



1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the board of county  
4 commissioners (commissioners) approving the partition of one  
5 lot into three lots.

6 **MOTION TO INTERVENE**

7 Jim and Patty Huntzicker (intervenors), the applicants  
8 below, move to intervene on the side of the respondent.  
9 There is no opposition to the motion, and it is allowed.

10 **MOTION TO FILE REPLY BRIEF**

11 Petitioner moves to file a reply brief. There is no  
12 opposition to the motion, and it is allowed.

13 **FACTS**

14 The subject property, which is almost square, comprises  
15 approximately one acre in the county's R-6 (Residential, 6  
16 units per acre) District. The proposed partition would  
17 create three lots. As shown on the map attached to the  
18 notice of the commissioners' decision, Lot 1 faces N.W.  
19 Kaiser Road. Lot 2 is located northeast of Lot 1. Lot 3 is  
20 a flag lot, the majority of which is northwest of Lots 1 and  
21 2.<sup>1</sup> The "pole" of Lot 3 reaches a right-of-way connecting  
22 to a cul-de-sac called N.W. Townsend Court.

23 The central issue in this appeal is the county's

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<sup>1</sup>Although Lot 3 appears to be a flag lot on the map, whether or not it is a flag lot is disputed, as discussed below.

1 approach to Washington County Community Development Code  
2 (CDC) 430-45, which governs flag lots.<sup>2</sup> A staff report  
3 dated October 18, 1995 includes the following finding with  
4 respect to CDC 430-45:

5 "One flag lot is proposed as a part of this  
6 partition (Parcel #3). The flag lot meets the  
7 dimensional requirements of Section 430-45.4.  
8 Compliance with the other requirements of Section  
9 430-45 will be ensured by the review of the Type I  
10 permit required for the construction of the single  
11 family home." Record 189.

12 The application was approved administratively in  
13 October, 1995, subject to conditions which included a  
14 requirement that the site plan show the house on Lot 2  
15 facing northwest and the house on Lot 3 facing southeast.  
16 Record 48. After receiving notice of the decision,  
17 petitioner filed an appeal to the county hearings officer on  
18 various grounds, including alleged violations of CDC 430-45.  
19 On May 16, 1996 intervenors submitted proposed findings,  
20 which stated the proposal would create "a single flag lot."  
21 Record 133. On the same day, at a hearing attended by both  
22 petitioner's and intervenors' attorneys, intervenors'

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<sup>2</sup>As relevant to this appeal, CDC 430-45 Flag Lot provides:

"A lot behind a frontage lot, plus a strip (pole) out to the street for an access drive. Creation of a flag lot shall be subject to the following:

"430-45.1 Buildings located on flag lots shall be oriented to provide the maximum privacy to surrounding existing and future residential structures;

"\* \* \* \* \*"

1 attorney testified before the hearings officer that the  
2 proposal would create a single flag lot. Record 222.

3 On May 23, 1996, intervenors' planner/architect wrote a  
4 letter to the hearings officer which included a statement  
5 that "[t]he updated partition plat attached to this letter  
6 and dated May 22, 1996 shows a 20' wide private access  
7 tract. Therefore, there will not be any flag lots as a part  
8 of this partition." Record 62 (emphasis added). The  
9 "updated partition plat" includes the words "private access  
10 tract," which are printed across what had been the flag lot  
11 "pole" of Lot 3, adjacent to the boundary of Lot 2.<sup>3</sup> Record  
12 66.

13 On June 20, 1996, intervenors submitted proposed  
14 findings (June 20 findings) which were apparently intended  
15 to replace the proposed findings submitted on May 16, 1996.  
16 The June 20 findings also address CDC 430-45:

17 "As explained in the May 23, 1996 letter from  
18 [intervenors' planner/architect] the updated  
19 preliminary partition plat shows a 20' wide  
20 private access tract. Therefore there will not be  
21 any flag lots as part of this partition. This  
22 notwithstanding, privacy relative to neighboring  
23 properties will be ensured because the backs of  
24 the houses to be built on parcels 2 and 3 will  
25 face the backs of the neighboring houses to the  
26 south and north respectively. Houses to the east  
27 will be well-separated from the houses on parcels  
28 2 and 3 by (1) the setback requirements that apply  
29 both to parcels 2 and 3 and the houses to the east

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<sup>3</sup>The boundaries of the individual lots are not clear on the updated partition plat.

1 and (2) the private road that provides access to  
2 parcels 2 and 3." Record 243 (emphasis added).

3 On July 18, 1996, the hearings officer issued a written  
4 decision approving the application and adopting as findings  
5 and conditions (1) the June 20 findings (with one  
6 exception); and (2) the staff report findings and conditions  
7 (with one additional condition). Record 51-53. The  
8 county's notice of the hearings officer's decision contained  
9 a map which did not show the private access tract. Record  
10 45.

11 Petitioner appealed the hearings officer's decision to  
12 the commissioners, who affirmed. The commissioners'  
13 decision, dated October 8, 1996, incorporates supplemental  
14 findings, which are not an issue in this proceeding, and the  
15 hearings officer's findings and conditions.

16 This appeal followed.

17 **THIRD ASSIGNMENT OF ERROR**

18 Petitioner contends that because the challenged  
19 decision includes both the hearings officer's decision,  
20 which incorporates the staff report to the effect the  
21 proposed partition includes a flag lot, and the June 20  
22 findings, which conclude the proposed partition does not  
23 include a flag lot, the findings are contradictory. The  
24 county and intervenors (respondents) answer that the  
25 "findings first accurately describe the originally proposed  
26 plat, and then accurately describe the revised plat which  
27 was ultimately approved." Response Brief 9.

