

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

PETER BRIGGS, RICHARD E. CAVE, JANE C. GIBBONS,  
CRAIG MCCLANAHAN, KATHERINE GUPTILL, KEN GUPTILL,  
JULIE D. READING, JANE M. FITZPATRICK, MITCHELL MOORE,  
GARY WESKE, LINDA FENDER, DARRELL FENDER,  
DOUGLAS PALMER, JAYNE PALMER, OLENA STROZHENKO,  
JOHN OSTYN, MARY OSTYN, NADINE SCOTT,  
JERRY MERRITT, and LORIN J. LYNCH,  
*Petitioners,*

vs.

LINCOLN COUNTY,  
*Respondent,*

and

MONICA KIRK and MICHELE RILEY,  
*Intervenors-Respondents.*

LUBA No. 2021-118

JUDY CAMMANN, JOHN BLACKBURN,  
LAURI HINES, and PETER PREHN,  
*Petitioners,*

vs.

LINCOLN COUNTY,  
*Respondent,*

and

MONICA KIRK and MICHELE RILEY,  
*Intervenors-Respondents.*

2  
3 FINAL OPINION  
4 AND ORDER  
5

6 Appeal from Lincoln County.  
7

8 Steve Berman filed a joint petition for review on behalf of petitioners Judy  
9 Cammann, John Blackburn, Lauri Hines, and Peter Prehn. Also on brief was  
10 Lydia Anderson-Dana and Stoll Stoll Berne Lokting & Schlachter, P.C. Steve  
11 Berman and Lydia Anderson-Dana argued on behalf of petitioners.  
12

13 Heather A. Brann filed a joint petition for review on behalf of petitioners  
14 Peter Briggs, Richard E. Cave, Jane C. Gibbons, Craig McClanahan, Katherine  
15 Guptill, Ken Guptill, Julie D. Reading, Jane M. Fitzpatrick, Mitchell Moore, Gary  
16 Weske, Linda Fender, Darrell Fender, Douglas Palmer, Jayne Palmer, Olena  
17 Strozhenko, John Ostyn, Mary Ostyn, Nadine Scott, Jerry Merritt, and Lorin J.  
18 Lynch. Also on brief was Dean N. Alterman, Alterman Law Group P.C., and  
19 Heather A. Brann P.C. Heather A. Brann argued on behalf of petitioners.  
20

21 Christopher D. Crean filed the response brief. Also on brief was Emily  
22 Matasar and Beery, Elsner & Hammond, LLP. Christopher D. Crean and Emily  
23 Matasar argued on behalf of respondent.  
24

25 Daniel H. Kearns filed the intervenors-respondents' brief and argued on  
26 behalf of intervenors-respondents. Also on brief was Reeve Kearns, PC.  
27

28 RUDD, Board Member; ZAMUDIO, Board Chair; RYAN, Board  
29 Member, participated in the decision.  
30

31 REVERSED

08/08/2022

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

**NATURE OF THE DECISION**

The decision challenged in these appeals is a county ballot measure addressing short term rentals (STRs), which was approved by voters on November 2, 2021, and certified by the county as final on November 19, 2021.

**BACKGROUND**

Lincoln County Code (LCC) chapter 4 “Business Regulation” has included licensing and operational regulations applicable to STRs since 2016 (STR Regulations). In November 2021, county voters approved and the county certified Ballot Measure (BM) 21-203, a ballot measure making changes and additions to the STR Regulations. BM 21-203 is the subject of these appeals.

BM 21-203 amends the findings and purpose statement of the STR Regulations to add references to three county residential zoning districts, as well as the county’s comprehensive plan. Specifically, BM 21-203 amends LCC 4.405 by adding a new subsection to the purpose statement explaining:

“The people of Lincoln County find that within low density residential zones R-1-A, R-1 and R-2, a major purpose of these provisions is to control, manage and limit vacation rentals in single-family dwellings to protect the character of neighborhoods for residents. Because of their location in said residential zones and their specific characteristics and potential impacts, [STRs] in dwellings in unincorporated Lincoln County require special consideration so they properly operate with respect to the Comprehensive Plan and the objectives of the underlying zone districts.” Record 1.

1 BM 21-203 includes a variety of substantive changes and additions to the STR  
2 Regulations, including expanding the definition of “short term rental,” found at  
3 LCC 4.415(16), to add the bolded language

4 “the **transient** renting of a dwelling unit (including any accessory  
5 guest house on the same property) to any person(s) on a day to day  
6 basis or for a period of up to thirty (30) consecutive nights. **Short**  
7 **term rentals are deemed commercial lodging businesses**  
8 **equivalent to hotels and motels. They are not residential uses.”**  
9 Record 3 (boldface in original).

