BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

PAUL MEYER and KRISTEN MEYER,
Intervenors-Respondents.

LUBA Nos. 2013-102/103

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Courtney Johnson, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Crag Law Center.

No appearance by Jackson County.

Daniel O'Connor, Medford, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Huycke, O'Connor, Jarvis, Dreyer, Davis & Glatte, LLP.

BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member, participated in the decision.

AFFIRMED (LUBA No. 2013-102) 04/22/2014
REMANDED (LUBA No. 2013-103) 04/22/2014

You are entitled to judicial review of this Order. Judicial review is

governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals two related hearings officer's decisions: (1) a decision verifying in part an asphalt batch plant operation as a lawfully established nonconforming use (LUBA No. 2013-103), and (2) a decision denying a floodplain permit to allow the batch plant to operate within a 100-year floodplain (LUBA No. 2013-102).

MOTION TO INTERVENE

Paul Meyer and Kristen Meyer (intervenors), the applicants below, move to intervene on the side of the county. No party opposes the motion and it is granted.

REPLY BRIEF

Petitioner moves to file a reply brief to respond to an argument in intervenors' brief that the appeal of the hearings officer's decision denying the floodplain permit is moot. There is no opposition to the reply brief, and it is allowed.

FACTS

The subject property is a 10.98-acre parcel zoned since 1982 as Rural Residential-5 (RR-5). The property is located within the urban growth boundary of the City of Talent. A substantial portion of the property is located within the floodway of Bear Creek, and the remainder of the property is located within the creek's 100-year floodplain. At the time of the county's decision that is the subject of this appeal, the property was developed with an asphalt batch plant, a crusher, a stockpile of aggregate materials, and a number of accessory structures. As explained below, the Jackson County Land Use Ordinance (LDO) defines "batch plant" as "[a]n apparatus used in the mixing

of asphalt or cement products, including any auxiliary apparatus used in such mixing process. Batch plants may be sited either as permanent or temporary facilities."

The RR-5 zone does not allow aggregate mining or batch plants. From 1973 to 1982, the property was zoned Open Space Development-5, which also does not allow aggregate mining or batch plants. Prior to 1973, the property was unzoned.

In 1963, Howard DeYoung began an aggregate mining operation on the property and a large parcel to the south, and that mining operation continued until approximately 2001, when the nearby aggregate resource was exhausted. DeYoung testified that he leased the subject property to Rogue River Paving Company from 1963 to 1974, and that the company operated a batch plant on the property during those years. Record 176-77.[1] DeYoung also testified that from 1974 to 1988 the property was leased to multiple unnamed batch plant operators. Finally, DeYoung testified that from 1988 to approximately 2000 the property was leased to Best Concrete to operate a concrete batch plant. As discussed below, the record includes conflicting evidence on all these points, but the hearings officer ultimately accepted DeYoung's testimony as accurate.

In April 2001, intervenors acquired the property and installed a permanent asphalt batch plant and crusher on the property. Intervenors also constructed several structures without obtaining county approval. The current

[1] Unless stated otherwise, all citations to the record are to the record in LUBA No. 2013-103. It is perhaps noteworthy that DeYoung did not state whether the batch plant present from 1963 to 1974 was an asphalt or concrete batch plant. In quoting DeYoung's testimony, the hearings officer inserted a parenthetical opining that the batch plant was "presumably for asphalt." Record 5.

asphalt batching operation includes delivery to the site of raw material (aggregate and asphalt, a petroleum byproduct), and storage of aggregate in stockpiles. The aggregate is refined through the crusher, mixed with asphalt in the batch plant, and the resulting product is transported off-site for paving projects.

In September 2012, following initiation of a county code enforcement proceeding, intervenors applied to the county seeking verification of the asphalt batch plant operation on the property as it existed in 2012, as a lawfully established nonconforming use. Intervenors also applied for a floodplain permit for the existing batch plant operation. Staff administratively approved both applications, with conditions. Petitioner and the City of Talent appealed both decisions to the hearings officer.

