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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

RIVER CITY DISPOSAL AND RECYCLING)
and STEVEN J. MCINNIS,)
)
Petitioners,)
)
vs.)
)
CITY OF PORTLAND,)
)
Respondent.)

LUBA No. 98-112

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Jonathan R. Gilbert, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Brownstein, Rask, Arenz, Sweeney, Kerr and Grim.

Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

HOLSTUN, Board Member; GUSTAFSON, Board Chair; participated in the decision.

AFFIRMED 12/15/98

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city hearings officer decision that grants in part and denies in part
4 a request for determination of legal nonconforming status.

5 **FACTS**

6 The subject property is occupied by two businesses—a sewer contracting business
7 operated by George Lind, Jr. (Lind) and a disposal and recycling business operated by
8 petitioner River City Disposal and Recycling (River City).¹ Lind's business occupies an
9 office building located at the front of the property near its frontage with NE Killingsworth
10 Street, as well as part of a storage building located at the rear of the property. River City
11 occupies three areas of the property: (1) an office trailer located in the central part of the
12 property; (2) an outdoor work area located next to the office trailer,² and (3) two storage
13 buildings located at the rear of the property.³

14 The Lind business has operated on the site since 1926. In 1961, Multnomah County
15 approved an expansion of Lind's business. The approved expansion included one of the
16 sheds located at the rear of the property. The 1961 decision also noted that the site was then
17 being used for "exterior storage of [Lind's] equipment, forms and vehicles." Record 7. River
18 City began operations on the subject property in 1995, leasing part of the property from
19 Lind.⁴

¹George Lind, Jr. was the applicant below.

²According to the decision, "River City stores a variety of medium and light trucks on the open portion of the site, as well as empty dumpsters and containers." Record 4.

³Part of the same storage building that is used by Lind, is also used by River City for maintenance and repair of containers. River City uses the other storage building located at the rear of the property for vehicle storage.

⁴According to the challenged decision:

1 The property is zoned R2h (Low-Density Multi-Dwelling Residential with Aircraft
2 Landing Zone overlay). The R2h zone does not allow either of the businesses that occupy
3 the subject property. The two business may only operate on the subject property if they
4 qualify as nonconforming situations.⁵ The challenged decision approved nonconforming
5 status for Lind's "sewer contracting business, as an Industrial Service use, at this site, with
6 interior storage of equipment and materials only." Record 12. Specifically, the decision
7 finds that Lind's use of the property for exterior storage was not "maintained over time" with
8 the result that such exterior storage "lost its legal nonconforming status." Id. The decision
9 also denies nonconforming status for all aspects of River City's operation.

10 **INTRODUCTION**

11 When zoning laws change, uses that were previously allowed may be prohibited, and
12 development standards may change such that existing development associated with permitted
13 or nonconforming uses is inconsistent with the new zoning standards. Under relevant
14 Portland City Code (PCC) provisions, if such uses or development were lawfully established
15 under prior zoning laws, they may continue as nonconforming uses and nonconforming
16 developments. PCC 33.258.010. The more general term "nonconforming situations"
17 encompasses both "nonconforming uses" and "nonconforming development." PCC
18 33.258.030.

"River City * * * operates approximately eight trucks from this location. The trucks leave the site between 6 a.m. and 7 a.m., delivering empty waste and recycling containers to customers, picking up loaded containers, delivering loaded containers to landfills, transfer stations or recycling centers. The trucks typically return to the site between 6 p.m. and 7 p.m. River City also operates two pump trucks out of the site. These vehicles pump out septic tanks, grease traps and catch basin separators at off-site locations and deliver the waste to appropriate treatment plants. No waste or port-a-potties are brought to the site. Servicing of trucks and drop boxes also occurs on the site." Record 3.

⁵As explained below, under the city code, "nonconforming situations" include "nonconforming uses" and "nonconforming development."

1 The applicant initially attempted to utilize an abbreviated procedure that the city
2 provides, under which the existence of a nonconforming situation may be established using
3 "standard evidence" to establish (1) that the use or development "was allowed when
4 established" and (2) has been "maintained over time."⁶ PCC 33.258.038. The applicant's
5 attempt to document the existence of a nonconforming situation on the subject property
6 under PCC 33.258.038 was not successful and is not at issue in this appeal.

