

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

3
4 JONATHAN TODD,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11
12 LUBA Nos. 2015-049 and 2015-053

13 ORDER

14 **MOTION TO DISMISS**

15 **A. Introduction**

16 These consolidated appeals concern two related decisions. In LUBA No.
17 2015-049, petitioner appeals a planning director’s decision on a land use
18 compatibility statement (LUCS), dated July 1, 2015. As discussed below, a
19 LUCS is a local government decision on a request to determine whether a
20 proposed state agency action is compatible with the local government’s
21 acknowledged comprehensive plan and land use regulations. In the present
22 case, petitioner requested that the county determine whether state agency
23 approval to install a standpipe in a culvert, in order to create a pond on
24 petitioner’s property, is compatible with the county’s land use regulations, *i.e.*,
25 whether it is permitted without review, requires review, is prohibited, etc. We
26 understand the planning director to have concluded in the July 1, 2015 LUCS
27 that future county land use reviews are necessary to approve the removal of

1 vegetation that the county believed was associated with creation of the pond.¹
2 The July 1, 2015 LUCS indicated that no applications for such land use
3 reviews had been submitted.

4 In LUBA No. 2015-053, petitioner appeals a July 14, 2015 letter from
5 the planning director informing petitioner that no local appeal of the July 1,
6 2015 LUCS decision is available. LUBA consolidated both appeals for review.

7 The county moves to dismiss LUBA No. 2015-049, the direct appeal to
8 LUBA of the July 1, 2015 LUCS decision, on the grounds that the LUCS
9 decision is excluded from LUBA's jurisdiction pursuant to ORS
10 197.015(10)(b)(H)(iii).² Petitioner has filed a conditional motion to transfer

¹ The pond is a former sedimentation settling pond from a defunct quarry operation. Petitioner re-created the pond by placing a standpipe in an existing culvert. In re-creating the pond, petitioner allegedly removed some trees and vegetation in the area of a small creek that drains through the culvert. Petitioner argues that the pond itself is a permitted use in the rural residential zone that applies to the subject property, as a "decorative pond" that is listed as a permitted accessory use to the primary residential use. ZDO Table 316-1. We do not understand the county to argue that the action of filling the pond with water in itself requires any county land use review or approval. The sole basis for the county's conclusion that future land use reviews are required appears to rest on the alleged removal of trees and vegetation within the small drainage way that feeds and forms the pond.

² LUBA has exclusive jurisdiction to review appeals of "land use decisions," which as that term is defined at ORS 197.015(10)(a) include decisions that concern the application of land use regulations, among other things. A LUCS decision almost always concerns the application of land use regulations, so absent some exclusion a LUCS decision is usually a land use decision. ORS 197.015(10)(b)(H) excludes from the definition of "land use

1 the July 1, 2015 LUCS decision to circuit court, in the event that we conclude
2 that LUBA lacks jurisdiction over the appeal of the LUCS decision.

3 **B. ORS 197.015(10)(b)(H)(iii)**

4 ORS 197.015(10)(b)(H)(iii) excludes from LUBA’s jurisdiction a LUCS
5 decision determining that the proposed use or activity “requires a future land
6 use review under the acknowledged comprehensive plan and land use
7 regulations implementing the plan[.]” *See* n 2. The July 1, 2015 LUCS
8 decision concludes that the proposed use (more precisely, the removal of
9 vegetation associated with the pond) requires one or more future county land

decision” certain types of LUCS decisions, specifically a local government
decision:

“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:

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

“(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

“(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[.]”

1 use reviews. On its face, the July 1, 2015 LUCS decision appears to fall
2 squarely within the exclusion at ORS 197.015(10)(b)(H)(iii).

3 However, we have held that, given the wording of the exclusions at ORS
4 197.015(10)(b)(H), LUBA must determine whether the local government
5 correctly categorized the proposed action in a manner that brings the decision
6 within the relevant exclusion. *Bishop v. Deschutes County*, __ Or LUBA __
7 (LUBA Nos. 2015-027/28/30, September 9, 2015, slip op 14-15 (citing
8 *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355, 360-62 (2012),
9 *aff'd* 256 Or App 402, 300 P3d 299 (2013)). That is because ORS
10 197.015(10)(b)(H) is worded such that the exclusions apply only “if” one of the
11 three predicate conditions are met. *See* n 2. Consequently, analysis under ORS
12 197.015(10)(b)(H) often requires LUBA to address at least some of the likely
13 merits of the appeal, to the extent necessary to resolve the jurisdictional
14 question.

