BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS BISHOP, DORBINA BISHOP,
and TRUSTEES OF THE BISHOP
FAMILY TRUST,
Petitioners,

and

CENTRAL OREGON LANDWATCH,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

KC DEVELOPMENT GROUP, LLC
Intervenor-Respondent.

LUBA Nos. 2017-002 and 2017-003

ORDER

INTRODUCTION

In LUBA No. 2017-003, petitioners appeal a county land use compatibility statement (LUCS) regarding a proposal to fill two reservoirs with groundwater. In LUBA No. 2017-002, petitioners appeal a county decision rejecting their local appeal of the LUCS decision. The two appeals are consolidated for review. Before the Board are various motions, including a motion to dismiss both appeals, and objections to the record.

FACTUAL BACKGROUND

Intervenor KC Development Group, LLC (KCDG) owns a large tract that consists of at least 11 parcels, which includes a reclaimed surface mine. The tract is developed with a single-family dwelling located on one of the parcels. In May 2007, the county rezoned the property from Surface Mining to Rural Residential 10-acre minimum (RR-10). The RR-10 zone allows surface mining as a conditional use only "in conjunction with an irrigation district." In March 2014, KCDG excavated at least 259,981 cubic yards of material from two locations on the property, in order to construct two lined reservoirs.

The first reservoir has a capacity of 59 acre-feet of water and includes two constructed islands comprised of dirt and gravel along with a marina, boat ramp, dock and a support structure for a boat house at the north end. The first reservoir is long and narrow, and was constructed as a water-skiing facility, with the constructed islands at each end used as turning points. The second reservoir has a slightly smaller capacity of 57 acre-feet of water.

On June 13, 2014, Tumalo Irrigation District (TID) and KCDG representatives met with the county to discuss a transfer of water from TID's system to the newly created reservoirs. At this meeting, KCDG informed the county that an application for a residential cluster development on the subject property would be submitted within a short period of time. Subsequent to the meeting, the county planning director issued notice that the director would elect to process any LUCS request regarding the water transfer to the subject

property as a "land use action," instead of a "development action." Deschutes County Code (DCC) specifies a "land use action" as a type of decision that requires notice and opportunity for hearing and appeals consistent with ORS 197.763 and ORS 215.416. A "development action," on the other hand, does not require public notice and hearing, and limits the right of local appeal to the applicant.

TID then applied to the Oregon Water Resources Department (OWRD) seeking permission to transfer water held in TID's irrigation system to the two new lined reservoirs created on the subject property. OWRD required TID to obtain a LUCS to determine whether the land uses served by the requested water transfer are consistent the county's land use laws. On August, 13, 2014, the county planning director issued a LUCS decision which concluded that the proposed transfer of water served the "[o]peration, maintenance, and piping of existing irrigation systems operated by an Irrigation District[,]" which is a permitted use in the RR-10 zone. DCC 18.60.020(I). In accordance with the planning director's decision to treat the application as a "land use action", the planning director provided notice of the decision to adjoining property owners.

That August 13, 2014 LUCS decision was appealed to the county hearings officer. After holding a *de novo* evidentiary review, the hearings officer reversed the August 13, 2014, LUCS decision. The hearings officer concluded that the scope of the proposed use involves not only the transfer of water but also the construction of two new reservoirs. The hearings officer

found the proposed use requires conditional use permits because construction of the new reservoirs constituted "surface mining" in conjunction with operation of an irrigation system to create a "reservoir," which is a conditional use in the RR-10 zone. DCC 18.60.030.[1] The hearings officer also concluded that the first reservoir, the water-skiing facility, constituted a large-scale recreational facility, which is a conditional use in the RR-10 zone. On appeal to the county board of commissioners, the commissioners upheld the hearings officer's decision. On appeal to LUBA, LUBA ultimately concluded that the commissioners' decision correctly categorized the proposed use. *Bishop v. Deschutes County*, 72 Or LUBA 103 (2015).

