

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 AUTHUR BOUCOT, BARBARA BOUCOT,  
5 LANCE CADDY, JOE CASPROWIAK,  
6 PAM CASPROWIAK, LAURI CHILDERS,  
7 THERESA HANOVER, WILLIAM KOENITZER,  
8 SUSAN MORRE, JEFF MORRE, ROBERT SMYTHE,  
9 JUSTIN SOARES, LINA SOARES,  
10 GEORGE TAYLOR, LUCINDA TAYLOR  
11 and CAROLYN ver LINDEN,  
12 *Petitioners,*  
13

14 vs.

15  
16 CITY OF CORVALLIS,  
17 *Respondent.*  
18

19 LUBA No. 2007-200

20  
21 FINAL OPINION  
22 AND ORDER  
23

24 Appeal from City of Corvallis.

25  
26 Anne C. Davies, Eugene, filed the petition for review and argued on behalf of  
27 petitioners.  
28

29 David E. Coulombe, Corvallis, filed the response brief and argued on behalf of  
30 respondent. With him on the brief was Fewel, Brewer & Coulombe.  
31

32 RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.  
33

34 HOLSTUN, Board Member, did not participate in the decision.  
35

36 REMANDED

05/30/2008

37  
38 You are entitled to judicial review of this Order. Judicial review is governed by the  
39 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a city decision approving conceptual and detailed development plans and a tentative subdivision plat for a 45-lot subdivision.

**FACTS**

The subject property is an approximately 26-acre parcel located on the southeast slope of Country Club Hill in southwest Corvallis near the confluence of the Marys River and Willamette River. The property is zoned Low Density Residential with a Planned Development Overlay (PD RS 3.5). The property is currently vacant except for gravel roads. The applicant originally proposed to create 42 residential lots and four common tracts. The planning commission denied the application, and the applicant appealed to the city council. After filing the local appeal, the applicant revised the application to include three additional residential lots as well as revised plot, grading/excavation, and tree preservation plans. The city council overturned the planning commission decision and approved the application with conditions. This appeal followed.

**MOTION TO FILE REPLY BRIEF AND MOTION TO STRIKE**

Petitioners move to file a reply brief to respond to new matters raised in the response brief. The city objects to the reply brief and moves that portions of the reply be stricken. The reply brief contains three sections (A, B, and C) that respectively address: (1) the statement of facts in the petition for review, (2) whether comprehensive plan policies are approval criteria, and (3) whether issues were waived because they were not raised below.

In the statement of facts in the petition for review, petitioners stated that the subject property was located on a significant hillside under the city code. In the response brief, the city argues that the subject property is not located on a significant hillside. In the reply brief, petitioners respond to that argument. We agree with the city that that is not a new matter as

1 required under OAR 661-010-0039 to file a reply brief. We will not consider section A of  
2 the reply brief.

3 In the petition for review, petitioners treated certain comprehensive plan policies as  
4 applicable approval criteria because they were listed as applicable criteria in the city’s notice.  
5 In the response brief, the city argues that while the policies may be “applicable criteria” they  
6 are not “approval” criteria. This is a new matter that petitioners may respond to in a reply  
7 brief. We will consider section B.

8 Section C replies to waiver arguments raised in the response brief. The city argues  
9 that portions of section C should be stricken because petitioners should have anticipated a  
10 waiver challenge. We do not agree. The reply to the waiver challenge properly responds to  
11 a new matter. We will consider section C.

12 **FIRST ASSIGNMENT OF ERROR**

13 Prior to the planning commission hearings, planning staff prepared a staff report  
14 recommending denial of the application. The planning commission adopted that staff report  
15 as its final decision. After the applicant appealed the planning commission decision to the  
16 city council, planning staff prepared a second staff report that again recommended denial. In  
17 approving the application, the city council adopted the findings from both staff reports that  
18 support the application, but not the findings in the staff reports adverse to the application.  
19 The city also adopted as findings the minutes of the two planning commission hearings and  
20 two city council hearings that support the application, but not the portions adverse to the  
21 application. Petitioners argue that the city improperly attempted to adopt and incorporate  
22 portions of the staff reports and minutes in approving the application. The city responds that  
23 it has adequately identified the documents that were adopted.

