

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the city council denying
4 petitioner's appeal of the planning commission's interpretation
5 of Portland City Code (PCC) provisions regulating petitioner's
6 auto towing operation.

7 FACTS

8 Petitioner operates a contract towing operation on four
9 contiguous parcels. The three parcels adjoining NE Union Ave.
10 are zoned Light Manufacturing (M3). The fourth parcel, which
11 adjoins NE Grand Ave., is zoned Multi-family Residential (R2).
12 The present zoning was applied in 1957 and 1959. Record
13 59-60. Prior to 1955, the property was used for a repair
14 garage. From 1955 until petitioner began using portions of the
15 property for its towing operation in November, 1986 the
16 property was used as a used car lot. Petitioner was using the
17 entire property for its towing operation by September, 1987.

18 Ninety percent of petitioner's towing business is police
19 ordered towing; ten percent is privately ordered tows. In
20 about 75% of the cases, towed cars are stored on petitioner's
21 property until either the cars are retrieved by their owners or
22 the statutory lien period expires and the vehicles are
23 auctioned or removed for salvage. Some of the towed vehicles
24 have been in accidents and are damaged. Approximately 100 cars
25 are processed each month. Petitioner uses a tow truck
26 exceeding 18,000 lbs. gross vehicle weight (GVW) in its

1 operation. Petitioner also uses other, lighter tow trucks.

2 On December 30, 1987, after receipt of a notice of code
3 violation from the city Bureau of Buildings, petitioner filed
4 a code interpretation request with the city planning director
5 under PCC 33.205.040.A.¹ Petitioner's letter asked whether
6 its towing operation is an allowable use under M3 zoning.

7 On January 27, 1988, the planning director issued an
8 interpretation in which he concluded (1) "[t]he use of an M3
9 site for a 'tow for hire' business is permitted as a * * * use
10 similar in nature to a Group 4 use;" (2) " * * * any vehicles
11 that are towed to the site, * * * damage[d] or not, must be
12 stored inside a structure;" and (3) "any tow vehicles used
13 * * * must be less than 18,000 lbs. GVW * * *." Record 47.

14 Petitioner appealed the planning director's interpretation
15 to the planning commission, which upheld the director's
16 interpretation on June 14, 1988. Record 111. On June 28,
17 1988, petitioner appealed the planning commission's
18 interpretation to the city council, and also requested
19 clarification by the planning commission. Record 38-46,
20 97-99. On July 12, 1988, the planning commission modified its
21 interpretation to provide that it is permissible for vehicles
22 18,000 lbs. GVW or greater to "visit sites in the M3 zone in
23 the course of operation of [a] business in that zone."
24 Record 23. The city council denied petitioner's appeal on
25 September 21, 1988. Record 8. This appeal followed.

26 //

1 INTRODUCTION

2 The PCC does not specifically list automobile towing as a
3 permitted use in the M3 zone. However, PCC 33.50.020(8)
4 provides that the uses permitted in the M3 zone include "other
5 light, non-nuisance manufacturing [uses found to be] similar
6 to" the uses listed in PCC 33.50.020(1)-(7) through the code
7 interpretation process of PCC 33.205.040.² In this case, the
8 city found, pursuant to PCC 33.50.020(8) and 33.205.040, that
9 petitioner's automobile towing operation is a permitted use in
10 the M3 zone as a use similar to "Group 4" uses.³ The Group 4
11 uses allowed in the M3 zone are the following:

- 12 "A. Group 4 uses listed in Section 33.42.020,⁴
- 13 "B. Auto reconditioning, painting, upholstering,
14 motor rebuilding,
- 15 "C. Body and fender work,
- 16 "D. Retail sales, service and rental of new or used
17 trailers, excluding truck trailers,
- 18 "E. Retail sales, service and rental of new or used
19 motor vehicles not to exceed a gross vehicle
20 weight of 18,000 pounds,
- 21 "F. Car washing by mechanical means;
- 22 "G. Household moving centers, trucks for rent shall
23 not exceed a gross vehicle weight of 18,000
24 pounds." PCC 33.50.020(4).

25 This aspect of the city's interpretation of the
26 applicability of the PCC's M3 zoning district provisions to
27 petitioner's automobile towing operation is not in dispute.
28 However, petitioner does dispute the city's interpretation of
29 the PCC M3 provisions to impose certain limitations on the

1 manner in which petitioner's automobile towing operation may be
2 operated in the M3 zone. In the first assignment of error,
3 petitioner challenges the city's interpretation that storage of
4 towed vehicles in the M3 zone must be conducted entirely within
5 buildings. In the third assignment of error, petitioner
6 challenges the city's interpretation that a towing vehicle of
7 18,000 lbs. GVW or more may only "visit" its M3 site in the
8 course of its towing business, but may not be parked or stored
9 there.⁵ In the fourth assignment of error, petitioner
10 challenges the city's interpretation that the M3 zone does not
11 allow storage of petitioner's towed vehicles in the off-street
12 parking spaces required by the M3 zone.

