1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3

4 LIN SHEN KOO, )
5 )
6 Petitioner, )
7 )
8 vs. )
9 )
10 POLK COUNTY, )
11 )
12 Respondent, ) LUBA No. 96-237
13 )
14 and ) FINAL OPINION
15 ) AND ORDER
16 STEVEN BARTLETT, RICHARD HILLMER, )
17 THEODORE W. CASTEEL, JEANETTE H. )
18 HURLESS, DAVID LLOYD-JONES, )
19 TIMOTHY MAGEE, TERESA MAGEE, )
20 VEDAN E. STOLK, and JONI )
21 WEATHERSPOON, )
22 )
23 Intervenors-Respondent. )
24
25
26 Appeal from Polk County.
27
28 Maureen Callahan VanderMay, Salem, filed the petition
29 for review and argued on behalf of petitioner. With her on
30 the brief was VanderMay & Doyle.
31
32 David Doyle, County Counsel, Dallas, filed a response
33 brief and argued on behalf of respondent.
34
35 Michael K. Collmeyer, Portland, filed a response brief
36 and argued on behalf of intervenors-respondent.
37
38 GUSTAFSON, Chief Referee; HANNA, Referee, participated
39 in the decision.
40
41 LIVINGSTON, Referee, dissenting.
42
43 REMANDED 09/09/97
44
45 You are entitled to judicial review of this Order.
46 Judicial review is governed by the provisions of ORS
47 197.850.

Opinion by Gustafson.

**NATURE OF THE DECISION**

Petitioner appeals the county's determination that lot lines of a 25-lot subdivision have been eliminated.

**MOTION TO INTERVENE**

Steven Bartlett, Richard Hillmer, Theodore W. Casteel, Jeanette H. Hurless, David Lloyd-Jones, Timothy and Teresa Magee, Vedan E. Stolk, and Joni Weatherspoon (intervenors), move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**MOTION TO FILE REPLY BRIEF**

Petitioner moves to file a reply brief. A reply brief accompanies an amended motion. The reply brief addresses a matter raised for the first time in intervenors' response brief regarding a purported 1978 partition of the subject property, and the effect of that 1978 action on the county's decision. Intervenors object to the reply brief on the basis that petitioner knew of the 1978 action and should have anticipated that intervenors would rely on it in defense of the county's decision.

OAR 660-10-039 requires that a reply brief "be confined solely to new matters raised in the respondent's brief." The reply brief is so limited. That intervenors believe petitioner should have anticipated intervenors' response to petitioner's assignments of error does not preclude petitioner from replying to a matter raised for the first time in intervenors' brief.

1 The motion to file a reply brief is granted.

2 **FACTS**

3 Petitioner owns two EFU-zoned tax lots (tax lots 200
4 and 300) totaling approximately 126 acres. In 1909, the 126
5 acres were divided into 25 separate lots, as part of the
6 Bethel Heights Walnut Groves subdivision. In 1971, some of
7 the roads within the subdivision were vacated. The record
8 contains little evidence regarding the road vacation.[1] The
9 record does not reflect who initiated the road vacation.
10 Nor does the record indicate that the road vacation would
11 have any impact on the 25 subdivision lots. The only
12 mention of any subdivision lots during the 1971 proceedings
13 is within the descriptions of the specific roads to be
14 vacated, where the roads are described as "adjoining" the
15 existing lots.[2]

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[1]The only evidence in the record regarding the road vacation is (1) minutes of a February 5, 1971 board of commissioners (commissioners) meeting, acknowledging receipt of a request for vacation of public roads within the Bethel Heights Walnut Groves Subdivision and referring the request to the county surveyor for a report (Record 118); (2) an order dated February 5, 1971 instructing the county surveyor to write a report regarding the vacation of specified roads within the subdivision (Record 119); (3) a February 18, 1971 order from the county surveyor recommending vacation of specified roads within the subdivision (Record 120); (4) minutes of the February 19, 1971 commissioners meeting acknowledging receipt of the surveyor's report (Record 121-22); (5) minutes of the March 26, 1971 commissioners meeting, acknowledging that no one appeared at vacation hearing and declaring hearing closed (Record 123-24); and (6) a March 26, 1971 order of vacation, ordering that specified public roads within the subdivision be vacated.

