BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES CURL and SHERYL CURL,
Petitioners,

vs.

DESCHUTES COUNTY,
Respondent,

and

CENTRAL OREGON IRRIGATION DISTRICT,
Intervenor-Respondent.

LUBA Nos. 2013-086/095

ORDER ON MOTION TO DISMISS

INTRODUCTION

Intervenor-respondent (intervenor) moves to dismiss both of these consolidated appeals. We set out the relevant facts below.

Intervenor owns and operates the Pilot Butte Canal, an irrigation ditch that is part of intervenor's irrigation system. Much of the Pilot Butte Canal is located in areas within the county that are planned and zoned for exclusive farm uses. However, a portion of the canal runs through an area within the City of Bend urban growth boundary. Petitioner owns a four-acre parcel that abuts this portion of the canal. Petitioner's property is designated Residential and zoned Suburban Residential 2.5 (SR 2.5), and is subject to the Bend Urban Area Comprehensive Plan and the Bend Urban Area Zoning Ordinance, Title 19 of the Deschutes County Code (DCC).

The portion of the canal that abuts petitioner's property is an open irrigation ditch. A short distance downstream from petitioner's property the SR 2.5 zoning district and the Bend

Urban area plan and zoning ends, and county EFU zoning begins, subject to DCC Title 18. In 2009, intervenor received county approval to construct a hydropower project on the canal approximately 2.5 miles downstream of petitioner's property. As part of that project, intervenor piped 2.5 miles of the open irrigation ditch within the county EFU zone, and that piping ends approximately at the boundary between the EFU zone and the SR 2.5 zone a short distance downstream from petitioner's property. Pursuant to a 2003 amendment, DCC Title 18 expressly allows piping of irrigation canals as an outright permitted use in the EFU zone. However, no similar express provision is found in the DCC Title 19 provisions that govern the SR 2.5 zone.

In 2013, intervenor applied to the Department of Environmental Quality (DEQ) for financing to allow intervenor to pipe approximately 4,500 linear feet of the canal within the SR 2.5 zone, including the portion that abuts petitioner's property. Pursuant to DEQ agency coordination regulations, DEQ required intervenor to obtain a determination from the county that the proposed piping complies with the county's comprehensive plan and land use regulations. Accordingly, intervenor applied to the county for a land use compatibility statement (LUCS).

On April 25, 2013, a county planner issued the requested LUCS on a two-page DEQ form. The LUCS describes the proposal as follows:

> "Central Oregon Irrigation District is proposing to pipe 4,500 feet of its Pilot Butte Canal. The piping will eliminate water loss through the canal and place 7.95 cfs [cubic feet per second] of water permanently instream in the Deschutes and Crooked Rivers." Record 1.

Under the question, "Is the activity or use compatible with your acknowledged comprehensive plan as required by OAR 660-031?," the planner then checked the box for "**YES**, the activity or use is allowed outright," and handwrote "DCC Section 18.16.020(M) and 19.88.120." Record 2. The planner then signed and dated the LUCS.

The county provided no notice of the LUCS decision to any person other than intervenor. Petitioners discovered the decision on or about August 16, 2013, and attempted to file a local appeal of the April 25, 2013 LUCS decision. As a precaution, petitioners also filed a direct appeal of the April 25, 2013 LUCS decision to LUBA, pursuant to ORS 197.830(3). That appeal is at issue in LUBA No. 2013-085. On September 5, 2013, a county planner advised petitioners by e-mail that the April 25, 2013 LUCS decision was a ministerial act for which no right of local appeal is available under the county's code. Accordingly, the county voided the local appeal, and returned the appeal fees to petitioners. Thereafter, on September 26, 2013, petitioners appealed to LUBA the September 5, 2013 e-mail rejecting their local appeal. That decision is at issue in LUBA No. 2013-095. Both appeals were consolidated for review.

MOTION TO DISMISS

Intervenor moves to dismiss both appeals, arguing under a variety of theories that LUBA lacks jurisdiction. Some theories appear to apply to both appeals, while others appear to apply only to LUBA No. 2013-085, the direct appeal of the April 25, 2013 LUCS decision. We address each theory in turn. For the reasons set out below, we deny intervenor's motion to dismiss the appeals.

