BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ARTHUR BOUCOT, BARBARA BOUCOT,
LANCE CADDY, SHERYL OAKES CADDY,
JOE CASPROWIAK, PAM CASPROWIAK,
LAURIE CHILDERS, BALZ FREI, SIMONE FREI,
MARK HOMMER, WILLIAM KOENITZER,
SUSAN MORRE, JEFFREY MORRE, JOHN SELKER,
ROBERT SMYTHE, JUSTIN SOARES, LINA SOARES,
GEORGE TAYLOR, LUCINDA TAYLOR,
CAROLYN VER LINDEN and ELIZABETH WALDRON,
Petitioners,
vs.

CITY OF CORVALLIS,
Respondent.

LUBA No. 2009-042

FINAL OPINION
AND ORDER

Appeal from City of Corvallis.

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

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

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

REMANDED 10/29/2009

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

Opinion by Ryan.

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 challenged decision is the city's decision on remand following our opinion in *Boucot v. Corvallis*, __ Or LUBA __ (LUBA No. 2007-200, May 30, 2008) (*Boucot I*). 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. The property is currently vacant except for gravel roads. The applicant proposes 45 residential lots.

In *Boucot I*, we sustained four of the petitioners' assignments of error and remanded the city's decision. On remand, the city council held a hearing and again approved the applications, adopting 75 pages of findings in support of the decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

On remand, the city adopted several pages of findings that purported to clarify whether and how various Corvallis Comprehensive Plan (CCP) policies provide review criteria that apply to the application. Record 38-41. We understand the city to take the position that because many CCP policies do not contain measurable development standards, those CCP policies are not approval criteria against which the proposed development must be evaluated. The city has taken similar positions in other appeals. *See Burgess v. Corvallis*, 55 Or LUBA 482, 502-03 (2008) (rejecting city's position that certain Corvallis Land Development Code provisions did not provide applicable approval criteria). In their first assignment of error, petitioners argue that to the extent the city attempted on remand to determine that certain provisions of the CCP are not applicable approval criteria, that

determination is inconsistent with the city's previous position in the proceedings that led to the city's first decision, and is inconsistent with LUBA's decision in *Boucot I*, and with *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992) (issues that were raised and resolved by the city in the local proceedings that led to the city's first decision generally may not be revisited in the local proceedings following LUBA's remand of the first decision). Petitioners do not assign error to any specific finding, however, and do not argue that the city's findings that certain CCP provisions are not applicable approval criteria provide an independent basis for reversal or remand of the decision. Thus, we need not and do not reach the issue.

SECOND ASSIGNMENT OF ERROR

CCP Policy 4.6.7, while literally written as a planning directive for future amendments to the LDC, in this case applies directly to the disputed development as an approval criterion.[1] In *Boucot I*, the city found that the applicant's proposed grading plan would satisfy CCP Policy 4.6.7.[2] The city based that determination on its imposition of a

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[1] As we explained in *Boucot I*:

> " * * * [T]he 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." *Boucot I* at slip op 10, n 4.

The city adopted amendments to the 1993 version of the Corvallis Land Development Code (LDC) in 2006. The challenged decision and the parties' arguments reference both the 1993 LDC and the 2006 LDC. In this opinion, we refer to the 1993 version of the LDC as "LDC" and the 2006 version of the LDC as "2006 LDC."

[2] CCP Policy 4.6.7 provides:

> "In areas where development is permitted, standards in the Land Development Code for hillside areas will achieve the following:
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> "A. Plan development to fit the topography, soil, geology, and hydrology of hillsides and to ensure hillside stability both during and after development.

condition of approval (Condition 27), which required that the applicant demonstrate that the proposed development complies with 2006 LDC Chapter 4.5 at a time in the future when the lots on the property are developed. We sustained petitioners' assignment of error challenging Condition 27:

> "[W]e agree with petitioners that the city's findings regarding whether the provisions of CCP 4.6.7 are satisfied are inadequate. First, the city's adopted findings do not address compliance with each of the provisions of CCP 4.6.7. Instead, the city appears to have concluded that compliance with the 2006 LDC hillside development provisions in a future review process will suffice to demonstrate compliance with CCP 4.6.7. However, even assuming that is the case, the city cannot defer such a demonstration of compliance with CCP 4.6.7 to a future review process that does not provide notice or opportunity for public participation. * * * If the city is going to rely on compliance with the 2006 hillside development standards to demonstrate compliance with CCP 4.6.7, it must address those 2006 standards in a process that provides notice and opportunity for public participation." *Boucot I* at slip op 11-12 (*citing Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992)).

