

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

FRANK MCCURDY and THE MCNAMEE)
NEIGHBORS,)
Petitioners,)
vs.)
MULTNOMAH COUNTY,)
Respondent,)
and)
ANGELL BROTHERS, INC.,)
Intervenor-Respondent.)

LUBA No. 97-025
FINAL OPINION
AND ORDER

Appeal from Multnomah County.

Hank McCurdy, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dobbins, McCurdy & Yu.

Sandra N. Duffy, County Counsel, Portland, filed a response brief on behalf of respondent.

Frank M. Parisi, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Parisi & Parisi.

GUSTAFSON, Chief Referee, participated in the decision.

REMANDED 09/30/97

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's approval of a
4 conditional use permit to expand an aggregate quarry.

5 **MOTION TO INTERVENE**

6 Angell Brothers, Inc., the applicant below, moves to
7 intervene on the side of the county. There is no opposition
8 to the motion, and it is allowed.

9 **MOTION TO FILE REPLY BRIEF**

10 Petitioners move to file a reply brief pursuant to OAR
11 661-10-039, under which the Board may grant permission to
12 file a reply brief confined solely to new matters raised in
13 the respondent's brief. We discern no new matters raised in
14 the response brief in this case to which the reply brief is
15 directed. The motion is denied.

16 **FACTS**

17 Angell Brothers, Inc. (intervenor) seeks a conditional
18 use permit to expand an existing aggregate quarry on a site
19 two miles north of the city of Portland, from 114 acres to
20 397 acres. The site contains parts of three drainages:
21 South, Middle and North Angell Brothers Creeks. The county
22 comprehensive plan identifies North Angell Brothers Creek as
23 a significant stream under Goal 5, largely because it
24 provides water for Burlington Bottoms, a protected wetland.

1 Some procedural background is necessary to explain the
2 issues arising from the challenged conditional use permit
3 approval.

4 In February, 1989 the county submitted its periodic
5 review order to the Department of Land Conservation and
6 Development (DLCD). DLCD required additional Goal 5
7 analysis on measures to protect two aggregate resource
8 sites, one of which is the quarry at issue in this appeal.
9 After several delays, in September, 1994 the county adopted
10 an amendment to its comprehensive plan entitled the "West
11 Hills Reconciliation Report" (9/94 Report). The principal
12 purpose of the 9/94 Report was to provide the Goal 5
13 measures missing from the county's 1989 periodic review
14 order. However, in February, 1995 DLCD rejected the 9/94
15 Report as still inadequate, and intervenor appealed to the
16 Land Conservation and Development Commission. At this
17 point, the county entered into mediation with DLCD, in which
18 the main parties were intervenor and a public interest
19 group, Friends of Forest Park.

20 As one result of that mediation, in August, 1995
21 intervenor agreed with Friends of Forest Park to sign a
22 "Grant of Conservation Easement" (Easement), in which
23 intervenor grants to Friends of Forest Park an easement over
24 the site once intervenor obtains all necessary permits to
25 mine the property in accordance

1 with a referenced Operating and Reclamation Plan dated
2 February, 1995 (February 1995 Mining Plan).¹

3 As another result of the mediation, the county agreed
4 to amend the 9/94 Report in order to implement the agreement
5 reached between intervenor and Friends of Forest Park.
6 Accordingly, in September, 1995 the county adopted Ordinance
7 831, which amended the county's comprehensive plan to
8 include the revised Reconciliation Report (9/95 Report). In
9 March, 1996, LCDC approved the 9/95 Report, with minor
10 revisions not relevant here. The final May, 1996 revision
11 of the Report (5/96 Report) differs from the 9/95 Report
12 only in making those minor revisions. As part of the
13 comprehensive plan, the 5/96 Report contains the applicable
14 requirements for approval of the quarry expansion at issue
15 here.

16 In July, 1996, intervenor filed for a conditional use
17 permit to operate the proposed expanded quarry, attaching in
18 support thereof a revised Mining Plan dated December, 1995

¹As discussed below, the February 1995 Mining Plan is not in the record. The only Operating and Reclamation Plan in the record is a revised plan dated December, 1995 (December 1995 Mining Plan). Petitioners assert, corroborated by references in the record, that intervenor has revised the December 1995 Mining Plan even further, in response to interactions with the State Department of Geology and Mineral Industries. The hearings officer found that intervenor's reclamation plans had changed so much that she had to rely on testimony as the final word rather than the submitted December 1995 Mining Plan. Record 136, n 5. It is unclear what version of the mining plan was before the county during its deliberations; however, it appears that many of the issues in this appeal involve revisions that were presented through testimony before the county rather than in the December 1995 Mining Plan. We will refer to the thus augmented December 1995 Mining Plan as the revised December 1995 Mining Plan.

1 (December 1995 Mining Plan). Petitioners, residential
2 neighbors of the quarry, received notice of the conditional
3 use permit application, and participated in the local
4 proceedings.

