  
33 argued on behalf of respondent, and Edward J. Sullivan  
34 argued on behalf of intervenors-respondent.

35  
36                    KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,  
37 Referee, participated in the decision.

38  
39                    REMANDED    09/01/92

40  
41                    You are entitled to judicial review of this Order.  
42 Judicial review is governed by the provisions of ORS  
43 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council denying  
4 their application for a conditional use permit for a bed and  
5 breakfast use in the Residential (R-7) zoning district.

6 **MOTION TO INTERVENE**

7 Ardis Mangels, William Mangels, Lois Janzer, Norman  
8 Janzer, and Terwilliger Neighbors Coalition move to  
9 intervene on the side of respondent in this appeal  
10 proceeding. There is no objection to the motion, and it is  
11 allowed.

12 **FACTS**

13 The proposed bed and breakfast use would be located in  
14 an existing dwelling. The operating characteristics of the  
15 proposed bed and breakfast consist of four guest rooms to  
16 accommodate a maximum of six guests per night. A part time  
17 housekeeper and gardener are proposed to be hired to assist  
18 in the operation of the bed and breakfast.

19 The planning department recommended approval of the  
20 proposal subject to certain conditions. However, the  
21 hearings officer denied the proposal. Petitioners appealed  
22 the hearings officer's decision to the city council. The  
23 city council affirmed the decision of the hearings officer,  
24 and this appeal followed.

25 **FIFTH ASSIGNMENT OF ERROR**

26 "[The City] Council's failure to follow code and  
27 statutory notice requirements substantially

1 prejudiced petitioners' rights to rebut evidence  
2 and to have a complete decision on mitigation  
3 factors and to frame a LUBA appeal on a complete  
4 record."

5 Portland Community Code (PCC) 33.730.100(B)(3)  
6 provides:

7 "At the beginning of each hearing,<sup>[1]</sup> the review  
8 body must state [t]hat any party can request the  
9 record be kept open for seven days[.]"

10 There is no dispute that the city council did not make  
11 this statement at any time during the city council  
12 proceedings below. Petitioners argue the failure to provide  
13 this statement at the hearing before the city council  
14 requires that we remand the challenged decision.

15 Respondent and intervenors-respondent (respondents)  
16 point out petitioners were represented below by an  
17 experienced land use attorney and that petitioners gave no  
18 hint below that they wanted to submit any further evidence  
19 and make ambiguous statements regarding the evidence they  
20 would have submitted had the statement required by

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<sup>1</sup>ORS 197.763(6) requires:

"Unless there is a continuance, if a participant so requests before the conclusion of the initial evidentiary hearing, the record shall remain open for at least seven days after the hearing. \* \* \*" (Emphasis supplied.)

While ORS 197.763(6) appears only to relate to the "initial evidentiary hearing," PCC 33.730.100(B)(3) applies to the "beginning of each hearing." Consequently, PCC 33.730.100(B)(3) provides broader protections to petitioners than ORS 197.763(6). We do not address ORS 197.763(6).

1 PCC 33.730.100(B)(3) been given.<sup>2</sup>

2 We agree with respondents that the failure to give the  
3 oral statement required by PCC 33.730.100(B)(3) is a  
4 procedural error.<sup>3</sup> Under ORS 197.835(7)(a)(B), this Board  
5 must reverse or remand a challenged land use decision on the  
6 basis of procedural error where such error causes prejudice  
7 to petitioners' substantial rights.

8 However, PCC 33.730.100(B)(3) is not purely a  
9 procedural requirement. In addition to requiring that the  
10 statement be given, PCC 33.730.100(B)(3) also requires that  
11 the record be held open where a party so requests. The  
12 right to submit one's case and make a record below is a  
13 substantial right. Petitioners indicate in their brief that  
14 they were unaware of their right under PCC 33.730.100(B)(3)  
15 and would have submitted additional evidence and argument,  
16 as well as a more detailed explanation of the significance  
17 of certain evidence in the record, had the statement been  
18 given about the option of keeping the record open for an  
19 additional seven days. Petition for Review 31. We fail to  
20 see what more petitioners need show to establish the city's  
21 failure to comply with PCC 33.730.100(B)(3) violated their

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<sup>2</sup>PCC 33.730.100(B)(3) concerns leaving the local record open. It does not distinguish between leaving the local record open for the receipt of additional evidence or for the receipt of additional legal argument concerning evidence already in the record.