[2]The 1971 "Order of Vacation" states, in part:

"* * * * *

1 In 1978, the then-property owner initiated a partition
2 proceeding, to partition the property into two parcels. The
3 parties dispute whether that partition was ever completed.
4 Petitioner contends that the partition was never completed
5 because no deed establishing the reconfigured lots was ever
6 filed, as petitioner alleges was required by the Polk County
7 regulations in effect at the time. Intervenor counters that
8 a "Final Approval of a Major or Minor Partition" was granted
9 in accordance with the Polk County subdivision and

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"Heretofore, the Board having on the 5th day of February, 1971, adopted an Order that proceedings be undertaken to vacate certain public roads in Bethel Heights Walnut Groves, more particularly described as follows:

> "Section 23, Township 6 SR 4 WWM, the road which adjoins Lots 1 through 8, Lots 10 through 34, Lots 37 through 44, Polk County, Oregon.

"It appearing to the Board that due and legal notices of this Order properly certified to as such by the County Clerk were duly posted by the County Surveyor as directed by the Board of Commissioners and the Affidavit of Surveyor being on file herein, and

"The Board having heretofore established by Order on file herein the time and place for hearing the Report of the Surveyor on the proposed vacation and said report having been filed, and

"Said hearing on the proposed vacation having been heard on the 26th day of March, 1971 at 10:00 A.M., and statements and testimony having been taken and the Board having been fully advised in the premises,

"IT IS SO ORDERED that certain public roads in Bethel Heights Walnut Groves, described as follows:

> "Section 23, Township 6 SR 4 WWM, the road which adjoins Lots 1 through 8, Lots 10 through 34, Lots 37 through 44, Polk County, Oregon,

"be and hereby are vacated." Record 126-27.

1 partitioning ordinance in effect, that "the partition was
2 properly endorsed by the County Surveyor, the County
3 Roadmaster, the Planning Director and the County Sanitarian"
4 and that it was properly recorded and filed. Intervenors'
5 Brief 22, 26.

6 In 1996, petitioner, who now owns the property,
7 submitted to the county a "Request for Research or Land Use
8 Determination" through which he asked the county to
9 "determine whether the [25] lots contained within tax lots
10 200 and 300 are considered separate and discrete lots within
11 the larger acreage." Record 136. In response, the county
12 planning director issued a "Land Use Determination," which
13 states, in part:

14 "Review of the information submitted and County
15 records indicates that the aforementioned lots
16 (subject lots) were lawfully created during the
17 month of April 1909, as part of Bethel Heights
18 Walnut Grove (Subdivision Plat No. SP 1-84/85).

19 "In 1971, an order of vacation was filed by the
20 Board of Commissioners and recorded * * *,
21 vacating the streets surrounding the subject lots.
22 In a recent case involving vacation of streets,
23 similar to this matter, it was the opinion of * *
24 * County Counsel, that '* * * the intent of the
25 Legislature was that a lawfully created lot or
26 parcel shall remain as such unless action is taken
27 [by the owner] to formally vacate it. On these
28 facts there was no employment of a specific
29 process to <u>eliminate</u> the property lines.'
30 Further, [County Counsel] had indicated that '* *
31 * the independent action by the County to vacate
32 the surrounding roads did not eliminate the
33 property lines'."

34 "Staff's research and review of County records
35 revealed that each of the [25] subject lots,
36 contained within Tax Lots 200 and 300, were

1 lawfully created, by a platted subdivision, prior
2 to the enactment of the Polk County Subdivisions
3 and Partitions Ordinance (May 15, 1974). Staff
4 concludes that the [25] subject lots are
5 considered separate and discreet lawfully created
6 lots, as defined by ORS 92.017." Record 173-74
7 (Emphasis in original.)

8 Intervenors appealed the planning director's
9 determination to the commissioners. After a public hearing,
10 the commissioners reversed the planning director's
11 determination. The sole substantive finding states:

12 "Whereas, the Board of Commissioners found that
13 since the roads within the subdivision were
14 vacated and the property was redivided, that,
15 consequently, the lot lines were eliminated.
16 Specifically, an order of vacation, processed in
17 1971, was filed by the Board of Commissioners * *
18 *, vacating the streets surrounding the subject
19 lots. It is the Board's opinion that the subject
20 vacation eliminated the lot lines within Bethel
21 Heights Walnut Grove Subdivision[.]" Record 23-
22 24.[3]

23 Petitioner appeals the county's determination.

24 **THIRD ASSIGNMENT OF ERROR**

25 Petitioner asserts that there is not substantial
26 evidence in the record to support the county's conclusion
27 that the 1971 road vacation also eliminated the 1909
28 subdivision lot lines.

