

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
13 LUBA No. 2021-109

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from Deschutes County.

19
20 Jeffrey L. Kleinman represented petitioner.

21
22 D. Adam Smith represented respondent.

23
24 ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board
25 Member, participated in the decision.

26
27 DISMISSED

01/05/2023

28
29 You are entitled to judicial review of this Order. Judicial review is
30 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 water rights transfer 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, Thornburgh sought approval for the first phase of
2 development.¹ Thornburgh 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. *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 Thornburgh 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,
9 Thornburgh applied for the golf course site plan review. On April 1, 2020, the
10 county planning division administratively approved the golf course site plan
11 review with 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, Thornburgh applied to OWRD for a water rights
17 transfer affecting a 50-acre portion of an existing water certificate (C-95746),
18 amounting to 1.25 cubic feet per second (cfs). Record 7. Specifically, Thornburgh
19 requested a change of the place of use, a change from a surface water diversion
20 to groundwater appropriation, and a change in the type of use to quasi-municipal.

1 *Id.* We refer to the requested OWRD action as the Water Rights Transfer.²
2 Pursuant to OWRD’s administrative rules, Thornburgh also filed with the county
3 an application for a LUCS on a form provided by OWRD. The LUCS application
4 asks the county to evaluate whether Thornburgh’s request for the Water Rights
5 Transfer is consistent with the county’s comprehensive plan and land use
6 regulations. In support of the LUCS application, Thornburgh submitted a letter
7 identifying the land uses that would be served by the Water Rights Transfer.
8 Thornburgh’s letter states:

9 “As is relevant to the LUCS, any number of uses allowed under a
10 quasi-municipal water right are permitted outright in EFU lands,
11 including ‘irrigation’ use.

12 “More importantly, the Applicant (or its affiliates), has also received
13 [FMP] approval for a destination resort on the same lands. Applicant
14 has also received tentative plan approval and related infrastructure
15 including road and facility systems, site plan approval for a golf
16 course and related infrastructure, [OLU] site plan approval, and is
17 pursuing a number of other applications. Together, file numbers
18 include but are not limited to:

- 19 “• Deschutes County Document No. 2006-151; CU-05-20

² Thornburgh 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 ___ (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 2021-066, Jan 5, 2023) (2021 Limited License); and *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-012, Jan 5, 2023) (2022 Limited License).

- 1 “• MU-07-2/MA-08-6
- 2 “• 247-19-000881-SP
- 3 “• 247-20-000279-A
- 4 “• 247-20-000282-A
- 5 “• 247-21-000553-MC
- 6 “• 247-21-000731-A; 18-386-TP, 18-454-SP, 18-542-MA
- 7 “• 247-21-000508-SP

8 “These multiple and binding land use decisions permit development,
9 including that which may be served by a quasi-municipal water
10 right. Therefore, Applicant requests that the county sign the LUCS
11 indicating that the proposed use of water is permitted outright,
12 permitted pursuant to the multitudes of land use decisions regarding
13 the Thornburgh Destination Resort, and that additional approvals
14 are also being pursued.” Record 10.

15 Some background is necessary to understand the role of the requested
16 LUCS. OWRD is obligated under ORS 197.180 to ensure that its actions comply
17 with the statewide planning goals. This obligation is implemented by OWRD’s
18 coordination program at OAR chapter 690, division 5. Under that program,
19 OWRD ensures that its actions (such as the requested Groundwater Permit)
20 comply with the goals by asking local governments to evaluate whether the land
21 use associated with the state agency action is consistent with the local
22 government’s comprehensive plan and land use regulations. This evaluation can
23 take various forms, but it typically involves an initial description or
24 categorization of the land use associated with the state agency action and a
25 determination of whether that particular land use is one that is allowed without