5 Under the county's conditional use ordinance,
6 intervenor must demonstrate that the expanded quarry meets
7 either the site-specific requirements in the 5/96 Report or,
8 alternatively, the general conditional use standards for
9 aggregate operations. The hearings officer determined that
10 intervenor's application did not comply with the site-
11 specific requirements found in the 5/96 Report but, subject
12 to a number of special conditions, it did meet the
13 alternative standards of the county's conditional use
14 ordinance. Among the conditions was a requirement that
15 intervenor revise the December 1995 Mining Plan to provide
16 for reclamation immediately following mining of the upper
17 benches of the quarry. The hearings officer approved the
18 permit with those conditions, and intervenor appealed to the
19 county board of commissioners (county).

20 The county rejected the analysis and most of the
21 conditions imposed by the hearings officer, based largely on
22 a determination that the 5/96 Report incorporated the
23 Easement (which incorporated the February 1995 Mining Plan),
24 and that compliance with the Easement and the Mining Plan
25 (which version is unclear) constituted compliance with most
26 of the applicable conditional use requirements. The county

1 determined also that requirements precluding mining in the
2 North Angell Brothers Creek "watershed" actually precluded
3 mining only in the creek's riparian zone. The county also
4 interpreted the 5/96 Report to permit operating hours from 6
5 a.m. to 10 p.m., notwithstanding inconsistent code
6 requirements. The county ultimately found that intervenor's
7 conditional use application satisfied all requirements in
8 the 5/96 Report, as construed to include the Easement and
9 some version of the Mining Plan, and approved the permit.
10 Among other things, the challenged decision eases
11 reclamation timetables required by ordinance, and defers
12 some reclamation requirements indefinitely.

13 This appeal followed.

14 **SECOND ASSIGNMENT OF ERROR²**

15 Petitioners assign as error the county's determination
16 that the 5/96 Report incorporates the Easement, as not
17 supported by substantial evidence. Petitioners contend that
18 the 5/96 Report lacks any express or implicit terms
19 incorporating the Easement.

20 Notwithstanding the absence of any language
21 incorporating the Easement, the county found, in pertinent
22 part:

23 "We intended at the time of mediation, and now,

²Petitioners' second and third assignments of error are logically antecedent to resolution of the first assignment of error, and we discuss them in that order.

1 that the mediation process would finally settle
2 all significant details of the Resource Protection
3 Programs in the West Hills Study Area, and that
4 the settlement document, in the form of the
5 Easement, would incorporate with specificity all
6 such conditions and all relevant mining
7 conditions, so that the parties would be able to
8 understand all the implications of settlement
9 before agreeing to it, and that we would have the
10 same full understanding of these documents before
11 we determined to incorporate them into the Report.
12 We find that this was actually done, as we stated
13 on page I-4 of the Report: 'The results of that
14 mediation process are presented as revisions to
15 the Report in the attached document . . . [which
16 was adopted on] September 7, 1995.'

17 * * * * *

18 "We interpret the Report to specifically adopt a
19 Program to Achieve the Goal on Pages VI-22 through
20 VI-23. It was and is our intent, and the intent
21 of the settling parties who have articulated their
22 intent to us here, that the Program to Achieve the
23 Goal incorporates the Easement, and that the
24 Easement, in turn, incorporates the [Mining Plan].
25 We interpret Section VI-C of the Report (together
26 with the Easement and the [Mining Plan]), to be
27 the County's "Program to Achieve the Goal" within
28 the meaning of Goal 5. We interpret this to be
29 the operative "site specific program" under Goal
30 5. * * * We determine now that complying with
31 the specific provisions in the Easement and in the
32 [Mining Plan] are sufficient to establish
33 compliance with various alternative provisions
34 covering the same issues in the Zoning Code."
35 Record 6-8.

36 Intervenor responds that the county's determination
37 that the 5/96 Report incorporates the Easement is not a
38 finding subject to review under a substantial evidence
39 standard, but an interpretation of the comprehensive plan
40 entitled to deference under Clark v. Jackson County, 313 Or

1 508, 836 P2d 710 (1988), and its statutory and case law
2 progeny. For the following reasons, we conclude that the
3 county's attempt to incorporate the Easement into the 5/96
4 Report fails under either standard.

5 It is evident that the quoted sections of the
6 challenged decision contain express interpretations, express
7 findings, and statements that arguably could be either one,
8 neither or both. Neither party makes an effort to identify
9 which language they believe to be an interpretation and
10 which they believe to be a finding.³ Where the decision
11 states that it "interprets" or "finds," the difference is
12 relatively clear. The main difficulty is that the
13 statements which purport to recognize that the 5/96
14 Reconciliation Report incorporated the Easement are phrased
15 as expressions of the county's former and current intent
16 that incorporation occur. However, a post-adoption
17 statement that the county intended the 5/96 Report to
18 incorporate the Easement is a statement of fact, either true
19 or false, but it is not itself an express or implicit
20 interpretation of any textual provisions. Even if
21 considered interpretations, a county's statements of intent
22 regarding previously adopted legislation cannot supersede
23 contrary provisions in that legislation. See Testa v.
24 Clackamas County, 29 Or LUBA 383, 388-390, aff'd 137 Or App

³More exactly, petitioners treat nearly every statement as a finding, while intervenor treats every statement as an interpretation.

