

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal an order of the Portland City Council which approves, with conditions, a three year conditional use permit to continue downtown surface parking on property owned by petitioners.

FACTS

Petitioners own an entire city block in downtown Portland. Petitioners' block is zoned Central Commercial/Design Zone (CXD). Petitioners' block is also in the Central City Plan District and within the Downtown Parking and Circulation Policy (DPCP) area.¹ Portland City Code (PCC) 33.702.130.B.1. Property in this area is subject to special parking regulations established by certain sections of the DPCP incorporated into PCC Chapter 33.702 (Central City Plan District). PCC 33.702.130.B.2. All requests for off-street parking within the DPCP area require conditional use review before the city hearings officer under a Type III procedure.² PCC 33.702.130.B.3.

The southeast corner of petitioners' block (Lots 3 and 4) is occupied by a building. The northern half of

¹The DPCP was initially adopted by the city in 1975. The current version of the DPCP was adopted by Ordinance No. 158254 on February 26, 1986. We take official notice of Ordinance No. 158254.

²PCC Chapter 33.215 (Procedures) provides for three types of administrative procedures. Under the Type III procedure, a public hearing is required, and the decision of the hearing authority is final unless appealed to the city council. PCC 33.215.050.

petitioners' block (Lots 1, 2, 7 and 8) is occupied by a surface parking lot containing 90 spaces and access drives onto S.W. Washington Street and 10th Avenue. The surface parking lot on Lots 1, 2, 7 and 8 received conditional use approval on December 23, 1970 (CU 90-70).³ Record 102. This conditional use approval has no expiration date.⁴

The southwest corner of petitioners' block (Lots 5 and 6) is occupied by a surface parking lot containing 44 spaces and access drives onto S.W. Alder Street and 10th Avenue. The parking lots on Lots 1, 2, 7 and 8 and Lots 5 and 6 are operated as one integrated parking lot. The parking lot on Lots 5 and 6 initially received a three year conditional use approval on February 11, 1971 (CU 10-71). Record 104.

On November 29, 1982, a further three year conditional use approval for a surface parking lot on Lots 5 and 6 was granted (CU 62-82).⁵ Record 108. CU 62-82 required that parking on Lots 5 and 6 be limited to short term use, and that the number of monthly permits for the "entire parking lot" (Lots 1, 2, 7 and 8, as well as Lots 5 and 6) not

³CU 90-70 was granted before adoption of the DPCP. It does not, by its terms, limit surface parking on Lots 1, 2, 7 and 8 to a certain number of spaces. However, under DPCP § 2-7.H, any increase in the capacity of an existing parking facility requires conditional use approval.

⁴With one exception not relevant to this case, after adoption of the DPCP, approvals of surface parking lots can only be for a period of three years. DPCP § 2-6.C.2.

⁵The record does not reveal what additional conditional use approvals may have been granted for parking on Lots 5 and 6 between 1971 and 1982.

exceed 85. CU 62-82 also imposed conditions regarding maintenance of landscaping and blockage of driveways on the entire parking lot. Id. On August 14, 1986, Ordinance No. 158893 was adopted, approving a three year revocable permit for a 44-space surface parking lot on Lots 5 and 6. Record 78. Ordinance No. 158893 imposed conditions similar to those imposed by CU 62-82, except that the number of monthly permits for the entire parking lot was limited to 70, and an additional condition was added which required reports to the city concerning parking operations on the entire parking lot.

On August 30, 1989, petitioners' predecessor in interest filed a conditional use application to continue the existing 44-space surface parking lot on Lots 5 and 6. On November 22, 1989, the hearings officer approved a three year conditional use (CU 88-89), imposing conditions nearly identical to those imposed by the previous revocable permit. Petitioners' predecessor in interest appealed the hearings officer's decision to the city council. On January 31, 1990, the city council denied the appeal and upheld the hearings officer's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

"The City acted without legal authority in approving Conditions A, C, D and E.^[6] Approval of

⁶The disputed conditions provide as follows:

those conditions violates petitioner's right under state statute and the Portland City Code to continue its nonconforming use of Lots 1, 2, 7 and 8."

Petitioners argue that the half block comprised of Lots 1, 2, 7 and 8 has been in continuous and lawful use as a surface parking lot since 1970. Petitioners point out that the parking lot on Lots 1, 2, 7 and 8 received conditional use approval in 1970 "with no limitations on its use and with no expiration period." Petition for Review 6. Petitioners contend, therefore, that their use of Lots 1, 2, 7 and 8 is a nonconforming use which may be continued unrestricted, despite the intervening adoption of the DPCP,

"A. On January 1 and June 1 of each year, the operator will submit to the City Parking Manager, in writing, the following information with respect to parking operations at the full three-quarter block lot:

"1. For any two randomly selected weekdays, the number of cars staying four hours or less and the number of cars staying more than four hours.

