

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

3
4 DONALD J. KLIEWER and PATRICIA A. KLIEWER,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF BEND,
10 *Respondent,*

11 and

12
13
14 JAKE SUTHERLAND, DARRYL HARMS,
15 JOSH LAGALO and BRICE MCMORRIS,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2015-105

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Bend.

24
25 Carrie A. Richter, Portland, filed the petition for review. With her on the
26 brief was Garvey Schubert Barer. Daniel Kearns, Portland, argued on behalf of
27 petitioners.

28
29 Mary A. Winters and Gary Firestone, Legal Counsel, Bend, filed the
30 response brief and argued on behalf of respondent.

31
32 Jake Sutherland, Darryl Harms, Josh Lagalo, and Brice McMorris, Bend,
33 filed a response brief. Darryl Harms and Brice McMorris argued on their own
34 behalf.

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

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REMANDED

05/25/2016

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the city landmarks commission approving construction of a new dwelling in a historic district.

MOTION TO TAKE OFFICIAL NOTICE

Petitioners move for LUBA to take official notice of materials from the application to nominate the Bend Old Town Historic District for the National Register of Historic Places (National Register), which are attached to the petition for review at Appendix 29-155. We do not understand either the city or intervenors-respondents to object to LUBA taking official notice of the attached materials. The motion is granted.

FACTS

The subject property is a 5,500-square-foot lot located in the Old Town Historic District (the district), a district listed on the National Register but not any state or local historic inventory. The property is developed with a dwelling constructed in 1916, which is designated a historic non-contributing structure under the Bend Development Code (BDC).¹ The existing dwelling is one-and-one-half stories tall, with 740 square feet on the ground floor and 456 square

¹ BDC 10.20.040 defines a historic non-contributing resource as an historic resource that “does not contribute to the historical integrity or architectural qualities that make the historic district or resource significant[,]” typically because the structure has been modified in ways, such as adding aluminum siding, that cover up design or architectural elements.

1 feet in the attic, for a total of 1,196 square feet of living space. The subject
2 parcel is zoned Medium Density Residential (RM) and is located at the corner
3 of NW Hunter Place and NW Sisemore Street, with the existing dwelling
4 facing NW Sisemore. A detached garage fronting on NW Hunter was
5 demolished in 2015.

6 The applicant proposes to construct a second dwelling on the property, in
7 the approximate location of the former detached garage, and facing NW
8 Hunter. The existing dwelling would remain, and the two dwellings together
9 would be treated as a duplex, an allowed use in the RM zone, for purposes of a
10 number of BDC requirements. The proposed second dwelling has two floors,
11 with 2,152 square feet total on both floors, not including a 823-square-foot
12 unfinished basement. Attached to the dwelling is a single-car garage with
13 living space, the master bedroom, located over it.

14 On October 20, 2015, the landmarks commission held a public hearing,
15 at which petitioners appeared in opposition. At the conclusion of the hearing,
16 the commission voted to approve the application with conditions. The
17 commission's decision was appealed to the city council, which declined to
18 review the decision. This appeal followed.

1 **FIRST ASSIGNMENT OF ERROR**

2 BDC 10.20.050.C includes two approval criteria for new structures in a
3 historic district.² BDC 10.20.050.C.1 requires a finding that “[t]he new
4 structure will be compatible with the appearance and character of the historic
5 district.” BDC 10.20.040 defines “Historic District” as “[a] geographically
6 defined area designated by the National Register of Historic Places possessing
7 a significant concentration, linkage, or continuity of sites, buildings, structures,
8 or objects unified by past events or aesthetically by plan or physical
9 development. Historic districts consist of contributing and noncontributing
10 properties.”

11 Petitioners argue that the commission misconstrued BDC 10.20.050.C.1,
12 and adopted inadequate findings not supported by substantial evidence, in
13 concluding that the proposed dwelling is compatible with the appearance and
14 character of the historic district.³

² BDC 10.20.050.C provides:

“Type II and III applications for the construction of new structures in a historic district shall meet all of the following criteria of approval:

- “1. The new structure will be compatible with the appearance and character of the historic district.
- “2. The new structure is consistent with the design review criteria of [BDC] 10.20.130.”