10 Petitioners in *Briggs v. Lincoln County*, LUBA No. 2021-118, appealed  
11 BM 21-203 to LUBA. The *Camman* petitioners filed a challenge to BM 21-203  
12 in circuit court. On March 15, 2022, the circuit court determined that BM 21-203  
13 is a land use decision subject to our jurisdiction, and transferred the *Camman*  
14 matter to LUBA. We assigned the *Camman* appeal LUBA No. 2022-030. On  
15 April 19, 2022, we issued our order consolidating these appeals.

16 Intervenors filed a motion requesting that we dismiss the appeals on the  
17 grounds that BM 21-203 is not a land use decision. On May 17, 2022, we issued  
18 our order denying the motion to dismiss. In our May 17, 2022 order, we stated  
19 that the record in this appeal was that which was transmitted to LUBA on January  
20 6, 2022 and that objections to the record must be filed within 14 days of May 17,  
21 2022. No objections to the record were filed and the appeals proceeded to briefing  
22 on the merits.

23 We resolve the pending motions and the appeals below.

1   **MOTIONS**

2       **A.    Motion to Strike**

3       ORS 197.835(2) provides:

4       “(a)   Review of a decision under ORS 197.830 to 197.845 shall be  
5           confined to the record.

6       “(b)   In the case of disputed allegations of standing,  
7           unconstitutionality of the decision, ex parte contacts, actions  
8           described in subsection (10)(a)(B) of this section or other  
9           procedural irregularities not shown in the record that, if  
10          proved, would warrant reversal or remand, the board may take  
11          evidence and make findings of fact on those allegations. The  
12          board shall be bound by any finding of fact of the local  
13          government, special district or state agency for which there is  
14          substantial evidence in the whole record.”

15       The county moves to strike from the petition for review references to and  
16   arguments relying upon documents and evidence which are not part of the record.  
17   Specifically, the county moves to strike references to and reliance on (1) a  
18   November 16, 2020 memorandum from former county counsel to the board of  
19   commissioners opining on the legality of BM 21-203; (2) statements by former  
20   county counsel on the legality of BM 21-203 at a public meeting; (3) comments  
21   concerning BM 21-203 made by a county commissioner during a public meeting;  
22   and (4) declarations by petitioners alleging BM 21-203 impacts on existing STR  
23   contracts.<sup>1</sup>

---

<sup>1</sup> The disputed materials are the former county counsel memorandum, a  
hyperlink to a YouTube video of a county board of commissioners meeting,

1 In response to the motion to strike, petitioners argue broadly

2 “Respondent seeks an order from the Board striking portions of  
3 Petitioners’ Petition for Review that refer to several publicly  
4 available documents that have been known to all parties in this  
5 matter and included in the prior circuit court record since the  
6 beginning of this litigation. Because Respondent has placed the  
7 evidence it seeks to have stricken into question by disputing factual  
8 allegations concerning ‘the unconstitutionality of the decision’ in its  
9 Response Brief, and the Measure is a citizen-drafted initiative that  
10 was debated at length by the Lincoln County Board of  
11 Commissioners and the County’s attorney prior to passage,  
12 Petitioners urge the Board to deny Respondent’s Motion to Strike.”  
13 Response to Motion to Strike 2.

14 In the alternative, petitioners filed motions to take evidence and official notice  
15 requesting that we consider the disputed materials. Response to Motion to Strike  
16 2-3. Petitioners request that, if we grant the motion to strike, we also

17 “disregard any statements in Respondent’s and Intervenor’s briefs  
18 regarding evidence outside of the record submitted by Respondent.  
19 *See, e.g.*, Response Brief of Intervenor Monica Kirk and Michele  
20 Riley at 4 (referring to ‘a grassroots, neighbor-driven effort’ to  
21 circulate petitions; the Board of Commissioners’ alleged ‘effort to  
22 stifle support for the Measure’ by adopting ‘a competing set of STR  
23 regulations as Ordinance 523 on October 27, 2021 – less than one  
24 week before election day’ and the election results, none of which is  
25 found in the record).” Response to Motion to Strike 8.

26 We agree with the parties that the identified documents and related assertions by  
27 all parties to this matter are not part of the record before us and we grant the  
28 motion to strike.

---

minutes from a county board of commissioners meeting, and declarations filed  
by *Camman* petitioners in circuit court and with their motion for stay.

