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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND AMENDED COMPLAINT Honorable Joseph C. Allison, Pro Tem Hearing Date: August 16-17, 2023 at 9:00 a.m.

Defendant Lincoln County, on behalf of itself and Defendant Curtis L. Landers (collectively "County"), submits this reply ("Reply") in support of Defendants' motion for summary judgment on Plaintiffs' second amended complaint[1] ("Defendants' Motion"). For the

[1] Plaintiffs' Response states, "Plaintiffs rely upon the Complaint, First Amended Complaint, Second Amended Complaint and exhibits thereto, as well as on all" other pleadings filed in this matter. Pls.' Resp. at 1-2. Suffice it to say, the initial Complaint and First Amended Complaint were superseded by the Second Amended Complaint and as such may not be relied upon by Plaintiffs. ORCP 23. *See Rodriguez ex rel Rodriguez v. The Holland, Inc.*, 328 Or 440, 445, 980 P2d 672 (1999) (citations omitted) ("After an original pleading has been amended, it no longer has status as a pleading in the action. The amended pleading supersedes the previous pleading and becomes the operative pleading.").

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reasons set forth in Defendants' Motion and as further described below, Plaintiffs' response in opposition to the Motion ("Plaintiffs' Response") does not provide a legal or factual basis to deny Defendants' Motion. Therefore, the Court should grant Defendants' Motion.

I. Jurisdiction in Circuit Court Is Proper and the County Is Entitled to Judgment in its Favor as a Matter of Law

The County is not moving and has never moved to dismiss this matter for lack of jurisdiction because—unlike Plaintiffs—the County recognizes that neither the Ordinances nor Resolutions nor Order are land use regulations, thus jurisdiction in this Court is proper. The fatal flaw in the majority of Plaintiffs' claims, and the reason the County is entitled to judgment in its favor as a matter of law, is that the plain text of the statutes Plaintiffs rely on to invalidate the Ordinances, Resolutions and Order *only apply to land use regulations*. Regardless of which tribunal considers the issue, the result is the same: the statutes do not apply to the short-term rental ("STR") regulations in the Ordinances, Resolutions and Order because the STR regulations are not land use regulations.

Preliminarily, Plaintiffs' assertion that certain facts are undisputed is demonstrably false because, apart from the alleged undisputed fact that each named plaintiff has at some point operated a short-term rental in a residential zone, the other purportedly "undisputed facts" are neither "undisputed" nor entirely "facts." Pls.' Resp. at 2. For example:

1. Plaintiffs assert is it "undisputed" that short-term rentals are a "use permitted outright" in residential zones under the Lincoln County zoning ordinance, LCC Chapter 1. The County has disputed this assertion throughout this litigation, including each time Plaintiffs have asserted it, and maintains that short-term rentals are not a permitted use, conditional use, prohibited use or any kind of "use" under LCC Chapter 1. *E.g.*, Defs.' Resp. at 7-9. Short-term rentals are simply a commercial activity that is regulated through business licensing, entirely outside of the County's zoning code.

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2. Plaintiffs assert it is "undisputed" that the County never provided notice under ORS 215.503 or ORS 215.223. While it is technically true that the County did not provide notice to landowners regarding the STR regulations, this is because these notice statutes *do not apply* to the STR regulations, therefore notice was not required when the County enacted them. *E.g.*, Defs.' Mot. at 28-29. Here, Plaintiffs conflate the law and facts to support an implausible legal argument under the guise of "undisputed facts." The notice statutes did not apply and the County was not required to provide or publish notice.

