

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county ordinance determining the
4 applicants for a conditional use permit for a farm related
5 dwelling have a vested right to residential use of the
6 subject property.¹

7 **FACTS**

8 The subject property (hereafter Tax Lot 1006) is
9 approximately 14 acres in size and is zoned Farm/Forest
10 (F/F). The F/F zone allows one single family dwelling or
11 mobile home customarily provided in conjunction with a
12 commercial farm as a conditional use. Linn County Zoning
13 Ordinance (LCZO) 7.050(12) (1986). The subject property is
14 owned by James and Mildred Bainbridge, the applicants below.
15 The dispute with regard to residential use of the subject
16 property has a long and complex history, an outline of which
17 is given here.

18 **A. Initial Division, Conveyances and Permits**

19 In 1978, the county did not regulate minor partitions
20 and recognized tax lot segregations as acts which
21 effectively divided land for planning purposes. At that
22 time, a 25 acre parcel owned by a family group was divided
23 by tax lot segregations into two 5 acre parcels and a

¹The ordinance also denies the requested conditional use permit for a farm related dwelling. This aspect of the ordinance is not challenged in this appeal.

1 15 acre parcel, the latter being essentially what currently
2 constitutes Tax Lot 1006.²

3 In July 1980, the family group sold the 15 acre parcel
4 to a realtor, who immediately sold one-half (7.5 acres) of
5 that parcel to another party. Within days of these
6 transfers, various people obtained permits to install septic
7 systems on what were then treated by the county as four
8 parcels. By late August 1980, septic systems had been
9 installed on one 5 acre parcel (hereafter Tax Lot 1002) and
10 the two 7.5 acre parcels, and mobile home placement permits
11 had been issued for these three parcels. Sometime in the
12 fall of 1980, a mobile home was placed on Tax Lot 1002, and
13 was occupied as a residence. However, the mobile home
14 placement permits for the two 7.5 acre parcels were not
15 acted upon within one year and, under county regulations,
16 they lapsed.

17 On September 1, 1980, the county adopted a new zoning
18 ordinance, which zoned the 25 acres F/F. At all times
19 relevant to this appeal, a dwelling of any type in the F/F
20 zone has been a conditional use, and no conditional use
21 permit has ever been issued for a dwelling on Tax Lot 1006.

22 **B. Purchase by Bainbridges, Denial of Mobile Home**
23 **Placement Permit**

24 In April 1984, as a result of foreclosure litigation, a

²In 1978, the 25 acres were zoned Agricultural/Residential/Timber (ART),
a district requiring a five acre minimum lot size.

1 Sheriff's Deed was issued transferring the original 15 acre
2 parcel (essentially Tax Lot 1006) back to the family group.
3 In February 1985, the Bainbridges (hereafter applicants)
4 entered into an agreement to purchase the western half of
5 what is now Tax Lot 1006. On March 26, 1985, the county
6 planning department issued a mobile home placement permit to
7 the applicants. This decision was appealed by petitioner
8 Monroe³ and was affirmed by the planning commission.
9 Petitioner Monroe appealed the planning commission's
10 decision to the board of commissioners. Sometime during the
11 course of these appeals, a mobile home was installed on the
12 western half of what is now Tax Lot 1006. On October 2,
13 1985, the board of commissioners issued an order upholding
14 the appeal and denying the mobile home placement permit, on
15 the ground that there could be no vested right to
16 residential development of the western half of what is now
17 Tax Lot 1006, since that 7.5 acres was not a legally created
18 parcel.

19 On October 28, 1985, the applicants acquired the
20 remainder of what is now Tax Lot 1006 from the family group.
21 Also on that date, the applicants filed a notice of intent
22 to appeal the board of commissioners' decision denying the
23 mobile home placement permit with this Board. That appeal

³At that time, petitioner Monroe owned F/F zoned property adjacent to Tax Lot 1006. Petitioner Joines is the current owner of that property. Petitioner Monroe continued to manage the farm/forest operations on this adjoining property until petitioner Joines began residing there.

