BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, Petitioner, vs. BENTON COUNTY, Respondent, and GENEVIEVE BARHAM, Intervenor-Respondent.	LUBA Nos. 93-175 and 93-178 FINAL OPINION AND ORDER

Appeal from Benton County.

Larry Knudsen, Assistant Attorney General, Salem, filed the petition for review and argued on behalf of petitioner. With him on the brief was Theodore R. Kulongoski, Attorney General; Thomas A. Balmer, Deputy Attorney General; and Virginia L. Linder, Solicitor General.

Janet S. McCoy, Assistant County Counsel, Corvallis, filed a response brief and argued on behalf of respondent.

Richard T. Ligon, Wilsonville, filed a motion to dismiss and argued on behalf of intervenor-respondent.

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

REVERSED (LUBA No. 93-175) 03/22/94
DISMISSED (LUBA No. 93-178)

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

Opinion by Holstun.

NATURE OF THE DECISION

In LUBA No. 93-175, petitioner appeals a 1986 decision that the county is equitably estopped from denying intervenor the right to develop single family residences on 10 contiguous, exclusive farm use (EFU) zoned five acre lots. In LUBA No. 93-178, petitioner challenges an October 4, 1993 planning staff letter stating the county would honor the 1986 decision.

MOTION TO INTERVENE

Genevieve Barham, the owner of the subject property, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The Hanshew Orchard Subdivision was platted in 1911. The subdivision consists of approximately 150 acres divided into approximately 5 acre lots. Some of the lots have been sold and developed with single family residences. In 1966, intervenor purchased 10 contiguous vacant lots, constituting the northeast 50 acres of the Hanshew Orchard Subdivision. At the time intervenor purchased the lots, they were undeveloped and unzoned. With the exception of intervenor's residence, no houses have been constructed on the lots intervenor purchased in 1966.

In 1974, the subject property was planned and zoned for rural residential use. However, the county subsequently

determined the property is subject to Statewide Planning Goal 3 (Agricultural Lands) and that the property does not qualify for an exception to that goal.[1] The county therefore rezoned the property for exclusive farm use in 1979. During the 1979 proceedings, intervenor raised questions concerning whether the rezoning of her lots would effectively preclude their development for residential use. On April 2, 1979, one of the county commissioners sent intervenor a letter, in which he stated:

> "Although the lots in the Hanshew Orchard Tracts are designated as Exclusive Farm Use, they are still buildable as 5-acre lots.
>
> "Since these lots were created as a subdivision before the adoption of the Comprehensive Plan, they cannot be changed retroactively. We have informed your attorney * * * about these lots.
>
> "I am sorry the letter of March 21, was not clear. The lots are what we call 'grandfathered', meaning they are legally in existence before the Comprehensive Plan and stay that way.
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> "* * * * *" Record 76.

Intervenor claims she did not appeal the EFU plan and zoning designations applied to her property in 1979, in reliance on the representations made in the above letter.

In 1986, intervenor contacted the county for an administrative determination that the property could be

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[1]Because the property is subject to Goal 3, an exception to that goal would be required to plan and zone the subject agricultural land for rural residential use. OAR 660-04-010(1)(a).

developed for single family use under ORS 92.225.[2] In June 1986, county counsel advised the planning director and intervenor that while the subject property is properly viewed as a "developed" subdivision, within the meaning of ORS 92.225, and ORS 92.017 operates to preserve the existing lots as platted, those statutes do not operate to grant a right to develop each lot residentially.[3] County counsel went on to state that a claim of equitable estoppel might be available, based on the April 2, 1979 letter quoted above.

On September 30, 1986, intervenor filed a complaint for declaratory judgment in circuit court. The complaint included three claims for relief: (1) equitable estoppel, (2) breach of contract, and (3) vested rights. Based on a stipulation submitted by intervenor and the county, on

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[2]ORS 92.225 provides a procedure whereby local governments determine whether subdivisions are developed or undeveloped. If a local government determines a subdivision is undeveloped, ORS 92.225(3) provides the local government may determine whether the subdivision complies with the existing comprehensive plan and land use regulations. ORS 92.225(4) authorizes the local government to conduct a public hearing to determine whether to replat or vacate an undeveloped subdivision.

