

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

3  
4 DOUGLAS ZIRKER and VIVIANN ZIRKER,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF BEND,  
10 *Respondent,*

11 and

12  
13 HOME FEDERAL BANK,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2011-036

17  
18 FINAL OPINION  
19 AND ORDER

20  
21  
22 Appeal from City of Bend.

23  
24 William H. Sherlock, Eugene, filed the petition for review and argued on behalf of  
25 petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock,  
26 P.C.

27  
28 Gary Firestone, City of Bend Legal Counsel, Bend, filed a response brief and argued  
29 on behalf of respondent. With him on the brief was Mary A. Winters.

30  
31 Steven P. Hultberg, Bend, filed the response brief and argued on behalf of interever-  
32 respondent. With him on the brief was Ball Janik LLP.

33  
34 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,  
35 participated in the decision.

36  
37 AFFIRMED

08/31/2011

38  
39 You are entitled to judicial review of this Order. Judicial review is governed by the  
40 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a city hearings officer’s decision that grants site plan review approval for a triplex.

**FACTS**

Petitioners have appealed three prior city decisions concerning the disputed triplex. *Zirker v. City of Bend*, 59 Or LUBA 1 (2009), *rev’d and remanded* 233 Or App 601, 227 P3d 1174 (2010) (*Zirker III*); *Tallman v. City of Bend*, 56 Or LUBA 398 (2008) (*Zirker II*);<sup>1</sup> *Zirker v. City of Bend*, 55 Or LUBA 188 (2007) (*Zirker I*). We set out the history of these appeals in some detail in our decision in *Zirker III*, and no purpose would be served by setting that history out in similar detail here. We limit our discussion of the facts to those necessary to understand our resolution of petitioners’ three assignments of error in the present appeal. While *Zirker I* was pending before LUBA, intervenor’s predecessor commenced construction of the triplex. Petitioners’ motion to stay the city’s decision in *Zirker I* was denied by LUBA. Construction of the triplex is now complete.

The subject property is zoned Residential Medium Density (RM) and has frontage on Steidl Road, an existing improved city street. The standard front yard setback in the RM zone is 10 feet, measured from the front lot line along the existing Steidl Road right-of-way. Bend Development Code (BDC) 2.1.300(C)(2)(a). The triplex complies with this requirement. Steidl Road has a 40-foot right-of-way and is improved with a 24-foot wide paved surface. Under the current BDC, a local street such as Steidl Road is required to have a 60 foot right-of-way and a 36-foot wide paved travel surface. In circumstances where existing streets and rights of way are substandard, the BDC imposes three requirements that are relevant here. First, it imposes a special 30-foot setback and requires that the normal

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<sup>1</sup> Petitioners *Zirker* were also petitioners in this appeal.

1 front yard setback in the applicable zone be measured from this 30-foot special setback  
2 instead of the edge of the existing right-of-way. BDC 3.4.200(J).<sup>2</sup> In this case, that would  
3 require that the 10-foot standard front yard setback in the RM zone be measured from the  
4 special 30-foot setback instead of the edge of the existing right-of-way. The triplex intrudes  
5 into this setback. In this opinion we will refer to the additional setback that is required under  
6 BDC 3.4.200(J) as the Extra Setback. The BDC also requires that sufficient right-of-way be  
7 dedicated to bring the right-of-way up to current standard. BDC 3.4.200(N).<sup>3</sup> In this case  
8 that would require dedication of an additional 10 feet of right-of-way along Steidl Road.  
9 Finally, the BDC requires a minimum pavement width of 36 feet. BDC 3.4.200 Table A. As  
10 previously mentioned, Steidl Road has a 24-foot wide pavement width.<sup>4</sup>

11 In *Zirker III*, the city granted intervenor’s predecessor Steidl Road LLC variances to  
12 the Extra Setback, right-of-way dedication and right-of-way improvement requirements.  
13 And, alternatively, the city waived the three requirements under a chapter of the BDC that  
14 authorized the city engineer to waive certain standards. In *Zirker III*, LUBA sustained  
15 petitioners’ challenge to the variances. However, LUBA rejected petitioners’ challenge to  
16 the waivers, and on the basis of those waivers, LUBA affirmed the city’s decision in *Zirker*  
17 *III*. The Court of Appeals found the city engineer had authority to waive the right-of-way

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<sup>2</sup> BDC 3.4.200(J)(3)(a) provides:

“Unless waived under Section 3.4.150, all buildings or structures shall be set back from planned future rights of way the minimum distance established in the applicable zoning district.”