15 The July 1, 2015 LUCS decision appears to identify three, perhaps four,
16 different “land use reviews” that are required.

17 The first is “River & Stream Conservation Area Permit,” subject to
18 Zoning Development Ordinance (ZDO) 704. The second is “Modification of
19 Subdivision Approval,” subject to ZDO 1002. As discussed below, we
20 understand that the second “land use review” may actually involve a third type
21 of land use review, approval of a re-vegetation and restoration plan. The fourth
22 and last stated land use review is “Goal 5 Application,” subject to “various”

1 unidentified land use standards. For each type of land use review, the planning
2 director indicates that land use approval is “Not Being Pursued.” Record 7. In
3 a written comment on the LUCS, the planning director states that “[o]ne or
4 more of the above land use approvals are required to authorize this project[,]”
5 and “[n]o land use applications have been submitted to date.” Record 7. We
6 address the parties’ contentions regarding these identified “land use reviews” in
7 reverse order.

8 **1. Goal 5 Application**

9 According to the county, the reference to a “Goal 5 application” was not
10 meant to identify a required “land use review,” but was instead meant to
11 indicate that one possible option to avoid the requirement to obtain a River and
12 Stream Conservation Area Permit pursuant to ZDO 704 is to instead file an
13 application to remove the SCA designation entirely from the subject property.
14 Petitioner agrees with the county that no Goal 5 application is “require[d]”
15 within the meaning of ORS 197.015(10)(b)(H)(iii).

16 We accept the parties’ apparent agreement that the reference to “Goal 5
17 application” does not identify a required “land use review” for purposes of
18 ORS 197.015(10)(b)(H)(iii). As we understand it, the reference to “Goal 5
19 application” was intended to identify a possible means to *change the*
20 *applicable law* in order to avoid or eliminate a legal requirement, restriction or
21 prohibition imposed by the currently applicable law, in this case ZDO 704. In
22 other words, as an alternative to obtaining a permit under ZDO 704, the

1 planning director suggested that petitioner could obtain an exception to Goal 5
2 to remove the SCA designation from petitioner’s property, with the result that
3 ZDO 704 would no longer apply to the property and no River and Stream
4 Conservation Area Permit would be required. We agree with the parties that
5 required “land use review[s]” for purposes of ORS 197.015(10)(b)(H)(iii) do
6 not include goal exceptions, zone changes, comprehensive plan amendments,
7 and similar decisions that would have the effect of changing the currently
8 applicable law in order to avoid some requirement, restriction or prohibition
9 imposed by that currently applicable law. ORS 197.015(10)(b)(H)(iii) is
10 concerned instead with permit or other authorizations and approvals required
11 under the currently applicable zoning and land use regulations.³

12 Accordingly, the reference to “Goal 5 Application” does not establish
13 that the July 1, 2015 LUCS is subject to the exclusion at ORS
14 197.015(10)(b)(H)(iii).

15 2. Modification of Subdivision Approval and ZDO 1002

16 The July 1, 2015 LUCS identified “Modification of Subdivision
17 Approval” pursuant to ZDO 1002 as one, or perhaps two, required land use

³ A conclusion that a proposed action can be approved only after a goal exception, zone change or comprehensive plan amendment is essentially a conclusion that the currently applicable zoning and land use regulations would prohibit or not allow the proposed action. Such a conclusion would not fall within any of the three exclusions at ORS 197.015(10)(b)(H), and a LUCS decision to that effect would therefore likely be a land use decision subject to LUBA’s jurisdiction (unless some other statutory exclusion applied).

1 reviews. The 2003 subdivision that created petitioner’s property included
2 Condition of Approval 9, which prohibits “land clearing and vegetation
3 removal” in the area that includes petitioner’s pond, but which allows removal
4 of invasive, non-native plants if approved by the planning director subject to a
5 re-vegetation and restoration plan.⁴

6 It is not entirely clear, but we understand the reference to “Modification
7 of Subdivision Approval” to mean an application to modify the 2003
8 subdivision in order to remove the prohibition in Condition 9 on “land clearing
9 and vegetation removal,” at least as it pertains to removal of trees and native
10 vegetation. It may also refer to an application to modify Condition 9 to
11 eliminate the requirement to obtain approval of a re-vegetation and restoration
12 plan in order to remove nuisance or non-native vegetation.

