

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

FEB 4 4 11 PM '82

1
2
3 PAUL R. MEYER and G. TODD)
NORVELL,)

4 Petitioners,)

5 v.)

6 THE CITY OF PORTLAND,)

7 Respondent.)

LUBA NO. 82-077
and 82-078

FINAL OPINION
AND ORDER

8
9 Appeal from the City of Portland.

10 Paul R. Meyer and Jan D. Sokol, Portland, filed the
11 Petition for Review and Mr. Meyer argued the cause on behalf of
Petitioners.

12 Kathryn Beaumont Imperati, Portland, filed the brief and
argued the cause on behalf of Respondent City of Portland.

13 Stephen T. Janik and Susan Quick Rosenfeld, Portland, filed
14 the brief and Mr. Janik argued the cause on behalf of
Respondent Forest Park Estate and Walter R. Lommel, Jr.

15 Kevin L. Hanway, Lake Oswego, filed the brief and argued
16 the cause on behalf of Respondent Home Builders Association of
Metropolitan Portland.

17 BAGG, Board Member; COX, Board Member; participated in this
18 decision.

19 AFFIRMED

2/04/83

20
21 You are entitled to judicial review of this Order.
22 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioners appeal two land use decisions of the City of
4 Portland. Both decisions are about the same piece of property
5 and the same development, a subdivision/planned unit
6 development known as Forest Park Estate. In this opinion, we
7 will discuss both decisions, separating issues not common to
8 both where necessary.

9 One decision is entitled "Order of the City Council on
10 appeal against approval of conditional use" (PC File No.
11 CU-68-81) issued August 11, 1982. The decision upheld the City
12 of Portland hearings officer who approved, subject to
13 conditions, a conditional use for a phased planned unit
14 development (PUD) of about 601.22 acres known as Forest Park
15 Estate. Petitioners ask that we reverse the decision

16 "and reject the application at this time as premature,
17 unsubstantiated, inconsistent with the requirements of
18 applicable statutes and codes, and in violation of
19 petitioners and others - due process and procedural
rights under Oregon statutes, city codes and federal
and state constitutional provisions."

20 The other decision is called "Order of the City Council on
21 appeal against approval of subdivision" (PC File No. S28-81)
22 issued August 11, 1982. The order upheld the hearings
23 officer's approval of two subdivision plats on 86 acres of the
24 subject land. The first subdivision plat created 96 lots for
25 single family homes and was called "Ridgeline." The second,
26 entitled "Mill Ridge" created 67 single family lots. The two

1 subdivision plats comprise phase I of the Forest Park Estate
2 PUD. Petitioners ask that we reverse the decision and reject
3 the application for the same reasons urged above against the
4 conditional use.

5 FACTS

6 The subject property is located on the western face of the
7 Tualatin Mountains, approximately four miles northwest of
8 downtown Portland and four miles northeast of downtown
9 Beaverton. The southeastern corner of the property is at the
10 intersection of NW Cornell and NW Miller Roads, and the
11 property is southwest of Skyline Blvd. and south of NW Thompson
12 Road. The property is bordered on the east by Multnomah County
13 and on the west and south by Washington County. The terrain is
14 alternating ridges and ravines, some with slopes of up to 50
15 percent. The land generally slopes downward from Skyline Blvd.
16 and Thompson Road to the southwest at an average grade of 10
17 percent. The ravines drain into an existing mill pond on the
18 southwest corner of the property, and the mill pond drains into
19 Cedar Mill Creek flowing southwest to Beaverton Creek and then
20 to the Tualatin River.

21 The site is not presently served by the local public
22 transportation service, Tri-Met. The nearest Tri-Met stop is
23 approximately one mile away from the subject property.

24 The land is presently undeveloped and surrounded by
25 sparsely developed residential areas on the south and west and
26 by Ramsay Heights and Panavista Subdivisions to the east. A

1 cemetary, Skyline Memorial Gardens, is north of the site.

2 Of this 601.22 acre site, 528.54 acres was rezoned in
3 September of 1975 from R-20 to R-10. The object of the
4 rezoning was to enable the property to be developed as a
5 planned unit development. Conditions were added to the
6 rezoning as follows:

7 "a. That applicant submit a Planned Unit
8 Development plan to the City Planning Commission which
9 must provide for a variety of housing types and for a
10 number of housing units substantially equivalent to
11 the maximum permitted in an R10 zone under current
12 City Planned Unit Development practices. The plan
13 must be in reasonable conformance to the proposed
14 development outlined by applicant with respect to
15 housing types and total number of housing units. That
16 the applicant's Planned Unit Development must provide
17 for a diversity of housing unit costs to satisfy the
18 public need stated above.

19 "b. That applicant's [PUD] plan be supported by
20 satisfactory evidence that development as proposed
21 will not create geological or building hazards and
22 that satisfactory drainage will be provided.

23 "c. That applicant shall have demonstrated to
24 the satisfaction of the Planning Commission that an
25 appropriate public agency is prepared to provide
26 water, sanitary sewer service, and fire protection to
the area. In addition, no building shall be commenced
until actual water and sewer connections are granted
and fire protection available.

"d. The Planning Commission shall have approved
in all respects, a plan for the development of
applicant's property as a planned unit development and
the City Council shall have approved the same if the
Planning Commission's determination is appealed.

"e. Applicant shall have submitted to the
Commission, and the Commission shall have approved, a
plan whereby applicant will undertake to foster the
use of mass transportation facilities by residents on
applicant's property to the fullest extent reasonably
possible and to otherwise minimize any adverse impact
of automobile traffic from the area. In the event

1 that transportation service is not to be provided by a
2 public agency on a basis which the Commission deems
3 adequate, the Commission may require applicant to
4 provide and subsidize a transportation service between
5 applicant's property and the central business
6 (district of Portland) to provide transportation
7 service which shall commence at such time as the
8 minimum of 100 units have been constructed.

9 "f. Applicant shall have demonstrated to the
10 satisfaction of the Commission financial ability to
11 carry out the plan approved by the Commission pursuant
12 to condition (d) and carry out financial commitments
13 required under condition (e)." Record 72-73.

14 Another 72.68 acres of the site was annexed to Portland
15 from Washington and Multnomah Counties in November of 1981. In
16 February and March of 1982, the annexed land was also zoned
17 R-10.

18 Before filing applications for a conditional use and a
19 subdivision to allow the project, there were four
20 pre-application conferences with representatives of the
21 applicant, city and county bureaus and interested persons. The
22 PUD preliminary plan was discussed at preapplication
23 conferences held on May 28, 1980 and February 25, 1981. On
24 March 26, 1981, notice of the first pre-application conference
25 on the subdivision to be held on April 8, 1981, was given to
26 interested persons. Petitioner Meyer and Petitioner Norvell of
the Forest Park Neighborhood Association were mailed notice of
and attended the April 8, 1981, meeting. The record also shows
Petitioners Meyer and Norvell to have been mailed notice of the
July 22, 1981 conference. Petitioner Norvell attended that
conference.

1 On June 10, 1981, Forest Park Estate filed the application
2 for a conditional use to construct a 2,104 unit planned unit
3 development on the 601.22 acre parcel. That application was
4 followed on September 10, 1981, by an application to subdivide
5 86 acres of the site to facilitate phase 1 of the PUD.

6 The first hearing before the city hearings officer on the
7 conditional use and the subdivision plats was on February 23,
8 1982. That meeting concluded on February 24. Petitioners
9 appeared and testified at the hearing. The hearings officer
10 issued written decisions approving both the conditional use and
11 the subdivision applications along with conditions to each on
12 February 24, and on March 18 petitioners appealed both
13 approvals to the city council.

14 The city council held hearings on May 26, June 9, June 24,
15 July 21, August 4 and August 11, 1982, to consider the
16 appeals. Petitioners were notified of the date of each
17 hearing. Petitioner Meyer appeared and testified at all but
18 the August 4 hearing. On August 11, 1982, the council voted to
19 affirm the hearings officer's decisions and to adopt findings
20 and orders approving both applications.

21 The approval allows for Forest Park Estate to develop the
22 site as a 2,104 unit planned unit development. The planned
23 unit development is divided into 14 low density and 11 medium
24 density areas and is to be developed in seven phases over an
25 eight to ten year period. The applicant says 200 to 300 units
26 will be constructed in each phase. Of the total, 311.4 acres

1 will be developed with houses and roads, and 216 acres will
2 remain as open space with a small remainder allocated to yards,
3 landscaped areas and recreational sites.

