

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

LAND USE  
BOARD OF APPEALS  
OCT 20 4 40 PM '89

MORSE BROS., INC., )  
an Oregon corporation, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CLACKAMAS COUNTY, )  
 )  
Respondent, )  
 )  
and )  
 )  
SANTE FE PACIFIC REALTY )  
CORPORATION, )  
 )  
Intervenor-Respondent. )

LUBA Nos. 89-069 and 89-090

FINAL OPINION  
AND ORDER

Appeal from Clackamas County.

Paul R. Hribernick and Steven R. Schell, Portland, filed the petition for review, and Paul R. Hribernick argued on behalf of petitioner. With them on the brief was Rappleyea, Beck, Helterline & Roskie.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of respondent.

John W. Gould and Ian K. Whitlock, Portland, filed a response brief, and John W. Gould argued on behalf of intervenor-respondent. With them on the brief was Spears, Lubersky, Bledsoe, Anderson, Young & Hilliard.

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

AFFIRMED 10/20/89

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

Opinion by Sherton.

1  
2 NATURE OF THE DECISION

3 Petitioner appeals an order of the Clackamas County  
4 Hearings Officer denying its application for conditional use  
5 approval for an aggregate processing plant (rock crusher), a  
6 concrete batch plant, an asphalt batch plant and related  
7 accessory structures.

8 MOTION TO INTERVENE

9 Santa Fe Pacific Realty Corporation moves to intervene in  
10 this proceeding on the side of respondent. There is no  
11 opposition to the motion, and it is allowed.

12 FACTS

13 Petitioner owns a 24.8 acre site in the Clackamas  
14 Industrial area. The site is designated General Industrial by  
15 the Clackamas County Comprehensive Plan (plan) and zoned General  
16 Industrial (I-3), and is surrounded by other properties with the  
17 same plan and zone designations. The site is bordered on the  
18 north by S.E. Jennifer Street and on the east by S.E. 130th  
19 Avenue. The site consists of two tax lots, a 17.1 acre tax lot  
20 adjoining S.E. 130th Avenue (Lot A), and a 7.7 acre tax lot  
21 (Lot B) adjoining Lot A to the west. A spur line of the  
22 Southern Pacific Railroad ends at the western boundary of Lot B.

23 Lot A contains petitioner's existing prestress concrete  
24 operation. The existing prestress concrete operation began in  
25 approximately 1970, when it was an outright permitted use under  
26 the county zone then applied. Record 583. Manufacture of

1 concrete products is listed as a conditional use in the  
2 currently applied I-3 zone. Clackamas County Zoning and  
3 Development Ordinance (ZDO) 603.05.A.10. Petitioner's prestress  
4 concrete operation has never obtained conditional use approval  
5 from the county. Id.

6 Access to the existing prestress concrete operation on  
7 Lot A is through two entrance gates located on S.E. Jennifer  
8 Street and S.E. 130th Avenue. The existing operation includes  
9 delivery of aggregate by truck to two existing on-site concrete  
10 batch plants. The mixed concrete from these batch plants is  
11 transported to the forming area, where it is poured into steel  
12 forms. The steel forms are removed after the concrete structure  
13 is cured. The existing structures on Lot A include a two-story  
14 office building, a large enclosed steel frame structure, two  
15 concrete batch plants and two large overhead cranes. The large  
16 steel frame structure is used as an enclosed work area,  
17 equipment storage area and repair shop.

18 A significant portion of Lot A is used for the storage of  
19 steel forms and finished prestress concrete products. In  
20 addition, the northern third of Lot B is currently used for  
21 storage of steel forms used in the prestress concrete operation.  
22 This use of the northern portion of Lot B is proposed to  
23 continue.

24 On January 9, 1989, petitioner filed an application for  
25 conditional use approval for a rock crusher, a concrete batch  
26 plant, an asphalt batch plant and related accessory structures,

1 to be placed on Lot B. Concrete mixing plants, manufacture of  
2 asphalt and rock crushing are listed as conditional uses in the  
3 I-3 zone. ZDO 603.05.A.4, 603.05.A.10, 603.05.A.14.

4 Under petitioner's proposal, the existing railroad spur  
5 line will be extended onto Lot B. Two types of material,  
6 crushed aggregate and finished aggregate product, will be  
7 delivered by train to Lot B. Delivery by train to Lot B will  
8 replace truck delivery of aggregate material to the existing  
9 concrete batch plants on Lot A. The proposed rock crusher will  
10 receive the crushed aggregate and produce a finished aggregate  
11 product. Both the finished aggregate delivered by train and  
12 that produced by the proposed rock crusher will be stored on  
13 Lot B for future use. The finished aggregate will be sorted by  
14 a radial stacker into stockpiles to be utilized by both the  
15 concrete and asphalt plants.

16 The proposed concrete and asphalt batch plants will receive  
17 the finished aggregate by conveyor. The proposed new concrete  
18 batch plant may, at some future date, replace one of the  
19 existing concrete batch plants currently used in the prestress  
20 concrete operation. The finished aggregate, asphalt and  
21 ready-mix concrete products from the proposed conditional use  
22 will be loaded into trucks and transported to construction sites  
23 where they are used. The proposed conditional use includes  
24 construction of an office building and a truck and equipment  
25 parking area. Access to the proposed conditional use will be  
26 via the existing S.E. Jennifer St. entryway on Lot A.

1 The county sent notices of, and requests for  
2 recommendations concerning, petitioner's application to various  
3 county bureaus and service districts. These notices stated that  
4 the subject application was for a conditional use subject to  
5 ZDO 1203.01.<sup>1</sup> Notices of the public hearings before the county  
6 hearings officer stated that the subject of the hearing was a  
7 "Conditional Use Application." After two public hearings, the  
8 county hearings officer issued a decision denying petitioner's  
9 conditional use application on the ground that petitioner's  
10 proposal constitutes the expansion of a nonconforming use.

11 Petitioner petitioned for rehearing by the hearings  
12 officer. On June 22, 1989, the hearings officer issued an order  
13 denying the rehearing request. This appeal followed.

14 FIRST ASSIGNMENT OF ERROR

15 "The Hearings Officer made a decision not supported by  
16 substantial evidence in the whole record, improperly  
17 construed applicable law, and failed to follow  
18 applicable procedures in a manner that prejudiced the  
19 substantial rights of the petitioner by failing to  
20 review petitioner's conditional use request under the  
21 County's conditional use standards and erroneously  
22 reviewing the conditional use application as an  
23 expansion of a nonconforming use."

24 SECOND ASSIGNMENT OF ERROR

25 "The County improperly construed applicable law by  
26 concluding that the Applicant's existing prestressed  
concrete use is a nonconforming use."

In these assignments of error, petitioner challenges

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<sup>1</sup>ZDO 1203.01 ("Conditional Use") sets out general approval criteria for conditional uses.

1 (1) the hearings officer's determination that petitioner's  
2 existing prestressed concrete operation is a nonconforming use;  
3 (2) the hearings officer's determination that the proposed uses  
4 constitute an expansion of the existing use; and (3) the  
5 hearings officer's failure to act upon petitioner's conditional  
6 use application for the proposed uses based on the county's  
7 standards for conditional uses. We address each of these issues  
8 separately below.

9 A. Existence of Nonconforming Use

10 The hearings officer's decision states:

11 "The applicant's prestress concrete plant on [Lot A]  
12 is also included within the I-3 zoning district. The  
13 prestress concrete plant, with its accessory  
14 structures and uses is not a primary use within the  
15 I-3 district. \* \* \* The prestress concrete plant  
16 could only be located on [Lot A] as a conditional use  
17 pursuant to subsection 603.05 of the ZDO. The  
18 prestress concrete plant does not have a conditional  
19 use approved. As such, the prestress concrete plant  
20 on [Lot A] is a nonconforming use, as defined by the  
21 ZDO. Record 52.

22 Petitioner argues that the ZDO requires not only that a  
23 "nonconforming use" be lawfully established prior to the  
24 adoption of an ordinance provision, but also that it be  
25 established that the use does not comply with some applicable  
26 provision of the subsequently adopted ordinance. According to  
petitioner, there is no suggestion in the record of this case  
that petitioner's existing prestress concrete operation does not  
comply with any applicable provision of the I-3 zone.

Petitioner argues that an existing use is not a  
nonconforming use simply because it is listed as conditional in

1 the I-3 zone, and lacks a conditional use permit. Petitioner  
2 maintains that the definition of "nonconforming use" in ZDO 202  
3 does not explicitly state that a use listed as conditional is  
4 nonconforming if it does not have a conditional use permit.  
5 Petitioner further argues that each district in the ZDO  
6 identifies what uses are considered nonconforming uses in that  
7 district. Petitioner contends ZDO 603.06.A provides that listed  
8 primary, accessory and conditional uses are "specifically  
9 permitted" in the I-3 district, whereas other uses are  
10 prohibited. According to petitioner, only prohibited uses can  
11 be nonconforming uses in the I-3 district.<sup>2</sup>

12 Petitioner argues that when the county intends a category  
13 of use to be classified as nonconforming in a particular  
14 district, it identifies the category as such in the ZDO  
15 provisions for that district. Petitioner cites as an example  
16 the High Density Residential (HDR) district, which explicitly  
17 provides that "uses not specifically permitted as a primary use  
18 [in the district] shall be nonconforming uses." (Emphasis  
19 added.) ZDO 303.07.D. Petitioner claims that the I-3 district  
20 differs from the HDR district in this regard because  
21 ZDO 603.06.A states that primary, accessory and conditional uses  
22 are "specifically permitted" in the district.

