

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 PAUL LIPSCOMB, ARCHIE BLEYER,
12 KEN GRAHAM, GISELA RYTER,
13 JANET SLEATH, PAUL SLEATH,
14 CENTRAL OREGON LANDWATCH,
15 ROY DWYER, SUSAN STRAUSS,
16 JEFF COUGHENOUR and SUSAN COUGHENOUR
17 *Intervenors-petitioners,*

18
19 vs.

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21 DESCHUTES COUNTY,
22 *Respondent,*

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24 and

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26 TANAGER DEVELOPMENT, LLC,
27 and KC DEVELOPMENT GROUP, LLC,
28 *Intervenors-Respondents.*

29
30 LUBA Nos. 2018-111 and 2018-112

31
32 ORDER

33 **MOTIONS TO INTERVENE**

34 Paul Lipscomb, Archie Bleyer, Ken Graham, Gisela Ryter, Janet Sleath,
35 Paul Sleath, Central Oregon Landwatch, Roy Dwyer, Susan Strauss, Jeff

1 Coughenour, and Susan Coughenour move to intervene on the side of
2 petitioners. There is no opposition to the motions, and they are allowed.

3 The applicants below, Tanager Development, LLC, and KC
4 Development Group, LLC (collectively, intervenors), move to intervene in both
5 of these consolidated appeals on the side of the respondent. There is no
6 opposition to their motions, and they are allowed.

7 **INTERVENORS' REQUEST TO EXTEND DEADLINES**

8 On September 13, 2018, petitioners filed a motion to suspend these
9 consolidated appeals. On September 21, 2018, intervenors filed a motion to
10 extend the deadline to file a response to petitioners' motion to suspend.
11 Petitioners oppose intervenors' request for an extension. On September 27,
12 2018, intervenors filed responses to petitioners' motion to suspend, thus
13 making it unnecessary to resolve the parties' dispute over the requested
14 extension.

15 **PETITIONERS' MOTION TO FILE REPLY**

16 Petitioners move for leave to file a reply to the responses to its motion to
17 suspend these appeals, discussed below. The motion is granted.

18 **PETITIONERS' MOTION TO SUSPEND APPEALS**

19 The two decisions challenged in these appeals approve conditional use
20 permits and related county approvals for residential and recreational
21 development involving two reservoirs that in 2014 were excavated without

1 county approval, including a 13-acre lake designed for water-skiing.¹ We refer
2 to the decisions before us in these appeals as the 2018 Decisions. Petitioners
3 move to suspend the current review proceeding until a separate line of
4 litigation currently before the Court of Appeals is concluded. Intervenor-
5 petitioner Central Oregon Landwatch joins petitioners' motion. Intervenor
6 oppose the motion. We first set forth the background necessary to understand
7 the dispute.

8 **A. Background**

9 In 2014, petitioners complained to the county about the newly excavated
10 reservoirs, leading to a county enforcement proceeding, which in turn prompted
11 a series of applications and related county decisions and appeals. In that
12 litigation, the county determined that excavation and use of the reservoirs
13 require county land use approval, as a mining operation and large-scale
14 recreational facility. That determination was affirmed on appeal. *Bishop v.*
15 *Deschutes County*, 72 Or LUBA 103 (2015).

16 In 2016, intervenor KC Development Group, LLC, filed conditional use
17 applications for surface mining and a large acreage recreational facility, which

¹ Specifically, intervenors applied for and received county approval for (1) a conditional use permit for surface mining of a mineral and aggregate resource and a comprehensive plan amendment that modifies the county's inventory of non-significant mining resources, and (2) a conditional use permit for a large-acreage recreational facility, planned unit residential development, site plan review, and related approvals.

1 the county hearings officer denied after concluding that the evidence the
2 applicant submitted in that proceeding did not demonstrate that the proposed
3 development complied with applicable conditional use permit standards. We
4 refer to this denial decision as the 2016 Decision. In the 2016 Decision, the
5 hearings officer did not determine that there is no possible development
6 involving the reservoirs that could be approved under the county's land use
7 code, or order the removal of the reservoirs. We understand that the present
8 applications represent a separate and now successful attempt by intervenors to
9 obtain county conditional use permit approval to construct and use the
10 reservoirs as a use permitted in the rural residential zone that applies to the
11 property.

12 In December 2016, intervenors requested that the county issue a land use
13 compatibility statement (LUCS) that was required in order to obtain permits
14 from the Oregon Water Resources Department (OWRD) to store and use the
15 water in the two reservoirs for aesthetic, landscaping and fire-fighting
16 purposes. We refer to this decision as the 2016 LUCS Decision. The 2016
17 LUCS Decision concluded that the limited use of water stored in the two
18 reservoirs as proposed in intervenors' request for a LUCS did not require
19 county land use approval. Petitioners' appealed the 2016 LUCS decision to
20 LUBA, and that appeal and related appeals were suspended for some time
21 based on jurisdictional motions.