The hearings officer conducted a hearing on June 24, 2013, and on September 26, 2013, issued two separate decisions. The first decision, at issue in LUBA No. 2013-103, concludes that a batch plant use on the subject property is a lawful non-conforming use, but that the accessory structures on the property and some of the physical area occupied by the current batch plant operation as it existed in 2012 represent unapproved alterations or expansions. Because intervenors had not requested approval of any alterations or expansions in their application, the hearings officer denied the application to verify the batch plant operation as it existed in 2012 as a lawful nonconforming use. The practical effect of the hearings officer's decision was to verify a limited asphalt batch plant operation, as that operation existed in 2001, as a nonconforming use.

The second decision, at issue in LUBA No. 2013-102, denies the floodplain permit, because the floodplain permit application was predicated on

verification of the batch plant operation as it existed in 2012 as a nonconforming use. Because the hearings officer denied the nonconforming use application, the hearings officer concluded that the floodplain permit application is moot and petitioner's appeal of that permit is also moot. Without further explanation, the hearings officer then vacated the staff decision approving the floodplain permit.

These appeals followed.

FIRST ASSIGNMENT OF ERROR

In three sub-assignments of error, petitioner challenges the hearings officer's partial verification of an asphalt batch plant as a lawfully established nonconforming use on the property. Because the second sub-assignment of error presents a very similar issue to that presented under the second assignment of error, we address both sets of arguments below under the second assignment of error.

A. Introduction

Consistent with ORS 215.130(5) through (11), LDO chapter 11 provides that a use lawfully established before contrary zoning is applied may be continued, as long as the use is not discontinued for more than two years. Repairs and normal maintenance of a nonconforming use are allowed, but no alteration or expansion is allowed unless specifically approved by the county. LDO 11.13(D). Any alteration or expansion, including a change from one nonconforming use to another no more intensive nonconforming use, requires review and approval. LDO 11.2. The process and standards to verify a use as a lawful nonconforming use are set out at LDO 11.8, which requires the

applicant to prove that the use was lawfully established at the time it became nonconforming, and that the use has not been discontinued or abandoned.[2]

ORS 215.130(10) authorizes counties to allow an applicant for nonconforming use verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application, and doing so provides a "rebuttable presumption" that the use lawfully existed on the date it became nonconforming and has continued uninterrupted since then.[3] ORS 215.130(11) provides that a county may not

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[2] LDO 11.8.1 provides, in relevant part:

> "(A) The application must be accompanied by documentation that establishes the approximate date that the use, structure, or sign was established; proof that the use, structure, or sign was lawfully established at the time it became nonconforming; and proof that the use has not been discontinued or abandoned * * *.
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> "(B) Notwithstanding subsection (A) above, the applicant will not be required to prove the existence, continuity, nature, and extent of the use for more than a consecutive 10-year period immediately preceding the date of application. Documentation showing the use existed and was continued during this time period creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application."

[3] ORS 215.130(10) provides in relevant part:

> "A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:
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> "(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an

require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application.[4] However, the applicant must nonetheless establish that the use was "lawful" at the time contrary zoning went into effect, even if that zoning was first applied more than 20 years ago. *Aguilar v. Washington County*, 201 Or App 640, 645-50, 120 P3d 514 (2005).

In the present case we understand that based on conflicting evidence in the record the hearings officer required intervenors to prove the existence, continuity, nature and extent of a batch plant use on the property for a period of 20 years prior to the application, or back to 1992. The hearings officer also concluded that intervenor sufficiently established that a batch plant operation on the property was lawfully established prior to 1973, when contrary zoning was first applied.

> applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application[.]"

[4] ORS 215.130(11) provides:

> "For purposes of verifying a use under [ORS 215.130(5)], a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application."

B. Existence

Under the first sub-assignment of error, petitioner argues that the hearings officer's conclusion that a batch plant existed on the property when the use became nonconforming is not supported by substantial evidence. Petitioner cites to evidence presented below, particularly a review of Department of Geology and Mineral Industries (DOGAMI) files (referred to in the decision as the "Reports"), to the effect that there is no evidence that a batch plant was present on the property from 1973 to 2001.