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[3]This finding does not designate which lot lines the commissioners determined were eliminated by the road vacation and, in fact, indicates that the commissioners determined that the road vacation eliminated all of the lot lines within the subdivision. This portion of the decision appears inconsistent with the language of the vacation order, which identified specific roads adjoining specific lots as subject to the vacation. However, the question of the scope of the lots affected by the county's decision is not before us in this proceeding.

1 Intervenors respond that the county's determination is
2 based upon both the 1971 road vacation and the 1978
3 partition. Intervenors argue that there is substantial
4 evidence in the record to support the county's determination
5 that either the 1971 road vacation or the 1978 partition
6 eliminated the subdivision lot lines.[4]

7 To support their position that the county's decision
8 rests on both the 1971 vacation and 1978 partition,
9 intervenors rely on the portion of the county's finding in
10 which the commissioners state "the Board of Commissioners
11 found that since the roads within the subdivision were
12 vacated and the property was redivided, that, consequently,
13 the lot lines were eliminated." Record 23. Intervenors
14 argue that the reference to "redivided" is to the 1978
15 partition, and establishes that the county relied on that
16 partition in its decision.

17 The county's finding does not expressly mention the
18 1978 partition proceeding. Nor does it explain the
19 reference to "redivided." That term could be interpreted as
20 a reference to the effect of the 1978 partition. However,
21 that interpretation would be inconsistent with the remainder

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[4]The county also filed a response brief, the essence of which is that the county's decision regarding the road vacation is entitled to deference under ORS 197.829(1). The county argues that its decision "is based on long-standing local practices" and that "LUBA is compelled [under ORS 197.829(1)] to accept the local interpretation of practice unless it is shown to be inconsistent with the comprehensive plan, local ordinance or state law." Respondent's Brief 1-2. It is not clear to us what "practice" the challenged decision interprets. ORS 197.829(1) does not require us to defer to implicit interpretations of unspecified informal local practices.

of the finding, which expressly limits the basis upon which the county rests its decision to the 1971 vacation, stating immediately following the reference to the property being redivided,

> "Specifically, an order of vacation, processed in 1971, was filed by the Board of Commissioners * * *, vacating the streets surrounding the subject lots. It is the Board's opinion that the subject vacation eliminated the lot lines within Bethel Heights Walnut Groves Subdivision[.]" Record 24 (emphasis added).

Given that the county's finding expressly determined that the 1971 vacation eliminated the subdivision lot lines, and that the 1978 partition was not mentioned in that finding, the county's reference to "redivided" in its finding does not establish that the county intended to rely on the 1978 partition to justify its conclusion.

Intervenors also suggest that the 1978 partition was evidence of the county's intent in 1971 that the road vacation also eliminated the subdivision lot lines, arguing:

> "The partition action in 1978 supports the reasonable conclusion that the parties at that time knew and understood that the 1971 vacation of the streets had also vacated the lot lines. This reasonable conclusion concerning what the parties knew and understood in 1978 about the legal effect of the 1971 street vacation proceedings supports and is consistent with the county's 1996 decision." Intervenors' Brief 21.

While intervenors' argument may be reasonable, it is not supported by the language of the county's finding. The county's finding establishes no connection between the 1978 partition and the 1971 road vacation, and we cannot infer

1 that such a connection was intended.

2 It is the local government's obligation to establish in
3 its findings the factual and legal bases for its
4 conclusions.[5] The county's findings in this case are not
5 adequate to establish that it intended to rely on the 1978
6 partition as a basis for its findings that the subdivision
7 lot lines had been eliminated. We cannot infer from the
8 county's finding that it intended to rely on the 1978
9 partition as a basis for its conclusion that the subdivision
10 lot lines have been eliminated, when the county's finding
11 does not in any manner evaluate the 1978 partition and, in
12 fact, states that the 1971 road vacation was the sole basis
13 upon which it decided the lot lines had been eliminated.

