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

BEND RESEARCH, INC.,
Petitioner,

and

CENTRAL OREGON LANDWATCH,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

TUMALO PROPERTY OWNERS ASSOCIATION, INC.,
Intervenor-Respondent.

LUBA No. 2022-049

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Garrett Chrostek filed the petition for review and argued on behalf of petitioner. Also on the brief was Bryant, Lovlien & Jarvis, P.C.

Rory Isbell filed the intervenor-petitioner's brief and reply brief and argued on behalf of intervenor-petitioner.

No appearance by Deschutes County.

Christopher P. Koback filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief was Hathaway Larson LLP.

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

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

TRANSFERRED 12/01/2022

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

Petitioner appeals a hearings officer decision to issue a land use compatibility statement (LUCS) for a proposed extension of private sewer lines to serve the unincorporated community of Tumalo.

MOTIONS TO INTERVENE

Tumalo Property Owners Association, Inc. (intervenor), the applicant below, moves to intervene on the side of the county. Central Oregon Landwatch (Landwatch) moves to intervene on the side of petitioner. The motions are unopposed and allowed.

FACTS

Tumalo is a rural unincorporated community located a few miles northwest of the city of Bend. The community encompasses 504 acres and includes 318 tax lots, with a population of 558 people. Most of the dwellings and structures within the community are served by individual septic systems. Due to soil characteristics and small lot sizes within the community, it is difficult to obtain approval from the county and the Oregon Department of Environmental Quality (DEQ) to install new or replacement on-site septic systems.

In 2018, the owner of a number of small lots within Tumalo obtained county and DEQ approval to construct a private wastewater treatment facility on land zoned exclusive farm use (EFU) and located outside the community, adjacent to land they own within the community. The owner developed a

wastewater collection and treatment system, in which each of the 27 lots served by the system collects and treats waste in a small pressure tank before the partially treated waste is piped to the larger treatment facility outside the community. The owner then formed intervenor, a private association, which owns and operates the private wastewater treatment facility. Individual association members own their small pressure tank and on-site facilities; the association owns the larger treatment facility and piping, which generally runs along rights-of-way.

Subsequently, property owners not within the association asked to join the association and connect to its private system, which would require extending the existing system of two- and four-inch piping within public rights-of-way. Rather than seek DEQ approval for each piecemeal extension, intervenor applied to DEQ for a single agency permit to extend piping throughout the community, forming what intervenor described as a "community-wide sewer system" to be owned by the association. Intervenor submitted to DEQ a "master plan" showing the proposed network of pipes and the streets in which the piping would be located, over time and in many phases as demand dictated.

Intervenor then submitted a LUCS request to the county, on a form generated by DEQ. A LUCS is essentially a state agency's means of ensuring that a state agency action—in this case, a DEQ permit authorizing a proposed extension of an existing wastewater treatment facility's piping—complies with the statewide planning goals and local comprehensive plans and land use regulations. *See* ORS 197.180(1) (setting out the obligation of state agencies to

take actions "in compliance with the goals" and "in a manner compatible with acknowledged comprehensive plans and land use regulations"); *see also Gould v. Deschutes* County, ___ Or LUBA ___ (LUBA No 2021-060, June 16, 2022) (describing the LUCS analysis); *Zenith Energy Terminal Holdings LLC v. City of Portland*, ___ Or LUBA ___ (LUBA No 2021-083, Feb 3, 2022) (same); *Bishop v. Deschutes County*, 75 Or LUBA 504, 514-15 (2017) (same).

The local government's response to a LUCS request does not, typically, authorize development or constitute a permit itself. A LUCS request simply asks the local government to determine whether the proposed action or associated land use is consistent with the local government's comprehensive plan and land use regulations. That determination usually requires assigning the proposed action or associated land use to one or more land use categories, determining whether that land use category is allowed in the applicable zones, and, finally, determining whether and what type of land use reviews or permits are required, if any. The local government then returns the LUCS to the state agency, which relies on the LUCS to determine, among other things, whether to delay issuance of the state agency permit pending any required local government land use reviews.

