

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

3
4 TIGARD SAND AND GRAVEL, INC.,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CLACKAMAS COUNTY,)
11)
12 Respondent,)
13)
14 and)
15)
16 STAFFORD ALLIANCE FOR THE)
17 ENVIRONMENT, FAR WEST CLACKAMAS)
18 COUNTY CPO, HON. KATHARINE)
19 ENGLISH, CHARLES GAULT, LARRY)
20 EDELMAN, JOHN PRINCE, CLAUDIA)
21 NAVRATRIL, CARLA GREEN, CINDY)
22 TYREE, KAY JEWETT, YVONNE JACOBS,)
23 RUTH HARDIE and THEONIE GILMORE,)
24)
25 Intervenors-Respondent.)

LUBA No. 96-182

FINAL OPINION
AND ORDER

26
27
28 Appeal from Clackamas County.

29
30 Michael J. Lilly, Portland, filed the petition for
31 review and argued on behalf of petitioner.

32
33 Michael E. Judd, Chief Assistant County Counsel, Oregon
34 City, filed a response brief and argued on behalf of
35 respondent.

36
37 Jeffrey L. Kleinman, Portland, filed a response brief
38 and argued on behalf of intervenors-respondent.

39
40 GUSTAFSON, Referee; HANNA, Chief Referee, participated
41 in the decision.

42
43 AFFIRMED 04/09/97

44
45 You are entitled to judicial review of this Order.

1 Judicial review is governed by the provisions of ORS
2 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's determination that its
4 nonconforming use has been discontinued and abandoned.

5 **FACTS**

6 Petitioner owns and operates a rock quarry, which is
7 the subject of this appeal. The quarry has been a
8 nonconforming use since zoning was first applied to the
9 property in 1973. Between 1984 and 1991, petitioner
10 discontinued blasting, crushing and other quarrying
11 activities at the site, and removed most indices of a quarry
12 operation. Some rock remained stockpiled on the site, and
13 petitioner asserts that occasionally during that period
14 stockpiled rock was either used by petitioner for its own
15 purposes or sold to landscapers. Petitioner resumed the
16 quarry operation after 1991.

17 In January, 1996, the county initiated an application
18 for an "interpretation" by the planning director "to
19 determine whether a protected nonconforming use for a rock
20 quarry has been discontinued." Record 387. The planning
21 director determined that a nonconforming use exists for the

22 "operation of a quarry, consisting of blasting,
23 excavating, crushing, stockpiling and sales of
24 aggregate materials, and the use of associated
25 structures, including a scale, a scalehouse, a
26 small office and a maintenance shop, on the
27 subject property, with the use being limited to a
28 maximum of 179,000 cubic yards of aggregate
29 extraction annually * * *." Record 1.

1 The planning director's determination was appealed to
2 the county hearings officer. Following a de novo hearing,
3 the hearings officer determined that by 1991, the quarry
4 operation had been discontinued and abandoned, and the right
5 to continue the quarry use as a nonconforming use had been
6 lost pursuant to ORS 215.130(7) and the county's zoning and
7 development ordinance (ZDO) 1206.02. The hearings officer
8 found, in part:

9 "ORS 215.130(7) provides that a protected
10 nonconforming use may not be resumed after a
11 period of interruption or abandonment, unless the
12 use complies with the requirements of zoning
13 ordinances and regulations at the time of
14 resumption. Subsection 1206.02 of this ZDO, at
15 all times material, provides that if a
16 nonconforming use is discontinued for a period of
17 more than 12 consecutive months, the use may not
18 be resumed unless the resumed use complies with
19 the requirements of the ZDO.

20 "Based on all the substantial evidence in this
21 record, the Hearings Officer finds as follows:
22 that no crushing or quarrying activity occurred on
23 the subject property from 1984 through 1991;
24 although there were stockpiles of crushed
25 aggregate and pit run material on the site during
26 this period of time, the site did not remain open
27 for the sale of that material; minor sales of
28 material probably occurred from this site during
29 the years 1983, 1984, 1985 and 1986, but such
30 sales were of small quantity, and were incidental
31 in nature; by the end of 1988, approximately 2
32 years had passed during which no identifiable
33 activity associated with a quarry use occurred on
34 the subject property; and, between the years of
35 1989 through 1991, the use of this property was
36 converted to a firewood processing and wood
37 sorting business, and the quarry use of the site
38 was abandoned.

