

1 BEFORE THE LAND USE BOARD OF APPEALS
2
3 OF THE STATE OF OREGON
4
5 GLISAN STREET ASSOCIATES, LTD.,)
6 an Oregon general partnership,)
7 Petitioner,)
8)
9 vs.)
10)
11 CITY OF PORTLAND,)
12)
13 Respondent,)
14)
15 and)
16)
17 BRIAN PERRY and YOKO PERRY,) LUBA No. 92-154
18)
19 Intervenors-Respondent.)
20 _____) FINAL OPINION
21) AND ORDER
22 BRIAN PERRY and YOKO PERRY,) LUBA No. 92-155
23)
24 Petitioners,)
25)
26 vs.)
27)
28 CITY OF PORTLAND,)
29)
30 Respondent,)
31)
32 and)
33)
34 GLISAN STREET ASSOCIATES, LTD.,)
35 an Oregon general partnership,)
36)
37 Intervenor-Respondent.)
38
39
40 Appeal from City of Portland.
41
42 Brian Perry and Yoko Perry, Rhododendron, filed the
43 petition for review. Brian Perry argued on his own behalf.
44
45 Adrienne Brockman, Deputy City Attorney, Portland,

1 filed a response brief and argued on behalf of respondent.
2

3 Mark D. Whitlow, Portland, filed a response brief and
4 argued on behalf of intervenor-respondent Glisan Street
5 Associates, Ltd. With him on the brief was Bogle & Gates.
6

7 HOLSTUN, Referee; SHERTON, Chief Referee, participated
8 in the decision.
9

10 DISMISSED (LUBA No. 92-154)

11 AFFIRMED (LUBA No. 92-155)

12 03/26/93

13 You are entitled to judicial review of this Order.
14 Judicial review is governed by the provisions of ORS
15 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners challenge a city decision allowing changes
4 in an existing parking lot.

5 **MOTION TO WITHDRAW APPEAL**

6 The city's decision is challenged by the applicant in
7 LUBA No. 92-154 and by opponents of the disputed parking lot
8 changes in LUBA No. 92-155. Petitioner in LUBA No. 92-154
9 advised the Board that it wishes to withdraw its appeal of
10 the city's decision. That request is granted, and LUBA No.
11 92-154 is dismissed.

12 **FACTS**

13 The subject property formerly housed the Boys and Girls
14 Aid Society (BGAS) headquarters building. The applicant
15 demolished that building in 1992 and constructed in its
16 place a 12,000 square foot retail commercial building. This
17 appeal concerns the conversion of the parking lot that
18 formerly served the BGAS building from an accessory parking
19 use to a commercial parking lot, open to any user.

20 Part of the subject property is zoned for commercial
21 use and part of the property is zoned for residential use.
22 The new retail commercial building and a portion of the
23 existing parking lot occupy the portion of the subject
24 property zoned for commercial use, as did the former BGAS
25 building. The commercially zoned portion of the property

1 allows retail commercial buildings and commercial parking.¹
2 The westerly 11,000 square foot portion of the parking lot
3 is located in a residential zone, which does not allow
4 commercial parking. The relevant zoning history of the
5 subject property is set out in the decision as follows:

6 "The building which formerly housed the [BGAS] and
7 a portion of the existing parking lot were built
8 in 1952 * * *. [In 1959], the [BGAS] building and
9 a portion of the adjacent parking lot [were] zoned
10 C2 (General Commercial). However, the westerly
11 portion of the parking lot [was] zoned AO
12 (Apartment Residential), which did not permit
13 commercial parking. Subsequently, in 1968, the
14 [BGAS] received a Zone Change * * * from AO to AOP
15 to make the existing nonconforming parking lot [on
16 the AO zoned portion of the subject property]
17 conforming and to expand the parking lot [to its
18 present location].^[2]

19 "[P]ermitted parking took place on [the AOP zoned
20 portion of the subject property] between [1968]
21 when the "P" overlay was established, and [1981],
22 when the Zoning Code and zoning map [were] once
23 again amended.

