

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

3
4 OREGONIANS IN ACTION LEGAL CENTER
5 and JON CHANDLER,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF LINCOLN CITY,
11 *Respondent.*

12
13 LUBA Nos. 2014-108/2015-002/003

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from Lincoln City.

19
20 Lynn R. Stafford, Tigard, filed the petition for review and David J.
21 Hunnicuttt argued on behalf of petitioners.

22
23 Richard Appicello, City Attorney, Lincoln City, filed the response brief
24 and argued on behalf of respondent.

25
26 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board
27 Member, participated in the decision.

28
29 LUBA NO. 2014-108 AFFIRMED April 22, 2015
30 LUBA NO. 2015-002 AFFIRMED April 22, 2015
31 LUBA NO. 2015-003 TRANSFERRED April 22, 2015

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

These consolidated appeals challenge three ordinances enacted by the city (the Ordinances). In LUBA No. 2014-108, petitioners appeal a city ordinance (Ordinance 2014-21) that creates a new Vacation Rental zoning district. In LUBA No. 2015-002, petitioners appeal a city ordinance (Ordinance 2014-22) that amends the special use provisions of the city’s zoning code regulating vacation rental dwellings. In LUBA No. 2015-003, petitioners appeal a city ordinance (Ordinance 2014-23) that amends the provisions of Title V of the city’s municipal ordinances relating to the issuance of vacation rental dwelling business licenses.

MOTION TO SUSPEND APPEALS

After the petition for review was filed, petitioners moved to suspend the appeals until after a May 2015 city election has taken place.¹ According to petitioners, the Ordinances are the subject of referenda, and if the Ordinances are rejected by the voters of the city in the May election, the Ordinances will not take effect.

The city opposes the motion. The city attaches copies of the referenda and points out, correctly, that only Ordinances 2014-22 and 2014-23 are the subject of the referenda, and Ordinance 2014-21 is not the subject of either of the referenda. Accordingly, the city argues, the election results will not have any effect on Ordinance 2014-21 and the consolidated appeals should proceed.

¹ Ordinances 2014-22 and 2014-23 provide that they take effect July 1, 2015.

1 Petitioners do not dispute that the referenda will have no effect on
2 Ordinance 2014-21. The three assignments of error presented in petitioners’
3 petition for review do not raise separate or independent challenges to each of
4 the Ordinances, and the arguments in support of the assignments of error
5 contain intertwined arguments regarding all three Ordinances. Therefore, it is
6 not possible to suspend only the appeals of Ordinances 2014-022 and 2014-23
7 that are subject to the referenda. Accordingly, we decline to suspend the
8 appeals.

9 Petitioners’ motion is denied.

10 **FACTS**

11 The city’s zoning code regulates the use of dwellings in all zones for
12 vacation rental purposes. In order to understand the changes the Ordinances
13 make to the existing regulations, we first describe the provisions of the city’s
14 zoning code and the city’s business license regulations that apply to vacation
15 rental dwellings, and then describe the changes that the Ordinances make to
16 those zoning code provisions and license regulations.²

17 **A. Existing Zoning Code Provisions**

18 Under Lincoln City Municipal Code (LCMC) 17.80.050, a vacation
19 dwelling rental is a special use allowed in the city, subject to the standards at
20 LCMC 17.80.050.B. In a residential zone, a vacation rental dwelling is

² The city submitted separate records for each of the appealed Ordinances. In this decision we refer to the record and page numbers the city submitted for LUBA No. 2014-108, the appeal of Ordinance 2014-21 as “Record 1-x;” the record and page numbers the city submitted for LUBA No. 2015-002, the appeal of Ordinance 2014-22 as “Record 2-x;” and the record the city submitted for LUBA No. 2015-003, the appeal of Ordinance 2014-23 as “Record 3-x.”

1 allowed as an “accessory use.” LCMC 17.80.050.B.2. LCMC 17.08.010
2 defines “accessory use” as “a * * * use incidental and subordinate to the main
3 use of property and located on the same lot as the main use, including any
4 required off-street parking within 200 feet (measured in a straight line) of the
5 building or use it is intended to serve.”

