IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF LINCOLN

PETER BRIGGS, RICHARD E. CAVE, JANE C. GIBBONS, CRAIG McCLANAHAN, KATHERINE GUPTILL, KEN GUPTILL, JULIE D. READING, JANE M. FITZPATRICK, MITCHELL MOORE, GARY WESKE, LINDA FENDER, DARRELL FENDER, DOUGLAS PALMER, JAYNE PALMER, OLENA STROZHENKO, NADINE SCOTT, JERRY MERRITT, LORIN J. LYNCH, and ZANE KESEY,

Plaintiffs,

v.

LINCOLN COUNTY, and CURTIS L. LANDERS, Lincoln County Sheriff, in his official capacity for Lincoln County Sheriff's Office, Licensing Authority under LCC Ch. 4,

Defendants.

Case No. 22CV38244

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND AMENDED COMPLAINT

ORAL ARGUMENT REQUESTED

Honorable Joseph C. Allison, Pro Tem

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page

Cases

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Statutes

Rules

Local Resolutions, Ordinances, Orders and Ballot Measures

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Codes

Other Authorities

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UTCR 5.050 STATEMENT

Time requested for Oral Argument: 60 minutes

Official Reporting Services Requested: Yes

I. MOTION

Pursuant to ORCP 47, Defendant Lincoln County, on behalf of itself and Defendant Curtis L. Landers (collectively "County"), respectfully moves the Court for an order granting summary judgment ("Motion") in the County's favor on Plaintiffs' Second Amended Complaint ("Complaint") because there is no genuine issue as to any material fact and the County is entitled to judgment as a matter of law. In support of this Motion, the County relies on ORCP 47, the pleadings in this action, the points and authorities set forth below and the declaration of Emily M. Matasar filed concurrently herewith and the exhibits attached thereto.

II. POINTS AND AUTHORITIES

A. Introduction

Plaintiffs challenge the validity of Lincoln County's short-term vacation rental license scheme in Lincoln County Code Chapter 4 by attacking the ordinance that adopted it (Ordinance 487), the ordinances that amended it (Ordinances 490, 509, and 523) (collectively "Ordinances"), resolutions that temporarily suspended licensing under it (collectively "Resolutions"), and the Lincoln County Board of Commissioners' ("Board") order implementing it (Order 01-23-037 ("Order")).

Plaintiffs seek certain declarations prohibiting enforcement of the Ordinances, Resolutions and Order for a number of reasons, but because none of Plaintiffs' various arguments invalidate the laws or prohibit enforcement as to Plaintiffs, they are not entitled to relief. First, none of the Ordinances, Resolutions or Order are land use regulations because they are not ordinances that relate to the County comprehensive plan, land use regulations or zoning. As a result, the land use laws Plaintiffs rely on to argue the short-term rental regulations are invalid simply do not apply. Second, the County acted within its authority in passing the

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Ordinances, Resolutions, and Order, which therefore are not preempted. As stated, the laws are not ordinances that relate to the local comprehensive plan, land use regulations or zoning and are thus not preempted by ORS 215.130(5), which applies exclusively to zoning ordinances and regulations. Third, the Ordinances adequately explain what conduct is prohibited, how violations are treated, and do not permit unrestrained enforcement authority, and are therefore not unconstitutionally vague. Finally, the County, and not Plaintiffs, are entitled to attorney fees because Plaintiffs have a financial interest in the outcome of the lawsuit, which should never have been filed in this Court after LUBA conclusively decided the majority of the issues Plaintiffs assert here.

Accordingly, the Court should grant this Motion because there is no genuine issue as to any material fact and the County is entitled to prevail as a matter of law.

B. Statement of Facts

1. Ordinance 487

Short-term vacation rentals in unincorporated Lincoln County are regulated under Lincoln County Code ("LCC") Sections 4.405 to 4.460, which were adopted by the County through Ordinance 487 on August 3, 2016. Declaration of Emily M. Matasar in Support of Defendants' Motion for Summary Judgment on Plaintiffs' Second Amended Complaint ("Matasar Decl.") Ex. 1 (Ordinance 487).[1] The County determined that the "growth in the number of short term rental of dwelling units within the County has been accompanied by increased problems of excessive noise, spilled garbage, shortages of parking, and overcrowded accommodations[.]" *Id.* at 1 (§ 4.405(1)(a)). The County further determined that the "best way to regulate these impacts is to establish conditions for operation of these rentals and to implement a licensing program by the County to ensure compliance with those standards[.]" *Id.* (§ 4.405(1)(b)). LCC 4.405(2), adopted through Ordinance 487, expressly states, "This is not a

[1] For the Court's convenience, all exhibits cited in this Motion are attached to the Declaration of Emily M. Matasar, including those previously submitted.

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land use ordinance and is not made a part of Lincoln County Code Chapter 1, Land Use Planning." *Id.* at 2 (§ 4.405(2))

The short-term rental ("STR") scheme adopted through Ordinance 487 generally makes it unlawful to operate a dwelling as a short-term rental without a license issued by the County. *Id.* at 4-6 (§ 4.420, § 4.430). The operating standards generally require signage, notice to the fire chief and sheriff's department, quiet hours, garbage service, parking, sufficient onsite wastewater treatment systems, occupancy limits and more. *Id.* at 6-9 (§ 4.440). There is a complaint procedure (§ 4.445) as well as procedures for denial, revocation and nonrenewal. *Id.* at 9-12 (§ 4.450). Ordinance 487 took effect December 1, 2016, and has never previously been challenged. *Id.* at 12 (Sec. 13).

2. Ordinance 490

The Board adopted Ordinance 490 on November 30, 2016, a few months after the Board initially adopted the STR regulations in Ordinance 487. Matasar Decl. Ex. 2 (Ordinance 490). Ordinance 490 made two primary changes to Ordinance 487, changes that were intended "to clarify one section of the code and delegate authority to the licensing authority to make rules, procedures, forms and practices consistent with the code to implement the program[.]" *Id.* at 1. First, Ordinance 490 amended LCC 4.415 by requiring that the contact person for the STR license "be located within Lincoln County, and cannot use the dwelling unit(s) licensed under this Chapter as the basis for compliance with this provision unless the [contact person] resides at that location." *Id.* at 2 (§ 4.415(2)(c)). Second, Ordinance 490 delegated authority and responsibility to the Lincoln County Licensing Authority "to adopt rules, procedures, forms and practices consistent with the overall intent of this Chapter, to implement, administer, and operate the licensing program for the County." *Id.* at 3 (§ 4.456). The STR regulations, as amended, took effect on December 1, 2016.

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3. Ordinance 509

After the County administered the STR licensing program for a few years, the Board determined some additional changes were necessary "to address long term public health concerns with licensees operating short term rentals in dwelling units with onsite wastewater treatment systems to handle effluent from these homes." Matasar Decl. Ex. 3 (Ordinance 509) at 1. The Board thus adopted Ordinance 509 on September 4, 2019. *Id.* at 7. Most of the changes in Ordinance 509 relate to wastewater. First, Ordinance 509 amended the definition of "Sleeping area" by adding, "The determination of sleeping areas shall not exceed the number of bedrooms authorized in accordance with LCC 4.440(6) for dwellings not served by public sewer." *Id.* at 3 (§ 4.415(11)). In addition, Ordinance 509 added "Onsite wastewater treatment system requirements." *Id.* at 5 (§ 4.440(6)). These requirements reference the Environmental Quality Commission's ("EQC") administrative rules on subsurface sewage disposal and are intended to ensure compliance with its standards. *Id.* They state, "If the property is not connected to a public sewer the onsite wastewater treatment system must be able to handle the capacity of the number of bedrooms of the home and the total number of occupants." *Id.* The capacity of the system is determined through either:

> (1) a current valid permit on file with Lincoln County Subsurface Division of the Department of Planning and Development (Department), showing the allowed number of bedrooms;
> (2) if there is no record of a valid permit or the permit does not indicate the number of bedrooms allowed, then the property owner must obtain an Existing System Evaluation Report (ESER) developed in accordance with OAR 340-071-0155 by a professional so authorized to conduct the evaluation as required by those rules.

Id. (§ 4.440(6)(a)). The ESER must include "a calculation of the number of allowed bedrooms based on the capacity of the system as it exists[,]" but "[f]inal determination of the capacity and suitability of the septic system from the report shall be made by the County Subsurface Division of the Department of Planning and Development upon review of the report." *Id.* (§ 4.440(6)(a)(2)). Ordinance 509 required current affected licensees to obtain an ESER and

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submit it to the Department within 120 days of notice of the requirement, and required future licensees to obtain an ESER in order to qualify for a license. *Id.*

Ordinance 509 also provided requirements for those situations when "the ESER indicates the system is not operating property or needs upgrades or repairs[.]" *Id.* at 6 (§ 4.440(6)(a)(3)). In addition, Ordinance 509 expressly linked occupancy limits to the ESER:

> For purposes of [the occupancy] calculation the number of sleeping areas is the number of bedrooms contained in either the valid onsite wastewater treatment system permit or the ESER, LCC 4.440(6), for dwellings subject to those requirements. The County shall recalculate occupancy for existing licensees, where appropriate, based on the requirements of this section and shall issue new maximum occupancies to begin January 6, 2020.