24 **A. Staff Reports**

25 In *Ellis v. City of Bend*, 28 Or LUBA 332, 333 (1994), we held that the city’s denial  
26 of an application was not supported by adequate findings, where the city council

1 incorporated as findings a hearings officer's decision *approving* the application, purporting  
2 to reject any findings in the hearings officer's decision inconsistent with the city's denial.  
3 We remanded because we could not tell which portions of the hearings officer's decision had  
4 been incorporated and which rejected, and concluded that the incorporation failed and the  
5 city's decision was not supported by adequate findings. Similarly, in the present case, both  
6 staff reports recommended denial of the application, but the city council approved the  
7 application based on the staff reports, without identifying which portions of those staff  
8 reports are incorporated and which are rejected. We agree with petitioners that incorporation  
9 of the staff reports fails and the findings are inadequate.

10 **B. Minutes**

11 Petitioners also argue that the city erred in incorporating those portions of the minutes  
12 that support the application. This case is similar to *Soares v. City of Corvallis*, \_\_\_ Or  
13 LUBA \_\_\_ (LUBA No. 2007-232, May 8, 2008), in that the city council attempted to  
14 incorporate the portions of the minutes that support the application as findings while  
15 rejecting those adverse to the application, without adequately identifying which portions are  
16 incorporated and which are rejected. As we explained in *Soares*, the limitation to those  
17 portions of the minutes that support the application is too imprecise and is therefore  
18 ineffective. *Id.* at slip op 5.

19 In *Soares*, however, we also explained that an ineffective incorporation of documents  
20 or minutes is not necessarily an independent basis for reversal or remand. If there are other  
21 findings that are adequate to demonstrate compliance with applicable approval criteria, the  
22 ineffective incorporation of other findings may be harmless error. In the first assignment of  
23 error, petitioners' only reference to applicable approval criteria concerns solar access  
24 standards. That reference is insufficiently developed to constitute an argument in support of  
25 the first assignment of error, and is insufficient for our review.

1 We address petitioners’ challenges to other adopted findings below, and sustain some  
2 of those challenges. However, petitioners’ arguments under the first assignment of error do  
3 not add anything to those bases for remand or provide an independent basis for remand.  
4 Therefore, the first assignment of error provides no independent basis for reversal or remand.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioners argue that the city erred in failing to provide proper notice of the amended  
8 proposal for a 45-lot subdivision. According to petitioners, the city violated ORS 197.830(5)  
9 because the change from a 42-lot subdivision to a 45-lot subdivision occurred after the  
10 appeal from the planning commission and that fact was not provided in the notice for the city  
11 council hearing.<sup>1</sup>

12 Even assuming petitioners are correct that the notice was inadequate, the remedy  
13 under ORS 197.830(5) is a tolling of the usual 21-day deadline for appealing final limited  
14 land use decisions to LUBA. There is no issue regarding the timeliness of petitioners’  
15 appeal. ORS 197.830(5) does not provide a basis for reversal or remand, and petitioners do  
16 not provide any other authority for reversal or remand for inadequate notice.

17 The second assignment of error is denied.

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<sup>1</sup> ORS 197.830(5) provides:

“If a local government makes a limited land use decision which is different from the proposal described in the notice to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to the board under this section:

“(a) Within 21 days of actual notice where notice is required; or

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioners argue that that the city’s findings are inadequate because the city  
3 organized the findings into general categories and failed to specifically address individual  
4 approval criteria. Although petitioners reference in this assignment of error their later  
5 challenges to findings of compliance with individual approval criteria under separate  
6 assignments of error, an allegation of improper organization of the findings is not in itself an  
7 independent basis for reversal or remand.