4 An extensive list of conditions was attached to the planned
5 unit development approval. The conditions include a
6 requirement for additional geotechnical studies to verify that
7 roadways, drainage ways and building sites could be safely
8 developed. The studies are to specify methods of storm water
9 and ground water disposal, and restrictions are placed on storm
10 water runoff. The developer is to be responsible for the storm
11 water facilities, subject to the satisfaction of the city
12 engineer and the Bureau of Buildings. The developer is further
13 required to comply with requirements of the city engineer
14 regarding streets. The applicant is made responsible, for a
15 time, for a bus transit system to downtown Portland. See
16 conditions listed in footnotes 7 and 12 infra.

17 The subdivision approval for phase 1 of the development
18 divides 86 acres of the planned unit development site into 163
19 single-family homesites and lots for 107 multi-family
20 dwellings. Conditions attached to the subdivision approval
21 include a requirement for a plan showing contours of earth work
22 to be approved by the Bureau of Buildings, a plat restriction
23 providing that fills may not be constructed or excavations made
24 within storm drainage reserves unless authorized by the city
25 engineer and all storm and sanitary sewers are to be
26 constructed in accordance with requirements of the city

1 engineer. The conditions also include requirements of access
2 and minimum development standards for lots within the
3 subdivision.

4 At its May 1, 1981 meeting, the Land Conservation and
5 Development Commission acknowledged Portland's comprehensive
6 plan and implementing ordinances as being in compliance with
7 statewide goals. The acknowledgment included "update items"
8 listed in city Resolution 32909. The resolution provided the
9 city would continue to apply Goals 5 and 15 to certain land use
10 decisions. On May 10, 1982, the director of LCDC informed the
11 city that certain ordinance amendments proposed by the city
12 complied with LCDC's acknowledged order and would relieve the
13 city "of the burden of applying Goal 5 and 15 to land use
14 decisions." Brief of Respondent, Appendix "A." On June 3,
15 1982, the council adopted the proposed amendments to the plan.
16 The amendments became effective on July 3, 1982.

17 ASSIGNMENT OF ERROR NO. 1

18 "The City's attempt to approve two preliminary
19 subdivisions simultaneously with the approval of a
20 preliminary PUD conditional use of the same property
21 violates City Code 34.09.020, which provides:

22 "The submission of a final development plan for
23 conditional use approval of a planned unit
24 development in accordance with the requirements
25 of title 33 shall constitute submission of a
26 tentative subdivision plan. Approval of such
27 final development plan shall constitute approval
28 of the tentative subdivision plan for the
29 purposes of this title." (emphasis added)."

30 Petitioners argue this provision provides tentative

1 subdivision approval may not be given until the final
2 development plan for a conditional use has been prepared and
3 submitted. Petitioners argue that conditional uses are only
4 allowed when they are approved in accordance with Municipal
5 Code, Sections 33.79 and 33.106. Section 33.79 is the section
6 controlling planned until developments. Section 33.106
7 requires a finding that

8 "the use at the particular location is desirable to
9 the public convenience and welfare and not detrimental
10 or injurious to the public health, peace or safety, or
11 to the character and value of the surrounding
12 properties." Municipal Code of the City of Portland,
13 Section 33.106.010.

14 Petitioners argue that to be able to make the determination of
15 compliance with public health, safety and welfare, sufficient
16 data must be presented and sufficient evaluation made before
17 findings can be adopted showing compliance with all issues
18 required for a conditional use and a planned unit development.
19 In this case, petitioners say the city failed to supply
20 adequate data to support soil and geotechnical matters, storm
21 water and drainage matters and mass transportation plans. The
22 applicant contended that all this information would not be
23 required until the time of final PUD development, but
24 petitioners argue that because of City Code 34.09.020, a final
25 development plan and plan for a conditional use PUD is required
26 for approval of a tentative subdivision plan for the same
property. There has been no final development plan, and
therefore preliminary approval of the subdivision is improper.

1 Respondents say that petitioners did not object to the
2 submission of the preliminary subdivision plat along with the
3 preliminary PUD plan. Respondents point out that there were
4 several hearings before the hearings officer and the city
5 council, and petitioners made no objection to the city's
6 authority to handle the applications as submitted. Respondents
7 argue that the petitioners have an obligation to bring
8 procedural errors to the attention of the local governing body
9 so that such errors might be corrected early. Dobaj v
10 Beaverton, 1 Or LUBA 237 (1980).

11 We agree with respondents. The manner in which the
12 application for the PUD and the subdivision were processed
13 involved a choice of procedure. The choice was, according to
14 the city, permissible under the code; but, correct or not, the
15 petitioners were aware of how the city was processing the
16 applications. Petitioners could have raised objection to the
17 chosen procedure early in the process and given the city the
18 chance to correct any error that might exist. The petitioners
19 did not do so and we will not entertain the objection for the
20 first time here. Dobaj, supra.

21 Assignment of error number 1 is denied.

22 ASSIGNMENT OF ERROR NO. 2

23 "The City's Decisions and Findings deprive petitioners
24 and other adversely affected neighbors and property
25 owners of due process of law by postponing applicant's
26 submission of essential data to support a conditional
use (PUD) and preliminary subdivisions until some
later proceeding in which petitioners and other
adversely affected persons are not afforded either

1 standing or an opportunity to participate in any
2 hearing to challenge such data or the City's approval
3 thereof, or to appeal therefrom."

3 Petitioners point out that a hearing on a planned unit
4 development application is only provided at the preliminary
5 development plan stage. Municipal Code 33.79.070, 33.106.020.
6 Code Section 33.79.070(c) allows an appeal from the hearings
7 officer's determination of a preliminary development plan, and
8 33.106.020 allows appeal on a conditional use, but no appeal is
9 possible from a final PUD development approval. Petitioners
10 argue the city placed conditions on this preliminary
11 development plan which allow the applicant to evade giving
12 opponents the opportunity to appeal "the very substance of
13 whether a conditional use permission should have been granted
14 in the first place." Petition for Review at 18. Petitioners
15 point to conditions A, B, C, D and E which require information
16 at the final development plan stage that petitioners claim is
17 really necessary for the city to make a preliminary judgment on
18 whether or not the development is feasible and may safely be
19 built.¹ As this initial information is to be submitted at
20 the final approval stage from which no opponent may seek
21 review, petitioners have been denied an opportunity to comment
22 on preliminary plan matters. Petitioners point to Fasano v
23 Washington County Commissioners, 264 Or 574, 507 P2d 23 (1973)
24 and West v City of Astoria, 18 Or App 212, 524 P2d 1216 (1974),
25 in support of their argument that the procedural requirements
26

1 of an impartial tribunal and the opportunity to present and
2 rebut evidence have their foundation in constitutional
3 requirements of due process. Petitioners argue their due
4 process rights have been denied by saving crucial decisions
5 until a time when petitioners will have no opportunity to rebut
6 evidence or appeal the determination.

7 Respondents argue petitioners were not deprived of due
8 process of law and were given a full and fair opportunity to
9 present and challenge evidence submitted in support of the
10 application.²

11 The respondents acknowledge the City Code provides
12 petitioners do not have standing to appeal final PUD or
13 subdivision plat approval as these approvals are
14 "administrative reviews." Brief of Respondent City at 12.
15 However, at each future phase of the planned unit development,
16 and at each future subdivision application, petitioners will
17 have the opportunity to challenge development proposals, say
18 respondents. Municipal Code, Sections 34.90.020 and
19 34.20.050(3). In addition, the city council made it explicit
20 that at each phase, an evaluation must be made to show
21 conformity with the preliminary plan and the conditions of
22 approval of the preliminary plan. The city provided that
23 future public hearings will be conducted on each PUD phase.
24 Record 86, 113. If there are any major changes to the approved
25 preliminary PUD, Section 33.79.110 requires further hearing.
26 There is also a condition that if a commercial site is to be

1 developed, a market study must be presented for a separate
2 public hearing. Record 81. At each of these proceedings,
3 petitioners will have the opportunity to present evidence and
4 make objection and appeal to the council if needed, claim
5 respondents.

