LUBA
OCT 28 2026 AM09:52

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

ROBERT GALANAKIS,
*Petitioner*,

vs.

CITY OF PORTLAND,
*Respondent*,

and

MOHAN GREWAL, AKUM INVESTMENT GROUP, LLC,
ROBERT LÉGER, BRUCE PRIOR, VICKI LYNNE BAGGS,
BRAD YAZZOLINO, DENNIS J. PUETZ,
MARK A. BAUSER, and DAVID B. SMITH,
*Intervenors-Respondents*.

LUBA No. 2026-027

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Andrew Mulkey filed the petition for review and reply brief and argued on behalf of petitioner.

Benjamin Taylor filed the respondent's brief and argued on behalf of respondent. Also on the brief was Lauren King.

Wendie L. Kellington filed the intervenor-respondent's brief and argued on behalf of intervenors-respondents Mohan Grewal and Akum Investment Group, LLC. Also on the brief were Kelly F. Huedepohl and Kellington Law Group, PC.

Intervenors-respondents Robert Léger, Bruce Prior, Vicki Lynne Baggs, Brad Yazzolino, Dennis J. Puetz, Mark A. Bauser, and David B. Smith represented themselves.

BASSHAM, Board Member; ZAMUDIO, Board Member, participated in the decision.

WILSON, Board Chair, did not participate in the decision.

AFFIRMED 10/28/2026

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

Opinion by Bassham

## NATURE OF THE DECISION

Petitioner appeals a hearings officer's decision on an application for legal nonconforming use status review, concluding that a nonconforming restaurant drive-through may be lawfully replaced under city code.

## MOTION TO DISMISS INTERVENORS-RESPONDENTS

Petitioner moves to dismiss as parties from this appeal intervenors-respondents Robert Léger, Bruce Prior, Vicki Lynne Baggs, Brad Yazzolino, Dennis J. Puetz, Mark A. Bauser, and David B. Smith, on the grounds that those parties did not file a response brief or cross-petition in this appeal. We refer to these parties as the *pro se* intervenors. Petitioner argues:

> "Petitioner asks that LUBA dismiss these parties because they presented no arguments and took no position on the petition or the merits of the city's decision. For that reason, they should not be parties to the appeal, and the remaining parties should not have to bear the cost or burden of providing further service to these intervenor-respondents in this or any subsequent appellate proceedings." Motion to Dismiss 2.

However, petitioner cites no authority that would allow LUBA to dismiss the *pro se* intervenors as parties from this appeal as a consequence of not filing a brief on the merits. While OAR 661-010-0040(1) provides that "[o]nly parties who have submitted briefs shall be allowed to present oral argument to the Board," neither that rule nor any other rule or case cited to our attention requires or authorizes dismissal of intervenors-respondents from a LUBA appeal based on failure to submit a brief on the merits. The only remotely relevant case we find is to the

contrary. *Setniker v. Polk County*, 63 Or LUBA 38, 41-42 (2011) (rejecting a motion to dismiss intervenors-petitioners who did not file or join in a petition for review). Accordingly, petitioner's motion to dismiss the *pro se* intervenors is denied.

**MOTION TO STRIKE PORTION OF RESPONSE BRIEF**

Petitioner moves to strike portions of the response brief filed by intervenor-respondents Mohan Grewal and Akum Investment Group, LLC (intervenors), the applicants below. Petitioner argues that the disputed portions of the response brief include arguments that some of petitioner's challenges to the city's nonconforming use status review decision represent an impermissible "collateral attack" on what intervenors characterize as a final land use decision, an October 11, 2022 building permit authorizing construction of the disputed drive-through. According to petitioner, during the proceedings below intervenors advanced a similar argument for approving the application for nonconforming use status review based on the finality of the October 11, 2022 building permit, arguing to the city that denying the application, as opponents urged below, would constitute a "collateral attack" on the building permit. However, petitioner argues, the city did not base its decision on intervenors' finality or collateral attack argument, but instead approved the application based on interpretations of the city code that petitioner challenges on appeal.

