BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

KIP O'CONNOR and LIFESTYLE VENTURES, LLC,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2019-119

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Kip O'Connor, Brightwood, filed the petition for review on his own behalf. Mark E. Griffin filed a reply brief and argued on behalf of petitioners. With him on the reply brief was Griffin & McCandlish.

Nathan K. Boderman, Assistant County Counsel, Oregon City, filed a response brief and argued on behalf of respondent. With him on the brief was Stephen L. Madkour.

RYAN, Board Member; RUDD, Board Chair, participated in the decision.

ZAMUDIO, Board Member, did not participate in the decision.

AFFIRMED 05/26/2020

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

Petitioners appeal a hearings officer decision denying two flood plain development permits.

INTRODUCTION

Petitioners own the subject properties, referred to as tax lots 4200 and 4400. The subject properties are approximately .12 acres each, and are adjacent to the east bank of the Sandy River and the west side of Relton Lane. The properties are zoned Recreational Residential (RR) and are located in the county's Floodplain Management District (FMD). Petitioners applied for floodplain development permits for dwellings on each of the properties. In a single decision, the county hearings officer denied the applications, and petitioners appealed that decision to LUBA.[1]

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[1] On October 30, 2019, Kip O'Connor (O'Connor) and Lifestyle Ventures, LLC (Lifestyle) filed a Notice of Intent to Appeal (NITA). OAR 661-010-0075(6) requires that an organization appearing before LUBA be represented by an active member of the Oregon State Bar. Lifestyle is an organization. On November 26, 2019, we issued an order requiring petitioners to file an amended NITA identifying the name, address, and telephone number of Lifestyle's attorney within 14 days of the date of the order. On January 28, 2020, O'Connor filed the petition for review individually, and *pro se*.

On April 6, 2020, petitioners' attorney filed a Notice of Appearance on behalf of O'Connor and Lifestyle. On April 21, 2020, LUBA received petitioners' Motion to Permit Lifestyle to file an Amended NITA and to Adopt Appeal Briefs, and an Amended NITA. The county does not oppose the motion, and the Amended NITA is allowed.

We discuss the applicable floodplain regulations and other pertinent background information before addressing petitioners' assignments of error.

A. The Floodplain Management District (FMD)

The FMD boundaries correspond to the county's Special Flood Hazard Area (SFHA), described at Clackamas County Zoning and Development Ordinance (ZDO) 703.04 (2014) as follows:

> "Section 703 applies to the FMD, which is applied to the special flood hazard areas (SFHAs) identified by the Federal Insurance Administration in a scientific and engineering report entitled, 'The Flood Insurance Study for Clackamas County, Oregon & Incorporated Areas,' (FIS) dated June 17, 2008, with accompanying Flood Insurance Rate Maps (FIRMs)."[2]

The FMD includes various subareas, including the floodway and the floodplain. The subject properties are located in the floodway, and therefore the SFHA and FMD.

ZDO section 703 governs development in the FMD.[3] A floodplain development permit is required for any development in the FMD, subject to a

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[2] The SFHA is defined by ZDO 703.05(LL) (2014) as: "The land area covered by the floodwaters of the base flood on National Flood Insurance Program (NFIP) maps and, thus, the area determined by detailed or approximate studies to be in a 100-year floodplain. The SFHA is subject to the NFIP's floodplain management regulations and the mandatory purchase of flood insurance. The SFHA includes the floodway, flood fringe, flood hazard, flood prone, and shallow flooding areas."

[3] After petitioners filed the application, the county amended its ZDO provisions regarding the FMD, apparently in an effort to clarify this procedure

few exceptions that do not apply here. However, ZDO 703.07 categorically prohibits development in the *floodway*.

