

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

3
4 ANNUNZIATA GOULD and
5 CENTRAL OREGON LANDWATCH,
6 *Petitioners,*

7
8 vs.

9
10 DESCHUTES COUNTY,
11 *Respondent,*

12
13 and

14
15 CENTRAL LAND AND CATTLE COMPANY, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA Nos. 2024-036/040

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Deschutes County.

24
25 Jennifer M. Bragar filed a joint petition for review and reply brief and
26 argued on behalf of petitioner Annunziata Gould. Also on the brief was Carol
27 Macbeth, Jay M. Harris, and Tomasi Bragar Dubay.

28
29 Carol Macbeth filed a joint petition for review and reply brief and argued
30 on behalf of petitioner Central Oregon Landwatch. Also on the brief was Jennifer
31 M. Bragar, Jay M. Harris, and Tomasi Bragar Dubay.

32
33 Stephanie Marshall filed a joint response brief and argued on behalf of
34 respondent. Also on the brief was David Doyle, J. Kenneth Katzaroff, Ryan J.
35 Roberts, and Schwabe, Williamson & Wyatt, P.C.

1 J. Kenneth Katzaroff filed a joint response brief and argued on behalf of
2 intervenor-respondent. Also on the brief was Stephanie Marshall, David Doyle,
3 Ryan J. Roberts, and Schwabe, Williamson & Wyatt, P.C.

4
5 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
6 Member, participated in the decision.

7
8 AFFIRMED

10/09/2024

9
10 You are entitled to judicial review of this Order. Judicial review is
11 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 In LUBA No. 2024-036, petitioner Gould appeals an email from the
4 county's counsel that rejected Gould's attempt to file a local appeal of a county
5 planner decision approving a one-year extension of previously issued site plan
6 approvals on land zoned exclusive farm use. In LUBA No. 2024-040, petitioner
7 Central Oregon LandWatch (LandWatch) appeals a nearly identical email from
8 the county's counsel to LandWatch that rejected LandWatch's attempt to file a
9 local appeal of the same county planner decision.

10 **FACTS**

11 The county previously approved site plans for a golf course and lakes on
12 land zoned exclusive farm use (EFU). We refer to those approvals as the Site Plan
13 Approvals. On March 6, 2024, intervenor-respondent Central Land and Cattle
14 Company, LLC (CLCC) submitted an application on a form entitled "Application
15 for Extension of a Land Use Permit." Record 38-40.¹ The application was
16 accompanied by a statement from CLCC that provided, as relevant here:

17 "Over the past several years, the Applicant has taken substantial

¹ Deschutes County Code (DCC) 22.36.010(B)(1) provides:

"Except as otherwise provided under DCC 22.36.010 or under applicable zoning ordinance provisions, a land use permit is void two years after the date the discretionary decision becomes final if the use approved in the permit is not initiated within that time period."

1 steps to initiate the use of the above-referenced site plan and
2 approval. Consistent with [Deschutes County Code (DCC)]
3 22.36.020(A)(2), Applicant believes that such use has been initiated,
4 as described below. However, in an abundance of caution, Applicant
5 files this request for an extension.

6 “ * * * * *

7 “Considering the actions already taken, as described above, the
8 Applicant may be considered to have ‘initiated’ the use authorized
9 in this approval, and requests that the County issue such a
10 determination under DCC 22.36.020. Nonetheless, the Applicant
11 also submits this extension request so as to be transparent with the
12 County and to provide the County information on its current
13 progress.

14 “Thank for your time in considering this application for a land use
15 permit extension.” Record 39.

16 On May 6, 2024, the county’s principal planner approved the application. Record

17 7. We refer to that decision as the Approval.² The Approval concluded:

18 “The Planning Division has reviewed your request for an extension
19 of applications 247-19-000881SP, 247-20-000279-A, 247-20-
20 000282-A against the criteria contained in Section 22.36.010(C) of
21 the [DCC]. Based on the burden of proof statement submitted with
22 the application, it is staff’s opinion the request satisfies all
23 applicable criteria for approval.

