

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
14 PINNACLE UTILITIES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-060

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Jeffrey L. Kleinman represented petitioner.

25
26 D. Adam Smith represented respondent.

27
28 J. Kenneth Katzaroff represented intervenor-respondent.

29
30 ZAMUDIO, Board Chair; RUDD, Board Member; RYAN, Board
31 Member, participated in the decision.

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33 TRANSFERRED 06/16/2022

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

NATURE OF THE DECISION

Petitioner appeals a land use compatibility statement (LUCS) issued by the county on a form provided by the Oregon Water Resources Department (OWRD) concluding that proposed changes to a water rights certificate are compatible with the county’s land use regulations.

INTRODUCTION

The present case involves a portion of the Thornburgh Destination Resort located on lands zoned Exclusive Farm Use (EFU). The Thornburgh Resort has a long and complex history of county land use decisions and related appeals dating back to 2005. We described the development dispute in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2020-095, June 11, 2021) (*Gould Golf*), *aff’d*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211 (2022), and recite the pertinent facts from that decision:

“In 2006, the county approved the Thornburgh Resort conceptual master plan (CMP) and, in 2008, it approved a final master plan (FMP). The FMP provides for phased development and includes a fish and wildlife habitat mitigation plan (FWMP) to offset the impacts of the resort development. The FMP divides the development into seven phases. The first phase, Phase A, includes development of transportation infrastructure, a golf course, a restaurant, meeting facilities, open space, 300 residential units, and 150 overnight lodging units (OLUs), and implementation of the FWMP.” *Gould Golf*, ___ Or LUBA at ___ (slip op at 3).

The CMP and FMP provide the framework for and will be implemented by subsequent land use applications across multiple development phases and

1 subphases. In May 2018, intervenor sought approval for the first phase of
2 development.¹ Intervenor requested approval of a tentative plan for a portion of
3 the approved Phase A, calling the partial subphase “Phase A-1,” which includes
4 a tentative subdivision plat for 192 single-family residential dwelling lots, 24
5 single-family deed-restricted OLU lots, and 13 OLU lots, together with roads,
6 utility facilities, lots, and tracts for future resort facilities and open space. We
7 refer to the proposals, collectively, as the Phase A-1 TP. A county hearings
8 officer approved the Phase A-1 TP with conditions. Petitioner appealed. On June
9 21, 2019, we remanded the Phase A-1 TP. *Gould v. Deschutes County*, 79 Or
10 LUBA 561 (2019) (*Gould VIII*), *aff’d*, 310 Or App 868, 484 P3d 1073 (2021).
11 Petitioner appealed our decision to the Court of Appeals. That appeal ultimately
12 went up to the Supreme Court and returned to the Court of Appeals, which
13 affirmed our decision.

14 While the Phase A-1 TP decision was climbing the appellate ladder,
15 intervenor applied for the golf course site plan review. On April 1, 2020, the

¹ The Thornburgh Resort Company, which was dissolved, sold its rights in and to the development of the Thornburgh Resort to Kameron K. DeLashmutt, who sold those rights to Central Land and Cattle Company, LLC. DeLashmutt also acquired water rights for the Thornburgh Resort and sold those water rights to Pinnacle Utilities, LLC, the intervenor-respondent in this appeal. *Gould Golf*, ___ Or LUBA ___ (citing *Central Land and Cattle Company, LLC v. Deschutes County*, 74 Or LUBA 326, 349 n 13, *aff’d*, 283 Or App 286, 388 P3d 739 (2016), *rev den*, 361 Or 311 (2017)). In this decision, we refer to these entities collectively as intervenor for ease of reference.

1 county planning division administratively approved the golf course site plan
2 review with conditions. Record 7-66. Petitioner appealed that approval to the
3 board of county commissioners, which approved the golf course site plan review
4 with conditions. We affirmed in *Gould Golf*.

5 Appeals of our decisions in *Gould Golf* and *Gould VIII* were pending at
6 the Court of Appeals when the county issued the challenged LUCS on May 13,
7 2021, and during briefing in this appeal. Petitioner's appeal in *Gould Golf* is now
8 resolved, and the county's approval is affirmed. We affirmed the county's
9 decision again approving the Phase A-1 TP on remand. *Gould v. Deschutes*
10 *County*, ___ Or LUBA ___ (LUBA No 2021-112, June 9, 2022).