Thereafter, KCDG and TID submitted applications to the county for the issuance of conditional use permits for surface mining and a large acreage recreational facility. The hearings officer denied both applications, after concluding that KCDG did not demonstrate compliance with the conditional use permit standards.

After the conditional use permit applications were denied, KCDG informed the county that it no longer proposed to fill the reservoirs with TID

---

[1] DCC 18.60.030(W) provides as a conditional use in the RR-10 zone:

> "Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material."

irrigation water or to operate the first reservoir as a water-skiing facility. Instead, KCDG then applied to OWRD for a permit to fill the two reservoirs with 124 acre-feet of groundwater, describing the proposed use of water as follows:

> "One-time fill plus 44 acre feet per year in mitigation water to be stored in 2 ponds by KC Development Group for landscape aesthetics, emergency fire protection, and temporary pass-through irrigation water for personal irrigation use by KC Development Group * * *." Record 13.

OWRD then sent its standard LUCS form to the county, which requests that the county provide one of two determinations. On December 14, 2016, a senior planner issued the LUCS decision that is challenged in LUBA No. 2017-003. The planner checked the first box on the ORWD LUCS form, indicating that the land uses served by the proposed water use are allowed outright or are not regulated by the DCC.

> "[**X**] Land uses to be served by the proposed water use (including proposed construction) are allowed outright or are not regulated by your comprehensive plan. * * *
>
> "[ ] Land uses to be served by the proposed water uses (including proposed construction) involve discretionary land-use approvals as listed in the table below. (Please attach documentation of applicable land-use approvals which have already been obtained). * * *" Record 14.

The OWRD LUCS form includes a box for additional comments, and the senior planner commented:

> "The Deschutes County Zoning Code does not regulate the use of water to be stored in 2 ponds for aesthetic landscaping, emergency

fire protection, or pass-through irrigation for the property owner." *Id.*

On December 22, 2016, petitioners attempted to file a local appeal of the December 14, 2016 LUCS decision to the hearings officer. With the appeal, petitioners requested that the planning director elect to treat the LUCS decision as a "land use action" rather than a "development action," as the director had elected to do in the previous LUCS decision at issue in *Bishop.*

On December 30, 2016, the senior planner responded by e-mail, advising petitioners that the LUCS decision was a "development action," for which only the applicant has a right of local appeal. Supplemental Record 2-4. Accordingly, the senior planner rejected petitioners' attempt to file a local appeal.

Thereafter, on January 4, 2017, petitioners appealed to LUBA both the December 14, 2016 LUCS decision and the December 30, 2016 e-mail rejecting their local appeal. The December 14, 2016 LUCS decision is the subject of LUBA No. 2017-003, and the December 30, 2016 appeal rejection is the subject of LUBA No. 2017-002. LUBA consolidated both appeals for review.

MOTION TO STRIKE APPENDIX A TO PETITIONERS' RESPONSE TO MOTION TO DISMISS

As discussed below, the county and KCDG (respondents) move to dismiss these consolidated appeals. Petitioners' response included a bound Appendix A, which includes 306 pages of documents not in the slim record the

county has transmitted to LUBA. In a reply, respondents move to strike Appendix A, arguing that the documents therein are not in the record and not subject to official notice.

Petitioners respond that Appendix A consists entirely of documents in the record of various public entities, most of which petitioners attempted to submit to the county during the proceedings below, and which are the subject of pending record objection. Petitioners argue that some documents in Appendix A, such as copies of the county code, are subject to official notice.

We have held that we may consider documents outside the record for the limited purpose of resolving jurisdictional disputes. While many of the documents in Appendix A have no obvious bearing on the jurisdictional challenges presented in these appeals, some appear to. Specifically, these include copies of the county's earlier decisions regarding the subject property and the two reservoirs at the heart of the parties' dispute, at Appendix A 28-115, 240-71, and 272-73. In addition, we conclude that the documents at Appendix A 116-34, which include a 2005 county decision verifying that the subject tract consists of at least 11 parcels, seem useful in resolving the parties' jurisdictional disputes. While the foregoing documents include a number of factual findings and statements regarding the subject tract, respondents do not argue that any of the factual statements therein are inaccurate. Accordingly, we shall consider the above documents for the limited purpose of resolving the motion to dismiss. It is unnecessary to consider the other documents in

Appendix A to resolve the motion, and accordingly we do not consider the remaining documents in Appendix A.