A. ORS 197.830(3) "Adversely Affected"

Petitioners appealed the April 25, 2013 LUCS decision directly to LUBA pursuant to ORS 197.830(3), which provides in relevant part:

> "If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Intervenor first argues that petitioner is not "adversely affected" by the April 25, 2013 LUCS decision. Generally, a person is "adversely affected" by a decision if the decision impinges on the petitioner's use and enjoyment of his or her property or otherwise detracts from interests personal to petitioner. *Jefferson Landfill Committee v. Marion County*, 297 Or 280, 283, 686 P2d 310 (1984) (interpreting a similarly worded repealed statute). Intervenor characterizes the decision challenged in LUBA No. 2013-085 as DEQ's decision "whether or not to grant a Revolving Fund Loan Request based on a LUCS." Motion to Dismiss 4. According to intervenor, the act of obtaining funding from DEQ cannot possibly affect petitioners' use and enjoyment of their property.

Petitioners respond, and we agree, that the decision challenged in LUBA NO. 2013-085 is not DEQ's decision whether or not to grant intervenor's loan request, but rather the *county*'s determination that the proposed piping of the irrigation canal adjoining petitioner's property complies with the county's comprehensive plan and land use regulations. The county's conclusion that piping the canal is an outright permitted use in the SR-2.5 zone is the challenged decision. Petitioners allege, in an affidavit, that they enjoy the sight and sound of water flowing in the adjacent canal, and associated vegetation and wildlife, and that piping the canal will adversely impact the use and enjoyment of their property. Those allegations are sufficient to demonstrate that petitioners are "adversely affected" by the decision for purposes of ORS 197.830(3).

Intervenor's only argument that the piping of the canal itself will not adversely affect petitioners' use and enjoyment of their property rests on two unpublished federal decisions, *Swalley Irrigation District v. Alvis*, 2006 U.S. Dist. LEXIS 11572 (D. Or. March 1, 2006), *aff'd*, 326 Fed. Appx. 995, 2009 U.S. App LEXIS 12382 (9th Cir. Or. 2009). In *Swalley*, the District Court and Ninth Circuit concluded that piping an existing irrigation canal within an easement is a permissible use of the easement, because it did not substantially increase the burden on the servient estate. We agree with petitioners that the holding in *Swalley* has no

bearing whatsoever on whether petitioners are "adversely affected" by piping the canal, for purposes of ORS 197.830(3).

B. ORS 197.015(10)(b)(A) Land Use Standards that Do Not Require Interpretation

As relevant here, LUBA's jurisdiction is limited to "land use decisions" as defined at ORS 197.015(10)(a), which includes a local government decision that concerns the application of a land use regulation. In issuing the LUCS decision, the county planner concluded that the proposed piping is an outright permitted use, citing two DCC provisions: DCC 18.16.020(M) and DCC 19.88.120. Deschutes County Code Titles 18 and 19 are land use regulations. The decision applied those two code provisions and therefore falls within the definition of "land use decision," unless an exception applies.

Intervenor argues that the April 25, 2013 LUCS decision falls within the exception at ORS 197.015(10)(b)(A), which excludes from the definition a decision of a local government that "is made under land use standards that do not require interpretation or the exercise of policy or legal judgment." According to intervenor, neither DCC 18.16.020(M) nor DCC 19.88.120 require any interpretation or the exercise of policy or legal judgment.

1. DCC 19.88.120

DCC 19.88.120 is entitled "Utilities," and applies to all zones within the Bend urban growth area. It provides, in relevant part:

> "The erection, construction, alteration or maintenance by public utility or municipal or other governmental agencies of underground, overhead, electrical, gas, steam or water transmission or distribution systems, collection, communication, supply or disposal system, including poles, towers, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment and accessories in connection therewith, but excluding buildings, may be permitted in any zone. * * * However, in considering an application for a public utility use, the Hearings Body or Planning Director shall determine that the site, easement or right of way is located to best serve the immediate area, and in the case of a right of way or easement, will not result in the uneconomic parceling of land. As far as possible, transmission towers, poles, overhead wires, pumping

> stations and similar gear shall be located, designed and installed to minimize their effect on scenic values."

