

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

3
4 MARK J. MAZESKI and)
5 DIANA CROSBY MAZESKI,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 CITY OF MOSIER,)
12)
13 Respondent,)
14)
15 and)
16)
17 DWAIN BLANCHARD,)
18)
19 Intervenor-Respondent.)

LUBA No. 93-220
FINAL OPINION
AND ORDER

20
21
22 Appeal from City of Mosier.

23
24 Mark J. Mazeski, Mosier, filed the petition for review
25 and argued on his own behalf.

26
27 Wilford K. Carey, City Attorney, Hood River; and H.V.
28 Garrabrant, Hood River, filed the response brief. With them
29 on the brief was Annala, Carey, & VanKoten. H.V. Garrabrant
30 argued on behalf of intervenor-respondent.

31
32 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
33 Referee, participated in the decision.

34
35 REMANDED 04/06/94

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city order determining that a rock
4 quarry qualifies as a nonconforming use.

5 **MOTION TO INTERVENE**

6 Dwaine Blanchard, the applicant below, moves to
7 intervene on the side of respondent in this appeal
8 proceeding. There is no objection to the motion, and it is
9 allowed.

10 **FACTS**

11 The subject property consists of 15 acres. The
12 challenged decision authorizes a quarry on five acres of the
13 subject property and allows removal of up to 5,000 cubic
14 yards of rock per year. The subject property was first
15 zoned in 1971 and the original zoning district did not allow
16 rock quarries.¹ Between 1978 and 1990, the subject property
17 was zoned Agricultural. The Agricultural zone permitted
18 rock quarries as conditional uses.² From 1990 through the
19 present, the subject property has been zoned Residential.
20 The Residential zone does not allow rock quarries.

21 This is the second time a city decision determining a
22 rock quarry on the subject property is a nonconforming use

¹The challenged decision does not identify the nature of the zoning applied to the property between 1971 and 1978.

²No conditional use permit was ever approved for a rock quarry on the subject property.

1 has been appealed to this Board. In Hood River Sand v. City
2 of Mosier, 24 Or LUBA 381 (1993), we remanded the city's
3 decision because it was not supported by findings explaining
4 the city's rationale for determining the existence of a
5 nonconforming use. On remand, the city council adopted the
6 challenged decision, which includes findings explaining the
7 city's decision. This appeal followed.

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 Under these assignments of error, petitioners challenge
10 the evidentiary support for the determinations in the
11 challenged decision concerning the size of the nonconforming
12 use and the amount of rock quarried from the site.

13 The challenged decision determines the following:

14 "* * * The quarry site contains about 5 acres,
15 based on a review of the aerial photograph. * * *

16 "* * * * *

17 "The council finds that the quarry lawfully
18 extracted at least 2,000 cubic yards in 1978 and
19 that it has not been abandoned or discontinued
20 since 1971. * * *

21 "* * * * *

22 "The Council finds that it is not possible to
23 establish precisely how much rock was extracted in
24 1971 when the quarry became a non-conforming use.
25 The evidence shows that the quarry has been used
26 since 1971 and that [the Department of Geology and
27 Mineral Industries (DOGAMI)] has not required a
28 permit. Therefore, the Council finds that the
29 intensity of the use in 1971 could not have exceed
30 5,000 cubic yards of extraction.

31 "The Council authorizes the continuation of the
32 quarry subject to the following conditions of

1 approval:

2 "(1) No more than 5,000 cubic yards of rock may be
3 removed from the quarry each calendar year.

4 "(2) The quarry may operate only with (sic) the
5 five acre area identified as the quarry area
6 and shown on the attached aerial photograph."
7 Record II 6-9.³

8 There is no dispute that 1971 is the year when any rock
9 quarrying activity on the subject property became
10 nonconforming. There is no dispute that rock extraction
11 allowed as a nonconforming use is "limited by [City of
12 Mosier Zoning Ordinance (MZO) 6.1(1)] to the annual
13 extraction amount that occurred when the quarry became a
14 nonconforming use." Record 6. Finally, there is no dispute
15 that MZO 6.1(1) limits "the area of active quarry operations
16 to * * * the confines of the quarry site that existed at the
17 time it became nonconforming." Id.

18 Petitioners contend there is no credible evidence in
19 the record establishing that a five acre portion of the
20 subject property was utilized for quarrying activities prior
21 to 1971 or that 5,000 cubic yards of rock per year were
22 removed from the site prior to 1971. Petitioners contend
23 the aerial photograph relied on by the challenged decision
24 is undated, and a reasonable decision maker would not rely
25 upon it to determine the size or scope of quarrying

³We refer to the record of the first city proceedings as Record I and the record submitted in this appeal proceeding as Record II.