The hearings officer reviewed the conflicting evidence on this point, and chose to rely on the testimony of Howard DeYoung and similar evidence to conclude that Rogue River Paving operated a batch plant on the property from 1963 to 1974, that other batch plant operators leased the property until 1988, and that in 1988 Best Concrete operated a concrete batch plant until approximately 2000, after which intervenors installed an asphalt batch plant on the property.[5] Petitioner argues that the hearings officer misunderstood the

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[5] The hearings officer's findings state:

> "The evidentiary conflict is significant, but it can be resolved. The hearings officer takes the DeYoung Letter, all of the statements and Reports to be accurate and honest and concludes that there has been a batch plant on the Property for the period starting in 1963 through the present. However, for most of those years it was not an asphalt batch plant. From the time Rogue River Paving ceased operations [in 1974] until 2000 the Property was occupied by concrete batch plants, and from 2001 until now has been occupied by [intervenors'] asphalt batch plant. DeYoung who owned and operated an aggregate business on the Property and the many individuals who bought concrete at the Property historically must be taken to that it was available there in those years.

evidence, and that there is not substantial evidence in the record supporting the conclusion that a batch plant of any kind existed on the property at any time prior to 2001.

Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

Intervenors argue, and we agree, that the hearings officer could reasonably conclude, based on the testimony of DeYoung and others, that a batch plant existed on the property in 1973, on the date that use of the property for a batch plant became nonconforming. Substantial evidence also supports the finding that a concrete batch plant existed on the property during the 20 year period from 1992 to 2012, the relevant period for purposes of ORS 215.130(11). That the hearings officer might have reached the opposite conclusion based on other evidence in the whole record does not provide a basis for reversal or remand, as long as the conclusion the hearings officer reached is one that a reasonable person would reach. We conclude that it is.

> "The Reports can be reconciled with this conclusion on the basis of the fact that they were for the specific purpose of determining whether an *asphalt* batch plant occupied the property. Their conclusion that one was not there is consistent with the DeYoung Letter and its supporting statements which represent only that a concrete batch plant operated from 1988 to 2000." Record 10-11 (emphasis original).

The first sub-assignment of error is denied.

C. Lawfully Established

Under the third sub-assignment of error, petitioner argues that even if substantial evidence supports a finding that a batch plant existed on the property when the use became nonconforming, the hearings officer erred in concluding that any such batch plant was "lawful." Petitioner cites to evidence that at all relevant times the Department of Environmental Quality (DEQ) has required air quality permits for batch plant operations, and that DEQ records show that DEQ permits for a batch plant on the property were first issued in 2001. According to petitioner, intervenor failed to produce evidence that any batch plant on the property received DEQ permits when the use became nonconforming or any time prior to 2001. Citing to *Bennett v. Linn County*, 14 Or LUBA 217 (1986), petitioner contends that in order for an applicant to verify a nonconforming use to demonstrate that the use was "lawfully" established, the applicant must provide evidence either that no state agency permits were required on the date the use became nonconforming, or that all required state agency permits were obtained.[6]

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[6] *Bennett* involved a nonconforming use verification for a slaughterhouse on one tax lot, and the slaughterhouse's wastewater discharge system, which was used to irrigate an adjoining tax lot zoned for agriculture. In 1969, DEQ certified the slaughterhouse's wastewater system as adequate, but did not issue a Water Pollution Control Facility Permit (WPCFP) for that system. In 1971, zoning was applied that made the slaughterhouse use a nonconforming use. In 1984, DEQ required the owner to upgrade the wastewater discharge system on the adjoining tax lot and obtain a WPCFP. The owner sought nonconforming use verification for both the slaughterhouse and the discharge system on the two tax lots, and county approval of the upgraded system as an "alteration." The county approved the verification and alteration. On appeal, LUBA first concluded that the wastewater discharge system was a conforming use in the

Although there is language in *Bennett* that supports petitioner's proposition, we agree with intervenors that neither ORS 215.130(5) nor the county's nonconforming use regulations require that intervenors provide evidence that in 1973 DEQ had issued air quality permits for a batch plant, in order to demonstrate that the batch plant was "lawful" at the time the use became nonconforming, within the meaning of LDO 11.13(D). To the extent the holding in *Bennett* supports a contrary conclusion, we disavow it.