1 "In reaching the above determinations of relevant
2 facts, the Hearings Officer is particularly
3 persuaded by the testimony of the activities on
4 the site, by the absence of reliable evidence from
5 the site owner, Tigard Sand & Gravel, concerning
6 its activities on the site during the years 1984
7 through 1991, by the expert testimony of
8 [intervenors' expert witnesses], and by the
9 physical evidence of the abandonment of the site,
10 including the absence of vehicle tracks, the
11 absence of, or rusted-out condition of, quarry
12 machinery and equipment and the abandoned
13 structures." Record 3.

14 The hearings officer then concluded:

15 "Applying the case law to the above findings of
16 historical fact, the Hearings Officer concludes
17 that this quarry use was discontinued for a period
18 of time more than 12 consecutive months,
19 specifically at least from 1987 through 1991, and,
20 in accordance with ORS 215.130(7) and ZDO 1206.02,
21 may not be resumed unless in accordance with
22 applicable ZDO provisions and other applicable
23 regulations. The Hearings Officer also concludes
24 that, upon the establishment of the firewood
25 processing and wood sorting business on the
26 subject property in 1989, the use of this site for
27 a quarry operation was abandoned, and could be
28 resumed only if in compliance with applicable ZDO
29 provisions and other applicable regulations."
30 Record 5.

31 Petitioner appeals the hearings officer's
32 determination.

33 **FIRST ASSIGNMENT OF ERROR**

34 Petitioner argues that "the Hearings Officer's findings
35 of reduced activity in the quarry are not sufficient to
36 support the conclusion that the nonconforming use of the
37 property for a quarry operation has been abandoned."
38 Petition for Review 13. Although the assignment expressly

1 challenges only the finding of abandonment, as we understand
2 the argument, petitioner contends the county's findings
3 misconstrue the requirements of ORS 215.130 for both
4 abandonment and interruption of a nonconforming use.^{1,2}

5 ORS 215.130 states, in part:

6 "(5) The lawful use of any building, structure or
7 land at the time of the enactment or
8 amendment of any zoning ordinance or
9 regulation may be continued. Alteration of
10 any such use may be permitted to reasonably
11 continue the use. Alteration of any such use
12 shall be permitted when necessary to comply
13 with any lawful requirement for alteration in
14 the use. A change of ownership or occupancy
15 shall be permitted.

16 * * * * *

¹The hearings officer did not use the term "interruption" in describing his finding of petitioner's non-use of the property. Rather, as quoted in full above, the hearings officer determined the use was "discontinued" for purposes of that statute. The statute does not use the term "discontinued." We read the hearings officer's finding of discontinuance as applied to ORS 215.130 to be the equivalent of a finding of interruption. Petitioner does not challenge the hearings officer's use of the term "discontinued" in applying the "interrupted" standard of ORS 215.130.

²Petitioner's interpretive challenge appears to be limited to ORS 215.130. We do not construe petitioner's argument to also challenge the county's interpretation of ZDO 1206, upon which the county also based its decision. ZDO 1206.02 states:

"DISCONTINUATION OF USE: If a nonconforming use is discontinued for a period of more than twelve (12) consecutive months, the use shall not be resumed unless the resumed use conforms with the requirements of the Ordinance and other regulations applicable at the time of the proposed resumption."

To the extent petitioners may have intended to also challenge the interpretation of the county's ordinance, the argument is insufficiently developed to enable review.

1 "(7) Any use described in subsection (5) of this
2 section may not be resumed after a period of
3 interruption or abandonment unless the
4 resumed use conforms with the requirements of
5 zoning ordinances or regulations applicable
6 at the time of the proposed resumption."

7 Petitioner argues that the facts in this case are
8 similar to those in Polk County v. Martin, 292 Or 69, 636
9 P2d 952 (1981) (Martin), where the Oregon Supreme Court
10 determined a nonconforming use had not been interrupted or
11 abandoned within the meaning of ORS 215.130(7). Petitioner
12 suggests that since the challenged operation in Martin was
13 not considered interrupted under the statute, the hearings
14 officer misconstrued the statute in this case by finding
15 that petitioner's operation has been discontinued and
16 abandoned.

