BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GORDON WEBB,
Petitioner,

vs.

CITY OF BANDON,
Respondent,

and

WILLIAM RUDELL and ROBERT RUDELL,
Intervenors-Respondent.

LUBA No. 2000-186

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioner.

No appearance by City of Bandon.

Allen J. Johnson, Eugene, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Johnson and Sherton.

BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 03/27/2001

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision partitioning a lot zoned Controlled Development Residential (CD-R1) to create a rectangular lot and a flag lot.

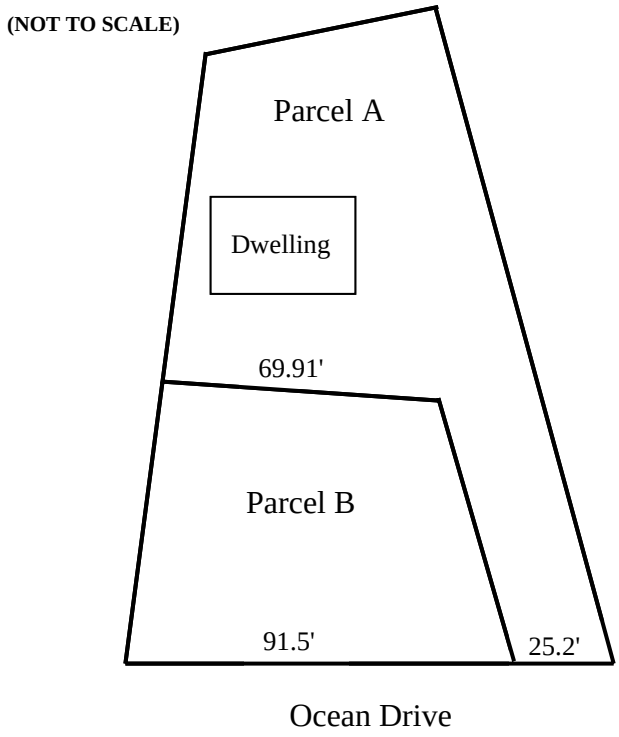
MOTION TO INTERVENE

William Rudell and Robert Rudell (intervenors), the applicants below, move to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is an 18,475 square foot lot along Ocean Drive. The property is roughly rectangular in shape, narrowing from a width of 116 feet where it fronts onto Ocean Drive, to 69 feet in width at the back of the lot. The subject property is improved with a dwelling, located in the back half of the lot.

On June 23, 2000, intervenors submitted an application to partition the property into an 11,376 square foot lot (parcel A) containing the existing dwelling and a connecting driveway to Ocean Drive, and a vacant 7,091 square foot lot (parcel B). A site plan at Record 96 shows parcel A as a flag lot, with the main or "flag" portion of parcel A located behind the approximately rectangular parcel B. The 25-foot wide "flag pole" part of parcel A runs generally north and south, along the easterly boundary of parcel B, and connects parcel A with Ocean Drive. The existing driveway is located on the flag pole part of parcel A. The proposed lot line between parcels A and B is 69 feet wide. The proposed street frontage for parcel B is 91 feet. See figure below.



The city planning commission held a hearing on July 27, 2000, and voted to deny the application, on the grounds that the partition did not meet the "purpose or the spirit" of the city's comprehensive plan. Record 71. Intervenors appealed to the city council, which held a hearing on October 2, 2000, and voted to reverse the planning commission decision, approving the partition. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Bandon Municipal Code (BMC) 17.32.060(B) provides that within the CD-R1 zone:

> "Lot width at the front building line shall be a minimum of sixty (60) feet. Lots shall have a minimum of twenty-five (25) feet of street frontage. This frontage shall be physically accessible."

The city found that the proposed partition complied with this provision:

> "Parcel A will have 69 [feet] of width at the front building line and will have 25 [feet] of accessible street frontage. Parcel B will have 91 [feet] of width at the front building line and will have 91 [feet] of accessible street frontage." Record 10.

Petitioner challenges that finding, arguing that under BMC 17.32.060(B) "front building line" must be interpreted to mean the same as "street frontage." Under that interpretation parcel A's width at its "front building line" is only 25 feet, not 69 feet, and parcel A does not comply with the 60-foot minimum lot width requirement.[1] Petitioner argues that this interpretation of the code was raised below, but the city's findings fail to explain why parcel A's "front building line" is not the same as "street frontage" for purposes of BMC 17.32.060(B).