MOTION TO STRIKE JOINT REPLY BRIEF

Petitioners move to strike respondents' reply brief, arguing that the reply brief merely reiterates arguments made in the motion to dismiss, raises a new issue regarding jurisdiction, and attempts to argue the merits of whether the county's decision is correct.

As discussed below, sometimes it is necessary to address some of the likely merits in resolving jurisdictional disputes regarding appeals of LUCS decisions, and that is the case here. The "new issue" raised in the reply brief responds to an argument made in petitioners' response that also goes to the likely merits. Because the jurisdictional issues are complex, and full briefing is helpful in resolving those issues, we shall consider the reply brief. The motion to strike the reply brief is denied.

MOTION TO DISMISS LUBA No. 2017-002

LUBA has exclusive jurisdiction over appeals of "land use decisions," defined in relevant part at ORS 197.015(10)(a) to include local government decisions that concern the application of land use regulations. The subject of LUBA No. 2017-002 is a December 30, 2016 e-mail from a senior planner to petitioners' attorney, rejecting their local appeal. The e-mail states in relevant part: "DCC 22.32.050 only allows the applicant, his or her representatives, and his or her witnesses to participate in an appeal of a LUCS. For this reason, the

Planning Division has not accepted the appeal request and will return the $250 check to your attention." Supplemental Record 2. The December 30, 2016 e-mail applies a land use regulation, and is thus a "land use decision," unless some exclusion applies. However, as discussed below, respondents do not argue that any exclusion applies to the appeal of the December 30, 2016 decision.

DCC 22.32.050, cited in the e-mail, is entitled "Development Action Appeals," and provides in relevant part that "Notice of the hearing date set for appeal shall be sent only to the applicant. Only the applicant, his or her representatives, and his or her witnesses shall be entitled to participate."[2] We understand the senior planner to have taken the position in the e-mail that the LUCS decision was a "development action" subject to DCC 22.32.050, and that under that code provision local appeals of development actions are limited to the applicant. As the parties discuss, the DCC distinguishes between "land use actions," which generally require notice and a hearing, and "development actions," which generally do not.[3]

---

[2] DCC 22.32.050 provides in full:

> "Notice of the hearing date set for appeal shall be sent only to the applicant. Only the applicant, his or her representatives, and his or her witnesses shall be entitled to participate. Continuances shall be at the discretion of the Hearings Body, and the record shall close at the end of the hearing."

[3] DCC 22.04.020 defines "development action" and "land use action" in relevant part as:

In their motion to dismiss LUBA No. 2017-003, respondents argue that the senior planner correctly concluded that the underlying LUCS decision is a "development action," and that local appeals of development actions are available only to the applicant, and therefore correctly rejected petitioners' attempt to file a local appeal of the December 14, 2016 LUCS.

Petitioners respond that the county's code is unclear regarding whether a right of local appeal exists in the present circumstances, and the county may not be correct that no right of local appeal exists for petitioners. Petitioners argue that DCC 22.32.010(A)(2), part of the county code governing local appeals, appears to authorize them to file a local appeal of the LUCS decision.[4]

> "'Development action' means the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that either:
>
> "A. Involves the application of a county zoning ordinance or the County subdivision and partition ordinance *and is not a land use action as defined below*[.]
>
> "* * * * *" (Emphasis added.)
>
> "'Land use action' includes any consideration for approval of a quasi-judicial plan amendment or zone change, any consideration for approval of a land use permit, and any consideration of a request for a declaratory ruling (including resolution of any procedural questions raised in any of these actions)."

[4] DCC 22.32.010 is entitled "Who May Appeal," and provides in relevant part:

> "A. The following may file an appeal:

According to petitioners, the LUCS decision is an administrative decision issued without prior notice, and petitioners are adversely affected or aggrieved by the decision, and therefore petitioners have a right of local appeal under DCC 22.32.010(A)(2).

