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. L.YNCH, and ZANE KESEY. Petitioners, v. LINCOLN COUNTY, and CURTIS LANDERS, Lincoln County Sheriff, in his official capacity for Lincoln County Sheriff's Office, Licensing Authority under LCC Ch. 4. Respondent.	Case No.: 22CV38244 PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND AMENDED COMPLAINT ORAL ARGUMENT REQUESTED *Hon. Joseph C. Allison, Judge Pro Tem* *August 16, 2023-* *August 17, 2023* *9:00 a.m.*

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs file this response in opposition to Defendants' Motion for Summary Judgment. In support of their opposition, and to avoid needless duplication, Plaintiffs rely upon the Complaint, First Amended Complaint, Second Amended Complaint and exhibits thereto, as well

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as on all Motions, Responses, Replies, Declarations in Support and Pleadings previously filed, and exhibits thereto, as if set forth fully herein. As explained in this Opposition, the Court must deny Defendants' Motion. Defendants' overarching, novel, and somewhat shocking argument is that it need not comply with ORS 215.503 unless LUBA has jurisdiction. Nothing in the text, context, or case law applying this statute supports Defendants' arguments. Second, Defendants make the same argument as to ORS 215.130(5). Nothing in the text, context, or case law applying this statute supports Defendants' arguments. On the contrary, where the violation of ORS 215.130(5) involves the interplay between land use regulation and non-land use regulation, Defendants' argument fails under *Morgan v. Jackson County*. Third, the Ordinances are unconstitutionally vague. Fourth, Defendants fee request is premature, unfounded, and designed to have a chilling effect on Plaintiff's right to seek redress of their grievances against government actors. For all of these reasons, Defendants' Motion must be denied in its entirety and Plaintiffs' Motion must be granted.

UNDISPUTED FACTS

In the County's Motion for Summary Judgment, the following facts remain undisputed by the County.

1. Short term rentals are a use permitted outright in residential zones under LCC Chapter 1 zoning code for "Dwellings."
2. Each named plaintiff has a dwelling in a residential zone that is or was a short term rental.
3. Lincoln County never gave Measure 56 notice under ORS 215.503, nor did Lincoln County proof of newspaper publication under ORS 215.223 prior to the adoption of any of the Ordinances, Resolutions, or Orders challenged in Plaintiffs' Complaint.
4. Each Ordinance Resolution and Board Order challenged in Plaintiffs' Second Amended complaint successively restricts a use permitted outright ("Dwellings") for every dwelling in the County.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. There is no Legal Support for the County's Argument that it Can Violate the Plain Language of ORS 215.503 (Measure 56) so long as the Ordinance, Resolution, or Order is not a "Land Use Decision" over which LUBA has Jurisdiction.

At the outset, it is important to note that the County cannot overcome Plaintiffs' motion for summary judgment. To do so, it could simply put into the record its Measure 56 notices and of the required public notice and hearing publication under ORS 215.223. It is therefore undisputed that no Measure 56 notice was given for any of the Ordinances, Resolutions or Orders that are the subject of Plaintiffs' Second Amended Complaint. It is likewise undisputed that the County never complied with the basic public notice and hearing publication requirement of ORS 215.223.

Instead, the County argues that (1) only LUBA can enforce ORS 215.503 and only LUBA can enforce ORS 215.223 (2) LUBA transferred this case here for Plaintiffs' failure to establish LUBA's jurisdiction and (3) therefore, the Court should not examine the statutes or undertake its own analysis but should treat LUBA's transfer order on jurisdiction as a final and conclusive decision on the merits. If LUBA has no jurisdiction to enforce these statutes, County argues, it need not comply with the statutes. Nothing in the County's argument supports the false equivalency: that only a "land use decision" (defined in ORS 197.010) can violate ORS 215.503 or ORS 215.223.

A. This Court is Empowered by Statute to Invalidate the Ordinances, Resolutions and Orders Challenged by the Plaintiffs

ORS 197.015(10) defines "land use decision," which includes any "land use regulation" or "new land use regulation." 197.015(10)(a)(A)("land use decision") ORS 197.015(11)("land use regulation.") "Land use regulation" includes a "local government zoning ordinance" or "similar general ordinance establishing standards for implementing a comprehensive plan." ORS 197.015(11). Under ORS 197.825(1), LUBA has exclusive jurisdiction to review "land use decisions" of a local government. ORS 197.825(1). If the legislature had intended to make

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LUBA's jurisdictional grant coextensive with the ability of circuit courts to review for violation of any portion of ORS 215, as argued by the County, it could certainly have written that "land use decision" includes "any decision of a county that ORS 215 does, or does not apply." That is not included in the definition of "land use decision." ORS 197.015(10), (11). Similarly, the grant of exclusive jurisdiction to LUBA does not include "any decision to a county to which ORS 215 applies," or "and decision of a county for which a petitioner contends the county was required, but failed to comply with a subsection of ORS 215." ORS 197.825(1). This runs counter to the statutory mandate that judges shall not "insert what has been omitted" when construing ordinances. ORS 174.010.

Moreover, for the Court to accept Defendants' arguments, it must so limit the powers of circuit courts to review the legality of ordinances as to invent an edit to the legislature's broad grant of power to circuit courts that [a]ny person interested . . . whose rights, status or other legal relations are affected by . . . ordinance . . . may have determined any question of construction or validity arising under any such . . . ordinance . . . and obtain a declaration of rights, status or other legal relations thereunder." ORS 28.020. It would also ignore the circuit court powers to invalidate ordinances for "procedural error in adoption or conflict with paramount state law." ORS 203.060. Again, Defendant can point to no such language or legal authority in either the declaratory judgments act, (ORS 28.010 to 28.160), the Ordinances collected at Chapter 215 of ORS concerning "County Planning, Zoning; Housing Codes," nor can Defendants point to language making the grant of exclusive jurisdiction to LUBA at ORS 197.825 that would supplant the plain and narrow statutory definitions of LUBA's jurisdiction, overcoming the circuit courts general powers to invalidate ordinances that conflict with paramount state law. ORS 203.060.

To invent such missing language as Defendants' arguments require runs afoul of ORS 174.010. Moreover, as to ORS chapter 215, Defendants' arguments are falsified by specific and differing jurisdictional grants under ORS chapter 215. For example, decisions under some subsections are expressly to be appealed to LUBA; others are enforceable by the circuit court. *See, e.g.,* ORS 215.422(2) (appealable to LUBA) ORS 215.416(12)(b) (final actions on permit

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applications appealable to LUBA as limited land use decisions); *but see* ORS 215.429(4) (if county fails to act on a land use application within 120 or 150 days, applicant may proceed on the application and applicable plan and land use regulations *or* may petition circuit court for a writ of mandamus); and (5) (if application not denied, burden shifts to county to prove approval would *violate* comprehensive plan or land use regulations). Most of the subsections are silent as to whether violation of the subsection is reviewable by circuit court or by LUBA, thus relying instead on other statutes conveying jurisdiction. This Court should do the same.

