

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council decision approving
4 the preliminary plat of the Ames Orchard No. 2 subdivision.

5 **MOTION TO INTERVENE**

6 Robert Ames, the applicant below, and Bull Mountain
7 Development Co., move to intervene in this proceeding on the
8 side of respondent. There is no opposition to the motion,
9 and it is allowed.

10 **FACTS**

11 The subject parcel is designated Low Density
12 Residential by the City of Tigard Comprehensive Plan (plan)
13 and is zoned Residential, 3.5 units per acre (R-3.5).¹ The
14 approved subdivision will divide the 12.68 acre parcel into
15 33 residential lots, plus two tracts (Tracts A and B) for a
16 water facility and for emergency access from an adjoining
17 street.

18 The intersection of SW 121st Avenue and SW Gaarde
19 Street adjoins the northern boundary of the subject
20 property, near its eastern edge. Access to the proposed
21 subdivision will be from SW 121st Avenue, a north-south

¹The subject property was originally zoned Residential, one unit per acre (R-1), and Residential, two units per acre (R-2). An application for a zone change to R-3.5 was submitted at the same time as the subject subdivision application. After an initial hearing before the planning commission on both the zone change and subdivision applications, the zone change was separately approved and is not at issue in this appeal. Record 9.

1 street that currently ends at the subject property's
2 northern boundary. SW Gaarde Street is developed to the
3 east of its intersection with SW 121st Avenue, but is
4 undeveloped west of that intersection.

5 Properties to the east of the proposed subdivision are
6 zoned R-2. The property to the south of the proposed
7 subdivision is zoned R-1. This property includes 23
8 residential lots developed with single-family dwellings, in
9 the Ames Orchard subdivision. Access to the Ames Orchard
10 subdivision is provided by SW Hazelhill Drive, a street
11 which terminates at the southern boundary of the property at
12 issue in this appeal, near its eastern end.

13 Properties to the west and north of the proposed
14 subdivision are zoned Residential, 4.5 units per acre
15 (R-4.5). The city has approved a 64-lot subdivision (Vista
16 Point) on the property to the north. Access to the Vista
17 Point subdivision will be from the presently undeveloped
18 portion of SW Gaarde Street west of its intersection with
19 SW 121st Avenue.² When developed, SW Gaarde St. west of
20 SW 121st Avenue will adjoin the northern boundary of the
21 subject property for most of its length, but will curve to
22 the north near the western end of the subject property, so

²Petitioner is the owner of the property to the north and the developer of the Vista Point subdivision. What is required of petitioner with regard to constructing or paying for the improvement of SW Gaarde Street west of SW 121st Avenue, as part of developing the Vista Point subdivision, is a matter of dispute in this appeal.

1 that the northwest corner of the subject property will not
2 abut SW Gaarde Street.

3 The streets in the approved Ames Orchard No. 2
4 subdivision form a loop, with residential lots on the
5 outside and inside of the loop. A street extends from the
6 northeast corner of the loop, connecting to the intersection
7 of SW 121st Avenue and SW Gaarde Street. A cul-de-sac is
8 located off the southeastern corner of the loop. Tract B
9 will provide emergency access between this cul-de-sac and
10 the stubbed end of SW Hazelhill Drive to the south. In
11 addition, a stubbed street extends from the northwest corner
12 of the loop to the northwest corner of the subject property.
13 This stubbed street is currently separated from the
14 undeveloped SW Gaarde Street right-of-way by a portion of a
15 lot in the Vista Point subdivision.

16 Intervenor Ames submitted his application for
17 subdivision preliminary plan approval in early 1993.
18 Intervenor Ames' original proposal included requests for
19 variances to certain street standards. After public
20 hearings, the planning commission denied intervenor Ames'
21 application. Intervenor Ames appealed the planning
22 commission's decision to the city council. Intervenor Ames
23 withdrew his requests for variances and also submitted a
24 revised preliminary plat. After a public hearing and a
25 de novo review, the city council issued the challenged
26 decision approving the revised subdivision preliminary plat.

1 **MOTION TO STRIKE**

2 Petitioner moves to strike Appendix 2 to intervenors-
3 respondent's (intervenors') brief. Appendix 2 consists of
4 the city's April 27, 1993 decision granting subdivision
5 preliminary plat approval and planned unit development
6 conceptual approval for the Vista Point subdivision (Vista
7 Point decision). Petitioner argues the Vista Point decision
8 is not in the local record and, therefore, cannot be
9 considered by this Board.

10 Intervenors contend we should consider the Vista Point
11 decision because the petition for review includes an
12 incorrect statement, not supported by the record, that the
13 Vista Point decision requires petitioner to construct a
14 half-street improvement extending SW Gaarde Street to the
15 west.

16 With certain exceptions not relevant here, our review
17 is limited to the record established during the city
18 proceedings. ORS 197.830(13)(a). The Vista Point decision
19 is not in the record. Therefore, we grant petitioner's
20 motion to strike.³ However, petitioner cites no evidence in
21 the record supporting the statement in its petition for
22 review that the Vista Point decision requires petitioner to
23 construct a half-street improvement extending SW Gaarde

³Certain statements in intervenors' brief, most notably the estoppel argument at Intervenors' Brief 17, rely on Appendix 2. We shall disregard any statements in intervenors' brief that are based on Appendix 2.

