

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

3
4 ANNUNZIATA GOULD and
5 CENTRAL OREGON LANDWATCH,
6 *Petitioners,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

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15 CENTRAL LAND AND CATTLE COMPANY, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2024-034/035

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

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25 Jennifer M. Bragar represented petitioner Annunziata Gould.

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27 Carol E. Macbeth represented petitioner Central Oregon LandWatch.

28
29 Stephanie Marshall represented respondent.

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31 J. Kenneth Katzaroff represented intervenor-respondent.

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

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36 TRANSFERRED 01/31/2025

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

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NATURE OF THE DECISION

Gould and Central Oregon LandWatch (together, petitioners) each appeal a county decision approving one-year extensions of previously approved site plans for a golf course and lakes on land zoned exclusive farm use (EFU).

FACTS

The county previously approved site plans for a golf course and lakes on land zoned EFU. We refer to those approvals as the Site Plan Approvals. On March 6, 2024, intervenor-respondent Central Land and Cattle Company, LLC (intervenor) submitted an application on a form entitled “Application for Extension of a Land Use Permit.” Record 32-33.¹ The application was accompanied by a statement from intervenor that provided, as relevant here:

“Over the past several years, [intervenor] has taken substantial steps to initiate the use of the above-referenced site plan and approval. Consistent with [Deschutes County Code (DCC)] 22.36.020(A)(2), [intervenor] believes that such use has been initiated, as described below. However, in an abundance of caution, [intervenor] files this request for an extension.

“* * * * *

¹ Deschutes County Code (DCC) 22.36.010(B)(1) provides:

“Except as otherwise provided under DCC 22.36.010 or under applicable zoning ordinance provisions, a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period.”

1 “Considering the actions already taken, as described above,
2 [intervenor] may be considered to have ‘initiated’ the use authorized
3 in this approval, and requests that the [c]ounty issue such a
4 determination under DCC 22.36.020. Nonetheless, [intervenor] also
5 submits this extension request so as to be transparent with the
6 [c]ounty and to provide the [c]ounty information on its current
7 progress.

8 “Thank for your time in considering this application for a land use
9 permit extension.” Record 33.

10 On May 6, 2024, the county’s principal planner approved the application. Record
11 1-2. We refer to that decision as the Extension Decision. The Extension Decision
12 concluded:

13 “The Planning Division has reviewed your request for an extension
14 of applications 247-19-000881SP, 247-20-000279-A, 247-20-
15 000282-A against the criteria contained in Section 22.36.010(C) of
16 the [DCC]. Based on the burden of proof statement submitted with
17 the application, it is staff’s opinion the request satisfies all
18 applicable criteria for approval.

19 “Staff notes that two public comments were received that raised the
20 issue of whether [intervenor] was able to file this application,
21 claiming the business had been administratively dissolved prior to
22 the application date. According to [c]ounty records, [intervenor],
23 Central Land & Cattle Company LLC, is listed as the owner.

24 “The comments also raised concerns that the application materials
25 contained statements directed towards an Initiation of Use
26 determination pursuant to DCC 22.36.020. Staff notes no Initiation
27 of Use application was filed and no criteria within DCC 22.36.020
28 have been reviewed in regard to this application for an extension.”
29 Record 1.

30 Petitioners then each appealed the Extension Decision to LUBA.

1 Petitioners each also attempted to file a local appeal of the Extension
2 Decision and the county took the position that the DCC did not provide a right of
3 local appeal of the decision. Appeals to LUBA of those county decisions rejecting
4 local appeals followed. In an order dated June 27, 2024, we suspended these
5 appeals pending our resolution of LUBA Nos. 2024-036/040, which challenged
6 the county's decisions that no local appeals of the Extension Decision were
7 available. On October 9, 2024, we issued a final opinion and order affirming the
8 decisions appealed in LUBA Nos. 2024-036/040. *Gould v. Deschutes County*,
9 LUBA Nos. 2024-036/040 (Oct 9, 2024). We affirmed the county's decisions
10 that no local appeals of the Extension Decision were available and, in doing so,
11 we were required to resolve the issue of whether intervenor applied for an
12 initiation of use determination. We concluded that intervenor applied for an
13 extension of the Site Plan Approvals and not an initiation of use determination.
14 *Id.* (slip op at 14-15).

15 Thereafter, we issued an order reactivating these appeals and requesting
16 focused briefing on jurisdiction. Petitioners, and the county and intervenor
17 (together, respondents) then filed pleadings regarding whether LUBA has
18 jurisdiction over the appeals.²

² Petitioners and respondents filed several extraneous pleadings. We have considered all of the pleadings that were filed to the extent they relate to the jurisdictional question.

1 **JURISDICTION**

2 Respondents move to dismiss the appeals on the basis that LUBA lacks
3 jurisdiction over the appeals. We begin by outlining the applicable law to provide
4 context for the dispute before us.