In the motion to strike, petitioner argues that, in the disputed portions of the response brief, intervenors return to the collateral attack argument,

contending that petitioner's interpretative challenges are precluded by the finality of the October 11, 2022 building permit, and that petitioner's challenges constitute an impermissible "collateral attack" on the building permit. Petitioner characterizes intervenor's collateral attack arguments as advancing a different basis for approving the application for nonconforming use status review than was relied upon by the city decision-makers. In doing so, petitioner argues, intervenors are effectively assigning error to the city's decision. Petitioner contends that intervenors can advance such a challenge to the city's decision only by filing a cross-petition for review, pursuant to OAR 661-010-0030(7).[1] *See also* OAR 661-010-0035(3)(c) (prohibiting inclusion of an assignment of error or cross-assignment of error in a response brief).

Intervenors respond, and we agree, that the arguments in their response brief based on the finality of the October 11, 2022 building permit are not challenges to the city's decision that can be advanced in this appeal only pursuant

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[1] OAR 661-010-0030(7) provides, as relevant:

> "Cross Petition: Any respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. A respondent or intervenor-respondent who seeks reversal or remand of an aspect of the decision on appeal only if the decision on appeal is reversed or remanded under the petition for review may file a cross petition for review that includes contingent cross-assignments of error, clearly labeled as such."

to a cross-petition for review. Intervenors do not seek reversal or remand of the city's decision. The disputed portions of the response brief argue that LUBA should reject petitioner's proposed code interpretations, because those interpretations would, if accepted and acted upon, represent a "collateral attack" on the finality of the October 11, 2022 building permit. Whatever the merits of that argument, it does not, in substance or form, seek reversal or remand of the city's decision, and therefore does not constitute an assignment of error. Accordingly, OAR 661-010-0030(7) and OAR 661-010-0035(3)(c) do not restrict advancement of that argument to a cross-petition for review.

The motion to strike is denied.

**MOTION TO FILE CORRECTED PETITION FOR REVIEW**

Petitioner moves to file a corrected petition for review that removes mistaken references to a photograph in the record that is of a different restaurant than the one at issue in this appeal. Intervenors filed a response stating no objection to the motion. The motion is allowed and LUBA will consider the corrected petition for review instead of the original petition for review.

**FACTS**

The subject property is a 9,360-square foot lot zoned Commercial/Mixed Use (CM2), that in the 1950s was developed with a Dairy Queen restaurant with a drive-through facility. The existing restaurant had no interior seating, and primarily provided drive-through or walk-up service. At that time no city zoning prohibited drive-through facilities, but at some point commercial zoning was

applied to the property that prohibited new drive-through facilities. Under the current CM2 zone, as amended in 2018, a retail establishment such as the Dairy Queen restaurant is a permitted use, but new drive-through facilities are prohibited. Portland City Code (PCC) 33.130.260.C.1.[2] However, as amended in 2018, PCC 33.130.260.C.2 provides that "[e]xisting drive-through facilities are allowed," and that "[e]xisting facilities can be rebuilt, expanded or relocated on the site," subject to specific criteria for drive-throughs set out in PCC 33.224. The remaining sentences of PCC 33.130.260.C.2 concern circumstances where an

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[2] PCC 33.130.260.C provides in relevant part:

> "The following regulations apply to drive-through facilities in the CM1, CM2 and CM3 zones:
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> "1. New drive-through facilities are prohibited; and
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> "2. Existing drive-through facilities are allowed. Existing facilities can be rebuilt, expanded, or relocated on the site. The standards for drive-through facilities are stated in Chapter 33.224, Drive-Through Facilities. If the use with the drive-through facility is discontinued for 3 continuous years, reestablishment of the drive-through facility is prohibited. If the use ceases operation, even if the structure or materials related to the use remain, the use has been discontinued. A list of the standard evidence that can be provided to prove that the use has been maintained over time can be found in Subsection 33.258.038.B. If the applicant provides standard evidence from the list, the Director of PP&D [Portland Permitting and Development] will determine if the evidence is satisfactory. If the applicant provides evidence other than the standard evidence listed, a Determination of Legal Nonconforming Status is required."

existing drive-through facility may be "discontinued" or may be "maintained" over a requisite three-year period. Whether the disputed drive-through was "discontinued" or "maintained" during the relevant time periods is the central issue in this appeal.

