

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

3
4 DOUGLAS ZIRKER, VIVIANN ZIRKER,
5 and PATRICIA NIPPERT,
6 *Petitioners,*

7
8 vs.

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10 CITY OF BEND,
11 *Respondent,*

12
13 and

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15 STEIDL ROAD, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2008-217

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Bend.

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25 William Hugh Sherlock, Eugene, filed a joint petition for review and represented
26 petitioners Douglas Zirker and Vivian Zirker. With him on the brief were Hutchinson Cox
27 Coons DuPriest Orr & Sherlock PC and Pamela Hardy.

28
29 Pamela Hardy, Bend, filed a joint petition for review and argued on behalf of
30 petitioner Patricia Nippert. With her on the brief were William Hugh Sherlock and
31 Hutchinson Cox Coons DuPriest Orr & Sherlock PC.

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33 Mary A. Winters, Bend, filed a response brief and represented respondent.

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35 Helen L. Eastwood, Bend, filed a response brief and argued on behalf of intervenor-
36 respondent. With her on the brief was Bryant Lovlien & Jarvis PC.

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38 HOLSTUN, Board Member; RYAN, Board Member, participated in the decision.

39
40 BASSHAM, Board Chair, did not participate in the decision.

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42 AFFIRMED

05/07/2009

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

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NATURE OF THE DECISION

Petitioners appeal a city decision that (1) waives a special setback requirement and road improvement requirements and (2) grants variances to those requirements.

MOTION TO INTERVENE

Steidl Road, LLC, the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

MOTION TO ALLOW REPLY BRIEF

Petitioners move for permission to file a reply brief, to respond to new issues in the city’s and intervenor’s response briefs. The motion is granted.

FACTS

A. Introduction

City decisions concerning the triplex that is at issue in this appeal have been appealed to LUBA twice before. *Tallman v. City of Bend*, 56 Or LUBA 398 (2008) (*Tallman*); *Zirker v. City of Bend*, 55 Or LUBA 188 (2007) (*Zirker I*). The decision that is before us in this appeal is the city’s decision following our remand in *Tallman*. While these appeals have been pending before LUBA, construction of the triplex has been completed.

Pioneer Park is located on the east side of the Deschutes River a short distance north of the city’s central business district. The triplex has been constructed in a mature residential area located west of Pioneer Park, on the west side of the Deschutes River. Steidl Road is two blocks long and runs north from Portland Avenue to Saginaw Avenue through the eastern part of that residential area. The Steidl Road pavement is approximately 24 feet wide and the right of way is 40 feet wide. As currently developed, Steidl Road lacks curbs and sidewalks and room for on-street parking. Under current city road standards, a 60-foot right

1 of way and 36-foot wide pavement with curbs and sidewalks would be required.¹ Such a
2 road would allow on-street parking.

3 The subject property and other nearby properties are zoned Urban Medium Density
4 Residential (RM). A single-family dwelling occupied the subject property for many years.
5 That single-family dwelling was removed and the disputed triplex was constructed in its
6 place. Under RM zoning, other lots in the area that are currently developed with single
7 family dwellings similarly could be redeveloped at higher densities, with duplexes, triplexes
8 or multi-family housing. Petitioners contend that this potential for redevelopment at higher
9 residential densities requires that the city enforce Bend Development Code (BDC)
10 requirements that would require that the disputed triplex be set back a sufficient distance to
11 allow Steidl Road to be improved to current city standards and that the applicant be required
12 to dedicate additional right of way and make street improvements along the section of Steidl
13 Road that passes in front of the triplex.² The city and intervenor disagree that the disputed
14 triplex or the additional development that is potentially allowable along this two-block
15 section of Steidl Road creates a need to improve Steidl Road to current city standards.

16 **B. *Zirker I***

17 The city first approved the disputed triplex by issuing a “Type I” administrative
18 decision that approved the triplex without providing a public hearing or any opportunity for

¹ Under the table that appears at Bend Development Code 3.4.200(F), the minimum right of way for a local street is 60 feet, and the minimum pavement width is 36 feet. A six-foot planter strip is required, along with a six-foot sidewalk. Bike lanes are not required.

² At times during the earlier appeals petitioners have appeared to argue that intervenor should either be denied permission to construct the triplex or be required to improve the entire two-block length of Steidl Road to current city standards. We now understand petitioners to concede that even if the BDC imposes such a requirement, that requirement in this case would likely be far more than “roughly proportional” to any impact that could be attributed to the disputed triplex, and therefore violate the takings clause of the Fifth Amendment of the U.S. Constitution under *Dolan v. City of Tigard*, 512 US 734, 114 S Ct 2309, 120 L Ed 2d 304 (1994). Petition for Review 21-22. We understand petitioners to contend that under relevant BDC standards, intervenors should be required to improve the portion of Steidl Road that borders the frontage of the subject property to current city standards, dedicate sufficient right of way to result in the currently required 60-foot right of way and set the triplex back at least 40 feet from the center line of Steidl Road.

1 public comment. That Type I decision also did not require that intervenor dedicate
2 additional right of way to bring Steidl Road up to current city standards or require that
3 intervenor improve the subject property's Steidl Road frontage to city standards. After
4 receiving city approval for the triplex, intervenor began pouring the foundation for the
5 triplex. Photographs in the record show the foundation being poured on June 13, 2007.
6 Record 292. When neighbors noticed the construction activity, an appeal was filed with
7 LUBA. On July 19, 2007, petitioners in *Zirker I* also filed a motion to stay the city's
8 decision pending final resolution of that LUBA appeal. Photographs in the record show that
9 by July 24, 2007, construction of the exterior walls of the triplex was substantially complete.
10 *Id.* The motion for stay was denied by LUBA on October 10, 2007. Intervenors continued
11 with construction of the triplex and as previously noted construction is now complete.