B. The Short Term Rental Ordinance in Each Ordinance Challenged by Plaintiffs Limits or Prohibits Land Uses Previously Allowed in the Affected Zone.

Having reviewed the relevant statutory architecture of the Declaratory Judgments Act and circuit court power to invalidate county ordinances that conflict with state law, LUBA's jurisdiction of land use decisions, and the fact that some issues under county planning statutes at Chapter 215 go to LUBA and others go to circuit court, we can then look to Measure 56 to examine the exact statutory language. Notably, there is no universal definition of "zoning" in any of these broader statutes. The most specific definition is a definition for "rezone" contained only in Measure 56 itself:

> For purposes of this section property 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.

ORS 215.503(9). Defendants' definition would limit the application of Measure 56 to circumstances where a county is *overtly* changing the zoning classification under ORS 215.503(9)(a). Defendants' interpretation is incorrect because it reads ORS 215.503(9)(b) out of the statute. Under subsection (9)(b) when the county *adopts or amends* an ordinance in a manner that *limits or prohibits land uses* previously allowed in the zone, it is rezoning. ORS 215.503(9)(b). The requirements of individual mailed notice, the timing of hearings, and inclusion of exact statutory language in the Measure 56 notice requires the county to mail "a written individual notice of land use change to be mailed to the owner of each lot or parcel of

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property that the ordinance proposes to rezone." ORS 215.503(4). The court must not read subsection (9)(b) out of Measure 56. ORS 174.010.

There is no genuine dispute that Short Term Rental of dwellings was a use previously allowed in residential zones. Plaintiffs set forth exhaustively that under LCC chapter 1, "dwelling" is a "use permitted outright" in all residential zones. *See Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs' Motion for Summary Judgment.* To be clear, LCC 1.1115(95) defines "use" as "the purpose for which a structure is designed, arranged, or intended, or for which the land is maintained or occupied." For "uses permitted outright" every residential zone permits "dwellings" as an outright use. LCC 1.131(1)(a) ("one family dwelling excluding single wide mobile homes" for zone R-1); LCC 1.1315(1) (same in Zone R-1-A); LCC 1.1320(1)(a) (same in Zone R-2); LCC 1.1330 (1)(a) (same in Zone R-3); LCC 1.1340(1)(a) (same in Zone R-4); LCC 1.1345(1)(a)(same); LCC 1.1355(1)(a) ("One single-family dwelling unit."); LCC 1.1357(1)(a) (same). The definitions fail to restrict the use, as "single family dwelling" "means a structure of which all habitable portions thereof are connected structurally and comprise one dwelling unit, including but not limited to factory built dwellings, mobile homes, and site built dwellings." LCC 1.1115(29)(a). There is no definition of "residential." LCC 1.1115 (*passim*). Consistent with Lincoln County's location as a premier natural and recreational destination on the Oregon Coast, household groups have always been allowed to reside in single family homes, even for a weekend. Indeed, according to the U.S. Census, roughly one third of dwelling units are not occupied by permanent residents.[1]

C. The County Short Term Rental Ordinances Explicitly Restrict the Uses of "Dwelling Units" as Defined in the Zoning Code at LCC Chapter 1.

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[1] https://www.census.gov/quickfacts/lincolncountyoregon shows for 2020 there are 32,339 housing units but only 22,093 households; yielding 32% of housing units not occupied by a permanently residing household.

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Most importantly, other than minor formatting variations, "dwelling unit" as defined in the zoning code at LCC Chapter 1 is identical to the definition of "dwelling unit" in Ordinance #523, Ordinance #509, Ordinance #490, and Ordinance #487:

> (3) "Dwelling Unit" means:
>
> (a) 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."

See Ord. 523 (4.415(3)(a)); Ord. 509 (4.415(3)(a)); Ord. 490 Ord. (4.415(3)(a)); 487 (4.415(3)(a)). And in the zoning code:

> (29) "**Dwelling Unit**" means 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."

LCC 1.1115(29) (bold in original). Sub-definitions for "single family" "two family" and "mutli family" are likewise identical in the zoning code and in LCC 4.415. LCC 1.1115(29) (a)-(c); Ord. 523, Ord. 509, Ord. 490 Ord. 487 (4.415(3)(b)-(d)). The short term rental ordinance thus targets a single category of land use: "dwelling units." Dwelling units in the zoning code were therefore, already defined and regulated by LCC Chapter 1, before any short term rental ordinance was enacted. See, e.g. LCC 1.1415 (14)(a)(b)(off street parking requirements); LCC 1.1310(3), 1.1315(3), 1.1320(3), 1.1330(3), 1.1340(3), 1.1345(3), 1.1355(3), 1.1357(3) (R-1, R-1-A, R-2, R-3, R-4, RR-2, RR-5, RR-10 lot size and setbacks).

D. There is no Genuine Dispute that Ordinance #486, 490, 509, and 523, each Resolution and Board Order challenged each "limits or prohibits" Short Term Rentals, and that Short Term Rentals were previously allowed in all Residential Zones; thus they Must be Invalidated for Failure to Comply with Measure 56 and Defendants' Motion Denied.

The only opinion Plaintiffs have found construing ORS 215.503(9)(b) held that a county is rezoning under Measure 56 "when it changes standards for uses presently allowed in the zone,

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and the change either physically restricts or constrains those uses, or narrows the circumstances under which the use may occur at all." *Murray v. Multnomah Co.*, LUBA No. 2007-191 at 13 (citing Oregon Department of Justice letter of advice to DLCD of November 30, 1999). The Court must first determine "what uses does the existing zoning ordinance allow," then ask "whether the challenged ordinance restricts the range or extent of those existing, permissible uses." *Id.* at 14. If "the ordinance, on its face, restricts the range or extent of permissible uses of the property, compared to existing law," the Measure 56 procedure and notice must be followed. *Id.* Defendants admit that with each successive ordinance, the County restricted and limited the uses allowed outright for "dwellings" as concerns the short term rental use. To this day, there are no such restrictions on "dwellings" in the zoning code, and only by successively greater restrictions has the short term rental of dwellings been restricted as to "the extent" of the permissible use of the property." As an example, Ordinance #487 prohibited the use without a license, where before short term rentals were unregulated. Ordinance #509 imposed new septic and other requirements not required of any other "dwelling" in the County but more importantly, made no allowance for a use to be continued at the existing level if the owner met the "new" health and safety standard. Ordinance #523 created a scheme to allow the Board to impose further restrictions outside of the ordinance process by Board Order only. The various resolutions suspending the ability of a property owner to begin short term rental of their dwellings, even if every other standard in the zoning ordinance and the licensing ordinance were met. Finally Board Order 1-23-037 adopted a new zoning map for every property in the County, thus legislating where additional short term rentals would be allowed and where they would be curtailed.