<sup>3</sup>PCC 33.730.030(H)(5) requires that city council appeal hearings comply with PCC 33.730.100.

1 substantial right to present their case.

2 It is impossible to determine, based on the record,  
3 whether petitioners would have really requested that the  
4 record be held open and submitted material had the statement  
5 required by PCC 33.730.100(B)(3) been given. Compare Reed  
6 v. Clatsop County, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA Nos. 91-088 and  
7 91-089, January 21, 1992) (where the record did demonstrate  
8 that such a request to submit additional evidence would have  
9 been made). We conclude the city's failure to advise  
10 petitioners of their right to request the record remain  
11 open, as required by PCC 33.730.100(B)(3), denied  
12 petitioners' substantial right to make such a request. This  
13 failure requires that we remand the challenged decision.

14 The fifth assignment of error is sustained.

15 **FIRST ASSIGNMENT OF ERROR**

16 "The [City Council] failed to identify the  
17 applicable standard for applying the approval  
18 criteria for this use and invented rules not  
19 present in [the PCC] and inconsistent with the  
20 purpose of bed and breakfast regulations."

21 **SECOND ASSIGNMENT OF ERROR**

22 "The [City Council] and the hearing[s] officer  
23 incorrectly applied a specific parking requirement  
24 for this use, but the staff mitigating condition  
25 satisfies even the criteria the council said it  
26 adopted."

27 **SIXTH ASSIGNMENT OF ERROR**

28 "Petitioners' base case for meeting all of the  
29 approval criteria and all required standards is  
30 un rebutted by substantial evidence in the record  
31 as a whole."

1           The proposed bed and breakfast is to be located on S.W.  
2 Westwood View Drive.       The decision characterizes S.W.  
3 Westwood View Drive as part of a "curvilinear maze of  
4 Westwood Drives, Westwood Courts, Westwood Views, and  
5 Westwood Lanes that switch back across the hillside."  
6 Record 20.    The decision also states that access to the  
7 dwelling is "via narrow, steep, sharply curving streets.  
8 Vision clearance is poor at the intersections of S.W.  
9 Westwood View and S.W. Westwood Drive." Record 19-20. S.W.  
10 Westwood View has no curbs or sidewalks.       Record 21.  
11 Concerning parking, the decision states:

12           "A 13 by 55 foot gravel shoulder is located in the  
13 public right of way, off the paved driveway,  
14 directly in front of the house.    The applicants  
15 propose to use this graveled area to meet a  
16 portion of the parking needs of bed and breakfast  
17 patrons.    The applicant contends this shoulder can  
18 physically accommodate three vehicles, bumper to  
19 bumper, in a parallel parking configuration.  
20 However, \* \* \* use of the eastern 10 feet of this  
21 shoulder is unsafe because a parked vehicle at  
22 this location obscures the vision of vehicles  
23 backing out of the driveway serving the residence  
24 to the east.    \* \* \* [T]he Council finds there are  
25 two safe on-street parking spaces in front of the  
26 subject property."<sup>4</sup>           (Footnote omitted.)  
27 (Record 18).

28           "[T]here is limited parking on the two blocks  
29 (approximately 600 feet) that comprise Westwood  
30 View.        Nine of the 13 residences on Westwood  
31 View do not have shoulders large enough to park a  
32 car in front of their houses.    Due to steep  
33 slopes, there is no on-street parking at all on

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<sup>4</sup>Petitioners dispute that the third on-street parking space is unsafe.