³ The parties agree that the city’s decision is a limited land use decision, and that the applicable standard of review is set out at ORS 197.828(2). ORS

1 **A. Appearance and Character of the Historic District**

2 Petitioners first contend that the commission failed to evaluate
3 compatibility with the “appearance and character of the historic district” based
4 on the National Register nomination that established the Old Town Historic
5 District. According to petitioners, any evaluation of compatibility with the
6 appearance and character of the Old Town Historic District must begin with the
7 nomination document, and should describe the appearance and character of the
8 district based on the features of historic contributing structures described in the
9 nominating document. Petitioners argue that the county’s findings make no
10 attempt to describe the “appearance and character of the historic district” at all,
11 much less to base that description on the features of historic contributing
12 structures constructed during the period of significance and identified in the
13 nominating document. Instead, petitioners argue, the findings addressing
14 compatibility almost exclusively address only the appearance and character of
15 the existing historic non-contributing dwelling on the subject property.⁴

197.828(2) provides in relevant part that LUBA shall reverse or remand a limited land use decision if the decision is not supported by substantial evidence or the decision does not comply with the applicable land use regulations.

⁴ The landmarks commission’s findings addressing BDC 10.20.050.C.1 state, in full:

“The subject property currently includes a single family dwelling. A non-historic detached garage has been recently removed from the property. Most of the properties within the immediate surrounding area include residential uses. The proposed single

1 Petitioners are correct that the commission’s findings make little attempt
2 to describe the appearance and character of the historic district itself, but focus
3 almost entirely on the appearance and character of the existing historic non-

family dwelling has been designated as a craftsman-style building in support of the historical, characteristic of the Old Town Historic District.

“The applicant provided testimony during the public hearing identifying that the new dwelling was designed to be more compatible with the general historic area than the non-descript existing dwelling on the property. The applicant believes the existing home does not have any architecturally significant features. From the only available historic photographs of the property it is difficult to discern any original design features. The height of the existing dwelling is extremely low making the height in the second story very uncomfortable and there is zero roof overhang on the home. The construction of the existing home construction is very poor including the lava rock foundation and newspaper insulation in the building. Therefore, the applicant did not consider adding onto the existing dwelling but constructing a new 1 and ½ story dwelling to the east or behind the historic dwelling on the property.

“The dwelling portion of the structure is narrower in width than the existing dwelling and the attached garage is stepped back by 10 feet from the dwelling portion of the structure in order to minimize the view of the garage. The ridge line direction, which is opposite to the existing dwelling, was chosen in order that the gabled end of the home as well as the proposed front porch are the predominate features of the new building. The garage is stepped back so it is understated from the main portion of the dwelling. In addition, an overhanging deck with a pergola element [is] proposed in order to minimize the view of the garage.

“The Landmarks Commission finds that this criterion is met.”
Record 69.

1 contributing dwelling on the property. BDC 10.20.050.C.1 requires the city to
2 determine whether the new structure is compatible with the appearance and
3 character of the *historic district*, not the existing noncontributing dwelling
4 considered in isolation from the historic district. We agree with petitioners that
5 the findings that address the existing dwelling rather than the historic district
6 are inadequate to establish compliance with BDC 10.20.050.C.1.

7 The only finding that appears directed at the appearance and character of
8 the historic district itself is the statement that “[t]he proposed single family
9 dwelling has been designed as a craftsman style building in support of the
10 historical, characteristic of the Old Town Historic District.” Record 69. This
11 finding appears to characterize the historic district as “craftsman,” but does not
12 explain what that label means, or what design or architectural features are
13 associated with craftsman-style structures in the historic district. The findings
14 addressing BDC 10.20.050.C.1 also do not identify what features of the
15 proposed dwelling are “craftsman-style,” or were considered in determining
16 whether the proposed dwelling is compatible with the appearance and character
17 of the historic district.

18 We generally agree with petitioners that competent findings addressing
19 BDC 10.20.050.C.1 would, at a minimum, (1) describe the appearance and
20 character of the historic district, as made relevant to the application, (2)
21 describe the appearance and character of the proposed structure, and (3)
22 explain why the proposed structure is or is not compatible with the described

1 appearance and character of the historic district. The commission’s findings
2 fall considerably short.