On remand, the city adopted the following findings:

> "The City Council notes that grading of the site consists of two phases. The first is grading to install the streets and utilities (mass grading). The Council notes that some lot grading will occur at this time to minimize the need to haul

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> "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."

materials off-site. The Council notes that this grading will be accomplished in compliance with the applicants' exhibit 'Y' – Brooklane Heights Cut/Fill Analysis (Attachment I.8 of the August 10, 2008, Staff Memorandum to City Council).

"The City Council notes that the second phase of grading will consist of grading for the development of individual lots. The Council notes that this grading will be done in compliance with the 2006 LDC Chapter 4.5 – Hillside Development Standards as described in Condition 27.

"The Council notes that Condition 27 requires all areas not proposed and approved to be mass graded to comply with the Hillside Development Standards in LDC Section 4.5.80. Council notes that these standards limit cuts and fills to eight feet, as defined in LDC Section 4.5.80.03. Council notes that based on Condition 27, exceptions to this standard may only be granted if approved through the Planned Development Major Modification process, which requires a public hearing.

" * * * * *

"On remand, Council finds that the Hillside Development Standards applied through Condition 27, and Condition 22, which permits cuts to exceed 8 feet only if within the building footprint, are clear and objective and do not require discretion or a future review proceeding to determine compliance. Council finds that development that does not comply with these standards shall not be permitted, unless a variation to the standards is approved through the major modification process, which will require a quasi-judicial public hearing. * * *" Record 68-69.

Revised Condition 27 provides:

"Mass grading shall be limited to the areas shown on the grading plan identified as Attachments I.7 and I.8 of the August 10, 2007, Staff Memorandum to the City Council. Cuts and fills in the areas permitted to be mass graded shall not exceed the measurements shown in Attachment I.8. All mass graded areas, as shown in Attachment I.8 shall be engineered and constructed such that retaining walls are neither required nor used. Grading and excavation activities in areas not approved for mass grading as shown in Attachment I.8 shall comply with Section 4.5.80 – Hillside Development Standards of the 2006 LDC Chapter 4.5 – Natural Hazards and Hillside Development Provisions. Regardless of the presence of extenuating circumstances, cuts and fills in areas not mass-graded shall comply with the eight-foot standard as defined in LDC Section 4.5.80.03 – Definitions. Exceptions or alterations to these standards shall only be permitted through the Planned Development process. * * *" Record 30.

In adopting the above-quoted findings, the city determined that the applicant's proposed "mass grading" activities on the property, such as grading for roads and utilities and other cuts and fills that do not involve development of specific lots, satisfy CCP 4.6.7. With respect to the grading of individual lots, we understand the city to have found that CCP 4.6.7 will be satisfied when the applicant demonstrates at some time in the future that individual lot grading meets the requirements of 2006 LDC Chapter 4.5.

In the second assignment of error, petitioners argue that the city's findings addressing CCP 4.6.7 are inadequate and are not supported by substantial evidence. Petitioners first argue that the applicant's grading plan fails to satisfy various provisions of 2006 LDC Chapter 4.5, which petitioners argue sets out the relevant approval criterion because the city has previously determined that 2006 LDC Chapter 4.5 implements CCP Policy 4.6.7. However, petitioners are incorrect that 2006 LDC Chapter 4.5 applies directly to this application for subdivision approval, which predates 2006 LDC Chapter 4.5. It is CCP Policy 4.6.7 that applies directly to the application. Because 2006 LDC Chapter 4.5 does not apply directly to the application, the city was not required to determine whether the applicant's proposed grading of the property satisfies those provisions. Rather, the city was required to determine whether those activities satisfy CCP 4.6.7, which is the relevant approval standard. The city appears to have made that determination, based on evidence in the record in the form of the applicant's revised grading plan. Petitioners do not argue that that plan does not constitute substantial evidence that the city could rely on in determining that the applicant's mass grading activities comply with CCP 4.6.7. For that reason, we need not address the numerous challenges that petitioners raise regarding whether the grading plan satisfies all the requirements of the 2006 LDC Chapter 4.5, with respect to mass grading, and petitioners' argument provides no basis for reversal or remand.

