

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

OREGON COAST ALLIANCE, PEG )  
REAGAN, and PENNY SUESS, )  
)  
    Petitioners, )  
)  
    vs. )  
)  
CURRY COUNTY, )  
)  
    Respondent. )

LUBA No. 2022-088  
LUBA No. 2022-088

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PETITIONERS' PETITION FOR REVIEW

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8

1 I. PETITIONERS' STANDING TO APPEAL

2 Petitioners Oregon Coast Alliance (ORCA), Peg Reagan, and Penny Suess  
3 submitted written comments of their own and participated at the hearings. *See*  
4 Record (R) 171-174, 309-310, 550-553 (ORCA), 221, 262 (Suess), 294-303  
5 (Reagan). Therefore, Petitioner has standing to appeal this land use decision under  
6 ORS 197.830(2).

7 II. STATEMENT OF THE CASE

8 A. NATURE OF THE LAND USE DECISION AND RELIEF SOUGHT

9 Petitioners seek review of the decision of the Curry County Board of  
10 Commissioners amending land use, including the following categories of  
11 amendments, authorizing the Board of Commissioners to review applications and  
12 appeals, increasing housing opportunities in the R2 zoning district, allowing an  
13 Accessory Dwelling Unit (ADU) on Residential zoned land, regulation of Short-  
14 Term Rentals (STRs) using clear and objective standards, and defining  
15 requirements for lot line adjustments." R 17 (Appx 2). Petitioners seek reversal or  
16 remand of the challenged decision.

17 B. SUMMARY OF ARGUMENTS

18 1. FIRST ASSIGNMENT OF ERROR

19 The Ordinance is not consistent with the comprehensive plan and the  
20 County's decision made inadequate findings not supported by substantial evidence.



1                   2.    SECOND ASSIGNMENT OF ERROR

2                   The County lacks specific comprehensive plan policies as the basis for its  
3 amendments and the Ordinance is inconsistent with the statewide planning goals.

4                   3.    THIRD ASSIGNMENT OF ERROR

5                   The Ordinance is inconsistent with existing land use regulations.

6                   4.    FOURTH ASSIGNMENT OF ERROR

7                   The Ordinance is not supported by substantial evidence or an adequate  
8 factual basis.

9                   5.    FIFTH ASSIGNMENT OF ERROR

10                  The severance clause is inconsistent with state law.

11                  6.    SIXTH ASSIGNMENT OF ERROR

12                  The County's property line adjustment criteria are inconsistent with state  
13 law.

14                  7.    SEVENTH ASSIGNMENT OF ERROR

15                  The Ordinance is inconsistent with state law governing ADUs.

16                  C.    SUMMARY OF MATERIAL FACTS

17                       1.    Ordinance No. 22-04

18                       At issue here is Ordinance No. 22-04, which was passed by the County with  
19 the following purpose:

1 “The purpose of this Ordinance is to make several changes to the Curry  
2 County Zoning Ordinance. The changes are for the purpose of carrying out  
3 five (5) primary land use objective. They are:

- 4
- 5 • 1. Authorizing the Board of Commissioners to review applications and  
6 appeals.
  - 7 • 2. Increasing housing opportunities in the R2 zoning district.
  - 8 • 3. Allowing an Accessory Dwelling Unit (ADU) on Residential zoned  
9 land.
  - 10 • 4. Regulation of Short-Term Rentals (STRs) using clear and objective  
11 standards.
  - 12 • 5. Defining requirements for Lot Line Adjustments.”

13  
14 R 17 (Appx 2). The ordinance contains the following amendments, identified as  
15 attachments A, B, D, E, F, G, H, I, J, K, L, M, N<sup>1</sup>:

16 “This ordinance repeals the Zoning Ordinance sections identified above and  
17 adopts Curry County Zoning Ordinance Article I, Section 1.030 Definitions;  
18 Article II, Section 2.400, Board of Commissioners Review of Applications  
19 and Appeals; Article III, Sections 3.080 - Section 3.157, Zoning Uses;  
20 Article IV, Section 4.090 Accessory Dwelling Unit Standards, inside the  
21 Urban Growth Boundaries (UGB); Article IV, Section 4.100, Accessory  
22 Dwelling Unit Standards Outside Urban Growth Boundaries (UGB); Article  
23 IV, Section 4.200, Neighborhood Activity Center and High Intensity  
24 Recreation Urban Use Standards in the R2 Zoning District; Article IV,  
25 Section 4.300, Short-Term Rentals; Article VIII, Section 8.100 - 8.175,  
26 Property Line Adjustments.”

27  
28 R 17 (Appx 2).

29 Attachment A is a text amendment to Article I, Section 1.030 that adds  
30 examples to the definition of “High Intensity Recreation” to include “activity  
31 center, lodge, club house or community gathering hall[.]” R 29 (Appx 13).

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<sup>1</sup> There appears to be no attachment C.

1 Attachment B is a text amendment to Article II, Section 2.400 allowing the  
2 Board of Commissioners to “call up [a decision of the Planning Director or  
3 Planning Commission] ... at any time prior to the expiration of the appeal period”  
4 R 31-32 (Appx 15-16).

5 Attachment D is a text amendment to the Rural Residential (RR) zone,  
6 Article II, Section 3.082 and renumbers subsequent provisions. *See* R 33-37 (Appx  
7 17-21). It allows for ADUs and STRs as permitted uses in the RR-2, RR-5, and  
8 RR-10 zones. R 33 (Appx 17), R 152.

9 Attachment E is a text amendment to Rural Community Residential (RCR)  
10 zone, Article III, Section 3.090, Table 3.090. R 38-41 (Appx 22-25), allowing for  
11 Short-Term Rentals as permitted.

12 Attachment F is a text amendment to Article II, Section 3.100, Table 3.100  
13 in the Residential-One Zone (R-1), allowing STRs as permitted. R 42-45 (Appx  
14 26-29).

15 Attachment G is a text amendment to Article II, Section 3.110 in the  
16 Residential-Two Zone (R-2) adding permitted uses, including Neighborhood  
17 Activity Center, High Intensity Recreation, and STR. R 46-49 (Appx 30-33).

18 Attachment H is a text amendment to Article III, Section 3.120 in the  
19 Residential-Three Zone (R-3) that adds STRs as permitted. R 50-52 (Appx 34-36).

1 Attachment I is a text amendment to Article III, Section 3.130 in Rural  
2 Commercial Zone (RC) allowing STRs as permitted. R 53-57 (Appx 37-41).

3 Attachment J is a text amendment to Article III, Section 3.150 in the Light  
4 Commercial Zone (C-1) allowing STRs as permitted. R 58-60 (Appx 42-44).

5 Attachment K is a text amendment to Article IV, Section 4.090 identifying  
6 “Accessory dwelling unit standards, inside Urban Growth Boundaries (UGB).” R  
7 61-62 (Appx 45-46). As noted by public testimony, “[t]his section allows ADUs  
8 inside Urban Growth Boundaries. However, unlike the ADUs permitted *outside*  
9 UGBs (see Sec. 4.100), this standard contains no limitation on an ADU becoming  
10 a short-term rental. Thus, there is a very real danger that ADUs inside urban  
11 growth boundaries will be flipped to short-term rental use.”

12 Attachment L is a text amendment to Article IV, Section 4.100 for  
13 Accessory Dwelling Unit Standards Outside the Urban Growth Boundary (UBG) R  
14 63-64 (Appx 47-48). Attachment L alleges that “neither the existing single-family  
15 dwelling nor the accessory dwelling unit shall be used as a vacation rental.” R 64  
16 (Appx 48). “Vacation rental” is an undefined term. Consistent with state law,  
17 Attachment L contains the requirement to comply with “the statewide wildfire risk  
18 maps,” but those maps have not yet been adopted.

1 Attachment M is a text amendment to Article IV, Section 4.200, creating the  
2 Neighborhood Activity Center and High Intensity Recreation Urban Use Standards  
3 in the R-2 Zoning District.” R 65-66 (Appx 49-50).

4 Attachment N is a text amendment to Article IV, Section 4.300, 4.340, 4.350  
5 defining STR, setting forth standards, and so forth. R 67-74 (Appx 51-58).  
6 Importantly, Attachment N allows for ADUs (and guesthouses and cottages) to be  
7 used as STRs: “[STRs] can include an accessory dwelling unit or a guest house or  
8 cottage.” R 67 (Appx 51).

9 Attachment O is a text amendment to Article VIII, Section 8.100 *et seq.*,  
10 Property Line Adjustments. R75-81 (Appx 59-65).