3 We do not agree with petitioners that the documentation submitted for
4 the National Register nomination necessarily must be used in any particular
5 way in describing the appearance and character of the historic district. Section
6 7 of the documentation includes detailed descriptions of the architectural styles
7 and periods common in the district, and detailed physical descriptions of
8 craftsman-style home and bungalows, which the nomination states is the most
9 prolific style in the district, representing 76 percent of the structures in the
10 district. The nomination then describes each of the 327 primary resources in
11 the district, and classifies them as historic contributing, historic non-
12 contributing, or simply non-contributing. BDC 10.20.040 includes definitions
13 of the terms “historic resource,” “historic district,” “historic significance,”
14 “resource, contributing,” “resource, noncontributing” and “character-defining”⁵

⁵ BDC 10.20.040 includes the following relevant definitions:

“**Historic resource** means a building, historic or cultural site, structure, object, or historic district that meets the significance and integrity criteria for designation as a landmark designated by the City Council, State of Oregon or National Park Service. Resource types are further described as:

“* * * * *

“5. Historic District: A geographically defined area designated by the National Register of Historic Places possessing a significant concentration, linkage, or continuity of sites,

1 that strongly suggest that the descriptions of the district and the historic
2 resources within the district that are included in the documentation recognizing
3 their historical significance are highly relevant, at least, to any determination
4 regarding “the appearance and character of the historic district,” for purposes
5 of BDC 10.20.050.C.1.

6 The city argues, nonetheless, that nothing in BDC 10.20.050.C.1
7 *requires* the commission to base its determination regarding the “appearance

buildings, structures, or objects unified by past events or aesthetically by plan or physical development. Historic districts consist of contributing and noncontributing properties.”

“**Historical significance** means that the structure or historical district (1) has character, interest, or value as part of the development, heritage, or cultural characteristics for the City, County, State, or nation; (2) is the site of a historic event with an effect upon society; (3) is identified with a person or group of persons who had some influence on society; or (4) exemplifies the cultural, political, economic, social, or historic heritage of the community.”

“**Resource, contributing** means a building, structure, or object which has been identified by the State or the General Plan as adding to the historical integrity or architectural qualities that make the historic district or resource significant.”

“**Resource, noncontributing** means buildings within a historic district identified by the State or General Plan as a contributing resource that does not contribute to the historical integrity or architectural qualities that make up the historic district or resource significant.”

“**Character-defining** means the qualities for which the resource has been recognized.”

1 and character of the historic district” on the National Historic nomination
2 materials. That is true, but the commission must base its determination on
3 *something*, and unless the commission undertakes to duplicate at least some of
4 the descriptive work that went into the nomination, there may be no practical
5 substitute for considering relevant portions of the National Historic nomination
6 materials.

7 The city also argues that “character” is not a defined term (although a
8 related term, “character-defining” is, *see* n 5), and that “character” is not
9 confined to historic resources or to any particular period of historic
10 significance. According to the city, the term “character” as used in BDC
11 10.20.50.C.1 refers to the *current* character of the district or, at most, the
12 character of the district in 2001, when the district was established. The city
13 disputes petitioners’ position that “character” refers to the character of historic
14 structures built during the period of significance, which according to the
15 National Register nomination is the period from 1910 to 1950. Petition for
16 Review App 39, 128. We understand the city to argue that in determining
17 compatibility with the appearance and character of the historic district, the
18 commission could consider whether the proposed dwelling is compatible with
19 modern buildings or additions constructed since 1950. However, the position
20 expressed in the city’s response brief is not one that the commission appears to
21 share. As noted, the commission found that the proposed dwelling has
22 “craftsman style” features “in support of the historical, characteristic of the Old

1 Town Historic District,” which suggests that the commission believes that
2 BDC 10.20.50.C.1 is concerned with the appearance and character of the
3 historic district as formed by its *historic* resources, not as formed by post-
4 historic modern development.⁶ As discussed above, the commission’s findings
5 addressing BDC 10.20.50.C.1 are deficient, but on this point, the commission’s
6 understanding of BDC 10.20.50.C.1 seems entirely consistent with its text and
7 context.

8 In sum, we agree with petitioners’ initial argument that the commission’s
9 findings are inadequate to demonstrate compliance with BDC 10.20.50.C.1,
10 and that remand is necessary to adopt more adequate findings that (1) describe
11 the appearance and character of the historic district, based on the National
12 Register materials or other competent evidence, (2) describe the features of the
13 proposed dwelling that are considered in determining its compatibility with the
14 appearance and character of the historic district and (3) explain its conclusion
15 that the dwelling is or is not compatible with the appearance and character of
16 the historic district.

⁶ The National Register nomination materials classify 26 primary structures built after 1950 in the district as non-contributing. Petition for Review App 38-39. Structures built before 1950 are described as either historic, contributing, or historic, non-contributing, suggesting that the authors of the nomination did not regard structures built after 1950 as historic.