12 In *Zirker I* LUBA remanded the city's Type I decision. The city's decision in *Zirker*
13 *I* was not supported by findings, and we ultimately concluded that without findings we could
14 not agree with intervenor that the challenged decision was properly reviewed as a Type I
15 decision. Intervenor argued in *Zirker I* that the BDC standards that petitioners relied on to
16 argue that additional right of way and improvements to Steidl Road were required did not
17 apply to the disputed Type I triplex approval decision. LUBA left open the possibility that
18 the city might be able to adopt findings to take and defend that position, but rejected
19 intervenor's arguments based on the lack of any city findings to that effect. Our decision in
20 *Zirker I* was not appealed.

21 **C. *Tallman***

22 Following our remand in *Zirker I*, the city adopted findings in an attempt to explain
23 its view that under the BDC, the disputed triplex approval decision was properly approved as
24 a Type I decision and that the discretionary BDC development standards identified by
25 petitioners did not apply to Type I triplex approval decisions. We rejected the city's
26 rationale in *Tallman*. Our decision in *Tallman* was not appealed.

1 **D. The Proceedings Following *Tallman***

2 Following our decision in *Tallman*, intervenor filed an application for site plan
3 approval and for variances from a special setback requirement and right of way width and
4 road improvement standards. The city land use hearings officer approved the application. In
5 doing so the hearings officer found that the city engineer properly waived the special setback
6 and roadway improvement standards and, in addition, found that intervenor’s application
7 demonstrated compliance with city variance criteria. Record 33-76. The city council
8 declined to review the hearings officer’s decision. Record 4. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 **A. The BDC 3.5.300 Special Setback**

11 The RM zone requires a 10-foot setback from the front property line. The subject
12 property’s front property line adjoins the existing 40-foot Steidl Road right of way. The
13 triplex that has been constructed on the subject property complies with the RM zone’s 10-
14 foot front setback requirement.

15 BDC 3.5.300 is entitled “Special Setbacks.” BDC 3.5.300(A) explains the purpose of
16 the special setback:

17 “The purpose of this section is to ensure that adequate right of way will be
18 available for the appropriate street improvements as the city grows and that
19 there will be no conflicts with the built environment.”

20 BDC 3.5.300(B) establishes a special setback of “30 feet” from the center line of local streets
21 like Steidl Road. Under BDC 3.5.300, the RM zoning district’s 10-foot set back must be
22 measured from this special setback, rather than the front property line. The front porches and
23 the north front corners of all three triplexes intrude into the RM zoning district’s 10-foot
24 setback if it is measured from the special setback instead of the front property line. Record
25 666.

26 In their first assignment of error, petitioners contend the hearings officer erred by
27 granting intervenors a variance to BDC 3.5.300. In their third assignment of error,

1 petitioners challenge the City Engineer’s waiver of the special setback. We address their
2 challenge to the variance here and their challenge to the City Engineer’s waiver under our
3 discussion of the third assignment of error.

4 **B. Failure to Preserve the Special Setback Issue**

5 Intervenor first argues that petitioners never mentioned the BDC 3.5.300 special
6 setback in *Zirker I* and *Tallman* and that they have therefore waived their right to challenge
7 the city’s decision to grant a variance to the BDC 3.5.300 special setback requirement.

8 Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), issues that were
9 resolved in an earlier appeal to LUBA, or could have been raised but were not, cannot be
10 raised in a subsequent appeal of the decision on remand. In *Zirker* and *Tallman* the central
11 issue was whether *any* discretionary approval standards in the BDC applied to the disputed
12 Type I decision. Intervenor and the city took the position that no discretionary approval
13 standards applied, with the result that the city’s Type I decision was not a land use decision
14 subject to LUBA review and petitioners had no right to participate in the city’s local
15 proceedings that led to the city’s first decision to approve the triplex. It was not until our
16 decision in *Tallman* that the city provided notice and an opportunity for petitioners to appear
17 and oppose the proposal. The city’s first notice of hearing listed BDC Chapter 3.5 among the
18 “Applicable Criteria.” Record 391. Intervenor submitted a burden of proof following our
19 remand in *Tallman*. In that burden of proof, intervenor identifies the BDC 3.5.300 special
20 setbacks as an applicable criterion and requests approval of a variance from the special
21 setbacks. Given this course of events, intervenor may not now claim that petitioners waived
22 their right to challenge the city’s variance to the BDC 3.5.300 setback. Even if it might have
23 been theoretically possible for petitioners to comb through the BDC and identify BDC
24 3.5.300 as among the approval standards that the city should have applied in reaching its
25 decision in *Zirker* and *Tallman*, we do not believe petitioners waived their right to challenge

1 the city’s decision to waive and grant variances to the BDC 3.5.300 special setback in this
2 appeal.

