

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

4 DAN PESZNECKER and)
5 MICHELE PESZNECKER,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13 Respondent.)

LUBA No. 93-027
FINAL OPINION
AND ORDER

14
15
16 Appeal from City of Portland.

17
18 Jon F. Strock, Gladstone, filed the petition for review
19 and argued on behalf of petitioners.

20
21 Ruth Spetter, Senior Deputy City Attorney, Portland,
22 filed the response brief and argued on behalf of respondent.

23
24 SHERTON, Chief Referee; HOLSTUN, Referee, participated
25 in the decision.

26
27 AFFIRMED 06/15/93

28
29 You are entitled to judicial review of this Order.
30 Judicial review is governed by the provisions of ORS
31 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city hearings officer decision
4 denying their application for the establishment of a
5 nonconforming use.

6 **FACTS**

7 From sometime in the 1950's through approximately 1973,
8 the subject property was used by Pesznecker Bros., Inc. for
9 their steel fabrication business. Maxi-Lube, a diesel
10 repair business, used the subject property in 1976. From
11 1977 through 1979, the subject property was used by ASI, a
12 motorcycle parts distributor. From 1979 through 1982,
13 Pesznecker Bros., Inc. returned to the property. From 1982
14 through March 1992, the subject property was occupied by
15 Mid-Jet Manufacturing, a boat repair and manufacturing use.
16 Sometime after March 1992, a motorcycle repair business
17 began operation on the property.

18 The subject property was originally under the
19 jurisdiction of Multnomah County. In 1960, the county
20 planning department recognized the existence of a sheet
21 metal fabrication shop on the site. In 1976, at a time when
22 the subject property was zoned Single Family Residential
23 (R7), the county planning commission recognized Maxi-Lube,
24 the diesel repair business, as a legal nonconforming use.
25 On July 26, 1979, Multnomah County zoned the subject
26 property Urban Low-Density Residential (LR-7). On

1 November 6, 1986, the property was annexed by the City of
2 Portland, but county LR-7 zoning was retained. On March 13,
3 1992, the city rezoned the property Single-Family
4 Residential (R5). After the 1976 county decision
5 recognizing Maxi-Lube as a nonconforming use, no further
6 county or city decision was made recognizing any subsequent
7 use of the property as a nonconforming use.

8 The subject property was originally owned by Pesznecker
9 Bros., Inc. In late 1987, Pesznecker Bros., Inc., filed for
10 bankruptcy and offered the subject property for sale to
11 petitioners, the owners of Mid-Jet Manufacturing, the boat
12 repair and manufacturing business that then occupied the
13 property. On November 9, 1987, petitioner Michelle
14 Pesznecker telephoned the city and spoke to a zoning
15 inspector with the city Bureau of Buildings. The substance
16 of that conversation provides the basis for petitioners'
17 estoppel claim, discussed infra. On November 14, 1987,
18 petitioners purchased the subject property. In March 1992,
19 Mid-Jet Manufacturing was sold and moved elsewhere.
20 Record 60. On September 4, 1992, petitioners filed an
21 application to establish a nonconforming use of the subject
22 property for "metal fabrication (boat building) * * * along
23 with/or vehicle repair * * *." Record 47.

24 On January 20, 1993, the city hearings officer denied
25 petitioners' application. The basis for the hearings
26 officer's decision is Multnomah County Code

1 (MCC) 18.15.8805, which provides:

2 "(A) A nonconforming structure or use may not be
3 changed or altered in any manner except as
4 provided here, unless such change or
5 alteration more nearly conforms with the
6 regulations of the district in which it is
7 located.

8 "* * * * *

9 "(C) If a nonconforming structure or use is
10 abandoned or discontinued for any reason for
11 more than one year, it shall not be
12 re-established unless specifically approved
13 by the Hearings Officer.

