

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

TIM DEAN, TRACEY DEAN,  
RICHARD E. CAVE, JANE C. GIBBONS,  
JOHN BLACKBURN, JAY BENNETT, LAURIE BENNETT,  
LINDEN KNAPP, RUTH KNAPP, ROYCE TRAMMELL,  
JULIE D. READING, and DALE NIEBERT,  
*Petitioners,*

vs.

LINCOLN COUNTY,  
*Respondent.*

LUBA No. 2023-020

FINAL OPINION  
AND ORDER

Appeal from Lincoln County.

Dean N. Alterman represented petitioners.

Christopher D. Crean represented respondent.

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

TRANSFERRED 09/20/2023

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

**NATURE OF THE DECISION**

Petitioners appeal a county board of commissioners order establishing geographic subareas for short term rental (STR) licenses and establishing limits on the number of STR licenses for each subarea.

**BACKGROUND**

The challenged decision is Order 01-23-037 (the Order). Motion to Dismiss Ex B. The Order adopted a resolution approving the creation of geographic licensing subareas for STR licenses and establishing a maximum number of STR licenses that the county's licensing authority will issue in each licensing subarea, consistent with Ordinance 523, an ordinance the board previously adopted in October 2021. Ordinance 523 amended Lincoln County Code (LCC) Chapter 4 Business Regulations applicable to STR licenses and required the future establishment of STR license subareas. Ordinance 523 adopted new section LCC 4.420(5) which provides:

“The boundaries of the subareas, and the number of licenses allowed within the subareas shall be recommended by the Licensing Authority and approved by the Board of Commissioners by Board Order. The boundaries and subarea capacities may be reviewed by the Board periodically and adjusted by Board Order.”

In *Briggs v. Lincoln County*, the petitioners appealed Ordinance 523. \_\_\_\_ Or LUBA \_\_\_\_ (LUBA No 2021-113, Feb 10, 2022) (*Briggs I*). We concluded that Ordinance 523 was not a land use decision subject to our jurisdiction and granted the petitioners' motion to transfer the appeal to circuit court. We explained that Ordinance 523 did not rezone property and that the petitioners had

1 failed to establish that it implemented the county's comprehensive plan or the  
2 zoning ordinance. That decision was not appealed, and is final.

3 On February 21, 2023, petitioners filed a notice of intent to appeal (NITA)  
4 "Ordinance #523: Amendment to Lincoln County Code (Ordinance #487, #490,  
5 and #509) Section 4.405 through 4.460 Short Term Rental of Dwelling Units, as  
6 modified by Order #01-23-037." NITA 1. In an order dated March 16, 2023, we  
7 granted the county's motion to suspend the deadline for transmitting the record.  
8 We also explained our understanding that the NITA appealed a single decision,  
9 the Order:

10 "We assume that because petitioners filed a single NITA, they are  
11 appealing only Order #01-23-037 (Order). OAR 661-010-  
12 0015(l)(d)." Order 1.

### 13 **JURISDICTION**

14 The county moves to dismiss the appeal on the grounds that the Order is  
15 not a land use decision subject to our jurisdiction. For the reasons explained  
16 below, we agree.

#### 17 **A. Prior Appeal of Ordinance 523**

18 As we explained in *Briggs I*, since 2016, the county has required that STRs  
19 obtain county business licenses. The STR regulations have prohibited the transfer  
20 of licenses and required a new owner of a property with an STR to obtain a new  
21 license.<sup>1</sup>

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<sup>1</sup> Modifications to the county's STR regulatory system have been the subject of other appeals filed at LUBA. *See Cave et al. v. Lincoln County*, \_\_\_\_ Or LUBA

1           **B.     Ordinance 523 is final and may not be challenged in this appeal.**

2           The county first argues that to the extent petitioners are attempting to  
3   appeal, again, Ordinance 523, that decision is final and not subject to appeal. As  
4   we explain above, LUBA issued a final opinion and order transferring that appeal  
5   to the circuit court after concluding that it was not a land use decision. That  
6   decision was not appealed and is final.

7           In their response to the motion to dismiss, petitioners first argue that the  
8   Order applies the regulations adopted in Ordinance 523 to specific properties and,  
9   accordingly, their appeal of the Order necessarily allows a challenge to the  
10   Ordinance.<sup>2</sup> We understand petitioners’ arguments to be a renewed attempt to

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\_\_\_\_ (LUBA No 2021-122, Mar 4, 2022) (transferring an appeal of a board of commissioners’ decision adopting a resolution temporarily restricting the issuance of STR licenses to circuit court because the resolution was not a land use decision subject to our jurisdiction); *Briggs v. Lincoln County*, \_\_\_\_ Or LUBA \_\_\_\_ (LUBA Nos 2021-118/2022-030, Aug 8, 2022) (reversing a voter-approved ballot measure amending the county’s zoning ordinance to classify existing STRs as nonconforming uses as inconsistent with ORS 215.130).

