

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

3
4 VICTOR C. PAGEL,
5 *Petitioner,*

6
7 vs.

8
9 MARION COUNTY,
10 *Respondent.*

11
12 LUBA No. 2025-078

13 FINAL OPINION
14 AND ORDER

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16
17 Appeal from Marion County.

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19 Petitioner filed the petition for review and reply brief and argued on behalf
20 of himself.

21
22 Andrew Mittendorf filed the respondent's brief and argued on behalf of
23 respondent.

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25 WILSON, Board Member; ZAMUDIO, Board Chair; BASSHAM, Board
26 Member, participated in the decision.

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28
29 REMANDED 03/17/2026

30
31 You are entitled to judicial review of this Order. Judicial review is
32 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision that approves a partition of an 8-acre parcel into three parcels and a variance to allow a private easement to serve more than four dwellings.

FACTS

The applicant owns an 8-acre parcel that is accessed from the north by a private easement that already serves four dwellings. The application sought to partition the property into one 4-acre parcel and two 2-acre parcels. All three parcels were proposed to be served by an extension of the private easement. The Marion County Code (MCC) allows private easements to serve up to four dwellings. As more than four dwellings would be served by the private easement, the applicant requested a variance to allow the private easement to serve additional dwellings on the new parcels.

The planning department approved the applications. Petitioner, an adjacent land owner, appealed the approval to a county hearings officer. During the local proceeding, petitioner did not challenge the partition but did challenge the variance. The hearings officer approved the partition and variance, and petitioner appealed to the board of county commissioners. The board of county commissioners denied the appeal and adopted the hearings officer's decision. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 MCC 17.110.800 restricts private drives to serving not more than four
3 dwellings.¹ There is no dispute that the existing private easement would need to
4 serve more than four dwellings to access the parcels created by the partition. The
5 county granted a variance to MCC 17.110.800 pursuant to MCC 17.122.010,
6 which provides:

7 “Power to grant variances. Subject to the restrictions and provisions
8 contained in this title, the director, planning commission, hearings
9 officer or board *shall have the power to vary or modify the strict*
10 *application of any of the standards of this title in any case where*
11 *such strict application would result in practical difficulties or*
12 *unnecessary hardships with reference to requirements governing:*
13 *lot area, lot width, percentage of lot coverage and number of*
14 *dwelling units or structures permitted on a lot, height of structures,*
15 *location, yards, signs, parking and loading space, vision clearance*
16 *and other standards when limits for an adjustment in MCC*
17 *17.116.030 are exceeded. Variances to allow uses or new uses not*
18 *otherwise allowed are prohibited. Variances to criteria and*
19 *definitions are also prohibited.” (Emphases added.)*

20 Petitioner argues that while MCC 17.122.010 provides that variances may
21 be obtained for “any of the standards of this title,” variances may only be obtained

¹ MCC 17.110.800 provides: “Dwellings and all other buildings to be accessible to public street. Every dwelling shall be situated on a lot having direct access by abutting upon a public street or a pre-existing private driveway of a width not less than 20 feet. A private drive shall not serve more than four dwelling units unless the parcels, on which those units are proposed to be placed, were established with the approval of Marion County in accordance with state law and Marion County ordinances prior to May 1, 1977, or were approved under Chapter 17.121 MCC, Planned Development.”

1 “in any case where such strict application would result in [difficulties or
2 hardships] with reference to requirements governing” a list of specific
3 requirements. According to petitioner, unless the limitation of four dwellings to
4 be served by a private easement in MCC 17.110.800 falls under the list of
5 referred-to requirements, a variance is not available.²

6 The hearings officer’s decision interpreted MCC 17.122.010 to allow the
7 four-dwelling limitation on private easements to be eligible for a variance
8 because variances are allowed “for any standards.” The hearings officer stopped
9 her analysis there and did not consider whether MCC 17.110.800 was one of the
10 requirements listed as available for variances. The hearings officer’s decision
11 states:

12 “[Petitioner] advances an *expressio unius est exclusio alterius*
13 argument (the expression of one thing implies the exclusion of
14 others). Courts have treated this maxim as a presumption that yields
15 to context. If the inclusion of terms is illustrative, then the specific
16 expression is not intended to exclude another term. The inclusion of
17 ‘catch all’ language like ‘and other’ and ‘otherwise’ can also defeat
18 the construction that the list is intended to be exhaustive.

19 “MCC 17.122.010 does include language that provides authority for
20 the hearings officer to allow a variance for ‘any of the standards of

² Although petitioner cites the maxim of *eiusdem generis* (the general terms of an act can be modified and limited by the enumeration of specific examples) and *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others), more plainly petitioner argues that the hearings officer ignored most of MCC 17.122.010 which sets out the necessary conditions for a variance to be available.