LUBA must defer to a governing body's express or implicit interpretation of a local provision, unless that interpretation is inconsistent with the language, purpose or underlying policy of that provision. ORS 197.829(1); *Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 942 P2d 836 (1997); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). If the local government fails to provide a necessary interpretation of a local provision, or its interpretation is inadequate for review, LUBA may interpret the provision in the first instance, or remand it for an interpretation. ORS 197.829(2); *Opp v. City of Portland*, 153 Or App 10, 14, 955 P2d 768 (1998). In the present case, to the extent the above-quoted finding embodies an interpretation of the relevant terms in BMC 17.32.060(B), that interpretation is internally inconsistent and inadequate for review. For parcel B, the finding appears to locate that parcel's front building line at the same place as its street frontage. For parcel A, however, the city locates that parcel's front building line elsewhere than its 25 feet of street frontage. The city appears to locate parcel A's front building line along the rear lot line of parcel B. The apparently different approaches taken with parcels A and B is not explained, nor is it clear to us why the city locates parcel A's front building line along the rear lot line of parcel B.

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[1]One consequence of petitioner's interpretation is that creation of flag lots would be difficult if not impossible in the CD-R1 zone. We understand from petitioner that whether the city's code allows the creation of flag lots at all was the focus of debate before the city, and that question represents petitioner's underlying concern.

Because the relevant issue of how the front building line should be located under the BMC was raised as an issue below, and because the city did not provide an adequate response to that issue, remand would normally be required. However, it is obvious that the interpretation petitioner argues the city should have applied is clearly wrong. For the reasons explained below, the only construction of the BMC that could lead to the conclusion that the lot width of parcel A at the front building line is less than 60 feet wide, as espoused by petitioner, would be clearly wrong.

The city's code does not define the terms "front building line" or "street frontage." However, the parties agree that two code definitions are relevant to BMC 17.32.060(B). BMC 17.040.030 defines "front lot line" as "the lot line separating the lot from the street other than an alley." Thus, it is reasonably clear under the city's code that "front lot line" and "street frontage" refer to the same thing.

BMC 16.04.020 defines "building line" as "the line on a plat or map indicating the limit beyond which buildings or structures may not be erected." BPO 16.04.020 defines "building line" not with respect to lot lines but with respect to limits on the permissible location of a building, presumably limits defined by setbacks or other applicable restrictions. We need not decide the precise meaning of "front building line," or whether the city's decision that parcel A's front building line is 69 feet wide is correct in this case. For present purposes it suffices to conclude that, whatever "front building line" means, it is not the same thing as "street frontage," as petitioner argues. The city's ordinances define "building line" and "front lot line" (*i.e.* street frontage) to mean quite different things. More importantly, petitioner's interpretation of BMC 17.32.060(B), to equate the 60-foot "front building line" requirement with the 25-foot 'street frontage" requirement, renders those requirements contradictory. The 25-foot street frontage requirement in the second sentence of BMC 17.32.060(B) becomes meaningless under petitioner's interpretation. Wherever parcel A's front building line is properly located under the city's code, petitioner is incorrect that

the city erred in locating parcel A's front building line at a different location than that parcel's street frontage. Petitioner has not offered any plausible interpretation of the relevant code provisions that could result in the front building line being located anywhere within parcel A that is less than 60 feet wide. Accordingly, petitioner's arguments under this assignment of error provide no basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city erred in identifying the subject application as a minor partition rather than a major partition, with the consequence that the city failed to address criteria applicable to a major partition.

BMC 16.04.020 defines a major partition as "a partition which includes the creation of a street, or creates the necessity for establishment of an easement or street to provide access to a public street," and a minor partition as "a partition that does not include the creation of a street." According to petitioner, the 25-foot wide flag pole portion of parcel A constitutes a "street" as defined in the BMC. Petitioner argues that the proposed partition creates a "street" and, therefore, the city's decision approves a major partition rather than a minor partition.

Intervenors respond that petitioner failed to raise any issue below whether the proposed partition was a major partition, and therefore that issue is waived. ORS 197.763(1).[2] At oral argument, petitioner identified a document at Record 50 that, petitioner argues, raises the issue under this assignment of error in a manner sufficient to

[2]ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals 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. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

afford the city and other parties an adequate opportunity to respond. Record 50 is a letter from a participant below, which states in relevant part:

> "Access to the existing lot would not qualify under the definition of street (Definitions) page 8 of the zoning ordinance or qualify under any of the street criteria found on page 13 of the Subdivision Ordinance (Ordinance 934)."

We disagree with petitioner that the above-quoted passage is sufficient to raise an issue that the proposed partition creates a street and is therefore a major partition. The passage seems to express the view that the proposed access is *not* a street. Whatever the passage was intended to convey, it does not assert in a manner sufficient to afford an adequate opportunity for response that the proposed partition creates a street, is therefore a major partition and accordingly the city must address criteria applicable to a major partition. *Boldt v. Clackamas County*, 21 Or LUBA 40, *aff'd* 107 Or App 619, 813 P2d 1078 (1991). We agree with intervenors that the only issue raised under this assignment of error is waived.

The second assignment of error is denied.

The city's decision is affirmed.