



Oregon

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NOTICE OF ADOPTED CHANGE TO A COMPREHENSIVE PLAN OR LAND USE REGULATION

Date: 01/07/2015
Jurisdiction: City of Lincoln City
Local file no.: CPA 2013-01 & ZOA 2013-01
DLCD file no.: 001-13

The Department of Land Conservation and Development (DLCD) received the attached notice of adopted amendment to a comprehensive plan or land use regulation on 12/23/2014. A copy of the adopted amendment is available for review at the DLCD office in Salem and the local government office.

Notice of the proposed amendment was submitted to DLCD 35 days prior to the first evidentiary hearing.

Appeal Procedures

Eligibility to appeal this amendment is governed by ORS 197.612, ORS 197.620, and ORS 197.830. Under ORS 197.830(9), a notice of intent to appeal a land use decision to LUBA must be filed no later than 21 days after the date the decision sought to be reviewed became final. If you have questions about the date the decision became final, please contact the jurisdiction that adopted the amendment.

A notice of intent to appeal must be served upon the local government and others who received written notice of the final decision from the local government. The notice of intent to appeal must be served and filed in the form and manner prescribed by LUBA, (OAR chapter 661, division 10).

If the amendment is not appealed, it will be deemed acknowledged as set forth in ORS 197.625(1)(a). Please call LUBA at 503-373-1265, if you have questions about appeal procedures.

DLCD Contact

If you have questions about this notice, please contact DLCD's Plan Amendment Specialist at 503-934-0017 or plan.amendments@state.or.us



NOTICE OF ADOPTED CHANGE TO A COMPREHENSIVE PLAN OR LAND USE REGULATION

FOR DLCD USE

File No.: 001-13 {19442}

Received: 12/23/2014

Local governments are required to send notice of an adopted change to a comprehensive plan or land use regulation **no more than 20 days after the adoption.** (See [OAR 660-018-0040](#)). The rules require that the notice include a completed copy of this form. **This notice form is not for submittal of a completed periodic review task or a plan amendment reviewed in the manner of periodic review.** Use [Form 4](#) for an adopted urban growth boundary including over 50 acres by a city with a population greater than 2,500 within the UGB or an urban growth boundary amendment over 100 acres adopted by a metropolitan service district. Use [Form 5](#) for an adopted urban reserve designation, or amendment to add over 50 acres, by a city with a population greater than 2,500 within the UGB. Use [Form 6](#) with submittal of an adopted periodic review task.

Jurisdiction: City of Lincoln City

Local file no.: **ZOA 2013-01, ZOA 2013-05**

Date of adoption: 12/08/2014 Date sent: 12/23/2014

Was Notice of a Proposed Change (Form 1) submitted to DLCD?

Yes: Date (use the date of last revision if a revised Form 1 was submitted): 8/27/2014

No

Is the adopted change different from what was described in the Notice of Proposed Change? Yes No

If yes, describe how the adoption differs from the proposal:

See attached description of how the adopted ordinance differs from the original draft ordinance(s).

Local contact (name and title): Richard Townsend, Planning & Community Development Director

Phone: 541-996-2153

E-mail: rtown@lincolncity.org

Street address: 801 SW Highway 101

City: Lincoln City

Zip: 97367

PLEASE COMPLETE ALL OF THE FOLLOWING SECTIONS THAT APPLY

For a change to comprehensive plan text:

Identify the sections of the plan that were added or amended and which statewide planning goals those sections implement, if any:

For a change to a comprehensive plan map:

Identify the former and new map designations and the area affected:

Change from	to	acres.	A goal exception was required for this
change.			
Change from	to	acres.	A goal exception was required for this
change.			
Change from	to	acres.	A goal exception was required for this
change.			
Change from	to	acres.	A goal exception was required for this change.

Location of affected property (T, R, Sec., TL and address):

The subject property is entirely within an urban growth boundary

The subject property is partially within an urban growth boundary

If the comprehensive plan map change is a UGB amendment including less than 50 acres and/or by a city with a population less than 2,500 in the urban area, indicate the number of acres of the former rural plan designation, by type, included in the boundary.

Exclusive Farm Use – Acres:	Non-resource – Acres:
Forest – Acres:	Marginal Lands – Acres:
Rural Residential – Acres:	Natural Resource/Coastal/Open Space – Acres:
Rural Commercial or Industrial – Acres:	Other: – Acres:

If the comprehensive plan map change is an urban reserve amendment including less than 50 acres, or establishment or amendment of an urban reserve by a city with a population less than 2,500 in the urban area, indicate the number of acres, by plan designation, included in the boundary.

Exclusive Farm Use – Acres:	Non-resource – Acres:
Forest – Acres:	Marginal Lands – Acres:
Rural Residential – Acres:	Natural Resource/Coastal/Open Space – Acres:
Rural Commercial or Industrial – Acres:	Other: – Acres:

For a change to the text of an ordinance or code:

Identify the sections of the ordinance or code that were added or amended by title and number:

The ordinance amends Title 17, Zoning, in Sections 17.08.010 (Definitions), Section 17.80.050 (Vacation Rental Dwellings), Chapter 17.84 (Remedies) and Section 17.84.020 (Enforcement)

For a change to a zoning map:

Identify the former and new base zone designations and the area affected:

Change from	to	Acres:
Change from	to	Acres:
Change from	to	Acres:
Change from	to	Acres:

Identify additions to or removal from an overlay zone designation and the area affected:

Overlay zone designation:	Acres added:	Acres removed:
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Location of affected property (T, R, Sec., TL and address):

List affected state or federal agencies, local governments and special districts:

Identify supplemental information that is included because it may be useful to inform DLCD or members of the public of the effect of the actual change that has been submitted with this Notice of Adopted Change, if any. If the submittal, including supplementary materials, exceeds 100 pages, include a summary of the amendment briefly describing its purpose and requirements.

Adds optional expedited process for 30 nights/year VRD approval; does not change the existing accessory use limitation in residential zones; offers an optional settlement option allowing 180 nights/year for existing VRDs in residential zones; creates option to apply for quasi-judicial determination of vested rights or nonconforming use status; expressly lists VRDs as permitted uses in commercial and mixed-use zones; eliminates special landscape criteria; clarifies enforcement processes.

1
2
3 **ORDINANCE NO. 2014-22**

4 **AN ORDINANCE AMENDING THE LINCOLN CITY MUNICIPAL CODE, TITLE**
5 **17, (ZONING), CHAPTER 17.08, SECTION 17.08.010 (DEFINITIONS), ADDING**
6 **CLARIFYING LANGUAGE; AMENDING CHAPTER 17.80, SECTION 17.80.050**
7 **(VACATION RENTAL DWELLINGS), ADDING CLARIFYING LANGUAGE**
8 **DIRECTING COMPLIANCE WITH EXISTING ACCESSORY USE LIMITATION IN**
9 **PERMITTING AND ENFORCEMENT, REQUIRING FINDINGS, ADDING AN**
10 **ALTERNATIVE NONDISCRETIONARY ZONING COMPLIANCE CHECK FOR**
11 **EXPEDITED REVIEW, AMENDING VRD LANDSCAPING REQUIREMENTS,**
12 **AMENDING THE EXISTING GC, RC, TVC, OPD-MSH, OPD-IM, OPD-OF, NPD-**
13 **NBD, NPD-NBMU ZONING CATEGORIES TO LIST VRDS AS A PERMITTED**
14 **USE, AMENDING CHAPTER 17.80.050 E. (EXISTING USES) TO CREATE AN**
15 **ADMINISTRATIVE ALLOWANCE FOR CONTINUATION OF EXISTING VRDS IN**
16 **THE R-1, R-R, R-M, AND NPD-NCR RESIDENTIAL ZONES, AMENDING**
17 **CHAPTER 17.84 (REMEDIES), AND SECTION 17.84.020 (ENFORCEMENT)**

18 The City Council finds:

- 19
- 20 A. The proposed amendments are in conformance with the Statewide Planning
21 Goals and Lincoln City Comprehensive Plan goals, as addressed in the Detailed
22 Findings attached as Exhibit "A" (the same findings adopted as part of Ordinance
23 2014-21).
- 24
- 25 B. The amendment process is in conformance with the Zoning Ordinance, including,
26 but not limited to, required initiation, processing and noticing requirements. The
27 City initiated both the "YES/NO" zone amendments removing the accessory use
28 limitation and alternate VRD amendments retaining the accessory use limitation
29 in 2013.
- 30
- 31 C. The City duly notified the Oregon Department of Land Conservation and
32 Development pursuant to ORS 197.610, of its consideration of VRD amendments,
33 first on April 16, 2013 and again on November 27, 2013; similarly, notice of the
34 proposed VRD amendments was included in two (2) ORS 227.186(4) (Measure 56)
35 notices to all affected property owners.
- 36
- 37 D. In June 2013 and in January 2014, the Planning Commission considered the
38 "YES/NO" zone and the alternate VRD amendments, respectively, and after public
39 hearings voted to recommend the "YES/NO" zone to the City Council but not
40 recommend the alternate amendments; and
41

- 1 E. The City Council held a public hearing on the proposed YES/NO zone in June
2 2013 and alternate amendment(s) in February 2014, and after such public
3 hearings left the record open for written testimony. All persons were given an
4 opportunity to provide written and/or oral testimony on the proposed
5 ordinances.
6
- 7 F. Council continued deliberations on the "YES/NO" zone amendments for
8 consideration concurrent with the alternate amendments. After due
9 consideration of the entire record, in deliberations, Council elected to select
10 portions of the various ordinances before them for adoption while rejecting or
11 modifying other portions.
12
- 13 G. Council first directed staff to remove VRD safety standards from the proposed
14 license ordinance amendment and adopt safety standards ahead of other VRD
15 provisions (Ord. 2014-7 adopted May 12, 2014). Council next directed the
16 creation of a new mixed use zone, based on the YES and VROZ overlays
17 proposed, for use by both the City Council and private property owners (Ord.
18 2014-21). The VR zone is a new mixed use zone which will permit VRD use
19 without the existing (residential zone) accessory use limitation. The Council
20 announced it will consider City-Initiated rezoning of some of the areas proposed
21 for the "YES" zone overlay to this new mixed use (VR) Zone. Owners are also
22 invited to request rezoning by private application.
23
- 24 H. Council further directed that the VR zone be brought forward together with
25 ordinances requiring the City to enforce the existing accessory use limitation in
26 permitting as well as revocation and other enforcement proceedings. The
27 Council rejected the request to repeal the accessory use limitation which has
28 existed un-amended in the Code for more than five years. Similarly, Council
29 decided to retain the existing limitation on VRD approvals where the use
30 authorization is lost upon sale or transfer. Council further directed that a
31 mechanism be created to bring existing VRDs operating in excess of such use
32 limitations back into compliance within a reasonable period of time and without
33 the need to initiate formal revocation or enforcement actions resulting in fines
34 and litigation (Ord. 2014-22).
35
- 36 I. Finally, Council directed that an option to the existing land use process be
37 created to streamline VRD approvals. Accordingly the VRD license ordinance is
38 also amended (Ord. 2014-23) to provide owners with an option of proceeding to
39 a license with a nondiscretionary zoning compliance check with a numeric
40 limitation for accessory use. The existing land use process will not be repealed
41 and will remain available for applicants.
42
- 43 J. On August 25, 2015 Council directed that the record be reopened and an
44 additional public hearing be conducted on Ordinances 2014-21, 2014-022 and

1 2014-23. Notice was provided to DLCD of the additional hearing. A public
2 hearing was conducted on September 15, 2015 and testimony was received. The
3 Council left the record open for written comments until noon on October 13,
4 2014. After the close of the record Council further deliberated and proceeded to
5 the question of adoption of the proposed ordinances. The Council scheduled
6 Ordinances for reading on October 27, 2014.
7

8 **The City Council of Lincoln City ordains as follows:**
9

10
11 **SECTION 1.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.08
12 (Definitions), Section 17.08.010 (Definitions), the unnumbered listed definition for
13 "Vacation rental dwelling" is hereby amended and clarified to read as follows:
14

15 "Vacation rental dwelling" (**VRD**) means a dwelling unit that, **for**
16 **money, value or other consideration, or the promise thereof,** is
17 used, rented or occupied on a daily or weekly basis, or is available
18 for use, rent, or occupancy on a daily or weekly basis, or is
19 advertised, or listed by an agent, as available for use, rent, or
20 occupancy on a daily or weekly basis. **Subject to site design**
21 **standards, a VRD is a permitted commercial use, and like other**
22 **commercial uses, is expressly prohibited in residential zones**
23 **except as specifically authorized in this Title, such as the**
24 **limited allowance for such use as an incidental and subordinate**
25 **Accessory Use in a residential zone [LCMC 17.80.050].**
26

27 **SECTION 2.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.80.050
28 (Provisions Applying to Special Uses), Section 17.80.050 (Vacation Rental
29 Dwellings), Paragraph B.2. is hereby amended and clarified to read as follows:

30 2. Accessory or Permitted Use.

31
32 **a.** A VRD is allowed as an accessory use in a residential zone and a
33 permitted use in a commercial zone, provided the VRD meets the
34 applicable standards of this chapter and obtains a license under
35 Chapter 5.14 LCMC. **"Residential" as used herein includes the**
36 **following zones: R-1, R-R, R-M, and NPD-NCR. "Commercial"**
37 **as used herein includes the following zones: GC, RC, TVC, OPD-**
38 **MSH, OPD-IM, OPD-OF, NPD-NBD, NPD-NBMU and the VR**
39 **zone.**
40

1 **b. An applicant for a VRD authorization may proceed under the**
2 **existing land use process [LCMC 17.80.050.C] as clarified by**
3 **required staff findings in subparagraph B.2.c. below or may**
4 **proceed directly to the license process under the expedited**
5 **review option, detailed in this paragraph. The expedited review**
6 **option is a simple zoning compliance check with a numeric**
7 **limitation on the number of VRD rental nights for the calendar**
8 **year. In commercial zones, specified above, staff verifies the**
9 **property is in the commercial zone and the use is permitted,**
10 **subject to a license, with no numeric limitation on the number**
11 **of VRD rental nights. For the expedited option, in a residential**
12 **zone, where the accessory use limitation applies, staff verifies**
13 **the property is in a residential zone and the use authorization is**
14 **subject to a license, and contains the numeric limitation to thirty**
15 **(30) VRD rental nights to implement the accessory use**
16 **limitation with a nondiscretionary standard. Prohibited transfer**
17 **(LCMC 17.80.050.B.1 above) of the property or license**
18 **revocation terminates the use authorization. Standards B.3-8**
19 **below are to be addressed in the License process when this**
20 **option is exercised.**

21
22 **c. Council directs that in residential accessory use VRD land use**
23 **permitting [LCMC 17.80.050] and code enforcement, including**
24 **revocation proceedings under this Title and Title 5, the Planning**
25 **Director, Planning Commission or other authorized decision-**
26 **maker shall expressly address with detailed findings, the**
27 **existing code accessory use definitional elements and**
28 **comprehensive plan and zoning code context in the decision.**

29 **SECTION 3.** LCMC 17.80.050.E. (Existing Uses) is amended by adding a new
30 paragraph 4. As follows:

31 **4. Administrative Allowance for Continuation of Vacation Rentals in**
32 **Residential Zones.**

33
34 **a. Subject to Section 4.b. below, a vacation rental dwelling that**
35 **(1) is located in the R-1, R-R, NCR, or R-M zone, and (2) had, prior to**
36 **October 27, 2014, received a vacation rental dwelling land use**
37 **approval and obtained (and maintains) a current vacation rental**
38 **dwelling license, or was the subject of an approved conditional use**

1 permit for a vacation rental dwelling and obtained (and maintains) a
2 current valid vacation rental dwelling license, may continue to be
3 operated up to 180 nights a year as a vacation rental dwelling until
4 property sale or transfer (as defined in LCMC 17.80.050 B.1.).
5 Violation of the limitations in this administrative allowance will result
6 in revocation proceedings or other appropriate enforcement action.
7

8 **b.**

9 (1) This administrative allowance is not a vested rights
10 determination or a determination that the subject vacation rental
11 dwelling is a legal nonconforming use. The allowance is offered by
12 the City as an alternative dispute resolution mechanism to bring
13 noncompliant property use – in violation of accessory use zoning
14 limitations, back in conformance with the adopted Zoning Code and
15 Comprehensive Plan. The extended compliance period is provided
16 by the City to acknowledge that underfunded enforcement by the
17 City and irresponsible real estate lending practices may have created
18 financial peril for property owners who rely upon a certain level of
19 vacation rental income to pay their mortgages. The administrative
20 allowance is an option available for property owners which they elect
21 at any time, in an executed compliance agreement approved by the
22 Municipal Court, or through the license process. There are two
23 alternatives to the administrative allowance: (1) the property owner
24 may request (but is not guaranteed) a rezoning to the VR zone or any
25 other available commercial zone [See LCMC 17.80.050.B.2.a] which
26 does not carry the accessory use limitation; or (2) the property owner
27 may simply apply for a license or renewal as normal, with the option
28 to apply for a formal nonconforming use or vested rights
29 determination as provided herein. Such determinations may be
30 considered concurrently with quasi-judicial zoning compliance / land
31 use & license revocation proceedings. If the referenced
32 nonconforming use / vested rights determination is not filed within
33 one year of the effective date of this Ordinance, the determination is
34 deemed waived.

35 (2) Submittal of a rezone application does not waive the
36 offered administrative allowance. Submission of a request for a
37 license renewal with the option to submit a rights/use determination
38 during the license year is not a rejection of the allowance, if the
39 formal rights determination is never filed. Submission of a formal

1 nonconforming use / vested rights determination is a rejection of the
2 settlement offer in the administrative allowance and waives the
3 allowance. If the property owner demonstrates rights over and above
4 the administrative allowance, the VRD use so established may
5 continue in the residential zone subject to all normal use termination
6 provisions and any other applicable nonconforming or vested rights
7 limitations. If the use is found to be illegal, (e.g. either not lawfully
8 established or operated in violation of the incidental and subordinate
9 accessory use limitation), the use and license will be revoked and
10 there will be additional enforcement actions.

11
12 **SECTION 4.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.80.050
13 (Provisions Applying to Special Uses), Section 17.80.050 (Vacation Rental
14 Dwellings), Paragraph B.5. is hereby amended to read as follows:
15

16 5. Landscaping.

