

FORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

MARK HINKLE, JESSE ROSENZWEIG,
DAVE HUSK, and WILLIAM LINCOLN,
Petitioners,

vs.

CITY OF BEND,
Respondent,

and

BCL, LLC,
Intervenor-Respondent.

LUBA No. 2022-094

FINAL OPINION
AND ORDER

Appeal from City of Bend.

Timothy J. Fransen filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief were Brandon L. Thornburg and Cosgrave Vergeer Kester LLP.

No appearance by City of Bend.

Christopher P. Koback filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Hathaway Larson LLP.

RYAN, Board Chair; ZAMUDIO, Board Member, participated in the decision.

RUDD, Board Member, did not participate in the decision.

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REMANDED

01/30/2023

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

NATURE OF THE DECISION

Petitioners appeal a hearings officer decision approving a tentative plan for a 44-lot subdivision, a waiver of public improvement standards to allow for a reduced right-of-way, and a waiver of public improvement standards to allow for a reduced fire flow.

MOTION TO INTERVENE

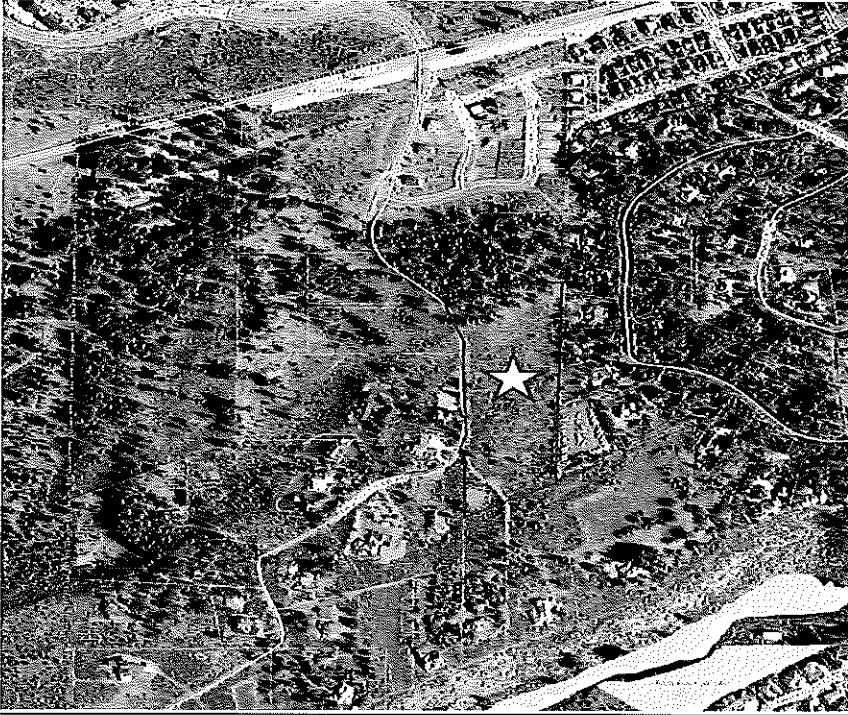
BCL, LLC (intervenor), the applicant below, moves to intervene on the side of the city. The motion is unopposed and is allowed.

FACTS

The subject 8.67 acre property is located on the east side of Bachelor View Road. Bachelor View Road runs south from its intersection with Century Drive to the southern boundary of the subject property. The portion of Bachelor View Road adjacent to the property is a 15-foot-wide paved road and is private. The portion of Bachelor View Road between Century Drive and the subject property, adjacent to The Lodges Subdivision, is dedicated as a public street and its paved surface is wider than 15 feet. The portion of Bachelor View Road to the north of the subject property will be dedicated as a public street pursuant to a previously approved subdivision, and if constructed, its paved surface will be wider than 15 feet.

The subject property is zoned Standard Density Residential (RS), and is surrounded by other RS-zoned properties. Property directly north of the subject

1 property is the subject of a separate city decision, which we and the parties refer
2 to as Bachelor View 1, that approved a tentative subdivision plan to create 26
3 new lots, and approved a waiver of public improvement standards to allow a 40-
4 foot right-of-way on Bachelor View Road. *See* Subdivision Record 27.¹ The
5 property to the east is used for recreational vehicle and boat storage, and property
6 to the east of that property contain single family dwellings. Properties to the west
7 are either vacant or developed with single family dwellings.



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9 Subdivision Record 22.