Each of these legislative acts on its face is a further restriction of the permissible use of a "dwelling" under LCC chapter 1. As such, each legislative act was "rezoning" under Measure 56. LUBA has stated it agrees that "legislative adoption of a new or corrected zoning map is "related to" zoning for purposes of ORS 215.503(2), and therefore must be accomplished by ordinance rather than resolution." *Sullivan v. Polk Co.*, LUBA No. 2005-137 at 11. In *Sullivan*, LUBA declined to find the act was legislative because the resolution proposed to correction the

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zoning map as to a portion of a single parcel with a significant and confusing history. *Id.* at 12 (suggesting such corrections were quasi-judicial). Here, the County map, on its face, rezones the eligibility of every dwelling in the county for short term rental use. Under ORS 215.503(2), such a legislative act must be by ordinance, not by resolution. LUBA has applied the same reasoning to Board Orders. *Sahagian v. Columbia County*, LUBA No. 93-171 at 13 (Noting that if the Board Order rezones only one property, it does not qualify as a "legislative act."). The Board Order, on its face, applies to every dwelling in the County and so cannot be defended by an argument that the activity is quasi-judicial, as opposed to a legislative act. Under the plain language of ORS 215.503(2), when the County wants to change the standards applicable to every "dwelling" as that term is defined under LCC Chapter 1, it is rezoning all residential property with "dwelling" as an outright use under LCC Chapter 1, and does so for every residential property in the County. As such, it was unlawful to change those standards by Board Order and by Resolution.

Under ORS 203.060, the Court should invalidate each Ordinance, Resolution and Board Order for "procedural irregularity and conflict with paramount state law." Here, a Marijuana cases is instructive. With the legalization of Marijuana, the state gave counties limited authority to enact moratoria so that each could amend its zoning ordinance to restrict the commercial use and farm uses when the activity was legalized. However some Counties took longer and did not timely or correctly amend their zoning code as was required. Obviously, "silence" in the zoning code would mean that retail sales were uses permitted outright provided the activity was otherwise allowed "retail" or "agricultural" in nature in the zone. In *Cossins v. Josephine County*, LUBA No. 2017-112, the county passed restrictions on growing marijuana in certain zones, but failed to give the required notice under Measure 56. LUBA held this was a "rezoning" under Measure 56, invalidated the law and remanded for the County to follow the correct procedure. In *Kovash v. Columbia County*, the County passed a moratorium on new and expanded marijuana facilities, including both grow sites and dispensaries. LUBA No. 2015-040. That moratorium was invalidated because Columbia County acted outside of state law for permissible moratoria—the need to "fix" one's zoning code was inadequate legal grounds to

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"freeze" or "pause" a land use. "Administrative convenience for the county in avoiding duplicative amendments to its zoning regulations is not sufficient justification to delay or avoid the normal planning process for planning and zoning land uses." *Id.* at 9.

Here, the same reasoning is true. Rather than follow state law to give **property owners** notice of changes and restrictions to their land zoned for any "dwelling" use, the County cut corners and routinely changes the rules without complying with state law. Such notice and procedure laws are designed to encourage public participation and due process, and invalidation with a declaration that the County must follow state law and did not a trivial right. "While it may be that any public hearing the county holds pursuant to that notice will result in no change to the Ordinance . . [nevertheless] . . . a different ordinance may well be adopted. *Or. Coast Alliance v. Clatsop County*, LUBA No. 2016-108 at 10.

II. There is no Legal Support for the County's Argument that it Can Violate the Plain Language of ORS 215.130(5) so long as the Ordinance, Resolution, or Order purporting the end the use is not a "Land Use Decision" over which LUBA has Jurisdiction; the Argument Further violates *Morgan v. Jackson County*.

At the outset, it is worth noting that Plaintiffs' legal argument that the County's adoption and implementation of Ballot Measure 21-203 would eventually legally undermine the entire licensing ordinance scheme for Lincoln County including Ordinance 487, 490, 509 and 523, as well as any modification of those Ordinances by Resolution or Board order is not some wild or speculative legal opinion. County Counsel Wayne Belmont (now retired) explicitly and publicly warned prior to the adoption of the Ballot Measure that "[i]t is my legal opinion that if adopted as presented, this Ordinance will lead to litigation and County exposure to monetary claims **and could result in the loss of any regulatory scheme for STRs incorporated into the Ordinance.**" *Brann Resp. Decl. Ex. 5.* at 2 n. 3. This demonstrates an awareness that even the original Ordinance 487 was a risky effort to avoid land use requirements; hence the disclaimer "this is not a land use ordinance" while "grandfathering" a very limited set of the largest homes as ORS 215.130(5) would require. If the County had any plausible argument that its Ordinance

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scheme was for licensing only did not tread into land use, while failing to follow state law as to procedural and substantive safeguards, the Ballot Measure destroyed that possibility by clearly rezoning dwellings and by shining light on the fact that short term rental of dwellings is a use permitted outright under the zoning ordinance at LCC Chapter 1.[2] Particularly now, where the County has amended Ordinance 523 by Board Order attempting to accomplish the goals of the ballot measure in a sneakier fashion, the current law violates ORS 215.130(5) for all of the reasons the ballot measure had to be invalidated.

A. As with Measure 56, Defendants' argument is Rebutted by the Plain Language of ORS 215.130(5).

All of Defendants arguments, that only "land use regulations" subject to LUBA's jurisdiction need comply with ORS 215.130(5) lack merit for all of the same reasons argued in section I as to Measure 56, above. Plaintiffs therefore incorporate all of these arguments as to compliance with ORS 215.130(5) as if fully set forth here. 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. *See* LCC 4.410 (no application in cities).

The plain text of ORS 215.130(5) limits the County's *conduct* where ORS 215.130(5) is triggered: "the lawful use of any building, structure, or land *at the time of enactment or amendment of any zoning ordinance or regulation* may be continued . . . a change of ownership or occupancy shall be permitted." ORS 215.130(5) emphasis added. In other words, once a nonconforming use is established, the owner has a statutory right under state law to continue the

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[2] Plaintiffs likewise agree with Counsel Belmont's first observation: 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. Plaintiffs here prefer to continue their preexisting lawful uses rather than to receive cash for having their rights taken, but Counsel Belmont was correct this is a potential consequence of the County's regulation that takes aim at property owners existing rights, rather than merely curbing new uses prospectively.

