

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 MICKEY MERTON and LYNN MERTON,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF JEFFERSON,  
10 *Respondent.*

11  
12 LUBA No. 2006-161

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Jefferson.

18  
19 Norman R. Hill, Salem, filed the petition for review on behalf of petitioners. With  
20 him on the brief was Martinis & Hill, Attorneys at Law.

21  
22 Richard D. Rodeman, Corvallis, filed a response brief and argued on behalf of  
23 respondent.

24  
25 BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

26  
27 RYAN, Board Member, did not participate in the decision.

28  
29 REMANDED

03/26/2007

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

**NATURE OF THE DECISION**

Petitioners appeal a city council decision dismissing their appeal of an administrative decision revoking a conditional use permit for a watchman’s residence.

**FACTS**

Petitioners own a commercially-zoned parcel developed with a building in which petitioners operate a business. The city’s commercial zone does not allow residential uses. In 1992, the city granted petitioners a conditional use permit (CUP) to place a manufactured dwelling on the parcel to the rear of the existing building, as a night watchman’s residence. The manufactured dwelling is linked to the commercial building’s water and septic systems. Conditions of approval attached to the 1992 CUP required, among other things, that (1) the CUP must be annually reviewed and renewed by the planning commission, and (2) the manufactured dwelling could not be sold as part of the underlying real property.

The city planning commission reviewed and renewed the CUP in 1993, 2000 and 2001. No reviews were conducted between 2001 and 2006. At some point, the property was rezoned from commercial to mixed use, which allows residential uses outright. Sometime in the period 2005-2006, petitioners transferred to their son a portion of the subject property that includes the manufactured dwelling. This transfer was accomplished by deed and without city approval for a partition of the property. The city viewed this transfer to be an attempted illegal partition of the property. At the city’s suggestion, petitioners then filed a partition application with the city, seeking to partition the subject property into two parcels, one including the manufactured dwelling and the other the commercial building.<sup>1</sup> The city granted tentative partition approval on March 23, 2006. Petitioners appealed the partition

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<sup>1</sup> Although not reflected in the record, we understand from the parties that the deed has been nullified in some manner, or petitioners’ son has reconveyed the portion of the property to petitioners.

1 approval to LUBA, but failed to file a petition for review, resulting in dismissal of that  
2 appeal. Petitioners have not pursued final partition plat approval.

3 Based on information acquired during the partition application, the city decided to  
4 review the status of the 1992 CUP approval. However, the planning commission did not  
5 conduct that review. Instead, city planning staff conducted an internal review without notice  
6 to petitioners and, on July 7, 2006, issued a document entitled “Conditional Use  
7 Permit/Partition/Review.” The July 7, 2006 decision revokes the 1992 CUP, and requires  
8 petitioners to remove the manufactured dwelling within 60 days. The decision states three  
9 grounds for revocation: (1) the manufactured home can no longer comply with the existing  
10 ordinances and regulations, (2) the use of the manufactured home does not comply with the  
11 1992 conditions of approval, and (3) the “de facto division” of the property violated the 1992  
12 CUP. The decision further states that petitioners may return the dwelling to the property  
13 after partitioning is complete, if the dwelling complies with applicable regulations and  
14 petitioners pay the required system development charges.

15 Petitioners received notice of the revocation decision and filed a timely appeal to the  
16 city council. At approximately the same time, petitioners completed a previously negotiated  
17 sale of the entire commercial property, including the manufactured home, to a third party.

18 The city council conducted a hearing on the appeal on August 24, 2006, at which  
19 petitioners appeared through their attorney. At the hearing, petitioners’ attorney informed  
20 the city council that the subject property had been sold. At the recommendation of the city  
21 attorney, the city council decided to dismiss petitioners’ appeal, “for the reason that the  
22 applicants have sold the property (real and personal) and no longer have any legal interest in  
23 the legal issues on the appeal.” Record 8. The city council issued a written order dismissing  
24 the local appeal, and petitioners now appeal that dismissal to LUBA.