In the present case, county staff elected to process the DEQ LUCS form under land use procedures that provide for notice and a hearing. On February 14, 2022, county planning staff issued a pre-hearing staff report. The staff report identified the key issue as whether the proposed action is properly categorized as the expansion of a "major" utility facility, a use category that is allowed in some

but not all Tumalo zones, or a "minor" utility facility, which is allowed in all zones. Staff also raised the question of whether proceeding on the LUCS request to install piping for a community-wide sewer system requires the consent of all property owners in the community, as the county code generally requires that a land use application include the signature or consent of the owners of affected property.

The county hearings officer conducted a public hearing on the LUCS request, at which the owner testified as a representative of the association. On April 7, 2022, the hearings officer issued the decision challenged in this appeal. The hearings officer characterized the proposed action as a proposal to extend two- and four-inch sewer lines in a number of private and public rights-of-way throughout the community. The hearings officer ultimately concluded that the proposed pipe extensions qualify as a "minor" utility facility and are therefore an allowed use in all Tumalo zones. However, the hearings officer also concluded that the proposed action will require some review and the application of county land use regulations in areas subject to the Flood Plain zone governed by Deschutes County Code (DCC) chapter 18.96. Further, the hearings officer noted that laying sewer pipe within the public rights-of-way will require county road permits. The hearings officer directed planning staff to complete and return the DEQ LUCS form, subject to specified limitations, and to attach the hearings officer's decision to the LUCS as findings.

Petitioner appealed the hearings officer's decision to the county board of commissioners, which declined to review the decision. This appeal followed.

JURISDICTION

On our own motion, we raised the issue of whether LUBA has jurisdiction to hear the present appeal. The parties provided and we have considered supplemental briefing on that point. For the following reasons, we conclude that we lack jurisdiction over the appeal.

As relevant here, LUBA's jurisdiction is generally limited to "land use decisions." ORS 197.825(1). ORS 197.015(10)(a) defines "land use decision," in relevant part, as a "final decision or determination made by a local government" that concerns the "application" of a land use regulation. In the petition for review, petitioner argues that the hearings officer's decision interprets and applies several county land use regulations and, therefore, is a land use decision. The intervenor-respondent's brief does not dispute LUBA's jurisdiction. However, we raised on our own motion the question of whether this appeal is excluded from LUBA's jurisdiction based on ORS 197.015(10)(b)(H).

ORS 197.015(10)(b)(H) excludes from the definition of "land use decision" most, if not nearly all, LUCS decisions. Specifically, ORS 197.015(10)(b)(H) provides that a "land use decision" does not include a decision by a local government:

> "That a proposed state agency action subject to ORS 197.180(1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:

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

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

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

In *Bishop v. Deschutes County*, we explained:

> "The subject of the exclusions at ORS 197.015(10)(b)(H) are certain decisions issued by local governments on a LUCS request, which conclude that a proposed state agency action is compatible with the local government's comprehensive plan and land use regulations, for one or more of the three reasons listed in (i) through (iii). 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 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).

We also noted in *Bishop* that the exclusion in ORS 197.015(10)(b)(H)(i) to (iii) is worded so that, "in order to determine whether an exclusion applies,

LUBA must address at least some of the likely merits of the appeal, and determine whether the local government *correctly* categorized the proposed action so as to bring it within the terms of the relevant exclusion." *Id.* (emphasis in original) (citing *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355, 360-62 (2012), *aff'd*, 256 Or App 402, 300 P3d 299 (2013)).

Accordingly, the question of LUBA's jurisdiction turns on whether the hearings officer correctly categorized the proposed extension of sewer pipes as a "minor" utility facility that is allowed in all Tumalo zones, subject to additional review for compliance in areas subject to the Flood Plain zone. In answering that question, we have considered the parties' jurisdictional briefing and those parts of the petition for review, intervenor-petitioner's brief, and intervenor-respondent's brief that bear on the correctness of the hearings officer's categorization of the proposed use. We generally have not considered the parties' arguments regarding alleged procedural or substantive errors that do not have a bearing on the jurisdictional issue.

A. Characterization of the Use

As noted, the hearings officer first characterized the nature and scope of the proposed use as the extension of existing two- and four-inch sewer lines in the right-of-way throughout the community. The hearings officer rejected more expansive characterizations of the proposed use as including the existing wastewater treatment facility outside the community. We first address the parties' arguments regarding the proper characterization of the proposed use.