Intervenor argues that DCC 19.88.120 unambiguously allows as a permitted use underground "water transmission or distribution systems," including "pipes," and therefore no interpretation is necessary to conclude that the code allows the proposed piping of the irrigation canal in the SR 2.5 zone as a permitted use.

Petitioners respond, and we agree, that interpretation of DCC 19.88.120 is required to conclude that it authorizes the proposed piping of the irrigation canal within the SR 2.5 zone. For purposes of ORS 197.015(10)(b)(A), a land use standard "requires interpretation" if the pertinent language can be plausibly interpreted in more than one way. *See Tirumali v. City of Portland*, 169 Or App 241, 246, 7 P3d 761 (2000) (addressing the similar exclusion at ORS 197.015(10)(b)(B) for building permits approved or denied under clear and objective land use standards).

Petitioner first argues that DCC 19.88.120 is ambiguous regarding whether it is intended to allow only domestic water transmission and distribution systems, or is also intended to allow transmission and distribution of irrigation water. Petitioners note that the other types of utilities described in DCC 19.88.120, electrical, gas, and steam, and the types of facilities described—poles, towers, wires, mains, drains, sewers, pipes, conduits, cables, fire alarm boxes, police call boxes, traffic signals, hydrants and other similar equipment—are typical urban area public utilities and facilities, which suggests that "water transmission and distribution systems" is talking about urban domestic water systems, not agricultural irrigation systems. Further, petitioners note that DCC 19.88.120 expressly authorizes only "underground" or "overhead" utility facilities, and would not authorize surface conveyances typified by open irrigation canals. Petitioners contend that considerable interpretation is needed to conclude that DCC 19.88.120 authorizes "piping" of surface irrigation canals, when those surface irrigation canals are not themselves allowed under DCC 19.88.120, and otherwise not allowed in the SR 2.5 zone.

In addition, petitioners argue that at least some public utilities authorized under DCC 19.88.120 are not allowed outright, but must comply with discretionary approval standards under the third or fourth sentence of DCC 19.88.120, which require (1) a determination that the site, easement or right of way of a "public utility use" is located to best serve the immediate area, and (2) as determination that towers, poles, wires, pumping stations and "similar gear" be located, designed and installed to minimize their effect on scenic values. Petitioners argue that interpretation is needed at least to determine whether the piping of an irrigation canal is a "public utility use" subject to review under the third sentence, and whether such piping constitutes "similar gear" to a pumping station, and therefore is subject to review under the fourth sentence.

Finally, petitioners note that the proposed piping of 4,500 linear feet of irrigation canal is apparently intended to function as part of a downstream hydroelectric facility that was authorized in 2009. A "hydroelectric facility" is allowed as a conditional use in the SR 2.5 zone, under DCC 19.20.030(L), and "hydroelectric facility" is broadly defined in DCC 19.04.040 to include "all aspects" of the project, including "conduits." At a minimum, petitioners argue that the conclusion that the proposed piping of the irrigation canal is permitted in the SR-2.5 zone requires consideration and interpretation of the SR 2.5 zone provisions to determine whether the proposed use is properly characterized as an expansion of a conditional use hydroelectric facility rather than a "utility" facility permitted by DCC 19.88.120.

We agree with each of the foregoing arguments that any conclusion whether or not the proposed piping is a permitted use in the SR 2.5 zone as a "utility" under DCC 19.88.120 requires interpretation, and therefore the county's decision does not qualify for the exclusion at ORS 197.015(10)(b)(A).

2. DCC 18.16.020(M)

DCC 18.16.020(M) is part of the provisions governing the county's EFU zone, and authorizes the "[o]peration, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050." Intervenor argues that DCC 18.16.020(M) unambiguously authorizes piping of existing irrigation system, but concedes that DCC 18.16.020(M) does not apply in the SR 2.5 zone, where the proposed piping will be located. We tend to agree with intervenor that DCC 18.16.020(M) does not require interpretation, even though the county almost certainly erred to the extent it relied on DCC 18.16.020(M) to approve piping in the SR 2.5 zone. In any case, given our conclusion above that application of DCC 19.88.120 removes the challenged decision from the ambit of the ORS 197.015(10)(b)(A) exclusion, we need not consider DCC 18.16.020(M) further.