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use and the county must allow a successive owner to continue the use. The focus is on "at the time" that something changes making the use nonconforming. Nothing in the Ordinance says that nonconforming use rights can only be examined against the first law that makes the use nonconforming. Nothing in the Ordinance states that non-land use regulation can alter the rights established by this subsection. Such an interpretation would add language that is not present in the statute. ORS 174.010.

The County's zoning ordinance lacks any process or procedure for verification of a nonconforming use, so no particular deadlines or standards apply apart from state law. *See* LCC 1.1701. Nothing in state law indicates that an Ordinance, Resolution, or Board order that purports *to take away* a nonconforming use *must be the same* Ordinance, Resolution, or Board order that *created* the nonconforming use. The plain language indicates that nonconforming uses are examined "*at the time of enactment* or amendment of any zoning ordinance or regulation . . ."

Even if the Court finds persuasive the contention that none of the challenged Ordinances, Resolutions or the Board Order are "land use," the Ballot Measure *was "enactment or amendment of any zoning ordinance or regulation,*" and made every short term rental Dwelling in the County at that time a nonconforming use, protected by ORS 215.130(5). Once begun, then undone. The enactment of the Ballot Measure on November 19, 2021, granted nonconforming use status to the short term rental of dwellings *as a zoning ordinance or regulation* effective November 19, 2021. As such, dwellings which established a nonconforming short term rental use of dwellings as of that date "may be continued," and for such nonconforming dwellings, a "change in ownership or occupancy shall be permitted." Nothing in the plain language of ORS 215.130(5) indicates that nonconforming use rights come and go based on whether additional and subsequent ordinances, resolutions, or orders purporting to violate the right constitutes "land use." The Ballot Measure was an enacted zoning ordinance, *Briggs-Cammann* established the nonconforming use of short term rental dwellings as of November 19, 2021, and that ruling was not appealed. Therefore, under ORS 215.130(5), those nonconforming uses "may be continued" and "a change in ownership or occupancy shall be permitted." ORS 215.130(5).

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B. If Defendants are Correct, then the Identical Property on the Same Date Both Has Nonconforming Use Status and Does Not have Nonconforming Use Status; that is Legally and Logically Impossible.

If the County was correct in its arguments, then the lawfulness of a use under zoning and land use laws could be both true and false on the same date for the same property, depending on which tribunal—circuit court or LUBA—is looking. An examination of the timeline of the relevant decisions is in the table below. First, it is important to note that both BM 21-203 and Ordinance 523 changed the same law at the same time. Under Lincoln County zoning and land use law, LCC 1, that short term rentals were an outright residential use under the zoning code in effect on October 15, 2021 was a key necessary ruling for the decision in *Briggs-Cammann*. The same analysis of LCC 1 and short-term rentals being an outright residential use under zoning code in effect on October 15, 2021 remains true.

Decisions

2015 to Present date.	**Under LCC Chapter 1, short term rentals are an outright use in residential zones under the zoning code and comprehensive plan**. *Briggs-Cammann* LUBA 2021-118.
Oct. 15, 2021	Under Lincoln County's argument, short term rentals are not an outright use in residential zones under the zoning code and comprehensive plan on this date.
Oct. 26, 2021	Ordinance 523 is Adopted.
Nov. 19, 2021	Effective date of Ballot Measure 21-203.
Nov. 19, 2021-Dec. 8, 2021	**Ballot Measure 21-203 takes effect; short term rental of dwellings becomes a nonconforming use**.
Dec. 8, 2021	The Circuit Court in *Cammann* issues a preliminary injunction, staying Ballot Measure 21-203. *Brann Resp. Decl. Ex. 7.*
January 25, 2022	Effective date of Ordinance 523.
February 10, 2022	LUBA rules that Ordinance 523 is not a "land use regulation" and transfers *Briggs I* finding no jurisdiction.
March 4, 2022	LUBA rules one of the moratoria is not a "land use regulation" and transfers *Cave*, finding no jurisdiction.
March 15, 2022	The *Cammann* court grants a joint motion to transfer the case to LUBA, over the objection of intervenor (BM 21-203's author). Plaintiff asserted concurrent jurisdiction of the circuit court and LUBA, the County asserted LUBA jurisdiction only, and Intervenors asserted exclusive jurisdiction in circuit court. *See Brann Resp. Decl.* Ex. 8. at 3 fn. 1 (*LUBA quoting the Order*)
May 17, 2022	LUBA denies the motion to dismiss *Briggs-Cammann* for lack of

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	jurisdiction and finds that BM 21-203 is a land use regulation, noting that the prior comprehensive plan and zoning code allowed short term rentals in residential zones, and BM 21-203 made them nonconforming. *See Brann Resp. Decl.* Ex. 8. at 3 fn. 1.
May 17, 2022	LUBA also denies petitioners' motion to stay BM 21-203 in *Briggs-Cammann.*
May 17, 2022-August 8, 2022	**The rezoning of BM 21-203 takes effect. All short term rentals in residential zones are nonconforming uses**.
August 8, 2022	LUBA rules on the merits of BM 21-203, invalidates the law as preempted by ORS 215.130(5).
February 1, 2023	Lincoln County amends Ordinance 523 by its "maps and caps" order; now limiting short term rentals to a small percentage of existing short term rental homes and requiring the use to end when the home is sold.

In the County's arguments, a preexisting lawful use is like Schrödinger's cat[3]: it can exist and not exist at the exact same time without any further explanation, ignoring that in reality, only one can be true. In this argument, Plaintiffs' short term rental use of their dwellings was a preexisting lawful use protected by ORS 215.130(5) from 2015 through November 19, 2021, the date of enactment of the ballot measure that made the short term rental use of dwellings nonconforming. If Defendants are correct, they ask the Court to rule that from 2015 through November 19, 2021, the short term rental use of dwellings is not nonconforming. Such a ruling is a direct attack on the final judgment in *Briggs-Cammann.* Yet Oregon law doesn't operate in the realm of hypotheticals; it requires consistency and finality, and that only one be true as a matter of law. The County's argument is illogical and should be rejected. In the only full and final adjudication on the merits, the *Briggs-Cammann* case, the County actively litigated the argument that prior to adoption of the Ballot Measure, under the zoning code at LCC Chapter 1, short term rentals were not preexisting lawful uses protected by ORS 215.130(5), and petitioners argued the opposite. *See Brann Decl.* Ex. 4. (*Transcript of Briggs-Cammann argument*). LUBA's ruling that short-term rental of dwellings was a preexisting lawful use *was necessary* to

[3] For a brief explanation of this paradox of quantum mechanics, see https://en.wikipedia.org/wiki/Schr%C3%B6dinger%27s_cat

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the ruling that BM 21-203 violated and was preempted by ORS 215.130(5). The County did not appeal that judgment and it is final. Indeed, the County's resistance to that ruling amounts to a collateral attack on LUBA's ruling after it waived any appeal. As stated in Plaintiffs' motion, issue preclusion should preclude the County from relitigating the issue that was conclusively adjudicated against it.

