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

GARY M. GEORGEFF and JUDITH A. SMITH,
Petitioners,

vs.

CURRY COUNTY,
Respondent.

LUBA No. 2000-163

FINAL OPINION
AND ORDER

Appeal from Curry County.

Gary M. Georgeff, Brookings, filed the petition for review. Paul M. Nelson, Lake Oswego, argued on behalf of petitioners.

No appearance by Curry County.

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

REMANDED

06/06/2001

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

NATURE OF THE DECISION

Petitioners appeal the county’s approval of a variance from county road standards to allow a partition.

FACTS

The applicant below owns property in southwest Curry County. The subject property consists of two parcels. One of those parcels is composed of two tax lots. Access to the applicant’s parcels is provided by Lynn Lane, a private road that also provides access to petitioners’ property and the property of two other persons, Wraith and Jones. Lynn Lane crosses Wraith’s property to reach the applicant’s parcels, and the extent of the applicant’s right to use the portion of Lynn Lane crossing Wraith’s property was recently settled by a stipulated judgment in Curry County Circuit Court. The stipulated judgment between the applicant and Wraith provides that the applicant has an easement to use Lynn Lane for ingress and egress to her parcels. However, under the stipulated judgment, the extent of the easement is limited to access for one permanent dwelling on each of applicant’s three tax lots and the width of the roadbed of Lynn Lane may not be expanded.

The portion of Lynn Lane that crosses the Wraith property is a narrow gravel road that winds through steep terrain. Although the precise dimensions are disputed, it is undisputed that Lynn Lane does not meet the current county road standards for private roads. In order to partition her parcel, the applicant must either improve Lynn Lane to county standards or obtain a variance to those standards. Because the stipulated judgment prevents the applicant from widening Lynn Lane, she applied for a variance to the county road standards.

The planning director denied the application for a variance and partition, and the applicant appealed the decision to the board of commissioners (commissioners). The commissioners reversed the planning director and approved the variance and partition.

1 Petitioners appealed the decision to LUBA. At the applicant’s request, the county withdrew
2 the decision for reconsideration pursuant to ORS 197.830(13)(b) and OAR 661-010-0021.
3 The commissioners subsequently discussed the matter with the applicant at a public meeting
4 without providing notice to petitioners, and the applicant indicated that she did not wish to
5 pursue the variance. However, the applicant later changed her mind and decided to go
6 forward with the variance application. The county filed a copy of the original decision with
7 LUBA on January 12, 2001, and indicated that the appeal should be restarted. This appeal
8 followed.¹

9 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

10 Curry County Code (CCC) 6.02.10 provides that:

11 “All public and private roads, streets and easements within subdivisions,
12 planned unit developments, major and minor partitions shall meet the
13 standards for road improvement established in the road standards adopted by
14 Curry County.”

15 CCC 3.01.200(2)(a) provides that private roads “shall be constructed with an all-weather
16 driveable surface of at least 16 feet * * *.” In order to partition her land, the applicant must
17 obtain a variance to CCC 3.01.200(2)(a) because she cannot improve the width of Lynn Lane
18 to county standards due to the restrictions of the stipulated judgment. A variance may be
19 obtained if all four of the circumstances described in CCC 3.01.220 exist.²

¹ The applicant below did not intervene in this appeal, and the county did not file a response brief.

² CCC 3.01.220 provides:

“A variance may be granted only in the event that all the following circumstances exist:

- “(1) Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same vicinity and result from lot size or shape, topography, or other circumstances over which the owners of the property since the enactment of this division have no control.
- “(2) The variance is necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the vicinity of the subject property.

1 Under the first and second assignments of error, petitioners argue that CCC
2 3.01.220(2) is not satisfied because the variance is not “necessary for the preservation of a
3 property right of the applicant substantially the same as owners of other property in the
4 vicinity” of applicant’s property.³ According to petitioners, the county misconstrued the
5 stipulated judgment to create the kind of “property right” identified in CCC 3.01.220(2). The
6 county’s findings state:

7 “The Stipulated Judgment and Decree * * * allows the applicant a residence
8 on Tax Lots 700, 1700, and 600. Generally the placement of these residences
9 would not be allowed unless the variance were granted and a partition
10 subsequently authorized. This would allow the applicant to use Lynn Lane in
11 the same way as the other property owners on that road.” Record 19.

12 The above findings are inadequate to demonstrate compliance with CCC 3.01.220(2).
13 For purposes of this opinion, we assume that CCC 3.01.220(2) would be satisfied if the
14 applicant could demonstrate that under applicable county land use laws the owners of other
15 properties “in the vicinity” have a “property right” to seek approval to partition their land and
16 to construct dwellings on resulting parcels, without first obtaining a variance,
17 notwithstanding the current condition of Lynn Lane. However, the findings make no attempt
18 to establish that such is the case.⁴

19 The first and second assignments of error are sustained.

“(3) The variance would not be materially detrimental to the purposes of this division, or to property in the vicinity of the subject property, or otherwise conflict with the objectives of any county plan or policy.

“(4) The variance requested is the minimum variance which would alleviate the hardship.”

