

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 THOMAS BISHOP, DORBINA BISHOP,
5 and TRUSTEES OF THE BISHOP
6 FAMILY TRUST,
7 *Petitioners,*

8
9 and

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11 CENTRAL OREGON LANDWATCH,
12 *Intervenor-Petitioner,*

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14 vs.

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16 DESCHUTES COUNTY,
17 *Respondent,*

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19 and

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21 KC DEVELOPMENT GROUP, LLC,
22 *Intervenor-Respondent.*

23
24 LUBA Nos. 2017-002 and 2017-003

25
26 ORDER

27 **INTRODUCTION**

28 In LUBA No. 2017-003, petitioners appeal a county land use
29 compatibility statement (LUCS) issued on December 14, 2016 regarding a
30 proposal to fill two reservoirs with groundwater. In LUBA No. 2017-002,
31 petitioners appeal a county decision rejecting their local appeal of the
32 December 14, 2016 LUCS decision. The two appeals seek review of closely
33 related decisions, and accordingly were consolidated for review. Before the

1 Board is intervenor-respondent KC Development Group, LLC's (KCDG's)
2 motion to dismiss and reply, petitioners' motion to suspend timelines and
3 petitioners' objections to the record.¹

4 **MOTION TO SUSPEND TIMELINES**

5 Petitioners have withdrawn their motion to suspend timelines in this
6 review proceeding. Accordingly, the Board will not consider the motion or
7 KCDG's responses thereto.

8 **MOTION TO FILE REPLY; MOTION TO STRIKE**

9 KCDG filed a motion to dismiss these appeals as moot, based on
10 KCDG's filing of new land use applications with the county, supported by a
11 new LUCS decision. We address the merits of that motion below. Petitioners
12 filed a response, arguing that these appeals are not moot because the county has
13 not rescinded or withdrawn the December 14, 2016 LUCS decision at issue.
14 KCDG then filed a reply to petitioners' response. Petitioners move to strike
15 KCDG's reply arguing that LUBA's rules do not provide for filing a reply, and
16 LUBA's practice is to consider a reply only if it addresses new issues raised in
17 a response to a motion. *Setniker v. Polk County*, 65 Or LUBA 49 (2012);

¹ On this date, we also issue a separate order in a companion consolidated appeal, LUBA No. 2017-018/-019. LUBA No. 2017-018 concerns petitioners' appeal of a subsequent LUCS decision concluding that temporarily filling the same two reservoirs with groundwater pursuant to a state agency (Oregon Water Resource Department (OWRD)) permit is a use allowed without review under Deschutes County's land use regulations. LUBA No. 2017-019 is an appeal of the county's decision rejecting petitioners' local appeal of the LUCS decision at issue in LUBA 2017-018.

1 *Frevach Land Co. v. Multnomah County*, 38 Or LUBA 729 (2000). According
2 to petitioners, the reply does not address new issues raised in the response, but
3 rather embellishes arguments made in KCDG’s motion or adds new arguments.

4 Where mootness is at issue, the jurisdictional arguments tend to evolve
5 over the course of the pleadings or can be updated by more recent events.
6 KCDG’s reply memorandum adds a new argument to its claim that these
7 appeals are now moot, based on a letter KCDG recently sent to Oregon Water
8 Resource Department (OWRD), and petitioners have responded to that new
9 argument in their motion to strike. We will consider both the reply
10 memorandum and petitioners’ countervailing arguments, for what they are
11 worth, in resolving the motion to dismiss.

12 **FACTUAL BACKGROUND**

13 On March 21, 2017, LUBA issued an order denying KCDG’s initial
14 motion to dismiss these appeals. *Bishop v. Deschutes County*, __ Or LUBA __
15 (LUBA Nos. 2017-002/003, Order, March 21, 2017). That order includes a full
16 factual background up to the date of the order. For purposes of resolving
17 KDCG’s second motion to dismiss based on mootness, we provide the
18 following summary and additional background.

