

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

3
4 PETER BRIGGS, RICHARD E. CAVE, JANE C. GIBBONS,
5 CRAIG MCCLANAHAN, KATHERINE GUPTILL, KEN GUPTILL,
6 JULIE D. READING, JANE M. FITZPATRICK, MITCHELL MOORE,
7 GARY WESKE, LINDA FENDER, DARRELL FENDER,
8 DOUGLAS PALMER, JAYNE PALMER, OLENA STROZHENKO,
9 JOHN OSTYN, MARY OSTYN, NADINE SCOTT,
10 JERRY MERRITT, and LORIN J. LYNCH,

11 *Petitioners,*

12
13 vs.

14
15 LINCOLN COUNTY,
16 *Respondent,*

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18 and

19
20 MONICA KIRK and MICHELE RILEY,
21 *Intervenors-Respondents.*

22
23 LUBA No. 2021-118

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25 JUDY CAMMANN, JOHN BLACKBURN,
26 LAURI HINES, and PETER PREHN,
27 *Petitioners,*

28
29 vs.

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31 LINCOLN COUNTY,
32 *Respondent,*

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34 and

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36 MONICA KIRK and MICHELE RILEY,
37 *Intervenors-Respondents.*

ORDER

BACKGROUND

The decision challenged in these appeals is county Ballot Measure (BM) 21-203, which was approved by voters on November 2, 2021, and certified by the county as final on November 19, 2021. BM 21-203 amends the portion of Lincoln County Code (LCC) chapter 4 that regulates and restricts short-term rentals (STRs) and vacation rentals in parts of the county.

LUBA No. 2021-118 was initiated by the filing of a notice of intent to appeal at LUBA. Intervenors subsequently filed a motion to intervene. On January 3, 2022, we suspended our review of LUBA No. 2021-118 while the circuit court considered an appeal of BM 21-203 in *Cammann v. Landers*, Case No. 21CV46002 (the circuit court case). On February 2, 2022, while the appeal was suspended, petitioners in LUBA No. 2021-118 filed a motion for stay of BM 21-203, and the county and intervenors subsequently filed responses to the motion for stay.

Plaintiffs and defendants in the circuit court case filed a joint motion to transfer the circuit court case to LUBA. On March 15, 2022, the circuit court issued a memorandum opinion determining that BM 21-203 is a land use decision over which the circuit court lacks jurisdiction and granting the motion to transfer

1 the circuit court case to LUBA. On March 24, 2022, the circuit court issued an
2 order transferring the circuit court case to LUBA.¹

3 LUBA designated the transferred circuit court case LUBA No. 2022-030
4 and directed plaintiffs in the circuit court case (petitioners in LUBA No. 2022-
5 030) to file a notice of transfer with LUBA. On April 13, 2022, petitioners in
6 LUBA No. 2022-030 filed a notice of transfer and a motion for stay of BM 21-
7 203. On April 19, 2022, we issued an order consolidating LUBA Nos. 2021-118
8 and 2022-030. On April 26, 2022, intervenors filed a response to petitioners’
9 motion for stay in LUBA No. 2022-030, as well as a motion to dismiss both
10 appeals for lack of jurisdiction. Intervenors’ response to the motion for stay in
11 LUBA No. 2022-030 incorporates by reference the jurisdictional arguments in
12 their motion to dismiss. Intervenors’ Response to 2022-030 Motion for Stay 4.

¹ In its March 15, 2022 memorandum opinion, the circuit court explained:

“Plaintiffs assert that the circuit court and LUBA have concurrent jurisdiction over some of the issues raised in this matter. Defendant[, the county and its sheriff,] asserts that LUBA has exclusive jurisdiction in this matter. Both request that the case be transferred to LUBA. Intervenors oppose the motion to transfer and assert that LUBA does not have jurisdiction in this case.”

Intervenors in the circuit court case are intervenors in these appeals and were lead petitioners for BM 21-203. The circuit court’s March 24, 2022 transfer order directed plaintiffs to file a motion for stay of BM 21-203 at LUBA, and it provided that a preliminary injunction the court previously issued, enjoining enforcement of BM 21-203, would remain in place until LUBA ruled on the motion for stay.

1 We resolve intervenors’ motion to dismiss and petitioners’ motions for
2 stay in LUBA Nos. 2021-118 and 2022-030 below.²

3 **MOTION TO DISMISS**

4 In their motion to dismiss, intervenors argue that we do not have
5 jurisdiction because BM 21-203 is not a land use decision.³ ORS 197.825(1).

6 ORS 197.015(10) provides:

7 “‘Land use decision’:

8 “(a) Includes:

9 “(A) A final decision or determination made by a local
10 government * * * that concerns the adoption,
11 amendment or application of:

12 “(i) The goals;

13 “(ii) A comprehensive plan provision;

14 “(iii) A land use regulation; or

15 “(iv) A new land use regulation[.]”

