

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision of the city council
4 determining that a nonconforming use of petitioner's
5 property lapsed.

6 **FACTS**

7 The subject property is currently zoned High Density
8 Residential (R1). Prior to 1981, the subject property was
9 zoned General Commercial (C2). Prior to the imposition of
10 the R-1 zoning district, petitioner established a printing
11 and reprographics business on the subject property. A
12 printing and reprographics business was permitted in the C2
13 zone, but is not allowed in the R1 zoning district.

14 The decision contains the following additional facts:

15 "In the early 1980's, [petitioner's wife]
16 contracted Alzheimer's disease and [petitioner
17 became her] full-time caretaker. In about 1980,
18 [petitioner] gave his business to his son.
19 [Petitioner's son] withdrew from the business in
20 1986 and leased the space to another printing
21 company. This printing company subsequently
22 folded in 1987. * * *

23 "[The planning department] approved the
24 establishment of a nonconforming use for the site
25 from 1981 to mid-1987. This decision [included a]
26 finding that there was no evidence of ongoing
27 activity on the site from May, 1987 onwards.
28 [Petitioner] requested a Type II review in order
29 to establish nonconforming use rights * * *."
30 Record 8.

31 The planning department denied petitioner's request for
32 a determination that he has a nonconforming use right to a

1 printing and reprographics business on the subject property.
2 Petitioner appealed to the hearings officer, who determined
3 petitioner had established a limited nonconforming use right
4 for the subject property. Petitioner appealed to the city
5 council. The city council determined that any nonconforming
6 use right petitioner may have had to a printing and
7 reprographics business was lost through nonuse for a period
8 in excess of two years. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 "The city council * * * misconstrued and
11 misapplied PCC 33.258.050.D.1. [It] erred in
12 finding that the site had been vacant for two
13 continuous years and lost its nonconforming use
14 right."

15 Portland City Code (PCC) 33.258.050.D.1 provides the
16 following concerning nonconforming uses:

17 "If the site of a nonconforming use is vacant for
18 2 continuous years, the nonconforming use rights
19 are lost and the re-establishment of a
20 nonconforming use is prohibited. If the site is
21 vacant for less than 2 continuous years, the
22 nonconforming use rights are maintained."
23 (Emphasis supplied.)

24 The challenged order determines:

25 "The Council disagreed with appellant that the
26 term 'vacant' referred to the land and not to
27 buildings. The Council made the following
28 findings:

29 "* * * Webster's Seventh College Dictionary
30 variously defines 'vacant' as empty, without
31 content or occupant, free from activity and
32 abandoned. The Council found that, since the
33 substantive issues are in the realm of land use,
34 the term 'vacant' is to be used consistently

1 throughout the [PCC], unless specifically stated
2 otherwise, to mean 'free of activity.' For this
3 particular review, the Council found that since
4 there was no evidence that there was any more than
5 intermittent activity on the site, the term
6 'vacant' is properly taken to mean 'free of
7 activity.'

8 * * * The Council found that applying the term
9 'vacant' to land and not to buildings would be
10 inconsistent and counterproductive to [the intent
11 of the PCC].

12 * * * Organization of the code. The term
13 'vacant' is used in PCC 33.258.050, Nonconforming
14 Uses. This section is distinguished from PCC
15 33.258.060, Nonconforming Residential Densities,
16 and PCC 33.258.070, Nonconforming Development.
17 The Council found that since the term 'vacant' is
18 used in a part of the code which regulates
19 nonconforming uses, the term vacant applies to
20 uses and not to the land.

21 * * * * *

22 * * * The Council found that [printing and
23 reprographics] use expired in May of 1987 and
24 because the site has been vacant for more than two
25 years, its nonconforming rights have expired. The
26 Council determined that the term 'vacant' referred
27 to the absence of activity on a site and not to
28 whether a structure occupied the site." (Emphasis
29 in original.) Record 10-11.

30 Petitioner argues the term "vacant," as used in
31 PCC 33.258.050.D.1, refers to the condition of the land
32 rather than the use of the buildings on the land.
33 Petitioner contends the city erred by equating the term
34 "vacant" with "free of activity."