<sup>2</sup> Petitioners argue that the Ordinance authorized “district” maps which create

“new zoning county-wide, where no new [STRs] will be allowed for at least a decade until attrition brings the numbers down. By capping the number of licenses to a number substantially less than the current number of existing lawful [STR] homes, the County explicitly prohibits transfers of ownership of the [STR] homes with that use intact, thus hastening that attrition contrary to ORS 215.130(5).”  
Response to Motion to Dismiss 3 (emphasis omitted).

Petitioners argue that Ordinance 523, as implemented by the Order, amends “existing land use designations and is functionally part of the comprehensive plan, by imposing a new map and restrictions applicable only to an existing

1 challenge Ordinance 523. As we explained in *Briggs I*, that ordinance is not a  
2 land use decision.<sup>3</sup> Accordingly, we do not consider any of petitioners' arguments  
3 that we understand to directly challenge Ordinance 523.

4 Next, petitioners argue that adoption of the Order modified Ordinance 523,  
5 and that the newly amended Ordinance 523 is subject to appeal. Response to  
6 Motion to Dismiss 1-2. We reject petitioners' argument. The Order does not  
7 amend the Ordinance in any way, either explicitly or implicitly.

8 Finally, petitioners contend:

9 "LUBA has jurisdiction to consider, and potentially invalidate, an  
10 earlier ordinance, when the second step makes the unlawfulness of  
11 the earlier land use decision clear. *Barnes v. City of Hillsboro*, 239  
12 Or App 73, 243 P3d 139 (2010) (in a single appeal to LUBA,  
13 affirming LUBA invalidation of an earlier zoning ordinance for lack  
14 of Measure 56 notice to owners when only the second land use  
15 decision applied the zoning to particular properties)." Response to  
16 Motion to Dismiss 2.

17 In the decision that was appealed in *Barnes*, Ordinance 5935, the city  
18 amended its zoning map to apply, for the first time, the Airport Use (AU) zone  
19 to the Hillsboro Airport and Airport Safety and Compatibility Overlay (ASCO)  
20 to numerous properties. In a prior decision that was not appealed, Ordinance  
21 5926, the city had first adopted legislative text amendments to the Hillsboro  
22 Zoning Ordinance that created the ASCO zone district, and that required that for

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lawful use of dwelling units in residential zones under LCC chapter 1." Response  
to Motion to Dismiss 15.

<sup>3</sup> In addition, any appeal of Ordinance 523 is late. ORS 197.830(9).

1 properties in that zone, prior to recording land division plats or city issuance of  
2 certificates for occupancy, the property owner must provide an avigation  
3 easement to the owner of the airport. However, Ordinance 5926 did not apply the  
4 AU or ASCO zone to any property in the city.

5 We concluded that the petitioners' challenge to the avigation easement  
6 provision in Ordinance 5935 that applied to specific properties was not a  
7 collateral attack on the legislative ordinance that created the zone but did not  
8 apply it to any properties. We rejected the respondent's argument that the  
9 petitioners' position that the easement requirement was facially inconsistent with  
10 the takings clause was a collateral attack on Ordinance 5926. We concluded that  
11 a challenge to the constitutionality of the avigation easement requirement was  
12 properly within our scope of review: "[w]e [saw] no principled reason why such  
13 statutory or constitutional challenges cannot be advanced in an appeal of a  
14 subsequent legislative ordinance that, for the first time, applies the ASCO zone  
15 to specific properties in the city," rather than requiring them to be advanced in  
16 as-applied challenges each time the city attempted to extract an avigation  
17 easement from the owner of property in the ASCO zone.

18 Importantly, *Barnes* concerned a city's adoption of *land use regulations* in  
19 one ordinance and application of *those land use regulations* in a second ordinance  
20 that applied the regulations to specific properties. Differently, here, the  
21 Ordinance is not a land use regulation and the Order does not amend the zoning  
22 map. *Barnes* is inapposite.

