

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

3
4 VESPER PARK/NW GLENRIDGE DRIVE
5 NEIGHBORHOOD ASSOCIATION,
6 *Petitioner,*

7
8 vs.

9
10 WASHINGTON COUNTY,
11 *Respondent.*

12
13 LUBA No. 2012-104

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from Washington County.

19
20 Lance R. Clark, Lake Oswego, filed the petition for review and argued on behalf of
21 petitioners. With him on the brief were David M. Phillips and Vial Fotheringham LLP.

22
23 No appearance by Washington County.

24
25 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
26 participated in the decision.

27
28 REMANDED

07/30/2013

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving development review and variance applications.

FACTS

The subject property is a 1.54-acre vacant property zoned Transit Oriented Residential District: 9-12 Units/Acre (TO:R9-12). The property is located on the north side of US Highway 26 (US 26), south of NW Glenridge Drive and north of the exit ramp from westbound US 26 to NW Murray Road. Access to the property is from NW Glenridge Drive, approximately 600 feet to the southeast of the intersection of NW Glenridge Drive and NW Murray Road/NW Sherry Street.¹ NW Glenridge Drive has a paved surface width of 20 feet between the subject property and NW Murray Road.

The applicant applied for development review of a proposal to construct 18 attached dwelling units contained in five three-story buildings. As part of the development review proposal, the applicant also sought a hardship relief variance to Washington County Community Development Code (CDC) 501-8.1(B)(2)(b), which requires a minimum 22-foot wide, five-year wearing surface for roads between the subject property and “the nearest adequate Collector or Arterial * * *.”² The hearings officer approved the development

¹ NW Sherry Street intersects with NW Murray Road approximately 15 feet to the west of NW Sherry Street’s intersection with NW Glenridge Drive. Petitioner appears to take the position that NW Murray Road is the nearest collector or arterial to NW Glenridge Drive.

² CDC 501-8.1 provides development standards for public facilities. CDC 501-8.1(B)(2)(b) provides in relevant part that:

“No development shall be approved without an adequate level of access to the proposed development in place or assured at the time of occupancy, with ‘adequate’ defined for critical road services as:

“ * * * * *

“(2) For those access roads lying adjacent to and between the property owner’s proposed development and the nearest adequate Collector or Arterial road, as defined in

1 review application and approved the requested variance to CDC 501-8.1(B)(2)(b). This
2 appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner’s first assignment of error is:

5 “In addressing public comment on legal issues brought by a member of the
6 public, the county failed to adequately consider comments that spot zoning
7 was an underlying issue affecting the proposed development.” Petition for
8 Review 5.

9 We understand petitioner to argue that the hearings officer erred in failing to address an issue
10 that was raised during the proceedings below that challenged as “spot zoning” the prior
11 rezoning of the area in which the subject property is located. Petitioner argues that “[t]he
12 development proposal should be remanded to the county to consider the spot zoning issue.”
13 *Id.*

14 The hearings officer found that the issue of spot zoning, as well as other issues, were
15 raised “without any identification of how they are relevant to the subject decision” and
16 declined to address the issue in the decision. Record 15. Petitioner has not explained how
17 any issues that a participant during the proceedings below raised regarding the prior rezoning
18 of the area in which the subject property is located are relevant to any of the approval criteria
19 that apply to the current development review proposal or the variance, which post-date that
20 rezoning decision by several years. Accordingly, the hearings officer did not err in declining
21 to address the issue, and petitioner’s first assignment of error provides no basis for reversal or
22 remand of the decision.

Essential Services, or future roadway alignments designated in the Washington
County Transportation Plan, likely to attract the highest traffic volume from the
proposed development (based on existing and/or forecast traffic volumes) the road(s)
must meet the following minimum standards:

“ * * * * *

“(b) Paved surfaces for existing roadways shall be twenty-two feet or greater in
width. New roads shall meet the adopted County Road Standards[.]”

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 CDC 435-5.3 governs variances, and provides:

4 “The Director shall grant such relief only when the Director makes findings,
5 based upon evidence in the record, that all of the following criteria have been
6 met:

7 “A. The standard imposes a significant economic burden on the applicant;

8 “B. The use is a permitted use in the District; and

9 “C. Relief will not be materially detrimental to other property in the
10 vicinity.”

11 As explained above, the hearings officer approved a hardship variance to the CDC 501-
12 8.1(B)(2)(b) requirement that the applicant provide a minimum 22-foot wide paved road
13 surface between its property and NW Murray Road.³ Doing so meant that the applicant was
14 allowed to rely on the existing 20-foot width of NW Glenridge Drive without widening it. In

³ The hearings officer found:

“Previous applications for development further south east of the subject site on NW Glenridge Drive * * * have received approved Hardship Relief Variances to the 22 foot width standard. As part of [the 1998 decision], the following findings were made:

““In addition, the applicant stated that the widening of the roadway to 22 feet would place ‘at risk’ the mature trees located within the right-of-way (on the south side of NW Glenridge Drive). The applicant also stated that the removal of the trees and the wider street would effectively result in ‘the loss of the current streetscape’ which in turn ‘would place an economic burden on the applicant by removing one of the key elements that make this location a desirable place to live.’ The narrative goes on to contend that ‘this is an area that is somewhat difficult to access and relies on the ‘country lane’ character for marketing purposes for the development.’ According to the applicant’s narrative the removal of the trees would equate to an economic loss of approximately \$7,500 per lot, for a total of approximately \$120,000. The total economic impact resulting from improving NW Glenridge Drive to 22 feet would be approximately \$8625 per lot * * *.’