6 In order to use a dwelling as a vacation rental dwelling, the owner must
7 apply for and obtain land use approval for the vacation rental dwelling and
8 provide the information required in LCMC 17.080.050.C.³ The planning

³ LCMC 17.080.050.C provides:

“1. Application Requirements.

- “a. The owner of the property or authorized agent shall apply for a vacation rental dwelling on a form provided by Lincoln City. The owner shall sign the application. No application shall be accepted without payment of the application fee.
- “b. At a minimum, the names, mailing addresses, and telephone numbers of all persons holding an ownership interest in the property, or holding an ownership interest in the entity that owns the property, shall be provided in the application.
- “c. The applicant shall certify that the person identified as the owner on the application does not own other property in the city that is used as a vacation rental dwelling or is approved by the city for vacation rental dwelling use, if the application is for a vacation rental dwelling in a residential zone.
- “d. The applicant shall certify solid waste collection service is provided to the property.
- “e. The application shall demonstrate parking and landscaping standards of this section are met.

1 director then reviews the application and issues a decision on it. That decision
2 is appealable to the city’s planning commission. LCMC 17.80.050.C.3. The
3 land use approval for a vacation rental dwelling terminates with a sale or
4 transfer of the property. LCMC 17.80.050.B.1.

5 After land use approval is received, the owner must present that approval
6 to the city and pay a fee to obtain a vacation rental dwelling business license
7 from the city, pursuant to LCMC 5.14. The license is required in order to rent
8 the dwelling as a vacation rental pursuant to the land use approval.

9 **B. Ordinance 2014-21**

10 Ordinance 2014-21 amends the city’s zoning code to add a new mixed
11 use zoning district, the Vacation Rental (VR) zone. A vacation rental dwelling
12 is an outright permitted use in the VR zone and is not subject to the “accessory
13 use” limitations described above for vacation rental dwellings in the residential
14 zone. Ordinance 2014-21 does not zone any property in the city as VR.

15 **C. Ordinance 2014-22**

16 Ordinance 2014-22 is arguably the primary focus of petitioners’ appeal.
17 As described above, LCMC 17.80.050.B.2 provides that a vacation rental
18 dwelling is an “accessory use” in a residential zone. Accordingly, land use
19 approval for a vacation rental dwelling in a residential zone is an approval to
20 use the subject dwelling for vacation rental purposes in a manner that ensures

“f. Providing false information in the application shall be a violation and grounds to deny the application, void the approval, enjoin the use, and revoke a vacation rental dwelling license issued for the dwelling under Chapter 5.14 LCMC.”

1 that the vacation rental use of the dwelling remains “incidental and
2 subordinate” to the main use of the dwelling, for single family residential
3 purposes.⁴

4 Ordinance 2014-22 amends the special use provisions of LCMC
5 17.80.050 described above.⁵ First, Ordinance 2014-22 creates a new
6 “Expedited Review” option. Under the expedited review option, a property
7 owner can agree to limit vacation rental dwelling use of the dwelling to 30
8 nights in a calendar year. No land use approval is required for the expedited
9 review option, and the city will issue a Residential Accessory Use VRD
10 License to the property owner upon receipt of an application for that type of
11 license pursuant to LCMC 5.14.050.C.2 (as amended by Ordinance 2014-23).

12 Second, Ordinance 2014-22 creates an “Administrative Allowance”
13 option. Under this option, a property owner can agree to limit vacation rental
14 dwelling use of the dwelling to no more than 180 nights per calendar year. If
15 the property owner elects the Administrative Allowance, the city will issue a

⁴ Ordinance 2014-22 amends the definition of “vacation rental dwelling” (VRD) to provide that “a VRD is a permitted commercial use, and like other commercial uses, is expressly prohibited in residential zones except as specifically authorized in [LCMC Title 17], such as the limited allowance for such use as an incidental and subordinate Accessory Use in a residential zone (LCMC 17.80.050).”