1 **B. Lot Coverage, Volume, Height, Garage, Design**

2 The remainder of petitioners’ argument under the first assignment of
3 error is concerned with specific characteristics of development within the
4 historic district that petitioners allege are based on the National Register
5 materials, and that petitioners argue must be considered in applying BDC
6 10.20.50.C.1.

7 According to petitioners, most of the historic dwellings in the district
8 constructed during the period of significance are characterized by the following
9 features: (1) small footprint homes on 5,000-square-foot lots, resulting in
10 limited lot coverage, (2) small volume homes, typically less than 1,500 square
11 feet in size, (3) low building height, typically one story with some one-and one-
12 half story dwellings, (4) detached garages, and (5) specific design and
13 architectural features. Petitioners contend that commission erred in failing to
14 consider these features in determining whether the proposed dwelling is
15 compatible with the appearance and character of the historic district.
16 Specifically, petitioners argue that the proposed dwelling has a larger footprint,
17 larger interior volume, and a taller height than other historic dwellings in the
18 district, and further the proposed dwelling features an attached garage with
19 living space over it, while all or nearly all historic garages in the district are
20 detached, with no living space above. With respect to design and architectural
21 features, petitioners argue that the proposed dwelling has design and

1 architectural features that differ in some ways from the typical “craftsman”
2 style exhibited by many of the historic dwellings in the district.

3 As discussed above, on remand, the commission should consider
4 whether to consider the National Register documentation in applying BDC
5 10.20.050.C.1 and, if so, which characteristics of historic development within
6 the district, if any, are considered for purposes of determining compatibility
7 under BDC 10.20.050.C.1. That said, we do not mean to endorse petitioners’
8 views regarding the specific characteristics identified above. For one thing, it
9 is not clear that they are characteristics identified or recognized in the Historic
10 Register nomination. For example, petitioners may be correct as a factual
11 matter that most or all of the historic dwellings in the district have small
12 footprints and hence cover only a relatively small portion of a typical 5,000-
13 square foot lot. However, petitioners have not identified anything in the
14 National Register documentation, or elsewhere, that identifies lot coverage
15 percentage as an attribute that contributes to the historical character of the
16 district.⁷ Similarly, petitioners have not identified anything in the

⁷ Petitioners cite to Section 7, pages 3-6 and Section 8, page 4, of the Historic National Register documentation, but nothing on the cited pages mentions lot coverage. Petitioners also cite to a map found at Petition for Review App 144, which shows existing building footprints on lots within the district. We understand petitioners to argue that it can be inferred from the map that a lot coverage pattern of relatively small dwellings on relatively large lots is common or typical in the district. However, even if that inference can be made, it does not follow that the lot coverage pattern was an identified basis for the historical significance of the district.

1 documentation indicating that relatively low volume or square footage is a
2 contributing feature to historical significance. On remand, the commission
3 should decide in the first instance what specific development characteristics, if
4 any, should be considered in determining whether the dwelling is compatible
5 with the appearance and character of the historic district, but in remanding we
6 do not mean to suggest that we agree with petitioners that any and all
7 characteristics that are common or typical of dwellings or development patterns
8 in the historic district are features that must be considered in applying BDC
9 10.20.050.C.1.

10 In addition, as the city argues, some of the features petitioners argue
11 about are the subject of historic design review criteria at BDC 10.20.130. For
12 example, as discussed below, BDC 10.20.130.C provides that the height of new
13 construction shall not exceed the height of historic buildings “in the
14 surrounding area.” It would be strange if proposed new construction complied
15 with the height standard at BDC 10.20.130.C, but nonetheless could be deemed
16 incompatible with the appearance and character of the historic district under
17 BDC 10.20.050.C.1, because its height over grade is taller than is common in
18 the district as a whole. The commission should consider the compatibility
19 requirement of BDC 10.20.050.C.1 in context with the BDC 10.20.130 design
20 review criteria.

21 The first assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 BDC 10.20.130.A.1 is a design review standard for development within
3 historic districts, which provides:

4 “In addition to the zoning requirements, the relationship of new
5 additions and new construction to the street and to the open space
6 between buildings shall be compatible with adjacent historic
7 buildings and with the historic character of the surrounding area.”

8 It is worth noting that the BDC 10.20.130.A.1 compatibility standard differs
9 from the BDC 10.20.050.C.1 compatibility standard discussed under the first
10 assignment, in that it focuses on the “relationship of new additions and new
11 construction to the street and open space between buildings,” compared to
12 “adjacent historic buildings” and the “character of the surrounding area,” rather
13 than to the entire historic district.