Id. (§ 4.440(7)(b)). Occupancies grandfathered at a higher occupancy through the provisions of Ordinance 487 "cannot exceed the capacity of the onsite wastewater system under a valid permit or Existing System Evaluation Report[, which] may reduce the higher occupancy allowed effective January 6, 2020." *Id.* (§ 4.440(7)(e)).

Lastly, Ordinance 509 made two minor administrative amendments unrelated to wastewater treatment. First, it clarified that renewals are issued for one year from the date the previous license expires, and if the license is older than one year, a new license is required. *Id.* at 3 (§ 4.430(2)). Second, it amended the signage requirements, providing minimum size requirements and updates if the information required to be on the signage changes. *Id.* at 4 (§ 4.440(1)(a)).

The changes in Ordinance 487 and 509 are incorporated in Ordinance 523, the latest amendment to the STR regulations. Thus, the current version of the STR regulations is set forth in Ordinance 523.

4. Ordinance 523

On October 27, 2021, the County adopted Ordinance 523, which amends LCC Sections 4.420, 4.430, 4.440, 4.445, 4.450 and 4.456. Matasar Decl. Ex. 4 (Ordinance 523).

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Ordinance 523 amends the regulations for STRs in a number of ways. *See id.* First, it expressly requires a license issued by the County in order to advertise or operate an STR (§ 4.420(2)) and provides that failure to renew a license results in the license being revoked. *Id.* at 3-5 (§ 4.430(2)). Second, it directs the County Licensing Authority to establish seven subareas within the county and sets a maximum limit on the number of STR licenses within each subarea. *Id.* at 4 (§ 4.420(4)). It also provides for the creation of a waiting list for licenses in each subarea when the number of licenses and applications exceed the number of licenses allowed in the subarea. *Id.* Third, it revises the standards for on-site sanitary sewer and requires the operator of an STR to obtain an ESER no later than December 31, 2023. *Id.* at 7-8 (§ 4.440(6)). The ESER must describe the number of bedrooms allowed based on the capacity of the system. *Id.* (§ 4.440(6)(b)). Any sewer deficiencies identified in the ESER must be remedied within 120 days, unless extended by the Licensing Authority. *Id.* at 8 (§ 4.440(6)(c)). Fourth, it revises the occupancy limits to allow two persons per bedroom plus two additional persons. *Id.* (§ 4.440(7)(b)). Fifth, it amends the complaint process to allow a complaint to be investigated by the Licensing Authority and, if not resolved, a hearing before a Hearings Officer. *Id.* at 9-10 (§ 4.445(3)). The Hearings Officer's decision may be appealed to the circuit court. *Id.* at 10 (§ 4.445(4)). Finally, it delegates authority to the County Licensing Authority, County Counsel, and the Onsite Waste Management Division of the County Department of Planning and Development to oversee and implement the licensing system. *Id.* at 11 (§ 4.456). As noted, the amendments in Ordinance 487, 490 and 509 are incorporated in Ordinance 523. Thus, the current version of the STR regulations is set forth in Ordinance 523, which became effective on January 28, 2022.

On November 17, 2021, Ordinance 523 was appealed to the Land Use Board of Appeals ("LUBA"). *Briggs et al. v. Lincoln Cnty.*, ___ Or LUBA ___ (LUBA No. 2021-113) (2022 WL 715524) (Feb 10, 2022) ("*Briggs I*"). Matasar Decl. Ex. 5 (*Briggs I* LUBA Final Opinion and

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Order).[2] The County moved to dismiss the appeal for lack of jurisdiction because the STR regulations are not land use regulations. LUBA agreed and, on February 10, 2022, issued a final opinion and order in which it concluded that Ordinance 523 is *not* a land use regulation because it does not provide standards to implement the County comprehensive plan. *Briggs I* at 13. Therefore, because Ordinance 523 is not a land use regulation, LUBA lacked jurisdiction and transferred the matter to Lincoln County Circuit Court. *Id.* LUBA's final opinion and order in *Briggs I* was not appealed. ORS 197.850 (providing for appeal of final order).

5. Resolutions Suspending Issuance of Licenses

As the County and its residents were reviewing and considering the issues created by short-term rentals, the County determined it necessary to perform "a comprehensive review of licensing standards, program operations, enforcement actions and full implementation of new provisions of the licensing program for short term rental of residences." Matasar Decl. Ex. 6, at 1 (Resolution 20-4-3B). In order to allow for this review, on March 4, 2020, the County passed Resolution 20-4-3B, which suspended "the processing of new licenses temporarily as set forth in [this] resolution while certain interim recommendations are reviewed and implemented, further longer term options are explored, and decisions are finalized for the update of the program requirements." *Id.* Resolution 20-4-3B was set to terminate on May 7, 2020, *id.*, but because Ordinance 523 was adopted, a ballot measure (Ballot Measure 21-203 ("Measure")) was approved by the voters amending the same sections of the code, and both were subsequently challenged in court, the County extended the suspension on issuing new licenses through a series of similar resolutions. Complaint ¶¶ 52-62; Matasar Decl. Ex. 7 (Ballot Measure 21-203). One such resolution, Resolution 21-3-12A, was adopted on December 3, 2021, after this Court issued a temporary restraining order against enforcement of the Measure. Matasar Decl. Ex. 8 (Resolution 21-3-12A). Plaintiffs Cave, Gibbons, Guptill, Guptill and Kesey appealed the

[2] Citations to *Briggs I* in this Motion are to the slip opinion.

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County's decision to adopt Resolution 21-3-12A to LUBA. *Cave et al. v. Lincoln County*, ___ Or LUBA ___ (LUBA No. 2021-122) (2022 WL 1128537) (Mar 4, 2022) ("*Cave*").[3] Matasar Decl. Ex. 9 (*Cave* LUBA Final Opinion and Order). Like the decision challenging Ordinance 523 in *Briggs I*, LUBA concluded that Resolution 21-3-12A was not a land use regulation because it did not provide standards to implement the County comprehensive plan. *Id.* at 8. As such, the resolution was *not* a land use regulation and LUBA lacked jurisdiction to review it. *Id.* at 11. LUBA's final opinion and order was not appealed.

All of the resolutions suspending the issuance of STR licenses have expired, therefore there is currently no temporary suspension of licenses in effect.[4]

6. Ballot Measure 21-203

On November 2, 2021, Lincoln County voters approved Ballot Measure 21-203. 2d Am. Compl. ¶ 36. The Measure amended certain provisions in LCC chapter 4, Sections 4.405 through 4.460. Matasar Decl. Ex. 7. The amendments were expressly intended to ensure STRs operated in a manner consistent with the County comprehensive land use plan and zoning regulations in three specific residential zones. Matasar Decl. Ex. 7, at 2. The Measure was appealed to both this Court and LUBA. LUBA stayed its review of the Measure to allow the circuit court to complete its review. In a memorandum opinion dated March 15, 2022, in *Cammann et al. v. Landers et al.*, Lincoln County Circuit Court Case No. 21CV46002, circuit court Judge Benjamin concluded that because the Measure provided "standards to implement [the] comprehensive plan," it was a land use regulation subject to LUBA's exclusive jurisdiction.

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[3] Citations to *Cave* in this Motion are to the slip opinion.

[4] Although Plaintiffs purport to challenge an alleged "Moratoria," which includes all expired suspension resolutions as well as the Board's Order (discussed *infra*), only the Order remains in effect as of the date of this Motion. As stated below, the Order implements the directive in Ordinance 523 to establish subarea boundaries and limitations on licenses within each. As such, the County has no intention to enact any additional resolutions suspending the issuance of licenses. Unless otherwise stated, this Motion will refer to the expired Resolutions and the Board's Order.

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Matasar Decl. Ex. 10, at 3-4 (Memorandum Opinion Re: Jurisdiction in 21CV46002). Accordingly, the case was transferred to LUBA where it was consolidated with the other appeal. On August 8, 2022, LUBA issued a final order invalidating the Measure because it was preempted by ORS 215.130(5). *Briggs et al. v. Lincoln County*, __ Or LUBA__ (LUBA Nos. 2021-118 and 2022-030) (2022 WL 4271730) (Aug 8, 2022), slip op. at 23 ("*Briggs II*").[5] Matasar Decl. Ex. 11 (*Briggs II* LUBA Final Opinion and Order). LUBA's decision was not appealed.

7. Order 01-23-037

On February 1, 2023, the Board enacted Order 01-23-037 ("Order"), which implements the directive in LCC 4.420(4) to establish seven geographical subarea boundaries for the short-term rental licensing program. 2d Am. Compl. ¶ 63;[6] Matasar Decl. Ex. 12 (Order 01-23-037). The Order also limits the number of licenses allowed in each subarea. *Id.* at 1.

On November 8, 2022, Plaintiffs filed this lawsuit challenging the County's STR regulatory scheme and the Ordinances, Resolutions and Order that implemented it, seeking declaratory and injunctive relief under ORS 28.010 *et seq.* and judicial review under ORS 203.060, and seeking attorney fees.

C. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Specifically, ORCP 47C provides: "[T]he court shall enter [summary] judgment for the moving party if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." No genuine issue of material fact exists if, "upon the record before the court viewed in a manner

[5] Citations to *Briggs II* in this Motion are to the slip opinion.
[6] Paragraph 63 of the Complaint erroneously identifies the Order as "1-23-027" rather than "01-23-037."