⁵ The findings adopted in support of the Ordinances make clear that due to increased conflicts between vacation rental dwelling use of single family dwellings in residential zones and permanent residents the city intends to begin enforcing the provisions of the zoning code that regulate vacation rental dwellings, and specifically to begin enforcing the “accessory use” limitation on vacation rental dwellings in residential zones. Record 2-49.

1 type of vacation rental dwelling business license called a “Special VRD
2 License.” LCMC 5.14.050.C.3 (as amended by Ordinance 2014-23).

3 Third, Ordinance 2014-22 allows a property owner with an existing land
4 use approval and companion vacation rental dwelling business license to seek
5 verification that the vacation rental use of the dwelling is a nonconforming use
6 of the property or that the owner possesses a vested right to rent the dwelling
7 for vacation rental use in a manner that exceeds the “accessory use” limitation
8 in LCMC 17.80.50.B.2.

9 Importantly, even with the amendments adopted by Ordinance 2014-22,
10 under LCMC 17.80.050.B a property owner with a dwelling in a residential
11 zone continues to have the option to apply for land use approval to use the
12 dwelling for vacation rental use and receive an administrative decision from the
13 planning director in the manner described above.

14 **D. Ordinance 2014-23**

15 Ordinance 2014-23 amends LCMC Title 5, Section 5.14. As explained
16 above, in order to legally operate a vacation rental dwelling in the city, a
17 property owner must obtain land use approval for the vacation rental dwelling
18 under LCMC Title 17, and then must obtain a vacation rental dwelling business
19 license under LCMC 5.14. In order to obtain a vacation rental dwelling
20 business license, a property owner must demonstrate that land use approval has
21 been obtained. LCMC 5.14.060.B.

22 Ordinance 2014-23 amends LCMC 5.14 to incorporate the expedited
23 review, administrative allowance, and nonconforming use/vested rights options
24 adopted in Ordinance 2014-22 as options for satisfying the vacation rental
25 business license requirement for prior land use approval. Under the expedited
26 review option, no prior land use approval is required in order for a property

1 owner to obtain a type of vacation rental dwelling business license called a
2 “Residential Accessory Use VRD License.” Ordinance 2014-23 also adopts
3 conforming amendments to the Special VRD License provisions to incorporate
4 the administrative allowance and nonconforming use/vested rights land use
5 approval options.

6 **MOTION TO DISMISS LUBA NO. 2015-003**

7 The city moves to dismiss LUBA No. 2015-003, the appeal of Ordinance
8 2014-23. According to the city, Ordinance 2014-23 is not a “land use
9 decision” within the meaning of ORS 197.015(10)(a) and LUBA lacks
10 jurisdiction over the appeal.⁶ The city maintains that the provisions of LCMC
11 5.14 are not “land use regulations” as defined in ORS 197.015(11).⁷ The city
12 explains that the regulatory framework for vacation rental dwellings requires a
13 separate land use decision and a subsequent, separate license decision under
14 LCMC 5.14, which does not contain any land use regulations. Accordingly,
15 the city argues, because Ordinance 2014-23 amends only licensing provisions
16 that are not “land use regulations,” as defined in ORS 197.015(11), Ordinance
17 2014-23 is not a land use decision.⁸

⁶ As relevant here, a land use decision is “[a] final decision or determination made by a local government * * * that concerns the adoption, amendment or application of * * * [t]he goals; * * * [a] comprehensive plan provision; * * * [a] land use regulation; or [a] new land use regulation[.]”

⁷ ORS 197.015(11) defines “land use regulation” to mean “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

⁸ The city also takes the position that to the extent that Ordinance 2014-23 implements the newly created “expedited review option” created in Ordinance

1 Petitioners respond that LCMC 17.80.050 and LCMC 5.14 operate
2 together to carry out the provisions of the city’s zoning regulations governing
3 VRDs. Petitioners point to language in LCMC 17.80.050 that provides that a
4 VRD is an accessory use in the residential zone “provided the VRD meets the
5 applicable standards of [Chapter 17.80.050] *and obtains a license under*
6 *Chapter 5.14 LCMC.*” (Emphasis added.) Accordingly, petitioners argue, the
7 city’s vacation rental dwelling business license provisions are “land use
8 regulation[s]” as defined by ORS 197.015(11) and Ordinance 2014-23 is an
9 amendment of a land use regulation.

