BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CLAUDIA I. CHAVES,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

TEAMER SCOTT
Intervenor-Respondent.

LUBA No. 2007-240

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Claudia I. Chaves, Gold Hill, filed the petition for review and argued on her own behalf.

No appearance by Jackson County.

Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

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

AFFIRMED 05/22/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving a non-farm dwelling.

MOTION TO INTERVENE

Teamer Scott, the applicant below, moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

Intervenor owns a tract that is zoned Exclusive Farm Use and that contains two adjacent parcels, currently known as Tax Lot 1107 and Tax Lot 1104. The two parcels are each approximately six to seven acres in size, and together total 13.85 acres.

In 1999, a prior owner, Birdseye, obtained county approval for a lot of record dwelling on one of the parcels. Pursuant to state law, the county approval required Birdseye to consolidate the two parcels. Record 162. In 2001, Birdseye submitted a form to the county assessor, requesting consolidation of the two tax lots and that they be assessed as a single tax lot. Record 92. The assessor accordingly consolidated the two tax lots into a single tax lot, Tax Lot 1104. However, the lot of record approval subsequently expired and no dwelling was constructed. Birdseye sold the tract to the Judds.

In 2002, the Judds obtained county approval for a non-farm dwelling on the 13.85-acre Tax Lot 1104. Record 114-115. In 2004, intervenor acquired the tract and applied to the county to amend the 2002 non-farm dwelling approval, to relocate the approved site for the dwelling north of where it was initially approved. The county approved the amendment. Record 55.

In 2007, intervenor applied for a non-farm dwelling on the southern parcel of Tax Lot 1104, on what is now known as Tax Lot 1107. Record 201. County planning staff initially denied the application because staff understood that the parcels had been consolidated in 2001 into a single parcel. Intervenor appealed the denial to the hearings officer. The

hearings officer concluded that the two parcels had been consolidated into a single tax lot, but remained separate parcels. The hearings officer approved the non-farm dwelling on Tax Lot 1107, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

In her first assignment of error, petitioner argues that the county is estopped from approving the non-farm dwelling application on Tax Lot 1107. Petitioner argues that when intervenor applied in 2004 to amend the 2002 non-farm dwelling approval to change the location of the initial non-farm dwelling, she represented that the parcel size for the approved non-farm dwelling was 13.85 acres, the combined acreage for Tax Lot 1107 and Tax Lot 1104. Petitioner argues that petitioner relied on intervenor's alleged representation as to the size of the parcel and that based on that alleged representation, she did not oppose the 2004 application to move the dwelling location.

The hearings officer rejected petitioner's estoppel argument. Record 8. Intervenor argues that the hearings officer's decision is correct.

We have never held that LUBA has the authority to reverse or remand a challenged decision based on equitable estoppel principles. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001); *Sparks v. City of Bandon*, 30 Or LUBA 69, 73 (1995); *Pesznecker v. City of Portland*, 25 Or LUBA 463 (1993). For purposes of this opinion, we assume, without deciding, that there might be circumstances where LUBA could reverse or remand a land use decision based on equitable estoppel principles.

First, intervenor argues, petitioner has not demonstrated that the elements of estoppel set forth in *Coos County v. State of Oregon*, 303 Or 173, 734 P2d 1348 (1973) are present.[1]

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[1] In *Coos County*, the court set out the elements of estoppel:

> "'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;

Specifically, intervenor alleges that petitioner has not demonstrated that any false representation was made with knowledge of the facts or with the intention that the representation should be acted upon. We agree with intervenor that petitioner has not demonstrated that a false representation was made with knowledge of the facts, or with the intent that petitioner should act on intervenor's representation made in the 2004 application to re-locate the approved dwelling.

Intervenor also argues that petitioner has not established that any representation that may have been made was one of material fact. For an estoppel claim to succeed, the representation must be one of material fact. *Coos County*, 303 Or at 181. Intervenor argues that any representation that may have been made by intervenor regarding the size of the non-farm dwelling parcel was not a misrepresentation of material fact, because approval or denial of a non-farm dwelling does not depend on whether a dwelling already exists on an adjacent parcel owned by the same party. Instead, intervenor explains, the applicable standards for approving a non-farm dwelling are found at ORS 215.284(2), and require a determination as to whether the parcel or portion of the parcel is generally unsuitable for the production of livestock, crops, or merchantable tree species. Because the size of a parcel or the placement of a dwelling on an adjacent parcel owned by the same party is irrelevant to the approval criteria applicable to an application for a non-farm dwelling, intervenor argues, even if a misrepresentation occurred, it was not relevant to any applicable approval criterion for a non-farm dwelling. We agree with intervenor that petitioner has not demonstrated that any representation occurred regarding a fact that is material to the challenged decision approving a non-farm dwelling.