1 21, 903 P2d 373 (1995).

2 The real question, in our view, is whether the 5/96
3 Report by its terms incorporates the Easement. The
4 challenged decision does not interpret any actual language
5 in the 5/96 Report to demonstrate that it incorporates the
6 Easement.⁴ The closest the challenged decision comes is a
7 "finding" that such incorporation occurred:

8 "We find that [incorporation] was actually done,
9 as we stated on page I-4 of the Report: 'The
10 results of [the] mediation process are presented
11 as revisions to the Report in the attached
12 document * * * [which was adopted on] September 7,
13 1995.'" Record 6-7.

14 To the extent this "finding" could be construed as an
15 interpretation, it is clearly wrong. ORS 197.829(1)(a).
16 The context and remainder of the quoted passage from the
17 Report demonstrate that the "attached document" adopted
18 September 7, 1995 is the revised 5/96 Report, not some other
19 document.⁵ Moreover, the passage clearly indicates that

⁴For the most part, the decision "interprets" large sections of and sometimes even the entire 5/96 Report. We have difficulty understanding how the county can "interpret" an entire document or sections of a document without reference to particular language in the document. Normally one interprets specific language in order to determine what the language means. A document like the 200-page 5/96 Report contains language with meaning but the document itself does not mean anything.

⁵The passage quoted by the county states in full:

"The results of [the] mediation process are presented as revisions to the Reconciliation Report in the attached document. The Multnomah County Board of Commissioners adopted this document on September 7, 1995. On March 7, 1996, the Land Conservation and Development Commission approved this document with one minor change required -- removal of properties

1 the revisions are in the Report. No reasonable reader could
2 conclude that this passage incorporates some unnamed set of
3 documents into the Report.

4 We have held, in the context of whether a local
5 government incorporated all or portions of another document
6 into a final decision, that the local government:

7 "must clearly (1) indicate its intent to
8 [incorporate a document], and (2) identify the
9 document or portions of the document so
10 incorporated. A local government decision will
11 satisfy these requirements if a reasonable person
12 reading the decision would realize that another
13 document is incorporated into the findings and
14 based on the decision itself, would be able both
15 to identify and to request the opportunity to
16 review the specific documents thus incorporated."
17 Gonzalez v. Lane County, 24 Or LUBA 251, 258
18 (1992). See also Johnson v. Lane County, 31 Or
19 LUBA 454, 461 (1996) (a county's incorporation of
20 the "entire application" is insufficient to
21 identify incorporated documents that are to become
22 findings).

23 We believe a similar, if not more stringent, test should
24 govern determining whether a comprehensive plan provision
25 incorporates another document to provide standards for land
26 use applications.

27 Nothing in the quoted passage or elsewhere in the 5/96
28 Report purports, expressly or implicitly, to incorporate the
29 Easement or any of its terms into the Report. The only
30 mention of the Easement pointed out to us in the 5/96 Report

adjacent to the Bonny Slope subdivision. This final document
reflects these changes." Record 600, Oversized Exhibit #2, I-4
(omitting emphasis in original; emphasis added).

1 is a one paragraph description.⁶ Nothing in that
2 description purports to incorporate the Easement, or
3 identify which parts are incorporated. A reasonable person
4 reading the 5/96 Report would have no idea that it
5 incorporates the Easement, much less that the Easement

⁶That paragraph provides in full:

"e. Program to Achieve the Goal

"Principal parties to the dispute surrounding development of the Angell Brothers quarry elected to pursue a structured mediation, which resulted in settlement terms being embodied in a Conservation Easement between Angell Brothers (the mining operator), Linnton Rock Corporation (the land owner of the Angell Brothers site), and Friends of Forest Park (the lead environmental group). Under the terms of the Conservation Easement, Angell Brothers agreed to mine only in particular areas, to give Conservation Easements in perpetuity to the Friends of Forest Park in areas called Preserves, and not to mine in a scenic buffer area of approximately 73 acres on the northern end of the site bordering Highway 30. At the conclusion of mining and reclamation, Angell Brothers will place the entire 397 acre site in a conservation easement. The Preserves include a large area of approximately 90 acres on the north of the site, a 625-foot strip on the south of the site, and an area on the west of the site that encompasses the North Angell Brothers stream drainage. Angell Brothers has also amended its agency permit applications, in accordance with the terms of the Easement. Angell Brothers has also agreed to convey a Hiking Trail Easement across the site upon the conclusion of mining, and has further agreed to promote and maintain Western Oregon old growth conditions on all of the Preserves and all of the scenic buffer area in perpetuity. Angell Brothers has also agreed not to allow any residences to be constructed on any portion of the property. The easements will be signed by all parties and deposited in an escrow with instructions to record the easements, if and when all agency permits in connection with the Angell Brothers mining are granted, periodic review at both the County and LCDC level is concluded on the site, and mining commences. The Angell Brothers Conservation Easement is the largest single conservation easement conveyed to the Friends of Forest Park. It is anticipated that Friends of Forest Park will assign the easement to METRO as part of the Greenspaces program." 5/96 Report, Record 600, Oversized Exhibit #2, VI-22:23.