11 The Supplemental Staff report, which contains additions from the original  
12 staff report in bold, is incorporated into the Ordinance. *See* R 17 (“The staff report  
13 and findings for these changes is included as Exhibit #1 which is attached hereto  
14 and incorporated by reference.”).

15 2. Public opposition to and concerns about Ordinance 22-04

16 The proposed changes to the Curry County Zoning Ordinance resulted in  
17 significant public comment, the overwhelming amount of which was opposed to  
18 the changes.<sup>2</sup> *See* R 143-429, 523-555; Supplemental (Supp) R 1 (planning

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<sup>2</sup> That is not to say that the public was opposed to STRs or ADUs but a great deal of public felt that the manner by which the Ordinance goes about and accomplishes that task creates problems for affordable housing, the housing base, water

1 commission member regretting voting for amendments). The testimony indicated  
2 concerns related to impacts to water resources (including drinking water,  
3 groundwater, and the watershed), water infrastructure, fire, and housing  
4 availability (including affordable housing), amongst others. *See e.g.*, R 23 (list of  
5 concerns and objections).

6 a. Public concerns about water resources (including  
7 drinking water, ground water, and the watershed)  
8 and fire suppression

9 One member of the public recounted the existing problems with the  
10 drinking water and associated infrastructure:  
11

12 “I am emailing you this morning in hopes that the planning proposal going  
13 before the Board of Commissioners has taken into account the catastrophic  
14 nature of Port Orford’s water supply and infrastructure system.... The leaks  
15 in our 1950s asbestos concrete and steel pipes and new pvc replacement pipe  
16 produce a 30-to 50 % drinking water loss each month. The pvc pipe was  
17 purchased from a company in Texas and cracked laterally. There was a class  
18 action suit against the company by many other municipalities but our former  
19 city administrator did not join the city to the suit in a timely manner.  
20 Consequently the city did [not] recoup its investment. The city's drinking  
21 wa[ter] impound holds enough water for approx. 2100 to 2200 residents. We  
22 now have in Port Orford about 1200 people. It means with a 30-50 percent  
23 water loss per month the city is at near maximum capacity usage. Further,  
24 our drinking water impound dredge broke down eleven years ago and the  
25 impound has not been dredged since. Twenty-five yards of material were

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resources, fire suppression, and so forth. For example, the public sought a cap on  
the number of STRs and a total ban on STRs using ADUs. *See* Supp R 3 (“The  
effort to develop solutions for housing for year-round residents of Curry County  
and for those coming to vacation is necessary and now is the time to do so.  
However, Amendments A-O are too broad, too many and too swiftly developed. If  
approved you will generate unintended consequences to growth that can never be  
reversed.”).

1 removed from the impound last year but that's a drop in the bucket.  
2 Currently the city is under a stage 2 water alert, due to these issues and  
3 concerns about resources for fire suppression. Further, as long ago as 2001  
4 we had a drought year and at that time we only had a three day supply of  
5 water for the city. Further, it would cost the city today approximately 25  
6 million dollars just to replace the primary drinking water lines along 101  
7 through the city. Additionally, our sewer lines are in a similar condition.”  
8  
9 R 185; R 322 (“Last summer, the water levels in the reservoir on the North Fork of  
10 Hubbard Creek were so low that there was not enough water for both fire fighting  
11 and drinking water. Luckily no fire occurred during the weeks until the supply was  
12 replenished by rain. This year is better, but there will be drought years in the  
13 future.”; “The increase in housing density that will be allowed with the code  
14 change – from single family to duplex or multiplexes or adding ADUs – will mean  
15 more septic systems and more wells tapping into the same water supply that feeds  
16 into our reservoir – and also more land clearing and roads that could impair or  
17 reduce our water supply. This concern has been raised by our local watershed  
18 council.”); R 181 (“strain on water and other infrastructure”); R 179 (“strain on  
19 infrastructure”); R 220 (“I am very concerned about our local resources and the  
20 impact these changes will have on our community and even quality of life. At a  
21 time when water is at high demand for fire suppression and the shortage of water is  
22 becoming an issue, more vacation rentals does not seem like a good answer.”); R  
23 261 (“concerned about ... water and natural resources”); R 150 (“My main concern  
24 regards Port Orford’s inadequate water issues, our ability to fight fires, keeping

1 drinking water safe and flowing” and concern about “fragile water system”); R 146  
2 (concern about “the effect the growth allowed housing density and in STRs will  
3 have on the water supply, both for adjacent properties in the watershed and for the  
4 City of Port Orford.”). The City of Port Orford also weighed in, noting that: “It is  
5 felt throughout the community that the changes to allow additional uses in the Port  
6 Orford Urban Growth Boundary do not adequately address the City's concerns  
7 regarding ... fire suppression and water use.” R 218; 249 (concern about water  
8 and fire); *see also* R 5 (showing Port Orford Drinking Water Source Area overlaid  
9 with UGB and R-2 zoning).

10 Public testimony also focused on the issues of increased fire potential and  
11 fire suppression. *See* R 146 (“I want to point out that demands for fire protection  
12 will increase significantly for our volunteer fire departments, which  
13 are currently in need of more volunteers.”); R 150 (“My main concern regards Port  
14 Orford’s inadequate water issues, our ability fight fires, and keeping drinking water  
15 safe and fowing.”); 153 (the R-2 zone “includes areas with high fire risk”); R 185  
16 (“Currently the city is under a stage 2 water alert, due to these issues and concerns  
17 about resources for fire suppression. Further, as long ago as 2001 we had a drought  
18 year and at that time we only had a three day supply of water for the city.”); R 195  
19 (“One of my greatest concerns is fire.... The increased demands on our



1 Volunteer Fire Departments aren't adequately addressed.”); R 201 (“These big  
2 [investment] firms likely won't donate to our volunteer fire department like full-  
3 time residents will, either, which you all know by now is currently understaffed  
4 and can barely service our area as it is.”); R 204 (fire risks associated with  
5 residential development and vacation activities); R 218 (City of Port Orford  
6 testimony and concern about “fire suppression”); R 220 (“At a time when water is  
7 at high demand for fire suppression and the shortage of water is becoming an issue,  
8 more vacation rentals does not seem like a good answer.”).

9 b. Public concerns about impacts to affordable  
10 housing and the housing base.

11 Many concerns were expressed about how the amendments would affect the  
12 issue of affordable housing. R 181, 179 (reduces the housing base and affordable  
13 housing base); R 146 (“Lack of affordable housing has a profound effect on  
14 younger people being able to own or rent homes and contribute to the community  
15 ... And when every other dwelling is a STR ...”); R 150 (“concerns about “the  
16 lack of affordable housing in our area”); R 152 (concern that “STRs in multiple  
17 family dwellings will become boutique motels in rural neighborhoods”); R 156 (“a  
18 home put into service as an STR removes it from the housing supply for people  
19 who live and work locally”); R 258 (“Data from Redfin shows that across the  
20 United States, real estate investors purchased nearly one in five, or 18.4%, of all  
21 homes sold in the fourth quarter of 2021. Oregon was one of the hardest hit states  
22

1 when it comes to affordable housing last year.”); R 261 (“concerned about ...  
2 “affordable housing”); R 273 (“If the goal is to help with affordable housing, these  
3 multiple family dwellings should not be allowed to become STRs – otherwise they  
4 will become, in effect, boutique motel commercial businesses in otherwise rural  
5 residential neighborhoods!”); R 275 (“if the goal is to provide more affordable  
6 housing, AD Us should not be allowed to become STRs.”); R 283 (article entitled  
7 “Inside Airbnb’s ‘Guerilla War’ Against Local Governments: “a surge in short-  
8 term rentals has exacerbated New Orleans’ affordable housing crunch and turned  
9 entire residential blocks into de facto hotels.”); R 304 (“it creates an unfettered  
10 opportunity for investors to create vacation rental empires here on the southcoast,  
11 and possibly exacerbating the affordable housing problem as the new housing  
12 supply is diverted and ‘lost’ permanently to STR use”); R 305 (“we need  
13 affordable housing for the folks who are trying to live and work here, not just more  
14 AirBnb’s.”); R 313 (“by allowing these ADU’s to become STR’s, it defeats the  
15 primary purpose of creating affordable housing for year-round residents”); R 349  
16 (“we all here understand the problems that are likely to be made worse by the  
17 changes – lack of affordable long term rentals that hurt the families of limited  
18 income ); R 356 (“We need more affordable housing for the people who are trying  
19 to live and work here, not more investment opportunity for folks looking to expand  
20 their vacation rental empire.”); R 373 (“If the goal is truly to create more

1 affordable housing, it seems that allowing all ADUs and multi-family dwellings to  
2 become STRs will, in fact, have the opposite effect of increasing property values  
3 and putting housing further out of the affordability of anyone but investors.”); R  
4 396 (“the fact that STRs reduce much needed affordable housing for people who  
5 live and work in these areas.”); R 236, 315, 316, 318, 319 (concern about housing  
6 base and affordable housing); R 212, 213, 249 (concern about STRs). The City of  
7 Port Orford also weighed in, noting that: “It is felt throughout the community that  
8 the changes to allow additional uses in the Port Orford Urban Growth Boundary do  
9 not adequately address the City's concerns regarding housing and STR density....”  
10 R 218. As noted below, the Comprehensive Plan also emphasizes the need for  
11 affordable housing. *See* Comprehensive Plan, Chapter 10.4, Page 231 (“most of  
12 the county population cannot afford to buy the average priced houses on the market  
13 today and needs some form of affordable housing.”); Comprehensive Plan, Chapter  
14 10.5, Page 231 (“Curry County recognizes that adequate and affordable housing is  
15 essential to its citizens and seeks to provide for these housing needs through its  
16 comprehensive plan.”).

