BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SANDY BARR, dba SANDY BARR ENTERPRISES, Petitioner, and DONALD H. OWEN and JUDITH J. OWEN, Intervenors-Petitioner, vs. CITY OF PORTLAND, Respondent.	LUBA No. 90-142 FINAL OPINION AND ORDER

Appeal from City of Portland.

Benjamin Rosenthal, Portland, filed a petition for review and argued on behalf of petitioner.

Peggy Hennessy, Portland, filed a petition for review and argued on behalf of intervenors-petitioner. With her on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

Peter A. Kasting, Portland, filed the response brief and argued on behalf of respondent.

SHERTON, Referee; KELLINGTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

AFFIRMED 04/30/91

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a City of Portland Code Hearings Officer's order directing petitioner and the owners of certain property to cease all "flea market" and other similar commercial activities on that property.

MOTION TO INTERVENE

Donald H. Owen and Judith J. Owen move to intervene in this proceeding on the side of petitioner. There is no opposition to the motion, and it is allowed.

FACTS

Petitioner leases three properties, referred to as tax lots 14, 18 and 21. Tax lot 18 has been zoned One-Family Residential (R-7) at all times relevant to this appeal. Prior to 1981, tax lots 14 and 21 were zoned General Commercial (C-2) and General Commercial/Buffer Zone Overlay (C-2B). When the Portland Comprehensive Plan took effect on January 1, 1981, tax lots 14 and 21 were rezoned to Neighborhood Commercial (C-4) and Neighborhood Commercial/Buffer Zone Overlay (C-4B).

Tax lots 14 and 21 are each developed with a commercial building in excess of 20,000 square feet. The building on tax lot 21 was developed as a bowling alley in the early 1960's. Intervenors-petitioner (intervenors) purchased tax lot 21 in 1968 and converted the building to a sports arena, which they use to stage professional wrestling exhibitions

on Saturday nights and lease for other events. Petitioner began conducting his operation on tax lot 21 in 1969, concurrently with the conversion of the building to sports arena use. The building on tax lot 14 was originally developed as a grocery store, and was operated as a grocery store until 1987. Since 1969, petitioner has used the parking lot on tax lot 14 in conjunction with his operation on tax lot 21. When the grocery store closed, petitioner began using the building on tax lot 14 as part of his operation as well. Tax lot 18 is undeveloped, and has been used as an overflow parking area in conjunction with petitioner's operation on tax lots 14 and 21.

Petitioner's operation is best described as a "flea market." Petitioner leases space within the buildings on tax lots 14 and 21 to independent vendors who display and sell a variety of items, including both new and used merchandise, handicrafts, food and beverages. The average space used by each vendor is approximately 200 square feet, and the maximum is 1200 square feet. Petitioner charges admission to the public to enter the premises.

On September 13, 1990, the city Bureau of Buildings filed a complaint against petitioner, intervenors and the owners of tax lots 14 and 18. The complaint alleges the following violations of the PCC:

> "Continuing to operate a secondhand business which exceeds the maximum square footage allowed in a C-4 * * * zone per PCC Section 33.40.080; allowing

> outdoor sales of goods and food in violation of * * * PCC Section 33.40.030; allowing use of R-7 zoned property for a parking lot in violation of * * * PCC Section 33.24.510. * * *" Record 29.

On October 4, 1990, the Code Hearings Officer (hearings officer) held a hearing on the complaint.

On October 12, 1990, the hearings officer issued an order directing petitioner, intervenors and the other property owners to cease all "flea market" and other similar commercial activities on tax lots 14, 18 and 21. The order concludes petitioner's operation (1) is not allowed under the current C-4, C-4B and R-7 zoning of the subject properties, and (2) is not a valid pre-existing use of any of the subject properties under PCC 33.40.155. Record 6-8. This appeal followed.[1]

FIRST ASSIGNMENT OF ERROR

> "Respondent misconstrued its [pre-1981] Code [to] requir[e] a conditional use permit for petitioner's business on Tax Lot 21 which is expressly permitted outright under the Code."

SECOND ASSIGNMENT OF ERROR

> "Respondent misconstrued its [pre-1981] Code [to] requir[e] petitioner to possess a Certificate of Occupancy for his use of Tax Lot 21 which was

---

[1]Neither petitioner nor intervenors challenge the city's determination that petitioner's operation is not allowed under the current zoning of tax lots 14, 18 and 21. Further, neither petitioner nor intervenors challenge the city's determination that petitioner's operation is not a valid pre-existing use of tax lot 18. Petitioner challenges the city's determination that his operation is not a valid pre-existing use of tax lots 14 and 21. Intervenors challenge the city's pre-existing use determination solely with regard to tax lot 21.

permitted outright when established."

FOURTH ASSIGNMENT OF ERROR (PARTS A AND B)

"Respondent made inadequate and inconsistent findings without support in the record on petitioner's use of [Tax Lot 21].