But with regard to proposed grading of individual lots, for reasons known only to the city, the city determined that it would apply 2006 LDC Chapter 4.5, instead of CCP 4.6.7,

and apply 2006 LDC Chapter 4.5 at some unspecified future date when the lots are developed and would do so without providing the public hearing process that is required for conceptual and detailed development plan approval. Petitioners argue that the city's condition requiring that the applicant's proposed grading of individual lots for development will comply with 2006 LDC Chapter 4.5 continues to suffer from the same flaw that led LUBA to remand the decision in *Boucot I*. In adopting the above-quoted findings, we understand the city to have concluded that, contrary to our decision in *Boucot I*, its decision to apply 2006 LDC Chapter 4.5 instead of CCP 4.6.7 to grading of individual lots, and its decision to apply 2006 LDC Chapter 4.5 in the future without the public hearing process that is required for conceptual and detailed development plan approval is permissible because application of 2006 LDC Chapter 4.5 in the future will not require the exercise of judgment. Petitioners argue that that finding contravenes our decision in *Boucot I* that in order for the city to defer its finding of compliance with LDC Chapter 4.5, the city was required to address LDC Chapter 4.5 in a future process that provides notice and opportunity for public participation, consistent with our decision in *Rhyne*.[3]

[3] 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 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)." *Rhyne v. Multnomah County*, 23 Or LUBA 442, 447-48 (1992) (footnotes omitted).

We agree with petitioners. On remand, the city had at least three options regarding application of CCP 4.6.7 to individual lot grading, if it wished to again approve the disputed subdivision. First, similar to its decision regarding the applicant's mass grading activities, the city could have made a present determination that the proposed lot grading complies with CCP 4.6.7, provided there is substantial evidence in the record that supports that determination. Second, the city could have made a present determination that the applicant's lot grading plan complies with the provisions of 2006 LDC Chapter 4.5 that the applicant apparently has agreed to have apply to that lot grading in place of CCP 4.6.7. Third, the city could have deferred a determination as to whether the individual lot grading complies with CCP 4.6.7 (or 2006 LDC Chapter 4.5) to a future proceeding that allows for public participation.

There are at least two problems with the city's decision to demonstrate that individual lot grading will comply with CCP 4.6.7 by applying LDC Chapter 4.5 to that lot grading in the future, without providing the public process that would be required for a current determination concerning CCP 4.6.7 or LDC Chapter 4.5. First, there is nothing in either our *Rhyne* decision or *Boucot I* decision that recognizes an exception that would allow the city to decide not to apply the criteria that the city's land use laws require to be applied in a public process when granting conceptual or detailed plan approval and instead defer application of those criteria (or substitute criteria) to a future non-public process, simply because those criteria are "nondiscretionary" or "clear and objective." The Court of Appeals' recent decision in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007), does not seem to recognize such an exception and in fact explicitly states that the deferred decision making must be "infuse[d] * * * with the same participatory rights" that would have been required if the decision making had not been deferred. Second, even if such an exception did exist, the city does not adequately explain why all of the applicable standards in LDC Chapter 4.5 are clear and objective and could be applied in the future without requiring any

exercise of judgment, no matter what circumstances are encountered on the lots, and we do not see that they are.[4]

The second assignment of error is sustained, in part.

THIRD ASSIGNMENT OF ERROR

In *Boucot I*, we remanded the city's decision in part because we agreed with petitioners that, absent the existence in the record of typical building elevation drawings for the proposed houses that appeared to be required by LDC 2.5.50.01(a)(3), there was not substantial evidence in the record to support the city's conclusion that the proposal complied with CCP Policy 4.6.7(G), CCP Policy 9.2.5 and CCP Policy 9.2.1. We held:

> "On remand, the city must either require submission of the typical building elevations, or in their absence identify a sufficient evidentiary basis to conclude that the development complies with applicable criteria." *Boucot I* at slip op 8.

Although we sustained petitioners' challenges to the decision in *Boucot I* on an evidentiary basis, on remand, the city adopted findings explaining how the city believes the proposal complies with CCP Policy 4.6.7(G), CCP Policy 9.2.1 and 9.2.5 notwithstanding the absence of typical building elevation drawings.[5] Petitioners argue that the findings are not supported by substantial evidence in the absence of typical building elevation drawings and that the findings are inadequate. We address those findings in turn.