1 this title.’ The language ‘any of the standards of this title’ is even
2 broader than a ‘catch all’ phrase and references a broader category
3 of permissible variances than the non-exhaustive listing in the code.

4 “* * * * *

5 “MCC 17.122.010 gives the county authority to vary ‘any of the
6 standards of this title’ (not uses). A ‘standard of this title’ is access
7 standard. The four-dwelling limit on a private drive is a standard
8 stated at MCC 17.110.800. As a standard, the four-dwelling limit
9 can be varied if the variance criteria are satisfied.” Record 13-14.

10 The board adopted the hearings officer’s interpretation. Under ORS
11 197.829(1), as construed in *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d
12 776 (2010), LUBA must defer to a local governing body’s interpretation of its
13 comprehensive plan and land use regulations, unless the local government’s
14 interpretation is inconsistent with the express language, purpose, or underlying
15 policy of the comprehensive plan or land use regulation.³ *Crowley v. City of Hood*

³ ORS 197.829 provides:

“(1) The Land Use Board of Appeals 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; or

1 *River*, 294 Or App 240, 244, 430 P3d 1113 (2018). In *Crowley*, an appeal that
2 involved the city council’s interpretation of the city’s comprehensive plan, the
3 Court of Appeals explained: “Whether the [local government’s] interpretation of
4 its comprehensive plan is inconsistent with the plan, or the purposes or policies
5 underlying that plan, depends on whether the interpretation is plausible, given the
6 interpretive principles that ordinarily apply to the construction of ordinances
7 under the rules of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12,
8 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 171-72, 206
9 P3d 1042 (2009).” *Id.* (quoting *Friends of the Hood River Waterfront v. City of*
10 *Hood River*, 263 Or App 80, 88-89, 326 P3d 1229 (2014); internal quotation
11 marks and brackets omitted). “The standard of review under ORS 197.829(1) and
12 *Siporen* is ‘highly deferential’ to the [local government], and the ‘existence of a
13 stronger or more logical interpretation does not render a weaker or less logical
14 interpretation ‘implausible.’” *Id.* at 245 (citing *Mark Latham Excavation, Inc. v.*
15 *Deschutes County*, 250 Or App 543, 555, 281 P3d 644 (2012)).

“(d) Is contrary to a state statute, land use goal or rule that
the comprehensive plan provision or land use
regulation implements.

“(2) If a local government fails to interpret a provision of its
comprehensive plan or land use regulations, or if such
interpretation is inadequate for review, the board may make
its own determination of whether the local government
decision is correct.”

1 The county’s interpretation gives meaning to the phrase “any of the
2 standards of this title” and concludes that is sufficient authority to grant a
3 variance. The county’s interpretation essentially found that the list of
4 circumstances describing when a variance is possible is superfluous. According
5 to the county, any standard may be varied – end of analysis.

6 The county’s interpretation is inconsistent with the express language of
7 MCC 17.122.010 because it does not consider, give meaning to, or harmonize the
8 whole of that provision. The express language of the ordinance provides that “any
9 standard” may be varied “where”: (1) “such strict application would result in
10 practical difficulties or unnecessary hardships” and (2) “with reference to
11 requirements governing” a list of development standards – or buckets, that is,
12 categories of standards that the county may vary. In other words, the provision
13 allows any standard to be varied as long as it creates a difficulty or hardship and
14 falls within one of the enumerated buckets. To allow “any standard” to be varied
15 without any consideration of the remaining language that clearly sets out that the
16 standard sought to varied must fall within one of the buckets is not plausible.
17 While *Siporen* deference gives the county considerable deference in determining
18 what standards fall within those buckets – *Siporen* deference does not allow the
19 county to ignore the language setting out the buckets altogether.

20 Below, planning staff and the applicant argued that the four-dwelling
21 standard of MCC 17.110.800 could be varied because it falls within the “number
22 of dwelling units or structures permitted on a lot” bucket. Staff also argued that

1 MCC 17.110.800 could be varied because it falls within the “and other standards”
2 bucket.⁴ The county’s adopted interpretation does not address either of these
3 arguments and the county did not rely on either of these interpretations in the
4 decision.⁵ Therefore, any interpretation that MCC 17.110.800 may be varied
5 under either of those buckets is not before us, and we express no opinion on any
6 such interpretation.

7 The challenged decision and the respondent’s brief also rely on the fact
8 that the county has traditionally allowed variances to MCC 17.110.800. The
9 decision states:

10 “As evidenced by prior orders submitted by Applicant, MCC
11 17.122.010 has been interpreted to allow a variance to allow more
12 than four dwellings to be served by a private road. In practice, the
13 County has treated requests to serve more than four dwellings on a
14 private road as a variance and evaluated them under MCC
15 17.122.020 * * *.” Record 13.