3 **C. The Class B Variance**

4 The City of Bend has several different classes of variances. Intervenor sought a Class
5 B variance to the BDC 3.5.300 special setback standard. The Class B variance criteria
6 appear at BDC 5.1.300(B).³ An applicant for approval of a Class B variance must
7 demonstrate that the request complies with all six of the criteria set out at BDC 5.1.300(B).
8 *See* n 3. Petitioners contend that intevenor’s application does not comply with any of those
9 six criteria. We need only address petitioners’ challenge to the “hardship” criterion at BDC
10 5.1.300(B)(2), which provides:

11 “A hardship exists that is peculiar to the nature of the requested use, lot size or
12 shape, topography, sensitive lands, or other similar circumstances related to
13 the property or use over which the applicant has no control, and which are not

³ BDC 5.1.300(B) provides:

“**Class B Approval Criteria.** The City shall approve, approve with conditions, or deny an application for a variance based the following criteria:

- “1. The proposed variance will not be materially detrimental to the stated purposes of the applicable Code requirements listed herein and to other properties in the same land use district or vicinity;
- “2. A hardship exists that is peculiar to the nature of the requested use, lot size or shape, topography, sensitive lands, or other similar circumstances related to the property or use over which the applicant has no control, and which are not applicable to other properties in the vicinity (e.g., the same land use district);
- “3. The use proposed is permitted within the underlying zoning district, and City standards will be maintained to the greatest extent that is reasonably possible while permitting reasonable economic use of the land;
- “4. Existing physical and natural systems, such as but not limited to, traffic, drainage, natural resources, and parks, will not be adversely affected any more than would occur if the development occurred in compliance with the subject Code standard;
- “5. The hardship is not self-imposed and such conditions and circumstances do not merely constitute pecuniary hardship or inconvenience; and
- “6. The variance requested is the minimum variance that would alleviate the hardship.”

1 applicable to other properties in the vicinity (e.g., the same land use
2 district)[.]”

3 Although BDC 5.1.300(B)(2) could be clearer, it requires that intervenor show that
4 there is something about the “nature of the requested use, lot size or shape, topography,
5 sensitive lands, or other similar circumstances related to the property” such that intervenor
6 would suffer a “hardship” if the city required the triplex to comply with the special setback.
7 A finding of hardship under BDC 5.1.300(B)(2) is barred if intervenor had control over those
8 factors or those factors also apply to other properties in the vicinity. As the Court of Appeals
9 explained in *Kelley v. Clackamas County*, 158 Or App 159, 163-65, 973 P2d 916 (1999),
10 under either the commonly understood meaning of the term “hardship” or appellate court
11 decisions construing that term in the variance context, a hardship must entail “suffering or
12 privation” and is not satisfied if complying with the land use law will only result in
13 inconvenience.

14 Before turning to petitioners’ challenge to the city’s findings regarding the BDC
15 5.1.300(B)(2) hardship criterion, we note that the hearings officer specifically found that the
16 fact that intervenor chose to complete construction of the triplex while these appeals were
17 pending could not be considered in applying BDC 5.1.300(B)(2). Specifically, the hearings
18 officer found that the fact that intervenor might have to remove parts of the front porches and
19 part of the triplex units themselves if the variance is not granted cannot play a role in
20 determining whether the BDC 5.1.300(B)(2) hardship criterion is satisfied in this case.
21 Record 67-68. We understand petitioners to agree with that finding and intervenor has not
22 assigned error to that finding. *See Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or
23 LUBA 653, 667, *aff’d* 193 Or App 822, 94 P3d 313 (2004) (under LUBA’s rules cross
24 assignments of error may be included in an intervenor-respondent’s brief). We therefore do
25 not consider whether the cost of removing the triplex units could be considered in applying
26 the BDC 5.1.300(B)(2) hardship criterion.

1 The hearings officer relied on the BDC 1.2 definition of “topographical constraint” to
2 conclude that requiring intervenor to comply with the special setback requirement would
3 result in a hardship.⁴ The hearings officer cited the existing substandard Steidl Road and the
4 existence of a large number of nearby properties on Steidl Road that include improvements
5 that are located close to Steidl Road as physical features (topography) that result in a
6 hardship to intervenor. Record 68.

7 We agree with petitioners that the hearings officer’s reasoning is fatally flawed. The
8 development that already exists within the special setback on nearby properties along with
9 the short length of Steidl Road and the limited potential for redevelopment of properties that
10 use Steidl Road for access may support a conclusion that requiring intervenor to comply with
11 the special setback would serve no practical purpose. We consider that question under the
12 third assignment of error. But the development on nearby properties that encroaches into the
13 special setback has no effect whatsoever on the difficulty intervenor would face in complying
14 with the special setback. As petitioners point out, any such difficulty likely would have to
15 arise from factors present on the subject property itself, and the subject property is flat and
16 was earlier developed with a single family dwelling that complied with the special setback
17 and has now been removed.

18 The hearings officer also cited the fact that the southern ¼ of the subject property is
19 not as deep as the northern ¾ of the property, in concluding that requiring intervenor to
20 comply with the special setback would result in a hardship. The hearings officer found that
21 intervenor is required “to meet the minimum density requirements of the RM zone” and the
22 hearings officer was uncertain whether the triplex could be redesigned to meet that minimum

⁴ BDC 1.2 includes the following definition of “topographical constraint:”

“**Topographical constraint** means where existing slopes, wetlands, water bodies, rock outcroppings, or *other physical features of a site*, which are not caused or created by the applicant or his or her agents, prevent conformance with a Code standard.” (Bold type in original; italics added.)

1 density requirement, keep the triplex unit garages accessible and meet site drainage
2 requirements. Record 69. The fundamental flaw in the hearings officer’s reasoning here is
3 that there is no minimum density requirement in the RM zone. As far as we can tell there
4 would be absolutely no problem with building a single family dwelling or duplex on the
5 subject property that complied with the special setback. Petitioners contend a redesigned
6 triplex is also possible.