³ We refer to the criteria set out in footnote 2 throughout this opinion.

⁴ The purported source of the only property right that the findings identify (placement of three dwellings on three existing tax lots) is the stipulated judgment and decree. We have no reason to believe the stipulated judgment and decree extends such a property right to other property owners in the vicinity who were not parties to the action that led to the stipulated judgment and decree, and the findings do not take that position.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioners argue that CCC 3.01.220(1) is not satisfied because “exceptional or
3 extraordinary circumstances” do not apply to the property that result from “lot size or shape,
4 topography, or other circumstances over which the owners of the property * * * have no
5 control.” According to petitioners, the county erred by finding that the restrictions of the
6 stipulated judgment constitute such exceptional or extraordinary circumstances. The
7 county’s findings state:

8 “The exceptional and [extra]ordinary circumstances are [the steepness of the
9 incline and the stipulated judgment]. The special circumstances that do apply
10 to [the applicant] and do not apply to other properties in the same vicinity
11 relate to the Stipulated Judgment and Decree which allows applicant to use
12 Lynn Lane but specifically prohibits the widening of the roadbed of Lynn
13 Lane. The applicant has no control over changing the court order and it is a
14 matter which is *res judicata*.” Record 19.

15 Initially, the steepness of the incline is not an exceptional or extraordinary
16 circumstance that does not apply to other property in the vicinity. The entire vicinity is
17 characterized by steep inclines and terrain. The county primarily relies on the stipulated
18 judgment to satisfy this criterion. Although we do not see that the applicant has no control
19 over changing the stipulated judgment through further negotiations, even if this were the
20 case, the stipulated judgment is hardly a circumstance over which the applicant had no
21 control. To the contrary, the applicant engaged in protracted negotiations with Wraith and
22 eventually agreed to the stipulated judgment that prevents her from improving Lynn Lane to
23 the county road standards that are necessary to partition her property. Finally, the decision
24 also appears to find that the exceptional circumstances are the need for a variance from the
25 road standards. The need for a variance cannot serve as the exceptional circumstance
26 justifying a variance. *Elder v. Douglas County*, 33 Or LUBA 276, 279-80 (1997).

27 Under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710
28 (1992), a local government may be able to interpret traditional variance standards differently
29 than they have traditionally been interpreted. However, the local government must articulate

1 such interpretations in its decision. *Bates v. City of Cascade Locks*, 38 Or LUBA 349, 351-
2 52 (2000). In the present case, the county makes no attempt to interpret its ordinance. In the
3 absence of such an interpretation, the county’s decision is not sufficient to demonstrate that
4 CCC 3.01.220(1) is satisfied.

5 The third assignment of error is sustained.

6 **FOURTH, FIFTH, AND SIXTH ASSIGNMENTS OF ERROR**

7 Petitioners argue that the county misconstrued CCC 3.01.220(3) in concluding that
8 the variance “would not be materially detrimental to the purposes of this division, or to
9 property in the vicinity of the subject property, or otherwise conflict with the objectives of
10 any county plan or policy” and that the findings in support of this conclusion are not
11 supported by substantial evidence.

12 Initially, petitioners contend that granting a variance to the county road standards for
13 private roads would be materially detrimental to the purpose of, and conflict with, the
14 objectives of the county policy requiring that roads serving new development meet minimum
15 road standards. Although the CCC establishes minimum road standards, it also allows
16 variances from those standards under certain circumstances. If a deviation from a particular
17 standard were sufficient, in and of itself, to demonstrate material detriment to the purpose or
18 objective of that standard, then a variance could never be obtained. The mere fact that a
19 requested variance would result in a specific standard not being met does not establish
20 material detriment to the purpose or objective of that standard.

21 Petitioners also challenge the evidentiary support for the county’s findings that the
22 requested variance would not be materially detrimental to the safety of other property owners
23 in the vicinity. According to petitioners, the county’s findings at Record 19 that Lynn Lane
24 is “at least 16 feet wide in most places” and that vehicles travelling in opposite directions
25 “can safely pass each other” are not supported by substantial evidence.

1 Substantial evidence is evidence a reasonable person could rely on in reaching a
2 decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). The only
3 evidence the decision relies on to determine that Lynn Lane is generally 16 feet wide is a
4 hand drawn diagram, apparently submitted by the applicant. Record 19, 123. Petitioners
5 testified that Lynn Lane is less than 16 feet wide in most places, and this testimony is
6 supported by the county roadmaster’s report, which states that “[t]he existing 12 to 14 foot
7 wide road is insufficient to permit standard sized sedans and pickups to easily pass when
8 head to head encounters occur.” Record 81. The decision does not explain why the county
9 disregarded the conflicting evidence in favor of the hand drawn diagram, and we will not
10 conduct an unassisted search of the record for such evidence on behalf of the county when
11 neither the county nor the applicant appear before LUBA. *Eckis v. Linn County*, 110 Or App
12 309, 313, 821 P2d 1127 (1991); *Calhoun v. Jefferson County*, 23 Or LUBA 436, 439 (1992).
13 We do not believe a reasonable person could conclude that Lynn Lane is 16 feet wide in most
14 places, based on the above-described evidence.

