

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

4 ARTHUR BOUCOT, BARBARA BOUCOT,  
5 LANCE CADDY, SHERYL OAKES CADDY,  
6 JOE CASPROWIAK, PAM CASPROWIAK,  
7 LAURIE CHILDERS, WILLIAM KOENITZER,  
8 SUSAN MORRÉ, JEFFREY MORRÉ, JOHN SELKER,  
9 ROBERT SMYTHE, GEORGE TAYLOR,  
10 LUCINDA TAYLOR, CAROLYN VER LINDEN,  
11 ELIZABETH WALDRON, JAMES WOHLWEND  
12 and PATRICIA WOHLWEND,  
13 *Petitioners,*

14  
15 vs.

16  
17 CITY OF CORVALLIS,  
18 *Respondent.*

19  
20 LUBA No. 2011-053

21  
22 FINAL OPINION  
23 AND ORDER  
24

25 Appeal from City of Corvallis.

26  
27 Arthur Boucot, Barbara Boucot, Lance Caddy, Sheryl Oakes Caddy, Joe Casprowiak,  
28 Pam Casprowiak, Laurie Childers, William Koenitzer, Susan Morr , Jeffrey Morr , John  
29 Selker, Robert Smythe, George Taylor, Lucinda Taylor, Carolyn Ver Linden, Elizabeth  
30 Waldron, James Wohlwend and Patricia Wohlwend, Corvallis, filed the petition for review  
31 and Susan Morr  argued on her own behalf.  
32

33 James K. Brewer, Corvallis, filed the response brief and argued on behalf of the  
34 respondent. With him on the brief was Fewel, Brewer and Coulombe.  
35

36 RYAN, Board Chair; BASSHAM, Board Member, participated in the decision.  
37

38 HOLSTUN, Board Member, did not participate in the decision.  
39

40 AFFIRMED

09/09/2011

41  
42 You are entitled to judicial review of this Order. Judicial review is governed by the  
43 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal a decision by the city approving a storm water facility plan for a 45-lot subdivision.

**MOTION TO STRIKE**

Petitioners filed the petition for review within the time required under OAR 661-010-0030(1). Approximately one week after the time for filing the petition for review had expired, petitioners filed an amended petition for review that included several appendices, including a copy of the decision as required by OAR 661-010-0030(4)(e). Petitioners did not seek permission of the Board before filing their amended petition for review, as required by OAR 661-010-0030(6).

In its response brief, the city moves to strike the amended petition for review because petitioners filed it outside the time for filing the petition for review and without seeking the permission of the Board. In the alternative the city moves to strike the appendices other than the copy of the decision.

It would serve no purpose to strike the amended petition for review because the amended petition is identical to the original petition, other than the inclusion of the appendices. It appears to us that Appendices 1 through 5 contain the copy of the decision required to be included under OAR 661-010-0030(4)(e) and material from the record or copies of excerpts from the Corvallis Land Development Code and Corvallis Comprehensive Plan that are properly attached to the petition for review. Appendix 6 appears to be quotations of LUBA headnotes and the basis for attaching them to the petition for review is not apparent. The city's motion to strike Appendix 6 is granted.

**FACTS**

Petitioners have appealed three prior decisions of the city approving various aspects of the proposed subdivision. *Boucot v. City of Corvallis*, 56 Or LUBA 662 (2008) (*Boucot*

1 *D*; *Boucot v. City of Corvallis*, 60 Or LUBA 57 (2009) (*Boucot II*); and *Boucot v. City of*  
2 *Corvallis*, 61 Or LUBA 459 (2010) (*Boucot III*). We set out the history of these appeals in  
3 some detail in *Boucot III*, and it would serve no purpose to set out that history in detail here.  
4 We limit our discussion of the facts to those necessary to understand our resolution of  
5 petitioners’ four assignments of error in the present appeal, which concerns only approval of  
6 a storm water facility plan.

7 Corvallis Comprehensive Plan (CCP) 4.6.7 and CCP 4.11.12 apply to the proposed  
8 subdivision.<sup>1</sup> *Boucot I*, 56 Or LUBA at 670. As we understand it, the applicant’s proposed

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<sup>1</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 treemeadow 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.”