5 OAR 660-033-0140(1) is an administrative rule promulgated by the Land
6 Conservation and Development Commission (LCDC) to implement Statewide
7 Planning Goal 3 (Agricultural Lands). It governs the expiration of discretionary
8 permits for development on agricultural land, like the Site Plan Approvals at issue
9 here. OAR 660-033-0140 is entitled “Permit Expiration Dates,” and provides, in
10 relevant part:

11 “(1) “[A] discretionary decision, except for a land division, made
12 after the effective date of this division approving a proposed
13 development on agricultural or forest land * * * is void two
14 years from the date of the final decision if the development
15 action is not initiated in that period.

16 “(2) A county may grant one extension period of up to 12 months
17 if:

18 “(a) An applicant makes a written request for an extension
19 of the development approval period;

20 “(b) The request is submitted to the county prior to the
21 expiration of the approval period;

22 “(c) The applicant states reasons that prevented the
23 applicant from beginning or continuing development
24 within the approval period; and

25 “(d) The county determines that the applicant was unable to
26 begin or continue development during the approval

1 period for reasons for which the applicant was not
2 responsible.

3 “(3) *Approval of an extension granted under this rule is an*
4 *administrative decision, is not a land use decision as*
5 *described in ORS 197.015 and is not subject to appeal as a*
6 *land use decision.*

7 “(4) Except for ‘residential development’ as defined in section (6),
8 additional one-year extensions may be authorized where
9 applicable criteria for the decision have not changed.

10 “(5) “(a) If a permit is approved for a proposed residential
11 development on agricultural or forest land outside of an urban
12 growth boundary, the permit shall be valid for four years.

13 “(b) An extension of a permit described in subsection (5)(a)
14 of this rule is valid for two years. A county may approve no
15 more than five additional one-year extensions of a permit if:

16 “(A) The applicant makes a written request for the
17 additional extension prior to the expiration of the
18 extension;

19 “(B) The applicable residential development statute
20 has not been amended following the approval of
21 the permit, except the amendments to ORS
22 215.750 by Oregon Laws 2019, chapter 433,
23 section 1; and

24 “(C) An applicable rule or land use regulation has not
25 been amended following the issuance of the
26 permit, unless allowed by the county, which may
27 require that the applicant comply with the
28 amended rule or land use regulation.

29 “(6) As used in section (5) of this rule, ‘residential development’
30 only includes the dwellings provided for under ORS
31 215.213(3) and (4), 215.284, 215.317, 215.705(1) to (3),

1 215.720, 215.740, 215.750 and 215.755 (1) and (3).”
2 (Emphasis added.)

3 In DCC 22.36.010 the county has adopted a provision that is a generally
4 applicable permit extension provision that is not specific to agricultural land.
5 However, DCC 22.36.010 implements OAR 660-033-0140 and, for purposes of
6 this opinion, we assume that OAR 660-033-0140 applies in the county’s EFU
7 zone even though DCC 22.36.010 is acknowledged. *Gould v. Deschutes County*,
8 67 Or LUBA 1, 7-9, *aff’d*, 256 Or App 520, 301 P3d 978 (2013).

9 DCC 22.36.010 provides as relevant here:

10 “(C) Extensions.

11 “1. The [p]lanning [d]irector may grant one extension of
12 up to one year for a land use approval or a phase of a
13 land use approval, and two years for those dwellings
14 listed in DCC 22.36.010(B)(4) above, regardless of
15 whether the applicable criteria have changed, if:

16 “a. An applicant makes a written request for an
17 extension of the development approval period;

18 “b. The request, along with the appropriate fee, is
19 submitted to the [c]ounty prior to the expiration
20 of the approval period;

21 “c. The applicant states reasons that prevented the
22 applicant from beginning or continuing
23 development or meeting conditions of approval
24 within the approval period; and

25 “d. The [c]ounty determines that the applicant was
26 unable to begin or continue development or meet
27 conditions of approval during the approval
28 period for reasons for which the applicant was
29 not responsible, including, but not limited to,

1 delay by a state or federal agency in issuing a
2 required permit.”

3 “(D) Procedures.

4 “1. A determination of whether a land use has been
5 initiated shall be processed as a declaratory ruling.

6 “2. Approval of an extension granted under DCC
7 22.36.010 is an administrative decision, is not a land
8 use decision described in ORS 197.015 or [DCC t]itle
9 22 and is not subject to appeal as a land use decision
10 and shall be processed under DCC [t]itle 22 as a
11 development action, except to the extent it is necessary
12 to determine whether the use has been initiated.”

13 Respondents move to dismiss the appeals of the Extension Decision,
14 arguing that OAR 660-033-0140(3) divests us of jurisdiction over the appeals.
15 Joint Motion to Dismiss 6-7 (citing *Jones v. Douglas County*, 63 Or LUBA 261,
16 *aff’d*, 247 Or App 81, 270 P3d 278 (2011) and *McLaughlin v. Douglas County*,
17 76 Or LUBA 77 (2017)).

