BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHRISTOPHER ANGIUS, MARK ANDERSON,
WILLIAM BALDWIN, LISA DUNNING and
DAWN GROSE,
*Petitioners,*

vs.

WASHINGTON COUNTY,
*Respondent,*

and

D. SHANE KOLLENBORN and
STEPHANIE N. KOLLENBORN,
*Intervenors-Respondent.*

LUBA No. 2006-003

FINAL OPINION
AND ORDER

Appeal from Washington County.

Carrie Richter, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief were Edward J. Sullivan and Garvey Schubert Barer.

No appearance by Washington County.

Jack L. Orchard, Portland, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief were Megan D. Walseth and Ball Janik LLP.

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

AFFIRMED 07/10/2006

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

Opinion by Bassham.

**NATURE OF THE DECISION**

Petitioners appeal a decision on remand from LUBA approving an application for approval of a tentative subdivision plan and a preliminary grading plan for a 10-lot subdivision.

**MOTION TO FILE REPLY BRIEF**

Petitioners move to file a reply brief responding to several waiver arguments raised in the response brief. There is no opposition to the reply brief and it is allowed.

**FACTS**

On June 24, 2004, intervenors submitted an initial application for a tentative plan for a 10-lot residential subdivision on a 2-acre parcel. The county informed intervenors that the application was incomplete. In September 2004, intervenors obtained a permit from the Oregon Department of Forestry to cut down much of the timber on the subject parcel, through the period from September 3, 2004 through October 7, 2004. Intervenors logged approximately 149 trees. On September 16, 2004, intervenors re-filed the tentative plan application. The re-filed application was deemed complete on October 19, 2004. The hearings officer held a hearing and on December 20, 2004, issued a final order approving the tentative plan. The hearings also approved a preliminary grading plan pursuant to Community Development Code (CDC) 410-1.1.[1] CDC 410-1.1 requires a finding based on

[1] CDC 410-1.1 provides:

> "All grading and drainage activities are to occur pursuant to the provisions of Appendix Chapter 33 of the 1994 Uniform Building Code and the applicable State of Oregon Plumbing Code, or their successors and this Code. All grading and drainage activities on lands located within the Clean Water Services boundary shall also occur pursuant to the provisions of the 'Design and Construction Standards for Sanitary Sewer and Surface Water Management' or its successor. In the event of any conflict between the provisions of this Code, the Community Plan, the Rural/Natural Resource Plan, and Appendix Chapter 33 of the 1994 Uniform Building Code, or its successor, the more restrictive standard shall prevail.

the preliminary grading plan whether it is feasible for the final grading plan to comply with the standards of CDC 410-3.[2]

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"Grading applications may be processed through a two-step procedure consisting of a preliminary review (grading plan) and a final review (grading permit), unless the Director consolidates the applications into one review.

"No grading and drainage activities that are subject to Section 410 shall be undertaken without a grading permit.

"For Type I development, preliminary grading plans may be submitted as a stand alone application. For development reviewed through the Type II and III procedure, preliminary grading plans are to be submitted with the development application.

"*The purpose of a preliminary grading plan (conceptual) is to determine whether or not it is feasible to comply with the grading permit review standards of Section 410-3.* Full engineering drawings are not required at the preliminary review stage. However, preliminary grading plans shall be accurate enough to provide a basis for determining whether or not the proposed activity, as designed and to be implemented, will meet the applicable Code requirements for a grading permit.

"All grading permit applications (the second step) shall include detailed plans, per Section 410-2, rather than preliminary grading plans." (Emphasis added).

[2] CDC 410-3 provides, in relevant part:

"A grading permit, which shall apply only to the area of the site where construction, grading, cut or fill is proposed, may be issued only after the Review Authority finds:

"410-3.1 The extent and nature of proposed grading is appropriate to the use proposed, and will not create site disturbance to an extent greater than that required for the use;

"410-3.2 Proposed grading will not cause erosion to any greater extent than would occur in the absence of development or result in erosion, stream sedimentation, or other adverse off-site effects or hazards to life or property; and

"410-3.3 Appropriate siting and design safeguards shall ensure structural stability and proper drainage of foundation and crawl space areas for development with any of the following soil conditions:

"A. Seasonal, perched, high or apparent water table;

"B. High shrink-swell capability;

"C. Low bearing strength such as compressible organic; or

"D. Shallow depth-to-bedrock.

"410-3.4 Revegetation:

Petitioner Angius appealed the hearings officer's decision to LUBA, advancing three assignments of error.[3] LUBA rejected the first and third assignments of error, but remanded the decision to the county under the second assignment of error to identify evidence supporting the hearings officer's finding, based on the preliminary grading plan, that it is feasible for the final grading plan to comply with the standards of CDC 410-3.

