

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

LAND USE  
BOARD OF APPEALS  
DEC 21 3 36 PM '87

HERBERT AND SHIRLEY SEMLER, )  
and HAROLD AND RUTH SALTZMAN, )  
Petitioners, ) LUBA No. 87-081  
vs. ) FINAL OPINION  
CITY OF PORTLAND, ) AND ORDER  
Respondent. )

Appeal from City of Portland.

Steven R. Schell, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief were Paul Hribernick and Rappleyea, Beck, Helterline, Spencer & Roskie.

Peter A. Kasting, Portland, filed a response brief and argued on behalf of Respondent City.

William C. Cox, Portland, filed a response brief and argued on behalf of Participant-Respondent, Homesite Development Corporation.

BAGG, Chief Referee; HOLSTUN, Referee; participated in the decision.

AFFIRMED 12/21/87

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

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioners appeal a City of Portland grant of preliminary  
4 approval for a Planned Unit Development (PUD) and subdivision  
5 in S.W. Portland. Petitioners ask that we reverse the decision  
6 or, in the alternative, remand the decision to the city council.

7 FACTS

8 The applicant, Homesite Development Corporation, requested  
9 approval of a 24 lot single family residential PUD and  
10 subdivision at 6005 S.W. Hamilton Street in Portland. The  
11 city's hearings officer approved the application, and  
12 petitioners, along with others, appealed the hearings officer's  
13 determination to the city council. The city council considered  
14 the appeal and subsequently made findings approving the  
15 development on August 20, 1987.

16 The property includes 8.39 acres and is zoned R-10. The  
17 R-10 zone is a single family residential zone with a 10,000  
18 square foot minimum lot size. Residential subdivisions are a  
19 permitted use in the R-10 zone, and PUDs are a conditional  
20 use.

21 FIRST ASSIGNMENT OF ERROR

22 "The City improperly construed applicable law and  
23 failed to follow the applicable procedures to the  
24 substantial prejudice of the Petitioners in that its  
25 decision to require no street improvements on S. W.  
Hamilton does not comply with the Comprehensive Plan  
nor applicable standards, and is not supported by  
substantial evidence in the whole record."

26 Petitioners begin with a general complaint that access to

1 the PUD is unsafe. Petitioners allege that S.W. Hamilton  
2 Street is "narrow, busy, lacks shoulders, lacks sidewalks and  
3 is dangerous \* \* \*" Petition for Review at 5. Petitioners  
4 divide the first assignment of error into four parts.

5 1. Bicycle Route

6 Petitioners note that the city's comprehensive plan  
7 requires that "improvements to public rights-of-way will be  
8 consistent with the rights-of-way classifications in the  
9 Arterial Streets Classification Policy." Comprehensive Plan  
10 Policy 11.10. Under the ASCP, the city is required to address  
11 the following standards.

12 "3. Design Treatment.

13 "a. Although safe passage of bicycles should be  
14 considered on all streets, special  
15 provisions for bicycle traffic shall be  
16 considered on streets classified as Bicycle  
17 Routes."

18 \* \* \* \* \*

19 "c. Separate bike lanes shall be considered on  
20 streets also classified as Regional or Major  
21 City Traffic and Transit Streets, District  
22 Collector Streets or Neighborhood Collector  
23 Streets." ASCP at 15.

24 Petitioners state the city's findings are devoid of any  
25 discussion of bicycle paths; and, therefore, the city failed to  
26 address this standard.

In addition, petitioners advise Comprehensive Plan Policy  
11.13 requires that as private funds become available, the city  
must include construction standards necessary to assure safe

1 access to bicyclists on new and reconstructed streets.  
2 Petitioners argue that access to the PUD will require S.W.  
3 Hamilton Street to be partially reconstructed. Therefore,  
4 petitioners argue Comprehensive Plan Policy 11.13 applies.

5 We are cited nothing in the record showing that S.W.  
6 Hamilton Street is to be improved or reconstructed. New access  
7 to the PUD will be connected to S.W. Hamilton Street, but we do  
8 not believe connection of a new street constitutes  
9 reconstruction of S.W. Hamilton Street. Because the  
10 comprehensive plan requires conformity with bicycle lane  
11 provisions of the ASCP only when "improvements" occur to public  
12 rights-of-way, we do not find the comprehensive plan policies  
13 cited by petitioners to be applicable.

14 We deny this subassignment of error.

15 2. Neighborhood Collectors

16 Petitioners state the ASCP requires care be taken in the  
17 design of the neighborhood collector streets and intersections  
18 in order to provide safe and frequent pedestrian and bicycle  
19 crossing opportunities. Petitioners say that bicyclists and  
20 joggers use the street in this area along with school buses.  
21 Petitioners cite to a statement by the Transportation Office  
22 that S.W. Hamilton lacks adequate shoulder width to accommodate  
23 bicycles and pedestrians comfortably. Record 328.

24 We understand petitioners to argue that the plan requires  
25 an accommodation of pedestrians and bicyclists, and the city's  
26 only accommodation is the dedication of an additional

1 right-of-way for future development. This action by the city  
2 is insufficient under the plan, as we understand petitioners'  
3 argument.

4 Respondent Homesite Development Corporation (Homesite)  
5 argues the applicant is not designing a neighborhood collector  
6 street, and this plan policy applies only to the design of  
7 neighborhood collector streets. In addition, Respondent  
8 Homesite notes the ASCP standard is not mandatory, but uses the  
9 word "should" to direct city consideration.

10 The city states that

11 "the record establishes that this development will not  
12 have significant traffic impacts and that improvements  
13 to this street should be made at a later date rather  
14 than in piecemeal fashion." Respondent City's Brief  
15 4.

16 The city also notes that the lots in the development will each  
17 contain a deed restriction waving the right to remonstrance  
18 against future local improvement districts created for the  
19 purpose of improving S.W. Hamilton.

20 We do not understand the ASCP policy to be a mandatory  
21 approval standard for the PUD in this case. The city is not  
22 now engaged in designing or or redesigning S.W. Hamilton; and,  
23 under such circumstances, the plan policy does not apply.

24 Also, we are cited to nothing in the city's land use  
25 regulations which requires improvement to the roadway providing  
26 access to a new development. That is, the code cited by  
petitioners does not call for improving S.W. Hamilton Street to  
any particular standard. Providing S.W. Hamilton Street

1 provides adequate access to the new development, we find no  
2 fault with this portion of the city's order.<sup>1</sup>

3 This subassignment of error is denied.

4 3. Minor Transit Street

5 Petitioners argue Comprehensive Plan Policy 11.9 requiring  
6 the city to give a high priority to "improvements which promote  
7 more effective public transportation for those streets  
8 functioning as transit corridors" remains unmet by the city's  
9 decision. In addition, Plan Policy 11.5 requiring safe  
10 pedestrian movement along all new or reconstructed streets is  
11 not satisfied by this decision, according to petitioners.

12 We previously determined the approval granted does not  
13 involve reconstruction of S.W. Hamilton Street. Therefore,  
14 Plan Policy 11.5 is not applicable. In addition, we believe  
15 Plan Policy 11.9, requiring the city to give high priority to  
16 improvements promoting public transportation, is not an  
17 approval standard applicable to this decision. The city did  
18 require dedication of a 10 foot wide right-of-way strip.  
19 Presumably, dedication of this extra footage will allow  
20 improvements to Hamilton Street when and if it is redesigned.  
21 We believe the appropriate time to apply Plan Policy 11.9 is  
22 when plans for improvement of S.W. Hamilton are proposed.

23 This subassignment of error is denied.

24 4. Orderly Land Development

25 Petitioners cite Comprehensive Plan Policy 11.2 providing  
26 "Urban Development should occur only where urban

1 public facilities and services exist or can be  
2 reasonably made available."

