

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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ASTORIA THUNDERBIRD, INC., )  
an Oregon corporation, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
THE CITY OF ASTORIA; THE )  
CITY OF ASTORIA PLANNING )  
COMMISSION; and THE CITY )  
OF ASTORIA CITY COUNCIL, )  
 )  
Respondents. )

LUBA Nos. 84-084  
84-098

FINAL OPINION  
AND ORDER

Appeal from the City of Astoria.

Donald A. Greig, Portland, filed the Petition for Review and argued the cause on behalf of petitioner. With him on the brief were McClaskey, Greig & Troutwine.

Robert C. Anderson, Astoria, filed a response brief and argued the cause on behalf of Respondent City of Astoria. With him on the brief were Anderson, Fulton & Van Thiel.

Timothy V. Ramis, Portland, filed a response brief and argued the cause on behalf of Respondent Port of Astoria. With him on the brief were O'Donnell & Ramis.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee, participated in the decision.

AFFIRMED 04/23/85

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

1 Opinion by Kressel.

2 NATURE OF DECISION

3 Petitioner appeals the city's approval of a conditional use  
4 permit. The permit allows the Port of Astoria to fill  
5 approximately 4.1 acres east of Pier 1 and west of the West  
6 Mooring Basin in Astoria, for the purpose of developing a heavy  
7 cargo handling facility.

8 FACTS

9 The Port filed an application for the challenged permit in  
10 June, 1984. The property is designated A-I (Aquatic  
11 Development) and is adjacent to land designated S-I (Marine  
12 Industrial) by the Astoria Zoning Ordinance. Filling land is a  
13 conditional use in the A-I Zone.

14 Petitioner operates the Astoria Thunderbird Motor Inn and  
15 Seafarer Restaurant adjacent to the property in question.  
16 Since 1979, the Motor Inn and restaurant have been classified  
17 by the city as non-conforming commercial uses. One wing of the  
18 Inn faces the planned cargo handling facility.

19 The city planning commission held a hearing on the permit  
20 application in August, 1984. At the hearing, representatives  
21 of petitioner expressed concern that the proposed project would  
22 adversely affect views from the Inn's northern wing. At  
23 petitioner's request, the planning commission voted to delay  
24 action on the application for 30 days.

25 During the thirty day continuance, petitioner negotiated  
26 with the Port, but the negotiations did not result in an

1 agreement. When the planning commission again took up the  
2 proposal in September, 1984, petitioner stated it would oppose  
3 the permit request unless conditions were added to protect the  
4 views from the Inn. However, the planning commission approved  
5 the permit without the suggested conditions.

6 Petitioner appealed the planning commission's decision to  
7 the Astoria City Council. The council initially refused to  
8 hear the appeal on grounds it had not been filed within the  
9 time limit established by the zoning ordinance. However,  
10 petitioner obtained a circuit court order requiring the council  
11 to accept the appeal. In response to the order, the city  
12 council accepted the appeal and referred it to the planning  
13 commission for a written report and recommendation concerning  
14 it.

15 In November, 1984, the planning commission considered  
16 petitioner's appeal on the record established at the previous  
17 hearings. At the conclusion of the meeting, the commission  
18 voted to recommend denial of the appeal.

19 Prior to consideration of the appeal by the city council,  
20 the Port and the council agreed the Port would attempt to  
21 obtain reconsideration of the circuit court's order and would  
22 assume the costs of this attempt. Based on the existence of  
23 this agreement, petitioner requested that the council appoint  
24 an independent body to make the final decision on the  
25 conditional use application. However, the council rejected the  
26 request. After conducting a hearing on the record, the council

1 denied petitioner's appeal.

2 FIRST ASSIGNMENT OF ERROR

3 Petitioner first claims a number of provisions of the  
4 city's comprehensive plan are violated by approval of the  
5 permit. The cited provisions call generally for protection of  
6 scenic views along Astoria's waterfront and for flexible and  
7 attractive waterfront development. The following are  
8 illustrative of the plan provisions relied on by petitioner:

9 "Natural Features

10 "2. The city will cooperate to foster a high quality  
11 of development through the use of flexible  
12 development standards...and other techniques...  
Protection of scenic views and vistas will be  
encouraged.