1 incorporates another unnamed document (the February 1995
2 Mining Plan), which in turn provides the standards for
3 conditional use approval.

4 Petitioners also argue that even if the county's
5 statement of intent is a legitimate interpretation, a local
6 government cannot through the guise of interpretation amend
7 its comprehensive plan. Goose Hollow Foothills League v.
8 City of Portland, 117 Or App 211, 218, 843 P2d 992 (1992).
9 We agree that an "interpretation" that would incorporate
10 into the comprehensive plan an 18-page contract between two
11 private parties (which in turn allegedly incorporates a two-
12 inch thick Mining Plan) is so extensive a revision that it
13 would unquestionably constitute an amendment.

14 In sum, we find that to the extent the county
15 "interpreted" the 5/96 Report to incorporate the Easement,
16 that interpretation is clearly wrong. Goose Hollow
17 Foothills League v. City of Portland, 117 Or App 211, 217
18 843 P2d 992 (1992); Marquam Farms Corp. v. Multnomah County,
19 147 Or App 368, 379, ___ P2d ___ (1997); ORS 197.829(1)(a).
20 To the extent the county's determination of incorporation is
21 a finding subject to the substantial evidence standard, we
22 conclude that, based on the evidence in the whole record, no
23 reasonable person could conclude that the county had
24 incorporated the Easement into the 5/96 Report when it
25 adopted the 5/96 Report in September, 1995. Carter v.
26 Umatilla County, 29 Or LUBA 181, 184-85 (1995).

1 The second assignment of error is sustained.

2 **THIRD ASSIGNMENT OF ERROR**

3 Petitioners assign as error the county's determination
4 that the Easement incorporates the terms and conditions of
5 the February 1995 Mining Plan. Our resolution of the second
6 assignment of error effectively resolves this assignment as
7 well, as it is immaterial whether the Easement incorporates
8 the February 1995 Mining Plan if the Easement is not part of
9 the 5/96 Report and hence applicable as a source of
10 standards for intervenor's conditional use application.
11 Nonetheless, we briefly address this assignment in order to
12 identify a significant flaw in the county's analysis which
13 should be recognized on remand.

14 The gravamen of the county's decision (and the subject
15 of petitioners' first assignment of error, discussed below)
16 is that the February 1995 Mining Plan, supposedly
17 incorporated into the Easement (which is supposedly
18 incorporated into the 5/96 Report), supplies all the
19 applicable site-specific requirements to resolve the
20 conditions of operation. The Easement itself contains few
21 or no terms governing operation. It merely grants an
22 easement to Friends of Forest Park over undefined preserves
23 and ultimately the entire site on condition that all permits
24 are secured and mining commences according to the February
25 1995 Mining Plan.

26 The basic problem is that the February, 1995 Mining

1 Plan appears nowhere in the record. The Mining Plan that
2 intervenor submitted in support of its conditional use
3 application is a revised plan dated December, 1995, after
4 the county supposedly incorporated the Mining Plan (through
5 the Easement) into its comprehensive plan in September,
6 1995. The Easement, executed in August, 1995, refers only
7 to the February 1995 Mining Plan, and does not provide for
8 future revisions. Thus, to the extent any site-specific
9 requirements in the 5/96 Report are derived from
10 intervenor's Mining Plan, they are derived from the February
11 1995 Mining Plan.⁷

12 The difference is not academic. The hearings officer
13 found that the 5/96 Report imposes 34 site-specific
14 requirements, including "simultaneous reclamation along with
15 mining to minimize non-vegetated areas." 5/96 Report, at
16 VI-18; see also Record 166-170 (listing requirements). In
17 contrast, subsequent revisions of the February 1995 Mining
18 Plan apparently permit the intervenor to defer, perhaps for
19 many years, some reclamation requirements. See Record 7,
20 15.

21 The point here is that the county cannot with any
22 consistency presume that the February 1995 Mining Plan is

⁷While we have held that the February 1995 Mining Plan is not incorporated, via the Easement, into the 5/96 Report, it is obvious that many of the requirements in the 5/96 Report were developed based on the proposals contained in the February 1995 Mining Plan. See e.g. 5/96 Report at IV-7, 11, 14 (discussing the February 1995 Mining Plan proposals for concurrent reclamation).

1 incorporated into the comprehensive plan and supplies all
2 the applicable site-specific requirements to operate the
3 quarry, and yet ignore those requirements in favor of a
4 revised December 1995 Mining Plan that is extrinsic to the
5 comprehensive plan. Thus, even if the county had been
6 correct that the February 1995 Mining Plan provides the
7 standards for approval, remand would be necessary because
8 the county did not in fact apply those standards.