B. Removing a Property from the Floodplain Management District

The procedure for removing properties from the SFHA is the central issue in this appeal. ZDO 703.04(B) describes the process for determining whether the FMD provisions apply to a property. It states:

> "The Planning Director shall make interpretations where needed, as to the exact location of the boundaries of the SFHA (for example, where there appears to be a conflict between a mapped boundary and actual field conditions, topography, and/or elevations). *In areas where base flood elevation data have been provided, the Planning Director may require the applicant to submit an elevation certificate to determine whether the proposed development is located in the SHFA*. To most precisely determine the base flood elevation of the subject area, the elevations provided by the FIS flood profiles in combination with the cross section lines on the FIRM shall supersede the base flood elevation lines and values identified on the FIRM." (Emphasis added.)

The county planning staff maintained before the hearings officer that the boundaries of the floodway are determined by the FIS FIRMs, and that in the circumstances presented, the only way for petitioners to remove property that is

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and to make it consistent with advice the county received from the Department of Land Conservation and Development (DLCD) and the Federal Emergency Management Agency (FEMA). Record I, 6-8, 12. The version of the ZDO that applies to petitioners' January 2, 2019 applications is the 2014 version, which references the June 17, 2008 FIS FIRMs. We refer to that version throughout this opinion, unless otherwise noted.

1 located in the floodway from the SFHA is through a Letter of Map Amendment
2 (LOMA), which is obtained from FEMA.[4]

3 Petitioners dispute the necessity of a LOMA. Petitioners argue that if the
4 applicant demonstrates to the county that a property is above the BFE, by
5 submitting an elevation certificate, the local government can issue floodplain
6 development permits without a LOMA.[5] Petitioners argued to the hearings

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[4] ZDO 703.05 defines a LOMA as:

> "An official amendment, by letter from the Federal Emergency Management Agency [(FEMA)], to an effective National Flood Insurance Program map. A LOMA established a property's location in relation to the special flood hazard area. LOMAs usually are issued because a property has been inadvertently mapped as being in the flood plain, but is actually on natural high ground above the base flood elevation [(BFE)]."

[5] In further support of this theory, petitioners cited to the NFIP Floodplain Handbook, which provides:

> "The [base flood elevation] BFE in relation to the actual ground elevation sets the floodplain limits for regulatory purposes. When ground surveys show that a development site is above the BFE, you can record the data and issue the permit. Then, if the developer or owner wants the property removed from the Special Flood Hazard Area designation, he or she can request a Letter of Map Amendment." Record I, 5.

Under petitioners' theory, a LOMA only concerns whether a property is identified on the FIRMs for purposes of insurance. While it would make sense for an owner to remove his or her property from the floodway to reduce insurance costs by obtaining a LOMA, according to petitioners, it is not necessary to do so to build a dwelling.

officer that the question of whether the property is located in the floodway is a question for the planning director, and that the local government can remove a property from the SFHA, and therefore issue a development permit for the property, if an applicant submits an elevation certificate that demonstrates that the property is above base flood elevation, pursuant to ZDO 703.04(B).[6]

Accordingly, the central issues before the hearings officer were: (1) whether the hearing officer had the authority to approve petitioners' application to remove the properties from the SHFA based on submission of an elevation certificate but absent a LOMA, and (2) whether the subject properties are in fact in the SHFA.

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[6] ZDO 703.05 defines an Elevation Certificate as:

> "A form produced by the Federal Emergency Management Agency (FEMA) that is completed by a professional engineer, licensed architect, or licensed surveyor, usually through field survey work, that reports elevation information about grades, structures, and other facilities. An elevation certificate is used to determine the relationship of grades, structures, and other facilities to the base flood elevation. It is also used to certify building elevations to ensure compliance with community floodplain regulations; determine proper insurance rates, and supply a Letter of Map Amendment or letter of Map Revision Based on Fill. Communities that participate in the Community Rating System are required to use an elevation certificate for all official reporting and recordkeeping of elevations."