13 "General Land and Water Use Goals

14 "1. It is the primary goal of the plan to maintain  
15 Astoria's existing character by encouraging a  
16 compact urban form by strengthening the downtown  
core and waterfront areas,... It is the intent of  
the plan to promote Astoria as the commercial,  
industrial and cultural center of the area.

17 "5. The special qualities that make Astoria a  
18 desirable place to visit or work should be  
19 promoted and protected through the city plan and  
20 land use ordinances. These include...the scenic  
21 views and water access along the waterfront, the  
commercial fishing and sport fishing industry and  
other activities and attract residents and  
tourists to the city.

22 "Economic Policies.

23 "2. Astoria's uniqueness, particularly its waterfront  
24 and its historic areas, must be considered an  
25 economic asset along with their other benefits.  
Development in these areas must respect this  
quality."

26 Petitioner asserts the council's decision is in conflict

1 with these and related plan provisions. The underlying  
2 problem, according to petitioner, is that the decision "will  
3 turn prime waterfront motel rooms, each with a view of the  
4 picturesque Astoria waterfront, into rooms looking out onto 4.1  
5 acres of paved heavy cargo storage and handling." Petition at  
6 10.

7 The city considered these policies in connection with the  
8 Port's application, concluding the proposal would not  
9 significantly harm views from adjacent uses (including the  
10 Motor Inn) and would promote needed economic development.  
11 Record at 133-35. Petitioner does not challenge the  
12 sufficiency of the city's findings or their evidentiary support  
13 in the record. Instead, petitioner asserts the record clearly  
14 demonstrates the policies are violated. However, petitioner's  
15 disagreement with the city on this issue is not a basis for  
16 relief by this Board. The cited plan provisions are worded in  
17 very broad terms, calling for the weighing of the facts and the  
18 exercise of discretion by local officials. We cannot say as a  
19 matter of law that the decision violates the policies.  
20 Accordingly, we cannot uphold the challenge.

21 One plan violation claim raised by petitioner in this  
22 assignment of error merits further discussion. Petitioner  
23 argues:

24 "Finally, Astoria's Comprehensive Plan describes in  
25 considerable detail the contemplated development of  
26 the Port of Astoria shorelands and aquatic area. The  
difficulty experienced by the Port in assembling  
property to support its operations is specifically

1 addressed in the comprehensive plan. The overall  
2 Subarea Policy (CP.165(8)) is based on a mediated  
3 agreement whereby the Port would fill between existing  
4 pier slips and develop piling supported facilities  
5 west of Pier 3. There is absolutely no suggestion in  
6 the comprehensive plan that Port development include  
7 the fill of the adjacent area to the east of Pier 1."  
8 Petition at 11.

9  
10 Liberally construed, petitioner's argument is that the  
11 city's plan lists the waterfront projects the Port may  
12 undertake; since the project in question is not listed in the  
13 plan, approval could not be granted.

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15 Were this an accurate characterization of the plan,  
16 reversal of the city's decision would be appropriate. ORS  
17 197.835(3); OAR 661-10-070(1)(A)(3). However, after reviewing  
18 the plan provisions cited by petitioner, we find no attempt to  
19 comprehensively list permissible waterfront projects. Fairly  
20 read, the plan identifies some possible waterfront improvement  
21 projects but does not foreclose others.<sup>1</sup> Moreover, as the  
22 Port points out, the plan and zoning ordinance also authorize  
23 water dependent industrial uses for the site. Accordingly, we  
24 cannot agree with petitioner that the Port's project is  
25 prohibited.

26  
27 The first assignment of error is denied.

#### 28 SECOND ASSIGNMENT OF ERROR

29  
30 In this assignment of error, petitioner claims the city's  
31 decision conflicts with certain zoning ordinance standards  
32 applicable to the Port's proposal. The cited standards, like  
33 the plan provisions discussed above, broadly recognize the need  
34

1 for compatibility among neighboring waterfront uses. The  
2 following provisions are illustrative of those cited by  
3 petitioner:

4 "10.670 Development Zone Standards. All uses and  
5 activities, in addition to meeting specific  
6 development standards, shall meet the following  
7 general shoreland and aquatic use and activity  
8 standards, when appropriate.