Both parties' arguments concern the likely merits of the appeal of the December 30, 2016 decision, but do not directly address LUBA's jurisdiction over that appeal. There is no dispute that the December 30, 2016 decision rejecting the local appeal applied a land use regulation, and for that reason fits within the definition of "land use decision" at ORS 197.015(10)(a), unless some exclusion applies. However, respondents do not argue that any exclusion to the definition of "land use decision" applies, or offer any theory or argument as to why LUBA lacks jurisdiction over the December 30, 2016 decision. Respondents may be correct on the merits that the planner correctly deemed the LUCS decision a "development action," and correctly interpreted DCC 22.32.050 in context to limit appeal of a development action to the applicant,

---

> "1. A party;
>
> "2. In the case of an appeal of an administrative decision without prior notice, a person entitled to notice, a person adversely affected or aggrieved by the administrative decision, or any other person who has filed comments on the application with the Planning Division[.]"

but in that case LUBA would affirm the decision after a review of the merits, rather than dismiss the appeal for lack of jurisdiction.[5]

In the absence of some legal argument invoking an exclusion to the definition of "land use decision" for the December 30, 2016 decision, or identification of some other legal theory as to why LUBA lacks jurisdiction over the appeal of that decision, we have no basis to dismiss LUBA No. 2017-002 or to grant petitioners' alternative motion to transfer the appeal to circuit court. Accordingly, respondents' motion to dismiss LUBA No. 2017-003 is denied.

MOTION TO DISMISS LUBA No. 2017-003

Respondents also move to dismiss LUBA No. 2017-003, the direct appeal of the planning director's December 14, 2016 LUCS decision, for two reasons.

First, respondents argue that the LUCS decision is excluded from LUBA's jurisdiction pursuant to ORS 197.015(10)(b)(H)(ii), which excludes from the definition of "land use decision" a LUCS decision concluding that the

[5] Indeed, in a case with a very similar posture, *Curl v. Deschutes County*, 69 Or LUBA 186, 192-93 (2014), we agreed with the county that under the DCC there is no right for a non-applicant to file a local appeal of a LUCS decision that the county treated as a development action rather than a land use action. In *Curl*, we ultimately affirmed the appeal of the decision denying the local appeal of a LUCS decision, and then addressed the merits of the direct appeal of the LUCS decision.

land use that would be authorized by the proposed state agency action is "allowed without review" under the county's land use regulations.[6]

Second, respondents argue that the LUCS decision is excluded from LUBA's jurisdiction pursuant to ORS 197.015(10)(b)(A), which excludes from the definition of "land use decision" a decision made under land use standards that do not require interpretation or the exercise of policy or legal judgment.[7] We address the two jurisdictional challenges together.

---

[6] ORS 197.015(10)(b)(H) excludes from the definition of "land use decision" at ORS 197.015(10)(a) 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[.]"

[7] ORS 197.015(10) provides, in relevant part:

> "'Land use decision':
>
> "* * * * *

A. Introduction

To satisfy statutory obligations to ensure that state agency actions affecting land use are consistent with the statewide planning goals, many state agencies have adopted coordination programs that essentially rely upon local governments to determine whether land uses associated with state agency permits and actions are consistent with acknowledged comprehensive plans and land use regulations. The LUCS determination is the vehicle commonly employed for accomplishing this function.

Providing an accurate and complete response to a state agency LUCS request often requires the local government to make several determinations, implicitly if not explicitly. First, to the degree necessary, the local government must characterize the nature and scope of the proposed land use that is associated with the state agency action. This step may involve consideration of past land use decisions approving the land use or aspects of the land use (*e.g.*, a prior nonconforming use verification, or prior conditional use permit). Typically, the characterization of the proposed use is based solely on information provided by the applicant. However, the local government is not bound by the characterization offered by the applicant, and can consider other

---

"(b) Does not include a decision of a local government:

"(A) That is made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

information as necessary to make a sufficient characterization of the nature and scope of the land use.