3 Petitioners cite the city's conclusion that improvements to  
4 S.W. Hamilton Street limited to the vicinity of the PUD are not  
5 appropriate at this time. The city reasoned that additional  
6 safety hazards would be created by improvement of only a small  
7 portion of the street. Petitioners argue the improvements are  
8 necessary, and the city recognized the need for future street  
9 improvements. Therefore, petitioners contend Plan Policy 11.2  
10 applies.

11 Petitioners do not claim that urban facilities and services  
12 do not exist at this site. Petitioners' claim is that the  
13 street is busy and substandard. However, there is evidence in  
14 the record that access to the Hamilton Woods PUD from Hamilton  
15 Street is adequate, and the additional traffic generated by the  
16 development "will not be expected to have a significant impact  
17 on traffic operations." Record 327. Further, the fact the  
18 city recognizes the street may be improved in the future does  
19 not mean the city is obliged to make such improvements now.

20 We deny this subassignment of error.

21 SECOND ASSIGNMENT OF ERROR

22 "The City's decision was not consistent with the  
23 acknowledged Comprehensive Plan and Land use  
24 regulations in that it determined that no identified  
25 water feature exists at the PUD. The City improperly  
26 construed applicable law by adopting the wrong  
standards for water feature protection, and its  
Findings concerning water features are not supported  
by substantial evidence in the whole record."

Petitioners quarrel with the city's conclusion that the PUD

1 will not significantly affect water resources and that no  
2 significant wetlands are affected by the application.  
3 Petitioners say the record shows there is a wetland feature in  
4 the S.W. corner of the property. Petitioners claim the City of  
5 Portland Water Features Map shows the water features to exist  
6 at the site.

7 Petitioners recognize the city took steps to improve  
8 drainageways in the area. Petitioners complain these drainage-  
9 way improvements do not adequately protect the water feature.  
10 The result, according to petitioners, is that the city failed  
11 to comply with the comprehensive plan policy 8.9 requiring the  
12 city to "restrict development within Portland's natural  
13 drainageways through development and application of a  
14 drainageway overlay zone."

15 In another condition, the city required creation of a  
16 drainage reserve "15 feet to either side of the center line of  
17 the natural water course." Record 9. Petitioners argue that  
18 the appropriate standard, Municipal Code of the City of  
19 Portland (MCP) 34.60.020(B), requires a drainage reserve to  
20 conform to the lines of the watercourse and extend 15 feet back  
21 from the top of each bank. If MCP 34.60.020(B) applies, it  
22 would require a larger drainage reserve than was required by  
23 the city. According to petitioners, the record does not  
24 establish the watercourse or the location of the top of the  
25 bank. The result of this misinterpretation is to allow the  
26 applicant to create an access road within the area which must



1 be protected as the drainage reserve, according to petitioners.

2 Petitioners also complain the city's condition is invalid  
3 because it attempts to shift the burden of protecting the water  
4 feature to adjacent land owners. Petitioners say the culvert  
5 marking the center line of the water feature is on the adjacent  
6 property and not within the PUD. The condition requires the  
7 applicant to establish a 15 foot drainage easement on either  
8 side of the center line, but the applicant has no control over  
9 property the applicant does not own. According to this  
10 argument, the city is attempting, impermissibly, to discharge  
11 its responsibilities under the code by imposing conditions on  
12 adjacent property.

13 The city replies that the water feature was identified.  
14 The city points to reports of the city's planning bureau,  
15 Record 359, the city's bureau of environmental services, Record  
16 99-101 and city council findings, Record 20, identifying and  
17 discussing this feature. According to the city, it properly  
18 applied MCP 33.79.100(f)(6) requiring the preliminary  
19 development plans to display water features. The findings note  
20 that this requirement is satisfied. See Record 19-20, 40, 133,  
21 359.

22 Also, the city argues MCP 34.60.020(B) is not applicable.  
23 MCP Title 34 does not apply at the preliminary PUD/Subdivision  
24 application stage, according to the city. In support of this  
25 argument, the city points to MCP 33.79.160 which provides as  
26 follows:

1 "A subdivision plat may be approved concurrently with  
2 the approval of the PUD. To do so the applicant shall  
3 request tentative plat approval at the same time as  
4 the PUD preliminary plan approval. The combined  
5 PUD-subdivision application shall be subject to the  
6 review and appeal procedures of this Chapter, 33.79,  
7 not those of Title 34. The Hearings Officer shall  
8 required [sic] that all informational requirements of  
9 Sections 34.20.030 and 34.20.040 of the Subdivision  
10 Code be fulfilled unless information in the PUD  
11 application is sufficient to meet the intent of Title  
12 34 requirements and to review the tentative plat  
13 application. Final plat approval shall be granted  
14 with the final development plan approval if all  
15 appropriate Title 34 requirements for final plats are  
16 met."

9 Therefore, according to the city, Title 34 is not a part of  
10 this approval, and petitioner's complaints about the adequacy  
11 of the city's conditions regarding the water course are  
12 misplaced.

13 MCP 33.79.160 provides that the PUD-Subdivision application  
14 is to be subject to "review and appeals procedures" of Chapter  
15 33.79, not those of Title 34. MCP 34.60.020 is a substantive  
16 standard requiring a specific drainageway reserve. The  
17 applicable provision is as follows:

18 If a tract is traversed by a watercourse such as a  
19 drainageway, channel or stream, there shall be  
20 provided a storm drainage reserve conforming  
21 substantially with the lines of the watercourse, and  
22 shall extend 15 feet back from the top of each bank.  
23 This storm drainage reserve shall remain in natural  
24 topograph condition. No private structures, culverts,  
25 excavations or fills shall be constructed within the  
26 drainage reserve unless authorized by the City  
27 Engineer." MCP 34.60.020(B).

24 The city's order mentions 34.60.020 in its findings. The  
25 finding is as follows:

26 "34.60.020(E) Easements:

1 "All public and private utilities, easements, as well  
2 as easements for natural drainageways, shall appear on  
3 the final plat map as required by the City Engineer."

4 The city imposed two conditions which arguably touch upon this  
5 requirement. The conditions are as follows:

6 "A. Sanitary and storm drainage facilities, public  
7 and private, must be designed according to  
8 specifications of the Bureau of Enviromental  
9 Services and be approved by the City Engineer  
10 prior to final plat approval.

11 "B. A drainage reserve, 15 feet to either side of the  
12 center line of natural watercourses shall be  
13 shown on the final plat as required by the City  
14 Engineer. The following statement shall appear  
15 on the final plat: 'The storm drainage reserve  
16 shall remain in natural topograph condition.  
17 Note private structures, culverts, excavations or  
18 fills shall be constructed within the drainage  
19 reserve unless authorized by the City Engineer.'" Record 28.

20 Our review of the record shows the city believed it had  
21 sufficient information to identify the wet area and the  
22 drainageway. See Record 20, 40, 133, 359 and the report on the  
23 drainage issue at Record 99-101, and Record 52. The city's  
24 code at MCP 33.79.100(f)(6) only requires that preliminary  
25 development plans display water features. The maps in the  
26 record and the discussion is sufficient to satisfy this  
27 requirement, in our view. Therefore, we do not accept  
28 petitioners' claim that the city had insufficient information  
29 to address the drainage issue.

30 We also do not find fault with the city's restriction of  
31 development within the drainageway. Comprehensive Plan Policy  
32 8.9 simply requires the city to "restrict" development within

1 drainageways, and condition "B," quoted supra, does so restrict  
2 development.

3 The larger issue, however, is compliance with MCP  
4 34.60.020(B) requiring that the drainage reserve conform to the  
5 lines of the watercourse and extend 15 feet back from the top  
6 of each bank. This particular requirement is not specifically  
7 addressed in the city's findings.