17 In Polk County v. Martin, 50 Or App 361, 622 P2d 1152,
18 rev'd 292 Or 69, 636 P2d 952 (1981) the Court of Appeals
19 reversed a circuit court determination that the owner of a
20 rock quarry had a valid nonconforming use under ORS 215.130.
21 The Court of Appeals explained the facts, in part, as
22 follows:

23 "Defendant owns a 107 acre parcel of land on which
24 there are four quarry sites. Most of the property
25 is underlain with rock which could be quarried.
26 For the last 40 years rock has been mined and
27 crushed on a recurrent basis.

28 "* * * Defendant's records show that more than
29 200,000 cubic yards of rock were removed in 1947
30 and 1978. Since that time, rock removal has been
31 less substantial and more sporadic. From 1949
32 through 1978, roughly 345,000 cubic yards of rock

1 were extracted. There was, however, no production
2 for 14 of those years, and sales for the entire
3 period amounted to only \$23,000. Although
4 defendant has constantly maintained stockpiles,
5 the only nonproduction year in which a sale was
6 made was 1967. No production or sales occurred in
7 1978, the year of the zone change.

8 "The fluctuations in production from defendant's
9 quarry are explained by the nature of his
10 business. Defendant does not actually operate the
11 quarry; instead, the rock is extracted on a
12 contractual basis by persons who own portable rock
13 crushing equipment. They extract, crush and
14 remove the rock for their own use, paying
15 defendant a royalty for the amounts they take, and
16 stockpiling the excess. Defendant owns no
17 equipment and has made no capital improvements.

18 * * * * *

19 * * * Here, defendant testified that he has
20 always intended to continue operating his quarry.
21 Although production has been sporadic, the
22 quarry's 40 year history of production is
23 consistent with this assertion. On the other hand
24 defendant's actual use has been meager, and for
25 the five years preceding the present zoning,
26 almost nonexistent. From 1974 through 1978, only
27 6,000 cubic yards of rock were removed with sales
28 totaling less than \$1,000. Defendant has made
29 little, if any, capital investment, and he
30 obviously has not promoted his business.

31 "We must acknowledge that, by forming an intent to
32 continue his business and by pursuing that
33 business over a long period of time, defendant has
34 committed his property to a use which, by its very
35 nature, has continued to exist since inception.
36 Even though we find no abandonment, we must
37 nonetheless determine whether defendant's
38 commitment deserves protection from restrictions
39 placed on land use by the county's current
40 zoning." 50 Or App 363-366.

41 Based on these facts, the Court of Appeals determined

1 that the use had been interrupted for purposes of ORS
2 215.130, and therefore could not be resumed. On appeal, the
3 Oregon Supreme Court adopted the Court of Appeals' findings
4 of fact, except to note that the record established that
5 sales of rock were made in 1976, 1977 and 1978. The Supreme
6 Court also accepted the Court of Appeals' conclusion that
7 there had been no "abandonment" as that term is used in the
8 statute. It considered only "whether the evidence shows
9 that a prior 'lawful use' under ORS 215.130(5) has been
10 established and whether there was an interruption of that
11 use under ORS 215.130[(7)] and under the zoning ordinance."
12 Martin, 292 Or at 73. Relying on Bither v. Baker Rock, 249
13 Or 640, 438 P2d 988, 440 P2d 368 (1968), the Supreme Court
14 reversed the Court of Appeals, holding:

15 "[R]ock was continuously stockpiled on the land,
16 sales were made from time to time, and rock was
17 quarried and crushed from time to time. As
18 observed by the trial court, '* * * the product
19 was always available and always being offered for
20 sale.' The Court of Appeals expressly found that
21 there was no abandonment, and its opinion
22 indicates that the court believed that 'the
23 fluctuations in production * * * are explained by
24 the nature of his business,' and that there was no
25 interruption of use, either before or after the
26 zoning ordinance became effective. The land had
27 been used in the same manner for over 30 years.
28 There was continuous use in the sense that
29 stockpiling existed and the owner had committed
30 the property to that use. Even though the sales
31 were not substantial, rock was available for sale
32 and sales were periodically made. The same is
33 true of the quarrying. There was no interruption
34 of the use within the meaning of ORS 215.130(7) or
35 under the ordinance itself." (Emphasis added.)

