

NATURE OF THE DECISION

Petitioners appeal the board of county commissioners’ adoption of Ordinance 523, which amends the county’s business regulations applicable to the short-term rental of dwelling units.

BACKGROUND

The Lincoln County Code (LCC) consists of ten chapters. LCC chapter 1 contains the Lincoln County Comprehensive Plan and Zoning Regulations. LCC 1.0001. LCC chapter 4 contains the county’s Business Regulations.

On October 27, 2021, the board of county commissioners adopted Ordinance 523. Ordinance 523 amends provisions of LCC chapter 4 addressing the licensing program, operating standards, and complaint procedures applicable to the short-term rental of dwelling units in unincorporated parts of the county.¹ Ordinance 523 explains that the amendments will “result in further actions by County staff to develop implementation guidelines and rules and to recommend specific limitations on licenses with subareas of the County, subject to periodic

¹ LCC 4.415(10) defines “Short Term Rental” as “the renting of a dwelling unit (including any accessory guest house on the same property) to any person(s) on a day to day basis or for a period of time of up to thirty (30) consecutive nights.”

LCC 4.410 provides that the short-term rental regulations do “not apply to Bed and Breakfast Inns, Hotels, Lodges, Motels, Resorts, Recreational Vehicle Parks, Campgrounds, or other similar lodging units which are regulated by LCC Chapter 1.”

1 review by the staff and Board to determine if additional actions are necessary.”²

2 Notice of Intent to Appeal Ex A, at 1.

3 Ordinance 523 modifies the on-site water treatment system regulations
4 applicable to short-term rentals and “requires the owner to obtain an ‘Existing
5 System Evaluation Report’ (“ESER”) that determines the number of persons (and
6 therefore bedrooms) for whom the wastewater system has sufficient capacity.”
7 Motion to Dismiss 4. Ordinance 523 restricts the maximum occupancy of short-
8 term rentals based on the capacity of the wastewater system serving the dwelling
9 unit and prohibits “[e]vents, such as weddings, rehearsal dinners, and similar
10 activities.” Notice of Intent to Appeal Ex A, at 8. Ordinance 523 tasks the
11 “Lincoln County Licensing Authority” with identifying and recommending to the

² Ordinance 523 includes a recital stating that the amendments are

“necessary to address: (1) subsurface sewage regulation and monitoring of [short-term rental] licensees; (2) code enforcement procedures for violations which will result in establishment of an administrative hearing process as an additional enforcement tool; (3) revised occupancy limits for individual [short-term rentals] (connected to capacity to handle sewage); and (4) limits or caps on [short-term rentals] specific to subareas of the county based on percentages of [short-term rentals] within the subareas. This change precludes the transfer of [short-term rental] licenses from one owner to the next and establishes delegated authority to establish a qualified pool of eligible applicants to select future [short-term rental] licensees on a lottery basis.” Notice of Intent to Appeal Ex A, at 1.

1 board of county commissioners seven short-term rental subareas based on the
2 concentration of short-term rentals in a given area. *Id.* at 4.

3 On November 17, 2021, petitioners filed a notice of intent to appeal the
4 board of county commissioners' adoption of Ordinance 523. On December 3,
5 2021, the county filed a motion to dismiss the appeal for lack of jurisdiction. On
6 December 7, 2021, we issued an order suspending the appeal until we resolved
7 the motion to dismiss. On December 16, 2021, petitioners filed their response to
8 the motion to dismiss.

9 **JURISDICTION**

10 ORS 197.825(1) provides that, “[e]xcept as provided in ORS 197.320 and
11 subsections (2) and (3) of this section, [LUBA] shall have exclusive jurisdiction
12 to review any land use decision or limited land use decision of a local
13 government, special district or a state agency in the manner provided in ORS
14 197.830 to 197.845.” “Land use decision” includes a local government decision
15 that concerns the adoption, amendment, or application of:

- 16 “(i) The goals;
- 17 “(ii) A comprehensive plan provision;
- 18 “(iii) A land use regulation; or
- 19 “(iv) A new land use regulation[.]” ORS 197.015(10)(a)(A).

20 “‘Land use regulation’ means any local government zoning ordinance, land
21 division ordinance, * * * or similar general ordinance establishing standards for
22 implementing a comprehensive plan.” ORS 197.015(11).