14 There are, however, instances where the facts compel a
15 conclusion, even when the findings do not adequately do so.
16 As we explained in <u>Waugh v. Coos County</u>, 26 Or LUBA 300, 307
17 (1993),

> 18 "ORS 197.835[(11)(b)] represents an exception to
> 19 this general rule [requiring adequate findings],
> 20 and allows this Board to overlook the absence or
> 21 inadequacy of findings * * * [but] only where 'the
> 22 parties identify relevant evidence in the record
> 23 which clearly supports the decision or a part of

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[5]As we have previously explained, findings must (1) identify the relevant approval standards, (2) set out the facts which are believed and relied upon, and (3) explain how those facts lead to the decision on compliance with the approval standards. <u>Heiller v. Josephine County</u>, 23 Or LUBA 551, 556 (1992); <u>see also</u>, <u>Sunnyside Neighborhood v. Clackamas Co. Comm.</u>, 280 Or 3, 20-21, 569 P2d 1063 (1977); <u>Vizina v. Douglas County</u>, 17 Or LUBA 829, 835 (1989).

the decision.'"[6]

Although intervenors do not expressly rely on ORS 197.835(11)(b), they do cite to evidence in the record which could support a conclusion that the 1978 partition was valid and had the effect of eliminating the lot lines. We presume intervenors intend to rely on that statute as a basis to affirm the county's conclusions notwithstanding that the county's findings. However, ORS 197.835(11)(b) does not permit this Board to draw inferences from the record that are either conflicting or not obvious or clearly evident from the county's findings or the record. Marcott Holdings, Inc. v. City of Tigard, 30 Or LUBA 101 (1995). As we explained in Waugh,

> "the evidentiary standard imposed by the ORS 197.835[(11)(b)] requirement for 'evidence * * * which clearly supports,' is considerably higher than the standard imposed by the ORS 197.835(7)(a)(C) requirement for 'substantial evidence.' See Friedman v. Yamhill County, 23 OR LUBA 306, 311 (1992). Where the relevant evidence in the record is conflicting, or provides a reasonable basis for different conclusions, such evidence does not 'clearly support' the challenged decision. Forster v. Polk County, 22 Or LUBA 380, 384 (1991); see Cummins v. Washington County, 22

[6] ORS 197.835(11)(b) states, in full:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

Or LUBA 129, 133 (1991), aff'd 110 Or App 468 (1992)." Waugh, 26 Or LUBA at 307.

In addition, ORS 197.835(11)(b) does not allow us to disregard or alter a finding of the local government. As we stated in Harcourt v. Marion County, __ Or LUBA __ (LUBA No. 97-028, July 31, 1997), slip op 7,

> "ORS 197.835(11)(b) does not authorize or permit us to disregard the local government's actual findings or to infer that the findings do not mean what they say, based upon citation in intervenors' brief to evidence in the record that could support different findings."

In this case, the evidence regarding the 1978 partition is conflicting: the parties disagree on whether that partition was valid; the county staff report opined that it was not. Record 114. Moreover, for us to conclude that the evidence "clearly supports" intervenors contention that the 1978 partition was valid and eliminated the subdivision lot lines, notwithstanding that conflict, would require us to alter the county's explicit finding that

> "[s]pecifically, an order of vacation, processed in 1971, was filed by the Board of Commissioners * * *, vacating the streets surrounding the subject lots. It is the Board's opinion that the subject vacation eliminated the lot lines." Record 24 (emphasis added).

The challenged decision does not establish that the county either determined the 1978 partition was valid or relied on that partition as a basis upon which to conclude that the subdivision lot lines were eliminated, and we decline to draw those conclusions under ORS 197.835(11)(b).

Based upon the language of the challenged decision, the

1 question before us is whether the record supports the
2 county's conclusion that the 1971 road vacation also
3 eliminated the lot lines. Intervenors contend we should
4 defer to the conclusions the county reached based on the
5 evidence before it because petitioner has not "identified
6 any evidence in the record which actively refutes the
7 evidence which supports the decision made." Response Brief
8 23.