14 Petitioners argue that the commission’s findings of compliance with
15 BDC 10.20.130.A.1 misconstrue the applicable law, are inadequate, and not
16 supported by substantial evidence.

17 Initially, the city responds that petitioners have not demonstrated that
18 any issues regarding BDC 10.20.130.A.1 were raised before the local hearings
19 body, in this case the landmarks commission. ORS 197.835(3).⁸ At oral

⁸ ORS 197.835(3) provides that issues before LUBA are “limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.” The city’s decision was a limited land use decision subject to the procedural requirements of ORS 197.195. ORS 197.195(3)(c)(B) requires the local government to provide notice to nearby property owners that includes a statement that “issues which

1 argument, petitioners argued that they raised issues regarding compliance with
2 BDC 10.20.130.A.1 before the commission at Record 102. We agree with
3 petitioners that the issues raised under this assignment of error were preserved
4 below for purposes of ORS 197.835(3).

5 On the merits, petitioners argue that the commission’s findings focus
6 exclusively on zoning requirements, such as setback requirements for duplex
7 units, but do not address the requirements of BDC 10.20.130.A.1, specifically
8 the relationship of the new dwelling to the street and open space between
9 buildings, to determine whether that relationship is compatible with adjacent
10 historic buildings and with the historic character of the surrounding area.

11 Petitioners are correct that the findings of compliance with BDC
12 10.20.130.A.1, at Record 70, address only zoning requirements and fail to
13 address the actual language of the siting criterion. Nothing in the findings
14 addressing BDC 10.20.130.A.1 purports to consider the relationship of the new
15 dwelling to the street and to the open space between buildings, or determine
16 whether that relationship is compatible with adjacent historic buildings and
17 with the historic character of the surrounding area. At a basic level, the
18 findings do not identify which adjacent buildings are historic, what the

may provide the basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue[.]” In the present case, petitioners submitted written testimony to the landmarks commission, found at Record 89-117. Petitioners did not appear or provide oral testimony at the commission’s public hearing on October 20, 2015.

1 “surrounding area” consists of, or what is the historic character of that
2 surrounding area with respect to siting and open space between historic
3 buildings.

4 The city does not attempt to argue that the findings address the
5 requirements of BDC 10.20.130.A.1, but cites to scattered findings addressing
6 other criteria and to evidence in the record, to argue that the findings as a
7 whole and the evidence in the record are sufficient to demonstrate compliance
8 with BDC 10.20.130.A.1. For example, the city cites to evidence that the new
9 dwelling will be set back from an adjacent dwelling to the east about the same
10 distance as the former garage. If we assume that the adjacent dwelling to the
11 east is an historic building, and that the spatial relationship of a one-car garage
12 to an adjacent dwelling is comparable to a 2,152-square-foot dwelling, that fact
13 might be one consideration in an adequate set of findings that address the
14 requirements of BDC 10.20.130.A.1. However, we disagree with the city that
15 that fact and others cited is sufficient to overcome the commission’s basic
16 failure to adopt findings that address the actual language of BDC
17 10.20.130.A.1. Because remand is necessary to adopt at least minimally
18 adequate findings, there is no point in addressing petitioners’ arguments that
19 the evidence in the record demonstrates that the proposed dwelling cannot
20 comply with BDC 10.20.130.A.1.

21 The second assignment of error is sustained.

1 **THIRD ASSIGNMENT OF ERROR**

2 BDC 10.20.130.A.2 is a design review requirement requiring in relevant
3 part that “new construction shall be sited so that the impact to the primary
4 facade(s) is kept to a minimum. Additions shall generally be located at the rear
5 portions of the property or in such locations where they have the least visual
6 impact from public ways.” The “primary facade(s)” in the present case is the
7 facade of the existing historic dwelling on the property, which faces west onto
8 NW Sisemore Street. The city’s findings of compliance with BDC
9 10.20.130.A.2 state, in full:

10 “The proposed new dwelling location is on the east side of the
11 subject property which is a corner property bordering both
12 Sisemore Street and Hunter Place. The new dwelling is located
13 behind the main dwelling which includes a primary facade that
14 faces west. No changes to the existing dwelling are proposed with
15 this application request. The ridge line of the new home is facing
16 a different direction from the existing dwelling in order to
17 minimize the visual impact to the primary facade of the existing
18 dwelling. The Landmarks Commission finds this standard is
19 satisfied.” Record 71.

