

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

JORDAN WINTERS, RACHEL WINTERS,
JUSTIN GREENE, NICOLE RALSTON,
CARL COFFMAN, PAUL KOEPKE, CARRIE KOEPKE,
and CASCADIA INVESTMENT PROPERTIES,
Petitioners,

vs.

TILLAMOOK COUNTY,
Respondent.

LUBA No. 2023-030

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Dean N. Alterman represented petitioners.

Daniel Kearns represented respondent.

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

DISMISSED 09/29/2023

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

NATURE OF THE DECISION

On March 23, 2023, petitioners appealed a May 25, 2022, board of county commissioners' order that temporarily suspended the issuance of permits for new short term rentals from July 1, 2022 through June 30, 2023.

BACKGROUND

In 2017, the board of county commissioners adopted Ordinance 84, the Tillamook County Short Term Rental Ordinance.¹ Ordinance 84 was enacted "pursuant to ORS 203.035."² Ordinance 84, section 2. Among other things,

¹ Prior to 2017, in 2009, the county enacted Ordinance 69, the "Tillamook County Short Term Rental Ordinance." *See* Petitioner's Response to Motion to Dismiss 5. Ordinance 69 (2009) required owners of dwellings used for short term rentals to pay a fee and obtain a county short term rental permit in order to operate a short term rental. Ordinance 69, section 7 (2009). Ordinance 69 was amended in 2012 to include additional standards and increase fees, and included a five-year sunset. Ordinance 69 (2012).

² ORS 203.035 provides:

"(1) Subject to subsection (3) of this section, the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States and of this state, as fully as if each particular power comprised in that general authority were specifically listed in ORS 203.030 to 203.075.

"(2) The power granted by this section is in addition to other grants of power to counties, shall not be construed to limit or qualify any such grant and shall be liberally construed, to the end that counties have all powers over matters of county concern that

1 Ordinance 84 (1) adopted definitions for terms used in Ordinance 84, and (2)
2 included standards for short term rental of dwellings, including: (a) quiet hours,
3 (b) identification of a local contact person, (c) parking, (d) garbage, (e) fire safety,
4 (f) emergency exits, (g) occupancy limits, and (h) inspections. Ordinance 84,
5 sections 5-6. Ordinance 84 required owners to acquire and pay for a short term
6 rental permit prior to occupancy of a dwelling for short term rental purposes, and
7 provided for revocation of the permit for non-compliance with Ordinance 84 or
8 with the county's ordinances imposing a Transient Lodging Tax (Ordinance 74
9 and Ordinance 75). Ordinance 84, section 7. Ordinance 84 was amended in 2019
10 in ways that are not relevant to this appeal.³

it is possible for them to have under the Constitutions and laws of the United States and of this state.

“(3) An ordinance adopted by a county governing body that changes the number or mode of selection of elective county officers shall not take effect unless the ordinance is submitted to and approved by the electors of the county at a primary election, general election or election held on the first Tuesday after the first Monday in November of an odd-numbered year. However, an ordinance adopted under this section may not change the mode of selection of a county assessor.

“(4) Nothing in this section shall be construed to limit the rights of the electors of a county to propose county ordinances through exercise of the initiative power.”

³ All citations to Ordinance 84 are to the version in effect on the date the Order was adopted.

1 On May 25, 2022, the board of county commissioners adopted Board
2 Order 22-033, “In the Matter of Temporarily Suspending the Processing and
3 Issuance of New Short Term Rental Permits in Unincorporated Tillamook
4 County” (Order). As relevant here, the Order suspended from July 1, 2022, to
5 June 30, 2023, acceptance and processing of *new* short term rental permits
6 pursuant to Ordinance 84, except for (1) applications for renewal or transfer of
7 existing permits; (2) applications filed before July 1, 2022, or (3) applications
8 from owners of real properties that were pending sale and in escrow on that date.
9 Notice of Intent to Appeal (NITA) Ex A, at 1.

10 In February 2023, petitioners each applied for new short term rental
11 permits, which the county declined to process based on the Order.⁴ *See* Response
12 to Motion to Dismiss 16-18. On March 23, 2023, petitioners filed this appeal of
13 the Order.⁵

⁴ Petitioners each completed construction of new dwellings in the county in 2022.