C. Even if the County is Correct that all of its Ordinances, Resolutions and Board Orders are "Mere Licensing" regulation, *Morgan v. Jackson County* prohibits Counties from limiting or restricting a land use by way of a Licensing Ordinance.

It appears that the County thinks that it can circumvent the protections of ORS 215.130(5) by use of mere labels. The County argues that if an ordinance is a "licensing" ordinance it can successfully end short-term rental use with a licensing ordinance where it cannot end that use with a zoning ordinance. This argument misses the point of Oregon law around pre-existing lawful uses.

First, as briefed in plaintiff's motion, the County made an identical pitch to LUBA in its briefs and argument about BM 21-203: "We are not ending the use, we are ending licenses for the use." That argument was rejected as "an end run" around ORS 215.130. Both BM 21-203 and Ordinance 523 preserved prior language from an earlier version of the Short Term Rental ordinance that reads "This is not a land use ordinance." LCC Ch. 4.

In *Morgan v. Jackson*, the Court of Appeals did not hold that only land use decisions reviewable by LUBA can violate ORS 215.130. Instead,

> The context of subsection (5) of ORS 215.130 further reinforces the proposition that "*lawful use*" is a matter that involves *laws concerning the use of a building, structure, or land as do* zoning and land use regulation.
> ***
> [By contrast] occupational licensing does not regulate the "use of a building structure or land" in any way generally comparable to zoning or land use regulation. . . . business or occupational licensing is a system that *does not regulate with regard to particular locations in the use of real properties*.

Morgan v. Jackson County, 290 Or App 111, 118, 414 P3d 917 (2018) *rev. den.,* 362 Or 860 (2018) (emphasis added). The County's argument misses the deeper meaning behind Morgan: a

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law is subject to ORS 215.130(5) that the "lawful use" *protected* must "concerns the use of a building, structure, or land." The "lawful use" that Plaintiffs claim is the fact that they began short term rental use, lawfully under LCC Chapter 1, before even Ordinance 487 was enacted, and later acknowledged by the *Briggs-Cammann* decision. To determine the "lawful use" the Court must look to the zoning ordinance at LCC Chapter 1—including the absence of any restriction in the zoning ordinance. Here, the preexisting lawful use protection arises from the fact that the zoning ordinance defines "dwelling" as a use permitted outright in all residential zone and there is no durational or "owners only" limitation on the use. The Short Term Rental Ordinances all take "dwellings" as defined in the zoning ordinance, and further restrict that land use with a "licensing" ordinance.

Assuming arguendo that each ordinance is "business licensing" and not "land use," *Morgan* held that a business licensing violation cannot interrupt or end the continuity of the land use, protected by ORS 215.130(5), because a licensing ordinance "does not regulate with regard to particular locations in the use of real properties." The problem is that Lincoln County is affirmatively trying to have its cake and eat it too. It wants to claim each ordinance is a "business licensing ordinance" that has nothing to do with land use. Yet the violation of a licensing ordinance cannot end a preexisting lawful land use—that is the entire purpose and goal of its increasingly restrictive County Ordinances, Resolutions, and the Board Order. In other words, to be effective to end or limit a land use, another land use or zoning ordinance is required. And because of ORS 215.130(5), the new zoning ordinance or regulation that ends a land use can only apply *prospectively* to *new* owners. It cannot curtail existing owners' nonconforming use rights, including the right to transfer the same property to a new owner with the nonconforming use intact. ORS 215.130(5).

Here the short term rental code is located within "business license" provisions at LCC chapter 4, but the business license ordinance has drifted into regulation "concerning the use of a building, structure or land." It can no longer be said that the short term rental portion of LCC 4 "does not regulate with regard to particular locations in the use of real properties."

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Tellingly, the county's latest moratorium is an "Order" that amends Ordinance #523 on the topic of maps and caps. Ordinance #523, as modified on February 1, 2023 by Order 1-23-037, now specifically creates county-wide zones on a map with different areas where short term rentals must be curtailed. *See Order 1-23-037*. Buyers of an existing short term rental home will be denied licenses on sale of the home and made to wait on a list with a "lottery" to continue the use. The same order set caps are a mere fraction of the current number of homes with licenses. The county's newest moratorium is now permanent and embedded in Ordinance #523. Regardless of whether the original Ordinance #523 went far enough to qualify, with the modification of Order 1-23-037, the county is clearly now legislating restrictive zones for short term rentals and will explicitly disallows a "change in ownership or operation" with the use intact by ending licenses on sale of the home. Under the plain language, current county code restricts "the use of a building, structure or land," and also "where" such a use may be located.

Put another way, when a county licensing ordinance regulates "where" and "whether" a "use of a building, structure or land" may continue, the county is doing the *type* of legislation subject to ORS 215.130(5) as explained by *Morgan.* The label of the ordinance or scheme is less important than the function of the regulation: "[m]ere labeling of the ordinance or its location within a local code does not make a land use regulation something else. *Home Builders Ass'n of Lane Cty. v. City of Eugene*, 41 Or LUBA 453, 457 (Feb. 28, 2002).

If the County is arguing that a use must be specifically mentioned in zoning code to be protected, that argument has been rejected numerous times, as ORS 215.130(5) protected uses may be lawful *because no zoning codes restricts the use at all.* "Therefore, the lawfulness of the prior state of affairs, was the lawfulness of the use *under nonexistent or less restrictive zoning or land use regulations*." *Morgan,* 290 Or App at 117 (emphasis added). The ruling in *Briggs-Cammann* found that the prior state of affairs—for example the law in effect on October 15, 2021—was that short term rentals were lawful under Lincoln County's zoning and land use. The ruling in *Briggs-Cammann* likewise explicitly rejected the County's arguments that "nonexistent" zoning meant the use was "unlawful."