11 Sometime in 2021, intervenor applied to OWRD for permission to
12 temporarily change the place of use and point of appropriation, and to add new
13 points of appropriation, for a portion of quasi-municipal water certificate 94958.
14 We refer to that requested OWRD action as the Temporary Transfer.² Pursuant
15 to OWRD's administrative rules, intervenor also filed with the county an
16 application for a LUCS on a form provided by OWRD. The LUCS application

² Intervenor also submitted three other LUCS applications to the county, which petitioner has also appealed to LUBA. These four appeals (and our shorthand labels for each) are *Gould v. Deschutes County*, LUBA No. 2021-062 (Groundwater Permit), *Gould v. Deschutes County*, LUBA No. 2021-066 (Limited License I), *Gould v. Deschutes County*, LUBA No. 2021-109 (Water Rights Transfer), and *Gould v. Deschutes County*, LUBA No. 2022-012 (Limited License II).

1 asks the county to evaluate whether intervenor's request for the Temporary
2 Transfer is consistent with the county's comprehensive plan and land use
3 regulations. Attached to intervenor's LUCS application is a copy of the county's
4 decision approving the golf course site plan.

5 Some background is necessary to understand the role of the requested
6 LUCS. OWRD is obligated under ORS 197.180(1)(b) to ensure that its actions
7 are compatible with acknowledged comprehensive plans and land use
8 regulations. This obligation is implemented by OWRD's coordination program
9 at OAR 690-005-0035. Under that program, OWRD ensures that its actions (such
10 as the requested Temporary Transfer) comply with acknowledged
11 comprehensive plans and land use regulations by asking local governments to
12 evaluate whether the land use associated with the state agency action is consistent
13 with the local government's comprehensive plan and land use regulations. This
14 evaluation can take various forms, but it typically involves an initial description
15 or categorization of the land use associated with the state agency action and a
16 determination of whether that particular land use is one that is allowed without
17 land use review or one that requires discretionary land use review. *See Zenith*
18 *Energy Terminals Holdings LLC v. City of Portland*, ___ Or LUBA ___ (LUBA
19 No 2021-083, Feb 3, 2022) (describing LUCS analysis); *Bishop v. Deschutes*
20 *County*, 75 Or LUBA 504, 514-15 (2017) (same). If the associated land use is
21 one that requires discretionary land use review, the local government further
22 determines whether the land use has received the required land use approval and

1 whether that approval is final, or whether some future land use approval is
2 required. For state agency purposes, it is important to know the status of required
3 land use approvals because, if the local approval is not yet final or has not yet
4 been applied for, the state agency must condition its action on the applicant
5 receiving final approvals for all required land use reviews. As relevant here, OAR
6 690-005-0035(4)(c) provides, in part:

7 “If local land use approvals are pending, [OWRD shall] place
8 conditions on a permit or other approval to preclude use of water
9 and any associated construction until the applicant obtains all
10 required local land use approvals; or, withhold issuance of the water
11 use permit or approval until the applicant obtains all required local
12 land use approvals.”³

³ OAR 690-005-0035(4) provides, in full:

“In processing water use approvals in OAR 690-005-0025(1) through (6), the Department or Commission shall:

“(a) Require land use information be submitted with applications or requests, or as otherwise specified prior to taking action on the water use approval. The information shall be sufficient to assess compatibility as specified on forms contained in the department’s Land Use Planning Procedures Guide;

“(b) Except as provided in subsection (4)(c) of this rule, the Department or Commission shall only approve the proposed water use if:

“(A) All requirements of statutes and rules governing Commission and Department actions are met;

“(B) The land use served by the proposed water use is allowed outright or does not require discretionary land

1 in a table in the next section of the form. Record 4. The LUCS form also states
2 that, “[i]f approvals have been obtained but all appeal periods have not ended,
3 check ‘Being Pursued.’” *Id.* (boldface omitted). The LUCS table section asks the
4 county to list the “Type of Land-Use Approval Needed” and to cite the most
5 significant applicable comprehensive plan policies or land use regulations. *Id.*
6 The LUCS table provides four check boxes under the heading “Land-Use
7 Approval,” which are labeled as follows: “Obtained,” “Denied,” “Being
8 Pursued,” or “Not Being Pursued.”

9 In a letter accompanying the LUCS application, intervenor stated:

10 “As is relevant to the LUCS, any number of uses allowed under a
11 quasi-municipal water right are permitted outright in EFU lands,
12 including ‘irrigation’ use. Perhaps more importantly, the Applicant
13 (or its affiliates), has also received [FMP] approval for a destination
14 resort on the same lands. As such, the request to transfer quasi-
15 municipal water is both permitted outright and pursuant to final land
16 use decisions on the subject property.” Record 6.