1 292 Or at 78.

2 Petitioners now contend that just as the "intermittent
3 and sporadic" quarrying operation in Martin was not
4 abandoned or interrupted under ORS 215.130, petitioner's
5 operation also has not been interrupted and abandoned under
6 that statute. The problem with petitioner's argument is
7 that the factual situation in this case is not the same as
8 that in Martin. Unlike Martin, the "fluctuation in
9 production" from petitioner's quarry cannot be explained by
10 the nature of its business. At no time has the quarry
11 operation been "sporadic and intermittent" as that phrase
12 was applied to describe the operation in Martin. To the
13 contrary, prior to 1984, and after the quarry operation
14 resumed in 1991, petitioner's records show there was then
15 and now is again an active, ongoing quarry operation. In
16 direct contrast, between 1984 and 1991, the hearings officer
17 found no evidence of any ongoing operation. No quarrying
18 activities were conducted, essential equipment was removed,
19 the site was left unmaintained, and in 1989 at least a
20 portion of it was leased for another, unrelated business
21 use.³ Thus, the county hearings officer did not find that

³This factual account does not suggest that the intensity of the operations before 1984 and since 1991 may not fluctuate from time to time. As the Oregon Supreme Court recognized in Martin,

"Quarry operations are by their nature sporadic, and a discontinuance or abandonment cannot be inferred from the mere fact blasting and crushing cease * * *, or from fluctuations in the volume of extractions or sales." 292 Or at 76 (quoting

1 petitioner had an consistently ongoing "intermittent and
2 sporadic" quarrying operation for which production
3 "fluctuated." Rather, the hearings officer determined that
4 during the early 1980s the quarry use was discontinued,
5 there was no quarrying operation for more than one year, and
6 that the quarrying operation had been abandoned when the
7 owner leased the site for use as a wood storage facility.
8 It is from this factual premise that the hearings officer
9 evaluated the status of petitioner's use for purposes of ORS
10 215.130.

11 While petitioner disputes the factual evidence upon
12 which the county relied in reaching its decision, that
13 factual dispute does not establish that the county
14 misconstrued ORS 215.130 in reaching its decision. In
15 evaluating whether the county properly construed ORS 215.130
16 in reaching its decision, we must determine whether the
17 county's interpretation is reasonable and correct. McCoy v.
18 Linn County, 90 Or App 271, 752 P2d 323 (1988).

19 Petitioner's argument appears to presume that so long
20 as there is evidence of some "stockpiled" rock on the site,
21 under the Supreme Court's interpretation of ORS 215.130 in

Lane County v. Bessett, 46 Or App 319, 326, 612 P2d 297
(1980).)

The distinction in this case is that, while before 1984 there may have been, and now may be, some fluctuations in production or sales due to the nature of the business, during the period of 1984-91, the hearings officer found that there was no business operating at the site, regardless of the nature.

1 Martin, a quarrying operation cannot be interrupted or
2 abandoned. Martin does not support such a proposition. Nor
3 does evidence of stockpiled rock otherwise preclude findings
4 of either interruption or abandonment under ORS 215.130.

5 Although petitioner considers the county's findings of
6 discontinuance and abandonment together, we note that the
7 two concepts are distinct, and in this case provided two
8 independent bases under ORS 215.130 for the county's
9 conclusion that petitioner had lost its right to resume its
10 quarry operation. First, the hearings officer determined
11 that by virtue of the quarry's non-use for more than one
12 year, the use had been discontinued (i.e., interrupted) for
13 purposes of ORS 215.130 and ZDO 1206. Second, the hearings
14 officer determined that petitioner had abandoned the quarry
15 use when it converted the property to a firewood processing
16 and wood sorting business. We do not find the hearings
17 officer misconstrued ORS 215.130 with regard to either
18 basis.

19 ORS 215.130 does not specify a time period necessary to
20 establish interruption. It merely provides that an affected
21 use "may not be resumed after a period of interruption."
22 The county applied the one year time limit for
23 discontinuance under ZDO 1206 to conclude the use was
24 discontinued for purposes of ORS 215.130. Petitioner does
25 not argue that the county misconstrued ORS 215.130 by
26 applying a one-year limit. Rather, petitioner argues the

1 county misconstrued ORS 215.130 by finding that the use was
2 discontinued when there was stockpiled rock remaining on the
3 site during that period.