10 We agree with the city that Ordinance 2014-23 is not a “land use
11 decision” within the meaning of ORS 197.015(10)(a). Petitioners have not
12 established that any provision of LCMC 5.14 is “a local government zoning
13 ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or
14 similar general ordinance establishing standards for implementing a
15 comprehensive plan” and have therefore not established that LCMC 5.14 is a
16 “land use regulation” as defined in ORS 197.015(11). Accordingly, Ordinance
17 2014-23’s amendment of LCMC 5.14 does not qualify as a “decision that
18 concerns the * * * amendment * * * of * * * a land use regulation.” The fact
19 that LCMC 17.80.050 includes a reference to a requirement to obtain a

2014-22, that portion of Ordinance 2014-23 qualifies for the ORS 197.015(10)(b)(A) exception to LUBA’s jurisdiction for decisions that “do not require interpretation or the exercise of policy or legal judgment[.]” That is so, the city argues, because the “over-the-counter” license for a property owner who opts for the expedited review option, which automatically allows 30 nights of vacation rental use without further inquiry, is an objective, non-discretionary decision that requires no exercise of policy or legal judgment because the city has determined that 30 nights VRD use qualifies the use as an “accessory use” under LCMC 17.80.050.B.1 without necessity of further inquiry.

1 business license under LCMC 5.14 does not convert LCMC 5.14 into a “land
2 use regulation.”

3 Petitioners request that if LUBA determines that Ordinance 2014-23 is
4 not a land use decision, the decision be transferred to circuit court. OAR 661-
5 010-0075(11)(a).

6 LUBA No. 2015-003 is transferred to Lincoln County Circuit Court.

7 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

8 Petitioners’ first and second assignments of error argue that the
9 Ordinances are inconsistent with the comprehensive plan’s Housing Element
10 and Economic Element.⁹ Petitioners additionally argue that the Ordinances
11 violate ORS 197.303 *et seq*, the needed housing statute.

12 **A. The Housing Element and the Needed Housing Statute**

13 Petitioners’ arguments are premised on a number of assumptions about
14 the city’s comprehensive plan Housing Element and about the effect of the
15 Ordinances on the future availability of vacation rental dwellings in residential
16 zones. We start by explaining, and rejecting, petitioners’ assumption about
17 what types of housing the city’s Housing Element and the needed housing
18 statute at ORS 197.307 require the city to provide.

19 Two provisions of the comprehensive plan’s Housing Element are at
20 issue in this appeal. First, the Housing Element lists four “users” of housing
21 “which determine Lincoln City housing needs.” Petition for Review App. B-2.
22 As relevant here, included as one of those categories of “users” is “the seasonal
23 resident seeking shelter.” Second, the city’s Housing Inventory that is a part of

⁹ ORS 197.175(2)(d) requires the city to make land use decisions that are consistent with the city’s adopted and acknowledged comprehensive plan.

1 the Housing Element identifies “single family second homes” as housing
2 needed to meet the needs of its citizens, and identifies a need for 83 acres of
3 land for single family second homes. Petition for Review App. B-43.

4 According to petitioners, the “seasonal resident seeking shelter” includes
5 “tourists” seeking to rent a single family dwelling for vacation
6 accommodations. Petition for Review 7. We understand petitioners to argue,
7 then, that where the Housing Element identifies one of the “users” of housing
8 in the city as “tourists,” the city is obligated to provide for the housing needs of
9 those tourists, including the desire for those tourists to rent vacation rental
10 dwellings. Petitioners argue that those vacation rental dwellings are provided
11 by “single family second homes.” Petitioners argue that the Ordinances limit
12 the ability of property owners to accommodate the need identified in the
13 Housing Element for tourists’ use of vacation rental dwellings by limiting the
14 number of dwellings in the residential zone that are available for use by
15 tourists.