In our view, a use is lawfully established for purposes of verifying that use as a nonconforming use under ORS 215.130(5) and the county's regulations if, at the time restrictive zoning is applied, the use is established and either required no local land use approvals under a comprehensive plan or land use regulations or received all required local land use approvals that were required under the applicable comprehensive plan and land use regulations. Under ORS 215.130(5) through (11), verification and other elements of nonconforming uses are described with reference to local zoning ordinances and land use regulations. For example, ORS 215.130(5) provides that "[t]he lawful use of any building, structure or land at the time of the enactment or

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agricultural zone, because it constituted irrigation. 14 Or LUBA at 223. Alternatively, LUBA concluded that if the discharge system was a nonconforming use, that the applicant had not provided evidence that the system existed on the adjoining tax lot in 1971, when the slaughterhouse use became nonconforming. Finally, LUBA concluded that even if the discharge system existed on that date, the applicant had not demonstrated that the system was "lawful," because it was unclear whether DEQ's 1969 approval encompassed the discharge system. LUBA stated that "we cannot interpret the 1969 approval as proof that the disposal system was lawful when the facility became nonconforming." *Id* at 227. It is this final statement, the second of two alternative conclusions, that petitioner cites to, for the proposition that a nonconforming use is "lawful" only if it has received all required state agency operating permits.

amendment of any zoning ordinance or regulation may be continued."[7] ORS 215.130(7) provides that a discontinued nonconforming use may not be resumed "unless the resumed use conforms with the requirements of zoning

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[7] ORS 215.130 provides, in relevant part:

> "(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. * * *
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> "(6) Restoration or replacement of any use described in [ORS 215.130(5)] may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. * * *
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> "(7)(a) Any use described in [ORS 215.130(5)] may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.
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> "* * * * *
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> "(9) As used in this section, "alteration" of a nonconforming use includes:
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> "(a) A change in the use of no greater adverse impact to the neighborhood; and
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> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

ordinances or regulations applicable at the time of the proposed resumption." The evidence used to verify the existence, continuity, nature and extent of a nonconforming use under ORS 215.130(10)(a) is evaluated with respect to the "applicable zoning ordinance or regulation." *See* n 3. Nothing in ORS 215.130(5) through (11) makes compliance with state or federal agency operating permits such as a DEQ air quality permit relevant to verification of a nonconforming use. *See Coonse v. Crook County*, 22 Or LUBA 138, 144 (1991) (noncompliance with "federal, state or local regulation or licensing requirements" is not a basis to conclude a use was not lawful under ORS 215.130(5), unless those requirements "are integrally related to the zoning or land use regulation").

Consistent with the foregoing, LDO 11.1.2 provides that a use that was "lawfully established before the effective date of this Ordinance[,] but which no longer conforms to the uses or dwelling density allowed in the zoning district in which it is located, is considered nonconforming[.]" LDO 13.3(141) defines the term "lawfully created/established" to mean "[a]ny building, structure, use, lot or parcel that complied with local land use laws and local standards, if any, in effect at the time of its creation or establishment, whether or not it could be created or established under this Ordinance." Petitioner has not demonstrated that the county's regulations on this point are inconsistent with ORS 215.130 or any LDO provision, or any other basis to conclude that whether a use is "lawful" at the time it became nonconforming depends on whether that use has received state or federal agency operating permits.

The third sub-assignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A fundamental premise of the hearings officer's decision is that a concrete batch plant and an asphalt batch plant are essentially the same use for purposes of verifying a nonconforming use. If an asphalt batch plant is not the same use as a concrete batch plant, the hearing officer stated, then "the Applicant cannot claim that his use relates back to the lawful[] establishment of batching operations on the Property." Record 12.

