

1                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

3  
4                   THOMAS BISHOP, DORBINA BISHOP,  
5                                   and TRUSTEES OF THE BISHOP  
6                                   FAMILY TRUST,  
7   *Petitioners,*

8  
9   and

10  
11                   CENTRAL OREGON LANDWATCH,  
12                                   *Intervenor-Petitioner,*

13  
14   vs.

01/05/18 AM 9:12 LUGA

15  
16                   DESCHUTES COUNTY,  
17                                   *Respondent,*

18  
19   and

20  
21                   KC DEVELOPMENT GROUP, LLC,  
22                                   *Intervenor-Respondent.*

23  
24                   LUBA Nos. 2017-002 and 2017-003

25  
26   FINAL OPINION  
27   AND ORDER

28  
29                   Appeal from Deschutes County.

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31                   Jennifer M. Bragar, Portland, represented petitioners.

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33                   Carol E. Macbeth, Bend, represented intervenor-petitioner.

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35                   David Doyle, Deschutes County Counsel, Bend, represented respondent.

36  
37                   J. Kenneth Katzaroff, Bend, represented intervenor-respondent.

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

3  
4 DISMISSED

01/05/2018

5  
6 You are entitled to judicial review of this Order. Judicial review is  
7 governed by the provisions of ORS 197.850.

**NATURE OF THE DECISION**

In LUBA No. 2017-002, petitioners appeal a December 14, 2016 land use compatibility statement (LUCS) concluding that storage of water in two reservoirs to support various land uses is not regulated by the county's land use ordinance (hereafter, the 2016 Groundwater LUCS decision). In LUBA No. 2017-003, petitioners appeal a December 30, 2016 county decision concluding that there is no local right to appeal the 2016 Groundwater LUCS decision.

**MOTION TO DISMISS FOR MOOTNESS**

On December 14, 2016, the county issued a LUCS requested by the Oregon Water Resources Department (OWRD), regarding the proposed use of water storage in two reservoirs, to support several land uses proposed by intervenor-respondent KC Development Group, LLC (KCDG). On February 7, 2017, the county issued a LUCS regarding a proposed temporary storage of water for the same set of uses involved in the 2016 Groundwater LUCS decision. We refer to the February 7, 2017 LUCS as the 2017 Limited License LUCS. The 2017 Limited License LUCS decisions are the subject of a separate but related set of appeals, LUBA Nos. 2017-018/019, which we dispose of in a separate final opinion and order issued this date.

On August 17, 2017, the county issued a new set of LUCS decisions involving water storage supporting a very different land use proposal for the subject property, a residential subdivision (hereafter, the 2017 New LUCS

1 decisions). KCDG subsequently requested that OWRD “substitute” the 2017  
2 New LUCS decisions for the 2016 Groundwater LUCS decision and the 2017  
3 Limited License LUCS, for purposes of obtaining OWRD permits for the  
4 proposed storage of water in the two reservoirs.

5 Subsequently, KCDG moved to dismiss the appeals of the 2016  
6 Groundwater LUCS decision and the related appeal of the county’s December  
7 30, 2016 decision concluding there is no local right of appeal of the 2016  
8 Groundwater LUCS decision, arguing that the 2017 New LUCS decisions had  
9 implicitly superseded or revoked the 2016 Groundwater LUCS decision. In an  
10 order dated November 3, 2017, we denied KCDG’s motion, concluding in  
11 relevant part that “[u]nless and until the county takes action to withdraw,  
12 revoke or supersede” the 2016 Groundwater LUCS decision, that decision  
13 remains valid, and a potential basis for KCDG to seek OWRD permits for the  
14 use evaluated in the 2016 Groundwater LUCS decision. *Bishop v. Deschutes*  
15 *County*, \_\_ Or LUBA \_\_ (LUBA No. 2017-002/003, Order, November 3, 2017)  
16 (slip op at 6). We noted that the 2017 New LUCS decisions included no  
17 language purporting to withdraw, revoke or supersede the 2016 Groundwater  
18 LUCS decision. *Id.* at 7. We indicated that an effective means to moot the  
19 present appeal would be for KCDG to request that the county “issue a new  
20 decision that rescinds or withdraws” the 2016 Groundwater LUCS decision.  
21 *Id.* at 8.

