

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

3
4 COLIN CARVER,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11 and

12
13 WESTWOOD HOMES LLC,
14 *Intervenor-Respondent.*

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16
17 LUBA No. 2014-063

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Washington County.

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24 Colin T. Carver, Portland, filed the petition for review and argued on his
25 own behalf.

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27 No appearance by Washington County

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29 Michael C. Robinson and Seth J. King, Portland, filed the response brief
30 and argued on behalf of intervenor-respondent. With them on the brief was
31 Perkins Coie LLP.

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33 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board
34 Member, participated in the decision.

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36 AFFIRMED

10/28/2014

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

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NATURE OF THE DECISION

Petitioner appeals a hearings officer’s decision approving an exception to county street width standards for a portion of roadway leading to a new residential development.

FACTS

The subject roadway is a 146-foot section of NW Melody Lane, which provides access to the 34 lots of Phase II of the Cedar Park subdivision, located nearby.¹ NW Melody Lane in this location is an “access road” that provides access between Phase II of the Cedar Park subdivision and the nearest collector road. This 146-foot section of NW Melody Lane currently has a 20-foot right of way. Washington County Community Development Code (CDC) 501-8.1.B(2)(b) requires that the subdivision have an “adequate level of access” to collector roads and defines “adequate” with respect to existing access roads such as NW Melody Lane to include a 22-foot wide paved width.²

¹ The county decision approving the Cedar Park subdivision was affirmed in *Carver v. Washington County*, __ Or LUBA __ (LUBA No. 2014-028, July 16, 2014).

² CDC 501-8.1(B) provides, in relevant part:

“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 Essential

1 The applicant, intervenor-respondent (intervenor) Westwood Homes
2 LLC, attempted to contact the four property owners adjoining the 146-foot
3 section of NW Melody Lane to acquire the needed additional right of way.
4 However, the adjoining property owners either refused to sell or did not
5 respond. Intervenor then applied to the county for an exception (a type of
6 variance) to allow the 146-foot section of NW Melody Lane to be constructed
7 with an 18-foot paved width within the existing 20 foot right of way.

8 The county hearings officer held a hearing on the application, at which
9 petitioner appeared in opposition. On June 20, 2014, the hearings officer
10 issued a decision approving the exception under the standards for an exception
11 set out at CDC 501-6.1.³ This appeal followed.

Services, * * * the road(s) must meet the following
minimum standards:

“* * * * *

“(b) Paved surfaces for existing roadways shall be twenty-
two (22) feet or greater in width. * * *

³ CDC 501-6.1 provides, in relevant part:

“Development proposals that cannot ensure critical and essential
services * * * within the required time frames shall be denied
unless all of the following findings can be made:

“A. The particular inadequate facility(ies) or service(s) is not
necessary for the particular proposal within the time period
identified by the service provider;

“B. The approval of the development application will not
substantially interfere with the ability to later provide the
particular inadequate facility(ies) or service(s) to anticipated
uses in the vicinity of the subject property;

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioner argues that the hearings officer misconstrued CDC 501-6 and
3 CDC 501-8.1 and erred in approving the exception to reduce the paved width
4 from 22 feet to 18 feet. According to petitioner, an exception to the CDC 501-
5 8.1 requirement for a 22-foot paved width is warranted only if the reduced 18-
6 foot paved width provides the same “adequate” level of access as the code-
7 required 22-foot paved width, or the record demonstrates that a 22-foot paved
8 width is not necessary to provide “adequate” levels of access. Petitioner cites
9 to testimony from intervenor’s traffic engineer that an 18-foot paved width will
10 result in slower traffic speeds and overall safer operation compared to a 22-foot
11 paved width, due in part to “driver discomfort” in driving and passing cars on
12 the narrower lanes. Petitioner argues that this testimony does not support the
13 exception, but to the contrary demonstrates that an 18-foot paved width fails to
14 provide an “adequate” level of access.

15 Intervenor responds, and we agree, that petitioner has not demonstrated
16 that the hearings officer misconstrued the applicable law or failed to adopt
17 adequate findings supported by substantial evidence. CDC 501-6 allows an
18 exception to the critical road services requirements of CDC 501-8.1 based on
19 the four criteria set out in CDC 501-6.1(A) through (D). Those criteria, if met,

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- “C. The approval of the development application without the assurance of the particular inadequate facility(ies) and service(s) will not cause a danger to the public or residents in the vicinity of the subject property; and
 - “D. It is shown that the applicant has exhausted all practical methods within the ability of the applicant to ensure the provisions of the unacceptable facility (ies) and service (s).”