### 17 III. JURISDICTION

18 LUBA has jurisdiction under ORS 197.015(10)(a)(A) and ORS 197.825(1).

1 IV. ARGUMENT

2 A. FIRST ASSIGNMENT OF ERROR – The Ordinance is not consistent  
3 with the comprehensive plan and the Ordinance contains inadequate  
4 findings not supported by substantial evidence.

5 1. Preservation of assignment of error

6  
7 Because this was a legislative decision, the raise it/waive it requirement does  
8  
9 not apply to legislative decisions. *See Roads End Sanitary District v. City of*  
10 *Lincoln City*, 48 Or LUBA 126, 129 (2004); *Parementer v. Wallowa County*, 21 Or  
11 LUBA 490, 492 (1991); *Columbia Pacific v. City of Portland*, 76 Or LUBA 15  
12 (2017).

13 2. Standard of review

14 An amendment to the County’s acknowledged land use regulations must be  
15 consistent with the County’s acknowledged comprehensive plan. ORS  
16 197.175(2)(d); ORS 197.835(7)(a) (“LUBA “shall reverse or remand an  
17 amendment to a land use regulation or the adoption of a new land use regulation if:  
18 (a) The regulation is not in compliance with the comprehensive plan[.]”). A  
19 petitioner must demonstrate that the [governing body] failed to meaningfully  
20 consider a reasonably specific and pertinent [comprehensive plan] goal or policy.”  
21 *Columbia Pacific v. City of Portland*, 76 Or LUBA 15, 27-28 (2017), *rev’d and*  
22 *rem’d on other grounds*, 289 Or App 739, 412 P3d 258, *rev den*, 363 Or 390  
23 (2018).

1           The county's decision must be supported by substantial evidence in the  
2 whole record. ORS 197.835(9)(a)(C). Substantial evidence is that which a  
3 reasonable person would accept to reach a conclusion. *Adler v. City of Portland*,  
4 25 Or LUBA 546 (1993). There is no statutory requirement that all legislative land  
5 use decisions be supported by findings, and, therefore, the failure to adopt findings  
6 in support of a legislative land use decision is not in itself a basis for reversal or  
7 remand. *Redland/Viola/Fischer's Mill Community Planning Organization v.*  
8 *Clackamas County*, 27 Or LUBA 560, 563-564 (1994). However, when findings  
9 are not specifically required, if LUBA cannot perform its review function to  
10 determine whether applicable decision-making criteria are satisfied without  
11 findings, the legislative land use decision may have to be remanded. *Citizens*  
12 *Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n. 6 (2002). Although  
13 legislative decisions need not be supported by findings when the local government  
14 can supply argument and citation to the record in its brief to demonstrate  
15 compliance with the applicable criteria, such arguments must be based on evidence  
16 contained in the record rather than created out of whole cloth. *Naumes Properties,*  
17 *LLC v. City of Central Point*, 46 Or LUBA 304, 315 (2004).

### 18           3.     Argument

19           The comprehensive plan contains numerous policies that conflict with the  
20 Ordinance.

1 Under Goal 5 of the comprehensive plan, open space policies state:

2 "A. With regard to Open Space Lands:

- 3 1. Curry County has adequate open space lands to meet the needs  
4 of its citizens and visitors.
- 5 2. Curry County recognizes the value of open space as an asset to  
6 the county for scenic qualities recreational opportunities, and  
7 wildlife habitat.
- 8 3. Curry County has preserved open space land within the county  
9 through the designation of much of the county land area for  
10 agricultural and forest use.

11 Comprehensive Plan, Chapter 5.12, Policies A1-3. The Rural Residential (RR)

12 Zone (CCZO 3.080) allows "[f]arming and forestry use," CCZO 3.081(2), and,

13 therefore, the RR zone aids in preserving open space in the County, pursuant to

14 Goal 5. An influx of ADUs and STRs will affect the comprehensive plan's

15 proposal to preserve open space. The Ordinance is, therefore, inconsistent with the

16 above policy.

17 Under Goal 5 of the Comprehensive Plan, the relevant "Water Resources"

18 policies provide that:

- 19 "3. Due to the questionable availability of surface water and groundwater  
20 in some parts of the county, residential development should be  
21 encouraged only in areas which are known to have adequate supplies  
22 of potable water.

23 \* \* \*

- 24 6. Curry County will cooperate with the Department of Water Resources  
25 and Department of Fish and Wildlife to obtain more information about  
26

1 groundwater and surface water availability and to conserve water  
2 resources for consumptive and non-consumptive uses to the benefit of  
3 the people of the county.”

4  
5 Comprehensive Plan, Chapter 5.12, Policies F.3, 6. As noted above, public  
6 testimony has indicated serious problems with the Port Orford water supply and  
7 infrastructure, as well as concerns about water availability in other parts of the  
8 County subject to the amendments, and the comprehensive plan specifically notes  
9 “the questionable availability of surface water and groundwater in some parts of  
10 the county.” *Supra*. The amendments will increase the number of dwellings and  
11 accessory dwellings, which are clearly “residential developments” as contemplated  
12 by policy 3 above, necessitating more of a resource that has “questionable  
13 availability.” Moreover, there is no evidence in the record or findings that the  
14 Department of Water Resources and Department of Fish and Wildlife were  
15 consulted or cooperated with in promulgating the Ordinance.

16 Under Goal 6 of the Comprehensive Plan, “Air, Land, Water Resource  
17 Quality” policies include the following:

18 “2. Curry County recognizes that development activities can cause loss of  
19 water quality, and can constitute a risk to the health, safety and  
20 welfare of its citizens due to transport of sediments and other  
21 pollutants by runoff, both at the time of construction, and from  
22 additional stormwater runoff generated by the creation of impervious  
23 surfaces, and from the loss of geological stability due to erosion and  
24 soil saturation. The County will limit these problems by establishing  
25 thresholds for vegetation removal and creation of impervious surfaces,  
26 and will allow development exceeding such thresholds only after  
27 approval of erosion control and stormwater management plans

1 prepared by applicants or qualified professionals as specified by  
2 County Ordinance, and after all special construction techniques  
3 necessary for construction of the plan improvements have been  
4 designed by an engineer licensed by the State of Oregon.”

5 \* \* \*

6  
7 4. Curry County will discourage activities which cause the degradation  
8 of the air, water or land resource quality in the implementation of its  
9 comprehensive plan and zoning ordinance.

10  
11 Comprehensive Plan Chapter 6.6, policy 2, 4. The Ordinance will, unquestionably,  
12 result in further “development” as that term is used in policy 2. See R 24 (Appx 9)  
13 (“The proposed CCZO change allows density increases including duplexes,  
14 triplexes and fourplexes ....”). Moreover, if the City’s availability of drinking  
15 water and infrastructure is “questionable,” as noted in the comprehensive plan, see  
16 *supra*, then it is likely that additional development, via the Ordinance, could “cause  
17 the degradation of the air, water or land resource quality in the implementation of  
18 its comprehensive plan and zoning ordinance” (Policy 4, *supra*).

