

NATURE OF THE DECISION

Petitioners appeal a Land Use Compatibility Statement (LUCS) signed by the city manager stating that a proposed crematory is a permitted use in the city’s low density residential (RS) zone.

FACTS

The subject property is occupied by a mortuary business that was originally established in 1889. The subject property and the surrounding neighborhood are zoned RS and designated as an historic district. The RS zone does not allow a mortuary or crematory as outright or conditionally permitted uses; such uses are allowed only in the city’s Commercial Retail (CR) zone.

In 1999, the mortuary applied for building permit approval to construct a 50 by 26 foot “garage” attached to the existing mortuary building.¹ Because the proposed garage altered the existing historic structure, the application required review by the city historic preservation committee. The committee approved the application, and the garage was subsequently built.

In 2006, the mortuary sought air discharge permits from the state Department of Environmental Quality (DEQ), necessary to allow installation of a cremation unit in the garage. DEQ submitted a LUCS to the city to determine whether the proposed use complies with applicable land use requirements. The LUCS form describes the proposed use or facility as an “[a]ddition of a state of the art crematory unit to an existing mortuary business established in 1889.” Record 26. On May 17, 2006, the city manager signed the LUCS, checking the “Yes” box next to the question “[d]oes the business or facility comply with all

¹ The city’s code defines “Garage, Private” as a “detached accessory building or portion of a main building for the parking or temporary storage of automobiles” “in which no business, occupation, or commercial service is conducted.” City of Independence Development Code (IZC) Subchapter 13.

1 applicable local land use requirements?” The LUCS form instructs the city to “attach
2 findings to support the affirmative compliance decision.” *Id.* The city did not attach any
3 findings to the LUCS, but the city manager wrote on the form “Permitted use. No local
4 review or planning approval required.” *Id.*

5 Approximately two months later petitioners, local residents, noticed construction at
6 the mortuary garage, including installation of a large smoke stack that extends above the
7 garage roof line. Petitioners complained to the city, which declined to take any action. This
8 appeal followed.

9 **ASSIGNMENT OF ERROR**

10 Petitioners argue that the city manager misconstrued the applicable law in
11 determining that the proposed crematory is a “permitted use,” and failed to adopt adequate
12 findings, supported by substantial evidence. In addition, petitioners argue that the city erred
13 in adopting the challenged decision without providing notice and opportunity for a hearing.

14 **A. Permitted Use**

15 The city chose not to file a response brief, and nothing in the decision or the record
16 indicates what led the city manager to conclude that the proposed crematory is a “permitted
17 use.” Petitioners argue that the existing mortuary business is a nonconforming use in the RS
18 zone, and speculate that the city manager may have believed, erroneously, that expansion of
19 that use to include a crematory is an outright permitted use. To the extent that was the city
20 manager’s theory, petitioners argue that the city manager’s conclusion is inconsistent with
21 the city code provisions governing nonconforming uses. *See* IZC 10.055(A) (nonconforming
22 uses “shall not be enlarged or extended beyond the area, size, or scope of activity that existed
23 at the time they became nonconforming”).²

² IZC 10.055(A) states, in relevant part:

“Within the zones established by this ordinance or amendments to it there may exist lots, parcels, structures, uses, and activities which were lawful prior to the adoption of this

1 Petitioners also speculate that the city manager may have believed that the 1999
2 building permit and historic preservation committee review authorized the use of the garage
3 as a crematory.³ If that was the city manager’s theory, petitioners argue, it is unsupported by
4 the record. Petitioners note that the 1999 building permit and historic preservation
5 committee decision are in the record filed in this appeal, and nothing in those documents
6 suggests that the city or the committee understood that they were authorizing a crematory.

7 We agree with petitioners that the city manager’s conclusion that the crematory is a
8 “[p]ermitted use” is inadequately explained and appears to be legally incorrect. Nothing in
9 the LUCS or elsewhere in the record indicates the basis for that conclusion. The RS zone
10 does not provide for a crematory as a permitted or conditionally permitted use. If the city
11 manager is relying on the presumably lawful nonconforming use status of the existing
12 mortuary, then petitioners appear to be correct that under the city’s nonconforming use
13 regulations an *expansion* of the scope of that nonconforming use to include a crematory
14 cannot possibly be a “permitted use” that requires no “local review or planning approval[.]”
15 As far as we can tell, installing a crematory in the garage would appear to be an expansion in
16 the “scope of activity” of the existing nonconforming mortuary use and hence prohibited by
17 IZC 10.055(A).