9 Intervenors correctly explain that our review of a
10 substantial evidence challenge accords deference to the
11 conclusions a local government draws from conflicting
12 evidence. See e.g. Waugh v. Coos County, 26 Or LUBA at 307.
13 However, petitioner does not request that we weigh
14 conflicting evidence. Rather, the essence of petitioner's
15 argument is that there is no conflicting evidence and, in
16 fact, there is no evidence to support the county's
17 conclusion. As the Court of Appeals explained in Canfield
18 v. Yamhill County, 142 Or App 12, 920 P2d 558 (1996),

19 "unlike the situation where a party argues that
20 the evidence that supports a finding is overcome
21 by or is insubstantial when viewed with detracting
22 evidence that can be identified and located in the
23 record, no identification of evidence in the
24 record is possible or necessary for a party to
25 obtain review by LUBA of a contention that there
26 is no evidence that supports the finding." Id. at
27 17 (emphasis in original).

28 Accordingly, we must consider whether there is any evidence
29 in the record to support the finding that the 1971 road
30 vacation eliminated the subdivision lot lines.

The evidence in the record regarding the 1971 road vacation does not address the impact of the road vacation on the subdivision lots. As explained above, the only reference to the subdivision lots in the record of the road vacation is in the road descriptions, where the roads to be vacated are described as "adjoining" particular lots. Although the lots are mentioned, none of the evidence indicates how the road vacation would affect those lots. The only "evidence" to which intervenors direct us is a legal argument made by intervenors' attorney that "[a]t no time in the history of the subject property, neither in 1909 nor in 1971, would it have been legally possible to create a subdivision in Oregon without establishing streets or roads to serve the lots so created." Record 35. Intervenors argue that since subdivision lots cannot be created without creation of streets or roads, the vacation of streets or roads also necessarily eliminates the lot lines. Intervenors further argue that it makes "no sense to interpret the statutes in effect in 1971 as allowing a subdivision to remain intact after its dedicated streets were vacated, when no such subdivision was allowed to be created in that condition." Response Brief 20 n8.

Intervenors' legal argument regarding the requirements for subdivision creation is undisputed. However, that argument does not establish that the 1971 road vacation eliminated the subdivision lots. Moreover, even accepting intervenors' argument that subdivisions cannot legally

1 remain following road vacation, that argument also does not
2 establish that the 1971 road vacation achieved that result.[7]
3 In this review of the county's 1996 determination, we
4 are not interpreting any 1971 statutes or evaluating the
5 legal merits of the county's 1971 action. Even if, based
6 upon applicable state statutes or local ordinances, the
7 county should have legally eliminated lot lines when it
8 vacated the roads in 1971, what is relevant to this
9 proceeding is not what it should have done, but only what it
10 did do. We cannot in this proceeding assess the legal
11 sufficiency of the county's 1971 decision. Thus, whether

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[7]The legal authority upon which intervenors apparently rely for their conclusion that subdivisions cannot be created without streets or roads does not necessarily compel the conclusion that a road vacation must legally eliminate the subdivision lots (or those lots within the subdivision adjoining the vacated roads). Specifically, the version of ORS 92.090 in effect in 1971 required that no plats would be approved unless "the streets and alleys are dedicated to the public use without any reservation or restriction whatever." This provision addresses only requirements for streets that are established through partitioning. It does not address the effect of the creation or vacation of streets on adjoining lots. Before the county intervenors also relied on Section 21.11 of the Polk County Zoning Ordinance in effect in 1971 to argue that vacation of streets "functionally vacated" the adjoining lots. Record 95. According to intervenors, that provision stated

> "Dwellings to be Accessible to Street. Every dwelling shall have direct access to a public street or alley or a private driveway of a width not less than twenty feet, and a private driveway shall not serve more than four dwellings."

Under this provision, it appears that roads providing access to individual subdivision lots could be vacated without impacting the subdivision lots, so long as private access to each lot was maintained. While the record of this case does not determine whether those facts are present here, it appears that it is at least legally possible to vacate subdivision streets without impacting the adjoining lots and that, contrary to intervenors' argument, the vacation of streets does not "functionally vacate" the adjoining lots.

the county satisfied any applicable statutory requirements or otherwise correctly processed the road vacation application in 1971 is not relevant now. Rather, in reviewing the county's 1996 decision, we are limited to the record before us and must determine, based upon that record, whether there is substantial evidence that the 1971 road vacation had the effect of eliminating the subdivision lot lines. See Rodriguez v. Marion County, 26 Or LUBA 50, 57 (1993).