4 With regard to the county's finding of abandonment
5 based on the lease of the site to another use, petitioner's
6 argument appears to be essentially the same: so long as
7 rock continued to be stockpiled on the site, there could be
8 no abandonment under ORS 215.130.

9 The hearings officer found, and we agree, that the
10 facts in this case are somewhat similar to those in Lane
11 County v. Bessett, where the Court of Appeals determined
12 that incidental sales of stockpiled rock after
13 discontinuance of quarrying activities did not constitute an
14 active quarry operation for purposes of ORS 215.130. In
15 that case, the US Army Corps of Engineers sold a former
16 quarry site to the Mobile Crushing Company after its use of
17 the quarry during a dam construction project. The court
18 explained,

19 "There was some additional evidence relating to
20 the removal of loose rock from the quarry after
21 1965. * * * [T]he most certain evidence of use of
22 rock from the quarry after 1965 was the documented
23 fact that 75 cubic yards of loose rock were
24 removed by the Corps of Engineers in 1975 * * *.

25 "There is no evidence -- and Mobile does not
26 contend -- that any quarry activities other than
27 removal of loose rock (i.e., blasting or crushing)
28 were conducted by the Corps on the property after
29 the dam construction projected was completed. * *
30 *

1 "In sum, even viewing Mobile's evidence most
2 favorably to it, there was a quantum diminution in
3 the amount and nature of the Corps' operations on
4 the property after the dam was completed.
5 Blasting and crushing ceased completely; the
6 volume of rock removed decreased from 2.5 million
7 cubic yards during the period of construction to
8 16,652.8 cubic yards for the ten year period
9 thereafter; and the regular daily operations which
10 took place during construction declined to a
11 maximum work total of 3,000 truckloads of rock
12 hauled from the quarry site by the Corps during
13 the 10 years from the time the dam construction
14 was completed to the time the property was zoned.

15 "Mobile argues that quarry operations are by their
16 nature sporadic, and a discontinuance or
17 abandonment cannot be inferred from the mere fact
18 blasting and crushing cease after large stockpiles
19 of loose rock have accumulated, or from
20 fluctuations in the volume of extractions or
21 sales. * * * While we agree with that concept in
22 the abstract, we do not agree with any implication
23 by Mobile -- if such is intended -- that a quarry
24 use cannot be abandoned."

25 " * * * * *

26 "The facts here differ from those in Bither [v.
27 Baker]. In that case, the discontinuance of types
28 of quarry activities (i.e., blasting and crushing)
29 was held to be insufficient to provide
30 discontinuance of the quarry use itself, in light
31 of the evidence that there were ongoing sales and
32 of the owner's intention to conduct quarry
33 operations in the future. In this case, there is
34 no persuasive evidence that the Corps intended the
35 continuation of the quarry operations on the site
36 after it completed the Fall Creek Dam in 1965.
37 Procedures for disposal of the property were
38 initiated by the Corps in December of that year.
39 Moreover, as earlier indicated, there was no proof
40 of any cognizable amount of rock removed from the
41 quarry site by the Corps of Engineers on the date
42 the property was zoned or during the relatively
43 proximate preceding period. * * * The quarry
44 activity which was occurring at the time of

1 zoning, as far as the evidence shows, was no more
2 than an incidental use of property which had been
3 declared excess and was awaiting sale." Lane
4 County v. Bessett, 46 Or App at 326-27 (Emphasis
5 in original.)

6 The inquiry in that case was whether an ongoing quarry
7 operation existed on the date restrictive zoning was applied
8 to the case. The court concluded that the fact there may
9 have been some incidental sale of rock which had remained
10 after the active quarrying had ceased did not establish a
11 continuation of the quarrying use. That, plus the fact that
12 the quarry owners had evidenced an intent to discontinue the
13 quarry use by virtue of their sale of the property, lead to
14 the court's conclusion that the quarry had been abandoned
15 for purposes of ORS 215.130 prior to establishment of
16 restrictive zoning.