C. Prior Actions Regarding the Subject Properties

1. 2010 Mandamus Action (Tax Lot 4400)

In a previous set of appeals, petitioners conceded that a LOMA was necessary to remove their properties from the SHFA.[7] In 2010, O'Connor filed a mandamus action in Clackamas County Circuit Court, seeking an order to require the county to issue a flood development permit for tax lot 4400. In 2012, the circuit court granted summary judgment in favor of the county, holding that O'Connor's requested relief would violate the law:

> "The County also asserts that the writ must be dismissed pursuant to ORS 215.429(5) because the grant of the writ would violate substantive law. The County asserts that the undisputed fact is that the property in question currently lies entirely within the regulated floodway as established by [the Federal Emergency Management Agency ('FEMA')]. Upon review of the record before the Court and considering the arguments of the parties, this Court is inclined to agree.
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> "[O'Connor] attempts to defend against dismissal by asserting that the property is not in-fact within the floodplain. [O'Connor] provides a wealth of factual evidence that the property should not be

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[7] One requirement necessary for the LOMA application to be processed by FEMA is a Community Acknowledgment Form signed by the county. The form requires, among other things, that the governmental body certify that no "fill" has been placed on the property that is proposed to be removed from the floodway. The county has previously determined that revetment had been placed on the subject properties and that the revetment constituted "fill." After conferring with FEMA, the county determined it could not sign the form due to the presence of fill. In December 2009, O'Connor submitted an application for a LOMA for tax lot 4400 to FEMA, but without the form, FEMA was unable to process the application. *O'Connor II*, 2013 WL 3818143, at *6; Record I, 482-83.

> classified as within the regulatory floodway. However, [O'Connor] provides no evidence and makes no argument that FEMA's classification has in-fact changed. [O'Connor] conceded at oral argument that a [Letter of Map Amendment ('LOMA')] permit signed by the County [*sic*] was the proper method to determine this issue.
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> "As such, this Court finds that a grant of mandamus in the case at bar would violate substantive law." Record I at 218 (quoting state circuit court opinion, brackets in original).[8]

O'Connor appealed that decision to the Court of Appeals. *State ex rel. O'Connor v. Helm/Clackamas County*, 273 Or App 717, 719 (2015), *rev den*, 358 Or 550 (2016) (*O'Connor I*). The Court of Appeals affirmed, explaining:

> "As the circuit court understood the case, the question framed by the parties below was not whether there was a factual dispute about whether the subject property *should be* designated as part of the regulatory floodway; the question was whether it *has been*, in light of the fact the relevant parts of the county's code, when viewed in the context of federal regulations, make clear that the regulatory floodway is determined in the first instance by the flood profiles included in the FIS and the accompanying FIRMs. O'Connor does not dispute that [tax lot 4400] is within the regulatory floodway as shown on FEMA's existing maps. Nor does he dispute that, as of the date of the mandamus action, no LOMA has been processed by FEMA to change that designation; in fact, one of O'Connor's complaints is that the county planning director incorrectly refused to sign off on the LOMA, thereby precluding him from obtaining the LOMA to which he would be otherwise be entitled. On this

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[8] Volume I is the county's record in county file Z0001-19-F (petitioners' application for tax lot 4400). Volume II is the county's record in county file Z0002-19-F (petitioners' application for tax lot 4200). The hearings officer issued a single opinion denying both of petitioners' applications. Vol I, 1-19; Vol II, 1-19.

> record, and in light of the parties' agreements, the trial court correctly ruled that there is no genuine issue of material fact as to whether tax lot 4400 is within the designated regulatory floodway, thereby precluding the construction of a new residence on that lot under the restriction in [ZDO] 703.07 in the absence of a change of designation." 273 Or App at 733-34 (emphases in original; footnote omitted).

2. First Federal Litigation (Tax Lot 4400)

In 2011, prior to resolution of the state court litigation, O'Connor filed an action in federal court. In that case, O'Connor alleged that the county and its planning officials violated O'Connor's substantive and procedural due process rights by, among other things, requiring a flood plain development permit to develop tax lot 4400 and denying O'Connor's floodplain development permit application.

