

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

4 FRIENDS OF BRYANT WOODS PARK,    )  
5 LEAGUE OF WOMEN VOTERS OF WEST   )  
6 CLACKAMAS COUNTY, CHILD'S        )  
7 NEIGHBORHOOD ASSOCIATION, SIGNE  )  
8 BIRGE, ROBERT ELLISON, JANICE    )  
9 ELLISON, CONNIE EMMONS, DAVID    )  
10 GEORGE, JANET HOLBROOK, RICHARD  )  
11 LAVINE, SHERRY PATTERSON and      )  
12 CHRISTINE ROTH,                    )

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LUBA No. 93-108

vs.

FINAL OPINION  
AND ORDER

CITY OF LAKE OSWEGO,

Respondent,

and

RIVERVIEW PARK PARTNERS,

Intervenor-Respondent.

Appeal from City of Lake Oswego.

Robert L. Liberty, Portland, filed the petition for review and argued on behalf of petitioners.

Jeffrey Condit, City Attorney, Lake Oswego, filed a response brief and argued on behalf of respondent.

William C. Cox, Portland, filed a response brief and argued on behalf of intervenor-respondent.

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

REMANDED

11/10/93

You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS  
2 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision approving a  
4 55-lot residential planned unit development (PUD), including  
5 variances to city cul-de-sac length and wetlands development  
6 standards.

7 **MOTION TO INTERVENE**

8 Riverview Park Partners, the applicant below, moves to  
9 intervene in this appeal proceeding on the side of  
10 respondent. There is no objection to the motion, and it is  
11 allowed.

12 **FACTS**

13 The subject property is undeveloped and consists of  
14 30.3 acres designated and zoned Single Family Residential  
15 (R-10). Portions of the subject property are designated as  
16 wetlands or 100-year floodplain. There are 8.16 acres of  
17 wetlands (7.96 acres classified as "essential" wetlands and  
18 0.2 acres classified as "non-essential" wetlands), located  
19 primarily in the northern and western portions of the  
20 property. The property is partially wooded, including  
21 significant groves of mature fir trees.

22 Childs Road abuts the subject property to the north.  
23 Across Childs Road from the eastern half of the subject  
24 property is Bryant Woods Park. Unimproved Canal Road abuts  
25 the subject property to the east, separating it from the  
26 Oswego Canal. Dogwood Drive abuts the subject property to

1 the south. Across Dogwood Drive is a row of single family  
2 dwellings along the north side of the Tualatin River.  
3 Sycamore Drive abuts the subject property to the west. An  
4 undeveloped right-of-way for Vine Maple Street bisects the  
5 subject property from Childs Road on the north to Dogwood  
6 Drive on the south.

7 The subject property was annexed to the city in 1989.  
8 In subsequent decisions, the city council applied the R-10  
9 zone, which has a 10,000 sq. ft. minimum lot size, to the  
10 subject property, but limited the maximum allowable density  
11 on certain portions of the property. Under these decisions,  
12 the maximum allowable density of development on the subject  
13 property is 74 lots. In 1990, the city approved a 32-lot  
14 residential PUD on the subject property (1990 PUD).  
15 However, the 1990 PUD was never developed, and its approval  
16 expired.

17 On August 3, 1992, intervenor filed its application for  
18 the proposed 55-lot residential PUD. Under intervenor's  
19 proposal, the 55 lots will be clustered on the southern and  
20 eastern portions of the property. A total of 13.69 acres in  
21 the northern and western portions of the subject property,  
22 including approximately 7.8 acres of the designated  
23 wetlands, will be preserved as park/open space. This area  
24 will form part of a "wildlife corridor" connecting Bryant  
25 Woods Park to the northeast with the Tualatin River corridor  
26 to the southwest.

1           Access to the PUD is proposed to be from Canal Road,  
2 via a J-shaped cul-de-sac approximately 2,600 ft. in length  
3 (Riverview Drive). The proposal includes improving Canal  
4 Road and its intersection with Childs Road and relocating  
5 the intersection of Canal and Childs Roads slightly to the  
6 west. The proposal also includes construction of an  
7 approximately 100 ft. section of Vine Maple Street at the  
8 southern edge of the property, connecting Dogwood Drive to  
9 approximately the midpoint of Riverview Drive. However,  
10 locked barriers will be used to limit use of Vine Maple  
11 Street to emergency vehicle access.