1. CCP Policy 4.6.7(G)

CCP Policy 4.6.7(G) requires in relevant part that development "demonstrate a concern" for views from and to the hillside. On remand, the city found in part that the proposal satisfies CCP Policy 4.6.7(G) because Condition 27 requires development on

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[4] For example, maximum cut and fill height varies depending on whether there are one or two "Extenuating Conditions," and whether the lot would "otherwise be unbuildable." 2006 LDC 4.5.80.04(d)(1). While the LDC provides some guidance regarding extenuating conditions, even with that guidance, those are not clear and objective criteria.

[5] On remand, the applicant did not submit typical building elevations, but provided images and illustrations that it claimed were examples of houses that could be built on the lots. Record 901-903.

individually graded lots to comply with 2006 LDC Chapter 4.5. Record 55. For the reasons we explained in our resolution of the second assignment of error, deferring a present finding of compliance with CCP 4.6.7(G) to a future proceeding that does not allow public participation is inconsistent with our decision in *Boucot I* and *Rhyne*.

However, the city also found that because 90 percent of the significant trees on the property will be preserved, and conditions 22 and 27 impose building height restrictions and limits on the types of buildings allowed, the proposal "demonstrates a concern" for views to and from the hillside and satisfies CCP Policy 4.6.7(G). Record 54. Petitioners do not challenge that finding. That finding appears to provide a sufficient explanation on its own for the city to conclude that CCP Policy 4.6.7(G) is satisfied.[6]

2. CCP Policies 9.2.1 and 9.2.5

a. General Findings

CCP Policy 9.2.1 requires that land use decisions "protect and maintain" the neighborhood characteristics that are defined in CCP Policy 9.2.5. CCP Policy 9.2.5 requires a demonstration that the development "reflects neighborhood characteristics appropriate to the site and area."[7] On remand, the city explained that condition 22 limits buildings on lots

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[6] The city also determined that Policy 4.6.7(G) is not an applicable approval criterion. Record 54. However, because the city made alternative findings that CCP Policy 4.6.7(G) is satisfied, we need not determine whether the city's finding that Policy 4.6.7(G) does not apply is correct.

[7] CCP Policy 9.2.5 provides:

> "Development shall reflect neighborhood characteristics appropriate to the site and area. New and existing residential, commercial, and employment areas may not have all of these neighborhood characteristics, but these characteristics shall be used to plan the development, redevelopment, or infill that may occur in these areas. These neighborhood characteristics are as follows:
>
> "A. Comprehensive neighborhoods have a neighborhood center to provide services within walking distance of homes. Locations of comprehensive neighborhood centers are determined by proximity to major streets, transit corridors, and higher density housing. Comprehensive neighborhoods use topography, open space, or major streets to form their edges.

on the west and north sides of the property to one story with a daylight basement and limits roof pitches and that such a limitation will be compatible with adjacent developments, which

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"B Comprehensive neighborhoods support effective transit and neighborhood services and have a wide range of densities. Higher densities generally are located close to the focus of essential services and transit.

"C. Comprehensive neighborhoods have a variety of types and sizes of public parks and open spaces to give structure and form to the neighborhood and compensate for smaller lot sizes and increased densities.

"D. Neighborhood development provides for compatible building transitions in terms of scale, mass, and orientation.

"E. Neighborhoods have a mix of densities, lot sizes, and housing types.

"F. Neighborhoods have an interconnecting street network with small blocks to help disperse traffic and provide convenient and direct routes for pedestrians and cyclists. In neighborhoods where full street connections cannot be made, access and connectivity are provided with pedestrian and bicycle ways. These pedestrian and bicycle ways have the same considerations as public streets, including building orientation, security-enhancing design, enclosure, and street trees.

"G. Neighborhoods have a layout that makes it easy for people to understand where they are and how to get to where they want to go. Public, civic, and cultural buildings are prominently sited. The street pattern is roughly rectilinear. The use and enhancement of views and natural features reinforces the neighborhood connection to the immediate and larger landscape.

"H. Neighborhoods have buildings (residential, commercial, and institutional) that are close to the street, with their main entrances oriented to the public areas.

"I. Neighborhoods have public areas that are designed to encourage the attention and presence of people at all hours of the day and night. Security is enhanced with a mix of uses and building openings and windows that overlook public areas.

"J. Neighborhoods have automobile parking and storage that does not adversely affect the pedestrian environment. Domestic garages are behind houses or otherwise minimized (e.g., by setting them back from the front facade of the residential structure.) Parking lots and structures are located at the rear or side of buildings. On-street parking may be an appropriate location for a portion of commercial, institutional, and domestic capacity. Curb cuts for driveways are limited, and alleys are encouraged.