13 FIRST ASSIGNMENT OF ERROR

14 "The interpretation states that 33.50.030 of Portland
15 City Code (Code) requires that all auto-related
16 activities in an M3 zone must take place 'wholly
17 within completely enclosed buildings' * * *.
18 Petitioner, relying on [a] plain and unambiguous
19 reading of 33.50.030, as well as the entire M3 section
20 (33.50), and a subsequent March 10, 1988 Director's
21 opinion in a different case * * * finds no such all
22 encompassing limitation on outdoor storage of
23 vehicles; therefore, outdoor storage of undamaged
24 vehicles is allowed in [the] M3 zone."

25 The key provision of the M3 zone at issue in this
26 assignment of error is PCC 33.50.030 ("Limitations on Use"),
27 which provides as relevant:

28 "(a) Groups 1 to 7, inclusive:

29 "(1) Any uses and operations objectionable due to
30 unsightliness, odor, dust, smoke, noise, glare,
31 heat, vibration, and other similar causes shall
32 be prohibited;

33

1 " * * * * *

2 "(b) Groups 3 and 7:

3 "Such uses are permitted in M3 Zones only if all
4 activities and operations, except off-street
5 loading and parking, are confined, contained, and
6 conducted wholly within completely enclosed
7 buildings except retail building material outlets
need not be entirely within enclosed buildings
provided all outside activities and operations,
including outside storage, are completely
enclosed by a sight-obscuring screen * * *.

8 "(c) Group 4:

9 "(1) Firms whose primary activity is salvaging
10 parts from wrecked vehicles are not
permitted in M3 Zones.

11 "(2) Lubrication, repair and servicing, tube and
12 tire repairing, battery service, body and
13 fender painting, upholstery work, and
storage of materials and equipment shall be
confined, contained and conducted wholly
within completely enclosed buildings.

14 "(3) Retail sales and/or rental as permitted in
15 Item (7), Group 4, Section 33.42.020 and
16 Items D and E, Group 4, Section 33.50.020
shall be allowed if:

17 "A. Any repair of automobiles, trucks or
18 trailers is conducted and confined
wholly within a building; and

19 "B. Sight-obscuring screening is provided
20 as required in Chapter 33.82 (Parking
Regulations).

21 " * * * * * "

22 Petitioner disagrees with the planning director's statement
23 that PCC "33.50.030 requires that all auto-related activities
24 * * * must take place wholly within completely enclosed
25 buildings." (Emphasis in original.) Record 47. Petitioner
26 argues that PCC 33.50.030(c)(2) and (3) specifically list

1 Group 4 activities which must be conducted wholly within
2 buildings, and that the temporary storage of undamaged towed
3 vehicles is not so listed. According to petitioner, this is a
4 classical case for application of the statutory construction
5 rule of "inclusio uno, exclusio todo." Petitioner asserts that
6 in Allen v. City of Portland, 15 Or LUBA 464, 469, rev'd other
7 grounds, 87 Or App 459, 742 P2d 701 (1987), rev den 305 Or 103
8 (1988), we held that a PCC provision clearly listing the types
9 of use exempt from an otherwise applicable regulation could not
10 be interpreted to include a type of use not so listed.

11 Petitioner also contends that because PCC 33.50.030(c)(2)
12 and (3) unambiguously require certain specific Group 4
13 activities to be conducted within buildings, but do not mention
14 the activity petitioner carries out, these provisions cannot be
15 interpreted to impose such a requirement on petitioner's
16 activity. Petitioner relies on City of Hillsboro v. Housing
17 Devel. Corp., 61 Or App 484, 488, 657 P2d 726 (1983)
18 (unambiguous statute should not be interpreted). Finally,
19 petitioner argues the requirement of PCC 33.50.030(c)(2) that
20 "storage of materials and equipment" occur wholly within
21 buildings applies only to the storage of items used for
22 activities listed in PCC 33.50.030(c)(2), such as lubrication,
23 repair, painting. In the alternative, petitioner argues that
24 if this provision has a generic application to all materials
25 and equipment, regardless of use, then it applies to materials
26 and equipment used in towing, not to towed vehicles.

1 Petitioner also argues that the city's interpretation is
2 inconsistent with a March 10, 1988 planning director
3 interpretation in a case involving an unrelated business,
4 Foster Rentals (Foster interpretation) stating that in the M3
5 zone "Group 4 uses are allowed to have outside storage, with
6 the limitation that all repair must take place inside buildings
7 * * *." Record 6. Finally, petitioner argues the fact "tow
8 for hire" is not specifically listed as a permitted use in the
9 M3 zone (but rather is allowed as a use similar to listed
10 Group 4 uses) is not justification for imposing a requirement
11 that towed vehicles be stored in a building.⁶

12 The city asserts that the question to be answered in this
13 assignment of error is how the provisions of PCC 33.50.030
14 ("Limitations on Use") apply to petitioner's automobile towing
15 operation.⁷ The city argues that interpretation of these
16 provisions requires a determination of their legislative
17 purpose and application of that purpose to the facts.

