

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

3  
4           MARILYN LONG,                                    )  
5    )  
6                    Petitioner,                            )           LUBA No. 93-109  
7    )  
8            vs.    )           FINAL OPINION  
9    )           AND ORDER  
10           MARION COUNTY,                                )  
11    )  
12                    Respondent.                            )  
13    )

14  
15           Appeal from Marion County.

16  
17           Maurice L. Russell, II, Salem, filed the petition for  
18 review and argued on behalf of petitioner. With him on the  
19 brief were Churchill, Leonard, Brown, Lincoln, Lodine and  
20 Hendrie.

21  
22           Jane Ellen Stonecipher, Assistant Marion County Legal  
23 Counsel, Salem, filed a response brief and argued on behalf  
24 of respondent.

25  
26           KELLINGTON, Chief Referee; HOLSTUN, Referee,  
27 participated in the decision.

28  
29                    AFFIRMED                                   10/22/93

30  
31           You are entitled to judicial review of this Order.  
32 Judicial review is governed by the provisions of ORS  
33 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county order approving an  
4 application to partition the subject property.

5 **FACTS**

6 The subject property is zoned Single Family Residential  
7 (RS). The subject property consists of a 79,000 square foot  
8 portion of a PUD established in 1969. The subject property  
9 is surrounded by developed residential lots. The proposal  
10 is to partition the subject property into three lots  
11 consisting of 46,500, 17,500 and 15,000 square feet  
12 respectively.

13 In 1986, the county foreclosed on the subject property  
14 to recover delinquent real property taxes. In 1990, the  
15 county sent questionnaires to property owners adjacent to  
16 the subject property to determine whether any of them were  
17 interested in purchasing the subject property. The record  
18 does not disclose whether any of the adjacent property  
19 owners responded to the questionnaire. In 1991, the subject  
20 property was sold to the applicants below.

21 The planning department approved the proposal and  
22 petitioner appealed to the hearings officer. The hearings  
23 officer issued a decision on June 16, 1992, dismissing the  
24 application on the basis that the subject property was PUD  
25 open space and that abutting PUD lots have a deeded easement  
26 of quiet enjoyment in the subject property. The hearings

1 officer concluded the county tax foreclosure sale did not  
2 extinguish these easements and that the proposed partition  
3 could not be approved. Record 156-159. The hearing  
4 officer's decision was appealed to the county board of  
5 commissioners. Record 150-54. The board of commissioners  
6 remanded the matter to the hearings officer for a  
7 determination on the merits of the application. Record 146-  
8 47. On remand, a different hearings officer reconsidered  
9 the initial decision and approved the application.  
10 Record 65-74. Petitioner appealed the hearings officer's  
11 decision to the board of commissioners. The board of  
12 commissioners affirmed the hearings officer, and this appeal  
13 followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 "The Hearings Officer did not correctly apply the  
16 Coordination provisions of the Comprehensive  
17 Plan."

18 Under this assignment of error, petitioner includes  
19 three separate arguments, which are discussed separately  
20 below.

21 **A. Coordination**

22 The Marion County Comprehensive Plan (plan) requires  
23 coordination between the county and the City of Salem for  
24 management of property within the county's municipal  
25 boundaries and the city's urban growth boundary. The  
26 subject property is subject to that coordination obligation.

27 Petitioner contends the challenged decision is

1 inconsistent with the county's coordination obligation  
2 because the city objected to the proposal. However, as  
3 respondent points out, the county gave the city an  
4 opportunity to comment on the proposal, and considered the  
5 city's comments. The challenged decision summarizes the  
6 city's comments as follows:

7 "The City of Salem Planning Department commented  
8 that:

9 "This looks incompatible with the  
10 surroundings. The abutting property  
11 owners purchased [their PUD lots] with  
12 the expectation of abutting open space,  
13 not access way and residential lot. The  
14 land would be more appropriately deeded  
15 to each abutting parcel.'" Record 67.

16 Under the heading of "Coordination," the challenged decision  
17 concludes as follows:

18 "\* \* \* There was no indication that the  
19 application was inconsistent with the [plan]  
20 designation and development policies which are  
21 relevant to this property. Since the subject  
22 property is within the Urban Growth Boundary of  
23 the [city], coordination between Marion County and  
24 the [city] for the properties' [sic] development  
25 is consistent with the [plan]. However, there is  
26 no basis for a finding that the application is  
27 inconsistent with the [plan] or development  
28 policies of either the [city] or Marion County."  
29 Record 71.

30 There is no general legal requirement that satisfaction  
31 of coordination obligations requires a local government to  
32 accede to the wishes of an affected, but nondeciding local  
33 government. It is adequate that the county sought and  
34 considered the city's comments concerning the proposal. See

1 Tektronix v. City of Beaverton, 18 Or LUBA 473, 484-85  
2 (1989).

3 This subassignment of error is denied.

4 **B. Cost**

5 Under this subassignment of error, petitioner argues:

6 "The [c]osts of extending services to the property  
7 virtually equaled, if they did not exceed, the  
8 value of the lots once developed." Petition for  
9 Review 9.

10 Petitioner cites no standard requiring the county to  
11 determine that the cost of extending services to the  
12 property will be less than the value of the lots to be  
13 developed, and we are aware of none. This subassignment  
14 provides no basis for reversal or remand of the challenged  
15 decision.

