

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

ANNUNZIATA GOULD,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

CENTRAL LAND AND CATTLE COMPANY, LLC,
and PINNACLE UTILITIES, LLC,
Intervenors-Respondents.

LUBA No. 2022-012

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Jeffrey L. Kleinman represented petitioner.

David Doyle represented respondent.

J. Kenneth Katzaroff represented intervenors-respondents.

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

DISMISSED

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 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'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, one of the intervenors-respondents in this appeal. DeLashmutt also acquired water rights for the Thornburgh Resort and sold those water rights to Pinnacle Utilities, LLC, the other 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 Intervenor applied to OWRD for a limited water use license to use .453
17 cubic feet per second (cfs) of groundwater for quasi-municipal use on the
18 Thornburgh Resort property. Record 4. We refer to the requested OWRD action
19 as the 2022 Limited License.² Pursuant to OWRD's administrative rules,

² Intervenor has submitted four other OWRD 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*,

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 2022 Limited License is consistent with the county's
4 comprehensive plan and land use regulations. In support of the LUCS
5 application, intervenor submitted a letter identifying the land uses that would be
6 served by the 2022 Limited License. Intervenor's letter states:

7 "As is relevant to the LUCS, any number of uses allowed under a
8 quasi-municipal water right are permitted outright in EFU lands,
9 including 'irrigation' use. Perhaps more importantly, the Applicant
10 (or its affiliates), has also received [FMP] approval for a destination
11 resort on the same lands. Additional and recent County land use
12 approvals that authorize quasi-municipal water use include:

13 "• Phase A-1 Tentative Plan, File Nos.: 247-21-000731-A;
14 LUBA No. 2018-140

15 "• Golf Course Site Plan, File Nos.: 247-19-000881-SP; 247-20-
16 000279-A; 282-A

17 "• OLU Site Plan, File Nos.: 247-21-000508-SP; -849-A

18 "As such, the request to transfer quasi-municipal water is both
19 permitted outright and pursuant to final land use decisions on the
20 subject property." Record 21.

___ 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); *Gould v. Deschutes
County*, ___ Or LUBA ___ (LUBA No 2021-109, Jan 5, 2023) (Water Rights
Transfer).

1 Some background is necessary to understand the role of the requested
2 LUCS. OWRD is obligated under ORS 197.180 to ensure that its actions comply
3 with the statewide planning goals. This obligation is implemented by OWRD's
4 coordination program at OAR chapter 690, division 5. Under that program,
5 OWRD ensures that its actions (such as the requested Groundwater Permit)
6 comply with the goals by asking local governments to evaluate whether the land
7 use associated with the state agency action is consistent with the local
8 government's comprehensive plan and land use regulations. This evaluation can
9 take various forms, but it typically involves an initial description or
10 categorization of the land use associated with the state agency action and a
11 determination of whether that particular land use is one that is allowed without
12 land use review or one that requires discretionary land use review. *See Bishop v.*
13 *Deschutes County*, 75 Or LUBA 504, 514-15 (2017) (describing the typical steps
14 of a LUCS analysis).³ If the associated land use is one that requires discretionary
15 land use review, the local government further determines whether the land use
16 has received the required land use approval and whether that approval is final, or
17 whether some future land use approval is required. For state agency purposes, it

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).

1 is important to know the status of required land use approvals because, if the local
2 approval is not yet final or has not yet been applied for, the state agency must
3 condition its action on the applicant receiving final approvals for all required land
4 use reviews. *See* OAR 690-005-0035(4)(c) (providing that, if local land use
5 approvals are pending, OWRD must impose conditions to preclude use of the
6 water until the applicant obtains all required local land use approvals);⁴ *see also*

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;

“(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.

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

“(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 issuing the LUCS, the county adopted several conclusions. First, the
2 county concluded that, “[t]o the extent the water in question is directed to ‘farm
3 use,’ as defined in [Deschutes County Code (DCC)] 18.04.030, such use is
4 permitted outright.” *Id.*

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

9 “The Thornburgh Destination Resort [FMP] is approved (ref. files
10 nos. 247-17-000761-A; 247-15-000529-A; M-07-2; MA-08-6). The
11 Phase A-1 Tentative Plan, Golf Course Site Plan, and 80 [OLUs]
12 have received final local land use approval (ref. file nos. 247-21-
13 000731-A; 247-19-000881-SP; 247-21-000508-SP). There are
14 appeals related to the local approvals above pending review by
15 [LUBA] and/or other State Courts. Additional development reviews
16 for the Resort are pending and anticipated.” *Id.*

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

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

20 “Nothing in this LUCS signature should be interpreted to allow uses
21 on the subject properties other than those allowed outright under the
22 DCC 18.04.030 definition of ‘farm use’ or those uses specifically
23 proposed and approved in the Thornburgh Destination Resort
24 decisions listed above.” *Id.*

25 The county issued the challenged LUCS on January 24, 2022. On that date,
26 the following county decisions were final and appeals exhausted: CMP, FMP,

1 and golf course site plan. The county's second approval of Phase A-1 was
2 pending LUBA review. The county's approval of 80 OLUs was issued the same
3 day as the LUCS challenged in this appeal, and it was at that point appealable
4 and not yet final. Petitioner appealed the OLU decision to LUBA, and we
5 affirmed. *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-013,
6 June 1, 2022), *aff'd*, 322 Or App 11, 518 P3d 978 (2022), *rev den*, ___ Or ___
7 (Jan 4, 2023).

