

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,*

03/21/17 AM 10:10 LUBA

8  
9 and

10  
11 CENTRAL OREGON LANDWATCH,  
12 *Intervenor-Petitioner,*

13  
14 vs.

15  
16 DESCHUTES COUNTY,  
17 *Respondent,*

18  
19 and

20  
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) regarding a proposal to fill two reservoirs with  
30 groundwater. In LUBA No. 2017-002, petitioners appeal a county decision  
31 rejecting their local appeal of the LUCS decision. The two appeals are  
32 consolidated for review. Before the Board are various motions, including a  
33 motion to dismiss both appeals, and objections to the record.

1 **FACTUAL BACKGROUND**

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

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

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

1 property as a “land use action,” instead of a “development action.” Deschutes  
2 County Code (DCC) specifies a “land use action” as a type of decision that  
3 requires notice and opportunity for hearing and appeals consistent with ORS  
4 197.763 and ORS 215.416. A “development action,” on the other hand, does  
5 not require public notice and hearing, and limits the right of local appeal to the  
6 applicant.

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

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

1 found the proposed use requires conditional use permits because construction  
2 of the new reservoirs constituted “surface mining” in conjunction with  
3 operation of an irrigation system to create a “reservoir,” which is a conditional  
4 use in the RR-10 zone. DCC 18.60.030.<sup>1</sup> The hearings officer also concluded  
5 that the first reservoir, the water-skiing facility, constituted a large-scale  
6 recreational facility, which is a conditional use in the RR-10 zone. On appeal  
7 to the county board of commissioners, the commissioners upheld the hearings  
8 officer’s decision. On appeal to LUBA, LUBA ultimately concluded that the  
9 commissioners’ decision correctly categorized the proposed use. *Bishop v.*  
10 *Deschutes County*, 72 Or LUBA 103 (2015).

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

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

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<sup>1</sup> 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.”

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

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

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

16 “[X] Land uses to be served by the proposed water use (including  
17 proposed construction) are allowed outright or are not regulated by  
18 your comprehensive plan. \* \* \*

19 “[ ] Land uses to be served by the proposed water uses (including  
20 proposed construction) involve discretionary land-use approvals as  
21 listed in the table below. (Please attach documentation of  
22 applicable land-use approvals which have already been obtained).  
23 \* \* \*” Record 14.

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

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

1 fire protection, or pass-through irrigation for the property owner.”  
2 *Id.*

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

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

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

19 **MOTION TO STRIKE APPENDIX A TO PETITIONERS’ RESPONSE**  
20 **TO MOTION TO DISMISS**

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

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

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

9 We have held that we may consider documents outside the record for the  
10 limited purpose of resolving jurisdictional disputes. While many of the  
11 documents in Appendix A have no obvious bearing on the jurisdictional  
12 challenges presented in these appeals, some appear to. Specifically, these  
13 include copies of the county's earlier decisions regarding the subject property  
14 and the two reservoirs at the heart of the parties' dispute, at Appendix A 28-  
15 115, 240-71, and 272-73. In addition, we conclude that the documents at  
16 Appendix A 116-34, which include a 2005 county decision verifying that the  
17 subject tract consists of at least 11 parcels, seem useful in resolving the parties'  
18 jurisdictional disputes. While the foregoing documents include a number of  
19 factual findings and statements regarding the subject tract, respondents do not  
20 argue that any of the factual statements therein are inaccurate. Accordingly, we  
21 shall consider the above documents for the limited purpose of resolving the  
22 motion to dismiss. It is unnecessary to consider the other documents in

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

3 **MOTION TO STRIKE JOINT REPLY BRIEF**

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

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

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

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



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

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

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<sup>2</sup> 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.”

<sup>3</sup> DCC 22.04.020 defines “development action” and “land use action” in relevant part as:

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

6           Petitioners respond that the county’s code is unclear regarding whether a  
7 right of local appeal exists in the present circumstances, and the county may  
8 not be correct that no right of local appeal exists for petitioners. Petitioners  
9 argue that DCC 22.32.010(A)(2), part of the county code governing local  
10 appeals, appears to authorize them to file a local appeal of the LUCS decision.<sup>4</sup>

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“‘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).”

<sup>4</sup> DCC 22.32.010 is entitled “Who May Appeal,” and provides in relevant part:

“A. The following may file an appeal:

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

5 Both parties' arguments concern the likely merits of the appeal of the  
6 December 30, 2016 decision, but do not directly address LUBA's jurisdiction  
7 over that appeal. There is no dispute that the December 30, 2016 decision  
8 rejecting the local appeal applied a land use regulation, and for that reason fits  
9 within the definition of "land use decision" at ORS 197.015(10)(a), unless  
10 some exclusion applies. However, respondents do not argue that any exclusion  
11 to the definition of "land use decision" applies, or offer any theory or argument  
12 as to why LUBA lacks jurisdiction over the December 30, 2016 decision.  
13 Respondents may be correct on the merits that the planner correctly deemed the  
14 LUCS decision a "development action," and correctly interpreted DCC  
15 22.32.050 in context to limit appeal of a development action to the applicant,

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"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[.]"

