

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

3  
4                   LANNY J. ROBSON and JUANITA I. ROBSON,  
5                                   *Petitioners,*

6  
7                                   vs.

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9                                   POLK COUNTY,  
10                                   *Respondent.*

11  
12                                   LUBA No. 2017-012

13  
14                                   FINAL OPINION  
15                                   AND ORDER

16  
17                   Appeal from Polk County.

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19                   Lanny J. Robson and Juanita I. Robson, Salem, represented themselves.

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21                   Morgan B. Smith, County Counsel, Dallas, represented the respondent.

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

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26                   DISMISSED                                   05/10/2017

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

**NATURE OF THE DECISION**

Petitioners appeal a February 2, 2017 letter from the Polk County Code Enforcement Officer advising them that the file the county opened as a result of petitioners' code enforcement complaint has been closed.

**FACTS**

On September 23, 2016, petitioners filed a code enforcement investigation request (complaint) with the county, alleging their neighbor was improperly using a residence as a log processing business. Response to Motion to Dismiss, Exhibit A1-A2. That request was accompanied by a letter to the county explaining the nature of the allegedly improper activity on their neighbor's property in more detail. *Id.*, Exhibit A3-A4. Additional letters detailing allegedly improper use of the neighbors' property and objecting to the county's failure to take action on the September 23, 2016 request were sent on November 14, 2016, November 21, 2016, and December 19, 2016. *Id.*, Exhibits B-D. On January 30, 2017 petitioners filed a second code enforcement investigation request, regarding a fence that had been constructed in front of their neighbor's house, which petitioners contended was approximately seven feet high and in violation of fence height restrictions in the Polk County Code. *Id.*, Exhibit F1-F2. That request was accompanied by a letter to the county in which petitioners argued the neighbor was now continuing to process logs behind the new fence. *Id.*, Exhibit F3-F4.

1 On February 2, 2017, the Polk County Code Enforcement Officer sent  
2 petitioners a letter with the following text:

3 “This letter is to inform you the Code Enforcement Complaint,  
4 CE16-032 has been closed. The complaint regard[ed] an alleged  
5 illegal home occupation business, open lean to shed and a fence  
6 placed in the front yard. The occupant has insured (*sic*) this  
7 Officer the business is now at a different address correcting the  
8 alleged violation for a home occupation. The lean to shed was  
9 removed from the building with assurance the structure will be  
10 constructed in accordance with the Polk County Development  
11 Code 112.280-112.390(A). The fence was found to not be in  
12 violation. \* \* \*” Petitioners’ Response to Motion to Dismiss,  
13 Exhibit G.

14 Petitioners filed their notice of intent to appeal with LUBA on February  
15 15, 2017, identifying the code enforcement officer’s February 2, 2017 letter as  
16 the appealed land use decision.

17 **JURISDICTION**

18 The county moves to dismiss this arguing, among other things, that the  
19 appealed February 2, 2017 letter is not a “final” decision, as it must be to  
20 qualify as a “land use decision” that is subject to appeal and review by LUBA.  
21 ORS 197.015(10)(a).<sup>1</sup> We agree with the county.

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<sup>1</sup> ORS 197.015(10) provides that a “[l]and use decision:”

“(a) Includes:

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

“(i) The goals;

1 The challenged decision can be generally characterized as an  
2 enforcement decision. As we explained in *Wells v. Yamhill County*, 51 Or  
3 LUBA 659, 665-66 (2006), enforcement decisions may or may not be land use  
4 decisions:

5 “\* \* \* Local government enforcement decisions are rendered in  
6 many different ways and may or may not result in a decision that is  
7 also a land use decision that is reviewable by LUBA. *Johnston v.*  
8 *Marion County*, 51 Or LUBA 250 (2006). A local government’s  
9 enforcement decision clearly can be a land use decision. *ODOT v.*  
10 *Mosier*, 161 Or App 252, 259-60, 984 P2d 351 (1999); *Putnam v.*  
11 *Klamath County*, 19 Or LUBA 616, 619-20 (1990). If the  
12 enforcement decision is a land use decision that is not appealed or  
13 is affirmed on appeal, the question of whether there is or is not a  
14 land use law violation is resolved by the land use decision. In any  
15 subsequent circuit court enforcement action that might be  
16 necessary to remove an illegal land use, the circuit court would  
17 simply be asked to enforce the land use decision; the circuit court  
18 would not be asked to decide whether the land use decision was  
19 correct, and the circuit court would not be asked to decide whether  
20 there was a land use law violation.

