

1                           BEFORE THE LAND USE BOARD OF APPEALS  
2                           OF THE STATE OF OREGON  
3

4 JACK G. KAADY,                           )  
5    )  
6                    Petitioner,                            )  
7    )  
8            and    )  
9    )

LUBA No. 93-020  
)

10 WILLIAM G. HAY, GEORGIANA F. HAY,  
11 WILLIAM J. ALLRED, and HALLMARK )  
12 INNS & RESORTS, INC.,                            )  
13    )  
14                    Intervenors-Petitioner,                            )        AND

FINAL OPINION  
)        AND

15 ORDER

16    )  
17            vs.    )  
18    )  
19 CITY OF CANNON BEACH,                            )  
20    )  
21                    Respondent.                            )

22  
23  
24            Appeal from City of Cannon Beach.

25  
26            Jack G. Kaady, Milwaukie, and Dean N. Alterman,  
27 Portland, filed the petition for review. With them on the  
28 brief was Kell, Alterman & Runstein. Jack G. Kaady argued  
29 on his own behalf, and Dean N. Alterman argued on behalf of  
30 intervenors-petitioner.

31  
32            William R. Canessa, Seaside, filed the response brief  
33 and argued on behalf of respondent. With him on the brief  
34 was Campbell, Moberg & Canessa.

35  
36            KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,  
37 Referee, participated in the decision.

38  
39                    AFFIRMED    01/13/94

40  
41            You are entitled to judicial review of this Order.  
42 Judicial review is governed by the provisions of ORS  
43 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner and intervenors-petitioner (petitioners)  
4 appeal an order of the city council determining that  
5 petitioner Kaady's property (which is the property at issue  
6 in this appeal), is subject to the requirements of Ordinance  
7 No. 92-1 governing the short term occupancy of dwellings.

8 **MOTION TO INTERVENE**

9 William G. Hay, Georgiana F. Hay, William J. Allred,  
10 and Hallmark Inns & Resorts, Inc., move to intervene on the  
11 side of petitioner in this appeal proceeding. There is no  
12 objection to the motion, and it is allowed.

13 **FACTS**

14 The subject property is zoned residential and is  
15 developed with a dwelling. The dwelling is licensed by the  
16 State of Oregon as a "recreation and housing facility."  
17 Petition for Review 5. Petitioner applied to the city for  
18 an "exemption" from the requirements of Ordinance No. 92-1.  
19 The city denied the request, and this appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 "The Challenged Decision Is Unconstitutional  
22 Because it Deprives Petitioner of His State Equal  
23 Protection Rights."

24 Petitioners argue the challenged decision violates  
25 Article I, section 20, of the Oregon Constitution, which  
26 provides:

27 "No law shall be passed granting to any citizen or

1 class of citizens privileges, or immunities,  
2 which, upon the same terms, shall not equally  
3 belong to all citizens."

4 Petitioners' claim of unequal treatment stems from  
5 their contention that the city exempted another business--  
6 the Tolovana Inn--from the requirements of Ordinance No.  
7 92-1, but refused to grant the same "exemption" to  
8 petitioner. Petitioners argue the Tolovana Inn was  
9 "exempted" from Ordinance No. 92-1 (in a separate  
10 proceeding), because it is deemed to be a motel. Motels are  
11 not regulated by Ordinance No 92-1. Petitioners assert the  
12 Tolovana Inn is not really a motel, and provide various  
13 reasons why they believe the city's separate decision  
14 concerning the Tolovana Inn is erroneous.<sup>1</sup> However,  
15 petitioners do not claim that petitioner Kaady's property  
16 constitutes a motel. Essentially, petitioners' arguments  
17 are simply that because the Tolovana Inn has been  
18 incorrectly termed a "motel" under Ordinance No. 92-1,  
19 petitioner should have the same benefits that flow from the  
20 city's allegedly incorrect determination concerning the  
21 Tolovana Inn.<sup>2</sup>

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<sup>1</sup>Petitioners do not challenge, in this proceeding, the city's separate decision determining the Tolovana Inn is a motel.