On remand, the hearings officer conducted an evidentiary hearing October 6, 2005. Because the notice of the hearing gave the incorrect date for the hearing, the hearings officer issued a second notice and conducted an additional hearing on November 17, 2005. At the end of the November 17, 2005 hearing, petitioner Angius requested that the record be held

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> "Where natural vegetation has been removed through grading in areas not affected by the landscaping requirements and that are not to be occupied by structures, such areas are to be replanted as set forth n this subsection to prevent erosion after construction activities are completed.
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> "A. Preparation for Revegetation:
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> > "In preparation for grading and construction, top soil removed from the surface twelve (12) inches shall be stored on or near the sites and protected from erosion while grading operations are underway. * * * After completion of such grading, topsoil is to be restored to exposed cut and fill embankments or building pads to provide a suitable base for seeding and planting.
>
> "* * * * *
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> "410-3.7 The proposed grading will preserve the functioning of off-site drainage courses or bodies of water.
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> "410-3.8 Comply with the applicable standards for permanent storm water quality control facilities adopted b the Oregon State Department of Environmental Quality, as set forth in OAR 340-41-345(4)(a-e). This standard is submitted by submittal of a service provider from [CWS] indicating that the proposed development is in compliance with DEQ requirements or will be in compliance when the requirements set forth in the service provider letter are met."

[3] Petitioners also appealed two decisions by Clean Water Services (CWS), a special district with jurisdiction over water quality and erosion issues. The two decisions were related to intervenors' tentative subdivision plan, and involved a "Sensitive Area Pre-Screening Site Assessment," and an "Erosion Control Permit." *Angius v. Clean Water Services District*, 50 Or LUBA 154 (2005). LUBA granted the district's motion to dismiss, because the Design and Construction Standards the district applied are not "land use regulations," and thus CWS decisions were not "land use decisions" as those terms are defined at ORS 197.015(11)(a) and 197.015(13).

open to respond to the oral testimony of intervenors' engineer at that hearing. The hearings officer declined, closed the hearing and, on December 18, 2005, issued a 19-page decision concluding that it is feasible for the final grading plan to comply with CDC 410-3. This appeal followed.

**FIRST ASSIGNMENT OF ERROR**

Petitioners contend that the county erred in deferring review of the final grading plan under CDC 410-3 to a proceeding that will not provide notice or opportunity for a hearing.

As noted, CDC 410-1.1 sets out a two-stage review process for grading plans. The first stage involves a preliminary grading plan, which requires a finding that it is feasible to comply with the final grading permit standards at CDC 410-3. The second stage involves submission of the final grading permit application, at which time the county will determine whether that application demonstrates compliance with CDC 410-3.

In the present case, the hearings officer found based on the preliminary grading plan that it is feasible to comply with the final grading permit standards. The hearings officer noted that intervenors will be required to obtain an erosion control permit from CWS, under the CWS Design and Construction Standards.[4] The hearings officer also imposed a

[4] The hearings officer's findings state, in relevant part:

> "Erosion control is required before disturbing the site. The applicants illustrate what typical erosion control measures they will employ on Sheets 4 and 12 of the February 2005 preliminary plans. The hearings officer finds that proper use of erosion control reduces site disturbance, because it limits the geographic extent of that disturbance, protects against sedimentation in runoff and facilitates revegetation. The applicants are required to demonstrate that they will properly use erosion control acceptable to CWS—which is charged with maintaining water quality and drainage in the area—before CWS will issue a grading permit. The hearings officer relies on the applicants' illustrations of their intentions for grading (i.e., the preliminary plans, particularly sheets 4 and 12) to conclude that the application can comply with CDC 410-3.1 subject to feasible conditions (e.g., to provide more detailed plans about where, when and how the illustrated measures will be used)." Record 21.
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> "Conditions of approval and the CDC require the applicants to submit and receive approval of final plans that show proposed grading will comply with the erosion control permit standards of CWS and with grading provisions of the Uniform Building Code. Because the applicants must submit and receive approval of final plans for grading and must submit to on-site

condition of approval requiring intervenors to apply for a CWS site development permit, which will require a detailed grading and erosion control plan.

Petitioners contend that any site development permit decision by CWS would be a discretionary "permit" decision as defined by ORS 215.416, and thus a land use decision, or in the alternative a limited land use decision as defined by ORS 197.015(13). However, petitioners argue, CWS review will not occur with notice and opportunity for a hearing. Petitioners cite to a line of cases holding that, where a local government defers findings that are required at the first step of a two-step process, the local government must ensure that the second step process provides notice and an opportunity for a hearing. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (and cases cited therein).

Intervenors respond that the hearings officer did not defer any findings required at the first step of the two-step grading permit process; the hearings officer properly found, as CDC 410-1.1 requires, that it is feasible for intervenors to comply with the final permit grading standards at CDC 410-3.[5] Intervenors further note that CWS will apply its Design and Construction Standards, which LUBA has already held are not land use regulations, and not the county's regulations.

A key premise underlying petitioners' argument is that CWS, and not the county, will review the final grading permit. *See* Petition for Review 12, n 4 ("Nothing in the CDC 410-2 Grading Permit application submittal requirements require further erosion control analysis or identification of erosion control measures. From this it must be inferred that the final review

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inspection of work in progress and on completion by public agencies, it is reasonably likely that the applicants can and will properly employ and maintain the approved erosion control methods." Record 22.