C. ORS 197.015(10)(b)(H): Exclusion for Certain LUCS Decisions

Intervenor next argues that the LUCS decision is excluded from LUBA's jurisdiction pursuant to ORS 197.015(10)(b)(H), which excludes from the definition of "land use decision" three types of LUCS decisions. Under ORS 197.015(10)(b)(H), the statutory definition of "land use decision" does not include a decision by a local government:

> "That a proposed state agency action subject to ORS 197.180 (1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:
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> "(i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;
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> "(ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or
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> "(iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan[.]"

Intervenor argues that the challenged LUCS decision falls within the exclusions at ORS 197.015(10)(b)(H)(i) and (ii). As shorthand, we refer to these as subsection (i) and (ii) exclusions.

1. Subsection (i): Past Land Use Decision Authorizing a Use that Encompasses the Proposed Action

Under subsection (i), intervenor argues that the proposed piping of the irrigation canal is "encompass[ed]" by three prior decisions. First, intervenor contends that the federal district court's *Swalley* decision, discussed above, is a local government land use decision that "encompasses" approval of the proposed piping. We do not understand the argument. A federal district court decision is not a local government land use decision of any kind. Further, the *Swalley* decision had nothing to do with the irrigation canal at issue in this appeal.

Intervenor next argues that the county's acknowledged comprehensive plan includes language that encourages piping of open irrigation canals, and therefore the comprehensive plan constitutes a land use decision that authorized the proposed piping. We disagree. For purposes of subsection (i), the past land use decision must "authorize" a specific use, and that authorization must "encompass" the proposed action. *McPhillips Farm, Inc. v. Yamhill County*, 256 Or App 402, 412, 300 P3d 299 (2013), illustrates the kind of authorizing land use decision contemplated by subsection (i). In *McPhillips*, the county had approved a quasi-judicial reasons exception to zone and site a landfill, and the exception expressly contemplated future expansion of the landfill within the exception area, as old cells were filled in and new ones needed. LUBA and the Court of Appeals concluded that the quasi-judicial reasons exception that authorized the landfill "encompass[ed]" the proposed expansion of that landfill within the exception area. In the present case, the county's legislative adoption of language in its comprehensive plan encouraging piping of irrigation canals is not a "decision" that "authorizes" a use within the meaning of subsection (i).

Finally, and more plausibly, intervenor argues that the county's 2009 conditional use permit approval of the in-stream hydroelectric facility 2.5 miles downstream of the portion of the Pilot Butte irrigation canal at issue in this appeal "encompasses" the proposed piping. However, the initial problem with that argument is that the challenged LUCS decision does not take the position that the 2009 approval of the hydroelectric facility "encompasses" the proposed piping. Instead, the LUCS decision relies exclusively on the conclusion that proposed piping is a permitted use under the county's land use regulations, which invokes subsection (ii), not subsection (i). In our decision in *McPhillips*, we stated that "[w]e do not think it appropriate for LUBA to resolve the jurisdictional dispute based on a *different* exclusion than the one the decision purports to fall under, based on findings that the local government might have made, but did not." __ Or LUBA __ (LUBA No. 2012-027, October 30, 2012), slip op 8 (emphasis original). We reach the same conclusion here.

In any case, a second problem with intervenor's reliance on subsection (i) is that intervenor has not established that the 2009 decision "encompasses" the proposed piping. Intervenor points out that the 2009 decision authorized, in addition to the hydroelectric facility, the piping of 2.5 miles of open irrigation ditch, for portions of the ditch within the county's EFU zones, outside the Bend Urban Growth Area. As noted above, in the county's EFU zones piping of irrigation ditches is expressly permitted outright. However, intervenor cites nothing in the 2009 decision that purports to authorize or even contemplate additional piping of the ditch upstream, where the ditch runs through areas zoned for urban development, where piping of irrigation ditches is not a listed permitted use in the applicable zones.

