

1
2 RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board
3 Member, participated in the decision.

4
5 DISMISSED 03/01/2024

6
7 You are entitled to judicial review of this Order. Judicial review is
8 governed by the provisions of ORS 197.850.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19

NATURE OF THE DECISION

Petitioners appeal Ordinance 2026 (Ordinance), an ordinance amending the city’s zoning ordinance that was adopted by the city council on September 12, 2016.

MOTION TO INTERVENE

Jennifer Tuvell, Eric Koivisto, Tanya Faude-Koivisto, Damian L. Skerbeck, Carrie S. Skerbeck, Tyler M. Tatman, and Kara E. Tatman move to intervene on the side of petitioners.¹ The motion to intervene is granted.

MOTION TO TAKE EVIDENCE

Respondent moves for the Board to take evidence not in the record pursuant to OAR 661-010-0045. First, respondent seeks to have the Board consider a “Notice of Application and Opportunity to Comment” dated November 17, 2017, that respondent states the city sent to all petitioners. Motion to Take Evidence 1. Second, respondent seeks to have the Board consider notices of administrative decisions approving nonconforming status for petitioners’ short-term rental (STR) operations. *Id.* Petitioners oppose respondent’s motion and argue that there is no factual dispute or other basis for the motion. Opposition to Motion to take Evidence 2.

¹ Tyler Tatman is also listed as a co-petitioner in the Notice of Intent to Appeal (NITA) and the Corrected Notice of Intent to Appeal (Corrected NITA), and Jennifer Tuvell is listed as a co-petitioner in the Corrected NITA but not in the NITA.

1 Petitioners “concede having received such notice [of the adoption of the
2 Ordinance] shortly after Ordinance 2026 was adopted.” Opposition to Motion to
3 Take Evidence 3. We agree that respondent has not established a basis for us to
4 consider the proffered evidence under OAR 661-010-0045. There appears to be
5 no factual dispute regarding whether petitioners received notice of the Ordinance
6 and thus respondent has not identified a basis for us to consider the evidence.²

7 Respondent’s motion to take evidence outside of the record is denied.

8 **JURISDICTION**

9 **A. Background**

10 On September 12, 2016, the city adopted the Ordinance. By its operative
11 terms, it took effect 31 days later, on October 13, 2016. Record 2. Prior to its
12 adoption, the city provided notice of the proposed zoning ordinance amendments
13 to the Department of Land Conservation and Development (DLCD) in
14 accordance with ORS 197.610(1), and provided notice to property owners in
15 accordance with ORS 227.186. Record 398-419, 350-397. After the city council

² OAR 661-010-0045(1) states the grounds for the Board to take evidence not in the record, which are,

“in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, *ex parte* contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision.”

1 adopted the Ordinance, the city provided notice to DLCDC in accordance with
2 ORS 197.615(1) and provided notice to persons entitled to notice of the decision
3 in accordance with ORS 197.615(4), including all petitioners. Record 1-9. As
4 noted, petitioners filed their notice of intent to appeal more than seven years later,
5 on October 24, 2023.³

6 The Ordinance amended title 17 of the Hood River Municipal Code
7 (HRMC), the city's zoning ordinance. It is a post-acknowledgement land use
8 regulation amendment (PAPA). The Ordinance added provisions to the city's
9 zoning ordinance regulating the short-term rental of dwellings in residential
10 zones. In particular, the Ordinance adopted HRMC 17.04.115(D) (2016), which
11 provides:

12 *"Prior Existing (Nonconforming) Use.* For purposes of hosted
13 homeshare and vacation home rentals, the nonconforming use
14 provisions in HRMC Chapter 17.05 (Nonconforming Uses and
15 Structures) shall apply except as specifically modified in this
16 section.

17 "1. Except as provided in subsection D6, any hosted homeshare
18 or vacation home rental lawfully established and actually in
19 existence prior to the effective date of this 2016 ordinance
20 may continue as a legal nonconforming use subject to the
21 following 'amortization periods':

³ Pursuant to our October 30, 2023, Order, petitioners filed a Corrected NITA on November 3, 2023. For purposes of considering the timeliness of the appeal, we consider the date of the NITA as the date of filing in this appeal.

1 “a. Until 5 years from the adoption date of this ordinance,
2 at which time use of the property shall come into
3 compliance with the parking requirements
4 in 17.04.115(B)(3).

5 “b Until 7 years from the adoption date of this ordinance,
6 at which time use of the property shall come into full
7 compliance with the then-applicable provisions of this
8 HRMC Title 17.” *See also* Record 25.

9 Thus, the Ordinance included a five-year grace period for compliance with the
10 parking requirements of the zoning ordinance, and a seven-year grace period for
11 all existing and future requirements of the zoning ordinance.