² Petitioners in LUBA No. 2022-030 request a telephone hearing. 2022-030 Motion for Stay 2. Our rules provide that we may, at our discretion, conduct a telephone conference with the parties to consider a motion. OAR 661-010-0065(3). We conclude that a telephone hearing is unnecessary for us to resolve these motions, and we resolve them on the written pleadings.

³ Intervenors also argued in the circuit court case that BM 21-203 is not a land use decision and that the circuit court should not transfer the circuit court case to us.

1 “‘Land use regulation’ means any local government zoning ordinance, land
2 division ordinance * * * or similar general ordinance establishing standards for
3 implementing a comprehensive plan.” ORS 197.015(11). The circuit court
4 concluded that the amendments to the STR portion of LCC chapter 4 in BM 21-
5 203 are a land use decision subject to our jurisdiction. We agree.

6 BM 21-203 rennumbers, but retains, a prior provision adopted in 2016
7 stating that “[t]he purpose of LCC 4.405 through 4.460 is to provide for the peace,
8 health, safety and livability of residents of, and visitors to, Lincoln County. *This*
9 *is not a land use decision and is not part of [LCC] Chapter 1, Land Use*
10 *Planning.*” LCC 4.405(3) (emphasis added). We have explained that,
11 “[g]enerally, where a local government makes it clear that the ordinance it is
12 adopting is not intended to be a land use regulation, LUBA does not have
13 jurisdiction to review such an ordinance, unless there is a clear connection
14 between the ordinance and the comprehensive plan.” *Emerald Cove LLC v. City*
15 *of Lincoln City*, 73 Or LUBA 72, 77 (2016) (concluding that an STR ordinance
16 was not a land use regulation).

17 Despite retaining the prior provision that the STR portion of LCC chapter
18 4 “is not intended to be a land use regulation,” BM 21-203 amends the findings
19 and purpose statement of those regulations to add references to three county
20 residential zoning districts, as well as the county’s comprehensive plan and
21 zoning ordinance. Specifically, BM 21-203 adds a new subsection to the purpose
22 statement explaining:

1 “The people of Lincoln County find that within low density
2 residential zones R-1-A, R-1 and R-2, a major purpose of these
3 provisions is to control, manage and limit vacation rentals in single-
4 family dwellings to protect the character of neighborhoods for
5 residents. Because of their location in said residential zones and
6 their specific characteristics and potential impacts, [STRs] in
7 dwellings in unincorporated Lincoln County require special
8 consideration so they properly operate with respect to the
9 Comprehensive Plan and the objectives of the underlying zone
10 districts.” LCC 4.405(2).

11 Intervenors maintain that the added reference to the comprehensive plan and the
12 objectives of the underlying residential zones in the purpose statement is
13 insufficient to transform the STR portion of LCC chapter 4, as amended by BM
14 21-203, into a land use regulation. Specifically, intervenors argue:

15 “This single reference in the Findings and Purpose section reflects
16 the Measure’s classification of STRs as commercial uses and
17 acknowledges the objectives of the County’s residential zones and
18 the voters’ desire that STRs properly operate with respect to the
19 Comprehensive Plan’s designation of residential lands for
20 residential purposes. But the motivation and purpose behind the
21 Measure ‘is to control, manage, and limit vacation rental
22 [businesses] in single-family dwellings to protect the character of
23 neighborhoods for residents.’ The problem the Measure was
24 intended to curtail is the pervasive nuisance impacts these otherwise
25 unregulated businesses camouflaged as dwellings inflict on their
26 residential neighbors. The mechanism the Measure employs to
27 curtail these nuisance impacts is not by zoning or regulating the use
28 of land, but by limiting where the County Sheriff can approve STR
29 business licenses and restricting ‘their specific characteristics and
30 potential impacts’ through the County’s STR licensing program.”
31 Motion to Dismiss 3-4 (underscoring in original; footnote omitted).

1 According to intervenors, “the Measure does not prohibit STRs in residential
2 zones; it prohibits the Sheriff from issuing or renewing STR licenses in
3 residential zones.” *Id.* at 4.

4 In *Briggs v. Lincoln County*, ___ Or LUBA ___ (LUBA No 2021-113, Feb
5 10, 2022) (*Briggs I*), we transferred to circuit court an appeal challenging an
6 ordinance that the county board of commissioners adopted amending the STR
7 portion of LCC chapter 4. We concluded that provisions in the ordinance that (1)
8 limited the number of bedrooms—and, therefore, the occupancy of a dwelling—
9 allowed under an STR license based on a sewer capacity evaluation, (2)
10 prohibited events such as weddings, and (3) created a future process that could
11 lead to the creation of subareas for licensing purposes did not amend existing
12 zoning and that the ordinance did not terminate or limit lawful land uses. *Briggs*
13 *I*, ___ Or LUBA at ___ (slip op at 8-10).