Second, the local government must determine whether and how its land use regulations categorize and govern the land use described in the first step. This second step can be quite straightforward, requiring a simple glance at the zoning code, or complex, involving interpretation or legal judgment. A straightforward example might be determining that a proposed single family dwelling in a rural residential zone is a permitted use in that zone. Such a determination would almost certainly result in a LUCS decision made under land use standards that do not require code interpretation or the exercise of legal judgment, and for that reason alone the decision would be excluded from LUBA's jurisdiction under ORS 197.015(10)(b)(A).

In other cases, determining the correct land use category for a proposed use and what land use regulations apply, if any, requires interpretation or legal analysis. For example, if the proposed use is not listed as an allowed or conditionally allowed use in the applicable zone, but the applicant asserts that it is accessory to an identified primary use of the property, some legal analysis may be necessary to determine whether the proposed use satisfies whatever requirements and limitations the applicable local land use laws impose on accessory uses. In the latter case, the resulting LUCS decision might not be subject to the exclusion for ministerial decisions at ORS 197.015(10)(b)(A)

(although, as discussed below, it may be subject to one of the exclusions at ORS 197.015(10)(b)(H)).

A final step is to determine, based on the characterization and categorization conducted in the first two steps, what future land use reviews and approvals, if any, are required for the proposed land use to operate consistently with the local government's land use legislation. If there are any discretionary reviews or approvals that are necessary to lawfully construct or operate the use, the LUCS decision should identify them.[8]

The foregoing description of the LUCS decision-making process represents something of an ideal, and the practical reality is that many LUCS decisions do not (and often need not) involve all three steps, or a detailed analysis at each step. In many cases, a simple "check the box" approach that the county planner employed here may suffice. However, a "check the box" approach presents problems on review (for LUBA or the circuit court, whichever body has jurisdiction) when the facts, the history of the property, or

---

[8] It is important to note that if the LUCS decision goes beyond identifying future required discretionary land use reviews, and actually conducts such reviews or issues approvals under discretionary standards, the decision is no longer simply a LUCS decision, but is likely also a "permit" decision as defined at ORS 215.402(4) and ORS 227.160(2), in which case the local government must provide notice and other statutorily required procedural protections. *Curl*, 69 Or LUBA at 194. There are also jurisdictional consequences: a LUCS decision that also applies approval standards to grant permits or approve development is not subject to the exclusions at ORS 197.015(10)(b)(H). *Campbell v. Columbia County*, 67 Or LUBA 53, 59-61 (2013).

the applicable law are more complex. In such cases, it would be appropriate to append a more detailed analysis to the state agency's LUCS form. With that general observation, we now turn to the parties' arguments regarding jurisdiction over the December 14, 2016 LUCS decision.

B. The December 14, 2016 LUCS Decision

As explained, in two previous land use decisions the county determined that the 2014 excavation of the two reservoirs belongs to a land use category called "surface mining," a use that is permitted outright in the Surface Mining zone, but allowed as a conditional use in other zones, including the RR-10 zone, only if done in conjunction with the operation of irrigation district system. After the county denied KCDG's application for a conditional use permit to construct and operate the reservoirs in conjunction with an irrigation district, KCDG applied to OWRD for a permit to fill the two reservoirs with 124 acre-feet of groundwater, describing the proposed use of water to be for "landscape aesthetics, emergency fire protection, and temporary pass-through irrigation water for personal irrigation use by KC Development Group * * *." Record 13. As noted, a county senior planner concluded that the DCC "does not regulate the use of water to be stored in 2 ponds for aesthetic landscaping, emergency fire protection, or pass-through irrigation for the property owner." Record 14.

1. ORS 197.015(10)(b)(A)

We first address respondents' argument that the December 14, 2016 LUCS decision is excluded from the definition of "land use decision" under ORS 197.015(10)(a), because the land use standards that apply do not require interpretation or exercise of legal judgment, and the decision thus falls within the exclusion at ORS 197.015(10)(b)(A). According to respondents, the planner correctly concluded that the proposed uses of water are "regulated solely by OWRD." Motion to Dismiss 8.