1 the north side of Westwood View or Westwood Lane.  
2 According to uncontested testimony presented at  
3 the public hearing, neighbors deal with the  
4 parking deficiency through an informal series of  
5 arrangements with each other \* \* \*.

6 "[T]here are, at most, six on-street parking  
7 spaces, within the right-of-way but off the paved  
8 roadway on the south side of Westwood View.<sup>[5]</sup>

9 "The driveways on the south side of Westwood View  
10 generally slope downward from the street. Thus,  
11 cars or trucks parked in the right-of-way obscure  
12 the vision of cars backing out of such driveways.  
13 In icy weather, homeowners often must use the  
14 street rather than driveways to park cars.  
15 Service vehicles and visitors to Westwood View  
16 residents also use these gravelled shoulders for  
17 parking. \* \* \* [T]hese parking spaces are used by  
18 the entire neighborhood, even though they may  
19 appear to be located in the front yards of the  
20 homes on S.W. Westwood View."<sup>6</sup> Record 20-21.

21 The city denied petitioners' requested bed and  
22 breakfast use on the basis that the application fails to  
23 satisfy PCC 33.815.105(C), which requires:

24 "The proposal will not have significant adverse  
25 impacts on the livability of nearby residential  
26 zoned lands due to:

27 "(1) Noise, glare from lights, late-night  
28 operations, odors and litter; and

29 "(2) Privacy and safety issues."

30 The city also determined the proposal failed to meet

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<sup>5</sup>Petitioners dispute there are only six parking spaces in the one block "impact area" identified by the city.

<sup>6</sup>Petitioners dispute that neighbors use the parking available on the street.

1 PCC 33.815.105(D)(2), as well as other PCC standards.

2 PCC 33.815.105(D)(2) requires a determination that:

3 "The transportations system is capable of safely  
4 supporting the proposed use in addition to the  
5 existing uses on the area. Evaluation factors  
6 include street capacity and level of service,  
7 access to arterials, transit availability,  
8 on-street parking impacts, access requirements,  
9 neighborhood impacts, and pedestrian safety."

10 The city determined the proposal would have significant  
11 adverse impacts on the neighborhood due to (1) inadequate  
12 parking facilities to accommodate the use, (2) inadequate  
13 access to the subject dwelling, (3) noise and lights  
14 associated with the dwelling as well as headlight glare and  
15 late night activities, and (4) upstairs bedrooms in the  
16 subject dwelling to be used in connection with the proposed  
17 bed and breakfast use being positioned such that they  
18 interfere with the privacy of neighboring houses. The city  
19 also determined that transportation systems serving the area  
20 are inadequate to safely serve the proposal.

21 Petitioners argue the city erroneously interpreted  
22 PCC 33.815.105(C) and (D) and the PCC bed and breakfast  
23 provisions generally, and that the decision is not supported  
24 by substantial evidence in the whole record. Even though  
25 the challenged decision must be remanded for the reasons  
26 articulated under the fifth assignment of error, to the  
27 extent we determine it is helpful to do so we address these  
28 issues below.

1           **A. Interpretation**

2           Petitioners raise two related interpretation issues.  
3           First, petitioners argue that PCC 33.815.105(C) and (D) are  
4           satisfied if the proposed use will have no greater adverse  
5           impacts and traffic safety problems than impacts and safety  
6           problems associated with residential uses permitted  
7           outright. Second, petitioners argue that the city may not  
8           deny an application for a bed and breakfast use if the  
9           impacts of that use may be mitigated by the imposition of  
10          conditions of approval.

11                   **1. PCC 33.815.105**

12          Petitioners contend the adverse impacts and safety  
13          problems identified by the city could be associated with any  
14          residential use permitted in the R-7 zoning district and,  
15          therefore, they do not provide a basis for denial of the  
16          application.

