

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

3
4 ANNUNZIATA GOULD,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11 and

12
13 THORNBURGH RESORT COMPANY, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA Nos. 2005-178 and 2006-002

17
18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Deschutes County.

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24 Paul D. Dewey, Bend, represented petitioner.

25
26 Mark E. Pilliod, County Counsel, Bend, represented respondent.

27
28 Peter Livingston, Portland, represented intervenor-respondent.

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30 BASSHAM, Board Member; DAVIES, Board Chair; HOLSTUN, Board Member,
31 participated in the decision.

32
33 DISMISSED

03/21/2006

34
35 You are entitled to judicial review of this Order. Judicial review is governed by the
36 provisions of ORS 197.850.

NATURE OF THE DECISION

In these consolidated appeals, petitioner appeals (1) an order by the board of county commissioners (BOCC) calling up for review a hearings officer’s decision denying an application for a destination resort, and (2) an order by the BOCC dismissing petitioner’s local appeal of the hearings officer’s decision.

MOTION TO INTERVENE

Thornburgh Resort Company, LLC (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

On November 9, 2005, the county hearings officer issued a decision denying intervenor’s conditional use application for a destination resort. On or about the same date, the statutory 150-day deadline for issuing the county’s final decision expired. The county and intervenor entered into negotiations, and in exchange for the county’s agreement to call up the hearings officer’s decision for review pursuant to Deschutes County Code (DCC) 22.28.050, intervenor agreed not to file a writ of mandamus as allowed under ORS 215.422, for an agreed upon period of time.¹ Accordingly, on November 21, 2005, the BOCC issued Order 2005-143, which calls up the hearings officer’s decision and schedules a *de novo*

¹ DCC 22.28.050 provides, in relevant part:

- “A. Review of an administrative action or a Hearings Body’s decision may be initiated by the Board of County Commissioners. * * *
- “B. Review by the Board shall be initiated by board order within 12 days of the date of the mailing of the final written decision of the Planning Director or lower Hearings Body.
- “C. Review shall be conducted in the same manner provided for in appeals, except that an appeal fee and transcript shall not be required. Any Board order calling up for review a decision shall specify whether the Board will review the decision called up on the record or *de novo* and whether it intends to limit the issues on review to certain specified issues.”

1 hearing for December 20, 2005. Petitioner appealed Order No. 2005-143 to LUBA, and that
2 order is the subject of LUBA No. 2005-178.

3 Following the hearings officer's decision, petitioner filed a timely appeal of the
4 hearings officer's decision to the BOCC, pursuant to DCC 22.32.015. However, on
5 December 12, 2005, the commissioners issued Order No. 2005-149, which declines to review
6 petitioner's local appeal. In that order, the BOCC found that petitioner's appeal was
7 "unnecessary," given that the BOCC had called up the hearings officer's decision for *de novo*
8 review. Petitioner appealed Order No. 2005-149 to LUBA, and that order is the subject of
9 LUBA No. 2006-002.²

10 **MOTIONS TO DISMISS**

11 The county moves to dismiss both LUBA No. 2005-178 and 2006-002, on the ground
12 that neither decision is a final decision, and therefore LUBA lacks jurisdiction to review
13 these appeals.

14 As relevant here, LUBA's jurisdiction extends only to appeals of "land use
15 decisions." ORS 197.825(1). As defined by ORS 197.015(10), a land use decision must be
16 a "final" decision. ORS 197.015(10)(a)(A). LUBA has no jurisdiction over non-final or
17 interlocutory decisions. *E & R Farm Partnership v. City of Gervais*, 37 Or LUBA 702, 705
18 (2000); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff'd* 93 Or App
19 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7
20 (1988).

21 **A. LUBA No. 2005-178**

22 As noted, Order No. 2005-143 calls up the hearings officer's decision for review.
23 Petitioner concedes that the portion of Order No. 2005-143 that calls up the hearings
24 officer's decision on the conditional use application may not be final, because a final

² The parties have not advised us of the status or outcome of the BOCC's review of the hearings officer's decision. As of the date of this opinion, no appeal of the BOCC decision has been filed with LUBA.

1 decision on the application would follow. However, petitioner contends that other portions of
2 the order are final because “they determine issues that will not be addressed again by the
3 [county] and that affect the substantial rights of [p]etitioner and the public to their prejudice.”
4 Petitioner’s Memorandum in Opposition to Motion to Dismiss 4. Petitioner objects to eight
5 aspects of Order No. 2005-143, including limitations on petitioner’s presentation at the
6 December 20, 2005 public hearing, and argues that the county’s determination of those
7 procedural aspects are final determinations that may be appealed to LUBA.