12           The city Development Review Board (DRB) approved  
13 intervenor's application. The DRB decision included  
14 approval of variances to Lake Oswego Code (LOC) 44.390,  
15 which limits the length of cul-de-sacs to 1,000 ft. It also  
16 included approval of a variance to Lake Oswego Development  
17 Standards (LODS) 4.020, which limits development of  
18 essential wetlands.

19           Petitioners appealed the DRB decision to the city  
20 council. With one exception not relevant to this appeal,  
21 the city council review was based on the evidentiary record  
22 established before the DRB. The city council affirmed the  
23 DRB decision, with two additional conditions of approval.  
24 This appeal followed.

25           **FIRST AND THIRD ASSIGNMENTS OF ERROR**

26           The city's approval of cul-de-sac length and wetland

1 protection variances is subject to the variance standards  
2 established by LOC 49.510. LOC 49.510(1)(C) imposes the  
3 following approval standard:

4 "The request is the minimum variance necessary to  
5 make reasonable use of the property[.]"

6 In these assignments of error, petitioners challenge  
7 the city's interpretation of LOC 49.510(1)(C) in the  
8 challenged decision. Petitioners argue that  
9 LOC 49.510(1)(C) does not require a determination of whether  
10 the proposed use, in the abstract, is "reasonable," but  
11 rather whether there is any alternative use of the subject  
12 property, requiring a lesser variance, that is "reasonable."  
13 According to petitioners, regardless of whether the proposed  
14 55-lot PUD is a reasonable use of the subject property,  
15 LOC 49.510(1)(C) is not satisfied if some other use of the  
16 subject property (e.g., a PUD with fewer than 55 lots),  
17 requiring a cul-de-sac shorter than that proposed here,  
18 would be a reasonable use of the property. Petitioners  
19 argue the city's interpretation that LOC 49.510(1)(C) is  
20 satisfied by determinations that the proposed use of the  
21 property is reasonable, and the requested variance is the  
22 minimum variance necessary to allow that use, is "clearly  
23 wrong," because under this interpretation LOC 49.510(1)(C)  
24 would be satisfied by any proposed variance.

25 Petitioners also argue the city's interpretation of  
26 LOC 49.510(1)(C) is unreasonable because it is inconsistent

1 with an earlier city interpretation of the same provision --  
2 an interpretation affirmed by this Board in Roberts v. City  
3 of Lake Oswego, 23 Or LUBA 302 (1992). According to  
4 petitioners, in Roberts, the city found a variance to a  
5 street frontage standard for a partition creating one new  
6 lot did not satisfy LOC 49.510(1)(C), because the existing  
7 use of the subject property for one dwelling was a  
8 reasonable use and, therefore, a variance was not necessary  
9 to put the property to reasonable use. Petitioners argue  
10 that in Roberts, the city found development at 50% of the  
11 density allowed under the LOC was a reasonable use.  
12 Petitioners also argue that in Roberts, unlike the present  
13 case, the city compared the potential use of the subject  
14 property without a variance to the proposed use with a  
15 variance, in determining whether LOC 49.510(1)(C) was met.

16 The city argues this Board previously determined the  
17 LOC 49.510 variance standards are not traditional, strict  
18 variance standards, and specifically found that  
19 LOC 49.510(1)(C) does not require a variance to be the  
20 minimum necessary to make some beneficial use of the subject  
21 property. Sokol v. City of Lake Oswego, 20 Or LUBA 429,  
22 441-42 (1989). According to the city, in Sokol, LUBA agreed  
23 with the city's interpretation that LOC 49.510(1)(C)  
24 required a determination that (1) the proposed partition of  
25 undeveloped land to create three residential lots was a  
26 reasonable use of the property, and (2) the proposed

1 variance was the minimum necessary to allow that use.<sup>1</sup>

2 The city further argues that its interpretation of  
3 LOC 49.510(1)(C) in Roberts is not inconsistent with its  
4 interpretation of LOC 49.510(1)(C) in this case. The city  
5 maintains its decision in Roberts did not establish any  
6 general rule that 50% of allowable density is a reasonable  
7 use, but rather was based on the specific facts of that  
8 case. The city contends that dividing a parcel with an  
9 existing dwelling into two parcels is quite different from  
10 dividing undeveloped property to create a 55-lot PUD.<sup>2</sup>