8 The third assignment or error is denied.

9 **FOURTH ASSIGNMENT OF ERROR**

10 The applicant filed applications for both Conceptual Development Plan (CDP) and  
11 Detailed Development Plan (DDP) approvals. Corvallis Land Development Code (LDC)  
12 2.5.50.01.a.3 requires the applicant to provide as part of DDP application “[ty]pical  
13 elevations of buildings and structures (which may be submitted on additional sheets)  
14 sufficient to indicate the architectural intent and character of the proposed development[.]”  
15 Under LDC 2.5.50.04, a DDP is deemed to conform to the CDP provided the DDP complies  
16 with the review standards for CDP approval, at LDC 2.5.40.04.

17 LDC 2.5.40.04 requires that a CDP must be consistent with the city’s comprehensive  
18 plan.<sup>2</sup> Corvallis Comprehensive Plan (CCP) 4.6.7(G) requires in relevant part that  
19 development “demonstrate a concern” for views from and to the hillside. CCP 9.2.5

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<sup>2</sup> LDC 2.5.40.04 provides in relevant part:

“Requests for approval of a Conceptual Development Plan shall be reviewed to assure consistency with the purposes of this chapter, policies and density requirements of the Comprehensive Plan, and any other applicable policies and standards adopted by the City Council. In addition, the following compatibility factors shall be considered:

“\* \* \* \* \*

“Visual elements (scale, structural design and form, materials, and so forth)

“ \* \* \* \* \*”

1 requires development to “reflect neighborhood characteristics.” CCP 9.2.5 provides that  
2 “[d]evelopment shall reflect neighborhood characteristics appropriate to the site and area,”  
3 and CCP 9.2.1 provides that land use decisions “protect and maintain” these neighborhood  
4 characteristics.

5 In their fourth assignment of error, petitioners argue that the city’s findings regarding  
6 the applications’ compliance with visual compatibility and neighborhood characteristics  
7 compatibility criteria found in the CCP are not supported by substantial evidence because the  
8 applicant was required to but did not provide a graphic of typical elevations for the proposed  
9 houses. Absent that graphic, petitioners argue, the city could not find that the development  
10 complies with code and comprehensive plan visual and neighborhood compatibility  
11 requirements. Petitioners also argue that the city’s findings regarding visual and  
12 neighborhood compatibility are inadequate because the findings rely in part on the  
13 applicant’s agreement to comply with inapplicable 2006 LDC provisions. We address each  
14 argument in turn.

15 In supplemental findings adopted by the city council, the city found in relevant part:

16 “The Council notes that the application does not propose typical building  
17 elevations, floor plans, or building footprints to demonstrate compliance with  
18 the neighborhood characteristics outlined in CCP 9.2.5. The Council notes  
19 that the absence of typical building elevations, floor plans, and building  
20 footprints was raised as a concern by the Planning Commission and in public  
21 testimony. The Council notes that \* \* \* construction of homes on the site will  
22 be subject to development standards in the 2006 LDC. \* \* \* Council notes  
23 that LDC 4.10 provides a menu of Code permitted design options that  
24 development will be required to adhere to. \* \* \*

25 “The Council finds that the proposed site design responds to the prevalent site  
26 characteristics noted above, and to the desired neighborhood characteristics  
27 specified in CCP 9.2.5 \* \* \* Given these findings, \* \* \* the City Council finds  
28 that the \* \* \* development is compatible with the housing types in the  
29 surrounding neighborhood, including one and two-story detached single  
30 family housing to the north, south and west.

31 “The City Council notes that concerns were raised through public testimony  
32 that building heights would be excessive and would negatively impact views  
33 from and of the hillside of the proposed development. Council notes that the

1 application does not seek to vary from LDC standards for building heights.  
2 The City Council notes that nearly 90% of the trees on the site will be  
3 preserved, most in open space tracts.

4 “The City Council finds that building to permitted heights of the underlying  
5 low density residential zone will not result in negative impacts and will  
6 protect views from the hill to the maximum extent practicable given the desire  
7 to locate development outside of tree groves. The Council finds that the  
8 preservation of the majority of the site’s trees, and the installation of the street  
9 trees will buffer views of development when looking at the site from points  
10 off the subject site.” Record 29-30.