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23  
24 <sup>2</sup>Petitioner recognizes that ZDO 603.06.A expressly provides that one  
25 particular type of prohibited use, a residential dwelling, is not a  
26 nonconforming use. However, petitioner contends that in all other  
instances a lawfully established existing use in the I-3 district is  
nonconforming only if it is a prohibited use.

1           Petitioner further argues that its existing prestress  
2 concrete operation is a "preexisting use," rather than a  
3 nonconforming use. According to petitioner, "preexisting uses,"  
4 as provided in various ZDO zoning districts, include existing  
5 residential and other existing uses that are listed in the  
6 subject district as primary, accessory or conditional uses.  
7 Petitioner argues that such "preexisting uses" are not subject  
8 to the ZDO provisions regulating nonconforming uses.

9           Respondents argue that the ZDO defines a nonconforming use  
10 as one which, among other things, "does not comply" with  
11 provisions of the existing zone. ZDO 202. Respondents contend  
12 that a use listed as a conditional use does not comply with the  
13 existing zoning district until "it is legitimized by affirmative  
14 approbation through the conditional use application process."  
15 Intervenor's Brief 29.

16           Respondents agree with petitioner that ZDO 603.06.A states  
17 that uses not "specifically permitted" in the I-3 district as  
18 primary, accessory or conditional uses are prohibited. However,  
19 respondents contend that a use listed as conditional cannot be  
20 considered "specifically permitted" unless it has been approved  
21 as provided in the ZDO for conditional uses. According to  
22 respondents, until such approval is obtained, the only basis for  
23 continuation of such an existing use is as a nonconforming use.

24           The county recognizes that the ZDO contains provisions  
25 which provide special treatment for certain specified  
26 "preexisting uses," generally residences. However, the county

1 argues that such ZDO provisions have no relevance in this case,  
2 as no provision of the I-3 district makes petitioner's existing  
3 prestress concrete operation a "preexisting use."

4 The terms "nonconforming use" and "conditional use" are not  
5 defined by statute. However, the ZDO provides the following  
6 relevant definitions:

7 \* \* \* \* \*

8 "CONDITIONAL USE: A use addressing a limited or  
9 specific need but generally secondary to a primary use  
10 and, due to a potential adverse effect upon primary  
11 uses or public services and facilities, is only  
12 allowed subject to review and the use standards of the  
13 district and Section 800 and the criteria of  
14 Section 1203.

15 \* \* \* \* \*

16 "NONCONFORMING USE: A dwelling, structure or use  
17 which was legally established prior to the adoption of  
18 any provision of this ordinance with which the  
19 building, structure or use does not comply.

20 \* \* \* \* \*" (Emphasis added.) ZDO 202.

21 Additionally, ZDO 603.05.A provides, with regard to conditional  
22 uses in the I-3 zone:

23 "The following uses may be allowed as Conditional Uses  
24 in the General Industrial district subject to review  
25 by the Hearings Officer, pursuant to Section 1300.  
26 Approval shall not be granted unless the proposal  
satisfies the criteria in Section 1203, and provisions  
of Section 800 \* \* \*." (Emphasis added.)

Based on the above-quoted ZDO provisions, we agree with  
respondents that a use which is listed as a conditional use in  
the I-3 district, but has not received conditional use review  
and approval by the county "does not comply" with the provisions

1 of ZDO 202 and 603.05.A and, therefore, is a nonconforming use.

2 The provisions of ZDO 603.06.A do not alter this  
3 conclusion. ZDO 603.06.A provides as follows with regard to  
4 prohibited uses in the I-3 zone:

5 "The following uses are prohibited in General  
6 Industrial districts:

7 "A. Uses of structures and land not specifically  
8 permitted in subsections 603.03, 603.04 or  
9 603.05 are prohibited in all General Industrial  
10 districts. However, residential dwelling units  
11 which legally existed at the time of adoption of  
12 this ordinance shall not be classified as a  
13 nonconforming use."<sup>3</sup> (Emphasis added.)

14 Petitioners contend that the above-emphasized phrase should  
15 be interpreted as meaning uses of structures and land "not  
16 specifically listed in." Respondents argue that the phrase is  
17 correctly interpreted as "not specifically permitted under." We  
18 agree with respondents that the interpretation of ZDO 603.06.A  
19 most consistent with the ZDO definitions and standards for  
20 conditional and nonconforming uses is that uses which are not  
21 allowed under ZDO 603.03, 603.04 or 603.05, including potential  
22 conditional uses which have not received the county review and  
23 approval required by ZDO 603.05, are prohibited in the I-3  
24 zone.<sup>4</sup>

25 <sup>3</sup>ZDO 603.03, 603.04 and 603.05 list the uses allowed as primary,  
26 accessory and conditional uses in the I-3 district.

<sup>4</sup>As indicated in n 2, a single exception is recognized by ZDO 603.06.A  
for dwellings which lawfully existed at the time the I-3 zone was applied.  
ZDO 603.06.A clearly provides that such uses are not nonconforming uses in  
the I-3 district. Had the county similarly intended that preexisting  
lawful uses listed in ZDO 603.05 as conditional uses not be considered

1 In several zoning districts, the ZDO describes as  
2 "preexisting uses" certain otherwise prohibited uses which were  
3 lawfully established at the time the subject district was  
4 applied. See, e.g., ZDO 303.07, 304.07, 501.06, 502.06, 503.07,  
5 504.06, 507.06, 601.07, 604.06. In each case, the ZDO provision  
6 also states that the specified "preexisting use" is not a  
7 nonconforming use, or that "all other preexisting uses and  
8 structures not specifically permitted in" the district are  
9 nonconforming uses. We agree with petitioner that such  
10 identified "preexisting uses" are not nonconforming uses.  
11 However, the I-3 district does not specifically identify any  
12 uses as "preexisting uses." We are cited to no provision of the  
13 ZDO expressing a general intent that all listed conditional uses  
14 lacking conditional use approval, but lawfully established when  
15 the applicable ZDO district was applied, are considered  
16 "preexisting uses," rather than nonconforming uses.

17 In this case, there is no dispute that petitioner's  
18 existing prestress concrete operation was lawfully established,  
19 is listed as a conditional use in the I-3 district, and has not  
20 received conditional use approval from the county. We believe  
21 the county correctly construed the ZDO in determining that the  
22 existing use is a nonconforming use.

23 This subassignment of error is denied.

24  
25  
26 \_\_\_\_\_  
nonconforming uses, it could have so stated.

1           B.    Expansion of Nonconforming Use

2           Petitioner argues that the proposed concrete batch plant,  
3 asphalt batch plant and rock crusher are, as a matter of law,  
4 uses separate and distinct from the existing prestress concrete  
5 operation because "concrete mixing plant," "manufacturing [of]  
6 asphalt," "rock crushing" and "manufacturing [of] concrete  
7 products" are separately listed as conditional uses in the I-3  
8 zone.    ZDO 603.05.A.4, 603.05.A.10, 603.05.A.14.    Petitioner  
9 argues that the hearings officer's decision "erroneously lumps  
10 the applicant's specifically listed conditional uses into a  
11 mythical 'aggregate resource business' category."    Petition for  
12 Review 12, n 7.    Petitioner also challenges the findings the  
13 hearings officer relied on in concluding that the proposed use  
14 constitutes an expansion of the existing use, arguing that each  
15 finding is irrelevant, unsupported by substantial evidence or  
16 both.

17           The county does not deny that the proposed uses are not  
18 exactly the same as the existing prestress concrete  
19 manufacturing operation.    However, the county contends that the  
20 proposed uses are "so closely tied to the existing operation  
21 that the conclusion the former are properly considered an  
22 expansion of the latter is valid."    Respondent's Brief 7.

23           That the proposed and existing uses are listed separately  
24 as conditional uses in ZDO 603.05.A is not dispositive of  
25 whether the petitioner's proposal constitutes an expansion of  
26 the existing use.    We agree with the county that whether the

1 petitioner's proposal would expand the existing use depends upon  
2 the facts in this case. The county's determination that  
3 petitioner's proposal constitutes an expansion of the existing  
4 use is correct if (1) the findings relied upon by the hearings  
5 officer demonstrate that the petitioner's proposal will expand  
6 the existing use directly, or that the proposed additional uses  
7 will be integrated with the existing use so as to make them an  
8 expansion of the existing operation; and (2) those findings are  
9 supported by substantial evidence in the record.