13 Petitioner argues that, like the reference to “Goal 5 Application,” the
14 reference to “Modification of Subdivision Approval” does not identify a
15 required land use review for purposes of ORS 197.015(10)(b)(H)(iii). We

⁴ Condition 9 states in relevant part:

“The final subdivision plat shall depict the ‘conservation easement’ depicted upon the preliminary plan as a Restricted Development and Open Space area and the plat shall contain a note/restriction stating that the development, including structures, access drives, grading, filling, land clear and vegetation removal, is prohibited. Removal of invasive, non-native plants may be permitted by the Planning Director subject to approval of a re-vegetation and restoration plan. * * *”

1 generally agree with petitioner. For the reasons set out above, an application to
2 eliminate the prohibitions and requirements of Condition 9 is not a required
3 “land use review.” Such an application would not seek to establish compliance
4 with Condition 9 or obtain approvals required by Condition 9, but rather
5 attempt to eliminate the prohibitions and requirements of Condition 9.
6 Accordingly, the reference to “Modification of Subdivision Approval” does not
7 in itself establish that the July 1, 2015 LUCS is subject to the exclusion at ORS
8 197.015(10)(b)(H)(iii).

9 The applicable law the planning director cited with respect to
10 “Modification of Subdivision Approval” is ZDO 1002, a code section which is
11 entitled “Protection of Natural Features,” and which includes standards for tree
12 removal, protection of wooded areas, and development within river and stream
13 corridors. Although it is not at all clear, the planning director may have
14 intended to identify as a required future land use review, to be approved under
15 ZDO 1002 standards, the re-vegetation and restoration plan required by
16 Condition 9 in order to remove nuisance and non-native vegetation.

17 We do not understand petitioner to dispute that he will need approval of
18 a re-vegetation and restoration plan of some kind, in order to comply with
19 Condition 9 and/or ZDO provisions.⁵ However, petitioner argues that an

⁵ Petitioner argued below that Condition 9 has been superseded by ZDO 1009. ZDO 1009, part of a code section entitled “Landscaping,” includes landscaping standards, including a requirement that existing invasive non-

1 application for a re-vegetation and restoration plan is not the subject of a *future*
2 land use review in this case, but one that was actually submitted for review, and
3 denied in the LUCS decision.

4 According to petitioner, he submitted as part of the LUCS request a
5 county form entitled “land use application,” attached to which was a report
6 from Schott and Associates, Inc., a wildlife and wetland specialist (the Schott
7 Report). The Schott report includes three recommendations for habitat
8 improvement. Record 52. Petitioner’s cover letter for the LUCS request
9 requested that the planning director issue the LUCS and also approve the
10 “Schott native planting and restoration plan.” Record 45. Petitioner contends
11 that the Schott report constitutes the re-vegetation and restoration plan required
12 by Condition 9. However, petitioner argues, the July 1, 2015 decision
13 implicitly *denied* the proposed re-vegetation and restoration plan. According to
14 petitioner, the exclusion at ORS 197.015(10)(b)(H)(iii) does not apply to a
15 LUCS decision that in fact approves or denies a required “land use review.”
16 *See Campbell v. Columbia County*, 67 Or LUBA 53, 59-60 (2013) (a county
17 decision on a LUCS request that also verifies the scope of a nonconforming use

native or noxious vegetation be removed. However, petitioner argues that at the county’s insistence he applied for a re-vegetation and restoration plan to comply with Condition 9, and for purposes of appeal we do not understand petitioner to dispute that Condition 9 requires approval of such a plan to remove non-native vegetation.

1 and approves alterations of that use is outside the scope of the exclusions at
2 ORS 197.015(10)(b)(H)).

3 *Campbell* does not assist petitioner. In *Campbell*, the challenged
4 decision combined a (1) LUCS decision concluding that all county approvals
5 had been obtained, and (2) a decision that issued all the required approvals,
6 namely a nonconforming use verification and alteration. In the present case,
7 we see nothing in the July 1, 2015 decision that purports to deny the “land use
8 application” that was attached to the LUCS request, or even recognize that an
9 application for approval of a re-vegetation and restoration plan had been
10 submitted (assuming the Schott report constitutes such a plan). We decline to
11 extend the reasoning in *Campbell* to include a LUCS decision that, at best, fails
12 to recognize that a related land use application had been submitted.