11 This Board is required to defer to a local government's  
12 interpretation of its own ordinances, unless that  
13 interpretation is contrary to the express words, policy or  
14 context of the local enactment. Clark v. Jackson County,  
15 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must  
16 defer to a local government's interpretation of its own  
17 enactments, unless that interpretation is "clearly wrong."  
18 Goose Hollow Foothills League v. City of Portland, 117 Or  
19 App 211, 217, 843 P2d 992 (1992); West v. Clackamas County,

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<sup>1</sup>In Sokol, we ultimately concluded the city had not adequately demonstrated that the second part of the standard was satisfied. Sokol, supra, 17 Or LUBA at 443.

<sup>2</sup>The city also argues its application of LOC 49.510(1)(C) in Roberts was affected by the fact that in Roberts it determined under LOC 49.510(1)(A) that denial of the requested variance would not create an "unnecessary hardship," i.e. that the variance was not necessary to achieve reasonable use of the subject property. The city points out that in this case, by contrast, it found the "unnecessary hardship" standard of LOC 49.510(1)(A) was met, and petitioners do not challenge that determination.



1 116 Or App 89, 93, 840 P2d 1354 (1992).

2 There is no dispute that in granting the cul-de-sac  
3 length and wetland protection variances, the city  
4 interpreted LOC 49.510(1)(C) to require that (1) the  
5 proposed use be a reasonable use of the subject property,  
6 considering the property's zoning designation and applicable  
7 environmental and safety standards impacting achievement of  
8 the density otherwise allowed under the zoning designation;  
9 and (2) the requested variance be the minimum necessary to  
10 allow the proposed use. Record 27-30, 40-42. This  
11 interpretation is not inconsistent with the words, policy or  
12 context of LC 49.510(1)(C) and, therefore, we defer to it.

13 One additional point merits comment. There can easily  
14 be more than one local government interpretation of a  
15 particular code provision that is not "clearly wrong."  
16 Under Clark, supra, any of these interpretations is  
17 affirmable. Nevertheless, we have previously said we do not  
18 believe Clark allows a local government arbitrarily to vary  
19 its interpretation of an approval standard when acting on  
20 permit applications. Smith v. Clackamas County, \_\_\_ Or LUBA  
21 \_\_\_ (LUBA No. 93-036, July 13, 1993), slip op 5 n 1.  
22 However, it has not been shown here that the city is acting  
23 arbitrarily.

24 The city's interpretation of LC 49.510(1)(C) in the  
25 challenged decision is consistent with its interpretation of  
26 that provision in Sokol, supra. The city appears to have

1 taken a different approach to analyzing compliance with  
2 LC 49.510(1)(C) in Roberts, supra. However, the situation  
3 in Roberts was very different from that in this case. In  
4 Roberts, the subject property was already developed with a  
5 residence and had only two possible uses -- either as one  
6 residential lot or two. We cannot say the city's  
7 interpretation of LC 49.510(1)(C) in Roberts actually  
8 conflicts with its interpretation in this case and in  
9 Sokol.<sup>3</sup> However, even if it did, we would simply have a  
10 situation where the city's interpretation of LC 49.510(1)(C)  
11 is consistent with one previous city interpretation of that  
12 provision and is inconsistent with another. We do not  
13 believe that is sufficient, in and of itself, to provide a  
14 basis for reversal or remand.

15 The first and third assignments of error are denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Access to the 55-lots of the approved PUD would be  
18 provided from Canal Road via Riverview Drive, a cul-de-sac  
19 2,600 ft. in length, 1,600 ft. longer than the 1,000 ft.  
20 cul-de-sac length limit established by LOC 44.390.  
21 Record 1086. In this assignment of error, petitioners  
22 challenge the adequacy of, and evidentiary support for, the  
23 city's findings demonstrating compliance with  
24 LC 49.510(1)(C) with regard to the cul-de-sac length

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<sup>3</sup>No issue of alleged inconsistency with the city's prior interpretation of LOC 49.510(1)(C) in Sokol was raised or discussed in Roberts itself.