15 In determining that the variance was not materially detrimental to other property
16 owners in the vicinity, the county appears to have based its decision in part on its finding that
17 many other substandard roads are in use throughout the county.

18 “The [commissioners find] that arguments from opponents regarding safety
19 are over-stated. It finds that Lynn Lane is in better shape and safer than many
20 of the other roads in the area.” Record 19.

21 In making this determination, the commissioners compared Lynn Lane to other substandard
22 roads.⁵ The issue, however, is not whether Lynn Lane is just as bad as other existing
23 substandard roads. Rather the question is whether a substandard Lynn Lane, with the
24 additional traffic that will result from the variance, is materially detrimental to the purposes

⁵ Commissioner Olds stated: “I don’t believe [Lynn Lane is] any worse or better than others.” Petition for Review, Appendix 123. Commissioner Roberts stated: “[O]ther roads in the county * * * seem like to me between 12 and 14 feet.” *Id.* at 114.

1 of the ordinance or to property in the vicinity, or otherwise conflicts with county objectives.
2 The county’s findings are inadequate to establish that CCC 3.01.220(3) is satisfied.

3 The fourth, fifth, and sixth assignments of error are sustained, in part.

4 **SEVENTH AND EIGHTH ASSIGNMENTS OF ERROR**

5 Petitioners argue that CCC 3.01.220(4) is not satisfied because the requested variance
6 is not “the minimum variance which would alleviate the hardship.” According to petitioners,
7 even if a variance to the 16-foot width requirement were granted, the applicant should still be
8 required to provide “an all-weather driveable surface.” CCC 3.01.200(2)(a). Petitioners
9 argue that the existing roadbed of Lynn Lane has deteriorated to the point that it no longer
10 qualifies as “an all-weather driveable surface” within the meaning of CCC 3.01.200(2)(a).⁶
11 The staff report prepared for the commissioners recommended that if a variance to the 16-
12 foot width requirement were granted, the applicant should nonetheless improve the existing
13 roadbed to satisfy the “all-weather driveable surface” requirement. Record 67. The county’s
14 decision does not address this issue and does not impose any condition requiring
15 improvement of the roadway surface. Record 20. It is not entirely clear whether the county
16 granted a variance to any applicable requirements that the road surface be improved as well
17 as width requirements, but the decision appears to grant a variance to both. *Id.* Assuming a
18 variance is granted to both requirements, we agree with petitioners that the decision does not
19 explain why granting a variance to the requirements of CCC 3.01.200(2)(a) is consistent with
20 CCC 3.01.220(4).

21 The seventh and eighth assignments of error are sustained.

⁶ Improving the roadbed to meet the requirements of CCC 3.01.200(2)(a) would apparently involve adding additional gravel and grading portions of the road.

1 **NINTH, TENTH, ELEVENTH, TWELFTH, AND THIRTEENTH ASSIGNMENTS**
2 **OF ERROR**

3 Under these five assignments of error, petitioners argue that the county erred by
4 (1) conducting an executive session and discussing this matter with the applicant during the
5 executive session without notice to petitioners, (2) engaging in *ex parte* contacts with the
6 applicant, (3) failing to disclose such *ex parte* contacts, (4) failing to give petitioners an
7 opportunity to respond to the *ex parte* contacts, and (5) failing to modify the decision based
8 on new evidence that was provided by the applicant. The new evidence indicates that the
9 applicant may have an alternative means of access to her property that would eliminate the
10 need to utilize Lynn Lane and, therefore, eliminate the need for the variance. Prior to oral
11 argument, petitioners and the county stipulated that the disputed contacts between the
12 applicant and the commissioners occurred at a public meeting rather than at an executive
13 session. However, the county concedes that petitioners were not given notice of the public
14 meeting.

15 At oral argument, counsel for petitioners withdrew these assignments of error based
16 on the stipulation and, therefore, we do not reach the merits of petitioners' arguments.⁷

17 **RELIEF REQUESTED**

18 Petitioners argue that the county's decision should be reversed because it violates
19 CCC 3.01.220 and is prohibited as a matter of law. OAR 661-010-0071(1)(c). We will
20 reverse a local government's decision only when it is wrong as a matter of law and cannot be
21 corrected by additional proceedings on remand. *Cedar Mill Creek Corr. Comm. v.*
22 *Washington County*, 38 Or LUBA 333, 342 (2000); *19th Street Project v. City of the Dalles*,
23 20 Or LUBA 440, 449 (1991). Although petitioners may well be correct that CCC 3.01.220

⁷ Were we to consider these assignments of error, it would appear that the county's *ex parte* discussions with the applicant, without also disclosing the substance of those discussions to petitioners and providing an opportunity for rebuttal or comment, would provide an additional basis for remand. *Smith v. City of Phoenix*, 28 Or LUBA 517, 520 (1995).

1 cannot be satisfied in this case, neither the county nor the applicant appeared to defend the
2 decision. We are not prepared to hold as a matter of law that the decision could not be
3 corrected on remand. *DLCD v. Wallowa County*, 37 Or LUBA 105, 121 (1999).

4 The county's decision is remanded.