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The County ignores the central reasoning of the Court of Appeals in *Morgan,* concerning a hypothetical of a Barber who fails to get his license:

> A landlord who had long owned a nonconforming shop on a street corner at the time of adoption of residential zoning, which would not allow a commercial use, would be told he did not have a "lawful use" if the barber who leased the shop space had unlawfully failed to maintain a barber's license. . . .Although the use of the shop had never changed, the barber's licensing violation would cause the landlord's property right to be forfeited.

Morgan, 290 Or App at 118-119. Here, seeking to circumvent ORS 215.130, Defendants have purposefully crafted a "licensing ordinance" that would overtly end the owner's nonconforming use rights based on any licensing lapse by the "barber" in Morgan's hypothetical (and contrary to *Morgan*). See LCC 4.420(1) "Citation for operation without a license shall **disqualify dwelling unit owners** from obtaining a future short term rental license in accordance with this Chapter." Notably, the license must be applied for by a "Contact Person," who "whether the owner or an agent, **must be located in Lincoln County**, and cannot use the dwelling unit(s) licensed under this Chapter as the basis for compliance with this provision unless the owner or agent resides at that location." LCC 4.415(2)(c). Thus Respondent's ordinance is designed to end the land use rights of any "out of County" owner on even an inadvertent lapse by the owner's agent, and having an agent is mandatory.[4] *Morgan* holds that land use rights are not subject to such whims under ORS 215.130(5). The hypothetical in *Morgan,* that a property owner could lose property rights because of a failure to comply with business or occupational license was *rejected* as "implausible legislative intent" as to ORS 215.130(5). *Morgan,* 290 Or App at 118-119. Zoning

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[4] This is exactly what happened to Petitioners *Cave* and *Gibbons*; despite having an established lawful use that predated any ordinance, the Sheriff issued them a "cease and desist letter" after discovering their professional local property manager had inadvertently failed to submit their licensing application, and despite having paid all lodging and other taxes on the activity. They never received any Measure 56 notice at any time from the County and had zero due process in the actions purporting to strip them of their nonconforming use rights with a "licensing ordinance."

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code at LCC 1 allows short term rentals in "Dwelling units" as an outright use. Thus, if the placement of the restrictive ordinance outside of the zoning code is properly characterized as a "licensing ordinance," *Morgan* rejects the notion that a property owner can lose nonconforming use rights by a lapse or violation in a licensing ordinance. This underscores that even if Lincoln County correctly identifies Ordinances 487, 490, 509 and 523 as "licensing" such identification does not assist them to establish that the Ordinances are lawful. Instead, under *Morgan,* the regulation is simply an attempt to evade the processes and laws that the County must comply with under paramount state law at ORS 215.130(5). Defendants read the logic of *Morgan* backwards. Where "lawfulness" of the protected use looks *only* to the zoning code, *licensing ordinances* cannot terminate or limit the lawful use as to a property owners' rights as determined by the zoning code alone.

D. Issue Preclusion applies against the County as to the Nonconforming Use Status of Short Term Rental Dwellings; but Does Not Apply to LUBA's Transfer Orders.

Plaintiffs addressed Defendants' arguments that *Briggs I* and *Cave* should not be entitled to preclusive effect in their Motions for Summary Judgment and incorporate those arguments here. Simply put, *this is the Briggs I and the Cave* case. This action relates back to the original complaint filed on transfer from LUBA. The Court ruled that—while consolidation of two writs of review and the present claims for declaratory relief was not improper—it was exercising discretion to trifurcate or sever the claims. Thus the original complaint following transfer from LUBA was refiled in this docket number at the Court's instruction on trifurcation. The severed writ of review claims from *Briggs I,* and *Cave* remain pending in circuit court.[5]

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[5] *Briggs I* is pending as 22CV07090, *Cave* is pending as 22CV09472, both stayed. Plaintiffs in circuit court originally filed a consolidated complaint that included both writ of review claims and declaratory relief and judicial invalidation claims. This Court held while consolidation was not improper, the non-writ of review claims should be severed and so those claims were re-filed as 22CV38244, with an order that those claims would relate back to the original LUBA filings (in *Briggs I*).

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All parties agree that LUBA in *Briggs I* and in *Cave* only ruled on its own jurisdiction; indeed, any discussion of the merits must be treated as *dicta,* because LUBA held it was the wrong court or Board to review the ordinance. As explained in Plaintiffs' Precautionary Motion to Refer the Question to the Court of Appeals, if this court is persuaded that only LUBA can answer these questions, as the transferee court under the statute, it must refer the question to the court of appeals. A careful ruling of *Briggs I* demonstrates that LUBA declined to rule on the Measure 56 question before its jurisdiction was established. Effectively, in *Briggs I Plaintiffs* made the argument Defendants make now (that if Measure 56 is violated only LUBA can enforce it) and were rejected: "We first reject petitioners' argument that ORS 215.503(9) is relevant in determining whether, in enacting Ordinance 523, the county enacted a "new land use regulation" [under ORS 197.015(10)(a)(A)(iv)] or amended its zoning ordinance. ORS 215.503(9) is a notice statute, it is the codified version of Ballot Measure 56, which was enacted by the voters in 1998 . . .ORS 215.503(9) does not answer the question of whether Ordinance 523 is effectively an amendment to the county's comprehensive plan and zoning ordinance [establishing LUBA's jurisdiction]." *Briggs I* at 8-9. Likewise, LUBA ruled that authorizing the County to make zoning maps in the future—did not yet create LUBA jurisdiction because Ordinance 523 (prior to the enactment of Order 1-23-037) "does not create any subareas at all." *Id.* at 9. Indeed, the entire tone of the *Briggs I* is that "Petitioners have failed to establish . . ." Failing in a legal burden does not foreclose a later action that *succeeds* in making that proof particularly in the land use context, where regulatory changes are moving targets.

In *Waste Not of Yamhill County v. Yamhill County,* the petitioner attempted to use an earlier decision on a different permit application and writ of review ruling against the operator of a nonconforming landfill on grounds of claim and issue preclusion. 305 Or App 436 (2020). The Court of Appeals rejected the contention that a different landfill request and litigation by the same operator was preclusive against the later landfill litigation where the issue in the second suit "was not actually litigated . . . and not essential to a final decision on the merits." 205 Or App at 462 (affirming *Nelson's* requirement that the issue was "actually litigated and essential to a *final decision on the merits* of the earlier proceeding" (emphasis added)). Claim preclusion

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was rejected because the claim was not "based on the same factual transaction." *Waste Not*, 205 Or App at 462. The Court of Appeals quoted the reasoning and realities of land use in Oregon: "'land use is not static' that '[t]he general doctrine of claim preclusion does not deny an applicant the right to file a successive application . . . [i]f one proposal for development is denied, land use ordinances [generally] anticipate and allow for additional attempts for modified, or even the same development.'" *Waste Not,* 205 Or App at 462 (quoting *Lawrence v. Clackamas County,* 180 Or App 495, 503 (2002)).