1    **JURISDICTION**

2           The city moves to dismiss this appeal, arguing that the challenged city council  
3 decision dismissing the local appeal is not a “land use decision” subject to LUBA’s  
4 jurisdiction.<sup>2</sup> According to the city, the city council’s decision does not concern the  
5 application of any statewide planning goal, comprehensive plan provision or land use  
6 regulation. Further, the city argues that the underlying staff decision revoking the 1992 CUP  
7 was also not a land use decision, because that staff decision merely reviewed whether the use  
8 continued to comply with the 1992 CUP conditions of approval and concluded that  
9 petitioners were in violation of those conditions. The city argues that conditions of approval  
10 are not goals, comprehensive plan provisions or land use regulations.

11           The decision before us is the city council’s decision, not the underlying July 7, 2006  
12 staff decision, although the character of that underlying decision may have some bearing on  
13 LUBA’s review of the city council decision. *See Wells v. Yamhill County*, 51 Or LUBA 659,  
14 666 (2006) (affirming interpretation of local appeal regulations to allow a local appeal only  
15 of underlying decisions that would be land use decisions if final). The short answer to the  
16 city’s jurisdictional challenge is that, as petitioners point out, Jefferson Zoning Ordinance  
17 (JZO) 12.10.050(D) provides that:

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<sup>2</sup> As relevant here, LUBA has exclusive jurisdiction over “land use decisions.” ORS 197.015(11)(a)(A) defines a “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[.]”

ORS 197.015(11)(b)(A) excludes from the definition of “land use decision” a decision that “is made under land use standards that do not require interpretation or the exercise of policy or legal judgment.”

1           “A development approval previously granted under this code may be revoked  
2           upon a determination that a violation of a condition of approval exists. A  
3           revocation shall be processed using the same process for notice, hearings,  
4           decisions and appeals that would apply to a new application of the same type  
5           as the previously granted development approval.”

6           Thus, the city’s zoning ordinance prescribes the procedures that must be followed when  
7           revoking a conditional use permit, that is, the same procedures that would apply to a  
8           conditional use permit application. There is no dispute that JZO 12.10.050(D) is a land use  
9           regulation, as are the regulations that govern procedures applicable to a new application for a  
10          conditional use permit. In addition, there seems little dispute that the city council  
11          proceedings on petitioners’ local appeal of the revocation decision were governed by city  
12          land use regulations. Petitioners assign error to the city’s failure to follow those procedures,  
13          in revoking the 1992 CUP and in conducting the local appeal. While we need not address the  
14          merits of that argument here, for purposes of the jurisdictional question it seems apparent  
15          that the city council’s decision “concerns” the application of land use regulations, and that  
16          decision therefore falls within the definition of “land use decision.”

17          The city also argues that the underlying revocation decision was not a land use  
18          decision as defined at ORS 197.015(11)(a)(A), because it falls within the  
19          ORS 197.015(11)(b)(A) exception to that definition, for decisions that are “made under land  
20          use standards that do not require interpretation or the exercise of policy or legal judgment.”  
21          See n 2. Again, the challenged decision is the city council’s decision dismissing petitioners’  
22          local appeal of the revocation decision, not the revocation decision. As noted above, that  
23          decision on petitioners’ local appeal was governed by land use standards. The city does not  
24          explain why those standards do not require interpretation or the exercise of policy or legal  
25          judgment. As discussed below, the city council clearly exercised discretion in deciding to  
26          dismiss petitioners’ appeal. The city has not established that the challenged decision is  
27          subject to the ORS 197.015(11)(b)(A) exception to our jurisdiction.

1 **FIRST THROUGH FOURTH ASSIGNMENTS OF ERROR**

2 Petitioners argue that the city erred in relying on petitioners' sale of the subject  
3 property and manufactured dwelling to dismiss their local appeal. According to petitioners,  
4 nothing in the city's code authorizes the city to dismiss an otherwise properly filed local  
5 appeal simply because the title to the property changes hands during the pendency of the  
6 appeal. Petitioners contend that the legal effect of dismissing the appeal without addressing  
7 the underlying revocation decision is that the underlying decision is still valid, and the CUP  
8 approval for the manufactured dwelling on the property has been revoked. Petitioners argue  
9 that their statutory and contractual obligations as the sellers to clarify the status of the  
10 manufactured dwelling grant them sufficient standing to challenge the revocation decision,  
11 even if they no longer own the property.