24 “Staff notes that two public comments were received that raised the
25 issue of whether the applicant was able to file this application,
26 claiming the business had been administratively dissolved prior to

² Petitioners have appealed the Approval to LUBA in LUBA Nos. 2024-034 and 2024-035. In an order dated June 27, 2024, LUBA suspended those consolidated appeals until LUBA issues its final opinion and order in the present appeals.

1 the application date. According to County records, the applicant.
2 Central Land & Cattle Company LLC, is listed as the owner.

3 “The comments also raised concerns that the application materials
4 contained statements directed towards an Initiation of Use
5 determination pursuant to DCC 22.36.020. Staff notes no Initiation
6 of Use application was filed and no criteria within DCC 22.36.020
7 have been reviewed in regard to this application for an extension.”
8 *Id.*

9 On May 20, 2024, petitioner Gould and petitioner LandWatch each
10 attempted to appeal the Approval. On May 21, 2024, the county’s counsel
11 emailed each petitioner and stated that “[t]he decision to approve the extension
12 request was final when issued. Because there is no appeal provided in the Code
13 (except to the applicant), there is no further action to be taken by the County, nor
14 any further record to be made nor added to.” Record 1, 3. These appeals
15 followed.³

16 **MOTION TO DISMISS**

17 LUBA has exclusive jurisdiction to review land use decisions. ORS
18 197.825(1). ORS 197.015(10)(a)(A)(iii) defines “[l]and use decision” to include
19 “[a] final decision or determination made by a local government or special district
20 that concerns the adoption, amendment or application of * * * [a] land use
21 regulation[.]” A local government decision “concerns” the application of a land

³ Petitioners and respondents have filed multiple lengthy pleadings and responses to pleadings, all of which we have considered in resolving these appeals.

1 use regulation if the decision maker in fact applied land use regulations. *Bradbury*
2 *v. City of Independence*, 18 Or LUBA 552, 559 (1989).

3 In the response brief, the county and CLCC (together respondents) argue
4 that

5 “[p]etitioners were not permitted to submit an appeal because 1)
6 only noticed parties (the applicant CLCC) may appeal a
7 development action if an appeal is allowed under DCC
8 22.16.020(B), and 2) no alternative right to appeal existed for any
9 entity or individual under DCC 22.16.030 because the County did
10 not rely upon any other authority independent of DCC Title 22 to
11 make its decision to grant CLCC a one year extension on its
12 approved Site Plan, and OAR 660-033-0140(3) bars an appeal of an
13 extension on EFU lands from appeal as a land use decision.” Joint
14 Respondent’s Brief 9.

15 Petitioners respond that the county’s decision to reject petitioners’ local appeals
16 concerned the application of DCC 22.36.010, 22.16.020, 22.16.030, and
17 22.32.050, and accordingly LUBA has jurisdiction over the appeals. Petitioners’
18 Response to Motion to Dismiss 14-15.

19 We agree with petitioners. Respondents’ arguments miss the point in two
20 respects. First, respondents’ arguments address the merits of the county’s
21 decisions to reject petitioners’ local appeals, *i.e.*, whether those decisions
22 correctly applied DCC Title 22, not whether the decisions challenged in these
23 appeals concern the application of those provisions and, thus, whether LUBA has
24 jurisdiction over the appeals. DCC Title 22 sets out the county’s development
25 procedures. The response brief acknowledges that the county counsel’s emails to

1 petitioners “rel[ie]d] on” “DCC Title 22” and therefore the emails “concern[] the
2 * * * application of * * * [a] land use regulation.” Joint Respondent’s Brief 11.

