

NATURE OF THE DECISION

In LUBA No. 2000-180, petitioners appeal a home occupation permit. In LUBA No. 2001-019, petitioners appeal a city decision that revokes that home occupation permit.

FACTS

The dispute that led to these appeals began when a real estate sales office was relocated to a residential dwelling on the subject property. The subject property is zoned General Commercial (GC). Petitioners contend that customers of the disputed real estate sales office trespassed on their adjoining motel property, blocking customer ingress to and egress from the motel.

Following complaints from petitioners, the city advised the property owner that he must obtain site plan approval to operate the real estate office on the subject property. The city later advised the property owner that he had a second option. In a March 27, 2000 letter, the city community development director advised the property owner that instead of seeking site plan approval, he could request approval of a home occupation permit. The property owner sought such approval, and the community development department approved a home occupation permit.

Petitioners appealed the home occupation permit to the planning commission, which denied petitioners' appeal and upheld the community development department's decision to grant the home occupation permit. Petitioners appealed the planning commission decision to the city council. The city council likewise denied petitioners' appeal and upheld the community development department's decision.

Petitioners appealed the home occupation permit to LUBA in LUBA No. 2000-180. Thereafter, the property owner wrote a letter to the city in which he advised the city that the real estate office had been relocated to a different property and that, because he no longer needed the home occupation permit for the subject property, he was withdrawing his

1 application. The property owner advised the city he would continue to use the property as
2 his personal residence.

3 On the basis of the property owner’s letter, the city moved to dismiss LUBA No.
4 2000-180 as moot. We denied that motion to dismiss, because we concluded the withdrawal
5 of the application *after* the home occupation permit had been issued was legally insufficient
6 to render LUBA No. 2000-180 moot.¹ The city subsequently adopted a resolution that
7 revoked the home occupation permit. Petitioners appealed that resolution to LUBA, and it is
8 the subject of LUBA No. 2001-019.

9 **CONSOLIDATION**

10 Under OAR 661-010-0055, LUBA may consolidate appeals that challenge “closely
11 related land use decision(s).” Because LUBA No. 2000-180 and LUBA No. 2001-019
12 challenge closely related decisions, we consolidate those appeals on our own motion.

¹We explained our denial of the motion to dismiss as follows:

“Respondent’s argument that this appeal should be dismissed as moot relies entirely on the applicant’s withdrawal of the application for a home occupation permit *after* that permit became final and *after* the city’s decision granting that home occupation permit was appealed to LUBA. Had the city adopted a decision to revoke or rescind the disputed home occupation permit, this appeal would likely have to be dismissed as moot. *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993) (LUBA appeal moot where county commissioners subsequently adopt an order rescinding the appealed home occupation permit). However, as we have explained on several occasions, where it is not clear whether the act of withdrawing a permit application after the permit has been granted has any legal effect on that decision, it does not render the appeal moot. *Berg v. Linn County*, 22 Or LUBA 507, 509 (1992); *Gilson v. City of Portland*, 22 Or LUBA 343, 352 (1991); *McKay Creek Valley Assoc. v. Washington County*, 16 Or LUBA 1028 (1987).

“* * * * *

“If the city wishes to rescind or revoke the challenged home occupation permit, it may file a motion requesting an extension of time to file the record to allow time for it to complete such action and thereafter move to dismiss the appeal as moot. Otherwise, the city shall have 10 days from the date of this order to file the local record in this matter.” *Robson v. City of La Grande*, ___ Or LUBA ___ (LUBA No. 2000-180, Order, December 14, 2000), slip op 1-3.