This demonstrates why Plaintiffs' issue preclusion argument succeeds and Defendants' arguments fail. Defendants' response is that *Briggs-Cammann* only adjudicated the ballot measure. That would be a valid response if Plaintiffs were moving on *claim* preclusion. *See, Waste Not, supra* (claim preclusion applies when "based on the same factual transaction"). But *issue preclusion* addresses underlying questions legal issues that established Plaintiffs' legal nonconforming use rights, which rights continue regardless of which new ordinance, resolution, or order the County uses to attempt to improperly end those rights. Finally, Defendants have failed to cite any legal authority supporting their contentions in the land use context, where there is doubt and uncertainty as to whether circuit court or LUBA will ultimately be the correct decision-maker. In the context of litigation that has been transferred under a unique statutory provision for land use, but not yet reached a "final decision on the merits" it would be improper to apply claim or issue preclusion based on *Briggs I* or *Cave* transfer orders.

III. The Ordinance is Unconstitutionally Vague.

As briefed in Plaintiffs' Motion for Summary Judgment, the Ordinance is unconstitutionally vague. Plaintiffs reassert the arguments made in that brief here. Defendants fail to explain how property owners can be strictly liable for the loss of their property rights when "event" is not even defined, and requires guesswork about what is, and what is not an "event." Defendants fail to explain how property owners can permanently lose their property rights for the error, omission or oversight of a local agent—effectively punishing an owner with a permanent loss of their property rights based solely on conduct of another, and without any prior due process for the owner.

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Defendants' fail to explain how owners can be afforded constitutionally adequate notice of "what conduct is prohibited" where the County's authority is delegated not only to the Sheriff's Office as "Licensing Authority" but also to "**County Counsel's Office and the Onsite Waste Management Division of the Department of Planning and Development** are delegated authority and responsibility to adopt rules, **requirements . . .** to implement . . . the Licensing Program." Ord. 523 (bold in original). In essence, the County delegates authority to all three departments make up the rules as they go, by fiat and not by legislation. An owner cannot simply read the ordinance and know what conduct is prohibited; they must also guess at what the Sheriff, County Counsel, and Onsite Waste will invent as a "requirement" in allowing the use to continue. Finally, as a larger structural issue, the County proposes the permanent loss of property rights by owners, based solely on the conduct of *others*, without a prior notice, opportunity to cure, or alternate punishment other than the permanent loss of their nonconforming use rights.

Ordinance 523 further allows the Board to edit prohibitions in the law by any Board Order, without any notice or due process given to owners that an owners' rights might be changed. Such a loss of rights is absolutely a constitutionally protected right. *See discussion of Measure 56, supra and ORS 215.130(5), supra.* It is well-settled that counties may not "summarily prohibit a lawfully established use of land"; to do so "would constitute a taking without compensation." *Bergford v. Clackamas Cty,* 15 Or App 362, 367 515 P2d 1345 (1973). The fact that Defendants cannot answer simple questions such as "what events are prohibited" and "how do we know when County Counsel makes a "requirement" that results in an owner losing their license," demonstrates that Ordinance 523 is unconstitutionally vague as it proposes to strip owners of their nonconforming use rights without adequate prior notice of the prohibited conduct, and without any procedure to cure or incur a lesser penalty *prior* to the permanent loss of the right. Indeed, the "gotcha" clause providing that any licensing lapse would result in the permanent loss of property rights was rejected as "implausible legislative intent" in *Morgan,* as discussed above. Substituting short term rentals for the hypothetical barber in Morgan, "Although the use of the [dwelling as a short term rental] had never changed, the [local contact's

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failure to timely relicense, or the guest's celebrating an undefined 'event' would be a] licensing violation [and] would cause the [owner]'s property right to be forfeited." *Morgan,* 290 Or App at 118-119. This obviously denies property owner any procedural or substantive due process whatsoever prior to taking the owner's property without compensation.

IV. Defendants' Latent Conditional Motion to Dismiss should be Denied or, In the Alternative, Plaintiffs' Make a Precautionary Motion to Refer the Jurisdiction Question to the Court of Appeals

In its Motion for Summary Judgment, Defendants submit a separate letter opinion of Judge Branford, deciding against a finding of nonconforming use on Plaintiff's motion for issue preclusion from the *Briggs-Cammann* decision in the *Blackburn* case. *Def. Mtn. Summary Judgment* at 11 n. 7. Defendants misrepresent that this opinion constituted agreement that "it lacked jurisdiction to provide the requested relief." *Id.* Instead, the Court explicitly opined: "[f]or clarity, the Court directs the parties' attention to Page 6 of the Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment. In section IV [A], Defendants asked the Court to deny the Motion for Partial Summary Judgment and to order dismissal of the case. The Court grants the former, **but declines to order the latter."** *Id.* at 3 (emphases added). Obviously, if a court agrees that it lacks jurisdiction it must dismiss the case without making further rulings. *See Plaintiffs' Response to Defendants' "Motion for Summary Judgment (Motion to Dismiss for Lack of Jurisdiction, Failure to State a Claim and to Make More Definite and certain Properly Considered Under ORCP 21."* Indeed, if a court lacks jurisdiction, its only power is to dismiss a case.

The section referred to in Judge Branford's opinion letter argued the court should dismiss that plaintiff's complaint for lack of jurisdiction on several grounds. *Brann Resp. Decl.*, Ex. 6 (*Section IV [A] of Defendants' Response in* Blackburn). The relief denied to Defendants was the exact arguments reiterated in Defendants' present Motion: (a) that relief requested as to expired resolutions were moot and "must be denied and the Complaint dismissed;" *Id.* at 6:15-16; (b) that affirming the prior nonconforming use status for short term rental dwellings in *Briggs-Cammann*

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was a topic where "LUBA has exclusive jurisdiction to review it" and "the circuit court lacks jurisdiction to make the declaration plaintiff requests;" *Id.* at 7:6-8; and that because that Plaintiff sought to enforce prior orders of LUBA in a new proceeding "ORS 197.825(3) does not provide a basis for circuit court jurisdiction." *Id* at 8:10-11.