Finally, intervenor also notes that in *Thoenes v. Tatro*, 270 Or 775, 529 P2d 912 (1974), the Court held that in order for an estoppel claim to succeed, the representation must

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> [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)).

be to the person claiming reliance on the representation, rather than to a government agency. Therefore, intervenor argues, petitioner's estoppel theory should fail because no representation was ever made to petitioner, but rather to a government agency. We agree with intervenor that petitioner has not established that a representation was made to petitioner.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted above, the 1999 lot of record approval required consolidation of the two parcels owned by Birdseye. Record 162. In 2001, Birdseye filed a form entitled "Consolidation of Properties" with the county assessor's office, possibly with the intent of partially or fully satisfying the condition of approval. Record 92. The form states that the owner "requests that those properties be consolidated and assessed as one tax lot." *Id*. The county assessor's office accepted the form and accordingly placed both parcels into a single tax lot. However, as noted, the 1999 ownership of record dwelling approval expired without the approved dwelling being built, and in 2002, the Judds received a new approval for a non-farm dwelling on the 13.85-acre Tax Lot 1104.

Under this assignment of error, petitioner challenges the hearings officer's finding that the 2001 tax assessor's form consolidated only the two tax lots into a single tax lot, and did not have the effect of vacating the parcel lines of the two parcels. Record 7. Although petitioner's argument is difficult to follow, we understand petitioner to argue that the 1999 approval of the lot of record dwelling consolidated the two parcels. Petitioners note that the county lot of record provisions and the statute on which they are based require that parcels within a tract shall be consolidated into a single parcel "when the dwelling is allowed." LDO 4.2.6(F)(1)(g); ORS 215.705(1)(g). Further, petitioner argues that if the 1999 decision did not consolidate the two parcels, filing of the tax assessor's form in 2001 clearly did so.

Intervenor responds that the hearings officer correctly determined that the 2001 form at Record 92 had the effect only of consolidating the tax lots, and did not and could not vacate the parcel lines between the two parcels. Intervenor notes that the form includes a reference at the top to ORS 308.210, and the form states that the purpose is to consolidate the listed tax lots into one tax lot for assessment purposes. Thus, intervenor argues, the parcel lines were not vacated by consolidating the tax lots in 2001.

With respect to the 1999 lot of record decision, intervenor argues that the phrase "when the dwelling is allowed" means that the parcels must be consolidated by the time that the building permit for the dwelling is approved, not that the lot of record approval decision itself acts to consolidate the parcels within a tract.

The county apparently has no specific process for consolidating parcels or vacating property lines, and it appears that at least county planning staff understood that consolidation of parcels could be accomplished by having the county tax assessor consolidate tax lots. Even if that was the county's understanding in accepting Birdseye's 2001 request for consolidation of parcels, we agree with intervenor that the hearings officer correctly determined that the 2001 form had the effect only of consolidating the two tax lots into a single tax lot, and did not have the effect of consolidating the two parcels into a single unit of land or vacating the property line that divides the two parcels. Petitioner does not explain how filing a tax assessor's form with the tax assessor's office could possibly have the legal effect of vacating parcel lines to create a single parcel of land. *See Resseger v. Clackamas County*, 7 Or LUBA 152, 156 (1983) (holding that "* * *tax lots are but lines of convenience for owners and assessor's office use") and ORS 92.017 (lawfully created lots or parcels shall remain discrete lots or parcels unless the lot lines are vacated or the lot or parcel is further divided, as provided by law). No legal authority cited to us provides that discrete parcels may be consolidated by means of filing a tax lot consolidation form with the county tax assessor.

Finally, we agree with intervenor that the phrase "when the dwelling is allowed" as used in LDO 4.2.6(F)(1)(g) and ORS 215.705(1)(g) does not necessarily refer to the decision approving the lot of record dwelling, such that upon issuance of that decision the lots or parcels within a tract are consolidated as a matter of law. The code and statute are silent as to how the required consolidation must be accomplished. While it is conceivable that the lot of record dwelling application could also include a replat application or similar request to accomplish a consolidation of multiple lots or parcels at the same time as lot of record approval, petitioner has not established that the 1999 application included such a request or that the 1999 decision approved such a request. The fact that the 1999 decision required consolidation as a *condition of approval* suggests that the county did not intend the 1999 lot of record decision to accomplish consolidation of the two parcels.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the third assignment of error, petitioner argues that the county erred in failing to notify her in 2006 that intervenor had requested remapping of her properties' tax lots. Intervenor responds that designation of tax lots is not a land use decision, so petitioner was not entitled to notice of the request or the county's re-mapping of the tax lots. We agree with intervenor.

The third assignment of error is denied.

The county's decision is affirmed.