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most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party." ORCP 47C. *See also Wilson v. Tri-County Metro. Transp. Dist.*, 343 Or 1, 15, 161 P3d 933 (2007).

Here, Plaintiffs first argue that the STR Ordinances, Resolutions and Order violate a number of land use planning statutes, which also preempt them. 2d Am. Compl. ¶¶ 77, 78, 79, and 85. However, the Ordinances, Resolutions and Order are not land use regulations, so the provisions of ORS Chapter 215 that Plaintiffs rely on do not apply to them. Because the provisions of ORS Chapter 215 do not apply to the Ordinances, Resolutions and Order, they are not in conflict with them, and are therefore not preempted. Additionally, the Ordinances are not vague because they put a person of ordinary intelligence on notice of the conduct it prohibits, and do not allow for arbitrary or discriminatory enforcement. Finally, the County is entitled to its attorney fees because Plaintiffs unreasonably brought claims in circuit court that have already been raised and decided previously at LUBA. There is no genuine issue of material fact, Plaintiffs' claims fail and the County is thus entitled to judgment in its favor as a matter of law.

D. Argument

1. The County Is Entitled to Judgment in Its Favor as a Matter of Law on the First and Second Claims for Relief

Plaintiffs' first claim for relief seeks an injunction as well as the following declarations under ORS 28.010 and ORS 28.020: (1) the Ordinances, Resolutions and Order were adopted in violation of the notice requirement in ORS 215.503 and the public hearing and notice requirements in ORS 215.223; (2) the Ordinances, Resolutions and Order violate ORS 215.130(5), which also preempts them, by restricting an existing lawful use of buildings, structures or land; (3) the Ordinances are unconstitutionally vague; (4) the Resolutions and Order are of no legal effect because they are not ordinances in violation of ORS 215.130(2); and (5) adjudication related to the expired Resolutions is not moot under ORS 14.175. 2d Am. Compl. ¶¶ 77-79. Plaintiffs' second claim for relief asks the court to find that the Ordinances,

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Resolutions and Order are invalid under ORS 203.060 because they are unreasonable, were adopted with procedural errors, and conflict with paramount state law or constitutional provisions for the same reasons identified in the first claim. 2d Am. Compl. ¶ 85. The third claim, against the County Sheriff, seeks a declaration that STR license applications that were improperly denied, refused or returned should be issued and an injunction against any suspensions of issuing STR licenses. 2d Am. Compl. ¶ 86. The third claim also seeks a declaration regarding certain procedural and land use rights and an injunction against enforcement of the invalidated portions of the ordinance. *Id.* Although the first three claims seek different relief, they all rely on the same legal theories, so the County will address them together.[7]

a. The Ordinances, Resolutions and Order Are Not Land Use Regulations; Therefore, the Provisions of ORS Chapter 215 Do Not Apply

Plaintiffs allege that the Ordinances, Resolutions and Order violate various state law requirements in ORS Chapter 215 that govern local land use regulations.[8] Specifically, Plaintiffs

[7] In a letter opinion issued on May 22, 2023, Judge Branford denied a motion for partial summary judgment in a related case brought by Plaintiffs' counsel here, *Blackburn et al v. Lincoln County*, Case No. 22CV37957. Matasar Decl. Ex. 13 (*Blackburn* Letter Opinion). In *Blackburn*, the plaintiff's motion for partial summary judgment sought the following declarations: (1) that his use of property as a short-term vacation rental is a lawful nonconforming use under LCC chapter 1; (2) that LUBA conclusively ruled in *Briggs II* that his use of property as a STR is a nonconforming use; and (3) that the County is precluded from arguing otherwise. Matasar Decl. Ex. 14 at 1-2 (*Blackburn* Defendants' Response to Plaintiff's Motion for Partial Summary Judgment). The Court determined that it lacked jurisdiction to provide the requested relief, and denied plaintiff's motion for partial summary judgment. *See* Matasar Decl. Ex. 13 at 3 (referring to Defendants' Response at section IV [A], which argues the court lacked jurisdiction).

[8] The Complaint asserts without support that the Ordinances, Resolutions and Order "relate[] to Lincoln County's comprehensive plan, land use planning and/or zoning[.]" *E.g.*, 2d Am. Compl. ¶¶ 77(a), 78(a), 79(a). These are legal conclusions insufficient to show genuine issues of fact to survive a summary judgment motion. *See Allen v. Kaiser Found. Hosp., Inc.*, 76 Or App 5, 9, 707 P2d 1289 (1985) (conclusory statement of liability is legal conclusion not sufficient to survive motion for summary judgment). Moreover, LUBA has already rejected these assertions. *Infra* Sec. II.D.1.a.ii.

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argue that the Ordinances, Resolutions and Order were adopted in violation of: the notice requirement in ORS 215.503 (also referred to as "Measure 56"), the notice and hearing requirement in ORS 215.223 and the limitations on nonconforming use regulations in ORS 215.130(5). 2d Am. Compl. ¶¶ 77(a)-(c), 78(a)-(c), 79(a)-(c), and 85. Plaintiffs also argue that the resolutions "are of no legal effect[] because the Moratoria were Resolutions, not Ordinances, in violation of ORS 215.130(2)." 2d Am. Compl. ¶ 79(d). Plaintiffs are simply wrong. The Ordinances, Resolutions and Order are not land use regulations, therefore the requirements in ORS Chapter 215 do not apply here and cannot provide a basis to invalidate the Ordinances, Resolutions or Order.

Each of the statutes in ORS Chapter 215 that Plaintiffs rely on only apply to an ordinance that relates to the local comprehensive plan, land use regulations or zoning: ORS 215.130(2) ("ordinance designed to carry out a county *comprehensive plan*"); ORS 215.130(5) ("enactment or amendment of any *zoning ordinance or regulation*"); ORS 215.223(1) (procedures for adopting a "*zoning ordinance*"); ORS 215.503(3) ("ordinance that proposes to *amend an existing comprehensive plan* or any element thereof or to adopt a *new comprehensive plan*"); and ORS 215.503(4) ("ordinance that proposes to *rezone property*") (emphases added). Pursuant to ORS 197.015(11), all such ordinances described in ORS 215.130, ORS 215.223, and ORS 215.503—ordinances that relate to the local comprehensive plan, land use regulations or zoning—are "land use regulations."[9] In other words, the provisions of ORS Chapter 215 that Plaintiffs rely on apply only to land use regulations. Because the Ordinances, Resolutions and Order are business licensing regulations, not land use regulations, ORS Chapter 215 does not apply and the County is entitled to judgment in its favor.

[9] Significantly, a decision to adopt a land use regulation is a "land use decision" subject to LUBA's exclusive jurisdiction. ORS 197.015(10)(a)(iii); ORS 197.825(1). Thus, to the extent Plaintiffs are correct that the Ordinances, Resolutions and Order are land use regulations, the decision to adopt them was a "land use decision" and this Court lacks jurisdiction.

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LUBA has already ruled that neither Ordinance 523 nor one of the Resolutions implement the County comprehensive plan and therefore they are not land use regulations. Nothing in the Complaint challenges this conclusion or provides a basis to conclude otherwise. Further, because Ordinance 487, 490 and 509 are simply the prior iterations of Ordinance 523, implementing the STR business licensing scheme in LCC Sections 4.405 to 4.460, the reasoning in LUBA's decision regarding Ordinance 523 applies equally to Ordinance 487, 490 and 509. In other words, because Ordinance 487, 490 and 509 do not implement the County comprehensive plan, they are not a "zoning ordinance or regulation" and ORS Chapter 215 does not apply. Likewise, the Order does not implement the County comprehensive plan and is not a "zoning ordinance or regulation." Rather, the Order establishes subarea boundaries and limitations on business licenses within them, and is thus also not a land use regulation. Accordingly, because the statutes in ORS Chapter 215 that Plaintiffs rely on do not apply to the Ordinances, Resolution or Order, the County is entitled to judgment as a matter of law.

i. The Ordinances, Resolutions, and Order Do Not Relate to a Comprehensive Plan, Land Use Planning or Zoning

Ordinance 487 enacted LCC Sections 4.405 to 4.460 to provide a business licensing scheme for short-term rental of residential properties in unincorporated Lincoln County. Ordinances 490, 509 and 523 each amended certain sections within LCC 4.405 to 4.460. LCC 4.405(2) expressly states, "This is not a land use ordinance and is not made a part of Lincoln County Code Chapter 1, Land Use Planning." Matasar Decl. Ex. 1, at 2, Ex. 2, at 2. Where the County states outright that an ordinance is not intended to be a land use regulation, the ordinance will not be deemed a zoning ordinance or land use regulation unless there is a clear connection between the ordinance and the County comprehensive plan. *Briggs I* at 7 (quoting *Emerald Cove LLC v. City of Lincoln City*, 73 Or LUBA 72, 76 (2016)); *Cave* at 8. Here, Plaintiffs do not establish that the Ordinances amend or implement the County's comprehensive plan, or establish standards for implementing a comprehensive plan, because they do not. ORS 197.015(11);

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Briggs I at 6-7. In addition, nothing in the Ordinances rezones property, literally or effectively, specifically or broadly. *Id.* at 9. The Ordinances establish business licensing regulations that exist outside of and separate from the County's land use and zoning regulations. In other words, the Ordinances are garden variety business regulations directed at short-term rental of residential properties; they are not "land use regulations" and thus are not subject to the statutes Plaintiffs cite in ORS Chapter 215.

