

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

3
4 ANNUZIATA GOULD,
5 *Petitioner,*

6
7 and

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9 CENTRAL OREGON LANDWATCH,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 DESCHUTES COUNTY,
15 *Respondent,*

16
17 and

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19 CENTRAL LAND & CATTLE COMPANY, LLC,
20 *Intervenor-Respondent.*

21
22 LUBA No. 2019-136

23 ORDER

24 **MOTIONS TO INTERVENE**

25 Central Oregon Landwatch moves to intervene on the side of petitioner.
26 Central Land and Cattle Company, LLC (CLCC), moves to intervene on the side
27 of respondent. There is no opposition to the motions, and they are granted.

28 **MOTION TO SUSPEND**

29 This appeal concerns a long-lived dispute over a planned destination resort
30 that has been before LUBA and the Court of Appeals numerous times since 2006.
31 Most recently, on June 21, 2019, we remanded a county hearings officer's

1 decision approving a tentative plan, site plan review, and site plan review
2 application modification for phased development of the destination resort. *Gould*
3 *v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-140, June 21, 2019)
4 (*Gould VII*), *appeal dismissed*, Order Entered July 18, 2019 (A171603), *rev*
5 *allowed*, 365 Or 819 (2019). Our remand was narrow. We concluded that a
6 condition of approval violated the right to a public hearing on whether a disputed
7 standard will be satisfied by mitigation water from sources not specified in the
8 mitigation plan. We concluded that, on remand, the county must consider
9 whether, without that condition, the tentative plan satisfies the standard and
10 whether a change in the source of mitigation water constitutes a substantial
11 change to the approval, requiring a new application, modification of the
12 application, or other further review consistent with destination resort regulations.
13 *Id.*, ___ Or LUBA ___, ___ (slip op at 32).

14 Petitioner sought judicial review of our decision in *Gould VIII* by mailing
15 a petition for judicial review by first-class mail to the Court of Appeals. The
16 Court of Appeals received the petition on July 15, 2019 and dismissed the appeal
17 on its own motion, reasoning that the petition for judicial review was not timely
18 filed. *Gould v. Deschutes County* (A171603). The court subsequently denied
19 petitioner’s motion for reconsideration of the court’s order of dismissal. On
20 December 12, 2019, the Supreme Court allowed review. *Gould v. Deschutes*
21 *County* (S067074). The issue on review is whether petitioner’s petition for review

1 in the Court of Appeals was deemed filed on the date it was sent by first-class
2 mail. Oral argument in that case is set for May 4, 2020.

3 Meanwhile, in late summer 2019, while petitioner’s petition for Supreme
4 Court review was pending before the court, the county began proceedings on
5 remand from our decision in *Gould VIII* and issued a decision on November 25,
6 2019. That decision is challenged in this appeal. During the county proceedings
7 on remand, petitioner argued that the county lacked jurisdiction to issue a final
8 decision on remand while her appeal of our decision in *Gould VIII* remains
9 pending before the Court of Appeals or the Supreme Court.¹ Record 594-95. The
10 county rejected that argument and determined that it had jurisdiction to issue a
11 final decision on remand, notwithstanding the pending petition for review in the
12 Supreme Court. The county reasoned that the Court of Appeals never obtained
13 jurisdiction because petitioner failed to timely file her petition for judicial review.
14 Record 26. On the merits, the county found that the approved plan satisfies the
15 applicable standards without the disputed condition of approval, and that the
16 applicant had demonstrated that compliance with the standard is feasible. Record
17 25.

¹ CLCC explains that it initiated the county remand proceeding while petitioner’s appeal remained pending at the appellate courts because ORS 215.435(2)(a) requires an applicant to request county remand proceedings “within 180 days of the effective date of the final order or the final resolution of the judicial review.” If the applicant fails to meet that deadline, then “the county shall deem the application terminated.” *Id.*

1 The statutes governing LUBA’s review implement the legislative policies
2 articulated at ORS 197.805: “It is the policy of the Legislative Assembly that
3 time is of the essence in reaching final decisions in matters involving land use
4 and that those decisions be made consistently with sound principles governing
5 judicial review.” The policy that “time is of the essence in reaching final
6 decisions in matters involving land use” is embodied by several statutory
7 deadlines, including ORS 197.830(14), which requires that LUBA “shall issue a
8 final order within 77 days after the date of transmittal of the record.” ORS
9 197.840(1)(d) and (2) allow the Board to grant a continuance of the 77-day period
10 for issuance of its final opinion under ORS 197.830(14) if the Board finds that
11 “the ends of justice served by granting the continuance outweigh the best interest
12 of the public and the parties in having a decision within 77 days.” At the time of
13 this order, the 77-day deadline is not yet pending because the time limits for all
14 further procedures in this appeal are suspended pending resolution of record
15 objections. OAR 661-010-0026(6).