<sup>3</sup> BDC 3.4.200(N) provides:

“**Existing Rights-of-Way.** Whenever 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 Tables A through E in Section 3.4.200, Transportation Improvement Standards, above.”

<sup>4</sup> In this opinion we cite to the amended BDC Extra Setback, right-of-way dedication and right-of-way improvement sections, some of which are not codified in the same location that they were codified at the time of *Zirker III*.

1 dedication and improvement requirements but did not have authority to waive the Extra  
2 Setback requirement. Based on the Court of Appeals’ decision in *Zirker III*, in an  
3 unpublished opinion, LUBA reversed the city’s decision on August 26, 2010. *Zirker v. City*  
4 *of Bend*, (LUBA No. 2008-217, August 26, 2010).

5 At some point, intervenor-respondent Home Federal Bank (Home Federal) took title  
6 to the property. In addition, following the Court of Appeals decision in *Zirker III*, the city  
7 amended the BDC to authorize the planning department to waive the Extra Setback  
8 requirement if certain standards are met. Thereafter, on December 3, 2010, Home Federal  
9 submitted a new application for site plan approval for the triplex, with waivers of the Extra  
10 Setback, right-of-way dedication, and right-of-way improvement requirements under the  
11 amended BDC. Applying the amended BDC, the city granted the waivers and site plan  
12 approval, and this appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 ORS 227.178(3) applies what is called a fixed “goal post” rule to cities. Petitioner  
15 argues that under ORS 227.178(3) the city was bound to apply the version of the BDC that  
16 was in effect in *Zirker I, II, and III*, and that the city erred in applying the amendments to the  
17 BDC that authorize the planning department to waive the Extra Setback, because those  
18 amendments post-date the complete applications that led to *Zirker I, II, and III*.

19 ORS 227.178(3)(a) provides:

20 “If the application [for a permit] was complete when first submitted or the  
21 applicant submits the requested additional information within 180 days of the  
22 date the application was first submitted and the city has a comprehensive plan  
23 and land use regulations acknowledged under ORS 197.251, approval or  
24 denial of the application shall be based upon the standards and criteria that  
25 were applicable at the time the application was first submitted.”

26 ORS 227.178(3) is part of a larger statutory scheme that was adopted to protect permit  
27 applicants from changes in law that are adopted after a permit application is submitted and to  
28 assure that permit applicants receive a timely final decision on permit applications. If a city

1 does not render a final decision on a permit application within the 120 days specified by ORS  
2 227.178(1), a permit applicant is authorized to file a petition for writ of mandamus. ORS  
3 227.179(1). In that event, the city must approve the permit application unless the city can  
4 establish that the approval would violate a substantive requirement of the city's  
5 comprehensive plan or land use regulations. In *Zirker III*, the city took action within the  
6 required 120-day deadline. There was no need to seek a mandamus remedy in *Zirker III*. All  
7 parties, including Steidl Road LLC and petitioners, "received everything they were entitled  
8 to under ORS 227.178" when the city rendered a timely final decision on those permit  
9 applications, based on the BDC standards that were in effect when Steidl Road LLC  
10 submitted its permit application. *Seitz v. City of Ashland*, 24 Or LUBA 311, 315 (1992).