Petitioners respond, and we agree, that the challenged LUCS decision does not fall within the exclusion for ministerial decisions at ORS 197.015(10)(b)(A). We first note that the LUCS decision appears to focus on the proposed end use of the *water* that OWRD would authorize (to provide water for landscaping, fire protection and irrigation), without identifying the "land uses to be served by the proposed water uses (including proposed construction)," as requested in the words of the OWRD LUCS form. It goes without saying, as respondents argue, that it is OWRD that regulates the proposed *use of water*. But that is not the question that OWRD asked the county. The relevant question is whether the county's land use ordinance includes provisions that govern the *land uses* to be served by the proposed use

of water.[9] The LUCS decision does not squarely address that question, which complicates our jurisdictional analysis.

In their motion to dismiss, respondents argue that the proposed uses of water will serve the residential use of the property, as accessory uses to the residence located on one parcel in the subject tracts. Respondents note that DCC 18.60.020 provides that a single-family residence is a permitted use in the RR-10 zone, and that "accessory uses" to permitted uses are also "permitted outright."

That theory might be implicit in the LUCS decision, but if so there are several problems with it. First, as petitioners argue, DCC 18.04.030 defines "accessory use or accessory structure" as a use or structure that is "incidental and subordinate to the main use of the property, and located on the same lot as

---

[9] To illustrate the distinction, if the applicant sought an OWRD permit to dig a well to supply groundwater to fill a swimming pool, OWRD's regulations would apply to the proposed well and possibly also the proposed end use of the water (for recreational swimming). The county's land use regulations, of course, do not regulate the use of water for recreational swimming (or landscaping, fire prevention or irrigation). But the county's land use regulations probably do govern construction and use of swimming pools in rural residential zones. Possibly, such pools would be categorized as accessory to a residential use or uses, and would be allowed if subordinate and incidental to a primary residential use of the property. An adequate LUCS decision in the foregoing circumstance would identify the land use to be served by the proposed use of water (the primary residential use), determine the category of the proposed land use or structure associated with the use of water (the swimming pool, an accessory structure/use to the primary residential use), and determine whether the pool's construction or operation requires any future discretionary land use approvals (probably not).

the main use." Petitioners argue, and respondents do not dispute, that the two reservoirs in which the groundwater will be stored are not located on the same lot (or parcel) as the dwelling on the property.

In a reply, respondents appear to withdraw their arguments based on accessory uses. Reply 13. Respondents argue that classifying the proposed uses as accessory uses is not necessary to support the decision. *Id.* That may be, but the problem remains that the LUCS decision does not identify any land uses that the proposed use of water will serve, and on appeal respondents have withdrawn their only attempt to identify or describe those land uses. This fundamental failure to identify a land use served by the proposed use of water has consequences for the jurisdictional analysis. Without an identified land use, we cannot tell whether the LUCS decision concerns land use regulations that do not require interpretation or the exercise of legal judgment, for purposes of the exclusion at ORS 197.015(10)(b)(A), because we can only speculate what land use regulations, if any, it *does* concern.

A related problem is that, unlike the county's previous LUCS decisions concerning proposed use of the two reservoirs, the challenged LUCS does not address the legal status of the two reservoirs. The county had previously determined that excavation and construction of the two reservoirs constituted "surface mining," which was potentially allowed as a conditional use in the RR-10 zone as long as it was in conjunction with the operation of an irrigation district system. KCDG's current request to OWRD specified that the

groundwater would be stored in the two reservoirs, and there seems no possible dispute that the two reservoirs are properly viewed as being part of the proposed land use, for purposes of making the LUCS decision.[10] As noted, the OWRD LUCS form requested that the county classify the land use to be served by the proposed water uses, "including proposed construction." Under these circumstances, we agree with petitioners that any LUCS decision involving the use of the two reservoirs must address the reservoirs' construction and legal status. Are they lawful nonconforming uses? Are they accessory to a primary use of the property? Or, as petitioners argue, are they allowed in the RR-10 zone at all only if in conjunction with an irrigation district system?