6 Respondents also argue there is no requirement that public
7 participation exist at every stage of PUD and subdivision
8 approval. The conditions that have been imposed require,
9 according to the city and other respondents, the expertise of
10 city offices. The conditions do not go to the feasibility of
11 the project in the first instance, according to the
12 respondents, but to technical matters that require expert
13 evaluation. Respondents say it is appropriate to leave such
14 matters to administrative approval and not subject them to the
15 full public hearing process.

16 We agree with respondents, there is nothing in the city
17 ordinance or in law which requires public participation in each
18 and every stage of an approval process. As we understand the
19 city's process, the feasibility of the development, an issue
20 requiring the exercise of discretion, is to be considered at
21 the preliminary stages of the PUD subdivision approval
22 process. Opportunity for full participation on the part of
23 interested persons is encouraged at this initial stage. Only
24 those matters which may be measured against conditions imposed
25 by the public body may be left to administrative approval. Any
26 changes in the plan or significant alterations must be

1 conducted with full opportunity for hearing and public
2 participation. We believe these safeguards are sufficient.

3 What remains, of course, is whether the city left issues
4 requiring city council discretion to final approval stages,
5 thereby violating the city's ordinance. If the city ordinance
6 is not followed and matters requiring hearing are set over to a
7 later time when no opportunity for hearing exists, then
8 petitioners have indeed been deprived of the right articulated
9 in Fasano, supra, to present and rebut evidence.

10 Conditions A, B, C, D and E, quoted in footnote 1, supra,
11 according to the city, are not necessary to establish project
12 feasibility in the first instance, but only require information
13 of a technical nature which the city's bureaus have the
14 expertise to evaluate. The city says "[m]any of the city and
15 county bureaus have technical standards which FPE [Forest Park
16 Estate] must satisfy in the construction of roads, sewers,
17 water lines and other portions of the infrastructure." Brief
18 of Respondent City at 15. The city cites Lee v City of
19 Portland, 57 Or App 798, 606 P2d 662 (1982) and Osborne v Lane
20 County, 5 Or LUBA 172 (1982), in support of its view that the
21 city may "properly require its technical bureaus to evaluate
22 additional information submitted by an applicant according to
23 standards adopted by that bureau."

24 We believe the city's conditions do not go to discretionary
25 matters. Municipal Code, Section 33.79.070 provides, in part,
26 the procedure for evaluation of a preliminary PUD application.

1 To be approved, the preliminary development plan must be
2 consistent with the city's comprehensive plan, meet the
3 requirements of the city's conditional use provisions, Section
4 33.106, be served by existing or proposed public facilities
5 "such as streets, water means, sewer lines, public safety
6 facilities and schools," and have a "effective and unified
7 treatment" of the PUD site and meet the objectives of Section
8 33.79.010.³ Additionally, Section 33.79.050 includes
9 specific development standards. The standards control open
10 space, buildings, parking, streets, covenants and conditions,
11 water, sanitary and storm facilities, utilities and other
12 matters that control how the land will be developed and
13 services provided.

14 At the final stage of the PUD approval procedure, the
15 applicant is to submit a "final development plan." The final
16 development plan must include, among other things, "a detailed
17 design plan for the PUD site including:

- 18 "1. The location of proposed buildings and structures
19 or the location of allowable building areas.
- 20 "2. Location, grade, right-of-way widths, and radii
21 of curves of all proposed streets.
- 22 "3. Location, width and purpose of all existing or
23 proposed easements, dedications and utility
24 corridors.
- 25 "4. A plan for all storm and sanitary sewers and
26 water mains including the proposed location of
fire hydrants.
- "F. If the proposed site is in a moderate or severe
land hazard area, as defined and indicated on
maps adopted by the Planning Commission, the

1 applicant shall submit an engineering geologist's
2 or soils engineer's report, prepared by a
qualified individual or firm, which includes:

3 "1. A grading plan.

4 "2. The identification of hazardous areas within and
adjacent to the site.

5 "3. A statement of the development and construction
6 methods to be followed to accommodate existing
hazards.

7 "4. A statement of on-site slope stability after the
8 proposed development.

9 "5. A statement of the estimated effect of the
10 development on surface water and recommendations
for control." Municipal Code, Section
33.79.070(d)(1)(D).

11
12 We do not find the city to have improperly put off
13 necessary preliminary issues to the final plan or plat approval
14 stage. Rather, the demands of the city expressed in the
15 conditions go to that level of information which will be
16 required in the final development plan. In particular,
17 conditions A and B only repeat or, as stated in condition A,
18 "verify," the requirements of Code, Section
19 33.79.070(d)(1)(f). See footnote 1, supra. While it might be
20 desirable to have detailed geotechnical reports earlier, we do
21 not believe the ordinance or the 1975 rezoning conditions
22 require it. We conclude that no violation of petitioners'
23 right to due process has occurred through operation of the PUD
24 approval conditions cited supra.

25 Assignment of error number 2 is denied.

1 INTRODUCTION TO ASSIGNMENT OF ERROR NO. 3

2 Petitioners' third assignment of error contains six
3 specific assertions. It is, however, similar to their second
4 assignment of error in that it alleges, in part, the city erred
5 in approving the conditional use and tentative subdivision plan
6 subject to conditions which should have been met prior to
7 preliminary PUD or subdivision plat approval. Further, the
8 assignment of error includes allegations that the city's
9 findings on important issues are conclusional and not supported
10 by substantial evidence in the record.

11 Under the city's PUD ordinance, a preliminary development
12 plan approval requires a submittal of, among other things,

13 "(6) A proposed site plan showing:

14 "(A) (Amended 153328 effective July 5, 1982)
15 Existing site conditions including topography,
16 watercourses, significant vegetation, floodplains,
17 unique natural features, identified fish and wildlife
18 habitats, and existing storm, sanitary and water
19 facilities.

20 "(B) The approximate location of dwelling units
21 or building sites with graphic or written support
22 material indicating the character of the proposed
23 units.

24 "(C) The existing and proposed traffic
25 circulation system serving the development, including
26 off street parking and points of access to existing
public rights-of-way, and a plan notation or
descriptive narrative outlining ownership of streets
and parkings areas.

 "(D) Proposed location and treatment of any
public or common areas including open spaces, park or
recreation areas and school sites.

 "(E) The existing and proposed pedestrian
circulation system.

1 "(F) Proposed conceptual utility plans including
2 sanitary sewers and water lines and provisions for
3 storm drainage.

4 "(7) Information on land areas contiguous to the
5 proposed PUD to indicate the relationships between the
6 proposed PUD and existing adjacent areas, including
7 zoning classifications, land uses, densities,
8 circulation systems, public facilities, and unique
9 natural features of the landscape.

10 "(8) If the PUD is being proposed for phased
11 development, a description and timing plan for the
12 approximate phases according to the requirements of
13 33.79.080.

14 "(9) If the applicant is requesting simultaneous
15 subdivision approval, a tentative subdivision plat
16 that meets the requirements of Section 34.20 of the
17 Subdivision Code." Section 33.79.060 (Title 33
18 Planning and Zoning, page 255-266).

19 There are additional requirements including the conditions
20 imposed in 1975 listed supra under "Facts" at pages 4-5 and
21 certain ordinance requirements.⁴

22 The standard against which the above ordinance provisions
23 and other requirements of approval are tested is the city's
24 determination that the project is "feasible." In an earlier
25 case, we had occasion to evaluate Portland's planned unit
26 development code provisions. In Margulis v. Portland, 4 Or
LUBA 89, 98 (1981) we stated:

"the final engineering studies and precise plans for
the placement of such items as traffic lights and
drainage tiles may wait for the final development plan
much as the precise nature of such facilities is
permitted at the final plat stage in a subdivision
approval. ORS 92.010-92.160. However, as the initial
feasibility of the subdivision must be shown at the
preliminary plat stage, the initial feasibility of the
PUD project must be shown at the preliminary

1 development plan stage. See Van Volkinburg v. Marion
2 County, 2 Or LUBA 112 (1980) and Atwood v. Portland, 2
Or LUBA 397 (1981)."