14 The amendments to the STR portion of LCC chapter 4 that were appealed
15 in *Briggs I* differ from the amendments in BM 21-203 that are at issue in this
16 appeal. Unlike BM 21-203, the amendments challenged in *Briggs I* did not
17 include references to the comprehensive plan, link the regulations to certain land
18 use zones, or, as we discuss below, provide for the phasing-out of STRs in certain
19 land use zones. We consider these differences and their relevance to the
20 determination of whether the STR portion of LCC chapter 4, as amended by BM
21 21-203, is a land use regulation below.

22 As we summarized in *Briggs I*,

1 “[i]n *Emerald Cove*, the petitioner argued that its prior vacation
2 rental use of *six* bedrooms was a nonconforming use under the city’s
3 zoning code. 73 Or LUBA at 75. The petitioner pointed out that the
4 city’s business regulations incorporated the definition of ‘lodging
5 house’ in the Oregon Residential Specialty Code and that its
6 comprehensive plan listed ‘Building Codes’ as an implementation
7 technique, thus linking the vacation rental dwelling regulations and
8 the comprehensive plan. *Id.* at 77-78. The petitioner also pointed to
9 a comprehensive plan housing goal policy to establish minimum
10 construction and lot coverage standards for residential development.
11 *Id.* at 78.

12 “The city responded that the amendment was not a land use
13 regulation because it did not establish any standards implementing
14 the comprehensive plan. We agreed with the city that petitioner
15 identified no clear connection to the comprehensive plan or zoning
16 ordinance and concluded that we lacked jurisdiction.

17 “Other cases reach a similar result. *See Ramsey v. City of Portland*,
18 30 Or LUBA 212, 213, 217-18 (1995) (concluding that an ordinance
19 that set out a procedure for applying to the city forester for a tree-
20 cutting permit, stated an application fee, included notice
21 requirements, created an appeal period in which to appeal either the
22 grant or denial of a permit, assigned the task of reviewing appeals to
23 the city’s Urban Forestry Commission, and stated that decisions of
24 the Urban Forestry Commission were reviewable solely by writ of
25 review lacked any clear connection to the comprehensive plan and
26 was not a statutory land use decision); *Oregon Aviation Watch v.*
27 *City of Hillsboro*, 67 Or LUBA 252, 253, 256-57 (2013) (concluding
28 that an ordinance that ‘prescribed a minimum height limit for
29 aircraft operations over the city and prohibited acrobatic flying and
30 the dropping of items from aircraft’ was not a land use regulation
31 because there was not ‘a clear connection between the
32 comprehensive plan and the ordinance requirements, and the
33 inference that the ordinance implement[ed] the comprehensive plan
34 [was not] unavoidable.’).

35 “We contrast those cases with *Buys v. City of Portland*, 69 Or LUBA
36 486, 491-93 (2014). In *Buys*, the petitioner appealed the city’s

1 Pedestrian Design Guide (PDG). The city’s comprehensive plan
2 specifically referenced the PDG, creating a clear and direct
3 connection between the comprehensive plan and the PDG. The PDG
4 established standards for implementing the comprehensive plan and
5 was subject to our jurisdiction. *Rest-Haven Memorial Park v. City*
6 *of Eugene*, 39 Or LUBA 282, *aff’d*, 175 Or App 419, 28 P3d 1229
7 (2001), is similar. In *Rest-Haven*, a city ordinance adopted ‘new
8 prohibitions, with certain exceptions, against placing pipes or fill in
9 the city’s open waterways (hereafter the ordinance or open
10 waterways ordinance).’ 39 Or LUBA at 283. We explained that, ‘[i]f
11 the open waterways ordinance establishes ‘standards for
12 implementing a comprehensive plan,’ it is a land use regulation and
13 its adoption is a land use decision over which LUBA has
14 jurisdiction.’⁴ *Id.* at 285. The purpose of the challenged ordinance
15 was to establish interim protection for constructed and natural open
16 waterways, which provided multiple stormwater benefits to the
17 community, until the city completed its Statewide Planning Goal 5
18 (Natural Resources, Scenic and Historic Areas, and Open Spaces)
19 process. *Id.* at 286-87. We concluded that it was clear that the
20 ordinance established standards for implementing the city’s
21 comprehensive plan and was a new land use regulation. *Id.* at 287.”
22 ___ Or LUBA at ___ (slip op at 10-13).

⁴ The city’s Comprehensive Stormwater Management Plan, which was part of the city’s comprehensive plan, included the following policies:

“Policy 1.1: Incorporate the beneficial functions (flood control, conveyance, water quality treatment) of natural resources into the City’s storm drainage system.

“Policy 1.2: Maintain flood control, drainage, and water quality treatment capacities along the city’s stormwater conveyance corridors while protecting and enhancing the health, diversity and continuity for wildlife habitat, native vegetation, and endangered species.” *Rest-Haven*, 39 Or LUBA at 286.

