



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 This is the second time a city decision determining the  
8 disputed nonconforming use has lapsed has been appealed to  
9 this Board. In Rhine v. City of Portland, 24 Or LUBA 557,  
10 558 (1993) (Rhine I), we stated the following relevant  
11 facts:

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

21 "The [original city decision states] the following  
22 additional facts:

23 "'In the early 1980's, [petitioner's  
24 wife] contracted Alzheimer's disease and  
25 [petitioner became her] full-time  
26 caretaker. In about 1980, [petitioner]  
27 gave his business to his son.  
28 [Petitioner's son] withdrew from the  
29 business in 1986 and leased the space to  
30 another printing company. This printing  
31 company subsequently folded in 1987. \*  
32 \* \*

33 "'[The planning department] approved the  
34 establishment of a nonconforming use for  
35 the site from 1981 to mid-1987. This

1 decision [included a] finding that there  
2 was no evidence of ongoing activity on  
3 the site from May, 1987 onwards.  
4 [Petitioner] requested a Type II review  
5 in order to establish nonconforming use  
6 rights \* \* \*.'"

7 This Board affirmed the original city council decision  
8 which determined that any nonconforming printing and  
9 reprographics business use petitioner may have possessed was  
10 lost through nonuse for a period exceeding two years. The  
11 court of appeals reversed and remanded Rhine I. Rhine v.  
12 City of Portland, 120 Or App 308, 852 P2d 874 (1993) (Rhine  
13 II). As explained below, the court of appeals determined  
14 the city's findings were inadequate.

15 On remand, the city conducted further proceedings and  
16 again determined that any nonconforming use rights had been  
17 lost through the discontinuation of petitioner's business.  
18 This appeal followed.

19 **FIRST ASSIGNMENT OF ERROR**

20 "The City Council erred in changing its findings  
21 contrary to the specific mandate of the Court of  
22 Appeals \* \* \*."

23 The city revised its original findings during the local  
24 proceedings on remand. According to petitioner, the city's  
25 action in changing its findings during the local remand  
26 proceedings is contrary to the scope of the remand specified  
27 by the court in Rhine II. In this regard, petitioner relies  
28 upon the following statements in Rhine II:

29 "We conclude that the findings are inconsistent  
30 with each other and, in the present posture of the

1 city's order, they do not support the city's  
2 ultimate conclusion. A remand to the City is  
3 necessary. We emphasize, however, that the remand  
4 is a narrow one. The only question that we  
5 require the City to consider is whether the  
6 petitioner's printing activities that, under its  
7 present findings, took place from 1987 on  
8 constitute a continuation of the nonconforming use  
9 or of some part of the use." Rhine II, 120 Or  
10 App at 314. (Emphasis supplied.)

11 Petitioner argues the emphasized language limits the city to  
12 its original findings with regard to printing activities  
13 occurring on the property after 1987.

14 We disagree. In addition to the statements quoted  
15 above, the court of appeals explained:

16 " \* \* \* The findings and conclusions are  
17 contradictory. They simultaneously recite that  
18 business activity ceased in May, 1987, but that  
19 some activity, including printing, was conducted  
20 'from 1987 on.' \* \* \* " Rhine II, 120 Or  
21 App at 312.

22 In other words, the court of appeals determined the city's  
23 original findings were inadequate because they were  
24 contradictory. While the court's remand does not require  
25 the city to revise its findings concerning post-1987  
26 printing activities, we do not agree the court's remand  
27 precludes the city from doing so. Provided the revised  
28 findings address the contradiction identified by the court,  
29 they do not exceed the scope of the court's remand.

30 The first assignment of error is denied.

31 **SECOND ASSIGNMENT OF ERROR**

32 "The [city's] findings \* \* \* are inconsistent with  
33 the record and not supported by substantial

1 evidence in the whole record."

2 **THIRD ASSIGNMENT OF ERROR**

3 "The City erred in misconstruing  
4 PCC 33.258.050(D)(1)."

