BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES MACFARLANE
and DIANA MACFARLANE,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2014-036

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

William C. Cox, Portland, filed the petition for review and argued on behalf of petitioners.

Nathan K. Boderman, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent. With him on the brief was Stephen L. Madkour, County Counsel.

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

AFFIRMED 08/05/2014

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's interpretation of the county zoning ordinance related to petitioners' request to treat two existing dwellings as a single dwelling.

FACTS

The subject property is a 10-acre parcel zoned Timber District (TBR), created by partition in 1975. The TBR zone is forest zone that, as relevant here, allows only one single family dwelling per parcel. The subject property currently includes two structures used for residential purposes, located approximately 45 feet apart from each other.

Petitioners purchased the property in 1980. The two residential structures (House #1 and House #2) were on the property at the time of purchase. The previous owners constructed House #1 in 1975, pursuant to county building permit issued in April 1975. At that time the property was unzoned, but effective July 7, 1975, county regulations required an Unzoned Area Development Permit in order to establish more than one dwelling on an unzoned lot or parcel.

The date that House #2 was constructed is disputed. In its decision, the county concluded that House #2 was constructed in 1976 as a non-residential accessory building. The county found that in 1977, the previous owners added kitchen facilities and a bathroom to the accessory building, converting it to residential use, but without obtaining a building permit or Unzoned Area Development Permit from the county. County records include no building permit or other permit approvals for House #2. In 1979, forest zoning was applied that effectively prohibited establishment of a second dwelling on the

property. In November, 2010, the county issued code violation citations to petitioners, alleging that multiple dwellings existed on the property without prior land use approval. The county ordered petitioners to either remove House #2 or convert it to a non-residential use.

In June, 2012, petitioners filed a formal request with the county to interpret the Zoning and Development Ordinance (ZDO), requesting that the county either (1) determine that House #2 is a lawfully established dwelling under one or more theories that were advanced by petitioners, or (2) allow House #1 to be "altered" by connecting the two dwellings with a breezeway, with the intent of converting House #1 into a single dwelling with two "dwelling units."

The county planning director concluded that House #2 was not a lawfully established dwelling under any of the theories advanced by petitioners. The planning director also rejected petitioners' alternative request to "alter" House #1 to convert the two structures into a single dwelling with two "dwelling units."

Petitioners appealed the planning director's findings to the hearings officer. In December, 2013, the hearings officer affirmed the planning director's decision. The board of county commissioners declined review, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

The arguments under the first assignment of error are difficult to follow. Petitioners appear to challenge the county's conclusion that House #2 was not "lawfully established" because it was constructed or converted to a dwelling after July 7, 1975. That date is significant, because it is the date that the county adopted regulations requiring an Unzoned Area Development Permit in order

to establish more than one dwelling on an unzoned lot or parcel. Petitioners contend that at some point the burden of proof shifted to the county to prove that House #2 had not been constructed prior to July 7, 1975, and that the county did not meet that burden, because county records do not include any building permit or other approval for House #2. Petitioners argue that the county's records are "incomplete," which places an insurmountable burden on petitioners to prove that House #2 was built before July 7, 1975. In addition, petitioners appear to suggest that the record includes sufficient evidence to conclude that House #2 was built before July 7, 1975. However, petitioners do not provide record citations to any such evidence.

As the findings explain, a 1996 flood destroyed some county records, but staff testified that the flood did not destroy older building permit records that would have included a permit for House #2, if one had been issued, because those older building permit records were located above the flooding. The hearings officer noted on this point that county permit records included the April 1975 building permit for House #1, which supports the finding that county building permit records are complete through that period, and that the absence of a building permit for House #2 most likely reflects the fact that no building permit was sought or obtained. The hearings officer considered the testimony that petitioners submitted on this point, and concluded that House #2 was most likely constructed in 1976 without a building permit and converted to a residence most likely in 1977, without obtaining an Unzoned Area Development Permit. That conclusion is supported by substantial evidence in the record, and petitioners have not demonstrated otherwise.

Finally, we agree with the county that petitioners have not established that at any point the burden of proof shifted to the county to demonstrate that House #2 was lawfully established.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ZDO 406.04(D) authorizes the "alteration" of a lawfully established dwelling in the TBR zone that has intact exterior walls, roof, indoor plumbing, etc. Petitioners' second assignment of error contends that the hearings officer misconstrued ZDO 406.04(D) in rejecting petitioners' argument that House #1 could be "altered" to connect to House #2, with the effect of creating one single family dwelling with two "dwelling units," which petitioners contend is a permitted use in the TBR zone.

