BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

EVELYN CRONE,	)	
	)	
Petitioner,	)	
	)	LUBA No. 90-166
vs.	)	
	)	FINAL OPINION
CLACKAMAS COUNTY,	)	AND ORDER
	)	
Respondent.	)	

Appeal from Clackamas County.

Vern Richards, Sandy, filed the petition for review and argued on behalf of petitioner.

Gloria Gardiner, Oregon City, filed the response brief and argued on behalf of respondent.

KELLINGTON, Chief Referee; SHERTON, Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 04/10/91

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County hearings officer denying her application for a legal lot of record determination.

FACTS

This appeal concerns the legal status of two tax lots, tax lots 200 and 400. Tax lots 200 and 400 are three acres and one acre in size, respectively. Both tax lots are currently zoned Rural Residential Farm Forest (RRFF-5).[1] The parent parcel from which tax lots 200 and 400 were created consisted of five acres.[2]

Petitioner[3] purchased the parent parcel in 1971 and shortly thereafter placed two homes on it.[4] In 1973, petitioner divided the parent parcel into two parcels, reducing the parent parcel to four acres, and creating a new

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[1]The RRFF-5 zone has a minimum lot size of five acres.

[2]There is no dispute that from 1971 through at least 1975, these five acres were zoned Rural Agriculture (RA-1), and that this zoning district permitted parcel sizes of one acre and greater. We are not advised when the RRFF-5 zoning was imposed.

[3]In relating the facts relevant to this appeal we refer to the petitioner for simplicity. However, the material events involved both petitioner and her deceased husband.

[4]Petitioner purchased the homes from the state and moved them to the parent parcel.

one acre parcel -- tax lot 300. Petitioner sold tax lot 300, including one of the two homes, to a third person.[5]

On October 26, 1974, the county adopted "The Clackamas County Subdivision and Partitioning Ordinance" (1974 SPO). On March 17, 1975, petitioner sold one acre of the now four acre parent parcel, including the second home, to the Butlers. Record 16. The county assessor reconfigured the assessment records to show a tax lot 200, consisting of three acres, and a tax lot 400, consisting of one acre. The parties agree the legal description in the deed from petitioner to the Butlers describes tax lot 400. The county assessment records identify the Butlers as the current owners of tax lot 400, and petitioner as the current owner of tax lot 200.

At no time did petitioner seek county approval to divide the parent parcel to create tax lots 200 and 400. However, the parties agree that the 1974 SPO was in effect at the time petitioner sold the one acre parcel (tax lot 400) to the Butlers.[6]

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[5]There is no issue presented in this appeal concerning the legal status of tax lot 300.

[6]The parties also do not dispute that the creation of tax lots 400 and 200 does not comply with the following provision of the 1974 SPO:

> "All parcels of land that are created by minor partition shall have a minimum of twenty (20) feet of frontage on an existing Public, County, State or Federal road."

In 1989, petitioner desired to sell tax lot 200. Before attempting to sell tax lot 200, petitioner filed a request for a "lot of record determination" to obtain a county decision that tax lot 200 has legal status as a separate parcel.[7] The county planning department denied petitioner's request and determined, for development purposes, tax lots 200 and 400 constitute one parcel.

Petitioner appealed the planning department's determination to the hearings officer. The hearings officer affirmed the decision of the planning department and denied petitioner's request. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the county's determination that she does not have a vested right to divide tax lot 400 from tax lot 200, is erroneous.[8] Specifically, petitioner contends

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Creation of tax lot 400 left tax lot 200 without a minimum of 20 feet of frontage on an existing public road.

[7]Clackamas County Zoning and Development Ordinance (ZDO) 902.02(A) provides:

> "A parcel is a legal lot of record for purposes of this Ordinance when the lot conformed to all zoning requirements, Subdivision Ordinance requirements, and Comprehensive Plan provisions, if any, in effect on the date when a recorded separate deed or contract creating the separate lot or parcel was signed by the parties to the deed or contract * * *
>
> "* * * * *"

[8]Petitioner also argues that the county erroneously concluded the issue of whether petitioner had a vested right to divide tax lot 400 from tax lot 200 was not before the county. While petitioner is correct that the county's findings establish it viewed the appeal as not including a vested

the following finding is not supported by substantial evidence in the whole record:

> "The applicant has failed to show any substantial expenditures directed to the creation of a second buildable lot, or any improvement of the property directed to the creation of two buildable lots prior to the effective date of the [1974 SPO]. No vested right has been established." Record 3.

We understand this finding to state petitioner failed to produce substantial evidence of expenditures adequate to establish a vested right to divide the parent parcel into two buildable lots.