1 Street to the west. Accordingly, we shall disregard that
2 statement.

3 **STANDING**

4 Respondent and intervenors (respondents) challenge
5 petitioner's standing. Respondents argue petitioner lacks
6 standing because it appeared at the city council hearing in
7 this matter as a proponent, not an opponent, of the proposed
8 subdivision.

9 A person may petition this Board for review of a land
10 use decision or limited land use decision, if that person
11 files a notice of intent to appeal and "appeared before the
12 local government * * * orally or in writing."
13 ORS 197.830(2)(a). ORS 197.830(2) does not limit standing
14 to appeal to persons who appeared in opposition to a
15 proposed development. There is no dispute that petitioner
16 appeared before the city council in this matter orally and
17 in writing. Record 62, 108. Consequently, petitioner has
18 standing to bring this appeal.

19 **JURISDICTION**

20 Respondents contend this Board lacks jurisdiction to
21 review the challenged decision because petitioner did not
22 exhaust all remedies available before the city. We
23 understand respondents to argue petitioners failed to
24 exhaust available remedies concerning certain issues because
25 they did not raise these issues before the city council.

26 ORS 197.825(2)(a) provides this Board's jurisdiction is

1 limited to appeals in which "the petitioner has exhausted
2 all remedies available by right * * *." The purpose of this
3 exhaustion requirement is to assure that the challenged
4 decision is reviewed by the highest level local decision
5 making body the local code makes available, before an appeal
6 to this Board is pursued. Moody v. Deschutes County, 22
7 Or LUBA 567, 569 (1992); McConnell v. City of West Linn, 17
8 Or LUBA 502 (1989). Where the challenged decision was made
9 by the highest level of local decision maker possible and
10 petitioner appeared before that decision maker, as is the
11 case here, the exhaustion requirement of ORS 197.825(2)(a)
12 is met.

13 Respondents' challenge to our jurisdiction is rejected.

14 **PRELIMINARY ISSUE**

15 Respondents contend petitioner is precluded from
16 raising before this Board all issues raised in petitioner's
17 first and third through seventh assignments of error.⁴
18 Respondents base their contention both on the principle of
19 affirmative waiver and on statutory waiver provisions.

20 **A. Affirmative Waiver**

21 At the city council hearing, petitioner's attorney
22 signed the city's testimony list as a "proponent" of the
23 proposal before the city. Record 68. The attorney stated

⁴In a letter dated January 3, 1994, petitioner withdrew its second assignment of error and the portions of its third assignment of error concerning minimum lot size in the R-3.5 zone.

1 he was testifying "in support [of the proposal] with one
2 proviso," concerning the construction and financing of the
3 SW Gaarde Street extension. Respondent's Brief App. I.

4 Respondents argue petitioner's appearance as a
5 proponent of the proposed subdivision demonstrates
6 petitioner affirmatively indicated it agreed with the
7 proposed subdivision approval except for a narrowly
8 circumscribed issue regarding intervenors' contribution to
9 the costs of improving SW Gaarde Street. Respondents argue
10 that a party who affirmatively states in local proceedings
11 that it agrees with the opposing side cannot change its
12 position in an appeal before LUBA. Newcomer v. Clackamas
13 County, 92 Or App 174, 758 P2d 369 (1988).

14 Prior to the enactment in 1989 of the statutory waiver
15 provisions discussed in the following section, there was no
16 general requirement that substantive issues must be raised
17 below in order to be raised before LUBA. See Lane County v.
18 City of Eugene, 54 Or App 26, 33, 633 P2d 1306 (1981);
19 Zusman v. Clackamas County Board of Commissioners, 13
20 Or LUBA 39, 42 (1985). However, both the court of appeals
21 and this Board recognized a party could affirmatively waive
22 an issue below by stating agreement with opposing parties on
23 a particular issue. Newcomer v. Clackamas County, 16
24 Or LUBA 564, 567, rev'd on other grounds 92 Or App 174,
25 modified 94 Or App 33 (1988). Assuming this nonstatutory
26 principle of affirmative waiver survives the 1989 enactment

1 of the statutory waiver provisions discussed below, it
2 continues to be a narrow exception. It is limited to
3 situations where a specific factual or legal position is
4 affirmatively agreed to below, and the party subsequently
5 seeks to challenge that position in an appeal to LUBA. See
6 Louisiana Pacific v. Umatilla County, ___ Or LUBA ___ (LUBA
7 No. 93-084, December 14, 1993), slip op 15-16; Neste Resins
8 Corp. v. City of Eugene, 23 Or LUBA 55, 65-66 (1992).

9 In this case, petitioner made no representations below
10 concerning its position on specific factual or legal issues
11 that it now seeks to challenge. Petitioner simply stated
12 below that it "supported" the proposed subdivision, with a
13 proviso regarding the issue of financing the improvements to
14 SW Gaarde Street. A general expression of support does not
15 affirmatively waive petitioner's ability to raise new issues
16 when challenging the decision adopted by the city.