1           We agree with petitioner that the findings are  
2 ostensibly contradictory. However, the contradiction is  
3 evidently the result of carelessness; a sentence should have  
4 been inserted in the challenged decision to make express  
5 that the earlier staff report findings were superseded on  
6 the issue of whether the proposed partition includes a flag  
7 lot. Nevertheless, it is evident that the June 20 findings  
8 did supersede the staff report on that issue. No purpose  
9 would be served by remanding to allow the county to make  
10 explicit what is already obvious. The June 20 findings  
11 state that the updated preliminary partition plat shows a  
12 private access tract and so there will not be a flag lot.

13           The third assignment of error is denied.

14           **FIRST AND SECOND ASSIGNMENTS OF ERROR**

15           In the first two assignments of error, petitioner  
16 contends that (1) because the findings are contradictory,  
17 whether Lot 3 is a flag lot or not is unclear (petitioner  
18 contends Lot 3 is a flag lot); and (2) if CDC 430-45  
19 applies, the county erred in deferring a discretionary  
20 decision under CDC 430-45.1 to be resolved, without notice  
21 and a hearing, under the county's "Type I" process.

22           **A. Waiver**

23           Respondents maintain that because petitioner did not  
24 challenge before the commissioners the hearings officer's  
25 finding that "there will not be any flag lots as part of  
26 this partition," the issue was waived under ORS 197.763(1),

1 which states that an

2 "issue which may be the basis for an appeal to  
3 [LUBA] shall be raised not later than the close of  
4 the record at or following the final evidentiary  
5 hearing on the proposal before the local  
6 government. Such issues shall be raised and  
7 accompanied by statements or evidence sufficient  
8 to afford the governing body, planning commission,  
9 hearings body or hearings officer, and the parties  
10 an adequate opportunity to respond to each issue."

11 Respondents also rely on CDC 209-3.1, which requires that a  
12 statement of the nature of the challenged decision and the  
13 specific grounds for a local appeal be specified in the  
14 local petition for review. Finally, respondents rely on  
15 local rules of procedure, which state that

16 "Failure to raise an issue associated with the  
17 appeal of the Hearings Officer's decision in the  
18 hearing, in person or by letter, or failure to  
19 raise issues accompanied by statements or evidence  
20 sufficient to afford the Board of Commissioners an  
21 opportunity to respond to the issue precludes  
22 appeal to the Land Use Board of Appeals based upon  
23 that issue." Record 38.

24 As we explained in Davenport v. City of Tigard, 25 Or  
25 LUBA 67, 70, aff'd 121 Or App 135 (1993), ORS 197.763(1) and  
26 ORS 197.835(3) make it clear that all a petitioner must do  
27 is raise the issue it wishes to raise at LUBA "not later  
28 than the close of the record at or following the final  
29 evidentiary hearing \* \* \*." ORS 197.763(1). A local  
30 governing body may be free to adopt provisions to narrow its  
31 own scope of review in local appeals, but it is not free to  
32 narrow LUBA's scope of review. Laurence v. Douglas County,  
33 \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-180, June 20, 1997), slip op 5-

1 6. We must consider, therefore, whether petitioner raised  
2 at any level below the issue it now raises at LUBA.

3 It is not disputed that petitioner expressed below its  
4 contentions that (1) the subject property includes a flag  
5 lot; and (2) compliance with CDC 430-45.1 cannot be  
6 determined through a Type I procedure. These issues were  
7 not waived.<sup>4</sup>

8 **B. Nature of Lot**

9 Petitioner contends the proposed partition includes a  
10 flag lot, as that is defined under CDC 430-45,  
11 notwithstanding the county's reliance on the creation of a  
12 private access tract in lieu of the flag "pole."  
13 Respondents contend that the county's findings concerning  
14 the private access tract comprise an interpretation of the  
15 definition:

16 "Based upon [the] revised plan showing a separate  
17 tract created for access purposes replacing the  
18 'flagpole' portion of a residential lot, and [the]  
19 explanation of this revision, the county  
20 determined that there was no longer a flag lot  
21 under consideration; where is no flagpole, there  
22 is no flag lot." Response Brief 8.

23 Respondents contend further that the county's interpretation  
24 is entitled to deference under Clark v. Jackson County, 313  
25 Or 508, 515, 836 P2d 710 (1992), and ORS 197.829(1).

26 The county's interpretation of the definition of "flag

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<sup>4</sup>The creation of the private access strip clearly did not resolve petitioner's concerns. Petitioner listed a failure to comply with CDC 430-45 as one of the grounds for its appeal to the commissioners.

1 lot" leaves much to be desired; it is barely adequate for  
2 review, in that it must be inferred from what the county  
3 did. However the test for whether an interpretation is  
4 adequate for review is not to be applied rigidly. Alliance  
5 for Responsible Land Use v. Deschutes Cty., 149 Or App 259,  
6 266, \_\_\_ P2d \_\_\_ (1997). The county's interpretation is  
7 inherent in the way that it applied the definition. We  
8 agree with respondents that the county's implicit  
9 interpretation is not "clearly wrong," and we therefore  
10 defer to it. Goose Hollow Foothills League v. City of  
11 Portland, 117 Or App 211, 843 P2d 992 (1992).

12 Because the proposed partition does not include a flag  
13 lot, it is not necessary to reach petitioner's contention  
14 that the county improperly deferred making a discretionary  
15 decision, i.e., the determination of compliance with the  
16 privacy criterion stated in CDC 430-45.1, without providing  
17 notice and a hearing.

18 The first and second assignments of error are denied.

19 The county's decision is affirmed.