24 "[In 1981 the AOP zoned portion of the property
25 was] rezoned from AOP to R1. At this point, the
26 parking that was previously permitted under the
27 AOP zoning became a nonconforming * * * use * * *
28 under [the 1981 Zoning Code]. In 1991, a new
29 Zoning Code was adopted * * *. [The 1991 Zoning
30 Code] distinguishes between 'accessory' and

¹The retail commercial development and the conversion of the portion of the parking lot located on the commercially zoned portion of the subject property are not challenged in this appeal.

²The zone change added the "P" (Parking) overlay zone to the AO zone, making the BGAS parking use of the residentially zoned portion of the property a permitted use.

1 'commercial' parking. * * *³ Record 17-18.

2 In its decision, the city determined that under the
3 1981 and 1991 Zoning Codes, the portion of the BGAS parking
4 lot located on the R1 zoned portion of the subject property
5 was a nonconforming accessory parking use.⁴ The city
6 further determined that changing that portion of the parking
7 lot from an accessory parking use to a commercial parking
8 lot, as proposed, constitutes a change in the existing
9 nonconforming use, which requires approval under PCC Chapter
10 33.258 (1991) (Nonconforming Uses and Development).⁵

11 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

12 Under the second assignment of error, petitioners
13 contend the BGAS building was properly viewed as a "Welfare
14 Institution" in 1981, when the AOP zoning for the
15 residentially zoned portion of the subject property was

³The Portland Zoning Code is codified at Portland City Code (PCC) Title 33. The Portland Zoning Code, as it existed in 1991 and 1981, is referred to in this opinion as the 1991 Zoning Code and the 1981 Zoning Code, respectively. When citing specific sections of those codes, we indicate the year of the Zoning Code being cited as follows: PCC 33.000.000 (1991) or PCC 33.000.000 (1981).

⁴As explained below, petitioner contends the existing parking lot is a conditional use rather than a nonconforming use.

⁵Prior to adoption of the 1991 Zoning Code, no distinction was made between "accessory" and "commercial" parking. The 1991 Zoning Code makes such a distinction. As defined in the 1991 Zoning Code, the applicant's proposed parking use constitutes "commercial" parking. PCC 33.920.210 (1991). Because the prior nonconforming parking use of the subject property did not include or constitute "commercial" parking, the city determined approval of a change in nonconforming use under PCC Chapter 33.258 (1991) is required.

1 changed to R1. "Welfare Institutions" were listed in the
2 1981 Zoning Code as a conditional use in both the C2 and AO
3 zones applied to the property at that time. PCC 33.106.015
4 (1981) provided that lawfully existing uses dating back to
5 1959 were "granted automatic conditional use status."
6 Petitioners reason that, under PCC 33.106.015 (1981), both
7 the BGAS building and its associated parking therefore
8 became approved conditional uses in 1981. As a consequence,
9 petitioners argue, the city erred in treating the portion of
10 the parking facility located on the residentially zoned
11 portion of the property as a nonconforming accessory use to
12 the BGAS commercial use.

13 Petitioners also contend similar provisions included in
14 the city's 1991 Zoning Code concerning "Community Services"
15 automatically made the BGAS Building and the associated
16 parking on the subject property conditional uses when the
17 1991 Zoning Code was adopted. PCC 33.920.030 (1991);
18 33.920.420(B) (1991).

19 The points petitioners argue are important because, if
20 petitioners are correct, a variety of comprehensive plan and
21 land use regulation provisions petitioners identify in the
22 first assignment of error would have to be considered to
23 change the existing parking lot use. The city does not have
24 to address those provisions if it is allowing a change in an
25 existing nonconforming use under PCC Chapter 33.258 (1991).

26 Contrary to petitioners' contention that the BGAS use

1 was a "Welfare Institution" as defined in the 1981 Zoning
2 Code and a "Community Service" as defined in the 1991 Zoning
3 Code, the city interpreted the relevant code language and
4 concluded the BGAS building was properly categorized as an
5 "office use" in 1981 and 1991.