21 “On the other hand, a local government’s initial determination  
22 whether or not an existing use violates its land use laws may be  
23 nothing more than a preliminary determination by a local official  
24 that may or may not lead to a circuit court enforcement action if  
25 the property owner does not agree to correct the alleged violation  
26 voluntarily. This kind of enforcement decision is not a land use  
27 decision appealable to LUBA. *Clackamas County v. Marson*, 128

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“(ii) A comprehensive plan provision;

“(iii) A land use regulation; or

“(iv) A new land use regulation[.]” (Emphasis added.)

1 Or App 18, 20-21, 874 P2d 110 (1994); *Wygant v. Curry County*,  
2 110 Or App 189, 192, 821 P2d 1109 (1991); *Yost v. Deschutes*  
3 *County*, 37 Or LUBA 653, 659-60 (2000). In cases where a local  
4 government has made such a preliminary determination that there  
5 is a local land use law violation, but the local government has not  
6 reached that conclusion via a land use decision, an action in circuit  
7 court may be necessary if the landowner does not agree to take  
8 action to correct the violation. To prevail in such a circuit court  
9 enforcement action, the local government will be required to  
10 demonstrate to the circuit court’s satisfaction that a land use law  
11 violation exists, because there would be no prior land use decision  
12 to establish that the land use law violation exists.”

13 As explained in more detail below, the Polk County Code (PCC) Chapter 50  
14 “Enforcement of County Ordinances” procedure, which applies to all county  
15 ordinances not just land use ordinances, is of the kind described in the second  
16 paragraph above.

17 As persons who filed a complaint that a neighboring property is being  
18 used in a manner that does not comply with the county’s land use laws (so as to  
19 constitute a public nuisance), petitioners have a limited role to play under PCC  
20 Chapter 50. PCC 50.205 allows any person to submit a public nuisance  
21 complaint and requires a county code enforcement officer to investigate if such  
22 a complaint is filed.<sup>2</sup> Filing that complaint is the extent of petitioners’ rights

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<sup>2</sup> PCC 50.205 provides, in part:

“(1) An enforcement officer may, *and on the bona fide signed complaint of any person or public body shall*, investigate to determine whether a nuisance exists under any Polk County ordinance. The Enforcement Officer may request the

1 under PCC Chapter 50. The resulting investigation will lead to a decision by  
2 the code enforcement officer that there is or is not “reasonable cause to believe  
3 a nuisance offense” exists. PCC 50.205(2); *see* n 2. The county code  
4 enforcement officer’s February 2, 2017 letter was in substance a determination  
5 by the code enforcement officer that he did not think he had “reasonable cause”  
6 to proceed further under PCC Chapter 50.

7 Had the code enforcement officer agreed with petitioners in this appeal,  
8 and the neighbor refused to correct the alleged violation, the county could have  
9 served an “infraction complaint” on petitioners’ neighbor. PCC 50.120.<sup>3</sup> In  
10 that event, petitioners’ neighbor would have had a right to appear in Polk  
11 County Circuit Court and either admit to the claimed violation or request a

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assistance of the Polk County Sheriff for the purpose of  
conducting such investigations.

“(2) After investigation, if the Enforcement Officer finds  
reasonable cause to believe a nuisance offense in violation  
of Chapter 43 exists, the officer shall proceed as provided in  
[PCC Chapter 50].

“\* \* \* \* \*” (Emphasis added.)

<sup>3</sup> PCC 50.120 provides, in part:

“(1) Service of an infraction complaint shall be made by an  
enforcement officer upon a person whose conduct, actions,  
or omissions are alleged to constitute a Polk County  
ordinance violation.