The federal district court entered summary judgment in favor of the county, finding, among other things, that local regulations authorized the county to: (a) determine that tax lot 4400 was located below base flood elevation; (b) require a floodplain development permit because the proposed residence on tax lot 4400 was located below base flood elevation; (c) deny the floodplain development permit application; and (d) require a LOMA from FEMA to remove tax lot 4400 from the SFHA. *O'Connor v. County of Clackamas*, No 3:11-CV-1297-SI, 2013 WL 3818143 at *13-15 (Judge Simon) (D Or July 22, 2013), *aff'd*, 627 Fed Appx 670 (9th Cir 2015) (*O'Connor II*). The court concluded that:

> "FEMA, the Clackamas County Circuit Court, the hearings officer, and this Court have all found [the county's] determination that all of Tax Lot 4400 is within the regulated floodway is warranted and

appropriate." 2013 WL 3818143 at *27.

O'Connor appealed, and the Ninth Circuit affirmed the court's grant of summary judgment. 627 Fed Appx 670.

3. 2015 Hearings Officer Decision (Tax Lot 4200)

In 2015, Lifestyle filed a floodplain development permit application with the county to develop a dwelling on tax lot 4200. In that case, the hearings officer determined that the entirety of tax lot 4200 was located within the SFHA, agreed with the county's methodology, and upheld the county's identification of the base flood elevation on tax lot 4200. Record II, 195-212. Because the county's code prohibits dwellings in the SFHA, the hearings officer also agreed with the county's decision to deny Lifestyle's application. *Id.* Lifestyle appealed the hearings officer's 2015 decision to LUBA, and subsequently voluntarily dismissed the appeal. *Lifestyle Ventures v. Clackamas County*, ___ Or LUBA ___ (LUBA No 2015-103, Apr 8, 2016) (*O'Connor III*).

4. Second Federal Litigation (Tax Lot 4200)

In 2016, petitioner Lifestyle filed a new complaint against the county in federal district court, alleging violation of the equal protection clause, and common law negligence claims, in connection with the county's requirement for Lifestyle to submit, and its ultimate denial of, an application for a floodplain development permit to develop tax lot 4200. Record I 13; *Lifestyle Ventures, LLC*

v. County of Clackamas, No 3:15-CV-1291-SB, 2017 WL 8159315 (D Or Dec 8, 2017) (Magistrate Beckman) (*O'Connor IV*).[9]

In a second amended complaint filed in February 2017, Lifestyle alleged the county was wrong about its base flood elevation calculation for tax lot 4200 and that the county had therefore improperly required Lifestyle to obtain a floodplain development permit prior to development. The federal magistrate cited the county hearings officer's 2015 decision in *O'Connor III* in which the hearings officer agreed with the county "'that an elevation certificate in and of itself does not remove a property from the SFHA.'" WL 8159315 at *3 (quoting *O'Connor III*). The hearings officer agreed with the methodology required by ZDO 703.04(B), and found the planning director's interpretation of base flood elevation for the property was correct, holding that the:

> "'mere fact that [petitioner's] surveyor submitted an elevation certificate does not establish the [base flood elevation] BFE' because '[a]s ZDO 703.04(B) provides, there is a required method for determining BFE—using the FIS flood profiles and the cross section lines from the FIRM. * * *' Therefore, because the property is in the SFHA and dwellings are prohibited in the SFHA, the Planning Director correctly denied the FDP." *Id.*

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[9] Lifestyle filed a motion to amend its complaint, in an attempt to add neighboring tax lot 4400 to its equal protection and negligence claims. The federal magistrate denied petitioners' motion because Lifestyle's owner, O'Connor, had already litigated claims relating to tax lot 4400 in federal court in *O'Connor II*. The court held "therefore collateral estoppel (i.e., issue preclusion bars further litigation of claims relating to lot 4400." WL 8159315 at *1.