6 In 1981, C2 zoning applied to the portion of the
7 subject property occupied by the BGAS building. That
8 portion of the subject property was zoned CS (Storefront
9 Commercial) in 1991. The 1981 Zoning Code listed "offices"
10 as a permitted use in the C2 zone, but did not define the
11 term. PCC 33.042.020 (1981). The 1991 Zoning Code lists
12 "Office" as an allowed use in the CS zone. PCC 33.130.100
13 (1991). PCC 33.920.240(A) (1991) lists the characteristics
14 of an "office" use as follows:

15 "Office uses are characterized by activities
16 conducted in an office setting and generally
17 focusing on business, government, professional,
18 medical, or financial services."

19 The relevant PCC definitions of "Welfare Institution" and
20 "Community Service" are set forth below:

21 **"33.12.800 [1981] Welfare Institution**

22 "'Welfare institution' means an institution under
23 the control of and financed by a unit of
24 government; or a religious, philanthropic,
25 charitable, or nonprofit organization devoted to
26 the housing, training or care of children, the
27 aged, or indigent, handicapped, or underprivileged
28 persons, including places of detention or
29 correction."

30 **"33.920.420(A) [1991] Community Services**

1 **"Characteristics.** Community Services are uses of
2 a public, nonprofit, or charitable nature
3 generally providing a local service to people of
4 the community. Generally, they provide the
5 service on the site or have employees at the site
6 on a regular basis. The service is ongoing, not
7 just for special events. Community centers or
8 facilities that have membership provisions are
9 open to the general public to join at any time * *
10 *. The use may also provide special counseling,
11 education, or training of a public, nonprofit or
12 charitable nature.

13 " * * * * ."

14 The challenged decision includes the following
15 explanation of the city's reasoning in concluding that the
16 BGAS use is properly viewed as an office use, even though
17 many of the BGAS activities, as an organization, are carried
18 out by "welfare institutions" (as that term is defined in
19 the 1981 Zoning Code) and "community service" uses (as that
20 term is used in the 1991 Zoning Code).

21 "[E]vidence in the record clearly establishes that
22 the BGAS's predominant use of the site was for
23 'offices' and not for 'community service'. [A]
24 memorandum dated March 2, 1992 [states as
25 follows:]

26 "'The [BGAS] used this site as their
27 state headquarters; with approximately
28 100 employees, all administrative
29 functions occurred here, along with some
30 services. A description of the
31 functions and purpose of the site could
32 fall under either the Office category or
33 the Community Services category.
34 However, because the primary function of
35 this site was for headquarter's office
36 use, with services provided both on-site
37 and off-site, the Office category
38 appears more appropriate. Additionally,

1 it should be noted that the client
2 services provided here - counseling and
3 food distribution - fit within the
4 description of the Office category; they
5 are professional or medical services.
6 Conversely, the description of the
7 Community Service category refers to the
8 offices as an accessory use, with the
9 service provision appearing to be the
10 primary function. On this site, offices
11 were the predominant use.' * * *"
12 Record 28-29.

13 The challenged decision goes on to point out that under the
14 1981 Zoning Code, where a use includes multiple activities,
15 it is to be categorized based on its "primary business
16 activity." PCC 33.111.040(B) (1981).

17 The city's explanation of its interpretation of its
18 code is adequate and acceptable. The city concedes the BGAS
19 use does not fit neatly into any definitional category. The
20 city then provides a reasonable explanation for its decision
21 that the use best fits the Office category, based on the
22 primary use. Even if we were persuaded that petitioners'
23 characterizations of the BGAS use under the 1981 and 1991
24 Zoning Codes are more correct or supportable, which we are
25 not, this Board may not second guess reasonable local
26 government interpretations of code language. Clark v.
27 Jackson County, 313 Or 508, 836 P2d 710 (1992); Goose Hollow
28 Foothills League v. City of Portland, 117 Or App 211, ____
29 P2d ____ (1992); West v. Clackamas County, 116 Or App 89, ____
30 P2d ____ (1992); Cope v. City of Cannon Beach, 115 Or App 11,
31 836 P2d 775 (1992).

