



Opinion by Kellington.

#### **NATURE OF THE DECISION**

Petitioner appeals a determination of the hearings officer that a parking lot use of property is not a "valid nonconforming use that has a right to continue." Record 4.

#### **FACTS**

The subject property fronts on North Powers Street and is zoned Residential (R5) (hereafter we refer to the subject property as the N. Powers Street property). The challenged decision provides the following additional relevant facts:

"[Petitioner] owns [an auto body repair] business \* \* \* located at 6903 N. Fessenden, lots 22-23 and 26-30. In response to a complaint, the Bureau of Buildings notified [petitioner] of violations of the [Portland City] Code resulting from the parking of motor vehicles on lots adjacent to this business [the N. Powers Street property]. The legality or status of the auto body business is not in question. The issue is the legality of the use of [the N. Powers Street property], for parking of cars related to the auto repair business.

"[Petitioner] uses [the N. Powers Street property] during business hours to park customers' cars waiting for repairs. Employees also use these lots to park their own cars. [The N. Powers Street property is] zoned R5, single-dwelling residential. Commercial parking is prohibited in the R5 zone under PCC Section 33.110.100.

"Under the procedures provided in PCC Section 33.258.020, [petitioner] requested a determination that the use is a valid nonconforming use that has the right to continue.  
\* \* \*

"The [N. Powers Street property] has not been developed. It is a 'vacant' lot with no

improvements. Access to the lot has been through an existing alley, so there are no curb cuts or other improvements that identify the site clearly as a parking lot. Because it is 'vacant,' there are no building permits or other records that show the use was allowed when established or maintained over time. Consequently, [petitioner] requested review under the Type II process. The Bureau of Planning made a determination that [petitioner] had not submitted adequate evidence to establish a nonconforming use, and [petitioner] appealed that decision to the Hearings Officer." Record 4.

The hearings officer affirmed the decision of the planning department and denied the request. This appeal followed.

#### **FIRST ASSIGNMENT OF ERROR**

"The hearings officer misconstrued the appropriate City of Portland zoning ordinances concerning the use of adjacent lots as parking areas."

PCC 33.258.020 provides:

"The nonconforming use and development regulations apply to those nonconforming situations which were allowed when established or which were approved through a land use review. Nonconforming situations which were not allowed when established have no legal rights and must be removed. The applicant must provide evidence to show that the nonconforming situation was allowed when established (using building permits) and was maintained over time (using utility bills). The Director will determine whether the evidence is satisfactory. If the applicant wishes to provide evidence other than those identified above in parentheses, a Type II process will be used to determine whether the evidence is satisfactory." (Emphasis supplied.)

Petitioner argues that the parking lot use of the N. Powers Street property predated the current zoning code,

and that provisions of the the city's pre-1959 zoning code provide the applicable standards for determining whether the parking lot use of the property was lawful when such use was "established."

Petitioner argues the challenged decision incorrectly interprets the pre-1959 zoning code by determining the disputed parking lot use could only have been lawfully established under a particular land use review procedure (local option procedure) allowing for the expansion of existing nonconforming uses.<sup>1</sup> Petitioner argues that under the pre-1959 code provisions, the parking lot use was allowed outright as "a storage parking lot for a transition use."

The city argues petitioner is barred under ORS 197.835(2)<sup>2</sup> and ORS 197.763(1)<sup>3</sup> from arguing in this

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<sup>1</sup>There is no dispute that the auto body repair business itself is a lawful nonconforming use. Under the "local option procedure" outlined in the pre-1959 code, that nonconforming use could be expanded to include the disputed parking use of the N. Powers Street property, if "local option" approval were received from the city. Apparently, "local option" approval could be obtained from the city if a majority of neighbors surrounding the existing nonconforming use agreed to the proposal to expand that use.

<sup>2</sup>ORS 197.835(2) provides:

"Issues [in an appeal to LUBA] shall be limited to those raised by any participant before the local hearings body as provided in ORS 197.763. \* \* \*"

<sup>3</sup>ORS 197.763(1) provides, in part:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or

appeal proceeding that the parking lot use of the N. Powers Street property was allowed outright when established, because that issue was not raised during the local proceedings below. The city contends:

"[The city] clearly indicated in letters, staff reports and testimony \* \* \* that the auto body shop was a nonconforming use and that the parking area would have been allowed as an expansion of a nonconforming use under the local option procedure in the pre-1959 zoning code. The petitioner agreed with this characterization. In his presentation \* \* \* the only issues the petitioner's representative discussed were the history of [the N. Powers Street property], the length of time [the N. Powers Street property] had been used for parking and the fairness of denying nonconforming use status for [this property]. The petitioner's representative engaged in a general discussion of the zoning history of [the N. Powers Street property] with the planning staff, but did not dispute the staff's interpretation of the pre-1959 zoning code." (Citations to record and appendices omitted.) Respondent's Brief 9.