Petitioner argues that the hearings officer should have inquired into whether the new community-wide master plan is beyond the scope of the county and DEQ approval of the wastewater treatment facility. If so, we understand petitioner to argue, using the wastewater treatment plant to service the entirety of the community will require a modified DEQ permit, if not modifications to the plant itself. If that is the case, petitioner argues, the hearings officer should have included the wastewater treatment facility within the scope of the proposed use for purposes of the present LUCS request and evaluated whether the entire system, not just the new pipeline extensions, is compatible with the county's comprehensive plan and land use regulations.

In *Bishop*, we held that a local government is not obligated to accept the characterization or scope of the use that the LUCS applicant proposes. 72 Or LUBA at 115. However, it does not follow that a local government is obligated to inquire outside the record to question the applicant's characterization of the proposed use if that characterization is otherwise supported by substantial evidence. The owner and others testified that connecting the new pipes to the existing system would not require changes to the treatment facility, which has sufficient capacity. The owner indicated that a modified DEQ permit for the treatment facility may be required, but the hearings officer found no evidence suggesting that the treatment facility itself would require modifications. The hearings officer carefully limited the scope of the present LUCS to the proposed two- and four-inch pipe extensions and provided that the "LUCS does not apply

to any pipes of a different size or to any modifications to the existing waste treatment facility." Record 114. Any modification to the treatment facility would therefore require a new LUCS.

As discussed below, the hearings officer concluded that the proposed pipelines are properly categorized under the governing code definitions as a "minor" utility facility, as distinguished from a "major" utility facility. It is the nature of most, if not all, utility facilities that they consist of a series of connected pieces of infrastructure, which are often installed and connected sequentially over time, each component of which may be subject to different use categories and review standards across multiple zoning districts. Petitioner offers no authority for the general proposition that, for purposes of a LUCS determination for a subsidiary utility facility, such as the extension of a pipeline, the county is necessarily obligated to render a LUCS determination for the entire utility system to which the pipeline will be connected. Absent some authority to that effect, petitioner's arguments regarding the nature and scope of the proposed use do not provide a basis to conclude that the exceptions to LUBA's jurisdiction at ORS 197.015(10)(b)(H) do not apply.

B. Major and Minor Utility Facilities

The hearings officer agreed with staff and intervenor that the proposed use is properly categorized as a type of "utility facility," a land use category defined at DCC 18.04.030:

> "'Utility facility' means any *major* structures, excluding hydroelectric facilities, owned or operated by a public, private or cooperative electric, fuel, communications, sewage or water company for the generation, transmission, distribution or processing of its products or for the disposal of cooling water, waste or by-products, and including power transmission lines, major trunk pipelines, power substations, telecommunications facilities, water towers, sewage lagoons, sanitary landfills and similar facilities, but excluding local sewer, water, gas, telephone and power distribution lines, and *similar minor facilities* allowed in any zone. This definition shall not include wireless telecommunication facilities where such facilities are listed as a separate use in a zone." (Emphases added.)

The hearings officer interpreted the DCC 18.04.030 definition of "utility facility" to describe two types of facilities: "major" facilities and "minor" facilities, the latter of which are "allowed in any zone."[1] County staff took the position that the proposed use qualifies as a "major trunk pipeline," which DCC 18.04.030 identifies as one type of major utility facility. We understand that staff and opponents suggested that a "minor" utility facility is limited to the lateral lines that provide proximate service to individual properties, not including the main or trunk lines within the rights-of-way that carry effluent to the wastewater treatment plant. The hearings officer disagreed, focusing on one of the clear

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[1] Tumalo has six zones, three of which list "utility facility" as a conditional use, two of which include no provisions for a "utility facility," and one of which, the Flood Plain zone under DCC chapter 18.96, allows a "utility structure" as a conditional use. None of the zones expressly list "minor utility facility" as a use, much less a permitted use. Thus, the definition at DCC 18.04.030 is the only apparent basis in the code to conclude that "minor" utility facilities are allowed in all zones.

textual distinctions between major and minor utility facilities, that the latter are limited to "local * * * distribution lines." The hearings officer reasoned:

> "Although it is only an analogy, a comparison of the proposed sewer lines to an electric utility is useful. The language relating to major utility facilities in the Code expressly includes as examples power transmission lines and power substations. The language relating to minor utility facilities refers expressly to power distribution lines. In other words, the portion of the power system to which customers connect (power distribution lines) are considered minor utility facilities allowed in any zone, whereas the portion of the power system that the distribution lines are connected to (transmission lines and substations) are considered major utility facilities. The sewer lines comprising the Project appear to serve a purpose that is more similar to power distribution lines because they are lines to which customers directly connect to receive service.
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> "Based on the foregoing, I find that a reasonable interpretation of the Code is that the proposed sewer extension lines are best categorized as a minor utility facility allowed in all zones. The lines appear to be local distribution lines in that they extend an existing service (waste treatment) from an existing facility to new locations in the local area directly to a customer. In a different scenario, for example where a new or expanded waste treatment facility is part of the proposal, a different analysis is required, and the outcome may be different." Record 111.

We agree with the hearings officer's interpretation. As the hearings officer noted, if a "major trunk pipeline" constitutes an example of a major utility facility, that logically suggests the existence of a "minor trunk pipeline," with the difference presumably being that the latter serves only a local area. The hearings officer noted that the term "local" is invariably used in the DCC to distinguish "local" from "regional" or larger contexts. The extension of a sewer pipeline system to

serve a few hundred lots within a small rural unincorporated community cannot possibly be said to serve a "regional" or larger area.

The hearings officer's analogy between electric and sewer facilities also seems useful. An electric utility system typically consists of multiple elements, including a generating facility, high-power transmission lines, substations, and distribution lines that deliver power to individual properties. In that example, it seems reasonable to view as a "minor" utility facility the distribution lines that run between individual properties and the most proximate major component of the larger system, presumably a substation or similar facility. Similarly, a wastewater collection and treatment system might consist of a central treatment facility and a series of pipes that collect and convey wastewater from individual properties in a local area. If, under the code definition, a line must be drawn somewhere between "major" and "minor" utility facilities, it seems reasonable to regard as "minor" utility facilities the collection lines upstream from the most proximate major facility.

In the present case, as we understand it, the extended pipelines would provide direct service to a relatively small number of individual properties in a localized area, and they would connect directly to existing, identically sized pipelines that, in turn, connect to an existing treatment facility. The hearings officer correctly rejected arguments that the extended pipelines are "major trunk pipelines" or other types of major utility facilities. At most, they are "minor trunk pipelines" or a similar type of minor utility facility. Accordingly, we conclude

that the hearings officer correctly categorized the proposed pipeline extensions as a minor utility facility.

C. Public, Private, or Cooperative Sewage Company

DCC 18.04.030 defines "utility facility," in relevant part, as "major structures * * * owned or operated by a public, private or cooperative electric, fuel, communications, sewage or water company." Petitioner and Landwatch (together, petitioners) argue that the county erred in failing to address whether intervenor, a private association, qualifies as a private sewage company for purposes of the definition. We understand petitioners to question whether the association is a "company." If it is not, petitioners argue, then the proposed pipeline extension cannot qualify as a "utility facility," whether major or minor.[2]

Petitioners' challenge is a findings challenge, which, as framed, has no bearing on the narrow jurisdictional issue before us, *i.e.*, whether the county correctly categorized the proposed use in one or more of the three ways specified in ORS 197.015(10)(b)(H).

D. Failure to Address the Comprehensive Plan

Petitioners argue that the hearings officer erred in failing to consider whether the proposed use is consistent with the county's comprehensive plan. Petitioners note that the DEQ LUCS form specifically asks the county to

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[2] This argument is presumably intended as an alternative to petitioners' contention that the proposed use is a "utility facility," meaning a major utility facility.

determine whether the "activity or use [is] compatible with [its] acknowledged comprehensive plan as required by OAR 660-031." Record 10. Petitioners identify several comprehensive plan provisions regarding rural sewer service and argue that the hearings officer should have considered whether the proposed private community-wide sewer system is compatible with those provisions.

Again, the absence or inadequacy of findings does not have any immediate bearing on the jurisdictional issue before us. However, we understand petitioners to argue that, if the proposed use in fact falls within a category of uses prohibited by the cited comprehensive plan provisions, then the exclusions at ORS 197.015(10)(b)(H) do not apply, and LUBA has jurisdiction over this appeal.