17 **B. Statutory Waiver**

18 **1. Background**

19 ORS 197.763 was enacted in 1989. It establishes a
20 number of procedural requirements for local government
21 quasi-judicial hearings on applications for land use
22 decisions.⁵ For instance, it requires that a notice of

⁵As relevant here, ORS 197.015(10)(a)(A) defines "land use decision" as:

"A final decision or determination made by a local government
* * * that concerns the adoption, amendment or application of:

1 hearing explaining the nature of the proposed use and
2 listing applicable approval criteria from the local
3 government comprehensive plan and land use regulations be
4 mailed to owners of certain neighboring property at least 20
5 days before the local government's evidentiary hearing.⁶
6 ORS 197.763(3)(a), (b) and (f). It also requires that all
7 evidence relied on by the applicant be submitted to the
8 local government and made available to the public by the
9 time the hearing notice is provided. ORS 197.763(4)(a). If
10 additional evidence is subsequently entered in support of
11 the application, any party is entitled to a continuance.
12 ORS 197.763(4)(b). Staff reports must be made available at
13 least seven days before the hearing. Id. If requested to
14 do so by a party, the local government must leave the record
15 open for at least seven days after the evidentiary hearing.
16 ORS 197.763(6).

17 With regard to the requirement to raise issues below,
18 ORS 197.763(1) provides:

-
- "(i) The [statewide planning] goals;
 - "(ii) A comprehensive plan provision;
 - "(iii) A land use regulation; or
 - "(iv) A new land use regulation[.]"

ORS 197.015(10)(b) establishes certain exceptions to the definition of "land use decision." Only one of these, discussed infra, is relevant here.

⁶In 1991, the statute was amended to require this notice of the local government hearing also be mailed to recognized neighborhood or community organizations. Or Laws 1991, ch 817, § 31.

1 "An issue which may be the basis for an appeal to
2 [LUBA] shall be raised not later than the close of
3 the record at or following the final evidentiary
4 hearing on the proposal before the local
5 government. Such issues shall be raised with
6 sufficient specificity so as to afford the [local
7 government decision maker], and the parties an
8 adequate opportunity to respond to each issue."

9 The hearing notice provided to neighboring property owners
10 is required to include, among other things, a statement that
11 "failure of an issue to be raised in a hearing * * * or
12 failure to provide sufficient specificity to afford the
13 decision maker an opportunity to respond to the issue
14 precludes appeal to [LUBA] based on that issue."

15 ORS 197.763(3)(e). A similar statement must be made "at the
16 commencement" of a hearing governed by ORS 197.763.

17 ORS 197.763(5)(c).

18 At the same time, the statutory provision governing the
19 filing of petitions for review with LUBA was amended to
20 read:

21 "A petition for review of the land use decision
22 and supporting brief shall be filed with [LUBA] as
23 required by [LUBA rule]. Issues shall be limited
24 to those raised by any participant before the
25 local hearings body as provided in ORS 197.763.
26 * * *" ORS 197.830(10) (1989).

27 The statutory provisions governing LUBA's scope of review
28 were similarly amended to include the following provision:

29 "Issues [raised before LUBA] shall be limited to
30 those raised by any participant before the local
31 hearings body as provided in ORS 197.763. * * *"
32 ORS 197.835(2) (1989).

33 However, the following identically worded provisions

1 qualifying the limitation on raising new issues before LUBA
2 were also added to these statutes:

3 "* * * A petitioner may raise new issues [before
4 LUBA] if:

5 "(a) The local government failed to follow the
6 requirements of ORS 197.763; or

7 "(b) The local government made a land use decision
8 which is different from the proposal
9 described in the notice to such a degree that
10 the notice of the proposed action did not
11 reasonably describe the local government's
12 final action." ORS 197.830(10) (1989);
13 197.835(2) (1989).

14 These statutory provisions represent a quid pro quo,
15 whereby local governments are required to give broader and
16 more detailed notice of quasi-judicial land use hearings and
17 make evidence and staff reports available in advance of such
18 hearings, in exchange for participants being required to
19 raise an issue during the local proceedings in order to be
20 able to raise that issue before LUBA. 1000 Friends of
21 Oregon v. Benton County, 20 Or LUBA 7, 10 (1990).

22 In 1991, the legislature created a new category of
23 decision subject to LUBA review -- "limited land use
24 decisions." Or Laws 1991, ch 817. ORS 197.015(12) defines
25 "limited land use decision," in relevant part, as:

26 "[A] final decision or determination made by a
27 local government pertaining to a site within an
28 urban growth boundary which concerns:

29 "(a) The approval or denial of a subdivision or
30 partition, as described in ORS chapter 92.

31 "* * * * *

1 A limited land use decision is not a land use decision and
2 is not subject to the requirements of ORS 197.763.
3 ORS 197.015(10)(b)(C); 197.195(2).