INTERVENORS' ASSIGNMENT OF ERROR

"Respondent misconstrued the applicable law in finding that Petitioner's use of the Sports Arena did not constitute a valid pre-existing use, entitled to continued operation with nonconforming status."

In these assignments of error, petitioner and intervenors (petitioners) challenge the city's interpretation and application of the pre-1981 PCC in determining that petitioner's operation does not constitute a valid pre-existing use of tax lot 21.

PCC 33.40.155(b)(1) defines "pre-existing use" in relevant part as follows:

"A use that was existing within the City limits of Portland at the time the Comprehensive Plan took effect on January 1, 1981, * * * and was a legally established principal or conditional use in its zone, and complied with all siting, structural, and parking requirements; but as a result of a zoning map or Zoning Code change at the time of the Plan's implementation the use is no longer a principal or conditional use in the zone[.]" (Emphasis added.)

The dispute concerning the pre-existing use status of petitioner's operation on tax lot 21 centers on whether petitioner's operation satisfied the above emphasized requirement.

Prior to 1981, PCC(1964)[2] 6-2102 listed permitted uses[3] allowed under the C-2 zone then applied to tax lot 21 in five "groups." As relevant to this appeal, the listed uses included "department stores" and "retail stores" (Group 1; 6-2102(a)(4) and (9)), "commercial amusements - indoor arenas" and "second-hand stores" (Group 3; 6-2102(c)(4) and (8)), and "auditorium exhibition hall, or other public assembly room" (Group 5; 6-2102(e)(1)). PCC(1964) 6-2102(g) also listed an additional category of uses permitted in the C-2 zone:

> "Other uses of a general commercial character found similar to the above in accordance with [PCC(1964)] 6-503."

The hearings officer's decision concludes that under PCC 33.40.155, use of tax lot 21 for a sports arena is a valid pre-existing use, because a sports arena "was a valid use of right within a C-2 zone at the time of its conversion from a bowling alley." Record 7. The decision further states that the building on tax lot 21 "was apparently permitted and approved for occupancy as a Group 3 (Commercial Amusements - Indoor Arenas) use " Id.

However, with regard to petitioner's "flea market" use

---

[2]The Portland City Code (PCC) in effect prior to 1981 shall be cited in this opinion as PCC(1964).

[3]Petitioner has never obtained a conditional use permit for conducting his operation on any of the subject properties, and whether petitioner's operation was listed as a conditional use in the C-2 zone by the PCC(1964) is not an issue in this appeal.

of tax lot 21, the decision concludes:

> "Notwithstanding the fact that the flea market operations apparently pre-date the C-4 re-zoning, those operations would be entitled to * * * pre-existing use status only if it is established that those operations were a legal existing use at the time of that re-zoning. [Petitioner's] operations do not appear to have been legal at the time of the re-zoning, and thus [are] not entitled to any pre-existing use status." Id.

There are essentially two bases for the hearings officer's determination that the "flea market" was not "legal at the time of the re-zoning." One is that a "flea market" was not listed as a permitted use in the C-2 zone:

> "* * * Nowhere in [PCC] Chapter 33.42[4] are 'flea market' activities mentioned, nor do any of the mentioned permitted C-2 zone uses seem to fairly encompass [petitioner's] business. As this business use is not specifically permitted under Chapter 33.42, it is prohibited within a C-2 zone and could acquire no pre-existing use rights at the time of C-4 rezoning.
>
> "[Petitioner's] operation is not really a second-hand store or any other use specifically listed in the [PCC]. Rather, it is a 'flea market,' a distinct type of business operation which is not listed in the [PCC] and is, therefore, not a permitted use, as of right, in any zone. A 'flea market' operation would be permitted in a C-2 zone only as a PCC 33.42.020(i) use approved through

[4]The hearings officer's decision refers to the provisions governing the C-2 zone in Chapter 33.42 of the current PCC. However, the parties do not dispute, and we agree, that whether petitioner's flea market operation has valid pre-existing use status is governed by whether it was a legally established use under the PCC provisions governing the C-2 zone which were in effect prior to the 1981 zone change. Those provisions are found in PCC(1964) Article 21, Sections 6-2101 et seq.

> the conditional use process.[5] Concededly, [petitioner] does not have, and has never had, any conditional use or other approval for his flea market operation on [tax lot 21]." (Footnote omitted.) Record 7-8.