9 The third assignment of error is sustained.

10 **FIRST ASSIGNMENT OF ERROR**

11 Petitioners assign as error the county's determination
12 that the Easement resolved the conditions under which
13 intervenor is allowed to operate the expanded mining
14 operation. Again, our resolution of the second and third
15 assignments of error resolves this assignment in
16 petitioners' favor. We write to emphasize the procedural
17 consequences in the county's approach.

18 Petitioners argue that the county's determination that
19 all relevant conditions of operation had already been
20 decided during mediation eviscerates the purpose of the
21 conditional use process, and prejudices petitioners'
22 substantial rights to notice and participation.

23 Intervenor implicitly concedes this point in responding
24 that petitioners missed their opportunity to challenge the
25 conditions of approval found in the February 1995 Mining
26 Plan and imposed in the challenged decision when the county

1 adopted the conditions as part of the 5/96 Report, which
2 petitioners did not appeal.

3 We disposed of intervenor's premise in our conclusion
4 that the 5/96 Report does not incorporate the February 1995
5 Mining Plan (via the Easement). And we reject now any
6 contention that the mediation process or its results
7 predetermined in any way the outcome of intervenor's
8 application for a conditional use permit. That application
9 must be judged under the site-specific requirements in the
10 5/96 Report or the county's conditional use ordinance. As
11 we have stated, the county erred in ignoring those
12 requirements in favor of less rigorous requirements in the
13 revised December 1995 Mining Plan.

14 The county's decisional approach is flawed for at least
15 two reasons. First, it inappropriately subsumes the
16 conditional use process into the legislative amendment
17 process. The county could have determined as a legislative
18 matter that the quarry expansion satisfied all conditional
19 use criteria, and thus obviated the need for the conditional
20 use process. Instead, the county chose to proceed in the
21 normal sequence of legislative amendment followed by a
22 quasi-judicial conditional use review to determine if the
23 proposed use complies with the legislative criteria. Having
24 chosen to proceed with quasi-judicial review, the county
25 cannot change horses midstream without doing violence to the
26 fundamental distinction between legislative and quasi-

1 judicial proceedings. See generally Strawberry Hill 4
2 Wheeler v. Benton Co. Bd. of Comm., 287 Or 591, 602-04, 601
3 P2d 769 (1979) (articulating differences between legislative
4 and quasi-judicial proceedings). Second, the county's
5 approach conflates requirements for approval with
6 demonstrations of compliance with those requirements. Under
7 the county's approach, whatever mining plan intervenor
8 submitted in support of its application both determined the
9 requirements for approval and satisfied those requirements.
10 Doing so permits intervenor to dictate its own conditions of
11 approval, rendering the conditional use review process a
12 meaningless exercise.

13 The first assignment of error is sustained.

14 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

15 Petitioners assign as error the county's determination
16 that the North Angell Brothers Creek "watershed" means only
17 the creek's riparian zone rather than the entire drainage
18 including a southern tributary, as not supported by
19 substantial evidence. The hearings officer found that the
20 5/96 Report prohibits mining in the creek's watershed.
21 Record 159-60.

22 The challenged decision states on this point:

23 "We intended during mediation, and now, that only
24 the main channel of North Angell Bros. Stream
25 should be listed as a Significant Stream. We
26 determined it to be "significant" within the
27 meaning of Goal 5 only to the extent of its
28 identified riparian area and its flows into
29 Burlington Bottoms. * * * We do not intend our

1 Program to Achieve the Goal to protect a
2 'watershed.'

3 ** * * * *

4 "The Hearings Officer apparently believed that a
5 theoretical watershed on the order of 350 acres
6 surrounding North Angell Bros. Stream should or
7 could be interpreted as the focus of a Goal 5
8 protection program because the stream setback was
9 referred to with the word 'watershed.' This
10 interpretation is incorrect. We found then, and
11 we now intend, that the value of the North Angell
12 Bros. Stream for Goal 5 purposes is limited to its
13 identified riparian area and its flows into
14 Burlington Bottoms. The settling parties
15 [intervenor and Friends of Forest Park] understood
16 this. We find credible the settling parties'
17 representations that the setback limits for mining
18 and stream protection were established during
19 mediation to protect riparian values and water
20 supply values for Burlington Bottoms' water
21 supply. * * * The setbacks the parties agreed
22 upon were surveyed and incorporated into the
23 [Mining Plan] and the Conservation Easement, and
24 we ultimately incorporated these documents into
25 the [5/96 Report]." Record 10.

26 The county went on to approve mining according to the
27 December 1995 Mining Plan, which proposes mining in a part
28 of the North Angell Bros. Creek watershed around the
29 headwaters of the disputed tributary. See December 1995
30 Mining Plan, Oversized Exhibit #3, figure 5, 17.

