

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

3  
4                   HOOD RIVER VALLEY  
5                   RESIDENTS' COMMITTEE, INC.  
6                                   *Petitioner,*

7  
8                                   vs.

9  
10                   HOOD RIVER COUNTY,  
11                                   *Respondent.*

01/04/18 PM 2:03 LUBA

12  
13                                   LUBA No. 2017-081

14  
15                                   FINAL OPINION  
16                                   AND ORDER

17  
18                   Appeal from Hood River County.

19  
20                   Christopher L. Tackett-Nelson, Portland, filed the petition for review and  
21 argued on behalf of petitioner.

22  
23                   Wilford K. Carey, County Counsel, Hood River, filed the response brief  
24 and argued on behalf of respondent. With him on the brief was Annala, Carey,  
25 Thompson, VanKoten & Cleaveland, P.C.

26  
27                   RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN Board  
28 Member, participated in the decision.

29  
30                                   REMANDED                   01/04/2018

31  
32                   You are entitled to judicial review of this Order. Judicial review is  
33 governed by the provisions of ORS 197.850.

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2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the county approving an application for  
4 a short-term rental permit.

5 **FACTS**

6 A property management company submitted an application for approval  
7 to use a 4.82-acre property zoned Rural Residential (RR) for short-term rental  
8 (STR) purposes. The county planning department approved the application,  
9 with 23 conditions.

10 Petitioner appealed the county planning department's decision to LUBA,  
11 and also appealed the decision locally. On October 6, 2017, the county  
12 scheduled a hearing for November 8, 2017 before the planning commission on  
13 petitioner's local appeal. On October 13, 2017, the county sent a notice to  
14 petitioner and others canceling the hearing before the planning commission.  
15 This appeal before LUBA then proceeded.

16 **JURISDICTION**

17 The county argues that petitioner failed to exhaust its administrative  
18 remedies, as ORS 197.825(2)(a) requires it to do.<sup>1</sup> Petitioner responds that it  
19 filed a local appeal of the decision, and accordingly exhausted that remedy.

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<sup>1</sup> ORS 197.825(2)(a) limits LUBA's jurisdiction to "those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review."

1 We simply do not understand the county’s argument. The record  
2 demonstrates that petitioner filed a local appeal of the county’s decision, citing  
3 Hood River County Zoning Ordinance (HRCZO) Article 72 as the basis for  
4 doing so. Record 6. The record also demonstrates that the county granted  
5 petitioner’s local appeal and scheduled a hearing. Record 3. The parties’  
6 pleadings in this appeal regarding petitioner’s motion to suspend the appeal  
7 demonstrate that the county later canceled the appeal hearing it had previously  
8 scheduled. Petitioner’s Motion for Stay Pending Local Appeal, Attachment A.  
9 There is nothing more that petitioner need have done to satisfy the exhaustion  
10 requirement in ORS 197.825(2)(a).

11 **BACKGROUND**

12 We briefly set out and discuss the relevant provisions of the HRCZO  
13 before resolving petitioner’s second assignment of error.

14 **A. HRCZO Article 53**

15 HRCZO Article 53 is entitled “Home Occupations, Short Term Rentals  
16 and Marijuana Businesses” and includes regulations governing short term  
17 rental of property in the county. HRCZO 53.40 includes a “Use Table” for  
18 Short-Term Rentals (STRs) that specifies the “review type” and the regulations  
19 that apply to applications for STRs, depending on the underlying zoning of the  
20 property.<sup>2</sup> The Use Table specifies that for STRs in the RR zone, the review

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<sup>2</sup> HRCZO 53.45 requires a property owner to obtain a “revocable short-term rental permit” prior to using a dwelling unit as a rental.

1 type is “Type I.”<sup>3</sup> Under the column entitled “Subject To,” no HRCZO  
2 regulations are listed. However, a note at the bottom of the Use Table provides  
3 that “[p]ermitted uses are subject to the applicable short-term rental provisions  
4 (Sections 53.45-53.55) and other applicable articles of the Hood River County  
5 Zoning Ordinance.” HRCZO 53.40. For STRs in the forest and exclusive farm  
6 use zones, the review type is “Type II.”

7 **B. HRCZO 1.170 Definitions**

8 HRCZO 1.170 includes a definition for “Ministerial Action (Type I)”  
9 and provides in relevant part that it is:

10 “[a] decision that does not require interpretation or the exercise of  
11 policy or legal judgment in evaluating approval standards. The  
12 review of a ministerial action requires no notice to any party other  
13 than the applicant and agencies that the Planning Director  
14 determines may be affected by the decision. \* \* \*<sup>4</sup>”

15 HRCZO 1.170 also includes a definition of “Non-Ministerial Action (Type II  
16 or III)” and provides that it is:

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<sup>3</sup> HRCZO Article 15 governs uses in the RR zone. HRCZO 15.10(H) provides that “[s]hort term rentals, subject to Article 53” are permitted uses in the RR zone. HRCZO 15.30(K) provides that “[h]ome [o]ccupations, subject to Article 53” are conditional uses in the RR zone.

