BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID A. NELSON,	)	
	)	
Petitioner,	)	
	)	LUBA No. 89-151
vs.	)	
	)	FINAL OPINION
	)	AND ORDER
CLACKAMAS COUNTY,	)	
	)	
Respondent.	)	

Appeal from Clackamas County.

Steven Schwindt, Canby, filed the petition for review and argued on behalf of petitioner. With him on the brief was Reif and Reif.

Michael Judd, Oregon City, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 04/30/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a decision of the Clackamas County Hearings Officer (hearings officer) denying his application to partition an 8.0 acre, Exclusive Farm Use 20 Acre (EFU-20) zoned parcel into two four acre parcels, and to establish a nonfarm residence on the second parcel.

FACTS

The subject 8.0 acre parcel (Tax Lot 300) is vegetated primarily with brush and deciduous trees, and is unimproved. Tax Lot 300 has soils with Class II agricultural capability and Class I forest capability. Tax Lot 300 is adjoined on the north and west by an EFU-20 zoned rural residential subdivision with lots generally five acres in size. It is adjoined on the east by a golf course. It is adjoined on the south by an approximately 19 acre EFU-20 zoned ownership currently in agricultural use.

Tax Lot 300 was created in 1980, when Board of County Commissioners Order No. 80-1071 approved the partitioning of a 14.45 acre EFU-20 zoned parcel into the 8.0 acre Tax Lot 300 and a 6.45 acre Tax Lot 320.[1] Record 57. The partitioning was for the purpose of selling Tax Lot 320 to the owner of 12.6 acre Tax Lot 311 to the south, to be

[1]The county's order refers to what is now Tax Lots 300 and 320 as being 7.08 and 7.38 acres in size, respectively. However, subsequent surveying revealed that the sizes of the tax lots created were actually 8.01 and 6.45 acres, respectively.

combined into a 19 acre ownership used for farm use. Id. The county order also approved establishment of a nonfarm residence on Tax Lot 300.[2]

On July 12, 1989, petitioner, the owner of Tax Lot 300, applied to the county Department of Transportation and Development, Planning and Economic Development Division (planning division) for a partition to divide Tax Lot 300 into two approximately four acre parcels and for establishment of a nonfarm residence on each parcel. The planning director approved petitioner's application. The planning director's decision was appealed by neighboring property owners. After a public hearing, the hearings officer issued his decision denying petitioner's application.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

> "The Hearings Officer erred when he required applicant (petitioner) to establish that the property is general[ly] unsuitable for production of farm crops and livestock * * *."

One of the three bases for the hearings officer's denial[3] was that petitioner's application failed to comply

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[2]As far as we can tell, Order No. 80-1071 did not expressly approve a conditional use permit for a nonfarm dwelling on Tax Lot 300. However, the parties agree that petitioner is entitled, under Order 80-1071, to place one nonfarm dwelling on Tax Lot 300 without additional conditional use approval.

[3]Petitioner challenges the other two bases for the denial in his first and third assignments of error, addressed infra.

with the following approval standard for nonfarm dwellings and partitions in the EFU-20 zone:

> "Single-family residential dwellings not provided in conjunction with farm use * * * shall not be [approved] unless the Planning Director finds that the proposed nonfarm use:
>
> "* * * * *
>
> "4. Is situated upon generally unsuitable land for the production of farm crops and livestock, considering the terrain, adverse soil or land conditions, drainage and flooding, vegetation, location and size of the tract;
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> "* * * * *." Clackamas County Zoning and Development Ordinance (ZDO) 401.05.A.[4]

However, in Order No. 80-1071, a county hearings officer previously concluded that creation of the present Tax Lot 300, and establishment of a nonfarm residence thereon, complied with ZDO 30.5.A.4(1980), an approval standard identical to ZDO 401.05.A.4. Record 58.

Petitioner complains that the hearings officer's 1989 findings and conclusion with regard to suitability of Tax Lot 300 for production of farm crops and livestock "are in contradiction to the findings and conclusion made in 1980 concerning the same property." Petition for Review 9. Petitioner argues that the findings and conclusion in Order No. 80-1071 are binding and conclusive.

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[4]Under ZDO 401.05.C, lot divisions to create nonfarm parcels in the EFU-20 zone are also subject to the approval standards for nonfarm uses of ZDO 401.05.A.