[5] Intervenors also argue that the issue raised under the first assignment of error was not raised during the proceedings in *Angius v. Washington County (Angius I)*, 50 Or LUBA 33 (2005), or was resolved in that case, and thus cannot be raised in an appeal of the decision on remand, under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). However, we agree with petitioners that that issue was raised in *Angius I*, but not resolved, and therefore petitioners are not precluded from seeking its resolution in the present appeal. *See Angius I*, 50 Or LUBA at 40 n 2 (declining to rule on petitioners' arguments that notice and opportunity for comment is required at second stage final grading permit proceedings).

will come from CWS rather than the county"). That premise is unexplained. Condition of Approval I(B) clearly requires intervenors to submit a completed grading permit application to the county building services division. Condition of Approval I(D) requires intervenors to also obtain a CWS site development permit. It seems relatively clear that intervenors must obtain two grading permits, one from the county and one from CWS. The county will apply the CDC 410-3 standards, and CWS will apply its standards. Thus, to the extent the county deferred anything, it deferred to county staff, not CWS.

In any case, even if petitioners' argument is understood to challenge deferral to county staff under the reasoning in *Rhyne*, we agree with intervenors that the hearings officer did not defer findings required at the first step of the two-step grading permit process. Instead, the hearings officer found that the application complies with CDC 410-1.1, which requires a finding, based on the preliminary grading plan, that it is feasible for the final grading plan to comply with the standards of CDC 410-3. The standards at CDC 410-3 do not apply directly at the first stage; they only apply directly at the second stage. In this respect, the two-step grading permit process mirrors the typical two-step subdivision approval process. Standards that apply only to the final subdivision plat do not apply to review of the preliminary plan, and vice versa. The hearings officer made the findings required at the first step preliminary grading permit stage, and did not defer any findings of compliance with standards that are applicable at that first step. Therefore, *Rhyne* is simply inapposite. Petitioners have not demonstrated that the hearings officer erred in failing to impose a condition of approval to require that the county provide notice and hearing at the second step final grading permit process in which it determines whether or not the final grading plan complies with CDC 410-3 standards.

Finally, we do not understand petitioners to argue that, even in the absence of a deferral under *Rhyne*, the present decision approving the preliminary grading plan must assure that the second step final grading permit decision will provide notice and opportunity

for hearing or comment. To the extent petitioners advance that argument, petitioners do not identify the basis for any obligation to determine, in the present decision, what procedures will govern the second step review. If petitioners are relying on *J.P. Finley & Son v. Washington County*, 19 Or LUBA 263 (1990), that reliance is misplaced. Although *J.P. Finley* also involved a grading plan and a two-stage decision process, the holding in *J.P. Finley* does not assist petitioners here. In *J.P. Finley*, the hearings officer imposed a condition of approval in the first step decision that expressly called for the second step decision to be rendered without a hearing. *J.P. Finley*, 19 Or LUBA at 265 n 4 (and related text). We held in *J.P. Finley* that because the petitioner did not appeal and challenge that first stage condition of approval he could not argue in an appeal of the second stage grading permit decision that the second stage decision should have included a hearing. *Id* at 270. The hearings officer's decision in this case includes no similar condition that the second stage final grading permit decision will be issued without a hearing. *J.P. Finley* is simply inapposite.

The first assignment of error is denied.

**SECOND ASSIGNMENT OF ERROR**

As noted earlier, CDC 410-3.1 requires a finding that "proposed grading is appropriate for the use proposed and will not create site disturbance to an extent greater than that required for the use." *See* n 2. Petitioners contend that the hearings officer misconstrued the applicable law and adopted findings not based on substantial evidence, in concluding that based on the preliminary grading plan that it is feasible to comply with the final grading plan requirements at CDC 410-3.1.

The hearings officer found, based on the revised preliminary grading plan submitted in 2005, that it is feasible to comply with CDC 410-3.1. Petitioners challenge that finding on four grounds: (1) the hearings officer improperly relied on the 2004 preliminary grading plan, which was superseded by the 2005 plan, (2) the hearings officer failed to address

impacts on nearby Bronson Creek, (3) the preliminary grading plans do not show any disturbance limits as required by CDC 410-1.2(B)(7), absent which it is impossible to determine whether it is feasible to comply with CDC 410-3.1, and (4) the hearings officer failed to evaluate the erosion potential created by clear-cutting that occurred in September and October 2004.

Intervenors respond, and we agree, that the hearings officer did not rely on the superseded 2004 plan. The relevant findings state that:

> "[a]lthough the February 2005 preliminary plans supersede the earlier plan Sheet C3, the hearings officer continues to find that the discussion in the Staff Report and December 20, 2004 final order is relevant to the determination regarding CDC 410-3 and relies on those findings and the evidence cited therein to the extent that they continue to apply." Record 18.

The hearings officer clearly understood that the 2004 plan had been superseded, but relied on the 2004 staff report and other evidence to the extent they continue to apply. Petitioners do not explain why that is error.

We also agree with intervenors that petitioners fail to explain why the existence or proximity of Bronson Creek is relevant to a finding that is feasible to comply with the final grading permit standards at CDC 410-3.

CDC 410-1.2(B)(7) sets out the submittal requirements for the grading plan, requiring that the site plan "show the area of the site where construction, grading, cut or fill is proposed[.]" However, the present question is not whether the preliminary grading plan includes the information required by CDC 410-1.2(B)(7), but whether the preliminary grading plan and other information provide a basis to conclude that it is feasible for the final grading plan to comply with CDC 410-3. It is not clear to us that the preliminary grading plan and other information fails to show the area of the site where construction, grading, cut or fill is proposed, but even it does, petitioners do not explain why that omission makes it impossible to determine whether it is feasible to comply with CDC 410-3.1.