35 The term "vacant" is not defined by the PCC. However,
36 PCC 33.700.070.D.1 and 33.910.010 provide that "words used

1 in the zoning code have their normal dictionary meaning"
2 where they are not defined by the code. While the city
3 acknowledges that one ordinary dictionary meaning of the
4 term "vacant" is "empty," the city also points out another
5 ordinary dictionary meaning of the term "vacant" is "free
6 from activity." The city contends that the "free from
7 activity" dictionary definition of "vacant" is appropriate,
8 in the context in which "vacant" is used in
9 PCC 33.258.050.D.1 concerning nonconforming uses.

10 Webster's Third New International Dictionary 2527
11 (1981) defines "vacant" as meaning among other things "free
12 from activity." We agree with the city that "free from
13 activity" is an ordinary dictionary meaning of the term
14 "vacant." That definition of "vacant," as used in
15 PCC 33.258.050.D.1, is not inconsistent with the express
16 words, policy or context of PCC 33.258.050.D.1, and we defer
17 to the city's choice between the normal dictionary
18 definitions of the term. Clark v. Jackson County, 313 Or
19 508, 836 P2d 710 (1992).

20 The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 "The City Council erred in finding * * * there was
23 no evidence of a requisite level of nonconforming
24 use on the site beyond May 1987. The Council
25 erred in its construction and application of the
26 continuity requirement of PCC 33.258.050.D.1"

27 **A. Continuity Requirement**

28 PCC 33.258.050.D.1 provides:

1 "If the site of a nonconforming use is vacant for
2 2 continuous years, the nonconforming use rights
3 are lost and the re-establishment of a
4 nonconforming use is prohibited. If the site is
5 vacant for less than 2 continuous years, the
6 nonconforming use rights are maintained."
7 (Emphasis supplied.)

8 Petitioner contends that the city misapplied the
9 "continuity" requirement of PCC 33.258.050.D.1 to his
10 nonconforming use. Petitioner points out there is no
11 definition in the PCC of the term "continuous," and
12 petitioner states that the dictionary definition of the term
13 "continuous" means "uninterrupted." Petitioner claims that,
14 as applied to his property, this means that so long as he
15 made any use of his property during the relevant two year
16 period, there was never any two year period that the
17 property was "free from activity." Petitioner also contends
18 the evidence does not support the city's determination that
19 the property was free from nonconforming use activity during
20 any "continuous" two year period.

21 The findings concerning how the city characterized the
22 activities conducted on the property after May, 1987 are
23 confusing. Specifically, as explained below, it is somewhat
24 unclear whether the city determined the nonconforming use
25 was discontinued altogether, or whether the city determined
26 the use continued at an insufficient level for the city to
27 conclude the use was preserved under PCC 33.258.050.D.1.

28 The city's findings are as follows:

29 "Council Findings: The Council was unable to

1 determine the precise level of activity which
2 occurred on this site. The Council found that
3 there was no evidence to indicate that business
4 activity on the site, as previously established,
5 continued after May, 1987. The City business
6 license indicated only that there was a
7 'commercial rental' on the site. A license which
8 shows 'commercial rental' only indicates that Mr.
9 Rhine was the landlord of a 'commercial
10 structure.' This business license designation
11 does not provide any information on the nature or
12 level of activity occurring on the site, and it
13 does not acknowledge any land use status for the
14 site. The Bureau of Licenses records show
15 Columbia Copy was licensed until May, 1987. The
16 Council found that business activity of Columbia
17 Copy ceased as of May, 1987. The Council found
18 that, from 1987 on, there was no telephone listing
19 for Columbia Copy and there was little consumption
20 of electricity and water. The Council was unable
21 to establish the specific level of activity on the
22 site from 1987, but found no evidence to indicate
23 that nonconforming rights had been preserved. The
24 Council found that this element was not met."
25 Record 9-10.

26 "The Council found that [the nonconforming use]
27 expired in May of 1987 and because the site has
28 been vacant for more than two years, its
29 nonconforming rights have expired." Record 11.

30 The first sentence of the above quoted findings
31 suggests the city determined that petitioner failed to
32 maintain a "level of activity" sufficient to establish that
33 activities occurring on the property after 1987 were
34 adequate to prevent lapse of the nonconforming use. Other
35 findings provide "[f]rom 1987 on, [petitioner] returned to
36 the building whenever he could to do small printing orders,
37 sell his remaining inventory and sell his equipment."
38 Record 8. Still other findings state "[t]he City Council

1 found no evidence to indicate that printing and
2 reprographics activities continued on this site beyond May,
3 1987 [at a] level which would maintain any nonconforming
4 commercial rights." Record 11.