“\* \* \* \* \*”

1 hearing in circuit court. PCC 50.135(1).<sup>4</sup> In any subsequent circuit court  
2 hearing, the county would have “the burden of proving the violation of an  
3 ordinance by a preponderance of the evidence.” PCC 50.150(3). The code  
4 enforcement officer’s February 2, 2017 letter was a preliminary “reasonable  
5 cause” decision and was clearly not intended as a “final” decision concerning  
6 whether petitioners’ neighbor is in violation of county land use laws.

7 Because the January 2, 2017 letter is not a “final” decision, it cannot be a  
8 “land use decision” subject to LUBA review. The county’s adopted ordinance  
9 enforcement procedure calls for a preliminary decision by the code  
10 enforcement officer to proceed or not to proceed with an enforcement action,  
11 depending on whether there is “reasonable cause” to believe there is an  
12 ordinance violation. That “reasonable cause” determination is not a “final”

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<sup>4</sup> PCC 50.135(1) provides:

“The violator shall appear in court at the time indicated in the summons, or prior to such time may:

“(a) Request a hearing.

“(b) Admit violation of the Polk County ordinance and give a statement of matters in explanation or mitigation of the violation.

“(c) Submit to the court an executed appearance, waiver of hearing, and admission of violation as set forth on the summons, together with cash, check or money order in the amount of the bail set forth on the summons. A statement in explanation or mitigation may also be submitted with the admission of violation of a Polk County ordinance.”

1 decision, no matter how the code enforcement officer resolves the “reasonable  
2 cause” question. If the code enforcement officer finds there is “reasonable  
3 cause,” and the property owner contests that position, a final decision regarding  
4 whether there is a code violation will be made by the circuit court under ORS  
5 197.825(3). *See* n 5. A county decision to proceed to circuit court to attempt to  
6 enjoin a land use law violation is clearly not a final land use decision. As the  
7 Court of Appeals explained in *Wygant*:

8 “At least when there is no pending related matter that must result  
9 in or be resolved by a land use decision, \* \* \* a local  
10 government’s decision to bring an enforcement proceeding  
11 pursuant to ORS 197.825(3)(a) is not reviewable by LUBA,  
12 because it is not a land use decision. Rather, the statute provides a  
13 procedure for the local government and others to enforce the  
14 government’s plan and regulations under circumstances where the  
15 land use decision-making process is not available for that  
16 purpose.” 110 Or App at 192 (citations omitted).

17 If the code enforcement officer instead finds there is no “reasonable cause,” the  
18 matter is closed. While such a decision could be viewed as “final” in the  
19 general sense that it ends a requested code enforcement action at the complaint  
20 stage, petitioners are apparently free to submit as many complaints as they  
21 wish, and neither they nor the county are bound by any prior determinations of  
22 no reasonable cause, if petitioners are ultimately able to convince the county  
23 that their neighbor is violating county land use laws.

24 It appears, as the county argues, that petitioners’ only remedies may be to  
25 continue to try to convince the county (1) that their neighbor is violating the  
26 Polk County land use laws and (2) to take action under PCC Chapter 50 in



1 circuit court against their neighbors. If petitioners are unable to convince the  
2 county to pursue a code enforcement action, petitioners are free to file their  
3 own action in circuit court, seeking declaratory or injunctive relief. ORS  
4 197.825(3).<sup>5</sup> In any such action, no party could be bound in any way by the  
5 county’s February 2, 2017 letter, which simply takes the position that the  
6 county did not believe it had reasonable cause at that time to proceed further  
7 with a code enforcement action.

8 Because the February 2, 2017 letter is not a land use decision, LUBA  
9 does not have jurisdiction to review it, and this appeal is dismissed.

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<sup>5</sup> ORS 197.825(1) provides that LUBA has “exclusive jurisdiction to review any land use decision \* \* \*.” But ORS 197.825(3) provides:

“Notwithstanding [ORS 197.825(1)], the circuit courts of this state retain jurisdiction:

“(a) To grant declaratory, injunctive or mandatory relief in proceedings arising from decisions described in ORS 197.015(10)(b) or proceedings brought to enforce the provisions of an adopted comprehensive plan or land use regulations; and

“(b) To enforce orders of [LUBA] in appropriate proceedings brought by [LUBA] or a party to the board proceeding resulting in the order.”