13 Consequently, to the extent the July 1, 2015 LUCS identified a re-
14 vegetation and restoration plan pursuant to Condition 9 and ZDO 1002 as a
15 required *future* land use review, that conclusion may well be correct. The
16 problem is that it is not at all clear that the planning director in fact identified
17 approval of a re-vegetation and restoration plan as a required future land use
18 review. The LUCS decision does not mention a re-vegetation and restoration
19 plan. Only by extensive reading between the lines is it possible to conclude
20 that the phrase “Modification of Subdivision Approval” and the citation to
21 ZDO 1002 represent a finding that approval of a re-vegetative and restoration
22 plan is a required future land use review. We conclude that that language in

1 the LUCS is insufficient to establish that the LUCS falls within the exclusion at
2 ORS 197.015(10)(b)(H)(iii).

3 **3. River and Stream Conservation Area Permit**

4 The LUCS decision identified, as a required future land use review, a
5 River and Stream Conservation Area Permit, pursuant to ZDO 704. The
6 apparent premise for that conclusion is that the unnamed tributary to Newland
7 Creek that the county believes is located on petitioner’s property is part of an
8 inventoried stream conservation area, or SCA. Petitioner argues that that
9 premise is incorrect.

10 As relevant here, ZDO 704 applies to land that is located within 50 feet
11 of the mean high water line of small “Type F” streams, as identified on the
12 county’s Water Protection Rule Classification (WPRC) maps. ZDO
13 704.03(D).⁶ The county takes the position that the small creek on petitioner’s
14 property is identified on the county’s WPRC maps, and is a “Type F” stream
15 that is part of the Newland Creek SCA. Generally, ZDO 704.07 prohibits or

⁶ ZDO 704.03 is entitled “Area of Application” and provides in relevant part:

“D. Section 704 also applies to land that located within 50 feet of the mean high water line of small Type F streams, identified on the WPRC Maps. The location of these streams may vary from these maps if more specific information is provided. Classified as SCAs, these small streams are designated in the Comprehensive Plan as those that generally have annual average flows of less than two cubic feet per second.”

1 regulates tree removal and removal of native vegetation within the relevant
2 setback for an SCA stream. According to the county, the planning director
3 concluded based on evidence in the record that re-creating the pond entailed
4 removal of trees and at least some native vegetation within the 50-foot setback,
5 and that such removal requires authorization under a River and Stream
6 Conservation Area permit, pursuant to ZDO 704.

7 Petitioner responds that no River and Stream Conservation Area Permit
8 is required, because the pond area is not within an SCA, and therefore not
9 subject to ZDO 704. According to petitioner, the Newland Creek SCA does
10 not include the unnamed tributary located on petitioner's property. Petitioner
11 contends that the county has identified no map or other acknowledged
12 document that designates the unnamed tributary on petitioner's property as part
13 of an SCA. Because there is no SCA located on the property, petitioner argues,
14 the planning director incorrectly concluded that a River and Stream
15 Conservation Area Permit under ZDO 704 is required to remove native
16 vegetation to fill the pond.

17 At LUBA's request, the county supplied to LUBA and petitioner a full-
18 size copy of the relevant WPRC map, which the county asserts is one basis for
19 the inventoried SCAs in the area. The WPRC map shows a black line in the
20 approximate area of petitioner's property, depicting a small tributary creek that
21 drains to Newland Creek. The county also submitted a color copy of a
22 computer-generated GIS map that, the county asserts, is based on the WPRC

1 maps and depicts the inventoried streams that form the basis for the county’s
2 various categories of SCAs. The GIS map appears to be based on the WPRC
3 map, and shows that same small creek outlined in yellow. According to the GIS
4 map legend, yellow denotes a “small” River and Stream Corridor Area. By
5 contrast, a pinkish outline denotes streams that are “Not Subject to RSCA
6 regulations.”

7 Petitioner filed an additional response after reviewing the two full-size
8 maps. With respect to the GIS map, petitioner argues that the county does not
9 claim that the GIS map is a map adopted by the county board of commissioners
10 and acknowledged to comply with Goal 5. Accordingly, petitioner argues, the
11 county cannot apply the GIS map as a basis to conclude that the subject
12 property is within an SCA area or subject to RSCA regulations, and thus
13 subject to ZDO 704.

14 To the extent petitioner argues that the computer-generated GIS map has
15 no bearing on the question of whether the subject property is within an SCA
16 area and subject to ZDO 704, we disagree. The GIS map presumably was
17 prepared as a more useable representation of the maps and documents adopted
18 by the county board of commissioners as part of the county’s Goal 5 inventory
19 of riparian and wildlife resources. The GIS map is a convenient starting point
20 for determining whether property is subject to the county’s RSCA regulations.
21 Petitioner, of course, is free to argue that the relevant portions of the GIS map
22 are inconsistent with the adopted and acknowledged maps that the GIS map is

1 intended to reflect. Petitioner makes such an argument below. If petitioner is
2 correct on that point, then the question of whether the subject property is within
3 an SCA area must be resolved based only the adopted and acknowledged maps,
4 not the GIS map.