1 was dismissed, based on motions to dismiss filed by the
2 petitioners in that appeal (the applicants here) and the
3 intervenors-respondent in that appeal (including petitioner
4 Monroe here). Bainbridge v. Linn County, ___ Or LUBA ___
5 (LUBA No. 85-088, June 25, 1986).

6 **C. Filing of Farm Dwelling Application, Circuit Court**
7 **Proceeding**

8 On October 20, 1986, the applicants filed with the
9 county an application for a conditional use permit for a
10 farm dwelling on Tax Lot 1006 in conjunction with a chicken
11 raising operation. The county informed the applicants that
12 they must obtain county land division approval to legitimize
13 the status of Tax Lot 1006 as a legal parcel. The
14 applicants declined to file a land division application. On
15 May 18, 1988, the board of commissioners directed that code
16 enforcement litigation regarding the 25 acres, involving all
17 affected parties, be initiated in circuit court. A
18 complaint seeking declaratory and injunctive relief, naming
19 the applicants and adjoining affected landowners (including
20 petitioner Monroe) as defendants, was filed in Linn County
21 Circuit Court on August 18, 1988.⁴

22 On May 5, 1990, the circuit court issued a letter
23 opinion stating, among other things, that Tax Lot 1006 is a

⁴The county's complaint requested "* * * a judgment declaring the rights, duties and legal obligations of Plaintiff [Linn County] and Defendants [including the applicants and petitioner Monroe] with regard to use and development of the subject tax lot 1006 * * *." Record 1191, 1209.

1 legal parcel; and, therefore, the applicants are not
2 required to obtain county land division approval in order to
3 develop Tax Lot 1006. Record 634. On June 5, 1990, the
4 circuit court issued an order on a partial motion for
5 summary judgment filed by petitioner Monroe and other
6 parties, in which the court found that the applicants "have
7 illegally place[d] a mobile home on [Tax Lot 1006] and
8 continue to have a mobile home on the property without a
9 permit." Record 621. The order also directs the applicants
10 to "immediately file the necessary land use applications"
11 with the county and states that the applicants "must remove
12 all structures and improvements from the property on or
13 before November 30, 1990, unless by that time they have
14 received all necessary county approvals."⁵ Id.

15 **D. County Action on Farm Dwelling Application**

16 On October 26, 1990, the applicants submitted an
17 amended conditional use permit application for a farm
18 dwelling on Tax Lot 1006 in conjunction with raising
19 blueberries and cattle. On December 11, 1990, a public
20 hearing was held before the planning commission. The
21 published notice of that hearing referred only to the
22 conditional use permit application. Neither the amended
23 application nor the notice of the planning commission's

⁵On February 25, 1991, the Linn County Circuit Court issued its Judgment and Decree. The nature of the judgment is essentially similar to the preliminary circuit court orders described previously, and is discussed in more detail under the second assignment of error below.

1 hearing mention a vested right determination. On
2 January 15, 1991, the planning commission issued a decision
3 denying the subject application for failure to comply with
4 LCZO approval standards for conditional use permits. The
5 applicants appealed the planning commission's decision to
6 the board of commissioners.

7 On April 3, 1991, the board of commissioners conducted
8 a hearing on the applicants' appeal. The notice of that
9 hearing mentions only the conditional use permit
10 application, not a vested right determination. Record 288.
11 During deliberation on April 17, 1991, a majority of the
12 board of commissioners made a tentative oral decision to
13 approve the application based on a vested right to
14 residential use of the subject property, and directed staff
15 to prepare a written decision. Record 259.