Finally, a pervasive theme throughout the petition for review is petitioners' contention that the hearings officer erred in failing to take into account the potential for erosion resulting from the logging activities that occurred pursuant to the September ODF permit. Petitioners argue that the logging was part of the proposed "development," and therefore any erosion related to logging activities must be evaluated under CDC 410-3. Intervenors respond initially that the hearings officer was aware that the site had been logged before the preliminary subdivision application became complete, and determined in the 2004 decision that that fact was legally irrelevant to the approval criteria for a preliminary plan application. Because that determination was not challenged in the *Angius I* proceedings, intervenors argue, it cannot be raised now.

In a reply brief, petitioners argue that the issue of whether erosion from logging activities must be evaluated need not be preserved because the hearings officer made no specific findings in the 2004 decision about the scope of grading activities, so there was nothing to challenge. However, it is not clear to us why that issue could not have been raised during the *Angius I* proceedings. The hearings officer determined in the 2004 decision that it was feasible to comply with the final grading plan standards at CDC 410-3. While we remanded that decision because no party identified evidence supporting that finding, we know no reason why the issue of whether logging activities should be considered part of the "proposed grading" for purposes of CDC 410-3.1 could not have been raised in the 2004 proceedings and before LUBA. We conclude that the issues of whether the proposed development includes the logging activities, or whether erosion attributable to logging activities must be evaluated for purposes of determining whether it is feasible to comply with the CDC 410-3.1 could have been raised in the 2004 proceedings and before LUBA, were not so raised, and therefore cannot be reviewed by LUBA in the present appeal. *See Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992) (issues that could have been

raised in prior proceedings, but were not raised, are waived in appeals of decisions following a LUBA remand); *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 34 n 1 (1994).

The second assignment of error is denied.

**THIRD ASSIGNMENT OF ERROR**

CDC 410-3.2 requires that the "[p]roposed grading will not cause erosion to any greater extent than would occur in the absence of development[.]" Petitioners again argue that the logging activities are part of the proposed "development," and therefore CDC 410-3.2 requires a determination whether the proposed grading will cause erosion to a greater extent than would have occurred prior to logging. In other words, petitioners contend that the baseline level of erosion is any erosion that may have been occurring prior to the logging, not the erosion that is occurring after the logging. In support of this argument, petitioners note that the CDC defines "development" broadly to include tree-cutting.[6]

The hearings officer rejected that argument, interpreting the term "absence of development" in CDC 410-3.2 to mean "absence of *proposed* development," and finding that logging activities or other development activities that pre-dated the date that the subdivision application became complete are not part of the proposed development that must be considered under CDC 410-3.2.[7]

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[6] CDC 106-57 defines "development" as "[a]ny man-made change to improved or unimproved real estate, including but not limited to * * * tree cutting * * * and site alteration such as that due to * * * grading, * * * or clearing."

[7] The hearings officer's findings state, in relevant part:

> "The hearings officer concludes that it would be inconsistent with the context of CDC 410-3.2 to construe that section to turn the clock back before the application was filed. Although the term 'development' includes tree-cutting, that is not the development proposed in the application before the hearings officer in this case. The proposed development is the subdivision on a site largely without trees. The trees were cut before the complete subdivision application was filed. The date that the applicants filed the application is the baseline for existing conditions. Because the trees were cut before the application was filed, the hearings officer construes the term 'absence of development' to mean after the applicants cut almost all of the trees on the site and before the applicants undertook development of the subdivision for purposes of the CDC.

Intervenors again respond that this issue was not preserved in the prior appeal. On the merits, intervenors argue that the hearings officer reasonably interpreted CDC 410-3.2 to apply to the development proposed, not activities or development that occurred prior to the date the subject application was filed.

In the reply brief, petitioners contend that the hearings officer made no interpretation of "absence of development" in the *Angius I* decision, so there was nothing to challenge in the prior proceeding, and the waiver principle in *Beck* does not apply. We disagree. The issue of whether to take into account logging activities that occurred under the ODF permit in determining whether it is feasible to comply with CDC 410-3.2 could have been raised in the prior proceeding and before LUBA, but apparently was not. That the hearings officer adopted findings addressing the issue when it was raised for the first time in the proceedings on remand does not mean petitioners did not waive that issue under *Beck* by failing to raise the issue in their prior appeal.

In any case, we agree with intervenors that the hearings officer's interpretation of "absence of development" to mean absence of *proposed* development is reasonable. The text and context of CDC 410-3.2 make it clear that "development" does not include all prior development efforts on the property, only to development proposed in the pending application.

The hearings officer also found that all tree-cutting occurred prior to the date the application was filed. Petitioners argue that there is no evidence supporting that finding. However, it is not clear to us the relevant conditions on the property for purposes of CDC 410-1.1 and 410-3.2 are the conditions that existed on the date of application. Although ORS

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> "* * * The hearings officer appreciates that the preceding construction is frustrating and appears to reward the applicants for cutting the trees. But any benefit to the applicants is not relevant to the interpretation. The context of the term 'development' in CDC 410-3.2, particularly 410-1.1, does not suggest that it is meant to refer to some prior date in time. It is meant to refer to the development being proposed; in this case, a subdivision on a site largely cleared of trees." Record 23.