[3]ORS 92.017 provides as follows:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are changed or vacated or the lot or parcel is further divided, as provided by law."

December 12, 1986, the circuit court entered a judgment in favor of intervenor on her first claim for relief.[4]

Petitioner was not a party to the circuit court proceeding leading to the December 12, 1986 judgment. Apparently no public hearings were held by the county in conjunction with the circuit court proceedings, and no notice of the stipulation or the circuit court's judgment was provided to petitioner. Petitioner was not aware of the 1986 circuit court proceedings or the December 12, 1986 judgment until it received a copy of the October 4, 1993 letter to intervenor advising her that the county will honor the 1986 stipulated judgment.

Petitioner thereafter inquired into this matter and filed its notice of intent to appeal in LUBA No. 93-175 challenging the 1986 stipulated judgment on October 22, 1993. Petitioner filed its notice of intent to appeal in LUBA No. 93-178 on October 26, 1993. LUBA Nos. 93-175 and 93-178 were consolidated for LUBA review. OAR 661-10-055.

JURISDICTION

Respondent and intervenor raise a number of arguments in support of their position that LUBA lacks jurisdiction to review the 1986 circuit court stipulation and the 1993 planning department letter.

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[4]The breach of contract and vested rights claims for relief were dismissed. Intervenor-Respondent's Memorandum in Support of Motion to Dismiss 3-4; Record 27.

A. October 4, 1993 Planning Department Letter

The October 4, 1993 planning department letter simply advises the intervenor and others receiving the letter that the county considers itself bound by the 1986 circuit court stipulated judgment. We conclude below that we have jurisdiction to consider petitioner's challenge to the 1986 stipulation. The 1993 planning department letter assumes the 1986 stipulation is valid and simply states the county will comply with its terms.

The 1993 planning department letter is not a land use decision, separate and apart from the 1986 stipulation, and we therefore grant the motion to dismiss LUBA No. 93-178.

B. 1986 Circuit Court Stipulation

1. LUBA/Circuit Court Jurisdiction Over Decisions Not To Require Compliance with Applicable Comprehensive Plan and Land Use Regulation Provisions

The circuit court has jurisdiction to grant declaratory relief. ORS 28.010. However, the circuit court's jurisdiction does not include authority to make land use decisions in the process of granting declaratory relief. Sauvie Island Agricultural v. GGS (Hawaii), Inc., 107 Or App 1, 6, 810 P2d 856 (1991). If the relief sought in a declaratory judgment proceeding requires that a land use decision be made, such relief is not available until the appropriate local government has rendered the required land use decision. Id.

The question presented in this appeal is whether the 1986 stipulation that the county is equitably estopped from applying its current land use regulations to the subject property is properly viewed as a county land use decision. If it is, the stipulation is properly before this Board, assuming the appeal was timely filed.[5] Although we are aware of no Oregon appellate court cases directly on point, there are appellate court cases concerning the proper forum for appellate review of vested rights determinations which provide guidance.

In some circumstances, a vested right may exist to use and develop property under previously existing land use regulations even though subsequently adopted land use regulations prohibit such use or development. See Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973). Prior to the creation of LUBA in 1979, circuit courts had

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[5]LUBA has exclusive jurisdiction to review "land use decisions," as that term is defined by ORS 197.015(10). ORS 197.825(1). ORS 197.015(10)(a)(A) defines "land use decision" as including:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
>
> "(ii) A comprehensive plan provision
>
> "(iii) A land use regulation; or
>
> "(iv) A new land use regulation[.]"

jurisdiction to declare the existence of such vested rights. Eklund v. Clackamas County, 36 Or App 73, 583 P2d 567 (1978); 1000 Friends of Oregon v. Clackamas Co. Comm., 29 Or App 617, 564 P2d 1080 (1977); Eagle Creek Rock Prod. v. Clackamas Co., 27 Or App 371, 556 P2d 150 (1976), rev den 278 Or 157 (1977).