⁵ Petitioners have also filed three separate appeals of three separate emails from the county to each of the petitioners, declining to process their short term rental permit applications, pursuant to the Order. Those appeals are consolidated in LUBA Nos. 2023-027/028/029, which we dismiss in a final opinion and order issued this same date. *Winters v. Tillamook County*, ____ Or LUBA ____ (LUBA Nos 2023-027/028/029, Sept 29, 2023).

1 **JURISDICTION**

2 The county moves to dismiss the appeal, arguing that the Order (1) is not
3 a land use decision under ORS 197.015(10)(a), and (2) is not a moratorium
4 described in ORS 197.505 to ORS 197.540. The county also argues that if the
5 Order is a land use decision, the NITA is untimely under ORS 197.830(9).⁶

⁶ ORS 197.830(9) provides:

“A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. Failure to include a statement identifying when, how and to whom notice was provided under ORS 197.615 does not render the notice defective. Copies of the notice of intent to appeal shall be served upon the local government, special district or state agency and the applicant of record, if any, in the local government, special district or state agency proceeding. The notice shall be served and filed in the form and manner prescribed by rule of the board and shall be accompanied by a filing fee of \$300. If a petition for review is not filed with the board as required in subsections (10) and (11) of this section, the board shall award the filing fee to the local government, special district or state agency.”

ORS 197.540(1) provides:

“In the manner provided in ORS 197.830 to 197.845, [LUBA] shall review upon petition by a county, city or special district governing body or state agency or a person or group of persons whose interests are substantially affected, any moratorium on construction or land

1 As the party seeking LUBA review, the burden is on petitioners to establish
2 that the appealed decision is a land use decision. *Billington v. Polk County*, 299
3 Or 471, 475, 703 P2d 232 (1985). Petitioners filed a response to the motion to
4 dismiss.⁷

5 We now resolve the county's motion to dismiss and conclude that we lack
6 jurisdiction over the appeal. Because we conclude that the Order is not a land use
7 decision, we need not address the county's argument that the appeal was untimely
8 filed.

9 **A. Land Use Decision**

10 LUBA has exclusive jurisdiction to review "land use decision[s]." ORS
11 197.825(1). "Land use decision" includes a local government decision that
12 concerns the adoption, amendment, or application of:

13 "(i) The goals;

14 "(ii) A comprehensive plan provision;

15 "(iii) A land use regulation; or

16 "(iv) A new land use regulation[.]" ORS 197.015(10)(a)(A).

development or a corrective program alleged to have been adopted
in violation of the provisions of ORS 197.505 to 197.540."

⁷ We issued an order suspending all deadlines in the appeal until we ruled on the motion to dismiss. Petitioners subsequently filed a "Motion for Summary Invalidation of [the Order]," and the county filed a response to that motion. The motion is denied as moot.

1 “Land use regulation” means “any local government zoning ordinance, land
2 division ordinance[,] * * * or similar general ordinance establishing standards for
3 implementing a comprehensive plan.” ORS 197.015(11).

4 The county argues that the Order is not a land use decision because the
5 Order does not “concern the adoption, amendment, or application” of a goal, a
6 comprehensive plan provision or a land use regulation. ORS 197.015(11). The
7 county argues that to the extent the Order amends Ordinance 84, Ordinance 84 is
8 not a land use regulation because it does not contain standards that implement the
9 county’s comprehensive plan.

10 Although petitioners’ arguments are difficult to follow, we understand
11 petitioners to argue that the Order amends a land use regulation, because,
12 according to petitioners, Ordinance 84 is a “land use regulation” as defined in
13 ORS 197.015(11). Petitioners argue that Ordinance 84 includes standards for
14 implementing Tillamook County Comprehensive Plan (TCCP), sections 1.1, 1.3,
15 1.4, 1.5 and 2, which are part of the TCCP Housing Element, and that the county
16 was required and failed to apply those TCCP provisions in adopting the Order.
17 Response to Motion to Dismiss 19, 23-24 (citing *Jaqua v. City of Springfield*, 46
18 Or LUBA 566, 574 (2004) (a decision “concerns” the application of a
19 comprehensive plan provision or land use regulation if a provision or regulation
20 (1) should have been applied in making the decision, or (2) is actually applied in
21 making the decision)).