20 Petitioners dispute that orienting the ridge line of the new dwelling
21 north-south rather than east-west does anything to minimize visual impacts on
22 the existing dwelling’s western facade. According to petitioners, the new
23 dwelling will face onto NW Hunter Place and its facade will dominate the view
24 of the property from that public street, causing the new dwelling to appear to be
25 the primary dwelling on the property due to its greater size and height.

1 The city responds that no issues were raised before the landmarks
2 commission regarding compliance with BDC 10.20.130.A.2. ORS 197.835(3).
3 Petitioners do not contend otherwise, but argue that they raised issues
4 regarding compliance with BDC 10.20.130.A.2 in their appeal of the
5 commission’s decision to the city council. Record 25. However, ORS
6 197.835(3) limits LUBA’s review in the present case to issues that were raised
7 before the “local hearings body.” *See* n 8. The landmarks commission was the
8 only local hearings body. Raising issues in a local appeal to a local review
9 body such as the city council may be sufficient and necessary to satisfy other
10 exhaustion or preservation requirements. *See Miles v. City of Florence*, 190 Or
11 App 500, 79 P3d 382 (2003) (if a local appeal is available, LUBA’s review is
12 limited to issues raised, and therefore exhausted, in the local appeal).
13 However, raising such issues *only* in a local appeal to a review body that
14 conducted no hearing is not sufficient to demonstrate that the issue was raised
15 before the “local hearings body” for purposes of ORS 197.835(3). Accordingly,
16 petitioners have not demonstrated that the issue raised under the third
17 assignment of error was preserved below.

18 The third assignment of error is denied.

19 **FOURTH ASSIGNMENT OF ERROR**

20 BDC 10.20.130.C.1 provides:

21 “In addition to zoning requirements, the height of new
22 construction shall not exceed the height of the historic building
23 being added onto, or of historic buildings in the surrounding area.”

1 The commission’s findings state, in relevant part:

2 “The height of the proposed new dwelling is 22 feet from finished
3 elevation which is a similar ridge height to many of the dwellings
4 within the surrounding area and the District. The proposed
5 building height is lower than the home to the north and not more
6 than five feet taller than the ridge height of the existing dwelling
7 on the property. The home is taller than the existing single family
8 dwelling to the east. * * *” Record 71-72.

9 Relatedly, in response to concerns that the proposed dwelling is actually a two-
10 story structure rather than a one-and-one-half-story structure, the commission
11 found:

12 “The applicant has stated that the proposed dwelling is a 1 ½ story
13 dwelling. The Landmarks Commission finds that given the
14 proposed approximately 9 foot plate heights on the second floor,
15 the dwelling is a two-story design. The applicant shall revise the
16 proposed plans in order that all the exterior wall plates shall be
17 less than 8’0” on the second floor with the use of dormers to
18 increase interior ceiling clearance on the second floor. If possible,
19 this shall include a shed dormer over the Master Bedroom on the
20 front facade in lieu of a pitched break. This shall be made a
21 condition of approval.” Record 72.

22 The decision goes on to impose a condition that requires that the walls of the
23 upper story of the new dwelling be less than eight feet high, which would
24 decrease the building height by about one foot. Condition 3 states:

25 “The building is proposed as a 1 ½ story building. Therefore, all
26 exterior wall plates shall be less than 8’0” on the second floor with
27 the use of dormers to increase interior ceiling clearance on the
28 second floor. If possible, this shall include a shed dormer over the
29 Master Bedroom on the front facade in lieu of a pitched break.
30 * * *” *Id.*

1 Petitioners argue that the findings are insufficient to establish
2 compliance with the height standard of BDC 10.20.130.C.1, and that Condition
3 3 does not provide any assurance that the height standard is met.

4 Again, the city argues that petitioners have failed to demonstrate that
5 compliance with the height standard at BDC 10.20.130.C.1 was preserved
6 before the commission. However, petitioners raised issues before the
7 landmarks commission regarding the height of the proposed dwelling, at
8 Record 102. For some reason, petitioners’ testimony either misquotes BDC
9 10.20.130.C.1 or quotes an unidentified and somewhat differently worded
10 standard to the effect that the “height of new construction shall not exceed the
11 height of the tallest historic building of similar type in the district.” *Id.*
12 Nonetheless, petitioners raised the same issue: that the height of the new
13 dwelling exceeds the height of historic buildings in the surrounding area.⁹ We

⁹ Petitioners argued below:

“The applicant proposes a two-story 22-foot high house. Historic houses in the district are mostly one and one-and-one-half stories and several were two stories. Some of the tallest houses are of similar height at the 400 and 500 block of Delaware Avenue [addresses omitted]. None are in the immediate vicinity. The staff report does not address the actual height of single family historic homes.