1 In its motion to dismiss, the county argues that Ordinance 523 is not a land
2 use decision subject to our exclusive jurisdiction. The county points out that,
3 since the initial adoption of the county’s short-term rental regulations in 2016,
4 LCC chapter 4 has stated, “The purpose of LCC 4.405 through 4.460 is to provide
5 for the peace, health, safety and livability of residents of, and visitors to, Lincoln
6 County. *This is not a land use decision and is not part of [LCC] Chapter 1, Land*
7 *Use Planning.*” LCC 4.405(2) (emphasis added). According to the county, where
8 the county adopts a regulation that the county does not intend to be a land use
9 regulation, LUBA lacks jurisdiction over an appeal of the adopted regulation
10 unless there is a clear connection between the adopted regulation and the county’s
11 comprehensive plan. Motion to Dismiss 2. The county proceeds to discuss the
12 water quality and housing goals and policies in its comprehensive plan and
13 maintains that they are broad and aspirational. Because those goals and polices
14 lack a clear or direct connection to Ordinance 523 and are not implemented by
15 Ordinance 523, the county maintains that Ordinance 523 is not a land use
16 regulation. Motion to Dismiss 6-9.³

17 As the parties seeking LUBA’s review, petitioners bear the burden of
18 establishing LUBA’s jurisdiction over Ordinance 523. *Emerald Cove LLC v. City*
19 *of Lincoln City*, 73 Or LUBA 72, 76 (2016). Petitioners argue that, in adopting

³ The county also argues, and we agree, that the county did not and was not required to apply the statewide planning goals or any comprehensive plan provisions to the adoption of Ordinance 523. Motion to Dismiss 9-12.

1 Ordinance 523, the county made a land use decision subject to our jurisdiction
2 because Ordinance 523 is a “new land use regulation” that “in effect” rezones
3 property by creating short-term rental subareas within the county and changing
4 the allowed uses within those subareas. Response to Motion to Dismiss 5-6.

5 **A. Ordinance 523 is not a new land use regulation.**

6 Petitioners argue that Ordinance 523 is a “new land use regulation” under
7 ORS 197.015(10)(a)(A)(iv) and ORS 197.015(11) and, therefore, subject to our
8 jurisdiction. We understand petitioners to argue that Ordinance 523 is a new land
9 use regulation because it tasks the Lincoln County Licensing Authority with (1)
10 identifying seven distinct subareas or districts, (2) establishing a maximum
11 number of short-term rentals in each of those subareas or districts, and (3)
12 terminating or limiting existing short-term rentals where certain regulatory
13 requirements are unmet. *Id.* However, petitioners do not take the position that
14 Ordinance 523 implements the county’s comprehensive plan or zoning ordinance
15 at all or otherwise explain how Ordinance 523 “establish[es] standards for
16 implementing a comprehensive plan.” ORS 197.015(11).

17 *Emerald Cove* concerned a petitioner’s application to renew a vacation
18 rental dwelling license and is instructive here. The subject property was annexed
19 into the city in 2013 but had not been rezoned. The subject property retained its
20 county zoning designation and was not subject to the city’s zoning ordinance. In
21 May 2014, the city amended its business regulations to generally prohibit the
22 occupancy of vacation rental dwellings from exceeding the lodging house

1 limitations in the Oregon Residential Specialty Code. Vacation rental dwelling
2 licenses were required to ‘state clearly the numeric occupancy limit for the
3 dwelling, including specifically the number of bedrooms.” *Emerald Cove*, 73 Or
4 LUBA at 74. The city’s decision made it clear that the amendment was not
5 intended to be a land use regulation. We explained that, “[g]enerally, where a
6 local government makes it clear that the ordinance it is adopting is not intended
7 to be a land use regulation, LUBA does not have jurisdiction to review such an
8 ordinance, unless there is a clear connection between the ordinance and the
9 comprehensive plan.” *Id.* at 77. As explained above, the county has previously
10 adopted language explaining that its short-term rental regulations are not intended
11 to be a land use decision, and petitioners do not dispute the county’s argument
12 that the water quality and housing provisions of its comprehensive plan are
13 unrelated to Ordinance 523. Ordinance 523 is not a new land use regulation.

14 **B. Ordinance 523 does not rezone property.**

15 Relying on ORS 215.503(9), petitioners also argue that Ordinance 523
16 rezones property. ORS 215.503(3) to (7) require local governments to provide
17 certain individualized notice when “property is rezoned.” ORS 215.503(9)
18 provides:

19 *“For purposes of this section, property is rezoned when the*
20 *governing body of the county:*

21 *“(a) Changes the base zoning classification of the property; or*

1 “(b) Adopts or amends an ordinance in a manner *that limits or*
2 *prohibits land uses* previously allowed in the affected zone.”
3 (Emphases added.)