7 If the existence of a nonconforming situation cannot be documented through the use
8 of standard evidence under PCC 33.258.038, the city offers other procedures for establishing
9 and expanding nonconforming situations. Those procedures were used in the decision
10 challenged in this appeal, and are noted briefly below.

11 **A. Determination of Legal Nonconforming Status Review**

12 PCC 33.258.075 provides a Type II review procedure to establish the existence of a
13 nonconforming situation using evidence other than the "standard evidence" required by PCC
14 33.258.038.⁷ The criteria that guide that determination are set out at PCC 33.258.075 and
15 are substantively the same as the criteria in PCC 33.258.038.⁸

⁶Standard evidence that a use was allowed when established is limited to "[b]uilding, land use, or development permits; or [z]oning codes or maps." PCC 33.258.038(A). Standard evidence that the use has been maintained over time is limited to "[u]tility bills; [i]ncome tax records; [b]usiness licenses; [l]istings in telephone, business, or Polk directories; [a]dvertisements in dated publications; or [b]uilding, land use, or development permits." PCC 33.258.038(B).

⁷Under the city's Type II procedure, an initial decision is made by planning staff and that decision may be appealed to the city land use hearings officer.

⁸As relevant, PCC 33.258.075(D) provides:

- "1. The legal status of the nonconforming situation will be certified if the review body finds that:
 - "a. The nonconforming situation would have been allowed when established;
 and
 - "b. The nonconforming situation has been maintained over time."

1 **B. Change of Nonconforming Uses**

2 PCC 33.258.050(B) also allows a change in a nonconforming use to another use in
3 the same category by right, if certain specified off-site impact standards are met.⁹ As part of
4 the application that led to the challenged decision, the applicant sought after-the-fact
5 approval to change Lind's nonconforming business to encompass River City's operation
6 through the PCC 33.258.050(B) provisions for changing nonconforming uses. See n 9. As
7 explained below, the hearings officer denied that part of the request, concluding that certain
8 off-site impact standards of PCC 33.262 would not be met.¹⁰

9 **ASSIGNMENT OF ERROR**

10 Petitioners allege a single assignment of error with several subassignments of error.
11 We address each subassignment of error separately below.

12 **A. Legal Status of the Non-Conforming Situation**

13 Petitioners argue that the hearings officer erred by requiring that Lind's business and
14 River City's business separately establish that each business "would have been allowed when
15 established," under PCC 33.258.075(D)(1). See n 8.

16 The hearings officer found that Lind's sewer contracting business was legally
17 established under PCC 33.258.075(D)(1). Petitioners point out that River City's and Lind's

⁹As relevant, PCC 33.258.050(B) provides:

"A change [of a nonconforming use] to another use in the same use category is allowed by right, provided that the off-site impact standards of Chapter 33.262, Off-Site Impacts, are met. The applicant must document in advance that the nonconforming use will meet the off-site impact standards. * * *"

¹⁰Finally, where an applicant wishes to change a nonconforming use to another use in the same use category but cannot meet the specified off-site impact standards, approval of the change can be sought through a "Nonconforming Situation Review" under PCC 33.258.080. PCC 33.258.080(B) sets out approval criteria that must be met to approve a change of use in that circumstance. In this case, the applicant did not separately pursue approval through a nonconforming situation review under PCC 33.258.080. Presumably that option remains open to the applicant.

1 businesses are both "Industrial Service" uses under PCC 33.920.300. From that fact,
2 petitioners reason:

3 "The 'non-conforming situation' in question in this matter is the 'Industrial
4 Service Use' established by [Lind] and continued by [River City]. Because
5 the 'Industrial Service Use' was allowed when established, the approval
6 criterion in PCC 33.258.075(D)(1)(a) was met by applicant River City."
7 Petition for Review 5.

8 In making the above argument, petitioners also rely on PCC 33.910 which states that a
9 nonconforming situation "may be nonconforming in more than one aspect."

10 We fail to see how the fact that a nonconforming situation may be composed of
11 multiple nonconforming uses obviates the requirement that each of those nonconforming
12 uses "would have been allowed when established" under PCC 33.258.075(D)(1)(a).
13 Petitioners' argument appears to be that it is the Industrial Service use category that is the
14 nonconforming use and that whatever Industrial Service use is legally established may
15 subsequently be changed to, or joined by, any other Industrial Service use, as a matter of
16 right. If that is petitioners' argument, it is without merit and was correctly rejected by the
17 hearings officer.