In Defendants' current motion, this argument is subtle but remains peppered throughout their brief in footnotes as a conditional motion to dismiss. *See Def. MSJ,* at 11 n. 7, 12 n. 9. Defendants have re-cast the argument that "if the Ordinances, Resolutions and Order are land use regulations subject to ORS Chapter 15, then this Court lacks jurisdiction to review them." *Id.* at 15: 23-24. Rather than drawing a logical conclusion: "because LUBA has declined jurisdiction, this court does have jurisdiction," Defendants argue "because LUBA has declined jurisdiction, we win on the merits and don't have to follow ORS 215!" As discussed in sections I and II above, this leap in reasoning is unsupported by any legal authority. Jurisdiction and compliance or violation of paramount state law are two entirely different questions.

Indeed, if this Court decides that the challenged ordinances *are* land use decisions and LUBA made a mistake in its rulings in *Briggs I* or in *Cave,* it *cannot dismiss the matter.* Instead, if the *transferee court* or board "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." ORS 34.102(5). Importantly, *this is the Briggs and Cave case!* Following each transfer order that Defendants claim to be "preclusive," Plaintiffs here filed a single, consolidated complaint with both transferred writs of review and seeking broader declaratory and injunctive relief as they are entitled to do by statute. Plaintiffs attempted to consolidate and simplify these proceedings and the court ruled—while consolidation was not improper—it preferred to trifurcate the complaint—ordering the non-writ of review claims to be filed separately in this new case number. *Brann Resp. Decl.* Ex. 9-10.

Defendants are no doubt skillful in their attempts to conjure preclusive rulings on the merits from interlocutory, procedural decisions. However, at the end of the day, if this Court believes the question of validity of Ordinance 523 or any Moratorium extension belongs before

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LUBA, the answer is not that Plaintiffs lost their rights forever by not appealing the transfer order. The answer is that the Court is statutorily obligated to refrain from ruling on the merits and refer the question to the Court of appeals, as the recipient of transferred appeals from LUBA.

V. Defendants' Motion for Summary Judgment on Plaintiffs' Attorney Fee Claim is Premature and should be Denied.

Defendants to not meet the summary judgment standard as to their attack of Plaintiffs' Attorney Fee Claim in the Complaint. First, Plaintiffs must prevail in order to be entitled to their fees. As such, any attorney fee claim is premature before the Court has adjudicated the merits and determines whether or not one party has prevailed, in whole or in part. The only argument to show "entitlement to judgment as a matter of law" is Defendants' speculation that Plaintiffs' cannot possibly be "vindicating an important constitutional right" because they earn income from the short term rental of dwellings. Indeed, if the County is held to have ignored state law and violated the rights of all property owners in the County by rezoning their property without due process and by attacking their ability to earn an income in their chosen profession or in retirement—an activity that was a perfectly lawful exercise of their constitutionally protected property rights when begun and for which state law guarantees the right to continue—constitutional rights certainly are at issue.

These Plaintiffs are a mere handful of the approximate 500 property owners who have nonconforming use rights and therefore expect and desire to continue to short term rent their dwellings. Oregon courts decided long ago to prohibit counties from taking away the nonconforming use rights guaranteed at ORS 215.130(5). The statute exists because taking away nonconforming use rights would be an unconstitutional taking of property. *Bergford v. Clack. Co. Trans. Serv.,* 15 Or App 362, 367 (1973). These Plaintiffs are not seeking a gain, graft or unfair profit; they are seeking merely to be left alone with the property rights guaranteed to them by the constitution. The right to earn a living, and the right to earn a retirement income certainly implicates constitutional guarantees against government taking of property without due process and without just compensation. If the County followed the letter or the spirit of ORS 215.130(5),

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there would be no lawsuits and no LUBA appeals. The Court should deny Defendants' Motion directed at entitlement to attorney fees.

VI. Defendants' Motion for Attorney Fees should be Denied on Summary Judgment.

In the letter opinion from Judge Branford in *Blackburn* submitted by Defendants, Defendants overlook the Judge's comments on how difficult and challenging it was to make a ruling. Simply put, the transfer orders favor Defendants' "view of the world" and the *Briggs-Cammann* ruling supports Plaintiffs' view of the world. Indeed, LUBA has given the parties conflicting rulings. Plaintiffs believe that the latter ruling, the only ruling on the merits, controls. However, Defendants nevertheless persist in making their frivolous argument that Plaintiffs should be liable for the County's attorney fees under the statute authorizing an award of fees *as a sanction.*

It should be noted that Defendants have had several opportunities to reduce the fees they are incurring, and their counsel has declined those opportunities on behalf of the County. Before the last status conference, counsel for Plaintiffs suggested they stipulate to stay these proceedings, in favor of allowing LUBA to decide who is correctly interpreting LUBA's prior orders. *Brann Resp Decl.* ¶8. Counsel for Defendants indicated that the County prefers to move forward before both LUBA and this Court. *Id.* Defendants have further refused any discourse or settlement discussions with the Plaintiffs, including the possibility of a negotiated consent decree or Ordinance Amendments to Resolve this Litigation. *Id.* Thus if Defendants are incurring attorney fees here, they are <u>volunteers</u> not <u>victims</u> as Defendants have repeatedly rejected opportunities to streamline and decrease the attorney fees that both sides are incurring in this matter.

Defendants seek attorney fees under the statute that empowers courts to impose them as a sanction against a party who "willfully disobeyed a court order or that there was no objectively reasonable basis for asserting the claim . . ." ORS 20.105(1). To meet this standard, Defendants must demonstrate Plaintiffs' position is "entirely devoid of legal or factual support" when the claim was made. *Dimeo v. Gesik,* 195 Or App 362, 371, 98 P3d 397 (2004), *modified on recons,*

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197 Or App 560, 106 P3d 697 (2005)(internal quotation marks and citation omitted). Any evidence of an objectively reasonable basis for a claim or defense is enough to defeat a claim for fees pursuant to ORS 20.105. *Minihan v. Stiglich,* 258 Or App 839, 861, 311 P3d 922 (2013). Obviously, Plaintiffs' desire to enforce the rights that LUBA granted to them in the *Briggs-Cammann* case is objectively reasonable; Defendants' claim should be denied and dismissed at the summary judgment stage on the merits and warrants no further discussion. *See also Mulier v. Johnson*, 332 Or 344, 351, 29 P3d 1104 (2001).

V. CONCLUSION

For the reasons set forth above Plaintiffs respectfully ask that the Court grant them the declaratory and injunctive relief set forth in the prayer of the Second Amended Complaint and Deny Defendants' Motion for Summary Judgment.

DATED this 20th day of June 2023.

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ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2023, I have made service of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DECLARATION OF HEATHER A. BRANN IN SUPPORT AND EXHIBITS** on the parties listed below in the manner indicated

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DATED this 20th day of June 2023.

s/ Heather A. Brann
Heather A. Brann, OSB #040495
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CERTIFICATE OF SERVICE