

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 EMERALD COVE LLC,
4 *Petitioner,*

5
6 vs.

7
8 CITY OF LINCOLN CITY,
9 *Respondent.*

10
11 LUBA No. 2015-078

12
13 FINAL OPINION
14 AND ORDER

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16 Appeal from City of Lincoln City.

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18 Dean N. Alterman, Portland, represented petitioner.

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20 Richard Appicello, Lincoln City, represented respondent.

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22 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board
23 Member, participated in the decision.

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25 DISMISSED 02/04/2016

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27 You are entitled to judicial review of this Order. Judicial review is
28 governed by the provisions of ORS 197.850.

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NATURE OF THE DECISION

Petitioner appeals a decision by the city’s Vacation Rental Dwelling License Appeals Board denying an appeal of the planning and community development director’s approval of petitioner’s Vacation Rental Dwelling license renewal application, with conditions.

FACTS

Petitioner owns a dwelling, constructed in 2008, that is located in the Road’s End area of the city. The city annexed the Road’s End area from Lincoln County effective July 2013 in Ordinance 2012-10 (Annexation Ordinance). The city has not rezoned the property and accordingly, pursuant to the Annexation Ordinance, petitioner’s property retains its county zoning designation of Residential Zone R-1-A, and is not subject to the provisions of the city’s zoning ordinance at Lincoln City Municipal Code (LCMC) Title 17.¹ Response Brief App C, 3-4.

¹ The Annexation Ordinance provides in relevant part:

“1. Property in the Annexation Area, if annexed, will have the Lincoln County zoning designation of Residential Zone R-1-A, (with the exception of the Roads End State Park, which will retain county PF zoning) and as provided by LCMC

1 As described by petitioner, the dwelling includes six bedrooms and two
2 “bunkrooms.”² Record 99. Since 2009, petitioner has rented its dwelling as a
3 vacation rental dwelling (VRD).³

4 LCMC 5.14 is part of Title 5 of the city’s municipal code, “Business
5 Taxes, Licenses and Regulations.”⁴ LCMC 5.14 requires the owner of property
6 to be used as a VRD to obtain a revocable VRD License annually, by

§17.12.050, will retain that zoning designation, rather than having a standard Lincoln City Title 17 zoning designation, until and unless rezoned by ordinance adopted by the City Council;

“ * * * * *

“3. The Annexation Area, if annexed, will retain all Lincoln County land use provisions until such time as the Annexation Area becomes subject to City zoning ordinances, through the rezoning process adopted by ordinance under City procedures.” Response Brief App C, 3.

² Petitioner does not explain how a bunkroom differs from a bedroom.

³ LCMC Chapter 17.80.050 regulates the use of dwellings as VRDs. LCMC 17.08.010 defines “vacation rental dwelling” as “a dwelling unit that is used, rented or occupied on a daily or weekly basis, or is available for use, rent, or occupancy on a daily or weekly basis, or is advertised, or listed by an agent, as available for use, rent, or occupancy on a daily or weekly basis.”

⁴ Title 5 also contains sections addressing “Occupation Taxes,” “Bankruptcy, Close Out, Fire, and Garage Sales,” “Bed and Breakfast Accommodations,” “Special Events,” “Liquor License Review,” “Solicitation,” and “Street Vendors.”

1 submitting an application that demonstrates compliance with LCMC 5.14.⁵ The
2 Annexation Ordinance required owners of properties within Road’s End
3 desired to be used as VRDs to submit an application for a VRD License to the
4 city not later than January 31, 2014.⁶ In 2014, petitioner applied for and
5 received a VRD License.

6 In May 2014, the city enacted Ordinance 2014-07, which took effect
7 January 1, 2015. Response Brief, App D 11-12. As relevant here, that
8 ordinance added LCMC 5.14.060.B.4.a, which provides:

9 “The occupancy of the VRD shall be limited based on the 1997
10 Uniform Housing Code, *but in no event shall occupancy exceed*
11 *the Oregon Residential Specialty Code lodging house limitations*
12 *applicable to the residential structure, or other predecessor*
13 *residential code (e.g., UBC lodging house limitations). Occupancy*

⁵ LCMC 5.14.020.C provides “[v]acation rental’ has the definition stated in LCMC 17.08.010.” See n 3.