In sum, intervenor has not demonstrated that the challenged LUCS is excluded from LUBA's jurisdiction under subsection (i).

2. Subsection (ii): Allowed Without Review

Subsection (ii) excludes from LUBA's jurisdiction a LUCS decision that the proposed action is "allowed without review" under the acknowledged comprehensive plan and land use regulations implementing the plan. Intervenor cites again to the *Swalley* decision, and argues that the *Swalley* decision stands for the proposition that the piping of an irrigation ditch is allowed without review under the acknowledged comprehensive plan and land use regulations. However, as we understand it, the *Swalley* decision concerned the scope and permissible use of an easement under federal law and had nothing to do with whether piping of an irrigation ditch is allowed without review under the county's plan and land use regulations.

That is the extent of intervenor's argument under subsection (ii). Notably, intervenor does not repeat or incorporate its earlier arguments, under ORS 197.015(10)(b)(A), that the proposed piping is unambiguously permitted outright in the SR 2.5 zone as a "utility" under DCC 19.88.120. As explained above, whether the proposed piping qualifies as a "utility" under DCC 19.88.120 requires interpretation, and thus does not fall within the exclusion at ORS 197.015(10)(b)(A). However, a similar argument could be made under subsection (ii). If the county planner *correctly* concluded that the proposed piping is permitted outright in the SR 2.5 zone under DC 19.88.120, then it would seem to follow without more that the piping is "allowed without review" for purposes of subsection (ii), and the LUCS decision is therefore excluded from our jurisdiction.

As we explained in our *McPhillips* decision, because the wording of the exclusions at ORS 197.015(10)(b)(H) turns on whether the decision is correct or not, LUBA may have to address the likely merits of the appeal to the extent necessary to determine whether the challenged decision falls within the statutory exclusion. *Slip op* at 5-6, (citing *Southwood Homeowners v. City Council of Philomath*, 106 Or App 21, 23-25, 806 P2d 162 (1991). In the present case, whether the planner correctly concluded that the proposed piping is

permitted in the SR 2.5 zone under DCC 19.88.120, or is "allowed without review" in the terminology of subsection (ii), will depend on the proper interpretation of ambiguous terms in that provision, in context. That issue has not been fully or sufficiently briefed by the parties. Accordingly, we do not consider the merits of that question further.

D. ORS 197.015(10)(e)(C): State Agency Action

ORS 197.015(10)(e)(C) excludes from the definition of "land use decision" a "state agency action subject to ORS 197.180(1)" under two circumstances that are similar to the exclusions in ORS 197.015(10)(b)(H)(i) and (ii).[1] Intervenor argues that the DEQ decision to fund the piping project cannot be appealed to LUBA, because the two circumstances described in ORS 197.015(10)(e)(C)(i) and (ii) are met here: *i.e.*, (1) the county has already made a land use decision approving the piping, and (2) the piping is allowed without review under the county's plan and land use regulations.

The flaw in this argument is that the DEQ decision to finance the piping is not the challenged decision in this appeal and is not before LUBA. ORS 197.015(10)(e)(C) is concerned with appeals of *state agency* decisions made under ORS 197.180(1), not appeals of local government LUCS decisions. The exclusions in ORS 197.015(10)(e)(C) simply do not apply.

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[1] ORS 197.015(10)(e)(C) provides that "land use decision" does not include:

> "A state agency action subject to ORS 197.180 (1), if:
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> "(i) The local government with land use jurisdiction over a use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action has already made a land use decision approving the use or activity; or
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> "(ii) A use or activity that would be authorized, funded or undertaken by the state agency as a result of the state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan."

E. ORS 197.825(2)(a): Exhaustion of Administrative Remedies

Intervenor next argues that petitioners failed to exhaust available administrative remedies as required by ORS 197.825(2)(a), because they failed to appeal the challenged LUCS decision to circuit court.