11 There is no dispute that Home Federal submitted a new application on December 3,  
12 2010 or that the amended BDC that gives the planning department authority to waive the  
13 Extra Setback had been adopted and was in effect on December 3, 2010. Citing *DLCD v.*  
14 *Jefferson County*, 220 Or App 518, 188 P3d 313 (2008), petitioners contend the city was  
15 nevertheless bound to continue to apply the prior version of the BDC that does not authorize  
16 the city to waive the Extra Setback to Home Federal's application, because the plans that  
17 supported Steidl Road LLC's permit application and the plans that support Home Federal's  
18 December 3, 2010 application are identical.

19 As respondent and Home Federal correctly note, LUBA has already determined that  
20 ORS 227.178(3) does not deprive an unsuccessful permit applicant of the right to submit a  
21 second application to again seek permit approval of the original proposal under amended  
22 permit standards:

23 "Petitioners' understanding of ORS 227.178(3) is not supported by the  
24 statutory language, and ignores the fact that a city council properly exercises  
25 both quasi-judicial and legislative powers. Nothing in ORS 227.178(3)  
26 prevents a city from (1) determining that an application cannot meet a city  
27 approval standard, (2) amending the city approval standard, and (3) applying  
28 the amended approval standard to an application submitted thereafter.

1            “We agree that in order for the amended \* \* \* provisions to apply, ORS  
2            227.178(3) requires that the subject application postdate the \* \* \*  
3            amendments \* \* \*. However, we do not agree that in order for the amended \*  
4            \* \* provisions to apply, the subject application cannot be identical to the  
5            original application. We see nothing in the statute to preclude an applicant  
6            from submitting a new application, similar or identical to a previous  
7            application found inconsistent with applicable standards, for the purpose of  
8            obtaining review under amended approval standards.”

9            *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, 701-02, *aff’d* 101 Or App  
10           458, 790 P2d 1213 (1990); *see Eckis v. Linn County*, 19 Or LUBA 15, 44 (1990) (reaching  
11           the same conclusion regarding the parallel language of ORS 215.428(3) applicable to  
12           counties).

13           Petitioners’ reliance on *DLCD v. Jefferson County*, is misplaced. It is true that in  
14           *DLCD* the Court of Appeals stated that a permit applicant cannot insist on the benefit of the  
15           goal post statute if the “application changes in a material way.” 220 Or App at 524. But that  
16           language in no way suggests that where there are two applications, the second application is  
17           not entitled to be judged by amended standards or criteria that were in effect on the date the  
18           second application was submitted, unless the second application “changes in a material way”  
19           from a prior application that was denied. There was only one application in *DLCD v.*  
20           *Jefferson County*; it was not a case where a second application sought approval for a  
21           proposal after the decision granting the first application had been reversed. The principle  
22           articulated in *DLCD v. Jefferson County* simply gives Home Federal the right to insist that its  
23           application be reviewed based on the standards and criteria in effect on December 3, 2010,  
24           unless that December 3, 2010 application was later changed in some “material way.”

25           The first assignment of error is denied.

26           **SECOND ASSIGNMENT OF ERROR**

27           In their second assignment of error, petitioners contend the city should be barred from  
28           applying the amended BDC to grant the Extra Setback waiver by the doctrine of equitable

1 estoppel. The elements of estoppel were set out in *Coos County v. State of Oregon*, 303 Or  
2 173, 734 P2d 1348 (1987):

3 “[T]here must (1) be a false representation; (2) it must be made with  
4 knowledge of the facts; (3) the other party must have been ignorant of the  
5 truth; (4) it must have been made with the intention that it should be acted  
6 upon by the other party; [and] (5) the other party must have been induced to  
7 act upon it.” *Id.* at 180-81 (quoting *Oregon v. Portland Gen. Elec. Co.*, 52 Or  
8 502, 528, 95 P 722 (1908)).