1           **C.     The Order is not a land use decision.**

2           It is petitioners' burden to establish that LUBA has jurisdiction to review  
3 the Order. *Billington v. Polk County*, 299 Or 471, 475, 703 P2d 232 (1985);  
4 *Bowen v. City of Dunes City*, 28 Or LUBA 324, 330 (1994). As relevant in this  
5 appeal, LUBA has jurisdiction to review "land use decisions." ORS 197.825(1).

6 Land use decisions subject to our jurisdiction include:

7           "A final decision or determination made by a local government \* \*  
8           \* that concerns the adoption, amendment or application of:

9           “(i)   The goals;

10          “(ii)  A comprehensive plan provision;

11          “(iii) A land use regulation; or

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

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

16          The county maintains that the Order does not adopt, amend, or apply the  
17 goals, comprehensive plan, or land use regulations. Motion to Dismiss 3.  
18 Petitioners' arguments that the Order is a land use decision are exceedingly  
19 difficult to understand and largely interwoven with their attempt to appeal  
20 Ordinance 523, and we address them here to the extent we are able to understand  
21 them and segregate them from Ordinance 523.

22          Petitioners argue that our holding in *Briggs I* “left open the possibility that  
23 future petitioners might establish [the] connection [between the county’s

1 comprehensive plan and land use regulations and Ordinance 523], *or that*  
2 *Respondent itself might make that connection when it adopted the subzones and*  
3 *caps on licenses that Ordinance 523 envisioned.*” Petitioners’ Sur-reply 7  
4 (emphasis added). We discussed Ordinance 523’s creation of subareas in *Briggs*  
5 *I*, explaining that Ordinance 523 included a recital stating that the Ordinance is  
6 necessary, in part, to address limits or caps on STRs specific to subareas of the  
7 county, based on percentages of STRs within subareas. We determined in *Briggs*  
8 *I* that Ordinance 523 did not create any subareas but “rather, it creates a future  
9 process that may lead to the creation of subareas for [STR] licensing purposes.  
10 Petitioners do not establish that these future subareas amend county zoning.” \_\_\_\_  
11 Or LUBA \_\_\_\_ (slip op at 9). Contrary to petitioners’ argument, nothing in *Briggs*  
12 *I* supports petitioners’ argument that the county amended the comprehensive plan  
13 or zoning ordinance.

14       Petitioners argue that the identification of licensing subareas in the Order  
15 imposes new comprehensive plan map and zoning restrictions. Petitioners  
16 identify nothing in the language of the Order itself that supports the conclusion  
17 that the Order is a land use decision. Petitioners do not identify a reference to  
18 land use zones in the Order. Moreover, even if such a reference existed, it would  
19 not necessarily make the regulations a land use decision. In *Oregonians in Action*  
20 *Legal Center v. City of Lincoln City*, the existing zoning code allowed vacation  
21 rental dwellings as an accessory use in residential zones subject to land use  
22 approval and included a Vacation Rental zone where STRS were outright  
23 permitted uses. 71 Or LUBA 234 (2015). In the decision challenged in

1   *Oregonians in Action*, the city also adopted a requirement in the business  
2   regulations section of the city's municipal code at Lincoln City Municipal Code  
3   (LCMC) 5.14 that business licenses be obtained and established requirements for  
4   those licenses. We concluded:

5           "Petitioners have not established that any provision of LCMC 5.14  
6           is 'a local government zoning ordinance, land division ordinance  
7           adopted under ORS 92.044 or 92.046 or similar general ordinance  
8           establishing standards for implementing a comprehensive plan' and  
9           have therefore not established that LCMC 5.14 is a 'land use  
10          regulation' as defined in ORS 197.015(11). Accordingly, Ordinance  
11          2014-23's amendment of LCMC 5.14 does not qualify as a 'decision  
12          that concerns the \* \* \* amendment \* \* \* of \* \* \* a land use  
13          regulation.' The fact that LCMC 17.80.050 includes a reference to a  
14          requirement to obtain a business license under LCMC 5.14 does not  
15          convert LCMC 5.14 into a 'land use regulation.'" 71 Or LUBA at  
16          240.

17   Here, the Order does not identify any relationship between the zoning map and  
18   the geographic subarea license map or indicate that the geographic subarea  
19   license map implements the zoning ordinance or comprehensive plan.