<sup>4</sup> HRCZO 1.170 defines “short term rental permit” as “[a] Type I or Type II development application authorizing a Short Term Rental or Short-Term Room Rental. Type I Short-Term Rental Permits are permitted by [] right, requiring only non-discretionary staff review to demonstrate compliance with the standards in this Ordinance. Type I permits (Ministerial Review) are limited to actions that do not require interpretation or the exercise of policy or legal judgment.”

1            “[a] decision that involves criteria that are subjective in nature and  
2            that require some level of interpretation or the exercise of policy  
3            or legal judgment. A non-ministerial action is the same as an  
4            ‘administrative action’ or ‘land use decision,’ as defined in ORS  
5            197.015, subject to the notice requirements, decision criteria, and  
6            appeal procedures.”

7            **C.     HRCZO Article 60**

8            HRCZO Article 60 sets out the procedures for an “[a]dministrative  
9            action[,]” described in HRCZO 60.00 as “a proceeding pursuant to [Article  
10            60].” “Administrative Action” is not defined in the HRCZO. HRCZO 60.02  
11            provides that “the Planning Director shall review and make decisions regarding  
12            \* \* \* administrative actions pursuant to provisions in [HRCZO] Article 72 –  
13            Planning Director’s Review Procedures[.]” The administrative actions listed in  
14            HRCZO 60.02 for which the Planning Director makes decisions include “Land  
15            Use Permits[.]” HRCZO 60.02(9). HRCZO 72.15(I) also provides that the  
16            planning director will make decisions on “Land Use Permits (Residential,  
17            Commercial and Industrial).” Notice of the decision is required to be sent to  
18            “the applicant and all applicable parties.” HRCZO 72.35.

19            **D.     HRCZO Article 64**

20            HRCZO 64.00 provides that, with certain exceptions not relevant here,  
21            “[p]rior to the issuance of any building permit *and prior to the commencement*  
22            *of any land use* \* \* \* a land use permit shall be issued by the Planning

1 Director.”<sup>5</sup> (Emphasis added). HRCZO 64.15(B) requires the planning director  
2 to submit the application to “agencies or officials deemed necessary,” but  
3 nothing in Article 64 requires notice of the application to be sent to any person.  
4 HRCZO 64.15(D)(1) requires the planning director to determine whether the  
5 application for a land use permit “meets the requirements of [the HRCZO][.]”  
6 A decision by the planning director is appealable to the planning commission,  
7 and the planning commission hears the appeal using the procedures in Article  
8 60. HRCZO 64.15(G).

9 With that background, we turn to the assignments of error.

## 10 **SECOND ASSIGNMENT OF ERROR**

11 In its second assignment of error, petitioner argues that the county  
12 committed a procedural error that prejudiced its substantial rights when the  
13 county failed to process the application as a “Non-Ministerial Action (Type II  
14 or III)” as defined in HRCZO 1.170, because the county was required to, but  
15 did not, apply the discretionary standards in HRCZO Article 53, governing  
16 home occupations in general and STRs in particular. Petitioner also argues that  
17 the challenged decision is a decision by the planning director approving a  
18 “Land Use Permit” as described in HRCZO Article 64, described briefly above.  
19 As such, we also understand petitioner to argue that the decision is a “permit”  
20 (as defined in ORS 215.402(4)), and that the county erred in failing to process

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<sup>5</sup> Notably, HRCZO 64.30 lists ten uses that are exempt from the requirement to obtain a land use permit. STRs are not included in that list.

1 the decision according to the county’s procedures in HRCZO Article 60 and  
2 Article 72, which we understand to implement ORS 215.416. Petition for  
3 Review 9, 13.

4 The county responds by relying on the Use Table at HRCZO 53.40 that  
5 provides that STRs in the RR zone are subject to “Type I” review.<sup>6</sup> However,  
6 for the reasons set forth below, we agree with petitioner that the decision is a  
7 decision on a “Land Use Permit” as that term is used in the HRCZO, or in other  
8 words a “permit” as defined at ORS 215.402(4), and accordingly that the  
9 county erred in failing to process the decision according to the procedures in  
10 HRCZO Articles 60 and 72.

11 HRCZO 53.20(A)(i) provides that “short term rental home occupation  
12 uses are subject to the provision contained in Section 53.30 and 53.40.”  
13 HRCZO 53.20(A)(i) (underlining in original). Accordingly, short term rental  
14 home occupations are subject to the provisions contained in HRCZO 53.30(A),  
15 which provides:

16 “The use shall be operated by a resident of the property on which  
17 the business is located and employs on the site no more than five  
18 full-time or part-time persons at any given time. A home  
19 occupation shall be operated substantially in:

20 “1. The dwelling; or

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<sup>6</sup> Nothing in the HRCZO explains what “Type I” review entails, or sets out any particular procedure for the county to follow in conducting a “Type I” review.

1           “2. Other buildings normally associated with uses permitted in  
2           the zone in which the property is located, except that such  
3           other buildings may not be utilized as bed and breakfast  
4           facilities or rental units unless they are legal residences.