7 We need not resolve the parties’ dispute over the feasibility of constructing a
8 redesigned triplex that would comply with the special setback. As far as the record shows, a
9 single-family dwelling or a duplex could be constructed on the subject property. Even if
10 intervenor could not site a redesigned triplex on the subject property without running afoul of
11 other development standards, intervenor’s inability to construct a triplex like the one that has
12 been built, as opposed to one of the other uses permitted in the RM zone, is not a “hardship”
13 within the commonly understood meaning of that term. *See Corbett/Terwilliger Neigh.*
14 *Assoc. v. City of Portland*, 19 Or LUBA 1, 14 (1990) (topographic constraints that prevent
15 maximizing development potential do not constitute a “practical difficulty or unnecessary
16 hardship”); *Hutmacher v. City of Salem*, 16 Or LUBA 187, 190 (1987) (same).

17 The first assignment of error is sustained.

18 **SECOND ASSIGNMENT OF ERROR**

19 **A. The Class C Variance**

20 Under BDC 3.4.200, intervenor would be required to dedicate an additional 10 feet of
21 right of way along the subject property’s frontage with Steidl Road.⁵ In addition, according

⁵ BDC 3.4.200(M) provides [w]henver existing rights-of-way adjacent to or within a tract are of less than standard width, additional rights-of-way shall be provided at the time of subdivision or site development, in conformance [with the BDC].” *See* n 1.

1 to petitioners, the BDC requires that intervenor “widen that stretch of pavement by
2 approximately six feet.” Petition for Review 22.⁶

3 Intervenor sought a Class C variance to avoid having to dedicate additional right of
4 way and to avoid having to improve Steidl Road to current city standards. Under BDC
5 5.1.400(A)(5), 5.1.400(B)(5) and 3.4.200(B), the approval criterion for a Class C variance to
6 transportation improvement requirements is as follows:

7 “Variances to the transportation design guidelines in this Section may be
8 granted by means of a Class C Variance, as governed by Chapter
9 5.1.400[(B)](5), Variance to Transportation Improvement Requirements. A
10 variance may be granted under this provision *only if a required improvement*
11 *is not feasible due to topographic constraints* or constraints posed by sensitive
12 lands or the project does not meet the exception standards listed herein.”
13 BDC 3.4.200(B) (emphasis added).

14 There are no sensitive lands on or near the property. There do not appear to be any
15 “exception standards.” The hearings officer again relied on his reasoning that the existing
16 substandard Steidl Road improvements and the encroachment of development closer than 30
17 feet to the center line of the existing road amount to topography that makes it “not feasible”
18 to require a 60-foot right of way and a 36-foot wide pavement with the required landscaping
19 and sidewalks. *See* n 1.

20 As was the case with the Class B variance, we agree with petitioners that the hearings
21 officer’s findings are erroneous. Again, the short length of Steidl Road, the limited

⁶ BDC 3.4.200(A) provides in part:

“No development shall occur unless * * * the following standards are met:

“1. Streets within or adjacent to a development shall be improved in accordance with the Bend Urban Area Transportation System Plan (TSP), provisions of this Chapter and other pertinent sections of this Code.

“* * * * *

“3. All new and/or existing streets and alleys shall be paved per the City of Bend Standards and Specifications document.”

1 development potential of properties that use that road for access and the historic
2 encroachment of development closer than 30 feet from the centerline of the existing road
3 may be sufficient bases upon which to conclude that no substantial purpose would be served
4 by widening the Steidl Road right of way and constructing a standard 36-foot wide street in
5 that right of way. But there is nothing about any of those factors that makes it infeasible for
6 intervenor to dedicate the required right of way or to construct the improvements necessary
7 to bring the section of Steidl Road that fronts the subject property up to current city
8 standards, and the hearings officer erred by concluding it is not feasible for intervenor to do
9 so.

10 This subassignment of error is sustained.

11 **B. BDC 3.4.100(E)**

12 Petitioners include a short argument concerning BDC 3.4.100(E), which in relevant
13 part provides: “No development shall occur unless required public facilities are in place or
14 guaranteed, in conformance with the provisions of this Code.” The argument does not add
15 anything to arguments that petitioners make elsewhere in their brief, and which we reject in
16 this opinion. We do not consider petitioners’ BDC 3.4.100(E) argument further.

17 This subassignment of error is denied.

18 **C. BDC 4.2.200(D)(5)**

19 Petitioners present the following argument concerning BDC 4.2.200(D)(5):

20 “* * * BDC 4.2.200(D)(5) mandates that before approving a site plan, the city
21 is required to ensure that ‘all required public facilities have adequate capacity
22 as determined by the City, to serve the proposed use.’ The term ‘public
23 facilities’ is defined in the [BDC] as ‘infrastructure improvements including
24 but not limited to water lines, sewer lines, **streets, curbs, sidewalks**, trails
25 and related facilities that are owned and maintained by the City of Bend.’
26 BDC 1.2 * * *.

27 “The only finding in the Hearings Officer’s decision under BDC
28 4.2.200(D)(5) addresses the flow capacity of nearby fire hydrants and baldly
29 asserts ‘the record reflects that all other public facilities have adequate
30 capacity to serve the proposed use.’

1 “Yet, Steidl Road does not have curbs or sidewalks. The street does not have
2 adequate capacity to accommodate any on-street parking without restricting
3 emergency vehicle access. The finding is therefore inadequate on its face. In
4 addition, Section 4.2 of the code was not subject to either variance request nor
5 is it within the purview of the transportation department to waive the adequate
6 capacity standards because that purported authority only applies to BDC
7 Chapter 3.0, not Chapter 4. Accordingly, the decision must be remanded for
8 this reason as well.” Petition for Review 24-25 (bold lettering in original).

