BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRANKLIN YOUNG and FRANCES YOUNG, Petitioners, vs. CLACKAMAS COUNTY, Respondent.	LUBA No. 92-168 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Dorothy S. Cofield and David B. Smith, Tigard, filed the petition for review. Dorothy S. Cofield argued on behalf of petitioners.

Michael E. Judd, Chief Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 02/17/93

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 Clackamas County Hearings Officer denying their request for a nonfarm dwelling in an Exclusive Farm Use (EFU-20) zoning district.

FACTS

The subject property consists of three separate parcels comprising a total of 6.41 acres. In 1988, petitioners obtained a county determination that the three parcels were three separate "legal lots of record, each buildable for a single residence, subject to EFU requirements. * * *" Petition for Review 4.[1] Thereafter, petitioners sold the three parcels to third parties.[2] Later, the third parties attempted to obtain nonresource dwelling permits for each of the three parcels. The planning department denied those requests. Each of the third parties appealed the planning department's decision to the hearings officer. The hearings officer consolidated the three appeals. After a public hearing, the hearings officer denied all three requests. Petitioners, as the contract sellers of the three parcels, appealed the hearings officer's decision to this Board.

---

[1]The county does not dispute this point.

[2]Each of these sales were subject to a condition that each parcel qualify for a nonresource dwelling permit.

FIRST ASSIGNMENT OF ERROR

> "The respondent made an unconstitutional decision under the Oregon Supreme Court's regulatory taking test because in denying the petitioners' dwellings not in conjunction with farm use, the regulation results in an intrusion that 'inflicts virtually irreversible damage.'"

THIRD ASSIGNMENT OF ERROR

> "The county's decision is unconstitutional under the 5th Amendment because it fails to substantially advance a legitimate state interest or secure an 'average reciprocity of advantage.'"

Petitioners[3] argue the county's denial of the three nonresource dwelling permit applications amounts to a taking of the subject property in violation of Article 1, section 8, of the Oregon Constitution and the Fifth Amendment to the United States Constitution. However, petitioners have not sought a comprehensive plan amendment or permission to establish any permitted or conditional use on the subject property other than a nonresource dwelling.[4] For this reason, respondent argues petitioners' "taking" claims is not ripe under the Oregon or U.S. Constitution. Dority, supra; Joyce v. Multnomah County, 114 Or App 244, ___ P2d ____ (1992).

---

[3]To avoid confusion, we refer in this opinion to the applicants and petitioners together as "petitioners."

[4]There is no dispute that a variance is not an available remedy under the local code. See Dority v. Clackamas County, 115 Or App 449, ____ P2d ___ (1992), rev den 315 Or 311 (1993).

A. Irreversible Damage and Futility as Exceptions to the Ripeness Requirement

Petitioners allege that they have suffered "irreversible damage" as set forth in the Oregon Supreme Court's decision in Fifth Avenue Corp. v. Washington Co., 282 Or 591, 581 P2d 50 (1978). Petitioners contend their allegation of irreversible damage excuses them from pursuing other local development approvals to satisfy the ripeness requirement for bringing a taking claim under the Oregon Constitution.

In Fifth Avenue, the Court held the following:

> "[E]ven if planning or zoning designates land for a public use and thereby effects some diminution in the value of * * * land, the owner is not entitled to compensation for inverse condemnation unless: (1) [the owner] is precluded from all economically feasible private uses pending eventual taking for public use; or (2) the designation results in such governmental intrusion as to inflict virtually irreversible damage. * * *" 282 Or at 614. (Emphasis supplied.)

As respondent correctly notes, this is not a case where petitioners' property has been designated for public use. Moreover, we are aware of nothing in Fifth Avenue that supports petitioners' argument that a taking claim under the "inflict virtually irreversible damage" test is excused from the ripeness requirement.

Petitioners also argue that they are excused from applying for a comprehensive plan amendment and zone change in order for their taking claim to be ripe for review, because to do so would be "undoubtedly futile." Petition

for Review 31. We will not assume it would be futile to apply for these approvals. Dority v. Clackamas County, supra; Joyce v. Multnomah County, supra; Larson v. Multnomah County, ____ Or LUBA _____ (LUBA No. 92-100, Order on Motion for Evidentiary Hearing, January 27, 1993).