3 In Margulis, our use of the word "feasibility" did not mean the
4 applicant was required to supply immediate and detailed
5 solutions to each and every potential problem. We did not then
6 and we do not now believe such a hard standard is either
7 required by the ordinance or advisable as a matter of policy.
8 In deciding whether or not a project is feasible and solutions
9 are available to identify problems, we believe the city is
10 entitled to rely on experts and, indeed, its own experts or
11 bureaus. Lee v City of Portland, 57 Or App 798, 646 P2d 662
12 (1982). A finding of initial feasibility of a project is
13 sufficient if "the experts have concluded that solutions" to
14 problems are possible and likely.

15 "To require greater detail now would be to take needed
16 design flexibility away from the developer and the
17 local government." Osborne v. Lane County, 5 Or LUBA
172, 188 (1982).

18 See also discussion under assignment of error number 2, supra.

19 We will now examine petitioners' six specific assertions
20 under assignment of error number 3.

21 ASSIGNMENT OF ERROR 3(A)

22 "The City failed to require applicants to submit
23 sufficient geotechnical data to support necessary
24 findings for approval."

25 Petitioners argue the study by the firms of Dames & Moore
26 and Delta Engineering relied upon by the city in approving the

1 preliminary PUD plan is the same data the city determined to be
2 insufficient in 1975. Petitioners point to condition 'b' of
3 the 1975 zone change

4 "that the applicant's [PUD] plan be supported by
5 satisfactory evidence that the development as proposed
6 will not create geological or building hazards and
7 that satisfactory drainage will be provided." City
8 Ordinance 140542, condition 'b', page 4, supra.

9 Petitioners argue the condition constitutes an adjudication by
10 the city that the Dames and Moore geological report was not
11 sufficient to show that geological or building hazards would
12 not be created by development on the property. Petitioners
13 claim no significant geological data other than this report has
14 been submitted to support the PUD application. They then point
15 to condition A of the PUD approval (see footnote 1), requiring
16 further geotechnical studies as support for this argument.

17 Respondents say the city was justified in finding
18 development on this site is feasible. Specifically, the city
19 argues the original Dames and Moore report itself concluded
20 that development of the site was feasible. The city cites to
21 the report as follows:

22 "Based on reviews of the available geologic
23 literature, the lots of wells in the vicinity of the
24 site, the aerial photographs, the topographic maps
25 developed from recent aerial photography, and the
26 conditions observed during the various geologic
reconnaissance [sic] traverses throughout the site, it
is our conclusion that development of the type
contemplated within this property is feasible.
Although geologic hazards do exist on this property,
the limiting slope criteria adopted by the developers
(30 percent slope) for use in siting the various
proposed units of the development on the property will

1 result in utilization of the more favorable areas of
2 the site. It is our conclusion that the more
3 favorable areas, as defined by the slope criteria
4 adopted, and considering the nature of the soil and
5 rock units and the water conditions observed, are
6 compatible or are better than a number of other
7 sites that have been developed in the general west
8 hills area of Portland." Record 1496.

9 Respondent Forest Park Estate adds that the Dames and Moore
10 report is still valid because the subject property has not
11 changed, Record 68 (findings), 546 (hearings officer's
12 report). Forest Park Estate also points to other evidence it
13 submitted further demonstrating the feasibility of the
14 project. Record 915, 919, 980.⁵ For example, Mr. Ken Robins
15 of Dames and Moore testified in the current proceeding that
16 development may be undertaken and is feasible. Record
17 680-683.

18 The city advises a geotechnical engineer with the city's
19 Bureau of Buildings concluded that the facts submitted by the
20 applicant, including the Dames and Moore report were adequate
21 to show "general feasibility of the project." Record
22 1058-1059. The engineer called for additional studies prior to
23 final approval which were adopted by the city. The city
24 submits the expression of concern and the request for
25 additional studies did not displace the engineer's original
26 conclusion that the project was feasible. Record 1060-1062.
27 As to the additional studies required by the conditions of
28 rezoning imposed in 1975 (condition 'b', page 4, supra), the
29 city argues these studies are not necessary or possible at this

1 preliminary plan stage. Citing the testimony of Mr. Robins of
2 Dames and Moore:

3 "Once they [sic] plan for the phases [sic] developed
4 then the geotechnical work associated with a basic
5 plan can be undertaken reasonably, expeditiously and
6 economically, which it can not be done if we set out
7 to do a detail geotechnical report on 600 acres of
8 land before any basic plan is developed." Record 681.

9 We agree with the respondents. We think the city had
10 sufficient evidence before it to conclude the project was
11 feasible. We recognize the condition imposed in the 1973
12 rezoning requires detailed geologic information. We do not
13 believe, however, the call for detailed geologic information
14 was intended to be applied at this stage. That condition
15 simply mirrors the information required in the final
16 development plan in the city's code. That is, under Municipal
17 Code, Section 33.79.070(d)(F) cited at pages 15-16, supra,
18 detailed engineering reports are required at the final approval
19 stage. Had the city believed this detailed information was
20 preliminary and required for an initial finding of project
21 feasibility, the call for such detailed information surely
22 would have appeared under 33.79.060, the section outlining the
23 requirements for the preliminary development plan.

24 We read the 1975 condition 'b' to be only a reinforcement
25 of what is already required under the city ordinance and not as
26 a separate requirement to be applied at the preliminary
development or preliminary subdivision plat approval stage.

1 ASSIGNMENT OF ERROR 3(B)

2 "The City failed to require applicants to submit
3 sufficient storm water and drainage data to support
4 necessary findings for approval."

5 Petitioners here argue that conditions 'b,' 'c,' and 'd,'
6 of the 1975 rezoning decision constitute an express
7 acknowledgement that the information submitted was not adequate
8 to determine that satisfactory drainage could be provided.

9 Petitioners include a report from the Bureau of Buildings made
10 in 1981 discussing lack of information about storm water
11 disposal and roadways into Ridgeline and Mill Ridge
12 Subdivisions. That 1981 report states:

13 "Another subject of concern is storm water disposal.
14 Serious erosion and downcutting is currently occurring
15 in many existing channels. Most evidence of
16 landsliding at this site appears to be the result of
17 loss of base support by erosion downcutting through
18 the highly erodible silts. Paving, storm sewers and
19 debris removal from creek bottoms all will contribute
20 to increased runoff rates and reduced time of
21 concentration, thereby accelerating the potential for
22 erosion and slope failures. It would appear to be
23 ill-advised to do anything that would increase
24 existing flow rates unless channels are improved.
25 Indeed it would appear that in many areas flow rates
26 should be decreased in order to reduce erosion that is
currently occurring. This matter is discussed in the
soils report. To control erosion it seems probable
that it will be necessary to make major channel
improvements or to make extensive use of closed storm
sewers. These items do not appear to have been
addressed.

"In order not to increase runoff flows off of the
property it appears that up to three reservoirs may be
required to provide temporary water storage. These
reservoirs are not discussed in the soils report. The
Mill Pond is currently existing but may need to be
increased in size. The dam appears to be only about 5
feet high, but soils in the area of the dam are wet

1 and soft. The stability of this dam has not been
2 addressed. The two proposed new reservoirs are in the
3 areas of steep slopes and potentially unstable soil
4 conditions. The area near proposed Star Flower Lake
5 is identified by the soils report as an area of active
6 sliding. The area near Trillium Lake has not been
7 explored but is also likely to contain areas of
8 unstable soil. Star Flower Lake will require a dam up
9 15 to 20 feet high and Trillium Lake will require a
10 dam 35 feet or more in height. Dams of this magnitude
11 are major structures that justify detailed feasibility
12 studies. Dam failure, particularly at Trillium Lake
13 could result in serious flooding and property damage.
14 A report by a qualified soils engineer should be
15 prepared for each dam site. It is my understanding
16 that the State of Oregon Department of Water Resources
17 also regulates dams of this size and they should be
18 contacted for possible additional requirements."
19 Record 1061-1062.

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The 1981 report concludes that because of "extreme erodibility
of the native silts a tentative erosion control plan should be
submitted." Record 1061-1062. In short, the matter of erosion
and its affect on the feasibility of the project is not
settled, and the city was in error to claim in its findings
that the issue was settled, argue petitioners. See Record 98.