14 "* * * * *"

15 The hearings officer concluded that because the Maxi-Lube
16 use of the property, recognized as a nonconforming use by
17 the county planning commission, was discontinued after 1976,
18 and there is no evidence that any subsequent use of the
19 subject property received approval under MCC 18.15.8805,
20 whatever nonconforming use rights existed for the subject
21 property have expired and cannot be reestablished. This
22 appeal followed.

23 **DECISION**

24 Petitioners do not challenge the above described
25 conclusion of the hearings officer in this appeal and, in
26 fact, concede that there is no legal nonconforming use of
27 the property under the applicable code provisions. However,
28 petitioners contend the city should be required to approve
29 their application based on the doctrine of equitable
30 estoppel.

1 In Crone v. Clackamas County, 21 Or LUBA 102, 108
2 (1991), we quoted the following description by the Oregon
3 Supreme Court of the elements of equitable estoppel:

4 "[T]here must (1) be a false representation;
5 (2) it must be made with knowledge of the facts;
6 (3) the other party must have been ignorant of the
7 truth; (4) it must have been made with the
8 intention that it should be acted upon by the
9 other party; (5) the other party must have been
10 induced to act upon it." Coos County v. State of
11 Oregon, 303 Or 173, 180-81, 743 P2d 1348 (1987)
12 (quoting from Oregon v. Portland General Electric
13 Co., 52 Or 502, 528, 95 P 722 (1908)).

14 Petitioners contend this case satisfies these elements.
15 Petitioners argue they had no knowledge of what "grandfather
16 rights" the subject property might have when petitioner
17 Michelle Pesznecker (hereafter petitioner) telephoned the
18 city for information on November 9, 1987. Petitioners
19 maintain petitioner told the zoning inspector with whom she
20 spoke exactly why she needed this information, i.e. to
21 assist in determining whether she and her husband should
22 purchase the subject property. According to petitioners,
23 petitioner described to the zoning inspector the use they
24 were making of the property and "gave an account of the
25 history of its use." Petition for Review 5. Petitioner
26 testified the zoning inspector told her the property was
27 "grandfathered in for use as 'light commercial,'" and
28 petitioners had a "'green light' to continue [their boat
29 building] operations." Record 60. Petitioner further
30 testified the zoning inspector told her she did not need

1 anything in writing because it was "clear" there were "no
2 problems." Id. Petitioners argued they relied on these
3 representations in purchasing the subject property.

4 Whether this Board has authority to reverse a local
5 government decision denying land use approval and order the
6 local government to grant land use approval, based on the
7 doctrine of equitable estoppel, is unclear. See Lemke v.
8 Lane County, 3 Or LUBA 11, 15 n 2 (1981). However, we do
9 not decide this issue here because, in any event,
10 petitioners have failed to establish that the city zoning
11 inspector made a false representation, with knowledge of the
12 relevant facts.

13 We have reviewed the evidence relied on by petitioners
14 in this regard. Record 59-60; Petition for Review App-23 to
15 App-25 (Transcript 13-15). The only evidence relating to
16 what facts were known by the zoning inspector when he made
17 the alleged misrepresentation is the following statement by
18 petitioner regarding the information she gave the zoning
19 inspector:

20 " * * * I explained what our situation was, that we
21 were building aluminum boats * * * in that
22 building, gave him the property address * * * and
23 other information, * * * that we'd been in the
24 building since 1982, and things of that nature.
25 * * *" Petition for Review App-24.¹

¹Petitioner's affidavit (Record 59-60) does not establish what facts were within the knowledge of the zoning inspector, but rather simply relates the statements made to petitioner by the zoning inspector.

1 This evidence is insufficient to establish that the zoning
2 inspector's alleged misrepresentation was made with
3 knowledge of the material facts that both petitioners' use
4 of the subject property, and the other uses made of the
5 subject property after 1976, occurred without required
6 county and city approvals and were, in fact, illegal uses.

7 The city's decision is affirmed.