8 While not specifically addressed, Condition "A," quoted  
9 supra, requiring that easements conform to the requirements of  
10 the City Engineer, echoes the language in MCP 34.60.020(B).  
11 The fact that there is an additional condition, Condition "B"  
12 setting the boundaries of the reserve 15 feet from the  
13 centerline of the drainageway does not, in our view, eliminate  
14 the necessity for compliance with MCP 34.60.020(B). That is,  
15 the city's reasons for imposing the 15 foot drainageway reserve  
16 may or may not be an attempt to comply with MCP 34.60.020(B).  
17 Nonetheless, MCP 34.60.020(B) is still in effect and still must  
18 be satisfied.

19 The code provision contains within it an allowance for  
20 variation from the 15 foot setback from the "top of each bank"  
21 requirement. The code expressly states the City Engineer may  
22 allow a development within the drainageway. The engineer's  
23 report found at Record 99-101 and Record 52 references the  
24 condition imposed to protect the drainageway and can reasonably  
25 be interpreted as the engineer's approval of a drainageway  
26 reserve that is not as restrictive as that apparently contained

1 in MCP 34.60.020(B).

2 Therefore, while not clearly stated, we do not find the  
3 city's order must be read to violate MCP 34.60.020(B).

4 We note, in addition, that the information necessary to  
5 establish a drainage reserve 15 feet from the top of each bank  
6 is not required at this stage of the PUD/Subdivision approval  
7 process. Under MCP 33.79.160, the city is only required to  
8 submit plans showing that city standards have been or will be  
9 met at the time of final plan approval. MCP 33.79.040 allows  
10 approval of this preliminary stage where a "reasonable  
11 certainty" exists that the PUD will fulfill all code  
12 requirements. Under 33.79.100, information on drainageways  
13 must be provided, but the requirement is only to display of  
14 water features. MCP 33.79.100(f)(6). The maps in the record  
15 of the discussion clearly satisfies this requirement.

16 The result, then, is that the precise location of the  
17 drainageway and the necessary reserve to satisfy 34.60.020 need  
18 not be provided at this time, but may be provided under the  
19 provisions of 33.79.130, the code provision controlling  
20 approval of a final development plan.

21 With regard to the petitioners' last argument about  
22 imposing restrictions to protect the watercourse of adjacent  
23 property, the Respondent City argues as follows:

24 "Any applicable development restrictions in the code  
25 apply regardless of whose property is affected. Just  
26 because Homesite cannot impose a reservation on  
someone else's property does not mean that the portion  
of the water feature on that property is unprotected

1 or that Homesite is prohibited from developing its own  
2 property in accordance with the code."

3 We are not quite certain what respondent city means by this  
4 comment. It may be the city is arguing that the 15 foot  
5 reserve to protect the drainageway is a restriction on property  
6 15 feet on either side of the center line of the drainageway no  
7 matter who owns it and no matter whether it is part of this  
8 development proposal. That is, not only Respondent Homesite  
9 would be restricted from construction within the drainageway  
10 reserve, but also the neighboring property owner. Under this  
11 view, petitioners are not responsible for solving a drainageway  
12 problem on Homesite Development property, but are only  
13 responsible for complying with drainageway restrictions on  
14 petitioners' own property.

15 Assuming the city is correct, we find no reason why the  
16 condition, even if it is an erroneous attempt to impose  
17 protective measures on the adjacent Semler property, requires a  
18 remand. Providing the development does not violate a  
19 drainageway standard, there is no error.

20 The Second Assignment of Error is denied.

21 THIRD ASSIGNMENT OF ERROR

22 "The City improperly construed applicable law when it  
23 did not require 30 foot setbacks for those lots  
24 abutting S.W. Hamilton Street."

25 Petitioners cite MCP 33.79.070(b) requiring that front yard  
26 requirements of the underlying zone must apply when the  
boundary of a PUD abutts an existing public street. The

1 minimum front yard requirement in the R-10 Zone is 30 feet.  
2 MCP 33.22.090(a). The minimum rear yard requirement is 10  
3 feet. MCP 33.22.110. Petitioners argue approval of this PUD  
4 allows the applicant to simply reverse the house orientation to  
5 circumvent the 30 foot front yard requirement.

6 The city replies that MCP 33.79.070(i) provides the  
7 hearings officer may reduce the distance requirements under  
8 Section 33.79.070(b). The hearings officer and the city  
9 council granted this reduction: therefore, the city says there  
10 is no violation of the code.

11 The city notes also that the precise location of buildable  
12 areas and setback lines is not to be shown in the preliminary  
13 plans stage, but in the final development plan. See  
14 33.79.130(d). Therefore, according to the city, the question  
15 of setbacks does not apply at this stage.<sup>2</sup>

16 We agree with the city. The question of setbacks is not a  
17 matter for city consideration until the final development plan  
18 stage. 33.79.130(d)(1) requires

19 "A detailed design plan for the PUD site including:

20 "The location of proposed buildings and structures,  
21 parking and maneuvering areas and/or the location of  
22 allowable building areas of individual lots. The  
23 solar envelopes for all lots not exempted."

24 The petitioners' concern about house orientation is  
25 premature. Also, we agree with the Respondent Homesite that  
26 the frontage of the structure is relevant to consideration of  
front and rear yard requirements. The code clearly provides

1 that front yard measurements are to be taken from the front of  
2 the structure. We see no basis in the code for denying the  
3 developer the opportunity to orient structures as he pleases,  
4 providing other applicable code provisions are satisfied.<sup>3</sup>

5 The Third Assignment of Error is denied.

6 FOURTH ASSIGNMENT OF ERROR

7 "The City made a decision inconsistent with  
8 acknowledged land use regulations, improperly  
9 construed the applicable law, and made a decision not  
10 supported by substantial evidence in the whole record  
11 in that it failed to make adequate Findings concerning  
12 injury to the value of the surrounding property."

13 Petitioners argue that MCP 33.106.010 requires that a  
14 development be

15 "not detrimental or injurious to the public health,  
16 peace, or safety, or the character and value of the  
17 surrounding properties."

18 Petitioners argue that there is no evidence in the record or  
19 any reason to assume that because the values of the houses to  
20 be constructed is high, adjoining properties will not be  
21 adversely affected. We understand petitioners to argue that  
22 their property values will be reduced.

23 Petitioners find particular fault with the city's  
24 methodology in arriving at values of adjoining properties. The  
25 city computed an average dollar value for properties in the  
26 area. Petitioners complain that this method fails to consider  
the loss in value which may occur to more valuable properties  
bordering the PUD.

The city interpreted its code to allow consideration of



1 property values within 400 feet of the subject site. The city  
2 found that such properties averaged \$135,909. Record 265-307.  
3 Also, the city found the value of the average home within the  
4 PUD to be approximately \$225,000. The city argues that from  
5 these facts it could reasonably conclude that a general  
6 improvement in property values in the area will have a  
7 beneficial affect on properties, even those with a higher  
8 assessed value.

9 The city adds the petitioners' claim that the PUD is  
10 detrimental to their property ignores the fact that the R-10  
11 zone permits single family dwellings on 10,000 square foot  
12 lots. There is nothing in the city code that would legally bar  
13 construction of inexpensive homes in this parcel provided the  
14 applicant developed a conventional subdivision rather than a  
15 PUD.

16 The standard in MCP 33.106.010 is subjective. We believe  
17 the city is entitled to considerable discretion. We do not  
18 find the city's interpretation of its ordinance and its method  
19 of considering character and value to be contrary to the terms  
20 of the ordinance or to be unreasonable. Therefore, we are  
21 bound to uphold the city's interpretation. Alluis v. Marion  
22 County, 64 Or App 478, 668 P2d 1242 (1983).

23 The Fourth Assignment of Error is denied.

24 FIFTH ASSIGNMENT OF ERORR

25 "The City improperly construed applicable law and  
26 failed to follow applicable procedures to the  
substantial prejudice of the Petitioner in that its

1 allowance of solar envelope exceptions is incorrectly  
2 based on a provision which is not applicable to this  
3 PUD, and its decision regarding solar envelopes is not  
4 supported by substantial evidence on the record."