16 The factors the board must consider in determining whether to grant a
17 continuance under the statute are as follows:

18 “(a) Whether the failure to grant a continuance in the proceeding
19 would be likely to make a continuation of the proceeding impossible
20 or result in a miscarriage of justice; or

21 “(b) Whether the case is so unusual or so complex, due to the
22 number of parties or the existence of novel questions of fact or law,
23 that it is unreasonable to expect adequate consideration of the issues
24 within the 77-day time limit.” ORS 197.840(2).

1 The county and CLCC (respondents) filed a motion to suspend this appeal
2 pending the Supreme Court’s decision on review. Respondents observe that the
3 Supreme Court will decide whether petitioner timely filed a petition for review
4 in the Court of Appeals, thus, vesting jurisdiction in the Court of Appeals.
5 Respondents argue that the Supreme Court’s resolution of whether petitioner’s
6 appeal to the Court of Appeals was timely filed will narrow the issues before
7 LUBA in this appeal. Respondents argue that, if LUBA does not suspend this
8 appeal, LUBA and the appellate courts may issue different decisions on the issue
9 of whether and when jurisdiction vested in the Court of Appeals.

10 Petitioner objects to the continuance. Foreshadowing her arguments on the
11 merits of this appeal, petitioner argues that the county lacked jurisdiction to issue
12 the challenged decision. According to petitioner, jurisdiction vested in the Court
13 of Appeals when petitioner filed her petition for review, and the appellate courts
14 retained jurisdiction on the date of the county’s final decision because an
15 appellate judgment had not yet issued, and will not issue, until the Supreme Court
16 issues a decision. Petitioner argues that even if the Supreme Court affirms the
17 Court of Appeals’ order of dismissal, the county’s decision will not be validated
18 by “retroactive county jurisdiction.” Opposition to Motion to Continue 5. In all
19 events, petitioner argues that the jurisdictional issue presented in this appeal will
20 not be decided in the pending Supreme Court case because the only issue on
21 review is whether a petition for judicial review is deemed filed on the date of
22 mailing.

1 Petitioner argues that time is of the essence in land use review and the best
2 interest of the public and the parties is served by LUBA not continuing this appeal
3 proceeding. ORS 197.840(1)(d) allows “[a] reasonable period of delay.”
4 Petitioner argues that the Supreme Court may take a year or longer to issue its
5 decision, which petitioner argues is an unreasonable period of delay. Petitioner
6 observes that if the Supreme Court rules that petitioner’s appeal to the Court of
7 Appeals was timely filed, then that appeal will return to the Court of Appeals for
8 briefing, oral argument, and a decision on the merits. The Court of Appeals’
9 decision on the merits could potentially require that we modify our decision in
10 *Gould VIII*, which could require different or additional county proceedings.

11 Citing *Blatt v. City of Portland*, 21 Or LUBA 510 (1991), petitioner argues
12 that LUBA will not grant a motion to continue over an objection where LUBA
13 cannot determine when other review proceedings may be completed. In *Blatt*, the
14 petitioners challenged a city ordinance adopting a natural resources management
15 plan (NRMP). The NRMP was designed to meet statutory requirements for a
16 Wetland Conservation Plan (WCP) for a portion of the management area. The
17 city submitted the NRMP to the Department of State Lands (DSL) for WCP
18 approval. We explained that the challenged ordinance is a final decision adopting
19 an NRMP, but is not a final decision adopting a WCP.

20 The petitioners moved to continue the LUBA proceeding until DSL issued
21 a decision on the WCP. We denied the motion to continue. We observed that
22 DSL’s WCP decision could potentially affect certain issues on appeal of the

1 NRMP. However, we also observed that it was uncertain when DSL would issue
2 a decision, whether that decision would be appealed, and whether the city would
3 modify the NRMP in response to DSL's decision on the WCP. In those
4 circumstances, we concluded that the best interest of the public and parties would
5 not be served by a continuance.