1 BM 21-203 does not identify any specific comprehensive plan policies or
2 zoning code provisions that are implemented thereby, but it does identify specific
3 residential zones. The county’s comprehensive plan and zoning ordinance are
4 combined in LCC chapter 1. LCC 1.0190 explains:

5 “The purpose of plan designations is to define and set down on maps
6 what the citizens and property owners of Lincoln County consider
7 to be appropriate uses of the land. These designations are the
8 conclusions wrought from the consideration of facts and information
9 presented and evaluated through the process of developing this
10 comprehensive plan.”

11 One of the comprehensive plan’s housing policies is to “designate suitable land
12 area to meet rural residential needs.” LCC 1.0165(3). LCC 1.0190 describes each
13 of the county’s plan designations, including the following:

14 “(3) **Dispersed Residential:** Dispersed residential areas are
15 located on marine terraces and valley floors. Residential use
16 densities shall be as necessary for on-site sewer disposal and
17 water supply. Uses such as forestry, farming and rural
18 residential subdivisions, and existing public recreation
19 facilities, quarrying, sanitary landfills, government uses and
20 similar uses may be included by County review.

21 “* * * * *

22 “(6) **Suburban Residential:** Building and facilities must be in
23 place at the time of adoption of this plan or be inside of an
24 established Urban Growth Boundary to acquire this
25 designation. If a small residential lot lies along an improved
26 road between two lots with buildings it is also considered
27 committed. Water must be available either by individual or
28 community system. These represent the minimum; if more
29 facilities are present then the area is further justified as built
30 and committed. *Primary uses are single-family residential,*

1 multi-family residential where urban facilities and services
2 are available, and existing public recreation facilities.
3 Secondary uses such as community facilities, new public
4 recreation facilities, government uses and similar uses may be
5 included by County review.” (Boldface in original; emphasis
6 added.)

7 LCC 1.1115(95) defines “use” as “the purpose for which a structure is designed,
8 arranged or intended or for which land is maintained or occupied.” LCC 1115(63)
9 defines “nonconforming use” as

10 “the use of a structure or land, or structure and land in combination,
11 which was lawfully established in compliance with all applicable
12 ordinances and laws, but which, because of the application of a
13 subsequent zoning ordinance, no longer conforms to the use
14 requirements for the use zone in which it is located.”

15 LCC 1.1115(29) defines “dwelling unit” as “a single unit providing complete,
16 independent living facilities for one or more persons including permanent
17 provisions for living, sleeping, eating, sanitation and only one cooking area.”
18 Properties in the R-1, R-1-A, and R-2 zones are subject to the regulations in LCC
19 1.1310, LCC 1.1315, and LCC 1.1320, respectively. Those regulations identify a
20 “one-family dwelling unit” as a permitted use in each of the zones. LCC
21 1.1310(1)(a); LCC 1.1315(1)(a); LCC 1.1320(1)(a).

22 BM 21-203 amends the definition of “short term rental” in the STR portion
23 of LCC chapter 4 to add the italicized language shown below:

24 “‘Short Term Rental’ means the *transient* renting of a dwelling unit
25 (including any accessory guest house on the same property) to any
26 person(s) on a day to day basis or for a period of time of up to thirty
27 (30) consecutive nights. *Short term rentals are deemed commercial*
28 *lodging businesses equivalent to hotels and motels. They are not*

1 *residential uses.*” LCC 4.415(16).

2 BM 21-203 adds LCC 4.422, which provides that, as of the date of the
3 measure’s adoption, (1) STR uses in the R-1-A, R-1, and R-2 zones will become
4 nonconforming uses and (2) the right to continue such uses will be personal to
5 the owner of record and expire upon transfer of the property. The stated intent of
6 the provision is to cause a gradual attrition in the number of dwellings in those
7 zones with STR licenses and to ensure that the licenses are not assignable, *i.e.*,
8 not transferable, and that the “uses” cease when ownership is transferred. LCC
9 4.422(a).

10 “If a subdivision now zoned R-1, R-1-A or R-2 wishes to allow
11 STRs to be licensed within its boundaries, it shall petition the
12 County to downzone it or to create a new zoning category to allow
13 such use. A majority of the property owners in said subdivision must
14 vote in favor of such a zoning change before applying to the County
15 for such a zone change.” LCC 4.422(b).

16 BM 21-203 therefore provides that the property in these zones must be rezoned
17 to allow STR uses or the county must create a new STR land use category,
18 presumably a zoning district. Amendment of the zoning map or the zoning code
19 is required to allow such uses.

20 BM 21-203 also adds LCC 4.423, which provides that, generally, all STR
21 licenses in the R-1-A, R-1, and R-2 zones will expire five years after the
22 measure’s adoption. LCC 4.423(a). There is an exception process allowing STR
23 use of an accessory dwelling if the primary dwelling *is not used* as an STR and if

1 the application for an exception is made within 60 days of the measure’s effective
2 date. LCC 4.423(b).

