

1 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city hearings officer's decision
4 denying nonconforming use status to petitioner Northgate
5 Litho Print, Inc. (hereafter Northgate), a lithography and
6 printing business.

7 **MOTIONS TO INTERVENE**

8 Harley R. Jones and Diane Rebagliati move to intervene
9 in this proceeding on the side of respondent. There is no
10 objection to the motions, and they are allowed.

11 **FACTS**

12 The subject property is owned by petitioners Spathas
13 and is located on the east side of NE 57th Avenue, between
14 NE Fremont and NE Milton Streets. The subject property is
15 currently zoned Neighborhood Commercial 2 (CN2) and is
16 developed with a two-story building containing residential
17 units on the second floor and commercial uses on the main
18 floor. Petitioner Northgate occupies the north end of the
19 first floor of this building. Petitioner Northgate's office
20 entrance is on NE 57th Avenue and its loading entrance is on
21 NE Milton Street.

22 To the south of the subject property is other property
23 zoned for and developed with commercial uses. To the west
24 of the subject property is the Rose City Cemetery. Property
25 to the north and east of the subject property is zoned
26 Multi-Dwelling Residential (R2). The lots to the north,

1 across SE Milton Street, are undeveloped; one is used to
2 provide accessory parking for the subject property. The lot
3 adjoining the subject property to the east is developed with
4 two dwellings. These dwellings are separated from the
5 building on the subject property by less than five feet.

6 The use of the subject property for a lithography and
7 printing business began in 1963 and has continued to the
8 present. In 1963 the subject property was outside city
9 limits, in unincorporated Multnomah County. On December 12,
10 1985, the subject property was annexed to the city. At the
11 time of annexation, the property was subject to the county's
12 Retail Commercial (C3) zone. Either at the time of
13 annexation or within two years thereafter, the zoning of the
14 subject property was changed to the city's General
15 Commercial (C2) zone and Site Review (sr) overlay zone.¹
16 The C2 zone lists seven groups of uses as "permitted."
17 Group 5 includes "[p]rinting, lithographing, or publishing."
18 Portland City Code (PCC) 33.42.020(f)(25).² PCC 33.42.030
19 ("Limitations on Use") provides the following with regard to
20 Groups 1 through 6 in the C2 zone:

¹Intervenor-respondent Jones (hereafter intervenor) contends the rezoning to C2 was accomplished by Ordinance No. 160061 on August 26, 1987. The challenged decision states the rezoning occurred at the time of annexation. Record 4-5. Whether the rezoning occurred on December 12, 1985 or August 26, 1987 does not affect our disposition of this appeal.

²All citations to provisions of the C2 district are to the PCC as codified in 1986.

1 "Any uses and operations objectionable due to
2 unsightliness, odor, dust, smoke, noise, glare,
3 heat, vibration, and other similar causes shall be
4 prohibited." PCC 33.42.030(a).

5 On January 1, 1991, the zoning of the subject property
6 was changed to its current CN2 designation. There is no
7 dispute that Northgate's lithography and printing business
8 is not allowed in the CN2 zone. On March 15, 1994, after a
9 code enforcement proceeding was initiated against them,
10 petitioners applied to the city for a determination of
11 whether the existing lithography and printing business has
12 nonconforming use status.³ The planning bureau determined
13 petitioners failed to establish that the business has
14 nonconforming use status, and petitioners appealed to the
15 city hearings officer. After a public hearing, the hearings
16 officer denied petitioners' application. This appeal
17 followed.

18 **DECISION**

19 PCC 33.258.075 ("Determination of Legal Nonconforming
20 Status Review") establishes a process for city

³Whether petitioners' application includes a request for an expansion of a nonconforming use, as stated in the challenged decision at Record 4, is a matter of dispute between the parties. If a legal nonconforming use were found to exist, whether approval of any expansion/alteration of the legal nonconforming use is required would depend on whether the current use exceeds the parameters of the legal nonconforming use. Because the city found petitioners did not establish the existence of a legal nonconforming use, it concluded the issue of expansion is moot. Record 4. Because petitioners believe their entire existing use is entitled to legal nonconforming use status, they contend no expansion/alteration approval is required.

1 determinations concerning whether a particular use or
2 property has legal nonconforming use status.
3 PCC 33.258.075.D(1) provides:

4 "The legal status of the nonconforming situation
5 will be certified if the review body finds that:

6 "a. The nonconforming situation would have been
7 allowed when established; and

8 "b. The nonconforming situation has been
9 maintained over time."