1 variance.<sup>4</sup>

2 **A. Reasonable Use**

3 Petitioners contend the city failed to determine  
4 whether a PUD with fewer than 55-lots would be a reasonable  
5 use of the subject property. Petitioners argue the city's  
6 findings that a 55-lot PUD is a reasonable use of the  
7 subject property (Record 28-29) are not relevant to  
8 determining whether some lesser number of lots would reduce  
9 the variance required while still permitting "reasonable  
10 use" of the subject property. Petitioners also contend  
11 there is no evidence in the record that a lesser number of  
12 lots would not constitute reasonable use of the property.  
13 Petitioners point to the fact that the city previously  
14 approved a 32-lot PUD for the same property.

15 Under the city's interpretation of LOC 49.510(1)(C),  
16 which we affirm supra, it is required to determine whether a  
17 55-lot PUD is a reasonable use of the subject property,  
18 considering the property's zoning and applicable  
19 environmental and safety standards impacting achievement of  
20 the density otherwise allowed under that zoning.<sup>5</sup> Under the

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<sup>4</sup>Under this assignment of error, petitioners contend several findings are "true but irrelevant." Petition for Review 27-28. Including irrelevant findings in a decision is not, of itself, a basis for reversal or remand. We address below only those arguments of petitioners that provide a potential basis for reversal or remand.

<sup>5</sup>Petitioners do not challenge the adequacy of the findings or evidentiary record to support the city's determination that 55-lots is a reasonable use of the property.

1 city's interpretation of LOC 49.510(1)(C), its decision is  
2 not required to be supported by findings and evidence that  
3 fewer than 55-lots is not a reasonable use of the property,  
4 or that the cul-de-sac length variance could not be reduced  
5 if there were fewer than 55 lots.

6 This subassignment of error is denied.

7 **B. Minimum Variance Necessary**

8 Under the city's interpretation of LOC 49.510(1)(C), it  
9 is required to determine the requested variance is the  
10 "minimum variance necessary" to allow the proposed 55-lot  
11 PUD. Petitioners challenge the evidentiary support for the  
12 following finding:

13 " \* \* \* Alternative street designs were considered  
14 which could have generated at least the same  
15 number of lots but were rejected, because of  
16 environmental and safety concerns. \* \* \*"<sup>6</sup>  
17 Record 28.

18 The city argues the challenged decision contains  
19 additional findings, not challenged by petitioners, which  
20 explain further the city's bases for rejecting alternative  
21 street designs. Record 24-26. The city also argues the  
22 proposed PUD minimizes the variance required by providing  
23 emergency access from Dogwood Drive via the stub of Vine  
24 Maple Street. The challenged decision interprets the

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<sup>6</sup>Petitioners also argue this finding is inadequate, because it fails to address whether alternative street designs serving fewer lots would require less of a variance. However, as we explained above, under the city's interpretation of LOC 49.510(1)(C), such findings are not required.

1 purpose of the cul-de-sac length limitation in LOC 44.390 to  
2 be assuring access for emergency vehicles. Record 25. The  
3 city argues the proposed PUD minimizes the requested  
4 variance because, with emergency vehicle access via Vine  
5 Maple Street, no section of the proposed cul-de-sac is more  
6 than 1,000 ft. from an emergency vehicle access point.  
7 Therefore, according to the city, reducing the length of the  
8 cul-de-sac would not reduce the variance required. The city  
9 argues its determination that no alternative street design  
10 would minimize the cul-de-sac length variance required is  
11 supported by substantial evidence at Record 1079-1112,  
12 1153-1237 and 2717-76. Intervenor also cites Record 107 and  
13 1237-39.

14 LOC 44.390 (Length of Culs-de-Sac and Dead End Streets)  
15 states:

16 "A cul-de-sac or dead end street shall be as short  
17 as practicable, but in no event more than 300  
18 metres [sic] (1000 feet) in length. A cul-de-sac  
19 shall provide a turnaround without the use of a  
20 driveway. \* \* \*"

21 The city does not contend the construction and use of  
22 Vine Maple Street for emergency vehicle access will make the  
23 proposed cul-de-sac comply with the cul-de-sac length  
24 limitation of LOC 44.390. Rather, the city contends use of  
25 Vine Maple Street for emergency access minimizes the  
26 variance from LOC 44.390 required for the proposed  
27 cul-de-sac, because it construes the purpose of LOC 44.390  
28 to be the provision of adequate emergency vehicle access.