11 The city does not dispute that the required typical building elevation drawings are  
12 intended to help demonstrate compliance with the criteria at LDC 2.5.40.04, including  
13 consistency with the cited CCP policies regarding neighborhood characteristics. However,  
14 the city relies in large part on the applicant’s agreement to demonstrate, in a future review  
15 proceeding, compliance with Section 4.10 of the 2006 LDC standards governing design to  
16 conclude that the development complies with LDC 2.5.40.04, including the requirements for  
17 compatible visual elements and compatibility with neighborhood characteristics. *See* n 4,  
18 *infra*. As we explain below in our discussion of the fifth assignment of error, the city’s  
19 reliance on the applicant’s agreement to comply in the future with inapplicable 2006 LDC  
20 design standards is insufficient to show that the development currently meets the applicable  
21 code and comprehensive plan requirements regarding compatibility with neighborhood  
22 characteristics.

23 The city’s remaining findings do not demonstrate a basis to conclude that the  
24 proposed development complies with the code and plan compatibility requirements, in the  
25 absence of the required typical building elevations. On remand, the city must either require  
26 submission of the typical building elevations, or in their absence identify a sufficient  
27 evidentiary basis to conclude that the development complies with applicable criteria. *See*  
28 *Save Oregon’s Cape Kiwanda v. Tillamook Cty.*, 177 Or App 347, 362, 34 P3d 745 (2001)  
29 (failure to submit required application materials may be a basis to remand a permit approval



1 if the record as a whole does not contain information sufficient to support a finding of  
2 compliance with applicable approval criteria).

3 The fourth assignment of error is sustained.

4 **FIFTH ASSIGNMENT OF ERROR**

5 Petitioners argue that the city misapplied the applicable criteria relevant to hillside  
6 development and that the findings addressing those criteria are inadequate and not supported  
7 by substantial evidence. The applicant submitted two possible grading and excavation plans  
8 before the planning commission. The planning commission found neither plan was adequate  
9 to demonstrate compliance with CCP 4.6.7.<sup>3</sup> After filing its local appeal with the city  
10 council, the applicant submitted a revised grading plan that staff again recommended denying  
11 for failure to comply with CCP 4.6.7. The city council approved the revised grading plan

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<sup>3</sup> CCP 4.6.7 provides:

“In areas where development is permitted, standards in the Land Development Code for hillside areas will achieve the following:

- “A. Plan development to fit the topography, soil, geology, and hydrology of hillsides and to ensure hillside stability both during and after development.
- “B. Preserve the most visually significant slopes and ridgelines in their natural state by utilizing techniques such as cluster development and reduced densities.
- “C. Preserve significant natural features such as tree groves, woodlands, the tree-meadow interface, and specimen trees.
- “D. Align the built surface infrastructure, such as roads and waterways, with the natural contours of terrain and minimize cutting and filling in developments.
- “E. Minimize soil disturbances and the removal of native vegetation and avoid these activities during winter months unless impacts can be mitigated.
- “F. Design developments and utilize construction techniques that minimize erosion and surface water runoff.
- “G. Demonstrate a concern for the view of the hills as well as the view from the hills.
- “H. Provide landscaping that enhances the identified open space resources.
- “I. Design developments that consider landscaping management that will minimize the threat of fire on improved property spreading to wildland habitat.”

1 with conditions, in particular, condition 27. We address each of petitioners’ subassignments  
2 of error in turn.

3 **A. Whether City Applied the Correct Standard**

4 Petitioners argue that the city applied the wrong standard to evaluate whether the  
5 revised grading plan complied with the applicable CCP provisions. According to petitioners,  
6 the city council found that the revised plan was acceptable because it minimized cuts and  
7 fills “compared to the plans submitted to the Planning Commission.” Record 35.

8 If that were the only finding made by the city council, we would agree with  
9 petitioners that the city failed to apply the correct approval criteria, the CCP policies. As  
10 petitioners recognize, however, the city also adopted other findings explaining why it  
11 believed the applicable CCP provisions were satisfied. Petitioners state that those findings  
12 are conclusory and not supported by substantial evidence and challenge them in a separate  
13 subassignment of error. We address those findings in turn. The city’s finding regarding the  
14 difference between the revised and original plans is surplusage, however, and does not  
15 provide an independent basis for reversal or remand.