1        **B.     Motion to Take Evidence**

2        OAR 661-010-0045(1) provides:

3        “The Board may, upon written motion, take evidence not in the  
4        record in the case of disputed factual allegations in the parties’ briefs  
5        concerning unconstitutionality of the decision, standing, ex parte  
6        contacts, actions for the purpose of avoiding the requirements of  
7        ORS 215.427 or 227.178, or other procedural irregularities not  
8        shown in the record and which, if proved, would warrant reversal or  
9        remand of the decision. The Board may also upon motion or at its  
10       discretion take evidence to resolve disputes regarding the content of  
11       the record, requests for stays, attorney fees, or actual damages under  
12       ORS 197.845.”

13       Petitioners ask that we take as evidence statements made by a county  
14       commissioner and former county counsel concerning BM 21-203. *See* n 1.

15       Petitioners’ motion is not well developed. Our rules require that motions  
16       to take evidence include “a statement explaining with particularity what facts the  
17       moving party seeks to establish, how those facts pertain to the grounds to take  
18       evidence specified in section (1) of this rule, and how those facts will affect the  
19       outcome of the review proceeding.” OAR 661-010-0045(2)(a). Petitioners argue  
20       that we may take the requested items as evidence because they relate to disputed  
21       factual allegations in the parties’ briefs concerning the unconstitutionality of the  
22       decision but do not state with specificity what facts they seek to establish.  
23       Response to Motion to Strike 9.

24       We assume petitioners’ alleged “disputed factual allegation” relates in part  
25       to an argument in their response to the motion to strike concerning what voters

1 intended to accomplish with the measure. Petitioners maintain in their response  
2 to the motion to strike:

3 “Respondent argues that ‘[i]t is clear from the text, context and  
4 legislative history of the Measure that the voters intended the STR  
5 licensing provisions in the Measure to apply only in unincorporated  
6 areas of Lincoln County and it thus complies with ORS 203.040.’  
7 Respondent Lincoln County’s Response Brief at 15. But this  
8 argument is misplaced, given that the Lincoln County  
9 Commissioners had actual knowledge that voters were confused  
10 about the reach of the Measure prior to the election, as noted in the  
11 evidence Respondent seeks to have stricken.” Response to Motion  
12 to Strike 5-6.

13 Petitioners have not identified a factual dispute, that is, that the county disputes  
14 that a county commissioner *thought* voters *might* be confused or that the former  
15 county counsel *believed* the measure was legally vulnerable. Further, petitioners  
16 have not explained how these facts affect the outcome of this proceeding.

17 The motion to take the county counsel’s and county commissioner’s  
18 comments and written opinion as evidence is denied.

19 Petitioners also argue that the ballot measure impairs their contracts in  
20 violation of a state constitutional provision, and that the fact of impairment is  
21 disputed by the respondent when they argue:

22 “[t]here is no evidence in the record that the Measure impairs  
23 contractual obligations in violation of Article I, section 21 of  
24 Oregon’s constitution.’ Respondent Lincoln County’s Response  
25 Brief at 2. The evidence submitted by Petitioners directly addresses  
26 these constitutional allegations.” Response to Motion to Strike 7.



1 Respondent states that there is no evidence in the record that petitioners'  
2 contracts are impaired. Petitioners do not argue that the record contains evidence  
3 relating to their contracts. Petitioners argue that respondent disputes that their  
4 contractual obligations are impaired, necessitating consideration of the  
5 declarations. Petitioners do not explain how the declarations they wish to have  
6 admitted affect the outcome of this proceeding. Copies of contracts were not  
7 proffered but petitioners maintain in their joint petition for review

8 "Petitioners have existing rental agreements throughout this year  
9 that will be impaired by the Measure's provisions that make their  
10 existing rental agreements at the previously acceptable higher  
11 occupancy rates unlawful and that require those Petitioners with  
12 multiple short-term rental licenses to cease rentals at one or more of  
13 their properties." Joint Petition for Review at 32-33.

14 The declarations each contain similar language and do not state that contracts *will*  
15 be impaired but rather that they *may* be impaired. For example, the Blackburn  
16 declaration includes statements that:

17 "5. My properties have current occupancy limits of 10 and 12  
18 people. It is my understanding that the *current occupancy of*  
19 *my properties could be reduced if the Measure is allowed to*  
20 *go into effect, which may impair current rental contracts I*  
21 *have.*

22 "6. I recently updated my properties' septic systems, in 2018 and  
23 2020. It is my understanding that the septic systems of my  
24 *properties could have to be updated if the Measure is allowed*  
25 *to go into effect, which may impair current rental contracts I*  
26 *have.*

27 "7. As stated above, I have two properties in unincorporated  
28 Lincoln County. It is my understanding that *I may not be able*

1           *to rent both of my properties* if the Measure is allowed to go  
2           into effect, which would require cancellation of upcoming  
3           rental agreements and greatly impact my income.” Response  
4           to Motion to Strike Ex C, at 2 (emphases added.)