10 We first consider petitioner's challenges to the individual  
11 findings relied on by the hearings officer. We next determine  
12 whether the findings which survive petitioner's challenges  
13 support the county's determination that petitioner's proposal  
14 constitutes an expansion of the existing use.

15 1. Shared Storage and Material Delivery

16 In concluding that petitioner's proposal is an expansion of  
17 the existing prestress concrete operation, the hearings officer  
18 relied in part on the following findings:

19 "The proposal is also factually an integral part of  
20 the existing use. The record establishes that the  
21 aggregate storage on [Lot B] will be utilized in the  
22 aggregate processing on [Lot A]. \* \* \* The present  
23 truck delivery of aggregate to [Lot A] will be  
24 replaced by the rail delivery of aggregate to [Lot B].  
25 \* \* \*" Record 53.

26 .Petitioner argues that a use is not nonconforming simply  
because it provides an incidental benefit to an adjoining  
nonconforming use. Petitioner contends that in Spencer Cr. Pol.  
Con. v. Org. Fertilizer, 264 Or 557, 505 P2d 919, 923 (1973)

1 (Spencer) and Bennett v. Linn County, 14 Or LUBA 217, 223 (1986)  
2 (Bennett), the Supreme Court and this Board concluded that  
3 fertilizing agriculturally zoned land with effluent from an  
4 adjoining nonconforming use is a permitted farm use, not an  
5 expansion of the nonconforming use. According to petitioner,  
6 these cases establish that "the nature of a use must be  
7 determined on the merits of what the use actually is, rather  
8 than a characterization of the use arising out of its  
9 relationship to an adjoining use." Petition for Review 16.  
10 Petitioner further argues that replacement of truck delivery of  
11 aggregate to the existing use with rail delivery, and the shared  
12 storage of aggregate materials, satisfy plan transportation  
13 goals and policies.

14 Respondents argue that both Spencer and Bennett concerned  
15 the application of wastewater from industrial processes onto  
16 agricultural lands and, therefore, are distinguishable from this  
17 case. Intervenor contends the Supreme Court in Spencer simply  
18 determined, based on the facts of that case, the spraying of  
19 effluent from a nonconforming feed lot on an adjoining parcel  
20 was not an extension or enlargement of the nonconforming use,  
21 and did not establish any policies of general applicability to  
22 the expansion of nonconforming uses. Intervenor argues that in  
23 Bennett this Board simply determined, based on the facts of that  
24 case, that the irrigation of fields with wastewater from an  
25 adjoining nonconforming slaughterhouse was a use distinct from  
26 the slaughterhouse operation.

1 We agree with respondents that Spencer and Bennett are  
2 distinguishable. These cases establish that the use of waste  
3 water from a nonconforming use to irrigate agricultural land  
4 does not make an otherwise permitted use of that agricultural  
5 land nonconforming.<sup>5</sup> However, in this appeal the issue is  
6 whether addition of a new means of delivering and storing raw  
7 materials for a proposed use, and allowing an existing  
8 nonconforming use to share those facilities, is a relevant  
9 factor in determining whether the proposal constitutes an  
10 expansion of the existing nonconforming use. We conclude that  
11 it is.<sup>6</sup>

## 12 2. Replacement of Concrete Batch Plant

13 In concluding that the proposal is an expansion of the  
14 existing prestress concrete operation, the hearings officer  
15 relied in part on the following finding:

16 " \* \* \* The applicant's materials indicate that the  
17 proposed concrete batch plant may in the future  
18 replace one of the existing batch plants. \* \* \*"  
19 Record 53.

20 Petitioner admits that it made the following statement in

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21 <sup>5</sup>In Bennett, we noted that the county's order was ambiguous in that it  
22 variously described the irrigation of adjoining land with waste water from  
23 the nonconforming use as "sporadic irrigation of crops," indicating the  
24 irrigation was not a nonconforming use, and "disposal of wastewater," which  
25 "may or may not justify classifying the use as nonconforming." Bennett,  
26 supra. We remanded the county's decision in part to resolve whether the  
irrigation was part of the nonconforming use.

<sup>6</sup>We agree with petitioner that the provision of such shared delivery and  
storage of raw materials might further plan policies and objectives.  
However, whether or not it furthers plan policies does not affect whether  
the proposal constitutes an expansion of the existing nonconforming use.

1 its initial submission to the county:

2       "\* \* \* The new concrete plant may, at some  
3       undetermined future date, replace one of the existing  
4       concrete batch plants currently in use at the  
5       prestress concrete operation." Record 1097.

6 However, petitioner points out that its conditional use  
7 application does not propose such replacement of one of the  
8 existing concrete batch plants. Petitioner argues that possible  
9 future replacement of an existing plant is not relevant to  
10 whether its proposal constitutes an expansion of the existing  
11 nonconforming use.

12       Petitioner does not challenge the evidentiary support for  
13 the county finding that the proposed concrete batch plant may  
14 replace one of the existing plants in the future. We agree with  
15 petitioner that the county's finding does not establish that the  
16 proposed concrete batch plant will replace one of the existing  
17 plants. However, we believe the placement of a plant on the  
18 site which may be used as part of the existing nonconforming  
19 use, is relevant to determining whether the proposal constitutes  
20 an expansion of the nonconforming use.

21       3.   Use of Product of Proposed Concrete Batch Plant  
22       in Prestress Concrete Operation

23       In concluding that petitioner's proposal is an expansion of  
24 the existing prestress concrete operation, the hearings officer  
25 relied in part on the following finding:

26       "\* \* \* Table 3, Exhibit 80 [Record 734] states that  
the proposed concrete batch plant would produce 32,000  
tons per year of prestress concrete. The clear intent  
of that production is utilization in the existing  
prestress concrete plant." Record 53.

1           Petitioner challenges the evidentiary support for this  
2 finding. Citing the "Air Quality Effects Analysis" (report)  
3 referenced in this finding, and the oral testimony of its  
4 author, petitioner argues that the report addresses not only the  
5 proposed concrete plant, asphalt plant and rock crusher, but  
6 also the existing prestress concrete plant. Record 443, 445,  
7 632, 718. According to petitioner, the entry on Table 3 of the  
8 report showing the production of 32,000 tons of prestress  
9 concrete per year refers to production by the existing concrete  
10 batch plants.

11           Petitioner also argues that the hearings officer's  
12 conclusion that the proposed concrete batch plant would produce  
13 32,000 tons of prestress concrete per year for use in the  
14 existing operation is undermined by evidence in the record that  
15 (1) the production of prestress concrete will not be increased  
16 (Record 1094, 1097-1098, 1551-1552)<sup>7</sup>; (2) the proposed concrete  
17 batch plant will produce readymix concrete for delivery for  
18 off-site use (Record 387, 502-506, 556-557, 1097-1098,  
19 1119-1132); and (3) the location of the proposed concrete batch  
20 plant at the western edge of Lot B is inconsistent with the  
21 production of prestress concrete for use in the existing  
22 operation (Record 1093, 1095).

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24           <sup>7</sup>Petitioner also cites "R. 11." Petition for Review 20, n 12. Item 11  
25 (Record 381-645) is a 265 page transcript of the May 11, 1989 hearing  
26 before the hearings officer. We will not search this transcript for  
evidence which supports petitioner's position. See Oregon State Parks v.  
City of Portland, 96 Or App 202, 205, \_\_\_ P2d \_\_\_ (1989).

1 The table in the report by petitioner's air quality  
 2 consultant relied on by the hearings officer lists the output of  
 3 the proposed concrete batch plant as being 80,000 tons/year  
 4 ready mix concrete and 32,000 tons/year prestress concrete.<sup>8</sup>  
 5 Record 734. However, contrary to petitioner's argument, the  
 6 table, introduction to the report and oral testimony by the  
 7 report's author indicate that the report addresses only the air  
 8 quality effects of the proposed uses, not effects of the  
 9 existing prestress concrete operation.<sup>9</sup> Record 434-436,  
 10 443-444, 632-633, 718.

11 \_\_\_\_\_  
 12 <sup>8</sup>The table provides as follows:

13 "PROPOSED PLANT  
 14 "MATERIAL THROUGHPUTS

"Material Quantity (1000's of ton/year)

"Use	<u>Entering Plant</u>	<u>Leaving Plant</u>
"Prestress Concrete	32	32
"Ready Mix Concrete	80	80
"Aggregate Sales (Base Rock)	110	100
"Asphalt	<u>90</u>	<u>100</u>
"Total	312	312"

21 Record 734.

22 <sup>9</sup>We note that the author's oral description of the emission sources he  
 23 considered does not include the existing prestress concrete operation.  
 24 Record 434-436. Furthermore, the author describes the property containing  
 25 the examined air contaminant sources as being the 7.7 acre Lot B, not  
 26 petitioner's entire 25 acre ownership. Record 443-444. Finally, the  
 author's statement that less than 10% of the dust projected to be emitted  
 is due to prestress operations, with about 1/3 overall due to concrete, is  
 not inconsistent with the proposed concrete batch plant producing both  
 ready mix and prestress concrete. Record 632-633.