1 However, the city cites nothing in the wording or context of  
2 LOC 44.390 establishing that its purpose is to provide  
3 adequate emergency vehicle access. Therefore, we disagree  
4 with the city that providing access for emergency vehicles  
5 via Vine Maple Street minimizes the variance required.  
6 Reducing the length of the proposed cul-de-sac would  
7 minimize the variance required, and the city has not  
8 explained why the cul-de-sac cannot be shortened.

9 The city correctly points out that additional findings,  
10 not challenged by petitioners, explain more fully the city's  
11 reasons for not providing access to the proposed PUD  
12 directly from Childs Road, or from Sycamore Avenue or  
13 Dogwood Drive. However, petitioners challenge the  
14 evidentiary support for the city's ultimate finding that  
15 LOC 49.510(1)(C) is satisfied because there is no  
16 alternative street design that would minimize the cul-de-sac  
17 length variance required.

18 Petitioners cite no evidence in the record on this  
19 issue. In response to petitioners' contention, the city and  
20 intervenor (respondents) cite over 200 pages of material,  
21 197 of which consist of the entire applicant's submittal and  
22 rebuttal and all staff reports in the record. Respondents  
23 do not identify where in these documents relevant material  
24 is located or explain why those documents are relevant.

25 It is the parties' responsibility to identify the  
26 evidence in the record that supports their position. Eckis

1 v. Linn County, 110 Or App 309, 313, 821 P2d 1127 (1991).  
2 It is not apparent that there is evidence in these documents  
3 supporting respondents' position, and we decline to search  
4 through 197 pages looking for such evidence.

5 The additional items in the record cited by respondents  
6 are a page from the transcript of the city council's  
7 April 13, 1993 hearing and a letter from intervenor's  
8 consultant to the Division of State Lands and Department of  
9 Fish and Wildlife (DSL letter). The transcript does not  
10 help respondents. In it a city staff member states the DRB  
11 considered alternative access designs that would have  
12 generated the same number of lots, but those alternative  
13 access designs are not described in the record. Record 107.  
14 The DSL letter states that an unidentified proposed access  
15 road was found to be unacceptable because of impacts on  
16 wetlands and that an access to the site from Canal Road is  
17 available. Record 1237-39. It does not, however, say  
18 anything about cul-de-sac length. We conclude the evidence  
19 in the record to which we are cited is not evidence upon  
20 which a reasonable person would rely to determine that there  
21 is no alternative street design requiring a lesser variance  
22 that could serve a 55-lot PUD on the subject property.<sup>7</sup>

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<sup>7</sup>We note the city specifically found that if the proposed section of Vine Maple Street connecting Dogwood Drive and Riverview Drive were a through street (i.e. were not restricted to emergency vehicle access only), no variance from the cul-de-sac length limitation of LOC 44.390 would be required. Record 25. In view of this finding, which is not challenged by petitioners, the city's determination that alternative street designs would

1 This subassignment of error is sustained, in part.

2 The second assignment of error is sustained, in part.

3 **FOURTH ASSIGNMENT OF ERROR**

4 LODS 4.020 limits development within "essential"  
5 wetlands. The city determined the proposed PUD requires a  
6 variance from LODS 4.020 for 0.22 acre of essential  
7 wetlands. Record 35-37. The impacted essential wetlands  
8 include 0.10 acre located on the subject property that will  
9 be filled in order to move Canal Road slightly to the west,  
10 at its intersection with Childs Road. The additional 0.12  
11 acre of off-site essential wetlands affected is on the north  
12 side of Childs Road, and will be impacted by improvements  
13 required to Childs Road at its intersection with Canal Road.  
14 Id.

15 In this assignment of error, petitioners challenge the  
16 adequacy of, and evidentiary support for, the city's  
17 findings demonstrating compliance with LC 49.510(1)(C) with  
18 regard to the wetland protection variance.