The hearings officer's decision further states that even if the flea market operation was included in some category of use listed as permitted in the C-2 zone, other than a "commercial amusements - indoor arenas" use, it was not a legally established use at the time of rezoning, because neither a building permit nor an occupancy permit for any use of the building on tax lot 21, other than a "commercial amusements - indoor arenas" use, had been issued:

> "[The building on tax lot 21] was apparently permitted and approved for occupancy as a Group 3 (Commercial Amusements - Indoor Arenas) use. There is no evidence of any subsequent building permit or certificate of occupancy for any other use. Absent such a permit and certificate of occupancy, [petitioner's] operations would be legal only if they could be fairly encompassed within the approved Group 3 (Commercial Amusements - Indoor Arenas) use. Clearly they cannot. [Petitioner's] flea market operations are not

---

[5]Once again, the hearings officer is referring to current PCC C-2 zone provisions. PCC 33.42.020(a)-(h) lists seven groups of permitted uses in the C-2 zone. PCC 33.42.020(i) provides that "other uses of a general commercial character found similar to the [listed permitted uses] in accordance with [PCC] 33.114.030" are also permitted. PCC 33.114.030 has been repealed. Procedures assigned to PCC Chapter 33.114 are now regulated by PCC 33.215.050, which provides for a Type III ("conditional use") procedure, including a public hearing. PCC 33.114.010. However, as explained above, whether petitioner's operation was a legally established use of tax lot 21 at the time of the 1981 rezoning is controlled by the pre-1981 PCC provisions. The requirements of the corresponding PCC(1964) provisions are discussed under section A.2 below.

> easily characterized, but they are manifestly different in nature from the types of operations contemplated by an 'Indoor Arena.'" Record 7.

A. Was Petitioner's "Flea Market" Operation a Permitted Use in the C-2 Zone Prior to 1981?

1. Group 1, 3 and 5 Uses

Petitioner contends his flea market operation constitutes a Group 1 "retail store" or "department store" use. Petitioner argues that "retail" means to sell directly to a consumer, and that customers purchase items at retail from flea market vendors. Petitioner further argues that Black's Law Dictionary (4th Ed., 1968) defines "department store" as a "store in which a variety of merchandise is arranged in or offered for sale from several departments or sections." According to petitioner, his flea market satisfies this definition because a variety of merchandise is displayed and offered for sale.

Alternatively, petitioner contends his flea market operation constitutes a Group 5 "auditorium exhibition hall, or other public assembly room" use. According to petitioner, the flea market functions as a trade show, and trade shows are carried on within auditorium exhibition halls. Petitioner argues that the definition of "exhibition" is "a public show; a display as of pictures, merchandise * * * in public." Webster's New Twentieth Century Dictionary (2nd Ed., 1972). Petitioner argues the record shows that the flea market "displays merchandise to

the public[, and] the fact that the merchandise was also sold cannot exclude the activity from this category" of use. Petition for Review 13.

Also in the alternative, petitioner contends his flea market operation constitutes a Group 3 "commercial amusement - indoor arena" or "second-hand store" use. Petitioner argues that approximately 30% of the flea market vendors sell some second hand merchandise. Petitioner also argues that he charges admission to the flea market and many customers frequent such bazaars as a form of entertainment. Petitioner further argues that his operation complies with the provision of PCC(1964) 6-2108 limiting "the gross floor area devoted to the conduct of any individual Group 3 use [to] five thousand square feet," because each flea market vendor is autonomous, and the largest occupies only 1200 square feet of space.

Petitioner concedes that his flea market operation has characteristics of more than one type of use listed as permitted in the C-2 zone. However, petitioner argues the uses listed in Groups 1 through 5 under PCC(1964) 6-2102 are not mutually exclusive, as many have overlapping characteristics (e.g., "retail store" and "department store"). According to petitioner, PCC(1964) 6-2102 should not be interpreted to prohibit flea markets in the C-2 zone simply because the characteristics of a flea market may overlap into more than one listed use.

The city notes petitioner's own argument asserts the flea market operation has characteristics of at least five different uses listed as permitted in the C-2 zone under three different groups. The city points out that under other provisions of the PCC(1964) C-2 zoning district, different use limitations applied to uses in different groups. The city argues "[g]iven the unusual mix of activities that occur at a flea market, the Code Hearings Officer reasonably concluded that the flea market does not fit squarely within any one of the use categories set out in section 6-2102 of the 1964 Code." Respondent's Brief 10.

We agree with the parties that petitioner's flea market operation has certain characteristics of all five of the identified uses listed by PCC(1964) 6-2102 under Groups 1, 3 and 5. However, we also agree with the city that the flea market's characteristics do not fit within any one of those uses, nor even within any one group of uses and, therefore, the hearings officer was correct in concluding that petitioner's flea market operation was not specifically listed as a permitted use in the C-2 zone prior to 1981.[6]

[6]Although the hearings officer's decision refers to the uses listed as permitted in PCC Chapter 33.42, rather than in PCC(1964) 6-2102, no party contends there is any significant difference between the uses specifically listed as permitted in the C-2 zone by the two ordinances. Both PCC(1964) 6-2102 and PCC 33.42.020 list as permitted, in Groups 1, 3 and 5, the five uses discussed under this subassignment. Therefore, we conclude that the decision's reference to PCC Chapter 33.42 in this regard, if error, is harmless error.