12 The city responds that dismissal of the appeal was appropriate, indeed necessary,  
13 once the city learned that petitioners had sold the property and manufactured dwelling.  
14 According to the city, it became clear at the appeal hearing that the wrong parties were  
15 before the city, and that the city had no authority to enforce the revocation decision against  
16 the third-party purchasers in that proceeding, who had never received notice of the  
17 revocation decision or the appeal proceeding. Because petitioners had no property interest in  
18 the parcel or dwelling, the city contends, they had no standing to bring the appeal, and  
19 therefore the city was required to dismiss the appeal.

20 The situation facing the city council was unusual, to say the least, and we are not  
21 aware of any cases, statutes or local land use regulations that govern what a local government  
22 should do when, during an appeal of a decision revoking a conditional use permit, the permit  
23 holder informs the local government that the property has been sold to a third party who is  
24 not a participant in the revocation or appeal proceedings. Nonetheless, we agree with  
25 petitioners that summary dismissal of the local appeal was not the correct response. As  
26 petitioners point out, dismissal of the local appeal effectively leaves the underlying

1 revocation decision in place. As we understand the revocation decision, it has two elements,  
2 first, a decision to revoke the 1992 CUP and, second, a decision to *enforce* that revocation by  
3 requiring petitioners to remove the manufactured dwelling. The city may be correct that sale  
4 of the manufactured dwelling to a third party means that the enforcement element of the  
5 revocation decision is a nullity. The revocation decision orders petitioners to remove the  
6 manufactured dwelling, and that element of the decision might not apply to other persons.  
7 However, it is not clear to us why sale of the parcel and manufactured dwelling has any  
8 impact on the decision to revoke the 1992 CUP. Unless the revocation decision is withdrawn  
9 or nullified in some way, that element of the decision operates to revoke the 1992 CUP and  
10 thus determines the legal status of the manufactured dwelling. The city council’s decision on  
11 appeal did not withdraw or nullify the revocation decision, and as far as we are informed that  
12 decision is still effective in revoking the 1992 CUP, without regard to whether the  
13 requirement that the dwelling be removed is enforceable against the new buyer.

14 As to petitioners’ “standing” to bring the local appeal, the city cites no code provision  
15 or other authority that limits standing to appeal a permit revocation decision to the persons  
16 who currently own the property to which the permit applies. It is not obvious to us that a  
17 person who is not the owner of the subject property—for example, a neighbor who requested  
18 that the city revoke a conditional use permit, or who supports continuation of the permit—  
19 could not file a local appeal of a land use decision that determines whether or not to revoke  
20 the permit. Here, petitioners allege and the city does not dispute that petitioners have at least  
21 a contractual obligation to pursue appeals of the revocation decision, in order to clarify the  
22 legal status of the manufactured dwelling. To the extent the legal interest of petitioners is a  
23 relevant consideration in determining whether to dismiss their local appeal for lack of  
24 standing, we conclude that petitioners have sufficiently established standing to file and  
25 prosecute the local appeal, notwithstanding sale of the property and dwelling to a third party.

1           Accordingly, remand is necessary for the city council to either proceed with the  
2 merits of the local appeal filed by petitioners, or take other steps consistent with this opinion.  
3 Specifically, we note that at oral argument the city took the position that the underlying July  
4 7, 2006 revocation decision is a nullity and the city has no plans to enforce that decision. If  
5 that is indeed the city's position in this matter, it is difficult to see why the city would  
6 proceed to address the merits of this appeal and it would appear that a decision on remand to  
7 rescind the July 7, 2006 decision would seem to be the most straightforward way to resolve  
8 this appeal.

9           **FIFTH THROUGH TENTH ASSIGNMENTS OF ERROR**

10           These assignments advance a number of procedural and substantive challenges to the  
11 underlying revocation decision. Because that decision is not before us, it would be  
12 premature, at least, to address them. We do not reach these assignments of error.

13           The city's decision is remanded.