4 The 1991 legislation also enacted ORS 197.195,
5 establishing requirements for local government procedures
6 for making limited land use decisions. There is no
7 requirement that a public hearing be held on an application
8 for a limited land use decision.⁷ Rather, the statute
9 requires that the local government provide written notice of
10 a 14 day period for submission of written comments on the
11 application for a limited land use decision to owners of
12 certain neighboring property and to recognized neighborhood
13 or community organizations. ORS 197.195(3)(b) and (c)(A).
14 The notice must list the approval criteria applicable to the
15 limited land use decision. ORS 197.195(3)(c)(C). All
16 evidence relied on by the applicant must be available for
17 review during the period for submission of written comments.
18 ORS 197.195(3)(c)(F).

19 ORS 197.195 does not require local governments to
20 provide a local appeal of limited land use decisions made in
21 the above described manner. However, ORS 197.195(3)(a)
22 provides:

⁷Limited land use decisions are excluded from the definitions of "permit" in ORS 215.402(4) and ORS 227.160(2). Consequently, the requirements for local government actions on permit applications set out in ORS 215.402 to 215.422 and ORS 227.160 to 227.180 do not apply to limited land use decisions.

1 "In making a limited land use decision, the local
2 government shall follow the applicable procedures
3 contained within its acknowledged comprehensive
4 plan and land use regulations and other applicable
5 legal requirements."

6 With regard to requiring that issues concerning a
7 limited land use decision be raised below, the written
8 notice of the 14 day period for submission of written
9 comments must:

10 "State that issues which may provide a basis for
11 an appeal to [LUBA] shall be raised in writing
12 prior to the expiration of the comment period.
13 Issues shall be raised with sufficient specificity
14 to enable the decision maker to respond to the
15 issue[.]" ORS 197.195(3)(c)(B).

16 The 1991 legislation also added the following references to
17 limited land use decisions to the LUBA petition for review
18 and scope of review statutory sections described above:

19 "A petition for review of the land use decision or
20 limited land use decision and supporting brief
21 shall be filed with [LUBA] as required by [LUBA
22 rule]. Issues shall be limited to those raised by
23 any participant before the local hearings body as
24 provided in ORS 197.763. A petitioner may raise
25 new issues [before LUBA] if:

26 "(a) The local government failed to follow the
27 requirements of ORS 197.763; or

28 "(b) The local government made a land use decision
29 or limited land use decision which is
30 different from the proposal described in the
31 notice to such a degree that the notice of
32 the proposed action did not reasonably
33 describe the local government's final
34 action." (Provisions added in 1991
35 emphasized.) ORS 197.830(10).

36 "Issues [raised before LUBA] shall be limited to

1 those raised by any participant before the local
2 hearings body as provided in ORS 197.763.

3 A petitioner may raise new issues [before LUBA]
4 if:

5 "(a) The local government failed to follow the
6 requirements of ORS 197.763; or

7 "(b) The local government made a land use decision
8 or limited land use decision which is
9 different from the proposal described in the
10 notice to such a degree that the notice of
11 the proposed action did not reasonably
12 describe the local government's final
13 action." (Provisions added in 1991
14 emphasized.) ORS 197.835(2).

15 2. Nature of the Challenged Decision

16 The challenged decision approves a preliminary
17 subdivision plat within the Portland Metropolitan Area Urban
18 Growth Boundary. Therefore, the challenged decision itself
19 is clearly a "limited land use decision."
20 ORS 197.015(12)(a).

21 However, which statutory requirements governed the city
22 proceedings on the subject application below is extremely
23 unclear. At the time the subject application was initially
24 filed, it either included or was filed together with,
25 applications for zone changes and variances, both of which
26 would be considered "land use decisions."⁸ Applications for
27 land use decisions are subject to the procedural
28 requirements of ORS 197.763. Only after the zone change

⁸The application(s) that initiated the proceedings below is not in the record submitted by the city.

1 proceedings had been bifurcated and the variance requests
2 withdrawn, at the city council stage of the proceedings
3 below, was the city acting on an application solely for a
4 limited land use decision, subject to the procedural
5 requirements of ORS 197.195. Additionally,
6 ORS 197.195(3)(a) provides that in making a limited land use
7 decision, a local government "shall follow the applicable
8 procedures contained within its acknowledged plan and land
9 use regulations * * *." Here, there is no dispute that the
10 procedures required for the subject application by the
11 acknowledged Tigard Community Development Code (TCDC) are
12 designed to implement ORS 197.763, not ORS 197.195.

13 In the waiver arguments and responses in their initial
14 briefs, the parties generally refer to the challenged
15 decision as a "land use decision" and cite the provisions of
16 ORS 197.763 as being applicable to the proceedings below.
17 Because of the above described uncertainty in the nature of
18 the decision requested and the applicable statutes at
19 different stages of the proceedings below, we believe it
20 would be overly technical for us to reject the parties'
21 arguments on this basis. Therefore, we address the parties'
22 arguments, infra, as if the comparable statutory provisions
23 applicable to limited land use decisions are cited as well.

24 **3. Applicability of Waiver to Limited Land Use**
25 **Decisions**

26 We have not previously determined whether our review of
27 limited land use decisions is limited to issues that were

1 sufficiently raised during the proceedings below. The
2 relevant statutes are ambiguous on this issue.