10 The appealed decision determines the subject lithography and
11 printing business satisfies PCC 33.258.075.D(1)(b) above,
12 and that determination is not challenged. The remainder of
13 this opinion addresses petitioners' contentions that the
14 hearings officer erred in determining petitioners failed to
15 satisfy PCC 33.258.075.D(1)(a) above.

16 **A. Hearings Officer's Decision**

17 The hearings officer interpreted PCC 33.258.075.D(1)(a)
18 to mean that petitioners in this case could demonstrate
19 establishment of a nonconforming use by showing the
20 lithography and printing business "would have been allowed"
21 either (1) under county zoning, prior to the time the
22 subject property was annexed; or (2) under the C2 zone,
23 prior to the time the subject property was rezoned CN2. The
24 hearings officer concluded petitioners failed to establish
25 the use would have been allowed under either county zoning
26 or the subsequent city C2 zoning. Record 6. Petitioners
27 challenge the hearings officer's conclusion only with regard

1 to (2).⁴

2 With regard to whether the lithography and printing
3 business "would have been allowed" under the C2 zone, the
4 challenged decision states:

5 * * * While printing and lithography were
6 allowed in the [C2] zone, they were allowed only
7 if they met the off-site impact criteria [of
8 PCC 33.42.030(a)]. [Petitioners] never applied
9 for the land use approval which would have allowed
10 evaluation of the use for compliance with the
11 off-site impact criteria. Therefore, [petitioners
12 have] not established that the use was allowed
13 [under the C2 zone].

14 "[The off-site impacts] must have been evaluated
15 before a determination could be made as to whether
16 the use was allowed at all. [Petitioners] never
17 legally established [the] use was permitted in the
18 C2 zone because [they] never obtained a
19 determination that it met all the requirements,
20 including a lack of off-site impacts, which were
21 prerequisites to allowing printing and lithography

⁴With regard to the legality of the lithography and printing business under county zoning, prior to annexation, the challenged decision states:

"[Petitioners have] provided no evidence to establish that the existing use was ever legally established in Multnomah County. To the contrary, the evidence in the record indicates that the only permit ever obtained for the subject property was a 1963 commercial artists permit. That permit * * * was unrelated to the use of the site for printing and lithography.

* * * * *

"[Petitioners'] use of the property for a lithography and printing business was never legally established * * * in Multnomah County * * *." Record 6.

Petitioners do not contend they demonstrated the subject business was legally established under applicable county code provisions.

1 in the C2 zone."⁵ (First two emphases in
2 original; third added.) Record 6.

3 Although printing and lithography were listed as
4 "permitted" uses in the C2 zone, they were also required to
5 comply with the prohibition against objectionable off-site
6 impacts established by PCC 33.42.030(a). We understand the
7 above quoted findings to mean the hearings officer
8 interprets PCC 33.258.075.D(1)(a) to require that
9 petitioners have obtained a city determination of compliance
10 with the PCC 33.42.030(a) prohibition against objectionable
11 off-site impacts prior to the January 1, 1991 rezoning of
12 the subject property to CN2. In other words, the hearings
13 officer found (1) compliance with PCC 33.42.030(a) is
14 required to establish the subject use "would have been
15 allowed" under the C2 zone; and (2) petitioners can
16 demonstrate compliance with PCC 33.42.030(a) only by showing
17 a city determination of compliance with PCC 33.42.030(a) was
18 obtained at the time C2 zoning was applied, or at least
19 during the time the property was zoned C2.⁶

⁵In addition, in discussing the C2 zone in general, the challenged decision states:

"* * * Thus, [Group 1-6] uses required a land use determination that they were not prohibited [under PCC 33.42.030(a)] because of these off-site impacts, before they were considered legally established." (Emphasis in original.) Record 5.

⁶In its brief, the city argues the challenged decision indicates that a determination the subject business complied with PCC 33.42.030(a) at the time CN2 zoning was applied can be made as part of the current

1 **B. Separate Basis for Affirmance**

2 Before we turn to petitioners' arguments, we note
3 intervenor contends there is a separate basis on which we
4 should affirm the challenged decision. Intervenor argues
5 PCC 33.258.075.D(1)(a) must be interpreted to require that a
6 use was lawful when it was initially established. Morrell
7 v. Lane County, 46 Or App 485, 487, 612 P2d 304, rev den 290
8 Or 1 (1980). According to intervenor, if the lithography
9 and printing business was not lawfully established in 1963,
10 whether it could have been allowed under land use
11 regulations subsequently applied to the subject property is
12 immaterial. Intervenor maintains the record in this case
13 clearly shows petitioners failed to establish the business
14 was lawfully established under county land use regulations
15 applicable in 1963.