31 Intervenor argues that the term "watershed" as used in
32 the 5/96 Report is ambiguous and the county's interpretation
33 to mean "riparian area" is reasonable and entitled to
34 deference.

35 We have already concluded that the Easement is not
36 incorporated into the 5/96 Report, and that the county's

1 intent and any understandings of the parties to the Easement
2 or any terms thereof do not control conflicting requirements
3 in the 5/96 Report. With respect to the North Angell
4 Brothers Creek, the 5/96 Report declares that:

1 "mining on the Angell Brothers site should not
2 take place within the North Angell Brothers
3 watershed, but instead should be directed into the
4 watersheds of Middle and South Angell Brothers
5 creeks, which are not designated as significant
6 streams * * *." Record 600, VI-16 (emphasis
7 added).

8 The 5/96 Report concludes that:

9 "Expansion of the Angell Brothers quarry site
10 should be allowed except for a 200 meter buffer
11 area along the south and west sides of the
12 property, and except for the North Angell Brothers
13 creek watershed. Quarry operations and
14 reclamations of the quarry site should minimize
15 impacts upon scenic views and wildlife habitat, by
16 1) maintenance of the natural terrain and
17 vegetation within the buffer area and the North
18 Angell Brothers watershed * * *." Record 600, VI-
19 17 (emphasis added).

20 The 5/96 Report states further that the North Angell
21 Bros. Creek watershed is 350 acres. Record 600, III-12,
22 III-106. A map of area watersheds shows the "watershed
23 boundaries" of the creek to encompass the entire drainage,
24 including the disputed tributary. Record 600, III-143.
25 Even the 5/96 Report's description of the Easement
26 contemplates that no mining shall occur in an area that
27 "encompasses the North Angell Brothers stream drainage."
28 Record 600, VI-23 (emphasis added).

29 Intervenor cites to us no definition of "watershed"
30 that is more limited in this context than the plain meaning

1 of "drainage basin."⁸ Intervenor cites no textual support
2 for the county's interpretation other than references to the
3 "riparian zones" that were the focus of the Multnomah County
4 Significant Streams study. Record 600, VI-19 and VI-25.
5 The 5/96 Report called for future regulations to protect the
6 dozens of streams studied in the West Hills region. Id. at
7 VI-20. However, none of these sections of the 5/96 Report,
8 discussing protection of all riparian zones in the West
9 Hills, provides a standard for land use applications with
10 respect to any stream. The cited sections do not provide a
11 site-specific requirement with respect to North Angell
12 Brothers Creek, or even mention it. Nothing in these
13 general references diminishes or conflicts with the specific
14 mandate that mining "should not take place within the North
15 Angell Brothers Creek watershed * * *." Id. at VI-16.

16 In the face of this unequivocal meaning, the county
17 opposes no more than its "intent" and the "understanding" of
18 the parties, neither of which controls our analysis.
19 Deference required under ORS 197.829 and Clark to the
20 county's interpretations does not permit the county to
21 announce that when it uses the word "watershed," the word
22 means just what the county chooses it to mean, neither more

⁸See Webster's Third New International Dictionary (unabridged), at 2584, defining "watershed" as a "region or area bounded peripherally by a water parting and draining ultimately to a particular watercourse or body of water: the catchment area or drainage basin from which the waters of a stream or stream system are drawn."

1 nor less.⁹ Clear language in a local ordinance cannot be
2 interpreted to mean something different. DLCD v. Tillamook
3 County, ___ Or LUBA ___ (April 21, 1997, slip op 11, n.7).
4 The county's interpretation of "watershed" to mean "riparian
5 area" is clearly wrong. ORS 197.829(1)(a-b).¹⁰

6 Our conclusion that the county's interpretation is
7 clearly wrong also resolves the issue of the disputed
8 tributary, which is within the watershed. We write only to
9 clarify that the county's finding that the tributary does
10 not flow ultimately into Burlington Bottoms is not supported
11 by substantial evidence in the record. The county's own
12 expert stream consultants observed the tributary approach
13 the creek from the south and join it just west of a power

⁹Lewis Carroll, *Through the Looking-Glass*, Macmillan and Co. 1872, 124:

"'When I use a word,' Humpty Dumpty said in rather a scornful
tone, 'it means just what I choose it to mean--neither more nor
less.'

"'The question is,' said Alice, 'whether you can make words
mean so many different things.'

"'The question is,' said Humpty Dumpty, 'which is to be master-
-that's all.'"

¹⁰Intervenor does not argue that the county implicitly determined that the prohibition on mining in the "North Angell Brothers Creek watershed" is not an approval criteria. Even if intervenor has so argued, this is not the kind of case where deference is required to the county's interpretation that of two or more arguably applicable local provisions only one contains approval criteria. Cf. deBardelaben v. Tillamook County, 142 Or App 319, 325, 922 P2d 683 (1995). In this case, the references to "riparian areas" in the 5/96 Report do not state anything that could arguably constitute a site-specific approval criterion, in part because they are not directed at the Angell Brothers Quarry at all, much less the North Angell Brothers Creek. See 5/96 Report at VI-19 and VI-25.