¹ The city transmitted one record for the subdivision proceeding, city file number PLLD20220119, and another record for the waiver proceeding, city file number PLMISC20220441. We refer to the former record as the “Subdivision Record” and the latter record as the “Waiver Record.”

1 On February 18, 2022, intervenor applied for approval of a tentative plan
2 for a subdivision with 34 lots, to be developed in two phases, and a waiver of
3 public improvement standards to vary from the required right-of-way standards.
4 Subdivision Record 22. On May 2, 2022, intervenor submitted a revised
5 application that proposed a 44-lot subdivision to be developed in four phases.
6 Intervenor submitted a Transportation Facilities Report (TFR) dated April 29,
7 2022 that concluded that the subdivision would add 415 trips, with 41 p.m. peak
8 hour trips. Subdivision Record 503. The record also includes a March 3, 2022
9 analysis of water and sewer availability. Subdivision Record 599-603. On May
10 3, 2022, the city deemed the application complete.

11 On June 15, 2022, intervenor submitted an application for a waiver of
12 public improvement standards relating to water flow standards and street
13 standards. The city processed both of the applications together, and the hearings
14 officer held a hearing on June 15, 2022 and, at the conclusion, continued the
15 hearing to July 11, 2022. After the hearing concluded, the hearings officer issued
16 a decision approving the subdivision application and approving the waiver
17 application. This appeal followed.

18 **FIRST ASSIGNMENT OF ERROR**

19 Petitioners' first assignment of error is that "[t]he [h]earings [o]fficer erred
20 in accepting intervenor-respondent's representation that the proposed
21 development only included 44 dwelling units, or one single family residence per
22 lot." Petition for Review 7. The general premise of the first assignment of error

1 is that intervenor incorrectly estimated the number of dwellings that could be
2 built in the subdivision because, under the city’s implementation of the Middle
3 Housing Statute, ORS 197.758, up to four dwellings are allowed on each new lot.

4 In the assignment of error, petitioners argue that “[Bend Development
5 Code (BDC)] 4.7.400(C)(3)(b) requires a more thorough transportation impact
6 analysis (TIA).”² Petition for Review 11. Petitioners also argue that

7 “the water-and-sewer capacity analysis assumes 45 dwelling units.
8 [Subdivision] Rec. 599. That analysis does not take into account the
9 impact of water and sewer capacity if middle housing is constructed
10 and additional dwelling units are included. [Subdivision] Rec. 599-
11 600[.] This is relevant to the application’s compliance with the
12 [provisions of] BDC 3.4.400. *See* [Subdivision] Rec. 66-69.”³
13 Petition for Review 12 (internal parenthetical omitted).

14 Intervenor responds, initially, that petitioners failed to raise the issues
15 raised in the first assignment of error with the specificity that is required under
16 ORS 197.797(1) to notify the hearings officer and intervenor that they needed to
17 address them. Before turning to intervenor’s argument, we explain the “raise it
18 or waive it” principles in ORS 197.797(1) and ORS 197.835(3).

19 ORS 197.797(1) provides:

20 “An issue which may be the basis for an appeal to [LUBA] shall be

² BDC 4.7.400(C)(3)(b) requires a more comprehensive transportation impact analysis than a TFR if a proposed development “[f]orecasts net increase in site traffic volumes greater than 700 average daily vehicle trips[.]”

³ Subdivision Record 66 to 69 are the hearings officer’s findings regarding BDC 3.4.400.

1 raised not later than the close of the record at or following the final
2 evidentiary hearing on the proposal before the local government.
3 Such issues shall be raised and accompanied by statements or
4 evidence sufficient to afford the * * * hearings officer[] and the
5 parties an adequate opportunity to respond to each issue.”

6 ORS 197.835(3), which addresses LUBA’s scope of review, provides that
7 “[i]ssues shall be limited to those raised by any participant before the local
8 hearings body as provided by ORS 197.195 or 197.797, whichever is applicable.”

9 As the Court of Appeals has explained, “those statutes comprise a so-called ‘raise
10 it or waive it’ requirement, whereby before an issue may be raised to LUBA it
11 must first have been raised before the local government along with statements
12 and evidence sufficient to allow the government and parties to respond to it.”

13 *Pliska v. Umatilla County*, 240 Or App 238, 244, 246 P3d 1146 (2010), *rev den*,
14 350 Or 408, 256 P3d 121 (2011).