1 **INTRODUCTION**

2 Before considering petitioners’ arguments, a word of explanation about why
3 petitioners, who oppose the home occupation permit, nevertheless appeal and oppose the
4 January 10, 2001 resolution that revokes that home occupation permit is in order.
5 Apparently, use of the existing dwelling as a residence is permissible in the GC zone only
6 because that use is protected as a nonconforming use under the City of La Grande Land
7 Development Code (LDC). Petitioners believe the resolution that is challenged in LUBA
8 No. 2001-019 improperly authorizes the property owner to resume use of his dwelling as a
9 residence. Petitioners apparently believe that under the LDC, the property owner’s operation
10 of a real estate office in the disputed residence rendered the *nonconforming* residence a
11 *conforming* commercial establishment. Petitioners reason that under LDC 3.16.010, the
12 property owner thereby lost his right to resume use of the existing dwelling as a residence.²

13 As explained below, petitioners are wrong about what the January 10, 2001 resolution
14 decides. That resolution does not determine that the property owner has a legal right to
15 continue using the disputed dwelling as a residence. We therefore need not and do not
16 decide whether petitioners are correct that the use of the disputed residence as a real estate
17 office had the legal effect of extinguishing the previously existing nonconforming use rights
18 for the subject property.

19 **LUBA NO. 2001-019 (REVOCATION OF HOME OCCUPATION PERMIT)**

20 **A. First, Second and Third Assignments of Error**

21 In their petition for review challenging the January 10, 2001 resolution, petitioners
22 include five assignments of error. The first assignment of error challenges a statement in a

²LDC 3.16.010 provides:

“Any nonconforming use may be changed to an allowable use provided that all applicable permit requirements and standards of this Code are satisfied. If a nonconforming use is converted to a conforming use, the nonconforming use shall not be resumed[.]”

1 March 27, 2000 letter from the community development director to the owner of the subject
2 property, concerning the inapplicability of an LDC prohibition against real estate sales
3 offices as a home occupation in residential zones. In the second assignment of error,
4 petitioners argue the city erred by not pursuing its initial position that the property owner
5 must submit a site plan to continue operating the disputed real estate office in the GC zone.
6 In the third assignment of error, petitioners argue that the home occupation permit was
7 improperly issued because, by the time the home occupation permit was issued, the use of the
8 dwelling had been converted to a real estate sales office.

9 The fatal flaw in each of the first three assignments of error is that they are not
10 directed at the January 10, 2001 resolution, which is the decision that is appealed in LUBA
11 No. 2001-019. Regardless of the merits of the legal arguments that petitioners present, those
12 arguments provide no basis for reversing or remanding the city council resolution that is
13 challenged in LUBA No. 2001-019. For that reason, the first, second and third assignments
14 of error are denied.

15 **B. Fourth Assignment of Error**

16 We understand petitioners to argue under the fourth assignment of error that the city
17 council did two things when it adopted the January 10, 2001 resolution. According to
18 petitioners, not only did the resolution revoke the previously approved home occupation
19 permit, it also “approved the nonconforming residential use of the property * * *.” Petition
20 for Review 10.

21 The difficulty with petitioners’ fourth assignment of error is that it is clear that the
22 January 10, 2001 resolution *only* revokes the home occupation permit. Following four
23 “WHEREAS” clauses that explain that the city is adopting the disputed resolution so that
24 LUBA No. 2000-180 will be rendered moot and can be dismissed, the resolution states:

25 “The Home Occupation Permit, File Number 03-HOA-00, approved on
26 October 18, 2000, to George Bruce for a real estate office at 2314 Adams
27 Avenue in La Grande is hereby revoked.” Record 2.

1 None of the above-mentioned “WHEREAS” clauses or anything else in the January 10, 2001
2 resolution expresses any position about how the property owner may use the residence on the
3 subject property.

4 Petitioners’ more expansive view of what the city decided in the January 10, 2001
5 resolution is based entirely on a January 11, 2001 letter that the community development
6 director sent to the property owner. In addition to providing the property owner notice of the
7 January 10, 2001 resolution, the January 11, 2001 letter expresses an opinion that the
8 property owner’s dwelling “may continue to be occupied as a legal, nonconforming single
9 family residence.” Record 1.

