

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 SUSANNA NOORDHOFF, KARLA SHERMAN,
5 and BUCK BOWLING,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF NORTH BEND,
11 *Respondent.*
12

13 LUBA No. 2011-122
14

15 FINAL OPINION
16 AND ORDER
17

18 Appeal from City of North Bend.
19

20 Susanna Noordhoff, Karla Sherman, and Buck Bowling, North Bend, represented
21 themselves.
22

23 Michael R. Stebbins, North Bend, represented respondent.
24

25 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
26 participated in the decision.
27

28 TRANSFERRED 06/27/2012
29

30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a December 7, 2011 letter from a city planner concluding that the holder of a home occupation permit is not in violation of the permit.

FACTS

In 1986, the city issued Frank Amatisto a home occupation permit to receive phone calls from a remote dispatcher and park a tow truck at his home in a residential neighborhood, in conjunction with his commercial towing business. Over time, neighbors including petitioners observed activities they believed to be in excess of the commercial activities allowed under the 1986 permit, including the parking of more than one tow truck. After neighbors complained to the city, a city planner issued a notice of zoning violation for maintaining more than one truck at the location of the home occupation. Amatisto agreed to park only one truck at the site, but filed an application with the city to modify the 1986 permit to allow the parking of two trucks at his property. Petitioners received notice of the application. On October 17, 2011, the planning commission denied Amatisto’s application, and that decision is not before us.

On November 10, 2011, petitioner Susanna Noordhoff wrote a letter to the city administrator complaining of continued violations of the 1986 permit. Attached to the letter were recent photographs showing two trucks parked at the Amatisto residence. Noordhoff requested that the city modify or revoke the 1986 permit and requested that her complaint be placed on the city council’s meeting agenda.

In a December 7, 2011 letter, a city planner responded, disagreeing with Noordhoff that more than one tow truck is stored at the residence.¹ According to the planner, a second

¹ The December 7, 2011 letter states, in relevant part:

“We have spoken with the Amatistos about your concerns about continuing tow truck traffic. They have assured us that they have not had two tow trucks on site since their appeal was

1 tow truck stored elsewhere occasionally makes brief stops to pick up and drop off paperwork.
2 However, the planner concluded, such brief stops do not constitute a violation of the home
3 occupation permit. Because the planning commission decision was not appealed and is final,
4 and there is no pending application to modify the 1986 permit, the planner declined to place
5 Noordhoff's complaint on the city council meeting agenda. Petitioners then filed this appeal
6 of the December 7, 2011 letter.

7 **MOTION TO DISMISS**

8 The city moves to dismiss the appeal of the December 7, 2011 letter, arguing that it is
9 not a "land use decision" subject to LUBA's jurisdiction, as that term is defined at ORS
10 197.015(10)(a).² We agree with the city.

11 ORS 197.015(10)(a) defines "land use decision" in relevant part as a final decision
12 that concerns the application of a "land use regulation." OAR 660-010-0010(3) defines
13 "final decision" as a decision that is reduced to writing and bears the necessary signatures of

denied by the Planning Commission on October 17th except for brief periods of time a few days a month. The Amatistos also assured us that the second truck is now being parked and operated from their impound yard at Ken Ware Chevrolet. It is our opinion that these occasional brief stops to pick up and deliver paperwork do not constitute a violation of their Home Occupation Permit, since the second truck is not being stored or operated from Meade Avenue. The Amatistos have also been alerted that any deviations from these terms will result in further action by the City, and they have agreed to cooperate.

"The Planning Commission did not take any action that modified or revoked the validity of the original Home Occupation Permit issued by the City, which allows one tow truck to be parked at the residence. Their decision was not appealed and has become final. The City will not, therefore, be placing this matter on the City Council Agenda of December 13, 2011." Record 4.

² ORS 197.015(10)(a)(A) defines "land use decision" to include :

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- "(i) The goals;
- "(ii) A comprehensive plan provision;
- "(iii) A land use regulation; or
- "(iv) A new land use regulation[.]"

1 the decision maker.³ The December 7, 2011 letter does not mention, much less apply, any
2 land use regulation. Petitioners do not identify any land use regulation that the city planner
3 applied, or should have applied, in writing the December 7, 2011 letter. The December 7,
4 2011 letter disagrees with Noordhoff’s factual assertion that Amatisto continues to park more
5 than one truck at the site, but that factual dispute does not concern the application of any land
6 use regulation. The letter also concludes that brief stops to pick up or deliver paperwork do
7 not constitute a violation of the 1986 home occupation permit. A decision that simply
8 concludes that a condition of permit approval is satisfied or not satisfied, is violated or not
9 violated, is not a land use decision as defined by ORS 197.015(10)(a), because it concerns
10 only the application or interpretation of a permit condition of approval, not the application or
11 interpretation of a land use regulation. *Mar-Dene Corp v. City of Woodburn*, 149 Or App
12 509, 515, 944 P2d 976 (1997).

13 Petitioners cite no other basis for LUBA’s jurisdiction over the December 7, 2011
14 letter. Because the December 7, 2011 letter is a not a land use decision, we lack jurisdiction
15 over this appeal.

16 **MOTION TO TRANSFER**

17 Petitioners filed a contingent motion to transfer this appeal to circuit court, in the
18 event that LUBA concludes that the challenged decision is not a land use decision. OAR
19 661-010-0075(11)(c).⁴ The motion is granted.

³ Petitioner’s notice of intent to appeal and the petition for review can be read to challenge other alleged actions or refusals to act by the city in addition to the December 7, 2011 letter, for example the city’s alleged refusal to respond to petitioners’ requests to amend or revoke the 1986 permit. However, those actions or refusals to act were never reduced to writing and signed by the decision maker, and therefore do not constitute “final decision[s]” as defined by OAR 660-010-0010(3). Accordingly, we understand this appeal to challenge only the December 7, 2011 letter, which is the only potential “final decision” identified in the notice of intent to appeal.

⁴ OAR 661-010-0075(11)(C) provides:

“If the Board determines the appealed decision is not reviewable as a land use decision or limited land use decision as defined in ORS 197.015(10) or (12), the Board shall dismiss the appeal unless a motion

1 The decision is transferred.

to transfer to circuit court is filed as provided in subsection (11)(b) of this rule, in which case the Board shall transfer the appeal to the circuit court of the county in which the appealed decision was made.