5 **FOURTH ASSIGNMENT OF ERROR**

6 "The City erred in denying the application for  
7 establishment of a nonconforming use."<sup>1</sup>

8 Under the Portland City Code (PCC), a nonconforming use  
9 is lost if it is discontinued for a period of two years.  
10 PCC 33.258.050.D.1 provides the following standard for  
11 determining whether a nonconforming use has been  
12 discontinued:

13 "Discontinuance. If the site of a nonconforming  
14 use is vacant for 2 continuous years, the  
15 nonconforming use rights are lost and the re-  
16 establishment of a nonconforming use if  
17 prohibited. If the site is vacant for less than 2  
18 continuous years, the nonconforming use rights are  
19 maintained." (Emphases supplied.)

20 The city interprets the term "vacant" in the context of  
21 PCC 33.258.050.D.1, as follows:

22 "[A] reduced level of nonconforming activity may  
23 preserve nonconforming use rights. \* \* \* If the  
24 reduced level of nonconforming activity persists  
25 over time, the right to maintain a nonconforming  
26 use may become the right to maintain a  
27 nonconforming use at the reduced level of  
28 activity. The activity being maintained at a  
29 reduced level must, however, be the kind of

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<sup>1</sup>Respondent argues the second, third and fourth assignments of error are inadequately stated to merit review. However, we believe the assignments of error are stated in sufficient detail to enable respondent to prepare a response and to allow review.

1 activity for which nonconforming use rights have  
2 been established or granted. In the case of a  
3 for-profit business, for example, nonconforming  
4 use rights may be preserved under PCC  
5 33.258.050(D)(1) only if the activity on the site  
6 is sufficient to demonstrate a bona fide effort to  
7 provide goods and services for profit." (Emphasis  
8 supplied.) Record 516.

9 In addition, the city interprets vacant to mean "free from  
10 activity consistent with the use of the property for the  
11 purpose for which nonconforming use rights are sought."  
12 Record 517.

13 Petitioner argues the city incorrectly interprets the  
14 term "vacant" to require petitioner to demonstrate  
15 performance of the nonconforming activity as "a bona fide  
16 effort to provide goods and services for profit." Record  
17 516. Petitioner contends the "bona fide effort to provide  
18 goods and services for profit" standard articulated in the  
19 challenged decision is a higher standard than required by  
20 the express requirement in PCC 33.258.050.D.1 that property  
21 simply not be "vacant" for a specified period of time.  
22 Petitioner maintains the "bona fide effort to provide goods  
23 and services for profit" standard does not exist in the PCC,  
24 and is not supported by the PCC.

25 Respondent contends the term "vacant" used in  
26 PCC 33.258.050.D.1 is vague and that the term may be  
27 interpreted to require an absence of "a bona fide effort to  
28 provide goods and services for profit" and to require that  
29 property be "free from activity consistent with the use of

1 the property for the purpose for which nonconforming use  
2 rights are sought."

3 PCC 33.700.070.A establishes rules of construction for  
4 the PCC, and provides:

5 "Reading and applying the code. Literal readings  
6 of the code language will be used. Regulations  
7 are no more or less strict than as stated \* \* \*."

8 Further, PCC 33.910.010 provides:

9 "Words used in the Zoning Code have their normal  
10 dictionary meaning unless they are listed in  
11 [PCC] 33.910.040 below."

12 In Rhine I, we stated the following:

13 "The term 'vacant' is not defined by the PCC.  
14 However, PCC 33.700.070.D.1 and 33.910.010 provide  
15 that 'words used in the zoning code have their  
16 normal dictionary meaning' where they are not  
17 defined by the code. While the city acknowledges  
18 that one ordinary dictionary meaning of the term  
19 'vacant' is 'empty,' the city also points out  
20 another ordinary dictionary meaning of the term  
21 'vacant' is 'free from activity.' The city  
22 contends that the 'free from activity' dictionary  
23 definition of 'vacant' is appropriate, in the  
24 context in which 'vacant' is used in  
25 PCC 33.258.050.D.1 concerning nonconforming uses.