Intervenors acquired the subject property in April 2017 and continued to operate the restaurant and drive-through. On July 30, 2018, intervenors applied for a building permit to construct a replacement Dairy Queen and an improved drive-through that met current standards at PCC 33.224, paying the fees and separate systems development charges for the restaurant and the drive-through facility. While the building permit application was under review, intervenors applied to the city for a demolition permit to demolish the restaurant and drive-through. On October 14, 2019, the city issued the demolition permit. The exact date the drive-through ceased operation is in dispute. The record includes a social media post commenting that, on October 19, 2019, the commentor observed that the Dairy Queen restaurant was closed on that date. Record 687. Intervenor Grewal testified that the drive-through remained open and operational through Halloween 2019, and was "permanently closed" sometime in the first week of November 2019. Record 873-74. By the spring of 2020, the restaurant and drive-through had been demolished, leaving the site vacant.

City processing of the building permit application was delayed by a variety of factors, including the COVID-19 pandemic, staffing shortages, applicant-proposed changes, and the need to coordinate with public works, transportation

and other city departments. On July 28, 2022, a city planner advised intervenors that, pursuant to PCC 33.130.260, the three-year expiration period for the drive-through element of the proposal would expire October 14, 2022, which is three years after the city issued the demolition permit. The city finally issued the building permit on October 11, 2022, approving the new restaurant and reconfigured drive-through. However, further delays ensued for various reasons, including revised building plans, and delayed issuance of a public works permit necessary to begin construction. Pursuant to city policy adopted during the pandemic, the city issued a number of extensions to the October 11, 2022 building permit, which would otherwise expire after 180 days if there is no activity on the permit. After a required public works permit issued in spring 2025, intervenors began initial construction on the restaurant and drive-through foundations.

On August 1, 2025, a neighborhood association sent the city a letter questioning the building permit extensions and whether the right to reconstruct the drive-through had been maintained throughout the relevant periods. In response, the city interim planning director sent intervenors a letter, dated September 17, 2025. The September 17, 2025 letter took the position that the right to construct the drive-through had been extended by issuance and extensions of the building permit, but that extended right would expire on October 11, 2025, which was the expiration date of the latest building permit extension. Record 786. The letter granted intervenors a final six-month extension to the building permit,

to allow intervenors time to submit a revised application without the drive-through component, which the letter assumed intervenors would not be able to complete by October 11, 2025. *Id.*

Intervenors responded in relevant part by appealing the September 17, 2025 letter directly to LUBA, while at the same time filing an application for Legal Nonconforming Status Review under PCC 33.258.075, in which intervenors sought to overturn the adverse determinations made in the letter. LUBA dismissed the direct appeal of the September 17, 2025 letter after concluding that the pending application for Legal Nonconforming Status Review represented an available local remedy that intervenors must exhaust prior to appealing to LUBA. *Akum Investment Group, LLC v. City of Portland*, LUBA No 2025-016 (Jan 6, 2026).

Legal Nonconforming Status Review is processed as a "Type II" procedure with an initial notice and comment period, followed by an administrative decision by planning staff, with appeal rights to a hearings officer. Its purpose is to "determine if a use or site has legal nonconforming situation rights." PCC 33.258.075.A. The approval criteria, set out in PCC 33.258.075.D, provide that the "legal status of the nonconforming situation will be certified if the review body finds," in relevant part, that "[t]he nonconforming situation has been maintained over time." Whether a use has been "maintained over time" is determined initially by reference to the types of "standard evidence" listed in PCC 33.258.038.B (Documenting a Nonconforming Situation). One type of

"standard evidence" listed in PCC 33.258.038.B is "Building, land use, or development permits." PCC 33.258.038.B.6.[3]

On December 24, 2025, planning staff issued its decision approving the Legal Nonconforming Status Review, concluding, in relevant part, that issuance of the October 11, 2022 building permit, and its subsequent extensions, constituted satisfactory standard evidence that the right to reconstruct the

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[3] PCC 33.258.038.B provides:

"Situation maintained over time. Standard evidence that the use has been maintained over time is:

"1. Utility bills;

"2. Income tax records;

"3. Business licenses;

"4. Listings in telephone, business, or Polk directories;

"5. Advertisements in dated publications;

"6. *Building, land use, or development permits*;

"7. Insurance policies;

"8. Leases;

"9. Dated aerial photos;

"10. Insurance maps that identify use or development, such as the Sanborn Maps; or

"11. Land use and development inventories prepared by a government agency." (Emphasis added.)

nonconforming drive-through facility had been "maintained over time" for purposes of PCC 33.258.038.B.6 and, therefore, PCC 33.130.260.C.2. Staff concluded that the "rights to reconstruct a drive-through facility [had been] maintained by the approved and issued building permit that includes a drive-through facility (18-210965 CO), and [staff does not] consider those rights to be lost unless the building permit expires." Record 19.