For the same reasons, the Resolutions, none of which are currently in effect, related to the regulations in LCC 4.405 to 4.460 and, as such, they were also not zoning ordinances or land use regulations subject to ORS Chapter 215. The Resolutions temporarily suspended short-term rental licensing to new residences, but allowed renewal of existing licenses. *E.g.*, Matasar Decl. Ex. 8, at 1 (Resolution 21-3-12A). The Resolutions were administrative directives to a County official regarding the implementation and administration of the business licensing regulations in LCC 4.405 to 4.460, but were not zoning ordinances or land use regulations because they did not amend or establish standards for implementing a comprehensive plan. ORS 197.015(11); *Cave* at 8 ("Petitioners do not identify any comprehensive plan provisions or statewide planning goals applicable to the Resolution"); *Emerald Cove*, 73 Or LUBA at 74. Therefore, the Resolutions were not land use regulations subject to the statutes Plaintiffs cite in ORS Chapter 215.

Likewise, the Order implements the directive in Ordinance 523 to establish geographical subarea boundaries and limitations on STR licenses for each subarea. Matasar Decl. Ex. 12, at 1. The Order does not reference any provisions in the County's comprehensive plan or zoning code in LCC chapter 1, and only references the STR business licensing regulations in LCC chapter 4. *Id.* The Order is thus not a land use regulation. ORS 197.015(11); *Emerald Cove*, 73 Or LUBA at 74.

Emerald Cove LLC v. City of Lincoln City is instructive. 73 Or LUBA 72, 2016 WL 851585 (2016). In that case, the petitioner challenged a Lincoln City ordinance that changed the occupancy standards in its vacation rental dwelling ("VRD") licensing program. *Id.* at 74. The

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city ordinance based the VRD occupancy limitations on the Oregon Residential Specialty Code's limitations for "lodging houses." *Id.* Petitioner applied to renew its VRD license and when the city issued the license with a smaller occupancy limit than previously allowed, petitioner appealed that decision, arguing it was an unlawful limitation of its nonconforming use. *Id.* at 75. LUBA concluded that the ordinance was not a land use regulation at all and thus LUBA lacked jurisdiction to review it, despite the fact that the ordinance (1) incorporated the state building code's restrictions; (2) the city provided notice of the ordinance to the Department of Land Conservation and Development pursuant to state land use law (ORS 197.610); and (3) the city's decision considered the petitioner's nonconforming use argument under the city's zoning code. *Id.* at 77-78.

The Order challenged here is even less connected to the County's land use regulations than the ordinance in *Emerald Cove*, which LUBA determined was not a land use regulation despite those connections to the city's land use regulations. Preliminarily, like the ordinance in *Emerald Cove*, the Ordinance here—which the Order merely implements—states it is "not a land use ordinance[.]" Matasar Decl. Ex. 1, at 2 (§ 4.405(2)); *id.* at 77. In contrast to the ordinance in *Emerald Cove* that LUBA found was not a land use ordinance despite several connections to state and local land use laws, the Order in this case relates only to business licensing and does not incorporate or refer to any land use regulations at all. The Order does not implement or amend the comprehensive plan and is therefore also not a land use regulation.

For these reasons, the Ordinance, Resolutions and Order are not land use regulations subject to the statutes in ORS Chapter 215 Plaintiffs rely on.

ii. LUBA Has Already Concluded that Ordinance 523 and the Resolutions Are Not Land Use Regulations

As previously stated, if the Ordinances, Resolutions and Order are land use regulations subject to ORS Chapter 215, then this Court lacks jurisdiction to review them. *Supra* n.9; 197.825(1). But LUBA has already concluded that Ordinance 523 and one of the Resolutions were not land use regulations. Thus, ORS Chapter 215 does not apply to them.

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As noted, Ordinance 523 was appealed to LUBA shortly after it was adopted. At LUBA, the County moved to dismiss the appeal on the grounds that LCC Title 4's STR regulations that were enacted in 2016 by Ordinance 487[10] are not "land use regulations" and therefore a decision by the County to amend the regulations also is not a "land use decision" subject to LUBA's exclusive jurisdiction. LUBA agreed, concluding that Ordinance 523 is not a land use decision because it is not a new land use regulation, does not rezone property and does not terminate or limit lawful land uses. *Briggs I* at 6-9. Therefore, because Ordinance 523 is not a "land use regulation" over which LUBA has jurisdiction, the appeal was transferred to this Court for resolution of any non-land use issues. *Id.* at 13-14. Again, LUBA's final opinion and order in *Briggs I* was not appealed. ORS 197.850.

LUBA also previously ruled that one of the Resolutions was not a land use regulation. As discussed, the County enacted a series of similar resolutions that direct the Sheriff to suspend issuing new STR licenses. S*upra* Sec. II.B.3; 2d Am. Compl. ¶¶ 50-62. One such resolution, Resolution 21-3-12A, was approved on December 3, 2021 and appealed to LUBA. Matasar Decl. Ex. 6, at 2; *Cave* at 3. On its own motion, LUBA raised the question of its jurisdiction and asked the parties to brief the issue. Following briefing, LUBA concluded that it lacked jurisdiction to review Resolution 21-3-12A for the same reasons it lacked jurisdiction to review Ordinance 523; that is, Resolution 21-3-12A was not a land use decision subject to LUBA's jurisdiction because it did not include standards to implement the County comprehensive plan. *Cave* at 11. LUBA's final opinion and order in *Cave* was not appealed. ORS 197.850. Accordingly, the appeal was transferred to the circuit court for resolution of any non-land use issues.

[10] Ordinance 487 has not been challenged previously. However, in *Cave*, LUBA stated, "we determined in [*Briggs I*], that the LCC chapter 4 regulations applicable to short-term rentals are not land use regulations." *Cave* at 7. Ordinance 487 initially adopted those regulations in 2016; therefore, it is also not a land use regulation.

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Although in *Cave* only Resolution 21-3-12A was before LUBA, *Cave* is nevertheless instructive. Plaintiffs argue that the County's suspension of licenses is a pattern of county action that is capable of repetition but evading review under ORS 14.175, and argue that the Court should thus exercise jurisdiction over the expired Resolutions. 2d Am. Compl. ¶ 79(e). In addition, Plaintiffs combine the Resolutions and Order, describing them together as a "Moratoria," because, according to Plaintiffs, the effect of the Order is "a permanent, indefinite moratorium on new short term rentals in five of the seven" subarea boundaries established by the Order. 2d Am. Compl. ¶ 63. The County maintains that each Resolution and the Order are individual actions the County took. Moreover, all of the Resolutions have expired; the Order remains currently in effect. However, considered together as "Moratoria," *Cave* controls because LUBA concluded that Resolution 21-3-12A—which Plaintiffs challenge as one part of the "Moratoria"—was not a land use regulation. *Cave* at 11. Because LUBA in *Cave* concluded the Resolution 21-3-12A is not a land use regulation, and if the "Moratoria" include all suspension resolutions as well as the Order, then *Cave* also applies to the Order and holds that those provisions in ORS Chapter 215 that only apply to land use regulations do not apply to the "Moratoria."

For these reasons, LUBA has already concluded that the Ordinances, Resolution and Order are not land use regulations and the provisions of ORS Chapter 215 do not apply. Accordingly, the County is entitled to judgment in its favor as a matter of law.

iii. Plaintiffs Are Precluded from Asserting that Either Ordinance 523 or the Resolution Is a Zoning Ordinance or Regulation

As described above, Ordinance 523 and one of the Resolutions were challenged at LUBA and LUBA concluded they were not land use regulations subject to the state's land use statutes. LUBA's final orders were not appealed. Plaintiffs are thus precluded from arguing here that Ordinance 523 or the Resolutions are land use regulations subject to ORS Chapter 215.

To analyze issue preclusion, it is necessary to provide some additional background on the LUBA cases *Briggs I* and *Cave*. In *Briggs I*, Petitioners Briggs, Cave, Gibbons, McClanahan,

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Guptill, Guptill, Reading, Fitzpatrick, Moore, Weske, Fender, Fender, Palmer, Palmer, Strozhenko, Scott, Merritt and Lynch—all of whom are also Plaintiffs here, along with Plaintiff Kesey—asserted to LUBA that Ordinance 523 is a land use regulation subject to provisions in ORS Chapter 215. As noted, LUBA in *Briggs I* considered Plaintiffs' arguments that Ordinance 523 is a land use regulation and rejected them, concluding Ordinance 523 is not a land use regulation because it does not provide standards to implement the County comprehensive plan. *Briggs I* at 6-7. LUBA also determined that the Ordinance does not rezone property. *Id.* at 7-9. Finally, LUBA found that Ordinance 523 does not terminate or limit lawful uses of land, and explicitly found that ORS 215.130(5) does not apply to Ordinance 523. *Id.* at 9-10 ("Ordinance 523 is not a 'zoning ordinance or regulation' and, therefore, ORS 215.130(5) does not apply."). LUBA's final order in *Briggs I* could have been appealed pursuant to ORS 197.850, but it was not. In light of LUBA's final order in *Briggs I*, issue preclusion bars Plaintiffs from making the same arguments again to this Court.