19  
20 The Comprehensive Plan also includes “Housing” policies and the  
21 introduction notes that “Curry County recognizes that adequate and affordable  
22 housing is essential to its citizens and seeks to provide for these housing needs  
23 through its comprehensive plan.” Comprehensive Plan, 10.5 (Plan Policies for  
24 Housing), Page 231; Comprehensive Plan, 10.4 (Future Housing Needs), Page 230  
25 (“most of the county population cannot afford to buy the average priced houses on



1 the market today and needs some form of affordable housing.”). Consistent with  
2 these comprehensive plan concerns, policy 6 provides as follows:

3 “6. Curry County will revise its comprehensive plan with regard to  
4 housing should any significant change take place in the existing  
5 population or housing demand which indicates an inadequate supply  
6 of housing units.”

7  
8 Comprehensive Plan, Chapter 10.5, Policy 6. As noted by public testimony, the  
9 issue of affordable housing demand has become even more dire, creating problems  
10 for a variety workers in the County. Testimony below also indicated that when a  
11 dwelling is converted to an STR, that reduces the availability of housing, including  
12 affordable housing. In light of these changing circumstances and “an inadequate  
13 supply of housing units,” the County was required to “revise its comprehensive  
14 plan with regard to housing” and address policy 6.

15 Under Goal 11 of the Comprehensive Plan, Chapter 11.3.1 addresses the  
16 “City of Port Orford Water Sytem” and the problems it has incurred:

17 “The City of Port Orford uses a small reservoir on the North Fork of  
18 Hubbard Creek (about 3/4 mile east of the city) as its principal source of  
19 water. The water is pumped from the source, treated, and stored for  
20 distribution throughout the city. Garrison Lake has also been used as a  
21 source of drinking water; however, problems with salt water intrusion into  
22 the lake from the ocean have limited its use as a water source. The city  
23 comprehensive plan contains additional information regarding the city water  
24 system.”

25  
26 Comprehensive Plan, Page 234. A representative from the Department of Land  
27 Conservation and Development (DLCD) provided “GIS outputs (requested by Port

1 Orford community members) from [DLCD's] GIS specialist" and a "map showing  
2 the overlap/intersection of the Port Orford UGB and the Hubbard Creek [Drinking  
3 Water Source Area] [(DWSA)]. See R 2-5.<sup>3</sup> Chapter 11 also addresses "Rural and  
4 Urban Level of Services" for Chapter 11, including the following:

5 "Plan designations and zoning have been applied to lands within the county  
6 that are appropriate to the identified service levels. The county has  
7 developed several rural residential zones which are applied to lands that  
8 have only rural services. These zones have minimum lot sizes which are  
9 appropriate for the provision of water and disposal of sewage on individual  
10 lots. The following land use zones are applied to rural lands:

- 11 1. Rural-Residential (5 acre & 10 acre dwelling density/minimum lot  
12 size) - for lands located outside Urban Growth Boundaries (UGB) and  
13 identified Rural Communities.
- 14 2. Rural-Residential (2.5 acre & 1.0 acre dwelling density/minimum lot  
15 size) - for lands located outside UGB's but within identified Rural  
16 Communities with public water systems.
- 17 3. Residential (1 acre to 6,000 square feet dwelling density/minimum lot  
18 size) - for lands within UGB's with lots less than one acre allowed  
19 where a public sewer system is available."  
20  
21  
22

23 Comprehensive Plan, Chapter 11.10 Rural and Urban Level Services, Page 242-  
24 243. Plan designations and zoning have been applied to their type of services and  
25 contingent upon minimum lot sizes and dwelling density, but the provisions for  
26 ADUs and STRs increase the development density in the respective zones. Under  
27

---

<sup>3</sup> The GIS outputs includes a list of "total parcels zoned R2 in Port Orford UGB"  
(582 parcels) (R 2-3) and a list of parcels zoned R-2 in UGB that intersect with the  
Hubbard Creek DWSA" (R 3-4).

1 Goal 11 of the comprehensive plan, Public Facilities policies include the  
2 following:

3 "1. Curry County recognizes three levels of public facilities and services  
4 existing in the county:

- 5 a. rural services;  
6 b. rural community services;  
7 c. urban services; and has defined these levels as part of the  
8 comprehensive plan.  
9

10 2. Urban service levels located within county jurisdiction are planned to  
11 be included within the urban growth boundaries of cities so that these  
12 facilities can be further developed in coordination with the adjacent  
13 cities through the Public Facilities Plans adopted for each city's urban  
14 growth area.  
15

16 3. Rural community services are located within unincorporated  
17 community centers which have organized water districts, fire  
18 protection; and have been defined by a community boundary that  
19 separates the higher service level from the adjacent rural lands.  
20

21 4. Rural lands are all other lands that are dependent upon individual  
22 sources of water and sewage disposal and have a limited level of other  
23 public facilities and services.  
24

25 \* \* \*

26  
27 6. The comprehensive plan designates uses appropriate to each of these  
28 service levels through the zoning and subdivision ordinances that  
29 determine land use and minimum lot size."  
30

31 \* \* \*

32  
33 9. Curry County recognizes the rural areas of the county as being a rural  
34 service area and does not encourage the provision of additional public  
35 services into these areas in order to preserve their rural character.  
36  
37

1 Comprehensive Plan, Chapter 11.11 (Plan Policies Regarding Public Facilities),  
2 Policy 6. The policies require “coordination with the adjacent cities through the  
3 Public Facilities Plans,” and, as noted by the City of Port Orford’s testimony,  
4 further coordination should have occurred based on the impacts to the City:

5 “the City of Port Orford has concerns about the proposed code changes to  
6 the R-2 zone in the Urban Growth Boundary. Unlike Gold Beach and  
7 Brookings, Port Orford has an unusually large Urban Growth Boundary that  
8 actually 2 times larger than the City. Therefore, increasing the density in the  
9 Urban Growth Boundary will have significant strain on the City and its  
10 resources.

11 The Port Orford City Council held a special meeting on Friday August 12th  
12 to address concerns the residents of Port Orford have with the proposed  
13 changes. It is felt throughout the community that the changes to allow  
14 additional uses in the Port Orford Urban Growth Boundary do not  
15 adequately address the City’s concerns regarding housing and STR density,  
16 fire suppression and water use. The Community also would have appreciated  
17 outreach during the process of the Code Amendments and STR regulations.  
18

19 Many areas of Port Orford's Comprehensive Plan and goals refer to the UGB  
20 areas. One of those goals is for the City of Port Orford to grow and annex  
21 properties in the UGB into the City in order to build the City out. The  
22 proposed changes may have affects on our Comprehensive Plan that are  
23 unintended consequences of the enhanced density and commercialization of  
24 the area through STRs. It is Port Orford's position that these affects should  
25 be researched prior to hastily adopting new code provisions.”  
26

27 R 329. Moreover, the plan “designates uses appropriate to each of these service  
28 levels [identified above] through the zoning and subdivision ordinances that  
29 determine land use and minimum lot size” (policy 6) but the Ordinance includes  
30 uses that will result in increased density that may affect the designations relevant to  
31 the service levels. The County was obligated to address these changes and  
32

1 impacts. Finally, pursuant to policy 9, the County “does not encourage the  
2 provision of additional public services into” the rural areas (policy 9), but the  
3 Ordinance increases development and dwelling density in rural areas, which could  
4 result in the provision of public services. Again, the County should have addressed  
5 these plan policies.

6 Chapter 14 of the Comprehensive Plan addresses the zoning of rural lands,  
7 as follows:

8 “Rural lands described in the comprehensive plan fall into two district  
9 categories, rural communities and rural exception areas, which delineate  
10 zoning. Lands which have been defined as being located within one of the  
11 four rural communities have been variously zoned for Rural Industrial (RI),  
12 Rural Commercial (RC), Rural Resort Commercial (RRC), and Rural  
13 Community Residential (RCR) use.

14  
15 Lands included within the various rural land exception areas have been  
16 zoned for Rural Residential (RR) use. The Rural Community Residential  
17 (RCR) zone has minimum lot sizes of 1, 2.5, 5, and 10 acres. The RCR 1 and  
18 2.5 acre minimum lot size zones are only applied to those lands which are  
19 physically developed or are irrevocably committed to urban use and are  
20 thereby an exception to Goal 14. The RCR 5 and ;10 acre minimum lot size  
21 zones are applied to areas within the rural communities which are physically  
22 developed or irrevocably committed to residential development of a more  
23 rural nature so that an exception to Goal 14 has not been taken under the  
24 Goal 2 process. The Rural Residential (RR) zone has minimum lot sizes of 5  
25 and 10 acres which have been applied to the various rural land exception  
26 areas based upon the physical development, degree of parcelization, and  
27 other factors existing in each particular area.