4 Petitioners argue that Ordinance 523 rezones property because it “limits or
5 prohibits” the short-term rental “land use” of dwelling units that was previously
6 allowed. According to petitioners, if the ESER determines that the capacity of the
7 wastewater system serving the dwelling unit is insufficient to accommodate the
8 number of existing bedrooms, then petitioners may not be able to obtain a license
9 for the same number of short-term rental bedrooms as was allowed prior to
10 Ordinance 523. Petitioners also argue that, because Ordinance 523 prohibits
11 “[e]vents, such as weddings, rehearsal dinners, and similar activities,” petitioners
12 may not be able to engage in those activities anymore.

13 We first reject petitioners’ argument that ORS 215.503(9) is relevant in
14 determining whether, in enacting Ordinance 523, the county enacted a “new land
15 use regulation” or amended its zoning ordinance. ORS 215.503(9) is a notice
16 statute, and it is the codified version of Ballot Measure 56, which was enacted by
17 the voters in 1998. Measure 56 was enacted to address the problem of local
18 governments enacting changes to their comprehensive plans and zoning
19 ordinances that affected and limited the use of property without providing
20 individualized notice to persons whose properties were affected by the changes.
21 ORS 215.503(9) does not answer the question of whether Ordinance 523 is
22 effectively an amendment to the county’s comprehensive plan and zoning

1 ordinance. Rather, *if* “property is rezoned” by Ordinance 523, then the county
2 must provide individualized notice as specified in ORS 215.503.

3 Second, we disagree with petitioners that limiting the number of bedrooms
4 and, therefore, occupancy under a short-term rental license based on the ESER,
5 and prohibiting events in dwelling units, rezones any property. Nothing in
6 Ordinance 523 changes the zoning of property or amends the provisions of LCC
7 chapter 1 constituting the county’s zoning code. Similarly, Ordinance 523 does
8 not create any subareas at all; rather, it creates a future process that may lead to
9 the creation of subareas for short-term rental licensing purposes. Petitioners do
10 not establish how those future subareas amend county zoning.

11 **C. Ordinance 523 does not terminate or limit lawful land uses.**

12 The county has regulated the short-term rental use of dwelling units since
13 2016 by requiring operators of short-term rentals to obtain licenses. In addition
14 to restricting the maximum occupancy of short-term rentals, prohibiting certain
15 events, and creating a future process that may lead to the creation of subareas for
16 short-term rental licensing purposes, Ordinance 523 “precludes the transfer of
17 [short-term rental] licenses from one owner to the next.” Notice of Intent to
18 Appeal Ex A, at 1. Petitioners argue that, in adopting Ordinance 523 and thereby
19 amending the licensing program, the county made a land use decision because
20 Ordinance 523 will potentially discontinue the lawful short-term rental use of
21 dwelling units in contravention of ORS 215.130(5). ORS 215.130(5) provides
22 that “[t]he lawful use of any building, structure or land at the time of enactment

1 or amendment of any zoning ordinance or regulation may be continued. * * * A
2 change of ownership or occupancy shall be permitted.” As explained above,
3 however, Ordinance 523 is not a “zoning ordinance or regulation” and, therefore,
4 ORS 215.130(5) does not apply and does not bar the county from restricting the
5 transfer of licenses upon the change of ownership of property. Furthermore,
6 failure to have a required business license is not relevant to a determination of
7 whether a land use is legally nonconforming for zoning purposes. *Morgan v.*
8 *Jackson County*, 290 Or App 111, 414 P3d 917, *rev den*, 362 Or 860 (2018)
9 (holding that the evaluation of whether a nonconforming use is lawful at the time
10 it becomes nonconforming is limited to noncompliance with local zoning or land
11 use regulations and does not include noncompliance with business licensing
12 laws). Petitioners have not, however, established that Ordinance 523 is in fact a
13 zoning ordinance or regulation. The county explains that a short-term rental is
14 not a land use designation or a use of a dwelling that is identified in LCC
15 chapter 1:

16 “Ordinance #523 does not regulate development—[a short-term
17 rental] is an activity that occurs in a dwelling, but approval of the
18 dwelling itself is separately regulated by LCC Chapter 1. There is
19 no connection or inference that the license limits, ESER
20 requirements and Hearings Officer procedures in Ordinance #523
21 have any role in approving or denying an application for a dwelling
22 under the County's land use regulations.” Motion to Dismiss 8.