17
18 **a. Residential Zones. The owner must landscape all yards of**
19 **the VRD property in accordance with the standards of LCMC**
20 **17.52.100.**

21
22 **b. Commercial Zones. The owner shall install and maintain**
23 **the landscaping for the VRD as shown in the approved site plan**
24 **for the commercial use or mixed-use application; if the approval**
25 **did not include a site plan, the landscaping, at a minimum, shall**
26 **meet the landscaping standards of LCMC 17.52.100.**

27
28 ~~**a. Residential Zones. The owner must landscape all yards.**~~
29 ~~**Landscaping must meet the following standards:**~~

30
31 ~~**i. Area. A minimum of 40 percent of the lot must be**~~
32 ~~**landscaped.**~~

33 ~~**ii. Front Yard. A minimum of 50 percent of the front**~~
34 ~~**yard (the area between the side lot lines, the front lot**~~
35 ~~**line, and the front of the dwelling) must be landscaped.**~~

36 ~~**iii. Hardscape Features. A maximum of 50 percent of the**~~
37 ~~**required landscape area may consist of hardscape**~~
38 ~~**features such as patios and decks, but not swimming**~~
39 ~~**pools, sport courts, driveways, or parking areas.**~~

1 ~~iv. Nonliving Plant Ground Covers. Bark dust, chips,~~
2 ~~aggregate, or other nonliving plant ground covers may~~
3 ~~be used on an area covering no more than 25 percent of~~
4 ~~the area to be landscaped.~~

5 ~~v. Plants. The use of native and drought-tolerant plant~~
6 ~~species is encouraged. Plants shall be species that are~~
7 ~~known to thrive in the Northern Oregon coastal~~
8 ~~environment, and either listed in the Lincoln City Tree~~
9 ~~Planting Guide and List of Recommended Species, or~~
10 ~~recommended by a licensed nurseryman as being~~
11 ~~suitable for the local climate, as approved by the~~
12 ~~planning and community development director. The use~~
13 ~~of noxious or invasive plant species is prohibited.~~

14 ~~vi. Shrub Size. Shrubs shall be planted from three-gallon~~
15 ~~containers or larger.~~

16 ~~vii. Ground Cover Size. Ground cover plants shall be~~
17 ~~sized and spaced so that they grow together to cover a~~
18 ~~minimum of 50 percent of the landscaped area within~~
19 ~~three years of planting.~~

20 ~~viii. Maintenance and Irrigation. Adequate irrigation~~
21 ~~shall be temporarily provided for all plants until they are~~
22 ~~established and permanently provided for all plants that~~
23 ~~are not drought-tolerant. The owner must maintain all~~
24 ~~plantings in good condition and must replace with like~~
25 ~~plants any plants that are removed or die for any reason.~~

26
27 ~~b. Commercial Zones. The owner shall install and maintain~~
28 ~~the landscaping as approved in the approved site plan for~~
29 ~~the commercial use or mixed-use application, or at a~~
30 ~~minimum meet the landscaping standards of subsection~~
31 ~~(B)(5)(a) of this section if site plan approval is not required.~~

32
33 **SECTION 5.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.28.
34 (Recreation-Commercial Zone [R-C]), Section 17.28.020 (Uses Permitted), is
35 hereby amended to add the following new paragraph M:

36 **M. Principal use of a single-family dwelling as a vacation rental**
37 **dwelling, subject to LCMC 17.80.050. and LCMC 5.14.**
38

1 **SECTION 6.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.32.
 2 (General Commercial Zone [G-C]), Section 17.32.020 (Uses Permitted), is hereby
 3 amended to add the following new paragraph BB:

4 **BB. Principal use of a single-family dwelling as a vacation rental**
 5 **dwelling, subject to LCMC 17.80.050. and LCMC 5.14.**
 6

7 **SECTION 7.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.34.
 8 (Nelscott Plan District [NP]), Section 17.34.050 (Uses Permitted), Table 17.34.050A.
 9 (Land Uses Allowed in Nelscott), row six (6) (only) of the Table, is hereby
 10 amended to correctly address vacation rentals in the NBD and NBMU Districts:

11 **Table 17.34.050.A – Land Uses Allowed in Nelscott**

Uses	Status of Use in District		
Use Categories	Business District	Cottage Residential	Beachside Mixed Use
Primary Principal use of a single-family dwelling as a vacation rental dwelling, subject to LCMC 17.80.050 and LCMC 5.14	P	N	P

12

13 **SECTION 8.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.45. (Taft
 14 Village Core [TVC]), Section 17.45.040 (Land Use Activities), "TVC Land Use
 15 Activity" Table, Paragraph C (Boarding and Lodging Facilities), only, is hereby
 16 amended to add a new row to specifically address vacation rentals, as follows:

17

TVC Land Use Activity	P or C
C. Boarding and Lodging Facilities¹	
Commercial establishments which provide boarding and lodging facilities:	

1. Bed and breakfast accommodations	P
2. Condominiums with 10 units or less and with nightly rentals ²	C
3. Hotels/motels with 10 units or less	P
4. Recreational vehicle parks	-
5. Time-share units	C
6. Principal Use of a single-family dwelling as a vacation rental dwelling subject to LCMC 17.80.050 and LCMC 5.14	P

1 **SECTION 9.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.50.
2 (Oceanlake Plan District [OP]), Section 17.50.050 (Permitted Uses), Table
3 17.50.050 (Land Uses Allowed in Oceanlake), is hereby amended (only) to add a
4 new row after "Bed and Breakfast inn, per LCMC 17.80.060" to specifically address
5 vacation rentals, as follows:

Table 17.50.050 – Land Uses Allowed in Oceanlake

Uses	Status of Use in District		
	Main Street Area	Interior Area	Oceanfront Area
Use Categories			
<u>Principal use of a single family dwelling as a vacation rental dwelling, subject to LCMC 17.80.050 and LCMC 5.14</u>	<u>P</u>	<u>P</u>	<u>P</u>

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SECTION 10. Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.80.050 (Provisions Applying to Special Uses), Section 17.80.050 (Vacation Rental Dwellings), Paragraph D. is hereby amended to read as follows:

D. Violation – Penalties – Sanction.

1. Unauthorized VRD Use Prohibited. The unauthorized use of a dwelling as a vacation rental dwelling in any zoning district is a violation of this Code and an offense against the City. Unauthorized use includes offering or making available a

1 vacation rental dwelling for occupancy, use, or rent, for an
2 exchange of money, value or other consideration or the
3 promise thereof, without first obtaining the approval under
4 City Code. Unauthorized use may include unpermitted use
5 (code violation due to no planning approval pursuant to
6 Chapter 17), unlicensed use (code violation due to no license
7 pursuant to Chapter 5.14), or both. A person commits the
8 offense of unauthorized use / operation of a vacation rental
9 dwelling, if the person causes, allows, permits, aids, abets,
10 suffers or conceals the unauthorized use or operation of a
11 dwelling as a VRD; A person convicted of violating this section
12 is subject to a fine and enforcement costs as established in
13 Chapter 1.16 LCMC, except that unauthorized use shall
14 constitute a Class A Violation as defined by state law. Each day
15 a violation continues is a separate offense. Upon conviction,
16 the minimum fine shall be no less than \$500.00, per offense,
17 plus costs.

18
19 **2. Except for enhanced penalties set forth herein, operating a**
20 **vacation rental dwelling or causing, allowing, permitting,**
21 **aiding, abetting, suffering or concealing a violation of any of**
22 **the applicable standards of LCMC 17.80.050.B is a Class A**
23 **violation and enforceable as provided in Chapter 1.16 LCMC. A**
24 **person convicted of violating this section is subject to a fine**
25 **and enforcement costs as established in Chapter 1.16 LCMC.**
26 **Each day a violation continues is a separate offense. Violation**
27 **of the standards in LCMC 17.80.050.B shall also be grounds to**
28 **revoke the accessory use approval consistent with Chapter**
29 **17.76 quasi-judicial procedures, or the suspension or**
30 **revocation or denial of renewal for a license issued under**
31 **Chapter 5.14 LCMC.**

32
33 **3. Commercial Use Defined. Commercial VRD operation is use**
34 **of a dwelling for VRD purposes for more than thirty (30) VRD**
35 **rental nights in a calendar year (for approvals under LCMC**
36 **17.80.050.B.2.b). Commercial VRD use is also use in excess of**
37 **the limited allowance in the code for incidental and**
38 **subordinate accessory use (for approvals under LCMC**
39 **17.80.050.B.2.a.).**
40

1 **4. Commercial VRD Use Prohibited in Residential Zones. In a**
2 **residential zone, a person who causes, allows, permits, aids,**
3 **abets, suffers or conceals the use of a dwelling as a VRD for**
4 **more than the authorized incidental and subordinate accessory**
5 **use or for commercial VRD use as defined herein is engaging in**
6 **unlawful commercial use of residential property. A person**
7 **convicted of violating this section is subject to a fine and**
8 **enforcement costs as established in Chapter 1.16 LCMC. Such**
9 **offense against the City shall constitute a Class A violation and**
10 **each day the dwelling is used in violation of the limitation of**
11 **this Section shall constitute a separate offense. Upon**
12 **conviction, the minimum fine shall be no less than \$500.00, per**
13 **offense, plus code enforcement costs. This prohibition is not**
14 **applicable to VRDs operating within the limitations of the**
15 **administrative allowance set forth in LCMC 17.80.050.E. or**
16 **other nonconforming use or vested rights verification or**
17 **determination. Use or occupancy outside the limitations of the**
18 **Administrative Allowance is a violation of this section.**

19
20 **5. Accessory Use Revocation. The City Attorney, City Manager**
21 **or Planning Director may initiate concurrent land use and/or**
22 **license revocation proceedings before Council or Council's**
23 **designee (consistent with Chapter 17.76 quasi-judicial**
24 **procedures and Chapter 5.14) for any prior VRD accessory use**
25 **approval in a residential zone, if the owner is not operating**
26 **under an administrative allowance of LCMC 17.80.050.E. or**
27 **approved nonconforming use or vested rights determination**
28 **and there is evidence of noncompliance with the limitation.**
29 **Revocation shall address the existing discretionary land use**
30 **criteria in LCMC 17.80.050.B.2. and LCMC 17.08.020 (accessory**
31 **definition). The occupancy and tax records for the VRD shall be**
32 **examined to determine if the owner has disregarded the**
33 **incidental and subordinate accessory use limitation of the**
34 **residential zone. This authorization is in addition to the**
35 **existing authorization for revocation in Sections 17.80.050.D. 1.**
36 **2 & 3 which are retained but renumbered as paragraphs 8.a, b**
37 **and c below.**

38
39 **6. Nuisance. Violation of the limitations and standards in**
40 **Section 17.80.050.B., including specifically the accessory use**

1 limitation, and violation of the commercial use prohibition in
2 residential zones, constitutes a nuisance and may be abated as
3 directed in LCMC Chapter 17.84 and under state law.

4
5 7. The penalties and remedies identified herein are not
6 exclusive and the violations may be abated by any means
7 necessary.
8

9
10 **D. Violation – Penalties – Sanction.**

11
12 **8. a.**

13
14 **1.** Offering or making available a vacation rental dwelling for
15 occupancy, use, or rent, ~~with or without~~ an exchange of
16 **money**, value or other consideration, **or the promise thereof**
17 without first obtaining city approval of the use under this
18 section, is a violation and enforceable as a Class A civil
19 infraction.

20 a. Proof the dwelling is advertised, listed with an agent, or
21 publicly described in any manner by the owner or owner's
22 agent as a vacation rental dwelling creates a rebuttable
23 presumption that a vacation rental dwelling exists and is
24 available for use, rent, or occupancy.

25 b. Oral or written statements indicating a vacation rental
26 dwelling is or was made available for use, rent, or
27 occupancy, including but not limited to an advertisement,
28 offer, agreement, or correspondence in any medium,
29 made on or about the date of an alleged violation, are
30 admissible in court for the purpose of establishing a
31 presumption that the vacation rental dwelling was
32 available for occupancy on the date of the alleged
33 violation, whether or not the dwelling was actually rented,
34 used or occupied on such date.

35 c. When a vacation rental dwelling is shown to be made
36 available on a particular date, it is presumed the VRD
37 continues to be made available unless the defendant
38 proves otherwise.
39

40 **8. b.**

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~~2.~~ Operating a vacation rental dwelling in violation of any of the standards of subsection (B) of this section is a Class A violation enforceable as provided in Chapter 1.16 LCMC, grounds to suspend or revoke a license under Chapter 5.14 LCMC, and a nuisance.

8. c.

~~3.~~ A person convicted of violating this section is subject to a fine as a penalty as established in Chapter 1.16 LCMC. Each day of violation is a separate violation.

SECTION 11. Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.84 (Remedies) Section 17.84.020 (Enforcement), is hereby amended to add possible increased penalties and make revisions, as follows:

17.84.20 Enforcement.

A. Civil Infraction. Any person, firm, association or corporation, whether as principal, agent, employee or otherwise, who violates any provision of this title or any order adopted pursuant to this title shall be punished under the provisions of Chapter 1.16 LCMC. **Unless otherwise specified, any Any** such violation is a Class A civil infraction. Each day that the violation of this title exists is deemed to be a separate offense.

B. Notice **of Violation.**

- 1. The building official, **designee,** or **an authorized enforcement officer listed in or designated pursuant to LCMC 1.16.040 (hereinafter "enforcement officer")** ~~The building official or code enforcement officer or designee~~ shall **may** give written notice of any violation of this title to the party responsible for the violation.
- 2. The party notified of the violation shall have 10 days to execute and deliver to the city an assurance of voluntary compliance. The assurance shall set forth what actions, if any, the party intends to take with respect to the alleged violation. If the ~~building official or code~~ enforcement officer ~~or~~

1 **designee** is satisfied with the assurance of voluntary
2 compliance, the assurance ~~may~~ **shall** be submitted to the
3 municipal court for approval, and if approved shall be filed
4 with the clerk of the court as an order of the court.

5 3. The ~~building official or code~~ enforcement officer ~~or~~
6 **designee** may reject any assurance:

7 a. Which does not provide for correction of the violation
8 or removal of a noncomplying structure in a timely
9 manner approved by the city; or

10 b. Which does not provide for restitution in specific
11 amounts to the city where there has been an
12 ascertainable loss of money or property as a result of the
13 alleged violation; or

14 c. Which does not contain any provision, including but not
15 limited to the keeping of records, which the **building**
16 ~~official or code~~ enforcement officer ~~or designee~~
17 reasonably believes necessary to ensure the continued
18 cessation of the alleged violation.

19 4. Violation of any terms of an assurance of voluntary
20 compliance which has been approved and filed with the court
21 shall constitute a contempt of court.

22 5. **The court shall not conduct a trial or hearing if the**
23 **named violator in the Notice of Violation, has timely filed**
24 **an appeal to the City land use reviewing body with**
25 **appropriate jurisdiction of any land use code**
26 **interpretation by the Planning Director contained in the**
27 **Notice of Violation letter. Upon exhaustion of the land**
28 **use appeal process, or failure to timely file such appeal by**
29 **the named violator, the court may proceed with**
30 **adjudication of the offense. In proceeding with the case**
31 **the Court is bound to apply the final interpretation of the**
32 **Director or the appropriate appellate reviewing body.**
33 **There can be no land use appeal based upon clear and**
34 **objective standards or based upon a codified**
35 **interpretation of a provision of the land use code, (i.e. the**
36 **Council has defined a term which would otherwise involve**
37 **the exercise of discretion).**

38 ~~Enforcement by the Police Department. The chief of~~
39 ~~police, his authorized representative and any sworn police~~

1 ~~officer shall have the power to enforce the provisions of~~
2 ~~this title.~~

3
4 C. Filing of Complaint.

5 1. After the expiration of 10 days from the date of notice given
6 under subsection (B) of this section, the ~~building official or~~
7 ~~code~~ enforcement officer ~~or designee~~ may bring action in the
8 name of the city in the municipal court to restrain the violation
9 or to seek daily imposition of fines and costs ~~a forfeiture~~
10 pursuant to Chapter 1.16 LCMC or both.

11 2. If the delay caused by complying with the notice provisions
12 of subsection (B) of this section would cause immediate harm
13 to the public health, safety or welfare or to property, or if it is
14 necessary to stop construction then underway, a stop work
15 order may be issued and an action ~~shall~~ **may** be immediately
16 commenced under subsection (A) of this section.

17 3. A temporary restraining order may be granted without prior
18 notice to the party allegedly violating the provisions of this
19 title, if the municipal court finds there is a threat of immediate
20 harm to the public health, safety or welfare or to property. The
21 court shall fix a time not to exceed 15 days after which the
22 temporary restraining order shall expire by its terms, unless
23 within the time fixed a hearing is held and for good cause
24 shown the court extends the restraining order or provides for
25 any other equitable relief.

26
27 D. Tree Removal Infraction. Any person, firm, association, or corporation,
28 whether as principal, agent, employee, or otherwise, who removes or destroys
29 any trees without first having obtained a tree removal permit in accordance
30 with LCMC 17.52.220(B), when such a permit is required, or who violates any
31 of the conditions of such a permit commits a civil infraction. Any such
32 infraction shall be punished under the provisions of Chapter 1.16 LCMC as a
33 tree removal infraction.

34
35 **E. Enforcement by the Police Department. The chief of police, his**
36 **authorized representative and any sworn police officer shall have**
37 **the power to enforce the provisions of this title.**
38

1 **SECTION 12.** Lincoln City Municipal Code, Title 17 (Zoning), Chapter 17.84
2 (Remedies) Section 17.84.050 (Inspection), is hereby amended to clarify the City's
3 intent to comply with inspection warrant requirements, as follows:

4 **17.84.050 Inspections.**

5
6 The building official or code enforcement officer or designee shall have the
7 authority to make routine periodic inspections of property and premises, **and**
8 **inspect books and records required to be maintained by City Code** within the
9 city limits to determine whether there is compliance with the laws, rules and
10 regulations which are designed for the protection of the health, safety and
11 welfare of the public, and to make such inspections upon receipt of complaints or
12 specific or general information indicating the existence of hazardous conditions
13 or noncompliance with such rules, regulations and laws. In the event that the
14 building official or code enforcement officer or designee is denied access to any
15 property or premises or **denied inspection of books and records required to**
16 **be maintained** for the purposes of making an inspection provided for in this title
17 **or other provision of the Municipal Code**, such officer or official shall not
18 inspect such premises **or records** unless or until he or she has obtained from the
19 municipal judge of the city a search warrant for the inspection of such premises
20 **or records**.

21
22 **SECTION 13. Findings Adopted.**

23
24 The findings contained in the Whereas Clauses of this ordinance, together with
25 the Findings set forth in Exhibit A (the same findings adopted as part of
26 Ordinance 2014-21), as well as the competent substantial evidence in the whole
27 record of this legislative proceeding are incorporated into this section by
28 reference as if fully set forth herein, and are adopted in support of this legislative
29 action.

30
31 **SECTION 14. Severability.**

32
33 The sections, subsections, paragraphs and clauses of this ordinance are severable.
34 The invalidity of one section, subsection, paragraph, or clause shall not affect the
35 validity of the remaining sections, subsections, paragraphs and clauses.

36
37 **SECTION 15. Savings.** Notwithstanding the amendment to this Title, the existing
38 Title remains valid and in full force and effect for purposes of all criminal, civil or
39 administrative code enforcement cases or land use actions or applications filed or

1 commenced during the time said ordinances were operative. Nothing in this
2 Ordinance affects the validity of prosecutions commenced and continued under
3 the laws in effect at the time the matters were originally filed.
4

5 **SECTION 16. Ordinance Effective Date.**

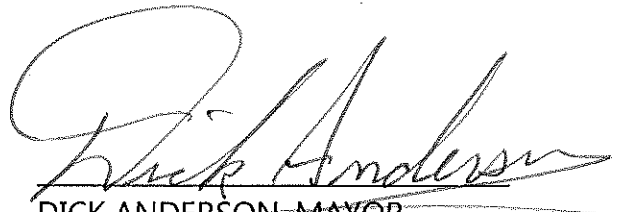
6 Notwithstanding Chapter IX, Section 9.3, this ordinance takes effect on July 1,
7 2015.
8

9 **SECTION 17. Codification.**

10
11 Provisions of this Ordinance shall be incorporated in the City of Lincoln City
12 Municipal Code and the word "ordinance" may be changed to "code", "article",
13 "section", "chapter" or another word, and the sections of this Ordinance may be
14 renumbered, or re-lettered, provided that any Whereas clauses and boilerplate
15 provisions (i.e. Sections 13-17) need not be codified and the City Recorder is
16 authorized to correct any cross-references and any typographical errors.
17


18 The foregoing ordinance was distinctly read by title only in accordance with
19 Chapter IX, Section 9.2 of the City of Lincoln City Charter on the 27th day of
20 October, 2014 (First Reading) and on the 8th day of December, 2014 (Second
21 Reading).
22

23 PASSED AND ADOPTED by the City Council of the City of Lincoln City this 8th
24 day of December, 2014.

25
26
27
28 
DICK ANDERSON, MAYOR

29 ATTEST:

30
31 
32 CATHY STEERE, CITY RECORDER

33
34 APPROVED AS TO FORM:
35
36 
37 RICHARD APPICELLO, CITY ATTORNEY

**BEFORE THE CITY COUNCIL FOR THE
CITY OF LINCOLN CITY, LINCOLN COUNTY, OREGON**

[NOVEMBER 10, 2014]

In the matter of the adoption of two land use)	
Ordinances 2014-21 and 2014-22, concerning)	
the creation of a new mixed use vacation rental)	
(VR) zone [2014-21] and an amendment to vacation)	
rental special provisions [2014-22]: (1) Creating an)	LAND USE
optional expedited process for commercial VRDs and)	FINDINGS
accessory use VRDs with a 30 night limit; (2) Providing)	
for an optional Administrative Allowance (settlement))	
for existing VRDs operating in residential zones;)	
(3) Providing for optional quasi-judicial vested rights)	
and nonconforming use determinations; (4) Directing)	
enforcement of the <u>existing</u> accessory use limitation)	
applicable to VRDs in residential zones)	
)	
Files: ZOA 2013-01 & ZOA 2013-05 [Council-Initiated])	

Based upon the evidence in the whole record, the City Council for the City of Lincoln City makes the following findings of fact and conclusions of law:

I. FINDING REQUIREMENT FOR LEGISLATIVE ACTIONS

Lincoln City Municipal Code, Title 17 (Zoning) Section 17.88.050, Paragraph D. provides:

In order for the city council to adopt an ordinance for an amendment to this title, comprehensive plan document and/or map, findings must be made, and adopted as a part of said ordinance, that are adequate to support the amendment proposal. The findings must be factual and must be supported by substantial evidence submitted into the record. It must be found that the amendment complies with and conforms to the comprehensive plan goals, policies and land use map. It may be further necessary to provide evidence that the proposed amendment is in conformance with statewide land use planning goals and policies when a more specific direction is provided by the goals than the comprehensive plan.

Findings concerning conformance of the proposed ordinances with comprehensive plan goals, policies and with applicable provisions of state law are for Council to adopt following the close of the record. Participants do not have the right to review or rebut findings. *Arlington Heights Homeowners v. City of Portland*, 41 Or LUBA 560, 565 (2001) *Sorte v. City of Newport*, 26 Or LUBA 236, 244-45 (1993); *Adler v. City of Portland*, 24 Or LUBA 1, 12 (1992). Council finds and determines that the record contains an adequate factual base for the proposed ordinance provisions.

II. SUMMARY OF FINAL ORDINANCES

Five ordinances were proposed in 2013 (see Nature of Proceedings below). Two ordinances concerned non-land use license ordinance amendments. Three ordinances concerned land use matters (including one ordinance accompanied by a series of zone changes implemented by overlay map). During the course of the public hearings and deliberations the ordinances evolved; Council selected portions of some ordinances, disregarded other portions, and made other modifications. Two ordinances resulted from the public hearing and deliberation process:

The first, Ordinance 2014-21, creates a new Vacation Rental (VR) Zoning District, a mixed use district which will permit vacation rental dwelling (VRD) use without the restriction of the existing accessory use limitation applicable to residential zones. The District is intended for geographic areas in close proximity to community attractions and recreation uses. New VR areas must have the full complement of public facilities and services, specifically sewer service. The zone is created in response to the demand for alternative tourist accommodations for families; the zone also creates a mechanism, in appropriate cases, for owners of residential properties to legitimize VRD operations which have grown beyond the limits of the existing accessory use limitation. Ordinance 2014-21 only creates the new zone for future application; the new zone is not imposed on any specific property by this ordinance.

