1	BEFORE THE LAND USE BOARD OF APPEALS
2	OF THE STATE OF OREGON
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4	DOUGLAS ZIRKER, VIVIANN ZIRKER,
5	and PATRICIA NIPPERT,
6	Petitioners,
7	
8	VS.
9	CITY OF DEND
10	CITY OF BEND,
11	Respondent,
12 13	and
13 14	and
15	STEIDL ROAD, LLC,
16	Intervenor-Respondent.
17	imervenor-Kesponuem.
18	LUBA No. 2008-217
19	DCB/110. 2000 217
	FINAL OPINION
21	AND ORDER
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20 21 22 23 24 25	On remand from the Court of Appeals.
24	11
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.
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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.

## Opinion by Holstun.

2	This matter has been before LUBA three times. Zirker v. City of Bend, 55 Or LUBA
3	188 (2007) (Zirker I); Tallman v. City of Bend, 56 Or LUBA 398 (2008); Zirker v. City of
4	Bend, 59 Or LUBA 1 (2009) (Zirker II). This matter is before us now for a fourth time
5	following the Court of Appeals' remand of our decision in Zirker II. Zirker v. City of Bend,
6	233 Or App 601, 227 P3d 1174, rev den 348 Or 415, 233 P3d 818 (2010). A detailed
7	restatement of the history of this appeal at this point would serve no purpose. We limit our
8	opinion here to the minimum necessary to explain why the Court of Appeals' decision in this
9	matter requires that the city's decision be reversed.

The underlying dispute concerns a triplex with frontage on Steidl Road, a road that does not meet current city standards. While these appeals have been in progress, intervenor has completed construction of the triplex. In *Zirker II*, three Bend Development Code (BDC) requirements were at issue. The first imposes a special setback that the now-constructed triplex violates. BDC 3.5.300(B). The second requires that intervenor dedicate ten feet of property along the property's Steidl Road frontage for right of way widening. BDC 3.4.200(M). The third requires that intervenor widen the existing Steidl Road pavement in front of intervenor's property. BDC 3.4.200(A).

In the decision that was before LUBA in *Zirker II*, the city hearings officer adopted two independent legal theories in approving the site plan for the triplex, notwithstanding that the triplex violates the BDC 3.5.300(B) special setback requirement, and notwithstanding that intervenor did not propose to dedicate property as required by BDC 3.4.200(M) or make the street improvements required by BDC 3.4.200(A). First, the hearings officer approved variances from those requirements. Second, the hearings officer also found the city engineer properly waived those requirements under BDC 3.4.100(B) and (C).

In *Zirker II*, we found that the hearings officer failed to demonstrate that all applicable variance approval criteria were met. We explained:

"Under the first and second assignments of error, we sustain petitioners' challenge to the \* \* \* variances. Moreover, it is clear that those variances cannot be approved under the facts presented in this appeal. Therefore, the city's decision must be reversed, unless we reject petitioners' challenge to the hearings officer's alternative basis for approving the disputed site plan.

\* \* \* "59 Or LUBA at 13.

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

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

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

The city's decision is reversed.