26 "Webster's Third New International Dictionary 2527  
27 (1981) defines 'vacant' as meaning among other  
28 things 'free from activity.' We agree with the  
29 city that 'free from activity' is an ordinary  
30 dictionary meaning of the term 'vacant.' That  
31 definition of 'vacant,' as used in  
32 PCC 33.258.050.D.1, is not inconsistent with the  
33 express words, policy or context of  
34 PCC 33.258.050.D.1, and we defer to the city's  
35 choice between the normal dictionary definitions  
36 of the term. Clark v. Jackson County, 313 Or 508,

1           836 P2d 710 (1992)." Rhine I, 24 Or LUBA at 560.<sup>2</sup>

2           On remand, the city reiterated its original definition  
3 of the term "vacant," in the sense that it determined that  
4 "vacant" property must be "free from activity consistent  
5 with the use of the property for the purpose for which  
6 nonconforming use rights are sought." In Rhine I, we agreed  
7 with this definition and we do not read Rhine II to reject  
8 that definition of the term "vacant."

9           However, in the challenged decision, the city  
10 embellished this definition of the term "vacant" by adding  
11 that it means the absence of "a bona fide effort to provide  
12 goods and services for profit." This is a significant  
13 change to the city's original definition. Under Clark v.  
14 Jackson County, supra, and ORS 197.829 (effective November  
15 3, 1993), we are required to defer to a local government's  
16 interpretation of its own enactment, so long as the local  
17 interpretation is not contrary to the express words, policy  
18 or context of the disputed enactment. Nevertheless, we  
19 agree with petitioner that the city's interpretation of the  
20 term "vacant" to require the absence of "a bona fide effort  
21 to provide goods and services for profit" is contrary to the  
22 express language of PCC 33.258.050.D.1, as the city is  
23 required to interpret and apply that language under PCC

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<sup>2</sup>Although the court of appeals ultimately reversed our decision based upon the manner in which the city's definition of vacant was applied, the court did not specifically state there was anything wrong per se with the city's original definition of the term "vacant."

1 33.700.070.A and 33.910.010.

2 It is not the function of this Board to choose for the  
3 city the appropriate dictionary definition, or to apply that  
4 definition to the facts established in the record relating  
5 to the historic use of petitioner's property. Neither may  
6 this Board determine whether petitioner's property was  
7 "vacant" under PCC 33.258.050.D.1 for the requisite period  
8 of time.<sup>3</sup> Therefore, we remand the challenged decision to  
9 the city to enable it to determine whether petitioner's  
10 property was vacant under a literal reading and normal  
11 dictionary definition of the term "vacant."

12 The second, third and fourth assignments of error are  
13 sustained, in part.<sup>4</sup>

14 **FIFTH ASSIGNMENT OF ERROR**

15 "The City Council erred in deciding this

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<sup>3</sup>In this regard, petitioner cites Hendgen v. Clackamas County, 115 Or App 117, 836 P2d 1369 (1992), and argues that finding 3 in the challenged decision establishes he conducted an adequate level of activity to demonstrate the subject property was not "vacant" for the requisite period of time. Finding 3 provides:

"When the applicant visited his business, he made occasional copies for people in the neighborhood, and passers-by until 1990." Record 517.

We agree that this finding strongly suggests the subject property was not "vacant" for the period of time covered by the finding.

<sup>4</sup>Petitioner argues the evidence in the record does not support the city's determinations that the property was "vacant" for a period in excess of two years. However, we determine above that the city's findings express an improper interpretation of the term "vacant." No purpose is served in reviewing the evidentiary support for findings applying an erroneous legal interpretation.

1 application without the participation of two of  
2 its five members."

3 Petitioner argues two city council members improperly  
4 recused themselves from participating in the local remand  
5 proceedings and that he was entitled to the benefit of their  
6 participation.<sup>5</sup>

7 Respondent argues the two newly elected council members  
8 decided not to participate in the local remand proceedings  
9 because they were not members of the council at the time the  
10 original local proceedings were conducted and were  
11 unfamiliar with the record. Respondent argues there is  
12 nothing wrong with the decision of those council members not  
13 to participate in the local remand proceedings. Respondent  
14 also argues the decision of the two new council members is  
15 consistent with the city charter. Respondent maintains this  
16 assignment of error fails to allege a basis upon which  
17 relief may be granted.

18 We agree with respondent. This assignment of error  
19 provides no basis for reversal or remand of the challenged  
20 decision.

21 The fifth assignment of error is denied.

22 The city's decision is remanded.

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<sup>5</sup>We note that petitioner does not argue the city council lacked a quorum.