

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

LUBA  
MAR 04 2022 PM 01:26

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4 RICHARD E. CAVE, JANE C. GIBBONS,  
5 KATHERINE GUPTILL, KEN GUPTILL,  
6 ZANE KESEY, and ANTHONY D. SCHAUERMANN,  
7 *Petitioners,*

8  
9 vs.

10  
11 LINCOLN COUNTY,  
12 *Respondent,*

13  
14 and

15  
16 MONICA KIRK and MICHELE RILEY,  
17 *Intervenors-Respondents.*

18  
19 LUBA No. 2021-122

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from Lincoln County.

25  
26 Dean N. Alterman represented petitioners.

27  
28 Christopher D. Crean represented respondent.

29  
30 Daniel Kearns represented intervenors-respondents.

31  
32 RUDD, Board Member; RYAN, Board Member, participated in the  
33 decision.

34  
35 ZAMUDIO, Board Chair, did not participate in the decision.

36  
37 TRANSFERRED 03/04/2022

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

**NATURE OF THE DECISION**

Petitioners appeal the board of county commissioners’ adoption of Resolution 21-24-5A, which temporarily restricts the issuance of new licenses authorizing the short-term rental of single-family dwellings.

**BACKGROUND**

Lincoln County Code (LCC) chapter 4, Business Regulations, includes regulations first adopted in 2016 that apply to short-term rentals, that is, “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 4.415(10).

On March 4, 2020, the board of commissioners adopted Resolution 20-4-3B, suspending the issuance of new short-term rental licenses through May 7, 2020, with the stated purpose of pausing new licensing while staff completed “a comprehensive review of licensing standards, program operations, enforcement actions and full implementation of new provisions of the licensing program for short term rental of residences (STRs), [LCC] Sections 4.405 through 4.460.” Petitioner’s Memorandum on Jurisdiction 2.

On April 27, 2020, the board of commissioners adopted Resolution 20-27-4A, extending the suspension period through September 30, 2020, and explaining that staff required additional time to review the program due to the COVID-19 pandemic and the attendant strain on staff resources. *Id.* at 3. Subsequently, the

1 board of commissioners adopted four additional resolutions extending the  
2 suspension period for the same reasons explained in Resolution 20-27-4A.<sup>1</sup>

3 Meanwhile, on October 27, 2021, the board of commissioners adopted  
4 Ordinance 523, amending provisions of LCC chapter 4 addressing the licensing  
5 program, operating standards, and complaint procedures applicable to the short-  
6 term rental of dwelling units in unincorporated parts of the county.<sup>2</sup> On  
7 November 2, 2021, voters approved Ballot Measure 21-203 (the Ballot Measure),  
8 amending the short-term rental regulations in LCC chapter 4. On November 19,  
9 2021, the county certified the Ballot Measure vote.<sup>3</sup>

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<sup>1</sup> On September 21, 2020, the board of commissioners adopted Resolution 20-21-9A, extending the suspension period through December 31, 2020, and explaining that staff required additional time to review the program due to the COVID-19 pandemic, wildfire emergencies, and the associated strain on staff resources. Petitioner’s Memorandum on Jurisdiction 3. On December 21, 2020, the board of commissioners adopted Resolution 20-21-12C, extending the suspension period through June 1, 2021, and explaining that staff required additional time to review the program for the previously identified reasons. *Id.* at 4. On May 24, 2021, the board of commissioners adopted Resolution 21-24-5A, extending the suspension period through November 30, 2021, and explaining that staff required additional time to review the program for the previously identified reasons and due to the resources needed for COVID-19 vaccination administration. *Id.* On November 30, 2021, Resolution 21-24-5A expired by its own terms.

<sup>2</sup> On February 10, 2022, we issued a final opinion and order in LUBA No. 2021-113, transferring an appeal of Ordinance 523 to the circuit court pursuant to OAR 661-010-0075(11)(c).

<sup>3</sup> An appeal of the Ballot Measure is before us in LUBA No. 2021-118. The validity of the Ballot Measure is also the subject of a challenge in a circuit court

1           On December 3, 2021, the board of commissioners adopted the resolution  
2 challenged in this appeal, Resolution 21-24-5A (the Resolution).<sup>4</sup> The Resolution  
3 recites that the Ballot Measure prohibits issuance of new short-term rental  
4 licenses in the county’s R-1, R-1-A, and R-2 zones, and that county seeks to  
5 pause licensing of new short-term rentals while the circuit court evaluates the  
6 validity of the Ballot Measure. The Resolution temporarily suspended in the R-  
7 1, R-1-A, and R-2 zones “acceptance, processing and issuance of short term  
8 rental licensing applications to new (never previously licensed) residences under  
9 the LCC except as [provided in the Resolution] or as determined appropriate to  
10 carry out the intent of the Resolution as determined by the licensing authority  
11 after consultation with County Counsel’s Office.” Notice of Intent to Appeal Ex  
12 A, at 1. Exceptions to the suspension included but were not limited to:

- 13           “a.     Currently pending or processing new applications for licenses  
14                 not in R-1, R-1A, and R-2 zones as of the date and time this  
15                 Resolution is adopted by the Board of Commissioners.
- 16           “b.     For in process applications for new owners as allowed under  
17                 Resolution #20-4-3B(2)(c).