18 PCC 33.258.050(B), quoted above, specifically allows a nonconforming use to be
19 changed to another use in the same category, but only if the applicant demonstrates in
20 advance that off-site impact standards will be met by the new use.¹¹ That provision is clearly
21 at odds with petitioners' apparent position that establishment of one nonconforming use ipso
22 facto allows any other use in the same use category that may later be added to the property.

23 The first subassignment of error is denied.

¹¹We believe a change in use includes adding a new use to an existing nonconforming use. There is no claim that when River City began operation in 1995 it established at that time that the relevant off-site impact standards would be met.

1 **B. The Hearings Officer's Decision Concerning Uses that were Established**
2 **and Maintained Over Time**

3 The hearings officer found that River City's office and exterior work area were not
4 allowed on the site when established. The hearings officer also found that the exterior
5 storage area initially established by Lind had not been maintained over time. Petitioners
6 contend these findings are not supported by substantial evidence.

7 **1. River City's Office and Exterior Work Area**

8 Petitioners' evidentiary challenge concerning the hearings officer's finding regarding
9 the office trailer and outdoor work area is based on the following testimony contained in an
10 affidavit signed by Lind:

11 "2. The area of the concrete pad constructed in 1995 by River City
12 Disposal and Recycling at the east side of the [subject] property was
13 formerly covered with gravel and was used continuously from at least
14 1960 until 1995 as an area for storage of equipment, trucks and
15 material relating to my and my father's contracting business.

16 "3. The attached aerial photographs accurately depict the [subject
17 property] in the years 1966, 1972, 1978, 1989, 1991 and 1995.

18 "4. The attached aerial photographs show exterior storage of construction
19 equipment and materials used as part of my contracting business.

20 "5. From at least 1960 through 1995, there existed storage sheds on the
21 site, as well as an office trailer at the southern end of the site. This
22 office trailer is shown on the aerial photographs in the space just
23 northeast of the 'L' shaped building at the southern end of the property.
24 The floor area of River City Disposal and Recycling's office trailer is
25 less than the combined floor area of the office trailer and storage
26 structures which existed on the site." Record 46-47.

27 Petitioners contend that in the absence of contrary testimony, the above affidavit testimony
28 constitutes substantial evidence that the office trailer and outdoor work area were allowed
29 when established and have been maintained over time.

30 The hearings officer's decision includes the following findings concerning the River
31 City office trailer and paved work area:

1 "Although Mr. Lind's affidavit states that there was an office trailer on the site
2 from at least 1960, such a trailer was not shown on [a] 1965 site plan. The
3 aerial photographs relied on by the applicant are so unclear as to not provide
4 substantial evidence of any particular use of the site. A review of Bureau of
5 Buildings records indicates no additional building permits have been issued
6 since March 1965 that would have allowed the placement of the office trailer
7 or construction of the paved exterior work area.

8 * * * * *

9 "The existence of a graveled area is not supported by any evidence other than
10 Mr. Lind's affidavit, which has not been supported by the facts on another
11 issue. The scale and quality of the aerial photographs make it impossible to
12 tell what is or was on the site at any particular time.

13 "Even if the paved area could be shown to not be an expansion of an exterior
14 improvement, questions arise regarding the use of the area. As discussed,
15 there is not substantial evidence showing for what the graveled area was used
16 as part of the contracting business. There is not substantial evidence to allow
17 a conclusion whether the current use for washing and storing River City
18 trucks is the same as Mr. Lind's previous use, or whether it constitutes a
19 change or expansion of that use."¹² Record 7.

20 The question presented in this appeal is not whether the affidavit testimony and aerial
21 photographs constitute substantial evidence that could support a decision by the hearings
22 officer that the River City office trailer and outdoor work area were legally established by
23 Lind and maintained over time. The question presented in this appeal is whether the hearings
24 officer's contrary decision that the office and outdoor work area were not legally established
25 and maintained over time is supported by substantial evidence.