1           Subsequently, the county and KCDG (respondents) filed a joint motion  
2 to dismiss the appeal of the 2016 Groundwater LUCS decision as moot,  
3 supported by the declaration of Peter Gutowsky, the county planning manager.  
4 Following a recitation of the factual history, Gutowsky declares:

5           “KC Development Group’s statements to the Oregon Water  
6 Resources Department [to substitute the 2017 New LUCS for the  
7 older ones] were consistent with my understanding of the intended  
8 effect of the 2017 New LUCSs when I issued those documents,  
9 namely that the 2017 New LUCS[] withdrew, revoked, or  
10 otherwise superseded the 2016 Groundwater LUCS and the 2017  
11 Limited License LUCS. If Deschutes County does not approve  
12 KC Development Group’s currently pending land use applications,  
13 and if, as a result, KC Development Group intends to use the  
14 subject property for those purposes previously identified in the  
15 2016 Groundwater LUCS or the 2017 Limited License LUCS,  
16 Deschutes County will not consider the 2016 Groundwater LUCS  
17 nor the 2017 Limited License LUCS valid or applicable to such  
18 intended uses.” Declaration of County Planning Manager Peter  
19 Gutowsky in Support of Joint Motion to Dismiss, 3.

20 Based on Gutowsky’s declaration that the county no longer considers the 2016  
21 Groundwater LUCS decision to be “valid,” the county and KCDG argue that  
22 LUBA should dismiss the appeal of the 2016 Groundwater LUCS decision as  
23 moot.

24           Petitioners oppose the motion, arguing that the Gutowsky declaration is  
25 insufficient to constitute a “decision” that effectively withdraws, revokes or  
26 supersedes the 2016 Groundwater LUCS decision. According to petitioners,  
27 Gutowsky’s declaration that the county no longer considers the 2016  
28 Groundwater LUCS decision to be “valid” simply states the current planning

1 manager's future position in the event that KCDG attempts to seek county land  
2 use approval based on the 2016 Groundwater LUCS decision. Petitioners  
3 argue that the declaration is not binding on the county, and a future planning  
4 manager may well reach a different conclusion and decide to recognize the  
5 2016 Groundwater LUCS decision as valid.

6         However, we agree with respondents that the Gutowsky declaration is a  
7 binding county determination that the 2016 Groundwater LUCS decision is no  
8 longer valid. It is true that that declaration lacks the indicia of a formal  
9 decision, and does not use magic words such as: "I hereby revoke the 2016  
10 Groundwater LUCS." Nonetheless, it is difficult to see how a more formal  
11 decision declaring that the 2016 Groundwater LUCS decision is no longer  
12 "valid" would differ in substance from the declaration. Petitioners do not  
13 dispute that Gutowsky, as the county planning manager, has the authority to  
14 withdraw, revoke or rescind the 2016 Groundwater LUCS decision, or  
15 otherwise bind the county to recognize that it is no longer a valid decision. If  
16 Gutowsky had issued a formal decision stating in so many words that the 2016  
17 Groundwater LUCS decision is no longer "valid," we see no reason why such a  
18 decision would not be binding on the county, and effective to revoke or rescind  
19 the 2016 Groundwater LUCS decision. We see no reason why a more formal  
20 decision or more precise words are necessary to accomplish that purpose,  
21 which the applicant clearly desires and the county has clearly agreed to.