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case filed by unrelated plaintiffs in *Cammann v. Jenkins*, Case No. 21CV46002. On December 1, 2021, the circuit court issued a temporary restraining order enjoining enforcement of the Ballot Measure, and we subsequently suspended LUBA No. 2021-118. On December 8, 2021, the circuit court issued a preliminary injunction, enjoining the county from enacting and enforcing the Ballot Measure pending a determination of its validity or further order of the circuit court.

<sup>4</sup> By its terms, the Resolution expired on March 3, 2022.

1       “c. Existing STR licensed residences as of the date of this  
2       Resolution are exempted from this moratorium. Under LCC  
3       4.420 licenses are not assignable.

4       “d. Other exceptions carrying forth the intent of this Resolution  
5       and the [LCC] as determined solely in the discretion of the  
6       licensing authority after consultation with County Counsel’s  
7       Office.” *Id.* at 1-2.

8       On December 20, 2021, LUBA received petitioners’ appeal of the  
9       Resolution.

## 10   **JURISDICTION**

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

17       “(i) The goals;

18       “(ii) A comprehensive plan provision;

19       “(iii) A land use regulation; or

20       “(iv) A new land use regulation[.]” ORS 197.015(10)(a)(A).

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

1           On January 24, 2022, we raised the issue of jurisdiction on our own motion  
2 and asked the parties to brief the issue. *Adams v. City of Ashland*, 33 Or LUBA  
3 552, 554 (1997). On February 7, 2022, petitioners filed their memorandum on  
4 jurisdiction. On February 9, 2022, intervenors-respondents (intervenors) filed  
5 their memorandum on jurisdiction. On February 22, 2022, the county filed its  
6 memorandum on jurisdiction. For the reasons explained below, we conclude that  
7 the Resolution is not a “land use decision” within the meaning of ORS  
8 197.015(10)(a) and, accordingly, we lack jurisdiction over the appeal.

9           The county and intervenors maintain that the county’s adoption of the  
10 Resolution is not a land use decision because the Resolution does not concern the  
11 adoption, amendment, or application of any land use regulations, provisions of  
12 the county’s comprehensive plan, or statewide planning goals. As the county  
13 observes, we determined in *Briggs v. Lincoln County*, \_\_\_ Or LUBA \_\_\_ (LUBA  
14 No 2021-113, Feb 10, 2022), that the LCC chapter 4 regulations applicable to  
15 short-term rentals are not land use regulations. The Resolution directs staff in the  
16 county sheriff’s office to suspend issuance of certain LCC chapter 4 short-term  
17 rental licenses. Intervenors maintain:

18           “The Board lacks jurisdiction to review this appeal because [the  
19 Resolution] is not a ‘land use decision’ as defined in ORS  
20 197.015(10), and its provisions do not constitute a ‘land use  
21 regulation’ as defined in ORS 197.015(11). [The Resolution] is  
22 purely a directive to the sheriff’s office on how to handle business  
23 license applications for short-term rentals (STRs).” Intervenors’  
24 Memorandum on Jurisdiction 1.

1 Similarly, the county maintains that the Resolution “simply directs County  
2 officials to suspend issuing new short-term rental licenses in portions of the  
3 County, under the existing licensing standards, until the circuit court determines  
4 the validity of the Measure.” County’s Memorandum on Jurisdiction 3-4.

5 As the parties seeking LUBA’s review, petitioners bear the burden of  
6 establishing LUBA’s jurisdiction over the Resolution. *Emerald Cove LLC v. City*  
7 *of Lincoln City*, 73 Or LUBA 72, 76 (2016) (citing *Billington v. Polk County*, 299  
8 Or 471, 475, 703 P2d 232 (1985)). Petitioners do not identify any comprehensive  
9 plan provisions or statewide planning goals applicable to the Resolution. Rather,  
10 petitioners argue that we have jurisdiction for four reasons that we summarize  
11 below.

12 First, petitioners maintain that LUBA has jurisdiction over the Resolution  
13 because the Resolution “cannot be viewed in isolation, but [must be viewed] in  
14 the context of Respondent’s two other recent decisions on vacation rentals, both  
15 now before LUBA.” Petitioner’s Memorandum on Jurisdiction 1. Second,  
16 petitioners maintain that the Resolution is subject to LUBA’s jurisdiction because  
17 it is not a temporary response to the Ballot Measure but, rather, the latest in a  
18 long line of licensing suspensions. However, petitioners do not explain why the  
19 amendments to LCC chapter 4 in Ordinance 523 and the Ballot Measure have  
20 any bearing on whether the Resolution is a land use decision or explain the  
21 relevance of prior county licensing suspensions. Petitioners do not develop those

1 arguments, and we do not address them further. *Deschutes Development v.*  
2 *Deschutes Cty.*, 5 Or LUBA 218, 220 (1982).