"K. Neighborhoods incorporate a narrow street standard for internal streets which slows and diffuses traffic.

"L. Neighborhood building and street proportions relate to one another in a way that provides a sense of enclosure.

"M. Neighborhoods have street trees in planting strips in the public right-of-way."

contain a variety of housing sizes and types.[8] The city also explained that Condition 27 limits houses on the site to single family detached houses and accessory buildings, matching the development on adjacent properties.[9] The city concluded:

> "[B]ecause the uses permitted on the subject site are limited to those of uses on adjacent sites, the proposed development will reflect the neighborhood characteristics appropriate to the site and area. * * *" Record 62.

The city's findings on remand appear to rely on the illustrations and images provided by the applicants and pictures provided by the opponents of the proposal, and the similarity between existing houses in adjacent and close by developments, as well as the architectural features required by the LDC. The city's findings also relied on the conditions of approval limiting certain houses to a single story and limiting the development to single family detached homes as its reasons for determining that the development is consistent with the identified neighborhood characteristics. Although it is a close call, the required considerations under CCP Policies 9.2.1 and 9.2.5 are subjective and we agree with the city that the city's findings that the development will be compatible with the neighborhood are supported by substantial evidence in the record.

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[8] Condition 22 provides:

> "Concurrent with final plat approval, the applicant shall record the following deed restrictions: Dwelling unit size on lots 19-29 shall not exceed 1,200 square feet. Buildings on Lots 2-13 and 44 and 45 shall be limited to one story above grade, with the option to construct daylight basements. The roof pitch of all buildings on all lots shall not exceed a 6:12 (rise:run) ratio. Cuts within any building footprint may exceed eight feet." Record 29-30.

[9] Condition 27 provides in relevant part:

> "Lots shall only be developed with single-family, detached homes and accessory structures consistent with conditions of this approval and 2006 LDC Sections 3.2.30 (except subsections 3.2.30.m – q), 3.2.40, and LDC Sections 4.3.30 and 4.3.40 for accessory structures. Landscaping shall be in accordance with the provision of 1993 LDC Chapter 4.2 – Landscaping, Buffering, and Screening. Development on all lots shall comply with the 2006 LDC Chapter 4.10 – Pedestrian Oriented Design Standards and criteria in LDC Sections 4.10.10 through 4.10.50.
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> "Modifications to applicable LDC standards, or standards established through this approval may only occur through a planned development major modification process." Record 31.

b. 2006 LDC Chapter 4.10 (Pedestrian Oriented Design Standards)

The city found that the proposal complies with CCP Policy 9.2.5. *See* n 7. However, the city also imposed Condition 27, which requires the development of individual lots to comply with 2006 LDC Chapter 4.10, which the parties refer to as Pedestrian Oriented Design Standards or PODS. PODS require dwellings to be oriented towards the street and contain other requirements that the city believes makes developments more pedestrian friendly. The city council found that certain provisions of CCP Policy 9.2.5 were satisfied by imposition of that condition, and went on to conclude that because PODS are "clear and objective standards," no public participation will be required when the applicant seeks to demonstrate compliance with those provisions. Record 64-65.

Petitioners argue that the city's attempt to defer a finding of compliance with CCP 9.2.5 through the imposition of condition 27 requiring future compliance with the PODS standards is inconsistent with our decision in *Boucot I*. If the city had completely failed to consider whether the proposal complies with CCP Policy 9.2.5, and instead deferred that consideration to a requirement that the applicants comply with the PODS standards in a future proceeding that does not involve participatory rights for the public, we would agree. However, as explained above, the city made a current finding that CCP Policy 9.2.5 is satisfied, and imposed an *additional* obligation on the applicants to comply with otherwise non-applicable criteria (the PODS standards.) That is not inconsistent with our decision in *Boucot I* or with *Rhyne*.

