BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BLOSSOM PROPERTIES, LLC,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

FRANK JOHNSTON and KATHY JOHNSTON,
Intervenors-Respondent.

LUBA No. 2005-077

FINAL OPINION
AND ORDER

Appeal from Marion County.

Andrew P. Ositis, Salem, filed the petition for review and argued on behalf of petitioner.

Jane Ellen Stonecipher, Marion County Legal Counsel, Salem, filed a response brief and argued on behalf of respondent.

Daniel B. Atchinson, Salem, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Wallace W. Lien, P.C.

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

AFFIRMED 09/20/2005

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a county decision denying its partition application.

MOTION TO INTERVENE

Frank Johnston and Kathy Johnston (intervenors), opponents below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

FACTS

Petitioner owns property in Marion County that is inside the City of Salem's urban growth boundary (UGB). The property is a narrow rectangle with the long boundaries running north to south. Streets adjoin the northern and southern boundaries; residential lots adjoin the eastern and western boundaries. The property is split zoned with the northern half zoned Urban Development (UD) and the southern half zoned Limited Multiple Family Residential (RL). There is an existing single-family residence near the northern boundary. The remainder of the property is vacant.[1]

Petitioner applied to partition the property into three parcels. Petitioner proposes to split the northern UD-zoned portion into two parcels, one for the existing residence and one for a proposed new single-family residence. As noted, petitioner proposes to build three duplexes on the remaining southern RL-zoned parcel. Access to the new single-family residence and the duplexes would be by two 20-foot access easements that pass between lots 11 and 12 and lots 13 and 14 of the subdivision to the east. Intervenors own lot 13. The two access easements are approximately 100 feet apart. The planning director approved the partition application. Intervenors appealed to the hearings officer who denied the application. On appeal, the board of county commissioners upheld the hearings officer's decision and adopted his findings rejecting the application. This appeal followed.

[1] According to petitioner three duplexes are under construction in the southern part of the property, and intervenors filed a circuit court action in an attempt to stop that construction.

FIRST ASSIGNMENT OF ERROR

Marion County Urban Zoning Ordinance (MCUZO) 33.68 provides the applicable access standards for the property:

> "All lots must have a minimum 20 feet of frontage on a public right-of-way or, when an access easement is proposed to serve one or more lots in any partitioning, the location and improvement of the roadway access shall conform to the following standards which are necessary for adequate access for emergency vehicles. Evidence that the access has been improved to these standards and a driveway permit has been obtained shall be provided prior to the issuance of building permits on the parcels served by the access easement. The easement shall meet the following standards:
>
> "(a) Have a minimum easement width of 25 feet;
>
> "(b) Have a maximum grade of 12%;
>
> "(c) Be improved with a paved surface with a minimum of 20 feet;
>
> "(d) Provide adequate sight-distance at intersections with public roadways;
>
> "(e) Be provided with a road name sign at the public roadway as an identification for emergency vehicles * * *."

Although a 20-foot wide easement apparently is sufficient to provide legal access to the existing parcel, MCUZO 33.68(a) applies because the property is to be partitioned to create additional parcels. The county found that the proposed partition failed to comply with MCUZO 33.68(a) because there is no 25-foot wide easement. The county's decision states:

> "The 20' easements qualify as access under MCUZO 27.50(c) for a use. The parcel has adequate access for an allowed or conditionally permitted use, but, [petitioner] is asking for a partition, and specific partition provisions require a minimum 25' access. The 25' access is the more restrictive requirement, and under MCUZO 27.00, when there is a conflict between a provision of chapter 27 and another chapter, the more restrictive provision applies.[2] MCUZO 33.68 requires

[2] MCUZO 27.00 provides that "[i]n the event of a conflict between a provision of this chapter and a more restrictive provision of this ordinance applicable to a particular lot, structure or use, the more restrictive provision shall apply." Petitioner does not dispute that the application must satisfy MCUZO 33.68, but rather argues that the county's interpretation of MCUZO 33.68 misconstrues the applicable law.

a 25' access and none is provided. There is no evidence that a 25' access can be provided. MCUZO 33.68(a) is not met." Record 30.

The county interpreted its ordinance to require a 25-foot wide easement for access to a partition. Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), we may only overturn a local government's interpretation of its own ordinances if it is inconsistent with the express language, purpose, or policy of the ordinance.[3] Petitioner argues that the purpose of the ordinance is to provide adequate access for emergency vehicles. According to petitioner, that purpose is achieved as well as if not better with two one-way 20-foot easements than with one 25-foot easement because instead of 12.5-foot wide access in each direction there will be a 20-foot wide access in each direction. Petitioner argues that a 20-foot easement is sufficient to satisfy Marion County Fire District Ordinance 1999.1, Section 3(A)(1).[4] According to petitioner there is nothing in the MCUZO that "prohibits a reasonable adding of the width of each of the access easements for purposes of determining if the ordinance requirements are met, particularly where each of the access easements meets the width requirements of the Fire District." Petition for Review 6.

While all the points petitioner makes may be reasonable arguments for why the county could have interpreted MCUZO 33.68 in the way that petitioner requested, the county did not adopt that

---

[3] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
>
> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

[4] According to petitioner, Marion County Fire District Ordinance 1999.1, Section 3(A)(1) requires an access road with an "[u]nobstructed width of not less than 20 feet," and a "[d]rivable surface of not less than 20 feet." Petition for Review 6.

interpretation. While such an interpretation might be affirmable under ORS 197.829(1), that is not the question before us. The question before us is whether the interpretation the county did adopt is consistent with the language, purpose, or policy of the MCUZO. The county's interpretation is clearly consistent with the language of MCUZO 33.68. The ordinance calls for an easement that is at least 25 feet wide, and the decision rejects the application for failing to provide an easement that is 25 feet wide. The purpose and policy of the ordinance is to provide adequate access for emergency vehicles. The access that would be provided over the two 20-foot one-way easements that petitioner proposes might provide adequate access for emergency vehicles.[5] However, it cannot be said that the 25-foot wide easement that is required under the county's interpretation does not. MCUZO 33.68(a) provides that a 25-foot wide access easement is required for emergency vehicle access, and the decision rejects the application for failing to provide such an access. The county's interpretation is not inconsistent with the language, purpose, or policy of MCUZO 33.68.

The first assignment of error is denied.[6]

The county's decision is affirmed.

---

[5] That access might even be superior in some respects to the access that would be provided by a single 25-foot two-way easement. However, we note that the Marion County Fire District Ordinance that petitioner cites calls for a "[d]rivable surface of at least 20 feet." That would require that the drivable surface occupy the entire easement area, leaving no area outside the drivable surface for shoulders or drainage. While that may not present any problem, petitioner simply assumes that the Marion County Fire District ordinance requirements can be met on a 20-foot easement.

[6] Because we sustain the county's interpretation of MCUZO 33.68 as a basis for denial, we need not reach petitioner's second assignment of error challenging the county's alternative basis for denial that access to multi-family housing is not a permitted use in a single-family residential zone. *Roozenboom v. Clackamas County*, 24 Or LUBA 433, 437 (1993) (to support a denial decision, a local government need only establish the existence of one adequate basis for denial). We also need not resolve intervenor's motion to strike.