16 At an April 23, 1991 work session, the board of
17 commissioners decided to reopen the hearing on the issue of
18 whether the applicants have a vested right to residential
19 use of Tax Lot 1006. Record 236. On August 14, 1991, the
20 board of commissioners held a public hearing on the vested
21 right issue. The board of commissioners stated the record
22 would remain open until August 20, 1991, for the limited
23 purpose of allowing the applicants to submit written
24 comments on new materials submitted by the opponents.
25 Record 149-50. At its deliberations on August 28, 1991, the
26 board of commissioners made a tentative oral decision

1 determining the applicants have a vested right to
2 residential use of the subject property. The board of
3 commissioners also granted a request by county counsel "to
4 submit all the documents that have been generated by Legal
5 Staff and Planning Staff for the official record."
6 Record 137.

7 On February 21, 1992, county counsel provided
8 petitioners with a list of a large number of documents he
9 intended to add to the county record in this matter.
10 Record 81. In letters dated February 26 and March 9, 1992,
11 petitioners objected to the submittal of these documents and
12 to the lack of an opportunity to respond to them.
13 Record 71, 81. The documents in question were placed before
14 the board of commissioners at its March 11, 1992 meeting.
15 On March 18, 1992, the board of commissioners adopted the
16 challenged decision.

17 **SECOND ASSIGNMENT OF ERROR**

18 "Linn County's decision violates judicial
19 principles of res judicata (claim preclusion) or
20 collateral estoppel (issue preclusion)."

21 Petitioners contend the challenged decision violates
22 the principles of claim preclusion and issue preclusion.⁶

⁶In North Clackamas School District v. White, 305 Or 48, 750 P2d 485, modified 305 Or 468 (1988) (North Clackamas), the Supreme Court explains that "res judicata" has been used to refer to a preclusive effect on a claim, whereas "collateral estoppel" has been used to refer to a preclusive effect on issues. The Court states it will refer to the preclusive effect on claims as "claim preclusion" and the preclusive effect on issues as "issue preclusion," as these terms "better describe the rules for which

1 Petitioners argue that under either or both principles, the
2 county is precluded from determining that applicants have a
3 vested right to residential use of Tax Lot 1006.
4 Petitioners point out the county, the applicants and
5 petitioner Monroe were all parties to Linn County Circuit
6 Court Case No. 88-1172. Petitioners contend the issue of
7 applicants' alleged vested right to residential use of the
8 subject property was litigated and determined adversely to
9 applicants in that circuit court proceeding.⁷ According to
10 petitioners, the issue of the applicants' alleged vested
11 right was argued during the circuit court proceeding, in
12 petitioner Monroe's motion for partial summary judgment and
13 the other parties' responses thereto. Record 646-47,
14 658-61, 695-96. Petitioners further contend the circuit
15 court's February 25, 1991 Judgment and Decree is a final
16 judgment declaring that the applicants have no vested right
17 to residential use of Tax Lot 1006.

18 The county contends the principles of claim preclusion
19 and issue preclusion do not operate to bar the county from
20 determining that the applicants have a vested right to

they are shorthand." North Clackamas, 305 Or at 50. We follow the Court's direction.

⁷We do not understand petitioners to argue that preclusive effect should also be given to the county's October 2, 1985 decision denying the applicants' request for a mobile home placement permit for the western half of what is now Tax Lot 1006. In any case, we note that the county's October 2, 1985 decision was based on the property that was the subject of that application not being a legally created parcel, rather than on a vested right determination adverse to the applicants.

1 residential use of Tax Lot 1006.⁸ The county argues that it
2 is not clear from the record that the applicants' vested
3 right claim received the full consideration necessary to
4 support giving claim or issue preclusion effect to the
5 circuit court's decision. According to the county, a review
6 of the record shows the applicants "did not present their
7 claim for a vested right in a timely or complete manner
8 sufficient to allow the Circuit Court to make a vested
9 rights determination." Respondent's Brief 21.