3 The operative provisions of ORS 197.830(10) and
4 197.835(2) state "[i]ssues shall be limited to those raised
5 by any participant before the local hearings body as
6 provided by ORS 197.763." (Emphasis added.) Since
7 ORS 197.763 is not applicable to local limited land use
8 decision proceedings, the quoted limitation to LUBA's scope
9 of review could be interpreted not to apply to limited land
10 use decisions. Additionally, both ORS 197.830(10)(a) and
11 197.835(2)(a) provide that new issues may be raised before
12 LUBA if "[t]he local government failed to follow the
13 requirements of ORS 197.763." This would likely almost
14 always be true in the case of limited land use decisions,
15 for which local government procedures are not required to
16 comply with ORS 197.763.

17 On the other hand, there are explicit indications in
18 the statutes that the legislature intended to limit LUBA's
19 review to issues that were raised during the local
20 government proceedings on limited land use decisions.
21 ORS 197.195(3)(c)(B) requires the local government notice of
22 the required 14 day period for submission of written
23 comments to include a statement that "issues which may
24 provide the basis for an appeal to [LUBA] shall be raised in
25 writing prior to expiration of the comment period." The
26 first sentence of ORS 197.830(10) was amended to indicate

1 that subsection applies to petitions for review challenging
2 both land use decisions and limited land use decisions. In
3 addition, the 1991 legislation creating limited land use
4 decisions also amended the exception to the statutory waiver
5 provisions found in ORS 197.830(10)(b) and 197.835(2)(b) to
6 allow new issues to be raised before LUBA if:

7 "[t]he local government made a land use decision
8 or limited land use decision which is different
9 from the proposal described in the notice to such
10 a degree that the notice of the proposed action
11 did not reasonably describe the local government's
12 final action." (Emphasis added.)

13 There would be no need to include limited land use decisions
14 in this exception to the waiver provisions if the waiver
15 provisions did not apply to limited land use decisions to
16 begin with.

17 As best we can determine, the 1991 limited land use
18 decision legislation was intended to relieve local
19 governments from having to comply with the complex
20 procedural requirements applicable to quasi-judicial "land
21 use decisions" and "permits," when making certain decisions
22 on allowing permitted uses within urban growth boundaries.
23 To that end, ORS 197.195(2) exempts limited land use
24 decisions from the procedural requirements applicable to
25 quasi-judicial "land use decisions" and "permits," and
26 ORS 197.195(3) establishes a simpler set of procedural
27 requirements for limited land use decisions.

28 There is no indication the legislature intended to

1 relieve participants in the limited land use decision making
2 process of the requirement that they raise issues below.
3 ORS 197.195(3) retains the basic elements of the "quid pro
4 quo" described above with regard to ORS 197.763. The local
5 government is required to mail written notice of a proposed
6 limited land use decision to owners of certain neighboring
7 properties and recognized neighborhood associations.
8 ORS 197.195(3)(b). That notice must list the approval
9 criteria applicable to the decision and state that issues
10 which may provide a basis for appeal to LUBA must be raised
11 below. ORS 197.195(3)(c)(B) and (C). All evidence relied
12 upon by the applicant is required to be available for review
13 during the required 14 day comment period.
14 ORS 197.195(3)(c)(F). Thus, as with ORS 197.763, in return
15 for following the procedures required by ORS 197.195, the
16 local government gains the benefit of participants being
17 required to raise issues below in order to raise them in an
18 appeal to LUBA.

19 As originally proposed, the limited land use decision
20 legislation did not include amendments to the preexisting
21 provisions of ORS 197.805 to 197.855 governing appeals
22 before LUBA. Amendments to integrate the new limited land
23 use decision provisions with these preexisting statutory
24 provisions appear to have been added to the limited land use
25 decision legislation hurriedly, late in the legislative

1 process.⁹ We believe the fact that amendments were made to
2 ORS 197.830(10) and 197.835(2) to include references to
3 limited land use decisions supports a conclusion that the
4 limitation of our review to issues raised below is intended
5 to apply to limited land use decisions subject to
6 ORS 197.195, as well as to land use decisions subject to
7 ORS 197.763. On the other hand, we also believe the
8 legislature intended that the waiver requirement be
9 conditioned on compliance with the procedures required by
10 ORS 197.195.

11 In conclusion, we will apply the statutory waiver
12 requirements to limited land use decisions the same way we
13 apply them to land use decisions. Our review of limited
14 land use decisions will be limited to issues that were
15 raised below unless (1) the local government did not satisfy
16 the procedural requirements of ORS 197.195,¹⁰ or (2) the
17 limited land use decision adopted differs significantly from
18 what was described in the local government's notice of
19 proposed action.

⁹The parties do not cite, and we have been unable to find, anything in the legislative history of Oregon Laws 1991, chapter 817, to shed light on the legislature's intent with regard to the application of a waiver requirement to our review of limited land use decisions.

¹⁰In this regard, we note that the procedural safeguards required by ORS 197.763 are generally parallel to, but exceed, those required by ORS 197.195. Therefore, if the procedures required by the local code are designed to comply with ORS 197.763, compliance with those procedures will generally also establish compliance with ORS 197.195.