28  
29 The Rural Industrial (RI), Rural Commercial (RC) and Rural Resort  
30 Commercial (RRC) zones have also been applied to many isolated  
31 individual parcels of land located throughout the county which are  
32 physically developed with industrial or commercial uses at present.”  
33

1 Comprehensive Plan, Chapter 14.7 Zoning of Rural Lands, Page 309. Chapter 14  
2 policies propose to retain “the rural character” of rural lands and places a square-  
3 footage limitation on new commercial uses on rural lands:

4 “7. Curry County recognizes rural lands in the county and seeks to retain  
5 the rural character of these lands by limiting the development of these  
6 lands through rural zoning which will retain the rural character of  
7 these areas as reflected in the existing lot size pattern.”

8  
9 \* \* \*

10  
11 “12. Curry County will limit commercial uses on rural lands; new  
12 commercial uses shall be no greater than 2500 square feet in area  
13 allowed only upon a finding that they are appropriate for, and limited  
14 to the needs and requirements of the rural area in which they are  
15 located; new commercial uses in the Rural Resort Commercial zone  
16 shall be limited to hotels, motels, and lodges no greater than 5000  
17 square feet in size and no more than 40 lodging units. The county will  
18 not allow the rezoning of land to Rural Resort Commercial or Rural  
19 Residential without an approved Goal 2 exception to Goal 14.”

20  
21 Comprehensive Plan, Chapter 14.8 (plan policies regarding urbanization), Policy  
22 12. Here, the imposition of new uses and a greater dwelling density in the rural  
23 areas threatens their “rural character” in conflict with policy 7. Moreover, the  
24 Ordinance places no limitation on the square footage (2500 sq.ft.) of STRs on rural  
25 lands, consistent with policy 12. See R 53-57 (Appx 37-42) (Rural Commercial  
26 Zone permitting STRs); R 58-60 (Appx 42-44) (Light Commercial Zone). The  
27 findings also concede that existing STRs are commercial endeavors that pay the  
28 “transient lodging tax” and “have a county business license.” R 26 (Appx 11).

1 B. SECOND ASSIGNMENT OF ERROR – The County lacks specific  
2 comprehensive plan policies as the basis for its amendments and the  
3 Ordinance is inconsistent with the statewide planning goals.

4  
5 1. Preservation of assignment of error

6  
7 Because this was a legislative decision, the raise it/waive it requirement does  
8 not apply to legislative decisions. *See supra*.

9 2. Standard of review

10 A local government's interpretation of state law and local law that  
11 implements state law is not entitled to the deferential standard of review under  
12 *Siporen v. City of Medford*, 349 Or 247, 266 (2010).

13 LUBA will reverse or remand a land use decision if it is not in compliance  
14 with the goals. ORS 197.835(6). LUBA reviews the county's interpretation and  
15 implementation of state law for errors of law. *Gage v. City of Portland*, 319 Or  
16 308, 316-317, 877 P2d 1187 (1994); *Kenagy v. Benton County*, 115 Or App 131  
17 (1992), *rev den*, 315 Or 271 (1992); *City of Sandy v. Clackamas County*, 28 Or  
18 LUBA 316, 319-320 (1994). LUBA will reverse or remand a decision that  
19 improperly construes applicable law. ORS 197.835(9)(a)(D). LUBA will remand  
20 a decision that "improperly construes the applicable law, but is not prohibited as a  
21 matter of law." OAR 661-010-0071(2)(d). LUBA will reverse a decision that  
22 "violates a provision of applicable law and is prohibited as a matter of law." OAR  
23 661-010-0071(1)(c).

1           There is no generally applicable requirement that legislative land use  
2 decisions be supported by findings. However, the decision and record must be  
3 sufficient to demonstrate that applicable criteria were applied and “required  
4 considerations were indeed considered.” *Citizens Against Irresponsible Growth v.*  
5 *Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). In addition, Statewide Planning  
6 Goal 2 (Land Use Planning ) requires that a legislative land use decision be  
7 supported by “an adequate factual basis,” which is an evidentiary standard that is  
8 equivalent to the requirement that a quasi-judicial decision be supported by  
9 substantial evidence in the whole record. *1000 Friends of Oregon v. City of North*  
10 *Plains*, 27 Or LUBA 372, 378, *aff’d*, 130 Or App 406, 882 P2d 1130 (1994);  
11 *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304, 315 n 16  
12 (2004) (explaining that the Goal 2 requirement for an adequate factual basis  
13 applies to all applicable law because LUBA “must have *something* from the  
14 decision or record to base our decision upon” (emphasis in original)). Substantial  
15 evidence exists to support a finding of fact when the record, viewed as a whole,  
16 would permit a reasonable person to make that finding. *Dodd v. Hood River*  
17 *County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or  
18 346, 351-352 (1988).



1           3.    Argument

2                   a.    Legal Background

3           LUBA will reverse or remand a land use decision if it is not in compliance  
4 with the goals. ORS 197.835(6). In addition, an amendment to an acknowledged  
5 land use regulation must comply with all applicable statewide planning goals, if the  
6 comprehensive plan “does not contain specific policies or other provisions which  
7 provide the basis for the regulation.” ORS 197.835(7)(b). *Roloff v. City of Milton-*  
8 *Freewater*, 27 Or LUBA 256 (1994); *1000 Friends of Oregon v. Clackamas*  
9 *County*, \_\_ Or LUBA \_\_ (LUBA No. 2021-003, Jan. 24, 2022) slip op \*24-26.  
10 Moreover, where an acknowledged land use regulation previously authorized a  
11 particular use, but is amended to adopt new approval standards for the use, LUBA  
12 has authority to review the new approval standards for compliance with the  
13 Statewide Planning Goals. *McKay Creek Valley Assoc. v. Washington County*, 19  
14 Or LUBA 421 (1990). Here, the County has approved new uses and new approval  
15 criteria for those uses.

16                   b.    The County does not have specific policies that provide a  
17                           basis for the Ordinance and the County did not address  
18                           any Statewide Planning Goals

19           Here, the County has not identified any specific policies that formulate the  
20  
21 basis for the land use regulations proposed. Similar to *1000 Friends of Oregon v.*  
22 *Clackamas County*, the County has no “specific policies” addressing “accessory

1 dwelling units” or “short-term rentals.” \_\_ Or LUBA \_\_ (LUBA No. 2021-003,  
2 Jan. 24, 2022) slip op \*24-26. Because the County has not identified (and indeed  
3 does not have) specific policies on the issues relevant to the Ordinance, the County  
4 was required to demonstrate consistency with the goals. R ORS 197.835(7)(b).  
5 The County has not provided any findings associated with any of the goals, and,  
6 therefore, Petitioners assert that the County must take up that requirement in the  
7 first instance – whether that is to amend its comprehensive plan to incorporate  
8 “specific findings” or make findings under the goals.

9 In an abundance of caution, however, Petitioners assert that the goals below  
10 are affected by and not consistent with the Ordinance.

11 c. Specific Goals

12 The Ordinance is inconsistent with Goal 1. Goal 1 requires meaningful  
13 engagement and citizen involvement. However, in the process of developing the  
14 proposed zoning amendments to the R2 zone in Port Orford’s UGB, the county did  
15 not explicitly coordinate with the city and its citizens. It was not brought up nor  
16 discussed at any Port Orford Planning Commission nor City Council meetings until  
17 after the decision was made by the Curry County Planning Commission.