10 The county also argues that giving claim or issue
11 preclusion effect to the circuit court decision is not
12 appropriate because of "the very limited character of the
13 Circuit Court's jurisdiction in [an] area that involves a
14 land use decision." Id. Campbell v. Bd. of County
15 Commissioners, 107 Or App 611, 813 P2d 1074 (1991); Sauvie
16 Island Agricultural v. GGS (Hawaii), 107 Or App 1, 810 P2d
17 856 (1991). According to the county, it has jurisdiction to
18 make a vested right determination, as a land use decision,
19 in the first instance. Lung v. Marion County, 21 Or LUBA
20 302 (1991); Crone v. Clackamas County, 21 Or LUBA 102

⁸The county also contends that our decision in Nelson v. Clackamas County, 19 Or LUBA 131 (1990) established that principles of claim preclusion and issue preclusion do not apply to local government land use proceedings. However, Nelson is not determinative here. In Nelson, we considered whether the principles of claim preclusion and issue preclusion could operate to give preclusive effect to a prior local government land use decision. Nelson says nothing about whether a circuit court judgment should be given preclusive effect in a subsequent local government land use proceeding or appeal before this Board involving the same parties.

1 (1991).

2 Claim preclusion applies to preclude an entire claim
3 when that claim has been litigated or, in certain
4 circumstances, could have been litigated. State v. Ratliff,
5 304 Or 254, n 4, 744 P2d 247 (1987); Gittelsohn v. City of
6 Cannon Beach, 44 Or App 247, 605 P2d 743 (1979). The
7 Supreme Court has explained:

8 "The doctrine of [claim preclusion] applies when a
9 subsequent action is brought by one party against
10 another party to a prior suit. If the two cases
11 involve the same 'claim, demand, or cause of
12 action,' then the judgment in the first suit not
13 only bars all matters actually determined, but
14 also every other matter which might have been
15 litigated and decided as incident to or
16 essentially connected therewith either as a claim
17 or a defense. * * *" Waxwing Cedar Products v.
18 Koennecke, 278 Or 603, 610, 564 P2d 1061 (1977),
19 quoting Western Baptist Mission v. Griggs, 248 Or
20 204, 209, 433 P2d 252 (1967).

21 There is no dispute that petitioner Monroe,⁹ the county
22 and the applicants were all parties to the circuit court
23 case that resulted in a judgment on February 25, 1991.
24 There also is no dispute that the question of whether the
25 applicants have a vested right to residential use of
26 Tax Lot 1006 constitutes a single claim or "aggregate of
27 operative facts which compose a single occasion for * * *
28 relief." Taylor v. Baker, 279 Or 139, 144, 566 P2d 884
29 (1977). Therefore, if the vested right claim was actually

⁹As pointed out supra, petitioner Joines is petitioner Monroe's
successor in interest.

1 determined by the circuit court judgment, the county is
2 precluded from making a new determination on that claim,
3 even if it otherwise would have jurisdiction to do so.¹⁰

4 We agree with petitioners that the issue of the
5 applicants' alleged vested right to residential use of
6 Tax Lot 1006 was raised and argued by the parties by and in
7 response to petitioner Monroe's motion for partial summary
8 judgment. Record 646-47, 658-61, 695-96, 907. The circuit
9 court judgment and decree provides, in relevant part:

10 "[T]he court finds [it has] jurisdiction over the
11 parties to the proceeding, and that a justiciable
12 controversy exists between the parties as to
13 whether Tax Lots 1002, 1003 and 1006 are 'lawful'
14 parcels as defined by ORS Chapters 92 and 215 as
15 well as whether the use of [Tax Lots] 1002 and
16 1006 for residential purposes is lawful.