1 **4. Petitioner's Defenses to Waiver**

2 Petitioner argues it raised the issues that are the
3 basis for the third, fifth and eighth assignments of error
4 below. Petitioner also argues it may raise new issues in
5 this appeal because the city failed to comply with the
6 procedural requirements of ORS 197.195.

7 **a. Failure to Comply with ORS 197.195**

8 Petitioner contends the city failed to comply with the
9 requirement of ORS 197.195(3)(c)(C) that it provide owners
10 of neighboring property with a written notice of the
11 proposed action listing the applicable approval criteria.
12 Petitioner argues that the comprehensive plan policies and
13 TCDC provisions cited in its sixth assignment of error are
14 approval criteria applicable to the proposed subdivision,
15 but were not listed in the city's notices.

16 ORS 197.195(3)(b) and (c)(A) require the city to give
17 owners of property within 100 feet of the subject site
18 notice of a 14 day period for the submission of written
19 comments. That notice must include a list of the approval
20 criteria applicable to the proposed subdivision.
21 ORS 197.195(3)(c)(C). The city's notice of the evidentiary
22 hearing before the planning commission was mailed to owners
23 of neighboring property 20 days before the scheduled hearing
24 date and invited submittal of written testimony prior to the

1 hearing.¹¹ Respondent's Supplemental Memorandum,
2 Appendix 1. Therefore, to the extent the city listed
3 approval standards applicable to the proposed subdivision in
4 that notice, it complied with ORS 197.195(3)(c)(C).

5 We have reviewed the city's notice of the evidentiary
6 hearing before the planning commission.¹² That notice does
7 not list as applicable criteria the following plan and TCDC
8 provisions cited in petitioner's sixth assignment of error:

9 Plan Policies 4.2.1, 4.3.1, 7.2.1, 7.5.1, 7.5.2.

10 TCDC 18.096, 18.102, 18.106, 18.108, 18.160.030,
11 18.160.070.

12 Consequently, if any of the above plan and TCDC provisions
13 are approval criteria applicable to the proposed
14 subdivision, the city failed to comply with
15 ORS 197.195(3)(c)(C), and petitioner may raise new issues in
16 this appeal. Cf. Weuster v. Clackamas County, 25 Or LUBA

¹¹The notice of the planning commission hearing mailed to neighboring property owners is not included in the local record. However, respondent submitted a copy of the notice, together with an affidavit of mailing, and petitioner does not object to our consideration of this notice for the purpose of determining compliance with ORS 197.195. See ORS 197.195(3)(b). Neither does petitioner contend intervenor's subsequent submission of a revised preliminary plat, and withdrawal of its request for variances, so changed the proposal that the notice of the planning commission hearing "did not reasonably describe the [city's] final action." ORS 197.835(2)(b).

¹²An evidentiary hearing was also held before the city council. The published notice of that hearing is in the record. Record 56. However, we are not cited to anything in the record indicating that notice was mailed to owners of neighboring property, as required by ORS 197.195(3)(b). In any case, the list of criteria applicable to the proposed subdivision in the published notice of city council hearing is identical to the list of applicable criteria in the mailed notice of planning commission hearing.

1 425, 428-29 (1993); Terra v. City of Newport, 24 Or LUBA
2 438, 450 n 10 (1993); Neuenschwander v. City of Ashland, 20
3 Or LUBA 144, 157 (1990).

4 The challenged decision does not address the above
5 listed plan and TCDC provisions. In their briefs and
6 supplemental memoranda, respondents argue these plan and
7 TCDC provisions are not standards for preliminary
8 subdivision plat approval.

9 This Board is required to defer to a local government's
10 interpretation of its own enactment, unless that
11 interpretation is contrary to the express words, policy or
12 context of the local enactment or to a state statute,
13 statewide planning goal or administrative rule which the
14 local enactment implements. ORS 197.829; Clark v. Jackson
15 County, 313 Or 508, 514-15, 836 P2d 710 (1992).
16 Furthermore, under Gage v. City of Portland, 123 Or App 269,
17 ___ P2d ___, adhered to 125 Or App 119 (1993), and Weeks v.
18 City of Tillamook, 117 Or App 449, 453-54, 844 P2d 914
19 (1992), this Board is required to review a local
20 government's interpretation of its code and may not
21 interpret the local government's code in the first instance.
22 Additionally, to be reviewable by LUBA, a local government's
23 interpretation of its regulations must be provided in the
24 challenged decision or the supporting findings, not in the
25 local government's brief. Eskandarian v. City of Portland,
26 ___ Or LUBA ___ (LUBA No. 93-012, October 15, 1993),

1 slip op 15; Miller v. Washington County, 25 Or LUBA 169, 179
2 (1993).

3 The plan and TCDC provisions listed above are capable
4 of more than one interpretation under the permissive scope
5 of review standard of ORS 197.829 and Clark, supra. Thus,
6 while we might be able to accept the interpretations
7 suggested by respondents in their briefs, if those
8 interpretations were adopted by the city in a challenged
9 decision, we must remand the decision to the city to
10 interpret and apply these provisions in the first instance.
11 See O'Mara v. Douglas County, 25 Or LUBA 25, 34, rev'd on
12 other grounds, 121 Or App 113, rev'd 318 Or 72 (1993).