3. CCP Policies 3.2.2 and 3.2.7

Petitioners also assert that there is not substantial evidence in the record that supports the city's findings that the application complies with CCP Policy 3.2.2 and 3.2.7. The city responds that petitioners are precluded from raising the issue of compliance with comprehensive plan policies that were not raised in *Boucot I*. Response Brief 21-22. We agree with the city that petitioners may not raise the issue of the applications' compliance

with those plan policies for the first time in this appeal. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In *Boucot I*, we remanded the city's decision in part because we concluded that the city's findings were inadequate to explain how the development satisfied CCP Policy 4.11.12, and that the city improperly deferred compliance with that approval criterion to a future proceeding with no opportunity for public participation.[10]

On remand, the city adopted findings that first explained that CCP Policy 4.11.12 is met by a showing of compliance with the city's 2002 Storm Water Master Plan (SWMP), which is part of the CCP:

> "City Council notes that CCP 4.11.12 is not a measurable development standard. Council notes that the City has adopted clear and objective stormwater quality and quantity standards in the City's 2002 Storm Water Master Plan (SWMP) that must be met for development to occur. Council notes that upon the adoption of the SWMP, that the SWMP became an amendment to the City's Comprehensive Plan, implementing the CCP along with CCP 4.11.12." Record 76-77.

The city found that the applicant proposed to use a combination of detention ponds and new public storm drain pipes to detain and capture runoff. The city also imposed Condition 19, which requires the applicant to design storm water facilities consistent with Appendix F of the SWMP. The city then determined that the standards set forth in Appendix F are "clear and objective * * *." Record 79.

In the fourth assignment of error, petitioners first argue that Appendix F requires all water quality facilities and detention facilities to be designed in accordance with the King

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[10] CCP 4.11.12 provides:

> "Development upslope of wetlands shall minimize interference with water patterns discharging to wetlands, and shall minimize detrimental changes in water quality for waters discharging to wetlands."

County, Washington Surface Water Design Manual (King County Manual), and that that manual requires that a drainage plan be submitted at the time of application. Thus, we understand petitioners to argue, a drainage plan is required to be submitted at the time the application is submitted, and because no drainage plan has been submitted, the proposal does not satisfy the relevant standards.

The city responds initially that petitioners did not raise this issue during the evidentiary proceedings on remand and are thus precluded under ORS 197.763(1) and ORS 197.835(3) from raising the issue in their appeal to LUBA. Petitioners responded to the city's waiver assertion during petitioners' rebuttal portion of oral argument, with a general response that did not include citations to places in the record where the issue was raised below. Given that lack of specificity, we treat the city's waiver argument as if there had been no response to it.[11] However, even if the issue was not waived, we also agree with the city's response that the SWMP's incorporation of *design standards* set forth in the King County Manual does not also incorporate *application requirements* that are part of that manual.

Petitioners also argue that a drainage plan is required by LDC 2.5.50.01.a.5.[12] We do not agree. That LDC provision requires submission of a utility plan. A utility plan is generally understood to identify the location of utilities such as power, gas, sewer and water on the property. It may also contain a plan for storm drainage. But that does not mean the code requires submission of a drainage plan.

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[11] It is generally inappropriate to wait until the rebuttal portion of oral argument to respond to a waiver argument that was raised in the response brief. *See Laurance v. Douglas County*, 45 Or LUBA 393, 398 (2003) (a petitioner at LUBA may not cite to evidence supporting petitioners' arguments for the first time during rebuttal at oral argument.)

[12] LDC 2.5.50.01.a.5 requires a detailed development plan to contain in relevant part:

> "[A] [d]etailed utilities plan indicating how sanitary sewer, storm sewer, drainage, and water systems will function[.]"

Finally, petitioners argue that the city's deferral of a present finding of compliance with CCP Policy 4.11.12 to a time in the future when a drainage plan is submitted is inconsistent with our decision in *Boucot I* and *Rhyne* because it is not clear that that future decision will allow for public participation. Although the city's findings regarding this criterion do not expressly state that because the SWMP contains "clear and objective" standards no public proceeding will be required, the city takes the position in its response brief that:

> "Because the City's SWMP regulations are clear and objective, and because the city council approved the [applications] varying from certain standards, but subject to compliance with the City's SWMP regulations, the *Rhyne* concern noted by LUBA in *Boucot I* is obviated." Response Brief 34.

If that is what the city intended in finding the SWMP standards to be "clear and objective," then we agree with petitioners. As we explained in *Boucot I*:

> "[T]he city appears to have completely deferred consideration of proposed drainage plans and facilities to a subsequent review process that does not provide for notice or opportunity for public input. As we explained above * * * such a deferral is inadequate to justify a finding of compliance with an applicable criterion." *Id*. at slip op 16.