3. Plaintiffs assert it is "undisputed" that the Ordinances, Resolutions and Order restrict the use of a dwelling. Again, this is a legal conclusion that the County disputes; it is neither a "fact" nor "undisputed." *See, e.g.*, Defs.' Resp. at 7-9 (STRs are not a "use" contemplated in the County's zoning code). Because short-term renting is not a "use" contemplated in the County's zoning code, nothing in the Ordinances, Resolutions or Order restricts Plaintiffs' residential use of their dwellings. The STR regulations restrict a specific *commercial activity* that occurs in a dwelling. Plaintiffs fail to distinguish between a "use" and an "activity," and the Ordinances, Resolutions and Order regulate a commercial activity that occurs in a dwelling in a residential zone; they do not restrict the residential use of a dwelling.

Accordingly, the Court should disregard Plaintiffs' alleged "undisputed facts."

A. Short-Term Rentals Are a Commercial Activity and Not a "Use" Recognized by the Zoning Code

As argued more fully in the County's Response to Plaintiffs' Motion for Summary Judgment, short-term rentals are not a "use" because they are not recognized or established in the County's zoning code. Defs.' Resp. at 7-9. According to case law, a "use" is determined by reference to the zoning code. *E.g.*, *Morgan v. Jackson Cnty.*, 290 Or App 111, 117, 414 P3d 917, *rev den*, 362 Or 860 (2018). Lincoln County's zoning code appears at Chapter 1 of the

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Lincoln County Code and does not regulate, contemplate or even mention STRs. In the first *Briggs et al. v. Lincoln County*, LUBA, the tribunal entrusted by the Legislature to decide matters involving land use, concluded "a short-term rental is not a land use designation or a use of a dwelling that is identified in LCC chapter 1[.]" ___ Or LUBA ___ (LUBA No. 2021-113) (2022 WL 715524) (Feb 10, 2022) ("*Briggs I*"). Matasar Mot. Decl. Ex. 5 (*Briggs I* LUBA Final Opinion and Order).[2] This should end the inquiry.

Plaintiffs continue to insist that, despite its absence from the zoning code, STR is a use permitted outright in residential zones, apparently as a sub-set of the "dwelling unit" use. Pls.' Resp. at 6. Plaintiffs then extrapolate that because the STR regulations affect their "use," the STR regulations are subject to the statutes that govern a county's ability to regulate land uses. *Id.* at 6-7. Plaintiffs' arguments are not well taken because the STR regulations are not land use regulations at all since they do not affect Plaintiffs' dwelling unit use or any land use.

Initially, although Plaintiffs state it often, they do not explain *how* short-term rentals are *themselves* a permitted, protected use by virtue of the fact that they occur in a "dwelling unit," and "dwelling unit" *is* a recognized use in the zoning code. While it is true that "under LCC chapter 1, 'dwelling' is a 'use permitted outright' in all residential zones" (Pls.' Resp. at 6 (citing Pls. Mot. Partial Summ. J. and Pls. Mot.)), the definition of "dwelling unit" in LCC chapter 1 does not apply because the STR regulations in LCC chapter 4 include their own definition of "dwelling unit," which expressly applies to LCC 4.405 to LCC 4.460. Matasar Mot. Decl. Ex. 4 at 2-3 (LCC § 4.415(3)). It does not logically follow that, and Plaintiffs do not explain how, short-term rentals are themselves a "use" under the County's land use regulations by virtue of a definition that does not apply. In addition, though the parties might agree that "dwelling unit" is a use recognized in the County's zoning code, just because an activity (here, short-term renting) occurs in a dwelling does not convert *that business activity* to a protected residential "use." *See*

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

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Briggs I at 10 (quoting County's Mot. Dismiss) ("Ordinance #523 does not regulate development—[a short-term rental] is an activity that occurs in a dwelling, but approval of the dwelling itself is separately regulated by LCC Chapter 1.").