1           Nonetheless, petitioners argue that in a related declaratory ruling action  
2 in circuit court, county counsel took the position that the 2016 Groundwater  
3 LUCS decision is a “land use decision” subject to LUBA’s jurisdiction. *See*  
4 *Petitioners’ Opposition to the Joint Motion to Dismiss*, Appendix B 1-2.<sup>1</sup>  
5 Petitioners argue that the county’s current position embodied in the Gutowsky  
6 declaration—that the 2016 Groundwater LUCS decision is no longer “valid”—  
7 is inconsistent with the position expressed by county counsel in the declaratory  
8 ruling proceeding. However, we see no inconsistency. In the declaratory  
9 ruling proceeding, county counsel argued that LUBA, rather than the circuit  
10 court, had subject matter jurisdiction over county decisions involving land uses  
11 on the subject property. Counsel did not take the position that decisions  
12 pending in appeals before LUBA, such as the 2016 Groundwater LUCS, cannot  
13 be mooted by later county decisions. If the 2016 Groundwater LUCS is invalid  
14 and its appeal to LUBA is therefore moot, then LUBA must dismiss the appeal.  
15 Like LUBA, the circuit court generally lacks jurisdiction over matters that  
16 become moot. *See Rogue Advocates v. Board of Comm. of Jackson County*,  
17 362 Or 269, 272, \_\_ P3d \_\_ (2017) (action in circuit court seeking to enforce  
18 the county’s land use regulations is moot once the disputed land use of the  
19 property is abandoned).

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<sup>1</sup> Both parties attach to their pleadings documents related to the circuit court proceeding. No party objects to our consideration of those documents, and we will consider them to the extent they are relevant to resolving the jurisdictional issue.

1           On December 26, 2017, petitioners filed an additional response arguing  
2 in relevant part that the appeal is not moot under ORS 14.175, which provides  
3 that, notwithstanding that the act of a public body challenged in a court no  
4 longer has a practical effect on the parties, the court “may issue a judgment on  
5 the validity of the challenged act” if it determines that the challenged act is  
6 “capable of repetition” and is “likely to evade judicial review in the future.”<sup>2</sup>  
7 Petitioners argue that the 2016 Groundwater LUCS decision is “capable of  
8 repetition” in the sense that KCDG could request a new LUCS from the county  
9 on the same terms as the 2016 Groundwater LUCS, or seek to revive the 2016  
10 Groundwater LUCS. According to petitioners, because the county and KCDG

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<sup>2</sup> ORS 14.175 provides:

“In any action in which a party alleges that an act, policy or practice of a public body, as defined in ORS 174.109, or of any officer, employee or agent of a public body, as defined in ORS 174.109, is unconstitutional or is otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:

- “(1) The party had standing to commence the action;
- “(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect; and
- “(3) The challenged policy or practice, or similar acts, are likely to evade judicial review in the future.”



1 have not conceded that the 2016 Groundwater LUCS decision was erroneous,  
2 the county may well at some point in the future consent to issue a new or  
3 revived LUCS that is substantively identical to the LUCS on appeal.

4         Petitioners also argue that the history of the present appeal illustrates that  
5 any new or revived LUCS would be “likely to evade judicial review in the  
6 future.” Petitioners argue that the county and KCDG have taken inconsistent  
7 positions at different points in this appeal and before the circuit court in a  
8 related enforcement action filed by petitioners, arguing at various times that:  
9 (1) LUBA lacks jurisdiction over the 2016 Groundwater LUCS, (2) the circuit  
10 court lacks jurisdiction over the enforcement action because jurisdiction over  
11 the underlying land use dispute, represented in the appeal of the 2016  
12 Groundwater LUCS decision, lies with LUBA, and most recently (3) LUBA  
13 lacks jurisdiction over the 2016 Groundwater LUCS decision because that  
14 decision is now moot.