"2. The number of monthly permits for each of the preceding six months.

** * * * *

"C. The number of monthly permits for the entire parking lot [Lots 1, 2, 5, 6, 7 and 8] shall be limited to no more than 70 permits.

"D. All existing landscaping and screening shall be maintained by watering, weeding, pruning and replacement of dead or diseased plants.

"E. The driveways shall not be blocked by stored cars and shall be available for automotive movement at all times.

** * * * *" Record 4-5.

"which for the first time regulated aspects of parking operations such as the number of short-term versus long-term parking spaces." Id. at 7.

According to petitioners, under ORS 215.130(5),⁷ they have the right to continue use of Lots 1, 2, 7 and 8 as a surface parking lot in the same manner and at the same level as they lawfully did prior to adoption of the DPCP. See Polk County v. Martin, 292 Or 69, 82, 636 P2d 952 (1981). Petitioners argue that PCC 33.215.170.D, the code provision which authorizes the city to attach conditions to the approval of a Type III decision regarding Lots 5 and 6, does not create an exception to the statutory protection for the lawful preexisting use of Lots 1, 2, 7 and 8. Petitioners contend the city cannot impose conditions on the use of Lots 1, 2, 7 and 8 which are inconsistent with the provisions of state law and PCC 33.94.010, which allows the continuation of nonconforming uses.⁸

The city argues that petitioners' use of Lots 1, 2, 7 and 8 is not a "nonconforming use" under state law or the

⁷ORS 215.130(5) provides in relevant part:

"The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. * * *"

⁸PCC 33.94.010 provides:

"A nonconforming use may be continued, except as otherwise provided in this Title, even though it is not in conformity with the use, height, area, and all other regulations for the zone in which it is located."

PCC. The city asserts that ORS 215.130(5) is part of the county planning and zoning statutes, and is inapplicable to cities. The city contends that ORS chapter 227, the city planning and zoning statutes, contains no provision parallel to ORS 215.130(5).

PCC 33.12.570 defines "nonconforming use" as

"* * * a use to which a structure, building or land was lawfully put at [sic] July 1, 1959 but which is not a permitted use in the zone in which it is located."

The city argues that the parking lot on Lots 1, 2, 7 and 8 fails to satisfy this definition for two reasons. First, as conceded by petitioners, the parking lot use did not begin until 1970. Second, a surface parking lot has been since at least 1970, and continues to be, a permitted conditional use in the CX zone. According to the city, the PCC recognizes two types of permitted uses -- uses permitted outright and conditional uses. The city maintains that adoption of the DPCP did not change the status of surface parking lots as a conditional use. The city argues that petitioners' use of Lots 1, 2, 7 and 8 for a surface parking lot is a permitted conditional use, for which conditional use approval has been granted.

The city also argues, in the alternative, that even if petitioners have a right to continue a nonconforming use of Lots 1, 2, 7 and 8, that right is simply to continue use of Lots 1, 2, 7 and 8 as a surface parking lot. According to

the city, its decision does not take away that right, because it does not reduce the number of parking spaces allowed or otherwise interfere with operation of the existing lot, but rather maintains the status quo and allows the parking lot to continue operating as it has since the disputed conditions were first imposed by the 1982 approval of CU 62-82. In any case, according to the city, a nonconforming use is not immune from reasonable police power regulation to protect the health, safety and general welfare.

ORS 215.010 to 215.190 deal with county planning and zoning authority. The reference in ORS 215.130(5) to the right to continue a lawful use after "the enactment or amendment of any zoning ordinance or regulation" refers to county regulations. There is no counterpart to ORS 215.130(5) in ORS chapter 227 ("City Planning and Zoning"), and petitioners cite no other statutory provision granting them a right to continue their use of Lots 1, 2, 7 and 8 unchanged, irrespective of the city's subsequent adoption of the DPCP.

We also agree with the city that petitioners' use of Lots 1, 2, 7 and 8 does not qualify as a "nonconforming use" under the definition in PCC 33.12.570, quoted supra. The use did not exist on July 1, 1959, as required by PCC 33.12.570. We, therefore, conclude that petitioners' use of Lots 1, 2, 7 and 8 for a surface parking lot is not a

"nonconforming use" which petitioners have a right to continue under the statutes and PCC.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"The City lacked jurisdiction over Lots 1, 2, 7 and 8."