<sup>2</sup>The city argues that if we reverse or remand the city's decision that the Tolovana Inn is a motel, then the bases for petitioners' assignments of error will disappear. However, in a decision issued this date, we affirm the city's decision determining the Tolovana Inn is a "motel" and, therefore, is not subject to regulation under Ordinance No. 92-1. Poddar v. City of Cannon Beach, \_\_\_\_\_ Or LUBA \_\_\_\_\_ (LUBA No. 93-120, January 13,

1           In the first place, we do not understand the city to  
2 have granted any "exemptions" from the regulations imposed  
3 by Ordinance No. 92-1. Rather, the city simply determined,  
4 in another proceeding, that the Tolovana Inn is not subject  
5 to regulation under Ordinance No. 92-1, because it is a  
6 motel. In this regard, no one contends petitioner Kaady  
7 sought a determination that his property qualifies as a  
8 "motel." Rather, petitioner Kaady simply asked the city for  
9 the same "exemption" that he believed the Tolovana Inn  
10 received. However, because the Tolovana Inn received no  
11 "exemption" from the requirements of Ordinance No. 92-1, no  
12 "exemptions" were refused to petitioner Kaady that were  
13 provided to any other person similarly situated.<sup>3</sup>

14           Second, even if the city incorrectly determined the  
15 Tolovana Inn is a motel, that would not establish the  
16 Tolovana Inn received any privilege not available to others  
17 similarly situated. If the city made an incorrect land use  
18 decision concerning the Tolovana Inn, that decision is  
19 subject to reversal or remand by this Board. However, any  
20 such decision has no bearing on the challenged decision's  
21 determination that petitioner Kaady's property is subject to

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1993). Another appeal challenging a similar city decision concerning the Tolovana Inn is currently pending before this Board. Kaady v. City of Cannon Beach, LUBA No. 93-109. The city's arguments in this regard do not provide a basis for rejecting petitioners' assignments of error in this appeal proceeding.

<sup>3</sup>Petitioners do not contend there is any other example of the city granting "exemptions" from the requirements of Ordinance No. 92-1.

1 the requirements of Ordinance No. 92-1.

2 One further point merits comment. Petitioners appear  
3 to take the position that the city could not, consistent  
4 with Article I, section 20, of the Oregon Constitution,  
5 consider the Tolovana Inn to be a "motel" under Ordinance  
6 No. 92-1, because the Tolovana Inn includes both short term  
7 rental units as well as owner-occupied dwelling units.  
8 Assuming the Tolovana Inn includes short term rental units  
9 as well as dwelling units, as petitioners argue, we do not  
10 believe that alone establishes that under Article 1, section  
11 20, of the Oregon Constitution, the city must treat  
12 petitioner Kaady's single family dwelling the same as the  
13 Tolovana Inn for purposes of determining the applicability  
14 of Ordinance No. 92-1.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 "The decision is unsupported by substantial  
18 evidence in the whole record because a necessary  
19 finding is contradicted by un rebutted evidence in  
20 the record."

21 Petitioners challenge the following finding in the  
22 challenged decision:

23 "There are no exemptions to the requirements of  
24 [Ordinance No. 92-1]." Record 4.

25 Petitioners argue that at least two of the Tolovana  
26 Inn's units are owner-occupied, and are not used as short  
27 term rentals. Petitioners reason the city in fact granted  
28 "exemptions" from the requirements of Ordinance No. 92-1 to

1 these two owner-occupied units because the city determined  
2 the Tolovana Inn, in its entirety, qualifies as a motel not  
3 subject to regulation under Ordinance No. 92-1.

4 The city argues that while the correctness of its  
5 determination that the Tolovana Inn is a motel may be  
6 subject to challenge, the city has granted no "exemption."  
7 It contends its finding is legally correct.

8 We agree with the city that this finding is consistent  
9 with the provisions of Ordinance No. 92-1. Further, it is a  
10 local interpretation of the provisions of the city's own  
11 enactment--Ordinance No. 92-1. The city's interpretation is  
12 not contrary to the express words, policy or purpose of  
13 Ordinance No. 92-1; and, therefore, we must defer to it.  
14 ORS 197.829; Clark v. Jackson County, 313 Or 508, 836 P2d  
15 710 (1992). We reject petitioners' attempt to characterize  
16 the city's decision concerning the Tolovana Inn as granting  
17 an exemption to the requirements of Ordinance No. 92-1.

18 Petitioner's evidentiary challenges are predicated on  
19 the erroneous assumption that the city's finding, that there  
20 are no exemptions allowed by Ordinance No. 92-1, is legally  
21 incorrect. Accordingly, we need not consider petitioners'  
22 evidentiary challenges further.

23 The second assignment of error is denied.

24 The city's decision is affirmed.

25