3 In addition, BM 21-203 adds LCC 4.424, which is a hardship provision for
4 property owners “who can substantiate that an investment made in alteration of a
5 dwelling exclusively to accommodate the nonconforming use of a dwelling as an
6 STR cannot be adequately amortized” within the five years provided in LCC
7 4.423(a). LCC 4.424(a). An application for hardship relief must be made within
8 60 days of the measure’s effective date. LCC 4.424(d). If the county makes the
9 requisite finding of hardship, the amortization period will be extended. LCC
10 4.424(e).

11 BM 21-203 treats STRs within certain zoning districts as a type of land use
12 (*i.e.*, a nonconforming use), and we agree with the circuit court that BM 21-203
13 is a land use decision subject to our jurisdiction. ORS 197.015(10)(a)(A)(iii)
14 provides that a local government decision that concerns the adoption or
15 amendment of a land use regulation is a land use decision. We conclude that the
16 STR portion of LCC chapter 4, as amended by BM 21-203, is a land use
17 regulation—that is, a “local government zoning ordinance, land division
18 ordinance * * * or similar general ordinance establishing standards for
19 implementing a comprehensive plan”—because it implements the stated
20 comprehensive plan policy to use plan designations to define and set down on
21 maps the appropriate uses of land. LCC 1.0190; ORS 197.015(11). Oregon’s
22 counties are required to enact land use regulations to implement their

1 comprehensive plans, and the boundaries of the county’s land use zones,
2 including the R-1, R-1-A, and R-2 zones, are indicated on maps entitled “Lincoln
3 County Comprehensive Plan and Zoning Maps.” ORS 197.175(2)(b); LCC
4 1.1303(1). For the reasons explained above, we conclude that the STR portion of
5 LCC chapter 4, as amended by BM 21-203, regulates the use of land zoned R-1,
6 R-1-A, and R-2.

7 Intervenor’s motion to dismiss is denied.

8 **MOTION FOR STAY**

9 ORS 197.845(1) provides:

10 “Upon application of the petitioner, the board may grant a stay of a
11 land use decision or limited land use decision under review if the
12 petitioner demonstrates:

13 “(a) A colorable claim of error in the land use decision or limited
14 land use decision under review; and

15 “(b) That the petitioner will suffer irreparable injury if the stay is
16 not granted.”

17 **A. Colorable Claim of Error**

18 As set out above, we may grant a stay of a land use decision if the petitioner
19 demonstrates a colorable claim of error in the land use decision under review.

20 ORS 197.845(1)(a). The requirement to demonstrate a colorable claim of error is
21 not demanding and does not require a showing that the petitioner will prevail on
22 the merits. *Meyer v. Jackson County*, 72 Or LUBA 462, 466 (2015). “Provided a
23 petitioner’s arguments are not devoid of legal merit, it is sufficient that the errors

1 alleged, if sustained, would result in reversal or remand of the challenged
2 decision.” *Id.*

3 Petitioners in LUBA Nos. 2021-118 and 2022-030 assert that BM 21-203
4 violates their right to continue a nonconforming use under state law. ORS
5 215.130 provides, in part:

6 “(5) The lawful use of any building, structure or land at the time
7 of the enactment or amendment of any zoning ordinance or
8 regulation may be continued. Alteration of any such use may
9 be permitted subject to subsection (9) of this section.
10 Alteration of any such use shall be permitted when necessary
11 to comply with any lawful requirement for alteration in the
12 use. Except as provided in ORS 215.215, a county shall not
13 place conditions upon the continuation or alteration of a use
14 described under this subsection when necessary to comply
15 with state or local health or safety requirements, or to
16 maintain in good repair the existing structures associated with
17 the use. A change of ownership or occupancy shall be
18 permitted.

19 “* * * * *

20 “(7)

21 “(a) Any use described in subsection (5) of this section may
22 not be resumed after a period of interruption or
23 abandonment unless the resumed use conforms with
24 the requirements of zoning ordinances or regulations
25 applicable at the time of the proposed resumption.”

26 In *Cossins v. Josephine County*, 77 Or LUBA 564 (2018), we considered
27 a request for stay of an ordinance prohibiting the commercial production of
28 marijuana in a rural residential zone on parcels five acres or less in size and
29 limiting the commercial production of marijuana on parcels larger than five acres

1 in size. The petitioners argued that the ordinance was inconsistent with the
2 restrictions on county regulation of nonconforming uses set out in ORS 215.130,
3 which, again, provides that “[t]he lawful use of any building, structure or land at
4 the time of the enactment or amendment of any zoning ordinance or regulation
5 may be continued.” *Cossins*, 77 Or LUBA at 566. We concluded that the
6 petitioners’ arguments were, “*if correct*, sufficient to warrant reversal or remand
7 of the decision and * * * sufficient to satisfy the colorable claim of error prong
8 of ORS 197.845(1).” *Id.* at 567 (emphasis added). Here, BM 21-203 provides that
9 existing STRs in the R-1-A, R-1, and R-2 zones are nonconforming uses as of
10 the date of the measure’s adoption and that the right to continue such uses expires
11 upon transfer of the property. Petitioners allege that, in so providing, BM 21-203
12 violates ORS 215.130. Petitioners have established a colorable claim of error.