The expenditures considered in determining the existence of a vested right must be made at a time when the proposed development did not require approvals, or at a time when approvals were given. See Clackamas County v. Homes, 265 Or 193, 198-199, 508 P2d 190 (1973); Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529, rev den 299 Or 4314 (1985); DLCD v. Curry County, __ Or LUBA ___ (LUBA No. 90-021, June 5, 1990), slip op 8.

No approvals to divide tax lots 400 and 200 have ever been given. The 1974 SPO, effective October 26, 1974, requires that certain approval standards be satisfied before a partition may be approved. Accordingly, the relevant date for calculating which expenditures may be considered in determining whether petitioner acquired a vested right to

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rights challenge, the county nevertheless made a determination regarding whether petitioner had a vested right to such a division.

divide the remaining parent parcel into tax lots 400 and 200 is October 26, 1974. Thus, the expenditures which may be considered are those made prior to October 26, 1974 which are "substantially and directly related" to dividing tax lots 400 and 200. Union Oil Co. v. Bd. of Co. Comm. of Clack. Co., 81 Or App 1, 724 P2d 341 (1986); DLCD v. Curry County, supra, slip op at 7.

Petitioner cites evidence that in 1971 she placed two homes on the parent parcel. However, at best, this evidence establishes that petitioner contemplated creating two parcels from the parent parcel -- the one acre parcel now designated as tax lot 300 and the remaining four acres of the parent parcel (now designated on the assessor's records as tax lot 400 and tax lot 200.) We do not believe that these expenditures are "substantially and directly" related to further dividing the parent parcel into tax lots 400 and 200.

Petitioner also cites evidence that she obtained two septic, two plumbing and two well drilling permits for the parent parcel. However, this evidence suffers from the same defects as the evidence regarding the 1971 placement of the two houses on the parent parcel -- it is not evidence which is "directly and substantially" related to creating anything other than a one acre parcel (tax lot 300) and developing

the remaining 4 acres of the parent parcel (the combination of tax lots 200 and 400), with a residence.[9]

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Failing to recognize Tax Lot 200 as a separate and buildable parcel constitutes a 'taking without just compensation' in violation of the fifth Amendment of the United States Constitution and Article 1, Section 18 of the Oregon Constitution."

Petitioner argues that by failing to recognize what is now designated as tax lot 200 on the county assessment records as a discrete parcel legally separate from tax lot 400, the county has "taken" her property without just compensation, in violation of the Fifth Amendment of the United States Constitution, and Article 1 Section 18 of the Oregon Constitution. Petitioner states that if the county does not recognize tax lot 200 as a legal lot of record, its value is that of "plottage only." Petitioner states that if tax lot 200 can be sold as a discrete parcel its value is substantially greater. Petitioner contends the county's failure to recognize tax lot 200 as having a legal status separate from tax lot 400 so substantially reduces the economic value tax lot 200 as to constitute a "taking" of it.

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[9]Petitioner also cites evidence that petitioner cleared a roadway in 1983 to tax lot 200. However, as we explain above, expenditures incurred after October 26, 1974 may not be considered in determining the existence of a vested right.

Petitioner has not established a "taking." The county's decision simply states tax lot 400 was never legally divided from tax lot 200, and that tax lot 200 and 400 therefore constitute one buildable parcel. The problem is not that petitioner has no economically viable use of her property as a result of the county's decision that tax lot 200 is not a legal lot of record. The problem petitioner faces results from her transfer of the one acre tax lot 400, without obtaining the required county approval for division of the property. Because tax lot 200 was never lawfully separated from tax lot 400, those tax lots together form one developable parcel. No requested development rights have been withheld by the county with regard to this single developable parcel. We conclude no taking has occurred through the county's refusal to recognize tax lot 200 as a legal lot of record.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under this assignment of error, petitioner argues the county should have provided individual written notice to petitioner of the adoption and requirements of the 1974 SPO. Petitioner also argues the county should have provided her

with individualized written notice of the legislative rezoning of the parent parcel from RA-1 to RRFF-5.[10]

The subject of this appeal is the county's December 7, 1990 decision that tax lot 200 is not a legal lot of record. The notice of intent to appeal does not identify the adoption of the 1974 SPO and the legislative rezoning of petitioner's property as the subject of the appeal. No appeal was filed within 21 days of the adoption of either decision. Accordingly, the adoption of the 1974 SPO and the legislative rezoning of the parent parcel are not before this Board in this appeal proceeding. Sabin v. Clackamas County, ___ Or LUBA ___ (LUBA No. 90-077, September 19, 1990), slip op 24; City of Corvallis v. Benton County, 16 Or LUBA 488, 492-493 (1988).