18 Goal 1, section 4 (Technical information) is intended “[t]o assure that  
19 technical information is available in an understandable form. Information  
20 necessary to reach policy decisions shall be available in a simplified,

1 understandable form.” Here, despite repeated requests, the County did not provide  
2 maps to the public to better understand the effect of the amendments. *See* R 145,  
3 151, 272 (requesting maps or mapping related to the Ordinance); R 216, 266, 328,  
4 363 (“There are not even maps provided for your review. This is not planning; this  
5 is a carte blanche land rush.”); R 369 (“There have been no maps provided to the  
6 public to help people understand which lands are impacted by proposed changes.”).  
7 A map supplied by a member of the public was submitted. *See* R 176 (illegible  
8 map of UGB), 271 (legible map of UGB). DLCD provided a map of the Hubbard  
9 Creek DWSA after the record was closed but was still included in the record. R 2-5  
10 (DLCD email, GIS plots, and map). Goal 1 also requires the County “develop a  
11 citizen involvement program that insures that opportunity for citizens to be  
12 involved in all phases of the planning, process” in order to “provide for continuity  
13 of citizen participation and of information that enables citizens to identify and  
14 comprehend the issues.” Goal 1 also requires that the county “adopt and publicize a  
15 program for citizen involvement that clearly defines the procedures by which the  
16 general public will be involved in the on-going, land-use planning process.” While  
17 the County has adopted a Citizens Committee Program (CCI) under the  
18 comprehensive plan, it was not used here and the basic citizen involvement in this  
19 case simply and systemically fell apart due to inadequate notices that did not  
20 explain what would be occurring at various meetings and hearings, leaving many

1 of the residents in the dark. For example, the County held meetings or hearings or  
2 workshops on June 17, 2021 (PC); November 3, 2021 (BOC); November 18, 2021  
3 (PC); December 1, 2021 (BOC); February, 16, 2022 (PC); May 19, 2022 (PC);  
4 June 8, 2022 (PC); June 16, 2022 9PC); July 12, 2022 (PC); July 21, 2022 (PC);  
5 August 17, 2022 (BOC). However, the record only contains a notice for the  
6 August 17, 2022, hearing (R 84d-e), the July 21, 2022, hearing (R 458), and the  
7 December 1, 2021, public workshop (R 683). For those notices that are contained  
8 in the record, aside from the last two, the matters ultimately adopted are not clearly  
9 presented. Therefore, the County's process, here, was inconsistent with Goal 1.

10 The Ordinance is inconsistent with Goal 2. Goal 2 is “[t]o establish a land  
11 use planning process and policy framework as a basis for all decision and actions  
12 related to use of land and to assure an adequate factual base for such decisions and  
13 actions.” Unlike the argument in *1000 Friends of Oregon v. Clackamas County*,  
14 \_\_ LUBA No. \_\_ (LUBA No. 2021-003, Jan 24, 2022), where the argument was  
15 that the comprehensive plan requires a “need for” for the proposed amendments,  
16 here, Petitioners argue that there simply needs to be a factual basis in the  
17 comprehensive plan. As it currently stands, the comprehensive plan is silent on  
18 these significant issues. Goal 2 requires that the comprehensive plan provide a

1 basis for the decision to allow a commercial use or a “lodge/motel”<sup>4</sup> in a residential  
2 zone. Under Goal 2, the County must demonstrate that allowing STRs in the  
3 residential zone has some basis in the plan, where the matter is required to be  
4 addressed first.

5 Goal 2 also requires that “[e]ach plan and related implementation measure  
6 shall be coordinated with the plans of affected governmental units[,]” which are  
7 defined as “those local governments, state and federal agencies and special districts  
8 which have programs, land ownership or responsibilities within the area included  
9 in the plan.” Here, despite the Ordinance significantly affecting the City of Port  
10 Orford<sup>5</sup>, the County failed to coordinate with the City:

11 “It is felt throughout the community that the changes to allow additional  
12 uses in the Port Orford Urban Growth Boundary do not adequately address  
13 the City's concerns regarding housing and STR density, fire suppression and  
14 water use. The Community also would have appreciated outreach during the  
15 process of the Code Amendments and STR regulations.

16  
17 Many areas of Port Orford's Comprehensive Plan and goals refer to the  
18 UGB areas. One of those goals is for the City of Port Orford to grow and  
19 annex properties in the UGB into the City in order to build the City out. “The  
20 proposed changes may have affects [*sic*] on our Comprehensive Plan that are  
21 unintended consequences of the enhanced density and commercialization of

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<sup>4</sup> As noted below, the definition of STR is no different than the definition for “motel/lodge.” *See infra*.

<sup>5</sup> R 218 (“the City of Port Orford has concerns about the proposed code changes to the R-2 zone in the Urban Growth Boundary. Unlike Gold Beach and Brookings, Port Orford has an unusually large Urban Growth Boundary that actually 2 times larger than the City. Therefore, increasing the density in the Urban Growth Boundary will have significant strain on the City and its resources.”).

1 the area through STRs. It is Port Orford's position that these affects should  
2 be researched prior to hastily adopting new code provisions.

3  
4 Based on the concerns that were brought to the Port Orford City Council we  
5 would like to respectfully request that the Board of Commissioners provide  
6 more time to develop the code language and to receive additional feedback  
7 from the Port Orford Community."

8  
9 R 218. Clearly, from Port Orford's perspective, there was no "coordination,"  
10 despite the impacts the Ordinance would have on the City.

11 The Ordinance is inconsistent with Goal 5. Goal 5 is "[t]o protect natural  
12 resources and conserve scenic and historic areas and open spaces."  
13 Implementation B.1 directs that "[d]evelopment should be planned and direct so as  
14 to conserve the needed amount of open space," but, here, the development  
15 permitted by the Ordinance would frustrate open spaces in areas subject to farm  
16 and forest uses in the various RR zones.

17 The Ordinance is inconsistent with Goal 10. Goal 10 is "[t]o provide for the  
18 housing needs of citizens of the state," and, as noted in this brief, the  
19 comprehensive plan concedes that the residents of Curry County cannot afford to  
20 live in Curry County. The allowance for STRs and the allowance to use ADUs as  
21 STRs in certain circumstances only serves to reduce availability and affordability  
22 of dwellings for County residents. Under implementation B.1, "[p]lans should  
23 provide for a continuing review of housing need projects and should establish a  
24 process for accommodating needed revisions." The revisions at issue here are

1 significant, but they occur without a review of housing need projections and by  
2 reducing availability and affordability, the County is not “accommodating needed  
3 revisions.” The County must demonstrate that it continues to satisfy its Goal 10  
4 obligations to maintain an adequate inventory of buildable lands,” *Opus*  
5 *Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995), especially, where,  
6 as here, the Ordinance can result in less housing. *See* R 541 (Article entitled  
7 “Inside Airbnb’s ‘Guerrilla War’ Against Local Governments: New Orleans was a  
8 poster child for Airbnb but the “surge in short-term rentals has exacerbated New  
9 Orleans’ affordable housing crunch and turned entire residential blocks into de  
10 facto hotels. Jane’s Place Neighborhood Sustainability Initiative, a local housing  
11 group, says there were 4,319 whole-unit Airbnb listings in the city last year, more  
12 than double the 1,764 in 2015. The group found that 11 percent of operators,  
13 including many from outside Louisiana, control 42 percent of the city’s short-term  
14 rentals.”).

15 The Ordinance is inconsistent with Goal 11. Goal 11 is “[t]o plan and  
16 develop a timely, orderly and efficient arrangement of public facilities and services  
17 to serve as a framework for urban and rural development.” Implementation B.1  
18 states that “[p]ublic facilities and services should be appropriate to support  
19 sufficient amounts of land to maintain an adequate housing market ....” *See also*  
20 Implementation B.3 (“The level of key facilities that can be provided should be

1 considered as a principal factor in planning for various densities and types of urban  
2 and rural land uses.”). Here, not only will the Ordinance result in fewer dwellings  
3 for residents but it will also require more and more facilities and services for the  
4 rentals. In other words, housing availability and affordability will decrease while  
5 the requirement for facilities and services will increase. The findings concede that  
6 STRs have reduced availability of housing. *See* R 25 (Appx 10) (“[STRs] have  
7 eroded the availability of long-term rentals and likely have displaced some work  
8 force housing.”). For each dwelling operated as an STR, DLCD agreed that STRs  
9 would result in a dwelling lost from the housing supply. R 556 (“Any analysis of  
10 housing need in the County’s Comprehensive Plan has to take into account the  
11 number of existing and projected STRs, because the County will need to allow  
12 more housing in urban areas to make up for the housing supply ‘lost’ to STR  
13 use.”).

14       The Ordinance is inconsistent with Goal 14. Goal 14 is “[t]o provide for an  
15 orderly and efficient transition from rural to urban land use, to accommodate urban  
16 population and urban employment inside urban growth boundaries, to ensure  
17 efficient use of land, and to provide for livable communities.” Implementation B.1  
18 provides that “[t]he type, location and phasing of public facilities and services are  
19 factors which should be utilized to direct urban expansion.” Here, the Ordinance



1 will decrease housing availability and affordability and increase the need for  
2 facilities, a matter which the findings concede. *See* R 25.

3 C. THIRD ASSIGNMENT OF ERROR – The Ordinance is inconsistent  
4 with existing land use regulations.

5  
6 1. Preservation of assignment of error

7  
8 Because this was a legislative decision, the raise it/waive it requirement does  
9 not apply to legislative decisions. *See supra*.