In their reply, respondents offer for the first time a theory regarding the legal status of the two reservoirs. According to respondents, the excavation and construction of the two reservoirs is exempt from the definition of "surface mining," at DCC 18.04.030, and hence excluded from the "surface mining" land use category.[11] Specifically, respondents argue that excavation and

---

[10] Although, as petitioners note, it is not clear why the end uses of water that KCDG identified—for aesthetic landscaping, fire prevention and irrigation—require storage of water in open reservoirs. Groundwater used for landscaping, fire prevention or irrigation on the property could possibly be pumped directly from the ground, depending on the volume required at any given time, rather than be pumped from the reservoir. Neither the LUCS decision nor KCDG on appeal explains why the proposed end use of water requires storage in the two reservoirs.

[11] DCC 18.04.030 defines the term "surface mining" in relevant part:

construction of the reservoirs is excluded from the definition of "surface mining" at DCC 18.04.030 because it involved excavation or grading operations conducted by the landowner in the process of "on-site construction[.]" We understand respondents to argue that the "on-site

---

"'Surface mining' means

"A. Includes:

"1. All or any part of the process of mining by removal of the overburden and extraction of natural mineral deposits thereby exposed by any method including, open pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for access roads; and

"2. Mining which involves more than 1,000 cubic yards of material or excavation prior to mining of a surface area of more than one acre.

"B. Does not include:

"1. The construction of adjacent or off-site borrow pits which are used for access roads to the surface mine;

"2. Excavation and crushing of sand, gravel, clay, rock or other similar materials conducted by a landowner, contractor or tenant on the landowner's property for the primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and *other on-site construction*, or nonsurface impacts of underground mines[.]" (Emphasis added.)

construction" that the excavation and grading furthered was the construction of the reservoirs themselves.

In their motion to strike the reply, petitioners argue that respondents' new theory goes to the merits of the appeal, and does not provide a basis for LUBA to conclude that the exclusion at ORS 197.015(10)(b)(A) applies, for decisions made under standards that do not require interpretation or legal judgment. Petitioners argue that, if given the chance, they will demonstrate that the county erred to the extent it relied upon the exemption for "on-site construction" in the definition of "surface mining" in DCC 18.04.030 to authorize the excavation and construction of the two reservoirs.

We agree with petitioners that respondents' new theory regarding the legal status of the two reservoirs does not establish that the LUCS decision was issued under land use standards that do not require interpretation or the exercise of legal judgment. The most obvious problem is that the LUCS decision did not adopt the theory articulated in respondents' reply, or even address the definition of surface mining the theory is based on. Even if that theory were deemed to be implicit in the LUCS decision, we agree with petitioners that some interpretation of DCC 18.04.030, and other contextual provisions, is necessary to reach any conclusion regarding whether the two reservoirs were authorized under the exemption to the definition of "surface mining" in DCC 18.04.030. Among other problems, the exemption provides that excavation and grading in the process of "on-site construction" is *not*

"surface mining," but it does not say what such excavation and grading *is*, or purports to independently authorize such activities. It could be that excavation and grading in the process of "on-site construction" is permitted as an adjunct to "on-site construction," but the structure that is constructed must be authorized elsewhere in the applicable zone. Respondents' apparent interpretation of the "surface mining" definition, that excavation of a hole in the ground is self-authorizing as a land use, because the excavation itself constitutes the "on-site construction" that exempts the excavation from the scope of "surface mining," is at best only one interpretation, and perhaps not the correct interpretation, of DCC 18.04.030.

In any case, no matter how the DCC 18.04.030 definition of "surface mining" is interpreted, the fact that it requires interpretation at all defeats respondents' argument that the standards applied in the LUCS decision do not require interpretation or the exercise of legal judgment, for purposes of the ministerial exclusion at ORS 197.015(10)(b)(A). Accordingly, we conclude that the challenged decision is not excluded under ORS 197.015(10)(b)(A) from the definition of "land use decision."