1 The record does show that ready mix concrete will be  
2 delivered by truck from the proposed concrete batch plant to its  
3 place of use. However, this fact is not inconsistent with the  
4 proposed plant also producing prestress concrete.<sup>10</sup> Although  
5 the record does show that the proposed concrete plant will be  
6 located at the western edge of Lot B, there is nothing in the  
7 record establishing that it is not feasible to transport  
8 prestress concrete from the proposed plant to Lot A for use in  
9 the prestress operation. Furthermore, even if petitioner were  
10 correct that the record shows that the output of the existing  
11 prestress concrete operation will not be increased overall, that  
12 would not mean that the existing prestress operation will not  
13 use concrete produced by the proposed plant.<sup>11</sup>

14 Substantial evidence is evidence a reasonable person would  
15 rely on to reach a conclusion. Williams v. Wasco County, \_\_\_  
16 Or LUBA \_\_\_ (LUBA No. 89-057, September 11, 1989), slip op 13;  
17 see Younger v. City of Portland, 305 Or 346, 348, 752 P2d 262  
18 (1988). We conclude there is substantial evidence in the record  
19 to support the county's conclusion that prestress concrete  
20 produced by the proposed concrete batch plant will be used in

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21  
22 <sup>10</sup>That the proposed concrete batch plant might replace one of the  
23 existing plants used in the prestress operation at some future date shows  
that it is possible for the proposed plant to produce prestress concrete.

24 <sup>11</sup>We note that the only item in the record to which we are cited  
25 supporting petitioner's argument that there will be no increase in output  
26 by the prestress operation is a statement by petitioner's attorney in the  
petition for rehearing. Record 43. Such a statement appears to be more in  
the nature of legal argument than evidence.

1 the existing prestress concrete operation.

2 4. Physical Layout

3 In concluding that petitioner's proposal is an expansion of  
4 the existing prestress concrete operation, the hearings officer  
5 relied in part on the following findings:

6 "The proposal presents a physical layout consistent  
7 only with the determination that the proposal  
8 constitutes an enlargement of the existing business.  
9 The uses are on the same approximately 25 acre parcel  
owned by the applicant. The facilities are  
intertwined, using the same access to Jennifer Street,  
the same administration building, and with no physical  
separation of the various operations." Record 53.

10 The hearings officer adopted the following additional findings  
11 in the Order Denying Rehearing Request:

12 "The Applicant has pointed out that the Hearings  
13 Officer erred in determining as a fact that the  
14 existing operation and the proposed additional  
15 operation would utilize the same administration  
16 building. Assuming this is true, although the clear  
inference of the existing record is to the contrary,  
that fact being removed from the Hearings Officer's  
analysis would not change the result. \* \* \*<sup>12</sup>  
Record 2.

17 Petitioner argues the proposed and existing uses are not  
18 located on the same 25 acre parcel, because all of the proposed  
19 uses (with the exception of the access way) are located on  
20 Lot B, a separate tax lot. Petitioner argues that the proposed  
21 uses are physically separated both from the prestress concrete  
22

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23 <sup>12</sup>At oral argument, the parties agreed that petitioner's Petition for  
24 Rehearing was, effectively, a request for reconsideration, and was so  
25 treated by the hearings officer. The parties further agreed that we should  
26 consider the hearings officer's June 22, 1989 Order Denying Rehearing  
Request as supplementing the June 1, 1989 order denying petitioner's  
conditional use application.

1 workshop and from the forming and curing area, by the prestress  
2 concrete form and product storage areas and the overhead crane  
3 tracks. Record 1095. According to petitioner, a wall could be  
4 built between Lot A and Lot B without affecting the proposal.  
5 Petitioner contends that a shared access way is not relevant to  
6 a determination of whether the proposal constitutes an expansion  
7 of the existing use, citing Spencer, supra, and Bennett, supra.  
8 Petitioner also maintains that the county's finding that the  
9 proposed and existing uses will use the same administration  
10 building is not supported by substantial evidence in the record.  
11 Record 18-19, 1095.

12 Respondents argue that the physical layout of the existing  
13 and proposed facilities indicates they are a combined operation.  
14 According to respondents, the fact that petitioner's property  
15 consists of two separate tax lots is irrelevant, particularly  
16 since the existing operation includes both tax lots.

17 The record indicates that the proposal includes a separate  
18 office building. Record 1095. We, therefore, agree with  
19 petitioner that the record does not support the finding that  
20 both the existing and proposed uses will use the same  
21 administration building. Nevertheless, we agree with  
22 respondents the facts that the existing and proposed operations  
23 (1) will occupy the same 25 acre site; (2) lack physical  
24 separation; and (3) share access from S.E. Jennifer St., are  
25 relevant to determining whether the proposal constitutes an  
26

1 expansion of the existing use.<sup>13</sup>

2 5. References to "Expansion" of the Existing Use

3 In concluding that petitioner's proposal is an expansion of  
4 the existing prestress concrete operation, the hearings officer  
5 relied in part on the following findings:

6 "It is significant that the applicant's materials and  
7 its witnesses repeatedly referred to the proposal as  
8 an expansion of the existing site and use. (e.g., see  
9 [Record 1027, 1102, 1103, 1107])." Record 53.

10 Petitioner argues it is a natural speech pattern to refer  
11 to the construction of additional facilities as an "expansion"  
12 of the existing use. However, because "expansion" of a  
13 nonconforming use was not recognized as an issue during the  
14 hearing below, petitioner contends such references are not  
15 significant.

16 Respondents assert the repeated references by petitioner  
17 and its witnesses to a proposed "expansion" of the existing use  
18 are relevant, and cannot be dismissed as mere "oral shorthand."

19 The challenged finding cites not only statements by  
20 petitioner and its witnesses that the proposal is an "expansion"  
21 of the existing prestress concrete operation, but also a  
22 statement by petitioner that the "proposed expansion \* \* \* will  
23 become an integral part of the existing pre-stress operation."

---

24 <sup>13</sup>The record shows that the existing use includes the storage of  
25 concrete forms on Lot B and, under petitioner's proposal, will receive and  
26 store aggregate materials on Lot B. Record 1094-1097. The proposed uses  
will utilize an access on Lot A. Record 1095. Thus, there is no clear  
separation of the uses between Lots A and B.

1 Record 1103. We do not believe such statements must be  
2 dismissed as mere patterns of speech. They are clearly relevant  
3 to a determination of whether the proposal constitutes an  
4 expansion of the existing use.

5 6. Summary

6 In the preceeding subsections, we rejected petitioner's  
7 challenges to the findings which led the county to conclude that  
8 the conditional use proposal constitutes an expansion of the  
9 existing use. We believe that the findings concerning shared  
10 aggregate delivery and storage, possible future replacement of  
11 an existing concrete batch plant, use of the product of the  
12 proposed concrete batch plant in the existing prestress concrete  
13 operation, physical layout of the site and references to  
14 "expansion" by petitioner and its witnesses adequately support  
15 the county's determination that petitioner's proposal  
16 constitutes an expansion of the existing use.<sup>14</sup>

17 This subassignment of error is denied.

18 C. Failure to Apply ZDO Conditional Use Standards

19 Petitioner argues that the hearings officer misinterpreted  
20 the ZDO in ruling on its conditional use application based on  
21 ZDO nonconforming use provisions rather than ZDO standards for  
22 approval of conditional uses. Petitioner points out that the  
23

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24 <sup>14</sup>We note that even if the finding that product of the proposed concrete  
25 batch plant will be used in the prestress operation were not supported by  
26 substantial evidence in the record, we would still find the remaining  
findings sufficient to support the county's conclusion.

1 I-3 zone lists 84 primary uses, 7 accessory uses, and 72  
2 conditional uses. The specifically listed conditional uses  
3 include the proposed concrete batch plant ("concrete mixing  
4 plant"), asphalt batch plant ("processing of \* \* \* asphalt") and  
5 rock crusher ("rock crushing"). ZDO 603.05.A.4, 603.05.A.10,  
6 603.05.A.14. According to petitioner, the ZDO's "use-specific  
7 system" requires that an application for a listed use be  
8 adjudicated under the standards set forth in the ZDO for that  
9 use. Petitioner argues the hearings officer, therefore, erred  
10 by reviewing the proposed listed conditional uses against ZDO  
11 nonconforming use provisions, rather than ZDO standards for  
12 conditional uses.