17 In this case, the hearings officer's finding of
18 discontinuance rests not only on his finding that possible
19 sales or other removal of stockpiles rock at times during
20 the late 1980's was no more than "incidental," but also on
21 his finding that there was more than a two-year period
22 during which there was no quarry-related activity at all.
23 The county's conclusion is both reasonable and correct.
24 Evidence of stockpiled rock in an otherwise unused and
25 unmaintained quarry does not constitute an ongoing quarry
26 operation. The hearings officer's finding that the quarry
27 was wholly inactive but for the remains of stockpiled rock
28 for more than one year, supports a conclusion that the site

1 has been discontinued or interrupted for purposes of ORS
2 215.130.

3 Regarding the finding of abandonment, the Oregon
4 Supreme Court has defined abandonment to mean the voluntary
5 relinquishment of a known right. Rencken v. Young, 300 Or
6 352, 357, 711 P2d 954 (1985). Based on this definition, and
7 on the courts' abandonment analyses in both Martin and Lane
8 County v. Bessett, we find the hearings officer's
9 determination that abandonment is established through an
10 active intent to discontinue the use is reasonable and
11 correct. The county did not misconstrue the standard when
12 it found that petitioner's lease of the site to another
13 unrelated business evidenced an intent to abandon the site
14 as a quarry.

15 The first assignment of error is denied.⁴

16 **SECOND, THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

17 Petitioner asserts the following county findings are
18 not supported by substantial evidence: (1) "that no
19 crushing or quarrying activity occurred on the property from
20 1984 through 1991"; (2) "that the site did not remain open
21 for the sale of rock from 1984 through 1991;" (3) "that by

⁴It is possible petitioner's argument is that the county's findings are inadequate to support its conclusion. We reject that argument, to the extent it is made. The county's findings adequately identify the relevant criteria, set forth the facts upon which the county relies, and explain how those facts lead to its conclusion. ORS 215.416; Mission Bottom Assoc. v. Marion County, ___ Or LUBA ___ (LUBA No. 96-057, September 26, 1996), slip op 8-10; LeRoux v. Malheur County, 30 Or LUBA 268 (1996).

1 the end of 1988, approximately two years had passed during
2 which no identifiable activity associated with a quarry use
3 occurred on the subject property"; and (4) "that between the
4 years of 1989 through 1991 the use of the property was
5 converted to firewood processing and wood sorting business,
6 and the quarry use of the site was abandoned." Petition for
7 Review 14-15.

8 Petitioner does not discuss these findings individually
9 to establish factually that the evidence in the record does
10 not support the hearings officer's findings. Rather,
11 petitioner contends generally that the evidence in the
12 record demonstrates that the evidence upon which the
13 hearings officer relied is incorrect, and that the hearings
14 officer did not adequately consider petitioner's evidence
15 which compels a conclusion that the quarry has been
16 continuously operational. Petitioner argues that the
17 evidence from neighboring property owners upon which the
18 hearings officer relied is wholly unreliable, and generally
19 contends that an affidavit from petitioner's president,
20 county records, Department of Geology and Mineral Industries
21 (DOGAMI) records, one letter from a neighboring property
22 owner and customer, four letters from other customers, and
23 testimony from an expert who testified on behalf of
24 intervenors, demonstrates that the hearings officer's
25 factual conclusions are incorrect.

26 Intervenors respond with numerous examples of specific

1 testimony and letters from neighbors of the site, all of
2 which uniformly contend that the quarry was closed and that
3 it appeared to be abandoned between 1984 and 1991, and that
4 between 1990-91 it was converted to a log storage yard.
5 Intervenors also discuss the evidence upon which petitioner
6 relies in arguing that petitioner's evidence does not refute
7 the factual observations of the neighbor or establish that
8 the quarry remained active during the contested period.

9 As intervenors explain, the bulk of petitioner's
10 evidence merely establishes that until the early 1980s
11 petitioner filed yearly "limited exemption permit" renewals
12 with DOGAMI in order to avoid reclamation requirements.
13 During the 1980s when the county, rather than DOGAMI,
14 maintained the limited exemption period records, a county
15 planner filed the required documents yearly. His inspection
16 report for 1985 states:

17 "No activity at site on inspection date. Office
18 appears unused - subject of considerable
19 vandalism. Excavation appears to be occurring
20 primarily on the north wall of the mining site,
21 directly north of the settling pond. Very little
22 stockpile observed (approx. 1500 cu ft) except for
23 older piles on gravel floor." (Emphasis added.)
24 Record 691.