1 line access road on the property. Record 600, III-106
2 (Multnomah County Significant Streams Study). The only
3 contrary evidence is an ambiguous statement by one of the
4 parties to the Easement that the main channel "is the only
5 channel that contributes water to Burlington Bottoms,"
6 Record 94, and testimony from one of intervenor's officers
7 that the tributary flows into an old landfill and goes
8 "underground." Record 10. Neither of these statements
9 state or necessarily

1 imply that water from the tributary does not reach
2 Burlington Bottoms.

3 Whatever worth these statements have, they are
4 undermined by the county consultant's own report, which
5 describes the tributary joining the creek and flowing
6 underground together through several culverts into
7 Burlington Bottoms. Record 600, III-106. We will defer to
8 the city's choice between conflicting evidence if a
9 reasonable person, viewing the record as a whole, could
10 reach the city's decision. Mazeski v. Wasco County, 28 Or
11 LUBA 178, 184 (1994), aff'd 133 Or App, 258, 890 P2d 455
12 (1995). However, given that Burlington Bottoms is directly
13 downstream of the creek drainage basin, no reasonable person
14 could conclude from the above that water from the tributary
15 does not contribute to flows into Burlington Bottoms.

16 The fourth and fifth assignments of error are
17 sustained.

18 **SIXTH ASSIGNMENT OF ERROR**

19 Petitioners assign as error the county's determination
20 that the 5/96 Report authorizes operating hours from 6 a.m.
21 to 10 p.m., notwithstanding contrary code provisions that
22 require operating hours from 7 a.m. to 6 p.m.

23 Multnomah County Code (MCC) 11.15.7325(C)(4) provides
24 that if hours of operation are not contained in the site-
25 specific comprehensive plan program, then operating hours
26 shall be 7 a.m. to 6 p.m. The 5/96 Report, the applicable

1 site-specific comprehensive plan program, does not specify
2 the hours of operation for intervenor's quarry operation.
3 The hearings officer concluded, and petitioners argue to us,
4 that MCC 11.15.7325(C)(4) thus imposes operating hours from
5 7 a.m. to 6 p.m.

6 The county avoided this ineluctable conclusion by
7 finding that intervenor's prior permits had allowed it to
8 operate expanded hours, that the parties to the Easement
9 assumed that the expanded hours would still apply, that that
10 assumption is somehow embodied in the Easement, and that the
11 Easement is incorporated into the 5/96 Report. Therefore,
12 the county reasons, the 5/96 Report, as the county construes
13 it, permits intervenor to operate expanded hours. Record
14 11, 12.

15 This conclusion rests on the faulty premise that the
16 Easement is incorporated into the 5/96 Report. Without the
17 support of that premise, the county's conclusion is clearly
18 contrary to MCC 11.15.7325(C)(4), and must be reversed. ORS
19 197.835(8).

20 This assignment of error is sustained.

21 **SEVENTH, EIGHTH AND TENTH ASSIGNMENTS OF ERROR**

22 In the seventh, eighth and tenth assignments of error,
23 petitioners challenge three alleged defects in the county's
24 decision that are amenable to a common analysis. The three
25 assignments of error share the common trait that they
26 involve requirements the hearings officer identified in the

1 5/96 Report that the county deleted or rejected in favor of
2 less stringent standards in the revised December 1995 Mining
3 Plan. In addition, the three assignments of error each
4 involve the issue of whether the 5/96 Report requires
5 concurrent and/or sequential reclamation.¹¹

6 The seventh, eighth, and tenth assignments of error
7 challenge, respectively, (1) the county's rejection of the
8 hearings officer's condition that intervenor conform its
9 Mining Plan to the site specific requirements in the 5/96
10 Report, particularly to require contemporaneous reclamation;
11 (2) the county's error in not imposing conditions of
12 concurrent or sequential reclamation, as required by the
13 5/96 Report; and (3) the county's deletion of findings by
14 the hearings officer that intervenor's application did not
15 meet directives in the 5/96 Report to protect scenic views
16 and fish and wildlife habitat through simultaneous
17 reclamation.

18 The hearings officer compiled a non-exhaustive list of
19 34 site-specific requirements identified in the 5/96 Report,
20 and required intervenor, inter alia, to revise its December

¹¹The parties dispute what "concurrent" reclamation and "sequential" reclamation mean without defining those terms or pointing to definitions in the record. For purposes of this appeal we understand "concurrent" (and its synonyms "contemporaneous" and "simultaneous," also used in the 5/96 Report) to mean that reclamation is occurring throughout the entire life of the mine, in order to minimize nonvegetated areas. We understand "sequential" to mean that reclamation is finished in one segment or phase of the mine before or as soon as possible after mining begins in another segment or phase. More precise definition is not necessary to resolve petitioners' assignments of error.