17 As noted, intervenor attached a copy of the golf course site review approval to
18 the LUCS form.

19 From these materials, the county adopted several conclusions. First, the
20 county concluded that, “[t]o the extent the water in question is directed to ‘farm
21 use,’ as defined in [Deschutes County Code (DCC)] 18.04.030, such use is
22 permitted outright.” Record 4. Second, the county concluded that the destination
23 resort uses served by the proposed water involve a number of discretionary land
24 use approvals, which the county described in a single paragraph:

1 “Thornburgh Destination Resort has an extensive County approval
2 process, recited in pages 3-5 of the attached [April 1, 2020 golf
3 course] site plan decision. Master Plans, Phase A-1 Tentative Plan
4 and Utility Site Plan Review, and Golf Course Site Plan have
5 received final local approval. Specific development plans for
6 overnight lodging facilities and other resort development are in
7 progress or are anticipated.” *Id.*

8 Opposite this description, the county checked the boxes for “Obtained” and
9 “Being Pursued.” *Id.*

10 Finally, in a box for additional comments, the county stated:

11 “Nothing in this LUCS signature should be interpreted to allow uses
12 on the subject properties other than those allowed outright under the
13 DCC 18.04.030 definition of ‘farm use’ or those uses specifically
14 proposed and approved in the Thornburgh Destination Resort
15 decision history recited in pages 3-5 of the attached site plan
16 decision and as subject to the terms and conditions of those
17 approvals.” *Id.*

18 The county issued the challenged LUCS on May 13, 2021. Petitioner
19 appealed the LUCS decision to LUBA and filed a petition for review with two
20 assignments of error. The first assignment of error alleges that the county erred
21 in finding that some of the required “land use approvals” had been “obtained”
22 because the Temporary Transfer could allow the use of water in a manner that
23 contravenes conditions of approval in the FMP that relate to water supply and
24 mitigation water for fish and wildlife. The second assignment of error alleges that
25 the county committed procedural error in not processing the LUCS as a permit
26 under ORS 215.416 or a “land use action” under DCC chapters 22.24, 22.28,

1 22.30, and 22.32, which would be subject to notice, hearing, and other procedural
2 protections.

3 The county and intervenor (together, respondents) filed a motion to dismiss
4 this appeal on the grounds that the challenged LUCS decision is not subject to
5 LUBA’s jurisdiction. Petitioner responded on the merits and filed an alternative
6 motion to transfer this appeal to circuit court in the event LUBA concludes it
7 lacks jurisdiction. For the following reasons, we agree with respondents that the
8 challenged LUCS decision is excluded from our jurisdiction.

9 **MOTION TO DISMISS**

10 ORS 197.825(1) provides that LUBA has exclusive jurisdiction over “land
11 use decisions.” ORS 197.015(10)(a) defines “land use decision,” in relevant part,
12 to include a local government decision that concerns the application of a
13 comprehensive plan provision or land use regulation. ORS 197.015(10)(b)(H)
14 excludes from the definition of “land use decision” a decision by a local
15 government

16 “[t]hat a proposed state agency action subject to ORS 197.180(1) is
17 compatible with the acknowledged comprehensive plan and land use
18 regulations implementing the plan, if:

19 “(i) The local government has already made a land use decision
20 authorizing a use or activity that encompasses the proposed
21 state agency action;

22 “(ii) The use or activity that would be authorized, funded or
23 undertaken by the proposed state agency action is allowed
24 without review under the acknowledged comprehensive plan
25 and land use regulations implementing the plan; or

1 “(iii) The use or activity that would be authorized, funded or
2 undertaken by the proposed state agency action requires a
3 future land use review under the acknowledged
4 comprehensive plan and land use regulations implementing
5 the plan[.]”

6 ORS 197.015(10)(b)(H) thus excludes from LUBA’s jurisdiction decisions that
7 fall within one or more of the three categories described in subparagraph (H).

8 In the present case, the county concluded that the Temporary Transfer of
9 water would serve a wide array of land uses that fell into all three categories
10 described in subparagraph (H): (1) those that are allowed without review in the
11 EFU zone (farm uses), (2) destination resort uses that had obtained final local
12 land use approval (the CMP, FMP, Phase A-1 TP, and golf course site plan
13 review decisions), and (3) destination resort uses that are allowed subject to
14 discretionary reviews for which future land use decisions will be required
15 (overnight lodging, etc.).