5   The declarations are, at best, speculative assertions that unidentified contracts  
6   may be impaired by the ballot measure. The declarations do not establish as a  
7   matter of fact that any contract will be impaired. Accordingly, the declarations  
8   do not evidence any fact that will affect the outcome of this appeal. The motion  
9   to take them as evidence is denied.

10           **C.    Motion for Official Notice**

11           Petitioners also request that we take official notice of the legal  
12   memorandum and statements by county counsel and the county commissioner  
13   pursuant to ORS 40.090(2). We will take official notice of “[p]ublic and private  
14   official acts of the legislative, executive and judicial departments of this state, the  
15   United States, any federally recognized American Indian tribal government and  
16   any other state, territory or other jurisdiction of the United States.” ORS  
17   40.090(2). We agree with the county that the written and verbal opinions of the  
18   county counsel and a county commissioner are not official acts of a legislative,  
19   executive or judicial department of the state or otherwise within the scope of ORS  
20   40.090(2) and are not subject to official notice.

21           **D.    Conclusion**

22           The motion to strike is granted. The motions to take evidence and for  
23   official notice are denied.

## 1   **FIRST AND THIRD ASSIGNMENTS OF ERROR**

### 2       **A.    Introduction**

3       ORS 215.130(5) provides:

4       “The lawful use of any building, structure or land at the time of the  
5       enactment or amendment of any zoning ordinance or regulation may  
6       be continued. Alteration of any such use may be permitted subject  
7       to subsection (9) of this section. Alteration of any such use shall be  
8       permitted when necessary to comply with any lawful requirement  
9       for alteration in the use. Except as provided in ORS 215.215, a  
10      county shall not place conditions upon the continuation or alteration  
11      of a use described under this subsection when necessary to comply  
12      with state or local health or safety requirements, or to maintain in  
13      good repair the existing structures associated with the use. A change  
14      of ownership or occupancy shall be permitted.”

15     Petitioners argue in their first assignment of error’s first subassignment of error  
16     that BM 21-203 violates ORS 215.130(5) because it requires that a previously  
17     lawful use be phased out in five years, does not allow transfer of the use to  
18     another, and imposes septic and occupancy restrictions. Lincoln County’s code  
19     allows and regulates the continuation of nonconforming uses. LCC 1.701. We  
20     assume for purposes of this decision, and particularly our application of ORS  
21     215.130(5), that BM 21-203 accurately categorizes STRs as nonconforming uses  
22     as that term is used in ORS 215.130(5). *See VanSpeybroeck v. Tillamook County*,  
23     221 Or App 677, 681, 191 P3d 712 (2008) (“Under state and local law, a  
24     nonconforming use can continue until abandoned, but alterations or replacements  
25     of the use are regulated.”). Petitioners’ third assignment of error’s first  
26     subassignment is that BM 21-203 is unconstitutional because it is preempted by

1 state statutes, including ORS 215.130(5). We address these assignments of error  
2 together. For the reasons explained below, we agree with petitioners that BM 21-  
3 203 violates ORS 215.130(5).

4 **B. BM 21-203 Text and Context Analysis**

5 **1. Consistency with ORS 215.130**

6 BM 21-203 amendments to LCC chapter 4 include, but are not limited to  
7 the addition of LCC

8 *“4.422 Non-conforming uses in R-1-A, R-1 and R-2 zones*

9 “(a) Effective on the date of adoption of this measure, existing  
10 licensed STR uses in R-1-A, R-1 and R-2 neighborhoods shall  
11 become non-conforming. These non-conforming uses shall be  
12 personal to the owner of record of a property at the time this  
13 measure is adopted and shall not be assignable or transferable,  
14 and such uses shall cease when ownership of a property is  
15 transferred. It is intended that the sale of homes with a rental  
16 license will result in gradual attrition of the total number of  
17 dwellings with a short-term rental license in the R-1-A, R-1  
18 and R-2 zones in the County.

19 “(b) If a subdivision now zoned R-1, R-1-A or R-2 wishes to allow  
20 STRs to be licensed within its boundaries, it shall petition the  
21 County to downzone it or to create a new zoning category to  
22 allow such use. A majority of the property owners in said  
23 subdivision must vote in favor of such a zoning change before  
24 applying to the County for such a zoning change.

25 *“4.423 Amortization, Exceptions in R-1-A, R-1 and R-2 zones*

26 “(a) License for non-conforming use of dwellings for STRs in R-  
27 1-A, R-1, and R-2 neighborhoods, shall be amortized within  
28 a five year period from the date of adoption of this measure.  
29 At the conclusion of the amortization period, all licenses for

1 STR usage of said non-conforming dwelling units shall  
2 expire, whether or not such use existed prior to the adoption  
3 of this measure unless hardship relief has been granted  
4 pursuant to Section 4.424 below.