“The staff report does not address this adequately, so no one can determine if this criterion is met.” Record 102.

1 conclude that the issue of compliance with the BDC 10.20.130.C.1 height
2 standard was sufficiently preserved before the local hearings body.¹⁰

3 On the merits, petitioners first note that the findings state that the
4 proposed dwelling is 22 feet high, measured from the finished floor. However,
5 petitioners argue that in other findings the commission rejected the applicant’s
6 assertion that the building height is 22 feet, noting that “building height” as
7 defined in the BDC is measured from the finished grade, not the finished first
8 floor elevation. Record 70.¹¹ Petitioners argue that if the foundation for the
9 unfinished basement is included, the actual building height will be higher than
10 22 feet above the finished grade. However, petitioners argue that in the
11 findings addressing BDC 10.20.130.C.1 the city simply repeated the
12 applicant’s incorrect assertion that the building height is only 22 feet.

13 Second, petitioners argue that the commission erred in evaluating the
14 height of the proposed building against “many of the dwellings within the
15 surrounding area and the District,” without recognizing that BDC
16 10.20.130.C.1 prohibits new construction that exceeds the height of *historic*

¹⁰ In their appeal to the city council, petitioners correctly identified and quoted BDC 10.20.130.C.1, and made essentially the same argument.

¹¹ BDC 1.2 defines “building height” to mean

“the average maximum vertical height of a building or structure measured at a minimum of three points from finished grade along each building elevation. Architectural elements that do not add floor area to a building or structure, such as chimneys and vents, are not considered part of the height of a building or structure.”

1 buildings in the surrounding area. Petitioners contend that the commission
2 compared the height of the new dwelling to *non-historic* buildings or additions
3 in the area. For example, petitioners argue, the findings state that the proposed
4 dwelling is lower in height than the dwelling to the north, but without
5 identifying the dwelling to the north as an historic dwelling. Petitioners cite to
6 evidence they submitted based on the National Register nomination to
7 demonstrate only two historic dwellings in the immediate area of the subject
8 property are as tall as one-and-one-half stories, and none are two stories.
9 According to petitioners, the proposed dwelling, which petitioners argue
10 remains effectively a two-story building even under Condition 3, is taller than
11 all historic buildings in the surrounding area.

12 The city responds that petitioners' arguments are based on the contention
13 that the proposed dwelling is a two-story building, ignoring the fact that under
14 Condition 3 the dwelling will be only one and one-half stories tall. We tend to
15 agree with the city that arguments based on the number of stories (however that
16 is determined), rather than building height measured in feet from the finished
17 grade, are immaterial to compliance with BDC 10.20.130.C.1. That code
18 provision is concerned with building height, which is defined as feet above
19 final grade, not the number of stories. The problem is that, as petitioners
20 correctly argue, the commission's findings describe the dwelling's height as 22
21 feet from the finished floor, instead of from the finished grade, and further state

1 that a 22-foot ridge height is similar to other dwellings in the area, without
2 appearing to distinguish between historic dwellings and non-historic dwellings.

3 BDC 10.20.130.C.1 prohibits new construction from exceeding the
4 building height of historic buildings in the surrounding area. Determining
5 compliance with BDC 10.20.130.C.1 should be relatively straightforward. The
6 likely first step is to determine the scope of the surrounding area. The second
7 step is to determine the building height of the tallest historic structure in that
8 surrounding area. The final step is to compare that height with the height of
9 the proposed dwelling. If the latter does not exceed the former, compliance is
10 established. However, the findings instead simply conclude that the 22-foot
11 ridge height is “similar” to many of the dwellings within the surrounding area,
12 without identifying the surrounding area, identifying any historic buildings
13 within that area, or attempting to identify and compare the building height of
14 any historic building with the height of the proposed dwelling. Even if the
15 proposed dwelling’s height may be “similar” to historic buildings in the
16 surrounding area, if the dwelling’s height in fact exceeds the tallest historic
17 building in the area, BDC 10.20.130.C.1 is not met. The commission made no
18 attempt to identify the tallest historic building in the surrounding area, and
19 compare its height to the proposed dwelling.