This subassignment of error is denied.[7]

2. Other Similar Commercial Uses

Petitioners challenge the city's determination that the flea market could only be approved in the C-2 zone as a "similar commercial use" through a conditional use process. Petitioners contend the hearings officer erroneously applied the current language of PCC 33.42.020(i), whereas the applicable language of PCC(1964) 6-2102(g) allows, as a permitted use, in the C-2 zone:

> "Other uses of a general commercial character found similar to the [listed permitted uses] in accordance with [PCC(1964)] 6-503."

PCC(1964) 6-503 ("Interpretation -- Purpose and Conflict") provides in relevant part:

> "* * * * *
>
> "The Director of the Bureau of Buildings shall be responsible for the initial interpretation of this Code. Whenever there is any question regarding his interpretation of any provision of this Code or his application of this Code to any specific case or situation, the Director of the Bureau of Buildings, or any person affected by his initial interpretation of the Code, may submit a written request to the Commission for interpretation of the intent of the Code. The Commission shall, by written decision, interpret the intent of any

[7]Petitioner also argues that the city erred in concluding that pre-1981 sports arena use of tax lot 21 was a Group 3 "commercial amusements - indoor arenas" use, rather than a Group 5 "auditorium exhibition hall, or other public assembly room" use. However, because we conclude that petitioner's flea market operation is neither a Group 3 nor a Group 5 use, whether the pre-1981 sports arena use is correctly classified as a Group 3 or Group 5 use is not material to whether petitioner's flea market is a valid pre-existing use.

provision in its application."

Petitioners argue that PCC(1964) 6-503 did not require that a conditional use process be followed to obtain city approval of a "similar commercial use" under PCC(1964) 6-2102. Petitioners also argue that PCC(1964) 6-503 did not require petitioner to obtain a written finding of similarity from the city prior to establishing his flea market operation on tax lot 21. According to petitioners, PCC(1964) 6-503 only authorizes the director of the Bureau of Buildings to initially interpret the PCC. Under this provision, it is only where there is a dispute regarding the director's interpretation that the director or the affected person may submit an appeal to the city commission. According to petitioners, there was never any dispute prior to 1981 regarding the permitted status of the flea market in the C-2 zone and, therefore, there was no reason for such an appeal to be filed.

Petitioner also argues that the application of the correct law, PCC(1964) 6-2102(g) and 6-503, to the evidence in the record regarding the nature of the flea market operation can only result in a conclusion that the flea market use was permitted outright under the C-2 zone prior to 1981. Intervenors contend the hearings officer found that under PCC 33.42.020(i), the flea market would be a similar commercial use, if only a conditional use permit had been obtained. According to intervenors, because the

hearings officer was wrong with regard to the requirement for a conditional use permit, but otherwise the language of PCC 33.42.020(i) and PCC(1964) 6-2102(g) is the same, the hearings officer actually found that the flea market was a permitted "similar commercial use" under PCC(1964) 6-2102.

The city argues the hearings officer did not find that the flea market would qualify as a PCC 33.42.020(i) "similar commercial use." According to the city, the hearings officer simply found that the only way the flea market could be allowed in the C-2 zone was under the "similar commercial use" provision of PCC 33.42.020(i), and this provision requires that city approval be obtained through a conditional use process.

The city concedes the hearings officer erred in applying PCC 33.42.020(i) rather than PCC(1964) 6-2102(g). However, the city argues that to qualify as a permitted use in the C-2 zone under PCC(1964) 6-2102, a use must be "found similar to the [listed permitted uses] in accordance with [PCC(1964)] 6-503." (Emphasis added.) According to the city, because "PCC[(1964)] 6-2102(g) requires a finding of similarity 'in accordance with [PCC(1964)] 6-503,' a use does not become authorized under PCC[(1964)] 6-2102(g) until the process specified in [PCC(1964)] 6-503 has been completed." Respondent's Brief 8. The city further argues that since there is no evidence that flea market use of tax lot 21 was approved by the city as a "similar commercial

use" pursuant to the PCC(1964) 6-503 process, petitioner cannot rely on PCC(1964) 6-2102(g) to contend the flea market was "legally established" when the 1981 zone change occurred.

We agree with the parties that the city's decision incorrectly applies PCC 33.42.020(i), rather than PCC(1964) 6-2102(g), in determining that the flea market was not legally established as a "similar commercial use" in the C-2 zone prior to the 1981 zone change. Because the procedural provisions referred to by PCC 33.42.020(i) and PCC(1964) 6-2102(g) are quite dissimilar, this was not harmless error. PCC(1964) 6-503 simply assigns responsibility for making initial interpretations of the code, but does not clearly establish a procedure for obtaining approval of a "similar commercial use" under PCC(1964) 6-2102(g). We believe the city must first interpret PCC(1964) 6-2102(g) and 6-503, with regard to what procedural requirements for establishing a "similar commercial use" in the C-2 zone existed prior to 1981, and must in the first instance apply those provisions to the facts of this case.