1 Meanwhile, in May 2017, petitioners filed an action for declaratory and
2 injunctive relief in circuit court to enforce the 2016 Decision and, ultimately, to
3 seek removal of the two reservoirs.

4 In July 2017, while the appeal of the 2016 LUCS Decision was pending
5 before LUBA, and while petitioners' declaratory ruling action was pending
6 before the circuit court, intervenors filed with the county the applications for
7 residential and recreational land uses resulting in the 2018 Decisions now on
8 appeal to LUBA. At the same time, intervenors requested that the county issue
9 a new LUCS based on the pending residential and recreational land use
10 applications. The county issued the new LUCS in August 2017, concluding
11 that excavation and the proposed use of the reservoirs to support residential
12 and recreational uses would be lawful if the county approved the pending land
13 use applications. We refer to this decision as the 2017 LUCS Decision.

14 Thereafter, intervenors requested that OWRD and the county treat the
15 2017 LUCS Decision as substituting for or replacing the 2016 LUCS Decision
16 then pending on appeal before LUBA. Subsequently, the county planning
17 director issued a document that LUBA determined had the intent and effect of
18 withdrawing the 2016 LUCS Decision then on appeal to LUBA. Because the
19 2016 LUCS Decision had been withdrawn, LUBA concluded that the appeal of
20 that decision was moot and dismissed that appeal and related appeals. *Bishop*
21 *v. Deschutes County*, __ Or LUBA __ (LUBA Nos. 2017-002/003, Jan 5,

1 2018); *Bishop v. Deschutes County*, __ Or LUBA __ (LUBA Nos. 2017-
2 018/019, Jan 5, 2018).

3 Meanwhile, in August and September 2017, while the 2016 LUCS
4 Decision was pending before LUBA, the circuit court heard argument on a
5 motion to dismiss petitioners’ declaratory judgment action. The circuit court
6 ultimately agreed with the county and intervenors that the circuit court lacked
7 jurisdiction to enforce the 2016 Decision and to grant the requested declaratory
8 and injunctive relief, because the legal issues presented were the same or
9 similar issues then pending before LUBA in the appeal of the 2016 LUCS
10 Decision. Accordingly, on October 2, 2017, the court entered judgment
11 dismissing the action. Petitioners have appealed the circuit court decision to
12 the Court of Appeals, where the matter is now pending. *Bishop v. KC*
13 *Development Group, LLC* (A166238).

14 During the period when LUBA and the circuit court were grappling with
15 jurisdictional issues, the county continued to process intervenor’s 2017
16 conditional use permit applications for residential and recreational
17 development, which involved retroactive approval of the reservoirs and
18 approval of their use as part of the requested residential and recreational
19 development. On August 23, 2018, the county issued two decisions, the 2018
20 Decisions, approving intervenors’ applications. As noted, petitioners appealed
21 the 2018 Decisions to LUBA, and LUBA consolidated the present appeals for
22 review.

1 **B. Motion to Suspend**

2 Turning to the present motion, petitioners argue that LUBA should
3 suspend review proceedings on these consolidated appeals, pending final
4 resolution of the appeal of the circuit court decision now pending before the
5 Court of Appeals. Petitioners state that they expect the Court of Appeals to
6 reverse the circuit court’s dismissal and remand the matter back to the circuit
7 court to consider petitioners’ claims for declaratory and injunctive relief. If the
8 circuit court grants that relief, petitioners argue, it could conflict with or moot
9 LUBA’s resolution of the issues advanced in the present appeals.
10 Notwithstanding that LUBA’s review of the 2018 Decisions and a potential
11 future circuit court review of petitioners’ declaratory ruling action would
12 involve discrete legal issues and legal standards, petitioners contend that
13 resolution of the circuit court proceeding could moot LUBA’s review, because
14 one possible outcome of a circuit court proceeding is an order granting
15 petitioners’ requested injunctive relief in the form of ordering the removal of
16 the reservoirs. If the reservoirs no longer exist, petitioners argue, then LUBA’s
17 review of the 2018 Decisions would become advisory.

18 Intervenors respond, and we agree, that petitioners have not established a
19 legal basis for LUBA to suspend the present appeals pending the final
20 resolution of petitioners’ appeal of the circuit court order dismissing their
21 action seeking to enforce the 2016 Decision. LUBA is a creature of statute,
22 and can exercise only those powers granted by the legislature. The statutes

1 governing LUBA’s review implement two legislative policies, articulated at
2 ORS 197.805:

3 “It is the policy of the Legislative Assembly that time is of the
4 essence in reaching final decisions in matters involving land use
5 and that those decisions be made consistently with sound
6 principles governing judicial review. It is the intent of the
7 Legislative Assembly in enacting ORS 197.805 to 197.855 to
8 accomplish these objectives.”