The basis for petitioners' argument is the general code definition of "dwelling" in ZDO 202, which defines "dwelling" in relevant part as "[a] building, or portion thereof, which contains one or more dwelling units." Petitioners contend that if the two houses are connected they will constitute a single "dwelling" with "one or more dwelling units," as defined at ZDO 202, and therefore the altered dwelling will comply with the TBR zone provisions that limit residential development to one single family "dwelling."

The problem with petitioners' reliance on the general code definition of "dwelling" is that a more specific definition of "dwelling" applies in the TBR zone. The term "dwelling," as used throughout the section 406 governing the TBR zone, is defined in ZDO 406.03(E): "Unless otherwise provided in Section 406, a dwelling is a *detached single-family dwelling* or a manufactured dwelling." ZDO 406.03(E). (Emphasis added.) In turn, ZDO 202 defines "detached single-family dwelling" as follows:

> "DWELLING, DETACHED SINGLE-FAMILY: A building, or portion thereof, that contains only *one dwelling unit* and is detached from any other dwelling, except where otherwise permitted for an accessory dwelling unit. A manufactured dwelling or residential trailer is not a detached single-family dwelling." ZDO 202. (Emphasis added.)

Thus, for purposes of ZDO 406.04(D) and residential uses in the TBR zone, a "dwelling" is a building that contains only one dwelling unit. The general code definition of "dwelling" that petitioners rely on serves other code purposes, and is inapplicable here. The hearings officer correctly rejected petitioners' argument that ZDO 406.04(D) authorizes the two houses to be connected to create a single "dwelling" with two "dwelling units."

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners argue that the doctrine of equitable estoppel should preclude the county from declaring that petitioners have violated zoning regulations. Petitioners contend that the county's "silence" concerning the unlawfulness of House #2 and the county's failure to enforce the code or inform petitioners of the code violation over the 35 years since petitioners bought the subject property means that the county is estopped from now enforcing the code.

We have questioned on a number of occasions whether we have statutory authority to apply equitable principles in reviewing a land use decision on appeal. *Lamar Outdoor Advertising Co. v. City of Tigard* __ Or LUBA __ (LUBA Nos. 2013-085/090, June 4, 2014). *See also Chaves v. Jackson County*, 56 Or LUBA 643, 645 (2008); *Heidgerken v. Marion County*, 35 Or LUBA 313, 323 (1998); *Mazeski v. Wasco County*, 30 Or LUBA 442, 446 *n* 4 (1995); *Pesznecker v. City of Portland*, 25 Or LUBA 463, 466 (1993); *Lemke v. Lane*

County, 3 Or LUBA 11, 15, *n* 2 (1981). We have never had to resolve that question, because in none of the many cases where a party has invoked equitable estoppel or other equitable doctrines have the elements of the doctrines been met. That is certainly the case here. Petitioner does not even address the elements of estoppel, much less attempt to demonstrate that all or even one of those elements are met.[1]

Over the many years that we have questioned our authority to reverse or remand a land use decision based on equitable doctrines, no party has advanced a remotely convincing argument that LUBA has that authority. LUBA is an administrative agency, part of the executive branch, and entirely a creature of statute. Our review authority is prescribed, and limited, by those statutes, particularly the scope of review set out in ORS 197.835. With the possible exception of ORS 197.805, nothing in ORS 197.805 to 197.845, the statutes governing LUBA, suggests that LUBA has authority to reverse or remand a decision based on equitable doctrines that, traditionally, only Courts have the authority to apply. However, ORS 197.805 merely directs that LUBA ensure that its decisions are "made consistently with sound principles governing judicial review." We believe that if the legislature wished that LUBA apply

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[1] In *Lamar Outdoor Advertising*, we stated:

> "The elements of estoppel were set out in *Coos County v. State of Oregon*, 303 Or 173, 734 P2d 1348 (1987): ['']There must (1) be a false representation; (2) it must be made with knowledge of the facts; (3) the other party must have been ignorant of the truth; (4) it must have been made with the intention that it should be acted upon by the other party; and (5) the other party must have been induced to act upon it.['] *Id*. at 180-81 (quoting *Oregon v. Portland Gen. Elec. Co.*, 52 Or 502, 528, 95 P 722 (1908))."

equitable principles to decide cases differently than required by applicable land use laws, it would have said so more directly. And we believe the legislature would have said so in ORS 197.835, which sets out LUBA's scope of review.

Perhaps the present case is as good as any to determine that LUBA will no longer entertain, even hypothetically, an argument that LUBA should reverse or remand a decision based on equitable principles, unless the proponent first provides a sufficient basis to conclude that the legislature granted LUBA that authority. Absent such a demonstration, LUBA will not consider any argument for reversal or remand based on equitable principles.

The third assignment of error is denied.

The county's decision is affirmed.