26 As we have explained on numerous occasions, LUBA does not replicate the role of
27 the hearings officer in considering whether a land use decision is supported by substantial
28 evidence. Douglas v. Multnomah County, 18 Or LUBA 607, 617-18 (1990). Where the
29 evidence in the record on review is conflicting, such that a reasonable decision maker could
30 reach different conclusions based on that evidence, the choice of which evidence to believe
31 and which conclusion to reach is for the local decision maker. Younger v. City of Portland,

¹²The 1965 site plan referenced by the hearings officer appears at Record 114.

1 305 Or 346, 360, 752 P2d 262 (1988); City of Portland v. Bureau of Labor and Ind., 298 Or
2 104, 119, 690 P2d 475 (1984); Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990);
3 Douglas, 18 Or LUBA at 617-18. This Board may not reweigh the evidence and substitute
4 its conclusions for the conclusions reached by the local decision maker in such
5 circumstances. 1000 Friends of Oregon v. Marion County, 116 Or App 584, 842 P2d 441
6 (1992); Heceta Water District v. Lane County, 24 Or LUBA 402, 427 (1993).

7 Moreover, a petitioner at LUBA assumes a particularly difficult burden where the
8 local decision maker concludes that a party with the burden of proof failed to carry that
9 burden locally. In challenging such a decision at LUBA on evidentiary grounds, a petitioner
10 must demonstrate to LUBA that the party carried its burden of proof before the local decision
11 maker as a matter of law. Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d
12 1241 (1979); Chemeketa Industries Corp. v. City of Salem, 14 Or LUBA 159, 163 (1985);
13 Weyerhaeuser v. Lane County, 7 Or LUBA 42, 46 (1982).

14 In this case the hearings officer explicitly chose not to believe the testimony
15 contained in the affidavit. The hearings officer gave several reasons why she did not find
16 that testimony persuasive (poor quality of the aerial photographs, lack of building permits,
17 and failure to show the office or work area on the 1965 conditional use permit site plan).
18 The evidence cited by petitioners falls short of demonstrating that, as a matter of law, the
19 applicant below carried his burden to demonstrate that the office trailer and outdoor work
20 area currently used by River City was legally established by Lind and maintained over time.

21 This subassignment of error is denied.

22 **2. Lind's Outdoor Storage Area**

23 The hearings officer found that evidence did not establish that the outdoor storage
24 area originally used by Lind has been maintained over time. Petitioners argue that finding is
25 not supported by substantial evidence.

1 Again petitioners must demonstrate that the evidence that was submitted to the
2 hearings officer establishes that the applicant carried his burden of proof as a matter of law.
3 Petitioners rely on the Lind affidavit and four additional affidavits. One affidavit signed by a
4 former Lind employee (Mulberry affidavit) states that the subject property was used by Lind
5 for outdoor storage of heavy equipment and construction materials between 1960 and 1973.¹³
6 Record 202. Another affidavit signed by a supplier of metal and concrete pipe (Town
7 affidavit) includes testimony that the site was used for outdoor storage of heavy equipment
8 and construction materials between 1951 and 1985. A third affidavit signed by a heavy
9 equipment salesman (Prock affidavit) states that heavy equipment and construction materials
10 were stored outdoors on the subject property by Lind between 1976 and 1986. A final
11 affidavit signed by a leasing agent (Longanecker affidavit) states that the affiant observed
12 "heavy equipment and building materials continuously stored outdoors at the site, for the
13 period of 1988 to the present." Record 45.

14 The hearings officer notes in her decision that notwithstanding the claim in the Lind
15 affidavit regarding continuous outdoor storage, planning bureau staff visits to the site in 1998
16 revealed that only River City was using the property for outdoor storage. The hearings
17 officer chose not to believe the allegations in the Lind affidavit, which is the only affidavit
18 that addresses the entire relevant period of time. The hearings officer notes that the
19 Mulberry, Town and Prock affidavits do not address the question of whether outdoor storage
20 was continued by Lind after 1986. Finally, with regard to the Longanecker affidavit, the
21 hearings officer notes that the affiant does not state that the outdoor storage observed since
22 1988 belonged to Lind.¹⁴

¹³The affiant states that he visited the site on one occasion after 1973 and witnessed Lind continuing to use the site for outdoor storage, but the affiant could not remember the date of that subsequent visit.