1 land use review or one that requires discretionary land use review. *See Bishop v.*
2 *Deschutes County*, 75 Or LUBA 504, 514-15 (2017) (describing the typical steps
3 of a LUCS analysis).³ If the associated land use is one that requires discretionary
4 land use review, the local government further determines whether the land use
5 has received the required land use approval and whether that approval is final, or
6 whether some future land use approval is required. For state agency purposes, it
7 is important to know the status of required land use approvals because, if the local
8 approval is not yet final or has not yet been applied for, the state agency must
9 condition its action on the applicant receiving final approvals for all required land
10 use reviews. *See* OAR 690-005-0035(4)(c) (providing that, if local land use
11 approvals are pending, OWRD must impose conditions to preclude use of the
12 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

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

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

10 Based on the LUCS form and supporting materials, the county adopted
11 several conclusions. First, the county concluded that, “[t]o the extent the water in
12 question is directed to ‘farm use,’ as defined in [Deschutes County Code (DCC)]
13 18.04.030, such use 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. Master Plans and Golf Course Site Plan have received final
20 local approval. Specific development plans for overnight lodging
21 facilities and other resort development are in progress or are
22 anticipated.” *Id.*

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

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

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

8 The county issued the challenged LUCS on October 20, 2021. On that date,
9 petitioner’s appeal in *Gould Golf* was pending a petition for review in the
10 Supreme Court and Phase A-1 was pending county review on remand from *Gould*
11 *VIII*. Petitioner’s appeal in *Gould Golf* is now resolved, and the county’s approval
12 is affirmed. We affirmed the county’s decision approving Phase A-1 after
13 remand. *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-112,
14 June 9, 2022), *aff’d*, 322 Or App 571 (2022).

15 Petitioner appealed the LUCS decision to LUBA and filed a petition for
16 review. Thornburgh did not intervene in this appeal, and the county did not file a
17 respondent’s brief. LUBA raised the issue of jurisdiction on its own motion,
18 suspended this appeal, and requested that petitioner and the county file
19 memorandum, and that the county file a response, explaining whether the
20 challenged LUCS falls under the exclusions to LUBA’s jurisdiction in ORS
21 197.015(10)(b)(H). Petitioner filed a memorandum arguing for the Board’s
22 jurisdiction. The county filed a response arguing that the Board lacks jurisdiction
23 over this appeal for the same reasons set out in the motions to dismiss filed in
24 several companion appeals. See n 2. Petitioner filed a reply to the county’s

1 response. For the following reasons, we agree with the county that the challenged
2 LUCS decision is excluded from our jurisdiction.

3 **JURISDICTION**

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

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

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

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

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

25 ORS 197.015(10)(b)(H) thus excludes from LUBA’s jurisdiction decisions that
26 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 Water Rights
2 Transfer 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 master plans and golf course site plan review
6 decisions), and (3) destination resort uses that are allowed subject to reviews for
7 which applications were pending and for which future land use decisions will be
8 required (overnight lodging, etc.). By checking the “Being Pursued” box, the
9 county also advised OWRD that some of the authorizing decisions were on
10 appeal and, thus, not yet final.

11 In their memorandum on jurisdiction, petitioner contends that the
12 exclusions in subparagraph (H) do not apply because the county should have
13 recognized that the Water Rights Transfer, if granted by OWRD, would modify
14 the water source and rights that formed much of the predicate for the county’s
15 CMP and FMP approvals. According to petitioner, the change in water source
16 and water rights may require a new water plan and water conservation plan, as
17 well as a modification of the CMP. Petitioner notes that, under DCC 18.113.080,
18 a proposal for a “substantial change” to a CMP must be approved in the same
19 manner as the original CMP.⁵ Petitioner argues that the county erred in failing to

⁵ DCC 18.113.080 provides:

1 consider whether the Water Rights Transfer represents a “substantial change” to
2 the CMP. If so, we understand petitioner to argue, the LUCS should have listed
3 a CMP modification as one of the future land use approvals required in order for
4 the Water Rights Transfer to be compatible with the county’s land use
5 regulations. Because the LUCS decision does not list a CMP modification as a
6 required future land use review, petitioner contends, the LUCS decision does not
7 qualify for the subparagraph (H) exclusions to LUBA’s jurisdiction.

