BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAY SCHOPPERT and IRENE SCHOPPERT, Petitioners, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 91-211
	FINAL OPINION AND ORDER

Appeal from Clackamas County.

Vernon L. Richards, Sandy, filed the petition for review and argued on behalf of petitioners.

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

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

AFFIRMED 04/10/92

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

Petitioners appeal a decision of the county hearings officer denying their application for a nonforest dwelling.

FACTS

The subject parcel is 10 acres in size, is designated on the county's comprehensive plan as Forest and is zoned General Timber District (GTD). A 157 acre parcel on the southern border of the subject property is managed for forest uses by Longview Fiber, Inc.

The hearings officer conducted a hearing on petitioners' application and thereafter issued the challenged decision denying the application. This appeal followed.

ASSIGNMENTS OF ERROR[1]

Petitioners argue that certain of the county's findings are not supported by substantial evidence in the whole record.

Under Clackamas County Zoning and Development Ordinance (ZDO) 404.05(A)(4), in order to approve a nonforest dwelling in the GTD zone, the county must determine the proposed nonforest dwelling will be:

"* * * situated upon generally unsuitable land for

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[1]The petition for Review does not contain separately stated assignments of error. We therefore limit our review to alleged errors that are clearly presented in petitioners' arguments contained in the petition for review. Freels v. Wallowa County, 17 Or LUBA 137, 141 (1988).

> the production of farm and forest products, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract[.]"

We have previously stated that under ZDO 404.05(A)(4), in determining whether a small but otherwise suitable parcel is "generally" unsuitable for forest uses, it is appropriate to ascertain whether the small parcel may be combined with other forest parcels and put to forest uses. Samoilov v. Clackamas County, ____ Or LUBA _____ (LUBA No. 91-131, December, 12, 1991); Sabin v. Clackamas County, ____ Or LUBA _____ (LUBA No. 90-077, September 19, 1990).

Here, the hearings officer determined:

> "[The subject parcel is] located immediately adjacent to a large parcel to the south which is in active forest management. There are no topographical or other features which preclude the subject property from being operated in conjunction with the property to the south. * * * The size of the [subject] property is a limiting characteristic. Ten acres is a marginal size for the parcel to be managed separately for forest production. The applicants have presented testimony to the effect that 10 acres is too small to manage separately to produce a profit. However, * * * the property can be combined with adjacent property also suitable for forest production, and incorporated into the management plan of the larger parcel. * * *" Record 4.

We have reviewed the evidence in the record cited by the parties, and conclude these findings are supported by substantial evidence in the whole record.

We have repeatedly held that in order to overturn, on evidentiary grounds, a county determination that an approval

standard is not met, petitioners must establish that the approval standard is satisfied as a matter of law. Morley v. Marion County, 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982). Petitioners have not done so here.[2]

Petitioners next argue the county is estopped from denying their application.

In order to establish estoppel, petitioners must show (1) the county made a false representation with knowledge of the facts, (2) petitioner was ignorant of the truth, (3) the county intended that petitioner act upon the false representation, and (4) petitioner in fact acted upon the false representation. Clackamas County v. Emmert, 14 Or App 493, 499-500, 513 P2d 532 (1973). Here, petitioners rely upon the following testimony of their agent to establish the county made a false statement to that agent concerning the subject property:

> "Well, I visited the planning officer and spoke to I don't remember which one of the planners about this proposal * * * and he indicated to me that I had two options of going with a nonforest use permit, or one of the other ones. He encouraged

[2]Because the challenged decision is one to deny the proposed development, the county need only adopt findings, supported by substantial evidence, demonstrating that one or more standards are not met. Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). Consequently, having decided the county's determination concerning noncompliance with ZDO 405.05(A)(4) is adequate, we need not review the county's other bases for denial.

> me to go with the nonforest use permit because he thought that would be acceptable, depending on the comments made. Later I came back with the completed application and went over it with him and he agreed that the application was good, and it should * * * meet the criteria." Record 26-27.

Even if true, nothing in this statement establishes the unidentified county planner made any false representation of fact or that the planner had any way of knowing the application would ultimately be denied by the hearings officer. At most, this statement establishes the planner was asked to give his opinion concerning whether petitioners' application for a nonforest dwelling was approvable, and he gave it. These facts are not sufficient to establish an estoppel against the county hearings officer's adoption of the challenged decision.

Finally, petitioners argue the county has unconstitutionally "taken" their property in violation of the Fifth Amendment of the United States Constitution and Article 1 Section 8 of the Oregon Constitution.[3] Petitioners argue the county's denial of their application for a nonforest dwelling leaves them with no economically viable use of the subject parcel.

In Dolan v. City of Tigard, ___ Or LUBA ____ (LUBA

[3]Petitioners also make the assertion, without developing a legal theory to support it, that the challenged decision denies petitioners equal protection of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. This Board will not review undeveloped constitutional claims. Torgeson v. City of Canby, 19 Or LUBA 511, 519 (1990); Van Sant v. Yamhill County, 17 Or LUBA 563, 566 (1989).

No. 90-029, January 24, 1991), slip op 14-18, we determined that taking claims under both the Oregon and Federal constitutions must be ripe for adjudication before we may review their merits. In Dolan, we concluded the failure to seek relief from applicable regulations through available variance processes before pursuing the taking claims precluded our review of those claims. Similarly, the Oregon Appellate courts have determined that property owners must seek quasi-judicial plan and zoning map amendments and conditional use permits for potentially allowable uses before pursuing claims that local regulations constitute an unconstitutional "taking" of their property. Fifth Avenue Corp. v. Washington County, 282 Or 591, 614-21, 581 P2d 50 (1978); Dunn v. City of Redmond, 86 Or App 267, 270, 739 P2d 55 (1987).

Here, petitioners have not sought any form of administrative relief from the applicable regulations of the GTD zone. Specifically, they have sought neither a variance nor a plan and zone map change. In addition, even if petitioners claims were ripe, petitioners have not established there is no other economically viable use which can be made of the subject property. The GTD zone allows various permitted and conditional uses, including forest uses and, as noted by the county in its decision, the cultivation of Christmas trees. Petitioners have not explained why the uses potentially allowed by the GTD zone

are not economically feasible uses.

Petitioners' constitutional claims are denied.

Petitioners' assignments of error are denied.

The county's decision is affirmed.