5 Petitioners complain that the city improperly granted an  
6 exemption under MCP 34.60.040(D)(5) to solar envelope  
7 requirements. Petitioners argue that the city's calculations  
8 applying MCP 34.60.040(D)(5) are mistaken and the city was not  
9 entitled to grant an exemption for this property.

10 The city explains that MCP 33.79.100(1)(1) provides that a  
11 preliminary development plan must contain an explanation of  
12 reasons for exempting lots for solar envelope requirements.  
13 The city articulated the exemption under Section  
14 34.060.040(D)(5). This provision permits exemption when the  
15 applicant can demonstrate that "the lot is an area where more  
16 than 80 percent of the land, including existing and proposed  
17 road areas, is forested by trees over 20 feet in height."

18 A tree survey supports the city's finding of entitlement to  
19 this exemption. See Record 363-364, 367 and additional Exhibit  
20 No. 5.

21 We find the city's response adequate. There is substantial  
22 evidence in the record to support the city's conclusion that  
23 the property is covered by the requisite number of trees of the  
24 requisite height, and we believe the city's calculation  
25 allowing the exemption under these circumstances is  
26 reasonable.

The Fifth Assignment of Error is denied.

1 SIXTH ASSIGNMENT OF ERROR

2 "The City's Findings and conclusions concerning  
3 increased noise do not adequately address concerns  
4 raised at the public hearing and are not supported by  
5 substantial evidence in the whole record."

6 In this assignment of error petitioners complain that the  
7 proposed use will increase noise levels in the area and  
8 therefore violate City Goal 8 which protects neighborhoods from  
9 "detrimental noise pollution." Petitioners' say the only  
10 evidence in the record is that development of the PUD will  
11 permit increased traffic noise to reach neighbors. See Record  
12 228.

13 The Planned Unit Development (PUD) is sited in a  
14 residential zone. It is a residential development, and an  
15 increase in noise may be expected simply because there will be  
16 additional dwellings in the neighborhood. There will be a  
17 certain amount of noise associated with people going to and  
18 from the dwellings.

19 Absent a showing that the PUD will increase noise levels  
20 beyond those expected of residential development permitted by  
21 right in the zone, we find no violation of city standards. By  
22 including this property within the R-10 zone, we believe the  
23 city made a legislative determination that the noise associated  
24 with normal residential use is acceptable under Goal 8 of its  
25 plan.

26 The Sixth Assignment of Error is denied.

//////

1 SEVENTH ASSIGNMENT OF ERROR

2 "The City's decision is inconsistent with the  
3 acknowledged Comprehensive Plan and inconsistent with  
4 the applicable zoning regulations and the City has  
5 misconstrued the applicable law by not protecting the  
6 wetlands in the southwest corner of the PUD."

7 Petitioners argue there is a wetland in the southwest  
8 corner of the PUD. Petitioners claim all criteria for  
9 identifying wetlands are met. See Petition for Review at  
10 24-25. Because a wetland exists, petitioners argue the city  
11 was obliged to show this natural feature under Code Section  
12 34.20.040. This code section provides the plan must illustrate

13 "Natural features such as rock outcroppings, marshes,  
14 wooded areas (exclusive of brush and scrub),  
15 identified fish and wildlife habitats, etc. \* \* \*."  
16 MCP 34.20.040(2) (f).

17 In addition, petitioners argue the wetlands must be shown on a  
18 preliminary drawing under MCP 33.79.100(e) (f) (6) requiring the  
19 plan to show "water features such as wetlands, and  
20 watercourses."

21 Lastly, petitioners argue that within the R-10 zone, the  
22 following requirement exists:

23 "(1) Development shall be restricted within the  
24 following areas:

25 "(a) Between the ordinary high waterline and 25  
26 feet back of the top of the bank of  
watercourses and water bodies such as  
rivers, lakes, ponds, sloughs or wetlands,  
as shown on the City of Portland Water  
Features Map \* \* \*." MCP 33.22.115(1) (a).

27 Petitioners conclude that until the wetland is placed on the  
28 tentative plan, with a showing of the top of the bank and the

1 25-foot setback area identified, it is impossible to tell  
2 whether development may be permitted by the code. Petitioners  
3 urge us to return this approval to the city to identify the  
4 wetland area and to establish conditions for protection of the  
5 wetland.

6 The city argues that the tentative subdivision plan shows  
7 the channel and the shallow swale constituting the water  
8 feature. See Map CCH 5, CCH 7, Record 371. Further, the city  
9 argues that the tentative plan shows that Selling Court, a  
10 roadway, is the only improvement located in the vicinity of the  
11 water feature, and MCP 33.22.115(7) provides that streets and  
12 certain other public utilities are exempted from the provisions  
13 of MCP 33.22.115.

14 More importantly, however, the city claims that MCP  
15 33.22.115 does not even apply to this application because MCP  
16 33.79.030 provides that a PUD application is to be approved if  
17 it meets the provisions of MCP 33.79 and 33.106 (conditional  
18 uses). The standard relied upon by petitioners, 33.79.115, is  
19 not incorporated into either MCP 33.79 and 33.106.

20 The city made the following finding regarding the wetland.

21 "The applicant submitted a topographic map showing the  
22 intermittent and year-round streams on the site and  
23 adjacent to the site. These maps included all the  
24 existing water courses. They also showed the wet area  
25 north of the site. There is no convincing evidence  
26 that any wetland exists on the site. The alleged  
wetland to the north of the site is not on the subject  
property. The groundwater from the subject property  
as it seeps into this northern drainageway can  
continue to serve this northern area by on-site  
drainage systems approved by appropriate city

1       bureaus. The wet area to the west was viewed by  
2       representatives of the City, Army Corps of Engineers,  
3       and the Division of State Lands. While they have  
4       indicated that some of the three major indicators of  
5       wetlands exist in the area, there is no consensus this  
6       wet area meets the Army Corps of Engineers' definition  
7       of wetland. The city maps do not show this as a  
8       wetland, and the city has no definition of wetland  
9       governing this area. During part 2 of this PUD  
10      process, if the Army Corps of Engineers were to  
11      determine this west area to be wetland, they as well  
12      as the Division of State Lands, have indicated it is  
13      not likely to constitute a substantial wetland and  
14      filling can be allowed through respective permits."  
15      Record page 19(f)(6).

16      The city concluded, therefore, that the area was not a  
17      wetland. It also, however, recognized the existence of a water  
18      course on the property and discussed the water course and  
19      mapped it. We conclude, therefore, that the city adequately  
20      complied with the requirements of its code to show the water  
21      course on this preliminary plan. See MCP 33.79.100(f)(6).

22      Also, as noted earlier, the provisions of MCP Title 34 do  
23      not apply at this stage of the proceeding. Provided the  
24      information required of Title 34 is given in sufficient detail  
25      to meet the "intent" of the subdivision ordinance, the specific  
26      information required in MCP 34.20.040 is not mandatory.  
27      Because we find the city's reliance on the informational  
28      requirements in MCP 33.79.100 to be sufficient under its code  
29      to meet the requirements for combined PUD/Subdivision  
30      application, we do not agree with petitioners that the  
31      information allegedly missing in petitioners' discussion of  
32      this assignment of error is critical to the decision.

33      The Seventh Assignment of Error is denied.

1 EIGHTH ASSIGNMENT OF ERROR

2 "The City improperly construed applicable law and  
3 failed to support its decision by substantial evidence  
4 in the whole record in that in its decision it did not  
5 require applicant to demonstrate a need for the  
6 development, demonstrate compliance with drainage,  
7 flood, water quality, vegetation, fish and wildlife or  
8 present mitigation measures nor did the City consider  
9 need for the project, potential adverse effects or  
10 mitigation measures."