19 Petitioners first argue the findings are inadequate  
20 because they fail to address whether fewer than 55 lots is a  
21 reasonable use of the property, or whether a PUD with fewer  
22 than 55 lots would require a smaller variance, i.e. would  
23 require that less essential wetlands be filled. However, as  
24 we explained above, under the city's interpretation of

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not minimize the variance must be supported by substantial evidence that this section of Vine Maple Street cannot be used as a through street.



1 LOC 49.510(1)(C), its decision is not required to be  
2 supported by findings that fewer than 55-lots is not a  
3 reasonable use of the property, or that the wetland  
4 protection variance could not be reduced if there were fewer  
5 than 55 lots. Rather, its findings must demonstrate that  
6 the wetland protection variance requested is the minimum  
7 variance that would allow the proposed 55 lot use.

8 Petitioners next challenge the following findings:

9 "[S]eeking access in any other location would have  
10 had a greater impact on the wetland, would have  
11 resulted in the destruction of other natural  
12 features, and/or would have required a variance to  
13 other City Code requirements (Preservation of  
14 Stream Corridors, LODS Section 3).

15 "[Intervenor's road location] design improves the  
16 Canal Road location in relation to the canal  
17 wildlife and stream corridor. The steep sided  
18 canal when related to the present location of  
19 Canal Road is less appealing as a wildlife  
20 corridor than will be the case when a larger  
21 buffer between the canal and the road is created  
22 by [intervenor's] road location design."  
23 Record 40-41.

24 Petitioners argue these findings are impermissibly  
25 conclusory and contend the city's determination that  
26 alternative access locations would not result in a lesser  
27 variance is not supported by substantial evidence in the  
28 record.

29 We understand petitioners to contend the above quoted  
30 findings are impermissibly conclusory because they do not  
31 adequately explain the basis for the city's ultimate  
32 conclusion that alternative access designs would not result

1 in a lesser variance being required. However, we need not  
2 determine whether the findings cited by petitioners, of  
3 themselves, are impermissibly conclusory. When considered  
4 together with other findings in the challenged decision  
5 cited by the city, the findings adequately explain why the  
6 city believes the relocation of Canal Road is required and  
7 that the requested wetland protection variance is the  
8 minimum variance necessary to allow reasonable use of the  
9 property. For instance, other findings state relocation of  
10 Canal Road improves sight distance at the intersection with  
11 Childs Road for safety purposes, complies with a requirement  
12 of LODS 3.020 that development not occur within a 25 ft.  
13 buffer area adjacent to the Oswego Canal and preserves a  
14 major stand of mature trees. Record 36-38.

15 We next consider petitioners' challenge to the  
16 evidentiary support for the city's determination that  
17 alternative access designs would not require a lesser  
18 variance. Petitioners cite no evidence in the record on  
19 this issue. Respondents cite 551 pages of material,  
20 including the entire applicant's submittal and rebuttal, all  
21 staff reports in the record, the entire staff report on the  
22 1990 PUD, the 1989 and 1992 wetland delineation reports in  
23 their entirety, and numerous entire reports on geology,  
24 floodplains, water quality, archaeology, traffic impacts and  
25 other issues. Record 1079-1112, 1113-1537, 2717-79,  
26 2891-2918. Respondents do not identify where in these

1 documents relevant material is located or explain why these  
2 documents are relevant.

3 As we stated above, it is the parties' responsibility  
4 to identify the evidence in the record that supports their  
5 position. Eckis v. Linn County, supra. It is not apparent  
6 to us that there is evidence supporting respondents'  
7 position in these documents, and we decline to search  
8 through 551 pages looking for such evidence.

9 The fourth assignment of error is sustained, in part.

10 **FIFTH ASSIGNMENT OF ERROR**

11 LOC Chapter 44 (Subdivisions) contains the following  
12 provision:

13 "Variances

14 "When, in the judgment of the decision-making  
15 body, strict compliance with the standards of this  
16 chapter would impose an undue hardship on the  
17 developer when compared to developers of similarly  
18 situated property, the decision-making body may  
19 grant variances to the extent required to render  
20 substantial justice. Any variance granted shall  
21 be the minimum required and may be denied or  
22 conditioned where necessary to achieve substantial  
23 compliance with the objectives and purposes of  
24 this chapter." LOC 44.396.