12 **B. The Appeal is Untimely**

13 ORS 197.830(9) provides that

14 “[a] notice of intent to appeal a land use decision or limited land use
15 decision shall be filed not later than 21 days after the date the
16 decision sought to be reviewed becomes final. *A notice of intent to*
17 *appeal plan and land use regulation amendments processed*
18 *pursuant to ORS 197.610 to 197.625 shall be filed not later than 21*
19 *days after notice of the decision sought to be reviewed is mailed or*
20 *otherwise submitted to parties entitled to notice under ORS*
21 *197.615.”* (Emphasis added.)

22 OAR 661-010-0015(1)(a) implements ORS 197.830(9) and provides that a notice
23 of intent to appeal

24 “shall be filed with the Board on or before the 21st day after the date
25 the decision sought to be reviewed becomes final or within the time
26 provided by ORS 197.830(3)–(5). *A notice of intent to appeal plan*
27 *and land use regulation amendments processed pursuant to ORS*
28 *197.610 to 197.625 shall be filed with the Board on or before the*
29 *21st day after the date the decision sought to be reviewed is mailed*
30 *to parties entitled to notice under ORS 197.615. A Notice filed*
31 *thereafter shall not be deemed timely filed, and the appeal shall be*

1 *dismissed.*” (Emphasis added.)

2 Respondent moves to dismiss this appeal as untimely under ORS 197.830(9)
3 because it was filed more than 21 days after the date the decision sought to be
4 reviewed was mailed to parties entitled to notice under ORS 197.615.

5 Petitioners respond that the Ordinance “became final as to [p]etitioners and
6 similarly situated STR owners[,]” on October 13, 2023, which was seven years
7 after the effective date of the Ordinance. Petitioners’ Response to Motion to
8 Dismiss 6. Petitioners further respond that “[t]he delayed finality of [the
9 Ordinance] as to [p]etitioners is evident from the plain language and context of
10 HRMC 17.04.115[(D)(1),]” and argue that pursuant to OAR 661-010-0010(3), a
11 local ordinance specifies the decision became final at a later date – namely
12 October 13, 2023. Petitioners’ Response to Motion to Dismiss 4. Petitioners
13 argue that the language in HRMC 17.04.115(D)(1)(b) that requires that a property
14 shall come into compliance “with the then-applicable provisions of this HRMC
15 Title 17[.]” means that portion of the Ordinance was not final until it took effect.
16 *Id.* at 4. Petitioners argue that if they had appealed the Ordinance in 2016, that
17 appeal would not have been ripe because “the ‘then-applicable provisions of this
18 HRMC Title 17’ at the seven-year mark were not yet known, and could very well
19 be non-existent or uncontroversial by [that] time[.]” *Id.* at 5. Petitioners argue
20 that the decision, as applied to them, was final seven years from October 13,
21 2016.

1 The Ordinance is a legislative PAPA controlled exclusively by ORS
2 197.610 to 197.625. In *Orenco Neighborhood v. City of Hillsboro*, 135 Or App
3 428, 432, 899 P2d 720 (1995), the court explained:

4 “ORS 197.830[9] defines two distinct 21–day appeal periods: the
5 first, for land use or limited land use decisions, runs from the time
6 of their finality; the second, for amendments to land use regulations
7 under the post-acknowledgment statutes, ORS 197.610 to ORS
8 197.625, runs from the time that the notice specified in those statutes
9 is given to persons entitled to notice under them.”

10 Petitioners’ arguments are all directed at the first sentence of ORS 197.830(9),
11 which specifies the deadline for appeal of a “land use decision or limited land use
12 decision.” However, it is the second sentence of ORS 197.830(9) that specifies
13 the deadline for appealing a PAPA decision such as the Ordinance to LUBA,
14 requiring that the appeal “shall be filed not later than 21 days after notice of the
15 decision sought to be reviewed is mailed or otherwise submitted to parties entitled
16 to notice under ORS 197.615.” *Hatley v. Umatilla County*, 66 Or LUBA 433, 440
17 (2012) (the “notice” referred to in ORS 197.830(9) is the written notice that ORS
18 197.615(4) requires the local government to mail to participants). Petitioners’
19 arguments regarding the first sentence of ORS 197.830(9) are inapposite and do
20 not establish that the appeal was timely filed.

21 Respondent mailed notice of the decision to parties entitled to notice under
22 ORS 197.615, including petitioners, on September 16, 2016. Petitioners had 21
23 days from that date to file their NITA. ORS 197.830(9); OAR 661-010-

1 0015(1)(a). Accordingly, their NITA filed more than seven years later, on
2 October 24, 2023, is untimely.

3 Respondent's motion to dismiss is granted.

4 The appeal is dismissed.