5 “(b) An exception may be made, on a case by case basis, for an  
6 accessory dwelling unit that is licensed and operating as an  
7 STR on the date of adoption of this measure, where the  
8 primary residence is not licensed or used as an STR. Anyone  
9 seeking such an exception shall file an application for such  
10 relief with the BOC not later than 60 days from the effective  
11 date of this measure. The BOC shall determine whether there  
12 is a basis for such exception to be granted. Persons who fail  
13 to file an application within the time period established in this  
14 Section shall be precluded from applying for such an  
15 exception.” Record 4 (emphases added).

16 Newly enacted LCC 4.424 is a hardship provision for property owners “who can  
17 substantiate that an investment made in alteration of a dwelling exclusively to  
18 accommodate *the non-conforming use of a dwelling* as an STR cannot be  
19 adequately amortized” within the five years provided in LCC 4.423(a).<sup>2</sup> Record  
20 4 (emphasis added).

21 We examine BM 21-203’s text and context with the goal of discerning  
22 voter intent. The stated intent of the LCC 4.422 provision that (1) STR uses in  
23 the R-1-A, R-1, and R-2 zones will become nonconforming uses; and (2) the right  
24 to continue such uses will be personal to the owner of record and expire upon  
25 transfer of the property, is to cause a gradual attrition in the number of dwellings

---

<sup>2</sup> An application for hardship relief must be made within 60 days of the measure’s effective date. LCC 4.424(d). If the county makes the requisite finding of hardship, the amortization period will be extended. LCC 4.424(e).

1 in those zones with STR licenses, to ensure that the licenses are not assignable,  
2 i.e., not transferable, and to ensure that the “uses” cease when ownership is  
3 transferred. Record 4. ORS 215.130(5) requires, however, that the county allow  
4 the continuance of “[t]he lawful use of any building, structure or land at the time  
5 of the enactment or amendment of any zoning ordinance or regulation[.]” We  
6 therefore consider whether BM 21-203’s designation of STRs as nonconforming  
7 uses conflicts with the continuance of a lawful use of a building at the time of the  
8 measure’s enactment.

9 Although BM 21-203 includes modifications and additions to LCC 4.415  
10 “Definitions,” it does not include a definition of “nonconforming use.”<sup>3</sup> LCC  
11 1.1115 defines “nonconforming use” as

12 “the use of a structure or land, or structure and land in combination,  
13 which was lawfully established in compliance with all applicable  
14 ordinances and laws, but which, because of the application of a  
15 subsequent zoning ordinance, no longer conforms to the use  
16 requirements for the use zone in which it is located.” LCC  
17 1.1115(63).

18 Although the county argues that the definitions in LCC 1.1115, the county’s land  
19 development code, do not apply to STR Regulations in LCC ch 4, LCC 1.1115’s  
20 definition of “nonconforming use” is consistent with a common understanding of

---

<sup>3</sup> For example, BM 21-203 changed the definition of “short term rental,” adding the modifier “transient” before the term “rental” and adding a provision that a STR is deemed a commercial lodging business and is not a residential use.

1 the term.<sup>4</sup> Furthermore, LCC 1.1115 definition's requirement that  
2 "nonconforming uses" have been "lawfully established in compliance with all  
3 applicable ordinances and laws" is consistent with the preexisting provision in  
4 the STR Regulations at 4.450 requiring STR license holder compliance with all  
5 applicable parts of the LCC.<sup>5</sup> We will therefore rely on the LCC 1.1115 definition  
6 of "nonconforming use" as the applicable definition for purposes of this appeal.

7 BM 21-203 states that effective upon the date of its enactment, STRs *shall*  
8 *become* nonconforming uses in the R-1-A, R-1 and R-2 zones. Said differently,  
9 because of the application of BM 21-203, STRs no longer conform to the use  
10 requirements in the R-1-A, R-1 and R-2 zones. BM 21-203 therefore presumes  
11 that prior to its enactment, STRs were allowed uses in those zones and for  
12 purposes of this opinion, we assume that is correct. ORS 215.130(5) provides that  
13 counties must allow nonconforming uses to continue. BM 21-203 requires that  
14 STRs in these zones cease after a five-year phase out period.

15 Intervenor-respondents (intervenor) respond generally that BM 21-203  
16 imposes a business licensing regime similar to that which we concluded was not

---

<sup>4</sup> Black's Law Dictionary defines "nonconforming use" as "[l]and use that is impermissible under current zoning restrictions but that is allowed because the use existed lawfully before the restrictions took effect." Black's Law Dictionary 1540 (7th ed 1999).