9 LUBA has questioned on numerous occasions whether LUBA has authority to decide  
10 an appeal based on equitable estoppel principles. *Chaves v. Jackson County*, 56 Or LUBA  
11 643, 645 (2008); *Hiedgerken v. Marion County*, 35 Or LUBA 313, 323 (1998); *Mazeski v.*  
12 *Wasco County*, 30 Or LUBA 442, 446 n 4 (1995); *Pesznecker v. City of Portland*, 25 Or  
13 LUBA 463, 466 (1993); *Lemke v. Lane County*, 3 Or LUBA 11, 15, n 2 (1981). However, in  
14 each of the cited cases LUBA concluded that even if a LUBA appeal could be decided based  
15 on equitable estoppel, in the circumstances presented in those appeals there was no equitable  
16 estoppel, making it unnecessary to decide the question. This is another such case.

17 Petitioners’ equitable estoppel argument relies on four documents. The first is an  
18 October 22, 2007 e-mail message from the city’s attorney to petitioners’ attorneys, following  
19 LUBA’s decision in *Zirker I*. The city attorney states in that message that the city believes  
20 its approval of the triplex in *Zirker I* was proper, but also advises petitioners’ attorneys that  
21 the city was requiring the applicant to execute an agreement that it would remove the triplex  
22 in the event the applicant does not ultimately receive a favorable city decision granting  
23 approval for the triplex.<sup>5</sup> The second document is an October 24, 2007 statement by Steidl

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<sup>5</sup> The substance of that message is set out below:

“Here is a summary in my words as to the City’s course of action:

“The City staff will be preparing findings in the next few days possibly early next week to respond to [LUBA’s] remand. Staff believes that the procedure that was followed is authorized by the [BDC].

1 Road LLC in which it “agrees to restore the site to its original condition if the application for  
2 the land use approval for the triplex is denied.”<sup>6</sup> The third document is a November 15, 2007  
3 performance agreement and guarantee that Steidl Road LLC will remove the triplex if a city  
4 decision approving the triplex is not issued or is reversed on appeal.<sup>7</sup> The fourth document is

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“The City is requiring that the applicant execute a removal agreement and provide security to remove the structure in the event that the applicant is not permitted to construct the tri-plex. Nevertheless, the City believes that the approval of the tri-plex was substantively proper. Staff is looking to the applicant to provide the security and removal agreement within the next few days. If these documents are not provided, it will issue a stop work order.” Record 81.

<sup>6</sup> The substance of the October 24, 2007 removal agreement is set out below:

“To Whom It May Concern:

“The applicant, Steidl Road LLC, accepts each and every risk of loss and damage that may result if the application is denied, and further agrees to hold City, its officers, agents and employees harmless from such loss and damage.

“The applicant agrees to restore the site to its original condition if the application for the land use approval for the triplex is denied.” Record 82.

<sup>7</sup> The substance of that agreement is set out below:

“A. PERFORMANCE AGREEMENT

“1. DEVELOPER agrees to deposit \$12,780.00 (which is 120% of the total estimated cost of the site restoration to be completed by the DEVELOPER) in a certificate of deposit account, # 042-1387619-8, at BANK’s Bend branch office, assigned to the City of Bend, to ensure that DEVELOPER completes all site restoration required by CITY for the development of the PZ 06-869 if said land use is denied by the Land Use Board of Appeals. Said improvements are shown on the construction plans for the Steidl Road Tri-plex per plans submitted to the CITY.

“2. In the event that the Land Use Board of Appeals denies the DEVELOPER’S project, the developer agrees to restore the site in accordance to City of Bend Development Code Section 4.1.910D. If the developer fails to restore the site according to the City of Bend Development Code to CITY standards, CITY may withdraw funds from the above mentioned account to complete the restoration to CITY standards. BANK agrees to disburse funds from said account to CITY upon request by CITY. CITY agrees that it will not request withdrawal of funds from said account except upon a failure of DEVELOPER to restore the site as required by CITY.

“3. Upon ultimate approval of PZ 06-869, including all appeals to LUBA and/or higher courts, all funds held in the account shall be disbursed to the DEVELOPER.” Record 107.