25 His inspection report for 1986 states, "A small amount of
26 pit-run material has been removed from this quarry during
27 the last year. No changes were observed." Record 687. His
28 inspection reports for 1987 and 1988 are nearly identical.
29 His 1989 inspection report states, "A small amount of pit-

1 run material has been removed form the quarry during the
2 last year of the permit. Much of the mining site has been
3 cleaned up and graded. There is some log storage within the
4 site." Finally, his 1990 inspection report states:

5 "Again, a small amount of pit-run material has
6 been removed from the quarry during the last year
7 of the permit. Most of the mining site is now
8 being used for sorting and transporting raw logs.
9 Also observed several piles of firewood. There is
10 a new office trailer on-site associated with this
11 logging business." Record 669.

12 During each of these years, petitioner's renewal
13 application, which prompted the county's inspection report,
14 represented that petitioner had removed approximately 1,000
15 cubic feet of rock, and in 1986 and 1987, 5,000 cubic feet.
16 Given petitioner's acknowledgment that no extraction
17 activities occurred between 1984-1991, and the planner's
18 initial observation that in 1985 only approximately 1,500
19 cubic feet remained, there appears to be an inconsistency in
20 the amount of rock removal that may have occurred during
21 this time. This inconsistency appears also in the letters
22 of customers who recall purchasing more than was either
23 represented by petitioner or observed by the county as being
24 removed from the site. See Record 56, 57.

25 In addition to the questions about the amount of rock
26 that may have been removed, intervenors also point out that
27 petitioner could not verify with any receipts, any sale of
28 rock between 1984 and 1991. An affidavit from petitioner's
29 president states that some sales receipts could not be

1 produced because they routinely are kept for only five
2 years. Petitioner did, nonetheless, produce extensive sales
3 receipts for sales before 1984 and after 1991. In
4 addition, although expressly requested by the hearings
5 officer, petitioner did not provide a copy of the lease to
6 the log storage operation which could have clarified the
7 terms and extent of that operation.⁵ Record 100.
8 Intervenors argue that the most petitioner's evidence could
9 establish is that some pit-run rock remained on the site
10 after all quarry operations otherwise ceased after 1984, and
11 that occasionally, some incidental amounts of pit-run rock
12 may have been removed from the site.

13 In order to factually establish the non-use of the
14 quarry site, intervenors rely on testimony from two experts
15 who used aerial photographs to evaluate the site. Both
16 provided detailed testimony to support their conclusion that
17 the quarry was inactive during the contested period.
18 Intervenors also provide accounts from numerous neighbors
19 who testified, both orally and in writing, that during the
20 period in question, no quarrying activities occurred on the
21 site. For example, several neighbors testified regarding
22 the debilitated condition of the structures of the site,

⁵Intervenor also explains that petitioner appeared during the local proceedings through its attorney. At the time of the public hearing, the evidence upon which petitioner relied consisted primarily of the DOGAMI and county records. Following the public hearing, but before the record was closed, petitioner supplemented the local record with the affidavit of petitioner's president and the customer letters.

1 which were vandalized, overgrown with vegetation and
2 apparently abandoned. Record 228-56; 468-89. Intervenors
3 also cite evidence provided by neighbors who testified that,
4 in contemplation of purchasing their home adjacent to the
5 quarry site, they contacted petitioner regarding the status
6 of the quarry and were told it had been closed. Record 468.
7 Another neighbor requested to purchase rock from the quarry
8 and was told by petitioner that it was closed. Record 353.
9 Others purchased rock from petitioner, with receipts showing
10 the rock came from another quarry owned by petitioner, a
11 much further distance away. One neighbor noted upon
12 visiting the site that there was no electrical service to
13 any of the structures. Record 485. Intervenor notes that
14 petitioner applied to have the electricity reinstalled in
15 1992. Record 319. Finally, a 1991 letter from petitioner
16 to DOGAMI mentions that "[t]he quarry has not been actively
17 mined in several years; however, we did mine approximately
18 1,000 tons in 1991 and may increase this amount in 1992."
19 Record 663.