Lastly, petitioners point to condition D of the present PUD
approval (Record 110) wherein the maintenance and operation of
the storm water detention facilities is to be the
responsibility of the developer "and/or homeowners
association." (See footnote 7, infra.) Petitioners say there
is nothing in the code that permits delegation of a
responsibility of this magnitude to a homeowners association
not yet in existence.

Respondent Forest Park Estate argues that a 1973 Delta

1 Engineering Study outlining features of inadequate storm water
2 drainage and drainage control plan is adequate to show initial
3 feasibility of the project. It claims its application follows
4 the recommendations in the Delta Engineering Study. The
5 company cites to the testimony of the city planner referencing
6 a plan to use existing ravines for stormwater drainage (Record
7 604).⁶

8 Forest Park Estate also points to the Public Works
9 Department of the City of Portland that found that "storm water
10 may be discharged, with proper controls, into existing drainage
11 courses." Record 1074. Similarly, the Washington County
12 Department of Public Works is cited for finding that a storm
13 water detention system could be developed which would "not
14 create a negative impact on the Washington County residents."
15 Record 1080. Forest Park Estate adds that a Portland Building
16 Bureau engineer's memo, supra, cited by petitioners to show the
17 problems with storm water and the need for a drainage plan,
18 failed to include the conclusion of the report stating that the
19 information submitted by respondent was adequate to establish
20 the general feasibility of the project. Record 1058. Further,
21 the company points out that at the proceeding before the
22 hearings officer, the same city Building Bureau engineer
23 testified that the respondent's engineers had adequately
24 addressed drainage concerns. See Record 684.

25 The city also cites to a report of its own Bureau of
26 Sanitary Engineering, wherein it was said that storm water

1 might be discharged into existing drainage courses. Record
2 1074. The city also cites one of applicant's experts, who
3 testified to the feasibility of an effective storm drainage
4 system. Record 1548, see also Record 680-683.

5 As to condition D of the PUD approval (see footnote 1)
6 requiring the homeowners to operate and maintain the storm
7 water detention facility, respondents challenge petitioner's
8 argument on the ground that petitioners have furnished no
9 authority to suggest such a delegation is improper.

10 We find requiring detailed plans for storm water control to
11 be submitted with the final development plan is permissible
12 under 33.79.070(d)(1)(D)(4). Under that provision, at the
13 final development plan stage, the applicant is required to
14 submit a "plan for all storm and sanitary sewers and water
15 mains including the proposed location of fire hydrants."
16 Therefore, the detailed information petitioners allege is
17 missing from the preliminary approval record is not required
18 until final plan approval. Again, what must be provided for,
19 is the "feasibility" of the project and the likelihood that
20 solutions to this recognized problem will be available. The
21 precise solutions need not be articulated at this point.
22 Osborne v Lane County, 5 Or LUBA 172 (1982); Margulis v City of
23 Portland, 4 Or LUBA 89 (1981).

24 In this case, we believe the evidence cited by the
25 respondents is sufficient to show that it is feasible to
26 control the storm water. As to the matter of delegation of the

1 responsibility for maintaining the system, we do not find any
2 prohibition on such a condition. We believe a municipal body
3 may impose conditions on private developers before granting
4 approval. This condition is not so onerous as to be
5 unreasonable or to be outside the city's authority to approve
6 projects subject to conditions. See Municipal Code, Section
7 33.79.070(d)(2).

8 ASSIGNMENT OF ERROR 3(C)

9 "The City failed to require applicants to provide an
10 adquate mass transportation system as a quid pro quo
for permitting increased density development."

11 In this subassignment of error, the petitioners argue that
12 condition 'e' and 'f' of the 1975 zone change ordinance (supra,
13 pages 4-5) have not been met. Petitioners argue the applicant
14 has "whittled away" these original conditions. Petition for
15 Review at 31. Petitioners claim the applicant is now only
16 required to provide a bus system until such time as it can be
17 shown that the service is not providing a useful purpose.
18 Condition Q, Record 111. In short, the conditions outlined in
19 the original zone change ordinance have not been fulfilled,
20 according to petitioners.

21 Condition 'e' requires the applicant to "provide and
22 subsidize a transportation service between applicant's property
23 and the central business (district of Portland) to provide
24 transportation service which shall commence at such time as the
25 minimum of 100 units had been constructed." Condition 'e,'
26

1 pages 4-5, supra. This condition is to be imposed in the event
2 a public transportation service is not provided. Record 72,
3 page 5, supra. Condition 'e,' the city and Respondent Forest
4 Park Estate point out, only requires the respondent to submit a
5 plan that would further the use of mass transportation
6 facilities to the fullest extent possible. The condition
7 provides the city "may" require the applicant to provide a
8 subsidized bus system to downtown Portland.⁷

9 Condition 'f' of the zone change ordinance requires the
10 developer to show financial ability to carry out the
11 commitments outlined in 'e' above. (Record 97. Supra at 5.)
12 The city points out that the zone change ordinance says nothing
13 about the manner in which Forest Park Estate must demonstrate
14 this financial responsibility, and the council was therefore
15 justified in determining that a promise to provide vehicles and
16 eventually annual bonds is sufficient. The city found that
17 purchase of buses or vans and provision of annual bonds would
18 be sufficient to demonstrate financial commitment to satisfy
19 this condition. Record 100, 835-836.⁸

20 We agree with the respondents. We do not believe condition
21 'e' in the 1975 rezoning requires the city to do more than it
22 has done with the imposition of conditions Q through S cited
23 above (see footnote 7). The original conditions do not mandate
24 a particular manner in which to accomplish the mass transit
25 goal, and we believe the city acted reasonably by accepting the
26 proposed incentives to mass transit and the private bus

1 services only so long as the need existed. We will not
2 overturn the city's interpretation of the conditions it imposed
3 without a showing that the city's interpretation is wrong.
4 Fifth Avenue Corp. v. Washington Co., 282 Or 591, 581 P2d 50
5 (1978); Theland v. Multnomah County, 4 Or LUBA 284 (1981).

6 As to the financial ability of the developer to provide the
7 service, condition 'f,' we note the condition simply left it up
8 to the "satisfaction of the commission" to decide financial
9 ability. Apparently, the "commission" (and in this case, the
10 city council) considered the promises and agreement to bond an
11 adequate demonstration of financial ability. We cannot say
12 that the city's finding that this condition is satisfied was
13 incorrect given the vague nature of the condition.⁹

14 ASSIGNMENT OF ERROR 3(D)

15 "The City's decision and findings that traffic
16 problems are regional and, therefore, neither the City
17 nor the applicant need seriously address them is an
illegal abandonment of the City's responsibility and a
violation of the City's comprehensive plan Goal 6."

18 Here, petitioners cite testimony of the city traffic
19 engineer showing that Forest Park Estate will add a significant
20 volume of traffic to already congested streets in the westside
21 area and will add "one-fourth of the traffic on Burnside and
22 Cornell Roads, the streets most heavily impacted by Forest Park
23 Estate traffic." Record 839. Petitioners point to the city
24 comprehensive plan goal 6 mandating that the city

25 "promote an efficient and balanced urban
26 transportation system, consistent with the arterial

1 streets classification policy, to encourage energy
2 conservation, reduce air pollution, lessen the impact
3 of vehicular traffic on residential neighborhoods, and
improve access to major employment and commercial
centers."

4 Petitioners claim that the city's response "is a copout."

5 Petition for Review 33. Petitioners point to the following
6 finding

7 "Any solution to traffic problems on the westside
8 corridor must be regional in nature. Such a solution
is beyond the capacity of the applicant to implement.
9 By imposing detailed conditions on the applicant, the
negative consequences of traffic generated by Forest
10 Park Estate will be reduced significantly." Record 93.

11 Petitioners argue this response violates city goal 6 and
12 the city transportation policies, 6.1, 6.2, 6.3, 6.4, 6.5, and
13 6.6.¹⁰ Petitioners cite the city traffic engineer's report
14 saying that both Cornell and Thompson Road should be widened
15 (Record 1076-1077) and say that the city failed to address the
16 report.