1 a November 30, 2007 e-mail message from the city attorney to petitioners' attorney advising  
2 him of the November 15 performance agreement.<sup>8</sup>

3 In a nutshell, petitioners contend the city falsely represented to petitioners that it  
4 would require Steidl Road LLC to remove the triplex if its permit application was ultimately  
5 denied, when the city intended all along that it would instead amend the BDC to again  
6 attempt to approve the permit application if the initial permit application was denied (*Coos*  
7 *County* elements 1-2). Petitioners contend they were ignorant of the city's intent (*Coos*  
8 *County* element 3). If we understand petitioners correctly, they contend the city made this  
9 false representation to induce petitioners to continue filing LUBA appeals and incurring  
10 significant legal expenses and petitioners were so induced (*Coos County* elements 4 and 5).

11 The city never made the representation that petitioners contend it made. While one  
12 might infer that the city might demand that Steidl Road LLC remove the triplex and restore  
13 the property if its permit were ultimately denied or approved and reversed on appeal, the city  
14 never represented to petitioners that it would do so. The most logical inference from the  
15 October 24, 2007 and November 15, 2007 documents and the related e-mail messages is that  
16 the city was taking steps to protect the city from incurring costs related to removal in the  
17 event the triplex had to be removed. *Coos County* element 1 is missing.

18 Neither is *Coos County* element 4 present in this case. There is simply no reason to  
19 believe the city took the actions it took in 2007 to induce petitioners to continue filing LUBA  
20 appeals to challenge the city's decisions.

21 The second assignment of error is denied.

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<sup>8</sup> The substance of the November 30, 2007 e-mail message is set out below:

“The applicant has made a cash deposit as security for the removal of the building.

“As to the local appeal, I am told that the appeal will not be accepted.” Record 83.

1 **THIRD ASSIGNMENT OF ERROR**

2 **A. The Waiver or Modification Criteria and the Hearings Officer’s Findings**

3 The amended BDC authorizes waivers or modifications of BDC standards. BDC  
4 3.4.150(A).<sup>9</sup> BDC 3.4.150(B) sets out the criteria for granting waivers or modifications.  
5 BDC 3.4.150(B).<sup>10</sup> As relevant here, BDC 3.4.150(B) requires the hearings officer to find

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<sup>9</sup> BDC 3.4.150(A) provides as follows:

**“Authority to Grant Waiver or Modification.** Waivers and/or modifications of the standards of this chapter and/or the City of Bend Standards and Specifications may be granted as part of a development approval only if the criteria of Subsection B are met.”

<sup>10</sup> As relevant, BDC 3.4.150(B) provides:

**Criteria.** The Review Authority, after considering the recommendation of the City Engineer, may waive or modify the standards of this title and the City of Bend Standards and Specifications based on a determination that (1) the waiver or modification will not harm or will be beneficial to the public in general; (2) the waiver and modification are not inconsistent with the general purpose of ensuring adequate public facilities; and (3) one or more of the following conditions are met:

“\* \* \* \* \*

“2. An existing structure such as a substantial retaining wall makes widening a street or right-of way or required placement of lines impractical or undesirable.

“\* \* \* \* \*

“5. The standard is a street or right-of-way standard and existing structures on the same side of the block make future widening of the remainder of the street or right-of-way unlikely and the additional width on the project site would not be beneficial for sidewalks or parking without the extension for the rest of the block.

“\* \* \* \* \*

“7. The existing infrastructure (a) does not meet current standards, (b) is and will remain functionally equivalent to current standards, and (c) there is little likelihood that current standards will be met in the area.

“\* \* \* \* \*

“9. There is insufficient right-of-way to allow a full width street cross section and additional right-of-way cannot be provided.