10 2. Standard of review

11 The board shall reverse or remand a decision involving the application of a  
12 plan or land use regulation provision if the decision is not in compliance with  
13 applicable provisions of the comprehensive plan or land use regulations. ORS  
14 197.835(8); ORS 197.835(9)(a)(D) (LUBA shall reverse or remand the land use  
15 decision if the local government improperly construed the applicable law).

16 3. Argument

17 The County’s definition of STR falls within the existing land use regulation  
18 definition for “motel/lodge,” thus allowing the STRs in more zones than originally  
19 contemplated. “Short term rental (STR) is defined as “a lawfully established  
20 dwelling unit, or portion of a dwelling that is rented to any person or entity for  
21 lodging or residential purposes, for a period of up to thirty (30) consecutive  
22 nights.” R 67 (Appx 51). The code defines “Motel/Lodge” as “[a] building or  
23 group of buildings on the same unit of land containing guest units with separate

1 entrances directly to the exterior and consisting of individual sleeping quarters,  
2 detached or in connected rows, for rental to travelers. Guest units may include  
3 kitchen facilities or meals may be provided.” CCZO 1.030(99). This is  
4 distinguishable from the definition of a “hotel” in that a “hotel” there are “no  
5 provisions ... made for cooking in the lodging rooms ....” CCZO 1.030(71). The  
6 definition of STR and motel/lodge are indistinguishable from one another.

7 In the Rural Resort Commercial (RRC) Zone, existing motels and lodges  
8 and their limited expansion are permitted outright, but new motels and lodges are  
9 conditional uses. *See* CCZO 3.141(2) (permitted use) and CCZO 3.142(7)  
10 (conditional use). Therefore, while STRs are now a permitted use in the RRC  
11 zone, according to the Ordinance, they also fall within the definition of “motel,” in  
12 which case new STRs are also conditional uses. This creates an unworkable  
13 conflict within the zone.

14 Similarly, in the Light Commercial (C-1) zone (CCZO 3.150), a motel is a  
15 permitted use outright but an STR is a permitted use subject to zoning standards  
16 and planning clearance, despite being functionally and definitionally the same. In  
17 the Heavy Commercial (C-2) zone (CCZO 3.160), a motel is permitted outright  
18 (CCZO 3.161) but there is no provision for STRs, whether outright permitted or  
19 conditionally. The Ordinance creates an unworkable and contradictory code.

1 D. FOURTH ASSIGNMENT OF ERROR – The Ordinance is not  
2 supported by substantial evidence or an adequate factual basis.

3  
4 1. Preservation of assignment of error

5 Because this was a legislative decision, the raise it/waive it requirement does  
6  
7 not apply to legislative decisions. *See supra*.

8 2. Standard of review

9 As noted above, there is no generally applicable requirement that legislative  
10 land use decisions be supported by findings. However, the decision and record  
11 must be sufficient to demonstrate that applicable criteria were applied and required  
12 considerations were indeed considered.

13 3. Argument

14 The Ordinance is accompanied by a revised staff report, which represents  
15 the only findings for the decision. There is no generally applicable requirement  
16 that legislative land use decisions be supported by findings. However, the decision  
17 and record must be sufficient to demonstrate that applicable criteria were applied  
18 and “required considerations were indeed considered.” *Citizens Against*  
19 *Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002). In  
20 addition, Statewide Planning Goal 2 (Land Use Planning) requires that a legislative  
21 land use decision be supported by “an adequate factual basis,” which is an  
22 evidentiary standard that is equivalent to the requirement that a quasi-judicial  
23 decision be supported by substantial evidence in the whole record. *1000 Friends*

1 of *Oregon v. City of North Plains*, 27 Or LUBA 372, 378, *aff'd*, 130 Or App 406,  
2 882 P2d 1130 (1994); *Naumes Properties, LLC v. City of Central Point*, 46 Or  
3 LUBA 304, 315 n 16 (2004) (explaining that the Goal 2 requirement for an  
4 adequate factual basis applies to all applicable law because LUBA “must have  
5 *something* from the decision or record to base our decision upon” (emphasis in  
6 original)). Substantial evidence exists to support a finding of fact when the record,  
7 viewed as a whole, would permit a reasonable person to make that finding. *Dodd*  
8 *v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of*  
9 *Portland*, 305 Or 346, 351-352, 752 P2d 262 (1988). As noted above, with regard  
10 to the consistency with comprehensive plan policies, statewide planning goals, and  
11 the land use regulations themselves, the Ordinance is not supported by substantial  
12 evidence or an adequate factual basis. Therefore, the decision must be remanded  
13 so that LUBA can have something to review to determine whether the Ordinance is  
14 consistent with the plan, goals, and land use regulations.

15 E. FIFTH ASSIGNMENT OF ERROR – The severance clause is  
16 inconsistent with state law.

17  
18 1. Preservation of assignment of error

19  
20 Because this was a legislative decision, the raise it/waive it requirement does  
21 not apply to legislative decisions. *See supra*.

1                   2.     Standard of review

2             The Board’s interpretation of its land use regulations must be consistent with  
3 the state statute that the land use regulation implements. ORS 197.829(1)(d).  
4 LUBA will reverse a land use decision that violates applicable law and is  
5 prohibited as a matter of law. OAR 661-010-0071(1). LUBA will reverse or  
6 remand a land use decision if the local government “[i]mproperly construed  
7 applicable law.” ORS 197.835(9)(a)(D).

8                   3.     Argument

9             The Ordinance includes a “severance clause,” which states as follows:

10            “If any section, subsection, paragraph, sentence, clause, or phrase of this  
11 Ordinance, or any part thereof, is for any reason held to be unconstitutional  
12 (or otherwise invalid), such decision shall not affect the validity of the  
13 remaining portions of this Ordinance or any part thereof. The legislative  
14 body hereby declares that it would have passed each section, subsection,  
15 subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the  
16 fact that anyone or more sections, subsections, subdivisions, paragraphs,  
17 sentences, clauses or phrases be declared unconstitutional (or otherwise  
18 invalid).”

19  
20 R 17-18 (Appx 2-3). LUBA’s rules do not allow LUBA to “sever” any offending  
21 provision. Rather, LUBA’s rules allow LUBA to remand, reverse, or affirm. If an  
22 assignment of error is sustained and a particular provision is remanded or reversed,  
23 then the entire ordinance is remanded or reversed.

24            This issue was explained in *LandWatch Lane County v. Lane County*, \_\_ Or  
25 LUBA \_\_ (LUBA No. 2019-024, August 15, 2019) slip op \*24-26:

1 “ORS 197.835(1) concerns our scope of review and provides in part that  
2 LUBA ‘shall review the land use decision or limited land use decision and  
3 prepare a final order affirming, reversing or remanding the land use decision  
4 or limited land use decision.’ ‘When LUBA remands a land use decision,  
5 absent some authority to the contrary, the remanded decision becomes  
6 ineffective unless and until the local government takes action on remand to  
7 re-adopt the decision or otherwise render the decision or portions of it  
8 effective.’ *Hatley v. Umatilla County*, 66 Or LUBA 433, 439 (2012)  
9 (‘[A]fter remand\* \* \* the [] ordinances were no longer effective, and  
10 required some formal action to render them effective again after the county  
11 addressed the bases for LUBA’s remand.’). Our rules require that the  
12 response brief generally contain the same content as the petitioner’s brief,  
13 including a statement of the requested relief. OAR 661-010-0035(3)(a);  
14 OAR 661-010-0030(4)(b)(A). The county did not appear in *Landwatch Lane*  
15 *County v. Lane County*, \_ Or LUBA \_ (LUBA No 2018-093, Jan 31, 2019)  
16 and no one requested that LUBA sever any portion of Ordinance No. 18-02.  
17 Even if, however, we had been asked in the prior proceeding to limit the  
18 remand, we question our authority to do so. In *DLCD v. Columbia County*,  
19 24 Or LUBA 32, 44-45, aff’d, 117 Or App 207, 843 P2d 996 (1992), the  
20 county requested that we affirm a portion of the challenged ordinance, and  
21 we agreed to sever sections that ‘were not contested by petitioner in its  
22 assignments of error and are capable of being applied independently of the  
23 portions of the ordinance challenged by petitioner.’ *Id.* (footnote omitted).  
24 The Court of Appeals questioned this disposition in *DLCD*, 117 Or App 207,  
25 and in *Welch v. City of Portland*, 28 Or LUBA 439,451 n 12 (1994), we  
26 explained the following:

27  
28 ‘Intervenor requests that if we do not sustain assignments of error  
29 challenging the environmental review portion of the challenged  
30 decision, we affirm that portion of the decision so that part of the  
31 phased development may go forward. While we are sympathetic to  
32 intervenor’s request, the court of appeals has strongly suggested that  
33 where an entire decision is appealed to this Board, and we sustain  
34 assignments of error, it is inappropriate for LUBA to affirm in part  
35 and remand in part. *DLCD v. Columbia County*, 117 Or App 207, 843  
36 P2d 996 (1992). This would appear to apply regardless of whether  
37 portions of an appealed decision are not successfully challenged.  
38 Therefore, we decline to affirm in part and remand in part.’  
39

1 This is consistent with the resolutions in *Morsman v. City of Madras*, 45 25  
2 Or LUBA 16, 21 n 6, *aff'd in part, rev'd in part on other grounds*, 191 Or  
3 App 26 149, 81 P3d 711 (2003) (request that remand on annexation  
4 challenge be limited to specific property denied absent citation to legal  
5 authority giving LUBA the power to do so); *7th Street Station LLC v. City of*  
6 *Corvallis*, 55 Or LUBA 321 (2007) (LUBA declined petitioner's invitation  
7 to affirm in part and reverse in part in light of decisions questioning LUBA's  
8 authority to grant such relief.); *City of Damascus v. City of Happy Valley*, 51  
9 Or LUBA 150, 164-65 (2006) ('[T]he 6 Court of Appeals has strongly  
10 suggested LUBA lacks authority to affirm an 7 ordinance in part and reverse  
11 in part.').

12  
13 Because the Ordinance's severance clause is inconsistent with LUBA's scope of  
14 review, the severance clause is inconsistent with and violates state law. Because  
15 the severance clause cannot be severed, the matter must be remanded to remove  
16 the clause.

17 F. SIXTH ASSIGNMENT OF ERROR – The Ordinance is inconsistent  
18 with state law governing property line adjustments.

19  
20 1. Preservation of assignment of error

21  
22 Because this was a legislative decision, the raise it/waive it requirement does  
23 not apply to legislative decisions. *See supra*.

24 2. Standard of review

25 The standard of review is set forth in the Fifth Assignment of Error. *Supra*.

26 3. Argument

27 The Ordinance includes amendments to Article VIII, Sections 8.100 – 8.175,  
28 Property Line Adjustments. *See* R 75-81 (Appx 59-65). Those amendments  
29 include the following provision that purportedly implements state law:

1 “c. A property line adjustment is subject to the minimum lot or parcel size  
2 standards of the applicable zoning district, except in the following  
3 circumstances:

4  
5 i. One or both abutting *properties* are smaller than the minimum  
6 lot or parcel size for the applicable zone before the property line  
7 adjustment and, after the adjustment, one is as large or larger  
8 than the minimum lot or parcel size for the applicable zone; or

9  
10 ii. Both abutting *properties* are smaller than the minimum lot or  
11 parcel size for the applicable zone before and after the property  
12 line adjustment.”

13  
14 R 77 (emphasis added). The above language purports to implement ORS

15 92.192(3) but the above language is not consistent with the statute. The Ordinance

16 is inconsistent with ORS 92.192(3) because the statute uses the phrase “lawfully

17 established units of land” and the Ordinance uses the term “properties.” The

18 Ordinance’s provision practically mirrors ORS 92.192(3) with a notable exception

19 being the aforementioned terms:

20 “(3) Subject to subsection (4) of this section, for land located entirely  
21 outside the corporate limits of a city, a county may approve a property  
22 line adjustment in which:

23  
24 (a) One or both of the abutting *lawfully established units of land*  
25 are smaller than the minimum lot or parcel size for the  
26 applicable zone before the property line adjustment and, after  
27 the adjustment, one is as large as or larger than the minimum lot  
28 or parcel size for the applicable zone; or

29  
30 (b) Both abutting *lawfully established units of land* are smaller than  
31 the minimum lot or parcel size for the applicable zone before  
32 and after the property line adjustment.”

33



1 ORS 92.192(3) (emphasis added). A “lawfully established unit of land” is defined  
2 to have a specific meaning in state law, *see* ORS 92.010(3)<sup>6</sup>, and the term  
3 “properties” or “property” do not have that same legal import. There is no legal  
4 significance to the term “property” in state law, but there is legal significance to  
5 the term “lawfully established unit of land. Because the Ordinance is inconsistent  
6 with and more lenient than state law, the Ordinance violates state law.

7 F. SEVENTH ASSIGNMENT OF ERROR – The Ordinance is  
8 inconsistent with state law governing ADUs.

9  
10 1. Preservation of assignment of error

11 Because this was a legislative decision, the raise it/waive it requirement does  
12 not apply to legislative decisions. *See supra*.

13  
14 2. Standard of review

15 The standard of review is set forth in the Fifth Assignment of Error. *Supra*.

---

<sup>6</sup> ORS 92.010(3)(a) provides as follows:

“Lawfully established unit of land” means:

- (A) A lot or parcel created pursuant to ORS 92.010 to 92.192; or
- (B) Another unit of land created:
  - (i) In compliance with all applicable planning, zoning and subdivision or partition ordinances and regulations; or
  - (ii) By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.”

1                   3.     Argument

2             The Ordinance is inconsistent with ORS 215.495<sup>7</sup>, which governs ADUs in  
3 rural residential zones. The Ordinance defines STR as “a lawfully established  
4 dwelling unit, or portion of a dwelling unit, that is rented to any person or entity  
5 for lodging or residential purposes, for a period of up to thirty (30) consecutive  
6 nights.” R 67 (Appx 51). ORS 215.495(3) provides that “a county may not allow  
7 an accessory dwelling unit allowed under this section to be used for vacation  
8 occupancy, as defined in ORS 90.100.”<sup>8</sup> The CCZO does not define or use the  
9 term “vacation occupancy.” The Ordinance’s ADU provisions provide that  
10 “[n]either the existing single-family dwelling nor the accessory dwelling unit shall  
11 be used as a vacation rental.” R 64 (Appx 48). The CCZO does not define  
12 “vacation rental.” Because the code does not use the term “vacation occupancy” or  
13 define the term “vacation rental,” the definition of STR can fall squarely within the

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<sup>7</sup> This statutory provision is inoperable because the state wildfire risk maps have never been adopted, as noted *supra*.

<sup>8</sup> ORS 90.100(51) provides as follows:

“(51) ‘Vacation occupancy’ means occupancy in a dwelling unit, not including transient occupancy in a hotel or motel, that has all of the following characteristics:

- (a) The occupant rents the unit for vacation purposes only, not as a principal residence;
- (b) The occupant has a principal residence other than at the unit;  
and
- (c) The period of authorized occupancy does not exceed 45 days.”

1 definition of “vacation occupancy.” An STR can be used for “vacation purposes”;  
2 an occupant of an STR can – and likely will – have a principal residence other than  
3 at the unit; and an STR can be occupied for 30 days, which is within the 45 limit  
4 for “vacation occupancy.” *See* ORS 90.100(51). Therefore, the Ordinance allows  
5 what the statute prohibits.

6 V. CONCLUSION

7 Petitioners respectfully request that LUBA reverse or remand the County’s  
8 decision. *See Angius v. Washington County*, 35 Or LUBA 462, 464-66 (1999);  
9 *Seitz v. City of Ashland*, 24 Or LUBA 311, 314 (1992).

10 Respectfully submitted this 23rd day of March, 2023.

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By:   
Sean T. Malone, # 084060  
Counsel for Petitioner

**CERTIFICATE OF COMPLIANCE, FILING, AND SERVICE**

I certify that (1) this brief complies with the word-count limitation in OAR  
661-010-0030(2) and (2) the word count of this brief as described in OAR 661-  
010-0030(2) is 10,740 words.

I certify that on March 23, 2023, I filed the original of Petitioner’s Petition  
for Review along with one copy with the Land Use Board of Appeals, DSL

1 Building, 775 Summer Street NE, Suite 330, Salem OR 97301-1283, by Certified  
2 First Class Mail, Return Receipt Requested.

3 I also certify that on March 23, 2023, I served a true and correct copy of this  
4 Petition for Review by First Class Mail to the following person(s):

5 Bill Kloos  
6 Law Office of Bill Kloos PC  
7 375 W. 4th Ave., Suite 204  
8 Eugene, OR 97401

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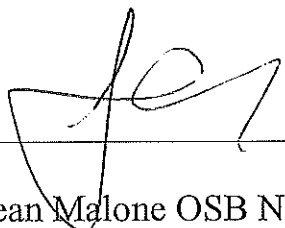
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Dated: March 23, 2023.

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