18 With regard to legislative purpose, the city argues that
19 descriptions in its comprehensive plan of the light industrial
20 plan designation and zoning district show that the plan
21 envisions the mixing of residential, commercial and industrial
22 uses in the M3 zone. The city also cites plan goals and
23 policies which encourage retaining the character of established
24 residential neighborhoods, allow for the continuation and
25 enhancement of mixed use areas and require preservation and
26 enhancement of the stability and diversity of the City's

1 neighborhoods.⁸ The city argues that the only way to
2 implement these goals and policies in the M3 zone is by placing
3 limitations on uses which have off-site impacts that are
4 incompatible with surrounding uses. According to the city,
5 PCC 33.50.030 carries out this legislative policy.

6 The city contends an analysis of PCC 33.50.030 shows the
7 following:

8 "1. The section applies to all uses in the zone.

9 "2. It is intended that all uses, activities and
10 storage be conducted in wholly enclosed buildings
except for:

11 "a. off-street loading and parking

12 "b. retail building materials outlet

13 "c. motor vehicle and trailer retail sales or
14 rental." Respondent's Brief 11.

15 The city also argues in this case the outdoor storage of
16 damaged vehicles is detrimental to surrounding business and
17 residential neighborhoods, and enforcement of a limitation on
18 outdoor vehicle storage will enhance the business environment
19 on Union Avenue. The city argues that in order to carry out
20 the intent of the PCC and plan, PCC 33.50.030 must be applied
21 to petitioner's towing operation in the M3 zone to require
22 storage of towed vehicles wholly within completely enclosed
23 buildings. The city contends storage of towed vehicles does
24 not fall within the exception from PCC 33.50.030 for sale or
25 rental of new and used vehicles. The city found vehicle sales
26 and rental is different from the storage of towed vehicles

1 because, in the former instance, the vehicles have more space
2 between them and are generally kept clean. Record 14.

3 The city also responds that the March 10, 1988 Foster
4 interpretation cited by petitioner is not inconsistent with the
5 interpretation appealed in this case. The city points out that
6 an interpretation of the code is only applicable to the parties
7 to that proceeding and to the same facts. The city asserts
8 that with regard to Group 4 uses, the Foster interpretation
9 only permitted rental of trailers to be conducted outside a
10 building, as specifically allowed by PCC 33.50.030(c)(3).
11 Finally, the city argues that, although parking lots for a fee
12 are recognized as permitted uses in some zones, such use does
13 not encompass use of property for towing and storage of
14 vehicles.

15 In Sevcik v. Jackson County, ___ OR LUBA ___ (LUBA No.
16 87-087, May 23, 1988), slip op 4 we stated the following with
17 regard to our scope of review in interpreting local government
18 ordinances:

19 "The interpretation of local ordinance provisions is a
20 question of law which LUBA reviews for correctness.
21 McCoy v. Linn County, 90 Or App 271, 275, 752 P2d 323
22 (1988); Gordon v. Clackamas County, 73 Or App 16, 21,
23 698 P2d 49 (1985). Although we give some weight in
24 our review to the local government's interpretation of
25 its own enactment, where that interpretation is not
clearly contrary to the express language and intent of
the enactment, our acceptance or rejection of that
interpretation is determined by whether we believe the
interpretation to be correct. McCoy v. Linn County,
90 Or App at 275-276; Fifth Avenue Corp. v. Washington
Co., 282 Or 591, 599-600, 581 P2d 50 (1974).

26 In this case the city council's interpretation of the

1 application of the M3 zone to petitioner's storage of towed
2 vehicles is based on four rationales. We will consider each in
3 turn.

4 A. Not a Parking Lot

5 The city council's findings state:

6 "Meeting parking lot design requirements is
7 impractical for vehicle towing yards. Parking lots
8 are required to have perimeter and internal
9 landscaping, screening, lighting and bumper stops. In
10 addition, each space must include 250 square feet of
11 parking and maneuvering room and be accessible without
12 moving another vehicle. It is not practical for tow
13 yards to meet these requirements." Record 14.

14 Petitioner does not claim its towing operation qualifies as
15 a parking lot. However, the fact that petitioner's operation
16 does not qualify as a parking lot is not a sufficient basis for
17 sustaining the city's interpretation, if petitioner is correct
18 that the M3 zone does not prohibit outdoor storage of towed
19 vehicles as part of a recognized "Group 4" permitted use.