16 This subassignment of error is denied.

17 **B. Adequacy of Condition 27**

18 The 2006 LDC hillside development standards are not applicable to the challenged  
19 decision. Rather, CCP 4.6.7 is applicable.<sup>4</sup> After the planning commission denied the  
20 application for noncompliance with CCP policies including CCP 4.6.7, the applicant  
21 proposed what became condition 27, requiring the lots to be developed in accordance with

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<sup>4</sup> The 2006 version of the LDC was adopted to implement the policies of the 1998 CCP, but the challenged decision was deemed complete before the 2006 LDC went into effect. Thus the 2006 LDC is not directly applicable. The city explains that the 1998 CCP is applicable to the challenged decision, and that CCP anticipated that there would be a period of time between the effective date of the CCP and the effective date of the 2006 LDC where the CCP policies to be implemented by the 2006 LDC would be directly applicable.

1 2006 LDC Chapter 4.5 – Natural Hazards and Hillside Development Provisions and 2006  
2 LDC Chapter 4.10 – Pedestrian Oriented Design Standards. Record 21. The city council  
3 accepted that condition, and based on the condition and a future demonstration of compliance  
4 with the 2006 LDC hillside development standards found that the proposed grading plan  
5 complies with applicable criteria, including CCP 4.6.7.

6 According to petitioners, the city cannot demonstrate that CCP 4.6.7 is satisfied by  
7 imposing a condition that the 2006 LDC hillside provisions will be complied with in the  
8 future, for two reasons. First, petitioners argue, that condition amounts to an unlawful  
9 deferral of a finding of compliance with an applicable approval criterion under *Rhyne v.*  
10 *Multnomah County*, 23 Or LUBA 442 (1992). Second, petitioners argue, even if such a  
11 condition did not amount to an unlawful deferral of a finding of compliance with an  
12 applicable approval criterion, the revised grading plan does not and cannot comply with the  
13 2006 LDC hillside development standards.

14 We need not address the numerous challenges that petitioners raise regarding  
15 whether the application can satisfy all the requirements of the 2006 LDC hillside  
16 development provisions, because we agree with petitioners that the city’s findings regarding  
17 whether the provisions of CCP 4.6.7 are satisfied are inadequate. First, the city’s adopted  
18 findings do not address compliance with each of the provisions of CCP 4.6.7. Instead, the  
19 city appears to have concluded that compliance with the 2006 LDC hillside development  
20 provisions in a future review process will suffice to demonstrate compliance with CCP 4.6.7.  
21 However, even assuming that is the case, the city cannot defer such a demonstration of  
22 compliance with CCP 4.6.7 to a future review process that does not provide notice or  
23 opportunity for public participation. *Rhyne*, 23 Or LUBA at 447-48.<sup>5</sup> If the city is going to

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<sup>5</sup> In *Rhyne*, we stated:

“Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially

1 rely on compliance with the 2006 hillside development standards to demonstrate compliance  
2 with CCP 4.6.7, it must address those 2006 standards in a process that provides notice and  
3 opportunity for public participation.

4 Second, even if the city had addressed the 2006 hillside development standards in this  
5 proceeding or required that those standards be addressed as part of a review process that  
6 provides notice and opportunity for public participation, it is not clear why the city believes  
7 that compliance with the 2006 LDC will suffice to demonstrate compliance with CCP 4.6.7.  
8 The city states in its brief that the 2006 LDC hillside development provisions implement  
9 CCP 4.6.7. However, the findings do not state that position, and the relationship between the  
10 CCP policy and the 2006 code standards is not clear to us. Because the city's findings do not  
11 specifically address the CCP policies and do not explain how compliance with 2006 LDC  
12 hillside development standards is sufficient to demonstrate compliance with those policies,  
13 the city's findings are inadequate.

14 This subassignment of error is sustained.

### 15 **C. DOGAMI or Department of Forestry Review**

16 Petitioners argue that the city failed to comply with ORS 195.260(1)(b), which  
17 provides that a local government:

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has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances. *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988).” (footnotes omitted).

