

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

3
4 GEORGE MARSHALL,
5 *Petitioner,*

6
7 vs.

8
9 WASHINGTON COUNTY,
10 *Respondent,*

11
12 and

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14 RICHARD VIAL, PAULA VIAL
15 and AR VIAL ASSOCIATES PC.
16 *Intervenors-Respondents.*

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18 LUBA No. 2011-034

19
20 FINAL OPINION
21 AND ORDER

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23 Appeal from Washington County.

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25 Roger A. Alfred and Michael C. Robinson, Portland, filed the petition for review.
26 With them on the brief was Perkins Coie LLP. Michael C. Robinson argued on behalf of
27 petitioner.

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29 No appearance by Washington County.

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31 Kevin V. Harker, Portland, filed the response brief and argued on behalf of
32 intervenors-respondents. With him on the brief was Vial Fotheringham LLP.

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

36
37 REMANDED

08/02/2011

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

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NATURE OF THE DECISION

Petitioner appeals a county hearings officer decision that approves intervenors’ request to convert an existing dwelling into a farm stand.

MOTION TO INTERVENE

Richard Vial, Paula Vial, and AR Vial Associates PC (intervenors), the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in intervenors’ response brief. OAR 661-010-0039. The motion is granted.

FACTS

Intervenors own a home that was constructed in 1939. That house is located on a .3 acre lot located adjacent to the southeast corner of a much larger parcel also owned by intervenors and adjacent to SW River Road. In a separate decision that is not before us in this appeal, the county approved a property line adjustment that has the effect of relocating the .3 acre lot within the larger adjoining lot to an interior location some distance from SW River Road. Intervenors propose to (1) replace the 1939 dwelling located next to SW River Road with a new dwelling on the relocated .3 acre lot, and (2) convert the 1939 dwelling into a farm stand. The challenged decision approves the requested replacement dwelling and conversion of the existing dwelling to a farm stand.

SW River Road runs east and west as it passes the 1939 dwelling. Petitioner’s driveway onto SW River Road is located a short distance east of the existing driveway that serves the 1939 dwelling. A short distance further east of the 1939 dwelling, SW River Road has a sight-obscuring vertical hump that blocks the view of the 1939 dwelling from west-bound traffic until that traffic passes over the hump in the vicinity of the 1939 dwelling.

1 Pursuant to the property line adjustment decision that is not before us in this appeal,
2 and the decision that is before us in this appeal, the existing driveway access for the 1939
3 dwelling will be closed. Record 53. The access from SW River Road to the new dwelling
4 and the proposed farm stand will be from an existing north/south driveway easement that
5 intersects SW River Road approximately 500 feet west of the 1939 dwelling. From that
6 north/south existing driveway easement two new east/west driveways will be constructed
7 across new east/west easements that will parallel SW River Road. One of those new
8 east/west easements will provide access to the replacement dwelling and one of the new
9 east/west easements will provide access to the proposed farm stand. By relocating the SW
10 River Road entrance for the proposed farm stand 500 feet to the west, the farm stand entrance
11 will have approximately 500 feet of sight distance to the east. The existing entrance to the
12 1939 dwelling, which is to be closed, has much less sight distance to the east due to the hump
13 in SW River Road.

14 **ASSIGNMENT OF ERROR**

15 Washington County Community Development Code (CDC) 501-9 sets out the limited
16 “Public Facility and Services Standards” that apply outside urban growth boundaries. CDC
17 501-9.3, a subsection of CDC 501-9, provides in part:

18 “For the purpose of determining impact and adequacy of public roads, Section
19 501-8.5 F. (Sight Distance), 501-8.5 H. (Road Standards), and 501-8.4
20 (Dedication of Right-of-way) of this article shall apply * * *. *However, in all*
21 *instances, traffic safety issues shall be addressed. * * **” (Emphasis added.)