5 With respect to the WPRC map, petitioner does not dispute that the
6 WPRC map the county provided is a copy of one of the adopted and
7 acknowledged maps that form the basis for the county's inventory of Goal 5-
8 protected stream and fish resources. However, petitioner argues that properly
9 construed the WPRC map does not indicate that the tributary creek is a "Type
10 F" stream that is part of an SCA area or that is subject to RSCA regulations
11 under ZDO 704. As noted, above ZDO 704.03(D) applies to Type F streams.
12 *See* n 6.

13 Petitioner's argument relies on OAR 629-635-0200, a Department of
14 Forestry administrative rule governing classification and protection of riparian
15 areas. The WPRC map apparently implements the rule's classification scheme.
16 Under OAR 629-635-0200, all streams are classified according to their
17 beneficial uses and size. OAR 629-635-0200(4) provides that streams are
18 classified into one of three beneficial uses: (1) Type F, for streams inhabited at
19 any time of the year by anadromous or game fish species or fish listed as
20 threatened or endangered; (2) Type D, for non-fish streams with a domestic
21 water use, and (3) Type N, all other streams. For each of these three categories,
22 there are three sub-categories based on size, small, medium and large.

1 On the WRPC map provided by the county, many of the streams,
2 including the Willamette River, the Molalla River, and many smaller creeks
3 and streams, have the symbol “F” written somewhere near or in the stream.
4 Although there is no relevant legend on the map, we understand the “F” symbol
5 to denote a fish-bearing or Type F stream. Where there is an “F” symbol
6 associated with a stream, it is near the head of the stream, or at the edge of the
7 map if the stream exits the map. There are no “D” or “N” symbols on the map,
8 as far as we can tell. In addition, different stretches of nearly all streams are
9 marked with “L,” “M” or “S,” presumably for large, medium and small.

10 The relevant body of water here is Newland Creek, which is marked at
11 its confluence with the Willamette River as “M.” Further upstream, Newland
12 Creek branches into three tributaries. Each tributary, including the one at issue
13 here, is marked “S.” However, nowhere near any of the tributaries or the main
14 stem of Newland Creek is found an “F” symbol. Most of the nearby creeks
15 have an “F” symbol, some do not.

16 Petitioner argues that the absence of an “F” symbol located near the
17 tributary closest to his property means that the tributary (indeed, perhaps all of
18 Newland Creek) is not a “Type F” stream, and therefore not regulated under
19 ZDO 704. In addition, petitioner questions whether the tributary in fact crosses
20 over his property. The WPRC map does not include property boundaries, and
21 petitioner asserts that his property is actually located west of the tributary.

1 The county has not responded to petitioner’s argument. Petitioner may
2 be correct that the absence of an “F” symbol near the tributary of Newland
3 Creek on the WPRC map provided by the county means that the tributary (and
4 possibly all of Newland Creek) is not a Type F stream for purposes of ZDO
5 704. However, we cannot tell for sure. It is possible that the handwritten “F”
6 symbol on the WPRC map does not have the significance that petitioner argues,
7 and that its absence near the tributary does not mean the tributary is not a Type
8 F stream. Both ZDO 704.03 and OAR 629-635-0200 appear to contemplate
9 revisions to water classifications over time, as new information is available.
10 Indeed, the WPRC map includes a notice that “This map shows only stream
11 size and ‘known’ fish use. An interim process described in OAR 629-635-200
12 will be used to determine the classification of streams with ‘unknown’ fish
13 use.” A second notice states that “The water classification maps are
14 periodically updated.” It is possible that the tributary was designated a Type F
15 stream in another acknowledged map or document, after the WPRC map
16 provided to us was adopted or the symbols handwritten on it. There are other
17 differences between the GIS map and the WPRC map, suggesting that the
18 WPRC map provided to us may not be the only basis for determining whether a
19 stream is “Type F” or otherwise subject to RSCA regulations.