20 B. Not a Listed Use

21 The city council's findings state:

22 "'Tow for hire' uses are not a listed use in the M3
23 zone. Therefore, a conservative interpretation of not
24 allowing outside storage of towed vehicles provides
25 more control of potential negative off-site effects
26 which may be associated with this unlisted use." Id.

27 The city is correct that "tow for hire" is not a listed use
28 in the M3 zone. However, the city determined petitioner's use
29 is a permitted Group 4 use in the M3 zone as a "similar" use
30 under PCC 33.50.020(8), and that determination is not
31 challenged in this appeal. The city has neither cited code

1 provisions nor given any other explanation demonstrating why it
2 may impose a restriction on an unlisted "similar" Group 4 use
3 which is not applicable to a listed Group 4 use. Similarly,
4 the city offers no argument as to why limitations on M3 Group 4
5 uses in the PCC should be interpreted more strictly for
6 unlisted "similar" Group 4 uses. The above-quoted rationale
7 does not support the city's interpretation.

8 C. Objectionable Use

9 The city's findings state:

10 " * * * the intent of the code is to provide visual
11 protection for residential and commercial
12 neighborhoods in these zones. Section 33.50.030(a)(1)
13 places a prohibition on 'operations objectionable due
14 to unsightliness and noise . . '. The [City Council]
15 finds that Union Avenue, as well as the residential
16 neighborhood on NE Grand, must be protected from such
17 uses." Record 14-15.

18 We agree with the city that PCC 33.50.030(a)(1) applies to
19 all uses in the M3 zone, and that it prohibits uses which are
20 objectionable due to unsightliness or noise. Thus, PCC
21 33.50.030(1)(a) could be a valid basis for determining that
22 outdoor storage of towed vehicles is not permitted in the M3
23 zone if the city determined that such storage is
24 "objectionable" due to unsightliness or a similar cause.
25 However, the city has not made such a determination.⁹ The
26 above-quoted rationale does not provide support for the city's
27 interpretation.

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1 D. Not Sales of New or Used Vehicles

2 The city's findings state:

3 "The most applicable group of uses within the M3 zone
4 are the Group 4 uses. The zoning code explicitly
5 limits Group 4 uses to be conducted within fully
6 enclosed buildings. The only exception are [sic] new
7 and used vehicle sales. The [City Council] finds that
8 vehicle sales are different from storage of towed
9 vehicles. Vehicles for sale have more spacing between
10 them and are generally kept clean to enhance sales."
11 (Emphasis added.) Record 14.

12 The portion of the quoted rationale emphasized above
13 demonstrates that the basis for the city's interpretation that
14 outdoor storage of towed vehicles is prohibited in the M3 zone
15 is a belief that the PCC requires all Group 4 uses in the M3
16 zone to be conducted wholly within buildings, except for new
17 and used vehicle sales. This explanation of the city's
18 rationale is supported by the following statement in the city
19 council's findings:¹⁰

20 " * * * In 1985, with regard to Les Schwab Tires, the
21 Planning Commission determined that all activities
22 associated with Group 4 uses have to be conducted
23 within fully enclosed buildings." Record 14.

24 It is also supported by the city's analysis of the effect of
25 PCC 33.50.030 in its brief, quoted supra.

26 We agree with the city that PCC 33.50.030(c)(3)A, which
states that retail sales, service and rental of trailers and
new or used vehicles listed as permitted Group 4 uses under
PCC 33.42.020(e)(7) and 33.50.020(4)D and E are allowed in the
M3 zone only if "any repair of automobiles, trucks or trailers
is conducted and confined wholly within a building," means

1 sales or rental of new or used vehicles does not have to be
2 conducted inside a building.¹¹ The city's decision finds
3 that new or used vehicle sales are different from the storage
4 of towed vehicles because vehicles for sale are spaced farther
5 apart and are kept clean. Record 14. Petitioner does not
6 challenge the evidentiary support for this finding. We also
7 agree with the city that the storage of towed vehicles is not
8 sufficiently similar to the sale of vehicles for
9 PCC 33.50.030(c)(3) to apply.

10 However, we do not agree with the city that, outside of the
11 "exception" in PCC 33.50.030(c)(3) for sale or rental of
12 vehicles or trailers, PCC 33.50.030 requires that all Group 4
13 uses be conducted wholly within completely enclosed
14 buildings.¹² PCC 33.50.030(a) and (c)(1) prohibit certain
15 uses, and have not been found to be applicable to petitioner's
16 use. PCC 33.50.030(b) requires only that, with certain
17 exceptions, Group 3 and 7 uses be conducted entirely inside
18 enclosed buildings. PCC 33.50.030(c)(2) lists specific Group 4
19 uses which must be conducted entirely within completely
20 enclosed buildings, but does not establish a requirement that
21 all Group 4 uses, other than those identified in
22 PCC 33.50.030(c)(3), be conducted within such buildings.¹³

23 The question remaining to be answered is whether
24 petitioner's storage of towed vehicles is required by
25 PCC 33.50.030(c)(2) to be conducted entirely within enclosed
26 buildings as the "storage of materials and equipment."