1 but in that case LUBA would affirm the decision after a review of the merits,  
2 rather than dismiss the appeal for lack of jurisdiction.<sup>5</sup>

3 In the absence of some legal argument invoking an exclusion to the  
4 definition of “land use decision” for the December 30, 2016 decision, or  
5 identification of some other legal theory as to why LUBA lacks jurisdiction  
6 over the appeal of that decision, we have no basis to dismiss LUBA No. 2017-  
7 002 or to grant petitioners’ alternative motion to transfer the appeal to circuit  
8 court. Accordingly, respondents’ motion to dismiss LUBA No. 2017-003 is  
9 denied.

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

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

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

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<sup>5</sup> 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.

1 land use that would be authorized by the proposed state agency action is  
2 “allowed without review” under the county’s land use regulations.<sup>6</sup>

3 Second, respondents argue that the LUCS decision is excluded from  
4 LUBA’s jurisdiction pursuant to ORS 197.015(10)(b)(A), which excludes from  
5 the definition of “land use decision” a decision made under land use standards  
6 that do not require interpretation or the exercise of policy or legal judgment.<sup>7</sup>  
7 We address the two jurisdictional challenges together.

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<sup>6</sup> 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[.]”

<sup>7</sup> ORS 197.015(10) provides, in relevant part:

“‘Land use decision’:

“\* \* \* \* \*

1           **A. Introduction**

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

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

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“(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[.]”

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

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

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

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

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

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

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<sup>8</sup> 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).



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

5 **B. The December 14, 2016 LUCS Decision**

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

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

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

9           Petitioners respond, and we agree, that the challenged LUCS decision  
10 does not fall within the exclusion for ministerial decisions at ORS  
11 197.015(10)(b)(A). We first note that the LUCS decision appears to focus on  
12 the proposed end use of the *water* that OWRD would authorize (to provide  
13 water for landscaping, fire protection and irrigation), without identifying the  
14 “land uses to be served by the proposed water uses (including proposed  
15 construction),” as requested in the words of the OWRD LUCS form. It goes  
16 without saying, as respondents argue, that it is OWRD that regulates the  
17 proposed *use of water*. But that is not the question that OWRD asked the  
18 county. The relevant question is whether the county’s land use ordinance  
19 includes provisions that govern the *land uses* to be served by the proposed use

1 of water.<sup>9</sup> The LUCS decision does not squarely address that question, which  
2 complicates our jurisdictional analysis.

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

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

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<sup>9</sup> 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).

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

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

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

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

11 In their reply, respondents offer for the first time a theory regarding the  
12 legal status of the two reservoirs. According to respondents, the excavation  
13 and construction of the two reservoirs is exempt from the definition of “surface  
14 mining,” at DCC 18.04.030, and hence excluded from the “surface mining”  
15 land use category.<sup>11</sup> Specifically, respondents argue that excavation and

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<sup>10</sup> 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.

<sup>11</sup> DCC 18.04.030 defines the term “surface mining” in relevant part:

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

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“‘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.)

1 construction” that the excavation and grading furthered was the construction of  
2 the reservoirs themselves.

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

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

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

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

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

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



1           ORS 197.015(10)(b)(H)(i) through (iii) apply to a LUCS decision that,  
2 essentially, categorizes a proposed land use in one of three ways: (1) as already  
3 approved, (2) as allowed without land use review, or (3) as allowed with future  
4 land review. *See* n 6. A LUCS decision that reaches some other conclusion,  
5 *e.g.*, that the proposed land use is not allowed under local land use regulations,  
6 is presumably not subject to the exclusion. Further, we have held that, given  
7 the wording of ORS 197.015(10)(b)(H), an exclusion under that provision  
8 applies only if the local government correctly categorizes the proposed use as  
9 falling within the scope of the relevant exclusion. *McPhillips v. Yamhill*  
10 *County*, 66 Or LUBA 355, 360 (2012), *aff'd* 256 Or App 402, 300 P3d 299  
11 (2013).

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

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

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

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<sup>12</sup> 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.

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

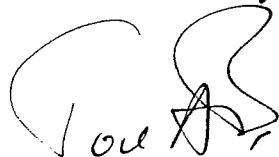
3 Accordingly, the motion to dismiss LUBA No. 2017-003 is denied.

4 **C. Conclusion**

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

19 Dated this 21st day of March, 2017.

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Tod A. Bassham  
Board Member

## Certificate of Mailing

I hereby certify that I served the foregoing Order for LUBA No. 2017-002/003 on March 21, 2017, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

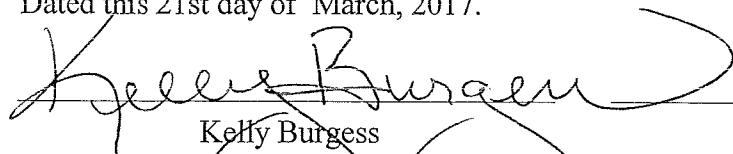
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Dated this 21st day of March, 2017.

  
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