3 Second, respondents’ arguments address whether *the Approval* is a land
4 use decision, but the Approval is not the decision challenged in these appeals.
5 *See n 2; Kuhn v. Deschutes County*, 58 Or LUBA 483, 490 (2009). Accordingly,
6 whether the Approval is a land use decision as defined in ORS 197.015(10)(a)
7 has no bearing on whether the county’s decisions to reject petitioners’ local
8 appeals is a land use decision. *Hoschek v. Tillamook County*, 52 Or LUBA 793,
9 796-97 (2006); *Von Lubken v. Hood River County*, 20 Or LUBA 208, 212 n 4
10 (1990).

11 In the response brief, respondents also argue that petitioners lack standing
12 to appeal the county counsel’s decisions to LUBA. Petitioner Gould’s reply brief
13 responds that ORS 197.830(2) provides that any person who appeared before the
14 local government has standing to appeal to LUBA, and that the record
15 demonstrates that petitioners attempted to file local appeals of the Approval. We
16 agree.

17 The motion to dismiss is denied.

18 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

19 The question presented in these appeals is whether the county correctly
20 concluded that the DCC does not provide petitioners with a right of local appeal
21 of the Approval. The correctness of those decisions, in turn, depends on whether
22 the Approval is properly classified as a “development action” or a “land use

1 action” as defined in DCC 22.04.020. We discuss the consequences of those
2 differences below before turning to the assignments of error.

3 **A. Land Use Actions vs. Development Actions**

4 Initially, we observe that the DCC is not a model of clarity. DCC 22.04.020
5 distinguishes between “land use actions” and “development actions.”

6 **1. Land Use Actions**

7 DCC 22.04.020 defines “land use action” to include:

8 “any consideration for approval of a quasi-judicial plan amendment
9 or zone change, any consideration for approval of a land use permit,
10 and any consideration of a request for a declaratory ruling (including
11 resolution of any procedural questions raised in any of these
12 actions).”

13 Under the above definition, a decision on a “land use permit” is a “land use
14 action.” DCC 22.04.020 provides the following definition of “land use permit”:

15 “‘Land use permit’ includes any approval of a proposed
16 development of land under the standards in the County zoning
17 ordinances or subdivision or partition ordinances involving the
18 exercise of significant discretion in applying those standards.

19 “By way of illustration, ‘land use permit’ includes review of
20 conditional use permits, landscape management plans, farm or
21 nonfarm dwellings, forest management plans, partition, master plan,
22 river setback exception, riverfront design review, site plan, site plan
23 change of use, modification of approval, solar access, solar shade
24 exception, subdivision, and subdivision variance and variance.”

25 DCC 22.32.010(A)(2) provides the following persons a right to appeal land use
26 actions:

27 “In the case of an appeal of an administrative decision without prior

1 notice, a person entitled to notice, a person adversely affected or
2 aggrieved by the administrative decision, or any other person who
3 has filed comments on the application with the Planning
4 Division[.]”⁴

5 2. Development Actions

6 DCC 22.04.020 provides the following definition of “development
7 action”:

8 “Development action’ means the review of any permit,
9 authorization or determination that the Deschutes County
10 Community Development Department is requested to issue, give or
11 make that either:

12 “A. Involves the application of a County zoning ordinance or the
13 County subdivision and partition ordinance and is not a land
14 use action as defined [in DCC 22.04.020]; or

15 “B. Involves the application of standards other than those referred
16 to in [paragraph A], such as the sign ordinance.

17 “For illustrative purposes, the term ‘development action’ includes
18 review of any condominium plat, *permit extension*, road name
19 change, sidewalk permit, sign permit, setback determination, and lot
20 coverage determination.” (Emphasis added.)

21 For development actions, the right of local appeal is limited. DCC 22.32.050
22 provides:

23 “Notice of the hearing date set for appeal shall be sent only to the
24 applicant. *Only the applicant, his or her representatives, and his or*

⁴DCC 22.32.010(A)(2) concerns appeals of an “administrative decision.” The DCC does not define the term. Absent any argument from the parties about the meaning of that term, we understand it to be included in the DCC 22.04.020 defined term “land use permit.”