The second, Ordinance 2014-22, creates an additional nondiscretionary expedited review process for VRDs in commercial zones and VRDs in residential zones (when the applicant elects to limit VRD use in the residential zone to thirty nights per year). This is an optional process which permits a new applicant to bypass the land use process; this is possible because, for purposes of this alternative route to a VRD license, the City Council has established a nondiscretionary numeric limit to implement the discretionary accessory use limitation.

The existing land use process for approval of accessory use VRDs remains unchanged. The operative discretionary limiting terms for VRDs in residential zones, (“accessory use” and “incidental and subordinate to the main use”) are not modified by this ordinance. The Council elected to avoid threatened Measure 49 claims by leaving the existing limiting language unaltered. Laws in existence for more than five years are exempt from Measure 49 claims. The accessory use limitation, dating back to 1989, has not been altered in over five years. While, there was a request to repeal the accessory use limitation, the Council emphasized that it is not repealing or changing the law by adding language directing staff to make findings and enforce the existing language of the code in the quasi-judicial land use permitting processes and in individual land use enforcement actions. The language is also added to stress to realtors and management companies that they must not represent to potential purchasers that there is no limit on VRD use in residential areas.

As regards existing VRDs, Ordinance 2014-22 also includes an optional settlement of disputed compliance issues with existing owners in residential zones. The ordinance offers an administrative allowance settlement by special license where the VRD use is limited to one-hundred, eighty (180) nights per year. This offer of a settlement protects such owners from enforcement actions concerning accessory use. The settlement terminates upon the loss of the VRD land use approval and license - which occurs under existing code at sale or transfer of the residential property. This is an option for existing owners who do not wish to be subject to a possible land use enforcement action concerning the limits of accessory use VRD operations.

For those VRD owners who do not wish to settle with an Administrative Allowance, Ordinance 2014-22 allows such owners to obtain a special license with the option to file for a quasi-judicial nonconforming use verification or vested rights determination to prove that they are entitled to more than 180 nights of VRD rental in a residential zone. The ordinance allows up to a year to file. VRD owners and their management companies who do not agree to settle are however subject to land use and license enforcement actions, including fines and revocation, for violation of the accessory use limitation.

Ordinance 2014-22 also does the following: (1) eliminates special landscape criteria for VRDs; (2) expressly lists VRDs as permitted uses in commercial and mixed use zones; (3) increases penalties for unauthorized/unlicensed VRD use and sets a minimum \$500 penalty; (4) prohibits commercial VRD use in residential zones (defined as more than incidental and subordinate use or more than 30 nights depending upon

the approval process); (5) clarifies enforcement processes, including revocation.

III. NATURE OF PROCEEDING

The findings herein concern the adoption of two land use ordinances which have evolved through the public hearing process before the Planning Commission and City Council. The ordinances as they have evolved are primarily legislative in character, in that no maps imposing new zoning districts or overlay zones are provided for in the two final proposed ordinances.

The City Council initiated a VRD Consensus Project was initiated in 2011. A contracted consultant (Professor Richard Birke) facilitated a public policy development process through the formation of a VRD Working Group made up of representatives of various stakeholder groups in the community. The role of the working group was to provide a forum for discussion. The Working Group was not to have a superior say in how the policy development process was to turn out. Members did not have 'votes' and were not a 'mini-City Council.' The group was not delegated legislative authority and was constrained from formal action (and in fact was not an official advisory committee) because of the financial interests of the stakeholders. The consultant completed the Lincoln City VRD Consensus Project Final Report and provided the report to Council and Staff in November 2012.

Planning Staff initiated several work tasks to have the Consensus Group Final Report recommendations heard before Planning Commission and City Council. See File CPA-2013-01 and File ZOA-2013-01 including proposed ordinance 2013-VRD establishing YES/NO overlay zones.

The City duly notified the Oregon Department of Land Conservation and Development pursuant to ORS 197.610, of its consideration of the proposed YES/NO amendments, including maps on April 16 & 18, 2013; notice of the proposed YES/NO amendments were included in an ORS 227.186(4) [Measure 56] notice to all affected property owners mailed on April 25-26, 2013. Approximately 5590 notices were sent. (Two necessary companion ordinances to the YES/NO zone ordinance -one removing land use text from Title 17 [2013-VRD2] and one adding text to Title 5 [2013-VRD3]) were initiated on September 23, 2013 and processed with the second set of alternative ordinances noted below).

At public hearings on May 21, 2013 and June 4, 2013, the Planning Commission considered the YES/NO Zone amendments and maps as proposed in Ordinance 2013-VRD, and after concluding the hearing,

voted to forward them to the City Council with a recommendation to adopt the proposed amendment(s), with some adjustments to maps.

The City Council held a public hearing on the proposed YES/NO zone amendment(s) on June 24, 2013; at the conclusion of the hearing the Council left the record open for written comments until July 16, 2013. City Council continued deliberations to July 22, 2013, October 28, 2013, January 27, 2014, February 10, 2014, February 24, 2014, March 10, 2014 and thereafter as noted below.

The City Council initiated alternate VRD amendment(s) 2013-ALT1 and 2013-ALT2 by Motion on September 23, 2013. At the same time Council initiated two companion ordinances to the YES/NO Ordinance 2013-VRD (i.e. 2013-VRD2 and 2013-VRD3) (ZOA 2013-05 with Alternatives)

The City duly notified the Oregon Department of Land Conservation and Development pursuant to ORS 197.610, of its consideration of the proposed alternate and companion amendment(s) on November 27, 2013; notice of the proposed alternate and companion VRD amendments were included in an ORS 227.186(4) [Measure 56] notice to all affected property owners. Approximately 6248 notices were sent, with notices also being sent to the recently annexed Roads End area. (*However, the land use ordinances under consideration do not regulate properties in Roads End.*)

On January 7, 2014, and January 21, 2014 the Planning Commission considered the alternate and companion VRD amendment(s) proposed. On February 4, 2014, after conclusion of the public hearings, the Commission voted to recommend the companion amendments but not the alternative amendments to the City Council.

The City Council held public hearings on the proposed alternate and companion amendment(s) on February 10, 2014 and February 24, 2014, after which the City Council left the record open until March 5, 2014 and continued deliberations to March 10, 2014.

Council deliberated on the "YES/NO" zone amendments concurrently with the alternate amendments and companion amendments. After due consideration of the entire record, in deliberations, Council elected to select portions of the various ordinances before them for adoption while rejecting or modifying other portions. Deliberations on both the alternative and companion Ordinances, together with deliberations on the original YES/NO zone amendments, were continued and conducted at numerous subsequent meetings including March 24, 2014, April 7, 2014,

April 21, 2014, June 23, 2014, July 14, 2014, August 18, 2014 (cancelled) and August 25, 2014.

Council first directed staff to remove VRD safety standards from the proposed license ordinance amendment and adopt safety standards ahead of other VRD provisions (Ord. 2014-7 adopted May 12, 2014). Council next directed the creation of a new mixed use zone, based on the YES and VROZ overlays proposed (see 2013-VRD and 2013-ALT1). The new zone would be available for Council initiated map amendments and for privately initiated amendments. (Ord. 2014-21).

Council further directed staff to bring the new VR zone forward together with enforcement options and alternatives including direction to City staff to enforce the existing accessory use limitation in permitting as well as revocation and other enforcement proceedings. The Council rejected the request to repeal the accessory use limitation which has existed un-amended in the Code for more than five years. Similarly, Council decided to retain the existing limitation on VRD approvals where the use authorization is lost upon sale or transfer. Council further directed that a voluntary compliance mechanism be created to bring existing VRDs operating in excess of such accessory use limitations back into compliance within a reasonable period of time and without the need to initiate formal revocation or enforcement actions resulting in fines and litigation (Ord. 2014-22).

Finally, Council directed staff to formulate an option to the existing land use process be created to streamline VRD approvals. Accordingly the VRD license ordinance is also amended (Ord. 2014-23) to provide owners with an option of proceeding to a license with a nondiscretionary zoning compliance check with a numeric limitation for accessory use. The existing land use process will not be repealed and will remain available for applicants.

On August 25, 2014 the Council reopened the record for additional public input and set an additional hearing date for September 15, 2014. Additional notice was also sent to DLCD. On September 15, 2014 the Council conducted an additional hearing on proposed Ordinances 2014-21, 2014-22, and (non-land use) 2014-23 and left the record open until September 24, 2014. On September 22, 2014 at the request of the City Manager, the Council extended the period for the record to remain open until noon on October 13, 2014.

On October 13, 2014 the City Council directed staff to prepare the Ordinances for First and Second Reading on October 27, 2014.

The City Council finds and determines that the amendment process is in conformance with the Zoning Ordinance and Comprehensive Plan procedural requirements, including, but not limited to, required initiation, processing, noticing and finding requirements of Chapter 17.88. Specifically, Council initiated all the proposed ordinances pursuant to LCMC 17.88.020.B. Unlike private applicants, Council is not required to submit an application for an amendment to the plan or code. (See 17.88.040). The Planning Commission timely reported recommendations to the City Council on the five proposed ordinances (only three of which were land use ordinances). The City Council postponed action on the proposed ordinances and reopened the hearing and record in response to numerous requests from interested parties not to act hastily and to take additional public input on the proposals. Map amendments are not included in the current proposed ordinances and will be subject to future properly noticed proceedings before the Planning Commission and City Council.

The amendments as they are currently proposed incorporate public sentiment adduced at the Planning Commission and City Council public hearings to enforce the law that currently exists. The Council deliberately advertised and noticed a wide range of options from repeal of the accessory use limitation with the adoption of YES/NO overlays to enforcement of the accessory use limitation with fixed numeric limits for ease of enforcement; the ordinances proposed do not substantially differ from the noticed range of options. Neither ORS 197.610 nor Measure 56 prohibit changes to proposed ordinances through the public hearing process. See *Broderson v. City of Ashland*, LUBA Nos. 2010-038, 2010-056 and 2010-058 (August 12, 2010) (question is whether notices generally describe proposed action, not differences in ordinances). The requirement of LCMC 17.88.050, that the amendments be supported by findings and an adequate factual base in the record is met. Other Comprehensive Plan polices concerning amendments to the Code and Plan are addressed under the respective Comprehensive Plan policies below.

IV. CONFLICT OF INTEREST AND BIAS

Financial Conflict of Interest

As a preliminary matter at the commencement of the 2013 hearings, Council members properly disclosed potential conflicts of interest, namely that three council members had either ownership or employment relationships with hotels and one Council member was a local contact person for a neighboring VRD unit. ORS 244.120(2)(a). These facts

present only potential conflicts of interest because the effect of the proposed ordinances could be to the private pecuniary benefit or detriment of the Council member or a business with which they are associated; any financial impact was by no means certain. ORS 244.020(14) & (16). In order for these relationships or interests to be actual conflicts of interest, the decision would have to be to the private pecuniary benefit or detriment to the Council member or associated business. Again, it cannot be said that any official action on the proposed legislative amendments or even the proposed maps definitely would have such an impact. (See Guide for Public Officials Page 21). Accordingly, the conflicts would only be potential and do not require abstention from participation or voting.

Over time the proposed ordinances have been narrowed and reduced to include fewer options and proposals, including the removal of proposed overlay maps, the only portion of the proposals that was arguably quasi-judicial. One Council member who earlier disclosed a potential conflict no longer has an employment relationship with a hotel. In addition, mere property ownership in the City by Council members is a condition shared by a very large class of persons, and the effect of the proposed legislative ordinances would be the same for the entire class of persons who own property, even if the classes are separated by zoning district. A class exemption removes even the requirement to disclose the alleged conflict. [ORS 244.020(14)(b)]. See *Halvorson-Mason Corp. v. City of Depoe Bay*, 39 Or LUBA 702 (2001). (Two City Council members deemed not to have actual conflicts of interest under ORS 244.020(14) by virtue of being members of class of owners of the PUD, including an undivided interest in ownership of common area; this lack of conflict was found despite the fact the quasi-judicial application concerned permissible uses of the common area of the PUD.) The Council finds and determines that the participation and voting of the Council members is not precluded by Oregon Government Ethics Laws. The Ordinances are primarily legislative in character, and will have no certain financial impact on the Council members or businesses with which they are associated.

Actual Bias

Because the ordinances as originally proposed included arguably quasi-judicial elements (particularly the determination of map boundaries as part of the original 2013-VRD YES/NO overlay), the Council followed some quasi-judicial procedural safeguards. Quasi-judicial proceedings require an impartial decision-maker; accordingly, the script for conduct of hearings included the opportunity to challenge for bias. No bias challenges were alleged during the entire planning commission or city council public hearings on the original proposals or the alternative and

companion proposals in 2013 or in 2014, including hearings concerning arguably quasi-judicial map changes.

However, on August 25, 2014, Council set an additional public hearing date and reopened the record to take additional written testimony on Ordinances 2014-21, 2014-22 and (non-land use ordinance) 2014-23. On September 15, 2014 the Council conducted an additional public hearing to receive testimony on these ordinances. A VRD owner (and realtor), challenged the Mayor for bias. The City Attorney explained the bias procedure and the burden on the person alleging bias. (Bias requires clear and unmistakable proof of disqualifying actual bias). The challenge included an allegation that the Mayor told a potential buyer of a home for sale in the complex where he lives, that VRD usage is limited in residential zones; he allegedly mentioned the 30 nights limit from the proposed ordinance. The allegation was made as hearsay related from another realtor. The allegation included a statement or threat that the Mayor's interference with the sale was "actionable". Exactly how the Mayor was biased in relation to the pending ordinances was not fully explained. It is clear however, that Council was not considering a quasi-judicial rezoning of the mayor's property or property surrounding the mayor. The matter before Council was legislative and concerned created a new zone, and providing for voluntary compliance options and alternatives for individuals possibly violating VRD limitations.

The Council finds and determines that the bias challenge was not well taken and was, in fact, inappropriate given the context of the proceedings. This was an additional public hearing added by Council after numerous meetings where Council deliberated legislative options presented by the multiple ordinances. During those extensive prior deliberations Council had eliminated options from consideration and directed staff to narrow the choices, resulting in ordinances 2014-21 and 2014-22. The ordinances which were the subject of the additional public hearing reflected Council's earlier choice in deliberations not to repeal the existing accessory use limitation. (Council rejected draft 2013-VRD2 which would repeal the limitation, in favor of draft 2013-ALT1 which retained the limitation). In this context, the bias allegation faults the Mayor for participating in the decision-making process as a member of the Council in those earlier deliberations and reporting to a potential buyer the fact that the existing law limits VRD use in residential areas. That the Mayor and Council had earlier considered ordinance VRD2 (repealing the accessory use limitation) and declined to adopt such ordinance as part of these proceedings does not indicate bias just a decision-making process. The challenger simply disagrees with the existing law and also disagrees with the Council's decision in deliberations not to repeal the limitation. A bias challenge is not the

appropriate forum to reflect the Realtor's disagreement with the Council's ongoing decision-making process.

Assuming that an elected official acting in a legislative capacity can be disqualified for bias, the Mayor's alleged statement that the existing code limits VRD rentals in residential zones is merely factual and does not reveal disqualifying bias. The Mayor's statements reveal knowledge of the existing law and the knowledge that the Council had already decided in official deliberations not to repeal that law. Again, even if this were a quasi-judicial decision, the City decision maker is not expected to be entirely free from bias:

As we have explained on many occasions, local quasi-judicial decision makers, who frequently are also elected officials, are not expected to be entirely free of any bias. To the contrary, local officials frequently are elected or appointed in part *because* they favor or oppose certain types of development. Local decision makers are only expected to (1) put whatever bias they may have to the side when deciding individual permit applications and (2) engage in the necessary fact finding and attempt to interpret and apply the law to the facts as they find them so that the ultimate decision is a reflection of their view of the facts and law rather than a product of any positive or negative bias the decision maker may bring to the process. [*Wal-Mart Stores, Inc. v. City of Central Point*, 49 Or LUBA 697 (2005)]

Further, that the Mayor may favor the enforcement of the existing law is not a basis for a bias challenge: "official involvement in community planning and related governmental activities... are not the kind [of interests] which *Fascano* was intended to guard against." The Oregon Supreme Court characterized the danger the impartiality requirement is intended to address as: "the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government." [citation omitted]

After the challenge, the Mayor indicated he still had an open mind on the issues presented by the ordinances and agreed with the following statement of impartiality, indicating that no final decision had yet been made:

"I have not prejudged this application and I am not prejudged or biased by any potential conflict, prior contacts or involvement; I will make this decision based solely on the application of the relevant criteria and standards to the facts and evidence in the record of this proceeding."

The Council voted on the mayor's participation and unanimously voted to permit the Mayor to continue to participate. The Council finds and determines that the bias challenge was inappropriate given the legislative character of the proceeding and that the Mayor's alleged statements to potential purchasers of the existing law and proposed ordinance provisions do not disqualify him from participation or voting. The challenger did not meet the burden of demonstrating bias in a clear and unmistakable manner. The evidence presented by the challenge actually demonstrates that the real estate community is unwilling to acknowledge the existing code limitations on the operation of VRDs in residential areas. The City Attorney stressed at the hearing, as does the Council here, that potential purchasers of residential property should be informed of existing land use restrictions on VRD use; the responsibility to accurately inform purchasers of such limitations also falls on the real estate community.

After Council's disposition of the challenge the bias challenge was essentially repeated at the hearing by the owner of the property that was listed for sale. The Council hearing was inappropriately interrupted by this individual shouting from the audience. [See e.g. ORS 166.025(c)] Despite the manner of the interruption, the Council heard from the objector and ascertained that the matter was the same issue as raised by the Realtor. The hearing then proceeded to receipt of testimony. Finally, the record was left open in these proceedings and the Mayor submitted for the record a letter with the facts as he remembered them relating to his encounter with a potential purchaser in his complex. The facts are very different from the portrayal by the challenger. The Council finds and determines that the facts submitted by the Mayor are more credible. After review of these statements entered into the record, the Council herein reaffirms its finding that the Mayor is not precluded from participation and voting in this proceeding due to alleged bias.

V. FINDINGS OF CONSISTENCY WITH COMPREHENSIVE PLAN AND ZONING CODE

This Section reviews compliance with applicable Comprehensive Plan Policies. The proposed amendments principally concern Land Use Planning, Housing, and Economy policies as well as the Citizen Involvement Program. Comprehensive Plan Elements include the following:

Land Use
Citizen Involvement
Public Services and Utilities
Urbanization
Natural Hazard
Housing
Economy
Aesthetics
Transportation
Energy
Overall Environmental
Shoreland, Beaches, Dunes, Estuary & Ocean Resources
Development Categories

Scope

As stated there were several ordinance options originally noticed for Council consideration. Only the ordinances proposed for final adoption are analyzed here. The ordinances proposed for adoption do not include changing the zoning or plan designation of any particular property. Several objectors point to a lack of studies of the impact of changing where vacation rentals will be located. Council finds and determines that such studies, if they are required, would appropriately accompany requests to apply the new mixed use zone to specific property on the map. There is no impact by merely creating the zone in the text and on the map legend.

Further, and importantly, the Council elected not to repeal the existing accessory use limitation in LCMC 17.80.050 and LCMC 17.08 (definition of accessory use); these existing provisions are already acknowledged land development regulations and have already been determined to be fully consistent with the comprehensive plan and zoning code. The Council does not need to defend the existing acknowledged law. That the request to repeal the law contained no analysis of the impact of the repeal was a significant factor in the rejection. The value of the existing law is more fully explained in the review and analysis of the accessory use limitation set forth in the record, a final copy of which is attached hereto as Exhibit 1, and made a part hereof by this reference. The Council also incorporates herein by this reference the findings and evidence contained in the staff and counsel reports and Council Communications in the record of these proceeding.

Comprehensive Plan Goals

1) Land Use Planning

"To establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to assure an adequate factual base for such decisions and actions."

The City Council established a land use policy framework and implementing ordinance through adoption of a comprehensive plan and zoning ordinance, respectively. The City of Lincoln City's Comprehensive Plan and implementing land development regulations (including Zoning Title 17) have been acknowledged by the Land Conservation and Development Commission as complying with the Statewide Planning Goals. Review of these amendments in accordance with the Lincoln City Comprehensive Plan and the applicable zoning ordinance provisions, establishes conformance with this goal.

Ordinance 2014-21 - Creating a New Vacation Rental (VR) Zoning District. - This ordinance involves the amendment of the zoning text and the combined zoning and comprehensive plan map to add a new District. This ordinance only creates the district and does not apply the District to any particular property.

The Comprehensive Plan Land Use Planning element identifies Zoning as the most common method of land use regulation and control. The plan states:

Essentially, zoning is a means of ensuring that the land uses of an area are properly situated in relation to one another. It provides adequate amounts of space for each type of development.