However, even if it were appropriate for petitioner to challenge the 1974 SPO and the legislative zone change to RRFF-5, petitioner has not established that the notice the county provided of these decisions was defective.

The 1974 SPO is county legislation adopted to govern subdivisions and partitions. As far as we can tell, the RRFF-5 zoning was imposed on the parent parcel in a legislative rezoning proceeding, and petitioner does not contend otherwise. No individual written notice is required

[10]The significance of the rezoning is that because tax lot 200 is less than five acres, it is below the minimum lot size required in the RRFF-5 zone and therefore may not be further divided.

for the county to make a legislative land use decision. Sabin v. Clackamas County, supra;[11] Allison v. Washington County, 24 Or App 571, 575, 548 P2d 188 (1975).

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In this assignment of error, petitioner argues the county is estopped, through its conduct toward petitioner, from now asserting that tax lot 200 is not a legal lot of record.

In order for there to be estoppel by conduct 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; (5) the other party must have been induced to act upon it." Coos County v. State of Oregon, 303 or 173, 180-181, 743 P2d 1348 (1987) (quoting from Oregon v. Portland General Electric Co., 52 Or 502, 528, 95 P 722 (1908)).

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[11]In Sabin, we noted the following:

> "* * * ORS 215.503 provides a requirement for individualized written notice of the proposed legislative rezoning. However, ORS 215.508 states that such individual written notice is not required for proposed legislative rezoning where there is no county charter provision which requires such notice, and where the Department of Land Conservation and Development does not make such funds available for such notice.* * *" Sabin, supra slip op, at 24-25 n 19.

As in Sabin, we are not here cited to any Clackamas County Charter provision requiring individual written notice of legislative rezoning, and petitioner does not argue that DLCD funds were available for provision of such notice.

Petitioner claims that representatives of the county planning department told petitioner's deceased husband:

> "* * * he could divide the parcels into 3 lots without requiring further application or documentation with the County." Petition for Review 8.

Petitioner does not identify when this statement was made. However, we infer it was made prior to the time petitioner made any attempts to divide the parent parcel. Petitioner first divided the parent parcel in 1973, a year before the 1974 SPO was enacted. As far as we can tell, prior to the adoption of the 1974 SPO the county had no regulations precluding petitioner from dividing the parent parcel into three parcels. Accordingly, even if sometime prior to 1973 representatives of the planning department did tell petitioner's husband that the parent parcel could be divided into three parcels, petitioner has not established that any such statement was false at the time it was made.

Next petitioner argues the following conduct establishes estoppel:[12]

> "* * * Listing and taxing Tax Lot 200 as a separate buildable lot, [gave] the Petitioner and her spouse the false impression that the original partitioning in 1973 and 1975 was proper. * * * [T]he fact that the taxing department has assigned a separate Tax Lot number to the 3 acre parcel and taxed them for fifteen years as if the parcel was

[12]Petitioner also argues that the county's failure to give individual notice of the requirements of the 1974 SPO establishes estoppel. We disagree for the reasons discussed under the third assignment of error.

> a separate buildable lot of record presents an estoppel. Also the Taxing Department of the County advising petitioner that she had 'grandfather' (vested) rights to build on the property should also certainly estop the County from denying that Petitioner and her spouse effectively partitioned the property in 1973 and 1975." Petition for Review 8-9.

The fact that in 1975 the county assessor assigned a tax lot number to identify that portion of the parent parcel which petitioner had transferred to the Butlers, does not establish the county made a false representation that tax lot 400 had been legally divided from the parent parcel. The assessor's records simply reflect the deed between petitioner and the Butlers. Additionally, the fact the county assessor thereafter may have assessed tax lot 200 as if it were a parcel separate from tax lot 400, does not constitute a representation by the county that tax lots 200 and 400 had been legally divided. Further, if petitioner believes the assessor has not properly assessed the property, her remedy is with the county Board of Equalization and not this Board. ORS 305.275; Sabin, supra, slip op at 27. Even if the county incorrectly assessed tax lots 200 and 400, we do not believe incorrect assessment values estop the county from determining (the first time it is asked), that a particular tax lot does not constitute a "lot of record."

Finally, with regard to petitioner's allegation that she was told she had "grandfather (vested) rights to build

on the property," petitioner does not identify when the alleged statement was made, by whom it was made, what authority the speaker had to make the statement, or to what "property" the statement refers. This allegation does not establish the county is estopped from determining that tax lot 200 is not a legal lot of record.

The fourth assignment of error is denied.

The county's decision is affirmed.