9 The hearings officer found that there is adequate sewer and water capacity to serve
10 the property and that school capacity either exists or will exist to serve the property. With
11 regard to street capacity, the hearings officer found;

12 “The public street, Steidl Road, has adequate capacity to serve the proposed
13 use, even though it does not meet the standards in Table A for road width.
14 The street functions to provide access to the existing residences without
15 delays or safety hazards. The City already limits parking on one side of the
16 street to allow for emergency vehicle access. If necessary, the City may
17 require additional limitations for on-street parking.” Record 433.

18 We do not understand petitioners to challenge the hearings officer’s findings
19 regarding sewer, water or school capacity. Petitioners are correct that no variance was
20 sought or granted for BDC 4.2.200(D)(5). Petitioners appear to be correct that the City
21 Engineer lacks authority under BDC 3.4.100(A) to waive BDC 4.2.200(D)(5).⁷ But the
22 hearings officer found that the proposal *complies* with BDC 4.2.200(D)(5); he did not find
23 that that City Engineer waived BDC 4.2.200(D)(5). BDC 4.2.200(D)(5) is an “adequate
24 capacity standard.” BDC 4.2.200(D)(5) is not a standard that necessarily requires that Steidl
25 Road be built to current city standards. To the extent petitioners contend under this
26 subassignment of error that BDC 4.2.200(D)(5) mandates that Steidl Road be improved to
27 current city standards, we reject the contention. We consider the hearings officer’s reasons
28 for concluding that Steidl Road has adequate capacity to serve the subject property under the

⁷ We discuss the City Engineer’s waiver authority under BDC 3.4.100(B) in our discussion of the third assignment of error below.

1 third assignment of error and reject petitioners’ challenges to that reasoning. This
2 subassignment of error provides no basis for reversal or remand.

3 This subassignment of error is denied.

4 The second assignment of error is sustained in part.

5 **THIRD ASSIGNMENT OF ERROR**

6 **A. Special Circumstances Waiver Under BDC 3.4.100(C)**

7 Under the first and second assignments of error, we sustain petitioners’ challenge to
8 the Class B and Class C variances. Moreover, it is clear that those variances cannot be
9 approved under the facts presented in this appeal. Therefore, the city’s decision must be
10 reversed, unless we reject petitioners’ challenge to the hearings officer’s alternative basis for
11 approving the disputed site plan. The hearings officer adopted an alternative legal theory in
12 support of his decision to grant site design approval for the disputed triplex. That alternative
13 legal theory relies on BDC 3.4.100(B) and (C). BDC 3.4.100(C) requires that the standards
14 and specifications for transportation facilities be met unless otherwise provided. BDC
15 3.4.100(B) provides that the City Engineer may “modify or waive the required content of this
16 chapter when in his/her judgment special circumstances dictate such change, pursuant to
17 Section 3.4.100(C) * * *.”⁸

⁸BDC 3.4.100(B) and (C) provide:

“**B. City’s Authority.** The City Engineer may, at his/her discretion, modify or waive the required content of this chapter when in his/her judgment *special circumstances dictate such change, pursuant to Section 3.4.100(C), below.*

“**C. When Standards Apply.** *Unless otherwise provided, the standard specifications for construction, reconstruction or repair of transportation facilities, utilities and other public improvements within the City shall conform to this Chapter. No development shall occur unless the public improvements related to development comply with the public facility requirements established in this Chapter, unless specifically exempt or otherwise specified by a land use review and/or condition of approval from a land use action.*” (Emphases added.)

1 The hearings officer’s findings explain that the City Engineer’s position in this matter
2 expanded from supporting the variance application to asserting that the special setback and
3 current road standards should be waived under BDC 3.4.100(B), without a variance, based
4 on special circumstances. Those special circumstances include the small amount of traffic
5 currently using Steidl Road and its short length, the limited development potential of the area
6 and the existence of significant development next to Steidl Road that would have to be
7 removed if Steidl Road were to be improved to current city standards within a 60-foot right
8 of way. The City Engineer ultimately concluded that even if the area redeveloped to the
9 maximum density allowed under the BDC, Steidl Road would still have a great deal of
10 unused capacity. We set out relevant findings below:

11 “The City’s Transportation Engineer, Julia Wellner, provided comments on
12 this application as follows:

13 ““Staff notes that widening Steidl Street to 36’ would serve no
14 useful purpose now or until such time as the entire
15 neighborhood is redeveloped, and would severely impact the
16 subject property as well as others in the area if the entire street
17 were to be widened. Similarly, staff notes that other existing
18 homes in the area are within the Special Setback area as
19 defined by the current code, and many are within the standard
20 setback area. The subject triplex does meet the standard
21 setback, as measured from the existing right-of-way. Based on
22 the observations noted above and below in 4.7, **staff does not**
23 **object to the request for variances to the proposed Special**
24 **Setback or Right-of-Way.’ * * ***

25 “Planning staff found that ‘these comments show the City Transportation
26 Engineer’s intent to waive certain required content of this chapter with regard
27 to street and right-of-way width requirements for this development’ or in
28 other words, to waive the special setback standards pursuant to BDC
29 3.4.100(B). The applicant agrees. The initial agency comments actually seem
30 to support a variance application and not a waiver under subsection B.
31 However, at the time of the public hearing the City’s traffic engineer, Ms.
32 Robin Lewis, stated that the Engineering Division had decided or intended to
33 waive the 36’ pavement width requirement and explained generally why, in
34 her opinion, such discretion to do so was important to the Engineering
35 Division. Ms. Lewis further explained the waiver decision identifying the
36 reasoning for such, including that there was a very low volume of traffic on

1 the subject streets, low pedestrian traffic, and short street length and that the
2 area was already developed, but for this lot, and redevelopment was very
3 unlikely. According to the Traffic Engineer, the 'built environment' is now
4 static, and includes other houses which do not comply with the current
5 standards, the streets currently function very well and as such the 36' width
6 requirement was unnecessary. She relied heavily on the traffic analysis
7 provide[d] by the applicant and her own observations of the site. The
8 Transportation Division Manager, Nick Arnis, supported this waiver decision
9 with a memorandum explaining in more detail the traffic level and the impact
10 of the proposed development.

