

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
12 and

13
14 PINNACLE UTILITIES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-066

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from Deschutes County.

23
24 Jeffrey L. Kleinman represented petitioner.

25
26 David Doyle represented respondent.

27
28 J. Kenneth Katzaroff represented intervenor-respondent.

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

32
33 TRANSFERRED 01/05/2023

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 a county planner on a form provided by the Oregon Water Resources Department (OWRD) concluding that a proposed limited license 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 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,” 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 limited water use
17 license to use 4.5 cubic feet per second (cfs) of groundwater for quasi-municipal
18 use on the Thornburgh Resort property. Record 3. We refer to the requested
19 OWRD action as the 2021 Limited License.² Pursuant to OWRD's administrative

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

1 rules, 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 2021 Limited License 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 2021-062, Jan 5, 2023) (Groundwater Permit); *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 June 8, 2021. On that date, the
14 county’s golf course site plan approval was pending LUBA review and Phase A-
15 1 was pending county review on remand from *Gould VIII*. Petitioner’s appeal in
16 *Gould Golf* is now resolved, and the county’s approval is affirmed. We affirmed
17 the county’s decision approving Phase A-1 after remand. *Gould v. Deschutes*
18 *County*, ___ Or LUBA ___ (LUBA No 2021-112, June 9, 2022), *aff’d*, 322 Or
19 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 2021 Limited
2 License 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 2021 Limited License 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’s responses to the motion to dismiss are similar to those offered
16 and rejected in *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-
17 060, June 16, 2022) (Temporary Transfer); and *Gould v. Deschutes County*, ___
18 Or LUBA ___ (LUBA No 2021-062, Jan 5, 2023) (Groundwater Permit). We
19 adopt by reference our analysis in those cases, and we address here only those
20 jurisdictional arguments that are sufficiently different to warrant additional
21 analysis.

1 In the present case, petitioner argues that the 2021 Limited License is for
2 temporary use of groundwater, which is different from the permanent
3 Groundwater Permit at issue in *Gould v. Deschutes County*, ___ Or LUBA ___
4 (LUBA No 2021-062, Jan 5, 2023). Relatedly, petitioner argues that, to the extent
5 water from the 2021 Limited License is intended to replace the now-expired
6 groundwater permit that was in place at the time of the county’s CMP, FMP, and
7 Phase A-1 approvals, the temporary use of groundwater cannot substitute for a
8 permanent groundwater permit. Petitioner also argues that the challenged LUCS
9 fails to explain the relationship between the waters drawn under the 2021 Limited
10 License, the Groundwater Permit, and the Temporary Transfer, and whether the
11 same or different wells or water sources are at issue. Petitioner contends that the
12 FMP approval was predicated on the use of certain wells and water sources, as
13 reflected in FMP Condition 10, which requires that, at the time of tentative
14 plat/site review for each phase of development, intervenor provide updated
15 documentation of water rights to serve the destination resort use and an
16 accounting of mitigation.⁶ Petitioner suggests that changing water sources or

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 permits could constitute a “substantial change” to the CMP, triggering the
2 procedures at DCC 18.113.080 for modification thereof.

3 In calling for “updated documentation” for each phase of development, the
4 text of FMP Condition 10 suggests that water sources and permits for the
5 destination resort could potentially change following FMP approval. In any case,
6 as we explained in the companion appeals, the jurisdictional question turns on
7 whether the LUCS decision correctly identifies the land uses associated with the
8 state agency action and correctly aligns those land uses with one or more of the
9 three subparagraph (H) exclusions. As long as the LUCS correctly identifies the
10 associated lands uses and correctly categorizes them in ways that fall within the
11 subparagraph (H) exclusions, jurisdiction to review the LUCS, and any alleged
12 errors, lies with the circuit court, not LUBA.

13 For the foregoing reasons, petitioner has not demonstrated that the county
14 incorrectly described or categorized the destination resort uses served by the 2021
15 Limited License, incorrectly assigned those land uses to one or more of the
16 subparagraph (H) exclusions, or made any determinations that would otherwise
17 bring the county’s decision outside the ambit of ORS 197.015(10)(b)(H).

⁷ In *Bishop*, 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

1 Accordingly, we agree with intervenor that the challenged decision is not within
2 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).⁸

7 Intervenor does not oppose the motion, and it is granted.

8 The appeal is transferred to Deschutes County Circuit Court.

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 at 113 (emphasis in original).

⁸ *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).”