In Forman v. Clatsop County, 297 Or 129, 681 P2d 786 (1984), the Oregon Supreme Court considered whether circuit courts retained jurisdiction to declare vested rights following the creation of LUBA. The court framed the issue presented in that case and resolved that issue as follows:

> "The issue is whether the determination of a 'vested right' for purposes of allowing a land use not in conformity with a current land use regulation is a 'land use decision of a local government,' because if it is, LUBA's exclusive jurisdiction to review it is beyond doubt. The law defines 'Land use decision' to mean a 'final decision or determination made by a local government * * * that concerns the adoption, amendment, or application of' a land use regulation, among other things. 'Land use regulation' includes a zoning ordinance. The Court of Appeals followed these definitions. It concluded that when the county determined that its 1980 zoning ordinance did not prevent continuation of the previously begun development, the county had made a 'final decision or determination' concerning the application of the ordinance, that is to say, a land use decision within the exclusive jurisdiction of LUBA.[6]

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[6]In Forman, the property owners had purchased a 50 acre recreational complex developed with a variety of athletic facilities. The property owners then purchased an additional 228 acres to develop as a recreational vehicle and tent camping facility. Such development of the 228 acres was

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"An amicus brief, and the dissenters in the Court of Appeals, maintain that the exclusion of a substantially advanced development from later land use regulations, under the rubric of 'vested rights,' concerns a 'property right.' Such a decision certainly concerns the right to use property, as does any decision that limits an owner's previous right to use property in a particular way, 'vested' or not. This does not preclude that local governments or agencies may have authority to determine the facts on which application of a rule or exemption from the rule depends.

"The statute placing exclusive jurisdiction in LUBA cannot be avoided by arguing that the court only decides on the existence of the asserted property right, not on the application of the land use regulation. So-called 'vested rights' do not exist in a vacuum, to be determined by a court abstractly without relation to the regulation against which the right is claimed. The term is relevant only as a shorthand phrase for one element of the applicable land use laws that may require a factual determination like other elements. Under the present legislative scheme, local governments necessarily determine many such facts in deciding on the 'application' of their 'land use regulations,' as those terms are defined in the [statutes]. If the facts are disputed, the determination must rest on substantial evidence in the whole record. Or Laws 1979, ch 772, § 4(7); see ORS 197.835(8)(a)(C). If the facts are not disputed, they may give rise to a question of law. In either case, the decision on the application of the regulation, if final, is a 'land use decision'

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permitted under the comprehensive plan and land use regulations in effect at the time the property was purchased, and the property owners commenced developing the 228 acres. The county then adopted a new zoning ordinance which prohibited such development of the 228 acres. The county conducted local hearings and "'issued findings of fact and conclusions of law and determined that [the property owners] had a vested right to continue their nonconforming use.'" Forman, supra, 297 Or at 131 (quoting from the court of appeals' decision).

for which the channel of review is through LUBA. There is no 'dual jurisdiction.'"

The complaint filed in circuit court by the intervenor in this appeal originally included a claim for relief based on an asserted vested right. The parties apparently recognized that in view of Forman, judgment by the circuit court in favor of the landowner on that claim for relief was not possible. However, it is reasonably clear from the portion of the court's decision in Forman quoted above that it is the county's decision concerning the applicability or non-applicability of its land use regulations that renders the decision a land use decision. The nature of the legal theory that provided the basis for the local government decision concerning the applicability of its land use regulations is not critical to the result in Forman.

Therefore, that the county in Forman relied on a vested rights legal theory to support its ultimate decision, whereas the county here relied on equitable estoppel, does not provide a basis for distinguishing this case from Forman with regard to the question of jurisdiction. In both cases the county referred to its land use regulations, found facts, and made an ultimate decision that its land use regulations do not apply. It was the necessity for reference to land use regulations and the ultimate decision that those regulations do not apply that rendered the ultimate decision a land use decision in Forman and renders the decision challenged in this appeal a land use decision.