Similarly, in *Cave*, Petitioners Cave, Gibbons, Guptill, Guptill, and Kesey—all Plaintiffs here along with Plaintiffs Briggs, McClanahan, Reading, Fitzpatrick, Moore, Weske, Fender, Fender, Palmer, Palmer, Strozhenko, Scott, Merritt and Lynch—challenged Resolution 21-3-12A, which is representative of what Plaintiffs here call the "moratorium" resolutions. As in *Briggs I*, LUBA concluded Resolution 21-3-12A is not a zoning ordinance or regulation and LUBA thus lacked jurisdiction to review it. *Cave* at 8 ("Petitioners do not identify any comprehensive plan provisions or statewide planning goals applicable to the Resolution."). LUBA's final order in *Cave* was also not appealed pursuant to ORS 197.850. Nonetheless, the *Cave* petitioners, as Plaintiffs here, reassert to this Court that the Resolutions "relate to Lincoln County's comprehensive plan, land use planning and/or zoning[.]" Compl. ¶ 79.

In *Nelson v. Emerald People's Utility District* the Court of Appeals set out five requirements necessary to preclude a party from re-raising an issue that has already been litigated:

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1. The issue in the two proceedings is identical;
2. The issue was actually litigated;
3. The party sought to be precluded has had a full and fair opportunity to be heard on that issue;
4. The party sought to be precluded was a party or was in privity with a party to the prior proceeding; and
5. The prior proceeding was the type of proceeding to which the court gives preclusive effect.

318 Or 99, 104, 862 P2d 1293 (1993). "[T]he party asserting issue preclusion bears the burden of proof on the first, second, and fourth factors, after which the party against whom preclusion is asserted has the burden on the third and fifth factors." *Barackman v. Anderson*, 214 Or App 660, 667, 167 P3d 994 (2007).

In this instance, all of the elements of issue preclusion are met. Regarding the first element, the issue here—whether Ordinance 523 and the Resolutions are land use regulations—is the exact issue that was argued at LUBA and that formed the basis of LUBA's final orders on jurisdiction in *Briggs I* and *Cave*. *Briggs I* at 13; *Cave* at 11.[11] If Ordinance 523 and the Resolutions were land use regulations, then LUBA would have had jurisdiction in *Briggs I* and *Cave*, respectively. Here, if the Ordinances and Resolutions are land use regulations, ORS 215.130, ORS 215.223 and ORS 215.503 might apply to them. LUBA determined the precise issue Plaintiffs argue in this action, so Plaintiffs are precluded from making the same argument in this subsequent matter.

The second element is also met because the issue of whether Ordinance 523 and the Resolutions were land use regulations was actually litigated in *Briggs I*. "Actually litigated" means the factual or legal issues the plaintiff brings in a subsequent matter were raised by the parties and determined by the court in the previous matter. *Thomas v. U.S. Bank Nat'l Ass'n*, 244 Or App 457, 472, 260 P3d 711 (2011) (citing *Ram Tech. Servs., Inc. v. Koresko*, 240 Or App

[11] For an explanation of why *Briggs II* does not have preclusive effect against the County here, see Defendants' Response to Plaintiffs' Motion for Summary Judgment (filed May 22, 2023) at 14-16.

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620, 632, 247 P3d 1251 (2011)). In other words, "the prior 'resolution of an issue must either be apparent from the face of a judgment or order or, if not apparent from the face [thereof], must have been necessary to the resolution of the prior adjudication.'" *Underwood v. City of Portland*, 319 Or App 648, 657, 510 P3d 918 (2022) (brackets in original) (quoting *Leach v. Scottsdale Indem. Co.*, 261 Or App 234, 240, 323 P3d 337 (2014)).

Relying on these standards, the issues of whether Ordinance 523 or the Resolutions are land use regulations was actually adjudicated in *Briggs I* and *Cave*, respectively, and essential to LUBA's determination that it lacked jurisdiction in both cases. *Briggs I* at 13-14; *Cave* at 11-12. As stated, LUBA has limited but exclusive jurisdiction over appeals of land use decisions, which include decisions to adopt, amend or apply land use regulations. ORS 197.825(1); ORS 197.015(10). In addition, all of the provisions in ORS Chapter 215 that Plaintiffs rely on here (ORS 215.130(2), ORS 215.130(5), ORS 215.223(1), ORS 215.503(3), and ORS 215.503(4)) only apply to land use regulations. *Supra* Sec. II.D.1.a. If, as Plaintiffs claim here, the Ordinances and Resolutions are subject to ORS Chapter 215, then they necessarily must be land use regulations over which LUBA has exclusive jurisdiction. In other words, in deciding the question of jurisdiction, LUBA necessarily had to determine whether Ordinance 523 or the Resolution were "land use regulations," and it concluded that they are not.

In Plaintiffs' response to Defendant's original motion for summary judgment in this action, Plaintiffs misconstrue this factor to argue that only final judgments that conclude the entire litigation are preclusive, and because LUBA's orders in *Briggs I* and *Cave* transferred the matters to circuit court, they are mere "interlocutory" orders that have no preclusive effect. Pls.' Resp. Defs.' Mot. at 5-6. Plaintiffs further argue that LUBA's orders in *Briggs I* and *Cave* are merely an "earlier phase of the same lawsuit" and as such, preclusion does not apply. *Id.* at 6. Plaintiffs' arguments are unconvincing. First, the *Thomas* case illustrates that final orders that do not entirely conclude a lawsuit may still have preclusive effect provided the issues are actually litigated to the court. 244 Or App at 463, 472. *Thomas* involves a series of class action lawsuits

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against defendant U.S. Bank alleging untimely paid termination wages. *Id.* at 459. In the first such suit, the trial court initially certified the class of plaintiffs, then after several years of litigation and upon defendant's renewed motion to decertify, the trial court decertified the class. *Id.* at 460, 462. Upon decertification, the named plaintiffs proceeded to trial on their claims. *Id.* at 463.[12]

As that initial suit was proceeding, plaintiffs' counsel filed several other class action suits against defendant, including the one at issue in *Thomas*. *Id.* at 463-64. The proposed class in *Thomas* consisted of members of the previous decertified class as well as some additional class members. *Id.* at 466. The defendant moved to dismiss plaintiffs' class-related claims as precluded by the previous decertification order. *Id.* at 467. The trial court denied defendants' motion, which defendant appealed through an interlocutory appeals process. *Id.* at 468. On appeal, the Court of Appeals reversed the trial court's denial, concluding "that the requisites of issue preclusion are established here as to the impropriety of class treatment of claims by members of the former [] class included in plaintiffs' proposed class." *Id.* at 474.

Regarding the second *Nelson* factor, the Court of Appeals found the dispositive issue of class certification was actually litigated in the previous suit, stating "An issue is 'actually litigated' when 'the factual and legal issues that the plaintiff raises in the second case were *actually* adjudicated and essential to the determination of the first case.'" *Id.* 244 Or App at 472 (quoting *Ram Tech. Servs., Inc.*, 240 Or App at 632). Because "the parties properly submitted, and the trial court determined, the class certification issue three times[,]" the Court of Appeals concluded "the dispositive issue here was not only 'actually,' but exhaustively, litigated and adjudicated." *Id.*

[12] Likewise, upon concluding the *Thomas* plaintiffs were precluded by this decertification order, the Court of Appeals reversed the trial court but remanded "because defendant does not contest the ability of the named plaintiffs to seek individual relief." *Id.* at 474.

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As stated, *Thomas* refutes Plaintiffs' argument that only judgments that conclude a suit have preclusive effect because the initial decision to decertify the class did not conclude the named plaintiffs' litigation; after decertification, they proceeded to trial on their own claims. *Id.* at 463. Here, LUBA's final orders in *Briggs I* and *Cave* ultimately did not conclude the litigation because LUBA transferred the cases to circuit court for resolution of non-land use issues. Nevertheless, the issues that were actually litigated and essential to LUBA's decision that it lacked jurisdiction have preclusive effect on Plaintiffs here, just like the issues that were actually litigated and essential to the circuit court's decertification of the class had preclusive effect on the plaintiffs in *Thomas*.

Plaintiffs' argument that this suit is a continuation of the LUBA suits similarly lacks merit. Petitioners in *Briggs I* and *Cave* moved to transfer their cases to circuit court "as permitted by ORS 34.102 and OAR 661-010-0075(11), if LUBA should find that the challenged decision is not reviewable as a land use decision or a limited land use decision." Matasar Decl. Ex. 15 (*Briggs I* Motion to Transfer) and Ex. 16 (*Cave* Motion to Transfer). ORS 34.102(4) states:

> A notice of intent to appeal filed with the Land Use Board of Appeals pursuant to ORS 197.830 and requesting review of a decision of a municipal corporation made in the transaction of municipal corporation business that is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015 shall be transferred to the circuit court *and treated as a petition for writ of review*. If the notice was not filed with the board within the time allowed for filing a petition for writ of review pursuant to ORS 34.010 to 34.100, the court shall dismiss the petition.