⁶ Section 15 of the Annexation Ordinance provides:

“LCMC §5.14 requirements for vacation rental dwelling licenses shall take effect with regard to property in the annexation area on December 1, 2013, and applications for vacation rental dwelling licenses are required to be submitted to the city no later than January 31, 2014. Vacation rental dwellings lawfully existing on the effective date of this annexation shall not be subject to the ownership limitation in the definition of ‘person’ in LCMC 5.14.020(B) and as set forth in LCMC 5.14.060(D). Notwithstanding this provision, the city retains the right to impose such a limitation or other requirements in the future.” Response Brief, App C, 11.

1 may exceed lodging house limitations only in vacation rental
2 dwellings constructed pursuant to (or retrofitted for compliance
3 with) the current (i.e., code in effect at the time of the VRD
4 application or renewal) Oregon Structural Specialty Code.
5 Occupancy in excess of lodging house limitations shall only be
6 permitted in commercial zoning districts or such other districts as
7 council may authorize by ordinance. *The license shall state clearly*
8 *the numeric occupancy limit for the dwelling, including*
9 *specifically the number of bedrooms.*⁷ (Emphases added.)

10 The 2014 Oregon Residential Specialty Code defines “lodging house” to mean
11 “[a]ny building or portion thereof containing not more than five guest rooms
12 where rent is paid in money, goods, labor or otherwise. The total number of
13 guests shall not exceed 16. Lodging houses include ‘bed and breakfast’ and
14 similar uses.” We understand the city to have interpreted LCMC 5.14.060.B.4.a
15 to require a limit of five bedrooms for petitioner’s VRD.

16 In January 2015, petitioner applied to renew its VRD License, and the
17 city issued a license with the following condition:

18 “Per LCMC § 5.14.060.B.4.a, the number of bedrooms made
19 available when used as a VRD shall not exceed five.” Record 98.

⁷ Ordinance 2014-07 also added provisions addressing egress windows, smoke detectors, carbon monoxide detectors and the posting of tsunami evacuation maps in VRDs.

1 Petitioner appealed that condition to the VRD License Appeals Board pursuant
2 to LCMC 5.14.090.⁸ In its appeal, petitioner argued to the VRD License
3 Appeals Board that (1) its dwelling is not a “lodging house” within the
4 meaning of LCMC 5.14.060.B.4.a or the Oregon Residential Specialty Code;
5 and (2) use of the six bedrooms and two bunkrooms for VRD purposes is a
6 nonconforming use under LCMC 17.64, the provisions of the city’s zoning
7 code governing nonconforming uses. Record 45-47, 87.

8 The VRD License Appeal Board denied petitioner’s appeal and upheld
9 the condition of approval. LCMC 5.14.090.E.4 provides in relevant part that
10 “[t]he board’s decision is the final decision of the city and is appealable only by
11 writ of review to circuit court.” Petitioner appealed the decision to LUBA.

12 **JURISDICTION**

13 In its response brief, the city moves to dismiss the appeal, arguing that
14 the challenged decision is not a “land use decision” as defined at ORS

⁸ LCMC 5.14.090(A) provides that “a VRD license appeals board shall be responsible for determining an appeal of a decision approving or denying an application or renewal application for a vacation rental dwelling license, or revoking or suspending a VRD license, in any zone.” The city council is authorized to act as the VRD License Appeals Board and is also authorized to delegate its authority and appoint seven people who meet the qualifications for being appointed as planning commissioners to serve as members of the VRD

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1 197.015(10)(a). ORS 197.015(10)(a) defines “[l]and use decision” in relevant
2 part as a final local government decision that concerns the application of
3 comprehensive plan provisions or land use regulations.⁹ ORS 197.015(11)
4 defines “[l]and use regulation” to mean “any local government zoning
5 ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or
6 similar general ordinance establishing standards for implementing a
7 comprehensive plan.” According to the city, no provision of LCMC 5.14 is a
8 “land use regulation” as defined in ORS 197.015(11) because LCMC 5.14 does
9 not establish any standards for implementing the city’s comprehensive plan.
10 Also according to the city, the decision on petitioner’s appeal does not concern
11 the application of any other land use regulations because the city, in

License Appeals Board. LCMC 2.18.020. The city council appointed the city planning commission to act as the VRD License Appeals Board. Record 31.

