

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

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

PINNACLE UTILITIES, LLC,
Intervenor-Respondent.

LUBA No. 2021-062

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jeffrey L. Kleinman represented petitioner.

David Doyle represented respondent.

J. Kenneth Katzaroff represented intervenor-respondent.

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

TRANSFERRED 01/05/2023

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

NATURE OF THE DECISION

Petitioner appeals a land use compatibility statement (LUCS) issued by a county planner on a form provided by the Oregon Water Resources Department (OWRD) concluding that a proposed permit to use groundwater to serve a partially approved destination resort on lands zoned Exclusive Farm Use (EFU) is compatible with the county's land use regulations.

INTRODUCTION

The present case involves a portion of the Thornburgh Destination Resort, a proposed development with 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'd*, 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,” and we refer to
4 the proposals contained therein, collectively, as Phase A-1, as well. Phase A-1
5 includes a tentative subdivision plat for 192 single-family residential dwelling
6 lots, 24 single-family deed-restricted OLU lots, and 13 OLU lots, together with
7 roads, utility facilities, lots, and tracts for future resort facilities and open space.

8 On October 30, 2018, a county hearings officer approved Phase A-1 with
9 conditions. Petitioner appealed. On June 21, 2019, we remanded Phase A-1.
10 *Gould v. Deschutes County*, 79 Or LUBA 561 (2019) (*Gould VIII*), *aff’d*, 310 Or
11 App 868, 484 P3d 1073 (2021). Petitioner appealed our decision to the Court of
12 Appeals, which dismissed the appeal as untimely filed in an order dated July 18,
13 2019, and a subsequent order denying reconsideration dated August 9, 2019. That
14 appeal ultimately went up to the Supreme Court, which allowed review in
15 December 2019 and reversed and remanded the Court of Appeals’ dismissal in

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 December 2020. *Gould v. Deschutes County*, 365 Or 819, 454 P3d 787 (2019);
2 *Gould v. Deschutes County*, 367 Or 427, 478 P3d 982 (2020). On April 21, 2021,
3 the Court of Appeals affirmed our decision remanding Phase A-1 to the county.
4 *Gould v. Deschutes County*, 310 Or App 868, 484 P3d 1073 (2021). On October
5 28, 2021, the county again approved Phase A-1 on remand. Petitioner appealed,
6 and we affirmed. *Gould v. Deschutes County*, ____ Or LUBA ____ (LUBA No
7 2021-112, June 9, 2022), *aff'd*, 322 Or App 571 (2022).

8 While the Phase A-1 decision was climbing the appellate ladder, intervenor
9 applied for the golf course site plan review. On April 1, 2020, the county planning
10 division administratively approved the golf course site plan review with
11 conditions. Petitioner appealed that approval to the board of county
12 commissioners, which approved the golf course site plan review with conditions.
13 On June 11, 2021, we affirmed in *Gould Golf*. Petitioner appealed. The Court of
14 Appeals affirmed and the Supreme Court denied review. *Gould v. Deschutes*
15 *County*, 314 Or App 636, 494 P3d 357 (2021), *rev den*, 369 Or 211 (2022).

16 Sometime in 2021, intervenor applied to OWRD for a permit to use 9.28
17 cubic feet per second (cfs) of groundwater for quasi-municipal use on the
18 Thornburgh Resort property. Record 3. We refer to the requested OWRD action
19 as the Groundwater Permit.² Pursuant to OWRD's administrative rules,

² Intervenor submitted four other LUCS applications to the county, which the county approved and petitioner also appealed to LUBA. These four appeals (and our shorthand labels for each) are *Gould v. Deschutes County*, ____ Or LUBA ____

1 intervenor also filed with the county an application for a LUCS on a form
2 provided by OWRD. The LUCS application asks the county to evaluate whether
3 intervenor's request for the Groundwater Permit is consistent with the county's
4 comprehensive plan and land use regulations. Attached to intervenor's LUCS
5 application are construction plans for the proposed groundwater well and utilities,
6 and a copy of the county's October 30, 2018 Phase A-1 approval. Record 21-101.