17          Respondents point out that a bed and breakfast is a  
18          conditional use subject to the requirements of  
19          PCC 33.815.105; a residential use permitted outright in the  
20          R-7 zone is not. Respondents argue regardless of whether a  
21          particular residential use allowed outright in the R-7 zone  
22          may generate traffic and other impacts similar to those  
23          which would be generated by the proposed bed and breakfast  
24          use, permitted residential uses need not establish  
25          conformity with the conditional use requirements of  
26          PCC 33.815.105. Respondents acknowledge that if a

1 particular residential use otherwise permitted outright in  
2 the R-7 zoning district were required to meet the  
3 conditional use requirements of PCC 33.815.105, such  
4 residential use might not be able to satisfy those  
5 requirements. However, respondents state it is the proposed  
6 conditional use which must satisfy the requirements of  
7 PCC 33.815.105, and that the city properly interpreted the  
8 PCC to determine that the proposed use should be denied  
9 because of particular operating characteristics and the  
10 unique and unsafe traffic situation in the area. Finally,  
11 respondents argue the city simply determined that the  
12 residential use of the subject dwelling allowed in the R-7  
13 zoning district, plus the proposed bed and breakfast use,  
14 together create sufficient traffic and other impacts so as  
15 to not satisfy the applicable criteria, and that this  
16 interpretation of the PCC is correct.

17 In Clark v. Jackson County, 313 Or 508, 514-15,  
18 \_\_\_\_ P2d \_\_\_\_ (1992), the Oregon Supreme Court expressed our  
19 scope of review in determining whether a challenged local  
20 government decision correctly interprets local ordinance  
21 provisions:

22 "Under ORS 197.835(7)(a)(D),<sup>[7]</sup> LUBA is granted  
23 review authority over a county's interpretation of  
24 a local land use ordinance. If a county has

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<sup>7</sup>ORS 197.835(7)(a)(D) provides LUBA "shall" reverse or remand a challenged decision where it determines the local government "[i]mproperly construed the applicable law \* \* \*."

1 construed an ordinance in a manner that clearly is  
2 contrary to the enacted language, LUBA acts within  
3 its scope of review in finding that the county  
4 improperly construed the applicable law. \* \* \*

5 \* \* \* \* \*

6 "LUBA is to affirm the county's interpretation of  
7 its own ordinance unless LUBA determines that the  
8 county's interpretation is inconsistent with  
9 express language of the ordinance or its apparent  
10 purpose or policy. LUBA lacks authority to  
11 substitute its own interpretation of the ordinance  
12 unless the county's interpretation was  
13 inconsistent with that ordinance, including its  
14 context."

15 The city determined that approval of the proposed bed  
16 and breakfast use would not be personal to petitioners, and  
17 that the R-7 zoning district allows an unlimited number of  
18 family members plus five unrelated persons to reside in a  
19 dwelling. The city determined that it must, therefore,  
20 evaluate the safety of the area transportation systems and  
21 the impacts of the proposed bed and breakfast, assuming a  
22 reasonable residential use together with the proposed bed  
23 and breakfast use. This interpretation is consistent with  
24 the language and context of PCC 33.815.105 and we therefore  
25 accept it as correct.

26 **2. Discretion to Deny a Bed and Breakfast**  
27 **Application**

28 Citing Anderson v. Peden, 284 Or 313, 587 P2d 59  
29 (1978), petitioners argue the determination that bed and  
30 breakfast uses are suitable in residential areas was made  
31 when the city listed them as conditionally allowable uses in

1 residential districts. Petitioners contend the city erred  
2 by failing to treat the proposed use as a permitted use in  
3 the R-7 zone, subject only to discretion to impose  
4 conditions of approval. Petitioners also cite PCC chapter  
5 33.212 (regulating bed and breakfast facilities generally),  
6 as support for the idea that such facilities are permitted  
7 outright, subject only to the imposition of conditions of  
8 approval.