Petitioner contends the issue necessarily determined in 1980 is the same as that involved in 1989, whether Tax Lot 300 is generally unsuitable for agricultural production. According to petitioner, the relevant characteristics of Tax Lot 300 have not changed since 1980. Petitioner also contends that the parties were the same in 1980 as in 1989, the county and petitioner (or his predecessor in interest). Petitioner further argues that the county had the right to appeal the 1980 decision if it thought that decision incorrect, but it chose not to do so. Finally, petitioner argues that he relied on the county's 1980 decision in purchasing Tax Lot 300.

Petitioner argues that

> "* * * a judgment or decree rendered upon the merits is a final and conclusive determination of the rights of the parties, and a bar to a subsequent proceeding between them upon the same claim or cause of suit, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided as incident to or essentially connected therewith, either as a matter of claim or defense, but that when the action is upon a different claim or demand the former judgment can only operate as a bar or estoppel as against matters actually litigated or questions directly in issue in the former action." Grant v. Yok, 233 Or 491, 378 P2d 962 (1963).

Petitioner argues that res judicata (claim preclusion) and collateral estoppel (issue preclusion) are equally applicable to administrative decisions. North Clackamas School Dist. v. White, 305 Or 48, 750 P2d 485, modified 305

Or 468 (1988) (North Clackamas). According to petitioner, both res judicata and collateral estoppel bar the county from relitigating the issue of whether Tax Lot 300 is generally unsuitable for agricultural production.

The county points out that the 1980 and 1989 applications are not the same. The county argues that the 1980 decision partitioned the parent 14.45 acre lot, with the southern parcel being put into farm use in conjunction with the adjoining property, and approved a single nonfarm dwelling for the northern parcel (Tax Lot 300). The county points out that the 1989 application seeks to divide the eight acre Tax Lot 300 into two parcels and to obtain approval for a second nonfarm dwelling.

The county further argues that the doctrines of res judicata and collateral estoppel do not apply to this situation. According to the county, under both res judicata and collateral estoppel, the issue is whether a party is bound by the result of previous litigation in which it was involved. The county maintains that in 1980 it was the decision maker, not one of the litigants. The county also disagrees with petitioner's contention that the county could have appealed its own 1980 decision.

In North Clackamas, a case concerning whether an employee's assertion of a medical expenses claim was precluded by an earlier ruling of the Workers' Compensation Board, the Oregon Supreme Court was asked for the first time

to determine "whether res judicata is applicable where an administrative agency is faced with a second proceeding involving the same parties and, arguably, the same claim."[5] North Clackamas, 305 Or at 51. The court concluded that "[a]lthough judge-made res judicata rules may not be applicable to all administrative proceedings, we should apply them where they facilitate prompt, orderly and fair problem resolution." Id. at 52.

The court went on to cite with approval the following passage from 2 Davis, Administrative Law Treatise 548, § 18.02 (1958):

> "As a matter of principle, it is completely clear that the reasons behind the doctrine of res judicata as developed in the court system are fully applicable to some administrative proceedings. * * * The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in favor." (Footnote omitted; emphasis in original.)

The court also quoted Restatement (Second) of Judgments

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[5]In 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 points out that the editors of the Restatement, in Restatement (Second) of Judgments (1980), now refer to the preclusive effect on claims as "claim preclusion" and the preclusive effect on issues as "issue preclusion." The court states it will use those terms in its opinions, as they "better describe the rules for which they are shorthand," and will also refer to "the law of res judicata" or "the rules of res judicata," as including both claim preclusion and issue preclusion. North Clackamas, 305 Or at 50. We follow the court's lead.

(hereafter "Restatement") § 83(1), which provides:

> "Except as stated in Subsections (2), (3), and (4), a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court."

The court's decision in North Clackamas gives some additional guidance as to how the court would decide whether the rules of res judicata apply in a particular instance where an administrative agency is faced with a second proceeding arguably involving the same parties and issues or claim. The court stated there is no reason why the rules of res judicata should not apply where "[t]he same quality of proceedings and opportunity to litigate is present in both proceedings." Id. at 52. The court also stated that where the forum is the same in both the original and subsequent proceedings, it need not consider further the relative competence and responsibility of the two forums.