(Emphasis added.) Because LUBA concluded it lacked jurisdiction in *Briggs I* and *Cave*, the matters were transferred as writs of review pursuant to ORS 34.102. However, as Plaintiffs admit, the writ of review suits are separate from this declaratory and injunctive relief action.[13] Pls.' Resp. to Defs.' Mot. at 5-6. ORS 34.102(4) only governs petitions for writ of review.

[13] The pending writ of review actions are *Briggs et al v. Lincoln County*, Case No. 22CV07090 and *Cave et al v. Lincoln County*, Case No. 22CV09472. Both actions have been stayed.

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Despite Plaintiffs' protestations otherwise, this declaratory and injunctive relief lawsuit is not "effectively the same case as the cases where LUBA ruled it lacked jurisdiction" but is another matter entirely. As a result, LUBA's final orders in *Briggs I* and *Cave* have preclusive effect in this separate, subsequent matter.[14]

Skipping ahead to the fifth *Nelson* element, LUBA has exclusive jurisdiction to review whether a local decision concerns the adoption or application of a land use regulation. ORS 197.825(1). "A valid and final administrative adjudication has the same preclusive effects as a court's judgment." *Chavez v. Boise Cascade Corp.*, 307 Or 632, 635, 772 P2d 409 (1989) (citing *N. Clackamas Sch. Dist. v. White*, 305 Or 48, 52, 750 P2d 485, *modified on other grounds*, 305 Or 468, 752 P2d 1210 (1988)). Because LUBA was expressly created to make that determination, its adjudication of the issue is precisely the type of decision to which this Court gives preclusive effect.

Regarding the third and fourth elements, most of the Plaintiffs themselves were parties in one or both of the LUBA cases, but even if they were not themselves parties at LUBA, they are in privity with the parties there and are thus precluded as if they were parties. First, as stated, Plaintiffs Briggs, Cave, Gibbons, McClanahan, Guptill, Guptill, Reading, Fitzpatrick, Moore, Weske, Fender, Fender, Palmer, Palmer, Strozhenko, Scott, Merritt and Lynch were also petitioners challenging Ordinance 523 in *Briggs I*, while Plaintiffs Cave, Gibbons, Guptill, Guptill and Kesey were also petitioners challenging Resolution 21-12-3A in *Cave*. Because the *Briggs I* Plaintiffs were parties at LUBA, they are thus precluded from arguing Ordinance 523 is a land use regulation subject to land use laws, and because the *Cave* Plaintiffs were parties at

[14] Assuming *arguendo* this was the same matter, Plaintiffs' argument is no more compelling: Plaintiffs would have this Court conclude Ordinance 523 and the Resolutions *are* land use regulations, depriving the Court of jurisdiction, so it would transfer the case back to LUBA, which has already concluded they *are not* land use regulations, at which point LUBA is likely to transfer it back to this Court. Plaintiffs missed their opportunity to appeal LUBA's final orders in *Briggs I* and *Cave* and are precluded from relitigating those issues conclusively determined there.

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LUBA, they are thus precluded from arguing the same regarding the Resolution. All Plaintiffs were parties to one of the suits at LUBA, and the Plaintiffs that did not participate in the other suit at LUBA are nevertheless precluded from both because they are in privity with the *Briggs I* and *Cave* Plaintiffs.

"Privity is essentially a conclusory term that describes the relationship between a party and a non-party that is deemed close enough to warrant the application of claim or issue preclusion to the non-party." *Ditton v. Bowerman*, 117 Or App 483, 487, 844 P2d 919 (1992) (citing 1B *Moore's Federal Practice* 392, ¶ 0.411[1] (2d ed 1992)). Privity "encompasses those who control an action although not parties to it; those whose interests are represented by a party to the action; and successors in interest to those having derivative claims." *Thomas,* 244 Or App at 473 (internal quotations and citations omitted).

The Complaint states, "Plaintiffs here are representative of all short-term rental license holders in Lincoln County who are detrimentally impacted by the Ordinance." 2d Am. Compl. ¶ 4. It further states:

> Unlicensed Plaintiffs here are representative of all property owners who attempted to license but were denied licenses; who were wrongfully ordered to cease and desist a preexisting lawful use only when licenses were unavailable; or who have been unable to request a short-term rental license because of the County's invalid Moratoria and lack of notice as to their land use changes.

2d Am. Compl. ¶ 5. Plaintiffs additionally "reserve the right to amend this complaint and plead a class action." 2d Am. Compl. ¶ 7. All of this demonstrates that all Plaintiffs in this action are in privity with the petitioners in *Briggs I* and *Cave* at LUBA and are thus precluded from making the same arguments challenging Ordinance 523 and the Resolution.

In *Hoffman v. Public Employes' Retirement Board*, two individual plaintiffs challenged then-Governor McCall's entitlement to his gubernatorial retirement benefits after the law providing the benefits was repealed. 31 Or App 85, 87, 569 P2d 701 (1977). The Governor's entitlement had already been challenged by two plaintiffs, an individual and a corporate plaintiff ("an organization of organizations"), in a previous suit. *Id.* at 87, 92. In the previous suit, the

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circuit court found the Governor both eligible for and entitled to the benefits, and although the previous plaintiffs filed a notice of appeal, they did not pursue an appeal. *Id.* at 88. Even though neither the plaintiffs nor the defendants were exactly the same between the two suits, the Court of Appeals concluded the rules of privity and virtual representation disposed of the second suit. *Id.* at 94.

The *Hoffman* court first explained privity in a "taxpayers' suit," where a plaintiff alleges their status as a taxpayer and then brings the suit "on behalf of themselves and other taxpayers of the State of Oregon." *Id.* at 90. The Court then summarized the defendant's argument "that when a suit is brought by one qualified citizen on behalf of other citizens to determine a public right in a matter of general interest, all citizens are barred from relitigating the issue." *Id.* at 93. Finally, the Court stated the rule on privity in a "taxpayers' suit:"

> Where a suit is brought to determine a public right, all citizens and taxpayers of the county are parties to the proceeding by representation, and are bound by the judgment, not only as to matters which were litigated, but also as to matters which existed at the time and which could have been litigated in the case, the same as the actual formal parties on the record, regardless of whether they had actual notice of the pendency of the suit or not.
>
> * * *
>
> In the absence of fraud or collusion a judgment for or against a municipal corporation, county, town, school or irrigation district or other local governmental agency or district, or a board or officers properly representing it, is binding and conclusive on all residents, citizens and taxpayers in respect to matters adjudicated which are of general or public interest such as questions relating to public property, contracts or other obligations. The rule is applicable to persons who have notice of the suit and even to persons without actual notice of the suit.
>
> The rule is founded upon basic concepts of privity and virtual representation. The doctrine of virtual representation, well recognized in equity, is based upon considerations of necessity and paramount convenience and may be invoked to prevent a failure of justice. The doctrine is applicable if the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them. And under the principles of that rule 'privity' depends more upon the relation of the parties to the subject matter than upon their connection as parties with or any activity in the former litigation.

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Id. at 93-94 (alterations omitted) (citing *Floersheim v. Bd. of Comm'rs of Harding Cnty.*, 28 NM 330, 335, 212 P 451 (1922), *Drainage Dist. No. 1 Reformed v. Matthews*, 361 Mo 286, 302-03, 234 SW 2d 567 (1950)). As a result, the Court of Appeals affirmed the circuit court's dissolution of the writ.

The principles of privity and virtual representation that disposed of the lawsuit in *Hoffman* apply with equal force here. The petitioners in *Briggs I* and *Cave* argued that Ordinance 523 and Resolution 21-3-12A were land use regulations subject to the applicable requirements of the land use laws, and LUBA's final orders, finding that neither Ordinance 523 nor Resolution 21-3-12A were land use regulations, are "binding and conclusive on all residents, citizens and taxpayers in respect to" those same challenges Plaintiffs pursue here. *Hoffman*, 31 Or App at 93-94 (quoting *Matthews*, 361 Mo at 302-03). Furthermore, similar to a "taxpayers' suit" brought on behalf of themselves and all taxpayers, Plaintiffs claim to be "representative of all short-term rental license holders in Lincoln County" and "all property owners" who tried to but failed to obtain licenses. 2d Am. Compl. ¶¶ 4, 5. And Plaintiffs' interests as property owners and short-term rental licensees are identical to petitioners' interests in *Briggs I* and *Cave* such that there is no adversity of interest between them. *Hoffman*, 31 Or App at 94 (quoting *Matthews*, 361 Mo at 302-03). Thus, Plaintiffs here were either parties at LUBA or were in privity with the petitioners there.

Accordingly, Plaintiffs are precluded from arguing to this Court that either Ordinance 523 or the Resolution is a zoning ordinance or land use regulation. Plaintiffs are simply trying to get a second bite of the apple and the Court is not obligated to accommodate the attempt.

iv. ORS 215.130, ORS 215.223 and ORS 215.503 Do Not Invalidate the Ordinances, Resolutions or Order

ORS 215.130(5) provides, in relevant part, "The lawful use of any building, structure or land *at the time of the enactment or amendment of any zoning ordinance or regulation* may be continued." (Emphasis added.) As described above, neither the Ordinances, Resolutions nor

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Order are a "zoning ordinance or regulation," and Plaintiffs have not identified any such zoning ordinance or regulation. Therefore, ORS 215.130(5) does not provide a legal basis to invalidate the Ordinances, Resolutions, or Order. *Morgan v. Jackson Cnty.*, 290 Or App 111, 414 P3d 917, *rev den*, 362 Or 860 (2018) (ORS 215.130(5) applies to zoning regulations, not business licensing regulations).