This subassignment of error is sustained.[8]

---

[8]However, sustaining this subassignment of error does not provide a basis for remand of the city's decision because, in the following subsection, we affirm an independent basis for the city's decision that petitioner's flea market was not "legally established" on tax lot 21 prior to the 1981 zone change.

B. Did Petitioner's "Flea Market" Operation Have All Required Permits?

Petitioners challenge the city's finding that the flea market use of the building on tax lot 21 lacked required building and occupancy permits at the time of the 1981 zone change. Petitioners argue that the sports arena and flea market uses of the property began concurrently in 1969. Petitioners contend intervenors obtained a "B2" class occupancy permit for use of the building on tax lot 21 around that time. According to petitioners, a B2 occupancy permit allows occupancy of:

> "Any Assembly building without a stage and having an occupant load of 300 or more in the building." Uniform Building Code (UBC)(1969) 7-701.

Petitioners argue that both sports arena and flea market use of the building on tax lot 21 qualify for approval under the above quoted definition, because more than 300 people assemble for both and neither have a stage.[9] Petitioners contend intervenors' occupancy permit is not limited to "weekly sporting events." Intervenors' Brief 11. Petitioners therefore conclude that a separate building permit or certificate of occupancy was not required to

---

[9]Petitioner also attaches to its petition for review copies of city Bureau of Buildings "Report of Building Inspection" forms which include inspection reports made from November 21, 1968 through February 11, 1970. Petition for Review A-16 to A-17. These forms indicate the building on tax lot 21 was classified in occupancy group B2.

legally establish the flea market use of the property.[10]

The city agrees with petitioners that flea market use of the building on tax lot 21 began concurrently with its conversion to use a sports arena in 1969. The city also agrees with petitioners that both sports arena and flea market use of the building satisfy the definition of class B2 occupancy quoted above. The city contends, however, that building and occupancy permits obtained by intervenors at that time were for use of the building as a "commercial amusement - indoor arena" under PCC(1964) 6-2102(c)(4), and do not include flea market use of the property.[11] Therefore, flea market use of tax lot 21 was not "legally established."

The city decided petitioner's flea market was not "legally established" on tax lot 21 at the time of the 1981

---

[10]Petitioner also contends the city erroneously concluded that flea market use of the building on tax lot 21 was a change in use from previously established sports arena use of the property, and this change in use required a new certificate of occupancy. However, the city's decision found, and the city does not dispute, that petitioner's flea market operation was initiated "concurrent with the conversion of the building to the Sports Arena." Record 5. The city's decision simply finds that the building permit and certificate of occupancy issued at that time did not include flea market use of the property, and that no building permit or certificate of occupancy for flea market use was issued at a later date. Record 7. We, therefore, do not address petitioner's arguments concerning change in use of tax lot 21.

[11]The city also argues that building and occupancy permits must specify a use as well as an occupancy classification, and attaches to its brief a UBC table which imposes different egress and access requirements on structures depending on their use. Although this table is from the current UBC, the city contends, and petitioners do not dispute, that the UBC(1969) contained a similar table.

zone change because building and occupancy permits required for flea market use had not been obtained. Record 7. Petitioners do not contend that building and occupancy permits are not legally required for flea market use of the building on tax lot 21. Rather, petitioners contend the permits obtained by intervenors when they converted the use of the building from a bowling alley to a sports arena are sufficient to allow use of the building for both sports arena and flea market purposes.

Petitioners rely primarily on the argument that because both sports arena and flea market uses come under the B2 occupancy classification, any building and occupancy permits issued must necessarily have covered both uses.[12] However, UBC(1969) 7-307(c) provides in relevant part:

> "Certificate Issued. If after final inspection it is found that the building or structure complies with the provisions of [the UBC], the Buildings Inspection Director shall issue a Certificate of Occupancy which shall thereafter be kept on the premises and shall contain the following:
>
> "1. The use and occupancy for which the certificate is issued.
>
> "* * * * *" (Emphasis added.)

Based on the above emphasized provision, and the fact that

[12]Petitioner also relies on the argument that any building and occupancy permits issued must have covered both uses, because sports arena and flea market uses are under the same zoning use classification, as either "commercial amusements - indoor arena" or "auditorium exhibition hall, or other public assembly room." However, under subsection A.1, supra, we decided that the flea market is neither a "commercial amusements - indoor arena" nor "auditorium exhibition hall, or other public assembly room" use.

the UBC imposes requirements on structures by their use, as well as their occupancy group, we cannot agree with petitioners that the building and occupancy permits issued for the building on tax lot 21 for a group B2 occupancy necessarily allowed flea market use of the building as well.