16 According to petitioners, the city has a shortage of residential land
17 available to meet the need identified in the Housing Element for single family
18 second homes, and the Ordinances exacerbate that shortage by limiting the
19 ability of the owners of single family second homes to rent the homes to
20 tourists to offset the cost of the home, and to finance the cost of the home.
21 Accordingly, petitioners argue, the Ordinances will increase the shortage of
22 land for single family second homes. Petitioners argue that limiting vacation
23 rental dwelling use of single family dwellings in the residential zone will make
24 it less likely that single family second homes will be built, and therefore the
25 city will not be able to provide adequate housing for tourists, as petitioners
26 argue the Housing Element requires the city to do.

1 The third source of authority that petitioners’ arguments implicate is the
2 needed housing statute at ORS 197.303(1), which defines “needed housing” in
3 relevant part as “housing types determined to meet the need shown for housing
4 within an urban growth boundary at particular price ranges and rent levels[.]”

5 The city adopted findings that reject petitioners’ assumptions that the
6 Housing Element’s description of the “seasonal resident seeking shelter”
7 includes “tourists” and that the Housing Element obligates the city to provide
8 for the housing needs of tourists by making vacation rental dwellings available
9 to them. Record 2-56-57. First, the city found that “seasonal residents seeking
10 shelter” are part-time or seasonal residents, and as “residents” those users are
11 not, by definition, tourists. Second, the city found that while single family
12 second homes are identified in the Housing Element as “needed housing,”
13 vacation rental dwelling *use* of a single family second home is not identified in
14 the Housing Element as “needed housing.” Such uses are allowed in
15 residential zones only if accessory to the primary use. Finally, the city also
16 adopted findings that the Ordinances will not change the amount of land
17 devoted to single family second homes because vacation rental use of those
18 homes is already limited by the existing “accessory use” limitation. Record 2-
19 74.

20 We reject petitioners’ argument that the Housing Element or the needed
21 housing statute obligate the city to provide vacation rental dwelling housing for
22 use by tourists. The city interpreted the phrase “seasonal resident seeking
23 shelter” used in its comprehensive plan as including part-time, seasonal
24 residents who are owners of single family second homes, and not tourists
25 seeking short term vacation rental dwellings. That interpretation is affirmed.
26 ORS 197.829(1).

1 The city also correctly concluded that while the Housing Element and the
2 Housing Inventory identify single family second homes as needed housing,
3 they do not identify vacation rental dwellings as needed housing. Accordingly,
4 the needed housing statute is not implicated.

5 Finally, we agree with the city that the Ordinances will not change the
6 amount of land devoted to single family second homes. The Ordinances do not
7 create any *additional* limits on vacation rental dwelling of single family second
8 homes. LCMC 17.80.50.B.2 limits that use to an “accessory use,” and that
9 provision is unchanged by the Ordinances. Ordinance 2014-22 is best
10 characterized as the city’s attempt to publicly announce the limits the city will
11 consider to be “accessory use,” within the meaning of LCMC 17.80.050.B.2
12 and the definition at LCMC 17.08.010, in the future when it considers whether
13 an existing or proposed vacation rental dwelling is an “accessory use,” either in
14 the context of an enforcement proceeding or a new application for a vacation
15 rental dwelling. But the property owner continues to have the option to seek
16 approval of use of a single family second home for vacation rental dwelling
17 purposes under the existing “accessory use” limitation. That option existed
18 before Ordinance 2014-22 was adopted and it remains in place after Ordinance
19 2014-22 was adopted.

20 Similarly, Ordinance 2014-21, which creates the new VR zoning district,
21 appears to increase the availability of VRDs in the city by permitting *unlimited*
22 VRD use of a dwelling that is in the VR zoning district. Because the
23 Ordinances do not affect the amount of land available for single family second
24 homes, the comprehensive plan’s Housing Element and the needed housing
25 statute are not implicated.

