

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

3  
4   DAVID L. TOWRY and PAM TOWRY,    )  
5    )  
6                    Petitioners,        )           LUBA No. 93-149  
7    )  
8            vs.                            )           FINAL OPINION  
9    )           AND ORDER  
10   CITY OF LINCOLN CITY,            )  
11    )  
12                    Respondent.        )

13  
14  
15            Appeal from City of Lincoln City.

16  
17            M. Chapin Milbank, Salem, filed the petition for review  
18   and argued on behalf of petitioners.

19  
20            Joan M. Chambers, City Attorney, Lincoln City, filed a  
21   response brief and argued on behalf of respondent.

22  
23            HOLSTUN, Referee; SHERTON, Referee, participated in the  
24   decision.

25  
26                    AFFIRMED    02/25/94

27  
28            You are entitled to judicial review of this Order.  
29   Judicial review is governed by the provisions of ORS  
30   197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision affirming a  
4 planning commission decision which denied their request for  
5 approval to use an existing dwelling as a vacation rental  
6 dwelling (VRD).<sup>1</sup>

7 **FACTS**

8 The subject property is located in the High Density  
9 Residential (R-5) zone. VRDs are allowable as conditional  
10 uses in the R-5 zone. LCZO 3.030(3)(a); 3.010(3)(k).

11 As explained more fully below, the LCZO imposes  
12 approval standards for VRDs concerning impacts on traffic  
13 and adjoining properties. Petitioners contend they  
14 demonstrated as a matter of law that the standards governing  
15 approval of the requested VRD permit are met, and the city  
16 therefore erred by denying their request. Petitioners also  
17 challenge the constitutionality of the standards and  
18 procedures followed by the city in denying their request for  
19 a VRD permit.

20 **FIRST ASSIGNMENT OF ERROR**

21 LCZO 10.050(B)(2) and (3) require that VRDs "not  
22 adversely affect the residential character of the

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<sup>1</sup>Lincoln City Zoning Ordinance (LCZO) 1.040 defines "Vacation Rental Dwelling" as follows:

"[A] dwelling unit which dwelling: is rented, or is available for rent on a daily or weekly basis or is advertised; or is listed with an agent as a vacation rental."

1 neighborhood" or generate "excessive \* \* \* traffic." LCZO  
2 6.050(C)(3) requires that the proposed use be served by  
3 "streets \* \* \* adequate in width and degree of improvement  
4 to handle the quality and kind of vehicular traffic that  
5 would be generated by the proposed use." LCZO 6.050(C)(4)  
6 requires that the proposed use "have minimal adverse impact  
7 on adjoining properties" and specifies a number of things to  
8 be considered in assessing any adverse impacts.<sup>2</sup>

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<sup>2</sup>The relevant text of the standards petitioners challenge under this assignment of error is set out in full below. LCZO 10.050(B) provides, in part, as follows:

"A 'Vacation Rental Dwelling Permit' shall be issued as an accessory use provided the following standards are met:

"\* \* \* \* \*

"2. The use shall not adversely affect the residential character of the neighborhood.

"3. There shall not be an excessive generation of traffic created by the vacation rental dwelling.

"\* \* \* \* \*"

In the circumstances presented in this case, the standards governing approval of conditional uses must also be satisfied. As relevant, LCZO 6.050(C) provides, in part, as follows:

"\* \* \* In order to grant any conditional use, the planning commission must find \* \* \* that:

"\* \* \* \* \*

"3. The site for the proposed use relates to streets and highways adequate in width and degree of improvement to handle the quantity and kind of vehicular traffic that would be generated by the proposed use.

"4. The proposed use will have minimal adverse impact upon adjoining properties and the improvements thereon. In

1 Petitioners contend these standards are so vague they are  
2 unenforceable. Citing Anderson v. Peden, 284 Or 313, 587  
3 P2d 59 (1978), petitioners argue these vague standards  
4 permit "ad hoc policy making" in violation of the Oregon  
5 Constitution's guarantee of equal privileges and immunities.  
6 Or Const Art I, § 20.