11 Petitioners argue that Title 33 requires certain  
12 considerations be given to water features in an R-10 Zone.  
13 These considerations are as follows:

14 "Regulations for development of lands adjacent to  
15 water features shall be as follows:

16 "(1) The applicant shall demonstrate a need for  
17 such development and that the development  
18 complies with the recommendations of any  
19 affected drainage district; provide an  
20 evaluation of the effect on flood flow and  
21 level, water quality, erosion, siltation,  
22 vegetation and fish and wildlife habitats;  
23 and state what measures are proposed to  
24 mitigate adverse affects.

25 "(2) In deciding whether to approve the  
26 conditional use application the Hearings  
Officer, or Council on appeal, shall  
consider the need for the project, the  
potential adverse effects of the project and  
the adequacy of the measures to mitigate  
those adverse effects."  
MCP 33.22.495.

27 Petitioners complain the applicant did not met these  
28 requirements in that (1) no need analysis was developed; (2) no  
29 compliance certification or analysis was obtained from any  
30 affected drainage district; and (3) no evaluation of flood  
31 flow, water level, water quality, siltation, vegetation or fish  
32 and wildlife habitat was made. According to petitioners, the

1 city also failed to apply this standard in that there are no  
2 findings illustrating need for this project. The findings do  
3 not address potential adverse affects of the project, and the  
4 findings and conditions do not provide mitigation measures or  
5 discuss the adequacy of those measures, according to  
6 petitioners.

7 Respondent City argues that MCP 33.22.495 does not apply.  
8 It is not incorporated into MCP 33.79 or MCP 33.106 and  
9 therefore is inapplicable. See our discussion under the  
10 preceding assignment of error.

11 The city adds, however, that the water feature on this  
12 parcel does not fit the definition of a water feature found in  
13 Section 33.22.115(1) because it is not identified by the city  
14 as a river, lake, pond, slough or wetland; and, in addition, it  
15 does not drain 30 acres or more. These conditions, part of the  
16 definition of water feature in 33.22.115(1), are not present on  
17 this property, according to the city.

18 Respondent Homesite adds that the applicant proposes to use  
19 the area petitioners claim to be a wetland for a roadway.  
20 Roadways and streets are not governed by the special wetland  
21 provisions under Section 33.22.115(7). Therefore, the sections  
22 claimed to be violated are not applicable, according to  
23 Homesite.

24 We agree with the city and Homesite that the cited  
25 requirements found in 33.22.495 are not applicable. See our  
26 discussion under the Eighth Assignment of Error. Under MCP



1 33.79.030, MCP 33.22.115(7) is not identified in MCP 33.79 or  
2 33.106 as an applicable standard at this stage of the  
3 proceeding.

4 Lastly, we agree with respondents that MCP 33.22.115(1)  
5 exempts streets. The provision does not apply absent an  
6 identified wetland and, expressly, does not apply to street  
7 construction. Specifically, MCP 33.22.115(7) provides as  
8 follows:

9 "Streets, roads, waterlines, storm and sanitary  
10 sewers, waste water pumping stations, underground  
11 utility lines and similar facilities are exempted from  
12 these provisions."

13 We deny the Eighth Assignment of Error.

14 NINTH ASSIGNMENT OF ERROR

15 "The City improperly construed applicable law, failed  
16 to follow applicable procedures in a manner that  
17 prejudiced the substantial rights of the Petitioners  
18 and made a decision not supported by substantial  
19 evidence in the whole record by finding and concluding  
20 that applicant provided sufficient preliminary  
21 development data to warrant approval of the  
22 application."

23 Under this assignment of error, petitioner argues that both  
24 PUD and subdivision regulations in the code require the  
25 applicant to provide a significant amount of information. Both  
26 the PUD and subdivision ordinances adopted by the city call for  
a two phase approval system wherein the applicant obtains  
initial approval subject to a public hearing, with opportunity  
for comment and objection, and later final approval by city  
planning officials. This later action final approval, may  
occur without public input. Petitioner argues it is essential

1 that specific detailed information be given early in the  
2 proceeding, at the preliminary first phase, to insure the  
3 public has an opportunity to comment upon and view the adequacy  
4 of the development against city standards. According to  
5 petitioners, the applicant failed to provide this minimum  
6 information required for tentative approval.

7 We have already discussed the city's view of how its code  
8 operates. That is, the requirements of the subdivision  
9 ordinance (Title 34) are not applicable to this stage of the  
10 proceeding providing the informational requirements in Title 34  
11 are met or, at least, the "intent" of Title 34 is satisfied.  
12 In this case, the city made a specific finding that the PUD "is  
13 consistent with Title 34 \* \* \*." Record 24. In addition, the  
14 city made findings on provisions in Title 34 it believed  
15 applicable. See Record 23-25.

16 In each of the complaints which follow, petitioners outline  
17 specific items that they believe are missing from the  
18 development application. In all cases, we find the application  
19 to be complete as required by the code.

20 We will list each of petitioner's concerns, and then state  
21 where in the record the allegedly missing information may be  
22 found, if it is to be found in the record.

23 (1) "A statement of how the purpose and intent of  
24 Section 33.79.010 will be achieved by the proposed  
25 PUD, including sketches or illustrations of the  
26 proposed character of the development \* \* \*."  
(MCP 33.79.100(c).)

26 Petitioners allege there are no sketches or illustrations

1 showing the proposed development. We disagree. See Record  
2 pages 337-345, 363-374, 31, 39, and additional exhibits 7-12.

3 (2) "An outline of the proposed PUD stating: land use  
4 allocation by type, including the amount of land  
5 for housing, open spaces \* \* \* and parking \* \* \*."  
(MCP 33.79.100(d).)

6 Petitioners claim no written outline of land allocation for  
7 housing, open space or parking was provided. We disagree, see  
8 citations under (1) above.

9 (3) "The preliminary drawings shall display the  
10 following:

11 "(4) Names, addresses and telephone numbers of  
12 the owners \* \* \*."  
(MCP 33.79.100[e][4].)

13 Petitioners claim preliminary drawings do not show the name  
14 of the deed holder, John Selling, Trustee for Adelaine Selling  
15 Trust. See Record 341.

16 This information apparently is not contained in the  
17 application. However, the information is contained in the  
18 staff report and recommendation of the Hearings Officer found  
19 at Record 347. It was available to the city council as part of  
20 the record of this proceeding, and we therefore find the error  
21 harmless.

22 (4) "A preliminary drawing shall display an inventory  
23 of existing site features including:

24 "(3) General soil types as shown on City maps or  
25 as documented by a soils engineer or  
26 engineering geologist."  
(MCP 33.79.100[f][3].)

27 Petitioners complain none of the soils information was  
28 included. Soils information was included. See Record 102-103,

1 371, and 39.

2 (5) "A preliminary drawing shall display an inventory  
3 of existing site features including:

4 "Proposed and existing storm water detention  
5 basing as shown on City Engineer maps."  
6 (MCP 33.79.100[f][5].)

7 Petitioners say the applicant provided no existing storm  
8 water information, however, the Record at 371 identifies a  
9 storm easement. See also Record 99-101, 337-345, 363-374, 39  
10 and Map CCH 5 and 7.

11 (6) "A preliminary drawing shall display an inventory  
12 of existing site features including:

13 "Water features such as ponds, wetlands and  
14 watercourses." (MCP 33.79.100[f][6].)

15 Petitioners complain the applicant failed to identify  
16 wetlands in detail courses on plan maps, see Record 188. Again  
17 we disagree. See Record 370, and Map CCH 5 and 7.

18 (7) "A preliminary drawing shall display an inventory  
19 of existing site features including:

20 "Areas subject to inundation or storm sewer  
21 overflow." (MCP 33.79.100[f][7].)