19 The December 14, 2016 LUCS at issue in LUBA No. 2017-002
20 evaluated the following proposal to fill the two reservoirs:

21 “[O]ne-time fill plus 44 acre feet per year in mitigation water to be
22 stored in 2 ponds by [KCDG] for landscape aesthetics, emergency
23 fire protection, and temporary pass-through irrigation water for
24 personal irrigation use by [KCDG] * * *.” Record 13.

1 A county planner concluded that the proposed land uses were allowed outright
2 or not regulated by the county’s comprehensive plan, because, as the LUCS
3 explains:

4 “The Deschutes County Zoning Code does not regulate the use of
5 water to be stored in 2 ponds for aesthetic landscaping, emergency
6 fire protection, or pass-through irrigation for the property owner.”
7 Record 14.

8 On February 3, 2017, KCDG and Deschutes County filed a joint motion
9 to dismiss the LUBA No. 2017-002 and -003 appeals, arguing that the
10 December 14, 2016 LUCS decision was not a “land use decision” subject to
11 LUBA’s jurisdiction. On March 21, 2017, we issued an order denying the
12 motion to dismiss, and in so doing noted several deficiencies in the December
13 14, 2016 LUCS decision that, we opined, would make the decision difficult to
14 defend on the merits regardless of whether LUBA or the circuit court exercised
15 jurisdiction over the appeal. The appeals remained suspended, however, under
16 pending record objections, and also to allow the parties the opportunity to
17 negotiate a voluntary remand. Negotiations were apparently unsuccessful, and
18 LUBA continued the suspension until August 31, 2017, after being informed
19 that petitioners had filed an action for declaratory judgment in circuit court
20 seeking to enforce earlier county decisions regarding the reservoirs.

21 Meanwhile, on July 28, 2017, KCDG submitted a series of new land use
22 applications to the county, seeking a conditional use permit for a 10-unit
23 subdivision and planned development and a conditional use permit for a
24 recreation-oriented facility to authorize the ponds on the property to be used for

1 motorized boating, as part of the planned development. In addition, KCDG
2 submitted a conditional use application for surface mining in conjunction with
3 an irrigation district and a post-acknowledgment plan amendment to authorize
4 the TID to utilize the ponds for irrigation storage. As before, KCDG requested
5 an OWRD permit for the proposed storage of water in the two reservoirs:

6
7 “One time fill plus 44 acre-feet per year to be stored in 2 ponds for
8 aesthetics, emergency fire protection, temporary pass-through for
9 private irrigation (‘bulge in the system’) and for recreation
10 purposes.” Petitioners’ Response to Motion to Dismiss, Exhibit 2,
11 2.

12 OWRD sent its LUCS form to the county, requesting that the county
13 categorize the land uses associated with the proposed water storage and
14 determine whether those land uses are allowed outright or allowed with
15 conditional or discretionary land use approvals. On August 17, 2017, the
16 county planning manager issued a new LUCS decision, indicating that
17 discretionary land-use approvals were required, and were being presently
18 pursued:

19
20 “Land use approval is required for a plan amendment, tentative
21 plat, conditional use permit, site plan, and lot line adjustments for
22 a clustered subdivision and recreation on large acreage (water ski
23 lake). KCDG has applied to the County for all necessary land use
24 approvals.” Petitioners’ Response to Motion to Dismiss, Exhibit 2,
25 3.

26 **MOTION TO DISMISS LUBA No. 2017-003**

27 KCDG moves to dismiss the appeal of the December 14, 2016 LUCS
28 decision, arguing that that decision is moot given that KCDG has proposed a

1 different land use (and water permit) involving the two reservoirs, and the
2 county is presently processing the required land use applications. Petitioners
3 oppose the motion, arguing that KCDG’s filing of new land use applications
4 does not supersede the county’s December 14, 2016 LUCS, which remains in
5 effect as a potential basis for an OWRD water permit supporting identified land
6 uses of the subject property, until the county takes action to withdraw or
7 supersede that LUCS decision.