7 In responding to a similar attack on similarly vague  
8 approval standards, the Oregon Supreme Court explained in  
9 Anderson that the risk of ad hoc policy making, in  
10 contravention of Article 1, section 20, of the Oregon  
11 Constitution, is always present where discretionary decision  
12 making involves application of subjective standards.<sup>3</sup>  
13 However, the court went on to explain as follows:

14 " \* \* \* But an attack based on this premise must  
15 show that in fact a policy unlawfully  
16 discriminating in favor of some persons against  
17 others either has been adopted or has been  
18 followed in practice." Anderson, 284 Or at 326.

19 Zoning ordinances frequently contain subjective  
20 approval standards. To the extent petitioners allege  
21 Article 1, section 20, of the Oregon Constitution in all

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making this determination, the commission shall consider,  
but not be limited to, the proposed location of the  
improvements on the site, vehicular egress/ingress and  
internal circulation, pedestrian access, setbacks, height  
and bulk of buildings, walls, and fences, landscaping,  
screening, exterior lighting and signing.

" \* \* \* \* "

<sup>3</sup>One of the zoning ordinance standards at issue in Anderson required that the proposed use be "an encouragement of the most appropriate use of land." Anderson, 284 Or at 323-24.

1 cases prohibits vague approval standards, we reject the  
2 suggestion.<sup>4</sup> It is not enough for petitioners to argue the  
3 challenged zoning ordinance standards are vague, subjective  
4 or potentially susceptible of discriminatory administration.  
5 Cf. Oswego Properties, Inc., v. City of Lake Oswego, 108 Or  
6 App 113, 814 P2d 539 (1991); Lee v. City of Portland, 57 Or  
7 App 798, 646 P2d 662 (1982).<sup>5</sup> Petitioners make no attempt  
8 to "show that in fact a policy unlawfully discriminating in  
9 favor of some persons against others either has been adopted  
10 or has been followed in practice." Anderson, supra. For  
11 that reason, the first assignment of error is denied.<sup>6</sup>

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<sup>4</sup>The challenged zoning ordinance provisions are not penal; they are standards governing case-by-case decisions concerning whether to grant VRD permits. Therefore, the more exacting scrutiny given penal laws under the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not apply. See Papachristou v. City of Jacksonville, 405 US 156, 162, 31 L Ed 2d 110, 92 S Ct 839 (1972).

<sup>5</sup>Both cases involved challenges of vague standards as not complying with the statutory requirement that city land use permit decisions be based on "standards and criteria." ORS 227.173(1). In Lee, 57 Or App at 802, the court of appeals explained the statute "does not require perfect standards, but only standards that are clear enough for an applicant to know what he must show during the application process."

<sup>6</sup>Petitioners do include the following contentions in the conclusion to the petition for review:

"During the existence of the VRD ordinance over 3 1/2 years, 80-100 VRD's [sic] have been processed by the planning director. The director has denied from 5-7 that failed to meet standards initially. After that stage, there have been only 'maybe a couple of revocations that they admitted they don't work and didn't even need to come before the planning commission.'" (Record citation omitted.) Petition for Review 21-22.

1 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

2 Under LCZO 6.050(C)(3) and 10.050(B)(3), the proposed  
3 VRD must not generate excessive traffic and the streets  
4 serving the subject property must be adequate. Under  
5 LCZO 6.050(C)(4) and 10.050(B)(2), the impacts of the  
6 proposed VRD on adjoining properties must be minimal, and it  
7 must not have an adverse affect on the residential character  
8 of the neighborhood.<sup>7</sup> The city found petitioners failed to  
9 carry their burden of proof regarding LCZO 6.050(C)(3) and  
10 (4) and 10.050(B)(2) and (3). The city's findings are as  
11 follows:

12 \* \* \* \* \*

13 "2. The burden of producing substantial evidence  
14 to support the requisite findings is on the  
15 applicant seeking the approval of the  
16 conditional use. One of the requisite  
17 findings listed in [LCZO 6.050(C)] provides  
18 that the site for the proposed use relates to  
19 streets and highways adequate in width and  
20 degree of improvement to handle the quantity  
21 and kind of vehicular traffic that would be  
22 generated by the proposed use. The applicant  
23 has pointed out that no information has been  
24 provided to the Planning Commission or City  
25 Council in the form of traffic studies,  
26 traffic count, traffic surveys or information  
27 regarding what is to be considered acceptable

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These contentions are not sufficient to demonstrate that the city has applied the disputed standards in a manner that violates petitioners' right to equal privileges and immunities. To the contrary, they suggest there is no pattern of discrimination against persons seeking approval of VRDs or persons wishing to use such dwellings, in that nearly all applications submitted to the city have been approved.

<sup>7</sup>These LCZO requirements are quoted in full at n 2, supra.

1 traffic generation. The burden of such proof  
2 is on the applicant. He has failed to meet  
3 his burden and to demonstrate that the  
4 streets are adequate to meet the traffic that  
5 would be generated by the proposed use.  
6 Similarly, he has failed to meet  
7 [LCZO 10.050(B)(3)] which requires that  
8 'there shall not be an excessive generation  
9 of traffic [created] by the vacation rental  
10 dwelling.'

11 "3. [LCZO 6.050(C)(4)] requires that the proposed  
12 use will have minimal adverse impact upon  
13 adjoining properties and the improvements  
14 thereon. Neighboring property owners  
15 testified that the transient population would  
16 impact the neighborhood adversely when a  
17 transient population travelled [sic] on  
18 neighbors' properties to try to find beach  
19 accesses.

20 "4. Testimony in the record indicated that the  
21 neighbors were concerned about the potential  
22 impact traffic would have on adjoining  
23 properties and that such traffic would  
24 adversely affect the residential character of  
25 the neighborhood. The applicant has not met  
26 his burden in producing substantial evidence  
27 to support the requisite findings that the  
28 use would not adversely affect the  
29 residential character of the neighborhood and  
30 that the proposed operation of the vacation  
31 rental dwelling would have only minimal  
32 adverse impact upon adjoining properties."  
33 Record 11-12.

34 Petitioners first contend the standards in  
35 LCZO 6.050(C) and 10.050(B) are performance rather than  
36 approval standards. If we understand petitioners correctly,  
37 they contend the city should have granted the VRD permit  
38 without applying those standards, subject to revocation of

1 the permit if the standards are violated in the future. See  
2 Simonson v. Marion County, 21 Or LUBA 313, 322-23 (1991).

3 LCZO 10.050(B) provides a VRD permit shall be issued  
4 "provided the following standards are met \* \* \*." LCZO  
5 6.050(C) requires that "[i]n order to grant any conditional  
6 use, the planning commission must find \* \* \* that [the  
7 listed standards are met]." See n 2, supra. We agree with  
8 respondent that LCZO 6.050(C) and 10.050(B) unambiguously  
9 state that the standards contained in those sections are  
10 approval standards, for which findings of compliance must be  
11 made before a VRD permit may issue.<sup>8</sup>

12 Petitioners do not contend a remand is required so that  
13 the city can adopt an interpretation of these provisions.  
14 See Weeks v. City of Tillamook, 117 Or App 449, 453-54, 844  
15 P2d 914 (1992). Even if they had, we would conclude the  
16 construction offered by petitioners is so untenable, that we  
17 may "reject it [without] an authoritative determination by  
18 the decision-maker." See Gage v. City of Portland, 123 Or  
19 App 269, 274-75, \_\_\_ P2d \_\_\_ (1993). In other words, had  
20 the city interpreted LCZO 6.050(C) and 10.050(B) as allowing  
21 a VRD permit to issue without first demonstrating compliance  
22 with the standards in those sections, we would reject that

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<sup>8</sup>LCZO 10.050(E) does provide a procedure for considering complaints after a VRD permit is issued. However, even though the procedure provided by LCZO 10.050(E) may result in revocation of a VRD permit, that does not alter the explicit requirement in the LCZO for findings of compliance with LCZO 6.050(C) and 10.050(B) prior to issuing a VRD permit.