5 On the other hand, the city argues in its brief:

6 "* * * Regardless of whether the code can be read
7 to require a particular level of activity or to
8 allow a partial discontinuance of nonconforming
9 use rights, the Council found that petitioner's
10 use of the site for a reprographics business
11 ceased altogether for a two year period sometime
12 after * * * 1987 and petitioner's nonconforming
13 use rights lapsed. * * *.⁵

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15 ----

16 "⁵Although the Council's findings mak[e] a
17 reference in passing to 'level of activity,' it is
18 clear that the Council's principal finding and
19 conclusion was that there was no reprographics
20 business activity on the site for a two year
21 period after * * * 1987. [T]here was some
22 commercial activity on the site after 1987. These
23 activities consisted of occasional equipment and
24 material sales, warehousing and storage and lease
25 of the premises for unspecified purposes.
26 However, as reflected in the Council's findings,
27 none of these activities is the use -- a
28 reprographics business -- protected by the City's
29 nonconforming use regulations." (Emphasis in
30 original.) Respondent's Brief 17-18.

31 We agree with the city that, read as a whole, the
32 challenged decision determines that the nonconforming use
33 was discontinued altogether after May, 1987, and the
34 activities which the city found occurred on the site after
35 May, 1987 were different from the prior nonconforming
36 printing and reprographics use.

1 The Court of Appeals has stated that under statutory
2 provisions applicable to counties, notwithstanding the
3 discontinuation of a business conducting a nonconforming
4 use, so long as a part of that nonconforming use is
5 maintained, the nonconforming use status of that part of the
6 nonconforming use is preserved. Hendgen v. Clackamas
7 County, 115 Or App 117, ____ P2d ____ (1992). In other
8 words, the court determined nonconforming use status depends
9 upon the nature of the use that precedes the imposition of
10 zoning restrictions, rather than the nature of the
11 particular business conducting the use. We recognize that
12 the principle discussed in Hendgen is not directly
13 applicable to the challenged city decision, because it is
14 not governed by the statutory nonconforming use provisions
15 applicable to counties interpreted in Hendgen. However,
16 even if the Hendgen principle applied to this case, it would
17 make no difference. As stated above, the city determined
18 there was no printing and reprographics use of the subject
19 property for a two year period beginning May, 1987. Thus,
20 petitioner's contention concerning his interpretation of the
21 meaning of the term "continuous," as used in
22 PCC 33.258.050.D.1, provides no basis for reversal or remand
23 of the challenged decision.

24 **B. Nature of the Nonconforming Use**

25 In order to address petitioner's evidentiary challenge,
26 we must first determine what the record discloses concerning

1 the nature of the nonconforming use. The record discloses
2 that the nonconforming use was a printing and reprographics
3 business, involving the printing and copying primarily of
4 blueprints. Specifically, the record indicates that the
5 nonconforming use was characterized as "general
6 reprographics, copying, printing, photo enlargement, like
7 aerial photos." Supplemental Record 15. Based on this
8 characterization of the business, the city evaluated
9 petitioner's request for a determination of nonconforming
10 use rights.

11 During the city's proceedings, petitioner never
12 appealed or disputed the city's characterization of the
13 business as a printing and reprographics business. However,
14 after oral argument, petitioner sent this Board two letters.
15 One letter cites petitioner's testimony in the supplemental
16 record as indicating that as part of petitioner's business,
17 he maintained certain equipment that he had a right to sell,
18 pursuant to a contractual arrangement with the
19 manufacturer.¹ The other letter contends that the position
20 stated in the first letter that the nonconforming use
21 included the sales of equipment is not a change of position,
22 and that such sales of equipment are an incidental part of a
23 printing and reprographics business. The city objected to

¹This letter also cites testimony stating that the nonconforming use included the sale of drafting paper and mylar. However, there is no contention that after May, 1987 petitioner sold drafting paper and mylar from the subject property.

1 this post oral argument attempt to recharacterize the nature
2 of the nonconforming use and to characterize equipment sales
3 as a normal incident of a printing and reprographics
4 business. The city argues that under ORS 197.763(1) and ORS
5 197.835(2),² petitioner was required to raise these issues
6 below to preserve them on appeal, and may not attempt to
7 change his characterization of the nature of the business
8 through post oral argument letters at LUBA.