We agree with petitioner that the record does not support the county's conclusion. Neither the road vacation order itself, nor any supporting documentation in the record regarding that vacation, indicates that the vacation was intended to or in fact had any affect on the existing lot lines. In addition, we have been directed to no legal authority in effect in 1971 that would compel the conclusion that, as a matter of law, a road vacation would necessarily eliminate adjacent lot lines. Thus, the county's decision is not supported by substantial evidence.

The third assignment of error is sustained.

**SECOND ASSIGNMENT OF ERROR**

Petitioner asserts that because the lot lines have not been vacated, the lots legally created in 1909 remain separate, and thus the county's contrary conclusion violates ORS 92.017. ORS 92.017 states:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further

divided, as provided by law."

In Kishpaugh v. Clackamas County, 24 Or LUBA 164, 172 (1992), we explained:

> "The text of ORS 92.107, and its legislative history, make it clear that the functions of ORS 92.017 were (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to eliminate such property lines."

The question in this case is whether the 1971 road vacation proceeding was "a specific process to eliminate" the adjoining lot lines. As determined above, we find that it was not. Specifically, the record in this case does not support the county's conclusion that the 1971 road vacation eliminated the adjoining lot lines. Unless the county can establish that a specific process eliminated the lot lines, under ORS 92.017, they remain discrete lots.[8],[9]

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[8]Intervenors argue that in addition to the 1971 vacation, the 1978 partition proceeding was such a specific process. If the 1978 partition was completed, intervenors would be correct; the partition of the entire parcel into two lots would eliminate the previous lot lines within those two lots. See Van Veldhuizen v. Marion County, 26 Or LUBA 468, 472 (1994). However, the county's finding makes no determination regarding the validity of the 1978 partition proceeding, and as discussed above, we cannot infer that the county's finding regarding the 1971 road vacation compels such a determination.

[9]We also noted in Kishpaugh that a determination that lots remain discrete for purposes of ORS 92.017 does not establish that those lots are separately developable. As we stated,

> "Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local government as being separately

1 The second and third assignments of error are
2 sustained.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner asserts the county's decision violates both
5 the United States and Oregon constitutions by depriving
6 petitioner of his due process rights and by taking his
7 property without compensation. Because we remand the
8 county's decision based upon our determination that the
9 county's decision is not supported by substantial evidence
10 and because the county has not established that its decision
11 complies with ORS 92.017, we need not reach these
12 constitutional issues.

13 The county's decision is remanded.[10]

14 Livingston, Referee, dissenting.

15 I join with the majority in concluding the findings are
16 inadequate because of a failure to explain further the
17 statement that "the property was redivided." However, in my

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> developable. In fact, the legislative history * * * makes it reasonably clear that the developability of such lots and parcels is to be determined with reference to planning and zoning standards." Kishpaugh, 24 Or LUBA at 172.

Thus, even if, on remand, petitioners are successful in establishing that the subject 25 lots remain discrete under ORS 92.017, that does not resolve the question of whether those lots can be separately developed. See also Campbell v. Multnomah County, 25 Or LUBA 479 (1993).

[10]Petitioner urges that because the county's decision violates 92.017, the case should be reversed rather than remanded. Reversal, rather than remand, is appropriate only when the local decision is wrong as a matter of law and cannot be legally corrected. OAR 661-10-071. In this case, while the record before us does not establish that the lot lines have been vacated, it remains possible that such facts could be established. Thus, remand is appropriate.

1 view, that statement cannot be understood as pertaining to
2 the 1971 road vacation. It can only refer to the 1978
3 partition.

4 Detailed written arguments concerning the effects of
5 both the 1971 road vacation and the 1978 partition were
6 presented to the commissioners shortly before they made the
7 challenged decision. Record 35-37. The first sentence of
8 the county's final finding states two bases for its
9 conclusion that the lot lines were eliminated: (1) "the
10 roads within the subdivision were vacated"; and (2) "the
11 property was redivided." Record 23. The next sentences
12 develop the first basis without mentioning the second.
13 However, they do not ever reject the second basis; they just
14 omit an explanation of it. For that reason, I think the
15 majority goes too far when it concludes that for us to rely
16 on the second basis would be to alter an explicit finding.