10 The January 11, 2001 letter does not address or answer the issues that petitioners
11 raise about the potential loss of nonconforming use rights on the subject property. We have
12 no reason to believe the letter is anything more than a nonbinding expression of the
13 community development director’s opinion—an expression of opinion that is not explained
14 and as far as we can tell could be changed at any time.³ As we have explained on many
15 occasions, land use decisions must be “final” decisions. *Hemstreet v. Seaside Improvement*
16 *Comm.*, 16 Or LUBA 748, 752, *aff’d* 93 Or App 73, 761 P2d 533 (1988); *CBH Company v.*
17 *City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988). Perhaps more to the point, for purposes
18 of this appeal, the January 11, 2001 community development director’s letter is not the
19 decision that is appealed in LUBA No. 2001-019. The city council’s January 10, 2001
20 resolution is the decision that is before us in this appeal.

21 We reject petitioners’ argument that the challenged resolution erroneously decided
22 that the disputed residence could continue to be used as a residence. The challenged
23 resolution takes no position on how the subject property may be used. The challenged
24 resolution only revokes the previously issued home occupation permit.

³Indeed one of petitioners’ central complaints is that the city has not adopted and followed a consistent position concerning the disputed real estate sales office.

1 The fourth assignment of error is denied.

2 **C. Fifth Assignment of Error**

3 In their fifth assignment of error, petitioners argue the city provided inadequate notice
4 of its January 10, 2001 meeting. However, petitioners make no attempt to indicate how they
5 believe the notice was inadequate or by what standards the adequacy of the notice must be
6 judged. We note that petitioners were present at the January 10, 2001 meeting and were
7 allowed to testify. Record 5-6. Petitioners neither develop an argument in support of their
8 contention that the notice was inadequate nor explain how any such procedural error may
9 have prejudiced their substantial rights.

10 Petitioners' arguments under the fifth assignment of error can also be read to take the
11 position that the city failed to provide a public hearing before revoking the home occupation
12 permit, and that the city was required to do so. This argument, however, is based entirely on
13 petitioners' erroneous understanding that the January 10, 2001 resolution approves continued
14 residential use of the subject property as a nonconforming use. Petitioners are likely correct
15 that a final written decision by the city concerning the nature and scope of the property
16 owner's nonconforming use rights under the LDC would constitute a "permit," as that term is
17 defined by ORS 227.160(2). Such permit decisions are subject to the public hearing or the
18 notice and local appeal requirements of ORS 227.175. However, as we have already
19 explained, the January 10, 2001 resolution does not include a final decision that the owner of
20 the subject property continues to have a right to use the dwelling on that property as a
21 residence. Petitioners do not argue a public hearing was required simply to revoke the
22 previously issued home occupation permit.

23 The fifth assignment of error is denied.

24 **D. Conclusion**

25 There is no doubt that petitioners believe the owner of the subject property no longer
26 has a right to use the disputed residence as a residence. The community development

1 director apparently believes that the owner does have such a right, although we do not know
2 how the community development director would respond to petitioners' argument to the
3 contrary. It may be that this dispute could be resolved in a properly filed action in circuit
4 court to enforce the LDC. *See* ORS 197.825(3)(a) (notwithstanding LUBA's exclusive
5 jurisdiction over land use decisions, circuit courts retain jurisdiction "to enforce the
6 provisions of an adopted comprehensive plan or land use regulations"). Alternatively, we
7 see no reason why the city could not adopt a land use decision that addresses petitioners'
8 questions and adopts a final decision concerning whether the disputed dwelling may continue
9 to be used for a residence as a nonconforming use. However, unless and until the city
10 addresses the question in a land use decision, LUBA has no reason or ability to consider the
11 question.

12 The decision appealed in LUBA 2001-019 is affirmed.

13 **LUBA NO. 2000-180 (APPROVAL OF HOME OCCUPATION PERMIT)**

14 As explained above, the home occupation permit that is challenged in this appeal has
15 been revoked. Accordingly, this appeal is moot. *Heiller*, 25 Or LUBA at 556.

16 LUBA No. 2000-180 is dismissed.