13 Petitioner argues that in Muhs v. Jackson County, 12  
14 Or LUBA 201, 214-215 (1984) (application for conditional use  
15 permit to operate and expand a counseling facility in a rural  
16 residential zone), this Board determined that the proper way to  
17 obtain approval for a listed conditional use is through a  
18 conditional use application, not a nonconforming use  
19 application. Petitioner also contends that in Zusman v.  
20 Clackamas County, 13 Or LUBA 39, 44 (1985) (approval of  
21 reclamation permit to allow mining of remaining 40 acres by  
22 mining operation begun when mining was a permitted, rather than  
23 conditional, use in the zone), this Board found that conditional  
24 use standards, not nonconforming use standards, were applicable  
25 to mining the final 40 acres of a parcel because mining was  
26 listed as a conditional use in the zoning ordinance.

1 The county argues that under the ZDO, a nonconforming use  
2 cannot be expanded through conditional use approval for the  
3 expansion, when the existing nonconforming use has not itself  
4 received the required conditional use approval. According to  
5 the county, the fact that the proposed uses are listed as  
6 conditional uses in the I-3 zone does not insulate the proposed  
7 uses from the requirements applicable to expansions of  
8 nonconforming uses.

9 Intervenor-respondent (intervenor) and the county  
10 (respondents) argue that our decision in Muhs v. Jackson County,  
11 supra, is consistent with the hearings officer's decision.  
12 Respondents contend the applicant in Muhs v. Jackson County  
13 sought conditional use approval for both the existing facility  
14 and the proposed expansion. Respondents point out that  
15 petitioner in this case does not seek conditional use approval  
16 for its existing facility. Thus, according to respondents, Muhs  
17 v. Jackson County, supra, does not establish that a  
18 nonconforming use may be expanded through conditional use  
19 approval for the expansion alone.

20 Respondents also argue that the holding of Zusman v.  
21 Clackamas County, supra, is not relevant to this case.  
22 According to respondents, the issue in that case was whether  
23 mining the remainder of the applicant's property would  
24 constitute continuation of the nonconforming use, or would  
25 expand the nonconforming use by increasing its nature and  
26 intensity, and the case was remanded to the county to make that

determination.

1  
2 The proposed uses are listed in the ZDO as conditional uses  
3 in the I-3 zone. However, as explained in sections A and B,  
4 supra, the proposed uses also constitute expansion of an  
5 existing nonconforming use in the I-3 zone. What we must  
6 determine in this section is how the ZDO, which has different  
7 criteria for approval of conditional uses and alterations of  
8 nonconforming uses, applies in such a fact situation.

9 The correct interpretation of local ordinance provisions is  
10 a question of law which must be decided by this Board. McCoy v.  
11 Linn County, 90 Or App 271, 275-276, 752 P2d 323(1988); Mental  
12 Health Division v. Lake County, \_\_\_ Or LUBA \_\_\_ (LUBA  
13 No. 89-004, July 18, 1989), slip op 8. The provisions of a  
14 comprehensive zoning ordinance should be construed as a whole,  
15 and effect given to the ordinance's overall policy. Clatsop  
16 County v. Morgan, 19 Or App 173, 178, 526 P2d 1393 (1974);  
17 Kellogg Lake Friends v. Clackamas County, \_\_\_ Or LUBA \_\_\_ (LUBA  
18 No. 88-061, December 22, 1988), slip op 10, aff'd 96 Or App 536,  
19 rev den 308 Or 197 (1989). Furthermore, where a zoning  
20 ordinance is ambiguous, it should be construed, if possible, to  
21 be consistent with applicable provisions of state statute. See  
22 Goracke v. Benton County, 12 Or LUBA 128, 135 (1984).

23 In a case concerning county approval of an alteration of a  
24 nonconforming use, we interpreted the effect of the relevant  
25 provisions of ORS 215.130 on county authority to approve

alterations of nonconforming uses as follows:<sup>15</sup>

"\* \* \* There are numerous provisions in the statutes which require counties to make land use decisions in compliance with their comprehensive plans and land use regulations. See, e.g., ORS 197.175(2)(d), 197.835(3) and ORS 215.416(4) and (8). The provisions of ORS 215.130 which authorize county approval of alterations to nonconforming uses represent a very limited grant of authority to counties to approve uses which, by definition, are not consistent with their adopted comprehensive plans or land use regulations.

"County approval of an alteration of a nonconforming use which does not comply with the relevant provisions of ORS 215.130 exceeds the authority granted to the county by the statute, and is subject to reversal or remand under ORS 197.835(8)(a)(A) or (D). \* \* \*" (Footnote omitted.) City of Corvallis v. Benton County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 87-115, March 21, 1988), slip op 7-8.

Thus, we have interpreted ORS 215.130 as limiting the authority of counties to approve alterations of nonconforming uses, and

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<sup>15</sup>The portions of ORS 215.130 relevant to this case provide:

"\* \* \* \* \*

"(5) The lawful use of any building, structure or land at the time of enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted to reasonably continue the use. \* \* \*

"\* \* \* \* \*

"(8) Any proposal for the alteration of a use under subsection (5) of this section \* \* \* shall be considered a contested case under ORS 215.402(1) subject to such procedures as the governing body may prescribe under ORS 215.412.

"(9) As used in this section, 'alteration' of a nonconforming use includes:

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

1 have determined that counties err when they adopt ordinances or  
2 decisions which exceed the authority conferred by statute.  
3 Gibson v. Deschutes County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 89-002,  
4 May 8, 1989), slip op 18; City of Corvallis v. Benton County,  
5 supra; Apalategui v. Washington County, 14 Or LUBA 261, 280,  
6 rev'd in part on other grounds, 80 Or App 508 (1986).

7 The provisions of ZDO 1206.06 governing alteration of  
8 nonconforming uses parallel those of ORS 215.130.<sup>16</sup> On the  
9 other hand, the ZDO 1203.01 approval criteria for conditional  
10 uses do not incorporate the requirements of ORS 215.130(5) and  
11 (9) that the alteration of a nonconforming use "reasonably  
12 continue the use" and have "no greater adverse impact to the  
13 neighborhood."<sup>17</sup> Consequently, if a proposed use is a listed  
14

15 \_\_\_\_\_  
16 <sup>16</sup>ZDO 1206.06 provides as follows:

17 "ALTERATIONS AND CHANGES

18 "A. The Planning Director shall approve an alteration to a  
19 nonconforming use \* \* \* when the following conditions are  
20 satisfied:

21 "1. The alteration of a structure or physical  
22 improvements is reasonably necessary in order to  
23 continue the existing use; and

24 "2. The alteration in the structure or physical  
25 improvements will have no greater adverse impact on  
26 the neighborhood than the existing structure and  
physical improvements.

"B. The Planning Director shall approve a change in use \* \* \*  
when the proposed use will have no greater adverse impact  
on the neighborhood than the existing use, and is  
reasonably necessary to continue the use."

<sup>17</sup>ZDO 1203.01 provides the following conditional use approval criteria:

1 conditional use and also constitutes an alteration of a  
2 nonconforming use, the only interpretation of the ZDO which is  
3 consistent with the authority granted by ORS 215.130(5) and (9)  
4 is that a decision to approve such a proposed use must satisfy  
5 the ZDO criteria for alteration of a nonconforming use. Such  
6 approvals may not be granted solely based on the conditional use  
7 standards of ZDO 1203.01.<sup>18</sup>

- 
- 8
- 9 "A. The use is listed as a conditional use in the underlying  
district.
- 10 "B. The characteristics of the site are suitable for the  
11 proposed use considering size, shape, location,  
topography, existence of improvements and natural  
12 features.
- 13 "C. The site and proposed development is timely, considering  
the adequacy of transportation systems, public facilities  
14 and services existing or planned for the area affected by  
the use.
- 15 "D. The proposed use will not alter the character of the  
surrounding area in a manner which substantially limits,  
16 impairs or precludes the use of surrounding properties  
for the primary uses listed in the underlying district.
- 17 "E. The proposal satisfies the goals and policies of the  
18 Comprehensive Plan which apply to the proposed use."

19 <sup>18</sup>We also agree with respondents that our decisions in Muhs v. Jackson  
County, supra, and Zusman v. Clackamas County, supra, are consistent with  
20 this conclusion. In Muhs v. Jackson County, the subject community center  
uses were classified as conditional uses under the county's zoning  
21 ordinance. It was not established whether the existing community center  
use was lawful when it began (i.e. whether it was a nonconforming use or  
22 simply an illegal use). We held that the expanded community center use  
could be approved through the conditional use process. However, in that  
23 case, conditional use approval was sought for both the existing use and the  
proposed expansion. Thus, if the existing use were a nonconforming use, it  
24 would be brought into conformance with the county's ordinance through the  
approval of the conditional use permit. On the other hand, in this case,  
25 petitioner does not seek conditional use approval for its existing  
nonconforming facilities, but rather only for its proposed additional uses.