16 Although intervenor describes his argument as a
17 separate basis for affirming the challenged, intervenor does
18 not contend the challenged decision itself contains a
19 separate basis for affirmance. Rather, intervenor contends
20 the interpretation of PCC 33.258.075.D(1)(a) applied in the

nonconforming use status proceeding, but the hearings officer concluded petitioners failed to demonstrate compliance with PCC 33.42.030(a). However, there is nothing in the challenged decision indicating the hearings officer believed PCC 33.258.075.D(1)(a) would be satisfied if a determination that the subject business complied with PCC 33.42.030(a) at the time of rezoning to CN2 was made as part of the current proceeding. The decision includes no attempt to make such a determination or explain why the record is insufficient to allow the hearings officer to make such a determination as part of the proceeding on petitioners' nonconforming use status application. Rather, the decision apparently assumes there would be no legal significance in making such a determination at the present time.

1 challenged decision is incorrect. However, a respondent or
2 intervenor-respondent who wishes to challenge some aspect of
3 an appealed decision must file either a cross-petition for
4 review or a separate appeal. LUBA will not consider
5 assignments of error included in a respondent's brief.⁷
6 Brentmar v. Jackson County, 27 Or LUBA 453, 456 (1994);
7 McKay Creek Valley Assoc. v. Washington County, 25 Or LUBA
8 238, 243, rev'd on other grounds 122 Or App 129 (1993).

9 **C. Relevance of Determination of Compliance with**
10 **PCC 33.42.030(a)**

11 Petitioners contend the fact that the PCC listed
12 lithography and printing as "permitted" uses in the C2 zone
13 is sufficient to establish that the subject business "would
14 have been allowed" under the C2 zone. According to
15 petitioners, compliance with a "nuisance limitation"
16 provision such as PCC 33.42.030(a) is legally irrelevant to
17 determining whether the subject business is a legal
18 nonconforming use. Bither v. Baker Rock Crushing, 249 Or
19 640, 438 P2d 988, modified 249 Or 653 (1968). Petitioners

⁷Even if we were to reach this issue, we would agree with the hearings officer's interpretation of the phrase "would have been allowed when established" in PCC 33.258.075.D(1)(a) as meaning "would have been allowed when the nonconforming use was established," i.e. when the use became nonconforming. Morrell v. Lane County, supra, and the other cases cited by intervenor, rely on ORS 215.130(5) (see n 8, infra), which, as noted in the text infra, does not apply to cities. Additionally, none of the cases cited by intervenor involves a situation where a use, although not shown to be lawful when it first came into existence, became lawful under land use regulations subsequently applied, prior to imposition of a restrictive regulation allegedly making the use nonconforming.

1 argue that even if a present violation of PCC 33.42.030(a)
2 could be demonstrated, that would not mean a nonconforming
3 use does not exist, just that its operation would have to be
4 modified to satisfy PCC 33.42.030(a).

5 We cannot agree with petitioners that, as a matter of
6 law, compliance with PCC 33.42.030(a) is irrelevant to
7 determining whether the subject business has nonconforming
8 use status because it "would have been allowed" in the C2
9 zone at the time the restrictive CN2 zoning was applied.
10 Bither, supra, is inapposite. Bither did not deal with the
11 question of whether a nonconforming use had been
12 established, but rather with whether there had been a
13 prohibited expansion of a nonconforming use. In addressing
14 the expansion issue, the court stated that even if a
15 prohibited expansion had occurred, the nonconforming use
16 would not be forfeited, but rather would have to be returned
17 to the level of the original nonconforming use.