<sup>5</sup> LCC 4.450 provides "Owners of [STR] units who hold a valid license under this Chapter are required to comply with all applicable provisions of this Chapter and the Lincoln County Code."

1 a land use regulation subject to our jurisdiction in *Briggs v. Lincoln County*, \_\_\_\_  
2 Or LUBA \_\_\_\_ (LUBA No 2021-113, Feb 10, 2022) and that ORS 215.130 is not  
3 implicated.<sup>6</sup> Our decision in *Briggs*, \_\_\_\_ Or LUBA \_\_\_\_, does not aid intervenors.  
4 The board of commissioners' adopted amendments in Ordinance 523 to LCC ch  
5 4 are qualitatively different than those voters adopted in BM 21-203 and we do  
6 not address them further.<sup>7</sup>

7 Instead, we look to *Port of Hood River v. City of Hood River*, where the  
8 petitioners appealed a voter approved ballot measure establishing a city policy to  
9 reserve certain property as a public park. 47 Or LUBA 62 (2004). There, the

---

<sup>6</sup> In October 2021, the county commission adopted Ordinance 523 amending the STR regulations. Ordinance 523 was the subject of the appeal in *Briggs v. Lincoln County*, LUBA No. 2021-113. We determined that Ordinance 523 was not a land use decision and transferred that appeal to circuit court. *Briggs v. Lincoln County*, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No 2021-113, Feb 10, 2022).

<sup>7</sup> Much of intervenors' response brief argues that BM 21-203 is not a land use decision. For example, intervenors argue:

"Although LUBA determined the Measure was a 'land use regulation' within its jurisdiction, in truth the Measure is a business regulation limiting the Sheriff's authority to issue or renew STR licenses and simply references residential zoning as an index of where the Sheriff can issue licenses. At most, the Measure furthers the County's protections for residential neighborhoods in a 'general or indirect way' through the business licensing program and is not a land use regulation." Intervenors-Respondents' Brief 1.

To the extent intervenors intend for this argument to serve as a motion for reconsideration of our order denying their motion to dismiss, it is denied.



1 ballot measure established a “city policy ‘to preserve for public parks’ a specified  
2 portion of the city waterfront.” *Id.* at 65. The property at issue was owned by the  
3 petitioner, developed with several industrial buildings, and zoned industrial, light  
4 industrial, and general commercial and the ballot measure allowed existing uses  
5 to remain as long as current operations continued. We concluded that “The  
6 negative implication of allowing existing uses to remain ‘as long as current  
7 operations continue’ is that new uses otherwise allowed in the industrial, light  
8 industrial and commercial zones are no longer allowed.” *Id.* at 67. Although  
9 intervenor in that appeal argued that the ballot measure was no more than an  
10 advisory expression of voter preference regarding the future of the city’s  
11 waterfront, we rejected that argument and concluded that the initiative effectively  
12 rezoned the petitioner’s property. We reach a similar conclusion here. BM 21-  
13 203 requires uses previously allowed in certain zones to end within five years.  
14 This violates ORS 215.130(5).

15       ORS 215.130(5) also requires that a change in ownership or occupancy be  
16 permitted. Conversely, BM 21-03, in newly enacted LCC 4.422(a), provides that  
17 “Effective on the date of adoption of this measure, \* \* \* [t]hese *non-conforming*  
18 *uses* shall be personal to the owner of record of a property at the time this measure  
19 is adopted and shall not be assignable or transferable, and *such uses shall cease*  
20 when ownership of a property is transferred.” Record 4 (emphasis added).

21       The county argues that because there was no right to transfer an STR  
22 *license* prior to BM 21-203’s approval, BM 21-203 does not effect a change that

1 implicates ORS 215.130(5). We disagree. The prior and retained language relied  
2 on by the county is the LCC 4.420(2) provision that “[n]o *license* granted under  
3 the provisions of LCC 4.405 through 4.460 shall be assignable. If the dwelling  
4 unit is sold or transferred by any means, a new license is required of the  
5 subsequent owner(s) who desire to continue short term rental operation[.]”  
6 (Emphasis added.) The BM 21-203 change is that LCC 4.442(a) provides that the  
7 *use* is required to cease.

8 LCC 4.423, also added by the BM 21-203, states in part:

9 “(a) *Licenses for non-conforming use* of dwellings for STRs in R-l-  
10 A, R-l, and R-2 neighborhoods *shall be amortized within a five year*  
11 *period* from the date of adoption of this measure. At the conclusion  
12 of the amortization period, all licenses for STR *usage* of said non-  
13 conforming dwelling units shall expire, whether or not such use  
14 existed prior to the adoption of this measure unless relief has been  
15 granted pursuant to Section 4.424 below.” Record 4 (emphases  
16 added).