26 In Zusman v. Clackamas County, a nonconforming surface mining operation

1 This subassignment of error is denied.

2 The first and second assignments of error are denied.

3 THIRD ASSIGNMENT OF ERROR

4 "The Hearings Officer improperly construed applicable  
5 law, failed to follow applicable procedures in a  
6 manner that prejudiced the substantial rights of  
7 petitioner, made a decision that is outside the range  
8 of discretion allowed the local government under its  
9 comprehensive plan and implementing ordinances, and  
10 exceeded his jurisdiction by making decisions  
11 delegated solely to the Planning Director and by  
12 improperly amending the ZDO through improper  
13 interpretation to require a conditional use to be  
14 reviewed under the nonconforming use standards of the  
15 ZDO."

16 Petitioner contends that, under the ZDO, the hearings  
17 officer does not have jurisdiction to decide questions of ZDO  
18 interpretation, or to adjudicate nonconforming use issues.  
19 According to petitioner, under ZDO 1305.01.K, the county  
20 planning director, not the hearings officer, has jurisdiction to  
21 decide all questions of ZDO interpretation, including the  
22 applicability of ZDO provisions to specific properties.<sup>19</sup>

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23 commenced its activity prior to surface mining being listed as a  
24 conditional use in the subject zone. The operator applied to the county  
25 for approval of a reclamation plan for the remaining 40 unmined acres. The  
26 petitioner challenged the county's approval of the reclamation plan on the  
basis that mining of the 40 acres would constitute an alteration of a  
nonconforming use, required to comply with the standards of ORS 215.130(9).  
We found the county's findings and the record inadequate to determine  
whether the proposed mining was an alteration, rather than a continuation,  
of the nonconforming use, and remanded the decision to the county to make  
that determination. We did not determine what standards would apply to the  
proposed mining if it were an alteration of a nonconforming use.

<sup>19</sup>ZDO 1305.01 provides, in relevant part:

"DUTIES: The Planning Director, or his designate, subject to  
the direction of the Board of County Commissioners, shall  
perform the following duties:

1 Petitioner also argues that under ZDO 1206.06.A and 104.01.B.2,  
2 the hearings officer has jurisdiction to hear nonconforming use  
3 issues only if a decision by the planning director concerning a  
4 nonconforming use is appealed to the hearings officer.<sup>20</sup>  
5 Petitioner contends that the hearings officer's consideration of  
6 nonconforming use and ZDO interpretation issues in this case  
7 constitutes an unlawful amendment of ZDO procedural provisions.

8 The county argues that under ZDO 1305.01.K, the planning  
9 director decides questions regarding ordinance interpretation  
10 when an applicant seeks only such an interpretation. The county  
11 maintains that under the ZDO, the hearings officer is not  
12 prohibited from interpreting the ZDO in the context of a  
13 contested case proceeding. According to the county, its  
14 administrative system could not function if every time the  
15

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16 \*\* \* \* \* \*

17 "K. Decide all questions of interpretation or applicability  
18 to specific properties of any provision of this  
19 Ordinance. The Planning Director's decision may be  
20 appealed to the Hearings Officer as an initial  
21 administrative action. \* \* \*

22 \*\* \* \* \* \*

23 <sup>20</sup>ZDO 1206.06.A provides in relevant part;

24 "The Planning Director shall approve an alteration to a  
25 nonconforming use, subject to the provisions under subsection  
26 1305.02, when the following conditions are satisfied:

27 \*\* \* \* \* \*

28 ZDO 1305.02 sets out procedures for administrative actions by the  
29 planning director. ZDO 1305.02.E.2 provides that if the planning  
30 director's decision is appealed, "the application shall be reviewed by the  
31 Hearings Officer \* \* \*."

1 hearings officer needed to determine the meaning of a ZDO  
2 provision, he had to refer the matter to the planning director.

3 We agree with respondents that the provision of  
4 ZDO 1305.01.K conferring authority on the planning director to  
5 decide questions of interpretation and applicability of ZDO  
6 provisions to specific properties applies where an applicant  
7 seeks only an interpretation of the ordinance, and does not  
8 concurrently seek approval of an administrative action subject  
9 to hearings officer review. Given the division of decision  
10 making authority under the ZDO, it would be virtually impossible  
11 for the hearings officer to carry out his duties if he did not  
12 have authority to interpret and apply the ZDO to the facts of  
13 the administrative proceedings before him.<sup>21</sup>

14 Furthermore, as explained in our discussion under the first  
15 assignment of error, supra, the hearings officer could not  
16 approve the proposed uses as conditional uses if they also  
17 constitute an alteration of a nonconforming use. Therefore, to  
18 adjudicate petitioner's conditional use request, the hearings  
19 officer was required to determine, as threshold issues, whether  
20 petitioner's existing use is nonconforming and, if so, whether  
21 the proposed uses constitute an alteration of that use. See

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22  
23 <sup>21</sup>We note that under ORS 214.428(1), the county must take final action  
24 on a discretionary permit application within 120 days after the application  
25 is deemed complete. Furthermore, ZDO 1303.01 requires the hearings officer  
26 to act upon applications before him within 60 days of receipt of the  
application by the planning director. If the hearings officer were  
required to refer every question of ordinance interpretation to the  
planning director, these deadlines almost certainly could not be met.

1 Moorefield v. City of Corvallis, \_\_\_ Or LUBA \_\_\_ (LUBA  
2 No. 89-069, September 28, 1989), slip op 25-29. We conclude  
3 that the hearings officer has authority under the ZDO to make  
4 such required threshold determinations in the context of  
5 adjudicating a conditional use request.<sup>22</sup>

6 The third assignment of error is denied.

7 FOURTH ASSIGNMENT OF ERROR

8 "The Hearings Officer made an unconstitutional  
9 decision which denied the Applicant equal protection  
10 of the law in violation of the Oregon and United  
11 States Constitutions."

12 Petitioner asserts that the Oregon Constitution, Article I,  
13 Section 20, and U.S. Constitution, Amendment XIV, require that  
14 persons similarly situated be treated in a similar manner, and  
15 that the county's application of the ZDO must be rationally  
16 related to a legitimate government interest. Petitioner  
17 contends the county's decision violates these constitutional  
18 provisions because:

19 "[i]n the universe of potential applicants, only Morse  
20 Bros. is required to address the [ZDO] nonconforming  
21 use criteria. No other applicant for the exact  
22 proposed conditional uses is required to address the

---

23 <sup>22</sup>We note that although ZDO 1206.06 expressly confers authority on the  
24 planning director to act on applications for alteration of a nonconforming  
25 use, the ZDO does not expressly confer authority on any decision maker to  
26 determine the existence of a nonconforming use. ZDO 1206.01 simply  
provides that "a nonconforming use may be continued although not in  
conformity with the regulations for the zone in which the use is located."  
We believe a determination on the existence of a nonconforming use can be  
made by the planning director, in response to an ordinance  
interpretation/applicability request pursuant to ZDO 1305.01.K, or by the  
hearings officer, planning commission or board of commissioners, if such a  
determination is necessary to their decisions on administrative actions  
before them.

1 nonconforming use criteria because only Morse Bros.  
owns the existing business on the adjacent parcel.  
2 \* \* \* Such an arbitrary classification of the owner  
of an adjacent use as opposed to all other potential  
3 land use applicants furthers no rational purpose of  
the local government." Petition for Review 34.

4 Petitioner also argues that the county's application of the ZDO  
5 nonconforming use provisions in this case unconstitutionally  
6 discriminates against it because Northwest Sand and Gravel and  
7 Empire Block, nearby aggregate businesses, received conditional  
8 use approvals from the county for additions to their  
9 "nonconforming" operations.

10 Respondents argue that the county's decision is based on a  
11 general interpretation of the applicable ZDO provisions which  
12 does not allow a nonconforming use to be expanded through  
13 conditional use approvals for the expansion only. According to  
14 respondents, such an interpretation applies to any applicant for  
15 a conditional use which constitutes the expansion of a  
16 nonconforming use in the I-3 zone, or any other county zone. In  
17 other words, respondents contend that any similarly situated  
18 applicant would be treated the same.

19 The county also argues that the record in this case does  
20 not indicate whether the instances cited by petitioner involving  
21 Northwest Sand and Gravel and Empire Block involved situations  
22 materially identical to this case. The county further argues  
23 that, even if the situations were identical, it would not prove  
24 the county has improperly singled out petitioner for special  
25 treatment. According to the county, there is no constitutional  
26 prohibition against a local government "coming to a new

1 interpretation of a regulation (if such this be), at least as  
2 long as the same rule is applied in the future." Respondent's  
3 Brief 11.

4 We agree with respondents that the county's interpretation  
5 of the ZDO, that a nonconforming use cannot be expanded through  
6 conditional use approval for the expansion only, applies equally  
7 to all similarly situated applicants. In other words, under the  
8 county's interpretation of the ZDO, any conditional use  
9 application for a use which also constitutes an expansion of an  
10 existing nonconforming use must be denied.<sup>23</sup> Whether the  
11 conditional use applicant is the owner of the existing  
12 nonconforming use is not a critical factor.