7 Some background is necessary to understand the role of the requested
8 LUCS. OWRD is obligated under ORS 197.180 to ensure that its actions comply
9 with the statewide planning goals. This obligation is implemented by OWRD's
10 coordination program at OAR chapter 690, division 5. Under that program,
11 OWRD ensures that its actions (such as the requested Groundwater Permit)
12 comply with the goals by asking local governments to evaluate whether the land
13 use associated with the state agency action is consistent with the local
14 government's comprehensive plan and land use regulations. This evaluation can
15 take various forms, but it typically involves an initial description or
16 categorization of the land use associated with the state agency action and a
17 determination of whether that particular land use is one that is allowed without
18 land use review or one that requires discretionary land use review. *See Bishop v.*

(LUBA No 2021-060, June 16, 2022) (Temporary Transfer); *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-066, Jan 5, 2023) (2021 Limited License); *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-109, Jan 5, 2023) (Water Rights Transfer); and *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-012, Jan 5, 2023) (2022 Limited License).

1 *Deschutes County*, 75 Or LUBA 504, 514-15 (2017) (describing the typical steps
2 of a LUCS analysis).³ If the associated land use is one that requires discretionary
3 land use review, the local government further determines whether the land use
4 has received the required land use approval and whether that approval is final, or
5 whether some future land use approval is required. For state agency purposes, it
6 is important to know the status of required land use approvals because, if the local
7 approval is not yet final or has not yet been applied for, the state agency must
8 condition its action on the applicant receiving final approvals for all required land
9 use reviews. *See* OAR 690-005-0035(4)(c) (providing that, if local land use
10 approvals are pending, OWRD must impose conditions to preclude use of the
11 water until the applicant obtains all required local land use approvals);⁴ *see also*

³ The initial LUCS decision at issue in *Bishop* failed to identify the land uses associated with the proposed transfer of water, which would be stored in two recently constructed reservoirs. The county later correctly determined that the associated land uses, including construction and use of the reservoirs, required discretionary land use approvals, which the applicant had not initially sought. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

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

“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;

1 *Skrepetos v. Water Resources Dept.*, 172 Or App 9, 12-13, 18 P3d 401 (2001)
2 (holding that OWRD properly issued a water permit with conditions prohibiting
3 water use until appeals of all land use decisions in a multi-stage destination resort
4 review process were resolved).

5 The OWRD LUCS form follows this general template, with an initial
6 section asking the county to determine whether the land uses to be served by the
7 proposed water uses either (1) “are allowed outright or are not regulated by your
8 comprehensive plan” or (2) “involve discretionary land-use approvals as listed”

“(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 use approvals under the applicable comprehensive plan; or

“(C) The applicant has already received necessary land use approvals for the land use served by the proposed water use.

“(c) If local land use approvals are pending, place conditions on a permit or other approval to preclude use of water and any associated construction until the applicant obtains all required local land use approvals; or, withhold issuance of the water use permit or approval until the applicant obtains all required local land use approvals.”

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.” *Id.*

9 Based on the LUCS form, the attached construction plans, and the attached
10 Phase A-1 hearings officer decision, the county adopted several conclusions.
11 First, the county concluded that, “[t]o the extent the water in question is directed
12 to ‘farm use,’ as defined in [Deschutes County Code (DCC)] 18.04.030, such use
13 is permitted outright.” *Id.*

14 Second, the county cited DCC 18.113, the chapter governing destination
15 resorts, as the most significant land use regulations. *Id.* The county concluded
16 that the destination resort uses served by the proposed water involve a number of
17 discretionary land-use approvals, which the county described as follows:

18 “Thornburgh Destination Resort has an extensive County approval
19 process, recited in pages 3-5 of the attached [October 30, 2018 Phase
20 A-1] site plan decision. Master Plans, Phase A-1 Tentative Plan and
21 Utility Site Plan Review, and Golf Course Site Plan have received
22 final local approval. Specific development plans for overnight

1 lodging facilities and other resort development are in progress or are
2 anticipated.” *Id.*⁵

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

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

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

13 The county issued the challenged LUCS on May 25, 2021. On that date,
14 the county’s golf course site plan approval was pending LUBA review and Phase
15 A-1 was pending county review on remand from *Gould VIII*. Petitioner’s appeal
16 in *Gould Golf* is now resolved, and the county’s approval is affirmed. We
17 affirmed the county’s decision approving Phase A-1 after remand. *Gould v.*
18 *Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-112, June 9, 2022), *aff’d*,
19 322 Or App 571 (2022).