The application filed, and approval requested by, petitioners' predecessor in interest are only for surface parking on Lots 5 and 6. However, PCC 33.12.450 provides:

"**Lot.** 'Lot' means any continuous area, tract or parcel of land owned by or under the lawful control and in the lawful possession of one distinct ownership undivided by a dedicated street or alley or another ownership. * * * Where the term 'site' is used in this Title it is used in place of 'lot.'"

In this case, Lots 1-8 form a continuous area under one distinct ownership. Due largely to the above quoted provision, the city concluded that based on the application for conditional use approval for Lots 5 and 6, it has the authority to impose conditions related to that application on Lots 1, 2, 7 and 8. Record 33, 36-37.⁹

Petitioners assert that the conditional use application filed by their predecessor in interest and accepted by the city covers only Lots 5 and 6. Record 97. According to petitioners, whether the entire block comprised of Lots 1-8

⁹The citation is to the hearings officer's decision. The Report and Decision of the Hearings Officer was adopted as part of the city council's order. Record 4.

"is a 'lot' or 'site' within the meaning of the zoning code matters only if the applicable portions of the code use these terms in a way that is relevant to [the subject] application." Petition for Review 9, quoting Record 43.

Petitioners argue that the PCC conditional use process focuses entirely on the property which is described in an application, not on all contiguous property in common ownership. Petitioners point out PCC 33.215.120.B.1 requires that a conditional use application contain "an accurate legal description, tax account number(s) and location of the property." (Emphasis added.) Petitioners also note that PCC 33.215.130.C.5 requires the notice of public hearing on a conditional use application to include a "map depicting the subject property in relation to the surrounding properties." (Emphasis added.)

Petitioners further argue that interpreting the PCC to give the city jurisdiction over all contiguous property owned by an applicant, rather than simply over the property that is the subject of the application, would lead to impermissible results. For instance, according to petitioners, such an interpretation would encourage property owners to hold contiguous property in separate ownerships to protect their rights to continued use of each part of the property. Petitioners also contend that this interpretation would effectively allow the city to revoke or modify conditional uses previously approved for other portions of

an applicant's property, without following the procedures and criteria for revocation and modification found in PCC 33.205.035 and 33.215.200. According to petitioners, this is in fact what the challenged city decision does to their 1970 conditional use approval for parking on Lots 1, 2, 7 and 8.

The city argues that by filing a conditional use application for a commercial parking "lot" on Lots 5 and 6, petitioners "brought lots 1, 2, 7 and 8 under scrutiny by operation of the [PCC's] definition of the term 'lot' and the use of the terms 'lot' and 'site' in the Type III procedural provisions and the [DPCP] area regulations." Respondent's Brief 10. The city argues that an application for Type III approval must include a description of the "existing and proposed use(s) or change(s) to the site or building(s)." (Emphasis added.) PCC 33.215.120.B.2.b. It must also include a "site or development plan" which must show "total lot area" and "parking lot * * * design and circulations." (Emphasis added.) PCC 33.215.120.B.3. The city further argues that the DPCP area regulations applicable to off-street parking in the Central City Plan district, found in PCC 33.702.130.B.4, "repeatedly use the term 'lot.'"¹⁰ Respondent's Brief 10.

¹⁰We note, however, that the use of the term "lot" in PCC 33.702.130.B.4 is primarily in the phrases "surface parking lot" or "surface lot," and is always in reference to a parking lot.

The city also contends that in this case it makes no sense to focus on only the portion of petitioners' "lot" with 44 parking spaces and an access drive and ignore the remainder of the parking operation on the same "lot," particularly since the parking lot in question is operated as a single unit. The city further argues that since 1982 it has treated petitioners' parking operation as a single use occupying one zoning "lot" and, therefore, its decision does not reflect an interpretation of the PCC which is novel or surprising to petitioners.

There is no dispute that the entire block owned by petitioners constitutes a "lot" or "site," as those terms are defined by PCC 33.12.450. The only issue to be decided is whether the filing of an application for conditional use approval for surface parking on a portion of a "lot" in the DPCP area makes the remainder of the "lot" subject to the imposition of conditions as part of the conditional use approval process. Furthermore, we agree with the parties that our decision on this issue is controlled by our interpretation of the city's use of the terms "lot" and "site" in its regulations governing such an application.