2. The Decision Maker

As explained earlier in this opinion, circuit courts do not make land use decisions; local governments, special districts and state agencies do. See ORS 197.015(10). The decision at issue in Forman was clearly a final decision of a local government.[7] Because the challenged decision in this appeal is in the form of a stipulation entered in a circuit court declaratory ruling proceeding, it is less clear whether the challenged decision is a final decision of the county. If the decision is properly viewed as a decision of the circuit court, then it is not a decision of the county and is not a land use decision.[8]

In Murphy Citizens Advisory Comm. v. Josephine County, 25 Or LUBA 507, rev'd 123 Or App 539 (1993), we concluded that a stipulation, entered pursuant to a circuit court mandamus preceding to compel issuance of a permit under ORS 215.428(7), was not a final county decision and, therefore, was not a land use decision as that term is defined by ORS 197.015(10). See n 5, supra. In reversing our decision in Murphy Citizens Advisory Comm., the Court of Appeals explained "the mandamus proceeding did not end with a final

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[7]See n 6, supra.

[8]As we noted above, the Oregon Court of Appeals has made it clear that a circuit court lacks jurisdiction to make a land use decision. Sauvie Island Agricultural v. GGS (Hawaii), Inc., supra. However, if the circuit court is properly viewed as the maker of the challenged 1986 decision, that would not make an improperly rendered circuit court decision a decision of the county.

judgment in favor of [the land owner] granting the relief that it requested. It ended after the county made a decision to agree to the stipulation." Murphy Citizens Advisory Comm. v. Josephine County, 123 Or App 539, 543, ___ P2d ___ (1993). The court further explained that "[t]he plain meaning of ORS 197.015(10) is that the application of land use laws that result in the approval or dismissal of an application for a permit constitutes a land use decision even if that decision is made outside the confines of the land use proceeding." (Emphasis added.) Id. at 542.

Applying the above reasoning in this case, the circuit court proceeding did not end with a judgment granting the relief requested in intervenor's complaint; it ended when the county entered the stipulation with intervenor and the court thereafter entered judgment based on the stipulation. That the stipulation was entered into outside the confines of a land use proceeding and without following any of the procedures required for making a land use decision does not make the decision any less a land use decision. The decision challenged in this appeal, like the decision challenged in Murphy Citizens Advisory Comm., binds the county to issue permits if certain conditions are met.

There are some differences in the contexts of the decision challenged in this appeal and the decision at issue in Murphy Citizens Advisory Comm. In Murphy Citizens Advisory Comm., the circuit court clearly had jurisdiction

under ORS 215.428(7) to entertain the mandamus proceeding in which the landowner sought to compel issuance of a permit. If our legal analysis in this opinion is correct, the circuit court lacked jurisdiction to grant the relief requested in the 1986 declaratory judgment proceedings. In Murphy Citizens Advisory Comm, there was a pending permit application and local proceedings had been conducted on that application. In this case, while intervenor initially sought an administrative determination from the county that each of her lots are separately buildable, relief was ultimately sought in circuit court. However, in both cases, the decision ultimately reached by the county took the form of a stipulation signed by the attorneys for the local government and the land owner during a circuit court proceeding. Both decisions bind the local government to issue permits for development of the properties at issue. The decision reached by the county in Murphy Citizens Advisory Comm., like the decision challenged in this appeal, ultimately was reached and memorialized without following county land use decision making procedures. The court in Murphy Citizens Advisory Comm. characterized that decision as a de facto land use decision. Because we see no principled way to distinguish the decision challenged here, or the manner in which it was reached, from the de facto land use decision in Murphy Citizens Advisory Comm., we

conclude the decision challenged in this appeal is also a de facto land use decision.

3. Timeliness of the Appeal

There remains the question of whether petitioner's appeal is timely. The challenged decision was rendered in 1986. The earliest anyone claims petitioner knew or should have known of the 1986 decision is when petitioner received the October 4, 1993 planning department letter. Petitioner's notice of intent to appeal in LUBA No. 93-175 was filed with LUBA on October 22, 1993.