17 The city acknowledges that "[t]he issue of traffic impacts
18 was one of the most difficult to resolve in this case." Brief
19 of Respondent City at 36. The site is tied to downtown
20 Portland by "a series of narrow winding roads." Ibid. Several
21 of the roads are under the jurisdiction of Multnomah County or
22 Washington County and are nearing capacity, according to a
23 Transportation Planning Department staff member. Record
24 652-657, 839-847. The staff person said if the PUD site were
25 to remain undeveloped, the volume of traffic using these roads
26

1 would reach capacity in the near future. Ibid. Also, the city
2 asserts the increase of traffic from Forest Park Estate will
3 cause Washington County commuters to use alternate routes. The
4 net effect of the development, then, will be the addition of
5 only a small volume of traffic to these local roadways. See
6 Record 655.¹¹

7 Recommendations were made to minimize the traffic problem.
8 The Transportation Planning Department recommended the
9 developer be required to install traffic signals, turn lanes,
10 widen certain roadways and make other improvements that might
11 be required by Multnomah County. Record 843-844. See also,
12 Record 1078. Further, extension of streets constructed within
13 the PUD to meet streets outside the PUD would help provide a
14 smooth flow of traffic. Record 839-847. The impact on
15 Washington County was to be minimized by recommendations
16 requiring the residents of the new development to share the
17 cost of making roadway improvements. Washington County
18 apparently concurred in these measures. Record 623-627,
19 662-663, 814-815, 1073.

20 In its brief, the city concludes that the city council was
21 faced with four alternatives. The first alternative was to
22 approve the PUD outright. The city claims this action would
23 have been irresponsible. The second alternative was to deny
24 the PUD and allow the property to be developed as a
25 conventional subdivision. The city says this alternative was
26 not acceptable because design flexibility allowed by the PUD

1 would not be available under a conventional subdivision, and
2 dwellings could not be clustered. Fewer housing units could be
3 constructed on the property therefore, and the result would be
4 individual houses of significantly more expense than that
5 proposed by this development. The third option was to deny the
6 development until improvements were made to surrounding
7 roadways. The city urges this option was unworkable because of
8 questions about funding and the possibility of exposing the
9 city to liability for a potential taking of a developer's
10 property. See Brief of Respondent City at 38 and 39. It is
11 the last alternative the city insists was the acceptable
12 alternative and the one chosen. The city argues as follows:

13 "By allowing FPE to develop as a PUD, the Council
14 recognized its obligation to provide reasonably priced
15 housing for the City's residents and the opportunity
16 to provide a neighborhood of sufficient density to
17 make transit service feasible. Recognizing the
18 regional nature of the traffic problems and FPE
19 contribution to these problems, the Council reasonably
20 required FPE to minimize its contribution to the
21 region's traffic problems as a condition of approval.
22 (R. 88, 92-93, 99-100, 106-108, 110-113) In doing so,
23 the council did not in any way abdicate its
24 responsibility to work with Multnomah County,
25 Washington County, or the Metropolitan Service
26 District to seek and fund long-range solutions to the
27 traffic problems experienced in the westside corridor
28 as a whole. The intergovernmental coordination,
29 transportation and public facilities goals of the
30 City's comprehensive plan obligate the City to
31 continue working toward such a regional solution. As
32 a first step, the City has identified improvements to
33 the Sunset corridor in its capitol improvement
34 program. (Goal 11 Comprehensive Plan Support
35 Document, p. 69)." Brief of Respondent at 39.

36 The Respondent City argues that Forest Park Estate could not be

1 made to bear the cost of solutions to a regional traffic
2 problem, and the council "struck a reasonable balance and
3 approved a PUD which would minimize FPE's contribution to these
4 problems." Brief of Respondent City at 40.

5 We do not believe city comprehensive plan goal 6 requires
6 more than what the city has done. The goal requires the city
7 to "lessen the impact of vehicular traffic on residential
8 neighborhoods." The goal does not require there be no impact.
9 The city imposed conditions to lessen the estimated traffic
10 impact on the street system.¹² There is substantial evidence
11 in the record, cited by the city in its brief, to show the
12 steps taken would lessen or "minimize" the traffic impact. As
13 the city's findings note, the capacity of the streets in the
14 area will be met or exceeded without this development, and the
15 impact of the development itself "will not substantially
16 exacerbate the problems which will be caused by reaching that
17 capacity." Record 108. This development, then, while
18 contributing to traffic problems is not itself the source of
19 such severe problems as to require denial. The corrective
20 measures, conditions of approval, that the city imposed on the
21 developer to minimize the traffic impact make the project
22 "feasible."

23 ASSIGNMENT OF ERROR 3(E)

24 "The City failed to require applicants to submit a
25 planned unit development plan in sufficient detail
that the development could be approved 'in all
26 respects.'"

1 Petitioners argue that condition 'e' of the 1975 zone
2 change ordinance requires that before the change may become
3 effective, the city must approve a plan for development, in all
4 respects. Record 97, 5, supra. Petitioners argue that the
5 city misinterpreted the intention of the council in that 1975
6 order by saying that approval of a detailed PUD plan for the
7 whole development "would be both unworkable and unrealistic for
8 a PUD of this size." Record 99. Petitioners say this
9 condition, along with condition 'f,' requiring financial
10 ability, show an obvious legislative intent by the city that
11 the feasibility of the whole development must be shown before
12 any development or construction can proceed on any part of the
13 proposal.

14 Respondent Forest Park Estate argues that condition 'e'
15 simply witnessed a city council desire that the whole project
16 be developed as a PUD (as opposed to piecemeal subdivisions or
17 separate PUDs). The present council found:

18 "The council's intent in imposing condition 3(d) was
19 to insure that the elements of any PUD built on the
20 site would be reviewed by the council in a rational,
sequential process satisfactory to the council prior
to construction." Record 99.

21 Respondent Forest Park Estate argues that to interpret this
22 condition differently than the city has would be to require
23 every single detail of any PUD to be submitted at the
24 preliminary stage, a requirement that is a "practical
25 impossibility both in terms of the burden on the respondent and
26

1 the city." Brief of Respondent Forest Park Estate at 46.

2 The city argues that its regulations permit approval of a
3 phased PUD by first submitting a preliminary plan for the whole
4 of the planned unit development, and if that preliminary plan
5 is approved, the approval plan is treated as the preliminary
6 plan for each separate phase of the PUD. A final development
7 plan may then be submitted for each phase of the project.

8 Municipal Code, Section 33.79.080. The city argues that this
9 process insures that the council or the hearings officer have
10 an opportunity to review an overall plan for a PUD and to
11 review subsequent implementation of that plan on a phase by
12 phase basis. Record 99. Further, as each phase of the PUD is
13 considered a separate hearing, the opponents will have the
14 opportunity to challenge each phase as it comes before the city
15 for preliminary approval.

16 We find this initial planned unit development approval is
17 the preliminary plan for each phase of the PUD. Code, Section
18 33.79.080. When the city gave the necessary approvals at this
19 initial phase, the city approved the PUD "in all respects." If
20 one argues that the "in all respects" language refers to the
21 final development plan, then final development plan approval
22 for each phase of the PUD will, be an approval "in all
23 respects" for that phase. We find the condition is satisfied
24 by this scheme, and we do not find any indication that the city
25 is requiring anything different than its ordinance requires.
26 If the city intended more, the language and the condition is

1 unclear and there is no guidance as to how it is to be enforced
2 given the present scheme of the city's ordinance. We believe
3 the city is entitled to interpret its conditions just as it is
4 entitled to interpret its code, and we will not overturn such
5 interpretations unless it can be shown they are wrong. Fifth
6 Avenue Corp., supra. See 33.79.080 approving phased PUD
7 procedures.

8 ASSIGNMENT OF ERROR 3(F)

9 "The City failed to require applicants to demonstrate
10 financial ability to develop an entire PUD in
11 accordance with approved plans and/or to subsidize the
12 transportation service."

13 Petitioners here argue that condition 'f' requiring the
14 applicant to demonstrate financial ability to carry out the
15 plan and to subsidize the transportation service has not been
16 met. Petitioners argue that the applicant refused to submit
17 information on its financial status but asked for alternative
18 methods of establishing financial ability by posting annual
19 bonds. Petitioners argue the city found compliance with
20 condition 'f' on the ground that improvement guarantees would
21 be required "for elements of public structures under Chapter
22 33.79 and the absurd speculation:

23 "The hearings officer and the City Council conclude
24 that the applicant's financial ability has been
25 successfully tested by almost a decade of pursuing the
26 project despite extensive appeals and litigation.
Additionally, the applicant is absorbing a substantial
portion of the cost of extending the sanitary sewer to
serve the project site." Petition for Review at 37.
Record 100.