13 If the city determines on remand that these plan and
14 TCDC provisions are not approval standards for the subject
15 decision, then petitioner waived all issues other than those
16 raised in the city proceedings leading to the decision
17 challenged in this appeal. We identify the issues raised by
18 petitioner before the city in the following section of this
19 opinion and address them infra.

20 On the other hand, if the city determines on remand
21 that any of the plan and TCDC provisions listed above are
22 approval standards for the challenged decision, then
23 petitioner did not waive its ability to raise before LUBA
24 issues that were not raised in the city proceedings leading
25 to the decision challenged in this appeal. If petitioner
26 then appeals the city's decision on remand to LUBA, we would

1 be able to address the issues raised in this appeal that
2 were not raised in the city proceedings.

3 **b. Issues Raised Below**

4 The parties agree the issue raised in petitioner's
5 eighth assignment of error was raised below, and that the
6 issues raised in petitioner's first, fourth, sixth and
7 seventh assignments of error were not raised below.
8 However, the parties disagree on whether the issues raised
9 in the third and fifth assignments of error were raised
10 below.

11 At the city council hearing, petitioner's attorney
12 stated petitioner's "sole concern" was:

13 * * * that we [have] some assurance of an
14 equitable situation in the funding of
15 [improvements to SW] Gaarde along the frontage of
16 this site, not the entire [SW Gaarde] extension as
17 it lies through [the Vista Point] site, of course,
18 but only along the frontage [of Ames Orchard
19 No. 2]. In the same manner that [petitioner] was
20 required to construct [SW Gaarde] on-site, we'd
21 like to * * * have a half-street improvement
22 requirement imposed on this project, the remainder
23 of course to be borne by Vista Point. That stems
24 from a provision in the [Tigard Community
25 Development] Code, 18.164.030(A), which requires
26 * * * that streets within a development and
27 streets adjacent shall be [im]proved in accordance
28 with the requirements of this title [of the] Code.
29 * * *

30 * * * Recognizing that if one [subdivision] were
31 to proceed in advance of the other, we could [in
32 that] case [require] a cash deposit in lieu of
33 * * * the half-street improvements, to be applied
34 later to the construction of the full improvement.
35 [T]hat's still the approach we can endorse without
36 question. * * *" Respondent's Brief, Appendix I.

1 Petitioner's attorney also submitted a proposed
2 condition. Record 108. Under this condition, if
3 development of Ames Orchard No. 2 precedes development of
4 Vista Point, intervenors would be required to deposit with
5 the city a fee equal to one-half the estimated cost of
6 improving the portion of SW Gaarde Street adjoining Ames
7 Orchard No. 2. On the other hand, the condition states that
8 if development of Vista Point precedes development of Ames
9 Orchard No. 2, intervenors "may be required to pay for up to
10 one-half of the cost of the improvements for this road
11 segment if the City Council approves the creation of a
12 reimbursement district." Id. Finally, petitioner's
13 attorney stated it would be difficult for him to endorse a
14 "zone of benefit" approach for reimbursing petitioner for
15 construction of the SW Gaarde Street extension, and that
16 petitioner would prefer the proposed condition.
17 Respondent's Brief App. I.

18 The challenged decision requires the dedication of
19 additional right-of-way for the SW Gaarde Street extension,
20 along the northern boundary of the approved subdivision.
21 Record 27. It also adopts the following condition
22 (Condition 6) to address the issue of financing the
23 construction of the SW Gaarde Street extension:

24 "[Intervenors] shall participate in a
25 reimbursement district or other financial
26 mechanism to share the cost of extending SW Gaarde
27 Street west of 121st [Avenue] where it abuts the
28 north property line. Exact cost allocations or

1 percentages are to be determined through
2 subsequent proceedings. If the Ames Orchard II
3 subdivision precedes development of property
4 abutting SW Gaarde [Street] to the north, the
5 final plat shall be conditioned to show, and
6 additional documents will be required to be
7 recorded, giving notice that each individual lot
8 in the subdivision will be required to participate
9 in a reimbursement district or other financial
10 mechanism to share in the cost of extending SW
11 Gaarde [Street] along the frontage of the
12 subdivision." Id.