1 Petitioners quote a portion of TCCP Housing Element 1.1, which provides
2 in relevant part that the “housing plan identifies existing housing needs and
3 problems and estimates future housing needs. Housing needs are translated into
4 land needs from which appropriate zoning can be determined.” Response to
5 Motion to Dismiss 19. Petitioners also cite TCCP Housing Element 1.3(a), which
6 explains that “Tillamook County has two populations, permanent and seasonal.
7 The permanent population[,] maintains their primary residence in the County[,]
8 while the seasonal population maintains primary residences outside of the County
9 and second homes for visitation within the County.” Petitioners argues that the
10 TCCP Housing Element refers to the seasonal population in its evaluation of
11 existing supply and its projection of housing needs. Response to Motion to
12 Dismiss 19. Petitioners argue that “the implication is that in the housing element
13 of [the TCCP], Tillamook County treated housing units for the seasonal
14 population – short term visitors – as part of its needed housing.” *Id.* Essentially,
15 petitioners argue that the TCCP’s references to the county’s “seasonal
16 population” means that Ordinance 84, which includes standards for short term
17 rental of dwellings, implements the TCCP.

18 We reject petitioners’ argument that Ordinance 84 includes standards that
19 implement the TCCP’s Housing Element, and accordingly, we also reject
20 petitioners’ argument that the Order concerns the application or amendment of a
21 land use regulation. The purpose of Ordinance 84 is described solely as “to
22 regulate short term rentals in order to enhance public safety and livability within

1 Tillamook County.” Ordinance 84, section 3. Ordinance 84 requires an owner of
2 a dwelling unit to apply for and obtain a short term rental permit after an
3 inspection and payment of a fee. Petitioners have not established that the county
4 was required and failed to apply any of those TCCP provisions to its adoption of
5 the Order or that Ordinance 84 implements any of the TCCP provisions that
6 petitioners cite.

7 **B. The Order is Not a Moratorium Described in ORS 197.505 to**
8 **197.540**

9 Petitioners also argue that the Order “suspended the land use rights of
10 developers in the process of constructing short term rental dwellings, permitted
11 as an outright use, contrary to [p]etitioners’ vested rights under the [Tillamook
12 County Land Use Ordinance] LUO and *contrary to state law on moratoria for*
13 *construction.*” Response to Motion to Dismiss 21 (emphasis added).⁸ ORS
14 197.520(1) provides:

15 “No city, county or special district may adopt a moratorium *on*
16 *construction or land development* unless it first:

17 “(a) Provides written notice to the Department of Land
18 Conservation and Development [(DLCD)] at least 45 days
19 prior to the final public hearing to be held to consider the
20 adoption of the moratorium;

⁸ The county states that it does not have “a codified code.” Motion to Dismiss
2 n 2. Rather, the county regulates it’s land use and development through their
adopted Tillamook County Land Use Ordinance (LUO). *Id.* at 3.

1 “(b) Makes written findings justifying the need for the moratorium
2 in the manner provided for in this section; and

3 “(c) Holds a public hearing on the adoption of the moratorium and
4 the findings which support the moratorium.” (Emphasis
5 added.)

6 ORS 197.524 provides:

7 “(1) When a local government engages in a pattern or practice of
8 delaying or stopping the issuance of permits, authorizations
9 or approvals necessary *for the subdivision or partitioning of,*
10 *or construction on, any land,* including delaying or stopping
11 issuance based on a shortage of public facilities, the local
12 government shall:

13 “(a) Adopt a public facilities strategy under ORS 197.768;
14 or

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

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

22 The county argues that the Order is not a moratorium because the Order
23 suspending the issuance of new short term rental licenses does not involve either
24 “construction or land development” pursuant to ORS 197.520(1), or “the
25 subdivision or partitioning of, or construction on, any land” pursuant to ORS
26 197.524(1). Dwellings may still be constructed in the county. We agree. The
27 Order does not in any way implicate the subdivision or partitioning of, or
28 construction or development on, any land in the county at all.

1 **C. Vested Rights**

2 In an undeveloped argument, petitioners also assert that they have “vested
3 rights” to short term rental permits. Response to Motion to Dismiss 36-37.
4 However, because we conclude that the Order is not a land use decision over
5 which we have jurisdiction, we do not address petitioners’ undeveloped argument
6 that they have vested rights to short term rental permits.

7 The county’s motion to dismiss is granted.

8 The appeal is dismissed.