20 A related issue here that may play a role on remand is whether to take
21 into account the height of modern additions to historic one-story dwellings in
22 the surrounding area. Intervenors-respondents note that across the street from

1 the subject property is a one-story historic dwelling with a two-story addition
2 (living space over a garage) that was constructed in 2000. If necessary, on
3 remand the commission should resolve in the first instance whether the height
4 comparison required by BDC 10.20.130.C.1 is limited to the height of historic
5 structures, or includes non-historic additions to historic structures.

6 Finally, petitioners argue that Condition 3 is not sufficient to guarantee
7 that BDC 10.20.130.C.1 is met. According to petitioners, at best Condition 3
8 results in lowering the dwelling’s height by one foot, but it remains unclear
9 what the resulting height would be when measured from the finished grade, or
10 whether the resulting height would or would not exceed the height of the tallest
11 historic structure in the surrounding area. We agree with petitioners that
12 Condition 3 does not remedy the inadequate findings addressing compliance
13 with BDC 10.20.130.C.1.

14 The fourth assignment of error is sustained.

15 **FIFTH ASSIGNMENT OF ERROR**

16 BDC 10.20.130.F.4 regulates garages in the historic district, and
17 provides:

- 18 “a. When feasible, garages and carports shall be located on the
19 site where they have the minimum visual impact from public
20 streets.
- 21 “b. Where garages must face the street front, they shall be
22 designed to minimize their bulk and visual impact. Single-
23 car garage doors should be employed.”

24 The city’s findings of compliance with BDC 10.20.130.F.4 state, in full:

1 “The applicant is proposing a single car garage attached to the new
2 dwelling. The garage is proposed to be setback at a distance of 20
3 feet from the front property line facing NW Hunter Place and the
4 remainder of the dwelling included the covered porch will be
5 placed within 10 feet of the front property line. There is no alley
6 abutting the subject property in which to place a garage. An
7 overhanging deck with a pergola element has been proposed to
8 minimize the view of the garage. The Commission finds that this
9 standard is met.” Record 75.

10 Petitioners argue that the proposed attached garage facing NW Hunter
11 Place, with living space over it, does not have a “minimum visual impact from
12 public streets.” According to petitioners, an attached garage has greater
13 volume and bulk compared to a detached garage. Petitioners argue that it is
14 entirely feasible to locate a single-car, detached garage in the rear of the lot
15 where it would be less visible from the street.

16 The city responds initially that petitioners have not demonstrated that the
17 issue of whether the proposed garage complies with BDC 10.20.130.F.4 was
18 specified as an issue in the local appeal to the city council, and thus that the
19 issue was preserved for LUBA’s review under *Miles v. City of Florence*. At
20 oral argument, petitioners cited to where this issue was raised in the local
21 appeal, at Record 39. We agree with petitioners that *Miles* does not bar
22 LUBA’s review of this assignment of error.

23 On the merits, the city responds that because the property is a corner lot
24 on a block with no alley, the feasible options for minimizing the visual impact
25 of the garage are limited. The city argues that the design of the garage, making
26 it attached and integrated into the dwelling, setting it back 20 feet from the

1 street and 10 feet back from the south face of the dwelling, and employing an
2 overhanging deck with a pergola to partially obscure sight of the garage,
3 minimizes the visual impact of the garage to the extent possible on the subject
4 property.

5 We agree with the city. Petitioners do not explain how it is feasible to
6 locate both the proposed dwelling *and* a detached garage anywhere on the
7 property. Further, petitioners cite no basis for their argument that an attached
8 garage has more bulk or visual impact than a detached garage. A detached
9 garage would have a separate roof and gables, while the attached garage is
10 integrated into the dwelling, and for that reason the proposed attached garage
11 could be found to have less bulk and fewer visual impacts compared to a
12 detached garage. Further, as the findings note, the garage is set back from the
13 main facade of the dwelling and partially obscured by a deck and overhanging
14 pergola. While petitioners argue that an attached garage with living space
15 above it is incompatible with the historic district or nearby historic resources,
16 the focus of BDC 10.20.130.F.4 is on minimizing the visual impacts of garages,
17 not compatibility with historic development patterns.¹² Petitioners have not

¹² As discussed above with respect to BDC 10.20.050.C.1, which requires a finding of compatibility with the appearance and character of the historic district, on remand the commission may choose to consider in the first instance whether a proposed garage is attached or detached is a relevant consideration under BDC 10.20.050.C.1.

1 established that the county's finding of compliance with BDC 10.20.130.F.4 is
2 erroneous or unsupported by substantial evidence.

3 The fifth assignment of error is denied.

4 The city's decision is remanded.