20 Petitioner appealed the LUCS decision to LUBA. Intervenor filed a motion
21 to dismiss, arguing that the LUCS is not a decision subject to LUBA’s
22 jurisdiction. Petitioner filed a response, arguing that LUBA has jurisdiction. In

⁵ Pages three to five of the October 30, 2018 Phase A-1 hearings officer decision describe the land use approval and litigation history of the CMP and FMP between November 2005 and August 21, 2018. Record 23-25.

1 the alternative, petitioner moves to transfer the appeal to circuit court in the event
2 LUBA concludes it lacks jurisdiction. For the following reasons, we agree with
3 intervenor that the challenged LUCS decision is excluded from our jurisdiction.

4 **MOTION TO DISMISS**

5 ORS 197.825(1) provides that LUBA has exclusive jurisdiction over “land
6 use decisions.” ORS 197.015(10)(a) defines “land use decision,” in relevant part,
7 to include a local government decision that concerns the application of a
8 comprehensive plan provision or land use regulation. However, ORS
9 197.015(10)(b)(H) excludes from the definition of “land use decision” a decision
10 by a local government

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

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

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

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

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

1 In the present case, the county concluded that water from the Groundwater
2 Permit would serve a wide array of land uses that fell into all three categories
3 described in subparagraph (H): (1) those that are allowed without review in the
4 EFU zone (farm uses), (2) destination resort uses that are already authorized by
5 past land use decisions (the CMP, FMP, Phase A-1, and golf course site plan
6 review decisions), and (3) destination resort uses that are allowed subject to
7 discretionary reviews for which future land use decisions will be required
8 (overnight lodging, etc.). By checking the “Being Pursued” box, the county also
9 advised OWRD that some of the authorizing decisions were on appeal and, thus,
10 not yet final.

11 Intervenor argues that the county accurately identified and assigned all
12 land uses served by the Groundwater Permit to one or more of three categories
13 corresponding to the exclusions at subparagraph (H) and, thus, the challenged
14 LUCS is subject to the subparagraph (H) exclusions to LUBA’s jurisdiction.

15 Petitioner responds, initially, that the county incorrectly identified “farm
16 use” as one of the land uses potentially served by the Groundwater Permit
17 because the record includes no evidence that the water will be used for farm use.
18 According to petitioner, the county’s finding that, “to the extent the water in
19 question is directed to ‘farm use,’ as defined in DCC 18.04.030, such use is
20 permitted outright” is simply a red herring, distracting from the fact that the water
21 is clearly intended to serve various destination resort uses.

1 Intervenor does not cite any evidence that the water would serve farm uses
2 but argues, nonetheless, that the county's finding, as far as it goes, is accurate and
3 legally correct: Farm use is a permitted use in the EFU zone. We agree with both
4 parties that this finding is not dispositive for purposes of determining our
5 jurisdiction under ORS 197.015(10)(b)(H). Inclusion of an irrelevant finding in
6 a LUCS does not help resolve the jurisdictional question.

7 Turning to the destination resort uses, petitioner argues that the LUCS does
8 not identify exactly which destination resort approvals have been "Obtained,"
9 *i.e.*, have become final, and which are "Being Pursued," *e.g.*, are on appeal or on
10 remand. In the absence of that information, petitioner argues, OWRD does not
11 have the information it requires to fulfill its coordination obligations under the
12 goals and its administrative rules. Petitioner observes that the county inaccurately
13 characterized the Phase A-1 and golf course site plan reviews as having received
14 final local approval when Phase A-1 was pending county review on remand and
15 the golf course site plan approval was pending appellate court review.