1 1995 Mining Plan to reflect the requirements for
2 contemporaneous reclamation.¹² Record 163. As we have
3 seen, the county overturned those conditions, and deleted
4 the list of purported requirements, based on its apparent
5 view that the Easement and Mining Plan provided all the
6 applicable site specific requirements. Record 9-10.

7 For the reasons explained above, the county erred to
8 the extent it located applicable standards anywhere but in

¹²Among the requirements the hearings officer identified in the 5/96 Report were the following:

"16. The Applicant shall engage in contemporaneous reclamation that promotes early visual screening of benches immediately following mining of upper benches. [p. IV-14]"

"* * * * *

"30. Multnomah County shall require the Angell Brothers expanded quarry site to make the following measures as part of its operations and reclamation plan:

"Minimization of the area mined at any given time.

"* * * * *

"Simultaneous reclamation along with mining to minimize non-vegetated areas. [p. VI-18]"

"* * * * *

"32. Quarry operations and reclamation of the quarry site should minimize impacts upon scenic views and wildlife habitat by 1) maintenance of the natural terrain and vegetation within the buffer area and the North Angell Brothers watershed, (2) a sequential mining plan which minimizes the amount of disturbed area at any one time during the life of the quarry operation and 3) a reclamation plan which sequentially restores the site to its natural vegetation after quarrying is completed. [p. IV-16]" Record 168-69.

1 the text of the 5/96 Report or the conditional use
2 ordinance.

3 With respect to the specific issue of the 5/96
4 requirements for concurrent and/or sequential reclamation,
5 intervenor's only argument not based on incorporation of the
6 Easement is that the conditional use ordinances MCC
7 11.15.7325(C)(10) and MCC 11.15.7325(C)(11) permit the
8 county to ease reclamation timing requirements when it, or
9 the Department of Geology and Mineral Industries (DOGAMI),
10 finds that those timing requirements cannot be met.¹³ Such
11 a finding was made in this case, Record 7, 152, and the
12 county imposed reclamation requirements that allows
13 intervenor to defer some reclamation. Record 15.

14 The flaw in intervenor's argument is that MCC

¹³MCC 11.15.7325(C) provides that

"The approval authority shall find that:

"* * * * *

"(10) Phasing Program

"All phases of an extraction operation shall be reclaimed before beginning the next, except where the Approval Authority or DOGAMI finds that the different phases cannot be operated and reclaimed separately.

"(11) Reclamation Schedule

"The reclamation plan shall include a timetable for continually reclaiming the land. The timetable shall provide for beginning reclamation within twelve (12) months after extraction activity ceases on any segment of the mined area and for completing reclamation within three (3) years after all mining ceases, except where the Approval Authority or DOGAMI finds that these time standards cannot be met." (Emphasis added).

1 11.15.7325(C)(10) and (11) cannot be applied inconsistently
2 with the comprehensive plan, i.e. the 5/96 Report. Baker
3 v. City of Milwaukie, 271 Or 500, 514, 533 P2d 772 (1975).
4 Some 5/96 Report requirements, including ones for
5 contemporaneous and sequential reclamation, apply even when
6 intervenor's application is evaluated solely under the
7 alternative conditional use ordinance.¹⁴ Thus, waiver of
8 timing requirements under MCC 11.15.7325(C)(10) and (11)
9 cannot supersede conflicting 5/96 Report requirements.

10 However, the county's wholesale dismissal of the 5/96
11 Report requirements makes it difficult to determine whether
12 waiver under MCC 11.15.7325(C)(10) and (11) actually
13 conflicts with those requirements. It is possible,
14 depending on what "concurrent" and "sequential" mean, that
15 waiver can be consistent with the 5/96 Report. See Record
16 152, 163 (finding by hearings officer that, notwithstanding
17 waiver of sequential reclamation obligation under MCC
18 11.15.7325(C)(10), intervenor must still comply with 5/96
19 Report requirements for contemporaneous reclamation
20 immediately after completing mining on upper benches).

21 We conclude that all three aspects of the decision
22 challenged in the seventh, eighth and tenth assignments of

¹⁴The conditional use ordinance requires compliance with certain site-specific requirements in the comprehensive plan, i.e. the 5/96 Report, for protection of scenic views and wildlife habitat, which in turn require contemporaneous and simultaneous reclamation. E.g. MCC 11.15.7325(C)(6); 5/96 Report at VI-25. Thus the county cannot escape applying at least some requirements in the 5/96 Report.

1 error must be remanded for the county to determine, as the
2 hearings officer did, whether intervenor's application
3 complies with the site-specific requirements in the text of
4 the 5/96 Report or applicable conditional use ordinance.

5 The seventh, eighth and tenth assignments of error are
6 sustained.

1 **NINTH AND ELEVENTH ASSIGNMENTS OF ERROR**

2 Petitioners' ninth and eleventh assignments of error
3 rest at most on harmless error, provide no basis for remand
4 or reversal, and are denied without further discussion.

5 **CONCLUSION**

6 The county's decision is remanded.