1           “May require a geotechnical report and, if a report is required, shall provide  
2           for a coordinated review of the geotechnical report by the State Department of  
3           Geology and Mineral Industries [DOGAMI] or the State Forestry Department,  
4           as appropriate, before issuing a building permit for a site in a further review  
5           area.”

6           Petitioners argue that the subject property is identified as having high landslide risks.  
7           According to petitioners, because the city required a geotechnical report and that report was  
8           not reviewed by DOGAMI, the city violated ORS 195.260(1)(b).

9           While it is true that the city required a geotechnical report and that DOGAMI did not  
10          review that report, petitioners do not contend and it does not appear to be the case that the  
11          subject property is a “site in a further review area.” OAR 632-007-0010(1) provides the  
12          definition for a “further review area”:

13          “‘Further review area’ for the purpose of this division, means an area of land  
14          that may be subject to rapidly moving landslides as specifically mapped by  
15          [DOGAMI] for the purpose of implementing ORS 195.260(4)(a).”

16          While petitioners’ experts testified that the subject property is in a high landslide risk  
17          area, there is no dispute that DOGAMI has not identified the subject property as a further  
18          review area pursuant to ORS 195.260. Because the subject property is not in a “further  
19          review area” the city was not required to have DOGAMI review the geotechnical report and  
20          the city did not violate ORS 195.260(1)(b).<sup>6</sup>

21          This subassignment of error is denied.

#### 22           **D. Whether Grading Will Exceed Eight Feet**

23          In order to demonstrate compliance with CCP 4.6.7(D), the city found that the revised  
24          grading plan “will generally limit cuts and fills to eight feet.” Record 36. Petitioners argue  
25          that that finding is not supported by substantial evidence. While petitioners appear to be  
26          correct, the city will need to adopt new findings on remand that either explain how the 2006

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<sup>6</sup> We also agree with the city that ORS 195.260(1)(b) applies to the issuance of building permits, not the issuance of land use permits. Because the challenged decision does not issue any building permits, it would not violate ORS 195.260 even if the statute were applicable.

1 LDC hillside grading standards implement each of the CCP 4.6.7 provisions or find  
2 compliance with each of the provisions of CCP 4.6.7. Because the city will have to adopt  
3 new findings, it would serve no purpose to address petitioners' substantial evidence  
4 challenge to the current findings.

5 We do not reach this subassignment of error.

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

7 **SIXTH ASSIGNMENT OF ERROR**

8 Petitioners argue that the city misapplied the criteria applicable to stormwater  
9 drainage and that the findings addressing those criteria are not supported by substantial  
10 evidence.

11 **A. Whether the City Erred in Allowing Activities Within Natural Drainageways**

12 The applicant's geotechnical report identified two potential "drainages" on the  
13 subject property – the east drainage and the west drainage. The city found that the east  
14 drainage met the LDC definition of natural drainageway and therefore certain restrictions  
15 apply to development in the drainageway. The city found that the west drainage did not meet  
16 the LDC definition of natural drainageway and thus development in that area was not subject  
17 to the same restrictions. Petitioners first argue that the city erred in determining that the west  
18 drainage was not a natural drainageway.

19 The city responds that this issue is waived under ORS 197.763(1) and 197.835(3)  
20 because the issue was not raised below with sufficient specificity for the city to address the  
21 issue. Petitioners respond that there were substantial discussions regarding development in  
22 drainageways and that the city itself specifically raised the issue of whether the west drainage  
23 was a natural drainageway. We have reviewed the record citations provided by petitioners  
24 regarding where they argue they raised the issue below. While petitioners are correct that the  
25 issue of development in drainageways was discussed, we see nothing indicating that the issue  
26 of whether the west drainage met the definition of a natural drainageway under the LDC was

1 ever raised. We have also reviewed the record citation where petitioners argue the city raised  
2 the issue. In the staff report to the planning commission, staff discusses the applicable  
3 criteria and explains why the east drainage is a natural drainageway and why the west  
4 drainage is not a natural drainageway. The staff report does not consider alternative points of  
5 view or conflicting evidence in making the determination that the west drainage is not a  
6 natural drainageway. As far as we are directed, the only position taken by the applicant,  
7 staff, or opponents below was that the west drainageway was not a natural drainageway.  
8 That is not sufficient to raise the issue below. The issue is waived.