Therefore, what the city had to determine, based on the facts in the record, is whether the permits issued to intervenors cover flea market use of the building on tax lot 21. However, the building and occupancy permits issued to intervenors when they converted the building from bowling alley use are not in the record. Further, the parties cite no other evidence in the record to establish the uses for which those permits were issued.[13]

The burden of proving an alleged nonconforming use was legally established rests on the party claiming nonconforming use protection. Lane County v. Bessett, 46 Or App 319, 323, 612 P2d 297 (1980); Bowman Park v. City of Albany, 11 Or LUBA 197, 205-205 (1984). In the absence of evidence in the record establishing that the building and occupancy permits issued to intervenors include use of the building on tax lot 21 for flea market purposes, petitioners

[13]At oral argument, petitioner indicated the building inspection reports attached to its Petition for Review at A-16 to A-19 are the only documents on file with the city relevant to the 1968 building and occupancy permits. However, we note that UBC(1969) 7-307(c), quoted in the text supra, requires the certificate of occupancy to be maintained on the premises. The record does not indicate the fate of the 1968 certificate of occupancy or why it could not be submitted for the record below.

did not carry their burden to demonstrate the flea market use was legally established, and the city properly found it was not.

This subassignment of error is denied. This requires that we affirm the city's determination that petitioner's flea market operation is not a valid pre-existing use of tax lot 21.

The first, second and fourth (parts A and B) assignments of error and intervenors' assignment of error are sustained, in part.

THIRD ASSIGNMENT OF ERROR

> "Respondent misconstrued the applicable law requiring petitioner to possess a certificate of occupancy for use use of Tax Lot 14."

FOURTH ASSIGNMENT OF ERROR (PART C)

> "Respondent made inadequate and inconsistent findings without support in the record on petitioner's use of [Tax Lot 14]."

In these assignments of error, petitioner challenges the city's interpretation and application of PCC 33.40.155(c)(1) (change of pre-existing use) in determining that petitioner's flea market operation does not constitute a valid pre-existing use of tax lot 14.

PCC 33.40.155(c)(1) provides in relevant part:

> "Change of use. Upon issuance of a certificate of occupancy by the Bureau of Buildings, a pre-existing use may be changed to a conforming use or to a use of the same or more restrictive classification without a loss of pre-existing use status. However, a pre-existing use may not be

changed to a use that would not have been permitted prior to the implementation of the Comprehensive Plan on January 1, 1981. Differences between the property owner and the Bureau of Buildings as to the determination of whether a proposed use is at the same or more restrictive classification shall be referred for interpretation as specified in [PCC] 33.114.030. * * *"

The city's decision states:

"* * * Under the C-2 zoning in effect [when the grocery store was constructed on tax lot 14], a grocery store was a use permitted as of right * * *. Thus, when the property was re-zoned as C-4 and C-4B as a part of the [1981] Comprehensive Plan re-zoning, the property had a valid, pre-existing use as a grocery store. * * *

"However, the grocery use was discontinued four or five years ago when [petitioner's] operations were established on this site. Whatever the proper characterization of [petitioner's] activities in relation to the categories utilized in the [PCC], it is clear that [petitioner's] flea market is a use different in both degree and character from a grocery store use. Accordingly, this change of use is controlled by the provisions of PCC 33.40.155(c)(1)[.]

"* * * * *

"There is no evidence in this proceeding that [petitioner] has ever obtained an appropriate certificate of occupancy for the change of use from a grocery store to a flea market. Nor is [petitioner's] flea market operation a conforming use or a use in the same or more restrictive classification as a grocery store. Accordingly, there is no valid pre-existing use right for [petitioner] to conduct his flea market operations on [tax lot 14]." (Footnote omitted.) Record 6-7.

Petitioner argues the city's finding that flea market

use is different in degree and character from grocery store use is not supported by evidence in the record. Petitioner argues that both uses are classed under PCC 33.42.020 as Group 1 "retail stores." Therefore, according to petitioner, use of tax lot 14 has remained unchanged since it became a pre-existing use in 1981, PCC 33.40.155(c)(1) does not apply, and no reissued certificate of occupancy is necessary.

We determined in the previous section that petitioner's flea market operation is not a Group 1 "retail store" use in the C-2 zone. Therefore, a change in the valid pre-existing use of tax lot 14 occurred in 1987 when the grocery store ceased operation and petitioner began using the building on tax lot 14 as part of his flea market operation. Under PCC 33.40.155(c)(1), a change of a pre-existing use, without loss of pre-existing use status, requires issuance of a certificate of occupancy by the city Bureau of Buildings.[14]

---

[14]Petitioner argues that despite the language of PCC 33.40.155(c)(1), issuance of a new certificate of occupancy was not required when use of the building on tax lot 14 was changed from a grocery store to a flea market, because both uses are in the same occupancy group. Assuming that a change to a use in the same occupancy group would not require issuance of a certificate of occupancy under PCC 33.40.155(c)(1), which we do not decide, petitioner's argument is based on the erroneous premise that the flea market operation on tax lot 14 is properly classified as a "retail store" for occupancy purposes.