2. ORS 197.015(10)(b)(H)(ii)

We turn then to respondents' argument that the challenged LUCS decision is subject to the exclusion at ORS 197.015(10)(b)(H)(ii), for LUCS decisions that determine that the land use associated with a state agency permit or action is "allowed without review" under local land use legislation.

ORS 197.015(10)(b)(H)(i) through (iii) apply to a LUCS decision that, essentially, categorizes a proposed land use in one of three ways: (1) as already approved, (2) as allowed without land use review, or (3) as allowed with future land review. *See* n 6. A LUCS decision that reaches some other conclusion, *e.g.*, that the proposed land use is not allowed under local land use regulations, is presumably not subject to the exclusion. Further, we have held that, given the wording of ORS 197.015(10)(b)(H), an exclusion under that provision applies only if the local government correctly categorizes the proposed use as falling within the scope of the relevant exclusion. *McPhillips v. Yamhill County*, 66 Or LUBA 355, 360 (2012), *aff'd* 256 Or App 402, 300 P3d 299 (2013).

For many of the same reasons discussed under the ministerial exception at ORS 197.015(10)(b)(A), we conclude that respondents have not demonstrated that the exclusion at ORS 197.015(10)(b)(H)(ii) applies. As noted, the county's LUCS decision concludes that the DCC does not regulate the end uses to which the groundwater will be put, aesthetic landscaping, emergency fire protection, and irrigation pass-throughs to the property owner. However, the decision does not identify the *land use or uses* served by the proposed use of water. The county may have implicitly viewed the pertinent land use to be the single-family dwelling located on one of the parcels that

make up the subject tract.[12] But even if we assume that to be the case, the decision makes no attempt to evaluate the legal status of the two reservoirs that will be used to store the groundwater, or to connect the two reservoirs to the single-family dwelling in any way. The first theory offered by respondents on appeal, that the reservoirs or the storage of water in the reservoirs is accessory to the dwelling, was withdrawn. The second theory, that excavation and construction of the two reservoirs is permitted without review because it constitutes "on-site construction" exempted from the definition of "surface mining," is problematic, as discussed above.

As noted, an exclusion at ORS 197.015(10)(b)(H) applies to deprive LUBA of jurisdiction it would otherwise exercise over a LUCS decision only if LUBA can conclude, based on the arguments and evidence presented, that the local government correctly categorized the land use at issue in a manner that brings it within the ambit of one of the exclusions. *McPhillips*, 66 Or LUBA at 360. As explained, the LUCS decision does not identify, much less categorize, the land use(s) served by the proposed use of groundwater, and makes no attempt to evaluate the legal status of the two reservoirs that are apparently a key structural element of the proposed use of water. Given these deficiencies, we cannot say that respondents have established that the LUCS decision

---

[12] Or possibly some unidentified agricultural use for the proposed pass-through irrigation. Petitioners argue, and respondents do not dispute, that there is little or no agricultural use on the subject tract.

correctly categorizes the land uses at issue in a manner that brings the decision within the ambit of the exclusion at ORS 197.015(10)(b)(H)(ii).

Accordingly, the motion to dismiss LUBA No. 2017-003 is denied.

C. Conclusion

In resolving the motions to dismiss, we have attempted to refrain from commenting on the likely merits of the two appeals. Nonetheless, our analysis necessarily highlighted several deficiencies in the December 14, 2016 LUCS decision that will likely be a problem for respondents in defending the decision on the merits, whether those merits are ultimately reviewed by LUBA, or by the circuit court after transfer, as petitioners have requested in the event LUBA concludes that it lacks jurisdiction over either appeal. Under these circumstances, we suggest that the more expeditious course may be for the parties to stipulate to (1) voluntary dismissal of LUBA No. 2017-002, the appeal of the December 30, 2016 e-mail rejecting the local appeal, and (2) voluntary remand of LUBA No. 2017-003, the December 14, 2016 LUCS decision. Absent such a stipulation that is filed with LUBA within 21 days of the date of this order, LUBA will proceed to resolve the pending record objections.

Dated this 21st day of March, 2017.

_____

Tod A. Bassham
Board Member