We do not understand the argument. LUBA and the circuit courts have disjunctive jurisdiction: generally speaking, jurisdiction over local government decisions that apply land use regulations will lie either with LUBA or the circuit court. As relevant here, LUBA has exclusive jurisdiction over "land use decisions" as defined by ORS 197.015(10)(a). The circuit court has exclusive jurisdiction over decisions that fall within the various exclusions set out in ORS 197.015(10)(b) through (e). If an appeal is filed in the wrong forum, transfer to the correct forum is generally available. ORS 34.102(3) and (4). But it is meaningless to assert that an appeal filed with LUBA must be dismissed for failure to exhaust administrative remedies, based on the failure to appeal to circuit court. ORS 197.825(2)(a) is concerned with exhaustion of *local* administrative remedies, such as a right of local appeal. Circuit court review is not an administrative remedy.

F. Right to File a Local Appeal

Finally, intervenor argues that petitioners cannot appeal the LUCS decision to LUBA, because under the county's code petitioners have no right to file a local appeal of the LUCS decision. According to intervenor, the LUCS decision is properly characterized as a "development action" under the DCC, and the DCC provides only to the applicant the right to file a local appeal of a development action. Because petitioners are not the applicants, intervenor argues, they do not have a right of local appeal, and therefore do not have standing to appeal the LUCS decision to LUBA.

To the extent we understand this argument, it is not well-developed. Petitioners may or may not have a right to appeal the LUCS decision to a hearings officer under the county's code. That issue remains to be resolved in petitioners' appeal of LUBA No. 2013-095. If

petitioners do have a right of local appeal, they must exhaust that local appeal before appealing to LUBA, pursuant to ORS 197.825(2)(a). But if they do not have any right of local appeal, then they may appeal the LUCS decision, which was rendered without a hearing, directly to LUBA under ORS 197.830(3). If the decision is otherwise subject to LUBA's jurisdiction, we may review the decision, notwithstanding that the county's code does not provide a right of local appeal to petitioners. Stated differently, standing to appeal to LUBA is governed comprehensively by statute. Assuming without deciding that intervenor is correct that under the DCC only the applicant has the right to file a local appeal of a LUCS decision, that limited local appeal right does not affect a non-applicant's standing to appeal the decision directly to LUBA, if otherwise granted under ORS 197.830(3) or other applicable statutes. Intervenor cites no authority for the contrary proposition, and we are aware of none.

Although it is not clear, it is possible that intervenor's arguments are also directed at the September 5, 2013 e-mail that rejected petitioners' local appeal, the decision that is challenged in LUBA No. 2013-095. Intervenor appears to argue that the county correctly concluded that petitioners had no right to locally appeal the LUCS decision, and therefore LUBA should dismiss LUBA No. 2013-095.

If that is intervenor's argument, it is not sufficiently developed for review. The county presumably applied its land use regulations in DCC chapter 22 in determining that no local appeal of the LUCS decision was available. Unless that application of its land use regulations falls within one of the exceptions to the definition of "land use decision" set out at ORS 197.015(10)(b) through (e), which intervenor does *not* argue, LUBA will have jurisdiction to review the September 5, 2013 decision rejecting petitioners' local appeal, to resolve any assignments of error petitioners may raise that the city erred in rejecting their local appeal. If such assignments of error are raised, and if we conclude that the county correctly determined that no right of local appeal is available under the county's land use

regulations, we would affirm the September 5, 2013 decision; we would not dismiss the appeal of that decision. Conversely, if we conclude that the county erred in rejecting their local appeal, we would remand the September 5, 2013 decision to the county to provide petitioners with a local appeal of the April 25, 2013 LUCS decision, in which case we would not address any assignments of error directed at the April 25, 2013 LUCS decision.

G. Conclusion

Intervenor has not demonstrated that LUBA lacks jurisdiction over either LUBA No. 2013-086 or LUBA No. 2013-095, for any of the reasons set out in the motion to dismiss. Accordingly, the motion to dismiss is denied.

The briefing schedule in these appeals remains as set out in our order dated December 18, 2013.

Dated this 8th day of January, 2014.

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Tod A. Bassham
Board Member