Plaintiffs' argument that STRs fit within the definition of "dwelling unit" shows that they recognize that STRs are not themselves inherently a "use" of land. The County could have chosen to regulate STRs as a land use with all of the protections of the land use laws; indeed, this is how the invalidated Ballot Measure 21-203 treated STRs (and then impermissibly limited and restricted the STR use in violation of the land use statutes). *Briggs et al. v. Lincoln County*, __ Or LUBA__ (LUBA Nos. 2021-118 and 2022-030) (2022 WL 4271730) (Aug 8, 2022), slip op. at 13-14 ("*Briggs II*").[3] Matasar Mot. Decl. Ex. 11 (*Briggs II* LUBA Final Opinion and Order). But the County instead chose to regulate STRs as a business activity through its business licensing scheme.

The County's land use regulation of bed and breakfasts is illustrative here. LCC 1.1115(10) defines "Bed and breakfast inn" as:

> a structure designed for and occupied as a single-family residence in which no more than two sleeping rooms are provided on a daily or weekly basis for the use of no more than a total of six travelers or transients at any one time for a charge or fee paid, or to be paid, for the rental or use of these facilities.

Matasar Reply Decl. Ex. 17 at 4. Bed and breakfast inns are conditional uses in R-1 residential zones, but are explicitly excluded as conditional uses in R-1-A residential zones. *Id.* at 7-9 (LCC § 1.1310(2)(w), LCC § 1.1315(2)(a) (in R-1-A zones, those conditional uses allowed in the R-1 residential zone are allowed "excluding single-wide manufactured dwellings and bed and breakfast inns."). Like short-term rentals, bed and breakfasts operate out of a structure designed for and occupied as a single-family residence (generally a "dwelling unit" per LCC 1.1115(29)). Also like with short-term rentals, the definition of "dwelling unit" does not by its terms restrict

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

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bed and breakfasts from operating in a dwelling; under the plain text of the dwelling unit use and without considering bed and breakfasts as a separate use, a person could lawfully operate a dwelling as a bed and breakfast. Both bed and breakfasts and STRs occur within a dwelling in residential zones, but the County chose to regulate bed and breakfasts under the zoning code as a separate land use, and chose to regulate STRs entirely outside of the zoning code through its business licensing regulations. STRs are not a "use" under the County's zoning code.

Throughout the extensive briefing in this action, Plaintiffs have relied on LUBA's opinion in *Briggs II*, stating that it "established the nonconforming use of short term rental dwellings as of November 19, 2021, and that ruling was not appealed." Pls.' Resp. at 12. As the County has argued before, the reason LUBA determined in *Briggs II* that STRs were a nonconforming use was that the text of the Measure stated that STRs were a nonconforming use. *E.g.*, Defs.' Resp. at 15-16. The result in *Briggs II* was that LUBA reversed the County's decision to approve the Measure. *Briggs II* at 24 ("The decision is reversed."). Thus, there is nothing anywhere in the Lincoln County Code that declares STRs to be a nonconforming use, and there never has been a legally valid provision to that effect. But Plaintiffs continue to rely on this invalidated text to argue that STRs are and will forever be a nonconforming use protected by ORS 215.130(5). *E.g.*, Pls.' Resp. at 13-14. The Measure did more than declare STRs nonconforming uses, however, which begs the question: what other sections of the invalidated Measure are still in effect? If the Measure's text declaring short-term rentals a nonconforming use is still effective, is its provision making the nonconforming use "personal to the owner of record of a property" or making it not "assignable or transferable"? Matasar Mot. Decl. Ex. 7 at 5. Are the hardship provisions still effective? *Id.* Clearly not because *LUBA reversed the decision to approve the Measure*. When LUBA so reversed, the entire Measure, including the text stating that STRs are a nonconforming use, was invalidated. Plaintiffs cite no authority that allows a court to rely on text of an invalid ordinance, and this Court should decline to do so.