1 *her witnesses shall be entitled to participate.* Continuances shall be
2 at the discretion of the Hearings Body, and the record shall close at
3 the end of the hearing.” (Emphasis added.)

4 Persons who are “adversely affected or aggrieved” by *land use actions* can appeal
5 under DCC 22.32.010(A)(2). However, under DCC 22.32.050, only the applicant
6 is “entitled to participate” in an appeal of a development action.

7 **B. Time Limitations on Site Plan Approvals**

8 DCC 22.36.010(B)(1) provides that the Site Plan Approvals are void if the
9 use is not initiated within two years after the decision becomes final. *See* n 1.

10 DCC 22.36.010(C)(1) provides for extensions of those Site Plan Approvals.⁵

11 DCC 22.36.010(D), in turn, provides:

⁵ DCC 22.36.010(C) provides:

“Extensions.

“1. The Planning Director may grant one extension of up to one year for a land use approval or a phase of a land use approval, and two years for those dwellings listed in DCC 22.36.010(B)(4) above, regardless of whether the applicable criteria have changed, if:

“a. An applicant makes a written request for an extension of the development approval period;

“b. The request, along with the appropriate fee, is submitted to the County prior to the expiration of the approval period;

“c. The applicant states reasons that prevented the applicant from beginning or continuing development or

1 “Procedures.

2 “1. A determination of whether a land use has been initiated shall
3 be processed as a declaratory ruling.

4 “2. Approval of an extension granted under DCC 22.36.010 is an
5 administrative decision, is not a land use decision described
6 in ORS 197.015 or Title 22 and is not subject to appeal as a
7 land use decision and shall be processed under DCC Title 22
8 as a development action, except to the extent it is necessary
9 to determine whether the use has been initiated.”

10 In sum, an initiation of use determination is processed as a declaratory ruling
11 pursuant to DCC 22.36.010(D)(1). Pursuant to DCC 22.04.020, that is a “land
12 use action” and the appeal provisions of DCC 22.32.010(A)(2) apply.
13 Differently, an extension approval is processed as a “development action”
14 “except to the extent it is necessary to determine whether the use has been
15 initiated.” For a development action, the appeal provisions of DCC 22.32.050
16 apply, and only the applicant is entitled to appeal.

17 **C. Petitioners’ First and Third Assignments of Error**

18 Petitioners’ first and third assignments of error present overlapping and
19 related arguments and we address them together. In their first and third

meeting conditions of approval within the approval
period; and

“d. The County determines that the applicant was unable
to begin or continue development or meet conditions of
approval during the approval period for reasons for
which the applicant was not responsible, including, but
not limited to, delay by a state or federal agency in
issuing a required permit.”

1 assignments of error, we understand petitioners to argue that the county
2 improperly construed DCC 22.32.050. Petitioners argue that CLCC applied for
3 both an extension of the Site Plan Approvals and an initiation of use
4 determination. Joint Petition for Review 13, 31. Petitioners also argue that the
5 county's failure to consider CLCC's application as an application for an initiation
6 of use determination, and thus treat the application as a land use action, was a
7 procedural error that prejudiced their rights to a local appeal hearing at which
8 they would have presented evidence and argument to demonstrate that the
9 applications should be denied. Joint Petition for Review 21. Finally, in their third
10 assignment of error, petitioners argue that the county improperly construed DCC
11 22.36.010(D)(1) and (2). Joint Petition for Review 31-32. According to
12 petitioners, the county was required to consider whether CLCC possessed the
13 legal capacity to submit the application, and in so doing, the county was required
14 to process the application as a "land use action" because resolution of that issue
15 required "resolution of a procedural question" as that phrase is used in DCC
16 22.04.020's definition of "land use action." *Id.*

17 In support of their arguments, petitioners quote language from the narrative
18 CLCC attached to its application, in which CLCC takes the position that CLCC
19 has initiated the use.⁶ Record 39. Petitioners also note that CLCC paid fees in
20 excess of those required for an extension application and assert that these excess

⁶ We quote the language relied upon by petitioners above.