Therefore, zoning asks if there is enough land devoted to a specific use and is it in the correct location. The proposed amendment is a modest amendment (nearly identical to the R-1 zone) in that it only creates a new mixed use zone where VRDs may operate without the accessory use limitation. The zone is not applied at this time. The existing Zoning Code states that vacation rentals are permitted uses in commercial zones (including mixed use) and accessory uses in residential zones. Therefore there is already a large amount of land available for this use (although it is limited in residential zones). The proposed amendment maintains this

division and limitation of incompatible uses consistent with the purpose of zoning.

As to what amount of land is appropriate to rezone to VR, that answer can only be adduced after individual rezoning applications are applied for and reviewed. While the need for additional lands can be assumed by currently incompatible levels of VRD use occurring in residential zones (more than authorized accessory use) such illegal use is not the proper measure of need for additional lands to accommodate the use. If such residential lands were properly used for accessory use VRDs, the use may simply be distributed more widely among existing residential lands or redirected to existing commercial lands where unlimited use is currently permitted. Again, future rezoning of lands to VR must be based upon more than simply curing a code violation or the desire to make greater profits. Accordingly, the proposed VR zone creation is consistent with the purposes of the plan in properly situating uses in relation to each other.

Ordinance 2014-22 - This Ordinance involves: (1) optional non-discretionary expedited process for specified accessory and commercial VRD licenses; (2) optional settlement offer to obtain voluntary compliance with the existing accessory use limitations; (3) provision for determination for rights in a quasi-judicial forum; and (4) Enforcement of the existing accessory use limitations of the Code.

This ordinance utilizes zoning controls, noted above, as well as creative code enforcement policies to resolve land use conflicts. Further, the technique of eliminating land use discretion is used to expedite certain desirable applications.

Expedited Review.

The City is adding a new optional process for expedited VRD review in residential zones. If the owner agrees to no more than thirty (30) nights of rentals per year, the applicant goes directly to the license process without the need for the separate land use process. VRDs in commercial zones similarly go directly to the license process, and because they are in commercial zones the number of rental nights is unrestricted. Council legislatively determines that thirty (30) nights of VRD usage per year is accessory to the main use of the seasonal housing (vacation home) by the owner. This objective number (while not the only possible number) is a determination that ensures the purposes of zoning, that is, that this particular VRD use (acknowledged nuisance-causing use) is properly limited and situated in relation to permitted residential uses.

Code Enforcement Alternatives

The Comprehensive Plan sets forth different levels of code enforcement. While the Code talks in terms of light penalties and heavy penalties, ultimately Council is most interested in compliance. As stated in the Comprehensive Plan, Land Use Planning element,

Code enforcement protects the public health safety and welfare by... ensuring that the community standards embodied by the comprehensive plan and implementing ordinances are adhered to.

Accordingly, because compliance is consistently the goal of code enforcement (whether fines are small or large) the Council finds that obtaining compliance with zoning, including maintaining the appropriate division of uses in relation to one another, is paramount. Specifically, the existing accessory use limitation (discussed below) if properly enforced, serves important comprehensive plan and zoning purposes to protect and stabilize existing residential neighborhoods from incompatible development. Before aggressive formal enforcement with the potential for large fines, the Council is first offering voluntary compliance options.

Settlement.

As regards existing VRDs, the City is proposing to settle with existing owners in residential zones by offering an administrative allowance settlement of 180 nights per year. This proposed settlement protects such owners from enforcement actions concerning accessory use. This proposed settlement terminates upon the loss of the VRD land use approval and license - which occurs under existing code at sale or transfer of the residential property. To reiterate, one currently cannot sell a VRD, use authorization and license; both terminate upon sale or transfer of the property. (There are approximately 26 exceptions based on prior conditional use approvals and the language of the existing code).

Quasi-judicial determination.

As regards existing VRDs, those VRD owners who do not wish to settle may request a license and have the option to file for a quasi-judicial nonconforming use verification or vested rights determination to prove that they are entitled to more than 180 nights of VRD rental in a residential zone. The ordinance allows up to a year to file. While such quasi-judicial determinations are prerequisite to Court actions, owners are not required to file the land use applications by the ordinance. However, VRD owners and their management companies who do not

agree to settle are subject to formal land use and license enforcement actions, including fines and revocation, for violation of the accessory use limitation.

Enforce Existing Accessory Use Limitation.

The proposed ordinance contains a directive to staff to enforce the existing accessory use limitation applicable to vacation rentals in residential zones. Council finds and determines that this directive is included in the ordinance to provide emphasis that Council has elected not to amend the existing code. The existing standard is retained in order to avoid Measure 49 claims. There is nothing wrong with this existing land use discretionary standard; it must simply be enforced using land use processes. Allegations that the standard is unenforceable are expressly rejected.

Simply stated, the existing City code does not allow unrestricted VRD use in residential zones. The existing accessory use limitation in LCMC 17.80.050.B.2 requires that VRD use be “incidental and subordinate to the main use” of the vacation home, the main use being the owner’s own use. [See LCMC 17.08.010 (definitions)]. Since 1996, [Measure 56] land use regulations can only be modified or repealed by ordinance. No ordinance has repealed the existing limitation applicable to VRD operations to incidental and subordinate accessory use in residential zones. Enforcement can be accomplished by quasi-judicial license and land use revocation proceedings, as well as other established Code remedies. Specifically, existing Code allows both license and land use revocation of the VRD license/approval for any violation of standards in LCMC 17.80.050.B. which includes the accessory use limitation LCMC 17.80.050.B.(2). [See LCMC 17.80.050.D.(2) and LCMC 17.84.070]

The accessory use limitation is part of an existing and acknowledged land development regulation. As such, the limitation has already been determined to be internally consistent with the zoning code, consistent with the City Comprehensive Plan and consistent with the Oregon Land Use Planning Goals. [*A review and analysis of the existing limitation including its consistency with the existing Zoning Code and Comprehensive Plan, is set forth in Exhibit 1.*]

Further, the accessory use limitation is part of an existing land development regulation which has been in effect for more than five years. As such, this existing limitation is immune from challenge under Measure 49, which permits claims based only on the adoption of new regulations imposing restrictions on residential use in single-family residential zones. Leaving the operative language in LCMC 17.80.050 and LCMC 17.08.010

un-amended protects such existing code limits on VRDs in residential zones from a claim - regardless of whether one believes VRD use is commercial or residential in nature.

Council finds that enforcement of the existing limitation is necessary to reduce land use conflicts caused by such incompatible levels of VRD use in residential zones. While the enforcement of the existing limitation reduces profits and therefore is not popular with VRD owners and management companies, it is the most effective and accessible remedy available to address the compatibility issue. The creation of a new VR zone and settlement proposals in the proposed ordinances are intended to soften the burden of enforcement of the existing accessory use limitation.

Plan Review and Amendment

The Land Use Planning Element of the Comprehensive Plan includes language and processes concerning reviewing, updating and amending various components of the comprehensive plan as well as zoning ordinance text and map amendments. As regards plan text and zoning text amendments, the Plan includes the following:

- (g) Proposed amendments should be considered based upon a finding that one or more of the following standards are met:
 - (1) Updated data manifests significantly different trends than indicated by previous data;
 - (2) New data reflects a new or previously disclosed public need; and
 - (3) New community attitudes representing a significant departure from previous attitudes is found to exist by the planning commission or city council; and
 - (4) Changes in statutory or case law occur which affects the applicability or appropriateness of applicable portions of the plan text; and
 - (5) A demonstrable error or inconsistency is found to exist;

The Planning Director points out that the language of these policies is that they "should" be used for such amendments. This non-mandatory language aside, at least one party has alleged that the City did not follow such procedures. The Council finds and determines that the City has met the non-mandatory procedures outlined in the Plan for review of amendments to the plan and code. The Council initiated the amendments, the Planning Commission and Council conducted public hearings (as more specifically detailed in the Nature of Proceedings and

citizen involvement sections of these findings) and Council adopted findings supporting the decision. Objectors point to the non-mandatory language in "(g) Procedure" which suggests one or more of five listed standards are to be met for an amendment.

Again there are two ordinances. One ordinance creates a new zone, but does not apply it. The other ordinance creates a streamlined approval process and offers a settlement to existing owners who may be operating in violation of existing standards. Both ordinances meet at least one of the standards identified in the plan. The need for the ordinances should however, be obvious. Council initiated the consensus project and these amendments in recognition of the fact that the proliferation of VRDs was creating problems, which needed to be addressed.

During the public hearing process there was a significant public outcry to not make the sweeping changes identified in the YES/NO zone Consensus Group proposal (i.e. to repeal the existing accessory use limitation and open up large YES areas to intense VRD operations and prohibit them in other NO areas). The public outcry included requests to simply enforce the existing law. In addition to this public testimony, the Council was presented with data from the City Manager concerning community attitudes in the form of survey results. The results clearly indicate that the predominant community attitude is not as portrayed by the Consensus Group. Sixty-two (62%) of registered voters with an opinion did not wish to encourage VRD growth. Further, sixty-five (65%) of those responding favored tight limits on vacation rentals in their neighborhoods. Council finds and determines that the public need expressed by the data and community attitudes exhibited by the survey is strongly in favor of enforcement of existing land use limitations to bring about land use compatibility. The offer of a voluntary compliance settlement in the ordinance is in furtherance of that public need. Similarly, the option to set forth and prove your case (either for a quasi-judicial zone or other use or rights determination) furthers the enforcement goals and balances consideration of economy goals. The Council further finds and determines that the Consensus Group's proposed solution to divide the City and separate incompatible uses, acknowledges the existence of the land use compatibility problem. The proposed VR zone is consistent with the existing division between limited VRD operation in residential zones and unrestricted VRD operations in commercial and mixed use zones. Because the VR is not imposed with these ordinances, there is no danger that the appropriate rezoning considerations will be glossed over. Council further finds that the City's proposed solution to enforce the existing limitation and offer voluntary compliance and other measures (like the VR zone) to soften the impact

of compliance - addresses other public needs, such as the economy goals addressed in these findings. The Land Use Planning Goal is satisfied.

(2) Citizen Involvement Goal

“Develop a Citizen Involvement Program which ensures the continued participation of citizens in the land use planning process.”

The Comprehensive Plan's Citizen Involvement Program goal is “Develop a Citizen Involvement Program (CIP) which ensures the continued participation of citizens in the land use planning process.” The City has developed a Citizen Involvement Program through Resolution 94-33. The public hearing process for the several proposed alternative ordinances, plan text and map changes included mailed, published, and internet posted notice to the public and property owners, and review of proposals by the Planning Commission and the City Council, consistent with the Plan, Goal and Resolution.

The findings set forth under the Nature of Proceedings and Land Use Planning above including the notice and hearing process for the range of proposed ordinances are incorporated herein by this reference. The Council finds and determines that the Comprehensive Plan and Goal 1 policies concerning citizen involvement are fully met by the proposals.

Among the policies under the City's Citizen Involvement Program goal is one that says “Lincoln City shall assure that a reasonable effort is made to encourage the opportunity for citizens to attend public meetings.” The Planning Commission and City Council meetings are publicized widely with hearing notices mailed to property owners in the affected area, and published in The News Guard weekly newspaper and on the City's website. The City holds public hearings in the evening in order to encourage public attendance. Moreover, for those unable to attend in person, the meetings are televised live and rebroadcast on cable television and are streamed live over the internet. Video of meetings and packet materials is also available on the City's website for review, free of charge. This constitutes a more than reasonable effort to encourage citizens to attend public meetings.

The Plan further provides that “Lincoln City shall encourage a variety of citizen programs such as neighborhood associations and other committees to serve in the interests of the community.” During the hearings, the Council heard from several neighborhood associations, including newly officially- recognized associations.

Consensus Group.

Attorney Joan Chambers alleges violation of Goal 1 and the City's Citizen Involvement program as follows:

"The City Council established a VRD consensus project staffed by a neutral convener. The committee came up with well-reasoned recommendations which the Council has ignored and is now proposing to adopt ordinances that are not consistent with the recommendations of the Citizens and affected individuals who made recommendations in the consensus project final report. In rejecting that report, the City Council is failing to give appropriate consideration to Goal 1 of the City and Statewide Planning Goals."

Contrary to Ms. Chambers assertions the Council did not ignore the consensus committee report. The Committee recommendations were the subject of hearings before the Planning Commission and City Council beginning with the draft ordinance 2013-VRD YES/NO zone overlay processed to Planning Commission and Council. Even after those hearings (and the extremely negative response to the YES/NO proposal) the recommendations of the committee were not ignored but were brought forward again with the companion ordinances VRD2 and VRD3 in the second set of hearings. [VRD2, proposed repeal of the existing accessory use limitation (missing from proposed overlay ordinance) and VRD 3 added to the license ordinance to do away with the land use process.]. These companion ordinances were reviewed at hearings before the Planning Commission and City Council, along with the alternative ordinances. However, the City Council had no duty or obligation to defer to the Consensus Group.

Ms. Chambers objection appears to be that the Council did not abdicate its legislative power to a consultant. Nothing in the City's citizen Involvement Program or Goal 1 requires the Council to abdicate its legislative power to a consultant or to a group of financially interested stakeholders. The Council expressly adopts the findings contained in the Council Communication concerning the flaws with the Consensus recommendation particularly the YES/ NO overlay and repeal:

- The consensus group recommendation to repeal did not address the land use planning goals, comprehensive plan policies, or code provisions furthered by the existing accessory use limitation or the equity (fairness) issues created by the YES/NO zone proposals. The division of the City into YES and NO zones was reflected on proposed overlay zone maps created by the Consensus Group. The

owners in the NO zone came to be referred to as “Losers” and the owners in the YES zone came to be referred to as “Winners.” Despite being located in residential zones, YES zone VRDs would have the right to operate unrestricted, the same as commercial VRDs. The YES zone cured violation of the accessory use limitation; NO zone would prohibit all VRDs and existing VRDs in the zone were grandfathered until sale or transfer. Owners of property in the NO zones threatened Measure 49 claims, [and] also protested the fairness of dividing residential zones into winners and losers. While separating high intensity VRD use from established neighborhoods is one means to protect established neighborhoods, the Group overlooked the fact that the Code already separated such high intensity VRD use from residential areas by requiring such use to be in commercial zones. Further, (to be fair) the existing Code allowed everyone in a residential zone only a limited amount of low intensity VRD use as a means to protect residential areas from incompatible uses. No one is a “loser” under this existing regulatory framework, if properly enforced.

- While the Council accepted many of the license and land use recommendations of the VRD Consensus Building Working Group, the Council was clearly not bound by the recommendations of the Group. Council did not delegate any legislative authority to the Consensus Group. The Group was significantly constrained by Oregon Government Ethics Laws as many members of the group had actual financial interests in the operation of vacation rentals (as owners and managers) and therefore could take no official actions due to the basic premise of Oregon Ethics Laws, that a public official, including volunteers, may not use their official positions to obtain a financial benefit for themselves or for businesses with which they are associated. The City website describes the group as “not have a superior say in how this process comes out.” “They are merely one more [forum] for discussion. Members do not have 'votes' and they are not a 'mini-City Council.’”

Measure 56

One principal of citizen involvement is reflected in Measure 56, adopted in 1996. Measure 56 is implemented in ORS 227.186 and requires individual notices be sent to property owners when an ordinance proposes to rezone property, including amendments which limit or prohibit land uses previously allowed in the affected zone. Because the formerly proposed NO zone would prohibit VRD use, in April 2013 notice was sent to all impacted property owners in the applicable zones (5590

notices). Similarly, because the alternative ordinances originally proposed a new numeric limit on VRD use in residential zones, notice of the alternative (and companion ordinances) were mailed to all such property owners impacted in November 2013. (6248 notices including Roads End).

Also related to citizen involvement, Measure 56 contained a limit on how land use matters could be addressed by local governments. Applicable to cities, ORS 227.186(2) provides:

(2) All legislative acts relating to comprehensive plans, land use planning or zoning adopted by a city shall be by ordinance.

Some individuals, principally realtors and managers and owners, asserted in these proceedings that there is no limit on operations of vacation rentals in residential zones. They claim that the accessory use limitation on vacation rental operations in residential zones is no longer in effect. However, the record reflects no repeal of this ordinance provision (contained in LCMC 17.80.050.B.2 (VRD Criteria) and LCMC 17.08.010 (Definitions)). To the contrary, the record reflects that the VRD ordinance provisions contained in Title 17 were last amended in July 2009 by ordinance. The findings supporting Ordinance 2009-02 provide:

(10) Goal 10: "Housing" The VRD amendments do not by themselves affect residential development. By themselves the VRD amendments do not affect the availability of housing because they relate only to housing that already is allowed and to **a use that is merely accessory to the primary use of the structures they are in as second homes**. Therefore, the VRD amendments are consistent with Goal 10. (**emphasis added**)

The record reflects no Ordinance repealing or modifying the accessory use limitation. There has been no change to the operative language of the code. The existing City code makes VRD use in residential zones an accessory use. The accessory use limitation in LCMC 17.80.050.B.2 requires that VRD use be "incidental and subordinate to the main use" of the vacation home, the main use being the owner's own use. [See LCMC 17.08.010 (definitions)]. No resolution, policy, order, memorandum, edict, opinion, proclamation or other writing can change the existing ordinance. Similarly, staff cannot waiver or excuse compliance with mandatory criteria in the Code. Only an ordinance processed in accordance with the code and state law can make such a change or repeal. The assertion by Realtors, property managers and VRD owners that the Code limitation no longer exists is contrary to the citizen involvement goals and contrary to state statute.

The Citizen Involvement Goal is satisfied.

(3) Public Services and Utilities Goal

"To plan and develop a timely, orderly, and efficient arrangement of public facility and services which compliment the area and serve as a framework for urban and rural development."

Public services and utilities are generally already in place in the areas affected by the VRD amendments. In the proposed VR zone where intense vacation rental use will be expressly authorized, one of the proposed locational criteria includes the availability of the full complement of public facilities and services, specifically sewer. No actual VR rezoning is proposed with the ordinances. Because the proposed amendments do not change any zoning designation and because any future change will be required to provide adequate public facilities, the proposed ordinances will not adversely affect the availability or arrangement of public services and utilities. The goal is satisfied or does not apply to the proposed amendments.

(4) Urbanization Goal

"To promote an orderly and efficient transition of land uses from rural to urban."

The VRD amendments do not affect the development densities of properties in Lincoln City. Since the amendments will not affect development (the development to which they relate already is authorized and limited by the zoning ordinance) they will not affect the transition of land uses from rural to urban. The proposed voluntary compliance options should operate to bring existing noncompliant development into compliance over time. This goal is satisfied or does not apply to the proposed amendments.

(5) Natural Hazard Goal

"The City shall control development in hazardous areas to protect life and property from natural disasters and hazards."

No plan designations or zoning districts are changed by the proposed regulations. No development is authorized by the proposed amendments. The city already has acknowledged ordinance standards

relating to development in these Natural Hazard Areas, and the VRD amendments do not authorize any development inconsistent with these natural hazard standards. This goal is satisfied or does not apply to the proposed amendments.

(6) Housing Goal

"To provide for the housing needs of all citizens."

The Comprehensive Plan Housing Policies provide:

There are four users which determine Lincoln City housing needs. These are:

1. The permanent resident seeking shelter at affordable prices.
2. The tourist industry seeking seasonal shelter for its employees.
3. The elderly population seeking retirement shelter.
4. The seasonal resident seeking shelter.

These users work in competition for the limited lands available for housing development.

The Comprehensive Plan recognizes that seasonal residents (i.e. the owners of second homes) compete with other users, such as permanent residents and retirees, for the City's available housing supply. The Plan does not prioritize such second home users over others. Further, the Comprehensive Plan does not identify short term VRD rental (tourist accommodations) as a *residential* housing demand; VRD rental is merely a minor commercial allowance provided to owners of seasonal housing in residential zones. The Housing Element goes on to establish policies to be implemented in the zoning code; these policies seek to guard against adversely impacting available residential housing stocks by encroachment of incompatible development, including business uses.

The Council finds and determines that a vacation home or summer home is housing under the City Code and Plan. The seasonal resident seeking shelter recognized in the Comprehensive Plan is the owner of such vacation or summer home. Such homes are located in residential zones and are compatible with existing residential neighborhoods. A vacation rental operation is quite different from a summer home used by its owner. Under the express terms of the Code a full time vacation rental operation is a tourist accommodation like a motel and is only to be located in a commercial or mixed use zone. Under the Code and Plan

such intense use is incompatible with residential areas. While a vacation home may be housing, under the express terms of the Code, commercial vacation rental operations are not. Oregonians in Action (OIA) comments (discussed more fully at the end of these findings) would appear to equate a vacation or summer home with commercial vacation rental operations. Council finds and determines that under the express terms of the Code, the former is housing, the latter is a business which must be located in a commercial or mixed use zone. The full time provision of overnight accommodations to tourists in a vacation home is not needed housing; it is a commercial business operation. The Code does not permit such operations in residential neighborhoods. Commercial VRDs are permitted only in designated commercial or mixed use zones. Contrary to such assertions, tourist accommodations are not needed housing and tourists are not seasonal residents seeking shelter. The Code and Plan operate together to limit vacation rental use of such seasonal housing in residential zones. That is, the limited (accessory use) allowance in the Code for vacation rental use of such seasonal housing operates to make an otherwise incompatible business use compatible with residential housing. Further, contrary to the OIA assertion that the “proposed ordinances will severely limit the availability of vacation rental dwellings in residential zones”, the existing code and plan currently limit vacation rental dwellings in residential zones. The proposed ordinances further the existing Comprehensive Plan housing policies by providing voluntary compliance mechanisms and alternatives to bring about compliance with the existing law.