Petitioner appealed the staff decision to the hearings officer, who conducted a hearing, at which petitioner appeared and argued that the record showed that the drive-through had been discontinued for more than three continuous years, as the code terms "discontinue" and "maintained" are properly interpreted and applied. On April 3, 2026, the hearings officer issued the city's final decision, rejecting petitioner's proposed interpretation and adopting planning staff's interpretation, to conclude that intervenors had demonstrated that they had maintained the right to reconstruct the drive-through pursuant to the issued and extended building permit, and that that right had not been discontinued for any continuous three-year period.

This appeal followed.

**FIRST AND SECOND ASSIGNMENTS OF ERROR**

The petition for review includes two assignments of error, which both argue that the hearings officer misconstrued and misapplied PCC 33.130.260.C.2 and PCC 33.258.038.B.6, and thereby erred in concluding that intervenors had established that they had maintained the right to reconstruct the disputed drive-

through. Because the arguments under both assignments of error overlap significantly and turn on a single interpretative question, we address them together.

**A. The building permit is evidence of maintenance.**

Reduced to essentials, the interpretative dispute between the parties turns on whether to give primacy to the "discontinuance" provisions of PCC 33.130.260.C, or the "maintenance" provisions of the same code section, in circumstances where both those elements are arguably present. In petitioner's view, if the record shows that a nonconforming drive-through ceased operation, indeed was demolished, and hence has become "discontinued," the applicant cannot thereafter attempt to demonstrate that the use was "maintained" over the relevant period by submitting the standard evidence listed in PCC 33.258.038.B, including a building permit. Petitioner argues that once the drive-through ceased operation and ceased to exist, the only way to avoid discontinuance is to physically "reestablish" the drive-through, and resume full operation within the three-year discontinuance period. Under this view, that the applicant submitted the pieces of paper listed in PCC 33.258.038.B cannot, as a matter of law, demonstrate that the drive-through use was "maintained over time," or at least that those pieces of paper cannot overcome the fact and legal conclusion that the use had been discontinued and not reestablished within a continuous three-year period.

The hearings officer rejected petitioner's interpretation, and resolved the tension between discontinuance and maintenance, as those terms are used in the code, by giving primacy to provisions allowing the applicant to demonstrate that the drive-through use was "maintained over time" by submission of the standard evidence listed in PCC 33.258.038.B. In the hearings officer's view, if the applicant demonstrates that it applied for, received, and actively maintained a valid, unexpired building permit to reconstruct the drive-through during all relevant periods, then the fact that the drive-through ceased operation and was indeed demolished during that period does not mean that the use was "discontinued," or at least that any discontinuance of the use is not incompatible with maintenance of the right to reconstruct the use as allowed under PCC 33.130.260.C.2.

For the following reasons, we agree with the city and intervenors that the hearings officer's interpretation better fits the text, context, and apparent purpose of PCC 33.130.260.C.2.

Our standard of review over the hearings officer's code interpretations is governed by ORS 197.835(9)(a)(D), which provides that LUBA shall reverse or remand a land use if decision if it finds that the local government improperly construed the applicable law. The deference usually owed to a governing body's code interpretation does not apply to review of a hearings officer's decision. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). Instead, we evaluate whether the hearings officer's interpretation is "correct," applying

standard methods of statutory construction, including analysis of text, context, and any legislative history that helps identify the governing body's intent, as that method is described in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611-612, 859 P2d 1143 (1993), and as modified in *State v. Gaines*, 346 Or 160,171-72, 206 P3d 1042 (2009).