13 **B. Irreparable Injury**

14 ORS 197.845(1)(b) requires that the movants for a stay demonstrate
15 irreparable injury. Demonstration of irreparable injury generally requires a
16 showing that, if a stay is not granted, the decision will authorize destruction or
17 injury of unique historic or natural resources, or other interests that cannot be
18 practically restored or adequately compensated for once injured or destroyed.
19 *Roberts v. Clatsop County*, 43 Or LUBA 577, 583 (2002).

20 “In order to satisfy the irreparable injury prong of ORS 197.845(1),
21 petitioners must, among other things, adequately specify the claimed
22 irreparable injury to the petitioner. The movant must specify the
23 following five factors:

1 “(1) the movant must adequately specify the injury that he or she
2 will suffer;

3 “(2) the injury must be one that cannot be compensated adequately
4 in money damages;

5 “(3) the injury must be substantial and unreasonable;

6 “(4) the conduct the movant seeks to bar must be probable rather
7 than merely threatened or feared; and

8 “(5) if the conduct is probable, the resulting injury must be
9 probable rather than merely threatened or feared.” *Cossins*, 77
10 Or LUBA at 567 (citing *Butte Conservancy v. City of*
11 *Gresham*, 47 Or LUBA 604, 609 (2004); *City of Oregon City*
12 *v. Clackamas County*, 17 Or LUBA 1032, 1042-43 (1988)).

13 We agree with intervenors that petitioners fail to adequately specify all of these
14 factors.⁵

15 **1. Petitioners have not adequately specified the injuries to be**
16 **suffered.**

17 Although petitioners allege a variety of potential injuries, those allegations
18 are not supported by evidence. Pursuant to OAR 661-010-0068(5),

19 “[t]he Board shall base its decision on the stay, including the right
20 to a stay, amount of undertaking, or conditions of any stay order,
21 upon evidence presented. Evidence may be attached to the motion
22 in the form of affidavits, documents or other materials, or presented
23 by means of a motion to take evidence outside the record.”

24 The role of evidence in evaluating assertions of irreparable injury is illustrated in
25 *Cossins*, where the petitioners submitted affidavits explaining that they had spent

⁵ We address some of the unmet factors. It is not necessary to address all of the factors because a stay requires that all of the factors be met.

1 years establishing unique strains of cannabis and establishing business goodwill
2 with their buyers. 77 Or LUBA at 567. The motion for stay stated that, on
3 average, each of the petitioners had invested roughly \$500,000 in their farming
4 operations. The petitioners represented to LUBA that the county had indicated
5 that it would enforce the ordinance and that, if the ordinance was enforced, the
6 petitioners would be forced to cease operations and, as a consequence, lose both
7 crops and business goodwill developed over years. *Id.* at 567-68. The petitioners
8 also represented to LUBA that at least one petitioner had been notified by the
9 Oregon Liquor Control Commission (OLCC) that its license to grow marijuana
10 would not be renewed after a given date unless the renewal was accompanied by
11 a new Land Use Compatibility Statement (LUCS) issued by the county. Although
12 the county pointed to a provision in the ordinance allowing the county and
13 farmers to enter into compliance plans to rectify violations, we explained:

14 “Given the time it will take for property owners to enter into a
15 Compliance Plan with the county and, at the conclusion, secure a
16 LUCS from the county, we understand petitioners to argue that
17 securing a new LUCS prior to the effective date is not possible and
18 therefore it is probable that OLCC will not renew their license
19 without that new LUCS. Petitioners argue that without an OLCC
20 license, they will be unable to operate their existing businesses in
21 the county. *Id.* at 569.

22 We concluded that the petitioners adequately identified the loss they would
23 suffer. We further explained:

24 “Petitioners will almost certainly have no legal right to continue to
25 operate if the county requires petitioners to stop farming during the
26 pendency of LUBA’s review of petitioners’ challenges to the

1 Ordinance. Finally, assuming, as we must, that petitioners ultimately
2 prevail in this appeal, the costs that would be incurred if petitioners
3 are forced to cease operations are substantial and unreasonable.” *Id.*
4 at 568.

5 The county responds that petitioners in LUBA No. 2021-118 did not
6 submit evidence in support of their motion for stay.⁶ We agree. Allegations in the

⁶ The county responds:

“Here, Petitioners’ allegations of irreparable injury fall far short of the required showing. The allegations that they ‘stand to’ lose the right to continue a use, or that they will have to cancel reservations are nothing more than speculation. For example, nowhere in the Motion are there any specific allegations that a Petitioner actually has a booking that will have to be cancelled because of the 2-person per bedroom limit. As such, they do not ‘adequately specify the injury’ they believe they will suffer or explain why the injury cannot be compensated with money damages. Moreover, there is no basis to conclude that these speculative harms are ‘probable,’ rather than merely ‘feared.’ For example, the Motion does not include evidence that any reservations will be cancelled as a result of the Measure, or of a property sale in which the sale price was adversely affected by the Measure. Similarly, they have not and cannot show that any harm cannot be compensated adequately in money damages and, because the harm they allege is financial in nature, it is impossible for them to make such a showing. They also make no effort to demonstrate that the interests they seek to protect cannot be ‘practicably restored or adequately compensated.’ Finally, the allegation that the Measure limits capacity to no more than 6-8 persons is flatly contradicted by the text of the Measure, which expressly allows occupancy up to 16 persons, and even allows certain ‘grandfathered occupancies’ above that limit.” County’s Response to 2021-118 Motion for Stay 7-8.

