

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

14  
15 STEIDL ROAD, LLC,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2008-217

19  
20 FINAL OPINION  
21 AND ORDER

22  
23 On remand from the Court of Appeals.

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25 William Hugh Sherlock, Eugene, represented petitioners Douglas Zirker and Vivian  
26 Zirker.

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28 Pamela Hardy, Bend, represented petitioner Patricia Nippert.

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30 Mary A. Winters, Bend, represented respondent.

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32 Helen L. Eastwood, Bend, represented intervenor-respondent.

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

36  
37 REVERSED

08/26/2010

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



1           “Under the first and second assignments of error, we sustain petitioners’  
2           challenge to the \* \* \* variances. Moreover, it is clear that those variances  
3           cannot be approved under the facts presented in this appeal. Therefore, the  
4           city’s decision must be reversed, unless we reject petitioners’ challenge to the  
5           hearings officer’s alternative basis for approving the disputed site plan.  
6           \* \* \*”59 Or LUBA at 13.

7           LUBA then rejected petitioners’ challenge to the hearings officer alternative legal theory that  
8           the city engineer properly waived those three requirements pursuant to BDC 3.4.100(B) and  
9           (C). Because the hearings officer’s alternative theory provided a separate and independent  
10          basis for approval of the site plan, we affirmed the hearings officer’s decision.

11          On appeal, the Court of Appeals concluded that while the city engineer’s waiver  
12          authority under BDC 3.4.100(B) and (C) had been properly exercised regarding the BDC  
13          3.4.200(M) dedication requirement and the BDC 3.4.200(A) street improvement  
14          requirement, the city engineer’s waiver authority under BDC 3.4.100(B) and (C) does not  
15          extend to the BDC 3.5.300(B) special setback requirement.

16          From the above, it now follows that the hearings officer’s decision granting site plan  
17          approval for the triplex must be reversed, because that triplex does not comply with the BDC  
18          3.5.300(B) special setback requirement and (1) a variance to that setback requirement cannot  
19          be granted in the circumstances presented in this appeal, and (2) the city engineer lacks  
20          authority under BDC 3.4.100(B) and (C) to waive the special setback requirement.

21          The city’s decision is reversed.