⁹ ORS 197.015(10)(a)(A) defines “land use decision” to include:

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

“(i) The goals;

“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]”

1 referencing provisions of the city’s zoning code at LCMC 17.64, was merely
2 providing alternative responses to arguments made below by petitioner
3 regarding nonconforming uses.¹⁰

4 As the party seeking review by LUBA, petitioner has the burden of
5 establishing that LUBA has jurisdiction. *Billington v. Polk County*, 299 Or 471,
6 475, 703 P2d 232 (1985). In its petition for review, petitioner took the position
7 that:

8 “LUBA has jurisdiction to hear this appeal because Respondent’s
9 final decision concerns the application of a mixture of land use
10 regulations and other regulations, including regulations that
11 Respondent is treating as land use regulations, and is therefore a
12 ‘land use decision’ under ORS 197.015(10).”

13
14 “ * * * * *

15
16 “The challenged decision is a final decision by a local government
17 that applies the City’s land use regulations on vacation rentals,
18 Lincoln City Municipal Code * * *, that applies Lincoln County’s
19 land use regulations (or absence of regulations) on vacation
20 rentals, and that improperly applies as land use regulations
21 portions of the Oregon Residential Specialty Code and the Oregon
22 Structural Specialty Code. * * *” Petition for Review 3, 6.

¹⁰ In the alternative, the city argues that LUBA lacks jurisdiction over the appeal because petitioner failed to exhaust its remedies at the local level, as required by ORS 197.825(2)(a), because petitioner did not file a local appeal of the initial decision approving the license renewal application under LCMC Title 17, the city’s zoning code provisions. Because we agree with the city that the challenged decision is not a land use decision, we need not address the city’s alternative exhaustion of remedies argument.

1 In its response to the motion to dismiss, petitioner elaborates on those
2 positions.

3 Petitioner first argues that LCMC 5.14.060.B.4.a is a land use regulation.
4 Ordinance 2014-07, the ordinance that enacted LCMC 5.14.060.B.4.a along
5 with other provisions of LCMC 5.14, states in the preamble that it is “not a
6 land use ordinance[.]” Response Brief App. D, 2. However, that part of the
7 ordinance goes on to recite that the city provided the Department of Land
8 Conservation and Development (DLCD) with the notice of the ordinance
9 required by ORS 197.610.¹¹ Generally, where a local government makes it
10 clear that the ordinance it is adopting is not intended to be a land use
11 regulation, LUBA does not have jurisdiction to review such an ordinance,
12 unless there is a clear connection between the ordinance and the comprehensive
13 plan. *Rest-Haven Memorial Park v. City of Eugene*, 39 Or LUBA 282, 288,
14 *aff’d* 175 Or App 419, 28 P3d 1229 (2001). Absent that clear connection, the
15 ordinance is not a land use regulation even though it may arguably further
16 some comprehensive plan provisions in a general or indirect way. *Id.*

¹¹ ORS 197.610 requires a local government to submit proposed comprehensive plan or land use regulation changes to DLCD before it adopts the changes.

1 The language in Ordinance 2014-07 that recites that the ordinance is not
2 intended as a land use ordinance is some indication that the city does not view
3 the ordinance as a land use regulation. On the other hand, the preamble also
4 recites that the city provided notice of the ordinance to DLCD, which suggests
5 that the city was at least concerned that the ordinance could be viewed as a land
6 use regulation. The language of the ordinance itself is inconclusive.