8 LUBA is required to issue its decisions “consistently with sound
9 principles governing judicial review.” ORS 197.805. Accordingly, LUBA has
10 held that its jurisdiction does not include review of land use decisions that have
11 been withdrawn, superseded or are no longer valid for some reason, because
12 LUBA’s review of such decisions would be advisory. *Tice v. Josephine*
13 *County*, 21 Or LUBA 550, 553 (1991) (citing *Brady v. Douglas County*, 7 Or
14 LUBA 251 (1983)).

15 In the present case, we understand KCDG to argue that it has now
16 abandoned any reliance on the December 14, 2016 LUCS decision, and instead
17 has chosen to seek the necessary county land use approvals and related OWRD
18 permits under an entirely different land use proceeding. However, as
19 petitioners argue, the applicant’s current intent to proceed under one set of land
20 use approvals does not necessarily render another set of land use approvals
21 ineffective. Unless and until the county takes action to withdraw, revoke or
22 supersede the December 14, 2016 LUCS decision, it remains as a potential

1 basis for KCDG to seek OWRD water permits and as a final and binding
2 county decision that the land uses identified in the application for the
3 December 14, 2016 LUCS decision are allowed outright in the rural residential
4 zone. As far as we know, nothing would prevent KCDG from withdrawing its
5 new land use applications and choosing to proceed under the authority of the
6 December 14, 2016 LUCS.

7 KCDG does not cite to any language in the August 17, 2017 LUCS
8 decision, or any other county decision, that purports to amend, rescind or
9 supersede the December 14, 2016 LUCS decision. If the two LUCS decisions
10 evaluated the *same* proposed land use under the county's code, it could be
11 argued that the county intended to supersede the earlier LUCS decision.
12 However, the August 17, 2017 LUCS decision evaluates a very different land
13 use proposal than the December 14, 2016 LUCS, and adds a new proposal for
14 the use of the water stored in the two reservoirs (recreation use). Thus, there is
15 no basis to infer that the county intended the August 17, 2017 LUCS to
16 supersede the December 14, 2016 LUCS.

17 KCDG also does not argue that it has *asked* the county to rescind or
18 withdraw the December 14, 2016 LUCS, or to supersede that decision with a
19 new one.² The county would presumably do so, if KCDG made that request,

² Generally, local governments lack the authority to amend or modify a decision that is on appeal to LUBA. *Standard Insurance Co. v. Washington County*, 17 Or LUBA 647, 660, *rev'd on other grounds* 97 Or App 687, 776 P2d 1315 (1989). However, local governments retain the authority to issue a

1 but KCDG has apparently not done so. In its reply, KCDG provides a
2 September 12, 2017 letter it sent to OWRD asking the agency to “substitute”
3 the pending county land use applications for the materials it had earlier
4 provided OWRD, in seeking the OWRD water permit that prompted the county
5 to issue the December 14, 2016 LUCS. Reply, Exhibit 2. We understand
6 KCDG to argue that it has effectively asked OWRD to withdraw the state
7 agency permit application that led the county to issue the December 14, 2016
8 LUCS decision. If that is the case, then the county could possibly rely on that
9 letter to issue a new decision that rescinds or withdraws the December 14, 2016
10 LUCS decision. Until the county does so, however, the December 14, 2016
11 LUCS decision remains a valid decision determining that the state agency
12 action requested by KCDG serves an allowed use in the applicable zone, and
13 thus we still have a live controversy. Accordingly, KCDG has not demonstrated
14 that this appeal of the December 14, 2016 LUCS is moot.