1 Petitioner argues that it is not.¹⁴ However, the city never
2 made a determination on this question, as it erroneously
3 believed that all Group 4 uses, other than those identified in
4 PCC 33.50.030(c)(3), are required to be conducted wholly within
5 enclosed buildings.¹⁵

6 While the courts and this Board are finally responsible for
7 the interpretation of local enactments, the local government
8 should be the one to interpret its own enactments, in the first
9 instance. Fifth Avenue Corp. v. Washington Co., 282 Or 591,
10 599, 581 P2d 50 (1978). On remand, the city must interpret and
11 apply the limitation of PCC 33.50.020(c)(2) to petitioner's
12 storage of towed vehicles, absent the misconception that there
13 is a general requirement in the PCC that Group 4 uses in the M3
14 zone be conducted wholly within completely enclosed buildings.

15 The first assignment of error is sustained.

16 THIRD ASSIGNMENT OF ERROR

17 "The interpretation states that '33.50.020 E of the
18 Code prohibits the use of any tow vehicles in excess
19 18,000 GVW' in M3 zone * * *. The Commission
20 clarified [the interpretation] allowing said vehicles
21 to "visit" the site. Petitioner contends that the
section relied on provides specific limitations
pertaining to 18,000 GVW vehicles, but not the one
volunteered by the Director or clarified by the
Commission."

22 Petitioner states it is relying on the same arguments with
23 regard to ordinance interpretation that it made under the first
24 assignment of error. Petitioner contends the M3 zone places a
25 prohibition on vehicles of 18,000 lbs. GVW or greater only with
26 regard to sales, service and rental. PCC 33.50.020(4)E.

1 Petitioner argues it is not doing any of these things with its
2 large tow truck. Petitioner also notes that the activities
3 referred to in PCC 33.50.020(4)E could potentially involve
4 large numbers of such vehicles, whereas its operation only
5 involves one such vehicle. Petitioner argues the city could
6 have prohibited the parking or storage of this class of vehicle
7 in the M3 zone if it had intended to do so, but it did not.
8 According to petitioner, the city's decision that the tow truck
9 can visit but not stay on the site has no basis in the PCC.

10 The city points out it found petitioner's towing operation
11 to be an allowable use in the M3 zone as a use similar to those
12 allowed by PCC 33.50.020(4)B-G. The city argues that an
13 examination of PCC 33.50.020(4)B-G shows a concern about scale
14 of vehicles. The city argues that imposing a 18,000 lbs. GVW
15 limitation on petitioner's parking or storage of vehicles is
16 consistent with the intent of the zoning scheme and the plan
17 goals and policies quoted at n 8, supra, and "assures that the
18 scale of the vehicles in the area will not adversely affect the
19 livability of the area." Respondent's Brief 25.

20 The planning director's interpretation states:

21 "The code further restricts the use of vehicles of
22 18,000 pounds GVW or more in auto-related activities.
23 Therefore, any tow vehicles used with a 'tow for hire'
24 business must be less than 18,000 pounds GVW
25 (33.50.020[(4)]E)." (Emphasis added.) Record 47.

26 The planning commission modified this interpretation to provide
that vehicles of 18,000 lbs. GVW or greater can "visit sites in
the M3 zone in the course of operation of business in that

1 zone," but adopted no findings or reasoning to explain its
2 original ruling or later clarification. Record 23, 111.
3 Furthermore, the city council findings contain no additional
4 discussion or reasoning concerning limitations on 18,000 lbs.
5 GVW or greater vehicles in the M3 zone.

6 PCC 33.50.020(4)E lists as a permitted Group 4 use in the
7 M3 zone:

8 "Retail sales, service and rental of new or used motor
9 vehicles not to exceed a gross vehicle weight of
10 18,000 pounds,"

11 PCC 33.50.020(4)G similarly lists the following:

12 "Household moving centers, trucks for rent shall not
13 exceed a gross vehicle weight of 18,000 pounds"

14 These are the only two provisions of the M3 zone which
15 refer to an 18,000 lbs. GVW limitation. We agree with
16 petitioner that these limitations apply only to the sale,
17 service and rental of such vehicles. They do not apply to
18 petitioner's use, parking or storage of such a vehicle as part
19 of its towing operation. We do not find that the M3 zone
20 contains a general provision prohibiting the parking or storage
21 of any vehicle of 18,000 lbs. GVW or greater as part of an
22 auto-related use. The listings for other auto-related Group 4
23 uses permitted in the M3 zone, such as a parking garage, do not
24 contain such a limitation. See PCC 33.50.020(4)A-D, F;
25 33.42.020(e)(2), (4)-(6).