The City’s Housing Goal is “to provide for the housing needs of all citizens.” The Housing Element further requires that “The city shall work to stabilize and protect existing residential areas from deterioration and incompatible development.” Unlimited operation of VRDs in residential areas converts such residential areas into *de facto* commercial districts. Such intense VRD business operations in residential zones, while creating profit for owners and investors, remove such lands as available housing. Similarly, when property owners deliberately build vacation rentals as business investments in residential zones, such homes are generally far too expensive for normal workforce housing. Such operations are incompatible with existing residential areas and not consistent with the applicable provisions of the City’s comprehensive plan to provide housing needs for all citizens.

To reinforce the fact that the VRD allowance in residential zones was not a *de facto* conversion to commercial use, and to lessen exposure to allegations of violation of the statewide planning goals and comprehensive plan policies, the findings supporting adoption of nearly every VRD related ordinance emphasized that the intensity and frequency

of the VRD use in residential zones was “**merely accessory**”. For example, findings for Ordinance 2009-02 provide:

(10) Goal 10: “Housing” The VRD amendments do not by themselves affect residential development. By themselves the VRD amendments do not affect the availability of housing because they relate only to housing that already is allowed and to a **use that is merely accessory to the primary use of the structures they are in as second homes**. Therefore, the VRD amendments are consistent with Goal 10. **(emphasis added)**

As noted, the seasonal home is housing, the vacation rental use is something else entirely. As was noted earlier, the Comprehensive Plan expressly provides:

4. The City shall work **to stabilize and protect** existing residential areas from deterioration and incompatible development. **(emphasis added)**:

Interpreting the allowance for VRDs in residential zones as being on par with commercial VRDs would be expressly contrary to the Comprehensive Plan’s policies, implemented in the Zoning Code to stabilize and protect existing residential areas from incompatible commercial development. The incompatibility of commercial scale VRDs with “existing residential areas” has been the impetus for much of the recent work, including the “Consensus” effort. While some proffer better controls on parking, garbage and noise, or more stringent penalties for unpermitted VRDs as solutions, it cannot be disputed that the **intensity and frequency** of VRD use in a residential zone is a paramount factor as regards incompatibility.

The problem, at core, is that some owners have used their residential VRD properties as if they were in commercial zones, and this frequency and intensity of use has created conflicts with surrounding residents, including noise, garbage and parking issues. What appears to have been overlooked in the current debate is that the allowance for VRD use in residential zones was never intended to be on par with commercial VRD intensity and frequency of use. There is a clear separation of commercial level VRD uses - required to be in commercial zones and minor accessory VRD use in residential zones. The text, context and history of the existing ordinance demonstrate that unlimited vacation rental use in a residential zone is unlawful commercial use, and a violation of the Code. Again, the Code and Plan support that such use is permitted only in a commercial zone, it is authorized only as incidental and subordinate accessory in a residential zone. One cannot pretend that full time commercial VRD use is housing.

Attorney Joan Chambers and others have argued that VRD use is residential and not commercial use. To the correct point, the City Council finds and determines that VRD use in residential neighborhoods at a level that is more than the authorized incidental and subordinate (accessory) use is incompatible with residential neighborhoods and prohibited by the Code and Plan. That the City labels it “Commercial” in the proposed ordinance, is almost immaterial. The City is not relying on an interpretation of commercial to limit vacation rentals in residential zones; the city relies upon the express terms of the code making such use accessory.

The intent to label VRD use as residential likely has to do with Measure 49. Measure 49 only protects residential uses of single family residentially zoned property. As noted, Measure 49 is not implicated because, the existing accessory use limitation is immune from Measure 49 because it has existed for more than five years; further, the proposed amendments, adding an expedited review option, an administrative allowance settlement, and rights or use determination processes are not imposed on residential properties but are available as voluntary options. Nevertheless, the Council finds and determines that under the City of Lincoln City Plan and Code, vacation rental use, other than authorized incidental and subordinate accessory use, is commercial and not residential in nature.

Yogman v. Parrot 325 OR 358 (1997) is not a judicial determination that vacation rental use is residential use and not commercial use. In *Yogman* a property owner sought to enforce a restrictive covenant prohibiting “commercial enterprise” in the subdivision. The prohibition did not specifically address vacation rentals. The Court found the limitation ambiguous and refused to interpret the prohibition to include vacation rental use, applying the maxim to interpret such prohibitions strictly against the covenant. Similarly, in *City of Portland v. Carriage Inn* the City attempted to prohibit transient occupancy in an apartment building based upon the interpretation that such use was not residential use. Again, based on the language (this time of the Portland Code), the Court would not distinguish short-term and long-term residential use without supportive language in the code. *Yogman* and *Carriage House* stand for the proposition that if you are going to write a restrictive covenant or a City code, it is best address overnight tourist accommodations like vacation rentals specifically. (See for example: *Davis v. Jackson County*; (Code language supports finding that vacation rental is a visitor accommodation and therefore a commercial use not permitted in the WR zone – rejecting petitioner’s argument that short term rental use is a residential use).

The City of Lincoln City Code is not interpreting the word “commercial” to prohibit VRDs in residential zones, the City is applying the express language of the Code calling out vacation rentals as mere accessory uses in residential zones; vacation rentals are specifically addressed, and have been since at least 1989 and certainly for more than five years. Under the Code the use is expressly permitted in commercial zones and allowed only as an incidental and subordinate accessory use in residential zones. [LCMC 17.80.050B.2.] See the attached Exhibit 1 analysis of the existing code, incorporated herein by this reference, as to how the existing language and context of the Code make the use commercial in nature. By code, the unrestricted business operation of a vacation rental dwelling is authorized only in a commercial zone. Also, by code only a limited authorization exists to operate a vacation rental in residential zones, (similar to a home business authorization).

While the proposed ordinance labels the use commercial (and therefore prohibited) in a residential zone, the prohibition on such use only becomes operative for enforcement purposes when the use exceeds the existing (incidental and subordinate) accessory use limitation of the code (or the limits in new voluntary options). The Council finds and determines, based on the text and context of the Code, that the City is not restricting or limiting a residential use of real property when the City restricts or limits vacation rental use in residential zones. Further, as the City has, for more than five years, limited such VRD use in residential zones to incidental and subordinate accessory use of a second or vacation home, the current ordinances do not change that restriction. Even if such use was deemed residential the restriction is immune from attack under Measure 49.

(7) Economy Goal

The Economy Element provides:

To assure a healthy economy as Lincoln City grown, there will be a need to provide more “quality” job opportunities.

The Plan further provides:

Tourism will continue to function as the basic industry in Lincoln City. An anticipated increase in the retirement population will serve to contribute to the ... economic base of the community. New employment opportunities are projected to occur in service related industries. Tourism and service jobs are labor intensive and relatively “clean industries”, however some of the positions are seasonal, the wages are minimal and are subject to sudden changes

in economic conditions.

To achieve a more stable economy, the city should strive to improve tourism, as well as attempt to diversify the economic base.

The Economy Element identifies Tourism and the Retirement Community as continuing sources of service related employment opportunities for citizens of Lincoln City. Both are estimated to increase. To a certain extent, the unconstrained growth of vacation rentals has caused acknowledged nuisance-like impacts on established residential areas occupied by retirees; some retirees have indicated they have moved from areas of the city due to these compatibility conflicts. (Retirees look for quiet enjoyment of their home; retirees generally do not seek to retire to a hotel room type atmosphere.) Accordingly, a balance between these two competing economies is required. This required balance is addressed in the Economy Goal:

Economy Goal

To support the tourist industry and achieve a degree of diversity in the community which will allow a balanced economy that will, in turn, support an adequate level of services for all members of the area.

A great deal of testimony was given about the economic benefits of vacation rentals. The Council does not dispute that vacation rental use of second homes has economic value to the City. The community benefits from economic activity by tourists. However, the economic engine of the tourism industry is not the sole consideration; such economic activity is to be balanced against the economic engine of the full time retiree. As was stated during public hearings, retirees have economic impact all year long not just on weekends or during the peak season.

Accordingly, the proposed ordinances seek to maintain the balance identified in the economy goal. The ordinances seek to create mechanisms to bring noncompliant VRD operations back into conformance with the Code and Plan. Such compliance will reduce or eliminate incompatible development driving away full time retired residents, an important aspect of the local economy. Similarly, the ordinances propose to facilitate legitimate increased levels of operations of vacation rentals by creating a new mixed use zone, which, after appropriate justification, can be applied to new properties in the City.

In addition, as noted, the goal of the Economic Element is to provide more "quality" job opportunities. Further the goal is to achieve balance

and diversity in jobs. The Tourism industry has acknowledged seasonal, minimum wage jobs, which are very vulnerable to changing economic conditions. In the economic study submitted by City Manager Hawker, the extreme seasonality of the vacation rental industry is verified.

The fundamental problem with our economy is the extreme seasonality and it certainly appears that the growth in the number of VRD's has made the seasonality worse. The seasonality of our economy is the reason we have such low annual median income and many businesses suffer. Many of the jobs that depend on visitors have less income during the off and shoulder seasons than during the peak season. The jobs at a disadvantage due to the seasonality are employees who work for restaurants, who clean rooms and who staff our businesses. The impacts are pervasive on the community, its institutions and its residents. The business community should understand that growing the shoulder and off seasons is the only way to improve the situation. Growing the peak without growing the other seasons as much or more does nothing to help, and just makes the problem worse. (September 22, 2014 memo page 2)

On several instances, individuals have come forward to speak of the economic harm that will be caused by the proposed ordinances. Most of the time it is not the proposed ordinances which are identified as the cause of the harm, rather it is the enforcement of the existing accessory use limitation which is identified. As was previously noted, the City is not changing the operative language of the code which has existed for over five years concerning the accessory use limitation on VRD use in residential zones. Accessory use is defined as incidental and subordinate to the main use, in the case of a VRD, the owner's own use of the vacation home. Enforcement of this existing law does not require an amendment to the Code.

The Code amendment [Ordinance 2014-22] includes a settlement offer for existing vacation rentals in residential zones. It is an option, not a requirement. The settlement would permit operation of a VRD for up to 180 nights a year, until transfer of the VRD, when the VRD authorization is lost (the loss on transfer is a requirement of the existing law, not the proposed settlement option in the amendment).

One individual testified that he will lose between \$22,500 to \$35,000 per year in income if he is forced to reduce rental of a VRD in a residential zone from an average 255 nights per year to 180 nights per year. He did mention that he did use his house himself and that sometimes his children use it. This testimony demonstrates the classic accessory use

violation scenario where the tail is wagging the dog. The accessory use (vacation rental business) has become the main use and the main use (owner's own use) has become the minor or accessory use. This is a code violation and can result in revocation of the license and land use approval - that is no authorized VRD use of the property.

The proposed settlement offer in ordinance 2014-22 will further the economic goal by legitimatizing operations at the above-referenced location by virtue of the settlement until sale or transfer. While some economic loss will occur to this owner (and presumably to service industry employees based on work performed at this location) other VRD owners, such as existing commercial VRDs located in commercial zones in the immediate area, will presumably pick up the rental activity. Similarly, the service industry workers would also pick up work associated with the rental at another location. Of course the alternative to settlement is an enforcement action under the existing code, which may mean no authorized use.

In addition to the settlement offer noted above, the proposed new VR zone in ordinance 2014-21, provides the above owner with an option to process a rezone request to permit legitimate operations. That is, rather than operate in violation of the accessory use limitation of the code (placing already vulnerable service workers in an even more vulnerable position), the owner can request to legitimize the commercial level of VRD operations under the code - assuming the demonstration of need is made and all other applicable policies are addressed. To argue against the proposed amendments, is therefore contrary to the economic element and argues for continued violation of the accessory use limitation, which implements and serves valuable plan and zoning code policies. Nothing in the Economic Element or Economy Goal requires the City to tolerate unlawful conduct "in the name of the economy" when City zoning code and comprehensive plan land use and housing compatibility policies are being violated by the conduct.

Finally, Economic Development Policies provide:

2. Lincoln City shall periodically analyze the commercially and industrially zones lands. The analysis shall include a summary of economic activities within the City including residential development in commercially or industrially zoned properties. The report shall make projections of future commercial land needs based on economic activities, residential development, and the supply of available commercial and industrial lands. If current demands exceed supply, the Planning Commission shall hold a public hearing as soon as possible to consider lands which may be

suitable for conversion to commercial or industrial uses.

As previously noted, tourist accommodations, such as full time vacation rental operations are expressly permitted uses in commercial zones. That the evidence in the record of this proceeding shows encroachment of full time vacation rental overnight accommodations into residential zones (in violation of the accessory use limitation of the code) may indicate that there is a shortage of commercial properties. The creation of a new VR mixed use zone (deemed commercial under LCMC 17.80.050B.2.) which will be available for use if need is demonstrated by future studies in the context of rezoning requests is therefore consistent with the above policy. Notwithstanding that use of residential lands for commercial VRD operations may indicate a need, such use is in violation of current zoning and the comprehensive plan policies which protect residential areas from incompatible uses. Accordingly, the enforcement directive and voluntary compliance mechanisms in the proposed ordinances further the housing policies and this policy (because the option to request rezone to VR is preserved even if a settlement is elected). If and when an owner elects to request a rezone of residential property to VR to facilitate full time VRD operations, (an intensity and frequency of overnight accommodation use on par with hotels and motels), the need for such new commercial use must be addressed with the application.

(8) Aesthetic Goal

"To develop a livable and pleasing city which enhances man's activities while protecting the exceptional aesthetic quality of the area."

The VRD amendments in the proposed ordinances do not address the aesthetic quality of development permitted under the existing zoning ordinance. Previously passed ordinances direct VRDs constructed pursuant to the commercial construction standards of the Oregon Structural Specialty Code to appropriate locations in commercial and mixed use zones, because such buildings are typically out of character with the bulk and scale of residential developments. Since the existing zoning ordinance has been found to be consistent with the comprehensive plan, including this goal, this goal is satisfied or not applicable.

(9) Transportation Goal

"To provide a safe, convenient and rapid transportation network to facilitate the movement of goods and people."

The VRD amendments, including creating the new VR zone contain locational criteria requiring the full complement of public facilities and services in order for the zone to be applied. The zone is not applied with these amendments. Other proposed amendments do not include any provisions authorizing any development and accordingly they do not, of themselves, create any additional transportation impacts on the existing transportation system. Therefore, this goal is satisfied or not applicable.

(10) Energy Goal

"To conserve energy."

"Policy 8. The City shall locate high-density development within walking distance of services and shopping areas."

The proposed VRD amendment creating the VR zone contains locational criteria for future use placing tourists in close proximity to recreational opportunities and attractions. By directing tourists to such areas and authorizing additional VRD usage (above the existing limited residential authorization), energy savings can be realized. This savings is based on the notion that the length of vehicle trips to daily goods, services and attractions would be reduced, and even eliminated by walking, if tourists were located closer to those destinations and services. The other amendments proposed have no adverse effects on the energy goal and simply facilitate compliance with other plan policies and objectives with voluntary compliance options. Therefore, the goal is satisfied.

(11) Overall Environmental Goal

"To achieve a balance between the need to provide housing and services and the need to protect and enhance the natural environment of the city."

Policy: Lincoln City shall develop programs to resolve conflicts between the preservation of sensitive wildlife habitats and conflicting uses.

The City compiled an inventory of natural resources, including wetlands, riparian areas, fish and wildlife habitat, and aesthetic and scenic areas. Resources deemed to be significant were evaluated to determine whether, and to what extent, to allow conflicting uses. The City adopted a

protection program, the Natural Resources Overlay, which balances protection and land use. Non-significant resources are not protected by the City.

The VRD amendments will not, of themselves, have any adverse effects on the natural environment. The proposed amendments will facilitate compliance with other goals and policies concerning incompatible development in residential zones. If justified by need and consistent with locational criteria, future application of the new VR zone will direct intense vacation rental use to locations well suited to the intensity of use, (e.g. full complement of public facilities and services). The proposed amendments will not adversely impact the natural environments of the City and do not authorize any additional development in any zone. This goal is satisfied.

(12) Shoreland, Beaches, Dunes, Estuary and Ocean Resources Goal

"To conserve, protect, and enhance the coastal resources of the city."

The city's coastal shorelands include all land west of Highway 101, land within 500 feet of the ordinary high-water elevation of Devils Lake and Spring Lake, and land within 1,000 feet of the shoreline mean higher-high-water elevation of Schooner Creek, Drift Creek, and Siletz Bay estuaries. These coastal shorelands include some areas of residential zoning, and also include areas that have been designated as significant aesthetic resources. The proposed VRD amendments do not themselves authorize any changes in development in the coastal shorelands area since they relate only to development already allowed under the zoning ordinance. The ordinances provide for voluntary mechanisms to bring existing development into compliance with existing limitations on vacation rental use. The new VR zone is not being applied to any particular property (only created) and does not alter any of the existing and acknowledged protective measures for the above-referenced resources. Therefore the VRD amendments are consistent with this goal.

(13) Development Categories

The VR Zone is added to the Comprehensive Plan as a new development category. The new category recognizes the reality that vacation rental operations in residential zones have grown beyond the authorized incidental and subordinate allowance for such use and into full blown

commercial operations, incompatible with residential neighborhoods. The category seeks to provide a new location to concentrate such uses and thereby reduce or eliminate conflicts with such residential neighborhoods. The new category is consistent with the existing separation of such incompatible uses between commercial mixed use and residential zones.

The proposed VR amendment works together with other proposed amendments to facilitate compliance with other goals and policies concerning incompatible development in residential zones. If justified by need and consistent with locational criteria, future application of the new VR zone will direct intense vacation rental use to locations well suited to the intensity of use, (e.g. full complement of public facilities and services). The proposed amendments are internally consistent with this section of the plan.

VI. STATEWIDE PLANNING GOALS.

- (1) Goal 1: "Citizen Involvement" The proposed ordinances and other documents were made available at no cost on the City's website and were also available for public review and purchase at the counter. Assistance was available to explain the proposals and technical information. Hearing notices were published in local papers in accordance with notice requirements. Mailed notices were twice sent to impacted property owners pursuant to Measure 56. The findings concerning the Comprehensive Plan Citizen Involvement Program as well as the findings under Nature of Proceedings and Land Use Planning are incorporated herein by this reference. Therefore, the amendments are consistent with Goal 1.
- (2) Goal 2: "Land Use Planning" This goal is to establish a land use planning process and policy framework as a basis for all decisions and actions related to use of land and to insure an adequate factual basis for such decisions and actions. The Lincoln City Comprehensive Plan and its implementation measure, the Lincoln City Zoning Ordinance, was adopted by the City Council of Lincoln City after public hearings and reviewed on a periodic cycle to take into account changing public policies and circumstances. Opportunities were provided for review and comment by citizens and affected governmental units during preparation, review, and revision of the plan and implementing ordinances. Review of these VRD amendments in accordance with the Lincoln City Comprehensive Plan and the applicable zoning ordinance provisions establishes conformance with this goal. The

Amendments are integrated and consistent with the planning process and policy framework; specifically the amendments further compliance with existing policies to stabilize and protect existing residential neighborhoods from incompatible uses. The amendments acknowledge the Economy Goal by providing for voluntary compliance mechanisms and alternatives to lessen economic impact of compliance on impacted property owners and workers. The findings concerning the Comprehensive Plan Land Use Element are incorporated herein by this reference. Therefore, the amendments are consistent with Goal 2.

- (3) Goal 3: "Agricultural Lands" The areas affected by the VRD amendments are located within the City's Urban Growth Boundary. The area is currently designated and zoned for urban development and will remain as such. No agricultural lands will be affected by the amendments. Therefore, Goal 3 is not applicable.
- (4) Goal 4: "Forest Lands" The areas affected by the VRD amendments are located within the City's Urban Growth Boundary. The area is zoned for urban development. Moreover, the affected areas do not contain any designated forest lands. Therefore, Goal 4 is not applicable.
- (5) Goal 5: "Open Spaces, Scenic and Historic Areas and Natural Resources" The areas affected by the VRD amendments are located within the City's Urban Growth Boundary. The VRD amendments do not include any areas currently zoned Open Space or Park. They do not include the city's one property listed on the National Register of Historic Places, the Dorchester House. The areas subject to the VRD amendments also include some sites adjacent to areas designated as significant aesthetic resources. However, because the amendments relate only to voluntary compliance options for uses already allowed or pertain to creation of a district which does not directly authorize any development inconsistent with the aesthetic nature of the sites, there is no impact on such resources. . The findings concerning the Overall Environmental Element as well as the Shoreland, Beaches, Dunes, Estuary & Ocean Resources Elements are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 5.
- (6) Goal 6: "Air, Water and Land Resources Quality" Because the proposed amendments relate to compliance issues associated with uses already allowed under the existing zoning ordinance, the VRD amendments will not serve to increase the waste and process discharges already being generated within the affected areas. Such

discharges include solid waste, thermal, noise, atmospheric or water pollutants, contaminants or products therefrom. Similarly, the proposed VR district requires the availability of the full complement of public facilities and services before its application. The proposed ordinances do not impose the VR district on any property. The findings concerning the Overall Environmental Element are incorporated herein by this reference. Therefore the VRD amendments are consistent with Goal 6.