20 As a review body, we are authorized to reverse or
21 remand the challenged decision if it is "not supported by
22 substantial evidence in the whole record."
23 ORS 197.835(7)(a)(C). Substantial evidence is evidence a
24 reasonable person would rely on in reaching a decision.
25 City of Portland v. Bureau of Labor and Ind., 298 Or 104,
26 119, 690 P2d 475 (1984); Bay v. State Board of Education,

1 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes
2 County, 21 Or LUBA 118, aff'd 108 Or App 339 (1991). In
3 reviewing the evidence, however, we may not substitute our
4 judgment for that of the local decision maker. Rather, we
5 must consider and weigh all the evidence in the record to
6 which we are directed, and determine whether, based on that
7 evidence, the local decisionmaker's conclusion is supported
8 by substantial evidence. Younger v. City of Portland, 305
9 Or 346, 358-60, 752 P2d 262 (1988); 1000 Friends of Oregon
10 v. Marion County, 116 Or App 584, 588, 842 P2d 441 (1992).
11 If there is substantial evidence in the whole record to
12 support the local government's decision, LUBA will defer to
13 it, notwithstanding that reasonable people could draw
14 different conclusions from the evidence. Adler v. City of
15 Portland, 25 Or LUBA 546, 554 (1993). Where the evidence is
16 conflicting, if a reasonable person could reach the decision
17 the city made, in view of all the evidence in the record,
18 LUBA will defer to the local government's choice between
19 conflicting evidence. Mazeski v. Wasco County, 28 Or LUBA
20 178, 184 (1994), aff'd 133 Or App, 258, 890 P2d 455 (1995);
21 Bottum v. Union County, 26 Or LUBA 407, 412 (1994); McInnis
22 v. City of Portland, 25 Or LUBA 376, 385 (1993). Further,
23 in order to overturn the county's denial on evidentiary
24 grounds, it is not sufficient for petitioner to show there
25 is substantial evidence in the record to support its
26 position. Rather, the "evidence must be such that a

1 reasonable trier of fact could only say petitioners'
2 evidence should be believed." Thomas v. City of Rockaway
3 Beach, 24 Or LUBA 532, 534 (1993); Schmaltz v. City of Hood
4 River, 22 Or LUBA 115, 119 (1991). Petitioner must
5 demonstrate it sustained its burden of proof of compliance
6 with the applicable criteria as a matter of law. Jurgenson
7 v. Union County Court, 42 Or App 505, 600 P2d 1241 (1979).

8 Petitioner's substantial evidence challenge appears to
9 be premised on its interpretation of ORS 215.130 that the
10 existence of rock stockpiled on the site, with some
11 indication of occasional incidental amounts of removal, is
12 sufficient to establish an ongoing quarry operation. As
13 discussed in the first assignment of error, the hearings
14 officer rejected that interpretation. Based on the hearings
15 officer's interpretation of the statute, there must be
16 substantial evidence of some ongoing quarry operation to
17 sustain a nonconforming use. The evidence upon which
18 petitioner relies does not establish, as a matter of law,
19 that its quarry was operational on an ongoing basis during
20 the contested period.

21 Moreover, even if the evidence upon which petitioner
22 relies could support a finding of continuous use, petitioner
23 has not established either that the evidence upon which the
24 county relied is incorrect, or that only petitioner's
25 evidence can be believed. Based on the uniformity of the
26 evidence provided by intervenors, and the inconsistencies

1 and gaps in petitioner's evidence, the hearings officer's
2 choice between sometimes conflicting evidence is reasonable.

3 Based on all the evidence in the record to which we
4 have been cited, we find that there is substantial evidence
5 in the record to support the county's decision that the
6 quarry operation was discontinued under ZDO 1206, and
7 interrupted and abandoned under ORS 215.130.

8 The second through fifth assignments of error are
9 denied.

10 **SIXTH ASSIGNMENT OF ERROR**

11 Petitioner disputes the county's method of calculating
12 the amount of aggregate extracted from the quarry prior to
13 the abandonment. Because we agree with the county's
14 determination that the quarry operation was discontinued and
15 abandoned, we need not reach the issue of whether the county
16 correctly calculated the amount of aggregate extracted prior
17 to the time the quarry lost its nonconforming use rights.

18 The county's decision is affirmed.