We repeat the text of PCC 33.130.260.C.2, numbering each of its eight sentences for easier reference:

> "[1] Existing drive-through facilities are allowed. [2] Existing facilities can be rebuilt, expanded, or relocated on the site. [3] The standards for drive-through facilities are stated in Chapter 33.224, Drive-Through Facilities. [4] If the use with the drive-through facility is discontinued for 3 continuous years, reestablishment of the drive-through facility is prohibited. [5] If the use ceases operation, even if the structure or materials related to the use remain, the use has been discontinued. [6] A list of the standard evidence that can be provided to prove that the use has been maintained over time can be found in Subsection 33.258.038.B. [7] If the applicant provides standard evidence from the list, the Director of PP&D [Portland Permitting and Development] will determine if the evidence is satisfactory. [8] If the applicant provides evidence other than the standard evidence listed, a Determination of Legal Nonconforming Status is required."

As the city argues, while new drive-throughs are prohibited in city commercial zones, an existing drive-through is not considered a nonconforming use under the PCC. *See* Record 16 (planning staff finding that an existing drive-through facility is not a nonconforming situation or development as those terms are defined at PCC 33.910). To the extent an existing drive-through can be viewed as a nonconforming use under the PCC, it is treated as a special category

of nonconforming uses under PCC 33.130.260.C.2. As the first sentence states, existing drive-through facilities in commercial zones are in fact "allowed" uses, which is not terminology that is generally applied to other types of nonconforming uses. *See* PCC 33.258.050(A) (specifying that nonconforming uses "may continue to operate," subject to restrictions).

The second sentence of PCC 33.130.260.C.2 expressly allows drive-through facilities to be "rebuilt, expanded, or relocated on the site," without being subject to the restrictions that generally apply to other types of nonconforming uses. *See* PCC 33.258.050(D) (providing that nonconforming uses "may expand under certain circumstances," and setting out a number of restrictions on expansions of a nonconforming use). Instead, under the third sentence, standards for rebuilding, expanding, or relocating a drive-through facility are set out at PCC 33.224.

The fourth and fifth sentences concern when a drive-through facility becomes "discontinued." The PCC includes no definition of that term, and its usage in PCC 33.130.260.C.2 differs somewhat from the general provisions of PCC 33.258, governing nonconforming situations. *See* PCC 33.258.050(E) (loss of nonconforming use status).[4] Indeed, the discontinuance provisions of PCC

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[4] PCC 33.258.050(E)(1) provides:

> "Discontinuance. If a nonconforming use is discontinued for 3 continuous years, the nonconforming use rights are lost. If a nonconforming use ceases operations, even if the structure or

33.130.260.C.2 are more restrictive in at least one particular than are the equivalent provisions of PCC 33.258.050(E)(1). The latter allows a use discontinued for more than three continuous years, but less than five continuous years, to apply for re-establishment of the use. PCC 33.130.260.C.2 absolutely prohibits re-establishment after a three-year period of discontinuance. However, the salient point here is that, as amended in 2018, the PCC treats drive-through facilities as a special category, even when it comes to discontinuance.

The final sixth, seventh, and eighth sentences of PCC 33.130.260.C.2 set out how the owner of a drive-through facility can demonstrate that the use was "maintained over time," and thus avoid the restrictions on discontinuance and prohibition set out in the fourth and fifth sentences. To prove that the use was maintained, and thus not discontinued, the applicant may either provide evidence from the list of standard evidence set out at PCC 33.258.038.B (documenting a nonconforming situation) or rely upon non-standard types of evidence, pursuant to a Determination of Legal Nonconforming Status under PCC 33.258.075.

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> materials related to the use remain, the use has been discontinued. If a nonconforming use changes to another use without obtaining all building, land use, and development permits that would have been required at the time of the change, the legal nonconforming use has been discontinued. A nonconforming use that has been discontinued for more than 3 continuous years may request re-establishment through a nonconforming situation review. Re-establishment of a nonconforming use that has been discontinued for 5 or more continuous years is prohibited."

In the present case, intervenors applied for a Determination of Legal Nonconforming Status under PCC 33.258.075. *See* PCC 33.258.075(B) (review may be requested by an applicant even when not required). Thus, intervenors' application was not limited to the evidence listed in PCC 33.258.038.B, and the planning director's and hearings officer's evidentiary reviews were similarly unconstrained. That turns out to be important, because one of the parties' interpretative disputes is the scope of one such listed "standard evidence": a building permit.