We disagree with the city's argument that the PCC's use of the term "lot" as part of a phrase such as "parking lot" or "surface [parking] lot" is indicative of an intent that the conditional use process for approval of a "parking lot" apply to all contiguous property in common ownership.

Although not specifically defined by the PCC, the term "parking lot" is a well understood phrase in common usage. We believe the PCC's use of the term "lot" in phrases such as "parking lot" or "surface lot" refers to a particular type of use, not to "lot" as it is defined in PCC 33.12.450.¹¹

There remain only two places in the regulations governing conditional use approval for off-street parking in the DPCP area where the term "lot" or "site" is used. PCC 33.215.120.B.2 provides that such an application shall include a "complete description of the proposal including existing and proposed use(s) or change(s) to the site or building(s)." (Emphasis added.) PCC 33.215.170.A.2 and 3 require that decisions and summaries of decisions on such applications include "the legal description and site location." (Emphasis added.) The terms "lot" or "site" are not found in the PCC's general conditional use approval criterion that "the use at the particular location is desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace, or safety, or to the character and value of the surrounding properties." (Emphasis added.) PCC 33.106.010. These terms are also absent from the DPCP area parking approval

¹¹We similarly find the PCC's use of the term "site" in the phrase "site plan" to refer to a certain type of plan with particular required contents, not "site" as it is defined by PCC 33.12.450. See PCC 33.215.120.B.3 and 33.903.050.A.

criteria. PCC 33.702.130.B.4.

On the other hand, PCC 33.215.120.B.1 requires an application for conditional use approval for off-street parking in the DPCP area to contain "an accurate legal description * * * and location of the property" and a statement of "the nature of the applicant's interest in the property." (Emphases added.) PCC 33.215.130.A and C require the notice of the public hearing on such an application to be mailed to the owners of the subject property, and to describe the location of, and contain a map depicting, the subject property. Perhaps most significantly, PCC 33.215.130.B provides that the area in which property owners are to be notified of such a public hearing is to be determined from "the boundary lines of the subject property and all other contiguous property that is under the legal control of the owner." (Emphasis added.) The emphasized provision makes it clear that "subject property" is not the same as a "lot" or "site," as defined in PCC 33.12.450.

The meaning of local legislation is a question of law for this Board, as the reviewing body, to decide. McCoy v. Linn County, 90 Or App 271, 275, 752 P2d 323 (1988). We do not believe the two references to the term "site" in PCC 33.215.120.B and 33.215.170.A are sufficient to demonstrate an intent to subject all contiguous property owned by a conditional use applicant to the conditional use

review process. The frequent use of terms such as "subject property" and the clear indication in PCC 33.215.130.B that "subject property" does not include all contiguous property in common ownership strongly suggest that was not the intent. We believe it is incorrect to interpret the city regulations governing applications for conditional use approval for off-street parking in the DPCP area to make all contiguous property owned by the applicant subject to the conditional use review. The city did not have authority to impose conditions on Lots 1, 2, 7 and 8 through petitioner's filing of a conditional use application for surface parking on Lots 5 and 6.¹²

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

"The City erred in imposing Condition C in that such decision was not supported by substantial evidence in the whole record, the City failed to adequately identify the standards for imposing that condition, and failed to relate the standards

¹²Admittedly, in this case there might be a logical purpose in considering petitioners' entire parking lot operation as a whole. We do not imply that the city could not adopt ordinance provisions which would make all contiguous property in common ownership, or all contiguous property in common ownership which is part of the same use, the subject of conditional use review when conditional use approval is sought for any part of the ownership. However, the PCC language discussed above neither automatically subjects all of an applicant's contiguous property to conditional use review nor gives the city the option unilaterally to subject the applicant's contiguous property to conditional use review. In this case, the application for conditional use approval for a parking lot on Lots 5 and 6 does not include contiguous property owned by the applicants, and the applicants are entitled to have their application for conditional use approval judged by application of the relevant approval standards solely to the proposed use of Lots 5 and 6.

to the facts."

Under this assignment of error, petitioners argue that the city's imposition of Condition C (quoted in n 6, supra), which effectively limits the number of monthly parking permits that petitioners can issue for the parking lot on Lots 1, 2, 7 and 8, fails to comply with the requirements of PCC 33.215.170.D for imposing conditions of approval.

Since we determined under the previous assignment of error that the city lacks authority to impose conditions on the use of Lots 1, 2, 7 and 8 in approving the subject application for conditional use approval for Lots 5 and 6, no purpose would be served by reviewing this assignment of error.

The city's decision is remanded.