We explained above in our resolution of the second assignment of error why the city's attempt to defer a determination regarding compliance with an applicable approval criterion to a non-public process is inconsistent with *Rhyne*. Because the city deferred a finding of compliance with CCP Policy 4.11.12 to a future proceeding involving a determination regarding compliance with the SWMP standards, and failed to ensure that that future proceeding will be a public proceeding, those findings are inadequate. *See Soares v. Corvallis*, 56 Or LUBA 551, 566 (2008) (city improperly deferred consideration of SWMP design standards to a later process that did not involve public participation). On remand, the city must clarify that a future proceeding to determine compliance with the SWMP standards will be subject to public participation.

Petitioners also argue that the proposed development violates certain SWMP provisions. However, we need not address the numerous challenges that petitioners raise at this stage regarding whether the application can satisfy all the requirements of the SWMP. Petitioners will have the opportunity during the future public proceeding to determine compliance with the SWMP to raise challenges under it.

The fourth assignment of error is sustained, in part.

FIFTH ASSIGNMENT OF ERROR

In their fifth assignment of error, petitioners argue that the city's findings regarding CCP Policy 4.2.2 and Policy 4.10.9 are inadequate. CCP Policy 4.2.2 requires that "natural features" and "areas determined to be significant" shall be preserved, mitigated or reclaimed. CCP Policy 4.10.9 provides that negative impacts on habitat and migration corridors for birds and wildlife, and on open space, shall be minimized.

The city council concluded:

> "[T]he proposal protects the majority of significant trees and nearly 42% of the site will be retained in tracts, protecting the habitat created, primarily, by the preserved oak groves. Council finds that protection of this habitat area is consistent with CCP 4.2.2 and 4.10.9. The City Council finds that protection of the significant trees and oak groves, amounting to 42% of the site, is sufficient mitigation for any loss to the other natural features on the site. The City Council finds that protection of significant trees and oak groves minimizes the negative impacts on habitat for birds, wildlife, aquatic life and on open space. Accordingly, the City Council concludes that the proposal as conditioned in consistent with CCP Policies 4.2.2 and 4.10.9." Record 93-94.

Although their arguments are difficult to follow, we understand petitioners to argue that the city erred in not recognizing other significant natural features on the site, including wildlife habitat, upland prairie, oak woodlands, natural hazard slopes, scenic views, archaeological resources, and open space, and in failing to determine whether CCP Policy 4.2.2 was met regarding these other features. Petition for Review 34.

As far as we can tell, the city council determined that significant natural features on the site are oak groves, upland prairie habitat, and wetlands, and that the open space values

of the property were not a significant natural feature under CCP Policy 4.2.2. The city council concluded that the proposal to preserve tracts of the property containing the oak groves satisfies CCP 4.2.2 and CP 4.10.9, because it will preserve both a significant natural feature and also identified habitat located within the oak groves. Record 92. The council also concluded that the property is not a migration corridor for birds or other wildlife, and that the upland prairie habitat has been degraded, but that mitigation through protection of other natural features on the site will satisfy CCP 4.2.2 and 4.10.9. Petitioners do not explain why those findings are inadequate to demonstrate compliance with the CCP.

Regarding the protection of wetlands, the city council concluded that adverse impacts to the wetlands will not occur or will be minimized by the applicants' proposed storm detention ponds and use of a manhole-based water quality system in addition to compliance with the city's water quality and quantity standards. Record 88-89. We understand petitioners to argue that the city erred in making this finding without the required drainage plan that petitioners argued in their fourth assignment of error is required by the LDC, and further that a manhole based water treatment facility is not typically allowed under the SWMP's standards. We also understand petitioners to argue that the city erred in failing to assess the impacts of the development on western pond turtles, which petitioners assert may be present south of the property.

We disagree with petitioners that the city erred in finding that wetlands located on the property would be preserved or impacts on them minimized through mitigation and water treatment methods. Even in the absence of a detailed drainage plan, the city could find that the use of detention ponds and compliance with city water quality treatment standards was sufficient to preserve or mitigate the impact on wetlands. In addition, the city concluded that the quantity of water entering pond turtle habitat will not be so significant as to impact turtle habitat, and that compliance with water quality standards will also minimize any negative

impacts on pond turtle habitat. Record 104. Petitioners have not explained why these findings are insufficient to demonstrate compliance with CCP 4.2.2 and Policy 4.10.9.

The fifth assignment of error is denied.

The city's decision is remanded.