1 monies support its argument that CLCC applied for an initiation of use
2 determination.⁷ Petitioners also argue that because CLCC applied for both an
3 extension and an initiation of use determination, ORS 215.416(2) obligated the
4 county to make a decision on both the extension and the initiation of use
5 application, which would qualify as a “declaratory ruling” and a “land use action”
6 with the attendant right of local appeal in DCC 22.32.010(A)(2).

7 We will reverse or remand land use decision if the local government
8 “[i]mproperly construed the applicable law” or “[f]ailed to follow the procedures
9 applicable to the matter before it in a manner that prejudiced the substantial rights
10 of the petitioner.” ORS 197.835(9)(a)(B), (D). Respondents respond, initially,
11 that the issue raised in the first assignment of error described above was not raised
12 with sufficient specificity to alert the county that it was being raised and,
13 accordingly, petitioners are precluded from raising the issue for the first time at
14 LUBA. ORS 197.797(1); ORS 197.835(3). In the petition for review, petitioners
15 cite Record 12. Joint Petition for Review 12, 30. We have reviewed the cited
16 record page and we agree with petitioners that the issue raised in the first
17 assignment of error was raised there. More importantly, respondents’ “raise it or
18 waive it” argument is based on ORS 197.797(1), which applies only to land use
19 decisions where the local government provides a hearing on a land use
20 application, such as a hearing on a permit application.

⁷ Petitioners’ Joint Motion to Take Evidence Not in the Record, Exhibit 1.

1 On the merits, respondents respond that the county correctly concluded
2 that no right of local appeal of the Approval is available to petitioners under the
3 DCC. Respondents acknowledge that CLCC’s application was “an inartful
4 request,” but note that it was on a form titled “Application for an Extension of a
5 Land Use Permit;” that the burden of proof statement that accompanied the
6 application clarified that CLCC sought an extension; and that petitioners have
7 not identified any statute or DCC provision that required the county to treat the
8 application as an application for an initiation of use determination.⁸ Joint
9 Respondent’s Brief 21. Respondents also take the position that “the County
10 requested an erroneous processing fee.” Joint Respondent’s Brief 19.

11 We agree with respondents. First, petitioners have not demonstrated that
12 the county improperly construed any applicable DCC provision in concluding
13 that no right of local appeal was available to petitioners where CLCC’s
14 application sought an extension, not an initiation of use determination.⁹ Second,
15 petitioners have not established that ORS 215.416(2) is a procedure that applies

⁸ For example, the Extension Application form included a type-written description of the “Nature of the Application” as “Extension of Site Plan Approval – File No. 247-19-000881-SP, 247-20-000279-A, and 247-20-000282-A.” Record 38. Further, the narrative included the explanation, “Consistent with DCC 22.36.020(A)(2), Applicant believes that such use has been initiated, as described below. However, in an abundance of caution, Applicant files this request for an extension.” Record 39.

⁹ There is no dispute that the county did not render any decision regarding whether CLCC has initiated the use.

1 to CLCC's application. That statute merely requires the county to adopt a
2 procedure for reviewing a consolidated application, and to process a consolidated
3 application according to those procedures.¹⁰ *McKenney v. Deschutes County*, 37
4 Or LUBA 685, 694 (2000). It does not obligate the county to process CLCC's
5 application according to those procedures, where the county determines that the
6 application is not a consolidated application and does not seek an initiation of use
7 determination.