1 body of the motion are not evidence, and petitioners in LUBA No. 2021-118 have
2 not adequately specified the injuries to be suffered.

3 Petitioners in LUBA No. 2022-030 submitted declarations in support of
4 their claims of irreparable injury, and we address that evidence below.

5 Petitioner Judy Cammann owns a property in unincorporated Lincoln
6 County for which they have a county-issued STR license. The property is zoned
7 R-1-A, R-1, or R-2. Petitioner Cammann has at least three rental contracts
8 between December 2021 and July 2022. They rent the house as a four-bedroom
9 house (three bedrooms and a family room that can be used as a bedroom). They
10 allege that the property’s occupancy limit *could* be reduced by BM 21-203. This
11 is speculative and does not adequately specify the injury to be suffered.

12 They also allege that, if BM 21-203 goes into effect, it would impact their
13 ability to derive income from their property. However, they make only general
14 statements as to the alleged injury. For example, they state, “If the Measure is
15 allowed to go into effect, it is my understanding that it would reduce the value of
16 my property.” 2022-030 Motion for Stay Ex H, at 2. That is speculation.
17 Similarly, they state, “If the Measure is allowed to go into effect, I may have to
18 sell my property. It is the only home I own and vacation rentals are my only
19 source of income, other than Social Security.” *Id.* The term “may” reflects the
20 speculative nature of the harm. No evidence is presented of the impact on rental
21 charges or property value. It is possible that a reduced supply of vacation rooms

1 would increase charges. Petitioner Cammann has not adequately specified the
2 injury to be suffered.

3 Petitioner John Blackburn owns two properties for which they have STR
4 licenses. The properties are zoned R-1-A, R-1, or R-2. Petitioner Blackburn has
5 at least 27 existing rental agreements for one of the properties and at least 30
6 existing rental agreements for the other property, beginning in December 2021
7 and going through November 2022. They explain that the properties have current
8 occupancy limits of 10 to 12 people and state that it is their “understanding that
9 the current occupancy of [their] properties *could* be reduced if the Measure is
10 allowed to go into effect, which *may* impair current rental contracts [they] have.”
11 2022-030 Motion for Stay Ex I, at 2 (emphases added). They state, without
12 support, that, if BM 21-203 goes into effect, it would impact their ability to derive
13 income from their properties and that it is their understanding that it would reduce
14 the value of their properties. They have not adequately specified the injury to be
15 suffered because they have not identified where the occupancy limits of their
16 units will be decreased or provided evidence that their property value will
17 decrease.

18 Petitioner Lauri Hines owns four properties with STR licenses, one of
19 which is in unincorporated Lincoln County (the Waldport property).⁷ They have
20 a county-issued STR license for the Waldport property. The Waldport property

⁷ The other three properties are in the city of Newport.

1 is zoned RR-2, which is not one of the zones specifically referenced in BM 21-
2 203. Petitioner Hines says that they understand that they *may* not be able to rent
3 more than one of their properties if BM 21-203 goes into effect. They state that
4 it is unclear how BM 21-203 impacts the Waldport property, given that it is zoned
5 RR-2, but they understand that the county has, at various times, said that BM 21-
6 203, in its entirety, applies to all STR licenses in residential unincorporated areas
7 of the county and, to the extent that it does, the impact on their properties would
8 be significant. They do not identify the source of a county statement that BM 21-
9 203 applies to all properties in unincorporated areas of the county, and they do
10 not identify provisions in BM 21-203 that state or imply that it applies outside
11 the R-1, R-1-A, and R-2 zones. They state that the inability to rent the Waldport
12 property (their biggest income generator) would reduce their income by 50
13 percent, but they provide no context for the 50 percent figure, that is, no statement
14 of total income. They state that the Waldport property has an occupancy limit of
15 16 people with six sleeping areas, and it is their understanding that the current
16 occupancy limit could be reduced if BM 21-203 goes into effect. They provide
17 no analysis showing how BM 21-203 reduces the occupancy limit. They state
18 that, if BM 21-203 goes into effect, it would impact their ability to derive income
19 from their properties, and it is their understanding that it would reduce the value
20 of their properties. Like the above petitioners, no evidentiary support is provided
21 for these broad, general assertions. They have not adequately specified the injury
22 to be suffered.