1 As explained earlier, this condition is vague and offers no
2 standards by which the city might decide whether or not the
3 developer had adequate financial resources to carry out his
4 project. We agree with the petitioners that the proof of
5 financial responsibility cited by the city is weak. However,
6 the city does find that the developer will have to provide
7 improvement guarantees and, as far as the transit plan is
8 concerned, provide vehicles or bonding. Further, as the city
9 points out, the city's PUD regulations and the city's
10 subdivision regulations require the developer to post a bond or
11 some other security prior to obtaining a final PUD plan or a
12 subdivision plan approval. See Sections 33.79.100 and
13 33.40.010 and 33.40.020. It would appear that the city's own
14 code provides more detailed information on what is required to
15 show financial responsibility than condition 'f' imposed in the
16 1975 rezoning. As Respondent City points out

17 "Condition 'f' required FPE to demonstrate its
18 financial ability to carry out the project and the
19 mass transit system to the council's satisfaction, and
20 not to the satisfaction of petitioners." Brief of
21 Respondent City at 45-46.

22 Assignment of error number 3 is denied.

23 ASSIGNMENT OF ERROR NO. 4

24 Assignment of error no. 4 states:

25 "Approval of the project violates LCDC Goal No. 5."

26 As we understand petitioners' argument, petitioners believe
Goal 5 has been violated because too little attention has been

1 paid to the matter of road locations, drainage channels and
2 creek bottoms and how the development and proposed locations of
3 roads will affect these features. Also, petitioners suggest

4 "because much of the unbuildable land will remain
5 unbuilt, these remaining 'natural' lands will be
6 available for wildlife habitats."

7 As Goal 5 is to protect "natural and scenic resources" and
8 "wildlife habitat," the city has failed to show how it is that
9 the goal will be met," argue petitioners.¹³

10 The approval of the planned unit development and
11 subdivision occurred on August 11, 1982. LCDC relieved the
12 city of any requirement to apply Goals 5 and 15 to land use
13 decisions on the effective date of the city's ordinance
14 amendments, July 3, 1982. Because the plan was found to be in
15 compliance with Goal 5 before the effective date of the
16 approvals in this case, and because the approvals were made
17 under color of the county's plan and implementing ordinances,
18 we believe petitioners' Goal 5 assignment of error has been
19 rendered moot. We may not review an assignment of error for
20 compliance with a statewide planning goal where the applicable
21 plan and ordinances have been found to be in compliance with
22 the goals pursuant to an acknowledgment order. Byrd v
23 Stringer, 60 Or App 1, ___ P2d ___ (1982); Fujimoto v. LUBA, 52
24 Or App 875, 630 P2d 364 (1981), rev denied, 291 Or 662, 634 P2d
25 212 (1981); Oregon Environmental Council v. Portland, 4 Or LUBA
26 208 (1981).

1 Assignment of error number 4 is denied.

2 The decisions of the City of Portland are affirmed.

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FOOTNOTES

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The conditions complained of are:

4 "A. Prior to final plat approval for any phase of the
5 project, additional geotechnical studies,
6 satisfactory to the Bureau of Buildings, shall be
7 performed within that phase. These studies shall
8 be adequate to verify that all proposed roadways,
9 drainageways and building sites can be safely
10 developed. The report shall also differentiate
between building lots that can be developed using
conventional foundations (without need of
additional geotechnical review) and lots that
will require additional geotechnical
consideration.

11 "B. Additional final geotechnical reports shall
12 specifically recommend suitable methods of
13 stormwater and groundwater disposal, including
14 the feasibility of groundwater recharge. The
15 sources of stormwater and groundwater to be
16 addressed shall include roof drains, foundation
17 drains, springs and other subsurface drainage
18 encountered during construction and runoff from
public and private streets, walkways, parking
lots, etc. The effect of the disposal methods on
soil stability (landslides, erosion) shall be
discussed. Underground disposal of stormwater
(leach fields, seepage trenches, drywells and so
forth) will not be permitted unless recommended
in an approved geotechnical report.

19 "C. The post-development release peak flow rate for
20 any storm on the totally developed project site
21 is to be restricted to no more than the
22 pre-development runoff for that storm, up to the
23 100-year event. For instance, during a 10 year
24 storm event, the post-development release flow
25 rate can be no more than that for a 10-year storm
26 with pre-development conditions. The release
flow-rate criteria is to be applied and tested
for the 5-, 10-, 25-, 50-and 100-year events.
(This stage-type analysis will require the outlet
structures to be of a multiple orifice, slot weir
or some other sophisticated type. For the
portions of this development within Washington
County, it is assumed that Washington County's

1 standard approach will be applied.) Roof drains
2 and foundation drains may not be discharged
3 on-site without the written approval of the
4 Bureau of Buildings. If proposed, this method
5 must be approved before design of the storm sewer
6 system.

7 "D. Operation and maintenance of the stormwater
8 detention facilities will be the responsibility
9 of the developers and/or homeowners'
10 association. An operation and maintenance plan
11 must be developed and approved by the City
12 Engineer prior to the City's acceptance of the
13 public drainage facilities.

14 "E. Prior to approval of any final plans for this
15 project, it shall be shown to the satisfaction of
16 the Bureau of Buildings and the City Engineer
17 that stormwater disposal for the entire
18 development can be adequately handled. The
19 feasibility of any dams or reservoirs necessary
20 for the proposed disposal method shall be
21 shown." Record, Vol. I, p. 109-110.

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1 Petitioners were active in opposing the project at hearings
2 before the hearings officer and the city council. See p. 5 and
3 6, supra.

3

1 Section 33.79.010 provides the objectives for a planned
2 unit development. The objectives are:

3 "a. To facilitate the efficient use of land, to
4 promote an economic arrangement of land uses,
5 buildings, circulation systems, open spaces and
6 utilities.

7 "b. To preserve to the greatest extent possible the
8 existing landscape features and amenities through
9 the use of a planning procedure that can relate
10 the type and design of a development to a
11 particular site.

12 "c. To encourage developments that recognize the
13 relationship between buildings, their use, open
14 spaces, and access ways and thereby maximize the
15 opportunities for innovative and diversified
16 living environments.

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2 4

The proposal must be consistent with the comprehensive plan, and it must be able to be served by existing or proposed public facilities. Municipal Code, Sections 33.79.010, 33.79.050, 33.79.070(a)(b). Because a planned unit development is treated as a conditional use under Code Section 33.79.020, the requirements of Section 33.106 must be met which include a finding that the use be "desirable for the public convenience and welfare and not detrimental or injurious to the public health, peace and safety, or to the character and value of the surrounding properties." Municipal Code, Section 33.106.010.

Furthermore, as this development includes many divisions of property ownership, a subdivision approval is necessary. A tentative subdivision plan must be submitted, and that plan must include, among other things, information on existing conditions on the property such as the location and widths of streets, easements, the location and kind of utilities, elevations, natural features, and water courses.

The proposed improvements in the subdivision must be shown including streets, easements, the lots and parcels to be created, proposed uses of the property, improvements, the domestic water system proposed and the method of sewage disposal. Also, the proposal must

"1. Identify the relationship of development to existing watercourses;

"2. Inventory means of flood control and easements or deed for drainage of land, including projects for proposed water courses and changes to existing streams;

"* * *

"4. Plan to locate and construct utilities and facilities such as sewer, gas, electrical and water to minimize or eliminate flood damage."
34.20.040(A)(3)(j).

The hearings officer (and the city) may not approve the subdivision if the land is unstable

"by reason of flooding, inadequate drainage, susceptibility to mud or earth slides, or any other reason harmful to the health, safety or well-being of the future residents or property owners of the proposed subdivision or partition or of the community

1 at large." Municipal Code 34.50.090

2 However, the plat may be approved if the developer agrees to
3 improve the land so that the site is suitable. Ibid.

4 5
5 This additional information is from David Evans and
6 Associates, Civil Engineers. It consists of site planning maps
7 that show slope, drainage, developable areas and other
8 information.

9 6
10 A drainage plan is set forth at Record 979-981.

11 7
12 The city has imposed several conditions that it posits will
13 encourage mass transit.