1 activities on the subject property in 1971.

2 Respondents argue petitioners failed to raise the issue
3 of the credibility of the aerial photograph during the local
4 proceedings and, therefore, are prohibited from raising that
5 issue before this Board under ORS 197.835(2) and
6 197.763(1).⁴

7 In Boldt v. Clackamas County, 107 Or App 619, 813 P2d
8 1078 (1991), the court of appeals made it clear that the
9 purpose of ORS 197.763(1) is to prevent unfair surprise, and
10 that an issue is waived only where it is not sufficiently
11 raised below to enable a reasonable decision maker to
12 understand the nature of the issue. ODOT v. Clackamas
13 County, 23 Or LUBA 370, 375 (1992). During the proceedings
14 below petitioners questioned how much of the subject
15 property was utilized for rock quarrying purposes prior to
16 1971 and also questioned how much rock was quarried during
17 that period of time. We believe this is adequate for a

⁴ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

"Issues shall be limited to those raised by any participant
before the local hearings body as provided by ORS 197.763.
* * *"

ORS 197.763(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall
be raised not later than the close of the record at or
following the final evidentiary hearing on the proposal before
the local government. Such issues shall be raised with
sufficient specificity so as to afford the governing body * * *
and the parties an adequate opportunity to respond to each
issue."

1 reasonable decision maker to understand that issues were
2 raised concerning the size and scope of quarrying activities
3 and the adequacy of the evidence relating to those issues.

4 We turn to petitioners' arguments that the challenged
5 decision is not supported by substantial evidence in the
6 whole record. Substantial evidence is evidence a reasonable
7 decision maker would rely upon to support a conclusion.
8 1000 Friends of Oregon v. LCDC (Lane County), 305 Or 384,
9 405, 752 P2d 271 (1988); Todd v. Columbia County, 24 Or LUBA
10 289, 291 (1992). The determination in the challenged
11 decision that the nonconforming quarry area occupied five
12 acres at the time it became nonconforming is not supported
13 by substantial evidence in the whole record. The only
14 evidence cited by the city to establish the size of the
15 quarrying operation prior to 1971 is the aerial photograph
16 referred to in the findings. However, as petitioner points
17 out, that photograph is undated. While the record contains
18 testimony from intervenor concerning the aerial photograph,
19 nothing establishes its date. It is unreasonable for the
20 city to rely upon an undated aerial photograph to establish
21 the size of the quarrying operation on any particular date.

22 Further, at best, there is very little evidence in the
23 record establishing volume of rock removed from the subject
24 property during or prior to 1971. There is no evidence to
25 establish that during or before 1971, the volume of rock
26 removed from the subject property was 5,000 cubic yards per

1 calendar year.⁵ The only evidence in the record cited to
2 establish the amount of rock quarried at the site during or
3 before 1971 is a letter from a planning consultant stating
4 that a rock quarry exists on the property and that "it is an
5 ongoing operation."⁶ Record I 16. However, nothing in the
6 record supports or explains the statement, and the statement
7 provides no evidence of the amount of rock quarried at the
8 site during or before 1971.

9 The city also relies upon the absence of a DOGAMI
10 permit to support its determination in the challenged
11 decision that up to 5,000 cubic yards of rock per year were
12 quarried at the site. The city's reasoning seems to be that
13 a quarry operation removing up to 5,000 cubic yards per year
14 must have existed on the site, because if the operation had
15 quarried more rock than a DOGAMI permit would have been
16 obtained. However, that a DOGAMI permit was not obtained
17 does not establish that in 1971 a quarrying operation was in
18 place removing up to 5,000 cubic yards per year (the level
19 of activity at which a DOGAMI permit is apparently

⁵The city and intervenor concede that "[i]t is not clear the exact amount of cubic yards taken in any given year, but the record, taken as a whole, indicates that less than 5,000 [cubic] yards [were removed] in any given year, except for 1992 when over nineteen thousand (19,000) [cubic] yards was (sic) taken." (Emphasis supplied.) Respondents' Brief 5.

⁶There is some evidence in the record relating to quarry activities occurring on the property after 1972. While we don't rule out that the post-1972 activities could conceivably have some bearing on the nature of the activities occurring on the property prior to 1971, the decision does not explain why such is the case here.

1 required).⁷ Therefore, the city's determination that
2 quarrying activities on the subject property during and
3 prior to 1971 removed 5,000 cubic yards of rock per calendar
4 year is not supported by substantial evidence in the whole
5 record.

6 The first and second assignments of error are
7 sustained.

8 The city's decision is remanded.

⁷We express no position on when or whether a DOGAMI permit is required.