1 construction as "clearly wrong." See Goose Hollow Foothills  
2 League v. City of Portland, 117 Or App 211, 843 P2d 992  
3 (1992); West v. Clackamas County, 116 Or App 89, 840 P2d  
4 1354 (1992); Cope v. City of Cannon Beach, 115 Or App 11,  
5 836 P2d 775 (1992), aff'd 317 Or 339 (1993).

6 Petitioners next contend the city erroneously concluded  
7 they failed to carry their burden of proof in this matter.  
8 Petitioners complain that much of the testimony in  
9 opposition to the proposal is based on problems associated  
10 with properties other than the petitioners'. Petitioners  
11 point out testimony presented on their behalf that the VDR  
12 for which they seek approval could be operated in a manner  
13 such that it would have no more traffic impact than a long-  
14 term rental.

15 The record shows that Bard Loop, which provides access  
16 to the subject property, is a narrow, one-lane road which  
17 has experienced traffic problems in the past. The city  
18 relied, in part, on the lack of studies establishing  
19 existing traffic conditions and expected traffic impacts, in  
20 concluding petitioners failed to carry their burden of  
21 proof. The evidence concerning whether there would or would  
22 not be unacceptable traffic impacts if the requested VRD  
23 permit is issued is largely opinion testimony. The  
24 opponents generally take the position that, as a short-term  
25 rental, the house will be occupied by more persons who are  
26 unfamiliar with the area and will seek beach access by

1 automobile, resulting in adverse impacts on the roads and  
2 neighborhood. Petitioners' testimony is generally to the  
3 effect that the use of the house as a VRD will have no more  
4 impact on the roads and neighborhood than would its use as a  
5 full-time residence or long-term rental.

6 Having reviewed the evidence cited by the parties, we  
7 conclude it is conflicting, and that it would support either  
8 a conclusion that the above quoted standards are met or that  
9 they are not satisfied. In such circumstances, the choice  
10 of which evidence to believe belongs to the city. Younger  
11 v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988);  
12 Douglas v. Multnomah County, 18 Or LUBA 607, 617 (1990).  
13 Moreover, the challenged decision is one denying  
14 petitioners' request for permit approval. Therefore, in  
15 challenging the city's findings on evidentiary grounds,  
16 petitioners must show the evidence is such that they carried  
17 their burden of proof as a matter of law. See Chemeketa  
18 Industries Corp. v. City of Salem, 14 Or LUBA 159, 163  
19 (1985) (relying on Jurgenson v. Union County Court, 42 Or  
20 App 505, 600 P2d 1241 (1979)). The evidence cited by  
21 petitioners comes nowhere near establishing compliance with  
22 these subjective approval standards as a matter of law.

23 The second and third assignments of error are denied.

1 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

2 Petitioners make two arguments that the LCZO provisions  
3 governing approval of VRDs violate the Due Process Clause of  
4 the Fourteenth Amendment to the United States Constitution.

5 **A. Consent Ordinance**

6 A local government may not delegate to any particular  
7 group of citizens standardless authority to veto a request  
8 for land use approval. Such consent ordinances deny the  
9 permit applicant due process and violate the Fourteenth  
10 Amendment. See Washington, ex rel. Seattle Title Trust Co.  
11 v. Roberge, 278 US 116, 73 L Ed 210, 49 S Ct 50 (1923);  
12 Anderson v. Peden, supra.

13 LCZO 10.050(C) sets out three procedures or processes  
14 for reviewing and making a decision on requests for VRD  
15 permit approval. Those processes are as follows:

16 "1. Step One Process.

17 "(a) Notice. Upon receipt of an application  
18 for a '[VRD] Permit,' notice must be  
19 mailed \* \* \* to all owners of property  
20 within 100 feet of the exterior boundary  
21 of the property for which the  
22 application is made, giving the property  
23 owners notified 20 days in which to  
24 respond to the city planning department.