9 "2. Uses will be designed to be compatible with  
10 adjacent uses. Appropriate landscaping, fencing  
11 and/or other buffering techniques, may be  
12 required to protect the character of adjacent  
13 uses.

14 "3. The placement of facilities will take into  
15 account the impact on views and vistas from  
16 adjacent...water-oriented commercial uses...."  
17 Section 10.670, Astoria Zoning Ordinance.

18 Petitioner claims the compatibility standards reflected in  
19 the city's zoning ordinance were violated by approval of the  
20 Port's proposal. To support this claim, petitioner points out  
21 that the city did not accept its suggestion to separate and  
22 screen the cargo facility from the adjacent Motor Inn.

23 Petitioner states:

24 "The Record of this proceeding clearly demonstrates  
25 that no effort has been made to ensure the  
26 compatibility of the proposed conditional use with the  
27 adjacent commercial use of the Astoria Thunderbird  
28 Motor Inn. The City zoning ordinance specifically  
29 directs the Planning Commission to impose conditions  
30 in permitting a conditional use that will protect the  
31 best interest of the surrounding property. That such  
32 protection could have been provided is evident from  
33 the modified fill plan which was verbally agreed to by  
34 the Port and the Astoria Thunderbird Motor Inn. A  
35 buffer area of 3/4 acre of open water would reduce the  
36 available area for the Port's proposed facility by  
37 only 18 percent. The berm and landscaping which the  
38 Port agreed to install would have afforded further  
39 protection at minimal cost. The evident

1 incompatibility of the proposed conditional use with  
2 existing adjacent uses violates Astoria's zoning  
ordinances and should not have been approved."  
Petition at 13-14.

3 We construe the above as a claim the city violated the  
4 compatibility standard in the zoning ordinance because it did  
5 not subject the permit to buffering and screening requirements  
6 designed to protect views from the Motor Inn. However, we do  
7 not read the zoning ordinance to mandate the imposition of such  
8 requirements. Rather, the provisions cited by petitioner  
9 merely authorize the city to impose protective conditions when  
10 they are deemed necessary to satisfy the compatibility  
11 standard.<sup>2</sup> Here, the city concluded the standard would be  
12 met without protective conditions. Record at 187-88.

13 We note petitioner does not challenge the adequacy of the  
14 findings or evidence supporting the city's conclusions of  
15 ordinance compliance. Instead, petitioner asserts the record  
16 demonstrates the incompatibility of the proposed conditional  
17 use with the adjacent commercial use of the Astoria Thunderbird  
18 Motor Inn. Petition at 13. However, as noted in our  
19 discussion of the first assignment of error, the question of  
20 whether the proposal is compatible with neighboring uses calls  
21 for the weighing of facts and the exercise of discretion by  
22 local officials. It is not up to this Board to reweigh the  
23 evidence and decide the issue de novo. Petitioner's challenge  
24 invites us to engage in just such an exercise. In this  
25 assignment of error, no other theory is presented as a basis  
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1 for relief. See ORS 197.835. Accordingly, we proceed no  
2 further.<sup>3</sup>

3 Based on the foregoing, the second assignment of error is  
4 denied.

5 THIRD ASSIGNMENT OF ERROR

6 Petitioner next contends the city failed to adopt findings  
7 of fact in support of its decision, in violation of ORS  
8 227.173(2) and the city zoning ordinance.<sup>4</sup> We disagree.

9 The minutes of the city council's hearing on petitioner's  
10 appeal state as follows:

11 "Commissioner Hauke commented that the council has  
12 done its homework and has the facts and figures of the  
13 matter. He is ready to make a determination. Motion  
14 by Commissioner Hauke, seconded by Commissioner  
15 Merriman, to deny the Thunderbird Appeal based on  
16 findings of facts (sic) as presented in the staff  
17 reports, minutes of previous meetings and the Crest  
18 report. (Motion carried.)" Record at 103.