18 Under Gage v. City of Portland, 319 Or 308, 316-17, ___
19 P2d ___ (1994), and Watson v. Clackamas County, 129 Or App
20 428, 431-32, ___ P2d ___ (1994), we are not required to
21 defer to interpretations of local enactments by a decision
22 maker other than the local governing body. When reviewing
23 an interpretation of a local enactment by a hearings
24 officer, our acceptance or rejection of the interpretation
25 is determined solely by whether the interpretation is right
26 or wrong. McCoy v. Linn County, 90 Or App 271, 275-76, 752

1 P2d 323 (1988); Gage v. City of Portland, ___ Or LUBA ___
2 (LUBA No. 93-030, November 23, 1994), slip op 5.

3 In the challenged decision, the hearings officer
4 concludes the subject business "would have been allowed" in
5 the C2 zone at the time it became nonconforming, as required
6 by PCC 33.258.075.D(1)(a), only if the business was in
7 compliance with the PCC 33.42.030(a) prohibition against
8 objectionable off-site impacts. There is no dispute that
9 PCC 33.42.030(a) was applicable to the subject use when it
10 was zoned C2. Whether an existing use is in compliance with
11 applicable provisions of a local government's zoning
12 ordinance at the time a restrictive zone is applied is an
13 issue central to a determination of whether that use is
14 entitled to continue as a nonconforming use.⁸ Therefore,
15 the hearings officer's interpretation of
16 PCC 33.258.075.D(1)(a), as requiring that the subject

⁸ORS 215.130(5), applicable to counties, provides:

"The lawful use of any building, structure, or land at the time
of the enactment or amendment of any zoning ordinance or
regulation may be continued. * * *"

Although there is no parallel statutory provision applicable to cities,
the legal principle expressed in ORS 215.130(5) is similar to that
established in PCC 33.258.075.D(1)(a). We have found that violations of
certain fire or building code requirements, which were not incorporated
into the local zoning ordinance, do not prevent a use from being a "lawful
use" entitled to continuation as a nonconforming use under ORS 215.130(5).
Coonse v. Crook County, 22 Or LUBA 138, 144-45 (1991). However, we also
noted in Coonse that if such fire or building code requirements are
incorporated into a local government's land use regulations, and are
applicable when restrictive zoning is applied, an existing structure would
have to comply with such requirements in order to be protected by
ORS 215.130(5).

1 business be in compliance with PCC 33.42.030(a) at the time
2 the restrictive CN2 zone was applied, is reasonable and
3 correct.

4 In the following section, we address whether the
5 hearings officer correctly interpreted the applicable code
6 provisions to require that petitioners had obtained a prior
7 determination of compliance with PCC 33.42.030(a) at the
8 time of, or during, application of the C2 zone to the
9 subject property.

10 **D. Requirement for Prior Determination of Compliance**
11 **with PCC 33.42.030(a)**

12 Petitioners contend the hearings officer erred in
13 interpreting PCC 33.258.075.D(1)(a) to require that a
14 determination of compliance with PCC 33.42.030(a) had been
15 obtained sometime prior to the rezoning of the subject
16 property to CN2. Petitioners further argue that during the
17 relevant period between annexation and rezoning to CN2,
18 there was no established procedure or permit process for
19 obtaining a city determination that a use in the C2 zone
20 complied with PCC 33.42.030(a).

21 As applicable here, PCC 33.258.075.D(1)(a) requires
22 petitioners to demonstrate the subject use "would have been
23 allowed" under the C2 zone. Under PCC 33.42.030(a)
24 (applicable to Group 1-6 uses) and (f)(2) (applicable to
25 Group 7 uses), every "permitted" use in the C2 zone was
26 subject to a prohibition against objectionable off-site
27 impacts. On the other hand, there was nothing in the PCC

1 establishing a process or procedure for making
2 determinations of compliance with PCC 33.42.030(a) (or
3 (f)(2)) prior to allowing such permitted uses to be
4 established in the C2 zone, and there is no evidence that
5 such a practice was ever followed by the city. In these
6 circumstances, we believe PCC 33.42.030(a) functioned more
7 as a performance standard than an approval standard.⁹ We
8 therefore agree with petitioners that it is incorrect to
9 interpret PCC 33.258.075.D(1)(a) to require that a
10 determination of compliance with PCC 33.42.030(a) must have
11 been obtained prior to or during the time the subject
12 property was zoned C2. We therefore remand the challenged
13 decision to the city to determine, as part of the current
14 proceedings, whether the subject business was in compliance
15 with PCC 33.42.030(a) at the time the restrictive CN2 zoning
16 was applied.¹⁰

17 One additional point merits comment. If the city
18 determines the subject use was in compliance with
19 PCC 33.42.030(a) at the time the CN2 zone was applied and,

⁹However, contrary to the dissent, we do not believe that the characterization of PCC 33.42.030(a) as a performance standard, means that compliance with PCC 33.42.030(a) at the time the subject use became nonconforming is irrelevant to a determination of whether the use "would have been allowed" under the C2 zone and, therefore, qualifies as a nonconforming use under PCC 33.258.075.D(1)(a).