8 In its response, we understand the county to dispute petitioner’s assertion
9 that the Water Rights Transfer will necessitate a future land use review to modify
10 the CMP. In any case, the county argues that the summary description of
11 associated land uses described in the LUCS application and acknowledged in the
12 LUCS decision is sufficient to advise OWRD that the destination resort still
13 requires future land use reviews, potentially including a modification to the CMP.

14 We agree with the county. As we explained in the companion appeals, the
15 jurisdictional question turns on whether the LUCS decision correctly identifies
16 the land uses associated with the state agency action and correctly aligns those

“Any substantial change, as determined by the Planning Director, proposed to an approved CMP shall be reviewed in the same manner as the original CMP. An insubstantial change may be approved by the Planning Director. Substantial change to an approved CMP, as used in DCC 18.113.080, means an alteration in the type, scale, location, phasing or other characteristic of the proposed development such that findings of fact on which the original approval was based would be materially affected.”

1 land uses with one or more of the three subparagraph (H) exclusions. Over the
2 course of a complex, multi-stage development, it is possible, even likely, that, at
3 some point, modifications of prior approvals or conditions will be required.
4 However, it is obviously difficult to predict, at any intermediate point in time,
5 what may transpire that may require a future modification. Unless the proposed
6 state agency action in some way makes it apparent that a future modification to a
7 land use approval will be needed, we do not believe that the state agency expects
8 or requires the county to speculate that future modifications may be needed and
9 to list such potential future modification decisions in the LUCS.

10 In our view, if the county is uncertain whether and which future land use
11 approvals may be necessary, a permissible option is to advise the state agency
12 that unspecified future approvals may be necessary. That is what the county did
13 in this case. The LUCS decision advised OWRD that the destination resort will
14 require future land use reviews in two ways. First it stated that “[s]pecific
15 development plans for overnight lodging facilities and other resort development
16 are in progress or are anticipated.” Record 6. Second, it checked the “Being
17 Pursued” box. *Id.* Either appears sufficient to advise OWRD that future land use
18 reviews are required to fully approve the destination resort. Under OAR 690-005-
19 0035(4)(c), that may be all OWRD needs in order to determine whether to impose
20 a condition on the state agency action. If not, OWRD presumably has the option
21 of rejecting the LUCS and requiring the applicant to submit to the county a new
22 or updated LUCS application requesting more information.

1 As we explained in *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA
2 355, 360 (2012), *aff'd*, 256 Or App 402, 300 P3d 299 (2013), resolving the
3 jurisdictional question under ORS 197.015(10)(b)(H) requires LUBA to
4 determine whether the county correctly characterized the associated land use and
5 correctly assigned it to one or more of the three subparagraph (H) exclusions, and
6 that limited jurisdictional review may overlap with the likely merits of the appeal.
7 Nonetheless, it is important not to conflate the question of whether the LUCS
8 decision falls within the exclusions at subparagraph (H) with the question of
9 whether the LUCS decision is erroneous in some particular. A LUCS decision
10 may include some error or omission yet fall outside LUBA's review authority.

11 In the present case, the county correctly concluded that some of the land
12 uses associated with the Water Rights Transfer are permitted outright, that others
13 require land use approvals that have been obtained and are final, that some require
14 land use approvals that are not yet final, and that some require future land use
15 approvals that have not yet been issued. Those determinations fall squarely within
16 the three exclusions set out in subparagraph (H). None of those determinations
17 exceeds the appropriate bounds of a LUCS decision. Accordingly, we conclude

⁶ 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 that the exclusions at ORS 197.015(10)(b)(H) apply, and the challenged LUCS
2 decision is not within our jurisdiction.

3 This appeal is dismissed.⁷

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).

⁷ The Board raised the jurisdictional issue on its own motion at the close of oral argument on January 25, 2022, and in a subsequent order issued January 26, 2022. Petitioner submitted a memorandum on jurisdiction but has not filed a motion to transfer this appeal to circuit court.