22 Petitioners complain the applicant failed to detail  
23 information subject to inundation or storm sewer overflow on  
24 the plan map. Again, we disagree. See Record 99-101, 370,  
25 371, 20 and 31 along with Map CCH 7. While the application may  
26 not include all the detail desirable, sufficient detail is  
available in the record to provide an adequate factual base for  
the city's conclusion of compliance with relevant standards.

(8) "A preliminary drawing shall display an inventory  
of existing site features including:

1 "Natural features such as large rock  
2 outcroppings or major wooded areas." (MCP  
3 33.79.100[f][8].)

4 Petitioners concede the applicant identified wooded areas  
5 but say wetlands, which are natural features, were not  
6 identified.

7 No wetland was identified as such by the city as discussed  
8 earlier in this opinion. However, see Record 19 and 20 wherein  
9 the city discusses the wetland issue. We find no error.

10 (9) "A preliminary drawing shall display an inventory  
11 of existing site features including:

12 "Existing on-site or abutting sanitary  
13 sewage, storm drainage and water supply  
14 facilities. If such facilities are not on  
15 or abutting the site, indicate the  
16 direction and distance to the nearest ones."  
17 (MCP 33.79.100[f][9].)

18 Petitioners complain the preliminary plans do not show  
19 existing or abutting sanitary sewage, storm drainage or water  
20 supply facilities. We do not agree. See Record 343 and 344  
21 along with Map CCH 5, 7.

22 (10) "A preliminary drawing shall display an inventory  
23 of existing site features including:

24 "Information on land areas contiguous to  
25 the proposed PUD to indicate the  
26 relationships between the proposed PUD and  
27 existing adjacent areas, including \* \* \*  
28 unique natural features \* \* \*."  
29 (MCP 33.79.100[f][11].)

30 Petitioners say preliminary information and plans do not  
31 show drainage reserves contiguous with the property nor do they  
32 show the nature and extent of the wetlands on the Semler  
33

1 property or an alleged wetland located on contiguous property  
2 to the north.

3 Record 31, 364, 370, 543 and the applicant's maps (CCH 5-7)  
4 show information on wet areas on the property. Again, the city  
5 did not identify the wet areas specifically as wetlands. We do  
6 not believe it was required to do so for the reason discussed  
7 earlier in this opinion.

8 (11) "A proposed site plan showing:

9 "The existing and proposed pedestrian and  
10 bicycle circulation system."  
MCP 33.79.100[g][4].)

11 The applicant's written materials, according to  
12 petitioners, include discussion about pedestrian areas, but the  
13 site plan makes no indication of proposed pedestrian or bicycle  
14 circulation systems. Petitioners' explain their concern is  
15 more with pedestrian and bicycle travel on S.W. Hamilton  
16 Street, than with circulation within the PUD.

17 There is a discussion of the proposed pedestrian  
18 circulation system in the applicant's statement and the  
19 findings. Record 22, 363, 367. However, there is no  
20 discussion of bicycle routes.

21 The city argues the code only requires a description of the  
22 pedestrian and bicycle routes where such routes are planned as  
23 a feature of the development. That is, absent a separate  
24 requirement for a pedestrian or bicycle plan (or a desire for  
25 such a feature by the developer), no pedestrian or bicycle plan  
26 is required by MCP 33.79.100(g)(4).

1 In addition, the city claims that because there are no  
2 improvements planned for S.W. Hamilton Street, there is no  
3 requirement for any special bicycle planning.

4 As discussed under parts 1 and 2 of the First Assignment of  
5 Error, because the city is not now engaged in designing or  
6 redesigning S.W. Hamilton Street, ASCP policies requiring  
7 consideration of pedestrian and bicycle crossing opportunities  
8 are not applicable. Therefore, there is no separate  
9 requirement that bicycle travel plans be provided for S.W.  
10 Hamilton Street.

11 The city's interpretation of its code as requiring  
12 submittal of a pedestrian and bicycle circulation plan only  
13 where such routes are part of the development plan is  
14 reasonable. There is no special internal pedestrian or bicycle  
15 circulation scheme; and, therefore, any omission of bicycle  
16 facilities is not error. Alluis v. Marion County, supra.

17 (12) "A proposed site plan showing:

18 "(5) Conceptual plans for all necessary services  
19 including their location and whether the  
20 services will be publicly or privately owned  
and maintained."  
(MCP 33.79.100[g][5].)

21 Petitioners say the site plan includes no information about  
22 the location of storm runoff systems or how the runoff system  
23 will be maintained. Further, the site plan includes no  
24 conceptual plans of necessary services.

25 We disagree. The Record at 343 and the staff report in the  
26 Record at 347 et seq, as well as the additional exhibits

1 discuss availability of necessary services, including water and  
2 sewer all address these issues. The fact that the applicant's  
3 submittal may be deficient in some regard is not error unless  
4 the needed information is not in the record at all.

5 (13) "A proposed site plan showing:

6 "The general treatment proposed for the  
7 periphery of the site."  
(MCP 33.79.100[g][7].)

8 Petitioners state the site plan gives no indication of how  
9 the periphery of the PUD will be treated, and petitioners are  
10 uncertain whether the plan will include preservation of  
11 vegetation. Petitioners are also particularly concerned about  
12 whether proper setbacks will be adhered to.

13 We discussed the issue of setbacks under the Third  
14 Assignment of Error. Setbacks are not required to be stated at  
15 this stage of the approval process except insofar as the city  
16 must consider distances to permit variance of the setback  
17 requirements in MCP 33.79.070(b). The applicant's statement at  
18 Record 363 to 367 discusses the general treatment of the site  
19 and the surrounding area.

20 (14) "A detailed explanation of reasons for:

21 "(1) Exempting lots from the solar envelope  
22 requirement; \* \* \* ." (MCP 33.79.100[1][1].)

23 Petitioners complain there is no explanation of how the  
24 solar envelope exemption area was calculated, what areas were  
25 included or excluded or the height of trees upon which the city  
26 relied in granting the exception.



1           Our discussion under Assignment of Error No. 5 found no  
2    fault with the city's use of the exemption for the solar  
3    envelope. We believe the evidence cited is sufficient to give  
4    information to the city from which it could conclude the  
5    exemption was appropriate. See Record 350, 363-364.

6           (15) "A tentative plan shall consist of drawings and  
7           supplementary written materials adequate to  
          provide the following information:

8           "(A) Detailed drawing: \* \* \* The Drawing shall  
9           display the following:

10                   "(1) (d) Names, addresses and telephone  
                  numbers of the owners \* \* \*."  
11                           (MCP 34.20.040[A][1][d].)

12           Again, petitioners complain that the plans do not include  
13    the name of the owner, Adelaide Selling Trust, John Selling,  
14    Trustee.

15           Whether or not the application contains this needed  
16    information is not important provided the information is  
17    available in the local record. See Record 341. The  
18    information is in the record and we find no error and no  
19    prejudice to petitioners' substantial rights.

20           Petitioners' concerns listed in items 16 through 23 are  
21    about information required for tentative subdivision plan  
22    approval in MCP 34.20.040 et seq. As noted elsewhere in this  
23    opinion, the provisions of Chapter 34 are applicable only  
24    insofar as the "informational requirements of Sections  
25    34.20.030 and 34.20.040" are concerned. The informational  
26    requirements included within these sections may be fulfilled,

1 under MCP 33.79.160, providing the application is sufficient to  
2 meet the "intent of Title 34 requirements and to review the  
3 tentative plat application."

4 In each of the several complaints that follow, there is a  
5 similar requirement for information in 33.79.100. That is, the  
6 tentative plan informational requirements contained in the  
7 subdivision ordinance (MCP Title 34) have similar provisions in  
8 the PUD application provisions contained in Title 33. While  
9 the city did not make its reliance on only Chapter 33 clear, it  
10 appears the city based its review of the preliminary  
11 application on the provisions of Chapter 33. Its review  
12 included the informational requirements contained in MCP  
13 33.79.100, not those contained in MCP 34.20.040.