The challenged decision concludes the county is equitably estopped from denying building permits to allow residential development of the subject property. The elements of equitable estoppel are set forth infra. Application of those elements requires the exercise of significant factual and legal judgment, and constitutes discretionary approval of intervenor's proposed development of the subject property. See Kirpal Light Satsang v. Douglas County, 18 Or LUBA 651, 660-63 (1990) (and cases cited therein). By statute, such decisions are "permits."[9] In order to approve a permit, the county is required to conduct at least one public hearing on the matter or to provide notice of the decision and an opportunity for a local appeal. ORS 215.416(3) and (11). There is no dispute

[9]As relevant, ORS 215.402(4) defines "permit" as "discretionary approval of a proposed development of land * * *."

that the county failed to conduct a public hearing prior to entering the 1986 stipulation and gave no notice of its 1986 decision. Therefore, the deadline for filing the notice of intent to appeal in this matter is governed by ORS 197.830(3).[10]

Neither respondent nor intervenor contends petitioner is not "adversely affected by the [challenged] decision." ORS 197.830(3). The notice of intent to appeal in LUBA No. 93-175 was filed not more than 18 days after petitioner "knew or should have known" of the 1986 stipulation.[11]

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[10]ORS 197.830(8) requires that a notice of intent to appeal a land use decision "shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final." However, ORS 197.830(3) provides, in part, as follows:

> "If a local government makes a land use decision without providing a hearing * * * a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision, where no notice is required."

ORS 197.830(3) was adopted by the legislature in 1989. Or Laws 1989, ch 761, § 12. For that reason ORS 197.830(3) may not apply to the subject appeal of a 1986 decision. However, this Board has determined, based on other statutory requirements, that a notice of intent to appeal challenging a permit decision is timely if filed within 21 days of actual notice, where the permit decision was rendered without observing statutory notice and hearing requirements. See Citizens Concerned v. City of Sherwood, 21 Or LUBA 515, 528 (1991)(and cases cited therein).

[11]We assume petitioner was not legally entitled to individual written notice of the 1986 decision. Therefore, the deadline for filing its notice of intent to appeal is governed by ORS 197.830(3)(b). See Leonard v. Union County, 24 Or LUBA 362, 375-76 (1992).

ORS 197.830(3)(b). For these reasons, petitioner's notice of intent to appeal was timely filed.

ORS 197.830(5)(a) provides, with one exception, that the time for filing a notice of intent to appeal under ORS 197.830(3) "shall not exceed three years after the date of the decision." However, the exception provided by ORS 197.830(5)(b) states that the three year limitation shall not apply "[i]f notice of a hearing or an administrative decision pursuant to ORS 197.763, 197.195, 215.416(11) or 227.175(10) is required but has not been provided * * *." As explained above, the county in this case was required either to hold a public hearing, for which notice is required under ORS 215.416(5) and 197.763, or to give notice of its decision and provide an opportunity for appeal under ORS 215.416(11). The county gave neither notice. Therefore the three year statute of ultimate repose in ORS 197.830(5)(a) does not apply.

For the reasons explained above, we have jurisdiction to review the decision challenged in LUBA No. 93-175.

DECISION

A. Issue and Claim Preclusion

In certain circumstances, a party may be precluded in an administrative proceeding from asserting a claim (res judicata) or asserting issues (collateral estoppel). North Clackamas School District v. White, 305 Or 48, 750 P2d 485, modified 305 Or 468 (1988); Joines v. Linn County, 24 Or

LUBA 456, 461-64 (1993). In State Farm Fire & Cas. v. Reuter, 299 Or 155, 158, 700 P2d 236 (1985), the Oregon Supreme Court explained these common law principles as follows:

> If a person has had a full and fair opportunity to litigate a claim to final judgment, most courts (including this one) hold that the decision on a particular issue or determinative fact is determinative in a subsequent action between the parties on the same claim (direct estoppel). See Waxwing Cedar Products v. Konnecke, 278 Or 603, 610, 564 P2d 1061, 1064-65 (1977); Bahler v. Fletcher, 257 Or 1, 4, 474 P2d 329, 331 (1970). The judgment generally is conclusive as well in a different action between parties as to issues actually litigated and determined in the prior action if their determination was essential to the judgment (collateral estoppel)."