Again, LUBA considered and rejected this exact argument regarding Ordinance 523 in *Briggs I.* Petitioners in *Briggs I* argued that because Ordinance 523 prohibits the transfer of an STR license from one owner to the next, Ordinance 523 violates ORS 215.130(5). *Briggs I* at 9. LUBA expressly rejected this argument, stating "Ordinance 523 is not a 'zoning ordinance or regulation' and, therefore, ORS 215.130(5) does not apply and does not bar the county from restricting the transfer of licenses upon the change of ownership of the property." *Id.* at 10. ORS 215.130(5) allows a "lawful use" of land to continue notwithstanding changes to the local "zoning ordinance or regulation[s]." Conversely, an ordinance that is not a "zoning ordinance or regulation" is not subject to the statute. *Morgan*, 290 Or App at 120. In *Briggs I*, LUBA expressly held that Ordinance 523 is a business licensing regulation, not a zoning regulation, therefore Ordinance 523 does not trigger the protections in ORS 215.130(5). *Briggs I* at 13. The decision in *Briggs I* was not appealed. ORS 197.850 (providing for appeal of a final order). It is therefore established law—binding on this Court regardless of issue preclusion—that Ordinance 523 is not a land use regulation and ORS 215.130(5) does not apply to a determination of a person's rights under it.[15]

The same is true for Ordinances 487, 490 and 509, the Resolutions and the Order: none is "zoning ordinance or regulation" and ORS 215.130(5) does not apply to bar the County from restricting the transfer of licenses. In short, ORS 215.130(5) simply does not apply.

[15] Again, because the same issue was raised, argued and resolved by LUBA, Plaintiffs are precluded from raising it again in this proceeding.

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Plaintiffs next allege that the Ordinances and Resolution were adopted in violation of the notice requirement in ORS 215.503 and the public hearing and notice requirements of ORS 215.223. 2d Am. Compl. ¶¶ 77(a)-(b), 78(a)-(b), 79(a)-(b), and 85. To the contrary, like ORS 215.130(5), ORS 215.503 and ORS 215.223 do not apply to the Ordinances, Resolutions or Order because they are not land use regulations. As a result, the County was not required to comply with the statutes when adopting the Ordinances, Resolutions or Order.

ORS 215.503 states, in relevant part:

> (2) All legislative acts *relating to comprehensive plans, land use planning or zoning* adopted by the governing body of a county shall be by ordinance.
>
> * * *
>
> (4) [A]t least 20 days but not more than 40 days before the date of the first hearing on *an ordinance that proposes to rezone property*, the governing body of a county shall cause a written individual notice of land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone.
>
> * * *
>
> (9) *[P]roperty is rezoned* when the governing body of the county:
> (a) Changes the base zoning classification of the property; or
> (b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone.

(Emphasis added.)

Similarly, ORS 215.223(1) states:

> No *zoning ordinance* enacted by the county governing body may have legal effect unless prior to its enactment the governing body or the planning commission conducts one or more public hearings on the ordinance and unless 10 days' advance public notice of each hearing is published in a newspaper of general circulation in the county or, in case the ordinance applies to only a part of the county, is so published in that part of the county.

(Emphasis added.) ORS 215.503 and ORS 215.223 did not apply to the County's decisions to adopt the Ordinances, Resolutions or Order because the Ordinances, Resolutions and Order do not "relate[] to comprehensive plans, land use planning or zoning[.]" Further, if the Ordinances, Resolutions and Order did relate to comprehensive plans, land use planning or zoning, they

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would be land use regulations subject to LUBA review and LUBA has already determined they are not. *See supra.* Moreover, LUBA already expressly rejected the argument that Ordinance 523 is subject to the notice requirements in ORS 215.503:

> [I]f 'property is rezoned' by Ordinance 523, then the county must provide individualized notice as specified in ORS 215.503. [W]e disagree with petitioners that [Ordinance 523] rezones any property. Nothing in Ordinance 523 changes the zoning of property or amends the provisions of LCC chapter 1 constituting the county's zoning code.

Briggs I at 7-9. As a result, ORS 215.503 and ORS 215.223 do not provide a basis for relief.

Plaintiffs argue that "the Moratoria are of no legal effect, because the moratoria were Resolutions, not Ordinances, in violation of ORS 215.130(2)." 2d Am. Compl. ¶ 79(d). Once again, this statute also does not apply. ORS 215.130(2) states:

> An *ordinance designed to carry out a county comprehensive plan and a county comprehensive plan* shall apply to:
>
> (a) The area within the county also within the boundaries of a city as a result of extending the boundaries of the city or creating a new city unless, or until the city has by ordinance or other provision provided otherwise; and
>
> (b) The area within the county also within the boundaries of a city if the governing body of such city adopts an ordinance declaring the area within its boundaries subject to the county's land use planning and regulatory ordinances, officers and procedures and the county governing body consents to the conferral of jurisdiction.

(Emphasis added.) The Resolutions were administrative actions that temporarily suspended the issuance of business licenses for short-term rentals; they were not "designed to carry out a county comprehensive plan," nor were they the "county comprehensive plan[.]" ORS 215.130(2). *See Cave* at 8 ("Petitioners do not identify any comprehensive plan provisions . . . applicable to the Resolution."). Like ORS 215.130(5), ORS 215.130(2) does not apply and therefore does not provide a basis for relief.

b. <u>The County Did Not Exceed its Authority and the Ordinances, Resolutions and Order Are Not Preempted by ORS 215.130(5)</u>

The Complaint asserts that the Ordinances, Resolutions and Order are preempted by ORS 215.130(5). 2d Am. Compl. ¶¶ 77(d), 78(d), 79(d), and 85. ORS 215.130(5) does not preempt

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the Ordinances, Resolutions and Order because they are business licensing regulations that do not conflict with the limitations on regulating uses of land.

When evaluating an allegation of preemption, "[t]he first inquiry must be whether the local rule in truth is incompatible with the [state] legislative policy, either because both cannot operate concurrently or because the legislature meant its law to be exclusive." *La Grande/Astoria v. PERB* ("*La Grande/Astoria*"), 281 Or 137, 148, 576 P2d 1204, *aff'd on reh'g*, 284 Or 173, 586 P2d 765 (1978). The Court "interpret[s] local enactments, if possible, to be intended to function consistently with state laws," and "assume[s] that the legislature does not mean to displace local civil or administrative regulation of local conditions by statewide law unless that intention is apparent." *Id.* at 148-49. "Only where the legislature '*unambiguously* expresses an intention to preclude local governments from regulating' in the same area governed by an applicable statute can th[e] presumption against preemption be overcome." *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or 437, 454, 353 P3d 581 (2015) (quoting *Gunderson LLC v. City of Portland*, 352 Or 649, 659, 290 P3d 803 (2012)).

To determine whether a state statute preempts a local enactment, the court must "ascertain the intentions of the legislature, looking first to the text in context and then, if necessary, to its enactment history and other aids to construction." *AT & T Commc'ns of the Pac. Nw., Inc. v. City of Eugene* ("*AT&T*"), 177 Or App 379, 392, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002). A state law "will displace the local rule where the text, context, and legislative history of the statute 'unambiguously expresses an intention to preclude local governments from regulating' in the same area as that governed by the statute." *Rogue Valley Sewer Servs.*, 357 Or at 450-51 (quoting *Gunderson*, 352 Or at 663). This is "a high bar to overcome." *Id.* at 454.

The Ordinances, Resolutions and Orders are not preempted by ORS 215.130(5) because the statute unambiguously applies only to a "zoning ordinance or regulation" and, as described above, the Ordinances, Resolutions and Orders are not zoning ordinances or regulations.

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Moreover, there is nothing in the Ordinances, Resolutions or Order that conflicts with ORS 215.130(5), which protects an existing lawful use from the application of a subsequently-enacted zoning ordinance or regulation, and the STRs are business licensing regulations that do not affect zoning or land use regulations. Further, nothing in ORS 215.130(5) evidences a legislative intent to limit or otherwise regulate a county's authority to regulate business activities in the county. *Morgan*, 290 Or App at 120 (ORS 215.130(5) does not apply to business licensing ordinance). Therefore, the Ordinances and Resolution are not preempted by the statute.