“\* \* \* \* \*

1 “that (1) the waiver or modification will not harm or will be beneficial to the public in  
2 general; [and] (2) the waiver and modification are not inconsistent with the general purpose  
3 of ensuring adequate public facilities[.]” BDC 3.4.150(B) also requires that the hearings  
4 officer find that one or more of 12 listed conditions are met. The hearings officer found that  
5 four of those 12 conditions are met, and petitioner does not assign error to those findings.  
6 Petitioners challenges are directed at the BDC 3.4.150(B)(1) and (2) criteria only.<sup>11</sup> The  
7 hearings officer’s findings concerning those criteria are set out below:

8 “The evidence before the Hearings Officer is that proposed development is in-  
9 fill development, and the development pattern in the area is already  
10 established. All but one lot surrounding the subject property are developed  
11 and were so before the time the site and surrounding properties were zoned  
12 Residential Medium and before the current setback and right-of-way  
13 standards applied. Four out of the five houses on the east side of Steidl Road  
14 do not meet the standards sought to be waived by the applicant, and none of  
15 the houses on the west side meet the setback standards sought to be waived by  
16 the applicant. The City Engineer recommends approval of this application  
17 and a waiver of the subject standards. Her comments are that Steidl Road  
18 receives very low use. The maximum capacity of a two-way two-lane  
19 roadway is 3,200 vehicles per hour according to the Highway Capacity  
20 Manual. Steidl Road has an approximate existing volume of 120 vehicles per  
21 hour. The City Engineer found that the changes of use on Steidl Road from a  
22 single family dwelling to a triplex is ‘... considerably less than 2 trips during  
23 peak hour of the day or less than one trip added in a single half an hour  
24 between the hours of 4 and 6 pm.’ She concludes that given the close  
25 proximity of parks, trails, schools and Downtown Bend ‘there will be *no*  
26 measurable impacts on Steidl Road or the greater transportation system from  
27 this development.’ The Engineer set forth her analysis in her comments to the  
28 record, describing on-street parking as sparse, and stating that where on-street  
29 parking occurs, the two-way travel is accommodated in the 16 to 17’ lanes  
30 allowing sufficient lanes for vehicles to pass each other. There will be a

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“Any waiver or modification of applicable standards and specifications shall be the minimum needed to allow development, and maximization of the number of lots or parcels in a land division is not a reason to allow a waiver or modification.”

<sup>11</sup> It is unclear to us whether petitioners challenge only the waiver to the Extra Setback or also challenge the waivers to the right-of-way dedication and right-of-way improvement standards. Because petitioners’ arguments are generally directed at the Extra Setback Waiver our discussion of the third assignment of error also focuses on the Extra Setback waiver. However, even if petitioners’ challenge does encompass the right-of-way dedication waiver and the right-of-way improvement waiver, our resolution of the third assignment of error is the same.

1 condition of approval preventing on-street parking in front of the proposed  
2 triplex. While additional on-street parking could be added by additional  
3 setback and right-of-way, there is no evidence that such is needed at all. As  
4 noted by the Engineer, there is no evidence of a lack of on-street parking or  
5 even a ‘high potential for on-street parking.’ I conclude the application of the  
6 setback and right-of-way consistent with the surrounding properties will not  
7 harm the public in general and will not inconsistent with the general purpose  
8 of ensuring adequate public facilities. To quote the Engineer, ‘there is no  
9 deficit in traffic operations or on-street parking....’” Record 52-53 (emphasis  
10 in original; citations omitted).

11 **B. The Effect of the Extra Setback Waiver**

12 Before turning to petitioners’ arguments, we note a point of confusion under this  
13 assignment of error. Petitioner argues:

14 “The Special Setback standards \* \* \* provide the City with the means to  
15 ensure adequate and safe transportation within the urban area as it grows and  
16 redevelops. For a local street such as Steidl road, the setback from the  
17 centerline is 30 feet. *It is undisputed that the triplex violates this standard as*  
18 *it was built within 20 feet of the street centerline.*” Petition for Review 12  
19 (emphasis added.)