11 *** **

12 "Opponents argue that the Subsection B runs afoul of ORS 227.173 because it
13 fails to articulate any standards or criteria other than 'special circumstances'
14 for issuing a waiver and that, at least up to and including the hearing of this
15 matter the Engineering Division provided only flimsy reasoning for its
16 decision. While the hearings officer agrees that in general terms, some
17 reasoning merely stated a variety of reasons, some applicable and some not,
18 for why this waiver authority is important to the engineering division, other
19 reasoning was specific and stated the facts relied upon when making the
20 waiver decision. The reasoning was the low traffic volume and impact. Ms.
21 Lewis stated that the total average daily trips (ADT) on Steidl Road would be
22 170 with the triplex, only 11% of what is expected on a typical residential
23 street. Steidl Road currently serves less than 150 ADT and the anticipated
24 value for the street classification is 1,500 ADT. She further testified that the
25 peak p.m. ADT with the development of the triplex would increase by only
26 .55% and that the street 'very infrequently' has even two cars on it at the same
27 time. She further described the street parking as 'very lightly parked' stating
28 that the parking demand is very low. She found that due to the built
29 environment, including short street length of about two blocks, and conflict
30 with existing structures in the event the street width and right-of-way are
31 widened, that it was very unlikely that Steidl Road would ever redevelop. She
32 generally explained that the widening of the street was unnecessary to
33 accommodate vehicle traffic from planned and future growth. After the
34 hearing this reasoning was explained again, and elaborated on, in the
35 aforementioned memo from Mr. Arnis, which explains that even with
36 redevelopment to the maximum density of the zone, 21 units per acre, there
37 will still only be an estimated 438 ADT on the street using the ITE manual."
38 Record 54-55 (bold lettering in original).

1 **B. ORS 227.173**

2 ORS 227.173(1) requires that land use permit decisions must “be based on standards
3 or criteria” in the city’s land use regulations.⁹ The central question presented under the third
4 assignment of error is whether a city decision to waive the special setback and current road
5 improvement standards under BDC 3.4.100(B) violates ORS 227.173(1). Stated more
6 directly, can the City Engineer waive the special setback requirement in BDC 3.5.300 and
7 current road improvement standards in BDC 3.4.200, if he or she finds that “special
8 circumstances dictate” such a waiver, or does ORS 227.173(1) require more in the way of
9 “standards and criteria?”

10 Before turning to that question, we note that the road standards in BDC 3.4.200
11 clearly fall within the waiver authority granted by BDC 3.4.100(B) to “modify or waive the
12 content of this chapter,” assuming BDC 3.4.100(B) includes the approval “standards and
13 criteria” that are required by ORS 227.173(1). *Sections* BDC 3.4.100 and BDC 3.4.200 are
14 both located in BDC *Chapter* 3.4 Public Improvement Standards. It less clear that the
15 special setback in Section BDC 3.5.300 falls within the scope of that waiver authority. BDC
16 Section 3.5.300 is located in BDC Chapter 3.5 Other Design Standards. But the special
17 setback imposed by BDC 3.5.300 is closely related to the BDC 3.4.200 road improvement

⁹ As relevant, ORS 227.173 provides:

“(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.

“* * * * *

“(3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.”

1 standards and it appears to exist solely to facilitate implementation of the BDC 3.4.200 road
2 improvements standards. The BDC does not use the term “chapter” with precision.¹⁰ More
3 importantly, the City Engineer specifically refers to the BDC 3.5.300 special setback when
4 discussing the BDC 3.4.100(B) waiver authority. Record 54; 173-74. It is reasonably clear
5 that the City Engineer intended to waive the BDC 3.5.300 special setback in this case.
6 Petitioners do not argue that the city applied BDC 3.4.100(B) too broadly to waive standards
7 that cannot be waived under that section¹¹. Petitioners’ argument is that BDC 3.4.100(B)
8 lacks the “standards and criteria” that are required by ORS 227.173(1). In this opinion we
9 limit our review to that contention.

10 **C. *BCT Partnership v. City of Portland***

11 Petitioners, intervenor and the hearings officer all seem to have agreed below that
12 BDC 3.4.100(B) and (C), viewed alone, are inadequate to identify the applicable “standards
13 or criteria,” within the meaning of ORS 227.173(1). Similarly, petitioners, intervenor and
14 the hearings officer all believed that the Court of Appeals’ decision in *BCT Partnership v.*
15 *City of Portland*, 130 Or App 271, 881 P2d 176 (1994) supplies the analysis that is required
16 to address that facial inadequacy. All parties believe *BCT* supports their position.

17 *BCT* concerned a City of Portland approval criterion for short term parking that
18 provided:

19 “The City may approve new structured short term parking as long as the City
20 finds that it is consistent with the *City’s short term parking strategy.*” *BCT*,
21 130 Or App at 273 (emphasis in original).