25 "b) Planning Department Review. If no  
26 objections or complaints are received  
27 regarding the proposed use of the  
28 property as a vacation rental dwelling,  
29 the planning department may issue a  
30 '[VRD] Permit' to the applicant.  
31 However, if the planning department  
32 determines that there are significant  
33 neighborhood impacts or that greater

1 discretion is required, the planning  
2 department may refer the application to  
3 the planning commission for a Step 3  
4 Process hearing.

5 "2. Step Two Process.

6 "(a) If three or fewer written objections or  
7 complaints are received from unrelated  
8 individuals who are adversely affected  
9 by the proposed use of the property as a  
10 vacation rental dwelling, after the  
11 notice requirements of the step one  
12 process have been met, the planning  
13 department shall hold a meeting  
14 involving the applicant and the  
15 complaining property owners and  
16 occupants to review the proposed  
17 application and use. The meeting shall  
18 be in lieu of a public hearing in order  
19 to the opportunity to resolve any  
20 potential conflicts in an informal  
21 setting, consistent with the standards  
22 of the zoning ordinance. [If the  
23 conflicts are not resolved through the  
24 Step 2 process, a public hearing is set  
25 before the planning commission in  
26 accordance with the Step 3 process.]

27 "3. Step Three Process.

28 "If the staff refers the matter to the  
29 Planning Commission for hearing, or a  
30 hearing is required as a result of a  
31 Step One or Step Two mandatory referral,  
32 the application will be deemed an  
33 application for a conditional use and  
34 the conditional use requirements of  
35 [LCZO 6.050] shall apply, as well as the  
36 'standards' for issuance of a vacation  
37 rental dwelling permit. \* \* \*"

38 In the present case five objections to petitioners'  
39 request for a VRD permit were filed, and the Step 3 process  
40 was followed. The planning commission denied petitioners'

1 request, and the planning commission's decision was affirmed  
2 by the city council on appeal. Petitioners argue the  
3 planning director would have approved the permit, but for  
4 the five objections. Petitioners contend the above quoted  
5 provisions therefore give opposing neighbors the ability to  
6 veto VRD permits, violating petitioners' right to due  
7 process.

8       There is nothing in the record supporting petitioners'  
9 contention that the planning director would have approved  
10 the disputed application under the Step 1 process, if the  
11 objections had not been received. More importantly, both  
12 the planning commission and the city council decisions  
13 denying the requested approval are based on findings that  
14 the requested approval violates the approval standards set  
15 out at LCZO 6.050(C) and 10.050(B). Those decision were not  
16 the automatic or inevitable consequence of the objections  
17 filed in this case and, for that reason, the LCZO procedures  
18 quoted above do not constitute consent ordinances.

19       The five objections did not, as petitioners allege,  
20 have the effect of vetoing the VRD permit request. The  
21 filing of those objections did have the effect of requiring  
22 a public hearing, conditional use approval and that the  
23 planning commission be the initial decision maker. However,  
24 petitioners do not argue these changes in the required

1 process violate their right to due process.<sup>9</sup> Because  
2 petitioners' due process argument is based on the erroneous  
3 premise that the five objections constitute a veto of the  
4 requested VRD permit, the argument is rejected, and this  
5 subassignment of error is denied.

6 **B. Arbitrary Discrimination Against Transient Renters**

7 Citing testimony by neighbors disparaging short-term  
8 renters, petitioners contend the challenged decision  
9 represents arbitrary discrimination against such renters.  
10 Petitioners rely in part on United Property Owners Assoc. v.  
11 Belmont, 185 NJ Super 163, 447 A2d 933 (1982), where the  
12 court held that a zoning ordinance precluding rental of  
13 properties in certain parts of the city for less than one  
14 year was arbitrary and constituted an unreasonable restraint  
15 on the use of property.