23 In *Emerald Cove*, the petitioner argued that its prior vacation rental use of
24 *six* bedrooms was a nonconforming use under the city’s zoning code. 73 Or

1 LUBA at 75. The petitioner pointed out that the city’s business regulations
2 incorporated the definition of “lodging house” in the Oregon Residential
3 Specialty Code and that its comprehensive plan listed “Building Codes” as an
4 implementation technique, thus linking the vacation rental dwelling regulations
5 and the comprehensive plan. *Id.* at 77-78. The petitioner also pointed to a
6 comprehensive plan housing goal policy to establish minimum construction and
7 lot coverage standards for residential development. *Id.* at 78.

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

13 Other cases reach a similar result. See *Ramsey v. City of Portland*, 30 Or
14 LUBA 212, 213, 217-18 (1995) (concluding that an ordinance that set out a
15 procedure for applying to the city forester for a tree-cutting permit, stated an
16 application fee, included notice requirements, created an appeal period in which
17 to appeal either the grant or denial of a permit, assigned the task of reviewing
18 appeals to the city’s Urban Forestry Commission, and stated that decisions of the
19 Urban Forestry Commission were reviewable solely by writ of review lacked any
20 clear connection to the comprehensive plan and was not a statutory land use
21 decision); *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252, 253,
22 256-57 (2013) (concluding that an ordinance that “prescribed a minimum height

1 limit for aircraft operations over the city and prohibited acrobatic flying and the
2 dropping of items from aircraft” was not a land use regulation because there was
3 not “a clear connection between the comprehensive plan and the ordinance
4 requirements, and the inference that the ordinance implement[ed] the
5 comprehensive plan [was not] unavoidable.”).

6 We contrast those cases with *Buys v. City of Portland*, 69 Or LUBA 486,
7 491-93 (2014). In *Buys*, the petitioner appealed the city’s Pedestrian Design
8 Guide (PDG). The city’s comprehensive plan specifically referenced the PDG,
9 creating a clear and direct connection between the comprehensive plan and the
10 PDG. The PDG established standards for implementing the comprehensive plan
11 and was subject to our jurisdiction. *Rest-Haven Memorial Park v. City of Eugene*,
12 39 Or LUBA 282, *aff’d*, 175 Or App 419, 28 P3d 1229 (2001), is similar. In *Rest-*
13 *Haven*, a city ordinance adopted “new prohibitions, with certain exceptions,
14 against placing pipes or fill in the city’s open waterways (hereafter the ordinance
15 or open waterways ordinance).” 39 Or LUBA at 283. We explained that, “[i]f the
16 open waterways ordinance establishes ‘standards for implementing a
17 comprehensive plan,’ it is a land use regulation and its adoption is a land use
18 decision over which LUBA has jurisdiction.”⁴ *Id.* at 285. The purpose of the

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

1 challenged ordinance was to establish interim protection for constructed and
2 natural open waterways, which provided multiple stormwater benefits to the
3 community, until the city completed its Statewide Planning Goal 5 (Natural
4 Resources, Scenic and Historic Areas, and Open Spaces) process. *Id.* at 286-87.
5 We concluded that it was clear that the ordinance established standards for
6 implementing the city’s comprehensive plan and was a new land use regulation.
7 *Id.* at 287. Here, however, petitioners have not established a connection between
8 the county’s comprehensive plan and land use regulations and Ordinance 523.

9 For the reasons explained above, we agree with the county that Ordinance
10 523 is not a land use decision subject to our jurisdiction.

11 **MOTION FOR STAY AND MOTION TO CONSOLIDATE**

12 On January 14, 2022, petitioners filed a motion requesting that we stay the
13 effectiveness of Ordinance 523. On January 20, 2022, petitioners filed a motion
14 requesting that we consolidate this appeal with two other pending appeals, LUBA

“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 No. 2021-118 and LUBA No. 2021-122.⁵ Because we conclude that we lack
2 jurisdiction over this appeal, we need not address petitioners' motion for stay and
3 motion to consolidate.

4 **MOTION TO TRANSFER**

5 On December 6, 2021, petitioners filed a motion to transfer this appeal to
6 circuit court in the event that we conclude that we do not have jurisdiction. The
7 motion to transfer is granted.

8 This appeal is transferred to Lincoln County Circuit Court.

⁵ LUBA No. 2021-118 is an appeal of a ballot measure amending the short-term rental regulations in LCC chapter 4, and LUBA No. 2021-122 is an appeal of a board of county commissioners resolution suspending the issuance of short-term rental licenses.