9 The policy that “time is of the essence in reaching final decisions in matters
10 involving land use” is embodied in part by several statutory deadlines,
11 including ORS 197.830(10)(a), which requires that the local government
12 transmit the local record with LUBA within 21 days after service of the notice
13 of intent to appeal, and ORS 197.830(14), which requires that LUBA “shall
14 issue a final order within 77 days after the date of transmittal of the record.”
15 ORS 197.840 provides a limited set of exceptions to that 77-day deadline, but
16 petitioners do not argue that a basis exists under ORS 197.840 to suspend the
17 77-day deadline in the present case.

18 Instead, petitioners argue only that suspension would be appropriate for
19 purposes of the second policy set out in ORS 197.805: that LUBA’s review be
20 conducted “consistently with sound principles governing judicial review.”
21 Petitioners argue that proceeding with LUBA’s review of petitioners’
22 challenges to the 2018 Decisions before us, while the proceedings in their
23 appeal of the circuit court decision play out, would be inconsistent with sound
24 principles of judicial review. Petitioners contend that if they are successful in

1 returning their enforcement action to circuit court and obtaining a circuit court
2 order to remove the reservoirs, then that order could moot the present appeals.
3 According to petitioners, proceeding to resolve the merits of a land use appeal
4 when there is a chance that a future circuit court decision might order removal
5 of a structure on which the appealed decision is based would not be an efficient
6 use of judicial resources.

7 The efficient use of judicial resources seems more of a prudential
8 consideration rather than a “sound principle[] governing judicial review.” But
9 even if it is properly viewed as a “principle[] governing judicial review” it is
10 not clear that the statutory policy that LUBA’s review be conducted
11 consistently with sound principles of judicial review constitutes sufficient
12 statutory authority in itself for LUBA to suspend, over the objection of a party,
13 the statutory deadlines that otherwise govern this appeal. However, for
14 purposes of resolving petitioners’ motion we will assume without deciding that
15 ORS 197.805 grants LUBA the inherent authority in appropriate circumstances
16 to suspend an appeal over the objections of a party.

17 Even with that assumption, petitioners have failed to demonstrate that
18 judicial efficiency or any other “sound principle[] governing judicial review”
19 supports suspending the present appeals. Specifically, petitioners have not
20 established that LUBA’s resolution of the present appeal could be rendered
21 moot if the circuit court ultimately decides, in a future remand proceeding from
22 the Court of Appeals, to grant petitioners the full injunctive relief they seek.

1 Petitioners’ mootness argument is based on multiple layers of
2 speculation piled on speculation. Petitioners ask us to assume that they will
3 prevail at the Court of Appeals, and then not only prevail in the subsequent
4 declaratory judgment action but receive the full extent of their requested relief:
5 a circuit court order to remove the disputed reservoirs based on the 2016
6 Decision and/or inconsistency with the county’s land use code. Among the
7 flaws in that chain of speculation is the reality that it is *extremely* unlikely that
8 the circuit court would issue an order based on the 2016 Decision or the
9 county’s land use code requiring the removal of the reservoirs, *if* the county has
10 issued a land use decision that authorizes the existence and use of the reservoir
11 as a conditional use under the county’s land use code, such as the 2018
12 Decisions before us in these appeals. As intervenors point out, the county
13 board of commissioners in the 2018 Decisions before us expressly stated that
14 the decisions are intended to supersede and replace the 2016 Decision.
15 Tanager Development LLC’s Response to Petitioners’ Motion to Suspend
16 Timelines 10. And if the county has actually issued land use approvals for the
17 reservoirs under its land use code, then it will be difficult for petitioners to
18 establish that the reservoirs must be removed because they are not authorized
19 under the county’s land use code. Therefore, if anything, considerations of
20 judicial efficiency would suggest that LUBA’s review of the 2018 Decisions
21 should be concluded before the circuit court is asked to determine whether

1 declaratory and injunctive relief should be granted, based on the 2016 Decision
2 or the county's land use code, to effect the removal of the reservoirs.

3 For the foregoing reasons, petitioners have not demonstrated any basis to
4 suspend the current review proceeding, and petitioners' motion is therefore
5 denied.²

6 **FILING OF THE RECORD**

7 The next event in this review proceeding is the filing of a consolidated
8 record. The county shall transmit the consolidated local record within 21 days
9 of the date of this order.

10 Dated this 12th day of October, 2018.

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Tod A. Bassham
Board Member

² Denial of petitioners' motion to suspend makes it unnecessary to consider intervenors' motion to strike certain documents attached to petitioners' motion.