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Finally, considering Plaintiffs' argument that a dwelling is a protected, permitted use, nothing in the Ordinances, Resolutions or Order limits or restricts Plaintiffs' use of their property as a "dwelling unit." "Dwelling unit" is defined in the zoning code as "a single unit providing complete, independent living facilities for one or more persons including permanent provisions for living, sleeping, eating, sanitation and only one cooking area." Matasar Reply Decl. Ex. 17 at 5 (LCC § 1.1115(29)). Complying with the Ordinances, Resolutions and Order does not affect Plaintiffs' own use of their dwelling as a "single unit providing complete, independent living facilities for one or more persons including permanent provisions for living, sleeping, eating, sanitation and only one cooking area." Plaintiffs may themselves continue to "use" their "dwelling unit" as allowed in the zoning code under the provisions of the Ordinances, Resolutions and Order. Renting a dwelling unit out to a third party on a short-term basis is a commercial activity that is not inherent in the definition of "dwelling unit." The Ordinances, Resolutions and Order only affect Plaintiffs' ability to operate commercial activity in their dwelling unit by renting it on a short-term basis to third parties; the Ordinances, Resolutions and Order do not interfere with Plaintiffs' own dwelling use of their properties. Because STRs are not a "use" under LCC chapter 1, all of Plaintiffs' claims that rely on land use laws must fail and the County is entitled to judgment in its favor as a matter of law.

B. The Statutes Plaintiffs Rely on to Argue the STR Regulations Are Invalid Do Not Apply Here

Plaintiffs misconstrue the County's argument as jurisdictional in nature and misrepresent that the County argues that "only LUBA can enforce" the land use statutes Plaintiffs rely on. *E.g.*, Pls.' Resp. at 3, 23-24. As stated, the County has never challenged this Court's jurisdiction,

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and has also never argued that only LUBA may enforce ORS 215.130(2),[4] ORS 215.130(5), ORS 215.223, ORS 215.503; rather, as stated throughout this litigation, this Court has jurisdiction over the Ordinances, Resolutions, and Order, but because the laws Plaintiffs rely on do not apply to the STR regulations, the County is entitled to judgment in its favor as a matter of law.

In addition to vagueness, Plaintiffs Second Amended Complaint challenges the Ordinances, Resolutions and Order under ORS 215.130(2), ORS 215.130(5), ORS 215.223, and ORS 215.503. 2d Am. Compl. ¶¶ 77-79. The plain text of these statutes demonstrate that they only apply to ordinances that relate to the local comprehensive plan, land use regulations, or zoning:

- ORS 215.130(2): 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.

- ORS 215.130(5): 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. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful

[4] In their Response, Plaintiffs state "Defendants' citation to ORS 215.130(2) makes no sense, as it only describes the fact that land use ordinances do not apply within the boundaries of an incorporated city. The only possible relevance that subsection has here is the fact that the Short Term Rental ordinances only apply to unincorporated areas, and not to cities, so again, it appears that the County is doing land use." Pls.' Resp. at 11. The only reason the County's Motion addressed ORS 215.130(2) is because Plaintiffs assert in the Second Amended Complaint 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) (emphasis added). Plaintiffs did not, however, argue this issue in their Motion, and it appears they may have abandoned it. *See* Pls.' Mot. *passim* (no mention of ORS 215.130(2)). Because ORS 215.130(2) remains in the operative Second Amended Complaint, the County relies on the arguments regarding ORS 215.130(2) in its Motion. *E.g.*, Defs.' Mot. at 29.

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requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

- ORS 215.223(1): 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.

- ORS 215.503(4): In addition to the notice required by ORS 215.223 (1), at 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.

(Emphasis added.)