1 storm water facility plan for the subdivision is required to satisfy CCP 4.6.7 because it will  
2 require grading activity in order to install elements of the storm drain facility, and is required  
3 to satisfy CCP 4.11.12 because it is proposed to be developed “upslope of wetlands.” See n  
4 1.

5 In *Boucot II*, we remanded the decision because we found that the city had  
6 impermissibly deferred to a non-public proceeding a decision on whether mass grading in  
7 areas not shown on the grading plan submitted by the applicant, as well as the grading of  
8 individual lots, satisfied CCP 4.6.7.<sup>2</sup> On remand, in making the decision challenged in  
9 *Boucot III*, which we subsequently affirmed, the city imposed conditions of approval that  
10 required that any decisions to approve a storm water facility plan and associated grading in  
11 areas not previously approved for mass grading, and grading of individual lots, would be  
12 made in a public proceeding. We quote and discuss those conditions below.

13 The applicant then submitted a storm water facility plan that requires mass grading of  
14 the property in some locations outside of the previously approved mass grading area. See n  
15 2. Elements of the proposed stormwater detention facilities include large storm water  
16 detention vaults that include treatment facilities, construction of an in-ground pipe, open  
17 channel drainage ways, and storm lines, some of which is proposed in areas not previously  
18 approved for mass grading.<sup>3</sup> In the challenged decision, the city determined that the  
19 proposed mass grading and the storm water facility plan satisfy CCP 4.11.12 and CCP 4.6.7.  
20 This appeal followed.

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<sup>2</sup> In *Boucot II*, we found that city had concluded that the proposed mass grading for streets and utilities shown on the applicant’s grading plan satisfied CCP 4.6.7. 60 Or LUBA at 61.

<sup>3</sup> The decision describes the facility:

“[T]he applicant proposes to install water quality and detention facilities. Stormwater on the site will be directed into stormwater pipes and overland drainage areas to underground detention vaults. After being treated to standards in the Corvallis Stormwater Master Plan, the water will enter existing public storm lines and be released in a wetland below the site, on the east side of Brooklane Drive.” Record 15.

1 **INTRODUCTION**

2 Petitioners’ assignments of error contain overlapping arguments, as well as  
3 arguments that do not appear to us to be related to the assignment of error. In addition,  
4 petitioners’ “Summary of Arguments” contained in the petition for review appears to contain  
5 independent arguments that are presented only in the summary and are not presented in any  
6 of the assignments of error that follow the “Summary.” In resolving the four assignments of  
7 error, we have attempted to identify and resolve any cognizable arguments contained in  
8 either the assignment of error itself, other assignments of error, or the Summary of  
9 Arguments.

10 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

11 **A. Introduction**

12 As explained above, in the decision challenged in *Boucot III*, the city deferred  
13 determining whether the storm water facility plan and grading associated with it comply with  
14 CCP 4.6.7 and CCP 4.11.12 to a later public proceeding, and imposed Conditions 20 and 27  
15 to ensure compliance with CCP 4.6.7 and CCP 4.11.12. Condition 27 provided:

16 **“27. Lot Grading and Structures** – Mass grading shall be limited to the  
17 areas shown on the grading plan identified as Drawing X – Brooklane Heights  
18 Grading and Tree Preservation Plan, and Drawing Y – Brooklane Heights  
19 Cut/Fill Analysis (Exhibits D.1, 2). \* \* \*

20 “Prior to grading and excavation activities in areas not approved for mass  
21 grading \* \* \* the applicant shall obtain approval by the City Council through  
22 a public hearing review process, detailing how the grading plan(s) for  
23 development on individual lots are consistent with [CCP] 4.6.7.” Record 18.

24 Condition 20 provided in relevant part:

25 **“20. Public Water Quality Facility Design & Maintenance** - The applicant  
26 shall submit the information required in this condition of approval. This  
27 information shall be reviewed for consistency with [CCP] 4.11.12 and  
28 approved through a City Council Public Hearing review process prior to  
29 issuance of [Public Improvement by Private Contract] PIPC permits.