15 When attempting to differentiate between “issues” and “arguments,” there
16 is no “easy or universally applicable formula.” *Reagan v. City of Oregon City*, 39
17 Or LUBA 672, 690 (2001). While a petitioner is not required to establish that a
18 *precise* argument made on appeal was made below, that does not mean that “*any*
19 argument can be advanced at LUBA so long as it has some bearing on an
20 applicable approval criterion *and general references to compliance with the*
21 *criterion itself were made below.*” *Id.* (first emphasis in original, second emphasis
22 added). A particular issue must be identified in a manner detailed enough to give
23 the decision-maker and the parties fair notice and an adequate opportunity to
24 respond. *Boldt v. Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991);

1 *see also Vanspeybroeck v. Tillamook County*, 221 Or App 677, 691 n 5, 191 P3d
2 712 (2008) (“[I]ssues [must] be preserved at the local government level for board
3 review * * * in sufficient detail to allow a thorough examination by the decision-
4 maker, so as to obviate the need for further review or at least to make that review
5 more efficient and timely.”).

6 In support of their argument that the issues presented in the first
7 assignment of error were raised in a manner that satisfies ORS 197.797(1),
8 petitioners first cite Subdivision Record 200, 238, 348, and 642. Subdivision
9 Record 200 includes the following statement:

10 “If both Bachelor view 1 and Bachelor view 2 are approved, taking
11 into account that 4 dwellings can be built on a single lot, then we
12 could be looking at 275 new dwellings on these 2 parcels alone. This
13 seems reckless and dangerous, considering the street is rated ‘High
14 Fire Risk’ by the state.”

15 Subdivision Record 238 includes the following statement:

16 “The developer is basing all assumptions on 70 units. However, with
17 HB2001, could actually be 280 units.”

18 Subdivision Record 348 includes the following statement:

19 “Under the current City code any single family lot can be built out
20 with up to a quadplex which means that all of [intervenor’s]
21 submittals for traffic flow, water and sewer services, fire prevention
22 and emergency access are all questionable as they are all based on
23 just one single family dwelling per lot.”

24 Subdivision Record 642 includes the following summary of statements from a
25 neighborhood meeting between intervenor and the neighborhood association:

1 “[A person] asked if the sewer and water analysis would be
2 calculated on 136 potential lots (max. density) since these lots can
3 have a number of units on each one. We stated that we are going to
4 address this based on the number of units being proposed.”

5 We conclude that the statements quoted above do not identify the issues now
6 raised in the first assignment of error in a manner detailed enough to give the
7 decision-maker and the parties fair notice and an adequate opportunity to
8 respond. Again, in the first assignment of error, petitioners argue that “BDC
9 4.7.400(C)(3)(b) requires a more thorough transportation impact analysis (TIA),”
10 and that “the water-and-sewer capacity analysis assumes 45 dwelling units. * * *

11 This is relevant to the application’s compliance with the [provisions of] BDC
12 3.4.400. *See* [Subdivision] Rec. 66-69.” Petition for Review 11-12. Nothing in
13 the materials quoted above includes any reference to the criteria now cited in the
14 assignment of error, or the operative language of the criteria, that are now
15 identified in the first assignment of error. Nothing in those record pages includes
16 any argument that those criteria are not met. *Savage v. City of Astoria*, 68 Or
17 LUBA 225, 231 (2013) (raising general traffic impact issues is not sufficient to
18 permit a petitioner at LUBA to later assign error to failures to comply with
19 technical TPR requirements); *Cornelius First v. City of Cornelius*, 52 Or LUBA
20 486, 495 (2006) (generalized arguments about lack of justification for
21 commercial zoning are insufficient to raise an issue under Goal 9 (Economic
22 Development) or the Goal 9 rule where neither Goal 9 nor the Goal 9 rule were
23 cited and no issue was raised regarding the substantive requirements of Goal 9 or
24 the Goal 9 rule); *Cox v. Yamhill County*, 29 Or LUBA 263, 266 (1995) (general

1 argument that good farm land should not be used for a church insufficient to raise
2 an issue under OAR 660-033-0120, which prohibits churches on high value farm
3 land); *Spiering v. Yamhill County*, 25 Or LUBA 695, 712 (1993) (no issue was
4 raised regarding the ORS 215.296 farm impacts test where the statute was not
5 cited and none of the operative terms of the statute were employed in petitioner’s
6 arguments below); *ODOT v. Clackamas County*, 23 Or LUBA 370, 375 (1992)
7 (general references to Goal 12 (Transportation) are insufficient to raise an issue
8 under OAR 660-012-0060).