5           “A home occupation shall not unreasonably interfere with other  
6           uses permitted in the zone in which the property is located, and is  
7           a secondary use, incidental, accessory or subordinate to the  
8           residential uses or the existing building.”

9           The county does not dispute that HRCZO 53.30(A) applies to the application.  
10          HRCZO 53.30 is a criterion that requires the county to exercise discretion in  
11          determining whether to approve the proposed STR permit. The term “resident”  
12          is not defined in the HRCZO, and petitioner and the county spend a fair  
13          number of pages of briefing in this appeal arguing over whether the property  
14          owner is a “resident” of the property that is the subject of the application,  
15          within the meaning of HRCZO 53.30(A). Determining whether an applicant is  
16          a “resident of the property” for purposes of HRCZO 53.30(A) requires the  
17          exercise of discretion. In addition, determining whether the STR will “not  
18          unreasonably interfere with other uses permitted in the zone” and whether the  
19          STR is a “secondary use, incidental, accessory or subordinate to the residential  
20          uses or the existing building” is highly discretionary exercise.

21          To the extent that the Use Table at HRCZO 53.40 that the county cites in  
22          its response brief purports to categorize a STR decision in the RR zone in a  
23          manner other than as a “Land Use Permit,” the Use Table conflicts with the  
24          HRCZO provisions cited above, as well as with ORS 215.402(4), which the  
25          provisions for a “Land Use Permit” presumably implement. Accordingly, we



1 agree with petitioner that the county’s decision is a decision on a “Land Use  
2 Permit,” *i.e.*, a “permit” as defined at ORS 215.402(4), and therefore the county  
3 erred in failing to process it according to the procedures for permits in HRCZO  
4 Articles 60 and 72.

5 The second assignment of error is sustained.

6 **FIRST ASSIGNMENT OF ERROR**

7 In its first assignment of error, petitioner argues that the county erred in  
8 failing to provide petitioner with a local appeal of the county’s decision that  
9 petitioner argues HRCZO Article 72 requires the county to provide. ORS  
10 197.835(9)(a)(B). Because we determine above in our resolution of the second  
11 assignment of error that the county erred in failing to process the application as  
12 permit, remand is required in order for the county to process the application  
13 pursuant to the provisions of HRCZO Article 60 and Article 72. Processing the  
14 application according to the procedures set out in HRCZO Article 60 and  
15 HRCZO Article 72 will result in a decision that is appealable locally under  
16 HRCZO Article 72. Accordingly, the issues presented in petitioner’s first  
17 assignment of error will be addressed by following the correct procedure on  
18 remand.

19 We do not reach the first assignment of error.

20 **THIRD ASSIGNMENT OF ERROR**

21 As noted, HRCZO 53.30(A) applies to the application and requires in  
22 relevant part that “[t]he use shall be operated by a resident of the property on

1 which the business is located[.]” The application lists a mailing address in the  
2 State of Georgia for one of the record owners of the property. Record 58.  
3 Condition 2 of the decision requires that “[t]he STR shall be operated by a  
4 resident of the property.” Record 21 (emphasis in original deleted). In its third  
5 assignment of error, petitioner argues that the decision does not include  
6 adequate findings explaining why the county concluded, if it did so conclude,  
7 that the STR will “be operated by a resident of the property” on which the STR  
8 will be located, and that any such conclusion the county reached is not  
9 supported by substantial evidence in the record. ORS 197.835(9)(a)(C).<sup>7</sup>

10 We sustain above the second assignment of error and conclude that the  
11 county followed the incorrect procedures in processing the application, and  
12 remand the decision in order for the county to process the application  
13 according to the county’s procedures for permits. Accordingly, it would be  
14 premature to address the third assignment of error, because a hearing on

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<sup>7</sup> The county responds that “County officials had personal knowledge that the applicant did meet the approval criteria for the STR permit. Specifically, the Planning Director had knowledge that the applicant lives on the property 2-3 months per year.” Response Brief 9.

Petitioner moves to strike that response as an unsupported factual allegation that relies on evidence not in the record, in violation of OAR 661-010-0035(3)(a). Because we do not decide this assignment of error, we need not address petitioner’s motion to strike.

1 remand could produce evidence and argument on the issue presented in the  
2 third assignment of error.<sup>8</sup>

3 We do not reach the third assignment of error.

4 The county's decision is remanded.

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<sup>8</sup> However, we note that if we were reviewing the county planning director's or planning commission's interpretation of the undefined operative term "resident," we would first look to the plain, ordinary meaning of the term found in the dictionary and rely on that plain, ordinary meaning in applying HRCZO 53.30(A) to the facts presented. *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

## Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2017-081 on January 4, 2018, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

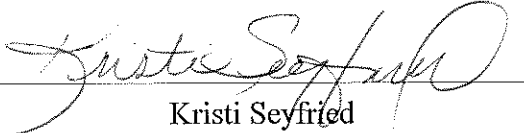
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Dated this 4th day of January, 2018.

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