26 The third assignment of error is sustained.

27 //

1 FOURTH ASSIGNMENT OF ERROR

2 "The interpretation states that the 'storage of
3 vehicles is prohibited in required yards and
4 off-street parking areas,' and that it 'must comply
5 with all other standards of Chapters 33.42 (C2 Zone)
6 and 33.82 (Parking) * * *. The petitioner contends
7 that 33.50.040(d) expressly allows outdoor parking of
8 vehicles in stock. In addition to stock parking,
9 section 33.82 defines and allows customer parking.
10 Petitioner would have accepted outdoor parking as a
11 varianceable [sic] alternative to storage in the M3
12 [zone] * * * ."

13 PCC 33.50.040 ("Off-street Parking Required") establishes
14 off-street parking requirements for different uses in the M3
15 zone. PCC 33.50.040(d) provides:

16 "Group 4 Uses: One space per two employees in
17 addition to spaces provided for customers' vehicles
18 and vehicles in stock."

19 Petitioner contends the above-quoted provision clearly
20 allows outdoor parking of vehicles in stock in the M3 zone.
21 Petitioner points out that neither parking of vehicles in stock
22 nor temporary storage of vehicles is defined in the code.
23 Petitioner argues there is no material difference between the
24 two. Petitioner asserts that the dictionary definition of
25 "stock" is "supply accumulated for future use." Petition for
26 Review 25. Petitioner adds that its storage of towed vehicles
27 could be considered customer parking, also allowed outdoors in
28 the M3 zone under PCC 33.50.040(d).¹⁶

29 The city responds that off-street parking is not a listed,
30 permitted use in the M3 zone (or any other zone), but rather is
31 an incidental use to any listed principal use. According to
32 the city, every zoning district contains off-street parking

1 standards, and these standards are limitations on the permitted
2 use, a development standard to protect the carrying capacity of
3 the city streets.

4 The planning director's decision states:

5 "Storage of vehicles is prohibited in required yards
6 and off-street parking areas. * * * " Record 47.

7 Neither the planning commission nor the city council adopted
8 any additional findings explaining or modifying this challenged
9 determination.

10 As we interpret PCC 33.50.040(d), it simply imposes an
11 off-street employee parking requirement and adds a
12 clarification concerning how the requirement is to be met. It
13 requires one off-street parking space per two employees and
14 clarifies that if spaces for customers' vehicles and vehicles
15 in stock are also provided, the required off-street parking for
16 employees must be in addition to such spaces. PCC 33.50.040(d)
17 does not, as petitioner alleges, expressly allow or require
18 outdoor parking of vehicles in stock. The planning director
19 correctly stated that storage of towed vehicles cannot occur in
20 the off-street parking spaces required for employees by
21 PCC 33.50.040(d).

22 The fourth assignment of error is denied.

23 SECOND ASSIGNMENT OF ERROR

24 "The petitioner asked, if a restrictive interpretation
25 of allowed outdoor uses in M3 was adopted, whether
26 outdoor storage of undamaged vehicles on her [sic]
site qualified as a valid nonconforming or
pre-existing use. Petitioner's question concerning

1 the nonconforming status of her [sic] site under 33.94
2 of the Code was left undecided, although discussed.
3 Petitioner believes that her [sic] site, as a matter
4 of definition, has had the same use since 1955."

5 Petitioner argues that in its original request to the
6 planning director for a code interpretation, petitioner asked
7 the director to rule that its use of the subject property
8 qualifies as a valid pre-existing use under PCC 33.50.135.¹⁷
9 Petitioner further argues that the director's interpretation
10 ignored this aspect of its request. Petitioner contends that
11 in its appeals of the director's interpretation it specifically
12 asked both the planning commission and the city council to
13 determine whether its use is a valid pre-existing use or a
14 nonconforming use under PCC Chapter 33.94. According to
15 petitioner, each body improperly neglected to decide the issue.

16 The city agrees that a determination of nonconforming or
17 pre-existing use status may be obtained through the
18 interpretation process of PCC 33.205.040, beginning with a
19 written request to the planning director for such an
20 interpretation. However, the city contends that petitioner's
21 original request to the director did not ask for such a
22 determination, but rather asked whether towing operations are
23 an allowable use under M3 zoning. According to the city,
24 because the issue was not properly placed before the planning
25 director, it could not be raised on appeal before the planning
26 commission or city council.

The city argues that petitioner's use cannot qualify for

1 pre-existing use status because it was not made nonconforming
2 by the adoption of the city's comprehensive plan and
3 accompanying rezoning on July 1, 1981. According to the city,
4 the plan designation and zoning of the subject property were
5 not changed at that time.