15         ORS 14.175 applies only to judicial proceedings, and LUBA is not a  
16 court. Nonetheless, we assume without deciding that ORS 14.175 is relevant to  
17 LUBA’s consideration of a mootness claim under ORS 197.805, which states  
18 the policy that LUBA’s review be consistent with “sound principles governing  
19 judicial review.” Even under that assumption, however, we disagree with  
20 petitioners that the conditions prescribed in ORS 14.175 are met, and that the  
21 statute authorizes LUBA to resolve the merits of this appeal, notwithstanding  
22 that the appeal is otherwise moot and without practical effect on the parties.

1 That the applicant can file a new application regarding the same use, or attempt  
2 to revive an invalidated prior decision, is not sufficient to demonstrate that the  
3 decision is “capable of repetition” for purposes of ORS 14.175. An applicant  
4 can almost always, at least in theory, file a new application or attempt to  
5 persuade the local government to revive an invalidated decision. If the  
6 “capable of repetition” prong of ORS 14.175 were that easy to satisfy, then it  
7 would become nearly impossible for a local government to moot an appeal by  
8 revoking or rescinding the decision at issue.

9 Similarly, we disagree with petitioners that LUBA must resolve the  
10 merits of the present appeal because a hypothetical future county LUCS  
11 decision, either to grant a new LUCS on the same terms or to revive the 2016  
12 Groundwater LUCS decision, would be “likely to evade judicial review in the  
13 future.” If anything, the history of the present case demonstrates that the  
14 county’s LUCS decisions regarding the subject property are quite capable of  
15 review, either as decisions that can be the subject of a writ of review to circuit  
16 court (in circumstances where the exclusions at ORS 197.015(10)(b)(H) apply)  
17 or as land use decisions that can be appealed to LUBA (in circumstances where  
18 the exclusions at ORS 197.015(10)(b)(H) do not apply). That the county may  
19 have taken arguably inconsistent positions at various times over the  
20 complicated question of whether LUBA or the circuit court has jurisdiction  
21 over the appeal of the 2016 Groundwater LUCS or the underlying land use

1 issues does not demonstrate that hypothetical future LUCS decisions are likely  
2 to evade judicial review, for purposes of ORS 14.175

3 On the merits, we agree with respondents that the Gutowsky declaration  
4 is a sufficient basis for LUBA to conclude that the appeal of the 2016  
5 Groundwater LUCS decision is now moot. LUBA must exercise its  
6 jurisdiction and review authority consistent with “sound principles governing  
7 judicial review.” ORS 197.805. Based on ORS 197.805, LUBA has long held  
8 that it will decline to exercise its jurisdiction under circumstances where our  
9 review would have no “practical effect” on the rights of the parties. *Heiller v.*  
10 *Josephine County*, 25 Or LUBA 555, 556 (1993) (appeal is moot where the  
11 local government rescinds the decision on appeal). As explained above, the  
12 Gutowsky declaration declares that the 2016 Groundwater LUCS decision is no  
13 longer “valid,” and thus effectively rescinds that planning department decision.  
14 Under these circumstances, petitioners have not established what “practical  
15 effect” LUBA’s review of the merits of petitioners’ challenges to the 2016  
16 Groundwater LUCS decision would have on the parties’ rights. We see none.

17 Accordingly, the appeal of the 2016 Groundwater LUCS decision at  
18 issue in LUBA No. 2017-002 is dismissed, as moot. Because that appeal is  
19 moot, the companion appeal in LUBA No. 2017-003, which appeals a  
20 December 30, 2016 decision that there is no right of local appeal for the 2016  
21 Groundwater LUCS decision, is also moot, and must be dismissed.

22 LUBA No. 2017-002 and LUBA No. 2017-003 are dismissed.

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-002/003 on January 5, 2018, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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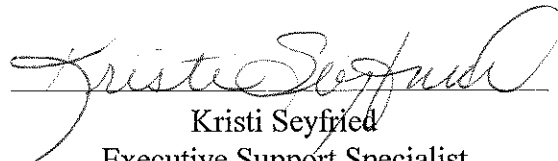
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Dated this 5th day of January, 2018.

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