¹⁴Because River City has used the property for outdoor storage since 1995, the hearings officer said she could not tell from the affidavit whether the outdoor storage observed after 1995 belonged to Lind or to River

1 Based on our review of the evidence in the record cited by the parties, a reasonable
2 trier of fact could conclude that the applicant failed to carry his burden of proof. Therefore,
3 the hearings officer's decision is supported by substantial evidence. Jurgenson, 42 Or App at
4 510. Again, it may be that the affidavits noted above would also constitute substantial
5 evidence to support a conclusion that Lind has maintained outdoor storage on the property.
6 However, they fall well short of establishing that proposition as a matter of law. Petitioners
7 place great weight on the fact that Lind's affidavit is not contradicted by opposing affidavits.
8 However, the hearings officer is not required to defer to an unopposed affidavit as
9 establishing the alleged facts. Id. Here the hearings officer adequately explains why she did
10 not find the Lind affidavit persuasive.

11 **D. Change of Use and Compliance with Off-Site Impact Standards**

12 While the hearings officer concluded that River City failed to demonstrate that its use
13 of the subject property was allowed when established, as previously noted, PCC
14 33.258.050(B) allows a change in a nonconforming use to another use in the same use
15 category if the off-site impact standards in PCC 33.262 are met. See n 9. However, the
16 hearings officer found that River City had not met and could not meet off-site impact
17 standards for noise and odor.

18 **1. Odor**

19 Issues were raised during the local proceedings before the hearings officer concerning
20 odors from empty dumpsters on the subject property. In support of its contention that River
21 City could meet the off-site odor standard, the applicant submitted no direct evidence and
22 attempted to rely instead on the lack of claims concerning odor violations in an earlier code
23 enforcement proceeding. The hearings officer's decision explains:

City. If that outdoor storage was River City's, Lind's outdoor storage was not "maintained over time," as required by PCC 33.258.075(D)(1)(b). See n 8.

1 "The applicant has presented no evidence showing whether or not the odor
2 standards can be met. The applicant has only argued that no odor complaints
3 were brought in the February [enforcement] proceedings, so that there is no
4 evidence that River City cannot meet the standards. The applicant has the
5 burden of proof to show that Off-Site Impacts standards will be met. The
6 citizens and the city do not have the burden of showing that those standards
7 cannot be met. In light of the evidence presented, the weight of the evidence
8 indicates it is very questionable whether the odor standards are being met."
9 Record 11.

10 The hearings officer then concluded that the applicant failed to carry his burden of proof to
11 demonstrate that the off-site impact standard for odor was met. Record 12.

12 The hearings officer's findings adequately explain why she concluded the applicant
13 failed to carry his burden of proof. We reject petitioners' argument that, in the face of
14 testimony about possible off-site odor problems associated with River City's operation, a lack
15 of odor-based complaints in an earlier code enforcement proceeding constitutes substantial
16 evidence that the off-site odor standards will be met. The hearings officer's finding that the
17 applicant failed to carry his burden of proof regarding the off-site odor impact standard is
18 supported by substantial evidence.

19 **2. Noise**

20 It is unclear in the decision whether the hearings officer believed the relevant off-site
21 noise standard is 65 decibels (as provided in a stipulated agreement between River City and
22 respondent) or 55 decibels (as required by the PCC for residential zoning). The first part of
23 the decision appears to conclude that the relevant standard is 65 decibels, but the latter part
24 of the decision appears to apply the 55 decibel standard. It is clear that the hearings officer
25 found that River City has violated and would continue to violate the 55 decibel standard, and
26 that finding is supported by the evidence in the record. With regard to the 65 decibel
27 standard, the hearings officer found that River City has violated that standard on two
28 occasions in the past, and the record supports that finding. However, it is not clear whether
29 the hearings officer also found River City could not meet the 65 decibel standard in the
30 future.

1 Because we have already determined that the hearings officer's decision that the
2 applicant failed to carry its burden to demonstrate River City would comply with the off-site
3 odor standards is supported by substantial evidence, no purpose would be served by
4 remanding the decision for clarification concerning which off-site noise standard applies and
5 whether the 65 decibel standard is met, even if 65 decibels is the applicable standard.

6 This subassignment of error is denied.

7 The city's decision is affirmed.