16 This subassignment is denied.

17 **C. Street Standards**

18 Petitioner argues:

19 "The street development standards applied were  
20 those of Marion County, and were inconsistent with  
21 the standards required by the City of Salem for  
22 projects [including] 1-4 lots, which require a  
23 25-foot roadway with 20 feet [of the roadway]  
24 paved. Moreover, given the shape of the parcel,  
25 the City's standards could not be met, because the  
26 parcel was only 20 feet wide at its minimum  
27 point." Petition for Review 9.

28 We are aware of no standard requiring the county to  
29 apply the city's street development standards to the  
30 proposal, and petitioner cites no such standard. This  
31 subassignment provides no basis for reversal or remand of

1 the challenged decision.

2 The first assignment of error is denied.

3 **SECOND ASSIGNMENT OF ERROR**

4 "The Standards applied by the Hearings Officer  
5 violate the Citizen Involvement requirements of  
6 the Comprehensive Plan."

7 **THIRD ASSIGNMENT OF ERROR**

8 "There is no substantial evidence to support the  
9 Hearin[g] Officer's conclusion that the  
10 application 'is in accord with \* \* \* all relevant  
11 ordinances \* \* \*.'"

12 Petitioner argues the challenged decision is  
13 inconsistent with the following plan provision concerning  
14 citizen involvement:

15 "The general public shall be afforded the  
16 opportunity to be involved in all phases of the  
17 planning process as provided for in the Citizen  
18 Involvement Program adopted by the Board of  
19 [County] Commissioners." Plan Policy 6.

20 Petitioner contends that simply conducting a public  
21 proceeding on the application for partition is not enough.

22 Petitioner argues:

23 "Once that hurdle is past, however, there is no  
24 public hearing available for considering whether  
25 any proposed use of the property, although listed  
26 as an allowed use in the Zone, may \* \* \* be  
27 unlawful. \* \* \* There is no public hearing  
28 before building permits [are] issued. Rather the  
29 public is left with recourse to the courts to  
30 prevent a development that was [allegedly]  
31 unlawful in the first place. \* \* \*" Petition for  
32 Review 12.

33 Nothing in the county's plan or anything else of which  
34 we are aware requires what petitioner asserts. Here, it is

1 undisputed that a public hearing was provided on the  
2 partition application before the county. Opportunities for  
3 the presentation of evidence and argument and for local  
4 appeals were provided. The above quoted plan policy  
5 requires nothing more. See also ORS 215.416; ORS 215.422.  
6 As we understand it, petitioner's real concern lies with her  
7 allegation that the proposed development violates private  
8 covenants, conditions and restrictions (CC&R's) covering the  
9 PUD. However, that proposed development may be inconsistent  
10 with CC&R's, in and of itself, provides no basis for  
11 reversal or remand of a challenged land use decision. See  
12 Saylor v. City of Durham, 63 Or App 327, 331, 663 P2d 803  
13 (1983); Brydon v. City of Portland, 2 Or LUBA 353, 356-57  
14 (1981). Similarly, that the record may lack substantial  
15 evidence to establish compliance with CC&R's provides no  
16 basis for reversal or remand of the challenged decision.

17 One further point merits comment. Under the third  
18 assignment of error, petitioner alleges the county PUD  
19 ordinance in effect at the time the PUD was established  
20 (Ordinance No. 217), requires that PUD's maintain open  
21 space. Ordinance 217 provides:

22 "The common open space shall be maintained by a  
23 Home Owners Association \* \* \*.

24 "Proportionate Open Space. Any final plat which  
25 is a portion only of the entire development for  
26 which preliminary approval was given, shall  
27 contain not less than 90% of the proportionate  
28 amount of the common area, based on the total  
29 common area when taken with any previous open area

1 in the proposed development." Record 52.

2 We agree with the county that the above quoted portion  
3 of Ordinance 217 does not require that PUD open space remain  
4 as such. Rather, it requires a home owner's association  
5 maintain any open space provided in connection with the PUD.  
6 We are cited to nothing requiring that the subject property  
7 remain as open space. Therefore, to the extent the proposal  
8 removes PUD open space that, of itself, provides no basis  
9 for reversal or remand of the challenged decision.<sup>1</sup>

10 The second and third assignments of error are denied.

11 **FOURTH ASSIGNMENT OF ERROR**

12 "The Hearings Officer erred in failing to follow  
13 the original order dismissing the application,  
14 since the application contained a false  
15 certificate that the proposal did not violate any  
16 restrictions on development of the property."

17 Petitioner argues the following statement in the  
18 partition application is incorrect:

19 "The above request does not violate any deed  
20 restrictions that may be attached to or be imposed  
21 upon the subject property." Record 252.

22 However, petitioner cites no standard requiring  
23 such a statement be included with the application or  
24 that such a statement be a correct summary of the legal  
25 status of property subject to a development  
26 application, and we are aware of none.

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<sup>1</sup>We express no position concerning whether the proposal may be inconsistent with any homeowner's association articles or CC&R's.

1           This Board may reverse or remand a challenged land  
2 use decision if it is inconsistent with applicable law.  
3 ORS 197.835(7)(a)(D).     Because petitioner cites no  
4 applicable law violated by the above quoted statement,  
5 this assignment of error provides no basis for reversal  
6 or remand of the challenged decision.

7           The fourth assignment of error is denied.

8           The county's decision is affirmed.