14 "Q. The applicant shall be required to provide a
15 bus-transit system to downtown Portland with the
16 following operating characteristics for at least
17 the period of time described below. Furthermore,
18 the need for increased transit service shall be
19 reviewed annually as provided for in proposed
20 condition R below. Service shall be provided
21 upon the completion and occupancy of 100
22 residential dwellings units (which is expected to
23 be during Phase 1 of the proposed development).
24 Service shall continue until the earlier of; (1)
25 date when Tri-Met or another public-
26 transportation agency provides equivalent service
to Forest Park Estate; or (2) the annual review
(see condition R below) indicates that the
service is not serving a useful purpose.
Initially, the system shall have the following
operating characteristics: service to and from
downtown Portland on Mondays through Fridays
(except legal holidays) at 20-minute headways,
during the hours of 6:40 a.m. to 9 a.m. and 4
p.m. to 7:40 p.m. Private facilities shall be of
the same general physical comfort as those
offered by public transit service.

"R. Forest Park Estate shall, on an annual basis,
prepare a transportation report, including but
not limited to the following analyses:

"* Analysis of the travel patterns of Forest

1 Park Estate residents;

2 "*" Analysis of the impact of Forest Park Estate
3 traffic on the road system based on, at
4 minimum, traffic counts taken at all
5 entrances to and exits from the development.

6 "*" Analysis of the amount of ridesharing by
7 Forest Park Estate residents, and evaluation
8 of the rideshare-incentive program (see
9 condition P).

10 "*" Analysis of the amount of transit usage by
11 Forest Park Estate residents and evaluation
12 of the transit service being provided.

13 "These annual transportation reports and the
14 goals of condition O shall be used by the
15 Planning Director, or the Hearings Officer if the
16 question is raised in connection with application
17 for further development to determine when the
18 transit service provided by the applicant shall
19 be expanded, reoriented (e.g., service to Cedar
20 Hills rather than or in addition to downtown), or
21 partially or totally discontinued. The report
22 shall also be incorporated in the applications
23 for subsequent phases of development.

24 "S. The Forest Park Estate transit system shall make
25 arrangements with Tri-Met so that its exclusive
26 passengers, or those transferring between the
Forest Park Estate service and Tri-Met buses,
will not have to pay a fare higher than would
have been the case under Tri-Met fare schedules,
if the latter were the exclusive service
provider." Record 111-112.

27

28 ⁸ The cite to page 835-836 is a letter from applicant's
29 attorney promising bonds to assure completion of the
30 "infrastructure" and the transit system.

31

32 ⁹ The city's finding detailing compliance with condition 'f'
33 is as follows:

34 "Condition 'f' has been met because improvement
35 guarantees are required for all elements of the public
36 infrastructure by Chapter 33.79 of the City PUD

1 regulations, which were enacted in 1978, three years
2 after Ordinance No. 140542 was adopted. The amounts
3 of the improvement guarantees are set by the City
4 Engineer. The Hearings Officer and the City Council
5 conclude that the applicant's financial ability has
6 been successfully tested by almost a decade of
7 pursuing the project despite extensive appeals and
8 litigation. Additionally the applicant is absorbing a
9 substantial portion of the cost of extending the
10 sanitary sewer to service the project site.

11 "Applicant's ability to carry out the transit plan
12 initially can be demonstrated by provisions of
13 adequate vehicles. Bonding may be necessary in
14 subsequent development phases, but is not necessary at
15 this time." Record 100.

16

17 _____
18 The city's comprehensive plan Goal 6 policies, in
19 pertinent part, state:

20 "6.1 Intergovernmental Cooperation

21 "Encourage efficient management of the
22 transportation resources located in the city and
23 metropolitan area through cooperation and
24 long-range planning with Federal, State and local
25 agencies.

26 "6.2 Regional and City Traffic Patterns

"Create and maintain regional and city traffic
patterns that protect the livability of
Portland's established residential neighborhoods
while improving access and mobility within
commercial and industrial areas.

"6.3 Land Use/Streets Relationship

"Land use planning and project development should
be guided by the trafficways classifications,
objectives and policies contained in the adopted
Arterial Streets Classification Policy and in
coordination with criteria established in the
Facilities System Plan.

"6.4 Public Transportation

"Encourage a safe, efficient metropolitan public
transportation system serving Portland as an
alternative to the automobile by providing more
direct cross-town service to residential
neighborhoods which connect commercial areas to
other centers of activity and employment

1 throughout the city and the region.

2 "6.5 Transit-Related Density

3 "Reinforce the link between public transportation
4 and land use by increasing residential urban
densities along designated major transit streets
and near commercial centers, where practical.

5 "6.6 Transit-Dependent Population

6 "Encourage a public transit system that addresses
7 the special needs of the transit-dependent
population."

8

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The Transportation Department staff person testified:

9 "I think the bottom line is that, yes Forest Park
10 Estate will have an impact. The difference that they
11 will make in the traffic volumes on Cornell Road over
and above what they would have been without these
12 developments is not all that great. You're gonna see
growth on Cornell Road no matter how you slice it,
Forest Park Estate, Panavista or no."

13
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12

In addition to the conditions imposed on the developer to
15 promote mass transit cited at footnote 8, supra, the following
conditions about traffic and transportation were imposed:

16 "I. All requirements of the City Engineer pertaining
17 to streets and related improvements, as addressed
in Exhibit 6d by the Bureau of Street and
18 Structural Engineering, shall be complied with to
the satisfaction of the City Engineer.

19 "J. Improvements to N.W. Thompson Road, N.W. Skyline
20 Boulevard, N.W. Cornell Road, N.W. 101st Avenue,
N.W. Laidlaw Road, and N.W. McDaniels Road shall
21 be specified by and subject to the approval of
Multnomah County Department of Environmental
22 Services, as specified in Exhibit 6h.

23 "K. Improvements to N.W. Rainmont Road and N.W. 102nd
24 Avenue shall be specified by and subject to
approval by the Washington County Department of
Public Works, as specified in Exhibit 6i.

25 "L. Forest Park Estate shall work with Washington
26 County to establish a mutually acceptable method

1 for determining and collecting Forest Park
2 Estate's and Forest Park Estate's residents' fair
3 share of the cost of improving Washington County
4 roads used by the residents.

5 "Unless the City, Washington County and the
6 applicant agree otherwise, prior to the second
7 and all subsequent phases of development, travel
8 surveys will be conducted by a mutually
9 acceptable fourth party at the developer's
expense. Said surveys must be: 1) Statistically
sound and verified by field observation, 2)
Intended to establish by mode of travel the
amount of traffic impact to Washington County
roads, and 3) Useable as the basis for
identifying the share of improvements in which
these phases would be conditioned to participate.

10 "M. A plan for the location and installation of bus
11 shelters shall be submitted to the Transportation
12 Planning Section of the Bureau of Planning for
13 review and approval.

14 "N. Paved pedestrian walkways (sidewalks or trails)
15 shall be provided for direct access between all
16 residential areas and at least one bus stop.

17 "O. The applicant shall recognize as a goal and
18 continue to take affirmative action toward
19 minimizing the volume of Forest Park Estate
20 traffic on the road system in the Westside
21 Corridor. Furthermore, the applicant shall also
22 recognize as a goal and work toward attaining
transit usage and ridesharing rates for Forest
Park Estate equal to those projected by Metro for
the Westside Corridor.

23 "P. The applicant shall establish, with the
24 assistance of Tri-Met, a transit/rideshare-
25 incentive program, as outlined in the
26 application."

22

13

23 Goal 5 provides in pertinent part:

24 "To conserve open space and protect natural and scenic
25 resources.

26 "Programs shall be provided that will: (1) insure
open space, (2) protect scenic and historic areas and

1 natural resources for future generations, and (3)
2 promote healthy and visually attractive environments
3 in harmony with the natural landscape character. The
4 location, quality and quantity of the following
5 resources shall be inventoried:

6 "a. Land needed or desirable for open space;
7 "* * *

8 "d. Fish and wildlife areas and habitats;

9 "e. Ecologically and scientifically significant
10 natural areas, including desert areas;

11 "f. Outstanding scenic views and sites;

12 "g. Water areas, wetlands, watersheds and groundwater
13 resources;

14 "h. Wilderness areas;

15 "* * * *"