We also note that as explained under the previous section, petitioners and the city agree (and this Board concurs) that the flea market operation on tax lot 21 is properly classified for occupancy purposes as an assembly building without a stage having an occupant load of 300 or more. As the character of the flea market use of tax lots 14 and 21 is the same, this

There is no dispute that no such certificate of occupancy was issued when the use of the building on tax lot 14 changed from a grocery store to flea market.[15] Therefore, the city was correct in determining that petitioner's flea market use of tax lot 14 does not have valid pre-existing use status.

The third and fourth (part C) assignments of error are denied.

FIFTH ASSIGNMENT OF ERROR

> "The Hearings examiner rendered a determination without adhering to procedural [requirements] for decisions affecting [tax lots 14 and 21]."

A. PCC 33.40.155(c)(1)

Petitioner contends the city's denial of pre-existing use status for his flea market operation on tax lots 14 and 21 is based on improperly made determinations that both uses require new certificates of occupancy. Petitioner argues that under PCC 33.40.155(c)(1), quoted supra, "[w]hether a certificate of occupancy is necessary must first be interpreted by the Director of the Bureau of Buildings

---

means flea market use of tax lot 14 is in a different occupancy classification from that of a retail store. See Petition for Review A-26.

[15]In addition, under PCC 33.40.155(c)(1), change of a pre-existing use without loss of pre-existing use status requires that the change be "to a conforming use or to a use of the same or more restrictive classification." Petitioner does not contend the flea market operation is a conforming use. Because we conclude the flea market did not retain pre-existing use status for other reasons, we do not decide whether a change from grocery store to flea market use is a change "to a use of the same or more restrictive classification."

before the Hearings Officer has the authority to render [a] determination." Petition for Review 26. According to petitioner, because the hearings officer had no determination by the director to review, the hearings officer exceeded his authority in making the challenged determinations.

The city argues that the hearings officer has authority under PCC Title 22 ("Code Hearings Officer") to determine whether the requirements of the PCC have been met. The city further argues that the hearings officer's decision in this case was not a ruling on an application for a change of pre-existing use pursuant to PCC 33.40.155(c)(1), or on an application for a new certificate of occupancy, but rather on a complaint of code violations filed pursuant to PCC 22.03.030(b). According to the city, the issue properly before the hearings officer was "whether petitioner had previously taken any of the actions * * * that might have rendered petitioner's use of the subject property lawful." (Emphasis in original.) Respondent's Brief 22.

We agree with the city that under PCC Title 22, the hearings officer has jurisdiction to interpret the PCC and determine whether its requirements have been met, including the requirement of PCC 33.40.155(c)(1) that change in a pre-existing use, without loss of pre-existing use status, be based upon issuance of a certificate of occupancy.

This subassignment of error is denied.

B. PCC 33.215.050

Petitioner argues "[w]hether certificates of occupancy [for a change in pre-existing use] are necessary can be determined only after the City adheres to certain procedures enumerated under PCC 33.215.050" (Type III Procedure). Petition for Review 27. Petitioner argues that under PCC 33.40.155(c)(1), disputes relating to certificates of occupancy for changes in pre-existing uses must be "referred for interpretation as specified in [PCC] 33.114.030," which has been superseded by PCC 33.215.050. PCC 33.114.010.

The city's proceeding was initiated by a complaint of code violation, not by an application for approval of a change to a pre-existing use. The proceeding was conducted as a code enforcement proceeding pursuant to procedural requirements set out in PCC Title 22. We are cited to nothing in PCC 33.215.050 or elsewhere in the code which makes the Type III procedures of PCC 33.215.050 applicable to a code enforcement proceeding.

This subassignment of error is denied.

C. ORS 227.160 et seq.

Petitioner argues that a city determination of whether a nonconforming use exists requires the exercise of discretion, as it is not governed by objective standards in statute or ordinance, and therefore requires that notice of and opportunity for a hearing be provided as set out in ORS 227.160 et seq. See Pienovi v. City of Canby, 16 Or LUBA

604 (1988). Petitioner contends the city failed to comply with the requirements of ORS 227.160 et seq. in three respects. First, petitioner contends the decision was not "based on an application which sets forth standards and criteria for approval or rejection," as required by PORS 227.173 and 227.175. Petition for Review 29. Second, petitioner contends he was not given an opportunity to rectify inadequacies in his application, as required by ORS 227.178(2). Finally, petitioner contends the notice of hearing did not "explain the nature of the proposed action, the proposed authorized uses and list the applicable criteria," as required by ORS 227.175(5) and 197.763. Id.