B. Petitioners' Remaining State and Federal Ripeness Contentions

Petitioners contend the ripeness requirements under the Oregon Constitution are inconsistent with recent federal cases interpreting the Fifth Amendment's proscription against the taking of private property without just compensation. Lucas v. South Carolina Coastal Council, ____ US _____, 112 S Ct 2886, 120 L Ed2d 798 (1992); MacDonald, Somer & Frates v. Yolo County, 477 US 340, 106 S Ct 2561, 2567, 91 L Ed2d 285 (1986); Williamson Co. Regional Planning v. Hamilton Bank, 473 US 172, 193, 105 S Ct 3108, 87 L Ed2d 126 (1985). Petitioners contend that under these federal cases, the ripeness requirements imposed in Oregon are improper.

Even assuming that these federal cases have some bearing on ripeness requirements applicable to Article 1, section 8 of the Oregon Constitution, we see nothing inconsistent between the ripeness requirements imposed by this Board and the appellate courts to alleged takings under the Oregon Constitution and the holdings of the federal cases cited. The cases interpreting the Fifth Amendment taking clause make it clear that a court should not

adjudicate a taking claim until it understands the nature and extent of permitted development.[5] We have stated that:

> "[t]he purpose of the requirement under applicable federal and state constitutions that a 'takings' claim be ripe, is to allow the reviewing body to know 'the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it * * *.' MacDonald, Sommer & Frates [supra]." Larson v. Multnomah County, supra, slip op at 8.

Similarly, in Suess Builders v. City of Beaverton, 294 Or 254, 262, 656 P2d 306 (1982), the Oregon Supreme Court stated:

> "* * * The significance of exhaustion is not to fix the time when the infringement of plaintiff's rights occurred. Rather, if a means of relief from the alleged confiscatory restraint remains available, the property has not been taken. * * *"

Petitioners have simply requested and been refused permission to construct nonfarm dwellings on the subject property. They have not sought a plan and zone change, and have not requested approvals for other listed conditional uses, or established that listed permitted uses cannot be established on the subject property. Larson v. Multnomah

---

[5]The situation in Lucas was very different from that presented in the instant case. In Lucas, the ripeness issue concerned whether an amendment to the South Carolina Beachfront Management Act postdating the disputed decision denying proposed development, and creating a special use permit for developers, constituted a new remedy the petitioner should have pursued. Here, the possibility for a plan amendment or for establishing a permitted or conditional use on the property has been available to petitioners throughout the proceedings concerning the nonresource dwelling permits.

County, supra. For this reason, petitioners' claims that their property has been taken without just compensation under Article 1, section 8 of the Oregon Constitution, and the Fifth Amendment to the United States Constitution are not ripe for review. Dority v. Clackamas County, supra; Joyce v. City of Portland, supra; Dunn v. City of Redmond, 86 Or App 267, 270, 739 P2d 55 (1987); Larson, supra; see also Dolan v. City of Tigard, 20 Or LUBA 411 (1991).

The first and third assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

> "The county's denial of the dwelling permits took a conservation easement in the petitioners' property which violates the taking clause of the 5th Amendment of the U.S. Constitution."

Petitioners argue the effect of the county regulations is to subject the property to a conservation easement, without the owners' permission and without compensation, in violation of both ORS 271.725(1) and Article I, section 18, of the Oregon Constitution. Petitioners state that in Lucas, supra, 120 L Ed2d at 815, the Supreme Court suggested that some land use restrictions could be the "practical equival[ents]" of servitudes; and petitioners argue the challenged regulation is the practical equivalent of a statutory servitude for which compensation is due.

ORS 271.725(1) provides as follows:

> "The state, any county, city or park and recreation district may acquire by purchase agreement or donation, but not by exercise of the power of eminent domain, unless specifically

> authorized by law, conservation easements[6] in any area within their respective jurisdictions whenever and to the extent that a state agency or the governing body of the county, city or park and recreation district determines that the acquisition will be in the public interest." (Emphasis supplied.)

We stated in Dodd v. Hood River County, 22 Or LUBA 711, 727, aff'd 115 Or App 139, rev allowed 315 Or 271 (1992):

> "Conservation easements are property interests that may be 'conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.' ORS 271.725(2). Although the county presumably could achieve many of the same objectives it now achieves through its comprehensive plan and land use regulations by purchasing conservation easements, we see nothing in the statutes cited by petitioners to suggest that the provisions concerning conservation easements were intended as a limitation on the county's authority to adopt land use regulations."

We adhere to our decision in Dodd. Here, as in Dodd, the county did not impose a conservation easement under ORS 271.725(1), and the challenged decision is not

---

[6]ORS 271.715(1) defines "conservation easement" as follows:

> "'Conservation easement' means a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open space values of real property, assuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical architectural, archaeological, or cultural aspects of real property."

compensable under either the Oregon or the United States constitutions as the "practical equivalent" of a conservation easement.

The second assignment of error is denied.

The county's decision is affirmed.