6 The city states that under its code a nonconforming use is
7 one which was lawful on July 1, 1959, but due to rezoning is no
8 longer a permitted use in the zone in which it is located. The
9 city argues that because a used car lot was and is a permitted
10 use of the M3 zoned lots, they do not qualify for nonconforming
11 use status. The city also argues that the fourth, R2 zoned lot
12 has lost any nonconforming use status due to lack of continuous
13 use or lack of sufficient on-site improvement.

14 PCC 33.205.040.A provides the planning director "is
15 responsible for the initial interpretation and application of"
16 Title 32 of the code, and requests for interpretations must be
17 in writing. Petitioner claims it requested a determination
18 from the planning director on whether its use is a valid
19 pre-existing use, but does not cite any document in the record
20 which demonstrates that it made such a request.¹⁸ We agree
21 with the city that if a request for interpretation is not first
22 submitted to the planning director in writing, it cannot later
23 be raised on appeal of the director's interpretation to the
24 planning commission or city council.

25 The second assignment of error is denied.

26 The city's decision is remanded.

FOOTNOTES

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PCC 33.205.040 ("Interpretations of this Title") provides a process for obtaining written interpretations of the content or application of PCC provisions. It states that the planning director is responsible for the initial interpretation and application of Title 32 of the PCC. Requests for interpretations must be filed in writing with the planning director, who is required to issue a written interpretation within ten working days. PCC 33.205.040.A. A person requesting an interpretation may seek review of the director's interpretation by the planning commission, which must issue its written interpretation within 45 days. PCC 33.205.040.B. The planning commission's interpretation may be appealed to the city council. PCC 33.205.040.C. Interpretations issued by the director, commission or the city council are binding on the city and the person requesting the interpretation, on the facts presented. PCC 33.205.040.D.

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2

PCC 33.50.020(8) actually refers to the process of PCC 33.114.030. However, that section has been repealed, and PCC 33.114.010 states "Chapter 33.114 is superseded by Chapters 33.200 through 33.225." The parties agree that PCC 33.114.030 is superseded by PCC 33.205.040.

15

3

We note, however, that PCC 33.50.020(8) appears to refer only to light, non-nuisance manufacturing uses which are similar to those listed as Group 7 uses in PCC 33.50.020(7).

18

4

PCC 33.42.020(e) lists the following Group 4 uses permitted in the General Commercial (C2) zone:

"(1) Bicycles and motorcycles - service and retail sales and/or rental;

"(2) Garage, parking or repair;

"(3) Retail sales, service, and rental of new motor vehicles, not to exceed a gross vehicle weight of 18,000 pounds;

"(4) Tire sales and service;

- 1 "(5) Self-service car wash;
- 2 "(6) Car washing by mechanical means;
- 3 "(7) Retail sales, service and rental of new or used
4 trailers, excluding house trailers (mobile
 homes), travel trailers, and truck trailers."

5

5

6 Petitioner's appeal to the city council was filed before
7 the planning commission modified the planning director's
8 interpretation with regard to the use of towing vehicles of
9 18,000 lbs. GVW or more. The city council decision simply
10 states that the appeal was denied. Record 8. The findings
11 incorporated into the council's decision do not address this
12 issue and simply describe the decision as to "uphold the
13 Planning Director's determination that the outside storage of
14 towed vehicles is not allowed" in the M3 zone. Record 15. It
15 is not, therefore, entirely clear whether the interpretation
16 finally adopted by the city council incorporates the
17 modification adopted by the planning commission on July 12,
18 1988. However, the parties to this appeal assume that it does,
19 and, therefore, we will assume so as well.

13

6

14 Petitioner also takes issue with statements in the planning
15 director and city council interpretations that towing with
16 outside storage is allowed in the General Manufacturing (M2)
17 zone. Record 15, 47. We regard these statements as
18 surplusage. The code interpretation adopted by the city is
19 binding only with regard to application of the M3 zone to
20 petitioner's activities on the subject property.

18

7

19 The city contends its recognition of the towing operation
20 as a permitted use similar to the listed Group 4 uses in the M3
21 zone essentially has the effect of creating a new listing,
22 "PCC 33.50.020(4)H, which reads, 'vehicle towing and
23 storage.'" Respondent's Brief 8.

22

8

23 The plan goals and policy cited by the city provide:

24 "Goal 2, Urban Development

25 "Maintain Portland's role as the major regional
26 employment, population and cultural center through

1 public policies that encourage expanded opportunity
2 for housing and jobs, while retaining the character of
3 established residential neighborhoods and business
4 centers."

5 "Policy 2.20, Mixed Use

6 "Continue a mechanism that will allow for the
7 continuation and enhancement of areas of mixed use
8 character where such areas act as buffers and where
9 opportunities exist for creation of nodes or centers
10 of mixed commercial, light industrial and apartment
11 development."