17 This section provides that licenses for “usage” (as opposed to use) will be phased  
18 out in five years. Given, however, that licenses have a one-year term pursuant to  
19 LCC 4.430(2), the provision that no new license will be issued after five years  
20 serves as a back door mechanism to phase out the nonconforming use. The  
21 hardship relief available pursuant to LCC 4.424 expressly recognizes that it “is  
22 established for property owners who can substantiate that an investment made in  
23 alteration of a dwelling exclusively *to accommodate the non-conforming use of*  
24 *a dwelling* as an STR cannot be adequately amortized” within five years. Record  
25 4 (emphasis added).

1 BM 21-203 is a land use regulation requiring cessation of a nonconforming  
2 use in contravention of ORS 215.130(5). LCC 4.422's provision that "such use  
3 shall cease when ownership of a property is transferred" further violates ORS  
4 215.130(5) by providing that a change in ownership is no longer allowed. Record  
5 4.

6 Lastly, ORS 215.130(5) provides, in part,

7 *"Alteration of any such use may be permitted* subject to subsection  
8 *(9) of this section. Alteration of any such use shall be permitted*  
9 *when necessary to comply with any lawful requirement for*  
10 *alteration in the use. Except as provided in ORS 215.215, a county*  
11 *shall not place conditions upon the continuation or alteration to a*  
12 *use described under this subsection when necessary to comply with*  
13 *state or local health or safety requirements, or to maintain in good*  
14 *repair the existing structures associated with the use."*<sup>8</sup> (Emphases  
15 added.)

---

<sup>8</sup> ORS 215.215 provides:

"(1) Notwithstanding ORS 215.130 (5) to (11), if a nonfarm use exists in an exclusive farm use zone and is unintentionally destroyed by fire, other casualty or natural disaster, the county may allow by its zoning regulations such use to be reestablished to its previous nature and extent, but the reestablishment shall meet all other building, plumbing, sanitation and other codes, ordinances and permit requirements.

"(2) Consistent with ORS 215.243, the county governing body may zone for the appropriate nonfarm use one or more lots or parcels in the interior of an exclusive farm use zone if the lots or parcels were physically developed for the nonfarm use prior to the establishment of the exclusive farm use zone.

1 Petitioners argue that ORS 215.130(9) provides that the definition of “alteration”  
2 includes

3 “(a) A change in the use of no greater adverse impact to the  
4 neighborhood; and

5 “(b) A change in the structure or physical improvements of no  
6 greater adverse impact to the neighborhood[]”

7 and that taken with ORS 215.130(5), these provisions mean that the county may  
8 not place any conditions on an unaltered nonconforming use. To the contrary,  
9 this language provides that the county may allow certain alterations to  
10 nonconforming uses but must allow the alterations of nonconforming uses  
11 necessary to comply with lawful, state or local health or safety requirements. BM  
12 21-203 imposes new septic and guest number restrictions and these *types* of  
13 restrictions may be permissible local public health and safety requirements. We  
14 do not discuss them further.

15 We agree with petitioners that BM 21-03 violates ORS 215.130(5) by  
16 requiring STRs in the identified zones to cease within five years and by  
17 prohibiting their transfer of ownership. ORS 215.130(5) prohibits the county  
18 from requiring lawful STRs that are nonconforming uses to cease in five years or  
19 prohibiting the transfer of their ownership.

20 The first assignment of error’s first subassignment of error is sustained in  
21 part.

1           **B.     Preemption**

2           Petitioners argue in the first subassignment of the third assignment of error  
3   that BM 21-03 is preempted by ORS 215.130. We agree that the two pieces of  
4   legislation cannot operate concurrently and that BM 21-203 is preempted by ORS  
5   215.130.

6           “Outside the context of laws prescribing the modes of local  
7   government, both municipalities and the state legislature in many  
8   cases have enacted laws in pursuit of substantive objectives, each  
9   well within its respective authority, that were arguably inconsistent  
10   with one another. In such cases, the first inquiry must be whether  
11   the local rule in truth is incompatible with the legislative policy,  
12   either because both cannot operate concurrently or because the  
13   legislature meant its law to be exclusive.” *La Grande/Astoria v.*  
14   *PERB*, 281 Or 137, 148, 576 P2d 1204, *aff’d on reh’g*, 284 Or 173,  
15   586 P2d 765 (1978).