The city argues that ORS 227.160 et seq. apply only to proceedings where an owner of land has applied to a city for a discretionary approval of a proposed development of land or for a zone change. ORS 227.160(2); 227.175(1). The city contends that a code enforcement proceeding is not conducted for the purpose of reviewing permit or zone change applications, or for requiring someone who is committing code violations to file such applications, but rather for the purpose of terminating uses which are unlawful. The city argues, therefore, ORS 227.160 et seq. do not apply to such proceedings.

We agree with the city that ORS 227.160 et seq. apply only to proceedings initiated by an application for approval of a development permit or a zone change, and not to code

enforcement proceedings initiated by a complaint and conducted pursuant to PCC Title 22. Petitioner could have applied for a pre-existing use determination from the city pursuant to PCC 33.205.040. See Great Northwest Towing v. City of Portland, 17 Or LUBA 544, 561 (1989). Had petitioner initiated such a proceeding, the procedural requirements of ORS 227.160 et seq. would have applied. However, petitioner instead chose to raise the issue of pre-existing use for the first time as an affirmative defense in a code enforcement proceeding. Under these circumstances, we do not believe the city is required to suspend the code enforcement proceedings or to conduct them as a development permit proceeding.[16]

This subassignment of error is denied.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

> "The denial of petitioner's pre-existing use on either [tax lot 14 or 21] because of a failure to have a certificate of occupancy constitutes a regulatory taking."

Petitioner maintains that no modified occupancy permits were required for his pre-1981 flea market operations on tax lots 14 and 21, because the flea market's occupancy

---

[16]Comprehensive procedural requirements for code enforcement proceedings, including provisions for notice, hearing, cross-examination of witnesses, depositions and subpoenas, are set out in PCC § 22.03. We note that petitioner does not allege that the city failed to comply with these procedural requirements for enforcement proceedings, or that the procedures employed violated constitutional Due Process requirements.

classification was the same as the classification in the occupancy certificate on record for each property. Petitioner argues the city incorrectly determined that the flea market was not a valid pre-existing use of these properties because the flea market use lacked a required occupancy permit. Petitioner argues that because of the city's decision, he lost his option to purchase tax lot 14, and consequently was required to close his flea market operation on that property. According to petitioner, because of the city's decision, he "lost the pre-existing right to continue operating his business" and, therefore a regulatory taking occurred. See Fifth Avenue Corp. v. Washington County, 282 Or 591, 581 P2d 50(1978).

Petitioner also argues that the city "denied the continued validity of [his] pre-existing use because of a purported failure to have a certificate of occupancy when the reason for denial [was] the impact the use has on the neighborhood." Petition for Review 32. Citing Nollan v. California Coastal Comm'n, 483 US 825, 107 SCt 3141 (1987), petitioner argues the city's decision lacks an essential nexus between the purpose of the certificate of occupancy requirement (structural integrity of the building) and the real reason for denial of pre-existing use status (according to petitioner, impacts of the use on the neighborhood).

According to the city, petitioner's argument under this assignment of error is predicated on a theory that

petitioner had a pre-existing right to continue flea market use of the subject property and, therefore, any decision that petitioner now lacks such a pre-existing right must be based on unconstitutional application of city regulations pertaining to certificates of occupancy. The city contends these premises are incorrect, as the issue before the hearings officer was whether petitioner in fact had a right to continue pre-1981 flea market use of the subject property. The city argues that a decision to abate an illegal use cannot constitute a regulatory taking.

We agree with the city that petitioner's arguments under this assignment of error are primarily based on the premise that the city erred in interpreting and applying the PCC and UBC to require that petitioner have obtained occupancy permits for his pre-1981 flea market use of the building on tax lot 21 and 1987 initiation of flea market use of the building on tax lot 14, and that such error accomplished a regulatory taking. As explained supra, we do not find the city erred with regard to application of the occupancy permit requirements. Further, the essence of the city's decision is that petitioner's flea market use of tax lots 14 and 21 was not legally established and, therefore, petitioner never had any right to conduct a flea market use on these properties which conceivably could be taken by the

city.[17]

The sixth assignment of error is denied.

The city's decision is affirmed. The stay of the city's decision approved by order of this Board dated December 12, 1990, is hereby lifted.

[17]We also note that we fail to see the applicability of Nolan v. California Coastal Comm'n., supra, to a code enforcement proceeding. In Nolan, a condition of development approval which constituted a physical invasion taking of a portion of the subject property was found invalid because an "essential nexus" between the purpose of the condition and the regulatory purposes for which the proposed development could otherwise be denied was lacking. The issue before the city in this case was whether an existing use is lawful, not whether conditions can be imposed on approval of a development application.