The county filed a motion to dismiss the amended complaint on several grounds, including collateral estoppel. The federal court granted the county's motion to dismiss, and after an extensive examination of federal and state issue preclusion law, determined that the doctrine applied to bar petitioners' action in *O'Connor IV*:

> "It is well settled that issue preclusion bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim. * * *
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> "The Court concludes that the issues Lifestyle seeks to litigate here are identical to the issues already litigated and decided in *O'Connor [II]*, those issues were actually litigated and decided in *O'Connor [II]*, Lifestyle (who the Court has already determined stands in privity with O'Connor) had a full and fair opportunity to litigate the issues, and the issues were necessary to decide in the merits in *O'Connor [II]*.
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> "In *O'Connor* [*II*], O'Connor alleged, among other things that the County and its planning official violated his constitutional rights by refusing to accept his surveyor's elevation certificate to determine [base flood elevation] BFE and by requiring an [floodplain development permit] FDP to develop Lot 4400 * * *. [The Court] entered summary judgment in favor of the County and its planning officials, and the Ninth Circuit affirmed. Here, Lifestyle again alleges that the County and its planning officials violated his constitutional rights by refusing to accept its surveyor's elevation certificate to determine BFE and by requiring an FDP to develop Lot 4200 * * *.
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> "More specifically, [the Court] held that the County's determination that the property 'is within the regulated floodway is warranted and appropriate,' noting that FEMA, the Clackamas County Circuit Court, and the Clackamas County Hearings Officer agreed with the

> County's determination that the property is located within the regulated floodway. [The Court] noted that the County had considered the contrary elevation information provided by O'Connor's surveyor, but nevertheless appropriately determined that the property is located within the regulated floodway. * * * Importantly, [the Court] held that the County has the authority to make that determination and to require an FDP to develop in the regulated floodplain.
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> "Despite [the Court's] prior holding [in *O'Connor II*] [] Lifestyle again asserts in this case that the County and its planning officials should have accepted Lifestyle's elevation certificate to determine BFE and should not have required an FDP to develop [its] property * * *. Lifestyle argues that collateral estoppel does not apply here because whether Lot 4200 can be developed without the necessity of Lifestyle obtaining an FDP, applying for a LOMA, or otherwise meeting the irrational demands that the County does not impose upon any other landowner was not decided in [*O'Connor II*]. On the contrary, [the Court] clearly held that the County has the authority to determine whether property is located within the regulated floodway and to require and deny an FDP if the property is so located." 2017 WL 8159315 at * 4-5 (internal citations omitted).

The federal magistrate then examined the similarities and differences between *O'Connor II* and *O'Connor IV*, and found that:

> "The only differences between *O'Connor [II]* and this case are that: (a) this case includes an equal protection claim, whereas the *O'Connor [II]* plaintiffs alleged violations of substantive and procedural due process; (b) the prior litigation relates to the County's requirement of an [floodplain development permit] FDP for Lot 4400, and this case relates to Lot 4200 in the same subdivision; (c) after *O'Connor [II],* Lifestyle learned that the County had allegedly placed a 'note' in its file to prevent any further development; and (d) Lifestyle alleges that the Hearings Officer clarified the legal interpretation of the relevant ZDO after *O'Connor [II].* This Court finds that these differences are inconsequential to its issue preclusion analysis. * * *

> "[T]he fact that Lifestyle's renewed challenge related to development of Lot 4200, instead of Lot 4400, is of no material significance because the issue that [the Court] decided is that the County has the authority to make the determination whether the property is located within the regulated floodway, and that the County has discretion to require and deny an FDP under these circumstances. *O'Connor* [*II*]. * * * The fact that Lot 4200 may be located at a slightly different elevation than Lot 4400 does not impact the legal issues [the Court in *O'Connor II*] has already decided. To hold otherwise would allow Lifestyle to file a new federal case every time Lifestyle applies to develop one of its lots in the [ ] [s]ubdivision or every time Lifestyle amends a previously-denied application, which would subject the County to never-ending litigation." *Id.* at * 5 (footnotes and internal citations omitted).

E. 2019 Hearings Officer Decision (Tax Lots 4200 & 4400)

Finally, on January 2, 2019, petitioners filed two new land use applications for floodplain development permits to allow the development of two single-family residences: one on tax lot 4200 and one on 4400. Record I, 426, 460-96; Record II, 423, 471-78. These hearings officer's decision regarding these applications is the subject of this appeal.