16   “[W]hen a local enactment is found incompatible with a state law in an area of  
17   substantive policy, the state law will displace the local rule.” *Id.* at 149. The Court  
18   of Appeals has also held that “a local law is preempted only to the extent that it  
19   ‘cannot operate concurrently’ with state law, *i.e.*, the operation of a local law  
20   makes it impossible to comply with a state statute.” *Thunderbird Mobile Club v.*  
21   *City of Wilsonville*, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524, 228  
22   P3d 152 (2010) (local legislation regulating tenant displacement benefits more  
23   generous than found in state law not preempted.)

24           The state in enacting ORS 215.130(5) has legislated that nonconforming  
25   uses must be allowed to continue. BM 21-203 requires that the nonconforming  
26   STR uses cease operations in no later than five years. Evidence of the

1 legislature's intent that ORS 215.130 constrain the county's regulation of  
2 nonconforming uses are found in ORS 215.130 provisions identifying what the  
3 county *may and may not* do, including

4 “(10) A local government *may adopt* standards and procedures to  
5 implement the provisions of this section. The standards and  
6 procedures may include but are not limited to the following:

7 “(a) For purposes of verifying a use under subsection (5) of  
8 this section, a county may adopt procedures that allow  
9 an applicant for verification to prove the existence,  
10 continuity, nature and extent of the use only for the 10-  
11 year period immediately preceding the date of  
12 application. Evidence proving the existence,  
13 continuity, nature and extent of the use for the 10-year  
14 period preceding application creates a rebuttable  
15 presumption that the use, as proven, lawfully existed at  
16 the time the applicable zoning ordinance or regulation  
17 was adopted and has continued uninterrupted until the  
18 date of application.

19 “(b) Establishing criteria to determine when a use has been  
20 interrupted or abandoned under subsection (7) of this  
21 section.

22 “(c) Conditioning approval of the alteration of a use in a  
23 manner calculated to ensure mitigation of adverse  
24 impacts as described in subsection (9) of this section.

25 “(11) For purposes of verifying a use under subsection (5) of this  
26 section, *a county may not* require an applicant for verification  
27 to prove the existence, continuity, nature and extent of the use

1 for a period exceeding 20 years immediately preceding the  
2 date of application.”<sup>9</sup> (Emphases added.)

3 Such is the case here; BM 21-203 prevents compliance with ORS 215.130 and is  
4 preempted. Because we conclude that BM 21-203 is preempted by ORS 215.130,  
5 we do not address petitioners’ arguments related to other state statutes.

6 The first assignment of error’s first subassignment of error is sustained, in  
7 part.

8 The third assignment of error’s first subassignment of error is sustained, in  
9 part.

#### 10 **DISPOSITION AND REMAINING ASSIGNMENTS OF ERROR**

11 In our resolution of the first subassignments of the first and third  
12 assignments of error, we conclude that BM 21-03 is inconsistent with ORS  
13 215.130(5), which preempts local legislation that cannot operate concurrently  
14 with that statute. Accordingly, the decision is “prohibited as a matter of law.”  
15 OAR 661-010-0071(1)(c) (LUBA shall reverse a land use decision that violates

---

<sup>9</sup> See for example, *Landwatch Lane County v. Lane County*, 77 Or LUBA 213, 222, *aff’d*, 292 Or App 415, 421 P3d 432 (2018) (“[U]nlike ORS 215.130(5), ORS 215.130(10)(b) expressly delegates to counties the authority to ‘[e]stablish[] criteria to determine when a use has been interrupted or abandoned under’ ORS 215.130(7).”); *Morgan v. Jackson County*, 78 Or LUBA 188, 206 (2018) (ORS 215.130(11) prohibits “compelling an applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of the application[.]”).

1 a provision of applicable law and is prohibited as a matter of law). Accordingly,  
2 we do not resolve the remaining assignments of error.<sup>10</sup>  
3 The decision is reversed.

---

<sup>10</sup> The remainder of petitioners' first assignment of error is that BM 21-203 is inconsistent with ORS 203.040. Petitioners' second assignment of error is that the BM 21-03 violates ORS 203.045(2)(b), ORS 215.503, and ORS 215.223. The remainder of petitioners' third assignment of error is that the decision is unconstitutionally vague, impairs contracts in violation of Article I, section 21 of the Oregon Constitution, and is preempted by the Oregon Planned Community Act and the Oregon Condominium Act.

Petitioners' fourth assignment of error is not an assignment of error, but rather seeks to avoid a disposition that affirms BM 21-03 in part and remands in part. Petition for Review 36-40. The county and intervenors respond with arguments that severance is appropriate. We do not have the authority to affirm in part and reverse or remand in part a decision. *Dept. of Land Conservation v. Columbia County*, 117 Or App 207, 843 P2d 996 (1992).