8 Petitioner appealed the LUCS decision to LUBA. In the intervenors-
9 respondents' brief, intervenor argued that LUBA lacks jurisdiction over this
10 appeal under the exclusions in ORS 197.015(10)(b)(H), described below. We
11 treat that argument as a motion to dismiss. Petitioner anticipated that argument
12 in the petition for review, and they also filed a reply brief arguing that LUBA has
13 jurisdiction. For the following reasons, we agree with intervenor that the
14 challenged LUCS decision is excluded from our jurisdiction.

15 **MOTION TO DISMISS**

16 ORS 197.825(1) provides that LUBA has exclusive jurisdiction over "land
17 use decisions." ORS 197.015(10)(a) defines "land use decision," in relevant part,
18 to include a local government decision that concerns the application of a
19 comprehensive plan provision or land use regulation. However, ORS
20 197.015(10)(b)(H) excludes from the definition of "land use decision" a decision
21 by a local government

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

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

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

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

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

18 In the present case, the county concluded that water from the 2022 Limited
19 License would serve a wide array of land uses that fell into all three categories
20 described in subparagraph (H): (1) those that are allowed without review in the
21 EFU zone (farm uses), (2) destination resort uses that are already authorized by
22 past land use decisions (the CMP, FMP, Phase A-1, golf course site plan review,
23 and OLU decisions), and (3) destination resort uses that are allowed subject to
24 discretionary reviews for which future land use decisions will be required. By
25 checking the “Being Pursued” box, the county also advised OWRD that some of
26 the authorizing decisions were on appeal and not yet final.

1 Intervenor argues that the county accurately identified and assigned all
2 land uses served by the 2022 Limited License to one or more of three categories
3 corresponding to the exclusions at subparagraph (H) and, thus, the challenged
4 LUCS is subject to the subparagraph (H) exclusions to LUBA's jurisdiction.

5 Petitioner's arguments that the exclusions in subparagraph (H) do not
6 apply are similar to arguments that we rejected in four other of petitioner's
7 appeals of county LUCSs, *Gould v. Deschutes County*, ___ Or LUBA ___
8 (LUBA No 2021-060, June 16, 2022) (Temporary Transfer); *Gould v. Deschutes*
9 *County*, ___ Or LUBA ___ (LUBA No 2021-062, Jan 5, 2023) (Groundwater
10 Permit); *Gould v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2021-066,
11 Jan 5, 2023) (2021 Limited License); *Gould v. Deschutes County*, ___ Or LUBA
12 ___ (LUBA No 2021-109, Jan 5, 2023) (Water Rights Transfer). We adopt by
13 reference our analysis in those cases, and we conclude that the challenged LUCS
14 in this appeal falls within the exclusions to our jurisdiction in ORS
15 197.015(10)(b)(H).

16 **DISPOSITION**

17 *Former* OAR 661-010-0075(11) (2021), *renumbered as* OAR 661-010-
18 0075(9)(a) (2022), governs motions to transfer to circuit court and provides:

19 “(a) Any party may request, pursuant to ORS 34.102, that an
20 appeal be transferred to the circuit court of the county in
21 which the appealed decision was made, in the event the Board
22 determines the appealed decision is not reviewable as a land
23 use decision or limited land use decision as defined in
24 197.015(10) or (12).

1 “(b) A request for a transfer pursuant to ORS 34.102 shall be
2 initiated by filing a motion to transfer to circuit court not later
3 than 14 days after the date a respondent’s brief or motion that
4 challenges the Board’s jurisdiction is filed. If the Board raises
5 a jurisdictional issue on its own motion, a motion to transfer
6 to circuit court shall be filed not later than 14 days after the
7 date the moving party learns the Board has raised a
8 jurisdictional issue.

9 “(c) If the Board determines the appealed decision is not
10 reviewable as a land use decision or limited land use decision
11 as defined in ORS 197.015(10) or (12), the Board shall
12 dismiss the appeal unless a motion to transfer to circuit court
13 is filed as provided in subsection (9)(b) of this rule, in which
14 case the Board shall transfer the appeal to the circuit court of
15 the county in which the appealed decision was made.”

16 Intervenor challenged the Board’s jurisdiction in the intervenors-
17 respondents’ brief, which was filed and served on April 12, 2022. In the petition
18 for review, petitioner stated

19 “The county or [intervenor] may argue that appeal of the subject
20 LUCS decision is not reviewable as a land use decision because of
21 the exceptions set out in ORS 197.015(10)(b)(H). In that case,
22 petitioner will move the board to issue an order transferring this
23 appeal to the Circuit Court for Deschutes County pursuant to ORS
24 34.102, should that argument succeed.” Petition for Review 18.

25 Petitioner filed a reply brief arguing that LUBA has jurisdiction but did not file a
26 motion to transfer this appeal to circuit court.

27 This appeal is dismissed.