“The Hearings Officer concurs with the findings made [in the 1998 decision] which immediately adjoins the subject site and finds that approval of a Hardship Relief Variance to the 22-foot, 5-year wearing surface * * * is consistent with the findings in [the 1998 decision]. The Hearings Officer also finds that conditions exist which make the widening of NW Glenridge Drive impracticable, including its location adjacent to NW Murray Boulevard and the presence of private structures in the right of way.” Record 39.

1 addition, although CDC 435-5.4 provides that “[t]he Director may impose such conditions as
2 are deemed necessary to mitigate any adverse impacts which may result from granting the
3 relief” the hearings officer did not impose any conditions to mitigate any adverse impacts
4 from granting the variance.

5 In its second assignment of error, petitioner argues that the findings are inadequate to
6 explain why the hearings officer concluded that granting the hardship relief variance “will not
7 be materially detrimental to other property in the vicinity.” We understand petitioner to argue
8 that remand is required where the findings do not address issues that were raised below
9 regarding impacts on traffic safety in the area from adding more traffic to the substandard 20-
10 foot wide road and regarding decreases in property values of other property in the area.
11 Petition for Review 8-9. We also understand petitioner to argue that the county’s decision to
12 grant the variance is not supported by substantial evidence in the record because the
13 challenged decision relies on a 1998 decision approving a 15-lot development on property
14 located on NW Glenridge Drive to the southeast of the subject property. That 1998 decision
15 also approved a variance to the same CDC development standard at issue in this appeal but
16 required the applicant to pave NW Glenridge Drive to its existing 20-foot width from its
17 intersection with NW Murray Road to the property that was the subject of that decision, and
18 resulted in the current 20-foot wide paved width of NW Glenridge Drive that exists today.
19 We understand petitioner to argue that the evidence that was cited and relied on in the 1998
20 decision does not provide substantial evidence that granting the variance at issue in this case
21 “will not be materially detrimental to other property in the vicinity.”⁴

⁴ As an example, petitioner points out that the 1998 decision relied on an anticipated reduction in the value of the new lots to be developed from the removal of mature trees that would be required to widen NW Glenridge Drive to 22 feet. As we understand it, those trees are either located on the subject property and will be removed as part of the development, or have already been removed. As a second example, petitioner points out that the 1998 decision found that NW Glenridge Drive has a “country lane” character, and argues that by virtue of the increased traffic on the street resulting from the 1998 decision, NW Glenridge Drive has ceased to have that character.

1 We agree with petitioner that remand is required where the hearings officer’s findings
2 do not explain why the proposed variance “will not be materially detrimental to other
3 property in the vicinity.” The hearings officer’s findings do not address CDC 435-5.3(C) at
4 all or otherwise explain why it is satisfied. We also agree with petitioner that to the extent
5 the hearings officer relied on the 1998 decision to conclude that granting the proposed
6 variance “will not be materially detrimental to other property in the vicinity,” the findings
7 from the 1998 decision that are quoted in the challenged decision appear to be addressing
8 CDC 435-5.3(A) rather than CDC 435-5.3(C). The 1998 decision is of limited value in
9 justifying a decision to grant the requested variance.⁵

10 Finally, we understand petitioner to argue that the hearings officer erred in failing to
11 impose a condition of approval requiring the applicant to build a sidewalk from the subject
12 property to the intersection of NW Glenridge Drive and NW Murray Road. The hearings
13 officer concluded that she “has no legal authority however, to require the applicant to build
14 sidewalks for 600 additional feet to Murray Boulevard, or to serve already existing and more
15 recently approved developments.” Record 39. We understand petitioner to argue that the
16 hearings officer should have required the applicant to construct sidewalks from the subject
17 property to NW Murray Road in order to mitigate the adverse effects of granting the variance,
18 as allowed under CDC 435-5.4.

19 We agree with petitioner that the hearings officer’s conclusion appears to be incorrect
20 and that CDC 435-5.4 could provide the hearings officer with legal authority to require
21 sidewalks to the intersection of NW Murray Road, subject to any constitutional limits that
22 may be placed on that requirement under the Takings Clause of the Fifth Amendment of the
23 United States Constitution and *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L

⁵ Additionally, we note that the hearings officer’s conclusion that “approval of a Hardship Relief Variance
* * * is consistent with the findings in [the 1998 decision]” appears to misconstrue CDC 435-5.3(C), which
requires the hearings officer to determine whether the proposed variance meets that CDC section, not whether
the proposed variance is consistent with a variance granted 15 years ago.

1 Ed2d 304 (1994). However, it is premature for us to resolve that issue until the hearings
2 officer determines on remand whether to grant the variance and determines whether there are
3 any adverse impacts to be mitigated.

4 The second assignment of error is sustained.

5 The county's decision is remanded.