19 We construe the foregoing to incorporate into the council's  
20 decision the findings appearing in the "Crest report." This is  
21 a reasonable interpretation of Commissioner Hauke's motion to  
22 deny the appeal "based on findings of facts (sic)" contained in  
23 those documents.<sup>5</sup> Although the motion might have been  
24 phrased more precisely to express the adoption of findings by  
25 the council, Oregon law does not require the invocation of  
26 particular magic words in such matters. See South of Sunnyside  
Neighborhood League v. Board of County Commissioners of  
Clackamas County, 280 Or 3, 21, 569 P2d 1063 (1977).

Petitioner seems also to argue that the council was

1 obligated to develop its own written findings on the appeal,  
2 rather than to rely on findings prepared by others. However,  
3 no authority is cited by petitioner for this proposition. The  
4 case law is to the contrary. South of Sunnyside Neighborhood  
5 League v. Board of County Commissioners of Clackamas County,  
6 supra; Neuberger v. City of Portland, 288 Or 585, 590-91, 607  
7 P2d 722 (1980); West v. City of Astoria, 18 Or App 212, 224,  
8 524 P2d 1216 (1974).

9 In our consideration of this assignment of error, we note  
10 petitioner does not attack the adequacy of any particular  
11 finding adopted by the council. Rather, petitioner more  
12 broadly contends that no written findings were adopted,  
13 contrary to state and local requirements. As noted, however,  
14 we conclude that findings were adopted.

15 The third assignment of error is denied.

16 FOURTH ASSIGNMENT OF ERROR

17 Petitioner next claims the city council followed improper  
18 procedure by conducting an on-the-record hearing on  
19 petitioner's appeal from the planning commission's decision.  
20 Relying on West v. City of Astoria, supra, petitioner claims a  
21 de novo proceeding should have been conducted because the  
22 planning commission failed to adopt written findings. However,  
23 as discussed below, we reject petitioner's challenge for two  
24 reasons: (1) petitioner's application of West to the present  
25 circumstance is incorrect; the council committed no procedural  
26 error in reviewing the appeal on the record and (2) even if

1 procedural error was committed, petitioner has failed to  
2 demonstrate the procedure was prejudicial to its substantial  
3 interests, as required by ORS 197.835(8)(a)(B).

4 In West v. City of Astoria, supra, the city planning  
5 commission voted to approve a conditional use permit, but did  
6 not adopt findings in support of its decision. On appeal by  
7 permit opponents, the city council reviewed the record of the  
8 planning commission's action and affirmed the approval. The  
9 council also adopted no findings. Plaintiff contended, inter  
10 alia, that the council should have conducted a de novo appeal  
11 hearing. In response, the Court of Appeals stated:

12 "We conclude that under the City's zoning ordinance  
13 one full-scale evidentiary public hearing before the  
14 planning commission is all that is required to provide  
15 plaintiff with due process of law, and that the city  
16 council is not required to conduct a second de novo  
17 evidentiary public hearing, provided, however, that an  
adequate record of the original hearing before the  
planning commission is made, and that proper and  
adequate findings, which are discussed later in this  
opinion, are made prior to official action on the  
permit application." 18 Or App 221-22 (citation  
omitted) (emphasis added).

18 The Court then concluded the decision should be remanded  
19 because neither the planning commission nor the city council  
20 had adopted findings. 18 Or App 224-25.

21 We read the foregoing portion of West to embody two  
22 distinct points of law. First, a governing body need not  
23 conduct a de novo review of an inferior tribunal's permit  
24 decision if the inferior tribunal establishes an adequate  
25 factual record. Second, prior to official (i.e., final) action  
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1 on a permit, adequate findings must be adopted. Petitioner  
2 incorrectly merges these two points when it alleges that the  
3 failure of the planning commission to adopt findings on the  
4 Port's proposal entitled it to a de novo hearing before the  
5 city council.

6 The record in this appeal indicates the planning commission  
7 conducted evidentiary hearings on the Port's application on two  
8 occasions. Petitioner does not claim it was deprived of an  
9 opportunity to introduce evidence into the record at these  
10 hearings, or that the record was in some other way inadequate  
11 for review by the city council. Failure of the planning  
12 commission to adopt findings would not, as we see it, make its  
13 evidentiary record inadequate for review by the council.  
14 Rather, such a failure would simply require the governing body  
15 to adopt findings after reviewing the record, as occurred in  
16 this case.