16 Initially, none of the county decisions entered into the record and relied
17 upon by the county address the question presented in this appeal – whether MCC
18 17.110.800 is a standard that may be varied under MCC 17.122.010. All of those
19 decisions merely assumed a variance was potentially available and went straight

⁴ The applicant presented this argument at Record 118. Staff presented this argument during the public hearing.

⁵ Respondent’s attorney confirmed at oral argument that the decision relied solely on the “any of the standards of this title” language and did not find that MCC 17.110.800 fell within any of the buckets.

1 to the variance approval criteria. Second, even if those decisions had addressed
2 the issue, that would not be binding on LUBA.⁶

3 While we could interpret MCC 17.122.010 ourselves pursuant to ORS
4 197.829(2) to determine whether MCC 17.110.800 falls within one of the
5 enumerated buckets, we believe the better course is for the county to make its
6 own interpretation after considering all of the language in the provision.⁷

7 The first assignment of error is sustained.

8 **SECOND ASSIGNMENT OF ERROR**

9 MCC 17.122.020 provides the approval criteria for a variance. Petitioner
10 argues that the county's finding that the first approval criterion is satisfied is not
11 supported by substantial evidence. MCC 17.122.020(A)(1) provides:

12 “(A) The director, planning commission, hearings officer, or board
13 may permit and authorize a variance when it appears from the
14 application and the facts presented that:

15 “(1) There are unnecessary, unreasonable hardships of
16 practical difficulties which can be relieved only by
17 modifying the literal requirements of this title[.]”

18 The county's findings state:

⁶ While it is understandable why the hearings officer felt she was bound by prior board of commissioners decisions, that is not a basis for LUBA to affirm the decision.

⁷ ORS 197.829(2) provides: “If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

1 “The only access to the subject property is off Happy Valley Way
2 SE. There is no direct access to a public roadway. Applicant states
3 that the granting of this variance will effectively utilize this
4 residential land and will keep development from encroaching on
5 nearby resource zones.

6 “Without the variance to MCC 17.110.800, Applicant would not be
7 able to partition and develop the land to the maximum density
8 allowed by the AR zone. The criterion is met.” Record 14.

9 Petitioner argues that under MCC 17.122.020(A)(1), a variance may be
10 granted if the hardship or difficulty can be relieved *only* by granting a variance.
11 According to petitioner, the hardship or difficulty could be relieved by extending
12 a public road to the new parcels rather than extending a private easement. While
13 it is not entirely clear exactly what petitioner is proposing, apparently a nearby
14 road, Burton Place, was extended to serve additional properties rather than
15 extending a private drive. Petitioner argues that if there is an alternative solution
16 that does not require a variance then a variance is not warranted.

17 Pursuant to OAR 661-010-0071(2)(b), we will remand a decision that is
18 not supported by substantial evidence in the whole record. Substantial evidence
19 is evidence that a reasonable person would rely on in making a decision. *Dodd v.*
20 *Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the
21 evidence, LUBA may not substitute its judgement for that of the local decision
22 maker. Rather, LUBA must consider all the evidence to which it is directed, and
23 determine whether based on that evidence, a reasonable local decision maker
24 could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-
25 60, 725 P2d 262 (1988).

1 The county explains that the applicant addressed the impracticability of
2 exploring the alternative proposed by petitioner:

3 “[T]he requirement that the applicant work with other property
4 owners along the easements is not practical. The solution that would
5 allow for the properties in question would require a subdivision
6 application with the dedication of a public street. This would impact
7 all of the property owners who would first agree and second give up
8 an additional 30 feet of their property to accomplish the 60 feet
9 required for a public street.” Respondent’s Brief 9 (citing Record
10 85).

11 Petitioner argues that the county improperly shifted the burden to
12 petitioner to demonstrate a feasible alternative rather than requiring the applicant
13 to establish that there were no reasonable alternatives. Petitioner cites *Stahl v.*
14 *Tillamook County*, 43 Or LUBA 518 (2003) in support of his argument. In *Stahl*,
15 however, the county specifically interpreted its ordinance to shift the burden to
16 opponents. *Id.* at 526-27. In the present case, the county found that the applicant
17 had established that there were no feasible alternatives. While the county did not
18 find that petitioner’s suggested alternative was feasible, it did not shift the burden
19 to petitioner. The county weighed conflicting evidence and found that the
20 applicant’s evidence was more persuasive. We agree with the county that a
21 reasonable person could rely on the fact that a subdivision application would be
22 required and that additional property owners would have to dedicate portions of
23 their property to accomplish petitioner’s alternative to find that the hardship or
24 difficulty can be relieved only by granting a variance.

25 The second assignment of error is denied.

1 The county's decision is remanded.