22 This appeal concerns the CDC 501-9.3 language emphasized above.

23 In his testimony below, petitioner testified that the traffic that will be attracted to the
24 farm stand in the vicinity of the hump in SW River Road will create traffic safety issues for
25 several reasons. First, he testified that cars tend to speed in this area. Second, for westbound
26 traffic the hump will block the view of the farm stand until cars are very close to the farm
27 stand, creating a likelihood that such cars will brake when the occupants see the farm stand,

1 with the result that cars may be hit by fast moving traffic that is following close behind those
2 cars. Third, when eastbound traffic approaches the farm stand that traffic will have already
3 passed the entrance 500 feet to the west and will likely use petitioner's driveway to turn
4 around and return west to the entrance. We set out some of petitioner's testimony below:

5 "[M]y concern is the safety issue, and no one knows the safety issue there in
6 that particular hump in the road better than [intervenors]. * * * The kids there
7 go about a hundred miles an hour over that hump to try and 'catch air.' * * *
8 If you are going west, coming down River Road, coming over that hump, and
9 an unsuspecting person sees what's going on, they're going to brake, and a
10 person behind the[m] going 55 mph or more just simply isn't going to have
11 time to brake. I just know it's going to be a major problem. Coming the other
12 way is a similar problem in that if they come past the new driveway at 150
13 feet [sic should be 550 feet] from the farmhouse, not necessarily looking for
14 what's there, they come past that and then see the farm stand going east, and
15 then slow down, now you've got a similar major problem. There is no
16 driveway to turn in there except mine. So there's no question in my mind,
17 somebody who finds [the farm stand] attractive or wants to look into [the farm
18 stand], the only thing they can do is to turn into my driveway, [and] either
19 park and go into the farmstand, or try to back out into River Road. It is
20 simply a major, major traffic problem. * * * Petition for Review, Extract of
21 Record 14.

22 In her decision, the county hearings officer applies CDC 501-9 and appears to
23 recognize the traffic safety issues petitioner raised:

24 "The appellant has raised concerns regarding traffic safety with the
25 establishment of the farm stand. He has asserted that the sight distance
26 standards in the CDC relate to the distance from the actual farm stand
27 building, rather than the sight distance from the access to that use. He points
28 out that there is a dangerous 'hump' in SW River Road right where the farm
29 stand (existing dwelling) is located, and that accidents will be caused when
30 drivers slow or stop when they see the farm stand. He points out that drivers
31 traveling west on SW River Road will put on their brakes when they see the
32 farm stand and they will be rear ended. He is also concerned that drivers
33 travelling east will miss the driveway because it will be 500 feet before the
34 actual farm stand, so they will turn into his driveway, which is just east of the
35 existing dwelling, in order to turn around." Record 20.

36 The hearings officer goes on to explain that the CDC 501-8.5(F) sight distance requirements
37 are measured at the access point onto SW River Road (in this case approximately 500 feet

1 west of the proposed farm stand) and that the CDC sight distance standards are met.¹
2 Petitioner does not assign error to those findings.

3 Petitioner’s assignment of error contends that the hearings officer erred in this case
4 by treating the safety issues petitioner raised as solely a question of whether the CDC
5 501.8.5(F) sight distance standards are met:

6 “The appellant has raised safety concerns regarding the operation of a farm
7 stand at the proposed location on SW River Road. However, the sight
8 distance requirements of the CDC do not apply to the replacement of a
9 dwelling or conversion to a farm stand that are the subject of this review.
10 Even if the sight distance requirements did apply, they have been satisfied by
11 moving the access road to the west. The only other private road standards,
12 those in CDC Section 409, do not address the issues raised by the appellant.
13 Record 21.

14 The hearings officer appears to have understood the traffic safety issues that petitioner raised
15 to be irrelevant under CDC 501-8.5(F), which sets a sight distance standard for the driveway
16 access to be located 500 feet west of the 1939 dwelling, but does not set a sight distance
17 standard for the 1939 dwelling itself, since the existing 1939 dwelling driveway will not be
18 used and is to be closed. The hearings officer apparently was either unaware of the CDC
19 501-9.3 requirement that “in all instances, traffic safety issues shall be addressed,” or did not
20 understand petitioner to raise traffic safety issues that were independent of CDC 501-8.5(F)
21 sight distance requirements, or both.