17 There is an additional reason why we must reject  
18 petitioner's procedural challenge. ORS 197.835(8)(a)(B)  
19 authorizes this Board to grant relief where the local  
20 government "failed to follow the procedures applicable to the  
21 matter before it in a manner that prejudiced the substantial  
22 rights of the petitioner." (Emphasis added.) Petitioner  
23 alleges the city followed improper procedure in the conduct of  
24 the appeal hearing, but does not explain how the procedure  
25 prejudiced its substantial rights. Accordingly, relief cannot  
26 be granted. ORS 197.835(8)(a)(B).

1 The fourth assignment of error is denied.

2 FIFTH ASSIGNMENT OF ERROR

3 Petitioner's final claim is that the city's decision must  
4 be reversed "due to ex parte contacts or bias resulting from ex  
5 parte contacts with a member of the city council." Petition at  
6 21. It is undisputed that prior to the council's hearing on  
7 petitioner's appeal, the Port privately agreed to assume the  
8 city's legal costs in seeking reconsideration or reversal of  
9 the circuit court's order compelling the council to take  
10 jurisdiction over the appeal.

11 Two theories are relied on in support of this challenge:

12 (1) the city council did not satisfy the disclosure  
13 requirements of ORS 227.180(3) and (2) the council did not  
14 maintain its impartiality in the matter, as required by Fasano  
15 v. Washington County Commission, 264 Or 574, 507 P2d 23  
16 (1973). As discussed below, we do not believe either theory  
17 can support relief in this case.

18 ORS 227.180(3) provides, in pertinent part:

19 "(3) No decision or action of a planning commission or  
20 city governing body shall be invalid due to ex  
21 parte contacts or bias resulting from ex parte  
22 contact with a member of the decision-making  
23 body, if the member of the decision-making body  
24 receiving the contact:

22 "(a) Places on the record the substance of any written  
23 or oral ex parte communications concerning the  
24 decision or action; and

24 "(b) Has a public announcement of the content of the  
25 communication and of the parties' right to rebut  
26 the substance of the communication made at the  
first hearing following the communication where

1           action will be considered or taken on the subject  
2           to which the communication related."

3           As a preliminary matter, we reject the Port's assertion  
4           that the contact with the city council was not sufficiently  
5           connected to the matter before the council to bring into play  
6           the statutory disclosure requirement. Although there might be  
7           instances where a contact with local decisionmakers is so  
8           remotely connected (or is unconnected) to the pending matter  
9           that the statute should not come into play, this is not such an  
10          instance. Here, the contact concerned an aspect of the very  
11          matter then pending before the local decisionmakers, i.e., the  
12          Port's permit request.

13          Although we conclude ORS 227.180(3) is applicable in this  
14          case, we also conclude the statute's disclosure requirements  
15          were satisfied. As we read the record, petitioner was on  
16          actual notice of the Port's agreement with the city as of  
17          November 26, 1984, the date the council heard petitioner's  
18          appeal of the planning commission's permit decision. Indeed,  
19          the record indicates petitioner's legal counsel expressly  
20          commented on the subject at the beginning of the hearing,  
21          citing the ex parte communication and the fee agreement as  
22          grounds for the council's appointment of an independent body to  
23          hear the appeal. Record at 102-03. Under these circumstances,  
24          we believe the statute's disclosure/rebuttal provisions were  
25          satisfied. No further procedural steps were required.

26          Petitioner also claims the agreement with the Port rendered

1 the city council incapable of making an unbiased decision on  
2 the permit appeal. Unquestionably, petitioner was entitled to  
3 have its appeal heard by an unbiased tribunal. Neuberger v.  
4 City of Portland, supra, 288 Or at 589. However, on the record  
5 before us, we cannot conclude respondent should be  
6 characterized as biased. The sole charge is that the council  
7 accepted the Port's assistance in attempting to establish the  
8 correctness of the council's initial refusal to accept  
9 petitioner's appeal. Standing alone, this circumstance does  
10 not establish bias in respondent. See Eastgate Theater, Inc.,  
11 v. Board of County Commissioners of Washington County, 37 Or  
12 App 745, 754, 588 P2d 640 (1978). Petitioner has produced no  
13 additional evidence of bias. The claim must therefore be  
14 rejected. Neuberger v. City of Portland, supra.