25 Petitioners contend the city erred by approving a  
26 variance to the cul-de-sac length limit of LOC 44.390  
27 without applying LOC 44.396.

28 **A. Waiver**

29 Respondents contend petitioners did not raise the issue  
30 of compliance with LOC 44.396 below, as is required by

1 ORS 197.763(1).<sup>8</sup> Petitioners argue under  
2 ORS 197.835(2)(a),<sup>9</sup> they may raise new issues before this  
3 Board, because the city did not comply with the procedural  
4 requirements of ORS 197.763 below. Petitioners specifically  
5 contend the notice of hearing required by ORS 197.763(3) did  
6 not list the applicable criteria from the city's  
7 comprehensive plan and ordinances that apply to the subject  
8 application, as required by ORS 197.763(3)(b).<sup>10</sup>

9 The notice mailed to neighboring property owners  
10 regarding the DRB's evidentiary hearing on the proposed PUD  
11 states that the applicant requests variances from LOC 44.390  
12 and LODS 4.020(2), but does not otherwise "list" applicable

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<sup>8</sup>ORS 197.763(1) provides, in relevant part:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. \* \* \*"

<sup>9</sup>ORS 197.835(2) provides:

"Issues [raised before LUBA] shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. A petitioner may raise new issues to [LUBA] if:

"(a) The local government failed to follow the requirements of ORS 197.763[.]

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

<sup>10</sup>ORS 197.763(3)(b) provides that the notice of hearing required to be mailed to the applicant, certain property owners and neighborhood organizations must:

"List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

1 approval criteria from the city's plan and ordinances.

2 Rather, the notice contains the following statement:

3 "The complete application, applicable standards,  
4 and other information are available for public  
5 review at the Planning Department, 3rd floor, City  
6 Hall." (Emphasis added.) Supp. Record 34.

7 Respondents argue the above statement is the equivalent of  
8 the "list" of applicable standards required by  
9 ORS 197.763(3)(b).

10 We previously determined that a statement in the local  
11 government notice of hearing required by ORS 197.763(3), to  
12 the effect that the applicable criteria can be reviewed at  
13 the local government planning office, "does not constitute  
14 listing the applicable criteria, as is required by  
15 ORS 197.763(3)(b)." Murphy Citizens Advisory Comm. v.  
16 Josephine County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-024, May 11,  
17 1993), slip op 5. Consequently, we conclude the city failed  
18 to comply with the requirements of ORS 197.763, and  
19 petitioners may raise new issues in this appeal.

20 **B. LOC 44.396**

21 Petitioners contend the city erred by approving a  
22 variance to the cul-de-sac length limit of LOC 44.390  
23 without finding that complying with LOC 44.390 "would impose  
24 an undue hardship on the developer when compared to  
25 developers of similarly situated property," as is required  
26 by LOC 44.396.

27 Respondents concede the challenged decision does not

1 address LOC 44.396 or its applicability to the subject  
2 application. Respondents argue, however, that it is clear  
3 the variance standards of LOC 49.510 supersede those of  
4 LOC 44.396. Respondents point out Chapter 49 was added to  
5 the LOC by Ordinance No. 1807, adopted September 15, 1981.  
6 Respondent's Brief App-35 to App-41. Although Ordinance  
7 No. 1807 modified or repealed some provisions of LOC  
8 Chapter 44, it did not amend or repeal LOC 44.396. However,  
9 respondents contend Section 22 of Ordinance No. 1807  
10 (entitled "Intent") clearly establishes that in this  
11 instance LOC 44.396 has been superseded by LOC 49.510:

12 "It is intended by the City Council that the  
13 provisions adopted by Section 1 of this ordinance  
14 [LOC Chapter 49], and the development standards  
15 adopted pursuant thereto [the LODS], are to be the  
16 provisions of the [LOC] which govern all  
17 development made subject to those provisions.  
18 Therefore, it is the Council's intent that all  
19 conflicting provisions of the [LOC] are superceded  
20 [sic], whether or not such conflicting provisions  
21 are specifically repealed by Section 24 of this  
22 ordinance. The City Manager shall apply this  
23 general statement of intent in the administration  
24 of the provisions of Section 1 of this ordinance."

