

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision that a nonconforming
4 use of his property lapsed.

5 **FACTS**

6 This case is before us on remand from the court of
7 appeals' decision in Rhine v. City of Portland, 120 Or App
8 308, _____ P2d _____ (1993) (Rhine II). In Rhine v. City of
9 Portland, 24 Or LUBA 557, 558 (1993), (Rhine I), we stated
10 the following facts:

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

20 "The decision contains the following additional
21 facts:

22 "'In the early 1980's, [petitioner's
23 wife] contracted Alzheimer's disease and
24 [petitioner became her] full-time
25 caretaker. In about 1980, [petitioner]
26 gave his business to his son.
27 [Petitioner's son] withdrew from the
28 business in 1986 and leased the space to
29 another printing company. This printing
30 company subsequently folded in 1987. *
31 * *

32 "'[The planning department] approved the
33 establishment of a nonconforming use for
34 the site from 1981 to mid-1987. This
35 decision [included a] finding that there
36 was no evidence of ongoing activity on

1 the site from May, 1987 onwards.
2 [Petitioner] requested a Type II review
3 in order to establish nonconforming use
4 rights * * *.' Record 8.

5 "The planning department denied petitioner's
6 request for a determination that he has a
7 nonconforming use right to a printing and
8 reprographics business on the subject property.
9 Petitioner appealed to the hearings officer, who
10 determined petitioner had established a limited
11 nonconforming use right for the subject property.
12 Petitioner appealed to the city council. The city
13 council determined that any nonconforming use
14 right petitioner may have had to a printing and
15 reprographics business was lost through nonuse for
16 a period in excess of two years. * * *"

17 We affirmed the city's decision, and stated, among
18 other things:

19 "We agree with the city that, read as a whole, the
20 challenged decision determines that the
21 nonconforming use was discontinued altogether
22 after May, 1987, and the activities which the city
23 found occurred on the site after May, 1987 were
24 different from the prior nonconforming printing
25 and reprographics use." Rhine I, 24 Or LUBA at
26 562.

27 The court of appeals disagreed, stating the city's findings
28 are inconsistent. The court directed us to remand the
29 challenged decision to the city.

30 **DECISION**

31 The court of appeals remanded our decision on a narrow
32 basis. That basis is as follows :

33 "[The city's findings] simultaneously recite that
34 business activity ceased in May, 1987, but that
35 some activity, including printing, was conducted
36 'from 1987 on.' Moreover, the findings and
37 conclusions appear to be founded on the legal

1 premise that a nonconforming use is lost
2 completely if it is not conducted at a 'sufficient
3 level' of intensity. That premise is contrary to
4 our cases applying the law of nonconforming uses,
5 and the city's order does not interpret the
6 ordinance as having - or not having - a meaning
7 that differs from those cases. * * * " Rhine II,
8 120 Or App at 312.

9 The court held:

10 "We conclude that the findings are inconsistent
11 with each other and, in the present posture of the
12 city's order, they do not support the ultimate
13 conclusion. A remand to the city is necessary.
14 We emphasize, however, that the remand is a narrow
15 one. The only question that we require the city
16 to consider is whether petitioner's printing
17 activities that, under its present findings, took
18 place 'from 1987 on' constituted a continuation of
19 the nonconforming use or of some part of the use.
20 * * *." Rhine II, 120 Or App at 314.

21 The city's decision is remanded for the city to
22 consider the question posed by the court of appeals.