1 In view of the above, the city correctly determined the
2 existing parking use of the residentially zoned portion of
3 the subject property is a nonconforming use. The city
4 therefore correctly determined that PCC Chapter 33.258
5 (1991) establishes the relevant standards that must be
6 satisfied to change that parking use in the manner proposed.
7 The city committed no error in failing to treat the existing
8 parking use as a conditional use or in failing to apply the
9 plan and code provisions that would apply if the existing
10 parking use were correctly viewed as a conditional use.

11 Finally, petitioners also suggest any nonconforming
12 parking use of the residentially zoned portion of the
13 subject property was lost when the BGAS building was removed
14 to allow construction of the new retail commercial building.

15 PCC 33.258.050(D) (1991) specifically establishes the
16 circumstances in which a nonconforming use may lose its
17 nonconforming use status. Replacing the BGAS building (a
18 permitted use in the CS zone), to which the nonconforming
19 parking use was accessory, with a retail commercial building
20 (another permitted use in the CS zone) is not one of those
21 circumstances. It is true that the proposed change in the
22 parking use is related to replacement of the BGAS building
23 with the new retail commercial building. However, PCC
24 Chapter 33.258 (1991) specifically allows changes in
25 nonconforming uses, such as the parking use on the
26 residentially zoned portion of the subject property.

1 Whether the city correctly determined the proposed changes
2 in the parking use satisfy those standards is addressed
3 under the third and fourth assignments of error.

4 The first and second assignments of error are denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Petitioners argue the evidence in the record shows the
7 parking lot occupying the residentially zoned portion of the
8 subject property was limited to 22 parking spaces, not the
9 32 spaces the city approved in the challenged decision for
10 the residentially zoned portion of the property.

11 Respondent and intervenor (respondents) both argue
12 petitioners failed to raise this issue below and, therefore,
13 may not raise the issue in this appeal. ORS 197.763(1);
14 ORS 197.835(2); Boldt v. Clackamas County, 21 Or LUBA 40,
15 aff'd 107 Or App 619 (1991).

16 Petitioners cite several places in the record where
17 they specifically referred to the existing parking lot on
18 the residentially zoned portion of the property as only
19 having 22 spaces. We conclude these statements are
20 sufficient to allow petitioners to raise the argument
21 presented in the third assignment of error.⁶ See Boldt v.
22 Clackamas County, supra, 21 Or LUBA at 46-47.

23 The short answer to petitioners' argument under this

⁶Respondent also argues petitioners failed to raise the issues they raise under the fourth assignment of error. We reject respondent's waiver argument under the fourth assignment of error for similar reasons.

1 assignment of error is that the challenged decision approves
2 a change in the existing nonconforming use. Therefore, the
3 city was not limited to approving a parking lot with only 22
4 spaces, assuming the standards for changing a nonconforming
5 use are met. We consider the city findings addressing those
6 standards under the fourth assignment of error.

7 The third assignment of error is denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 Under PCC 33.258.050(B) (1991), the proposed change in
10 the existing nonconforming parking use must satisfy the
11 standards set forth in PCC 33.258.080 (1991). PCC
12 33.258.080(B) (1991) provides, in relevant part, as follows:

13 **"Approval Criteria.** The request will be approved
14 if the review body finds that the applicant has
15 shown that all of the following approval criteria
16 are met:

17 "1. With mitigation measures, there will be a net
18 decrease in overall detrimental impacts (over
19 the impacts of the previous use or
20 development) on the surrounding area taking
21 into account factors such as:

22 "a. The hours of operation;

23 "b. Vehicle trips to the site and impact on
24 surrounding on-street parking;

25 "c. Noise, vibration, dust odor, fumes,
26 glare, and smoke;

27 "d. Potential for increased litter; and

28 "e. The amount, location, and nature of any
29 outside displays, storage, or
30 activities; and

1 "2. If the nonconforming use is in an OS or R
2 zone, and if any changes are proposed to the
3 site, the appearance of the new use or
4 development will not lessen the residential
5 character of the OS or R zoned area. This is
6 based on taking into account factors such as:

7 "a. Building scale, placement, and facade;

8 "b. Parking area placement;

9 "c. Buffering and the potential loss of
10 privacy to abutting residential uses;
11 and

12 "d. Lighting and signs * * *[.]"