As we understand the hearings officer's findings, they viewed the scope of "building permit" as used in PCC 33.258.038.B.6 to include not only the building permit issued on October 11, 2022 authorizing reconstruction of the drive-through, but also to include other documents related to that building permit, such as the application for a building permit filed on July 30, 2018, the staff decisions to extend the October 11, 2022 building permit, and related communications between staff and intervenors regarding the building permit, affirming that the right to reconstruct the drive-through is preserved by the building permit, as long as that permit is maintained in active status.[5] Based on review of this corpus of

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[5] The hearings officer's findings state, as relevant:

> "The Applicant applied for the building permit in 2018 (18-210965-000-00-CO) and then COVID happened – which threw a wrench in all aspects of life and business, including City of Portland operations. After applying for the building permit, Applicant did not receive an active building permit until 2022. A myriad of delays

documents, the hearings officer concluded that the drive-through use had been "maintained over time," apparently meaning since July 30, 2018 through the present, notwithstanding the fact that for the majority of that lengthy period of time the drive-through had ceased to operate and the restaurant improvements had been completely demolished.

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occurred throughout Applicant's permitting journey – ultimately, who bore the responsibility for the delays is not critical for this matter, but the City consistently offered extensions. When those extensions were granted, they proceeded at every juncture as a restaurant with a drive-thru, consistent with the System Development Charges (SDC) paid for a quick service restaurant with a drive-thru. Because the evidence clearly establishes that the use has been maintained over time with the active building permit, further extensive analysis of the term discontinue or cease operations are unwarranted.

"A strict interpretation of the code would seemingly lead to the result sought by Appellant. The drive-thru has not been operational serving customers because the restaurant was closed and later demolished: no restaurant, no drive-thru: operations have ceased. However, what this interpretation fails to contemplate is (1) that the Applicant's building permit was actively pending at that time; and (2) that there is another code provision that says: these are ways to show a use has been maintained over time. By providing a list of 'standard' evidence to show the use has been maintained, the code provides an alternate path forward when questions exist surrounding the issue of discontinuance or ceases operations. To interpret otherwise would be inconsistent with the communications the Applicant has had with the City throughout the process wherein the bureau was following and applying its own land use code provisions." Record 6-7.

Petitioner advances a number of challenges to that conclusion, all of them premised on petitioner's contrary code interpretations that the hearings officer rejected. We begin with petitioner's argument that the term "building permit" as used in PCC 33.258.038.B.6 refers to an *issued* building permit, and does not include an *application* for a building permit.[6]

The text of PCC 33.258.038.B.6 is ambiguous on this point. PCC 33.258.038.B.6 does not mention *applications* for building, development, or land use permits. But neither does it expressly limit its scope to *issued* building, development, or land use permits, or necessarily exclude from consideration as "standard evidence" applications for such permits. Petitioner may be correct that a mere application for a building permit, by itself, might be deemed unsatisfactory "standard evidence" of maintenance by the planning director. But even if so, the consequence is that the applicant would be required to demonstrate that the nonconforming use was maintained via the Determination of Legal Nonconforming Status process under PCC 33.258.075, which is not limited to the "standard evidence" listed in PCC 33.258.038.B.6. In the present case, intervenors applied for a Determination of Legal Nonconforming Status under PCC 33.258.075. Accordingly, it was not error for the planning director and hearings officer to consider evidence that might not, in itself, qualify as "standard

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[6] This argument appears in several places in the petition for review, but most directly in the sixth sub-assignment to the second assignment of error.

evidence" listed in PCC 33.258.038.B.6. We agree with respondents that in determining whether the drive-through had been "maintained over time," rather than "discontinued," the decision-makers could consider all relevant evidence, including the building permit application process culminating in the issuance of the building permit, and the totality of intervenors' actions (or inactions) to obtain and maintain that building permit from July 30, 2018 to the present.