As part of the applications, petitioners submitted new elevation certificates for each of the properties, prepared by petitioners' registered professional land surveyor. Record I, 464-65; Record II, 475-76. The county found that petitioners' elevation certificates stated that petitioners' surveyor had calculated the same base flood elevation for both tax lot 4200 and 4400 as had been calculated by

petitioners' previously submitted elevation certificates.[10] Record I, 426; Record II, 423. Petitioners submitted additional application materials in July 2019, including revised elevation certificates for each of the properties, this time suggesting revised building footprint locations had been identified and recalculating the base flood elevation. Record I, 426; Record II, 423. According to petitioners: (1) if the proposed dwellings on tax lots 4200 and 4400 are above the base flood elevation, they are not in the floodway; (2) if the properties are not in the floodway, then they are not in the SFHA; (3) if the properties are not in the SFHA, the FMD is not applicable; and therefore (4) a floodplain development permit is not necessary.

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[10] In August 2009, petitioners submitted an application for a floodplain development permit on tax lot 4400 (Z-0519-09-F) for a new single-family dwelling to be located within the mapped floodway. Petitioners submitted an elevation certificate dated November 5, 2009, and calculating the base flood elevation. The county's base flood elevation calculations differed from petitioners' certificate, and indicated tax lot 4400 remained below base flood elevation. Record I, 425. Petitioners' attempts to remove from tax lot 4400 from the SFHA were the subject of the appeals in *O'Connor I* and *O'Connor II*.

In 2015, petitioners submitted an application for a floodplain development permit on tax lot 4200 (Z-0289-15-F) for a new single-family dwelling to be located within the mapped floodway. Petitioners submitted an elevation certificate dated October 26, 2007, and calculating the base flood elevation. The county's base flood elevation calculations differed from petitioners' certificate, and indicated tax lot 4200 remained below base flood elevation. Record II, 422. Petitioners' attempts to remove tax lot 4200 from the SFHA were the subject matter of the appeals in *O'Connor III* and *O'Connor IV*.

The county's planning staff responded that even if the applicant is correct that the elevations of the proposed homesites are above the base flood elevation, the *properties* are still identified on the FIS FIRM, and until the properties are removed from the FIS FIRM through a LOMA, no development is allowed. Record II, 423. The county's planning staff further responded that even if the applicant is correct that a demonstration that the elevation of the proposed homesites could remove the property from the floodway and SFHA, petitioners' inconsistent and contradictory 2019 elevation certificates are wrong, and do not demonstrate that the elevation of the proposed homesites are above BFE.[11] *Id.*

On August 29, 2019, the hearings officer conducted a public hearing to receive testimony and evidence about the application. On October 10, 2019, the hearings officer issued his decision. The hearings officer did not address petitioners' arguments regarding the base flood elevation or otherwise consider petitioners' applications because he concluded that the issues had already been decided adversely to petitioners by the federal courts in *O'Connor II* and *O'Connor IV* and ultimately denied both of petitioners' applications on the basis of issue preclusion. This appeal followed.

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[11] In addition, county staff noted the apparently unresolved county enforcement issues surrounding the addition and presence of fill on the properties. Record II, 423.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners argue the hearings officer improperly construed the applicable law in denying petitioners' applications on the basis that issues resolved in the federal court's decisions in *O'Connor II* and *O'Connor IV* precluded him from approving the applications. ORS 197.835(9)(a)(D). Petitioners also argue that the hearings officer erred in failing to find that all five of the *Nelson v. Emerald People's Utility District*, 318 Or 99, 104, 862 P2d 1293 (1993) factors had been met; that the doctrine of issue preclusion is contrary to Oregon land use law; and that the hearings officer did not actually decide that the federal court's opinion had preclusive effect.