¹⁰ The BDC is “Chapter 10-10” of the Bend Code. The BDC is divided into Chapter 1 through Chapter 6. Each of those “Chapters” is broken down into a number of “Chapters.” For example, Chapter 3 is divided into Chapter 3.0 through Chapter 3.6. It is not until after this third level of chapters is reached that the BDC begins identifying Sections.

¹¹ In fact, petitioners appear to agree that the BDC 3.4.100(B) waiver authority extends to all the subchapters of Chapter 3 of the BDC. Petition for Review 25.

1 Because the City of Portland had no short term parking strategy, denominated as such,
2 LUBA found that the city erred by proceeding to derive a short term parking strategy from
3 language in eleven comprehensive plan provisions. The city derived that short term parking
4 strategy in the process of reviewing and approving a quasi-judicial application for short term
5 parking. LUBA concluded that the purpose of ORS 227.173(1) is to ensure that decisions on
6 permit applications are governed by adopted standards, rather than standards that are first
7 articulated after a permit application is submitted:

8 “* * * No provision of the city’s development ordinances sets out the city’s
9 ‘short term parking strategy.’ Rather, the challenged decision determines the
10 city’s ‘short term parking strategy’ is something that *underlies*, or can be
11 deduced from, 11 provisions in the DPCP, Central City Plan and Downtown
12 Plan and can be announced for the first time in the city’s decision on a permit
13 application. This violates the requirement of ORS 227.173(1) that permit
14 standards and criteria *themselves* must be set out in the city’s development
15 ordinances.” *BCT Partnership v. City of Portland*, 27 Or LUBA 278, 287
16 (1994) (emphases in original; footnote omitted).

17 In reversing LUBA, the Court of Appeals explained:

18 “* * * The city’s legislation includes sufficient general provisions to establish
19 and identify the short term parking strategy that the city interpreted them as
20 embodying; the issues to be addressed in the proceeding were sufficiently
21 discernable from those provisions; and the city’s order provided the necessary
22 explanation under ORS 227.173(2) of what standards it was applying and how
23 they applied.” *BCT*, 130 Or App at 277.

24 BDC 3.4.100(B) is the standard that petitioners contend is inadequate to satisfy the
25 ORS 227.173(1) requirement for “standards and criteria.” If BDC 3.4.100(B) was worded to
26 say “the City Engineer may, at his/her discretion, modify or waive the required content of
27 this chapter when consistent with the city’s road improvement strategy,” and the city had no
28 road improvement strategy labeled as such, *BCT* might have some relevance in resolving
29 petitioners argument that BDC 3.4.100(B) violates ORS 227.173(1). But BDC 3.4.100(B) is
30 not worded in that way; it grants the City Engineer authority to modify or waive road
31 standards where “special circumstances dictate such change.” *See* n 8. The parties’ reliance
32 on and discussion of *BCT* unnecessarily confuses the question that must be answered under

1 the third assignment of error and unnecessarily complicates the question to be answered.
2 Again, that question is whether the City Engineer can waive the special setback requirement
3 in BDC 3.5.300 and current road improvement standards in BDC 3.4.200 if he or she finds
4 that “special circumstances dictate” such a waiver, or whether ORS 227.173(1) requires more
5 in the way of “standards and criteria.”

6 BDC 3.4.100(B) and (C) could be worded more clearly. But BDC 3.4.100(C) states
7 that the public improvement standards must be complied with “[u]nless otherwise provided.”
8 BDC 3.4.100(B) is a method by which the City Engineer may provide otherwise. Although
9 the hearings officer discussion of BDC 3.4.100(B) and (C) is a great deal more complicated
10 and he considered a number of things that did not need to be considered, we believe the
11 hearings officer effectively adopted this interpretation along with a number of other
12 questionable and unnecessary interpretations. The question becomes whether the “special
13 circumstances” standard is sufficient to comply with ORS 227.173(1). The “special
14 circumstances dictate” standard in BDC 3.4.100(B) is admittedly a highly subjective
15 standard. But it is no more subjective than several of the city’s Class B variance approval
16 criteria. *See* n 3.¹² We disagree with petitioners, intervenor and the hearings officer that
17 BDC 3.4.100(B) lacks “standards or criteria” or that other sections of the BDC need to be
18 consulted to satisfy the ORS 227.173(1) requirement for “standards and criteria.”¹³

19 As the Court of Appeals explained in *Lee v. City of Portland*, 57 Or App 798, 802,
20 646 P2d 662 (1982), “ORS 227.173(1) does not require perfect standards, but only standards
21 that are clear enough for an applicant to know what he must show during the application

¹² For example, BDC 5.1.300(B)(1) requires a finding that a variance “will not be materially detrimental to the stated purpose of the applicable Code requirements * * *.”

¹³ The hearings officer adopted two pages of findings discussing various sections of the BDC and finding that those sections supplied “standards and criteria,” within the meaning of ORS 227.173(1). Record 56-57. Because we determine that exercise was unnecessary, we do not consider petitioners’ challenges to those findings.

1 process.” In *Lee*, the Court of Appeals found that a standard that required the city to find that
2 a location was “desirable to the public convenience and welfare and not detrimental or
3 injurious to the public health, peace or safety, or to the character and value of the
4 surrounding properties” passed muster under ORS 227.173(1). *Id.* LUBA has rejected ORS
5 227.173(1) challenges to similarly subjective standards and criteria that leave considerable
6 discretion to local government decision makers in determining whether those standards are
7 met in individual adjudications. *Multi-Light Sign Co. v. City of Portland*, 39 Or LUBA 605,
8 614-15 (2001); *Oregon Entertainment Corp. v. City of Beaverton*, 38 Or LUBA 440, 458-59
9 (2000), *aff’d* 172 Or App 361, 19 P3d 918 (2001); *Sokol v. City of Lake Oswego*, 17 Or
10 LUBA 429, 433-35 (1989); *Cook v. City of Eugene*, 15 Or LUBA 344, 355 (1987).