3 Third, petitioners state that, “[i]f the [Ballot Measure] is a land use  
4 regulation, then the [Resolution] is a decision by Respondent that ‘concerns the  
5 adoption, amendment or application of \* \* \* a land use regulation,’ ORS  
6 197.015(10)(a)(A), and is therefore itself a land use decision.” Petitioner’s  
7 Memorandum on Jurisdiction 6 (emphasis added). Petitioners make no effort to  
8 establish that the Ballot Measure is a land use regulation but, rather, suggest a  
9 consequence if the Ballot Measure is a land use regulation. Assuming solely for  
10 purposes of this decision, and without deciding, that the Ballot Measure is a land  
11 use decision because it adopts or amends a land use regulation, petitioners have  
12 not established that the Resolution adopts, amends, or applies the Ballot Measure.  
13 The Resolution may in some respects align with the Ballot Measure, but the  
14 Resolution does not adopt, amend, or apply the Ballot Measure.

15 Fourth, petitioners argue that the Resolution is subject to our jurisdiction  
16 under the significant impacts test.

17 “A ‘significant impact’s land use decision is a decision that does not  
18 qualify under the definition of ‘land use decision’ at ORS  
19 197.015(10)(a)(A) but, nonetheless, is deemed to be reviewable as  
20 a land use decision if, among other things, it creates ‘an actual,  
21 qualitatively or quantitatively significant impact on present or future  
22 land uses.’” *Vagabond Properties, LLC v. City of Port Orford*, \_\_\_  
23 Or LUBA \_\_\_, \_\_\_ (LUBA No 2021-042, Dec 6, 2021) (slip op at  
24 21) (quoting *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414  
25 (1994)).

1 In *Northwest Trail Alliance v. City of Portland*, we explained:

2 “In the very rare cases when the significant impacts test is deemed  
3 met, LUBA’s review is typically conducted under statutes or other  
4 laws, such as road vacation statutes, that provide standards for the  
5 decision, and that have some direct bearing on the use of land. \* \* \*

6 “In or view, LUBA should exercise review jurisdiction over a  
7 decision under the significant impacts test only if the petitioner  
8 identifies the non-land-use standards that the petitioner believes  
9 apply to the decision and would govern LUBA’s review. Further,  
10 we believe that those identified non-land-use standards must have  
11 *some* bearing or relationship to the use of land.” 71 Or LUBA 339,  
12 346 (2015) (emphasis in original).

13 According to petitioners, the Resolution is a significant impacts land use decision  
14 because the county has used a series of resolutions to restrict short-term rentals.

15 As petitioners recognize, we will generally only exercise review  
16 jurisdiction under the significant impacts test if the petitioner identifies non-land-  
17 use standards that have some direct bearing on or relationship to the use of land  
18 that the petitioner believes apply to the decision and would govern LUBA’s  
19 review. *Vagabond*, \_\_\_ Or LUBA at \_\_\_ (slip op at 21). Petitioners argue that the  
20 applicable non-land-use standards supporting a finding of significant impacts in  
21 this case are those applicable to development moratoria at ORS 197.524.

22 ORS 197.524 provides:

23 “(1) When a local government engages in a pattern or practice of  
24 delaying or stopping the issuance of permits, authorizations  
25 or approvals *necessary for the subdivision or partitioning of,*  
26 *or construction on, any land,* including delaying or stopping  
27 issuance based on a shortage of public facilities, the local  
28 government shall:

1           “(a) Adopt a public facilities strategy under ORS 197.768;  
2           or

3           “(b) Adopt a moratorium on construction or land  
4           development under ORS 197.505 to 197.540.

5           “(2) The provisions of subsection (1) of this section do not apply  
6           to the delay or stopping of the issuance of permits,  
7           authorizations or approvals because they are inconsistent with  
8           the local government’s comprehensive plan or land use  
9           regulations.” (Emphasis added.)

10    ORS 197.524 may apply where a local government action stops the issuance of  
11    permits, authorizations, or approvals necessary for the subdivision or partitioning  
12    of land or construction thereon. Subdivisions and partitions are not at issue here,  
13    and petitioners have not identified any provision in the Resolution that prevents  
14    the construction of dwellings. Petitioners therefore have not established that ORS  
15    197.524 is a non-land-use standard that applies to the Resolution.

16           Furthermore, petitioners have not explained why a restriction on the  
17    issuance of business licenses will have a significant impact on the designated  
18    *land use* of dwellings. Although petitioners assert that the county has “prohibited  
19    owners from building and operating new vacation rentals in areas that are zoned  
20    to allow that use,” they provide no citation to any provision of the county’s  
21    zoning code that authorizes the use of dwellings as short-term rentals. Petitioner’s  
22    Memorandum on Jurisdiction 8. Petitioners have not established that the  
23    Resolution is a significant impacts land use decision.

24           We conclude that the Resolution is not a land use decision and,  
25    accordingly, we lack jurisdiction over the appeal.

1 **MOTION TO TRANSFER**

2           On February 4, 2022, petitioners filed a motion to transfer this appeal to  
3 circuit court in the event that we conclude that we do not have jurisdiction. The  
4 motion to transfer is granted.

5           This appeal is transferred to Lincoln County Circuit Court.