20 The county, as the party moving to dismiss, bears the initial burden of
21 demonstrating that the challenged decision is not subject to LUBA’s
22 jurisdiction, although petitioner retains the ultimate burden of demonstrating

1 that the decision *is* subject to our jurisdiction. Based on the pleadings and
2 information provided to date, we cannot tell whether the unnamed creek is
3 subject to RSCA regulations under ZDO 704, and therefore whether the county
4 correctly concluded that petitioner must obtain a River and Stream
5 Conservation Area Permit under ZDO 704.

6 We also lack sufficient information to evaluate petitioner's assertion that
7 the tributary is not actually located on his property. The WPRC map does not
8 depict property lines. The GIS map does, but it was apparently printed prior to
9 the final subdivision plat that created petitioner's property, because the
10 property boundaries in the area appear to depict the undivided quarry property
11 rather than the current subdivision that includes petitioner's property.⁷

12 In a similar circumstance, LUBA tentatively denied the motion to
13 dismiss a LUCS decision, and retained jurisdiction to allow the parties to
14 develop the record and arguments to a point where LUBA could determine
15 whether the local government correctly classified the agency action, and thus
16 whether the LUCS decision is excluded from LUBA's jurisdiction under one of
17 the three exclusions at ORS 197.015(10)(b)(H). *Curl v. Deschutes County*, 69

⁷ Based on a casual comparison of the GIS map, the 2003 subdivision plat, and other information in the record or provided to us, it seems to us that the county is correct that the unnamed tributary runs through petitioner's property. And, to point out the obvious, the water that fills petitioner's pond must come from somewhere. But like many things in this appeal, that also is not entirely clear.

1 Or LUBA 451, 461 (2014). Like the present case, *Curl* involved appeals of (1)
2 a LUCS decision and (2) a county decision that no local appeal of the LUCS
3 decision was available. After briefing on the merits of both appeals, LUBA
4 first addressed the appeal of the decision that no local appeal was available.
5 After affirming that decision, LUBA took up the renewed jurisdiction
6 challenge to the appeal of the LUCS decision, and ultimately concluded based
7 on more adequate pleadings that the county had incorrectly classified the
8 agency action, and thus the relevant exclusions at ORS 197.015(10)(b)(H) did
9 not apply. *Curl v. Deschutes County*, 69 Or LUBA 186, 190-91 (2014).

10 The present case is similar to *Curl* in that (1) we cannot tell from the
11 present pleadings and record whether the exclusion at ORS
12 197.015(10)(b)(H)(iii) apply, and (2) the appeal of the LUCS decision is
13 consolidated with an appeal of a related land use decision regarding the
14 availability of local appeal.

15 Even if there were greater certainty regarding the jurisdictional question,
16 as in *Curl* it seems prudent to keep this appeal of the county's LUCS decision
17 in the same forum, and on the same track, as the appeal of the July 14, 2015
18 planning director's decision that there is no local appeal of the LUCS decision,
19 for as long as possible. The two decisions are inextricably linked, in the sense
20 that if petitioner prevails in his appeal of the July 14, 2015 planning director's
21 decision, the consequence is that that decision would have to be remanded to
22 the county to provide the local appeal of the LUCS decision to which petitioner

1 would be entitled. In that event, the question of whether LUBA or the circuit
2 court has jurisdiction over the LUCS decision would be a moot point, because
3 the July 1, 2015 LUCS decision would not be a final decision capable of
4 review by either review body. Until it is known whether the LUCS decision is
5 a final decision capable of review, it makes little sense to attempt to reach firm
6 conclusions regarding the jurisdictional challenge to the appeal of the LUCS
7 decision, even if the pleadings and record made firm conclusions possible.

8 Accordingly, the county's motion to dismiss is tentatively denied. The
9 county has leave to renew the motion to dismiss, based on additional
10 information, documents or pleadings. In the meantime, we will order these
11 consolidated appeals to proceed in due course. The Board expects that briefing
12 on the merits of these consolidated appeals will focus first on challenges to the
13 July 14, 2015 planning director's letter. If LUBA rejects petitioner's challenges
14 to the July 14, 2015 letter, and denies the appeal of that letter, LUBA will
15 resolve any renewed jurisdictional challenges to the July 1, 2015 LUCS
16 decision.

17 **C. Briefing Schedule**

18 The briefing schedule in both appeals is currently suspended pending
19 resolution of the motion to dismiss. The next event in both appeals is the filing
20 of the petition for review. Accordingly, the petition for review is due 21 days,
21 and the response brief due 42 days, from the date of this order. The Board's
22 final opinion and order is due 77 days from the date of this order.

1 Dated this 27th day of January, 2016.

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Tod A. Bassham

9 Board Chair