Intervenor responds, initially, that no issues regarding the cited comprehensive plan provisions were raised below, and, thus, such issues are waived pursuant to ORS 197.797(1).[3] At oral argument, intervenor conceded that

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[3] ORS 197.797(1) (renumbered in 2021 from ORS 197.763(1)) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

one of the cited comprehensive plan provisions, Tumalo Community Plan (TCP) Public Facility Policy 8, was raised during the hearings below.[4]

Landwatch replies that general issues were raised below regarding compatibility with the comprehensive plan and that the "raise it or waive it" principle embodied in ORS 197.797(1) does not require participants to cite and make arguments under particular comprehensive plan policies.

We agree with intervenor that issues regarding compatibility with the comprehensive plan were not raised below with the specificity required by ORS 197.797(1), with the exception of TCP Public Facility Policy 8. While it is less essential to preservation to cite a specific applicable provision, raising an issue under that provision with the specificity required by ORS 197.797(1) requires more than general assertions that the proposal is inconsistent with the comprehensive plan. Such general assertions did not provide the hearings officer and other participants with an adequate opportunity to respond to the issue raised on appeal. That is evident from the hearings officer's decision, in which they struggled to understand what opponents were asserting with respect to the comprehensive plan. Record 22.

That said, it is not clear to us that waiver of issues is an appropriate basis to reject petitioners' arguments that LUBA has jurisdiction over this appeal. In

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[4] The TCP is part of the county's comprehensive plan. TCP Public Facility Policy 8 is to "[c]oordinate with the Tumalo residents and business owners on the creation of a sewer district, if the community initiates district formation."

resolving a dispute over LUBA's subject-matter jurisdiction, LUBA's review is generally not confined to the record or necessarily constrained by preservation of issues in local proceedings. Arguably, if petitioners can demonstrate on appeal that the proposed use is incompatible with applicable comprehensive plan provisions, LUBA should consider such arguments to the extent that they have a direct bearing on whether the exclusions to LUBA's jurisdiction at ORS 197.015(10)(b)(H) apply, notwithstanding failure to preserve such issues during the proceedings below. Accordingly, we consider petitioners' arguments regarding the cited comprehensive plan provisions.

We first consider TCP Public Facility Policy 8, which was cited below as part of general arguments that the county should not render a decision on the LUCS but, instead, initiate a public process for developing a public sewer system in Tumalo. The hearings officer found such arguments to have no bearing on the question presented by the LUCS application. For present purposes, as intervenor argues, TCP Public Facility Policy 8 applies only in the event that the community initiates district formation for a sewer district. There is no evidence in the record that the community has initiated district formation.[5] Petitioners have not

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[5] The parties note that, after the LUCS application was received, the county issued a request for proposals (RFP) to solicit bids for evaluation of different options for providing wastewater treatment in Tumalo. Intervenor argues that the RFP specifically requests evaluation of whether extending pipelines connected to intervenor's wastewater treatment facility would be the preferred option,

established that TCP Public Facility Policy 8 has any bearing on the LUCS determination or the narrow jurisdictional issue before us.

Petitioners also cite Deschutes County Comprehensive Plan (DCCP) section 3.6, which describes "public facilities and services" to include:

> "Sewer Districts: Creating or expanding existing sewer systems outside an urban growth boundary or unincorporating community is governed by Statewide Goal 11 and OAR 660-011-0060. In order to protect rural areas from urban-style development, the rules regulate where and when rural sewers are appropriate. Some sewer districts, such as Oregon Water Wonderland Unit 2, have used the Statewide Goal 2 exception process to create or expand a sewer system."

Petitioners argue that DCCP section 3.6 suggests that, under the comprehensive plan, public sewer districts are the "default" organizational form for providing community-wide sewer service. That may be a permissible inference, but, even if so, nothing in DCCP section 3.6 or elsewhere cited to us prohibits a privately owned sewer facility or otherwise suggests that a private facility is incompatible with the DCCP.

Landwatch cites DCCP Public Facilities and Services Goal 1, which is to "[s]upport the orderly, efficient and cost-effective siting of rural public facilities and services," and DCCP Policy 3.6.2, which is to "[e]ncourage early planning and acquisition of sites needed for public facilities, such as roads, water and

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which does not suggest that the county believes the comprehensive plan prohibits that option.

wastewater facilities." Again, nothing in these cited DCCP provisions suggests that a private sewer facility is impermissible or incompatible with the DCCP.