18 With respect to the possibility that the city manager was relying on the 1999
19 decisions authorizing the garage, nothing in the LUCS suggests that was the basis for the city
20 manager’s conclusion that the crematory is a “permitted use.” To the extent that was or

ordinance, but which are prohibited or restricted under these more recent regulations. It is the intent of this section that such existing nonconforming lots, parcels, structures, uses, and activities shall be permitted to continue until they are removed, destroyed, or abandoned. Such nonconforming lots, parcels, structures, uses, and activities, however, are declared by this section to be incompatible with the uses and activities permitted in the same zone under this ordinance; their continued existence is not encouraged, and they shall not be enlarged or extended beyond the area, size, or scope of activity that existed at the time they became nonconforming.”

³ In a response to petitioners’ record objections, the city attorney argued that the decisions approving the crematory were the 1999 building permit and historic preservation committee decisions, not the LUCS decision.

1 could be considered a basis, petitioners appear to be correct that the documents related to the
2 1999 approvals that are in the record do not indicate that the applicant proposed a crematory
3 to the city, or that the city understood it was approving a crematory.

4 **B. Notice and Opportunity for a Hearing**

5 Petitioners also argue that the city erred in failing to provide notice and hearing prior
6 to making the LUCS decision, which petitioners characterize as a decision approving the
7 disputed crematory. According to petitioners, failure to provide notice and opportunity for a
8 hearing “is a violation of due process, ORS 197.763 and IZC Chapter 11[.]” Petition for
9 Review 10.

10 Petitioners’ argument that “due process” requires the city to provide notice and
11 hearing of the LUCS decision is insufficiently developed for review. ORS 197.763 sets out
12 procedural requirements that apply when local governments conduct quasi-judicial land use
13 hearings, but that statute is not itself a *source* of any requirement that local governments
14 provide notice and hearing when making quasi-judicial land use decisions. Similarly,
15 petitioners cite to nothing in IZC Chapter 11 that requires the city to provide notice and
16 hearing when making a LUCS decision.

17 Although petitioners do not directly cite it, the most likely statutory source of any
18 requirement that the city provide notice and at least opportunity for a hearing is ORS 227.160
19 through ORS 227.175, which as relevant here requires cities to provide notice and a hearing
20 or opportunity for a hearing when making a “permit” decision.⁴ ORS 227.160(2) defines a
21 “permit” as the “discretionary approval of a proposed development of land” under city land
22 use legislation.⁵ We understand petitioners to contend that the city manager exercised

⁴ Petitioners do cite to ORS 227.173(3), which is part of the statutory scheme governing “permits” and zone changes, in arguing that the city’s findings are inadequate.

⁵ ORS 227.160(2) provides, in relevant part:

1 discretion in making the challenged LUCS decision, and the decision essentially approved a
2 crematory, and thus constituted the “approval of a proposed development of land.”

3 Assuming that is petitioners’ argument, it is not clear to us that the challenged LUCS
4 decision constitutes a “permit” as defined by ORS 227.160(2). The city manager determined
5 in the LUCS decision that the proposed crematory is a “permitted use” and that it does not
6 require local review or planning approval. That determination probably involved the
7 exercise of discretion. *See Tirumali v. City of Portland*, 41 Or LUBA 231, 240, *aff’d* 180 Or
8 App 613, 45 P3d 519 (2002) (“[t]he cases where [LUBA] or the Court of Appeals has
9 determined that approval or denial of a building permit involves the kind of discretion that
10 renders it a ‘permit’ as defined in ORS 227.160 or 215.402 have tended to involve
11 circumstances where there is some question as to the nature of the proposed use or whether
12 the use is permitted at all in the zone”). Arguably, it also involved an “approval of proposed
13 development of land.” However, we note that ORS 227.160(2) excludes from the definition
14 of “permit” a particular type of decision known as a “zoning classification” decision.

15 A zoning classification decision under ORS 227.160(2)(b) determines the appropriate
16 zoning classification for a particular use. *See* n 5. To qualify as a zoning classification
17 decision, the decision must apply only to land within an urban growth boundary. *Id.* As
18 defined, a zoning classification decision under ORS 227.160(2)(b) is not a statutory
19 “permit,” and hence the procedural requirements of ORS 227.175(3) and (10) do not apply.
20 Instead, ORS 227.175(11) provides that a zoning classification decision must be entered in a

“‘Permit’ means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. ‘Permit’ does not include:

“(a) A limited land use decision as defined in ORS 197.015;

“(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]”

1 public registry and that it is subject to LUBA’s jurisdiction in the same manner as a limited
2 land use decision.⁶

3 It seems at least possible that the challenged LUCS decision is properly viewed as a
4 “zoning classification” decision as defined by ORS 227.160(2)(b). The city manager’s
5 decision presumably involves land entirely within an urban growth boundary, and it
6 essentially determines how the proposed crematory is classified under the city’s land use
7 regulations. We know of no reason why a LUCS decision that appears to fit squarely within
8 the definition of a zoning classification decision should not be viewed as a zoning
9 classification decision, and therefore not an ORS 227.160(2) permit.⁷

⁶ ORS 227.175(11) and (12) provide:

“(11) A decision described in ORS 227.160(2)(b) shall:

“(a) Be entered in a registry available to the public setting forth:

“(A) The street address or other easily understood geographic reference to the subject property;

“(B) The date of the decision; and

“(C) A description of the decision made.