9 Petitioners also argue, in the alternative, that the hearings officer’s decision
10 in the Bachelor View 1 proceedings somehow preserved the issues raised in the
11 first assignment of error. We understand petitioners to argue that the hearings
12 officer committed “plain error” in Bachelor View I because we remanded the
13 Bachelor View 1 decision in *Husk v. City of Bend*, ___ Or LUBA ___ (LUBA
14 No 2022-052, Oct 21, 2022) and therefore the issues raised in the first assignment
15 of error here do not need to be preserved.

16 The plain error doctrine is an exception to the requirement that an issue be
17 preserved for appellate review *in appellate courts*. ORAP 5.45(1); *Ailes v.*
18 *Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991) (establishing
19 a two-step test to determine whether an appellate court may consider unpreserved
20 error and whether it will exercise its discretion to do so). No prior LUBA case
21 has applied the plain error doctrine to allow LUBA to review an issue that
22 otherwise was not preserved as required by ORS 197.797(1). Petitioners do not

1 cite any other basis for us to review issues that were otherwise not preserved
2 pursuant to ORS 197.797(1).

3 We conclude that the issues raised in the first assignment of error were not
4 raised during the local proceedings and are waived under ORS 197.797(1).

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 Bend Development Code (BDC) chapter 3.4 provides requirements for
8 design and construction of public and private transportation facilities. BDC
9 3.4.200(F) Table A provides minimum right-of-way and pavement width, planter
10 strips, sidewalks, and other requirements for local streets in the RS zone. BDC
11 3.4.150 provides a process to seek a waiver or modification of public
12 improvement standards. BDC 3.4.150(B) provides, in relevant part:

13 “The Review Authority, after considering the recommendation of
14 the City Engineer, may waive or modify the standards of this title
15 and the City of Bend Standards and Specifications based on a
16 determination that (a) the waiver or modification will not harm or
17 will be beneficial to the public in general; (b) the waiver and
18 modification are not inconsistent with the general purpose of
19 ensuring adequate public facilities; and (c) one or more of the
20 following conditions are met:

21 “* * * * *

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

25 Intervenor sought and the hearings officer approved a modification of the BDC
26 3.4.200(F) Table A requirements to reduce the minimum right-of-way width

1 from 60 feet to 40 feet, and to improve only the east side of Bachelor View Drive,
2 on intervenor's property, with planters, curbs and sidewalks. Subdivision Record
3 522. The hearings officer approved the waiver. Subdivision Record 53.
4 Petitioners' second assignment of error is that the hearings officer's decision does
5 not comply with BDC 3.4.150(B) for two reasons.

6 **A. BDC 3.4.150(B)'s "Will not harm or will be beneficial to the**
7 **public in general" waiver requirement**

8 First, petitioners argue that the hearings officer's evaluation under BDC
9 3.4.150(B) improperly compared the effect of constructing the proposed
10 development with the waiver against the effect of having no development at all.⁴
11 Petition for Review 18-19. Petitioners argue that BDC 3.4.150(B) required the
12 hearings officer to consider the harm or benefit of constructing the proposed
13 development without the waiver against the harm or benefit of constructing the
14 development with the waiver.

15 Intervenor responds, initially, that the issue raised in this portion of
16 petitioners' second assignment of error is waived because it was not raised before
17 the hearings officer. The issue raised in this portion of the second assignment of
18 error is whether the hearings officer correctly construed BDC 3.4.150(B) when
19 evaluating the waiver/modification application to allow a 40-foot right-of-way
20 and planters and sidewalks only on one side of the street.

⁴ Petitioners argue that "the hearings officer applied the wrong legal framework to this element [of BDC 3.4.150(B)]." Petition for Review 18.

1 In the petition for review, petitioners argue, confusingly, that the issue
2 raised in the second assignment of error is preserved because the hearings officer,
3 during the hearing on intervenor's application that led to the challenged decision,
4 references their decision in Bachelor View 1. We have trouble following that
5 argument, but we understand it to be that, if petitioners preserved the issue, raised
6 in their current second assignment of error, in the proceedings related to the
7 hearings officer's Bachelor View 1 decision, then that issue is preserved for
8 purposes of this proceeding. If that is petitioners' argument, we reject it. ORS
9 197.797(1) requires, as relevant, an issue to be raised "on the proposal before the
10 local government." Raising an issue in a different, prior proceeding on a different
11 proposal, or the hearings officer's reference to a different proposal in a different,
12 prior proceeding, is not sufficient to raise the issue "on the proposal before the
13 local government." ORS 197.797(1).