17 The county's finding that the property was redivided is
18 supported by overwhelming evidence in the record. ORS
19 chapter 92 (1977 Edition) contained no specific requirements
20 for the form and contents of tentative plans of minor
21 partitions, but permitted a county or city to establish such
22 requirements in its "ordinances and regulations."
23 ORS 92.046(2) (1977 Edition).[11] The county's subdivision

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[11]ORS 92.046(2) (1977 Edition) provides:

> "Such ordinances or regulations may establish the form and contents of the tentative plans of minor partitions submitted for approval and may establish adequate measures for the

and partitioning ordinance in effect in 1978 required that a tentative plan of the proposed partitioning be filed with the county planning office for distribution to the county health office, roadmaster and surveyor, with a request for comments. Approval of the submitted plan was to be considered final when properly endorsed by the county surveyor, roadmaster, planning director and sanitarian. Properly approved and endorsed plans for major and minor partitions were to be a permanent part of the files of the county surveyor. Record 48.

The record indicates that prior to the approval of the preliminary plan in 1978, comments were solicited from the county health office, roadmaster and surveyor. A final plat, endorsed by the county surveyor, roadmaster, planning director and sanitarian, was designated as County Survey Number 5181, Record 114, and recorded in the county land records at book 123, pages 876-77. Record 41-42. That plat maps the partitioned property, showing dimensions and monument locations, and is followed by a description of the 20-acre parcel which was being partitioned from the parent 126-acre parcel.[12]

Nothing in the record supports the staff's suggestion

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central filing, including but not limited to recording with the city recorder or the county recording officer, and for the maintenance of tentative plans for minor partitions following approval."

[12]The survey also notes that the 20-acre parcel has no approved access to a public road or county road. Record 42.

1 that "parcels created after May 15, 1974 and prior to 1990,
2 are not to be considered lawfully created until such time
3 that a deed is filed which describes a [parcel's] new
4 configuration." Record 114. That suggestion was made
5 before the submissions of intervenors' attorney and was not
6 repeated after. The county's 1978 subdivision and
7 partitioning ordinance did not require that deeds be
8 recorded describing the new parcels. Petitioner has not
9 suggested that such a requirement was stated elsewhere in
10 the county's ordinances or regulations and has provided no
11 evidence that it was.[13]

12 Following its statement of the deed requirement, the
13 county staff concluded, "[E]ven in the event that the Minor
14 Partition were exercised, the legal status of the
15 subdivision lots within them would continue to exist."
16 Record 114. This conclusion contradicts our holding in Van
17 Veldhuizen to the effect that recording a plat acts to
18 vacate pre-existing lot lines.

19 As the cases cited by the majority indicate, we have
20 been extremely reluctant in the past to affirm part or all

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[13]Petitioner has attached as Appendix B to the petition for review a July 31, 1996 memorandum from the commissioners to the planning staff regarding "Lawfully Created lots and parcels." This memorandum is mentioned in a staff report, Record 112, but apparently is not itself part of the record. Even if it were part of the record, it would not support petitioner. The memorandum contains staff's explanation of when, during different periods, a lot or parcel must be considered "lawfully created" under ORS 92.017. It does not say that in 1978 there was a requirement that deeds containing descriptions of newly created parcels be recorded before a minor partition plat could be considered final.

1 of a local government decision in the face of defective
2 findings. The reason for our reluctance is obvious: it is
3 up to the local government to interpret its own
4 comprehensive plan and local ordinances and to evaluate the
5 evidence before it in the first instance.

6 This is a very rare case. The record before us clearly
7 supports a conclusion that in 1978 the subject property was
8 partitioned into two parcels.[14] Under Van Veldhuizen, the
9 1978 partition acted to vacate the 1909 subdivision lot
10 lines. Both the record and relevant case law thus justify
11 the county's otherwise unexplained finding that "the
12 property was redivided." In my view, we are required by ORS
13 197.835(11)(b) to affirm that portion of the challenged
14 decision and reach petitioner's constitutional arguments.

15 I respectfully dissent.

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[14]If the county had found, based on this record, that the 1978 partition was not completed and the subject property was not redivided in 1978, that finding would, in my opinion, have been unsustainable against an assignment of error because not supported by substantial evidence in the whole record. See Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988).