13 The city adopted findings addressing each of the
14 factors listed under PCC 33.258.080(B)(1) and (2) (1991).
15 Record 34-37. The findings addressing factor "a" under PCC
16 33.258.080(B)(1) (1991) explain that the hours of operation
17 would be approximately the same as the BGAS operating hours,
18 resulting in no additional impact on adjoining properties.

19 The findings addressing factor "b" under PCC
20 33.258.080(B)(1) (1991) explain that the new retail
21 commercial use would generate fewer automobile trips than
22 did the BGAS. The findings state as follows:

23 "The Boys and Girls Aid Society consistently
24 overfilled [its] lot and spilled its parking
25 demand onto the surrounding neighborhood, with a
26 significant impact on the nearby on-street parking
27 supply. The proposed project, by providing a
28 significant increase in off-street parking without
29 increasing the overall demand for parking, will
30 reduce pressure on the surrounding on-street
31 spaces." (Record citations omitted.) Record 35.

32 The city's findings addressing factor "c" under

1 PCC 33.258.080(B)(1) (1991) begin as follows:

2 "So long as the number of vehicles parked on [the
3 residentially zoned portion of the property] does
4 not exceed the number which were accommodated on
5 the site previously, these criteria will be met. *
6 * *"

7 The findings addressing this factor go on to explain, based
8 on the expected overall reduction in vehicle trips to and
9 from the site resulting from the change in the nature of
10 building on the property and its clientele, "the amount of
11 noise, vibration, dust, odor, fumes, glare, and smoke will
12 therefore be less than [was] emitted from the site when it
13 was operated by the Boys and Girls Aid Society."⁷ Record
14 35.

15 The city also adopted findings addressing factors "a"
16 through "d" under PCC 33.258.080(B)(2) (1991). Those
17 findings explain the improved landscaping buffer along the
18 western and northern edges of the property, moving parking
19 away from the surrounding residences, will avoid any
20 lessening of the residential character of the area.

21 The city ultimately concludes the proposal, as limited
22 by the decision, complies with the standards of
23 PCC 33.258.080(B)(1) and (2) (1991). The city's conclusion
24 includes the following:

⁷The findings also note the new retail commercial building is seven feet higher than the BGAS building was, "adding more sound reduction from N.W. 23rd Avenue vehicle traffic." Record 36. The findings go on to explain that an acoustical engineer testified that the proposed landscaping buffer would further reduce noise to abutting residences.

1 "** * * So long as no more than 32 parking spaces
2 are provided on [the residentially zoned portion
3 of the property], which is roughly the number that
4 existed when the use became nonconforming on
5 January 1, 1981, and so long as no stacked parking
6 occurs and adequate landscaping and buffering take
7 place as proposed in the applicant's alternative
8 site plan, the change to commercial use from
9 accessory use during the day will satisfy the
10 approval criteria. In fact, a well designed and
11 managed commercial lot, used only during the day *
12 * * will not lessen the character of the
13 residential area and will likely decrease the
14 overall detrimental impacts on the surrounding
15 area because roughly the same amount [sic] of cars
16 will be parked in a more effectively designed and
17 managed space.

18 "With the appropriate conditions of approval of
19 the applicant's alternative proposal and site
20 plan, this nonconforming parking lot can operate
21 commercially so long as the number of spaces does
22 not increase from the number used by the Boys and
23 Girls Aid Society, and so long as no stacked
24 parking occurs." (Emphases added.) Record 38-39.