30 “As part of the plans for public improvements the applicant shall provide  
31 engineered calculations for storm water quality facilities demonstrating

1 compliance with both criteria outlined in Appendix F of the Storm Water  
2 Master Plan, and criteria outlined in the King County, Washington, Surface  
3 Water Design Manual. Infiltration facilities are a recommended means of  
4 meeting water quality requirements where soil and slope conditions (not more  
5 than 10%) permit the use of infiltration facilities and where the facilities will  
6 not have an adverse impact on the subject site or adjacent or downhill  
7 properties. The water quality analysis shall contain a discussion on the  
8 feasibility of implementing infiltration during both wet and dry seasons.”  
9 Record 13.

10 In the decision challenged in the present appeal, the city determined that the proposed  
11 grading in connection with the storm water facility plan, and the facility plan for storm water  
12 disposal itself, satisfied CCP 4.6.7 and CCP 4.11.12.

13 **B. Assignments of Error**

14 Petitioners’ first assignment of error is set out below:

15 “The city misconstrued applicable review criteria by finding that the applicant  
16 need only demonstrate ‘consistency’ with the [Corvallis Land Development  
17 Code] rather than demonstrate ‘compliance’ with mandatory review criteria  
18 CCP 4.6.7 and 4.11.12, as LUBA had determined in their final opinion. This  
19 plan fails to comply with these mandatory review criteria.” Petition for  
20 Review 10.

21 In a portion of their first assignment of error, petitioners challenge the city’s determination  
22 that the proposed stormwater facility plan and the grading associated with that plan satisfy  
23 CCP 4.6.7 and CCP 4.11.12. We understand petitioners to argue that the city misconstrued  
24 applicable law when it found in some places in the decision that the proposed stormwater  
25 facility plan is “consistent with” CCP 4.6.7 and CCP 4.11.12. According to petitioners,  
26 *Hoskinson v. City of Corvallis*, 60 Or LUBA 93 (2009), stands for the proposition that the  
27 city must determine that the proposal “complies with” the applicable review criteria, and  
28 such a determination requires a more stringent analysis than a determination that the proposal  
29 is “consistent with” the applicable CCP provisions. Based on that alleged misconstruction,  
30 petitioners also argue that findings 18, 20, 22, and 24 are inadequate to satisfy the  
31 requirement that the city determine that the proposal “complies with” CCP 4.6.7.

1           The city responds that *Hoskinson* does not stand for the proposition that petitioners’  
2 appear to argue and is inapposite in the present appeal. The city also responds that there is  
3 no meaningful distinction between analysis for “compliance” or “consistency” with CCP  
4 4.6.7 and CCP 4.11.12, because ultimately the city must determine whether the proposal  
5 satisfies the applicable review criteria.

6           We agree with the city. In *Hoskinson*, we rejected the city’s suggestion that a code  
7 provision that required review for “consistency with” various code provisions was not an  
8 approval criterion that applied to the subdivision proposed in that appeal. We did not hold  
9 that in all cases review for “consistency with” a code provision is a less stringent requirement  
10 than review for “compliance with” a code provision. What the city is required to determine  
11 with respect to the 45-lot subdivision proposed in the present appeal is whether the proposed  
12 stormwater facility plan *satisfies* the applicable CCP provisions. The language contained in  
13 many of the city’s findings, and in each of the findings challenged by petitioners,  
14 demonstrates that the city uses the words “consistent with” and “complies with”  
15 interchangeably and that the city understood that its task was to determine whether the storm  
16 drainage plan satisfies the applicable review criteria, CCP 4.6.7 and CCP 4.11.12.<sup>4</sup>

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<sup>4</sup> In addition, petitioners’ selective citations to language of those findings that use the phrase “consistent with” to support their argument is not particularly persuasive where other portions of the same finding also use the phrase “complies with.” See, *e.g.* in relevant part:

Finding 18:

“[t]he Council notes that analysis of the proposal’s *compliance with* CCP 4.6.7 is found in the Staff Report \* \* \*. The City Council finds the application materials and Staff report provide sufficient information and analysis to evaluate the proposal’s *consistency with* CCP 4.6.7.” Record 18 (Emphases added.)