13 With regard to petitioner's claim that it's application  
14 received different treatment than other conditional use  
15 applications filed in the past by Northwest Sand and Gravel and  
16 Empire Block, we are directed in the record to only the  
17 following statements by a county planner:

18 "[Northwest Sand and Gravel has] an asphalt batch  
19 plant which received conditional use approval about  
20 six years ago; the mining activity \* \* \* predates the  
21 zoning for that area." Record 582.

---

22 <sup>23</sup>Under the first and second assignments of error, supra, we determined  
23 this interpretation of the ZDO is correct. We also believe that this  
24 interpretation is rationally related to a legitimate government interest.  
25 Although nonconforming uses may be continued notwithstanding present county  
26 zoning regulations, the county has a legitimate interest in encouraging  
that such uses be brought into conformity with the county's land use  
regulations. Prohibiting the expansion of a nonconforming use unless  
(1) the entire use is brought into conformity with the zoning regulations;  
or (2) the expansion meets the more stringent standards of ZDO 1206.06, is  
rationally related to this purpose.

1           "\* \* \* I'm less familiar with the permit history for  
2           [Empire Block]; they have had conditional use [sic]  
3           for portions of their operation, and portions of their  
          operation also are nonconforming. \* \* \* I'm not as  
          familiar with that project." Record 584.

4           Petitioner has the burden of establishing the  
5           unconstitutionality of the county's decision. Wagner v. Marion  
6           County, 15 Or LUBA 260, 273 (1987). We cannot say, based on the  
7           scant information in the statements quoted above, that Northwest  
8           Sand and Gravel and Empire Block, or their conditional use  
9           applications, were similarly situated to petitioner and its  
10          conditional use application in this case. Furthermore, even if  
11          the county did interpret the ZDO differently when it acted on  
12          previous conditional use applications, our task is to determine  
13          whether the city's interpretation and application of the ZDO in  
14          this case is correct. Beamer v. City of Roseburg, 15 Or LUBA  
15          491, 493 (1987). That the county may have based past decisions  
16          on an incorrect interpretation of its ordinance, does not make  
17          application of a correct ordinance interpretation  
18          unconstitutional. See Medford Assembly of God v. City of  
19          Medford, 12 Or LUBA 167 (1984), aff'd 72 Or App 333, rev den 299  
20          Or 203 (1985).

21          The fourth assignment of error is denied.

22          FIFTH ASSIGNMENT OF ERROR

23          "The Hearings Officer failed to follow the applicable  
24          procedures in a manner that prejudiced the substantial  
25          rights of the Petitioner, improperly construed  
26          applicable law, made a decision outside the range of  
          discretion allowed to the County under its  
          comprehensive plan and implementing ordinance by  
          specifying the criteria upon which a decision would be

1 made, but adjudicating the application under other  
2 criteria."

3 SEVENTH ASSIGNMENT OF ERROR

4 "The Hearings Officer improperly construed the  
5 applicable law, failed to follow the applicable  
6 procedures in a manner that prejudiced the substantial  
7 rights of the petitioner, and made a decision not  
8 supported by substantial evidence in the whole record  
9 by denying the Applicant's Petition for Rehearing."

10 In these assignments of error, petitioner contends that the  
11 manner in which the county applied ZDO nonconforming use  
12 provisions to petitioner's conditional use application violated  
13 applicable procedural requirements in a manner which prejudiced  
14 petitioner's substantial rights.

15 A. Failure to Identify Criteria

16 Petitioner maintains that the county, in its notices of  
17 public hearing concerning petitioner's conditional use  
18 application, identified the applicable criteria as only the  
19 ZDO 1203 criteria for approval of a conditional use, and failed  
20 to identify the ZDO 1206 provisions governing nonconforming uses  
21 as applicable.<sup>24</sup> According to petitioner, the procedure  
22 followed violated ORS 215.416(5) and ORS 197.762.<sup>25</sup> Petitioner

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23 <sup>24</sup>To the extent petitioner also argues under these assignments of error  
24 that the county erred in concluding the nonconforming use provisions of the  
25 ZDO are applicable, that argument is addressed under the first and second  
26 assignments of error, *supra*.

<sup>25</sup>Petitioner states:

"Whether framed in terms of violation of state statute (ORS  
215.416 and 197.762), estoppel or regularity [of]  
administrative proceedings, failure of the Hearings Officer to  
decide the application on the announced applicable standards  
makes sham of the land use process." Petition for Review  
37-38.

1 argues these statutes require the county to identify the  
2 criteria applicable to its proposal in the notices of hearing  
3 and at the beginning of the public hearing. Petitioner contends  
4 that the county's failure to adhere to the announced criteria  
5 was a procedural error that violated the substantial rights of  
6 petitioner to introduce evidence and address applicable  
7 criteria.

8 Intervenor argues that ORS 197.762 principally defines and  
9 limits parties' rights of appeal in certain local government  
10 proceedings concerning property within urban growth boundaries.  
11 Intervenor contends ORS 197.762 does not compel a local decision  
12 maker to ignore applicable criteria which inadvertently were not  
13 specifically identified in notices of or at public hearings.

14 We explained in Stotter v. City of Eugene, \_\_\_ Or LUBA \_\_\_  
15 (LUBA No. 89-037, October 10, 1989), slip op 10, and McConnell  
16 v. City of West Linn, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-111,  
17 March 13, 1989), slip op 7-10, that ORS 197.762 prescribes  
18 requirements for notices and hearings of the governing body.<sup>26</sup>  
19 ORS 197.762 does not apply to proceedings before lower level  
20 local decision making bodies, such as hearings officers and  
21

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22  
23 However, petitioner provides no additional argument with regard to  
24 "estoppel" or "regularity of administrative proceedings" as bases for  
25 reversal or remand of the county's decision. It is petitioner's  
responsibility to explain the basis upon which we may grant relief.  
Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

26 <sup>26</sup>ORS 197.762 was extensively revised by Oregon Laws 1989, chapter 761,  
section 10. These amendments, however, do not apply to this case.

1 planning commissions. Therefore, ORS 197.762 does not apply in  
2 the circumstances of this case, and failure to comply with it  
3 cannot constitute a basis for reversal or remand of the appealed  
4 county decision.<sup>27</sup>

5 This subassignment of error is denied.

6 B. Denial of Request for Rehearing

7 Petitioner points out it submitted a petition for rehearing  
8 to the hearings officer pursuant to ZDO 1304.03. Petitioner  
9 argues that following the rehearing process of ZDO 1304.03 would  
10 have given the hearings officer the opportunity to correct  
11 errors of law and fact in his initial order denying the  
12 conditional use application. Petitioner contends the hearings  
13 officer's rejection of its petition for rehearing was,  
14 therefore, error.

15 According to intervenor, the hearings officer specifically  
16 invited petitions for rehearing concerning the nonconforming use  
17 issue. Intervenor argues that petitioner was allowed to present  
18 its arguments concerning this issue, in detail, in its petition  
19 for rehearing and reply memorandum. Record 4-19, 36-49.  
20 Intervenor contends that petitioner did not request the  
21 opportunity to submit additional evidence concerning the  
22 nonconforming use issue. According to intervenor, in these

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25 <sup>27</sup>However, even if ORS 197.762 did apply to this case, we note that  
26 ORS 197.830(11)(b) provides that "failure of a local governing body to  
describe a[n applicable] criterion as required by ORS 197.762(2)(a) is not  
a basis for reversal of the decision of the local governing body."

1 circumstances, petitioner was not prejudiced by the failure to  
2 identify ZDO nonconforming use provisions as applicable at the  
3 commencement of the local hearing.

4 In addition, the county argues that ZDO 1304.03 contains no  
5 standards governing decisions on whether to grant a rehearing.  
6 Citing Consolidated Rock Products, Inc. v. Clackamas County, \_\_\_  
7 Or LUBA \_\_\_ (LUBA No. 88-090, April 10, 1989), the county argues  
8 that such a decision is completely within the hearings officer's  
9 discretion and, therefore, provides no basis for reversal or  
10 remand by this Board.

11 We agree with the county that ZDO 1304.03 provides no  
12 criteria to control the hearings officer's decision on whether  
13 to grant a petition for rehearing. The ZDO leaves that decision  
14 "completely within the discretion of the hearings officer."  
15 Consolidated Rock products, Inc. v. Clackamas County, supra,  
16 slip op at 27.