15 KCDG’s Motion to Dismiss LUBA No. 2017-003 is denied.

16 **MOTION TO DISMISS LUBA No. 2017-002**

17 KCDG also moves to dismiss LUBA No. 2017-002 on the same
18 mootness grounds. The subject of LUBA No. 2017-002 is a December 30,
19 2016 e-mail from a senior county planner to petitioners’ attorney, rejecting
20 their local appeal of the county’s December 14, 2016 LUCS decision. The e-

new decision that rescinds or expressly supersedes the decision on appeal. In that event, LUBA typically dismisses the appeal of the original decision, as moot. *Jacobsen v. Douglas County*, 62 Or LUBA 461 (2010).

1 mail states in relevant part: “DCC 22.32.050 only allows the applicant, his or
2 her representatives, and his or her witnesses to participate in an appeal of a
3 LUCS. For this reason, the Planning Division has not accepted the appeal
4 request and will return the \$250 check to your attention.” Supp. Record 2.

5 KCDG argues that the appeal of the December 30, 2016 e-mail is also
6 moot, because the appeal of the underlying decision, the December 14, 2016
7 LUCS decision, is moot. We agree with KCDG that if we conclude that LUBA
8 No. 2017-002 is moot, the same conclusion would govern the derivative appeal
9 of the December 30, 2016 decision rejecting petitioners’ local appeal, at issue
10 in LUBA No. 2017-003. However, as explained above, KCDG has not
11 demonstrated that the county has taken any action or issued any new decision
12 that purports to rescind or supersede the December 14, 2017 LUCS decision.
13 The county has also not taken any action to rescind or supersede its December
14 30, 2016 decision that no local appeal is available to petitioners. Until the
15 county takes one or the other of those actions, or some similar action, the
16 appeal of the county decision to deny petitioner’s local appeal of the December
17 14, 2016 LUCS is not moot.

18 KCDG’s motion to dismiss LUBA No. 2017-002 is denied.

19 **RECORD OBJECTIONS**

20 The next event in these consolidated review proceeding is to resolve
21 record objections. On February 8, 2017, petitioner filed objections to the
22 record. On February 9, 2017 the county transmitted a supplemental record in

1 partial response to those record objections. Both the county and KCDG filed a
2 response to petitioners’ record objections, disputing some objections. We now
3 resolve the outstanding objections.

4 **A. Objection 1**

5 Petitioners argue that the consolidated record omits the December 30,
6 2016 decision rejecting petitioners’ appeal. The county submitted a
7 supplemental record that includes the decision. This objection is resolved.

8 **B. Objection 2**

9 Petitioners argue the record omits 27 attachments to petitioners’ appeal
10 letter. Petitioner contends those omitted attachments should be included in the
11 record, because these records were “placed before” the final decision maker
12 and were not rejected. OAR 661-010-0025(1)(b) (the record includes all
13 documents “placed before, and not rejected by,” the final decision maker).

14 In response, the county and KCDG argue that the 27 attachments, which
15 consist of approximately 2800 pages of documents and a compact disc, were
16 properly excluded from the record because the planner who rejected
17 petitioner’s local appeal did not consider those materials, but rather returned
18 them to petitioners and thus “rejected” them. Supp. Record 2.

19 We agree with respondents that, while petitioners provided the county
20 with the exhibits in question, the county planner effectively “rejected” the
21 exhibits by returning them to petitioners, after concluding that petitioners had
22 no right of local appeal. In the appeal of the December 30, 2016 decision

1 rejecting their local appeal, petitioners can assign error, if they choose, both to
2 the conclusion that petitioners have no right of local appeal and the planner's
3 decision to reject the exhibits. But for purposes of resolving the content of the
4 local record, the rejected materials are not part of the local record. This
5 objection is denied.

6 The record is settled as of the date of this order. Unless the parties
7 stipulate to a different schedule or the Board orders otherwise, the petition for
8 review shall be due 21 days from the date of this order. The response briefs
9 shall be due 42 days from the date of this order. The Board's final opinion and
10 order shall be due 77 days from the date of this order.

11 Dated this 3rd day of November, 2017.

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Tod A. Bassham
Board Member