12 "Goal 3 Neighborhoods

13 "Preserve and reinforce the stability and diversity of
14 the City's neighborhoods while allowing for increased
15 density in order to attract and retain long-term
16 residents and businesses and insure the City's
17 residential quality and economic vitality."

18 _____
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20 We note the city council findings include the following
21 statement:

22 " * * * The outdoor storage of damaged vehicles is
23 visually detrimental to business and residential
24 neighborhoods and is contrary to the intent of the
25 code to protect these neighborhoods." Record 13-14.

26 This finding would support only a determination that PCC
27 33.50.030(a)(1) prohibits outdoor storage of damaged towed
28 vehicles in the M3 zone, not that it prohibits outdoor storage
29 of all towed vehicles.

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32 We note the planning director's decision contained a
33 similar, although slightly less inclusive, statement concerning
34 the breadth of the confinement to buildings restriction imposed
35 by PCC 33.50.030 on Group 4 uses in the M3 zone:

36 " * * * [PCC] 33.50.030 requires that all auto-related
37 activities (including dismantling, repair or storage
38 of towed vehicles) must take place wholly within
39 completely enclosed buildings. * * * " (Emphasis in
40 original deleted.) Record 47.

41 //

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2 Although we agree with the city that the Foster
3 interpretation is not directly relevant to this appeal, as it
4 involves different parties and was based on different facts, we
5 believe the Foster interpretation and the interpretation
6 appealed in this case are consistent. The only Group 4 use
7 involved in the Foster case was the rental of trailers. The
8 rental of trailers, a permitted use under PCC 33.50.020(4)D,
9 comes under the same specific exception from indoor storage
10 requirements that the city recognized for the sale of new or
11 used vehicles in the appealed interpretation.
12 PCC 33.50.030(c)(3).

8 _____
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9 In fact, this provision is not best characterized as an
10 "exception." It is more accurately characterized as a
11 requirement that repair of new or used vehicles or trailers,
12 when conducted as part of a retail sales or rental operation in
13 the M3 zone, be "conducted and confined wholly within a
14 building." If it is an "exception" at all, it is an exception
15 to the requirement of PCC 33.50.030(c)(2) that repairs
16 generally be "confined, contained and conducted wholly within
17 completely enclosed buildings." This interpretation is
18 supported by the accompanying requirement of
19 PCC 33.50.030(c)(3)B for sight-obscuring screening.

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16 We note that there are Group 4 uses permitted in the M3
17 zone which are not mentioned in either PCC 33.50.030(c)(2) or
18 (3). These include sales and rental of bicycles and
19 motorcycles, parking garages, tire sales, self-service car
20 washes and mechanical car washes. PCC 33.50.020(4)A and F;
21 33.42.020(3)(1),(2),(4),(5),and (6).

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21 Petitioner also argues that PCC 33.50.030(c)(2) is
22 unambiguous and does not require interpretation. However, we
23 note that petitioner itself offered two possible
24 interpretations of "storage of equipment and materials." We do
25 not find this term to be unambiguous.

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25 Although the plan goals and policy cited by the city at
26 n 8, supra, do not provide a basis for imposing a general
27 requirement that Group 4 uses in the M3 zone be conducted
28 entirely within completely enclosed buildings, where such

1 requirement has no foundation in the language of the code, the
2 cited plan goals and policy may have some bearing on the city's
3 interpretation of ambiguous code provisions such as "storage of
4 materials and equipment," as that term is used used in
5 PCC 33.50.030(c)(2).

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Petitioner also argues under this assignment that use of
the property as a used car lot prior to July 1, 1959
constituted outdoor, off-street parking spaces which are
"grandfathered" under PCC 33.82.010(g). We address the issue
of petitioner's claims of a nonconforming or pre-existing use
status under the Second Assignment of Error, infra.

17

Under PCC 33.50.135, a pre-existing use is a particular
type of nonconforming use, one which was made nonconforming
specifically by adoption and implementation of the city's
comprehensive plan on July 1, 1981.

18

Respondent attached to its brief a copy of a letter from
petitioner's attorney to the planning director, marked received
by the city on December 30, 1987, which is not in the record.
This letter appears to be petitioner's initial request for an
interpretation from the planning director. We note that this
letter contains no request for a determination on the
pre-existing or nonconforming use status of petitioner's towing
operation. The only mention of either is in the following
question:

"If this is not an allowable use under M3 [zoning] or
a valid pre-existing use what administrative remedies
does Ms. Coly have or how can she solve her problem?"
Respondent's Brief App-3.

This question asks the planning director to inform petitioner
of what remedies it might have if the towing operation is not a
valid pre-existing use (and is not allowable under the M3
zone). It does not ask the director to determine whether the
use is a valid pre-existing or nonconforming use.