215.427(3) imposes a fixed goal post rule on the county with regard to legal standards adopted after the application is submitted, we are aware of no similar fixed goal post rule for facts on the ground. We question petitioners' apparent position that the proposed subdivision should have been analyzed as though any trees that were cut after the application was submitted were still there. Further, we question petitioners' broader view that the subdivision approval decision (which does not authorize harvesting of trees) must analyze the subdivision proposal as if the parcel had never been logged at all. Petitioners have not demonstrated that the timing or extent of logging activities under the ODF permit has any bearing on the subdivision or grading applications for purposes of CDC 410-1.1 and 410-3.2.

The third assignment of error is denied.

**FOURTH ASSIGNMENT OF ERROR**

CDC 410-3.3 requires that "[a]ppropriate siting and design safeguards shall ensure structural stability and proper drainage of foundation and crawl space areas for development" when soils conditions such as a "seasonal, perched, high or apparent water table" exist on the property. *See* n 2. The applicant's geotechnical report found a seasonal perched or apparent water table two to three feet below grade on part of the subject property.

The hearings officer found it feasible to provide appropriate siting and design safeguards, including the proposed "installation of footing drains connected to a storm drainage system," and stated that conditions of approval will ensure that proposed structures will incorporate such measures.[8] Similarly, in addressing feasibility of compliance with

[8] The hearings officer's findings state, in relevant part:

> "The hearings officer finds that the geotechnical report is the best evidence of whether the soil conditions listed in CDC 410-3.3 exist on the site. The hearings officer relies on that report to conclude that the site does not contain any of those conditions except a seasonal perched or apparent water table 2 to 3 feet below grade in part of the site. The hearings officer finds that appropriate siting and design safeguards to protect the stability and drainage of foundations and crawl space areas include installation of footing drains connected to a storm drainage system that provides for water quality and quantity controls. Conditions of approval ensure that proposed structures will incorporate such measures." Record 23-24.

CDC 410-3.7, which requires a finding that the proposed grading will preserve the functioning of off-site drainage courses, the hearings officer found it feasible to provide a storm water swale and indicated that the applicants had proposed to do so and would be required to do so by condition of approval.[9]

Petitioners argue that, notwithstanding the hearings officer's indication that conditions of approval were necessary to ensure that technical solutions such as footing drains and a stormwater swale would be constructed, in fact the challenged decision includes no conditions of approval to that effect.

Intervenors respond that the same conditions of approval appeared in the 2004 decision, and petitioners could have assigned error to any deficiency in those conditions in *Angius I*, but failed to do so. On the merits, intervenors emphasize that the present issue is whether it is *feasible* to comply with the final grading plan standards at CDC 410-3.3 and 410-3.7. The hearings officer found that it was, noting that technical solutions to perched groundwater and storm water runoff, such as the proposed footing drains and the proposed storm water swale, are available. Intervenors contend that it is unnecessary in approving the preliminary grading plan to impose conditions requiring that these particular technical solutions be implemented in the final grading plan.

With respect to waiver, petitioners respond that the 2004 decision did not include findings specifically addressing CDC 410-3.3 and 410-3.7, much less findings stating that

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[9] The challenged decision addressed arguments that required drainage improvements in the public right of way will adversely affect the quality of water in Bronson Creek as follows, in relevant part:

> "The proposed storm water swale will enhance the quality of storm water from the whole site after grading and development. Assuming this is relevant to CDC 410-3.7, the hearings officer finds that the applicant can undertake additional engineering, as needed, to provide an appropriately sized, shaped and landscaped swale to function effectively based on the preliminary plans, particularly Sheets 3, 5 and 8 and the written comments in the record from CWS. The applicants have agreed to do so (see the Supplement) and are required to do so by conditions of approval. Therefore the application can comply with CDC 410-3.7 before the applicants disturb the site for grading for the subdivision." Record 30-31.

conditions of approval will ensure compliance with those standards. Nonetheless, petitioners' basic complaint is that conditions of approval are necessary to ensure compliance with CDC 410-3.3 and 410-3.7, and the hearings officer failed to impose such conditions. We do not see why that issue could not have been raised in *Angius I*. That the hearings officer in addressing issues raised for the first time on remand adopted findings agreeing to impose such conditions does not allow petitioners to raise that waived issue in the present appeal.

In any case, we agree with intervenors that it is not clear that the hearings officer found that conditions of approval requiring the proposed footing drains and storm water swale are necessary to ensure compliance with CDC 410-3.3 and 410-3.7. As intervenors note, the issue is whether the preliminary grading plan and other evidence demonstrates it is *feasible* for the final grading plan to comply with CDC 410-3.3 and 410-3.7. The hearings officer was not required to determine whether the preliminary grading plan complies with those standards, or even necessarily to *ensure* via conditions of preliminary plan approval that the *final* grading plan complies with those standards. At the appropriate time, county staff will apply CDC 410-3.3 and 410-3.7 and determine whether the final grading plan in fact complies with those standards. In so doing, staff will presumably determine exactly what measures are necessary to comply and require them, if necessary, as conditions of final grading plan approval. Because conditions of approval are not necessary to determine whether it is feasible for the final grading plan to comply with CDC 410-3.3 and 410-3.7, the hearings officer's failure to impose conditions requiring particular measures in the present decision is, at most, harmless error.

The fourth assignment of error is denied.