Petitioner does not cite any portions of the record which he contends demonstrate that he raised the issue of whether the disputed parking use was allowed outright as a storage parking lot for a transition use or challenged the city's interpretation that the disputed parking use was validly established only if approved under the pre-1959 local option procedure. Accordingly, we agree with the city

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following the final evidentiary hearing on the proposal before the local government. \* \* \*

that petitioner waived this issue below, and may not raise it here.<sup>4</sup>

The first assignment of error is denied.

### **THIRD ASSIGNMENT OF ERROR**

"The hearings officer's decision is not supported by substantial evidence and is based on evidence not in the record."

Petitioner argues the hearings officer erroneously concluded that he failed to provide adequate evidence of when the parking lot use was established. Petitioner cites the typewritten Kost affidavit dated June 21, 1991 which states:

"I am fifty seven years of age. My father owned property at or near 6903 N. Fessenden at approximately 1952.

"The rectangular piece of property directly North of [the auto body shop] had automobiles parked on it as far back as I can recall which would be 1952.

"The rectangular piece of property fronts on North Powers Street." Record 13.

Petitioner also cites a handwritten November 5, 1991 amendment to that affidavit which states:

"I'm sorry I referred to the property as a rectangular piece of property. It was in fact a triangular piece of property. Dad always referred

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<sup>4</sup>However, we note that regardless of whether the disputed use could have been established as a permitted use under the pre-1959 zoning code, a more fundamental issue in this appeal is when the disputed parking lot use of the N. Powers Street property was established in the first place. This issue was raised below and we consider it under the following assignments of error.

to it as the 'pie shaped area.' Yes, as far back as I can remember he did park cars there \* \* \*." Record 13.<sup>5</sup>

At the outset we note that petitioner is challenging a city decision to deny his application for a determination that the parking lot use of the N. Powers Street property is a nonconforming use. In order to overturn a denial, petitioner must establish compliance with all relevant standards as a matter of law. Garre v. Clackamas County, 18 Or LUBA 877, aff'd 102 Or App 123 (1990). We believe that reasonable people could draw inferences from the evidence cited in the record to support either the city's position that it does not establish when the parking lot use was established, or petitioners' position that the parking lot use was established in 1952. Accordingly, we may not conclude as a matter of law that the evidence supports petitioner's position that the parking lot use of the N. Powers Street property was established in 1952.

The third assignment of error is denied.

#### **SECOND ASSIGNMENT OF ERROR**

"The hearings officer misconstrued the standard of evidence needed to be supplied by an applicant pursuant to PCC 33.258.020."

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<sup>5</sup>Petitioner also cites other evidence which establishes the existence of the auto repair shop, but which makes no reference to the disputed parking use of the subject property. Evidence of the existence of the auto repair business has little if any probative value, in itself, to demonstrate the existence of the disputed parking lot use of the N. Powers Street property.

Petitioner argues the city erroneously required him to provide "substantial evidence" to show when the parking lot use was established and that the use was maintained over time. According to petitioner, PCC 33.258.020 only requires that he provide "satisfactory evidence" of when the use was established, and whether it was maintained over time, which he regards as a lesser evidentiary burden.

We do not agree that the hearings officer imposed a greater evidentiary burden on petitioner than required by PCC 33.258.020. The hearings officer concluded:

"\* \* \* While it may be difficult to document that the use was allowed when established and was maintained over time, the burden is on the applicant, who has not offered sufficient evidence to determine that this nonconforming use should be allowed to continue under the regulations in PCC 33.258.020." Record 6.

While the hearings officer stated in the challenged decision that the Kost affidavit is not "substantial evidence" of when the parking lot use was established, the hearings officer also stated:

"This affidavit alone does not provide much proof of when the existing parking use was established, or if it had been maintained over time. The affidavit only says that the site 'had automobiles parked on it as far back as I can recall which would be 1952.' \* \* \*" Record 5.

This statement in the challenged decision together with the hearings officer's ultimate conclusion that there was simply not enough evidence to conclude that the parking lot use was lawful when established, as required by PCC

33.258.020, establishes the hearings officer believed that the evidence petitioner produced during the proceedings below was not satisfactory. This is not inconsistent with the PCC 33.258.020 requirement that satisfactory evidence be established to allow the city to determine the relevant standards are met.

The second assignment of error is denied.

The city's decision is affirmed.