11 Notwithstanding the hearings officer’s erroneous conclusion that BDC 3.4.100(B)
12 viewed by itself lacks “standards and criteria,” his findings nevertheless are sufficient to
13 explain why he found that the City Engineer’s waiver decision was appropriate under BDC
14 3.4.100(B). As the hearings officer observed in his findings, the City Engineer cited a
15 number of special circumstances that argue against requiring that Steidl Road be widened to
16 a 36-foot wide paved surface with sidewalks and a 60-foot right of way: (1) the short (two-
17 block) length of Steidl Road, (2) the fact that Steidl Road has significant excess capacity to
18 serve current development, (3) the fact that Steidl Road has capacity to carry the additional
19 traffic that would be generated if the area were to develop to its maximum density in the
20 future, without any additional improvements, and (4) there is significant existing
21 development that would have to be removed if Steidl Road were to be constructed to current
22 city standards. We understand the City Engineer to have ultimately concluded that these are
23 special circumstances that dictate the waiver in this case. Given the subjective nature of the
24 standard, it is likely that the City Engineer could also have decided that a waiver is not
25 dictated in this case, for a number of reasons, including those that petitioners advance in their

1 brief.¹⁴ But the City Engineer’s decision that the BDC 3.4.200 road standards and the BDC
2 3.5.300 special setback need not be imposed as a condition of approving the disputed triplex
3 was within the City Engineer’s discretion under BDC 3.4.100(B). We conclude that in doing
4 so, the City Engineer applied a standard that complies with ORS 227.173(1) and that the
5 hearings officer’s findings are sufficient to comply with ORS 227.173(3) requirement for a
6 “brief statement that explains the criteria and standards considered relevant to the decision,
7 states the facts relied upon in rendering the decision and explains the justification for the
8 decision based on the criteria, standards and facts set forth.” See n 9.

9 We upheld a somewhat similar authority to modify road construction standards that
10 was granted to the city engineer by the City of Tigard. *Frewing v. City of Tigard*, 50 Or
11 LUBA 226, 234-37, *aff’d* 203 Or App 322, 127 P3d 681 (2005). The authority granted by
12 BDC 3.4.100(B) is less circumscribed than was the case in *Frewing*, but it serves a similar
13 function. As petitioners correctly note, granting the city engineer authority to modify or
14 waive city street construction standards under the subjective standard in BDC 3.4.100(B)
15 could lead to modifications or waivers that the city council might not consider appropriate.
16 Of course if that happens, the city council could amend the BDC to eliminate that authority
17 or impose standards to narrow the circumstances in which the City Engineer is authorized to
18 grant modifications and waivers.

19 Finally, petitioners argue that the city’s decision “violates ORS 197.763(3)(b), which
20 requires that all relevant criteria must be identified in the public notice prior to the hearing.”

¹⁴ Petitioners complain that the concern about existing development on nearby properties having to be removed is a false concern since that development would not have to be removed now and would be removed anyway when the properties redevelop. Petitioners also point out that a wider pavement would allow more room for walkers, bikers, parking and traffic than the current roadway, and the BDC calls for attention to all forms of transportation.

1 Petition for Review 32.¹⁵ This argument appears to be directed at the hearings officer's
2 findings that purported to derive the ORS 227.173(1) "standards and criteria" from BDC
3 sections other than BDC 3.4.100(B). Because we have concluded those findings were
4 unnecessary, petitioners' argument provides no basis for reversal or remand.

5 If generously read, the petition for review can also be understood to complain that the
6 city's decision to rely on the BDC 3.4.100(B) waiver came late in the proceedings and
7 thereby worked an unfair disadvantage on petitioners because the focus until the August 21,
8 2008 public hearing was on the variance requests. Such a complaint would have some merit.
9 The city's decision to rely in part on BDC 3.4.100(B) did emerge late in the city proceeding.
10 But the city's notice identified BDC Chapter 3.4 as one of the sources of applicable criteria.
11 Record 391. Petitioners were aware of the possibility that the city would rely on BDC
12 3.4.100(B) before the August 21, 2008 hearing where BDC 3.4.100(B) was extensively
13 discussed, and in their memorandum dated August 21, 2008 argued against relying on BDC
14 3.4.100(B). Record 201-02. Petitioners presented additional argument concerning BDC
15 3.4.100(B) in their post-hearing memoranda. Record 126-28; 157-58.

16 Even if the city's late decision to rely on BDC 3.4.100(B) resulted in a procedural
17 error, to assert a procedural error as a basis for remand at LUBA, petitioners must establish
18 that they objected below and that the error prejudiced their substantial rights. ORS
19 197.835(9)(a)(B); *Mason v. Linn County*, 13 Or LUBA 1, 4 (1984), *aff'd in part, rev'd and*
20 *rem'd on other grounds*, 73 Or App 334, 698 P2d 529 (1985). It does not appear that
21 petitioners ever argued that they should have been allowed additional time to address the
22 meaning or potential applicability of BDC 3.4.100(B). Petitioners also have not

¹⁵ ORS 197.763(3) sets out the required content of quasi-judicial land use hearing notices. ORS 197.763(3)(b) requires that the notice "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue."

1 demonstrated that the city's timing in relying on BDC 3.4.100(B) prejudiced their substantial
2 rights.

3 The third assignment of error is denied.

4 The city's decision is affirmed.