As evident by the emphasized text above, these statutes only apply to "an ordinance designed to carry out a county comprehensive plan and a county comprehensive plan" (ORS 215.130(2)), a "zoning ordinance or regulation" (ORS 215.130(5)), a "zoning ordinance" (ORS 215.223(1)), or "an ordinance that proposes to rezone property" (ORS 215.503(4)). Neither the Ordinances, Resolutions nor Order are "an ordinance designed to carry out a county comprehensive plan," "a county comprehensive plan," a "zoning ordinance or regulation," a "zoning ordinance," or "an ordinance that proposes to rezone property,"[5] so the laws that only apply to those types of ordinances do not apply to the STR regulations. The reason Plaintiffs' claims fail is not a matter of jurisdiction, but that the claims rely on statutes that do not apply to

[5] An "ordinance designed to carry out a county comprehensive plan," "a county comprehensive plan," a "zoning ordinance or regulation," a "zoning ordinance," or "an ordinance that proposes to rezone property," are all land use regulations, and LUBA has exclusive jurisdiction to review a decision to adopt land use regulations. ORS 197.015(11), ORS 197.825. But none of the Ordinances, Resolutions nor Order are a land use regulation, so jurisdiction to review them is not proper at LUBA; jurisdiction in the circuit court is.

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the Ordinances, Resolutions and Order Plaintiffs challenge here.[6] As such, the County is entitled to judgment in its favor as a matter of law.

C. Plaintiffs' Purported Precautionary Motion Is Untimely, Improper, and Ineffective

In addition to misrepresenting the County's argument, Plaintiffs also purport to make a "Precautionary Motion to Refer the Jurisdiction Question to the Court of Appeals," citing ORS 34.102(5). Pls.' Resp. at 23, 24. The Court should disregard this purported motion for several reasons. First, the purported motion is not timely. In its April 11, 2023 Order, the Court ordered that "[a]ny motions to be heard at the summary judgment proceeding will be filed by 4/28/23." Plaintiffs' Response was filed on June 20, 2023, nearly two months after that deadline. Second, the purported motion does not comply with ORCP 14. ORCP 14 A states, in relevant part, "Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." ORCP 14 B states, "The rules applicable to captions, signing, and other matters of form of pleadings, including Rule 17 A, apply to all motions and other papers provided for by these rules." Plaintiffs may not simply

[6] For the same reason, Plaintiffs' threat in footnote two is empty, but demonstrates why the County is seeking attorney fees at this point. Plaintiffs state "even if the County prevails in this particular action, and its Ordinances are ultimately upheld, the County will merely find itself the proud recipient of 500 or more Measure 49 claims and be required to pay for the diminution in value to the license holders' property by legislating away a measurable and valuable property right. Pls.' Resp. at 11 n.2. Measure 49 claims only apply when "a public entity enacts one or more *land use regulations* that restrict the *residential* use of private real property . . . and that reduce the fair market value of the property[.]" ORS 195.305(1) (Measure 49 codified) (emphasis added). Here, the Ordinances, Resolutions and Order are not land use regulations, so Measure 49 does not apply, and Plaintiffs' STRs are a commercial rather than residential activity. Thus, if the County prevails here, there will be yet another precedent establishing that the STR regulations are not land use regulations, though Plaintiffs apparently intend to argue yet again that they are in order to seek Measure 49 compensation that they would not be entitled to. After the final opinions and orders in *Briggs I*, *Cave*, *Briggs II* and *Blackburn*, this position has become objectively unreasonable, which is why the County is entitled to its attorney fees. *See* Defs.' Mot. at 35 (argument that County is entitled to attorney fees here).

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append a motion into their response to the County's own motion for summary judgment. *See Mulier v. Johnson*, 332 Or 344, 351, 29 P3d 1104 (2001) (memorandum supporting motion is not a motion for purposes of ORCP 68 C). If Plaintiffs wanted to make a proper motion to refer a jurisdiction question to the Court of Appeals, Plaintiffs would have needed to file a motion in compliance with ORCP 14.

Finally, even if Plaintiffs had properly and timely made the motion, the purported motion should be denied. To support their motion, Plaintiffs cite ORS 34.102(5), which states:

> In any case in which the Land Use Board of Appeals or circuit court to which a petition or notice is transferred under subsection (3) or (4) of this section disputes whether it has authority to review the decision with which the petition or notice is concerned, the board or court before which the matter is pending shall refer the question of whether the board or court has authority to review to the Court of Appeals, which shall decide the question in a summary manner.