17 " * * * * *

18 "It is ORDERED, ADJUDGED AND DECREED:

19 "1. [Tax Lot 1006 is] a legal parcel as that term
20 is defined in ORS Chapters 92 and 215, and
21 [the applicants] do not have to obtain an
22 after-the-fact approval of a land division as
23 part of any application made to Linn County

¹⁰We decline the county's invitation to question in this appeal whether the circuit court had jurisdiction to make a vested right determination concerning Tax Lot 1006 in 1991. But see Forman v. Clatsop County, 297 Or 129, 133, 681 P2d 786 (1984) (noting Court of Appeals' implication that a circuit court might make a vested right determination if the circuit court proceeding was initiated before local government determined vested right was merely dicta). The time for the county to raise that issue was in an appeal of the circuit court's February 25, 1991 decision. The county may not collaterally attack the circuit court decision in this proceeding. J.P. Finley & Son v. Washington County, 19 Or LUBA 263, 269-70 (1990); Corbett/Terwilliger Neigh. Assoc. v. City of Portland, 16 Or LUBA 49, 52 (1987).

1 seeking approval of the residential use of
2 their property.

3 "2. [Tax Lot 1002 is] a legal parcel and that
4 based on the precedent of Clackamas County v.
5 Holmes, 265 Or 163 (1976), [the owners] have
6 a vested right to use the property for
7 residential purposes.

8 * * * * *

9 "4. [The applicants'] residential use of [Tax
10 Lot 1006] must cease. They will, however,
11 have the opportunity to seek approval of
12 their residential use through the Linn County
13 planning process and subject to their making
14 good faith efforts to complete the process,
15 the Court will allow them to maintain one
16 residential mobile home on [Tax Lot 1006]
17 pending the outcome of that zoning process.
18 * * *" (Emphasis added.) Record 300-01.¹¹

19 The first emphasized portion of the above quote
20 indicates the circuit court judgment determines the issues
21 of whether both Tax Lots 1002 and 1006, and their use for
22 residential purposes, are lawful. Paragraph 4 provides that
23 residential use of Tax Lot 1006 is not lawful and,
24 therefore, must cease. However, paragraph 4 recognizes the
25 possibility that residential use of Tax Lot 1006 may be
26 approved through the county "planning" or "zoning" process
27 and, therefore, allows the existing mobile home to remain on
28 site pending the outcome of that process.

29 We agree with petitioners that the circuit court

¹¹Page 10 of the circuit court's February 25, 1991 judgment and decree is missing from the local record. It should be located between Record 300 and 301. The parties agree that the missing text is duplicated in the revised proposed judgment and decree at Record 520-21.

1 judgment determines the applicants have no vested right to
2 residential use of Tax Lot 1006 as part of the basis for
3 determining that the existing residential use of
4 Tax Lot 1006 is unlawful and must cease, unless approval is
5 obtained through the county "planning" or "zoning" process.
6 We believe the county "planning" or "zoning" process
7 referred to by the court is the process of obtaining a
8 conditional use permit for residential use of the property,
9 a process that was pending at the time the court issued its
10 judgment.¹²

11 The second assignment of error is sustained.¹³

12 The county's decision is reversed.¹⁴

¹²We also note that neither the LCZO nor any other county regulation provides a process for obtaining a county determination on the existence of a vested right to a specific use of particular property. LCZO Sub-Article 30.3 (1986) (Nonconforming Uses) regulates the continuation, alteration and expansion of nonconforming uses. LCZO Article 32 defines "nonconforming use" as "a lawful use of land existing on the effective date of this ordinance which does not conform with the regulations * * * for the zoning district in which such land is located." (Emphasis added.) A vested right is a right to a use that did not yet exist on the date a restrictive regulation was imposed. LCZO Sub-Article 30.3 (1986) does not establish procedures or standards for making a vested right determination.

¹³Because the county's determination that applicants have a vested right to residential use of Tax Lot 1006 is barred by claim preclusion, we do not address petitioners' arguments concerning issue preclusion.

¹⁴Because the county's consideration of the applicants' vested right claim is barred, no purpose would be served by addressing petitioners' other assignments of error challenging the merits of the county's vested right determination and the procedure used by the county in making that determination.