20 As we explained earlier, it is the Extra Setback that the disputed triplex does not  
21 comply with. The triplex is not built within 20 feet of the centerline of Steidl Road, as  
22 petitioners suggest above. It is true that granting the waiver to the Extra Setback permits the  
23 triplex to be closer to a 60-foot Steidl Road right-of-way, if that right-of-way is expanded to  
24 60 feet in the future. But petitioners incorrectly suggest throughout their argument under the  
25 third assignment of error that granting the disputed waiver to the Extra Setback will prevent  
26 widening the Steidl Road right-of-way and prevent constructing roadway improvements that  
27 meet current standards within that expanded right-of-way. As the planning staff advised the  
28 hearings officer in a January 11, 2011 memorandum:

29 “If in the future it is determined that Steidl Road must be upgraded to meet  
30 current improvement standards, a thirty-six-foot-wide street with six-foot-  
31 wide curbside sidewalks could be installed along the frontage of the site and  
32 the triplex porch would still be setback six feet from the sidewalk.” Record  
33 88.

1 The point the staff is making is that granting the Extra Setback waiver does not preclude  
2 expanding the Steidl Road right-of-way to a full 60 feet and does not preclude construction  
3 of a standard city street with sidewalks and on-street parking. The Extra Setback waiver  
4 simply means the triplex would be closer to an expanded Steidl Road right-of-way (if it is  
5 expanded in the future) than it would be without the waiver.

6 **C. Petitioners' Arguments**

7 **1. On-Street Parking, Emergency Vehicles, Planned Development**

8 Petitioners contend waiver of the Extra Setback “will ensure that on-street parking  
9 along Steidl Road will never be allowed or legal, will ensure that emergency response  
10 vehicles will be hampered and constructed indefinitely, and will ensure that ‘adequate right-  
11 of-way’ will NOT be available as the City grows \* \* \*.” Petition for Review 13.

12 It may be that large emergency vehicles that encounter on-street parking on Steidl  
13 Road will have to navigate past the limited amount of on-street parking with less than ideal  
14 roadway width. However, Home Federal responds that there is no evidence in the record that  
15 emergency response vehicles are experiencing difficulty on Steidl Road. Home Federal also  
16 points to testimony from the city engineer that the existing 24-foot roadway with two 12-foot  
17 travel lanes is more than adequate given the low traffic volumes and low demand for on-  
18 street parking on Steidl Road. Record 153. We agree with Home Federal.

19 With regard to petitioners’ contention that the hearings officer failed to consider that  
20 planned development may create a need to widen and improve Steidl Road, the hearings  
21 officer found the “development pattern of the area is already established.” Record 52. In  
22 other findings addressing BDC 3.4.150(B), *see* n 10, the hearings officer found:

23 “\* \* \* Given the low traffic volumes and the existing development pattern it is  
24 unlikely that the City would condemn houses to make room for additional  
25 right-of-way or want to and the City Engineer considered what she refers to as  
26 a conservative redevelopment scenario. That is, she considered the  
27 underlying zone and the possibility of redevelopment consistent with an RM  
28 standard. She still opined that street-widening is not warranted and there

1           would be no harmful effect in maintaining the current right-of-way. \* \* \*.”  
2           Record 53.

3           The record does not support petitioners’ contention that the hearings officer failed to  
4           consider redevelopment under RM zoning. Rather, the record shows the hearings officer  
5           simply viewed the neighborhood as one that is almost completely developed with single  
6           family dwellings with little chance that there will be significant redevelopment at higher  
7           densities. In the January 11, 2011 planning department memorandum to the hearings officer,  
8           planning staff took the position that redevelopment at higher densities in this area of the city  
9           is unlikely:

10           “\* \* \* While it is true that [it] is *possible* that all of the properties along Steidl  
11           Road could be redeveloped in the future with duplexes, triplexes or higher  
12           density residential development, this scenario is *unlikely*. With the exception  
13           of one other lot on the street, the lots are already developed with single family  
14           homes, most of which are higher-end homes in good repair. Although it is  
15           true that this site is redeveloping, there is no history of significant levels of  
16           redevelopment in the surrounding neighborhoods to indicate that the existing  
17           development pattern is likely to significantly change. \* \* \*” Record 87  
18           (emphasis in original).