8 We disagree. Order No. 2005-143 is clearly an interlocutory order that is not final in
9 any sense of that word. Because the order requires a subsequent *de novo* hearing followed
10 by issuance of the county’s final decision on the conditional use application, no aspect of that
11 order is final, including any of the procedural determinations petitioner objects to. Nothing
12 cited to us in the order would preclude the county from changing its mind with respect to
13 how the hearing is conducted, for example. Any errors procedural or otherwise that the
14 county may have committed in issuing Order No. 2005-143 or in how it conducts the appeal
15 before the commissioners must be challenged by appealing the county’s final decision on the
16 conditional use application. Accordingly, LUBA No. 2005-178 must be dismissed.

17 **B. LUBA No. 2006-002**

18 LUBA No. 2006-002 appeals Order No. 2005-149, a BOCC order declining to review
19 petitioner’s local appeal of the hearings officer’s decision.³ The county explains that an

³ Order No. 2005-149 states, in relevant part:

“WHEREAS, Annunziata Gould has appealed the Deschutes county Hearings Officer’s denial of a conditional use permit application, CU-05-20, submitted by Thornburgh Resort Company, LLC, and

“WHEREAS, Section 22.32.035 of the Deschutes County Code (‘DCC’) allows the Board of County Commissioners (‘Board’) discretion on whether to hear appeals of Hearings Officer’s decisions; and

1 appeal of a hearings officer’s decision is “entirely discretionary,” under DCC 22.32.035.⁴ In
2 the usual case, the county admits, an order declining to review a hearings officer’s decision
3 pursuant to DCC 22.32.035(B) would have the effect of making the hearings officer’s
4 decision the county’s final decision. However, the county argues that because the BOCC had

“WHEREAS, the Board, in Order 2005-143, initiated review of the Hearings Officer’s decision pursuant to DCC 22.28.050(A) and decided that review shall be *de novo*, making the appeal submitted by Annunziata Gould unnecessary, and

“WHEREAS, the substantial rights of the appellant will not be significantly prejudiced because of the opportunity to present evidence at the *de novo* hearing, and

“WHEREAS, because the Board has declined to hear the appeal of Annunziata Gould, DCC 22.32.025(A) requiring the consolidation of appeals filed by multiple parties is inapplicable because that provision is applicable only if the Board agrees to hear more than one appeal, and

“WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

“THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

“Section 1. That it will not hear the appeal of Annunziata Gould on application CU-05-20(A-05-16).

“Section 2. The Board decision on the conditional use application becomes final upon mailing of a final decision pursuant [to] Order 2005-143.”

⁴ DCC 22.32.035 provides, in relevant part:

“Except as set forth in DCC 22.28.030, when there is an appeal of a land use action and the Board of County Commissioners is the Hearings Body:

“A. The Board may on a case-by-case basis or by standing order for a class of cases decide at a public meeting that the decision of the lower Hearings Body of an individual land use action or a class of land use action decisions shall be the final decision of the County.

“B. If the Board of County Commissioners decides that the lower Hearings Body decision shall be the final decision of the County, then the Board shall not hear the appeal and the party appealing may continue the appeal as provided by law. In such a case, the County shall provide written notice of its decision to all parties. The decision on the land use application becomes final upon mailing of the Board’s decision to decline review.

“C. The decision of the Board of County Commissioners not to hear a land use action appeal is entirely discretionary.”

1 already initiated a *de novo* review of the hearings officer's decision, declining to review
2 petitioner's appeal did not result in making the hearings officer's decision final, as Order No.
3 2005-149 expressly reflects. Under the order, the BOCC decision resulting from that *de*
4 *novo* review will be the county's final decision on the conditional use application. The
5 county contends that petitioner may appear at that *de novo* hearing, and the BOCC final order
6 will address any issues petitioner raises. If petitioner is unsatisfied with the county's final
7 order, petitioner may appeal that final order to LUBA. Under these circumstances, the
8 county argues, Order 2005-149 is not a final decision that may be appealed to LUBA.

9 Petitioner responds that she appealed Order 2005-149 to LUBA to preserve her
10 objections to certain aspects of the hearings officer's decision, out of concern that the county
11 or applicant would later claim that the BOCC denial of her local appeal is a final order with
12 respect to those aspects of the hearings officer's decision that petitioner wishes to challenge.
13 However, petitioner does not appear to dispute the county's position expressed in the motion
14 to dismiss, that Order 2005-149 is not a final decision.

15 We agree with the county that by its terms Order 2005-149 is not the county's final
16 decision on the conditional use application, and does not make the hearings officer's decision
17 the county's final decision. As explained above, any error the county may have committed in
18 Order 2005-149 or in the conduct of its *de novo* review must be challenged in an appeal of
19 the county's final decision. If the county's final decision affirms aspects of the hearings
20 officer's decision to which petitioner objects, we perceive nothing in Order 2005-149 that
21 would preclude petitioner from appealing the county's final decision to LUBA and
22 challenging those aspects before LUBA. In any case, because Order 2005-149 is not a final
23 decision, we must dismiss LUBA No. 2006-002.

24 These consolidated appeals are dismissed.