9 The challenged decision characterizes the nonconforming
10 use as a "reprographics, blueprint and printing business."
11 Record 7-9. Petitioner did not challenge this
12 characterization of the nonconforming use in his petition
13 for review. Petitioner may not challenge the city's
14 characterization of the nonconforming use for the first time
15 in a post oral argument letter. See Ward v. City of Lake
16 Oswego, 21 Or LUBA 470, 482 (1991).

17 Moreover, under ORS 197.763(1) and 197.835(2), issues

²ORS 197.835(2) provides, in part:

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

ORS 197.763(1) provides:

"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
following the final evidentiary hearing on the proposal before
the local government. Such issues shall be raised with
sufficient specificity so as to afford the governing body,
planning commission, hearings body or hearings officer, and the
parties an adequate opportunity to respond to each issue."

1 must be raised below with "sufficient specificity" for a
2 local government to respond to the issue. In Boldt v.
3 Clackamas County, 107 Or App 619, 623, 813 P2d 1078 (1991),
4 the court explained the purposes of the "sufficient
5 specificity" requirement are to afford the decision maker
6 and the parties an adequate opportunity to respond to each
7 issue; to provide fair notice to adjudicators and opponents
8 that an issue is important to a party. We believe that
9 here, where the characterization of the nonconforming use
10 was the basis for all later city determinations, more was
11 required of a petitioner than to state, in passing, that he
12 maintained equipment he had a right to sell. The record is
13 clear, that when it came to characterizing the nonconforming
14 printing and reprographics use, the use was not
15 characterized as a business involving the sales of
16 equipment. Petitioner never questioned the city's
17 characterization of his nonconforming use, when the
18 characterization of that use was the central issue in the
19 local proceedings. Under these circumstances, we believed
20 petitioner waived his right to contend before LUBA that the
21 nonconforming use should be characterized as one involving
22 equipment sales.

23 **C. Evidentiary Challenge**

24 Petitioner contends the record lacks evidentiary
25 support for the city's determination that there was no use
26 of the subject property consistent with the nonconforming

1 printing and reprographics business during the relevant two
2 year period. Accordingly, we evaluate the evidence in light
3 of this nonconforming use as a printing and reprographics
4 business which included printing, copying and photo
5 enlargement activity.

6 The record contains evidence that after 1987,
7 petitioner conducted sporadic activities on the subject
8 property consistent with liquidating the printing and
9 reprographics use, to the extent that he sold his remaining
10 equipment in the building.³ There is evidence that
11 petitioner leased the property to others to conduct
12 temporary activities, but these activities were not
13 consistent with the nonconforming printing and reprographics
14 use. In addition, the record indicates that petitioner's
15 business license to conduct a printing and reprographics
16 business lapsed in 1987. Further, the record shows that
17 utility records disclose there was virtually no water or
18 electricity use within the subject building after 1987.
19 There was no telephone listing for a printing and
20 reprographics business on the property after 1987. Save for
21 petitioner's testimony that he made some copies in 1990,
22 there is no evidence of any printing and reprographics use
23 of the property after 1987.

24 The city could choose to disbelieve petitioner's

³Such sales were advertised by propping wooden signs on the sidewalk outside of the subject building.

1 uncorroborated testimony that he made copies during 1990.⁴
2 See Brandt v. Marion County, 22 Or LUBA 473, 481 (1991).
3 Further, to overturn on evidentiary grounds the city's
4 determination that PCC 33.258.050.D.1 is not met, it is
5 insufficient for petitioner to show there is substantial
6 evidence in the record to support his position. Rather, the
7 "evidence must be such that a reasonable trier of fact could
8 only say petitioner['s] evidence should be believed."
9 Morley v. Marion County, 16 Or LUBA 385, 393 (1987); McCoy
10 v. Marion County, 16 Or LUBA 284, 286 (1987); Weyerhauser v.
11 Lane County, 7 Or LUBA 42, 46 (1982). In other words,
12 petitioner must demonstrate that he sustained his burden of
13 proof of compliance with PCC 33.258.050.D.1 as a matter of
14 law. Jurgenson v. Union County Court, 42 Or App 505, 600
15 P2d 1241 (1979); Consolidated Rock Products v. Clackamas
16 County, 17 Or LUBA 609, 619 (1989). We cannot say as a
17 matter of law that the printing and reprographics
18 nonconforming use of the subject property was not
19 discontinued for two years following May, 1987.

20 The second assignment of error is denied.

21 The city's decision is affirmed.

⁴It is not clear to us whether it matters, in any event, that petitioner made copies during 1990, as all of 1990 is more than two years beyond May, 1987.