Finding 22:

“The Council finds it is only required to evaluate the currently proposed grading, occurring outside of previously approved mass graded areas, for *consistency with* CCP 4.6.7. The Council finds it is not required to evaluate or re-evaluate the entire development proposal or grading that is not currently being proposed, for *compliance with* Condition of Approval 27 or CCP 4.6.7.” Record 20 (Emphases added.)

1           In this assignment of error, we also understand petitioners to argue that the city  
2 misconstrued applicable law in concluding that “[t]he Council finds that part of its role as the  
3 decision maker is to determine which policies are applicable.” Record 13. According to  
4 petitioners, planning staff—not the city council—determines applicable review criteria.  
5 While petitioners are incorrect in their assertion that the city’s planning staff has the final  
6 authority to determine which land use regulations apply to a land use application, we need  
7 not determine whether the quoted finding is correct or incorrect, because petitioners do not  
8 explain how such an error, if made, requires the decision to be reversed or remanded.  
9 Accordingly, petitioners’ argument does not contain a basis for reversal or remand of the  
10 decision.

11           In a portion of their first assignment of error, and in their second assignment of error,  
12 petitioners also argue that the findings are inadequate to explain how the proposed removal  
13 of an additional 15 trees to construct the storm water facility system satisfies CCP 4.6.7(C),  
14 (E), and (G). *See* n 1. However, in findings 24 through 27 the city council addressed the  
15 issue of whether the removal of additional trees satisfies those CCP provisions, and  
16 concluded that it does. Record 22-24. In addition, the city imposed additional conditions  
17 requiring mitigation trees to be planted. Record 9. Petitioners do not recognize or cite these  
18 findings or conditions or otherwise explain why they are inadequate.

19           Finally, in a portion of their first assignment of error and in their third assignment of  
20 error, we understand petitioners to argue that there is not substantial evidence to support the  
21 city’s determination that the proposed storm water facility plan satisfies CCP 4.6.7(A), CCP  
22 4.11.12, and Corvallis Land Development Code (1993 Version) (1993 LDC) 4.5.90.b.1.  
23 Substantial evidence is evidence a reasonable person would rely on in making a decision. In  
24 reviewing the evidence, LUBA may not substitute its judgment for that of the local decision  
25 maker. Rather, LUBA must consider all the evidence to which it is directed, and determine

1 whether based on that evidence, a reasonable local decision maker could reach the decision  
2 that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

3 **1. CCP 4.6.7(A) and CCP 4.11.12**

4 Petitioners argue that the storm water facility plan “interferes with the hydrology of  
5 the hillside,” and therefore does not satisfy CCP 4.6.7(A) (plan development to fit the  
6 topography, soil, geology, and hydrology of hillsides), and that the drainage plan “will  
7 prevent much of the rainfall from percolating into the soil, and diverting storm water to the  
8 proposed massive detention vault will prevent that infiltration as well,” and therefore does  
9 not satisfy CCP 4.11.12 (development upslope of wetlands shall minimize interference with  
10 water patterns discharging to wetlands). Petition for Review 12-13. The city responds that  
11 there is substantial evidence in the record to support the city’s conclusion that CCP 4.6.7(A)  
12 is satisfied, and cites to geotechnical reports, the storm water design report, and a staff report  
13 that support the city’s conclusion. We agree with the city that the geotechnical reports, the  
14 storm water design report and the staff report amount to substantial evidence in the record to  
15 support the city’s conclusion that the proposed stormwater drainage plan “fit[s] the  
16 topography, soil, geology, and hydrology of hillsides and \* \* \* ensure[s] hillside stability  
17 both during and after development.” Petitioners do not recognize that evidence or point to  
18 conflicting evidence that calls that evidence into question.

19 The city also points to findings that explain the city’s conclusion that the storm water  
20 drainage plan complies with CCP 4.11.12, and cites to evidence in the application and the  
21 staff reports that support that determination. Record 14-16. We agree with the city that there  
22 is substantial evidence in the record to support the city’s determination that “[d]evelopment  
23 upslope of wetlands \* \* \* minimize[s] interference with water patterns discharging to  
24 wetlands, and \* \* \* minimize[s] detrimental changes in water quality for waters discharging  
25 to wetlands.” Petitioners do not recognize that evidence or point to conflicting evidence that  
26 calls that evidence into question.