**FIFTH ASSIGNMENT OF ERROR**

In addressing CDC 410-3.3, the hearings officer also rejected arguments that the high water table on parts of the property would detract from the performance of the proposed stormwater swale. Specifically, the hearings officer stated:

> "There is no substantial evidence in the record that the presence of a relatively high ground water table will detract from the performance of the proposed storm water swale or that measures cannot be taken to enhance the swale's performance. Sheet 8 of the 2005 preliminary plans shows that the swale will extend 1.5 feet below grade, which suggests it will be above the highest elevation at which the geotechnical staff encountered groundwater. Moreover the hearings officer is familiar with similar soil/groundwater conditions in other areas where swales have been and continue to be used successfully.
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> "* * * The hearings officer also is not persuaded that the swale cannot be modified, if necessary, to comply with CWS standards. The site size would accommodate a longer and/or wider storm water swale or multiple swales if necessary without making significant changes to the preliminary plat other than to include such features in tracts and easements and to reconfigure the affected lots. * * * Therefore the application can comply with CDC 410-3.3 before grading occurs." Record 24-25.

Petitioners challenge several statements in those findings. First, petitioners argue that the finding that there is no substantial evidence that ground water will detract from the performance of the storm water swale improperly placed the burden on petitioners to introduce evidence that CDC 410-3.3 could not be met. Further, petitioners contend that because the perched groundwater is two to three feet below grade, and the proposed swale is only 1.5 feet below grade, it is a physical impossibility for the swale to capture the perched groundwater, and thus the evidence in the record establishes that the swale will not perform its function.

Second, petitioners fault the hearings officer for relying on his personal experience with swales and similar soil/groundwater conditions. Petitioners contend that the hearings officer's personal experiences are outside the record, and cannot be relied upon.

Third, petitioners argue that the hearings officer speculated that the swale could be modified, if necessary. According to petitioners, there is no evidence in the record

supporting the hearings officer's speculations, or addressing the effect of reconfiguring the subdivision lots to allow for a larger or modified stormwater swale system, which again improperly places the burden of proof on petitioners.

Intervenors argue, and we agree, that the hearings officer did not shift the burden of proving feasibility of compliance with CDC 410-3.3 to petitioners. The hearings officer noted the absence of evidence in the record indicating any reason to believe that the perched groundwater would interfere with the storm water swale's performance. As the hearings officer noted, the groundwater and swale are at different elevations, and thus there is no reason to believe that they will interact. Petitioners appear to presume that the swale is intended to drain off the groundwater, instead of or in addition to draining off storm water, but petitioners cite to nothing in the record to support that presumption.

Petitioners are correct that findings of feasibility must be based on evidence on the record, not on the hearings officer's personal knowledge or experience outside the record. *See Mitchell v. Washington County*, 37 Or LUBA 452, 469, *aff'd* 166 Or App 363, 4 P3d 774 (2000) (remand is necessary where hearings officer rejects a proposed drainage system, but approves development based on a finding that it is feasible for an alternative drainage system devised by the hearings officer to comply with applicable criteria, and there is no evidence in the record supporting that finding). However, the challenged comment is merely an additional basis to reach the main conclusion that the perched groundwater will not detract from the swale's performance. We have affirmed that that main conclusion is supported by the record. Any error in citing an additional basis outside the record to support that conclusion is, at most, harmless error.

Finally, the hearings officer's finding that the swale could be modified if necessary without significant reconfiguration of lots is clearly based on his review of the site plan. Petitioners cite to no evidence suggesting the contrary. We disagree that the finding, which

is merely an alternative basis for finding it feasible to comply with CDC 410-3.3, is speculative or unsupported by the record.

The fifth assignment of error is denied.

**SIXTH ASSIGNMENT OF ERROR**

CDC 410-3.4 requires a finding that where "natural vegetation has been removed through grading * * * such areas are to be replanted as set forth in this subsection to prevent erosion after construction activities are completed." *See* n 2.

The hearings officer concluded that CDC 410-3.4 required only revegetation of certain areas where natural vegetation is removed by the grading proposed in the present application, and does not require revegetation of areas where vegetation was removed by the logging that occurred in 2004.[10]

Petitioners repeat their arguments that the logging activities are part of the proposed development and any grading associated with those activities must be considered in determining whether it is feasible to comply with CDC 410-3. We reject those arguments, for the reasons expressed above. Petitioners also contend that the hearings officer's interpretation of CDC 410-3.4 is inconsistent with CDC 410-1.1, which requires that all grading activities on lands within CWS boundaries must comply with CWS standards, and that in the event of any conflict between CWS standards and the county's standards, the more restrictive standard shall prevail. According to petitioners, CWS erosion control standards apply regardless of whether the property is involved in construction or development activity.

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[10] The hearings officer stated, in relevant part:

> "Based on the plain meaning of the words, the hearings officer finds that CDC 410-3.4 applies only where natural vegetation has been removed through grading in areas not affected by the landscaping requirements and that are not to be occupied by structures. The grading in this case is the grading proposed for the subdivision, rather than grading that occurred, if it occurred, during the tree-cutting that preceded the date of the complete application." Record 25.