“(b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.

“(c) Be subject to the appeal period described in ORS 197.830(5)(b).

“(12) At the option of the applicant, the local government shall provide notice of the decision described in ORS 227.160(2)(b) in the manner required by ORS 197.763(2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights.”

⁷ The qualification that a zoning classification decision applies only to land *inside* an urban growth boundary means that that exception to the definition of “permit” does not exist *outside* urban growth boundaries. Consequently, many LUCS decisions involving land outside urban growth boundaries that might otherwise qualify as “zoning classification” decisions may instead constitute statutory “permit” decisions, under the analogue to ORS 227.160 applicable to counties, at ORS 215.402. *See, e.g., Friends of the Creek v. Jackson Co.*, 165 Or App 138, 141, 995 P32d 1204 (2000) (affirming LUBA’s holding that a LUCS decision finding that a proposed biosolid facility is a permitted use in the EFU zone is a statutory permit subject to the procedural requirements of ORS 215.402 *et seq.*).

1 However, we do not hold in the present case that the challenged LUCS decision is a
2 zoning classification decision, for two reasons. First, we have already ventured far beyond
3 the arguments made in the single brief before us. Second, it seems to us that whether a
4 LUCS decision within an urban growth boundary constitutes a “zoning classification”
5 decision or something else depends on a number of variables, including the *outcome* of the
6 local government’s zoning classification review and any *actions* the local government takes
7 as a result of that review. For example, if the result of the zoning classification review is that
8 the proposed use requires discretionary land use approval, and the local government attaches
9 to the LUCS form findings that “support the affirmative compliance decision,” as the DEQ
10 LUCS form in the present case instructs, then that LUCS decision may no longer fit within
11 the narrow definition of a “zoning classification” decision and may instead constitute or
12 include a “permit” decision as those terms are defined in ORS 227.160(2). In short, until the
13 proper classification of the proposed use is determined, it may be difficult to tell whether a
14 LUCS decision within an urban growth boundary is a permit decision or a zoning
15 classification decision, and therefore what procedures if any are required under ORS 227.160
16 *et seq.*

17 In the present case, we have concluded that the record does not support the city
18 manager’s determination that the proposed crematory is a “permitted use” that does not
19 require approval or planning review. Petitioners argue that the proposed use is a *prohibited*
20 use under the city’s land use legislation, and therefore the challenged decision is “prohibited
21 as a matter of law,” and the decision must be reversed rather than remanded. OAR 661-010-
22 0071(1)(c). Based on the present decision and record, we tend to agree with petitioners that
23 the correct answer to the question posed by the LUCS is that the proposed crematory is a
24 prohibited use on the subject property. However, given the extremely limited state of the
25 decision, record and pleadings, we cannot foreclose the possibility that the city can adopt a
26 sustainable conclusion, based on more adequate findings and possibly a different evidentiary

1 record, that the proposed use is properly viewed as a permissible or conditionally permissible
2 use. Because we cannot tell with reasonably certainty that the challenged decision is
3 “prohibited as a matter of law,” remand is appropriate rather than reversal. On remand, the
4 city must at a minimum adopt findings that determine the proper classification of the
5 proposed use and that adequately explain the basis for that determination.

6 Given our uncertainty about whether the requirements of ORS 227.175 *et seq.* for
7 notice and hearing apply to the city’s *initial* decision concerning whether the disputed
8 crematory is allowed under one or more legal theories under the IZC, it may be that the city
9 need not comply with the permit procedural requirements at ORS 227.175(3) and (10) in
10 adopting another LUCS decision following this remand. However, since it seems likely that
11 petitioners will eventually learn of any new LUCS decision following this remand and rely
12 on ORS 197.830(3) to file another appeal to LUBA within 21 days after they learn of that
13 decision, the prudent course for the applicant and the city on remand would be to observe the
14 procedural requirements set out at ORS 227.175(3) and (10). That way the city and the
15 applicant will know whether there will be a LUBA appeal 21 days after the new LUCS
16 decision becomes final.

17 The assignment of error is sustained.

18 The city’s decision is remanded.