16 Respondents argue that the county accurately identified and placed all land
17 uses served by the Temporary Transfer within one or more of three categories
18 corresponding to the exclusions at subparagraph (H) and, thus, the challenged
19 LUCS is subject to the subparagraph (H) exclusions to LUBA’s jurisdiction.

20 Petitioner responds that the LUCS decision fails to provide OWRD with
21 all the information necessary to allow OWRD to fulfill its coordination
22 obligations. Petitioner first argues that the LUCS decision fails to advise OWRD
23 exactly which decisions are on appeal and, thus, not yet final. In filling out the
24 LUCS form, the county planner did not separately itemize each of the many prior

1 decisions and check individual boxes for the status of each prior decision. Instead,
2 the planner wrote a single omnibus entry referencing several recent decisions and
3 referring to a detailed history of the destination resort development decisions at
4 pages 3 to 5 of the golf course site plan approval that was attached to the LUCS.
5 Record 4. However, petitioner has not established that the OWRD LUCS requires
6 greater specificity. The LUCS form advises local governments that, “[i]f
7 approvals have been obtained but all appeal periods have not ended, check ‘Being
8 Pursued,’” and the challenged LUCS checks the box for “Being Pursued” for the
9 omnibus entry, signaling that at least one of the prior approvals is on appeal. *Id.*

10 As explained above, OAR 690-005-0035(4)(c) provides that, if local land
11 use approvals are pending, OWRD must impose conditions to preclude use of the
12 water until the applicant obtains all required local land use approvals or “withhold
13 issuance of the water use permit or approval until the applicant obtains all
14 required local land use approvals.” In *Skrepetos v. Water Resources Dept.*, the
15 petitioners sought review of a ground water permit OWRD issued to serve a
16 destination resort which, at the time of the permit, had obtained conceptual plan
17 approval and was in the process of seeking subsequent land use approvals. 172
18 Or App 9, 18 P3d 401 (2001). The resort development plan was subject to a three-
19 stage review and approval process: conceptual, preliminary, and final. The
20 petitioners actively opposed the resort developer’s land use application to the
21 county. At the time of the Court of Appeals’ decision, the county’s approval of
22 the conceptual plan was complete. The conceptual plan approval restricted the

1 use of ground water for the resort's operational needs. The county had also issued
2 preliminary plan approval, which also restricted the use of ground water and
3 contained a condition requiring the resort developer to obtain necessary permits
4 from OWRD. At the time of the Court of Appeals' decision on the OWRD permit,
5 the county's decision approving the preliminary plan was on remand after a
6 LUBA appeal. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995). No county
7 action at the final review and approval stage had yet occurred.

8 The petitioners argued that the conceptual plan approval was a final
9 decision and that it did not allow the use of ground water that the OWRD permit
10 ultimately could. OWRD rejected that argument, and the Court of Appeals agreed
11 with OWRD. OWRD concluded that the circumstances fell within OAR 690-
12 005-0035(4)(c) and conditioned the use of the ground water on the resort
13 developer obtaining all required local land use approvals. OWRD noted that the
14 conceptual plan approval was "the first step of a multi-step process for land use
15 approval." The Court of Appeals agreed that, while the conceptual plan approval
16 was final, the land use application was "'pending' until it reache[d] the stage of
17 a final disposition at the third stage or [was] withdrawn or dispositively rejected
18 at an earlier stage." *Skrepetos*, 172 Or App at 12.

19 Under OAR 690-005-0035(4)(c) and *Skrepetos*, it appears that OWRD
20 must impose conditions to preclude use of the water until the applicant obtains

1 *all* local land use approvals required for the use of water approved by OWRD.⁴
2 The check-box approach used in the OWRD form suggests that OWRD is looking
3 for binary yes/no information to answer the following question: Has the applicant
4 received and has the appeal period ended for all required land use approvals? If
5 not, then OAR 690-005-0035(4)(c) arguably requires OWRD to condition the
6 requested action to preclude use of the water until all land use approvals are
7 obtained and all appeals are final.

8 More importantly, for purposes of determining LUBA's jurisdiction under
9 ORS 197.015(10)(b)(H), the question is whether the LUCS decision fits within
10 one or more of the statutory exclusions at subparagraph (H), not whether the
11 LUCS decision includes all the information OWRD may need in deciding
12 whether to grant, deny, or condition the requested agency action under its
13 administrative rules. Stated differently, even if OWRD ultimately decides it
14 needs more refined information from the applicant or county in order to impose
15 appropriate conditions, that does not necessarily mean that LUBA (rather than
16 the circuit court) exercises jurisdiction to review the LUCS decision.