18 Petitioners’ response reprises their arguments in LUBA Nos. 2024-
19 036/040. First, petitioners argue, as they argued in LUBA Nos. 2024-036/040,
20 that in its March 6, 2024, application submittal intervenor sought an initiation of
21 use determination and not an extension. It follows, petitioners argue, that the
22 county should have applied the DCC provisions that govern an initiation of use
23 determination, which would provide a right of local appeal and which would
24 make OAR 660-033-0140(3) inapplicable to the appeals. We rejected that
25 argument in LUBA Nos. 2024-036/040 and for the same reasons, we reject it
26 here. *Gould*, LUBA Nos. 2024-036/040 (slip op at 14-15). Intervenor sought, and

1 the county granted, an extension of the Site Plan Approvals pursuant to DCC
2 22.36.010(C) and (D), which implement OAR 660-033-0140.

3 Second, petitioners reprise their argument from LUBA Nos. 2024-036/040
4 that intervenor lacked “legal capacity” to submit an application for an extension
5 on the date they did so because, on that date, they were an administratively
6 dissolved limited liability company. Response to Motion to Dismiss 13.
7 However, that argument addresses the merits of the county’s decision to approve
8 the extensions in the Extension Decision, not whether LUBA has jurisdiction
9 over the appeals.

10 As relevant to this appeal, LUBA has jurisdiction to decide appeals of
11 “land use decisions.” ORS 197.825(1). ORS 197.015(10)(a) defines a “land use
12 decision” in relevant part as a final decision or determination made by a local
13 government that concerns the application of a “land use regulation.” ORS
14 197.015(10)(a)(A)(iii). As defined in ORS 197.015(11), a land use regulation
15 means “any local government zoning ordinance, land division ordinance adopted
16 under ORS 92.044 or 92.046 or similar general ordinance establishing standards
17 for implementing a comprehensive plan.”

18 As noted, the county’s decision concerns the application of DCC 22.36.010
19 which is indisputably a “land use regulation” as defined at ORS 197.015(11).
20 Therefore, the challenged decision meets the definition of “land use decision” at
21 ORS 197.015(10)(a), unless some exclusion applies. ORS 197.015(10)(b) lists a
22 number of exclusions, including “a decision of a local government * * * made

1 under land use standards that do not require interpretation or the exercise of
2 policy or legal judgment[.]” ORS 197.015(10)(b)(A).

3 Intervenor argues that the county’s decision is excluded from LUBA’s
4 jurisdiction based upon OAR 660-033-0140(3) and *Jones*, 63 Or LUBA 261 at
5 281. In *Jones*, we explained that the county’s code provision implemented OAR
6 660-033-0140. *Id.* at 266. OAR 660-033-0140(3) expressly provides that permit
7 extension decisions on farm or forest land are not land use decisions. *Id.* at 282-
8 83. We speculated regarding the rationale for this, as follows:

9 “OAR 660-033-0140(3) possibly represents LCDC’s interpretation
10 of the ORS 197.015(10) definition of ‘land use decision’ or one of
11 the exclusions to that definition, at ORS 197.015(10)(b). Or possibly
12 it represents an additional exclusion, independent from those set out
13 in the statute. LCDC has general statutory authority to ‘adopt rules
14 that it considers necessary to carry out ORS chapters 195, 196 and
15 197.’ ORS 197.040(1)(b). LCDC also has broad statutory authority
16 to adopt rules regarding use of farm and forest lands. *See generally*
17 *Lane County v. LCDC*, 325 Or 569, 942 P2d 278 (1997). Petitioners
18 do not argue that OAR 660-033-0140(3) exceeds LCDC’s authority,
19 or is inconsistent with any statute, and we express no opinion in that
20 regard. Because petitioners offer no basis for concluding that OAR
21 660-033-0140(3) does not control the present circumstances, we
22 apply and give effect to the rule.” *Id.*

23 In the present case, petitioners do not engage with OAR 660-033-0140(3), or our
24 reasoning in *Jones*, or offer any basis for concluding that OAR 660-033-0140(3)
25 does not control, or argue that LCDC lacks statutory authority to limit LUBA’s
26 jurisdiction. Instead, petitioners argue that the county misconstrued intervenor’s

1 application and should have treated it as an application for an initiation of use
2 determination.

3 Accordingly, consistent with *Jones*, and in the absence of any argument
4 that OAR 660-033-0140(3) exceeds LCDC's authority, we conclude that a
5 "decision extending a permit decision on agricultural or forest land is not a 'land
6 use decision' as defined in ORS 197.015 and therefore is not subject to LUBA's
7 jurisdiction." 63 Or LUBA at 283. The Extension Decision is not a land use
8 decision over which we have jurisdiction.

9 **DISPOSITION**

10 Pursuant to ORS 34.102 and OAR 661-010-0075(9), petitioners filed a
11 contingent motion to transfer these appeals to circuit court, in the event LUBA
12 determines that the challenged decision is not reviewable as a "land use
13 decision."³ Because we have concluded that the challenged decision is not
14 reviewable as a land use decision, the motion to transfer is granted.

15 The appeals are transferred to Deschutes County Circuit Court.

³ OAR 661-010-0075(9)(c) provides:

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