8 Finally, petitioners have not established that they were entitled to a local
9 appeal of the Approval merely because after the application was filed, petitioners
10 questioned whether CLCC had the legal capacity to submit an application for an
11 extension or an initiation of use determination. Petitioners' arguments in the third
12 assignment of error are derivative of and depend on our agreement that CLCC
13 applied for, and therefore the county was required to issue a declaratory ruling
14 on, an initiation of use determination, *i.e.*, a "land use action." We have already
15 rejected that argument above and we reject it here as well.

¹⁰ ORS 215.416(2) provides:

"The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. The consolidated procedure shall be subject to the time limitations set out in ORS 215.427. The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations."

1 The first and third assignments of error are denied.

2 **D. Second Assignment of Error**

3 In their second, related assignment of error, petitioners argue that the
4 county committed a procedural error that prejudiced their substantial rights when
5 the county failed to accept their local appeals of the Approval. Joint Petition for
6 Review 28.

7 We understand petitioners to argue that ORS 215.422(1)(a) is a “procedure
8 applicable to the matter” that required the county to allow petitioners to appeal
9 the Approval locally. ORS 215.422(1)(a) provides:

10 “A party aggrieved by the action of a hearings officer or other
11 decision-making authority may appeal the action to the planning
12 commission or county governing body, or both, *however the*
13 *governing body prescribes*. The appellate authority on its own
14 motion may review the action. The procedure and type of hearing
15 for such an appeal or review shall be prescribed by the governing
16 body, but shall not require the notice of appeal to be filed within less
17 than seven days after the date the governing body mails or delivers
18 the decision to the parties.”

19 ORS 215.422(1)(a) grants local governments a wide range of discretion in
20 determining local appeal procedures, and ORS 215.422(1)(b) specifically
21 provides that “the governing body may provide that the decision of a hearings
22 officer or other decision-making authority is the final determination of the
23 county.” The county has done so in DCC 22.32.050 for Development Actions, at
24 least for persons other than the applicant. We reject petitioners’ argument that
25 ORS 215.422(1)(a) is an applicable procedure.

1 Petitioners next cite DCC 22.32.022(B) and argue that that provision
2 required the county to accept their local appeals, because only the “Hearings
3 Body” has authority to determine “jurisdictional defects in an appeal.”¹¹
4 Petitioners argue “[i]n this case, Respondent’s planning staff and County Counsel
5 usurped the power reserved to the Hearings Body to determine whether the appeal
6 had a jurisdictional defect, and did so without reviewing the Notice of Appeal.”
7 Joint Petition for Review 27. Petitioners argue that the county’s failure to accept
8 their local appeals and “submit them to the Hearings Body” is a procedural error
9 that prejudiced their substantial rights to an appeal.

10 Respondents’ response to petitioners’ arguments lacks coherence.
11 However, we understand respondents to respond that DCC 22.32.022 is not an
12 applicable procedure because DCC 22.32.050 provides that only the applicant is

¹¹ DCC 22.32.022 provides:

- “Every notice of appeal shall include:
 - “A. A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute.
 - “B. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons why the Board should review the lower Hearings Body's decision.
 - “C. If the Board of County Commissioners is the Hearings Body and de novo review is desired, a request for de novo review by the Board stating the reasons why the Board should provide de novo review as provided in DCC 22.32.030.”

1 entitled to appeal a development action. Joint Respondent's Brief 23-24. We
2 agree. Petitioners do not cite or otherwise discuss DCC 22.32.050, and have not
3 established that DCC 22.32.022 is an applicable procedure, where the county's
4 decision is a development action, and DCC 22.32.050 establishes that only the
5 applicant may appeal a development action. In other words, where DCC
6 22.32.050 does not provide a right of local appeal because petitioners are not the
7 applicant, DCC 22.32.022's notice of appeal provisions do not require the
8 hearings body to do anything.

9 Petitioners have not demonstrated that the county committed a procedural
10 error because they have not demonstrated that the county failed to follow any
11 procedures applicable to challenged decisions.

12 The second assignment of error is denied.

13 The county's decision is affirmed.