In response, the county argues LUBA should affirm the hearings officer's conclusion that the federal court's decisions have preclusive effect. According to the county, the hearings officer's basis for denial was that the federal court's decisions precluded him from considering the base flood elevation of tax lots 4200 and 4400 because the issues of whether the lots are appropriately mapped, and whether the county may in turn require permits to build on these lots, has been conclusively decided. According to the county, the issues decided by the federal court "are unequivocal in terms of the scope of its decision: that the issue of whether tax lots 4200 and 4400 are appropriately mapped, and the issue of whether the County has the authority to require a permit to build has already been decided and is not subject to further review." Response Brief 11-12.

We review the hearings officer's decision to determine whether it was correct. *Gage v. City of Portland*, 319 Or 308, 877 P2d 1187 (1994). For the reasons explained below, we agree with the county that the hearings officer's decision was correct.

LUBA has considered issue preclusion in the past, and concluded "issue preclusion does not generally apply in local land use hearings."[12] *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519 (2001), *aff'd*, 180 Or App 495, 43 P3d 1192, *rev den*, 334 Or 327 (2002). Petitioners cite *Bishop v. Deschutes County*, ___ Or LUBA ___ (LUBA Nos 2018-111/112, May 1, 2019) (slip op at 29) and *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990) for the general proposition that the state's land use system is "incompatible with giving preclusive effect to issues previously determined by a local government tribunal in another proceeding." 19 Or LUBA at 140. However, as the county notes, in *Bishop*, we clarified that this proposition only applies to "issues previously determined by a

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[12] Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding. *Nelson*, 318 Or at 103. When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue if five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Id.* at 104.

local government tribunal." ___ Or LUBA ___ (LUBA Nos 2018-111/112, May 1, 2019) (slip op at 29) (emphasis added). As we also clarified in *Joines v. Linn County*, 24 Or LUBA 456, 461-62 n 8 (1993), "*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."

Petitioners argue that the hearings officer's decision is unclear as to whether he applied the doctrine of issue preclusion, or some other preclusive doctrine, in concluding that that he was precluded from considering the base flood elevation of tax lots 4200 and 4400. We disagree with petitioners. The basis for the hearings officer's decision is that he is precluded from considering the base flood elevation of the subject properties because of the preclusive effect of the federal courts' decisions in *O'Connor II* and *O'Connor IV*.[13] We agree with

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[13] The hearings officer stated:

> "The [*O'Connor IV*] Opinion, however, did not just determine that the properties were below BFE. The [*O'Connor IV*] Opinion held that the issue of whether the properties are below [base flood elevation] BFE has been conclusively determined and issue preclusion prevents reconsideration of that issue. Even if I disagreed with the Court's decision, the U.S. District Court outranks me. I do not have the authority to overrule or ignore the Court's decision. Based on the [*O'Connor IV*] Opinion the issue of the BFEs for Lots 4200 and 4400 have been conclusively determined to be below BFE by issue preclusion. Therefore, because the properties are in the SFHA and dwellings are prohibited in the SFHA, the applications must be denied." Record I, 18 (footnotes omitted).

that conclusion. As the response brief notes, under both the theory of issue preclusion and the concept of "binding precedent," a party is precluded from advancing issues that have already been decided. Whether that is so under the traditional principles of issue preclusion as articulated by the Oregon Supreme Court in *Nelson*, or whether that is so because ORS 43.130 requires judgments of the federal courts to be accorded full faith and credit in state proceedings, we can see no reason why the result should not be the same. *See Aleali v. City of Sherwood*, 262 Or App 59, 66 n 4, 325 P3d 747 (2014) (acknowledging the technical merits of some of the petitioner's criticisms of LUBA's decision but affirming the decision).[14]

In *O'Connor IV*, the federal magistrate clearly determined that issue preclusion applied to the proceeding, based on the federal court's decision in *O'Connor II*.[15] The two issues presented in this appeal are (1) whether the county

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[14] In addition, as the Supreme Court described in *Outdoor Media Dimensions Inc. v. State*, 331 Or 634, 659 20 P3d 180 (2001), the "right for the wrong reason" principle stands for the proposition that:

> "When a trial court makes a ruling, we will affirm that ruling on appeal, even if the trial court's legal reasoning for the ruling was erroneous, if another legally correct reason, and, to the extent necessary, the record developed in the trial court support the ruling." (Internal citations omitted.)