20          We have previously concluded that decisions lacking a clear connection to  
21   the comprehensive plan or zoning regulations are not land use decisions. For  
22   example, in *Ramsey v. City of Portland*, 30 Or LUBA 212, 213, 217-18 (1995),  
23   we concluded that an ordinance that set out a procedure for applying to the city  
24   forester for a tree cutting permit, stated an application fee, included notice  
25   requirements, created an appeal period in which to appeal either the grant or  
26   denial of a permit, assigned the task of reviewing appeals to the city's Urban  
27   Forestry Commission, and stated that decisions of the Urban Forestry

1 Commission were reviewable solely by writ of review lacked any clear  
2 connection to the comprehensive plan and was not a statutory land use decision.  
3 In *Oregon Aviation Watch v. City of Hillsboro*, 67 Or LUBA 252, 253, 256  
4 (2013), we concluded that an ordinance that “prescribed a minimum height limit  
5 for aircraft operations over the city, and prohibited acrobatic flying and the  
6 dropping of items from aircraft” was not a land use regulation because there was  
7 not “a clear connection between the comprehensive plan and the ordinance  
8 requirements, and the inference that the ordinance implement[ed] the  
9 comprehensive plan [was not] unavoidable.”

10 Finally, petitioners argue that the Lincoln County Comprehensive Plan  
11 (LCCP) includes a statement that the comprehensive plan’s purpose is:

12 “to allow the public to make decisions in advance about  
13 development of the County and the use and conservation of its  
14 resources. The resulting plan is a document on which public  
15 agencies and private firms and *individuals can rely so their*  
16 *decisions and investments can be made with confidence* \* \* \*

17 “‘The Comprehensive Plan Maps assign land *use designations to all*  
18 *areas of the County* in accordance with the requirements of the  
19 Comprehensive Plan Policies.’ (emphases in original.) LCC  
20 1.0005.” Response to Motion to Dismiss 15.

21 General references to investment-backed expectations or land use designations  
22 in the comprehensive plan do not make the Order an amendment or application  
23 of the comprehensive plan or zoning ordinance. Here, there is no clear connection  
24 between the Order and the comprehensive plan or zoning ordinance.

25 The Order is not a land use decision and we do not have jurisdiction.

1   **MOTION TO TRANSFER**

2           Petitioners ask, “If the Board determines that the challenged decision is not  
3   reviewable by LUBA as a land use decision or limited land use decision then  
4   Petitioners move to transfer their appeal to Lincoln County Circuit Court, as  
5   permitted by ORS 34.102 and OAR 661-010-0075[9](b).” Motion to Transfer 1.  
6   The county objects to transfer. Respondent’s Objection to Motion to Transfer.

7           ORS 34.102(4) provides:

8           “A notice of intent to appeal filed with the Land Use Board of  
9   Appeals pursuant to ORS 197.830 and requesting *review of a*  
10   *decision of a municipal corporation* made in the transaction of  
11   municipal corporation business *that is not reviewable as a land use*  
12   *decision or limited land use decision* as defined in ORS 197.015  
13   *shall be transferred to the circuit court* and treated as a petition for  
14   writ of review. If the notice was not filed with the board within the  
15   time allowed for filing a petition for writ of review pursuant to ORS  
16   34.010 to 34.100, the court shall dismiss the petition.” (Emphases  
17   added.)

18          OAR 661-010-0075(9)(c) implements ORS 34.102(4) and provides:

19          “If the Board determines the appealed decision is not reviewable as  
20   a land use decision or limited land use decision as defined in ORS  
21   197.015(10) or (12), the Board shall dismiss the appeal *unless a*  
22   *motion to transfer to circuit court is filed* as provided in subsection  
23   (9)(b) of this rule, *in which case the Board shall transfer the appeal*  
24   *to the circuit court of the county* in which the appealed decision was  
25   made.” (Emphases added.)

26          Both provisions state conditions under which we *shall* transfer an appeal.

27   We conclude above that the decision is not a land use decision subject to our  
28   jurisdiction. Petitioners timely moved to transfer their appeal to circuit court.

29          The motion to transfer is granted.

1           This appeal is transferred to Lincoln County Circuit Court.<sup>4</sup>

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<sup>4</sup> OAR 661-010-0012(7) provides:

“Notice of Related Matters: When a party files a notice of intent to appeal, a motion to intervene, or a brief, if the party is aware of another appeal pending before the Board or in another forum that involves the same or a closely related land use matter, then the party shall file a notice with the Board identifying the related matter by title and case number. The notice may not be combined with another document. A party may likewise notify the Board if the party is aware of another matter pending in another forum that raises the same or a closely related legal issue. A party need not notify the Board of a related matter if another party has already done so.”

On August 14, 2023, the county filed a Notice of Related Matter that notifies LUBA that a circuit court action challenging the Order is pending in Lincoln County Circuit Court.