9 We disagree that Anderson v. Peden, supra, holds that a  
10 conditional use is one permitted subject only to the  
11 imposition of conditions of approval. Anderson v. Peden  
12 upheld a local government interpretation of an ordinance  
13 that conditional uses were not permitted uses subject only  
14 to the imposition of conditions. Here, conditionally  
15 permitted uses are subject to several mandatory approval  
16 standards. We see nothing in PCC chapter 33.212 indicating  
17 that the city intended to deprive itself of discretion to  
18 deny an application for a bed and breakfast use that is not  
19 in compliance with mandatory approval standards, regardless  
20 of whether conditions limiting the use could be imposed to  
21 enable compliance with such standards. Further, this Board  
22 has determined under similar ordinance provisions that where  
23 an applicant fails to establish a proposed conditional use  
24 complies with applicable standards, the local government is  
25 not required to impose conditions of approval to enable  
26 approval of the use. Simonson v. Marion County, \_\_\_\_ Or

1 LUBA \_\_\_\_ (LUBA No. 90-171, June 21, 1991), slip op 16-17.

2 Like the Court in Anderson v. Peden, we determine the  
3 city correctly concluded that conditionally permitted uses  
4 may be denied if they fail to establish compliance with  
5 relevant PCC approval standards. The city was under no  
6 obligation to impose conditions of approval to minimize  
7 safety concerns and other impacts associated with the  
8 proposal.<sup>8</sup> If the bed and breakfast use as proposed in the  
9 application does not comply with relevant PCC standards,  
10 then the city is under no obligation to impose conditions of  
11 approval limiting the use so as to render it approvable.

12 This subassignment of error is denied.

13 **B. Substantial Evidence**

14 Under this subassignment of error, petitioners argue  
15 the record lacks substantial evidence to support the  
16 decision.<sup>9</sup> However, because the city failed to give the  
17 required statement concerning the option of leaving the  
18 record open, as explained under the fifth assignment of

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<sup>8</sup>Petitioners also suggested at oral argument that their application for a bed and breakfast use was modified consistent with conditions of approval suggested by planning department staff in their recommendation of approval of the proposal, but rejected by the city council in the challenged decision. However, we see no evidence in the record that the application was modified in any respect.

<sup>9</sup>Petitioners also contend the record lacks substantial evidence to support a determination that the proposed bed and breakfast use violates applicable standards, assuming the imposition of conditions of approval. However, as explained above, there is no requirement that the city impose conditions to limit the proposed use.

1 error, on remand the record will likely be supplemented.  
2 Accordingly, no purpose is served in reviewing the  
3 evidentiary support for the challenged decision based on the  
4 existing record.

5 This subassignment of error is denied.

6 The first, second and sixth assignments of error are  
7 denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 "[The City] Council did not understand the  
10 conditional use process and voted based on  
11 political considerations rather than on criteria  
12 and standards in the [PCC]."

13 Petitioners argue we should review certain oral  
14 comments of city council members during the proceedings  
15 below. Petitioners argue those comments indicate the city  
16 council members did not understand that they could impose  
17 conditions of approval to mitigate impacts associated with  
18 the proposed use.<sup>10</sup> As we understand it, petitioners argue  
19 these oral comments establish a basis for remanding the  
20 challenged decision under ORS 227.173(2),<sup>11</sup> because the

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<sup>10</sup>Petitioners also argue the oral comments show the city council arrived at the challenged decision because neighborhood assent amounted to "a mandatory approval criterion." Petition for Review 24. However, we see no evidence in the oral comments cited by petitioners, or in the challenged decision for that matter, that neighborhood opposition was given disproportionate consideration or that neighborhood assent to the proposal was used as an approval standard.

<sup>11</sup>ORS 227.173(2) provides:

"Approval or denial of a permit application \* \* \* shall be based upon and accompanied by a brief statement that explains

1 decision was not based on applicable standards and criteria  
2 (presumably standards and criteria requiring the imposition  
3 of conditions of approval as an alternative to denial of an  
4 application).