14 Additionally, petitioners cite intervenor's application submittals at
15 Subdivision Record 471. The application cites BDC 3.4.150 and briefly explains
16 the requested public improvement standards waiver. No issue is raised regarding
17 the correct application of BDC 3.4.150(B).

18 Petitioners also cite Subdivision Record 202-203, 342, 351, 353, 365 and
19 368 as preserving the issue raised in the second assignment of error. We have
20 reviewed those record pages in detail, and we agree with intervenor that nothing
21 on the cited record pages raises the issue raised in the second assignment of error.
22 We agree with intervenor that the materials on the cited record pages are not

1 sufficient to alert the city and intervenor to the issue now raised in the second
2 assignment of error, concerning the proper analysis under BDC 3.4.150(B), and
3 thereby provide them an adequate opportunity to respond. *ODOT v. Clackamas*
4 *County*, 23 Or LUBA 370, 375 (1992).

5 Nothing in the cited record pages cites the relevant portion of BDC
6 3.4.150(B) or any of the operative language of the relevant code provision. The
7 cited record pages contain statements of general opposition to a modified road
8 width, expressed in terms of questions about maintenance and repair of the road,
9 increased traffic, and safety.⁵ Nothing in the cited record pages raises an issue

⁵ Subdivision Record 202: “Considering * * * [intervenor’s] request for a waiver, reducing the driving surface of the street will exacerbate the access for residents as well as delivery trucks, public services and emergency vehicles.”

Subdivision Record 342: “The proposed development seems to require that private easements are extinguished and that the newly established road would be partially private and partially public. There is no framework in place to repair or maintain this road, and the builder does not have proper ownership over the land being discussed.”

Subdivision Record 351 “[Intervenor] is proposing a ‘half street’ adjacent to the private road which does not meet City Code. * * * If allowed this creates a myriad of problems that [interevenor] and the City of Bend are not prepared to adequately address. Who will repair the road? Who will plow the road? Will a landowner be liable for an injury that occurs on their half of the road? Does [intervenor] even have legal authority to proceed with this project without the approval of property owners whose land adjoins the proposed development?”

- 1 regarding how BDC 3.4.150(B)(a) should be applied to intervenor's modification
2 request.

Subdivision Record 353: "We are also concerned about the design of the proposed 'half road,' which could lead to an additional burden of use and maintenance on our Private Road. There is the potential for the City to plow its snow onto our side of the road, for overlapping maintenance issues, and for increased traffic and reckless speeds leading into a very sharp blind corner to the southwest where Bachelor View Rd turns west. BDC 4.3.400(F)(2)(a) requires that all streets and roads for public use must be dedicated to the public without any reservation or restriction." (Boldface omitted.)

Subdivision Record 365: "Granting multiple waivers to Code and allowing for half-baked and half developed roads sets a dangerous precedent for other developers to follow in the future * * *.

"* * * * *

"[Intervenor] seeks to ignore the legal standing of these easements with both projects and seeks a 'half road' which does not meet City Code requirements and creates a huge quandary. Who will maintain this road? How will it be plowed of snow? Will the City only plow half of it? How will it be repaired and maintained? Will the City ask for our approval for access when they need to repair or replace their half? Who will bear responsibility and under whose jurisdiction will it fall if there is an accident on the road? None of these questions have been answered because there are no clear or logical answers."

Subdivision Record 368: "This area (Bachelor View Road) *is not in a key opportunity area and thus not appropriate for granting waivers* (3.4.150 Waiver and Modification of Public Improvement Standards.) to bypass Bend city code." (Emphasis added.)

1 **B. BDC 3.4.150(B)(9)**

2 The hearings officer found that the waiver request met BDC 3.4.150(B)(9),
3 which requires intervenor to demonstrate that “[t]here is insufficient right-of-way
4 to allow a full width street cross-section *and additional right-of-way cannot be*
5 *provided.*” (Emphasis added); *see* Subdivision Record 53. The hearings officer
6 reasoned that intervenor could not legally be required to purchase land from the
7 neighboring property to the west to meet the 60-foot width requirement.
8 Subdivision Record 53.