- (7) Goal 7: "Areas Subject to Natural Disasters and Hazards" The areas affected by the VRD amendments include some identified Natural Hazards areas. The city already has acknowledged ordinance standards relating to development in these areas, and the VRD amendments do not authorize (or exempt) any development inconsistent with these natural hazard standards. The findings concerning the Natural Hazard Element are incorporated herein by this reference. Therefore the VRD amendments are consistent with Goal 7.
- (8) Goal 8: "Recreational Needs" The areas affected by the VRD amendments do not include any areas zoned for open space or park use, nor do they of themselves authorize any development inconsistent with the recreational needs of the community, region, or state. Therefore, the VRD amendments are consistent with Goal 8.
- (9) Goal 9: "Economic Development" The VRD amendments do not affect the availability of land suitable for industrial and commercial development. The existing Zoning Code, implementing the Comprehensive Plan directs full time commercial vacation rental operations into commercial and mixed use zones. The proposed amendments continue this structure by creating an additional mixed use zone, for future application. At the time of the future application the need for this additional mixed use (deemed commercial for VRD purposes) will need to be demonstrated. Similarly, the creation of voluntary compliance mechanisms to remove violations in residential areas, consistent with the current plan and code, will not adversely impact commercial and industrial lands, as such unlimited VRD use is already authorized in these zones. The effect on economic development in Lincoln City, will be that owners of vacation rentals who are operating illegally in violation of existing code and plan policies will make less money. The economy overall will not suffer as such use will undoubtedly shift to locations where the use is expressly authorized by the Code. The proposed voluntary compliance mechanisms and

available new zone create an avenue for existing owners operating in violation of the law to bring their properties into compliance. The already vulnerable service workforce in the city can only benefit from the legitimization of such operations. The findings concerning the Economy Element are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 9.

- (10) Goal 10: "Housing" The VRD amendments do not by themselves affect residential development. By themselves the VRD amendments do not affect the availability of housing because they relate only to housing that already is allowed and to a use that is merely accessory to the primary use of the structures they are in as second homes. The amendments include compliance mechanisms to bring existing development into compliance with existing code which implement important Comprehensive Plan policies to protect and stabilize residential neighborhoods. The findings concerning the Housing Element and Land Use Planning Element are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 10.
- (11) Goal 11: "Public Facilities and Services" Existing City water and sewer infrastructure and treatment facilities will not be affected by the VRD amendments, nor will their ability to serve surrounding properties be affected, because the VRD amendments do not authorize any uses not already allowed by the zoning ordinance. The new VR Zone is not applied with these proposals, and contains a requirement that the full complement of public facilities and services (including sewer) be available before application. The findings concerning the Public Services and Utilities Element are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 11.
- (12) Goal 12: "Transportation" The VRD amendments are consistent with the City's *Comprehensive Plan* and *Transportation Master Plan* because they concern compliance mechanisms to bring existing uses into conformance with the existing limitations of the zoning code, which itself implements the *Comprehensive Plan* and because they do not adversely affect any transportation facility since they relate only to uses already allowed. Further the new VR zone is not applied to any particular property and requires the full complement of public facilities and services as part of any future application. The findings concerning the Transportation Element are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 12.

- (13) Goal 13: "Energy Conservation" The VRD amendments do not change any land use patterns and development already allowed and therefore will not have any effect on Energy Conservation. . The findings concerning the Energy Element are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 13.
- (14) Goal 14: "Urbanization" The proposed VRD amendments do not increase or decrease densities allowed, and accordingly do not tend to promote the expansion of the Urban Growth Boundary. The new VR District is not applied with this proposal, but includes locational policies for use of the District as a transition between commercial uses and residential districts, therefore not in proximity to the urban growth boundary. The findings concerning the Comprehensive Plan Land Use Element, Housing Element and Urbanization Element are incorporated herein by this reference. Therefore, the amendments are consistent with Goal 14.
- (15) Goal 15: "Willamette River Greenway" The affected areas are not located within the Willamette River Greenway. Therefore, Goal 15 is not applicable.
- (16) Goal 16: "Estuarine Resources" The affected areas of the VRD amendments include some areas adjacent to a designated estuarine resource. However, the VRD amendments, by themselves, do not authorize any development, only provide voluntary compliance mechanisms for bringing existing development into compliance with limitations in the zone. Similarly the new VR District is not applied to any particular property and does not alter any protective regulations concerning Estuarine Resources. The findings concerning the Comprehensive Plan Land Use Element are incorporated herein by this reference. Therefore, the amendments are consistent with Goal 16.
- (17) Goal 17: "Coastal Shorelands" The city's coastal shorelands include all land west of Highway 101, land within 500 feet of the ordinary high-water elevation of Devils Lake and Spring Lake, and land within 1,000 feet of the shoreline mean higher-high-water elevation of Schooner Creek, Drift Creek, and Siletz Bay estuaries. These coastal shorelands include some areas of residential zoning, and also include areas that have been designated as significant aesthetic resources. The proposed VRD amendments do not themselves authorize any changes in development in the coastal shorelands area since they relate only to compliance issues for

development already allowed under the zoning ordinance. Similarly the VR district is merely created by the proposals and not applied to any particular property. The VR District does not alter any of the regulations governing the protection of the identified resources. The findings concerning the Shoreland, Beaches, Dunes, Estuary & Ocean Resources Element are incorporated herein by this reference. Therefore, Goal 17 is met or not applicable.

- (18) Goal 18: "Beaches & Dunes" The affected areas of the VRD amendments are not located within a beach or active dune area. The findings concerning the Shoreland, Beaches, Dunes, Estuary & Ocean Resources Element are incorporated herein by this reference. Therefore, Goal 18 is met or not applicable.
- (19) Goal 19: "Ocean Resources" Because the affected areas of the VRD amendments are solely on the dry land areas of the city, and because the VRD amendments will not by themselves authorize any development, the VRD amendments will not affect the nearshore ocean and continental shelf. The findings concerning the Shoreland, Beaches, Dunes, Estuary & Ocean Resources Element are incorporated herein by this reference. Therefore, the VRD amendments are consistent with Goal 19.

Findings Concerning Specific Allegations by OIA:

Oregonians in Action (OIA) alleged the proposed ordinances violate (1) the Housing Element of the Comprehensive Plan; (2) the Housing Inventory; (3) Needed Housing Provisions of 197.307; (4) Economic Element of the Comprehensive Plan; (5) Need for Commercial Land -also in the Economic Element; (6) Goal 9 and; (7) OAR 660-009-0025 .

Roads End. OIA's comments are submitted on behalf of Jon Chandler, a resident of Roads End. The Council clarifies as follows: The July 2013 annexation of approximately 246 acres of residential land in Roads End did not rezone the Road's End area to City residential zoning. The area maintains County residential zoning. By 2014 settlement agreement the City agreed not to initiate rezoning of Roads End for five years. Roads End vacation rentals are therefore not limited by the existing accessory use limitation applicable to City residential zones. Accordingly, the settlement offers to existing VRD owners with City residential zoning, the alternative expedited process for new VRDs with city residential zones, and most other provisions of the proposed ordinances do not impact Roads End. The only references to Roads End in the proposed ordinances are essentially to exclude Roads End from City land use provisions. If

created, the new VR zone will be available for Roads End residents to request, but it is not being proposed to be applied to Roads End, (or any other area) with ordinances 2014-21 or 2014-22. The Housing impact of the Roads End annexation is to increase the amount of single family residential land in the City.

The Council finds and determines that the proposed ordinances do not violate the OIA referenced Plan, Goal and statutory provisions cited. The Council incorporates herein all applicable findings set forth above. In addition, the Council finds and determines as follows:

Housing Element. The City does encourage a wide range of housing types, including seasonal housing (a/k/a summer, second, or vacation homes) as acknowledged in the Plan. Second homes located in residential zones are compatible with residential neighborhoods. Second homes in residential zones enjoy only a limited authorization to engage in rental activity. The limitation is that the rental activity must be incidental and subordinate to the owner's own use of the vacation home. The limited allowance for rentals helps second home owners afford their homes and the limitation also keeps the rental use compatible with the residential neighborhood. The existing code contains the above restrictions and such provisions are not being amended. The existing provisions implement important comprehensive plan policies designed to protect and stabilize residential areas from incompatible uses.

OIA appears to equate second homes with unlimited vacation rental operations. OIA states the proposed ordinances will severely limit vacation rental dwellings in residential zones. There is a big difference between a second home (recognized as housing by the plan) and a full time commercial vacation rental operation (a business). Full time vacation rental activities are simply not authorized in residential zones. Such uses are expressly required by existing law to be located in mixed use or commercial zones.

The City Council has announced that the City will enforce the existing limitation in the Code applicable to VRDs in residential zones; enforcement is required to address violations of the Code, which in turn violate Plan policies to protect and stabilize residential neighborhoods. To ease the economic impact of enforcement of the restrictions, Council has offered some voluntary compliance options and alternatives for property owners who will be impacted. Accordingly, opposing the proposed ordinances simply reduces compliance options and alternatives for property owners facing enforcement actions. Council therefore finds and determines that the existing Code and Comprehensive Plan (not the proposed ordinances) limit vacation rental activity in residential zones.

Second homes in residential zones are not limited, by existing code or by the proposed ordinances, but are in fact encouraged in the proposed ordinances to engage in a limited (accessory) amount of rental activity to recover costs and make the homes affordable. The effect of the proposed ordinances will be to reduce and mitigate illegal commercial operations in residential zones and distribute the rental activity to properly operated accessory locations in residential zones or to VRDs in commercial or mixed use zones, where unlimited operations are expressly permitted.

Contrary to the conclusion offered by OIA, there is no requirement that the City demonstrate that the new VR zone can accommodate the amount of VRD usage that will be lost if operators are forced to comply with the existing law. Excessive operations in residential zones violate the Housing Element and the City Code and there is no requirement that the City find other locations for such rentals. Moreover, as noted, there are ample commercial and mixed use properties that can legally operate at a high level and many more residential properties that can accommodate new or additional accessory use. The pending ordinances only offer compliance options and alternatives, the violations stem from the existing, unaltered provisions of the code. If such owners wish to demonstrate the need for a VR zone, they have the option to propose such an amendment; in the alternative they can select a settlement option or defend an enforcement action.

Housing Inventory. The 1990 Housing Inventory does in fact indicate a need for 83 acres of single family second homes. However, the 2014 annexation of Roads End alone added 246 acres of residential land to the City (predominantly second homes). Notwithstanding the alleged need twenty-five years ago, the proposed ordinances will not change the amount of land devoted to second homes. The existing law limits vacation rental operations in second homes in residential areas to accessory use. This accessory use allows owners to recover some of their costs. Full time commercial VRD operations must be in commercial or mixed use zones. Use of second homes in residential areas for full time commercial VRD operations is unlawful. The Council is not compelled by the 1990 need for additional seasonal housing, to tolerate chronic violation of a zoning accessory use limitation or for that matter chronic misrepresentation of the zoning limitations applicable to VRDs by financially interested parties. Even without the adoption of the proposed ordinances, enforcement of the existing zoning limitation will likely discourage the violation of the accessory use limitation in existing VRDs in residential areas and will likely discourage the construction of new commercial level VRD operations in residential areas. These results are consistent with the Plan and code polices designed to protect residential

areas from incompatible levels of VRD use. Adoption of the proposed ordinances will only lessen the severity of the impact on existing owners by providing options and alternatives. Not adopting the ordinances will not stop enforcement of the existing law; it will only remove voluntary compliance options and alternatives. Finally, the Ordinances do not discourage second homes. Commercial level of use of residential VRDs is essentially an illegal method of financing second homes. Legal methods have been and continue to be available.

Needed Housing. The findings above under Housing Element and Housing Inventory are incorporated herein by this reference. Second homes and commercial vacation rental operations are not the same. Second homes are permitted uses in residential zones. The 1990 need for additional second home acreage appears to have been met. But even if one assumes second homes are needed, that does not mean that vacation rental operations are needed housing. Under City Code such operations are a permitted business use in commercial zones and some mixed use zones. The minor allowance to owners in residential zones to engage in limited rentals to help recover costs, does not convert full time commercial vacation rental operations into needed housing. The facts, in the record are that vacation rental operations in residential zones have increased operations in violation of the code and plan policies to the point that they have eroded existing neighborhoods and become de facto commercial zones, with periods of intense activity and then vacancy. Further new construction in residential areas is being geared toward this high profit commercial rental activity, in violation of the Code and Plan policies. During the hearings, when the Housing Element mandate to provide for the housing needs of all citizens was mentioned, a Realtor testified that these [VRD] homes were built as large high occupancy vacation rentals and are simply too expensive for working people in the City. The Realtor's point was that the workforce really wasn't the target market for these homes; Council's point was - Exactly! Commercial VRD operations belong in commercial zones. Housing for all citizens belongs in residential zones. The point was made. If the Council does not enforce the limitations in the existing Code and Plan, the development interests and others will simply ignore the limited allowance for vacation rentals in residential zones, and new construction will more likely than not be directed toward this high profit commercial use instead of the required mix of housing types for the needs of all citizens. The housing studies in the record bears out the conclusion that the effect of VRDs is to reduce the available mix of housing available in the city of Lincoln City. In light of the housing studies, it is no small perversion of the needed housing statute, (a statute designed to protect against discrimination against low income housing) to argue that second home

owners should be permitted to violate zoning restrictions designed to protect and stabilize existing neighborhoods in order to afford their second homes and lifestyles conducted elsewhere.

Contrary to the conclusion offered by OIA, the proposed ordinances do not “greatly restrict” single family second homes. Second homes remain permitted uses in residential zones. Similarly, the limitation in the existing code on the use of second homes as vacation rentals is unchanged by the proposed ordinances. The City has not removed any available land for second homes by proposing voluntary compliance mechanisms and options to code enforcement actions in the proposed ordinances. In fact, with the addition of 246 residential acres in Roads End to the City in July 2014, the City has increased greatly the number of second homes located in the City. Finally, there is no requirement that the City apply the new VR zone (without cost or risk to second home owners) to provide for additional commercial VRD use to offset the loss of or to cure the illegal operations of VRDs in residential zones.

Economic Element. OIA alleges that the proposed ordinances limit the availability of housing for VRDs and is therefore contrary to the requirement to goal to support tourism. The existing law limits VRDs in residential zones, not the proposed ordinances. The proposed ordinances propose options and alternatives to code enforcement actions. As noted above under the Economy Goal, support of the Tourist industry does not require allowing violation of code provisions and important plan policies protecting residential neighborhoods in the Housing element.

Contrary to the conclusion offered by OIA, the City is not required to show that it has not decreased the opportunity for VRDs, or simply moved them around. Nothing in the Economy Element requires the City help mitigate losses to persons violating the existing code due to enforcement. Nevertheless, the City Council has offered voluntary compliance options and alternatives to such violators to reduce the economic impact on owners and service workers alike.

Commercial Land Need. OIA alleges that the proposed ordinances move VRDs from residential zones to commercial zones without any attempt to identify the impact on commercial zones or the new VR zone. OIA states the “City must identify the impact of that new use on the need for additional commercial land needed to satisfy the city’s requirement for a 20 year supply of commercial land.” Vacation Rental use is a permitted use in commercial zones, which includes numerous mixed use zones, including the new VR. Accordingly, the use is not new, but is in fact where such intense VRD uses were intended and required to be located. Further the City has not removed the allowance for accessory VRD use in

residential zones. (Something the Consensus Group had proposed for NO zones). Further, it appears there may be a surplus of commercial lands identified in the Comp Plan inventory. Pg 9-22).

Contrary to the conclusion offered by OIA, the City is not required to map new VR zones or do an analysis of a new use in commercial zones because the use is not new. As previously stated, the proposed amendments create voluntary compliance mechanisms and alternatives for property owners who are located in residential areas and are exceeding the existing code allowance for vacation rental activity.

Goal 9. Contrary to the conclusion offered by OIA, and consistent with the findings above on commercial need, the City is not violating Goal 9 because the VRD use is not a new use being added to commercial zones. The use is an existing permitted use. The City is not in the proposed ordinances "severely restricting" the city's residential zones from using the homes as VRDs. The existing code, which is not being amended, restricts vacation rental use of second homes in residential zones. The proposed ordinances only create voluntary compliance mechanisms and alternatives for property owners facing enforcement actions. The existing Code and Plan policies require commercial vacation rental operations to be located in commercial or mixed use zones. Only a limited allowance is provided for in residential zones.

OAR 660-009-0025(3) economic development opportunities. The City is creating a new zone VR , but not applying the zone to any particular property. Such application must await future application and demonstration of consistency with applicable city comprehensive plan policies and state law. Nevertheless OAI concludes that the City will consume existing commercial and industrial lands with this new zone. Further OIA again concludes the City is moving existing uses out of R-1 and into commercial zones, again failing to realize that such uses are already permitted uses in these zones and failing to recognize that the uses remain available (albeit at a residentially compatible level) in all residential zones. Contrary to the conclusion offered by OIA, the City is not violating the above-referenced OAR by creating a new zone and not applying it and by offering voluntary compliance mechanisms and alternatives to residential owners who are facing enforcement actions under existing law.

Supplemental Findings:

During the hearings and in the correspondence in the record there are allegations that the proposed ordinances constitute a regulatory taking resulting in the city having to pay compensation to landowners.

In Hall v. State ex rel Oregon Dept. of Transp., 355 Or. 503 (2014), the Oregon Supreme Court recently clarified the test applicable to different kinds of takings claims. As regards regulatory takings the Court stated:

Other types of government actions also can result in a *de facto* taking. When, for example, a government regulation—rather than a physical occupation or invasion—restricts a property owner's right of possession, enjoyment, and use, a taking can occur if, as a consequence, the property retains no economically viable or substantial beneficial use. *Dunn*, 355 Or. at 348, 328 P.3d 1261; *Coast Range Conifers*, 339 Or. at 146-47, 117 P.3d 990; *Boise Cascade Corp. v. Board of Forestry*, 325 Or. 185, 197-98, 935 P.2d 411 (1997).

The proposed ordinances:

- create a new mixed use zone for future application;
- provide for an optional expedited route to a new limited VRD license in a residential zone;
- maintain the existing land use process for accessory use approval;
- provide an optional settlement offer for existing VRDs who may or may not be operating in excess of accessory use limitations;
- provide a license with the option to apply for a vested rights/nonconforming use determination; and
- provide that the existing accessory use language in the Code be enforced in both future land use permitting and future land use enforcement actions.

The ordinances provide options and alternatives to property owners. There is no new regulation, only the stated intent to enforce the existing code. Any taking allegation based on the existing code will have to await exhaustion of the applicable land use processes and appeals identified (including vested rights or nonconforming use determination). Further the standard for taking of this sort, as clarified by the court this year, is not mere diminution in value but rather the more restrictive “no economically viable or substantial beneficial use.” (Hall found that the same restrictive standard applies to “condemnation blight” cases - where condemnation is threatened.)

The issue of VRD regulation was previously litigated in *Cope v. City of Cannon Beach*, 115 Or. App. 11, 14-15 (1992). In *Cope* the City ordinance prohibited rentals in certain residential zones of less than 14 days and provided for an exception process akin to a vested rights determination process. The Court stated:

Petitioners argued to LUBA and in their first assignment to us that the restriction constitutes a taking without just compensation. LUBA rejected that argument on the ground that the ordinance contains a “hardship relief” provision under which an affected property owner may apply to continue a rental use by showing that investments made exclusively to develop that use cannot be adequately recouped under the other provisions of the ordinance. Therefore, LUBA held, the taking argument is not ripe. We agree. *See Joyce v. Multnomah County*, 114 Or.App. 244, 835 (1992).

Petitioners contend, however: “The so-called ‘hardship relief’ provided in the challenged ordinance is available only to owners of property where the physical improvements have committed the property to short term rental use, a standard nearly impossible to meet.” The argument proves too much because, if the property is not committed to short-term rental use, the prohibition could not arguably eliminate all other viable economic uses, such as living in one's own dwelling. Therefore, there *could* be no taking of property that does not meet the threshold criterion for hardship relief that petitioners describe.

The case points out that vacation rental use is not the only use available for single family homes in residential zones. There are other viable uses such as “living in one’s own dwelling.” Further the City of Lincoln City has not proposed outlawing VRDs in the City. To the contrary, every residential lot may enjoy some limited VRD use.

Expressly to avoid Measure 49 (diminution in value) claims, the City is not changing the existing operative language of the Code related to the accessory use limitation. While the City does not believe Measure 49 applies because the use is commercial and not residential use, the City has taken the additional precaution of not amending the accessory use language (as was originally proposed) just to avoid the volume of possible Measure 49 claims. The existing language has been in place for more than five years and is immune to any Measure 49 challenge.

The Council elected not to repeal the existing accessory use limitation as was requested. The limitation was retained because it served valuable zoning and comprehensive plan policies to protect and stabilize

residential neighborhoods. In *Cannon Beach*, the Court upheld the ordinance against challenges the ordinance violated the Tourism based Economy Policies of the Plan. The Court pointed to the City's findings, which are equally applicable here:

The city's findings recite, *inter alia*, this interpretation of those plan policies:

"Cannon Beach has determined it will provide for a moderate level of controlled growth (The Economy Policy 1).