That would presumably be the case even if the present proceeding were a more typical nonconforming use verification process under PCC 33.258.075. However, as respondents argue, the present circumstances are atypical, in that the reconstruction of a drive-through is actually an "allowed" use under PCC 33.130.260.C.2. That allowed use is subject to specified nonconforming use restrictions on maintenance and discontinuance, but as something of a special category. Respondents argue, and we agree, that that context informs how the city applies the nonconforming use verification standards at PCC 33.258.038.B.6 in the present case. In this context, the city is not required to apply the concepts of "maintenance" and "discontinuance" in the same way those concepts would apply to a typical nonconforming use verification. Throughout the petition for review petitioner argues that the concepts of "maintenance" and "discontinuance" must be rigidly applied in the same manner as they would in an application to verify a nonconforming use. For the reasons explained, we reject that premise.

### B. Reestablishment of the Use Within Three Years

Petitioner next argues that even the *issued* building permit is insufficient, in the present case, to demonstrate that the drive-through was "maintained" over any period of time under PCC 33.130.260.C.2.[7] Petitioner contends that, because intervenors ceased operation and demolished the drive-through, the subsequent issuance of the building permit on October 11, 2022, is an irrelevant consideration in determining whether the use was maintained or discontinued. According to petitioner, once the use ceased operating, and certainly once it was physically removed, the use became as a matter of fact and law "discontinued," and thereafter the only way to show that it was "maintained" at any point within the subsequent three-year discontinuance period is to "reestablish" the drive-through, by completing construction and re-commencing restaurant operations within the three-year window. Under this view, the fact that the city issued the building permit to reconstruct the drive-through is an irrelevant consideration; only actual physical and operational "reestablishment" of the drive-through within the three-year window would suffice to maintain the right to use the drive-through.

Respondents argue, and we agree, that this view is inconsistent with the text, context, and purpose of PCC 33.130.260.C.2. Again, reconstruction,

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[7] This argument appears in a number of places in the petition for review, most directly in the first, third and fourth sub-assignments to the second assignment of error.

expansion, and relocation of a drive-through are allowed uses under that code provision. Any reconstruction, expansion, or relocation of a drive-through necessarily entails (1) application for and issuance of a building permit, and (2) operational cessation and perhaps removal of the existing drive-through, via a city-issued demolition permit, so that the reconstructed, expanded, or relocated drive-through can be constructed as authorized under the building permit. As the city argues, a restaurant that closes to customers for permitted reconstruction does not thereby "cease operations" in the sense of discontinuing the use. Petitioner's view that cessation or removal in this context must be viewed as "discontinuance" of the drive-through use, and that issuance of the building permit is irrelevant to the question of whether the use was "maintained," fails to give effect to the text and purpose of PCC 33.130.260.C.2 and PCC 33.258.038.B.6, read in context with each other. PCC 33.258.038.B.6 expressly allows a "building permit" (at least an issued, active building permit) to provide standard evidence of maintenance, and thus to negate discontinuance. In context with PCC 33.130.260.C.2, that language is correctly understood to allow the city to rely upon a building permit issued to authorize the reconstruction of an otherwise permitted drive-through facility to conclude that the use was "maintained over time," notwithstanding that the existing drive-through ceased operation and was demolished in anticipation of permitted reconstruction.

Further, as respondents argue, petitioner's view that cessation and removal in pursuit of reconstruction under a building permit constitutes "discontinuance"

as a matter of law, and hence forces an applicant to accomplish the reconstruction and resume operation within three years of cessation, ignores the reality, manifest in the present case, that issuance of the necessary building permit may be delayed for an extended period of time, for reasons that may be beyond the applicant's control. Far from being irrelevant, the October 11, 2022 building permit was the keystone to the arch of documentary evidence that intervenors submitted to demonstrate that they had maintained the drive-through use over all relevant time periods, starting July 30, 2018 and continuing to the present, as the concept of "maintenance" is applied in this context. The city relied upon that evidence of maintenance to conclude that intervenors had not, during any relevant time, "discontinued" the drive-through for purposes of PCC 33.130.260.C.2. As explained above, that conclusion is consistent with the text, context and apparent purpose of PCC 33.130.260.C.2. The city did not err in rejecting petitioner's contrary interpretations of "maintenance" and "discontinuation," or petitioner's related contention that only "reestablishment" of the use within the three-year discontinuance period can save the use from discontinuance.