1 Lastly, petitioner Peter Prehn states that they own two properties in the
2 county for which they have STR licenses. One is in unincorporated Lincoln
3 County and zoned R-1-A, R-1, or R-2. They have at least 13 existing rental
4 agreements from December 2021 through July 2022, including seven for the
5 property in the unincorporated area of the county. The current occupancy limit is
6 11 people, and it is their understanding that the occupancy limit *may* be reduced
7 if BM 21-203 goes into effect. There is no analysis of when the occupancy limit
8 might be reduced or analysis of how much it would be reduced by BM 21-203.
9 This broad assertion is insufficient for the reasons set out above.

10 Petitioner Prehn explains that they understand that they may not be able to
11 rent both properties and, therefore, may have to cancel some rental agreements,
12 impacting their income. They state that it is their understanding that BM 21-203
13 would reduce the value of their properties. There is no analysis of when those
14 alleged impacts would occur or estimation of the amount of income or property
15 value that would be lost.

16 Each petitioner in LUBA No. 2022-030 alleges that they plan to pass the
17 property—that is, the dwelling site—on to heirs or sell the property, if needed,
18 and that their ability to do so may be harmed. Although BM 21-203 provides that
19 STR licenses are not transferrable, petitioners do not explain how BM 21-203
20 impacts their ability to transfer the property, and petitioners have not adequately
21 specified the injury to be suffered.

1 Petitioners Prehn, Blackburn, and Hines each state that their septic systems
2 were recently updated, that they understand that they may have to update their
3 septic systems further if BM 21-203 goes into effect, and that the update may
4 impair rental contracts. None of the petitioners provides an estimate of the cost
5 of required upgrades or analysis of how completion of the upgrades will impact
6 existing contracts. These petitioners have not adequately specified the injury to
7 be suffered.

8 We will not issue a stay where the petitioners have failed to adequately
9 specify the alleged injury. In *Mingo v. Morrow County*, 63 Or LUBA 515 (2011),
10 a wind farm operator sought a stay of a county decision determining that their
11 wind farm operation was in partial violation of a condition of approval related to
12 noise standards and amending the prior permit to require the operator to
13 determine and implement any necessary compliance measures. We concluded
14 that, where a claim of irreparable injury is based on the financial cost of
15 complying with a condition of approval, but the movant does not provide any
16 estimate of those costs, the movant has not adequately specified the alleged
17 injury. We explained:

18 “[The wind farm operator] does not attempt to specify the potential
19 cost of collecting and evaluating data, or the cost of measures to
20 ensure compliance with the condition, and has not ‘adequately
21 specified’ the injury [the wind farm operator] will suffer. For the
22 same reason, [the wind farm operator] has not adequately
23 demonstrated that the feared injury is ‘substantial,’ or provided
24 LUBA with information necessary to determine whether the injury
25 will be ‘unreasonable.’ For all we are informed, such costs may be

1 extremely modest.” *Mingo*, 63 Or LUBA at 519.

2 The declarations submitted by the petitioners in LUBA No. 2022-030 contain
3 unsupported assertions. They do not provide detail as to the amount of anticipated
4 financial injury or the timing of county application of BM 21-203 restrictions to
5 existing STRs. Petitioners have not adequately specified the injuries to be
6 suffered. For the same reasons, petitioners have not demonstrated that any
7 potential injury to them is substantial or unreasonable.

8 **2. Petitioners have not shown that the alleged injury is**
9 **probable.**

10 Petitioners do not show that the alleged injury is probable. Intervenors
11 explain that BM 21-203 provides that lawfully existing STR licenses are
12 recognized and have a five-year amortization period. Petitioners provide no
13 evidence relating to the probable date the county would begin enforcing BM 21-
14 203 in a manner causing them injury. For example, petitioners have not shown
15 that it is probable that the county will begin to enforce requirements to upgrade
16 septic systems, assuming that petitioners’ systems require upgrades, before
17 resolution of this appeal and, therefore, have not shown that the alleged injury is
18 probable. Similarly, petitioners have provided no evidence as to when the county
19 will begin enforcing any occupancy limits and, therefore, have not shown that the
20 alleged injury is probable.

21 The motions for stay in LUBA Nos. 2021-118 and 2022-030 are denied.

1 **BRIEFING SCHEDULE**

2 These appeals are reactivated. The record in these consolidated appeals is
3 the record in LUBA No. 2021-118, which was transmitted to LUBA on January
4 6, 2022.

5 Objections to the consolidated record shall be filed within 14 days of the
6 date of this order. If objections are filed, the county shall file its response and any
7 supplemental or amended record within 14 days of the date the objection is filed.
8 Thereafter, the Board will issue an order resolving the objections, settling the
9 record, and establishing a briefing schedule.

10 If no objections are filed, the petitions for review are due 21 days from the
11 date of this order, the response briefs are due 42 days from the date of this order,
12 and our final opinion is due 77 days from the date of this order.

13 Dated this 17th day of May 2022.

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Michelle Gates Rudd
Board Member