6 *Blatt* is distinguishable. *Blatt* involved an entirely separate administrative
7 proceeding. While the city's pending DSL request involved overlapping subject
8 matter with the decision on appeal to LUBA, the effect of DSL's pending
9 decision on the LUBA appeal was uncertain, at best. Differently, here, the
10 pending appellate proceedings are a direct extension of the land use proceedings
11 challenging the county land use approval and our decision in *Gould VIII*. The
12 present appeal is also a direct extension of those land use proceedings.

13 Unlike in *Blatt*, the pending appellate decisions will impact the issues in
14 this appeal. If the Supreme Court rules that petitioner's appeal to the Court of
15 Appeals was timely filed, then that appeal will return to the Court of Appeals for
16 briefing, oral argument, and a decision on the merits. The Court of Appeals'
17 decision on the merits could potentially require that we modify our decision in
18 *Gould VIII*, which could require different or additional county proceedings.

19 While the appellate courts will not directly decide whether the county had
20 jurisdiction to issue its decision on remand while the appeals were pending in the
21 appellate courts, the Supreme Court will decide whether petitioner's petition for
22 review was timely. That decision, in turn, will determine whether petitioner's

1 appeal was perfected, which will impact our analysis in the present appeal of
2 whether the county had jurisdiction to issue the decision challenged in this
3 appeal. *See Standard Insurance Co. v. Washington County*, 17 Or LUBA 647,
4 660, *rev'd on other grounds*, 97 Or App 687, 776 P2d 1315 (1989) (“Where
5 jurisdiction is conferred upon an appellate review body, once appeal/judicial
6 review is perfected, the lower decision making body loses its jurisdiction over
7 the challenged decision unless the statute specifically provides otherwise.”).

8 In *Kine v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-130,
9 Order, Feb 13, 2019) (slip op at 4), we granted a continuance based on “a strong
10 possibility of inconsistent rulings if we were to proceed to resolve the merits of
11 petitioner’s appeal * * *, before the Court of Appeals has ruled on petitioner’s
12 appeal of the mandamus decision, and before any subsequent circuit court action
13 that might be required by the Court of Appeals’ disposition of that appeal.”
14 Similarly, in this case, there is a possibility that the Supreme Court will reverse
15 the Court of Appeals’ order of dismissal, in which case, that appeal will proceed
16 on the merits, which could result in reversal or remand of our prior decision in
17 *Gould VIII*. If we denied the continuance and proceeded to the merits of this
18 appeal, we might issue an unnecessary final opinion and order or a final opinion
19 and order that is incorrect.

20 We find that the ends of justice served by granting the continuance
21 outweigh the best interest of the public and the parties in having a decision within

1 77 days. ORS 197.840(1)(d). We adopt the following findings under ORS
2 197.840(1)(d) and (2).

3 1. The Board finds that this appeal presents complex and novel legal issues,
4 including novel questions of law regarding appellate court jurisdiction.

5 2. The Board finds that this appeal is of unusual complexity because of
6 proceedings currently before the Supreme Court, and that the ends of justice
7 served by granting the continuance outweigh the best interests of the public and
8 the other parties in LUBA issuing a final opinion within the statutory deadline.

9 3. The Board finds that the failure to grant a continuance on the appeal
10 until such time as the Supreme Court renders its decision and the Court of
11 Appeals renders a decision and appellate judgment, if any, would cause
12 unnecessary and potentially inconsistent rulings by this Board, and thus prejudice
13 the interests of the parties, which include an interest in obtaining consistent
14 rulings from the county, LUBA, and the appellate courts.

15 4. Based on all of the above factors, an extension of the statutory deadline
16 is warranted.

17 The statutory deadline under ORS 197.830(14) for issuing our final
18 opinion and order in this appeal is hereby extended pending issuance of the
19 decision in *Gould v. Deschutes County* (S067074) and appellate judgment in
20 *Gould v. Deschutes County* (A171603). The county shall provide the Board with
21 written notice of (1) the Supreme Court decision and (2) the Court of Appeals'
22 notice of appellate judgment within fourteen days after the date each is issued.

1 Dated this 18th day of February 2020.

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H.M. Zamudio

7 Board Member