⁴ We note that the Thornburgh Destination Resort is in a different procedural posture than the resort development at issue in *Skrepetos* because intervenor has received final, third-stage approval for some components of the resort development. It may be that OWRD could condition its permit in a manner that would allow intervenor to use water to serve land uses for which intervenor has received final land use approval.

1 Petitioner next argues that the Temporary Transfer may be inconsistent
2 with FMP Condition 10, which requires that, at the time of tentative plat/site
3 review, the applicant provide updated documentation of water rights to serve the
4 destination resort use and a full accounting of mitigation.⁵ Respondents dispute
5 that the Temporary Transfer is inconsistent with Condition 10 and note that the
6 LUCS decision specifically states that it does not allow anything not authorized
7 under the destination resort approvals and that it is subject to the terms and
8 conditions of those approvals. We agree with respondents that petitioner has not
9 established that the LUCS decision authorizes any change to or inconsistency
10 with Condition 10.

11 Even if petitioner had established that the Temporary Transfer is somehow
12 inconsistent with Condition 10 or some other aspect of the FMP, it does not
13 necessarily follow that LUBA (rather than the circuit court) has jurisdiction to
14 review the LUCS decision for the alleged error. As we explained in *McPhillips*
15 *Farm Inc. v. Yamhill County*, 66 Or LUBA 355, 360 (2012), *aff'd*, 256 Or App
16 402, 300 P3d 299 (2013), resolving the jurisdictional question under ORS
17 197.015(b)(H) requires LUBA to determine whether the county correctly

⁵ FMP Condition 10 states:

“Applicant shall provide, at the time of tentative plat/site plan review for each individual phase of the resort development, updated documentation for the state water right permit and an accounting of the full amount of mitigation, as required under the water right, for that individual phase.”

1 characterized the associated land use and correctly assigned it to one or more of
2 the three subparagraph (H) exclusions, and that limited jurisdictional review may
3 overlap with the likely merits of the appeal. Nonetheless, it is important not to
4 conflate the question of whether the LUCS decision falls within the exclusions at
5 subparagraph (H) with the question of whether the LUCS decision is erroneous
6 in some particular. A LUCS decision may include some error yet correctly
7 categorize the associated land use and correctly assign it to one or more of the
8 three subparagraph (H) exclusions. If so, jurisdiction to review the decision for
9 legal error lies with the circuit court.

10 In the present case, petitioner has not demonstrated that the county
11 incorrectly described or categorized the uses served by the Temporary Transfer,
12 incorrectly assigned those land uses to one or more of the subparagraph (H)
13 exclusions, or made any determinations that would otherwise bring the county's
14 decision outside the ambit of ORS 197.015(10)(b)(H). Accordingly, we agree
15 with respondents that the challenged decision is not within our jurisdiction.

⁶ In *Bishop v. Deschutes County*, we described three circumstances where a LUCS decision may exceed the bounds of ORS 197.015(10)(b)(H), with the jurisdictional consequence that LUBA, rather than the circuit court, exercises jurisdiction over the appeal:

“Other types of decisions resulting from a LUCS request, however, do not fall within those three exclusions. For example, if a local government decides that the proposed agency action is *not* compatible with its plan and land use regulations, or that the action is compatible for reasons other than the three listed at (i)-(iii), or if

1 **MOTION TO TRANSFER**

2 Petitioner requests that, if LUBA concludes it lacks jurisdiction, the Board
3 transfer the appeal to circuit court pursuant to ORS 34.102 and OAR 661-010-
4 0075(11)(a).⁷ Respondents do not oppose the motion, and it is granted.

5 The appeal is transferred to Deschutes County Circuit Court.

the local government decides that land use review is necessary, conducts that review and approves or denies the proposed use, then the resulting decision does not fall within the exclusions at ORS 197.015(10)(b)(H)(i)-(iii). *See Campbell v. Columbia County*, 67 Or LUBA 53, 59-60 (2013) (a LUCS decision that also verifies a nonconforming use and approves alterations is not subject to the exclusions at ORS 197.015(10)(b)(H)(i)-(iii)).” 72 Or LUBA 103, 113 (2015) (emphasis in original).

⁷ OAR 661-010-0075(11)(a) provides:

“Any party may request, pursuant to ORS 34.102, that an appeal be transferred to the circuit court of the county in which the appealed decision was made, in the event the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in 197.015(10) or (12).”