

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of his
4 application for a non-resource dwelling in the
5 Agricultural/Forest (AG/F) zone.

6 **MOTION TO INTERVENE**

7 Bruce McCullough moves to intervene on the side of
8 respondent. There is no opposition to the motion, and it is
9 allowed.

10 **FACTS**

11 Petitioner owns an approximately 10-acre parcel zoned
12 AG/F. Petitioner describes the history of his use of the
13 property as follows:

14 "In [November] 1992, Petitioner applied for
15 approval of a farm management plan for a
16 commercial nursery on the property and for a
17 dwelling in conjunction with that farm use. * * *
18 In the application for approval of the farm
19 management plan, Petitioner represented that 8.5
20 acres of the tract were planted in Christmas trees
21 and the balance in reforestation. He proposed
22 phasing out the Christmas trees over three years.
23 * * * The application stated that on four acres of
24 approximately 1.6 acres each approximately 500
25 Christmas trees per acre were planted. * * * The
26 farm management plan was approved [on January 21,
27 1993]. * * * Approximately two and one-half acres
28 of the subject property were cleared in 1993, but
29 the proposed nursery was not developed." Petition
30 for Review 2.

31 In November, 1995, petitioner submitted another
32 application, this time for a non-resource forest dwelling
33 pursuant to Clackamas County Zoning Ordinance (CCZO)

1 407.05(B)(2) (the "template test.") The application was
2 also subject to ORS 215.705(4), which states:

3 "If land is in a zone that allows both farm and
4 forest uses, is acknowledged to be in compliance
5 with goals relating to other agriculture and
6 forestry and may qualify as an exclusive farm use
7 zone under this chapter, the county may apply the
8 standards for siting a dwelling under either
9 subsection (1)(d) of this section or ORS 215.720,
10 215.740 and 215.750 as appropriate for the
11 predominant use of the tract on January 1, 1993."
12 (Emphasis added.)

13 ORS 215.705(1)(d) addresses dwellings on property zoned for
14 farm use. ORS 215.740 addresses dwellings on forest land
15 under the template test.

16 Petitioner testified that notwithstanding his earlier
17 representations, the property was actually in forest use on
18 January 1, 1993, and thus subject to development under ORS
19 215.740. He also provided testimony from a forestry expert
20 that, based upon his current observations, the trees that
21 petitioner had represented earlier as being Christmas trees
22 were more likely planted for timber production and never
23 managed for Christmas tree production. In addition, an
24 Oregon State University forest extension agent submitted
25 written testimony that six acres of Douglas fir on the
26 property met the current Forest Protection Act Requirements
27 as "forest land" and that the trees were not planted
28 consistent with the planting and management of Christmas
29 trees.

30 The county's decision states that, "[a]lthough there is

1 conflicting evidence on the issue, the Hearings Officer
2 concludes that the subject property was predominately in
3 farm use on January 1, 1993, and is therefore subject to the
4 siting standards of ORS 215.705(1)." Record 4. The
5 evidence upon which the hearings officer based his
6 conclusion included petitioner's November, 1992 farm
7 management plan application, in which petitioner represented
8 that the property was presently used for Christmas tree
9 production, and the details of petitioner's proposed farm
10 management plan, in which petitioner represented that he
11 planned to continue the farm operation, gradually replacing
12 the Christmas trees with a more intensive nursery operation.

13 The Hearings Officer determined that intervenor did not
14 satisfy the siting standards of ORS 215.705(1), and denied
15 the application on that basis.

16 Petitioner appeals the county's denial of his
17 application.

18 **ASSIGNMENT OF ERROR**

19 Petitioner asserts that the hearings officer's finding
20 that on January 1, 1993, the subject property was
21 predominately in farm use, is not supported by substantial
22 evidence in the whole record. Petitioner contends that,
23 notwithstanding the January, 1993 farm management plan
24 approval, in fact on January 1, 1993 the predominate use of
25 the property was for forest use. Essentially, petitioner
26 argues his present testimony, along with the expert

1 testimony provided in conjunction with his present
2 application, is more substantial and persuasive than the
3 evidence upon which he based his farm management application
4 in 1992.

5 As a review body, we are authorized to reverse or
6 remand the challenged decision if it is "not supported by
7 substantial evidence in the whole record."
8 ORS 197.835(7)(a)(C). Substantial evidence is evidence a
9 reasonable person would rely on in reaching a decision.
10 City of Portland v. Bureau of Labor and Ind., 298 Or 104,
11 119, 690 P2d 475 (1984); Carsey v. Deschutes County, 21 Or
12 LUBA 118, aff'd 108 Or App 339 (1991). In reviewing the
13 evidence, we may not substitute our judgment for that of the
14 local decisionmaker. Rather, we must consider and weigh all
15 the evidence in the record to which we are directed, and
16 determine whether, based on that evidence, the local
17 decisionmaker's conclusion is supported by substantial
18 evidence. Younger v. City of Portland, 305 Or 346, 358-60,
19 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County,
20 116 Or App 584, 588, 842 P2d 441 (1992). If there is
21 substantial evidence in the whole record to support the
22 county's decision, LUBA will defer to it, notwithstanding
23 that reasonable people could draw different conclusions from
24 the evidence. Adler v. City of Portland, 25 Or LUBA 546,
25 554 (1993). Where the evidence is conflicting, if a
26 reasonable person could reach the decision the county made,

1 in view of all the evidence in the record, LUBA will defer
2 to the county's choice between conflicting evidence.
3 Mazeski v. Wasco County, 28 Or LUBA 178, 184 (1994), aff'd
4 133 Or App 258, 890 P2d 455 (1995); Bottum v. Union County,
5 26 Or LUBA 407, 412 (1994); McInnis v. City of Portland, 25
6 Or LUBA 376, 385 (1993).

7 Further, in order to overturn a local denial of an
8 application on evidentiary grounds, it is not sufficient for
9 petitioner to show there is substantial evidence in the
10 record to support his position. Rather, the "evidence must
11 be such that a reasonable trier of fact could only say
12 petitioner's evidence should be believed." Thomas v. City
13 of Rockaway Beach, 24 Or LUBA 532, 534 (1993); Schmaltz v.
14 City of Hood River, 22 Or LUBA 115, 119 (1991); McCoy v.
15 Marion County, 16 Or LUBA 284, 286 (1987). Petitioner must
16 demonstrate he sustained his burden of proof as a matter of
17 law. Jurgenson v. Union County Court, 42 Or App 505, 600
18 P2d 1241 (1979); Consolidated Rock Products v. Clackamas
19 County, 17 Or LUBA 609, 619 (1989).

20 The evidence in this case is conflicting, and the
21 conflict stems from the petitioner's own testimony. What
22 petitioner asks of us now is a determination that,
23 notwithstanding his contrary representations in November,
24 1992, the testimony he provided in November, 1995, that the
25 predominate use of the property on January 1, 1993 was for
26 forest use is, as a matter of law, the only evidence upon

1 which the county could rely. We cannot reach such a
2 conclusion. In view of all the evidence in the record, the
3 hearings officer's choice between the conflicting evidence
4 is reasonable, and we must defer to it.

5 The county's decision is affirmed.