Local government quasi-judicial land use proceedings are similar to adjudicative administrative agency proceedings. Furthermore, the "forum" for both the 1980 and 1989 decisions at issue in this case was the county hearings officer. Therefore, it appears, in principal, that the rules of res judicata could apply to these county proceedings. See Gittlesohn v. City of Cannon Beach, 44 Or App 247, 605 P2d 743 (1979) (subsequent action filed in circuit court, to declare building permits were issued in

violation of zoning ordinance, precluded because of res judicata effect of prior circuit court proceedings which could have or did determine validity of zoning action).

However, we agree with the county that the "claims" involved in the 1980 and 1989 proceedings are not the same. In 1980, the application was to partition a 14.45 acre lot, putting the southern parcel into farm use in conjunction with the adjoining property, and to approve a single nonfarm dwelling for the northern parcel (Tax Lot 300). The 1989 application is to divide the eight acre Tax Lot 300 into two parcels and to approve a second nonfarm dwelling. Therefore, claim preclusion does not apply.

Whether issue preclusion applies, i.e., whether the county's 1980 determination on the general unsuitability of Tax Lot 300 should have preclusive effect on the county's 1989 determination on the same issue, is a closer question.[6] We are uncertain whether, as the county argues, its 1980 decision could not be given preclusive effect, preventing the county from making a different determination on the same issue in 1989, because the county was the "decision maker" in the 1980 and 1989 proceedings, rather than a "party."

Both decisions of the Oregon appellate courts and the Restatement suggest that issue preclusion might apply to

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[6]In this instance, it is undisputed that general unsuitability of Tax Lot 300 was determined in the county's 1980 decision, and was essential to that decision.

prevent an administrative agency from deciding an issue differently than it did in a previous decision. See Bowser v. Evans Products Co., 17 Or App 542, 522 P2d 1405 (1974) (award of medical services by Workers' Compensation Board precluded by earlier Board ruling that claimant had no permanent partial disability); Restatement §83, comment h (recognizes that issue preclusion can generally be invoked against the government in adjudications before an administrative agency unless an exception applies).

Although issue preclusion is generally invoked by a party against an opposing party appearing before an administrative tribunal, it is not clear whether the involvement in the agency adjudication of an opposing, non-agency party is essential to the application of the doctrine. For instance, the Restatement discusses the possibility that, where the same fact pattern presents itself in adjudications occurring before a state revenue agency over the course of time, issue preclusion could apply to prevent the state revenue agency from reaching a different determination concerning a taxpayer's tax liability than it had in a previous year. Restatement §83, comment c.

Furthermore, unlike a court in judicial adjudications, a local government has a more complex role in quasi-judicial land use adjudications before it than that of a neutral decision maker. For instance, although the local government

must provide an unbiased decision maker (usually a hearings officer, planning commission or the governing body), local government staff members may present evidence to the decision maker and advocate positions regarding interpretation and application of approval criteria. Additionally, unlike a trial court, when local governments' decisions are appealed to this Board, the local governments are parties respondent and generally appear and defend their decisions. See League of Women Voters v. Coos County, 82 Or App 673, 679, 729 P2d 588 (1986) ("counties are always nominally, and are often in fact, adverse parties to the appellant in appeals to LUBA from their decisions").

However, even if issue preclusion could theoretically be applied to the county, even though it did not participate in the 1980 proceeding as a "party," an issue we need not and do not decide, we conclude it would be inappropriate to apply issue preclusion in this case. According to Restatement § 83(1), quoted supra, giving preclusive effect to adjudicative determinations by an administrative tribunal is subject to the same general exceptions to the application of issue preclusion recognized by Restatement § 28, and to specific exceptions recognized by Restatement § 83(2)-(4). Of these exceptions, we find two have particular relevance to the situation presented in this case.

Restatement § 28(2) states that issue preclusion will not be applied where "[t]he issue is one of law and * * * a

new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws * * *." In explaining this exception, the Restatement provides in comment c:

> "In determining whether the applicable legal context has changed, or that applying preclusion would result in inequitable administration of the law, it is important to recognize that two concepts of equality are in competition with each other. One is the concept that the outcomes of similar legal disputes between the same parties at different points in time should not be disparate. The other is that the outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards. Applying issue preclusion invokes the first of these concepts, treating temporally separated controversies the same way at the expense of applying different legal standards to persons similarly situated at the time of the second litigation. * * *
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> "In deciding whether to apply issue preclusion, or instead to apply a subsequent emerging legal standard, the choice is between two forms of disparity in resolution of legal controversy. * * * [T]he essential problem is that there has been change in [interpretation of] the law but not the facts. * * * In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally, as in the case of tax law. Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favored position in current administration of law." (Emphasis added.)