"Tourism is the main element of the city's economy. The city has determined that future economic development must maintain a balance between tourism and the stability of its residential areas (The Economy Policy 2) because tourism has the capability of adversely affecting the city's small town character and its residential areas.

"A loss of the city's small town character and the integrity of its residential neighbors will adversely affect the economic health of the community. It is the charm of the city's commercial and residential areas that attracts persons to Cannon Beach not only as a tourist destination but also as a retirement community.

"The rental of dwelling units for transient occupancy is a commercial use associated with the city's tourism industry. The city has determined that this commercial use in residential areas will adversely affect the character of residential areas and is thus inconsistent with its stated policy of finding a balance between tourist development and the maintenance of residential areas."

Cope v. City of Cannon Beach, 115 Or. App. 11, 15-16 (1992).

Findings Concerning Other Allegations:

In the correspondence entered into the record (including specifically September 15, 2014 and October 13, 2014) individuals made various constitutional challenges and other allegations concerning the proposed ordinances.

The Council finds and determines that the proposed ordinances do not violate the referenced constitutional provisions and the Council incorporates herein all applicable findings set forth above. In addition, the Council finds and determines as follows:

The proposed ordinances:

- create a new mixed use zone for future application;
- provide for an optional expedited route to a new limited VRD license in a residential zone;
- maintain the existing land use process for accessory use approval;
- provide an optional settlement offer for existing VRD owners who may or may not be operating in excess of accessory use limitations;
- provide a license with the option to apply for a vested rights/nonconforming use determination; and
- provide that the existing accessory use language in the Code be enforced in both future land use permitting and future land use enforcement actions.

The allegations are numerous:

- Measure 49 claims can be filed based on new law that “significantly changes the interpretation” of a previous law.

The new ordinances do not amend the definition of accessory use, currently defined as incidental and subordinate to the main use. Although Council initiated an ordinance to clarify and further define the accessory use limitation with a nondiscretionary standard, the threat of Measure 49 claims altered Council’s proposal to simply retain the existing language. The new Code clearly indicates staff is to apply and interpret the existing language in future land use enforcement actions and in future land use permit decisions. This emphasis is made to signify Council is not changing the existing language in order to avoid Measure 49 claims. Accordingly, the existing accessory use language will be interpreted by the Director or other authorized decision maker in the context of such future land use actions.

The findings for these ordinances contain an analysis of the existing accessory use language in the code as well as the zoning and comprehensive plan context of the existing law. These findings have two purposes. First, given the request to repeal the existing accessory

use language and replace it with the YES/NO overlay maps, the interpretation and analysis reveals that enforcement of the existing code is the only available means to attain land use compatibility consistent with comprehensive plan policies while avoiding Measure 49 claims. In short, the existing code language, if properly enforced, implements the plan and code policies and goals. The Council's decision to reject the YES/NO approach and retain the accessory use limitation is well supported. Second, the interpretation of the language in the zoning code and comprehensive plan context is necessary in these ordinances in order to justify and support Council's decision to offer the expedited VRD license path. In the findings, supported by the Council's analysis, the Council finds and determines that thirty (30) nights of VRD rental in a residential zone is incidental and subordinate to the main use of the premises as the owner's vacation home. As stated in previous findings and staff reports, this is not the only number of nights which is incidental and subordinate to the main use, but the Council must support its decision to offer this nondiscretionary OPTIONAL route to a VRD license. The findings, interpretation and analysis support the Council's decision that 30 nights is incidental and subordinate.

The opponents of these ordinances do not argue that 30 nights does not meet the incidental and subordinate standard. There is nothing wrong with the "incidental and subordinate" land use standard as set forth in the existing law. It is not an interpretation of the language that opponents object to, it is any enforcement of the existing standard. However, enforcement of the existing language can occur without the options and alternatives created by these ordinances. In accordance with established land use enforcement mechanisms, including but not limited to LCMC 17.80.050 D.2., any violation of standards in LCMC 17.80.050.B. subjects the VRD approval to revocation. LCMC 17.80.050.B.2 is the accessory use limitation. The ordinances contain alternatives and options to lessen the burden of enforcement. The interpretation and analysis in the findings of these ordinances support the decision not to repeal the limitation and support the offered optional expedited VRD process. Finally, the existing language in the Code will be applied and interpreted to future land use decisions and future enforcement actions.

- Incidental and subordinate is far from settled - referencing OIA correspondence.

Opponents of these ordinances refer to a number of interpretations of the terms "incidental and subordinate", including a summary of cases

by OIA in the context of state laws governing resource lands. After discounting the City of Beaverton case, ultimately they conclude the law is far from settled. As noted above, it is less an issue of interpretation of the standard and more an issue of enforcement. If opponents are proposing an interpretation it is that the Code language means nothing. Council expressly rejects this interpretation. As noted above, opponents are free to argue their alternative interpretations of the land use standard in the appropriate land use permitting or enforcement process. In its findings, Council supported its decision not to repeal the accessory use limitation and found that thirty nights is incidental and subordinate using the analytical framework of the Beaverton case. As noted, this is not the only number of nights which can be found to be incidental and subordinate.

Beaverton simply looked at the text of the ordinance and the context - that being the implementation of zoning and comprehensive plan policies.

Accordingly, the City's analysis of the existing code in the findings addresses how the existing "incidental and subordinate" accessory use limitation is consistent with the adopted comprehensive plan policies protecting residential neighborhoods from incompatible development and is internally consistent with the zoning code and code purposes. For this reason the request to repeal the limitation in favor of the YES/NO zone was rejected. Also, the City of Beaverton case concerns a local government's interpretation of its own code which implements its comprehensive plan, and is materially different (in terms of deference) from resource land cases where local governing bodies apply state administrative rules protecting resource lands. Nevertheless, as noted, the interpretation of the existing accessory use language will occur in future land use permit decisions and future enforcement actions subject to appeal. This ordinance does not amend the applicable definitions or establish a significantly different interpretation.

It is worth noting that opponents also criticize the use of time (number of rental nights) relative to accessory use, claiming it does not make sense. Certainly, an accessory structure is easy to quantify in terms of size. One can easily examine the accessory structure and compare it to the principal structure and determine it is incidental and subordinate. Use can be more difficult. When measured as a portion of property or a building, e.g. a percentage of a home used for a home business, it can be understood. Accessory use of a portion of a property can, however, change over time; it can creep-up or expand or even take over the main use (owner moves out of the house where

the home business is located). When, as in the case of a VRD, the entire house (not just a portion) is used for the accessory use, the only limitation is time - there is no spacial or size limitation. Given the VRD accessory use is expressly limited to the annual license, time in number of nights per year is the appropriate measure for accessory use. Accordingly, the Council finds and determines that the only limitation on accessory use that makes sense in the VRD context is time.

- IRS considers a vacation home a personal residence, unless rented for 300 days a year.

The Lincoln City TRT Code matches the exemption in IRS regulations, that is, if you rent your vacation home for less than 14 days, no tax is imposed. The IRS considers this small amount of use to be unimportant, insignificant and of little value. If you rent your Lincoln City vacation home for more than 14 days, the rental use of the property becomes taxable as rental income, deductions are limited, and the exact amount of use must be tracked for tax purposes.

- Findings must be made available for comment

As previously noted, the findings are what the Council believes is shown by the evidence in the record. Parties do not have the right to review or comment on findings.

- No evidence short term rental housing reduces availability of residential housing.

Common sense dictates that if residential properties are devoted to high income tourist accommodations, the available residential market for affordable rentals or homes for workers and retirees is reduced. The growth of VRDs located in residential zones in the City is well documented in the record. See Economic analysis and Housing studies in the record.

- Enforcement Action by DLCD not likely.

Staff identified City Council ordinance findings concerning housing goals and policies in virtually every prior ordinance concerning VRDs. These findings expressly state that VRD use is merely accessory and as such will not impact housing supplies. Opponents do not wish to abide by the accessory use limitation and object to staff pointing out that the City faces possible enforcement action by DLCD and citizens

groups. Even if the hearsay statement attributed to DLCD staff is accurate, DLCD staff's belief that they don't expect to be taking any action cannot bind or preclude the agency from taking future enforcement actions authorized by Oregon law. In addition, the risk that citizens will bring land use enforcement actions is not addressed by opponents. Council finds and determines that regardless of whether the Department or citizens bring land use enforcement actions, the Council must enforce the accessory use limitation because it furthers important comprehensive plan and zoning code purposes. The likelihood that Council could possibly "get away with" not enforcing its code does not mean that Council should ignore the adopted provisions of its comprehensive plan and zoning code.

- Goals.

Like the balance between the Economy Goal and the Housing Goal in previous findings incorporated herein, the proposed VR zone facilitates more legal short term rental use consistent with Recreation Needs, in areas where land use compatibility has been addressed in the rezoning decision. Similarly, adequacy of public facilities in the new VR zone, specifically sewer, was addressed by council. While a vacation home used occasionally by an out of town owner may be adequately served by a septic system, full time vacation rental use as would be authorized in the VR zone requires sewer service. The VR zone is based on the idea (like the idea of the YES and VROZ proposals) that a new zone could be created where vacation rentals could be unlimited; however, the VR zone proposal emphasizes review of land use compatibility through the rezone process. The reference to "based on the YES and VROZ overlays proposed" is not a reference to maps. The disruption of established neighborhoods by short term rentals was the issue twenty years ago in Cannon Beach and lead to the enactment of restrictive regulations. Citizens in Lincoln City similarly testified in person and in writing before Council that the quiet enjoyment of their properties has been disrupted by commercial levels of vacation rental operations. The existing code recognizes these nuisance impacts. Citizens testified that in addition to noise, parking and trash, the fact that you never know who your neighbors will be from week to week has an impact on your quality of life and security. Further, VRDs are getting bigger and more intense. One realtor and VRD owner with a large VRD testified that VRDs are often far too large and expensive for residents.

- Existing VRD definition

LCMC 17.80.050.D. concerning enforcement, contains language concerning “with or without an exchange of value or other consideration.” As Council is concerned with rental for consideration (or the promise of consideration) the language will be modified accordingly.

- Record

It has previously been noted in the Nature of Proceedings and other sections herein that the record was reopened on all three ordinances on August 25, 2014 for additional public hearing on September 15, 2014 and written comment until noon on October 13, 2014.

- Roads End provisions discriminate against everyone else.

All similarly situated properties (those with City zoning) are treated equally. Recently annexed Roads End does not have city zoning and is therefore not similarly situated.

- Records of Occupancy.

The record keeping requirements are reasonably related to enforcement of the existing accessory use limitation and are complimentary of existing requirements concerning VRD guest registers, TRT tax receipts and IRS records for rental of second homes.

- VRD penalties

A manager or owner that causes or suffers violations identified has a right to a trial before the municipal court or hearing before the VRD license board as applicable.

- More Takings allegations

After making numerous allegations, the above-referenced correspondence (page 11) refers to a White Paper by the *Robinson and Cole LLC* done for the National Association of Realtors. The correspondence sets forth various excerpts including the statement that “land use regulation that is excessively restrictive may constitute a - taking of property for which compensation must be paid....”

The correspondence neglects to mention that the White Paper then references the Oregon Supreme Court opinion in *Cope v. City of Cannon Beach*, 317 Or. 339 (1993) for the proposition that such VRD regulation is not a taking of all economically viable use.

The Oregon Supreme Court's Opinion in Cannon Beach held:

We next consider whether Ordinance 92-1, by prohibiting transient occupancy, denies property owners economically viable use of their properties. *See Agins v. Tiburon, supra*, 447 U.S. at 260, 100 S.Ct. at 2141 (stating second part of test). We conclude that it does not. On its face,

Ordinance 92-1 permits rentals of dwellings for periods of 14 days or more. The ordinance also permits the owners themselves to reside in the dwellings. Although those uses may not be as profitable as are shorter-term rentals of the properties, they are economically viable uses.

(See also Court of Appeals opinion quoted earlier in the findings).

Unlike the consensus committee's recommended NO zone, the proposed ordinances do not prohibit short term rentals. Staff is directed to enforce the existing limitations in the Code (the existing accessory use limitation). The existing code allows all residential zones a limited allowance of VRD use. Moreover, such enforcement will occur in future land use enforcement actions or future land use permit decisions. The ordinances proposed add optional mechanisms and alternatives to the enforcement process.

**BEFORE THE CITY COUNCIL FOR THE
CITY OF LINCOLN CITY, LINCOLN COUNTY, OREGON**

[November 10, 2014]

ANALYSIS AND REVIEW OF LANGUAGE AND)	
CONTEXT OF LINCOLN CITY MUNICIPAL CODE,)	
SECTION 17.80.050.B.2. AND SECTION 17.08.010)	COUNCIL INTERPRETATION
RELATING TO THE EXISTING INCIDENTAL)	GUIDANCE
AND SUBORDINATE ACCESSORY USE LIMITATION)	
ON OPERATION OF VACATION RENTAL DWELLINGS)	No. 2014-01
LOCATED IN RESIDENTIAL ZONES)	

Interpreting Legislative Body:

City Council of the City of Lincoln City.
[The interpretation by the Planning Director in the record is modified herein by the City Council]

Land Use Regulations:

LCMC Section 17.08.010 *Definitions* (the definition of "Accessory Use")
LCMC Section 17.80.050 *Vacation rental dwelling use criteria* (allowing vacation rental dwellings as an accessory use in residential zones and permitted use in commercial zones)

Problem & Question Presented:

Zoning and land use controls are imposed by local governments to prevent conflicts between property owners caused by incompatible uses. Businesses, including uses like overnight accommodations, are generally located in commercial zoning districts to avoid conflicts with residents. Some of these uses, like home occupations, bed and breakfasts and vacation rentals enjoy limited authorization to operate in residential zones. Authorization to operate as an accessory use is a common limitation. Sometimes owners and their management companies violate these use limitations, in favor of more profits, triggering conflicts with surrounding properties. Adversely impacted residents in turn request enforcement action by the City or such private parties may initiate private enforcement actions. Finally, DLCD may become involved in enforcement if the City fails to act.

Vacation rentals, especially those operated as high intensity business operations, have acknowledged nuisance impacts on residential neighborhoods. The VRD problem is that of land use compatibility. Acknowledging the problem, the VRD Consensus Group sought to separate the uses into YES and NO zones. Objections were made based on fairness and Measure 49 claims were threatened. However, what was overlooked was that the existing Code also separated such incompatible uses by requiring high intensity VRD business operations to be in commercial zones. Only limited VRD operations were authorized in residential zones. In this context, the question presented to Council is at what point does the authorized accessory use of a dwelling as a vacation rental in a residential zone cease being merely an incidental and subordinate accessory use and become an incompatible commercial use in a residential zone?

Discussion:

This analysis and interpretation addresses the plain meaning of the definitional words used in the Lincoln City Municipal Code, together with the existing context of the language in the existing code. This interpretation further addresses the guidance presented by the Comprehensive Plan and Zoning Code purposes and other existing code provisions, together with applicable case law and legislative history.

A "vacation rental dwelling" (VRD) is a dwelling unit that is used, rented or occupied on a daily or weekly basis, or is available for use, rent, or occupancy on a daily or weekly basis, or is advertised, or listed by an agent, as available for use, rent, or occupancy on a daily or weekly basis. [See LCMC 17.08.010]. The existing zoning ordinance expressly acknowledges that this type of short term rental use can have nuisance impacts on residential neighborhoods [See LCMC 17.80.050A.2.].

Accordingly, the Lincoln City Municipal Code contains an accessory use limitation on vacation rental dwelling use in residential zones. Specifically, LCMC 17.80.050.B.2 provides:

2. Accessory or Permitted Use. A VRD is allowed as an accessory use in a residential zone and a permitted use in a commercial zone, provided the VRD meets the applicable standards of this chapter and obtains a license under Chapter 5.14 LCMC.

This accessory use limitation on VRDs has existed in the Zoning Code since at least 1989.¹ It differentiates this short-term rental use from other rental use of residentially zoned property. This accessory use limitation is further specifically defined in the existing code as "incidental and subordinate to the main use" of the property [LCMC 17.08.010]. The accessory use authorization is also expressly subject to an annual license.

Different types of VRDs.

The Code referenced above begins with the word "Accessory" followed by the disjunctive "or" and then the words "Permitted Use". The Code indicates two mutually exclusive possibilities. Similarly, the first sentence of the section states that VRDs are allowed as accessory uses in residential zones and permitted uses in commercial zones. Given that the Code expresses two alternatives, to treat the Code as authorizing only one type or level of VRD use would be expressly contrary to the language of the Code and would render the words used by the legislative body a nullity. VRDs in commercial zones, as permitted uses, are more like motels in intensity and frequency of use.² Accessory Use VRDs in residential zones must be significantly different in terms of intensity and frequency of use; such accessory use is more like a Home Occupation allowance.³ Accordingly, the plain language of the code supports that

¹ This limitation is currently contained in LCMC 17.80.050.B.2., which has not been amended for more than five years. The limitation actually has existed in one form or another in the Zoning Code for approximately 25 years. [See prior LCMC 6.050(2)(Ordinance 89-11) as well as prior LCMC 10.050(2),(Ordinance 92-03). Both referenced ordinances provided that "A vacation rental dwelling permit shall be issued as an accessory use ..." (emphasis added). Ordinance 2007-11 clarified that the limitation did not apply to commercial zones by expressly limiting the accessory use language to residential zones.

² See staff report Ordinance 2002-02 "Single family homes in the commercial zones are required to obtain a business occupation tax permit, and the rental of these homes are treated similar to the operation of a motel."

³ See May 11, 2009 City Attorney Council Memorandum making the comparison to home occupation.

there are at least two types of VRDs: Limited Accessory Use VRDs in Residential Zones and Permitted Use VRDs in Commercial Zones.⁴

Accessory Use defined.⁵

"Accessory structure" or "accessory use" means a structure or **use incidental and subordinate to the main use** of property and located on the same lot as the main use, including any required off-street parking within 200 feet (measured in a straight line) of the building or use it is intended to serve. [LCMC 17.08] (**emphasis added**)

An accessory use, like an accessory structure, must be "incidental and subordinate to the main use" of the property. The main (principal) use of the property is a permitted use which is a different use from the incidental and subordinate accessory use. The textbook example is a home office. Some codes would allow an accessory home office with a limitation that it be a small percentage of the gross floor area - e.g. ten percent under the State Building Code. The main use is the residential use of the home by the owner; the accessory use is the subordinate or minor office use. As relates to vacation rental dwelling use, the language of the existing Code clearly dictates that there are two uses - both a main use and an accessory VRD use. The main use must be the permitted residential use of the dwelling as a second home by the owner; the VRD use is the subordinate or minor use. In the home office example above, if the owner builds another residence and moves out of the house, the office use becomes the dominant use, even if the owner occasionally stays there. Similarly, if the VRD use is the main use of the vacation home (there is little or no use by the owner) the code limitation is violated.

Incidental and subordinate.

The common and ordinary meaning of the word "Incidental" means: "1. happening as a minor part or result of something else." "Minor" in turn means: "not very important or valuable; **small in number, quantity, or extent;**" "**not very serious**" (**emphasis added**). Stated another way: "inferior in importance, size, or degree: comparatively unimportant."

Similarly, "subordinate" means "of or characteristic of a low rank or importance;" "inferior" or "secondary." "Secondary" meaning "not as important or valuable as something else."

Accordingly, the existing code definitional limitations on accessory use dictate that an accessory use VRD in a residential zone must be very different from a permitted use VRD in a Commercial Zone, the difference being the intensity and frequency of the use. An accessory use VRD must be both incidental and subordinate to the main (principal) use. There must be two uses - the main or principal permitted use (typically the owner's use of his/her second home) which is dominant, and the subordinate, incidental minor VRD use. Of the two uses, the VRD use must be the inferior use; the VRD use is minor, meaning it is not very important or valuable, small in number, quantity, or extent, comparatively unimportant. The plain and ordinary dictionary meaning of the words used in the existing code operate to limit the accessory use to a small number. These definitional limitations are supported by the context, the context being the code as an implementation measure for the code purposes and comprehensive plan policies.

⁴ In the proposed Ordinance there are three types of VRD licenses, the third simply being a catch-all Special category for the proposed Administrative Allowance or a VRD approved under some other land use process.

⁵ This definition has not been altered since its original adoption in 1984 (Ordinance 84-02, Section 1.040)

Context: VRD Code purposes.

The purposes set forth in LCMC 17.80.050 A.1 support the limited allowance for VRDs in residential zones:

“Vacation rental dwellings are allowed in recognition of the fact that property owners may desire to allow others to use a vacation home on occasions when the owners themselves are not using it ...”

Clearly the language of the code contemplates that the “owners themselves” are using the vacation home. The principal use of the dwelling was always contemplated to be the owner’s own use of the vacation home; VRD use was only to be occasional.⁶ Accordingly, a vacation home in a residential zone is not to be operated at an intensity or frequency similar to a permitted commercial VRD business in a commercial zone; the VRD use is merely an incidental and subordinate minor use of the owner’s vacation home.

Context: VRD Ownership Limitation.

Similarly, the one VRD per person in a residential zone limitation in the Code [LCMC 17.80.050 B.1] supports the limited allowance for VRDs in residential zones.