22 We agree with petitioner that the hearings officer’s decision must be remanded. The
23 cited potential traffic safety issue of eastbound traffic driving past the new entrance for the
24 proposed farm stand and then parking or turning around in petitioner’s driveway to return to
25 the entrance is only partially a sight distance question and is separate from the CDC 501-
26 8.5(F) driveway sight distance standards. The potential traffic safety issue with westbound

¹ CDC 501-8.5(F) sets intersection sight distance standards for driveways that access public roads, based on vehicular speed of the public road. Vehicular speed is computed in three different ways under the CDC. The hearings officer found that CDC 501-8.5(F) requires that the driveway that intersects with River Road 500 feet west of the proposed farm stand have 550 feet of sight distance.

1 traffic stopping suddenly is also only partially a sight distance question, and is unrelated to
2 the CDC 501-8.5(F) driveway sight distance standards. Moving the existing driveway access
3 onto SW River Road 500 feet to the west to comply with CDC 501-8.5(F) is actually the
4 cause of the first potential traffic safety issue for eastbound traffic. The hearings officer's
5 decision acknowledges the applicability of CDC 501-9 but does not specifically identify any
6 of the subsections of CDC 501-9.

7 It appears to us that petitioner raised four related traffic safety issues: (1) speeding
8 traffic in the area, (2) the hump in SW River Road, (3) the likelihood that westbound traffic
9 will brake suddenly when that traffic first sees the farm stand, and (4) the likelihood that
10 eastbound traffic will overshoot the relocated entrance to the west and create traffic safety
11 issues by turning around in petitioner's driveway to access the farm stand. As we have
12 already noted, CDC 501-9.3 requires that "in all instances, traffic safety issues shall be
13 addressed." It is not clear to us what substantive standard CDC 501-9.3 imposes beyond the
14 requirement that traffic safety issues must be "addressed." But at a minimum, the traffic
15 safety issues that petitioner raised must be addressed. We express no view regarding
16 whether there are adequate answers or solutions for each of those traffic safety issues or
17 whether CDC 501-9.3 requires that the county assure any particular level of traffic safety.
18 However, because the hearings officer's decision acknowledges those issues, but does not
19 address them, remand is required.

20 Finally, under ORS 197.763(1) and 197.835(3), our review is limited to issues raised
21 with adequate specificity below. Intervenors argue petitioner waived the traffic safety issues
22 he raises in this appeal by not raising the issues with sufficient specificity to prevent unfair
23 surprise. We conclude that petitioner raised the issues he presents in this appeal with
24 sufficient specificity. It is true that petitioner does not specifically cite subsection CDC 501-
25 9.3. However, the hearings officer was clearly aware of CDC 501-9 because she cites and
26 addresses CDC 501-9 generally in her opinion. ORS 197.763(1) and 197.835(3) do not

1 require the precision necessary to preserve issues in a judicial proceeding, and those statutes
2 do not require that petitioner cite the specific subsection of CDD 501-9 that he relies on.
3 Petitioner used the operative language “traffic safety” in asserting that there were unresolved
4 traffic safety issues and the hearings officer was clearly aware that CDC 501-9 applied.
5 Petitioner’s reference to the operative term “traffic safety” was sufficient to put the hearings
6 officer and intervenors on fair notice that the identified traffic safety issues needed to be
7 addressed under CDC 501-9.3. *Boldt v. Clackamas County*, 107 Or App 619, 624, 813 P2d
8 1078 (1991) (petitioner’s reference in his local presentation to operative term “hardship” was
9 sufficient to preserve issue on appeal under a code standard requiring a finding of “an
10 extraordinary, unnecessary and unreasonable hardship”); *Graser-Lindsey v. City of Oregon*
11 *City*, 56 Or LUBA 504, 510 (2008) (“A petitioner adequately raises an issue under ORS
12 197.763(1) and 197.835(3) by citing the relevant legal standard, presenting argument that
13 includes the operative terms of the legal standard, or taking other actions to raise the issue
14 such that the city knows or should know that the issue is one that needs to be addressed in its
15 decision.”)

16 The county’s decision is remanded.