

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

ANNUNZIATA GOULD,  
*Petitioner,*

vs.

DESCHUTES COUNTY,  
*Respondent,*

and

20925 HARPER ROAD, LLC,  
*Intervenor-Respondent.*

LUBA No. 2022-007

FINAL OPINION  
AND ORDER

Appeal on remand from the Court of Appeals.

Jennifer M. Bragar represented petitioner.

David Doyle represented respondent.

J. Kenneth Katzaroff represented intervenor-respondent.

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

REMANDED

02/24/2023

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 decision by the county approving a personal use airport on land zoned exclusive farm use (EFU).

**BACKGROUND**

This matter is on remand from the Court of Appeals. In *Gould v. Deschutes County*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2022-007, June 8, 2022), we remanded the decision. We sustained portions of petitioner’s first and second assignments of error. We denied petitioner’s third assignment of error. In *Gould v. Deschutes County*, 322 Or App 340, 520 P3d 433 (2022), the Court of Appeals reversed our decision in three particulars. We now address the court’s decision.

**A. DCC 18.16.040(A)(3)**

As relevant here, we sustained a portion of petitioner’s first and second assignments of error that argued that the hearings officer improperly construed Deschutes County Code (DCC) 18.16.040(A)(3), which requires a finding “[t]hat the actual site on which the use is to be located is the least suitable for the production of farm crops or livestock.” The Court of Appeals reversed our conclusion and determined that the hearings officer’s interpretation was plausible and required to be affirmed under the deferential standard of review at ORS 197.829(1). 322 Or App at 350-51. Accordingly, that aspect of petitioner’s first and second assignments of error is denied.

1           **B.     DCC 18.128.015(B)**

2           Also in our decision, we sustained a portion of petitioner's second  
3 assignment of error that argued that the hearings officer's findings under DCC  
4 18.128.015(B), which requires the hearings officer to determine that "[t]he  
5 proposed use shall be compatible with existing and projected uses on surrounding  
6 properties," were inadequate with respect to noise from one of the two airplanes  
7 that intervenor intended to use at the airport. \_\_\_\_ Or LUBA at \_\_\_\_ (slip op at 20).  
8 The court reversed that aspect of our decision and concluded that the findings  
9 were adequate. 322 Or App at 352. Accordingly, the portion of petitioner's  
10 second assignment of error that challenged the hearings officer's findings with  
11 respect to noise is denied.<sup>1</sup>

12           **C.     ORS 215.283(2)(h)**

13           Petitioner's third assignment of error challenged the hearings officer's  
14 conclusion that ORS 215.283(2)(h) was met. ORS 215.283(2)(h) allows to be  
15 established on land zoned EFU "[p]ersonal-use airports for airplanes and  
16 helicopter pads, including associated hangar, maintenance and service facilities.  
17 \* \* \* *No aircraft may be based on a personal-use airport other than those owned*  
18 *or controlled by the owner of the airstrip.*" (Emphasis added.) As the hearings

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<sup>1</sup> We sustained a portion of petitioner's second assignment of error and remanded the decision for the hearings officer to "adopt more adequate findings addressing the compatibility standard with respect to golden eagle nests on surrounding properties." \_\_\_\_ Or LUBA at \_\_\_\_ (slip op at 22). That aspect of our decision was not disturbed.

1 officer explained, intervenor, a limited liability company, holds title to the land  
2 on which the personal use airport is proposed to be sited. Two other limited  
3 liability companies own the two planes to be based at the airstrip. A revocable  
4 trust is the sole member of each of the three limited liability companies.  
5 Alexander Polvi is the trustee of the trust. Record 45.

6 In the challenged decision, the hearings officer concluded that, “based on  
7 the current corporate structure, \* \* \* Mr. Polvi is the individual that controls the  
8 aircraft and he also owns the airstrip.” *Id.* Petitioner argued that the hearings  
9 officer improperly construed ORS 215.283(2)(h) in concluding that the aircraft  
10 to be based at the airport are “owned or controlled by the owner of the airstrip”  
11 because the evidence in the record was that the limited liability company that  
12 owns the subject property is not the same as the limited liability companies that  
13 own the aircraft. We denied the third assignment of error, concluding that

14 “the hearings officer correctly interpreted ORS 215.283(2)(h) to  
15 conclude that the limited liability company ‘owner of the airstrip’ is  
16 the same as the limited liability companies that ‘own[] or control[]’  
17 the aircraft because all are owned by the same revocable trust of  
18 which Polvi is the sole trustee, as explained by intervenor during the  
19 proceedings before the hearings officer.” \_\_\_\_ Or LUBA at \_\_\_\_ (slip  
20 op at 24).

21 The court reversed that aspect of our decision, holding that,

22 “[a]s the dictionary definition cited by LUBA shows, an ‘owner’ is  
23 the entity that holds title to the property. The titles to the land and to  
24 the two aircraft are held by three separate LLCs that, under Oregon  
25 law, are legally able to own property and hold title. ORS  
26 63.077(2)(b) (listing among the powers of an LLC the ability to

1 [p]urchase, take, receive, lease, or otherwise acquire, own, hold,  
2 improve, use and otherwise deal in or with real or personal property  
3 or any interest in real or personal property, wherever situated'). As  
4 the sole member of each of the three LLCs, Willow Trust does not  
5 have an ownership interest in the LLCs' real or personal property.  
6 See ORS 63.239 ('A membership interest is personal property. A  
7 member is not a co-owner of and has no interest in specific limited  
8 liability company property.'). It follows that, under Oregon law,  
9 neither Willow Trust nor Polvi owns either the airstrip or the  
10 aircraft.

11 "We do not see any basis in either the text or context of ORS  
12 215.283(2)(h) for saying that the terms 'own' and 'owner' should  
13 not be given their ordinary meaning. We accordingly agree with  
14 [petitioner] that neither Polvi nor Willow Trust owns the proposed  
15 airstrip or the two planes. Rather, [intervenor] owns the proposed  
16 airstrip, but it does not own the two aircraft that will be based there.  
17 The two separate LLCs do. LUBA's order concluding otherwise is  
18 unlawful in substance. See *Mountain West Investment Corp. v. City*  
19 *of Silverton*, 175 Or App 556, 559, 30 P3d 420 (2001) ('A LUBA  
20 order is unlawful in substance "if it represented a mistaken  
21 interpretation of the applicable law."').

22 "The remaining question under the statute is whether [intervenor],  
23 the owner of the proposed airstrip, controls the two aircraft. Neither  
24 the hearings officer nor LUBA addressed that issue. It may be that  
25 Polvi, through Willow Trust, controls each of the three separate  
26 L[L]Cs. The question, however, that the statute poses—whether  
27 [intervenor] controls the other two LLCs or the planes that those  
28 LLCs own—presents a separate, distinct issue. Neither [petitioner]  
29 nor [intervenor] has briefed that issue in any substantial way, and  
30 we conclude that the better course is to remand that issue so that the  
31 parties can brief and LUBA can resolve it in the first instance." 322  
32 Or App at 355-56.

33 Because other aspects of our decision remanding the county's decision to  
34 the county were not disturbed, *see* n 1, and because the hearings officer did not

1 address the issue of whether intervenor “controls” the other two LLCs, we  
2 conclude that remand to the hearings officer to address, in the first instance, the  
3 issue of “whether [intervenor], the owner of the proposed airstrip, controls the  
4 two aircraft” is the best course of action.

5 The third assignment of error is sustained.

6 The county’s decision is remanded.