1 expressly allow an exception for “inadequate” facilities. *See* n 3. Therefore, the
2 hearings officer was not required to find that a reduced paved width is
3 “adequate” or provides the same level of adequate access as the required 22-
4 foot width, as petitioner suggests.

5 The exception standard at issue in this assignment of error is CDC 501-
6 6.1(A), which essentially requires a finding that a 22-foot paved width is not
7 “necessary” to serve intervenor’s subdivision within the time period identified
8 by the service provider.⁴ The hearings officer found, based on the testimony of
9 intervenor’s traffic engineer:

10 “The applicant’s traffic engineer concluded that the proposed
11 roadway is adequate to safely accommodate traffic generated by
12 the 39 homes served by this roadway. NW Melody Lane is a local
13 street, designed and intended to serve the local residential
14 community. Low speeds are encouraged for local streets in order
15 to accommodate pedestrians, bicycles, other vehicles backing out
16 of driveways and similar activities common to neighborhoods.
17 This local street will carry a weekday total of 372 vehicles per day,
18 far less than the 1,500 vehicles per day expected on a typical local
19 street. The 18 foot paved width and the 20 foot total width (one
20 foot gravel shoulders) provides sufficient room for two motor
21 vehicles to meet and pass one another, but to do so will result in
22 some level of driver discomfort. This ‘driver discomfort’ will
23 result in slower travel speeds, attentive driver behavior and overall
24 safer operation. While the narrow section will require drivers to
25 slow down and occasionally incur minor delays in yielding to
26 other users, volumes will not be sufficiently high to result in actual
27 congestion or considerable delay.” Record 14-15.

⁴ The hearings officer found that the relevant “time period identified by the service provider” in the present case is the “time period between construction of this subdivision and future development of the properties abutting the narrow section of NW Melody Lane,” at which time the road will be constructed to full county local street standards. Record App 14.

1 The hearings officer ultimately concluded that an additional four feet of paved
2 width is not necessary to serve the proposed development within the relevant
3 time frame. Record 14. The hearings officer’s findings under CDC 501-6.1(A)
4 are supported by substantial evidence, and adequately explain the conclusion
5 that a 22-foot paved width is not necessary to serve the subdivision.
6 Petitioner’s arguments to the contrary are based on petitioner’s erroneous
7 understanding that an exception can be approved only if the reduced paved
8 width results in the same level and type of access as provided by a 22-foot
9 paved width.

10 Petitioner’s first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 CDC 501-6.1(D) requires, essentially, a demonstration that “the
13 applicant has exhausted all practical methods within the ability of the
14 applicant” to construct the facility to code standards. *See* n 3. Petitioner argues
15 that intervenor has not exhausted all practical methods to acquire the additional
16 four feet of right-of-way necessary to construct a 22-foot paved width as
17 required by CDC 501-8.1, and therefore has failed to comply with CDC 501-
18 6.1(D).

19 Intervenor’s planner testified that he spoke to the two property owners
20 on the south side of the 146-foot section of NW Melody Lane and both refused
21 to sell or dedicate additional right-of-way to widen the road. Of the two
22 property owners on the north side of the street, one did not respond to a
23 solicitation letter, while the owner of a flagpole lot indicated that he was
24 willing to sell or dedicate his 20 feet of frontage along the 146 foot section of
25 Melody Lane. The hearings officer found that intervenor had exhausted all

1 practical methods because willing sellers could not be found to widen the full
2 146 feet of NW Melody Lane.

3 Petitioner argues that because one adjoining property owner was willing
4 to sell 20 feet of frontage that intervenor necessarily failed to demonstrate that
5 it exhausted “all practical methods” to comply with the 22-foot paved width
6 requirement, and therefore failed to demonstrate that an exception is warranted.
7 We disagree. Acquisition of 20 feet of right-of-way would not eliminate the
8 need for an exception for the remaining 126 feet of NW Melody Lane. The
9 hearings officer did not err in concluding that intervenor had exhausted all
10 practical methods within its ability to acquire the 146 feet of additional right of
11 way necessary to construct NW Melody Lane to a full 22-foot paved width.

12 Petitioner’s second assignment of error is denied.

13 The county’s decision is affirmed.