¹⁰In referring to determining compliance with PCC 33.42.030(a), "at the time the restrictive zoning was applied," we do not necessarily mean at the precise instant the CN2 zone was applied, but rather for a period of time prior to the application of CN2 zoning sufficient to encompass normal variations in the intensity of the subject business.

1 therefore, has nonconforming use status, it must establish
2 the parameters of such nonconforming use. Any changes in
3 the nonconforming use after application of the CN2 zone are
4 governed by the PCC 33.258.080 provisions controlling
5 changes of nonconforming uses, not by former
6 PCC 33.42.030(a).

7 The city's decision is remanded.

8

9 Holstun, Chief Referee, dissenting.

10 The interpretation of PCC 33.258.075.D(1)(a) and former
11 PCC 33.42.030(a) embraced by the majority is, in my view,
12 neither reasonable nor correct. I would reject it. Under
13 that interpretation, any use of property not currently
14 allowed in the CN2 district, but which was listed as a use
15 permitted outright subject to PCC 33.42.030(a) under the C2
16 zoning applicable to the property before the CN2 zoning was
17 applied, could only qualify as a nonconforming use if it
18 complied with PCC 33.42.030(a) at the time the property was
19 rezoned CN2. In other words, where the nonconforming use
20 status of such a property is challenged, the owner would be
21 required to show that at the time the zoning changed the use
22 was not "objectionable due to unsightliness, odor, dust,
23 smoke, noise, glare, heat, vibration, and other similar
24 causes * * *."¹¹ Moreover, the owner of the use could have

¹¹In view of n 10, supra, I assume the majority would not necessarily conclude a use permitted outright in the C2 zone would be disqualified as a

1 the burden of making this showing many years after the CN2
2 zoning was applied, when there may be little or no evidence
3 of conditions on the date the CN2 zoning was applied.

4 As the majority correctly suggests, PCC 33.42.030(a) is
5 a performance standard rather than an approval standard. I
6 do not believe a use must comply with all performance
7 standards in effect on the date it became a nonconforming
8 use, in order to qualify as a nonconforming use. I
9 recognize that the distinction between an approval standard
10 and a performance standard may be a fine one in particular
11 cases. However, in my view, PCC 33.42.030(a) is clearly a
12 performance standard which was imposed to limit the uses
13 otherwise permitted outright in the C2 zone. Whether
14 petitioners' permitted use complied with PCC 33.42.030(a) on
15 the date CN2 zoning was applied to the property is
16 irrelevant to whether petitioners' lithography and printing
17 business may continue as a nonconforming use in the CN2
18 zone.

19 While petitioners' compliance with PCC 33.42.030(a) on
20 the date CN2 zoning was applied is irrelevant to whether

nonconforming use if it were in violation of PCC 33.42.030(a) on the day
the property were rezoned CN2. However, I also assume neither would a
permitted use in the C2 zone that was in conformance with PCC 33.42.030(a)
on the day the property was rezoned CN2 necessarily be allowed to continue
as a nonconforming use. The property owner would have to shoulder the
additional burden of showing that the permitted use did not violate the
sightliness, odor, dust, smoke, noise, glare, heat, vibration, etc.
requirements of PCC 33.42.030(a) for "a period of time prior to the
application of CN2 zoning sufficient to encompass normal variations in the
intensity of the subject business."

1 petitioners' use may continue as a nonconforming use, that
2 does not mean petitioners' use need not comply with
3 PCC 33.42.030(a), or any other performance standard which
4 applied on the date the use became nonconforming, even if
5 PCC 33.42.030(a) or any such other performance standard were
6 repealed after petitioners' use became nonconforming.
7 Petitioners' nonconforming use right does not include a
8 right to continue operating in violation of a performance
9 standard that was in effect at the time the use became
10 nonconforming simply because petitioner may have been in
11 violation of that performance standard at the time the use
12 became nonconforming. The performance standard limitation
13 is part and parcel of the nonconforming use right and
14 continues to apply to the nonconforming use as long as the
15 nonconforming use status of the use is the legal basis for
16 continuing the use.

17 I respectfully dissent.