**C. Exact Date the Restaurant Ceased Serving Customers**

Petitioner argues that even if issuance of the October 11, 2022 building permit had the critical effect of establishing "maintenance" as of that date, and the use need not be "reestablished" within the three-year window, the city was nonetheless obliged to determine the exact date that the drive-through operation ceased, so that the city could determine whether the three-year window expired

prior to issuance of the building permit.[8] Petitioner argues that it is undisputed that the drive-through ceased operation at the latest sometime during the first week of November 2019, according to intervenor Grewal's testimony. However, petitioner argues that the record includes evidence that the restaurant was not open on October 19, 2019. Petitioner argues that this evidence, a social media post, is evidence that the use may have been "permanently closed" as early as October 19, 2019. Record 687. Further, petitioner speculates that the restaurant and drive-through may have ceased operation even earlier, perhaps prior to October 11, 2019. If so, petitioner argues, the three-year window might have closed prior to issuance of the building permit on October 11, 2022. In these circumstances, petitioner argues, it is incumbent on the city to adopt findings to determine the exact date the drive-through ceased operation. Petitioner argues that the hearings officer erred in finding it unnecessary to do so.

As noted, the hearings officer concluded that, "[b]ecause the evidence clearly establishes that the use has been maintained over time with the active building permit, further extensive analysis of the term discontinue or cease operations are unwarranted." Record 6. Neither the hearings officer nor planning staff adopted a finding that determines the exact date that the drive-through operation ceased. Under the city's interpretations of PCC 33.130.260.C.2 and

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[8] This argument is raised in several places in the petition for review, including the first assignment of error, and the second and fifth sub-assignments to the second assignment of error.

PCC 33.258.038.B.6, which we have affirmed above, that determination was not necessary, and the absence of findings on that point is therefore not a basis for reversal or remand.

We also agree with respondents' alternative argument on this point, that even if the determination that the use was maintained over time depends on evidence that the restaurant had at least one day of operation within three years prior to the date the building permit issued, all the cited evidence in the record on this point indicates that it was operated after October 11, 2019, three years prior to the date the building permit issued. The record includes sworn testimony that the restaurant operation served customers through Halloween 2019, and was not "permanently closed" until the last week of October 2019 or the first week of November 2019. Record 873-74. The social media post petitioner cites to simply states that the commentor observed that the restaurant was not open at one point in time on one day, October 19, 2019. Nothing in the post or any other evidence cited in the record suggests that the restaurant was closed to customers on any other day, much less that it was permanently closed prior to October 11, 2019.[9]

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[9] Petitioner points out that the planning staff decision includes a statement that "[t]he closing date for the old restaurant is not in City records, but the restaurant appears to have closed sometime before the October 14, 2019 issuance date of the demolition permit." Record 19. However, petitioner does not argue that this statement is supported by any evidence in the record. As far as we can tell or petitioner can establish, the statement appears to be a speculative inference drawn by the staff decision-maker. That inference is contradicted by the only direct evidence cited to us in the record: intervenor Grewal's sworn declaration that the

The record does not include any conflicting evidence on this point. In the absence of conflicting evidence, we disagree with petitioner that the city's failure to adopt findings determining the date on which the drive-through last served customers, if such findings were required at all, warrants reversal or remand.

**D. Conclusion**

Petitioner's arguments under the first and second assignments are premised on petitioner's interpretations of PCC 33.258.075 and PCC 33.258.038.B.6. In petitioner's view, in circumstances where a drive-through has ceased operation for more than three years for any reason, issuance of a building permit or similar evidence that the use was maintained within that three-year period is simply irrelevant, and cannot avoid or negate a finding of discontinuance. The hearings officer rejected those interpretations and, for the reasons set out above, we also reject them. While it may be difficult in some cases to give full effect to both the discontinuance and maintenance provisions of PCC 33.258.038.B.6, in the present case we affirm as more consistent with the text, context and apparent purpose of PCC 33.258.075 and PCC 33.258.038.B.6 the hearings officer's interpretations of those code provisions, pursuant to which the hearings officer concluded that the drive-through use had been maintained over all relevant time periods. Petitioner has not demonstrated that the hearings officer misconstrued

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use did not cease operation and was not permanently closed until the end of October or first week of November 2019.

the applicable law, or that their conclusions lack adequate findings or substantial evidence. Accordingly, the first and second assignments of error are denied.

The city's decision is affirmed.