19           Finally, as we have already noted, if it turns out that emergency vehicles do begin  
20           having problems on Steidl Road, or that more on-street parking is needed or that  
21           redevelopment exceeds the planning department’s expectations, the Extra Setback waiver  
22           granted to Home Federal would not preclude expanding the Steidl Road right-of-way.  
23           Petitioners’ argument regarding emergency vehicle access, on-street parking and the  
24           potential for redevelopment do not demonstrate that the hearings officer erred in waiving the  
25           Extra Setback.

26                           **2.           Focus on the East Side of Steidl Road**

27           Petitioners contend “the Hearing Officer looks to the far-side of Steidl Road in [an]  
28           attempt to justify waiving the setback and improvement requirements, noting ‘Four out five  
29           houses on the east side of Steidl Road do not meet the standards sought to be waived by the  
30           applicant.’ While this may be true, this does not justify a decision to waive setback

1 restrictions on the west side of the street where the subject property is currently located.  
2 \* \* \*” Petition for Review 15.

3 As the above-quoted findings make clear, the hearings officer did not focus  
4 exclusively on the east side of Steidl Road. To the contrary, immediately after the finding  
5 that four out of five houses on the east side of Steidl Road do not comply with the Extra  
6 Setback, the hearings officer found “none of the houses on the west side meet the setback  
7 standards sought to be waived by the applicant.” Record 52. Petitioners’ contention that the  
8 hearings officer erroneously focused on the east side of Steidl Road is without merit.

9 **3. Improper Focus on Steidl Road’s Current Excess Capacity**

10 Petitioners next fault the hearings officer for following the city engineer’s reliance on  
11 Steidl Road’s current excess capacity and the lack of any significant transportation impacts  
12 expected from the triplex itself in concluding that the Extra Setback waiver is warranted  
13 here. Petitioners contend that reliance led the hearings officer to fail to account for planned  
14 growth.

15 We see no reason to fault the hearings officer’s reliance in part on Steidl Road’s  
16 excess capacity or the lack of any significant traffic impact expected from the triplex. As for  
17 the hearings officer’s failure to account for planned growth, as we have already noted, we  
18 simply understand the hearings officer to have a very different view of the likelihood of any  
19 significant redevelopment that might increase traffic on Steidl Road and create a need for a  
20 wider right-of-way and the on-street parking that a wider travel surface might allow.

21 Petitioners’ arguments that the hearings officer assigned improper significance to  
22 Steidl Road’s excess capacity is without merit.

23 **4. Failure to Establish That the Waiver is the Minimum Needed**

24 The last paragraph of BDC 3.4.150(B) requires that a waiver under BDC 3.4.150(B)  
25 “shall be the minimum needed to allow development.” *See* n 10. Petitioners contend the  
26 hearings officer failed to address this requirement.

1 LUBA’s scope of review is “limited to those [issues] raised by any participant before  
2 the local hearings body[.]” ORS 197.835(3). Under ORS 197.763(1), issues must be raised  
3 sufficiently, prior to the close of the record, to give the parties and decision maker “an  
4 adequate opportunity to respond to each issue.”<sup>12</sup> Home Federal contends that petitioners  
5 failed to raise this issue below before the close of the record, and therefore the issue has not  
6 been preserved for LUBA review. Home Federal also argues that petitioners failed to raise  
7 this issue in their local notice of appeal to the Bend City Council, and the issue is therefore  
8 also waived because petitioners failed to exhaust their available remedies regarding this  
9 issue. *Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003).

10 Petitioners did not file a reply brief or respond to Home Federal’s waiver arguments  
11 at oral argument. We therefore do not consider petitioners’ argument that the hearings  
12 officer’s decision should be remanded because the hearings officer adopted no findings  
13 concerning whether the waiver is the “minimum needed to allow development.” *Williamson*  
14 *v. City of Salem*, 52 Or LUBA 615, 619 (2006); *Coyner v. City of Portland*, 23 Or LUBA 79,  
15 82 (1992).

16 Petitioners’ third assignment of error is denied.

17 The city’s decision is affirmed.

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<sup>12</sup> ORS 197.763(1) states:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”