7 Petitioner argues that there is a “clear connection” between LCMC
8 5.14.060.B.4.a and two provisions of the comprehensive plan. Petitioner cites a
9 provision of the Land Use Planning chapter of the comprehensive plan titled
10 “Inventory of Implementation Techniques.” One technique listed is “Building
11 Codes.” According to petitioner, the incorporation in LCMC 5.14.060.B.4.a of
12 the Oregon Residential Specialty Code (or building code) definition of
13 “lodging house” demonstrates that “LCMC 5.14 is * * * a land use regulation
14 because it implements respondent’s comprehensive plan by using one of the
15 techniques that respondent has stated it will use to implement the plan.”
16 Response to Motion to Dismiss 5. Second, petitioner also argues that LCMC
17 5.14.060.B.4.a implements one of the comprehensive plan’s housing goal
18 policies: “to establish minimum construction and lot coverage standards for
19 residential development.”

1 We conclude that there is no basis to infer that LCMC 5.14.060.B.4.a is
2 intended to implement those comprehensive plan provisions and there is no
3 clear, if any, connection between LCMC 5.14.060.B.4.a and the plan
4 provisions cited by petitioner. The cited comprehensive plan provisions are
5 potential implementation strategies and broadly worded policy statements, with
6 no clear or direct connection to the occupancy limitation imposed by LCMC
7 5.14.060.B.4.a. Accordingly, LCMC 5.14.060.B.4.a is not a land use regulation
8 within the meaning of ORS 197.015(11).

9 **B. LCMC 17.64**

10 LCMC 17.64 contains the zoning code provisions governing
11 nonconforming uses. As noted above, the Annexation Agreement provides that
12 petitioner’s property is not subject to the provisions of the city’s zoning code.
13 In its written appeal and testimony to the VRD License Appeals Board,
14 petitioner took the position that it has a “nonconforming use,” citing LCMC
15 17.64, to use all six bedrooms in the dwelling for VRD purposes. Record 45-
16 47, 84.

17 In its decision, the VRD License Appeals Board concluded that it lacked
18 jurisdiction to consider the argument:

19 “The Planning Director raised the issue of jurisdiction concerning
20 the allegations * * * that the VRDs enjoyed protection under
21 LCMC Chapter 17.64 (nonconforming uses). The Director made

1 the jurisdictional argument in the alternative and without prejudice
2 to the argument on the merits. The Board finds and determines that
3 the Planning Director correctly points out that the jurisdiction of
4 the Board is limited to licenses and that a separate process exists
5 for land use appeals. The jurisdiction of the Board is limited to
6 Chapter 5.14. Title 17 is within the exclusive jurisdiction of the
7 Planning Director, Planning Commission and Council to consider
8 in a valid timely filed appeal of a land use decision. No appeal to
9 the Planning Commission has been timely filed concerning
10 nonconforming use determinations for these properties. * * *

11
12 “Accordingly, the Board finds and determines that the Vacation
13 Rental License Appeals Board does not have jurisdiction over land
14 use decisions and is without jurisdiction to determine the existence
15 of a nonconforming use. The land use arguments contained in the
16 * * * appeals are outside the jurisdiction of the Board and as such
17 are summarily denied.” Record 8.

18 However, later in the final decision the VRD License Appeals Board went on
19 to address and reject petitioner’s nonconforming use argument.¹²

¹² The decision provides:

“Not in derogation of the jurisdictional findings above, the Board makes the following findings concerning the nonconforming use allegations in the appeal.

“25) The staff report in the record, addressed the merits of a nonconforming use argument, finding that to be entitled to protection under LCMC 17.64 the use must be legal, and concluding that it has never been legal to construct or convert a single family dwelling (with no occupancy limit) to a lodging house with a five bedroom limitation. Lack of enforcement by the County does not waive or excuse violation of the lodging house limitation. The Board incorporates the Director’s arguments set forth below:

“Appellants argue that even if the lodging house restriction in the building code applies, the dwelling is a nonconforming use and entitled to continue with more than five bedrooms. This is true, [Appellants assert], because the dwelling was constructed and operated as VRD before the city began applying the lodging house restriction.