In this case the 1986 circuit court proceeding ended by stipulation of the parties without actual litigation of the issues. More importantly, petitioner was provided no notice or opportunity to participate in the circuit court proceedings that led to the 1986 stipulation and was not a party to those proceedings. Petitioner therefore had no "full and fair opportunity to litigate" its claims in the 1986 circuit court proceeding. We conclude the circuit court proceeding that terminated with the 1986 stipulation provides no basis for precluding this appeal or any issues petitioner seeks to raise in this appeal.

B. Equitable Estoppel

The elements of equitable estoppel were explained by the Oregon Supreme Court in Coos County v. State of Oregon, 303 Or 173, 180-81, 734 P2d 1348 (1987), as follows:

> "The elements of equitable estoppel in Oregon were set out by this court in Oregon v. Portland General Elec. Co., 52 Or 502, 528, 95 P 722 (1908):
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> > "'To constitute 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: Bigelow, Estoppel (5 ed.), 569, 570'
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> "Courts generally have held that the misrepresentation must be one of existing material fact, and not of intention, nor may it be a conclusion from facts or a conclusion of law. Everest and Strode, The Law of Estoppel 251 (3d ed 1923). The party seeking estoppel must demonstrate not only reliance, but a right to rely upon the representation of the estopped party. * * *." (Emphases added.)

The April 2, 1979 letter upon which the stipulation relies in concluding the county is equitably estopped from applying its current comprehensive plan and EFU zoning is quoted above in the statement of facts. Reading that letter in the light most favorable to intervenor and the county in this appeal, it states that the county will approve residences for each of intervenor's EFU zoned lots without requiring compliance with the stringent criteria for

approving residences on EFU zoned land. The letter explains the legal basis for that position as the existence of an approved subdivision plat for the property on the date the subject property was first placed in an EFU zone.

Although the letter contains erroneous conclusions of law, we fail to see any misrepresentations of "material fact." The county commissioner's conclusion that the 1979 EFU zoning would not apply to limit intervenor's ability to secure building permits for residences on each of the 10 lots is an erroneous conclusion of law. See Columbia Hills v. LCDC, 50 Or App 483, 624 P2d 157, rev den 291 Or 9 (1981). However, as far as we can tell, the statement is a factually accurate description of the county's then held legal position and practice concerning approval of residential building permits for properties such as intervenor's.

As petitioner points out, there are appellate court decisions which raise substantial question about whether equitable estoppel could ever apply to preclude a local government from requiring compliance with applicable comprehensive plan and land use regulation requirements. Bankus v. City of Brookings, 252 Or 257, 260, 449 P2d 646 (1969); Holdner v. Columbia County, 123 Or App 48, 53, ___ P2d ___ (1993); Clackamas County v. Emmert, 14 Or App 493, 500-03, 513 P2d 532 (1973).

However, even if the county could be equitably estopped from requiring intervenor to comply with existing comprehensive plan and EFU zoning requirements, such an estoppel cannot apply because one county commissioner failed to anticipate the court of appeals' decision in Columbia Hills v. LCDC and expressed the erroneous legal conclusion that the EFU zoning requirements applied to the subject property could be ignored based on the existence of the 1911 subdivision plat.[12] Even if an erroneous misrepresentation of material fact might, in appropriate circumstances, estop the county from requiring compliance with otherwise applicable comprehensive plan and land use regulation requirements, an erroneous legal opinion cannot.[13]

The county's decision is reversed.

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[12]We also share petitioner's doubts that, even in an appropriate factual context, a letter sent by one county commissioner could give rise to an estoppel against the board of county commissioners as a governmental entity, absent some indication that the other county commissioners agreed with the letter, that it was written on behalf of all the county commissioners or that the author had authority to bind the board of county commissioners.

[13]Petitioner challenges the 1986 stipulation on a variety of procedural and substantive bases and attacks the adequacy of the evidentiary record and findings. Because the important facts are not in dispute, and we conclude that the challenged decision is erroneous as a matter of law, we do not address the remainder of petitioner's assignments of error.