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, 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. 2010-014

FINAL OPINION
AND ORDER

Appeal from Corvallis.

Arthur Boucot, Barbara Boucot, Lance Caddy, Sheryl Oakes Caddy, Joe Casprowiak, Pam Casprowiak, Laurie Childers, William Koenitzer, Susan Morre, Jeffrey Morre, John Selker, Robert Smythe, Justin Soares, Lina Soares, George Taylor, Lucinda Taylor, Carolyn Ver Linden and Elizabeth Waldron, Corvallis, filed the petition for review. Susan Morre argued on her own behalf.

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

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

AFFIRMED 07/15/2010

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

FACTS

The challenged decision is the city's third decision approving the proposed development, and is the city's decision on remand following our opinion in *Boucot v. City of Corvallis*, __ Or LUBA __ (LUBA No. 2009-042, October 29, 2009) (*Boucot II*). We take the facts from *Boucot II*:

> "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." *Boucot II* at slip op 2.

The city's initial decision approving the same development was remanded in *Boucot v. Corvallis*, 56 Or LUBA 662 (2008) (*Boucot I*). As we explained in *Boucot I*, various provisions of the Corvallis Comprehensive Plan (CCP) apply directly to the application:

> "The 2006 version of the [Corvallis Land Development Code] 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." 56 Or LUBA at 670, n 4.[1]

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[1] In particular, CCP 4.6.7 and CCP 4.11.12 apply to the application. CCP 4.6.7 provides in relevant part:

> "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.

On remand, the city again approved the proposed development, and petitioners appealed that approval to LUBA. In *Boucot II*, we agreed with petitioners that the city's findings that deferred a determination as to whether the applicant's proposal complied with provisions of the Corvallis Comprehensive Plan (CCP) to a future proceeding that did not allow for public participation were impermissible. First, we concluded that the city could not lawfully defer a determination as to whether individual lot grading complies with CCP 4.6.7 to a future proceeding that did not allow for public participation. *Boucot II* at slip op 8. Second, we concluded that the city could not lawfully defer a determination as to whether the applicant's proposal to use a combination of detention ponds and new public storm drain pipes to detain and capture runoff complied with CCP 4.11.12 to a future proceeding that did not allow for public participation.[2] *Id.* at slip op 16. However, in sustaining those portions of petitioners' assignments of error in *Boucot II*, we did not in any way conclude that deferral

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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.
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> "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."

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."

of a determination of compliance with an applicable criterion was impermissible, but only that such a deferral must include a public process that was "'infuse[d] * * * with the same participatory rights that would have been required if the decision making had not been deferred." *Id*. at slip op 8 (citing *Gould v. Deschutes County*, 216 Or App 150, 162, 171 P3d 1017 (2007)).

In sustaining petitioners' second assignment of error in *Boucot II*, we also concluded that CCP 4.6.7, rather than the 2006 LDC, applied to the application, including proposed individual lot grading, even though, we noted, the applicant had apparently agreed to have the arguably more stringent provisions of the 2006 LDC Chapter 4.5 apply in place of CCP 4.6.7:

> "* * * [P]etitioners 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." *Id*. at slip op 6.

In the above-quoted part of our decision in *Boucot II*, we concluded that the city's finding that the proposed mass grading of the subject property complies with CCP 4.6.7 was supported by substantial evidence in the record.

On remand from our opinion in *Boucot II*, the city again approved the proposed development. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, we understand petitioners to argue that the city erred in failing to make a current determination as to whether the proposed development complies with CCP 4.11.12. *See* n 1. On remand, the city imposed Condition 20, which requires the applicant to provide information regarding proposed storm drainage plans and provides:

> "The applicant shall submit the information required in this condition of approval. This information shall be reviewed for consistency with [CCP] 4.11.12 and approved through a City Council Public Hearing review process prior to issuance of [Public Improvement by Private Contract] PIPC permits." Record 21.

To the extent petitioners argue that it was unlawful for the city to defer a determination of compliance with CCP 4.11.12, we reject that argument. The city's decision deferred a current finding of compliance with CCP 4.11.12 to a later proceeding that apparently includes a city council review process and the public participation rights we stated were required in order to lawfully defer a current finding of compliance in *Boucot II*. That is all that is required.

The first assignment of error is denied.

SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR

These assignments of error challenge the city's decision regarding CCP 4.6.7. *See* n 1.

A. Second and Fourth Assignments of Error

In their second and fourth assignments of error, petitioners argue that (1) the proposed mass grading of the property (as opposed to individual lot grading) does not comply with CCP 4.6.7, (2) the city erred in failing to determine whether the mass grading of the property complies with CCP 4.6.7, and (3) there is no substantial evidence in the record to allow the city to determine whether the application complies with CCP 4.6.7.

The city responds first that petitioners are precluded from challenging the city's previous determination in *Boucot II* that the proposed mass grading satisfies CCP 4.6.7. *See*

Beck v. Tillamook County, 313 Or 148, 831 P2d 678 (1992) (parties are foreclosed from raising old, resolved issues). We agree with the city that petitioners may not challenge in the present appeal the city's determination, which we sustained in *Boucot II*, that the proposed mass grading complies with CCP 4.6.7.

With respect to individual lot grading, the city also responds that in approving the application on remand, the city imposed Condition 27, which provides in relevant part that:

> "[p]rior to grading and excavation activities in areas not approved for mass grading * * * the applicant shall obtain approval by the City Council through a public hearing review process, detailing how the grading plan(s) for development on individual lots are consistent with [CCP] 4.6.7." Record 23.

To the extent petitioners argue that it was unlawful for the city to defer a determination of compliance with CCP 4.6.7 with respect to individual lot grading, we reject that argument. As with the first assignment of error, the city's decision deferred a current finding of compliance with CCP 4.6.7 to a later proceeding that includes a city council review process and the public participation rights we stated were required in order to lawfully defer a current finding of compliance in *Boucot II*. That is all that is required.

The second and fourth assignments of error are denied.

B. Third Assignment of Error

In the third assignment of error, petitioners argue:

> "Respondent erred in changing the applicable review criteria for future lot development from 2006 LDC 4.5 to the 1998 CCP 4.6.7.
>
> "This change was in response to [LUBA's opinion in *Boucot II*] which petitioners believe misinterpreted the city's reason to apply 2006 LDC to future lot development and house construction, rather than CCP 4.6.7. We are unsure how LUBA handles a request to reconsider a previous decision based on such misinterpretation, but feel it is relevant to note it here." Petition for Review 9.

There is no provision in the statutes governing LUBA's review authority to reconsider a final opinion. If we committed error in *Boucot II*, the remedy was for petitioners to appeal that decision to the Court of Appeals pursuant to ORS 197.850. *Sarti v. City of Lake Oswego*, 20

Or LUBA 562 (1991). Accordingly, the third assignment of error provides no basis for reversal or remand of the decision.

The city's decision is affirmed.