A matter in circuit court that was transferred under ORS 34.102(4) is "treated as a petition for writ of review." This suit is for declaratory and injunctive relief and *is not* a petition for writ of review. ORS 34.102(5) therefore does not apply, and even if Plaintiffs had made a timely motion properly under the rules, it should be denied.

D. The Decision in Blackburn v. Lincoln County Is Directly Relevant

Plaintiffs object to the County's characterization of the trial court decision in *Blackburn et al. v. Lincoln County*, Lincoln County Circuit Court No. 22CV37957 (2023).[7] Pls.' Resp. at 23-24. Because the County received the order only two days before its Motion was due, the County did not have an opportunity to fully address the scope of the decision in the Motion. Accordingly, we do so here.

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[7] A copy of the trial court's decision is attached as Exhibit 13 to the Matasar Declaration in Support of Defendants' Motion for Summary Judgment.

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The County's Motion asserts that the court in *Blackburn* "determined that it lacked jurisdiction to provide the requested relief, and denied plaintiff's motion for partial summary judgment." Defs.' Mot. at 11 n.7. This is a true and accurate description of the decision in *Blackburn*. The *Blackburn* plaintiff filed suit challenging the STR regulations and their effect on his ability to sell his house. The plaintiff then filed a motion for *partial* summary judgment seeking three specific declarations from the court: (1) that plaintiff's use of his property as short-term rental is a lawful nonconforming use under LCC chapter 1, the County's land use regulations; (2) that LUBA conclusively ruled that plaintiff's use of the property as a short-term rental was a nonconforming use; and (3) that the County was precluded from arguing otherwise. To reiterate, this was a motion for *partial* summary judgment limited to these declarations and claims; other claims asserted in the complaint were not addressed in the motion or ultimately in the court's order.

In a letter opinion dated May 19, 2023, the court denied plaintiff's motion, citing Section IV(A) of the County's response to the motion for partial summary judgment. Matasar Mot. Decl. Ex. 13 at 3. Section IV(A) of the County's response is entitled "The Court Lack[s] Subject Matter Jurisdiction" and provides two reasons the court lacks jurisdiction. The County first argued in Section IV(A) that the court lacked jurisdiction to make a declaration of plaintiff's rights under the resolution because the resolution challenged in *Blackburn* had already expired and the claim was thus moot. Matasar Mot. Decl. Ex. 14 at 6 (citing *Cyrus v. Bd. of Comm'rs of Deschutes Cnty.*, 226 Or App 1, 5, 202 P3d 274 (2009) (citations omitted) (claim is moot if decision on the merits will have no practical effect on the rights of the parties)). If resolving the merits of a claim will not have a practical effect on the parties, the claim is moot and the court "shall" dismiss it for lack of jurisdiction. ORCP 21 G(4); *Corey v. DLCD*, 344 Or 457, 465, 184 P3d 1109 (2008); *Yancy v. Shatzer*, 337 Or 345, 349, 97 P3d 1161 (2004).

Second, the County argued that the court lacked jurisdiction because plaintiff's motion asked the court to make a land use decision, which the circuit courts may not do. Matasar Mot.