“LCMC 17.08 defines ‘nonconforming use’ as follows:

“‘Nonconforming use’ means a use that was originally lawful, but no longer is a permitted use in the district in which it is situated. Any existing use for which zoning regulations now require a conditional use permit shall be deemed to be nonconforming until such a permit is secured.

“Similarly, LCMC 17.64.030.A says in relevant part:

“Lawful Nonconforming Uses Allowed to Continue. A lawful nonconforming use of land may continue as long as it remains otherwise lawful, provided the nonconforming use does not cease for any reason for a period of more than six months.

“One of the key aspects of both of these provisions is that the use must have been lawful at the time it was established. Staff does not dispute that the dwelling at issue here was lawfully built as a single-family dwelling with more than five bedrooms. The ORSC does not have any limits on the number of bedrooms that may be included in a single-family dwelling. Building a six bedroom house was and is lawful.

“But a six bedroom VRD, built to residential building code standards, was not lawful at the time it was built, nor was it lawful if it was converted from as single-family dwelling to a VRD at some point after construction. As it does today, the OSSC and the ORSC that were in effect in [2007 and]

1 We understand petitioner to argue that the portion of the decision quoted
2 in the margin applied LCMC 17.64, and some unspecified county land use
3 regulation, to conclude that petitioner does not have a nonconforming use of
4 six bedrooms for VRD use, and therefore the decision is a land use decision.¹³
5 Petitioner’s Response to Respondent’s Motion to Dismiss 7.

6 We disagree with petitioner. As far as the record demonstrates, petitioner
7 did not apply for or otherwise seek a nonconforming use determination under
8 LCMC 17.64 or any other city zoning code provision governing
9 nonconforming uses or VRDs at the same time that it applied for its VRD
10 license renewal. It is reasonably clear from the language addressing petitioner’s
11 nonconforming use argument that that part of the decision is (1) alternative and
12 subordinate to the VRD License Appeal Board’s main conclusion that it lacked

2008 allowed ‘lodging houses’ to be built to the ORSC standards only if it had no more than five bedrooms. But as [Appellants] admit, at the time the building was constructed it had six bedrooms. The fact that Lincoln County may not have enforced the building codes’ ‘lodging house’ limitation of no more than five bedrooms does not render the six bedroom VRD lawful. The situation is no different than if the County Sheriff didn’t enforce the speed limit on Highway 101. That doesn’t make speeding legal.” Record 15-16 (bold and italics in original omitted.)

1 jurisdiction to consider petitioner’s nonconforming use argument; and (2) was
2 adopted solely in order to respond to the argument raised by petitioner in its
3 appeal. The decision does not apply any of the standards and criteria set out in
4 LCMC 17.64 for establishing the existence of a nonconforming use.¹⁴
5 Admittedly the findings at Record 15-16 do apply the LMC 17.08 definition of
6 “nonconforming use” and conclude petitioner does not qualify. But the entire
7 discussion of nonconforming use protections is prefaced by the city’s finding
8 that those findings are “[n]ot in derogation of the jurisdictional findings[.]”
9 While the city certainly could have been clearer, we conclude the
10 nonconforming use findings are surplusage and were not intended as a final
11 city decision regarding whether petitioner’s VRD is protected from the LCMC
12 5.14.060.B.4.a five-bedroom limit, as a nonconforming use. Essentially, the

¹³ Petitioner also argues that the city applied “Lincoln County’s land use regulations (or absence of regulations) on vacation rentals[.]” Petition for review 6. We understand that argument to be part of the same argument.

¹⁴ In its motion to dismiss the city argues that, pursuant to the Annexation Ordinance, LCMC Title 17 does not yet apply to petitioner’s recently annexed property. The challenged decision does not take that position.

- 1 language is dicta. Accordingly, the decision does not concern the application of
- 2 a land use regulation.
- 3 The appeal is dismissed.¹⁵

¹⁵ Petitioner has not filed a motion to transfer the appeal to circuit court as provided under OAR 661-010-0075(11).
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