9 Also in the second assignment of error, petitioners argue that “the record
10 does not show why intervenor[] cannot dedicate more of its own property to
11 create a 60-foot right-of-way and obviate the need for additional property from
12 the neighboring owner.” Petition for Review 23 (citing Subdivision Record 203).
13 Intervenor responds that “it was clear from the city that its policy was to not have
14 all 60 feet on the development site. [Subdivision] Rec. 522.” Intervenor’s Brief
15 35. However, Subdivision Record 522 does not address this issue at all. The
16 hearings officer’s findings do not explain their conclusion that “additional right
17 of way could not be provided” under BDC 3.4.150(B)(9) by using more of the
18 subject property.⁶ In the absence of any explanation in the decision identifying

⁶ It could be that such an additional dedication from the subject property would create a misalignment of that portion of Bachelor View Road and the portion to the north of the subject property, creating a road not consistent with city alignment and connectivity standards. It could also be that such a

1 why the evidence supports the hearings officer's conclusion, or anything
2 addressing the issue in the findings, we agree with petitioners that there is not
3 substantial evidence in the record to support the hearings officer's decision that
4 additional right of way could not be provided by using more of the subject
5 property.

6 The second assignment of error is sustained, in part.

7 **THIRD ASSIGNMENT OF ERROR**

8 BDC 3.4.400(A) requires water mains to be installed in accordance with
9 the Bend Standards and Specifications (BSS). BSS 5.6.1 requires a minimum
10 water flow of 1,500 gallons per minute (gpm) in the RS zone. Intervenor's initial
11 application materials proposed using an 8-inch water main that would meet or
12 exceed 1,000 gpm.⁷ As noted, in June 2022 intervenor applied for a waiver of the
13 water flow requirement "out of an abundance of caution." Subdivision Record
14 53, 320-21.

15 In July 2022, intervenor submitted a revised memorandum that proposed
16 to meet and exceed the 1,500 gpm standard using a 12 inch water main.
17 Subdivision Record 292. Intervenor also proposed and the hearings officer
18 imposed Condition 12, which requires intervenor to, prior to final plat approval,

requirement could have constitutional implications. However, no explanation is provided in the decision.

⁷ We understand the city's planning staff to have originally identified, in error, the applicable standard as requiring a water flow of at least 1,000 gpm. Subdivision Record 401.

1 either demonstrate that (1) the water system will meet the minimum gpm standard
2 in BSS 5.6; or (2) the water system will meet or exceed 500 gpm and all dwellings
3 will be constructed using alternative construction methods approved by the city's
4 building official and the State Fire Marshal, as allowed by the Oregon Fire Code.
5 Subdivision Record 85.

6 The hearings officer concluded that intervenor demonstrated that BDC
7 3.4.400 was met if intervenor construed the water system under the first option
8 in Condition 12, and that no waiver was required in that circumstance.
9 Subdivision Record 68-69. In the alternative, in the event intervenor chose the
10 second option in Condition 12, the hearings officer also approved the waiver
11 application. Subdivision Record 55.

12 Petitioners' third assignment of error is that the hearings officer erred in
13 interpreting BDC 3.4.150(B), and that the hearings officer should have compared
14 whether allowing the development with a minimum of 500 gpm water flow with
15 alternative construction methods was harmful or beneficial to the public
16 compared to allowing the development with 1,500 gpm.

17 Intervenor responds, initially, that the issue raised in the third assignment
18 of error was not raised during the proceedings before the hearings officer and
19 therefore it is waived. Petitioners cite Subdivision Record 196-97, 238, 295, 297,
20 339, 342, 350, 351, 368. We have reviewed the cited record pages, and we agree
21 with intervenor that the issue raised in the third assignment of error was not raised

1 with the specificity required to alert the hearings officer and intervenor that it
2 needed to respond to it.

3 However, to the extent the third assignment of error challenges the
4 hearings officer's conclusion that a waiver was justified, intervenor responds, and
5 we agree, that the hearings officer interpreted BDC 3.4.150(B) in exactly the
6 manner that petitioners argue it should be interpreted. Intervenor point to the
7 hearings officer's findings at Subdivision Record 55-56, which compare allowing
8 the development with 500 gpm with alternative construction methods to allowing
9 the development with 1,500 gpm, and conclude that granting the waiver will not
10 harm public safety and that adding fire hydrants where none previously existed
11 will benefit the public. Petitioners do not acknowledge those findings or
12 otherwise explain why they provide a basis for reversal or remand. We agree with
13 intervenor that the third assignment of error provides no basis for reversal or
14 remand of the decision.

15 The third assignment of error is denied.

16 The city's decision is remanded.