Intervenors respond that petitioners misunderstand CDC 410-1.1, which does not state that in the event of conflict between CWS standards and county standards, the more restrictive shall prevail. Instead, it states that in the event of conflict between the county code, other county provisions, or the uniform building code, the more restrictive shall prevail.[11]

Intervenors are correct. Petitioners contend that the reference to CWS standards in CDC 410-1.1 has the effect of incorporating the CWS standards into the CDC. However, we do not read the first sentence of CDC 410-1.1 quoted in the margin to incorporate the referenced CWS standards; it simply states that all grading and drainage activities on lands within CWS jurisdiction shall *also* comply with CWS standards.

The sixth assignment of error is denied.

**SEVENTH ASSIGNMENT OF ERROR**

Petitioners argue that the hearings officer made a procedural error prejudicial to petitioners in denying petitioners' request to rebut oral testimony submitted at the final November 17, 2005 hearing.

CDC 410-3.4(A) requires that topsoil removed from the surface 12 inches during grading "shall be stored on or near the sites and protected from erosion while grading operations are underway." *See* n 2. After completion of grading, "the topsoil is to be restored to exposed cut and fill embankments or building pads to provide a suitable base for seeding and planting." *Id.* Petitioners explain that at the first hearing on October 6, 2005, the applicants' representative stated that all "stripped soil" will be hauled off-site and there

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[11] CDC 410-1.1 provides:

> "* * * All grading and drainage activities on lands located within [CWS] boundary shall also occur pursuant to the provisions of the 'Design and Construction Standards for Sanitary Sewer and Surface Water Management' or its successor. In the event of any conflict between the provisions of this Code, the Community Plan, the Rural/Natural Resource Plan, and Appendix Chapter 33 of the 1994 Uniform Building Code, or its successor, the more restrictive standard shall prevail."

will be no storage on-site. The hearings officer held the record open for five weeks for evidentiary rebuttal and final argument. Under that schedule, the applicants submitted a supplement stating that all "strippings and excess soils" will be hauled off-site and not stored on-site because they are not needed for re-vegetation. Petitioners responded that CDC 410-3.4(A) categorically requires that topsoil removed from the top 12 inches shall be stored on-site and re-used.

Due to a defect in the notice of hearing, the hearings officer eventually decided to conduct an additional hearing, which was scheduled for November 17, 2005. At that hearing, the applicants' consultant responded to petitioners' argument by clarifying that "stripping" referred to grasses and other vegetative material not suitable for re-vegetation, and that only excess soils—soils not needed for re-vegetation—will be removed. At the end of the November 17, 2005 hearing, petitioner Angius requested that the hearings officer leave the record open for a reasonable time to allow petitioners to respond to the consultant's testimony. The hearings officer declined, stating that he did not think there was any new evidence submitted at the hearing, and that there was nothing to respond to.

The hearings officer adopted findings interpreting CDC 410-3.4(A) to require only that the applicant store top soil that is needed for revegetation of graded areas, rejecting petitioners' argument that the all soil taken from the top 12 inches must be stored and re-used. Record 26-27. The hearings officer also found that most of the site that will be graded will be covered in structures and pavement, and not much top soil will need to be stored and re-used. *Id.*

Petitioners do not challenge that interpretation or those findings. Instead, they focus on the last paragraph of the hearings officer's findings, in which he stated that he was persuaded by the applicant's written and oral testimony that the applicant intends to and is able to store top soil that is needed for revegetation, and thus that it is feasible to comply with CDC 410-3.4(A). Petitioners contend that the hearings officer relied on the consultant's

"new evidence" at the November 17, 2005 hearing, and erred in refusing to allow petitioners to rebut that new evidence. Petitioners argue that, if they had been allowed to submit rebuttal evidence, they would have shown that due to logging on the property there is in fact little or no "excess soil" on the site, and the lack of available top soil on the property may interfere with the applicant's ability to revegetate the site.

Intervenors respond that the consultant simply clarified previous testimony and did not offer "new evidence." In any case, intervenors argue, CDC 410-3.4(A) is essentially a performance standard that under the hearings officer's interpretation requires only that any "top soil" (which the hearings officer defined narrowly) that is removed by grading that is *also* necessary to revegetate the site must be stored and re-used on the property. We understand intervenors to argue that CDC 410-3.4(A) does not require that the property actually *have* top soil that can be removed and then restored, only that *if* the property has topsoil that is removed under the final grading permit, such topsoil as is needed for revegetating graded portions must be stored and re-used. Intervenors argue that there is no basis to dispute that to the extent the property has topsoil that is removed under the final grading permit, any such topsoil needed for revegetation can and will be stored and re-used.

It is not clear to us whether the consultant's testimony at the November 17, 2005 hearing was "new evidence" or simply a clarification of existing evidence. Even if it is considered new evidence, petitioners have not established that there is anything to rebut. The proffered evidence, that the property may not have any "excess" topsoil, seems irrelevant under the hearings officer's interpretation of CDC 410-3.4(A), which petitioners do not challenge. Under that interpretation, CDC 410-3.4(A) does not require that the property have sufficient topsoil to revegetate the site after grading, only that of the amount of topsoil that is removed any amount *needed* for revegetation must be stored and re-used. To the extent the hearings officer erred in accepting new evidence without offering petitioners

an opportunity for evidentiary rebuttal, petitioners have not established that that procedural error prejudiced petitioners' substantial rights.

The seventh assignment of error is denied.

**EIGHTH ASSIGNMENT OF ERROR**

Petitioners challenge the hearings officer's findings that it is feasible to comply with CDC 410-3.7 and 410-3.8.