Landwatch also cites the TCP Public Facilities Goal, which is to "[e]nsure water and sewage treatment systems encompass the appropriate scale and cost." This goal does not address, much less proscribe, private sewer facilities.

In sum, based on the cited comprehensive plan provisions, it is fair to say that the county assumed that, in the future, most, if not all, community-wide sewer systems would be public facilities. However, it does not follow from that inference that the county intended to prohibit a privately owned sewer system serving a small rural unincorporated community.

E. Failure to Address OAR 660-022-0050

OAR 660-022-0050 is part of a division of administrative rules governing urban and rural unincorporated communities. The rule generally requires that counties adopt a public facility plan for unincorporated communities over 2,500 in population. OAR 660-022-0050(1). However, it further provides:

> "For all communities, a sewer and water community public facility plan is required if:
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> "* * * * *
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> "(d) Land in the community has been declared a health hazard or has a history of failing septic systems or wells."[6] *Id.*

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[6] OAR 660-022-0050(1) provides, in full:

Petitioners argue that the TCP includes language noting that planned growth for Tumalo cannot be adequately served with individual septic systems, given soil conditions and other constraints. Petitioners also cite testimony from intervenor regarding problems obtaining new DEQ permits for septic systems when existing septic systems fail or require replacement. Petitioners contend that this testimony indicates that there is a "history of failing septic systems" for purposes of OAR 660-022-0050(1)(d). Accordingly, petitioners argue, the county

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> "In coordination with special districts, counties shall adopt public facility plans meeting the requirements of OAR 660, division 11, and include them in the comprehensive plan for unincorporated communities over 2,500 in population. A community public facility plan addressing sewer and water is required if the unincorporated community is designated as an urban unincorporated community under OAR 660-022-0010 and 660-022-0020. For all communities, a sewer and water community public facility plan is required if:
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> "(a) Existing sewer or water facilities are insufficient for current needs, or are projected to become insufficient due to physical conditions, financial circumstances or changing state or federal standards; or
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> "(b) The plan for the unincorporated community provides for an amount, type or density of additional growth or infill that cannot be adequately served with individual water or sanitary systems or by existing community facilities and services; or
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> "(c) The community relies on groundwater and is within a groundwater limited or groundwater critical area as identified by the Oregon Department of Water Resources; or
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> "(d) Land in the community has been declared a health hazard or has a history of failing septic systems or wells."

is obligated to adopt a sewer and water community facility plan for Tumalo. No such plan has been adopted. In the absence of such a plan, petitioners argue, the county should not have processed the present LUCS application.

Intervenor responds that, while OAR 660-022-0050 was cited to the hearings officer below, it was not accompanied by any argument establishing the rule's relevance to the LUCS application, and the issue is thus waived under ORS 197.979(1). We tend to agree with intervenor that the issue raised on appeal was not raised below with the specificity required by ORS 197.979(1). Nonetheless, as explained above, we will consider arguments bearing on our subject-matter jurisdiction notwithstanding potential preservation issues.

Petitioners' arguments under OAR 660-022-0050 provide no basis to conclude that the exclusions at ORS 197.015(10)(b)(H) do not apply. Even assuming without deciding that evidence in the record indicates a history of failing septic systems, potentially triggering an obligation under OAR 660-022-0050(1)(d) for the county to develop a sewer and water plan, petitioners fail to explain why, in the absence of such a plan, the county is precluded from processing intervenor's LUCS application or is otherwise compelled to categorize the proposed use in some way that would bring it outside the exclusions at ORS 197.015(10)(b)(H).

F. Conclusion

For the reasons set out above, the hearings officer's conclusion that the proposed pipeline extensions are an allowed use in the relevant Tumalo zones,

and that they will require review and approval under land use standards in the Flood Plain zone, falls squarely within one or more of the exclusions at ORS 197.015(10)(b)(H). Accordingly, the challenged decision is not a "land use decision," and LUBA lacks jurisdiction over the appeal.

MOTION TO TRANSFER

Petitioners filed motions to transfer the appeal to circuit court. The motions are granted, and the appeal is transferred to Deschutes County Circuit Court.