16 We reject this subassignment of error as well. As  
17 respondent points out, the challenged LCZO provisions do not  
18 preclude VRDs, they merely regulate their approval. In  
19 fact, petitioners concede that most requests for VRD permits

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<sup>9</sup>Planning director approval under the step one process would require findings of compliance with the LCZO 10.050(B) standards governing approval of VRDs, but would not require findings of compliance with the LCZO 6.050(C) conditional use standards. The standards of LCZO 10.050(B) and LCZO 6.050(C) are similar. Petitioners do not base their arguments under these assignments of error on a contention that subjecting their application to the conditional use standards, while not subjecting applications that proceed through the step one process to those standards, violates their right to due process. Rather, petitioners' arguments are based on the erroneous contention that the LCZO grants opponents a veto over their application.

1 have been approved. As respondent points out, the Oregon  
2 Supreme Court recently rejected arguments that a general  
3 prohibition against short-term rentals violated the Taking  
4 Clause of the Fifth Amendment. Cope v. City of Cannon  
5 Beach, 317 Or 339, 855 P2d 1083 (1993). In reaching that  
6 conclusion, the court held the city adequately demonstrated  
7 restricting short-term rentals has a substantial nexus to a  
8 legitimate governmental interest in preserving the character  
9 and integrity of residential neighborhoods. There is  
10 nothing arbitrary about the city's exercise of its zoning  
11 power in this case to regulate VRDs to ensure the streets  
12 are adequate to handle the traffic VRDs will generate and  
13 that impacts of VRDs on the neighborhood will be minimal.

14 This subassignment of error is denied.

15 The fourth and fifth assignments of error are denied.

16 **SIXTH ASSIGNMENT OF ERROR**

17 Petitioners contend the challenged LCZO provisions  
18 discriminate between short-term and long-term rentals,  
19 "without explanation or reason for the classification."  
20 Petition for Review 21. Citing Memorial Hospital v.  
21 Maricopa County, 415 US 250, 94 S Ct 1076, 39 L Ed 2d 306  
22 (1974) and Shapiro v. Thompson, 394 US 618, 89 S Ct 1322, 22  
23 L Ed 2d 600 (1969), petitioners contend such irrational  
24 classification denies "equal protection of the laws under  
25 the Fourteenth Amendment of the United States Constitution."  
26 Petition for Review 21.

1           The cases cited by petitioners simply hold that absent  
2 a compelling governmental interest, the state may not  
3 withhold welfare or medical care benefits to persons  
4 otherwise qualifying for such assistance, based solely on  
5 minimum residency requirements. Petitioners do not develop  
6 an argument that a "compelling governmental interest" is  
7 required for the city to regulate VRDs. To the extent  
8 petitioners suggest that persons wishing to rent vacation  
9 dwellings on a short-term basis constitute a suspect or  
10 quasi-suspect classification, warranting heightened scrutiny  
11 of the disputed LCZO provisions under the Equal Protection  
12 Clause, the argument is not developed and we reject the  
13 suggestion. See City of Cleburne v. Cleburne Living Center,  
14 473 US 432, 105 S Ct 3249, 87 L Ed2d 313 (1974). The city's  
15 decision to regulate VRDs differently than it regulates  
16 long-term rentals is justified, so long as there is a  
17 rational basis for that distinction. Belle Terre v. Boraas,  
18 416 US 1, 94 S Ct 1536 39 L Ed2d 797 (1974); Wagner v.  
19 Marion County, 15 Or LUBA 260, 272 (1987).

20           The challenged provisions are directed at the use of  
21 existing dwellings, not at temporary residents. As already  
22 explained, the challenged LCZO provisions do not prohibit  
23 VRDs, they simply regulate their approval to limit their  
24 impact. There is no penalty against short-term renters  
25 "without explanation or reason for the classification," as  
26 petitioners allege. The standards simply require a



1 demonstration that the VRD will not have adverse impacts on  
2 traffic and neighborhoods. We conclude the disputed LCZO  
3 provisions have a rational basis and, therefore, do not  
4 offend the Equal Protection Clause of the Fourteenth  
5 Amendment to the United States Constitution.

6 The sixth assignment of error is denied.

7 The city's decision is affirmed.