5 As we explain above, there is no PCC standard requiring  
6 the city to explore whether conditions of approval may be  
7 imposed as an alternative to denial of an application for a  
8 bed and breakfast use. Accordingly, the oral comments of  
9 city council members cited by petitioners provide no basis  
10 for concluding petitioners' bed and breakfast application  
11 was not reviewed on the basis of applicable standards and  
12 criteria, as required by ORS 227.173(2). This assignment of  
13 error provides no basis for reversal or remand of the  
14 challenged decision.

15 The third assignment of error is denied.

16 **FOURTH ASSIGNMENT OF ERROR**

17 "[The City Council's] findings violate [PCC]  
18 requirements and the city process for adoption of  
19 findings denie[d] the petitioners protection  
20 afforded by Article I Sec. 20 of the Oregon  
21 Constitution."

22 Under this assignment of error, petitioners argue the  
23 procedure employed by the city for adopting the findings  
24 supporting the challenged decision violates petitioners'  
25 rights protected under Article I, section 20, of the Oregon

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the criteria and standards considered relevant to the decision,  
states the facts relied upon in rendering the decision and  
explains the justification for the decision based on the  
criteria, standards and facts set forth."

1 Constitution, which provides:

2 "No law shall be passed granting to any citizen or  
3 class of citizens privileges and immunities,  
4 which, upon the same terms, shall not equally  
5 belong to all citizens."

6 Petitioners argue Article I, section 20, of the Oregon  
7 Constitution is violated because the findings do not  
8 accurately reflect the oral tentative decision of the city  
9 council and because petitioners were not afforded an  
10 opportunity to object to those findings.

11 PCC 33.730.030(H)(6)(b) provides:

12 "The Council may take a tentative action and  
13 direct that proposed findings and a decision be  
14 prepared. If the prevailing party is represented  
15 by a land use professional or attorney, the  
16 prevailing party must provide findings and  
17 conclusions to support the Council's decision."

18 Petitioners argue that PCC 33.730.030(H)(6)(b) makes the  
19 tentative decision the final decision "pending new findings  
20 to fit the decision." Petition for Review 26. Petitioners  
21 assert:

22 "\* \* \* It is the absence of standards \* \* \* by  
23 which Council may or may not grant a party an  
24 opportunity to object to the proposed findings or  
25 request a clarification while the decision is  
26 still tentative that offends the Oregon  
27 Constitution." Id.

28 We see no constitutional violation. Nothing in the PCC  
29 or in any statute of which we are aware requires provision  
30 of an opportunity to object to proposed findings submitted  
31 to the local decision maker by the prevailing party in a  
32 local land use proceeding. Therefore, the city's failure to

1 establish standards governing the manner in which findings  
2 are prepared and adopted does not offend Article I, section  
3 20, of the Oregon Constitution.

4 Further, there is nothing inherently wrong with  
5 allowing a party to a land use proceeding to draft proposed  
6 findings for adoption by the local decision making body.  
7 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21,  
8 569 P2d 1063 (1977). An oral tentative decision typically  
9 will determine whether the request for land use approval is  
10 denied, approved, or approved with conditions. The oral  
11 tentative decision may include an exhaustive explanation of  
12 the rationale underlying the decision, but often it will  
13 not. Because land use decisions in this state must be  
14 supported by written findings, it is standard procedure for  
15 local government decision makers to make a tentative  
16 decision and direct staff or the prevailing party to prepare  
17 a final written decision and supporting findings for their  
18 review and adoption. As long as the decision maker in fact  
19 adopts the written decision and supporting findings, it does  
20 not matter that every aspect of the reasoning in support of  
21 the decision may not have been previously articulated  
22 orally. Of course, the legal adequacy of any such findings  
23 and the evidentiary support for those findings may be  
24 challenged in an appeal to this Board. The ability to  
25 challenge the findings ultimately adopted by the local  
26 government in an appeal to this Board satisfies any rights

1 petitioners may have under Article I, section 20, of the  
2 Oregon Constitution to object to those findings.

3       The fourth assignment of error is denied.

4       The city's decision is remanded.