13 We see no meaningful difference between the
14 ORS 197.195(3)(c)(B) requirement that an issue be raised
15 below "with sufficient specificity to enable the [local]
16 decision maker to respond to the issue" and the
17 ORS 197.763(1) requirement that an issue be raised below
18 "with sufficient specificity so as to afford the [local
19 decision maker] an adequate opportunity to respond to each
20 issue." With regard to the requirement of ORS 197.763(1),
21 we have stated:

22 " * * * ORS 197.763(1) does not require that
23 arguments identical to those in the petition for
24 review have been presented during local
25 proceedings, but rather that 'argument presented
26 in the local proceedings sufficiently raise the
27 issue sought to be raised in the petition for
28 review, so that the local government and other
29 parties had a chance to respond to that issue.'
30 Hale v. City of Beaverton, 21 Or LUBA 249, 254
31 (1991); Boldt v. Clackamas County, 21 Or LUBA 40,
32 46 (1991). The Court of Appeals affirmed our
33 interpretation of the ORS 197.763(1) 'sufficient
34 specificity' requirement, stating '* * * the
35 statute requires no more than fair notice to
36 adjudicators and opponents, rather than the
37 particularity that inheres in judicial
38 preservation concepts.' Boldt v. Clackamas

1 County, 107 Or App 619, 623, 813 P2d 1078 (1991)."
2 DLCD v. Coos County, 25 Or LUBA 158, 167 (1993).

3 We believe the above described comments by petitioner's
4 attorney before the city council gave the city fair notice
5 that petitioner contended only a requirement for half-street
6 construction of the portion of the SW Gaarde Street
7 extension adjoining the subject subdivision, or a cash
8 deposit in lieu thereof, is adequate to satisfy
9 TCDC 18.164.030(A). Therefore, petitioner may raise in this
10 appeal issues concerning whether the challenged decision,
11 including the condition quoted above, complies with
12 TCDC 18.164.030(A) with regard to the SW Gaarde Street
13 extension.

14 The fifth assignment of error concerns only whether
15 Condition 6 complies with plan policies 8.1.1 and 8.1.3.
16 Petitioner did not raise compliance with these plan policies
17 as an issue below. Therefore, we do not address the fifth
18 assignment of error here. The third assignment of error
19 includes several issues. Among them is an argument that
20 Condition 6 violates TCDC 18.164.030(A) because it does not
21 require intervenors to construct required improvements to
22 SW Gaarde Street. This argument was sufficiently raised
23 below and, therefore, we address this portion of the third
24 assignment of error.¹³

¹³Petitioner also argues in the third assignment of error that the approved preliminary subdivision plat does not provide adequate access and circulation and violates TCDC 16.164.030(K) and 18.164.040 requirements

1 **THIRD AND EIGHTH ASSIGNMENTS OF ERROR**

2 TCDC 18.164.030(A)(1) provides:

3 "No development shall occur unless the development
4 has frontage or approved access to a public
5 street:

6 "(a) Streets within a development and streets
7 adjacent shall be improved in accordance with
8 this title;

9 "(b) Any new street or additional street width
10 planned as a portion of an approved street
11 plan shall be dedicated and improved in
12 accordance with this code; and

13 "(c) The Director may accept a future improvement
14 guarantee in lieu of street improvements if
15 one or more of the following conditions
16 exist:

17 "[A list of six reasons why street
18 improvements or partial improvements might
19 not be feasible or desirable.]"

20 A portion of the proposed SW Gaarde Street extension is
21 adjacent to the approved subdivision. Petitioner argues the
22 challenged decision does not find that acceptance of an
23 improvement guarantee for the SW Gaarde Street extension is
24 warranted under TCDC 18.164.030(A)(1)(c).¹⁴ Petitioner
25 contends TCDC 18.164.030(A)(1)(a) and (b), when interpreted
26 in conjunction with plan policies 8.1.1 and 8.1.3 and
27 implementing strategy 5, mandate actual construction of the

concerning long blocks and cul-de-sacs. We agree with respondents that these issues were not raised below.

¹⁴Petitioner also notes that in any event, Condition 6 would not satisfy TCDC 18.164.030(A)(1)(c) because, according to petitioner, it does not guarantee payment for the future improvement of SW Gaarde Street.

1 portion of the SW Gaarde Street extension adjacent to the
2 approved subdivision. Petitioner argues
3 TCDC 18.164.030(A)(1)(a) and (b) are not satisfied by
4 Condition 6, quoted supra, because under
5 TCDC 13.08.020(5)(e), the future creation of a reimbursement
6 district or other financial mechanism to pay for the SW
7 Gaarde Street improvements are under the "sole discretion"
8 of the city council. According to petitioner, condition 6
9 does not require the city or intervenors to do anything.

10 The challenged decision includes extensive findings on
11 TCDC Chapter 18.164. Record 18-23. However, these findings
12 are primarily directed at justifying the city's decision to
13 require intervenors to participate in paying for a portion
14 of the SW Gaarde Street extension. They do not determine
15 acceptance of a future improvement guarantee for the SW
16 Gaarde Street extension is justified under
17 TCDC 18.164.030(A)(1)(c), or explain why the city believes
18 Condition 6 is adequate to constitute such a future
19 improvement guarantee. Neither do the findings interpret
20 TCDC 18.164.030(A)(1)(a) and (b) with regard to the issue
21 raised by petitioner -- that they mandate actual improvement
22 of this adjacent street to be required as part of the
23 subdivision approval.

24 As explained above, this Board cannot interpret the
25 provisions of TCDC 18.164.030(A)(1) in the first instance.
26 Gage, supra; Weeks, supra. Consequently, the third

1 assignment of error (in part) and the eighth assignment of
2 error are sustained.

3 The city's decision is remanded.