25 Determining whether and how LOC 44.396 applies to the  
26 subject application requires interpretation of its  
27 provisions, as well as those of LOC 49.510 and Section 22 of  
28 Ordinance No. 1807. In Weeks v. City of Tillamook, 117 Or  
29 App 449, 453, 844 P2d 914 (1992), the court of appeals  
30 explained that Clark v. Jackson County, supra, requires that  
31 this Board not interpret a local government's ordinances in

1 the first instance, but rather review the local government's  
2 interpretation of its ordinances. The court of appeals  
3 recently reemphasized that failure of the local government  
4 to make the initial interpretation of local regulations is  
5 almost always a basis for remand. Gage v. City of Portland,  
6 123 Or App 269, 274-75, \_\_\_ P2d \_\_\_ (1993).<sup>11</sup> Thus, we must  
7 remand the decision to the city for it to interpret its  
8 ordinance provisions in the first instance.

9 The fifth assignment of error is sustained.

10 **SIXTH ASSIGNMENT OF ERROR**

11 Petitioners contend LODS 4.020 prohibits non-wetland  
12 dependent development in essential wetlands, as was found in  
13 Forest Highlands Neigh. Assoc. v. City of Lake Oswego,  
14 9 Or LUBA 278, 294 (1983). According to petitioners, this  
15 means that a variance to LODS 4.020 for a non-wetland  
16 dependent use cannot be granted in any circumstances.  
17 Petitioners argue that a previous city decision, included in  
18 the record here, adopted such an interpretation of the  
19 relevant LOC and LODS provisions. Record 1881-91.  
20 Petitioners argue the city is required to adhere to its

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<sup>11</sup>The court described the possibility of an exception as follows:

"\* \* \* We do not foreclose the possibility that, in some cases, the local provisions on which a party relies may be so clear in their meaning or so tenuously related to the issues that a remand for a local interpretation would be an empty act.  
\* \* \*" Gage, supra, 123 Or App at 275.

However, this is not such a case.

1 prior interpretation. Petitioners also argue the challenged  
2 decision fails to address this issue or interpret LODS 4.020  
3 in this regard.<sup>12</sup>

4 Respondents argue that a memorandum by the city  
5 attorney at Record 2869-70 provides the necessary  
6 interpretation of city code provisions with regard to  
7 whether a variance to LODS 4.020 can be approved for a  
8 non-wetland dependent use. According to respondents, this  
9 memorandum was adopted as part of the DRB findings, and the  
10 DRB findings in turn were adopted by the city council.<sup>13</sup>

11 Petitioners argue that the portion of the DRB findings  
12 in question was superseded by the findings adopted by the  
13 city council. We agree with petitioners. Initially, the  
14 city council decision adopts the DRB findings as the basis  
15 for its decision. Record 18. However, the "Wetland  
16 Variance" portion of the city council decision begins as  
17 follows:

18 "The City Council hereby replaces some of the  
19 findings and conclusions of the DRB regarding the  
20 issue of a wetland variance. The specific DRB  
21 findings and conclusions that are replaced with  
22 the following findings and conclusions \* \* \*  
23 identified by the same headings used by the City  
24 Council in this document. Those findings and

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<sup>12</sup>There is no dispute that the challenged decision approves a variance to LODS 4.020 for a non-wetland dependent use.

<sup>13</sup>In view of our disposition of this assignment of error, we do not consider whether the DRB findings are adequate to incorporate the city attorney's memorandum as findings. See Gonzalez v. Lane County, 24 Or LUBA 251, 258-59 (1992).



1 conclusions are generally found at [Record  
2 620-24]." (Emphasis added.) Record 35.

3 The DRB findings on "Wetland Variance" at  
4 Record 620-24, including the finding citing the city  
5 attorney's memorandum, have the same headings as the city  
6 council's findings on "Wetland Variance" at Record 35-47.  
7 Thus, the DRB findings at Record 620-24 were replaced by the  
8 city council findings at Record 35-47.

9 We conclude the challenged decision does not interpret  
10 the relevant city ordinance provisions with regard to  
11 whether a variance to LODS 4.020 can be approved for a  
12 non-wetland dependent use. Accordingly, the decision must  
13 be remanded for the city to make such an interpretation in  
14 the first instance.

15 The sixth assignment of error is sustained.

16 The city's decision is remanded.