15 We conclude respondent violated neither ORS 227.180(3) nor  
16 the impartial-tribunal requirement recognized in Oregon case  
17 law. The fifth assignment of error is therefore denied.

18 Respondent's decision is affirmed.

19 AFFIRMED.

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FOOTNOTES

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1 The Astoria Comprehensive Plan, Section 165, states in pertinent part:

"Shorelands Designations.

"All shorelands in this subarea are designated S-1, Water-Dependent Development.

\* \* \*

Subarea Policies.

- "1. Filling of slips 1 and 2 and the 2.1-acre site north of pier 3 may occur as required to meet specific development proposals.
- "2. The 10-acre Aquatic Development parcel west of pier 3 may be developed as part of a specific proposal to fully utilize the filled area inclusive of slip 2, the 2.1-acre fill, pier 3 and the existing filled area adjacent to pier 3.
- "3. The 10-acre Aquatic Development area shall be developed using piling to the maximum extent feasible as objections have been expressed to the use of fill in this area.
- "4. Filling shall only be allowed for water-dependent uses. Specific proposals for the extent of fill or pile in the area west of pier 3 must be justified at the time of permit application, specifically addressing physical and biological effects on the area west of pier 3."

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2 For example, Section 10.985 of the zoning ordinance, which governs approval of conditional uses, includes the following provision:

"In permitting a conditional use...the planning commission may impose, in addition to those standards and requirements expressly specified in this ordinance, any conditions which it considers necessary to protect the best interests of the surrounding property or the city as a whole." Section 10.985, Astoria Zoning Ordinance.

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2 This assignment of error also charges that the city "failed  
3 to take into account" the impact of the Port's proposal on the  
4 adjacent Motor Inn. The zoning ordinance imposes this duty on  
5 the city in cases involving "the placement of facilities." See  
6 Section 10.670.3 and 10.690.1, Astoria Zoning Ordinance.  
7 Assuming, arguendo, these provisions are applicable to the  
8 Port's fill proposal, we cannot sustain petitioner's charge.  
9 The adopted findings do "take into account" the question of  
10 adverse impact on the Motor Inn. Record at 187-88. Whether  
11 the city's findings adequately considered this issue is a  
12 separate question not raised by petitioner.

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9 ORS 227.173(2) reads:

10 "Approval or denial of a permit application shall be  
11 based upon and accompanied by a brief statement that  
12 explains the criteria and standards considered  
13 relevant to the decision, states the facts relied upon  
14 in rendering the decision and explains the  
15 justification for the decision based on the criteria,  
16 standards and facts set forth."

13 Astoria Code, Section Z01.010(3) provides, in relevant  
14 part:

15 "The planning commission will determine whether the  
16 evidence supports a finding that requirements of the  
17 comprehensive plan, zoning ordinance, and other city  
18 ordinances have been met. It will approve, approve  
19 with conditions, or deny the application accordingly.  
20 The approval or denial will be in writing and include  
21 findings on each of the applicable requirements."

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20 In connection with the permit request, two staff reports  
21 were prepared by Crest (Columbia River Estuary Task Force).  
22 The reports are written as findings of fact and conclusions of  
23 law. They identify the pertinent approval criteria, state the  
24 facts, and explain the justification for the decision based on  
25 the criteria and facts. The record contains no other staff  
26 reports, and we therefore assume the council's motion refers to  
the findings in the Crest staff reports.

24 The motion refers also to "minutes of previous meetings,"  
25 but neither the city nor the Port contend the minutes actually  
26 constitute findings. We agree that minutes are not findings.  
Allen v. Columbia County Board of Commissioners, 6 Or LUBA 81,

1 82 (1982). As noted above, we believe adoption of the Crest  
staff reports satisfied the city's duty to adopt findings.

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