25 Petitioners do not specifically challenge any of the
26 above findings, except those relating to the number of
27 parking spaces existing on the residentially zoned portion
28 of the property when that portion of the parking lot first
29 became nonconforming.⁸ Petitioners identify evidence in the
30 record that the portion of the parking lot on the
31 residentially zoned portion of the property was striped for

⁸Petitioners do dispute the finding that the taller retail commercial building reduces noise impacts on abutting residences by better shielding them from traffic noise on N.W. 23rd than did the shorter BGAS building. See n 7, supra. Petitioners point out the same building also reflects parking lot noise into the adjoining neighborhood. There is testimony in the record supporting both positions, and we conclude the city's finding is supported by substantial evidence.

1 22 spaces, not the 32 spaces approved in the decision
2 challenged in this appeal.⁹ Respondents cite evidence
3 suggesting that more than 22 cars may have parked on the
4 residentially zoned portion of the property in the past.¹⁰

5 There is no specific evidence in the record cited by
6 any party that purports to establish the exact number of
7 spaces existing on the site in 1981, when the portion of the
8 parking lot on the residentially zoned portion first became
9 nonconforming. This lack of evidence might warrant remand
10 if the issue presented in this appeal were the precise scope
11 of the nonconforming use established in 1981. However,
12 whether the actual number of parking spaces on that date was
13 22, as petitioners allege, or more than 22, as respondents
14 suggest in their briefs, is not critical to the challenged
15 decision. As previously noted, the challenged decision is
16 one allowing a change in a nonconforming use. Thus, while
17 the number of spaces in 1981 may have some bearing on
18 compliance with PCC 33.258.080(B)(1) and (2) (1991), the
19 city was not required by those standards to limit parking on
20 the residentially zoned portion of the property to the
21 number of spaces existing in 1981.

⁹Petitioners rely largely on a site plan submitted in conjunction with a 1985 permit application.

¹⁰Respondent cites evidence submitted on behalf of the applicant showing that there were 29 spaces on the residentially zoned portion of the property in 1992. There is also testimony in the record that at times in the past "more than 60 cars [were] crammed onto the [entire] parking lot * * *. Record 596.

1 As noted above, the city found that the 32 spaces it
2 permitted in the challenged decision is roughly the same
3 number that existed in 1981. Some of the city's findings
4 undeniably suggest the city believed it was limiting the
5 nonconforming portion of the parking lot to the number of
6 spaces existing in 1981. However, other findings make it
7 reasonably clear that the city believed the 32 spaces it was
8 approving approximated the number of spaces existing in
9 1981. One certainly can quibble with the city's
10 characterization of 32 spaces as being approximately the
11 same as 22 spaces, assuming those were the numbers the city
12 was comparing. However, we believe it is sufficiently clear
13 from the decision that the number of parking spaces on the
14 subject property, while a factor in the city's decision, was
15 not the controlling factor in its determination that the
16 relevant standards of PCC 33.258.080(B)(1) and (2) (1991)
17 are met.¹¹

18 We conclude the city's findings make it sufficiently
19 clear that it was relying primarily on the expected
20 reduction in the number of vehicle trips expected to be
21 generated by the site as well as changes in the structure
22 and perimeter landscaping in concluding the standards of PCC

¹¹Under the applicant's original proposal, 67 spaces were proposed for the residentially zoned portion of the parking lot. Although it could be clearer, we conclude the number of parking spaces in 1981 was the controlling factor only in the city's decision to reject the applicant's original proposal to use attended parking to allow the parking lot to be striped for significantly more parking spaces.

1 33.258.080(B)(1) and (2) (1991) are met, regardless of the
2 precise number of parking spaces that may have existed on
3 the residentially zoned portion of the property in 1981.

4 The city's findings are adequate to support its decision.¹²

5 The fourth assignment of error is denied.

6 The city's decision is affirmed.

¹²Except as noted above at n 8, petitioners do not challenge the evidentiary support for these findings.