**A. CDC 410-3.7**

CDC 410-3.7 requires that "the proposed grading will preserve the functioning of off-site drainage courses or bodies of water." *See* n 2. The nearest body of water is Bronson Creek, which is approximately 180 feet west of the subject property. The hearings officer found it feasible for intervenors to comply with CDC 410-3.7, based on the preliminary grading plan, which indicates how intervenors will use erosion control measures in grading the property.

Petitioners repeat their argument that the "development" under consideration includes the logging operation, and that the hearings officer failed to address the effect of erosion from that operation on Bronson Creek. We reject that argument for the same reasons set out above.

Petitioners also argue under this assignment of error that CWS regulations require a natural resource assessment when water quality sensitive areas exist within 200 feet of the subject property, even if such areas are subsequently discovered on or within 200 feet of the site. Given the undisputed fact that water quality sensitive areas exist within 200 feet of the subject property, petitioners argue, it is clear that the applicants must comply with CWS regulations and provide a natural resource assessment. In the absence of such an assessment, petitioners contend, the record lacks substantial evidence on which the hearings officer can find that it is feasible for applicants to comply with CDC 410-3.7.

The hearings officer adopted lengthy findings addressing CDC 410-3.7, which petitioners do not challenge.[12] Intervenors argue that the natural resource assessment required by CWS regulations is a parallel requirement to CDC 410-3.7 that is not incorporated as a necessary element of CDC 410-3.7, and petitioners fail to explain why a natural resource assessment must be completed before a finding can be made that it is feasible to comply with CDC 410-3.7. We agree with intervenors that petitioners have not demonstrated that completion of a natural resource assessment required under CWS regulations is necessary in order to adopt a finding that it is feasible to comply with CDC 410-3.7.

**B. CDC 410-3.8**

CDC 410-3.8 requires a finding that the final grading plan complies with applicable standards for storm water quality control facilities adopted by the Oregon Department of Environmental Quality (DEQ), a finding that is satisfied by a letter from CWS stating that the development complies with DEQ requirements or will be in compliance when CWS requirements set out in the letter are met. *See* n 2.

The hearings officer found not only that it was feasible to comply with CDC 410-3.8, but that intervenors had in fact complied with it, by submitting a CWS pre-screening site

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[12] The hearings officer's findings include the following:

> "The hearings officer finds that the applicants intend to and can protect Bronson Creek from adverse impacts of grading based on Sheets 3 and 4 of the 2005 preliminary plan. These sheets show that the applicants intend to employ erosion control measures to prevent grading from causing erosion off-site, including the stabilized entrance, numerous inlets at possible discharge points each of which is protected by inlet protection type 4, and four sets of bio bags in locations west of the west edge of the site to capture any erosion in the drainage ditch after it resurfaces to the west. Additional significant vegetation on the north side of NW Evergreen Street and west of the site generally further ensures that erosion from grading on the site will not affect the creek. The hearings officer also relies on additional review and approval of final plans required by conditions of approval before the applicants begin grading on the site to ensure that the applicants can comply with CDC 410-3.6 [sic]. Such conditions are feasible; there is no evidence to the contrary." Record 30.

assessment during the 2004 proceedings.[13] The 2004 CWS pre-screening site assessment determines that no water quality sensitive areas exist within 200 feet of the property. Petitioners explain that under CWS regulations if a pre-screening site assessment determines that no water quality sensitive areas exist within 200 feet of the subject property, no further site assessment or service provider letter is required. However, petitioners argue that the CWS assessment is erroneous, because it fails to recognize that water quality sensitive areas, such as Bronson Creek, are within 200 feet of the subject property.

As the hearings officer explained, CDC 410-3.8 requires only that CWS provide the required service provider letter, not that the letter be accurate or free from error. CDC 410-3.8 does not require or allow the hearings officer to second-guess the CWS assessment, however faulty that assessment may turn out to be. Petitioners do not challenge that interpretation of CDC 410-3.8, or explain why it is erroneous. In any case, the hearings officer found that CWS has the authority and will have the opportunity to re-assess the 2004 letter prior to issuing the required CWS grading permit. The hearings officer found that it is feasible for applicants to comply with CDC 410-3.8 prior to obtaining the final grading permit. Petitioners do not challenge that alternative basis or explain why it is error.

The eighth assignment of error is denied.

The county's decision is affirmed.

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[13] The hearings officer's findings state, in relevant part:

> "This standard is satisfied by submittal of a service provider letter from the CWS indicating the proposed development is in compliance with DEQ requirements or will be in compliance when the requirements set forth in the service provider letter are met. Such a statement is in the record. For instance, see Exhibits B and D of the Supplement. Moreover, if CWS wants the applicants to file a more updated or detailed request for comments, nothing prevents them from doing so before they approve the grading permit. Therefore the hearings officer finds that the application does or can comply with CDC 410-3.8 before the applicants disturb the site for grading for the subdivision.
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> "* * * [Petitioners] argue that the CWS comments dated May 26, 2004 are incomplete and in error. However it is not relevant to CDC 410-3.8 whether the comments are complete or correct. CDC 410-3.8 merely requires CWS to provide the comment. Even if the form is incomplete, it can be completed before CWS authorizes the grading permit." Record 31.