Land use regulations, like tax law, affect the general public. Furthermore, in Oregon, counties and cities are the

units of government charged with administering the general body of land use law (i.e., comprehensive plans, land use regulations, statewide planning goals and relevant state statutes), and applying it to members of the public. Apparently, the county's interpretation of one element of that law, the general unsuitability standard for permitting nonfarm divisions and uses in the EFU-20 zone, has evolved during the period between its 1980 and 1989 decisions. Precluding the county from applying its current interpretation of the general unsuitability standard in its 1989 decision would unjustifiably give petitioner a favored position in the current administration of that standard.

In addition, Restatement §83(4) provides:

> "An adjudicative determination of an issue by an administrative tribunal does not preclude relitigation of that issue in another tribunal if according preclusive effect to determination of the issue would be incompatible with a legislative policy that:
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> "(a) The determination of the tribunal adjudicating the issue is not to be accorded conclusive effect in subsequent proceedings; * * *
>
> "* * * * *"

In comment h to this section, the Restatement states that the above quoted subsection

> "* * * recognizes that the legislation governing a particular statutory scheme may call for withholding preclusion where it would otherwise be applied. * * * The scheme of remedies may intend that the proceedings in an administrative tribunal be determinative only for the purposes of the

> controversy immediately before the agency. For example, the [statutory] scheme may contemplate that the agency proceedings be as expeditious as possible. * * * Thus, issue preclusion may be withheld so that the parties will not be induced to dispute the administrative proceeding in anticipation of its effect in another proceeding."

Oregon's statutory land use scheme places a great deal of importance on advance knowledge by the public of the standards and criteria to be applied in local government quasi-judicial adjudications, and on an expeditious conclusion to such proceedings. For example, ORS 215.416(8) and 227.173(1) require that county and city decisions on land development permits be based on "standards and criteria which shall be set forth in the [zoning or development] ordinance." ORS 197.763(3)(b) and (5)(a) require local governments to give notice before and at the commencement of quasi-judicial land use hearings which includes identifying the applicable criteria from the local government's plan and land use regulations. ORS 215.428(3) and 227.178(3) require that counties and cities take final action on applications for quasi-judicial land use permits and zone changes within 120 days after the application is filed and deemed complete.

In addition, we note that Oregon counties and cities generally permit an unsuccessful land use applicant to reapply for the denied development, albeit some require that a specified period of time have elapsed before such reapplication can be made. If a local government denial of land use approval had a preclusive effect, the applied for

use could never be approved by the local government, unless applicable approval criteria providing the original basis for denial were amended.

In conclusion, we believe the system of local government land use adjudications established by state statute and local regulations places primary importance on expeditious adjudications, contemporaneous application of the same approval criteria, as set out in comprehensive plans and land use regulations, to all similarly situated applicants and the ability of a local government tribunal to make an independent determination on the application of those approval criteria to the facts before it. This system is incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding.

The only basis for petitioner's claim of error in the county's determination that the proposed nonfarm partition and dwelling do not comply with the general unsuitability standard of ZDO 401.05.A is petitioner's argument that the county's 1980 decision precludes such a determination.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

> "The Hearings Officer erred when he found that petitioner's proposal did not comply with, nor was it consistent with the intent and purpose of ORS 215.243 * * *."

THIRD ASSIGNMENT OF ERROR

> "The Hearings Officer erred when he found that the petitioner's proposal conflicted with Clackamas County's Comprehensive Plan * * *."

Petitioner's contentions under these assignments that the county erred in determining noncompliance with two other approval criteria are based solely upon the argument that these determinations of noncompliance are precluded by the county's determination of compliance with identically worded ordinance standards in its 1980 decision. We rejected that argument in resolving petitioner's second assignment of error.

The first and third assignments of error are denied.

The county's decision is affirmed.