14 We believe the city's apparent choice is permissible under  
15 the code. That is, providing sufficient information is present  
16 in the preliminary application to meet the requirements of  
17 33.79.100, the fact that there are slightly different  
18 requirements contained in Chapter 34 does not mean the  
19 requirements of Chapter 34 must also be met. It must be  
20 remembered that 33.79.160 provides that informational  
21 requirements in MCP 34.20.030 and 040 may be fulfilled if the  
22 information is sufficient to meet the "intent of Title 34  
23 requirements."

24 If the "intent" of informational requirements in Title 34  
25 is to provide a sufficient basis from which the city may  
26 conclude, that with reasonable certainty the design of this

1 project complies with all code provisions. We believe  
2 33.79.160 is satisfied, and the city may rely on the  
3 informational requirements in 33.79.100. See MCP 33.79.040.  
4 See also Margulis v. City of Portland, 4 Or LUBA 89 (1981) and  
5 Meyer v. City of Portland, 7 Or LUBA 184, aff'd 67 Or App 274,  
6 678 P2d 741 (1984). The city specifically found that this  
7 proposal "is consistent with the provisions of Title 34 \* \* \*"  
8 Record 25. It did so after consideration of several Title 34  
9 code sections. See Record 23 through 25.

10 We conclude this methodology is not unreasonable under the  
11 code, and we find no error as alleged. We will, however,  
12 discuss the remaining claims of error under Title 34.

13 (16) "A tentative plan shall consist of drawings and  
14 supplementary written material adequate to  
provide the following information:

15 "(A) Detailed drawing: \* \* \* The drawing shall  
16 display the following:

17 "(f) Natural features such as rock  
18 outcroppings, marshes, wooded areas  
(exclusive of brush and scrub),  
19 identified fish and wildlife' [sic]  
habitats, etc."  
(MCP 34.20.040[A][2][f].)

20 Petitioners complain the plans do not identify the marshes  
21 which are a significant feature in this area.

22 Respondent replies that the map at 31 and a tree survey  
23 included in the additional exhibits show the wetland areas.

24 See Record 19-20 and Map CCH 5. We find no error.

25 (17) "A tentative plan shall consist of drawings and  
26 supplementary written material adequate to  
provide the following information:

1                   "(A) Detailed drawing: \* \* \* The drawing shall  
2                   display the following:

3                   "(g) Watercourses on the abutting property;  
4                   approximate location of areas subject  
5                   to inundation or storm sewer overflow,  
6                   or all areas covered by water, and the  
7                   location, width and direction of flow  
8                   of all water courses \* \* \*."  
9                   (MCP 34.20.040[A][2][g].)

10                  A map showing the drainage swale is included in the record  
11                  at 343. MCP 33.79.100(f)(b) requires features such as ponds,  
12                  wetlands and watercourses be shown. We find the city complied  
13                  with this requirement. See Record 20, 26-27, 37-40, 52, 99-101  
14                  and 186-193.

15                  (18) "A tentative plan shall consist of drawings and  
16                  supplementary written material adequate to  
17                  provide the following information:

18                  "(A) Detailed drawing: \* \* \* The drawing shall  
19                  display the following:

20                  "(3) (a)   Streets: Location, names,  
21                               right-of-way widths, approximate  
22                               radii of curves, and approximate  
23                               finished center line grades \* \* \*."  
24                               (MCP 34.20.040[A][3][a].)

25                  Petitioners argue that the preliminary drawings fail to  
26                  indicate the radii of curves and the two private roads  
27                  indicated on the plan as Tract A and Tract B.

28                  This information is not required until final development  
29                  plan stage under Code Section 33.79.130(d)(4)(a). What is  
30                  applicable at the preliminary stage is the showing of the  
31                  existing and a proposed traffic circulation system under  
32                  33.79.100(g)(3). The map at Record 343 and discussion at

1 Record 363-367 show this system. We find no error.

2 (19) "A tentative plan shall consist of drawings and  
3 supplementary written material adequate to  
provide the following information:

4 "(A) Detailed drawings: \* \* \* The drawing shall  
5 display the following:

6 "(3) (e) Improvements: \* \* \* Statement of  
7 the major land division  
8 improvements proposed to be made  
9 or installed, including street  
tree planting, and the time such  
improvements are to be made or  
completed."  
(MCP 34.20.040 [A] [3] [f].)

10 Petitioners complain the application is silent as to these  
11 improvements.

12 There is a description of street tree plantings at Record  
13 366. However, 33.79.100 does not call for this information to  
14 be submitted as part of a preliminary development plan. The  
15 allegedly missing information is to be submitted as part of a  
16 final development plan. See 33.79.130(d) (8)

17 (20) "A tentative plan shall consist of drawings and  
18 supplementary written material adequate to  
provide the following information:

19 "(A) Detailed drawing: \* \* \* The drawing shall  
20 display the following:

21 "(3) (f) Water supply: The domestic water  
22 system proposed."  
(MCP 34.20.040 [A] [3] [f].)

23 The petitioners complain the written material states only  
24 an eight inch water main will be provided. There is no other  
25 information given, and petitioners claim error. The Record at  
26 363-371, and additional exhibits 1-12 contain information on

1 services. We note, however, under 33.79.160, the informational  
2 requirements for a combined PUD/Subdivision preliminary plan do  
3 not include provisions requiring detailed drawings of the water  
4 supply system. The water supply information is required as  
5 part of final approval under 33.79.130(d) (B) (5).

6 We therefore find no error as alleged.

7 (21) "A tentative plan shall consist of drawings and  
8 supplementary written material adequate to  
9 provide the following information:

10 "(A) Detailed drawing: \* \* \* The drawing shall  
11 display the following:

12 (3) (h) Other utilities: The approximate  
13 location and identity of other  
14 utilities including the locations  
15 of street lighting fixtures."  
16 (MCP 34.20.040[A][3][h].)

17 Petitioners complain the applicant's drawings include no  
18 information about the identity of utilities or the location of  
19 street light fixtures. These issues are required at final plan  
20 stage by MCP 33.79.130(d) (8). We find no error.

21 (22) "A tentative plan shall consist of drawings and  
22 supplementary written material adequate to \* \* \*  
23 display the following:

24 "(3) (j) (ii) Inventory means of flood  
25 control and easements or deeds  
26 for drainage of land, including  
projects for proposed  
watercourses and changes to  
existing streams; \* \* \*."  
(MCP 34.20.040[A][3][j][ii].)

27 Petitioners complain the applicant's material includes no  
28 information about flood control, drainage easements or deeds;  
29 and, in addition, the plan does not describe how the alteration  
30

1 of an watercourse and wetland on the property will be  
2 accomplished.

3 The information about watercourses contained in this  
4 objection and about flood elevation discussed under Objection  
5 No. 23 do not have an equivalent requirement in 33.79.100 or  
6 33.79.130. However, 33.79.100(f)(6) and (7), requiring  
7 identification of waterfeatures and areas subject to inundation  
8 is sufficient, in our view, to adequately determine water  
9 hazards whether by flood or other water hazards. We therefore  
10 do not find error as alleged by petitioners.

11 Also, detailed information on this issue is to be included  
12 at the final development stage. Section 33.79.130(b)(3) and  
13 (f)(2), (4). We find no error.

14 (23) "A tentative plan shall consist of drawings and  
15 supplementary written material adequate to  
provide the following information:

16 "(3)(j)(v) Identify base flood elevation data  
17 if the Subdivision is greater than  
18 10 lots or 1.5 acres, whichever is  
lesser."  
(MCP 34.20.040[A][3][j][v].)

19 Once again, petitioners complain about base flood  
20 elevation, and again we reply that this information need not be  
21 included at this point, but is to be included during the later  
22 final plan approval stage. Section 33.79.160 and 34.90.020.