17 This subassignment of error is denied.

18 C. Prejudice to Petitioner's Substantial Rights

19 Even if a procedural error were committed by the county in  
20 not identifying the ZDO nonconforming use provisions as  
21 applicable prior to the close of the public hearing and not  
22 granting the petition for rehearing, we do not believe that  
23 under the circumstances of this case petitioner's substantial  
24 rights to a fair hearing and to present and rebut evidence were  
25  
26

1 prejudiced.<sup>28</sup> As noted by intervenor, petitioner submitted  
2 extensive argument on the nonconforming use issue in its  
3 petition for rehearing and reply memorandum. The hearings  
4 officer considered these arguments and responded to them in his  
5 order denying rehearing. Record 1-2. That order also includes  
6 the following:

7 "As to the factual determinations which led to the  
8 conclusions of law and decision, the Applicant is not  
9 requesting further opportunity to submit additional  
10 evidence which may or may not have been presented in  
11 the earlier hearings. In a telephone conversation of  
12 June 14, 1989, among Mr. Schell, as the attorney for  
13 the Applicant, Mr. John Gould, attorney for opponent  
14 Santa Fe Realty Corporation and the Hearings Officer,  
15 Mr. Schell advised the Hearings Officer that the  
16 Applicant requested that this Request for Rehearing be  
17 considered as a request for reconsideration, and that  
18 the Applicant was not requesting that additional  
19 factual hearings be held." Record 1-2.

20 Although the petition for review, at 43, arguably contains  
21 statements inconsistent with the above-quoted findings,  
22 petitioner does not specifically challenge the accuracy of these  
23 findings.<sup>29</sup> These findings establish that petitioner waived any  
24 right it might have had to present additional evidence  
25 concerning the nonconforming use issue. We conclude that  
26 petitioner's substantial rights to a fair hearing and to present  
27 evidence addressing applicable criteria were not prejudiced by

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28 Under ORS 197.835(8)(a)(B), we are authorized to reverse or remand a  
29 decision for failure to follow applicable procedures only if petitioner's  
30 substantial rights are prejudiced.

31 <sup>29</sup>At oral argument, petitioner agreed that its attorney had made the  
32 statements recounted by the hearings officer in his order denying  
33 rehearing.

1 the procedures followed by the county in this case. See Holder  
2 v. Josephine County, 14 Or LUBA 454, 460 (1986).

3 The fifth and seventh assignments of error are denied.

4 SIXTH ASSIGNMENT OF ERROR

5 "The Hearings Officer improperly construed applicable  
6 law and failed to follow applicable procedures in a  
7 manner that prejudiced the substantial rights of the  
8 petitioner by failing to make findings and addressing  
9 the County ordinance's criteria relating to  
10 nonconforming uses and in determining that expansions  
11 of nonconforming uses are prohibited."

12 The hearings officer's initial order denying petitioner's  
13 conditional use application states:

14 "Section 1206 of the ZDO prohibits the expansion of a  
15 nonconforming use. An expansion of a nonconforming  
16 use has been repeatedly construed as including the  
17 enlargement of an existing business and the erection  
18 of new or enlarged structures. For the reasons  
19 discussed above, this application is a request for an  
20 expansion of the nonconforming [prestress concrete]  
21 use on [Lot A], and is prohibited by Section 1206 of  
22 the ZDO." Record 53.

23 Petitioner contends the hearings officer erred in  
24 concluding ZDO 1206 prohibits expansion of nonconforming uses.  
25 Petitioner points out that while ZDO 1206.03, 1206.04 and  
26 1206.06 allow restoration, replacement, alteration and change of  
nonconforming uses, subject to certain standards, ZDO 1206  
contains no specific prohibition against enlargement of a  
nonconforming use. Petitioner argues ZDO 1206 is consistent  
with ORS 215.130(5), (8) and (9), which allow "expansion" of a  
nonconforming use if the criteria for "alteration" of the use  
are met. Petitioner advises that the legislative history of  
ORS 215.130 indicates the legislature has rejected the idea that

1 a nonconforming use cannot be expanded.<sup>30</sup>

2 Respondents argue that while there is no specific  
3 prohibition against "expansion" of nonconforming uses in  
4 ZDO 1206, neither is there any indication that expansion is  
5 allowed. Respondents contend an "expansion" of a nonconforming  
6 use is different from an "alteration." Respondents maintain  
7 this Board has generally taken the view that nonconforming uses  
8 may not be expanded, unless such expansion would be necessary to  
9 continue the existing use. Respondents cite Michael v.  
10 Clackamas County, 9 Or LUBA 70, 77 (1983); Zusman v. Clackamas  
11 County, supra; Jessel v. Lincoln County, 14 Or LUBA 376 (1986).  
12 According to respondents, while the county may have authority  
13 under ORS 215.130 to allow expansions of nonconforming uses,  
14 subject to certain standards, it is reasonable to assume that it  
15 has not exercised that authority absent specific indications to  
16 the contrary in ZDO 1206.

17 In Gibson v. Deschutes County, \_\_\_ Or LUBA \_\_\_ (LUBA  
18 No. 89-002, May 8, 1989) (Gibson), slip op-13, we responded to  
19 a claim that "expansions" of nonconforming uses are not allowed  
20 by ORS 215.130 as follows:

21 "ORS 215.130(9), quoted supra, defines 'alteration' of

22 \_\_\_\_\_  
23 <sup>30</sup>Petitioner points out that prior to 1979 ORS 215.130(5) allowed  
24 alteration of a nonconforming use "when necessary to reasonably continue  
25 the use without increase." (Emphasis added.) Oregon Laws 1979,  
26 chapter 610, section 1 changed the quoted portion of ORS 215.130(5) to "to  
reasonably continue the use," removing the prohibition against "increase,"  
and added ORS 215.130(9), defining and establishing approval standards for  
alterations of nonconforming uses.

1 a nonconforming use to include changes to the use,  
2 structure or physical improvements 'of no greater  
3 adverse impact to the neighborhood.' This definition  
4 specifically includes additions to the physical  
5 improvements of a nonconforming use, such as proposed  
6 in this case, so long as the change would not have  
7 greater adverse impacts on the neighborhood. The  
8 statute imposes no other limitation on the changes  
9 which may be defined as potentially permissible  
10 alterations to nonconforming uses."

11 This paragraph was accompanied by the following footnote:

12 "\* \* \* prior to its amendment in 1979, ORS 215.130(5)  
13 provided that alteration of a nonconforming use 'may  
14 be permitted when necessary to reasonably continue the  
15 use without increase \* \* \*.' (Emphasis added.)  
16 Oregon Laws 1979, chapter 610, section 1 deleted  
17 'without increase' and added the present definition of  
18 alteration of a nonconforming use as having no greater  
19 adverse impacts on the neighborhood. This change  
20 shows the legislature intended to replace a general  
21 prohibition against 'increase' in nonconforming uses  
22 with a specific requirement that any change in a  
23 nonconforming use result in no greater adverse impacts  
24 on the neighborhood." Gibson, supra, slip op 21-22,  
n 8.

25 We see no reason to depart from the interpretation of  
26 ORS 215.130 with regard to "expansion" and "alteration" of  
nonconforming uses which we expressed in Gibson. ZDO 1206.06  
contains no explicit prohibition against expansions of  
nonconforming uses.<sup>31</sup> Its provisions concerning alteration of  
nonconforming uses mirror those of ORS 215.130(5) and (9),  
except that ZDO 1206.06.A.1 and 1206.06.B use "reasonably  
necessary to continue the use," rather than the statutory "to  
reasonably continue the use." Compare n 15 and 16.

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<sup>31</sup>For an example of a local ordinance which does specifically prohibit  
expansion of nonconforming uses, see Moorefield v. City of Corvallis, \_\_\_  
Or LUBA \_\_\_ (LUBA No. 89-045, September 28, 1989), slip op 29-30, n 24.

1           Where a county ordinance provision is drafted to correspond  
2 to a state statute, it is appropriate to construe that ordinance  
3 provision consistently with the statute. McCaw Communications  
4 v. Marion County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 88-068, December 12,  
5 1988), slip op 18, rev'd in part on other grounds 96 Or App 552  
6 (1989). Thus, we conclude that ZDO 1206 does not prohibit  
7 "expansions" of nonconforming uses per se. An "expansion," like  
8 any other alteration to a nonconforming use or structure, may be  
9 allowed if it satisfies the applicable criteria of ZDO 1206.06.

10           Accordingly, we agree with petitioner that the hearings  
11 officer erred in interpreting ZDO 1206 to prohibit expansion of  
12 nonconforming uses. However, we must determine whether that  
13 error in interpretation by the hearings officer provides a basis  
14 for reversal or remand of the appealed decision.

15           The decision appealed is denial of a conditional use  
16 application, not denial of a nonconforming use alteration  
17 application. The gist of the appealed decision, and the reason  
18 that denial of petitioner's conditional use application was  
19 required, is that "a nonconforming use cannot be expanded \* \* \*  
20 through the application for, and approval of, a conditional use  
21 permit for the expansion only." Record 1. The same statement  
22 would be true for alteration of a nonconforming use. Thus, we  
23 regard the hearings officer's statements regarding ZDO 1206  
24 prohibiting "expansion" of nonconforming uses as dicta. As we  
25 explained under section C of the first and second assignments of  
26 error, once the hearings officer determined that petitioner's

1 proposal constituted an expansion (or alteration) of a  
2 nonconforming use, he could not allow such an action through  
3 conditional use approval.

4 The sixth assignment of error is denied.

5 The county's decision is affirmed.  
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