1           **B.     LDC 4.5.90.b.1**

2           The city apparently concluded that 1993 LDC 4.5.90.b.1 applied to the proposed  
3 stormwater master plan for the subdivision. Record 208. 1993 LDC 4.5.90.b.1 provides in  
4 relevant part:

5           “When detention and/or retention are required

6           “1.    Development Projects that create impervious surfaces (roads,  
7                driveways, parking lots, walks, patios, and roofs) in excess of 25,000  
8                square feet are required to implement stormwater detention and/or  
9                retention measures as specified in the Corvallis Design Criteria  
10              Manual. Detention facilities shall be designed to maximize  
11              stormwater infiltration.” Record 229.

12          However, the city concluded that LDC 4.5.90.b.1 does not require stormwater infiltration for  
13 the proposed subdivision because Section K.2.b of the city’s adopted Storm Water Master  
14 Plan provides that “[i]nfiltration shall not be allowed in areas with slopes over 10 percent,”  
15 and the slopes on the property exceed 10%.<sup>5</sup> Record 17, 208-209.

16          In a portion of their first assignment of error and in their third assignment of error, we  
17 understand petitioners to argue that a storm water facility plan that proposes detention vaults,  
18 rather than infiltration, does not satisfy LDC 4.5.90.b.1. However, petitioners do not  
19 acknowledge the city’s finding that the city’s Storm Water Master Plan precludes infiltration,  
20 or otherwise explain why that finding is inadequate to explain why the city concluded that  
21 infiltration was not required. We agree with the city that substantial evidence in the record

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<sup>5</sup> The findings set forth in the staff report were incorporated into the city council’s decision. Record 12.  
The staff report found:

“While LDC 4.5.90.b.1 requires detention facilities to maximize infiltration, Appendix F of the City’s Stormwater Master Plan states that infiltration shall not be allowed in areas with slopes over 10%. The applicant’s site is largely covered with areas of slopes over 10%. In addition, the applicant’s Geotechnical Report recommends lining the detention ponds to minimize stormwater infiltration ‘to decrease the risk of seepage and/or piping that could undermine the slopes or create localized instabilities.’ The applicant has proposed to construct subsurface detention vaults for storage of stormwater in excess of the pre-developed 2-year through 10-year flows. Detention vaults comply with the requirements of Appendix F and the recommendations of the Geotechnical Report.” Record 208-09.

1 supports the city's conclusion that slopes on the property exceed 10% and that therefore,  
2 infiltration is precluded.

3 The first, second and third assignments of error are denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 In this assignment of error, we understand petitioners to argue that the city erred in  
6 deferring a determination regarding whether grading of individual lots complies with the  
7 applicable review criteria to a subsequent review proceeding. As explained above, in making  
8 the decision challenged in *Boucot III*, the city deferred making a determination as to whether  
9 individual lot grading (as opposed to mass grading) complies with the applicable review  
10 criteria to a future public proceeding, and imposed Condition 20. The city responds that  
11 petitioners are precluded from raising an issue challenging the city's deferral of that  
12 determination and imposition of Condition 20, under *Beck v. City of Tillamook*, 313 Or 148,  
13 153, 831 P2d 678 (1992). We agree with the city. We denied petitioners' challenge to  
14 Condition 20 and affirmed the city's decision to defer making a determination about  
15 individual lot grading and impose Condition 20 in *Boucot III*. 61 Or LUBA at 462-63.  
16 Petitioners may not now renew a challenge to that condition in the present appeal.

17 In this assignment of error, we also understand petitioners to argue, as they argued in  
18 the third assignment of error, that there is not substantial evidence in the record to support  
19 the city's conclusion that the newly proposed mass grading activities on the property comply  
20 with CCP 4.6.7 without requiring a grading plan for individual lots. We concluded above  
21 that there is substantial evidence in the record to support the city's decision that the newly  
22 proposed mass grading activities comply with CCP 4.6.7. Petitioners do not explain why a  
23 grading plan for individual lots is required in order for the city to determine that the mass  
24 grading activities satisfy CCP 4.6.7.

25 The fourth assignment of error is denied.

26 The city's decision is affirmed.