23 TENTH ASSIGNMENT OF ERROR

24 "The City improperly construed applicable law, failed  
25 to follow applicable procedures in a manner that  
26 prejudiced the substantial rights of the Petitioners,  
and made a decision not supported by substantial  
evidence in the whole record by delegating complete

1 control over discretionary decisions to City staff  
2 without either adequate standards to guide staff  
3 decisions or accurate and logical factual  
4 determination which to guide decision."

5 Petitioners allege the city improperly delegated certain  
6 responsibilities to staff members. The delegation is allegedly  
7 inadequate because information is lacking in the original  
8 application and because staff is being asked to make  
9 discretionary decisions pursuant to the delegation without  
10 adequate guidelines.

11 Trees

12 Petitioners say the city's duty is to encourage the  
13 preservation of natural features. The city approved this  
14 application, however, without placing restrictions on where the  
15 dwellings might be placed. In doing so, the city did not  
16 protect trees, according to petitioners. The decision on what  
17 trees are to be preserved is, therefore, improperly delegated  
18 to staff, according to petitioners.

19 We disagree. The city's condition regarding trees simply  
20 states as follows:

21 "K. The applicant shall take an inventory of trees  
22 and develop a tree preservation plan, to be  
23 reviewed and approved by the City Forester's  
24 Office, prior to issuance of city permits. With  
25 the exception of the building footprint, the plan  
26 will include a specific commitment to retain all  
existing healthy trees at least 6 inches in  
diameter and 20 feet in height which have been  
determined to be significant to the character of  
both the development and surrounding areas.  
Conditions, covenants and restrictions (C, C and  
R's) shall be submitted to the City Attorney for  
review and approval and the plan shall be  
recorded with the deeds of each lot. The C, C



1 and R's shall require all development on the site  
2 to comply with the tree preservation plan  
approved by the City Forester."

3 MCP 33.79.130(e) addresses landscaping. The landscaping  
4 provisions require the final plan to show areas remaining in  
5 natural vegetation, the kinds of landscaping to be used and  
6 other information relevant to landscaping plans. The submittal  
7 under MCP 33.79.130 is approved following the city's  
8 administrative process. There is no requirement, other than a  
9 detailed explanation of any exemption from the solar envelope  
10 requirements under MCP 33.79.100(k), for landscaping in the  
11 preliminary plan phase. That is, discretionary approval does  
12 not appear, under the city's scheme, to include tree and  
13 landscaping issues. Such matters are left for administrative  
14 approval during the final plan stage.

15 Because of this scheme, the rather subjective standards to  
16 be applied for the tree preservation plan in Condition "K"  
17 above appear to be within the limits established under the  
18 code. We therefore do not find error as alleged.

19 Wetland

20 Petitioners again complain that wetlands exist within the  
21 boundaries of the planned unit development, and preservation of  
22 wetlands has been improperly given to the control of the city  
23 engineer.

24 Condition B of the city's decision provides as follows:

25 "B. A drainage reserve, 15 feet to either side of the  
26 centerline of natural watercourses shall be shown  
on the final plat as required by the City

1 Engineer. The following statement shall appear  
2 on the final plat: "The storm drainage reserve  
3 shall remain in natural topographic condition.  
4 No private structures, culverts, excavations or  
5 fills shall be constructed within the drainage  
6 reserve unless authorized by the City Engineer."

7 Aside from the fact that the city found that no wetland  
8 existed on the property, as defined in the city's regulatory  
9 scheme, we do not find the city to have improperly delegated  
10 responsibility to the City Engineer. The city found compliance  
11 with its code provisions regarding water courses and wetlands,  
12 and the delegation to the City Engineer is one of final detail  
13 or engineering approval. Such delegation is appropriate,  
14 because it does not grant discretionary authority over approval  
15 criteria to staff. See, Margulis, supra and Meyer, supra.

#### 16 Storm Drainage

17 Petitioners argue that the city failed to adopt standards  
18 to protect the drainage reserve. In so doing, it ignored the  
19 requirement that a setback be maintained from the top of the  
20 bank. See Code Section 34.60.020(b) and 33.79.070(g)(5).  
21 According to petitioners, condition A, then becomes an improper  
22 delegation of city approval authority.

23 Condition A provides:

24 "A. Sanitary and storm drainage facilities, public  
25 and private, must be designed according to the  
26 specifications of the Bureau of Environmental  
Services and be approved by the City Engineer  
prior to final plat approval."

We note that 33.79.100(g)(5) simply requires a conceptual

1 plan for all necessary services. 33.79.100 is, of course, the  
2 section controlling the requirements for a preliminary  
3 development plan. The specifics of the drainage control  
4 measures are left for administrative approval under MCP  
5 33.79.130. We conclude, therefore, that the code specifically  
6 allows staff to pass on the adequacy of such measures. The  
7 condition, then, does not delegate away a city council finding,  
8 it simply echos the code scheme for final drainage control  
9 measure approval.

#### 10 Street Safety

11 Petitioners echo their argument in the first assignment of  
12 error that the city failed to properly consider applicable  
13 standards in determining what stream improvements were  
14 necessary. Petitioners' quarrel with the city's delegation to  
15 staff to approve access from the development to S.W. Hamilton  
16 Street. In short, petitioners argue that because the city  
17 failed to apply the correct standard regarding access, the  
18 delegation is improper.

19 City staff reported to the city that Hamilton Street is  
20 operating at less than design capacity, and the proposed  
21 intersection meets site distance safety standards. See Record  
22 327. The specifics of how access is to be provided and  
23 precisely where is not a subject for preliminary plan  
24 application approval. Rather, the final development plan  
25 application is required to include detail regarding streets.  
26 See 33.79.130(d)(4). We therefore find no error.

1           We note that the complaints raised by petitioners are  
2 critical to matters of public safety and adequacy of public  
3 services. The city's code does not, apparently, provide for  
4 any review and comment by the public at the time the final  
5 development plan is submitted. That is, there is no notice  
6 published that the final plan has been submitted, and no  
7 apparent opportunity for hearing. There is an opportunity to  
8 appeal a decision regarding a final plan approval, but the  
9 appeal is only available to the applicant. See Section  
10 33.79.130(d). We express no opinion on whether the review  
11 options are available to petitioners at that time.

12           The city's decision is affirmed.

FOOTNOTES

1  
2  
3 1

The city found Hamilton Street to be operating below design capacity and the new PUD will not cause traffic to exceed design capacity. Record 18.

6 2

See MCP 33.79.100(d)(1) requiring the preliminary site plan to show building location.

8 3

9 Submittal of the final development plan under MCP 33.79.130  
10 constitutes submission of a tentative subdivision plan under  
MCP 34.90.020. Approval of a final development plan under MCP  
11 33.79.140 constitutes approval of the tentative subdivision  
plan under MCP 34.90.020. We note, however, that under MCP  
12 33.79.160, final plat approval is to be granted with final  
development plan approval "if all appropriate Title 34  
requirements for final plats are met."

13  
14 It appears, then, that providing the applicant submits the  
information for final development plan approval for the PUD  
15 under MCP 33.79.130, the applicant need not be concerned with  
the more detailed informational requirements required by Title  
16 34. See our discussion under the Second Assignment of Error,  
supra.

17 Because structure orientation is the subject for final  
development plan consideration, and is a matter for  
18 administrative review (to determine whether, indeed, the  
structures are placed on the property in accordance with  
19 specific distance requirements of the code, all that is  
required of the applicant at this stage of the procedure is  
20 enough information so that the hearings officer and city  
council may exercise their discretionary authority to reduce  
21 the specific distance requirements found in MCP 33.79.070(B).  
As noted in our discussion, the city did reduce these distance  
22 requirements under the power granted it in MCP 33.79.070(i).