Plaintiffs' argument relies on LUBA's decision in *Briggs II* in which LUBA held that ORS 215.130(5) preempted a *completely different regulation*. The regulation at issue in *Briggs II* was Ballot Measure 21-203, the initiative measure that was approved by the voters. The Measure expressly declared licensed short-term rentals to be a nonconforming use. Matasar Decl. Ex. 7, at 5. The Measure also declared that it was intended to implement the County comprehensive plan and achieve the purposes of specific residential zones. *Id.* at 2. Therefore, LUBA concluded that the Measure was a land use regulation. *Briggs II* at 16 n.7 (citing Order Denying Motion to Dismiss). LUBA also restated its conclusion from *Briggs I* that Ordinance 523 is *not* a land use regulation because "the amendments in Ordinance 523 to LCC ch 4 are qualitatively different from those the voters adopted in [Measure] 21-203." *Id.* In short, because the Ordinances are not a "zoning ordinance or regulation," they cannot be preempted by ORS 215.130(5) as a matter of law and LUBA's disposition of an unrelated ballot measure is irrelevant.

c. <u>The Ordinances Are Not Vague</u>

Plaintiffs also challenge the Ordinances as unconstitutionally vague. 2d Am. Compl. ¶¶ 77(e), 78(e). This is so, Plaintiffs argue in their Motion for Summary Judgment, because the Ordinances do not adequately explain what conduct is prohibited or confer unrestrained enforcement authority on County Counsel. Pls.' Mot. at 28-30. Plaintiffs' arguments are not supported by either the text of the Ordinances or the relevant authorities. Because a person of

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ordinary intelligence can readily understand what conduct is prohibited by the Ordinances and they are not unconstitutionally vague, the County is entitled to judgment in its favor.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 US 104, 110, 92 S Ct 2294, 33 L Ed 2d 222 (1972). A government regulation is unconstitutionally vague when it "fail[s] to give persons of ordinary intelligence adequate notice of what conduct is proscribed" or it "permit[s] or authorize[s] 'arbitrary and discriminatory enforcement.'" *G.K. Ltd. Travel v. City of Lake Oswego*, 436 F3d 1064, 1084 (9th Cir 2006) (citing *Hill v. Colorado*, 530 US 703, 732, 120 S Ct 2480, 147 L Ed 2d 597 (2000)). However, "[v]agueness doctrine cannot be understood in a manner that prohibits governments from addressing problems that are difficult to define in objective terms." *Gammoh v. City of La Habra*, 395 F3d 1114, 1121 (9th Cir 2005) (citing *Grayned*, 408 US at 110). The language in the regulation need not be "mathematical[ly] certain[,]" and may be flexible and broad, so long as it is clear what it does. *Grayned*, 408 US at 110 (citing *Esteban v. Cent. Mo. State Coll.*, 415 F2d 1077, 1088 (CA8 1969), *cert. denied*, 398 US 965, 90 S Ct 2169, 26 L Ed 2d 548 (1970)).

Plaintiffs do not argue the Ordinances are vague as applied to their particular situations and thus appear to raise a facial challenge.[16] *See Delgado v. Souders*, 334 Or 122, 149, 46 P3d 729 (2002) ("Defendant makes no argument that any aspect of [the statute] is vague as applied to his particular case; rather, he contends that 'the entire statute leaves a person charged with its violation uncertain as to what is forbidden and what is not.' Accordingly, defendant raises only a facial challenge to [the statute]."). A facial vagueness challenge that implicates no constitutionally protected conduct must demonstrate that the "enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 US 489, 494-95, 102 S Ct 1186 (1982). "[E]conomic regulation is subject to a less strict vagueness

[16] Plaintiffs appear to concede that their challenge is facial. 2d Am. Compl. ¶ 1.

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test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* (citations omitted). "A 'reasonable degree of certainty' about what conduct falls within the statute's prohibition is required; absolute certainty is not." *State v. Plowman*, 314 Or 157, 160, 838 P2d 558 (1992) (en banc) (quoting *State v. Cornell/Pinnell*, 304 Or 27, 29-30, 741 P2d 501 (1987)).

Plaintiffs bring a facial vagueness challenge against economic regulations that do not implicate any constitutionally protected conduct, which the case law establishes as an extremely high bar that Plaintiffs simply cannot meet. The Ordinances, Resolutions and Order combine to provide persons of ordinary intelligence adequate notice of what is prescribed. Generally, the STR regulations establish conditions for operating short-term rentals and implement a licensing program to ensure compliance with those standards. Matasar Decl. Ex. 2 at 1 (§ 4.405(1)(b)). The regulations make it unlawful to operate a short-term rental without a license, and state that the consequence for doing so is disqualification from obtaining a future license. *Id.* at 2 (§ 4.420(1)). The operating standards include requirements related to signage, notice to the fire chief and sheriff's department, quiet hours, garbage service, parking, onsite wastewater treatment systems, occupancy limits, and other conditions relevant to operating a short-term rental. *Id.* at 6-9 (§ 4.440). They establish clear subarea boundaries and limitations on licenses issued in each, and explain the process when that limitation is reached and exceeded. *Id.* at 3 (§ 4.420(4)). They provide a process to field complaints about individual STR properties, including offering STR owners a hearing to respond to the allegations in the complaint. *Id.* at 9-10 (§ 4.445). They also allow a process to appeal the denial of a license. *Id.* at 10 (§ 4.450). The regulations, which do not permit arbitrary or discriminatory enforcement, provide a comprehensive business licensing scheme for the operation and licensing of a short-term rental in Lincoln County and are therefore not vague.

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For these reasons, the Ordinances are not unconstitutionally vague and the County is entitled to judgment in its favor.

2. The County Is Entitled to Judgment in its Favor as a Matter of Law on the Third Claim for Relief

The third claim seeks declaratory and injunctive relief against the Lincoln County Sheriff if the Ordinances, Resolutions and Order are invalidated. For the reasons stated above, the County is entitled to judgment as a matter of law on the first two claims; therefore, because the Ordinances, Resolutions and Order are valid, the County is also entitled to judgment in its favor as a matter of law on the third claim for relief as well.

3. The County is Entitled to Judgment in its Favor as a Matter of Law on the Fourth Claim for Relief

Plaintiffs' fourth claim for relief alleges an entitlement to attorney fees. The fourth claim is based on the allegation that Plaintiffs are protecting an important public interest and relies on the decisions in *Deras v. Myers*, 272 Or 47, 535 P2d 541 (1975) and *De Young v. Brown*, 368 Or 64, 486 P3d 740 (2021). 2d Am. Compl. ¶ 93. Properly understood, the Complaint completely contradicts the principles articulated by the Court in *Deras* and *De Young*, and the Court should grant summary judgment in the County's favor on this claim as well.

In *De Young*, the Oregon Supreme Court determined that the courts have equitable authority to award attorney fees under the public benefit theory and articulated the prerequisites for a valid claim. 368 Or at 70. In so deciding, the court identified "three prerequisites for a fee award under that inherent equitable authority: (1) the proceeding must be one in equity; (2) the party requesting fees must have been the prevailing party; and (3) the party requesting fees must have been seeking to vindicate a right that applies to others as well as the party itself, *without an overriding personal pecuniary interest*." *De Young*, 368 Or at 71 (emphasis added) (citing *Armatta v. Kitzhaber*, 327 Or 250, 287, 959 P2d 49 (1998); *Gilbert v. Hoisting & Portable*

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Eng'rs, 237 Or 130, 137-38, 384 P2d 136 (1963), *aff'd as modified*, 237 Or 130, 390 P2d 320 (1964), *cert. den.*, 376 US 963, 84 S Ct 1125, 11 LEd2d 981 (1964)).

Deras stands for the same proposition: a party may be entitled to award of attorney fees only when the party "vindicates an important constitutional right applying to all residents of the state, *without personal gain to the party*." *De Young*, 368 Or at 71 (emphasis added) (citing *Deras*, 272 Or at 66).

In this case, Plaintiffs' overriding personal financial interests are evident from the Complaint: to derive income from their STRs. *See* 2d Am. Compl. ¶ 8-28 (Plaintiffs generally state "The Ordinance, if valid and enforced, would detrimentally impact the value of [their] property and [their] right to earn a livelihood [or, alternatively, an income] from that property."). Plaintiffs are not entitled to an award of attorney fees because the doctrine they invoke is intended to protect the *public* interest rather than their own *private* financial interests. There is no reasonable basis for the allegation that "Plaintiffs seek to represent a public interest, without an overriding personal pecuniary interest." 2d Am. Compl. ¶ 92. Furthermore, in contravention of *Deras*, Plaintiffs only seek to protect their right to continue to receive income from their properties by using them for short-term rentals which, if successful, will result in "personal gain" to each Plaintiff. Accordingly, Plaintiff's reliance on *Deras* and *De Young* is misplaced. Plaintiffs are not entitled to relief on the third claim and the County is entitled to judgment as a matter of law.

4. The County Is Entitled to an Award of Its Attorney Fees

For the reasons described above, there is no objectively reasonable basis for the claims asserted in the Complaint, most of which have already been conclusively decided by LUBA in the *Briggs I* and *Cave* decisions. By bringing the same claims for a second time, after they have already been rejected once, Plaintiffs have imposed upon the residents and taxpayers of Lincoln County a burden they should not have had to bear. Accordingly, the County is entitled to an award of its reasonable attorney fees pursuant to ORS 20.075(1), 20.105 and ORCP 68.

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III. CONCLUSION

For these reasons, and there being no issue of material fact, the County is entitled to judgment as a matter of law.

DATED this 26th day of May, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I caused to be served a copy of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND AMENDED COMPLAINT on:

Heather A. Brann
Email: branns@earthlink.net
Attorney for Plaintiffs

by the following indicated method or methods:

☐ by **First-Class Mail**

☐ by **Hand-Delivery**

☐ by **Overnight Delivery**

☐ by **Facsimile Transmission**

☒ by **Electronic Mail**

☒ by **Electronic Service (UTCR 21.100)**

DATED this 26th day of May, 2023.

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