[15] The federal court concluded in *O'Connor II*:

> "[Floodplain development permits] FDPs are required for development in the FMD and the FMD is applied to the SFHA. *See*

ZDOs 703.09 (FDP permit requirement); 703.04 (FMD is applied to the SFHA). [The county] had the authority to determine the boundaries of the SFHA, including, without limitation, instances where there appears to be a conflict between a mapped boundary and actual field conditions. *See* ZDO 703.04(B) (Planning Director has authority to determine the boundaries of the SFHA). Plaintiffs contend that the proposed residence on Tax Lot 4400 was above [base flood elevation] BFE and thus outside the regulated floodway. Plaintiffs submitted to the County information from a surveyor that, Plaintiffs argue, supports their interpretation of the floodway boundaries. [The county], however, determined from reviewing the FIRM and Plaintiffs' surveyor's information that the residence and the revetment were both in the regulated floodway. [The county] has the authority to make that determination under ZDO 703.04(B).

"[The county] notified Plaintiffs that if they believe that the County's interpretation of the FIRMs is incorrect and that the portion of Tax Lot 4400 on which the proposed residence was to be developed is above the BFE, Plaintiffs should seek to have that portion of Tax Lot 4400 removed from the SFHA by FEMA. This removal could be accomplished by amending the relevant FIRM through a LOMA. [The county] also notified Plaintiffs that if FEMA determined the proposed residence was above the BFE, Clackamas County would accept FEMA's determination. Plaintiffs characterize this as improperly requiring a LOMA to issue the FDP, in violation of the ZDO. The Court disagrees. [The county] determined that the proposed development was within the SFHA (despite Plaintiffs' argument to the contrary), and [the county] has the authority under the ZDOs to determine the boundaries of the SFHA. After determining the proposed residence was within the SFHA based on his interpretation of the FIRMs. [The county] had discretion to act in any number of ways, including to deny the FDP or, as [the county] did in this case, offer the option of a LOMA or agree to accept FEMA's interpretation of the BFE.

"Plaintiffs submitted the LOMA application and related information to FEMA, asking FEMA to remove the location of the proposed

has authority to remove a property from the SHFA, and (2) whether the subject properties should be removed from the SHFA. These two issues were previously addressed and decided by the federal court in *O'Connor II*. The fact that petitioners disagree with the outcome reached by the federal district courts, and the Ninth Circuit Court of Appeals, does not establish that the hearings officer was required to consider petitioners' arguments yet again. Accordingly, the hearings officer did not err in (1) concluding that the issue of whether tax lots 4200 and 4400 are appropriately mapped has already been decided and is not subject to further review by the county, and (2) denying the applications on that basis.

The first assignment of error is denied.

SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR

In their second, third and fourth assignments of error, petitioners argue that the hearings officer's decision is not supported by substantial evidence in the record; that the county's decision to deny petitioners' application does not comply with ZDO 703; and that the county failed to apply the standards of ZDO

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residence from the SFHA. After reviewing the information from O'Connor's surveyor, FEMA concluded that the area requested for removal from the SFHA is located below the Base Flood Elevation (BFE). * * * Further, the subject property is fully located within the regulatory floodway for Sandy River. Thus, FEMA concurred with [the county's] conclusion that the location of the proposed residence on Tax Lot 4400 is below the BFE and within the regulated floodway." *O'Connor II*, 2013 WL 3818143, at *13-14 (internal citations omitted).

703 by failing to make factual determinations as to whether the properties are within the SFHA. We need not reach those assignments of error, because the first assignment of error is dispositive of petitioners' other assignments of error.

The second, third and fourth assignments of error are denied.

The county's decision is affirmed.