1 **B. Economic Element**

2 Petitioners also argue that the Ordinances are inconsistent with the
3 comprehensive plan’s Economic Element, in two ways. First, petitioners argue
4 that the Ordinances are inconsistent with the Economic Element goal to
5 “support the tourist industry,” where they limit the availability of housing for
6 tourists. Second, petitioners argue that the new VR zone will be applied to
7 properties that are currently zoned commercial and therefore exacerbate an
8 existing shortage of commercial lands by developing commercial land with
9 non-commercial uses.

10 The city responds that the Ordinances are not inconsistent with the
11 Economic Element. First, the city points out, the Economic Element includes
12 several goals that the city must balance with the goal of supporting the tourist
13 industry, including a goal to “achieve a degree of diversity in the community
14 which will allow a balanced economy[.]” Petition for Review App B-4. The
15 city also disagrees with petitioners’ assertion that the Economic Element
16 demonstrates that there is a shortage of commercial land in the city. Finally,
17 the city disagrees with petitioners’ assertion that the new VR zone will
18 decrease the amount of land available for commercial development. The city
19 points out that all commercial zones in the city already permit unlimited VRD
20 usage and for that reason petitioners’ speculation that the city will rezone
21 commercial lands to VR is without support.

22 We agree with the city on all three points. For the reasons explained by
23 the city, petitioners have not demonstrated that the Ordinances are inconsistent
24 with the comprehensive plan’s Economic Element.

25 The first and second assignments of error are denied.

1 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

2 Statewide Planning Goal 9 (Economic Development) requires in relevant
3 part that comprehensive plans must provide for “an adequate supply of sites of
4 suitable sizes, types, locations, and service levels for a variety of industrial and
5 commercial uses[.]” A related administrative rule cited by petitioners, OAR
6 660-009-0025(3), requires certain cities to “designate suitable land to respond
7 to economic development opportunities as they arise.”

8 In their third and fourth assignments of error, petitioners argue that the
9 Ordinances are inconsistent with the requirement in Goal 9 to provide an
10 adequate supply of sites for a variety of commercial and industrial uses, and in
11 the cited administrative rule to respond to economic development
12 opportunities. According to petitioners, the city’s enforcement of the existing
13 accessory use limitation on vacation rental dwellings in residential zones
14 coupled with the creation of the new VR zoning district will increase vacation
15 rental dwelling development and uses on commercial and industrially zoned
16 lands, resulting in an inadequate supply of commercial and industrially zoned
17 lands for other commercial and industrial development opportunities.
18 According to petitioners the city erred in failing to demonstrate that an
19 adequate supply of sites for commercial and industrial uses will remain.

20 The city first responds that the city’s comprehensive plan shows an
21 adequate supply of commercial and industrial lands available for economic
22 development opportunities. Next, the city responds that petitioners have failed
23 to demonstrate that the Ordinances reduce the supply of land available for
24 commercial and industrial uses. Finally, we also understand the city to respond
25 that petitioners’ arguments are premature, because nothing in the Ordinances
26 actually applies the new VR zoning district to any property in the city.

1 Again, we agree with the city on all points. First, petitioners’ arguments
2 challenging the adoption of the VR zoning district are premature. The
3 arguments petitioners make all assume the city will actually apply the VR
4 zoning district to city property. Such arguments must await a city decision that
5 actually applies the new zoning district to some property in the city. *Port of St.*
6 *Helens v. City of Scappoose*, 58 Or LUBA 122 (2008).

7 Second, for the reasons explained above in our discussion of the first and
8 second assignments of error, petitioners’ arguments regarding the potential
9 effect of the city’s future enforcement of its existing accessory use limitations
10 on vacation rental dwellings fail to demonstrate that the Ordinances will have
11 the effect of reducing the supply of commercial and industrial land available
12 for economic development opportunities.

13 The third and fourth assignments of error are denied.

14 LUBA Nos. 2014-108 and 2015-002 are affirmed.