9           Petitioners also argue that the city misapplied LDC 4.5.110(b), which prohibits most  
10 activities in drainageways and wetlands, and LDC 4.5.120, which requires mitigation for  
11 disturbances to drainageways and wetlands. The city allowed crossings to be constructed in  
12 drainageways when the drainageways must be crossed to allow appropriate development of  
13 the property. The city interpreted the LDC to allow such crossings when necessary despite  
14 the restrictions of LDC 4.5.110(b), as long as mitigation occurred pursuant to LDC 4.5.120.  
15 While we are inclined to agree with the city’s interpretation, we also agree with the city that  
16 the issue was not raised below with sufficient specificity to preserve the issue at LUBA.  
17 ORS 19.763(1); ORS 197.835(3).

18           This subassignment of error is denied.

19           **B. Compliance With Drainage Criteria**

20           Petitioners argue that the city’s findings of compliance with CCP 4.11.12 are  
21 inadequate and are not supported by substantial evidence. CCP 4.11.12 provides:

22           “Development upslope of wetlands shall minimize interference with water  
23 patterns discharging to wetlands, and shall minimize detrimental changes in  
24 water quality for waters discharging to wetlands.”

25           According to petitioners, due to the steep slopes on the subject property, drainage is  
26 especially important due to the potential for flooding on downslope properties. Because the  
27 applicant did not submit a drainage plan, petitioners argue there is no way to demonstrate

1 that CCP 4.11.12 is satisfied. The city relies on the supplemental findings at Record 42-44  
2 and conditions of approval imposed regarding drainage, including conditions 8, 18, 19, and  
3 20. In particular, condition 19 requires that the applicant submit engineered calculations  
4 demonstrating that the storm drainage facilities will match pre-and post-development flows.

5 The problems with the city’s findings are similar to the problems identified by  
6 petitioners in the first and third assignments of error. While there are a page and a half of  
7 supplemental findings regarding drainage, it is difficult to tell which findings concern CCP  
8 4.11.12. A greater problem is that the supplemental findings also repeatedly reference the  
9 “incorporated findings” in which the city attempted to incorporate the portions of staff  
10 reports and minutes that were favorable to the application. As we discussed in the first  
11 assignment of error, that purported incorporation was ineffective. Further, the city appears to  
12 have completely deferred consideration of proposed drainage plans and facilities to a  
13 subsequent review process that does not provide for notice or opportunity for public input.  
14 As we explained above in our resolution of the fifth assignment of error, such a deferral is  
15 inadequate to justify a finding of compliance with an applicable criterion.

16 Because the supplemental findings themselves do not adequately demonstrate that  
17 CCP 4.11.12 is satisfied, and the purportedly incorporated findings cannot bolster the city’s  
18 determination, the city’s finding that CCP 4.11.12 is satisfied is inadequate. This  
19 subassignment of error is sustained.

20 The sixth assignment of error is sustained, in part.

21 **SEVENTH ASSIGNMENT OF ERROR**

22 Petitioners argue that the city’s findings regarding protection of environmentally  
23 significant resources, including upland prairie and habitat, tree preservation, wetlands, and  
24 pond turtles, are inadequate and not supported by substantial evidence.

25 A number of CCP policies cited by petitioners require that city minimize negative  
26 impacts on environmentally significant resources. As in the second subassignment of the



1 sixth assignment of error, the findings addressing these CCP policies lump numerous  
2 approval criteria together in a manner that makes it difficult to determine which findings are  
3 applicable to which approval criteria. An even greater problem is that the city relies on  
4 purportedly incorporated findings from staff reports and minutes. As discussed earlier, those  
5 purported incorporations were ineffective, and because the findings rely on those ineffective  
6 incorporations, the findings are inadequate.

7           The seventh assignment of error is sustained.

8           The city's decision is remanded.