16 We addressed and rejected a similar argument in *Gould v. Deschutes*
17 *County*, ___ Or LUBA ___ (LUBA No 2021-060, June 16, 2022). For the reasons
18 explained in that decision, we disagree with petitioner that failure to precisely
19 identify which of the several destination resort approvals are final, and which are
20 on appeal, does not necessarily mean that OWRD is unable to perform its
21 coordination responsibilities. More to the point, the question before us is whether
22 the LUCS decision fits within one or more of the exclusions at subparagraph (H),

1 not whether the LUCS decision includes all the information OWRD may need in
2 deciding whether to grant, deny, or condition the requested agency action under
3 its administrative rules. Stated differently, the county's choice to describe and
4 categorize the various destination resort approval decisions in a single omnibus
5 finding rather than individual findings does not necessarily mean that the county
6 incorrectly described or categorized those decisions, or that the exclusions at
7 ORS 197.015(10)(b)(H) do not apply.

8 Petitioner next argues that the Groundwater Permit may represent a
9 modification of the groundwater permits or sources that were in place at the time
10 of the CMP, FMP, and Phase A-1 approvals, and, thus, conflict with FMP
11 Condition 10, which requires that, at the time of tentative plat/site review,
12 intervenor provide updated documentation of water rights to serve the destination
13 resort use and a full accounting of mitigation.⁶ Petitioner argues that, in issuing
14 the LUCS, the county failed to inform OWRD that a modification of FMP
15 Condition 10 may be necessary to reflect the changed source of groundwater. We
16 understand petitioner to argue that the LUCS failed to correctly identify and

⁶ 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 categorize a required future land use decision and, thus, the exclusions at
2 subparagraph (H) do not apply.

3 We rejected a similar argument in *Gould v. Deschutes County*, ___ Or
4 LUBA ___, ___ (LUBA No 2021-060, June 16, 2022) (slip op at 15-16), and we
5 reject the argument here for the same reasons. Even if petitioner had established
6 that the Groundwater Permit is somehow inconsistent with FMP Condition 10 or
7 some other aspect of the FMP, it does not necessarily follow that LUBA (rather
8 than the circuit court) has jurisdiction to review the LUCS decision for the alleged
9 error. As we explained in *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA
10 355, 360 (2012), *aff'd*, 256 Or App 402, 300 P3d 299 (2013), resolving the
11 jurisdictional question under ORS 197.015(10)(b)(H) requires LUBA to
12 determine whether the county correctly characterized the associated land use and
13 correctly assigned it to one or more of the three subparagraph (H) exclusions, and
14 that limited jurisdictional review may overlap with the likely merits of the appeal.

15 In the present case, petitioner has not demonstrated that the county
16 incorrectly described or categorized the uses served by the Groundwater Permit,
17 incorrectly assigned those land uses to one or more of the subparagraph (H)
18 exclusions, or made any determinations that would otherwise bring the county's
19 decision outside the ambit of ORS 197.015(10)(b)(H). For purposes of the
20 jurisdictional analysis, the possibility that, in the future, intervenor might
21 propose, or the county might require, a modification of the FMP or a condition
22 of FMP approval does not establish that the county failed to correctly identify or

1 categorize required land use approvals for the destination resort. We agree with
2 intervenor that the challenged decision is not within our jurisdiction.

3 **MOTION TO TRANSFER**

4 Petitioner requests that, if LUBA concludes it lacks jurisdiction, the Board
5 transfer the appeal to circuit court pursuant to ORS 34.102 and *former* OAR 661-
6 010-0075(11)(a) (2020), *renumbered as* OAR 661-010-0075(9)(a) (2022).⁷
7 Intervenor does not oppose the motion, and it is granted.

8 The appeal is transferred to Deschutes County Circuit Court.

⁷ *Former* OAR 661-010-0075(11)(a) (2020), *renumbered as* OAR 661-010-0075(9)(a) (2022), 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).”