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Decl. Ex. 14 at 6-8. By statute, a decision that adopts or applies the County's land use regulations is a "land use decision." ORS 197.015(10)(a)(A)(ii)-(iii); *Billington v. Polk Cnty.*, 299 Or 471, 479-80, 703 P2d 232 (1985); *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004). Authority to make land use decisions has been delegated to local governments pursuant to ORS 197.175, and LUBA has exclusive jurisdiction to review those decisions under ORS 197.825(1). The County's comprehensive plan and land use regulations are set forth in LCC chapter 1. *Briggs I* at 2. The plaintiff's motion for partial summary judgment specifically asked the court to declare that using his property as a short-term vacation rental was a "preexisting lawful use under LCC chapter 1." Like the Plaintiffs here, the plaintiff in *Blackburn* also cited specific provisions of LCC chapter 1 he believed supported his argument that using the property as a short-term rental was a lawful nonconforming use under the County's zoning ordinance. However, reaching that conclusion necessarily requires the circuit court to interpret and apply the County's land use regulations and make a statutory "land use decision" regarding the status of the property under those regulations. Per ORS 197.175, only the County has the authority to make such a land use decision, and LUBA has exclusive jurisdiction to review it. ORS 197.175; ORS 197.825(1); *Campbell v. Bd. of Cnty. Comm'rs of Multnomah Cnty.*, 107 Or App 611, 616, 813 P2d 1074 (1991) (a party may not ask the court to make a land use decision in the guise of a circuit court proceeding); *Rogue Advocates v. Bd. of Cnty. Comm'rs of Jackson Cnty.*, 277 Or App 651, 660, 372 P3d 587 (2016) ("[I]f local or LUBA jurisdiction exists or has been exercised, there is no circuit court jurisdiction to render a decision on [land use] matters[.]").

Again, the court in *Blackburn* specifically cited to this portion of the County's response brief to deny plaintiff's motion for partial summary judgment. Thus, whether the court concluded only that it lacked authority to make the declarations plaintiff sought or also that as to the resolution the matter was moot because the resolution had expired, the court expressly denied the motion on jurisdictional grounds. Therefore, the statement in the County's Motion that the

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Blackburn court "determined that it lacked jurisdiction to provide the requested relief and denied plaintiff's motion for partial summary judgment" is correct and accurate in every respect. Because the motion only sought "partial" summary judgment, the court declined to dismiss the entire complaint.[8]

In this instance, where Plaintiffs seek the same relief the plaintiff sought in *Blackburn*, the relevance of the *Blackburn* decision is manifest. Plaintiffs' Motion here asks the Court to make essentially the same declarations the plaintiff in *Blackburn* sought, specifically that: (1) "Short Term Rental use of Dwellings, was an outright use under LCC Chapter 1 in 2016 and still is an outright use under LCC Chapter 1"; and (2) "under the doctrine of issue preclusion, Defendants cannot relitigate several legal issues adjudicated against the County by LUBA and necessary to the final Order in *Briggs* [*II*.]" Pls.' Mot. at 3. Doing so would require this Court to interpret and apply the County's land use regulations and make a statutory "land use decision" which the Court lacks authority to do. Likewise, to the extent Plaintiffs' claims rely on such land use decisions (*e.g.*, the claims that ORS 215.130, ORS 215.223 or ORS 215.503 invalidate the Ordinances, Resolutions or Order), those claims also fail as a matter of law. As described in the Motion and as LUBA conclusively ruled in *Briggs I* and *Cave*, the short-term rental regulations in LCC 4.405 to LCC 4.465 are not "land use regulation," therefore this Court has jurisdiction to determine the validity of the regulations. *Cave et al. v. Lincoln County,* ___ Or LUBA ___ (LUBA No. 2021-122) (2022 WL 1128537) (Mar 4, 2022) ("*Cave*").[9] Matasar Mot. Decl. Ex. 9 (*Cave* LUBA Final Opinion and Order). However, it also means that ORS 215.130, 215.223 and 215.503 do not apply because they only apply to a decision to adopt a "land use regulation."

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[8] The plaintiff in *Blackburn* subsequently withdrew his complaint.

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

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II. CONCLUSION

As established in the Motion, there is no genuine issue of material fact and the County is entitled to judgment in its favor as a matter of law.

DATED this 28th day of June, 2023.

BEERY, ELSNER & HAMMOND, LLP

s/ Emily M. Matasar

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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' REPLY IN SUPPORT OF 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 28th day of June, 2023.

BEERY, ELSNER & HAMMOND, LLP

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