... a person can have an ownership right, title, or interest in no more than one dwelling unit in a residential zone that has a vacation rental dwelling,...

A person who has a vacation home may, on occasion when they are not using it, rent their home to others; a person with more than one vacation home in the same City is engaged in the business of renting vacation homes. In Lincoln City, the former is authorized in residential zones, the latter is not. (See Administrative Interpretation 2007-01 providing that the dwelling being rented must be the owner’s “vacation home” and that it would be illogical to own more than one vacation home in the same City). Multiple ownership of commercial VRDs is appropriate in commercial zones (no limitation on ownership); in residential zones it is this limitation which again reinforces that there are two uses, the main use by the owner as a vacation home and the incidental minor use by others. If a person or business was permitted to own multiple VRDs in a residential zone, the nature of business being what it is, the principal use would be VRD use and the intensity and frequency of use would be to rent the dwelling for as many days as possible to maximize profit, making the use no different than use in a Commercial Zone. The one VRD per owner limitation supports the fact that the allowance for VRDs in Residential zones is only a minor allowance granted to the home owner to help recover costs while providing an alternative tourist accommodation, not to maximize profits as in a business zone.

Context: R-1 Zoning Code purposes and other authorized uses.

The purposes of the R-1 Zones and other similar authorized uses in the zoning code, similarly support the limited allowance for VRDs in residential zones. LCMC 17.16.010 provides:

17.16.010 Purpose.

⁶ See Ordinance 89-11: The “Vacation Rental Dwelling Permit” is in recognition of the desire of many people to rent their vacation home on occasions when they, themselves, are not using it. (emphasis added)

To promote and encourage a suitable environment for family living and to protect and stabilize the residential characteristics of the zone. The R-1 zone is intended to provide primarily for single-family dwellings.

The purpose of the R-1 zone is to protect and stabilize residential characteristics of the zone. Authorizing VRDs at the same level as allowed in commercial zones (with an intensity and frequency of use similar to motels) would not protect residential zones. This "protect and stabilize" language is similar to language in the comprehensive plan (discussed later). The accessory use limitation in the current code furthers this policy by limiting VRD use in residential zones to a small amount (in terms of frequency and intensity of use).

Similarly, the list of Permitted and Accessory uses in R-1 zones demonstrates a context of consistent safeguards against high levels of intensity or frequency of commercial use. Guest houses are not to be rented [at all] or otherwise conducted as a business; home occupations are limited to 25% of the floor area, and may have no outward appearance of a business; bed and breakfasts must be owner-occupied (main use) and are limited to rental of two rooms (i.e. a small amount) [See LCMC 17.16.020 and LCMC 17.16.030].

Similarly, and specifically related to overnight accommodations (other than motels and hotels), the Code [LCMC 17.52.210.G] expressly authorizes only a limited amount of Recreation Commercial uses in large scale Planned Developments (100 acres or more). The Code permits overnight accommodation cabins and structures (not including motel and hotel uses listed separately) as authorized in such large scale mixed use planned developments only if the impacts of such commercial uses are "internalized and mitigated through master planning and coordinated on-site management." Such other overnight accommodations are limited by LCMC 17.52.210.G(2)(b) to 15% of the gross site area of the large scale residential planned development. There is no allowance for such RC uses in smaller planned developments. Accordingly, commercial operations of overnight accommodations (like VRDs) are permitted in residential zones only in large master planned communities when the impacts of such RC uses are internalized and mitigated through master planning and on-site management, and even then they are limited to only 15% of the gross land area. Accordingly, in large planned developments, Commercial (RC) such use is tightly constrained by master planning, on-site management and a percentage of land area. The accessory use limitation similarly acts to constrain VRD use outside of such large master planned communities; because such communities have not had the benefit of master planning to internalize impacts, accessory use authorization for VRD use must be less intense than master planned communities.

Context - VRD Ordinance Goal Findings. The City's Housing Goal is "to provide for the housing needs of all citizens." The Housing Element further requires that "The city shall work to stabilize and protect existing residential areas from deterioration and incompatible development." Unlimited operation of VRDs in residential areas converts such residential areas into *de facto* commercial districts. Such intense VRD business operations in residential zones, while creating profit for owners and investors, remove such lands as available housing. Similarly, when property owners deliberately build vacation rentals as business investments in residential zones, such homes are generally far too expensive for normal workforce housing. (A realtor testified to this effect during the hearing). Such operations are incompatible with existing residential areas and not consistent with the applicable provisions of the City's comprehensive plan to provide housing needs for all citizens. To reinforce the fact that the VRD allowance in residential zones was not a *de facto* conversion to commercial use, and to lessen exposure to allegations of violation of the statewide planning goals and comprehensive plan policies, the findings supporting adoption of

nearly every VRD related ordinance emphasized that the intensity and frequency of the VRD use was "**merely accessory**". Findings for Ordinance 2009-02 provide:

(10) Goal 10: "Housing" The VRD amendments do not by themselves affect residential development. By themselves the VRD amendments do not affect the availability of housing because they relate only to housing that already is allowed and to **a use that is merely accessory to the primary use of the structures they are in as second homes**. Therefore, the VRD amendments are consistent with Goal 10. (**emphasis added**)

Similarly, findings concerning adequacy of public facilities, energy conservation and protection of natural resources find that the most code amendments concerning VRDs will have little or no impact on the listed goal resources. To interpret the allowance for accessory use VRDs in residential zones as unconstrained, and on-par with VRDs in commercial zones, would be contrary to this legislative history and the language of the ordinance.

Context - Acknowledged Comprehensive Plan

The Comprehensive Plan Housing Policies provide:

There are four users which determine Lincoln City housing needs. These are:

- 1.The permanent resident seeking shelter at affordable prices.
- 2.The tourist industry seeking seasonal shelter for its employees.
- 3.The elderly population seeking retirement shelter.
- 4.The seasonal resident seeking shelter.

These users work in competition for the limited lands available for housing development.

The Comprehensive Plan recognizes that seasonal residents (i.e. owners of second homes) compete with other users, such as permanent residents and retirees, for the City's available housing supply. The Plan does not prioritize such users over others. Further, the Comprehensive Plan does not identify short term VRD rental as a *residential* housing demand; VRD rental is merely a minor commercial aspect of seasonal housing in residential zones. The plan goes on to establish policies to be implemented in the zoning code; these policies seek to guard against adversely impacting available residential housing stocks by encroachment of incompatible development, including commercial uses. As was noted earlier, the Comprehensive Plan expressly provides (**emphasis added**):

4. The City shall work **to stabilize and protect** existing residential areas from deterioration and incompatible development.

Interpreting the allowance for VRDs in residential zones as being on par with commercial VRDs would be expressly contrary to the Comprehensive Plan's policies, implemented in the Zoning Code to stabilize and protect existing residential areas from incompatible commercial development. The incompatibility of commercial scale VRDs with "existing residential areas" has been the impetus for much of the recent work, including the "Consensus" effort. While some proffer better controls on parking, garbage and noise, or more stringent penalties for unpermitted VRDs as solutions, it cannot be disputed that the **intensity and frequency** of VRD use in a residential zone is a paramount factor as regards incompatibility.

The problem, at core, is that some owners have used their residential VRD properties as if they were commercial VRDs, and this frequency and intensity of use has created conflicts with surrounding residents,

including noise, garbage and parking issues. What appears to have been overlooked in the current debate is that the allowance for VRD use in residential zones was never intended to be on par with commercial VRD intensity and frequency of use. The text, context and history of the existing ordinance demonstrates that such unlimited use is unlawful, and a violation of the Code. Such use is subject to enforcement action, including land use and license revocation proceedings, injunction and fines. In sum, a residential VRD, approved as an accessory use, is incidental and subordinate to the Main (Principal) use of the property as the Owner's vacation home. The VRD use is minor, meaning it is not very important or valuable, and the use is small in number, quantity, or extent.

Accessory Use / Accessory Structure Case law

As noted above, the definitional terms "Incidental and Subordinate" are not mathematically precise, but they are constrained by the common dictionary definitions of the words and the context in which they are used. In this case, the words are used in the context of implementing the comprehensive plan policies and zoning code purposes for protection of single family residential lands. This is not a new or remarkable concept in land use.

In 1985, just a few years before the 1989 adoption of the VRD regulations, the Land Use Board of Appeals upheld the City of Beaverton's interpretation of the terms "incidental and subordinate" in *Leonetti Furniture Manufacturing Co. v. City of Beaverton*, 13 Or LUBA 59 (1985). Leonetti was selling his Industrial property to Costco. Costco argued that their wholesale use was permitted in the Industrial zone and that their retail sales were allowed as an accessory use. Costco's actual retail sales were about 40 – 49% of their wholesale sales. Costco argued the terms "incidental and subordinate" can only mean just less than one-half, and therefore their accessory retail use was allowed. Beaverton rejected this interpretation. Using the definition of the terms and the purposes of the zone, Beaverton found that accessory use was a use that was **"extremely minor in nature compared to the main permitted use."** LUBA similarly turned to the purposes of the Code and acknowledged that Beaverton's interpretation was reasonable and consistent with the City's Development Code. Costco's interpretation, that it could only mean "just less than one-half" was rejected.

Evolution of the Problem - Creep

An Accessory Structure is examined to determine if the structure is incidental and subordinate to the principal structure. Unless the structure is physically expanded, the determination is static. By contrast, an Accessory Use is more susceptible to change over time (i.e. it is easier to notice an expanded building as opposed to increased use). Nevertheless, frequency of use and intensity of use may change over time making accessory uses more susceptible to "creep" - an incremental increase in frequency or intensity of use until the inferior accessory use has become the dominant use, or it simply replaces the dominant use. This is often referred to as the "tail wagging the dog."

The "tail wagging the dog" was recently addressed in a pair of recent cases (one from the Land Use Board of Appeals and one from the Oregon Court of Appeals). The cases address at what point certain "incidental and secondary" uses at a winery (food service and events) overtake the winery's primary activity (processing and selling wine), or at what point the tail wags the dog. (*Resource lands are often subject to litigation as to the extent of incidental and subordinate accessory uses*).

At issue in the winery cases was a county conditional use permit allowing an existing winery to construct a new building to contain a tasting room, a commercial kitchen, and other facilities, and to host a total of 44 "events" per year. Among the events were 40 single-day events and four three-day events. This, coupled

with a commercial kitchen that was authorized to operate as a restaurant in conjunction with the events, caused both LUBA and the Court of Appeals to conclude that the incidental and subordinate "event" activities came "dangerously close" (to use the words of the Court of Appeals) to the incidental and subordinate activities overtaking the primary activity.

The legislature reacted to the case [SB 841] by clarifying some of the activities would be permitting and creating a land use process to ensure that events were subordinate to the wine production. The legislature capped the number of events at 18, a small number.

The incidental and subordinate language of accessory use definition is capable of more than one local government interpretation. The City Council is not bound by any prior interpretation of the language of the ordinance in any quasi-judicial decision. [Bemis v. City of Ashland 48 OR LUBA 42 (2004)]. Further Council may clarify such language when Council believes it has been erroneously or inconsistently applied. Even though subject to interpretation, there are parameters which clearly cannot be exceeded. For example, interpreting the language of the ordinance to permit an accessory use to operate more than the main use (more than 50%) would clearly violate the plain meaning of the word "subordinate". The language of the ordinance includes more than just the word subordinate; it includes both the words "incidental and subordinate." Given the language of the ordinance, the context of the zoning code, the comprehensive plan and zoning code focus on the protection of residential areas from incompatible activities, and consistency with land use goals, the "small in number, quantity or extent" when compared to the main use interpretation of the existing language of the code is clearly defensible.

Title 17 contains no fixed numeric limitation on the number of nights a vacation rental may be rented. That does not make the restriction unenforceable; it merely makes it a land use restriction, subject to quasi-judicial land use enforcement proceedings. As with the winery legislation noted above, every enforcement action alleging violation of this standard will trigger, or have the potential to trigger, a land use decisional process. Enforcement proceedings can ask and answer the question, is the operation of the vacation rental incidental and subordinate to the main use. Is the VRD use small in number, quantity or extent?

The Small TRT Number

The City Code does contain a small numeric limit on VRD usage. The City's Transient Room Tax (Chapter 3.04) exempts Vacation Rental Dwellings rented 14 or fewer days per year from the requirement to pay TRT to the City. Both the land use ordinance (LCMC 17.80.050.B.7) and the license ordinance (LCMC 5.14.130) require compliance with the TRT ordinance. Section 3.04.050 (**emphasis added**) provides:

3.04.050 Exemptions.

The tax shall not be imposed on the following, which shall be the only exemptions permitted:

- A. Any occupant for more than 30 successive calendar days (a person who pays for lodging on a monthly basis, irrespective of the number of days in such month, shall not be deemed a transient);
- B. Any occupant whose rent is of a value less than \$2.00 per day;
- C. Any person who rents a **private home, vacation cabin, or like facility** from any owner who rents such facilities for a total of **less than 15 days per year** who does not advertise the dwelling for rent or list it with an agent as a vacation rental;

D. Any occupant whose rent is paid for a hospital room or to a medical clinic, convalescent home or home for aged people, or to a public institution owned and operated by a unit of government;

E. Any churches, synagogues or nonprofit tax-exempt charitable organizations in furtherance of their charitable or religious purposes;

F. State and federal employees on government business, where payment for the rooms is made by the government directly to the operator;

G. Any occupant whose rent is paid by the city.

The 15 day or more trigger for TRT payment is also the Internal Revenue Service trigger for when the primary function of the home is that of a rental property. (Publication 527). (It is no longer minor and incidental). Neither the land use provisions of Chapter 17.80 (Special Uses) nor Vacation Rental License provisions of Chapter 5.14 exempt vacation rental activity of less than 15 days from compliance with the land use or license requirements of the Code. This provision does not appear to be dictated by Charter or state TRT statutes. Reading the Lincoln City Municipal Code as one integrated document, the numeric limit in the TRT ordinance associated with short term rental of a private home could correspond with the limitation in Title 17 to incidental and subordinate VRD use in residential zones. (The definitional allowance for advertising or listing VRDs can be seen to apply to VRDs in commercial zones, not those in residential zones; therefore there is no inconsistency.)

Conclusion.

If the Code is to be interpreted in land use permitting and enforcement actions on a case by case basis, the most defensible position based upon the language and context is that incidental and subordinate is not "just less than half", but is a number that is not very important or valuable, and is minor in relation to the main use. That is, the VRD allowance in residential zones is small in number, quantity or extent. The TRT ordinance allowance of 14 or fewer VRD rental days per year would certainly meet this criteria. (Not much different than the winery allowance established by the legislature for subordinate events at 18 days). This number is minor, meaning it is not very important or valuable, and it is small in number, quantity, or extent.

Because the City Council can, in the legislative context, establish a number, the Council can take into account other factors impacting the residential housing stock in the City. Owners of homes in flood zones have recently been advised that Federal subsidy for flood insurance is ending. Second homes, including seasonal vacation homes recognized by the Comprehensive Plan, will have increasing flood insurance rates for a number of years until the subsidy is removed. Accordingly, provided the number of days remains "incidental and subordinate" (small in number, quantity or extent), Council can set a nondiscretionary number which meets the accessory use criteria to remove land use discretion. Because of Measure 49 allegations, imposition of the number as the only alternative is ill-advised. (Not because of the likelihood of success of such Measure 49 claims but because of the sheer number of claims possible). Accordingly, Council has proposed not to impose a number but to create an option for owners where owners of residential lands can agree to a 30 night limit on VRD rentals and skip the land use decisional process. Council is in fact determining that 30 nights is a number of rental nights that is incidental and subordinate, small in number, quantify or extent. Council is not determining that 30 nights is the only number. Except for this optional nondiscretionary standard, and any voluntary compliance

settlements, land use decision makers will continue to be required to apply the incidental and subordinate accessory use standard in land use permitting and enforcement. Each such decision is required to follow land use decisional processes and must be supported by appropriate findings and interpretations of the discretionary land use criteria.

**NOTICE OF ADOPTION
BY THE CITY COUNCIL –
ZONING ORDINANCE AMENDMENTS**

Zoning Ordinance Amendments – Files ZOA 2013-01, ZOA 2013-05
Land Use Amendments for Vacation Rental Dwellings (Title 17- Zoning)

On December 8, 2014, the City Council adopted Ordinance 2014-22, which approved amendments to the Lincoln City Municipal Code, Title 17, Zoning, regarding vacation rental dwellings (VRDs). In summary, the ordinance does the following:

- Adds an optional expedited process for VRD approval when the applicant voluntarily limits VRD use in a residential zone to 30 nights per year (alternative non-discretionary process).
- The existing accessory use limitation for VRDs in residential zones, “incidental and subordinate to the main use” is unchanged; Council emphasized that it was not repealing the limitation by adding language directing staff to enforce existing language of the code.
- Regarding accessory use enforcement in residential zones (specifically, R-1, R-R, R-M, and NPD-NCR zones), offers an optional settlement option where VRD use is limited to 180 nights per year. Settlement protects owners from enforcement actions and terminates when approval terminates under existing code - upon transfer of the property.
- Creates option to apply for a quasi-judicial determination of vested rights or nonconforming use status.
- Expressly lists VRDs as permitted uses in commercial and mixed-use zones (no limitation on number of rental nights per year in GC, RC, TVC, OPD-MSH, OPD-IM, OPD-OF, NPD-NBD, and NBD-NBMU zones).
- Eliminates special landscape criteria for VRDs (landscape requirements will now be the same as for other residences).
- Increases penalties for unauthorized/unlicensed VRDs, and clarifies enforcement processes.

The project file and Ordinance 2014-22 as approved may be reviewed at the Planning & Community Development Department at City Hall, 801 SW Highway 101, between 8:00 AM and 5:00 PM, Monday through Friday. The adopted ordinance may also be viewed on the City’s website at www.lincolncity.org (search for “Recently Adopted Ordinances”). If additional information is necessary, contact Kate Daschel, Assistant Planner, at 541-996-1232.

Persons who participated orally or in writing in the proceedings before the City leading to the adoption of Ordinance 2014-22 may appeal the City Council’s decision to adopt the ordinance to the Land Use Board of Appeals (LUBA), as provided in ORS 197.830 to 197.845, by filing a notice of intent to appeal with LUBA not later than 21 days after the mailing date of this notice. In any such appeal, the issues that may be considered are limited to those raised by any participant in the proceedings before the City.

Mailed by:



Kathrine A. Daschel, Assistant Planner

MAILED: December 23, 2014.

How the adoption differs from the original proposal:

The original ordinance, submitted to DLCD on 4/16/2013, proposed creating a "Vacation Rental Overlay Zone" and also included a YES/NO map to apply the overlay. The companion to that ordinance submitted to DLCD on 11/27/2013 proposed removing VRD land use regulations from LCMC 17.80.050, including specifically repeal of the accessory use limitation in the existing code.

As an alternative to the controversial YES/NO division of the City, an ALTERNATIVE ordinance was prepared and submitted to DLCD on 11/27/2013. This Ordinance derives primarily from the ALTERNATIVE ordinance. The ALTERNATIVE was based on enforcement of the existing accessory use limitation, not repeal of the limitation. The ALTERNATIVE added numeric limitations on VRD use in residential zones (30 nights). Another provision allowed up to 90 nights via conditional use. These provisions were intended to better define the existing accessory use limitation and streamline permitting and enforcement with objective numeric standards. The ALTERNATIVE also included use a new overlay VR zone (permitting VRDs), as well as EROZ (prohibiting VRDs).

During the hearings the proposed numeric limitations were attacked by VRD proponents on several bases, including Measure 49. As a consequence, the Council elected to leave the existing Accessory Use Limitation (a discretionary land use standard) in place unaltered – thus avoiding any Measure 49 claim as the provision has been in place for more than five years. To emphasize a new standard was not being adopted, Council added language indicating that the existing limitation was to be enforced. The Council modified the numeric proposals as follows: Council added an optional expedited path to a VRD license if the applicant voluntarily agrees to no more than thirty (30) nights of VRD rental per year. (i.e. bypass the land use process) Council determined 30 nights is incidental and subordinate to the main use of the vacation home by the owner and thus met the existing accessory use limitation. Council also added a 180 night administrative allowance settlement or “safe harbor” provision to the code. An existing VRD could avoid an enforcement action for violating the accessory use limitation by electing the Administrative Allowance settlement and limiting operations to 180 nights per year. Again this was an option. The ALTERNATIVE ordinance also provides for quasi-judicial processes to determine vested rights or nonconforming use verification. Another ordinance, adopted on 12/08/2014, creates a new “Vacation Rental” (VR) zone, (as opposed to an overlay) a mixed use district which will permit vacation rental dwelling use without the restriction of the existing accessory use limitation applicable to residential zones. All these provisions were intended to provide options and alternatives for property owners to lessen the burden of enforcement of the existing accessory use limitation. This ordinance includes re-organized and re-worked provisions, mostly from ALT 1, but includes ideas from the other versions of ordinances previously provided including the original 4/16/2013 ordinance. While the city did not believe these revisions constituted a substantial alteration under ORS 197.610(6), in an abundance of caution, the ordinances were nonetheless transmitted to DLCD on 8/27/2014, before an additional public hearing conducted on September 15, 2014. The record was reopened for public comment on the revised ordinances between August 25 and October 13, 2014.