Under the second sub-assignment of the first assignment of error, petitioner challenges the conclusion that intervenor's asphalt batch plant as installed in 2001 is the "same use" as the concrete batch plants that have operated on the property prior to 2001, for purposes of verifying intervenor's plant as a lawful nonconforming use. Under the second assignment of error, petitioner argues that the hearings officer erred in failing to evaluate the 2001 installation of intervenors' asphalt batch plant as an "alteration" of the predecessor nonconforming concrete batch plant use, for purposes of evaluating the nature and extent of the lawful nonconforming use. We address both arguments together.

Petitioner argues that asphalt and concrete batch plants are distinctly different uses, with different inputs, machinery, end products, and impacts on surrounding residential uses in the RR-5 zone. Petitioner also contends that asphalt and concrete batch plants are categorized differently under the county's land use regulations. We understand petitioner to argue that replacing one kind of batch plant use with the other kind represents an "alteration" of the original use that must be approved as such, and that absent such approval the alteration cannot be verified as part of the original nonconforming use. Thus, petitioner argues that the hearings officer erred in verifying the nature and extent of

intervenor's asphalt batch plant as it was installed in 2001, because installation of that asphalt batch plant represented, at a minimum, an unapproved alteration of the concrete batch plant that preceded it.

The hearings officer rejected petitioner's argument that an asphalt batch plant and a concrete batch plant are different uses, and accepted intervenor's counterargument that they are the same use under the county's classification scheme. Specifically, the hearings officer noted that LDO 13.3(20) provides a single definition for "batch plant" that encompasses both asphalt and concrete batch plants.[8] The hearings officer also noted that the LDO use classification scheme organizes uses into general use categories and specific use types "based on common functional, product, or physical characteristics." LDO 13.2.1(A). The hearings officer concluded that the county's use classification scheme applies the same regulations to asphalt and concrete batch plants and does not distinguish between the two types of batch plants.

The general use category of "Mineral and Aggregate" includes a specific use type of "Aggregate or surface mining, stocking-piling or processing (e.g. batch plants)." LDO Table 6.2-1. A related definition states that "processing" includes the "batching and blending of [mineral and aggregate] resources into asphalt and portland cement." LDO 13.3(6)(f). However, LDO 13.2.2(C)(2) excludes from the category of mineral and aggregate uses "[p]ermanent concrete and asphalt batch plants[,]" which are "classified as

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[8] LDO 13.3(2) defines "batch plant" as:

> "[a]n apparatus used in the mixing of asphalt or cement products, including an auxiliary apparatus used in such mixing process. A batch plant may be sited as either permanent or temporary facilities."

Industrial/Manufacturing uses." Thus, batch plants appear to fall within two basic categories: (1) those associated with mineral and aggregate extraction, which are treated as accessory uses to the mineral and aggregate use, and (2) stand-alone batch plants, which are treated as primary industrial/manufacturing uses.

Turning to the general use category of Industrial/Manufacturing uses, Table 6.2-1 breaks that category into several sub-categories, including Manufacturing and Production. That sub-category has five specific uses, including (1) "Manufacturing and production, high-impact" and (2) "Manufacturing petroleum by-product." Both specific uses are allowed only in industrial zones, but the latter use is subject to more intensive Type 3 review.

The hearings officer concluded that permanent asphalt and concrete batch plants both fall into the use category of "Manufacturing and production, high-impact." Because the LDO use classification scheme does not distinguish between asphalt and concrete batch plants, the hearings officer concluded, they are the same use, and therefore a change from concrete batch plant to an asphalt batch plant has no significance, for purposes of nonconforming use verification.

Petitioner argues, however, that the hearings officer's conclusion fails to consider whether an asphalt batch plant falls within the specific use category of "Manufacturing, petroleum by-product" and thus whether an asphalt batch plant is a different use from a concrete batch plant. The hearings officer found that intervenors' asphalt batch plant "blends petroleum products with aggregate and other materials to create asphalt." Record 3. A concrete batch plant does not involve petroleum byproducts. Petitioner contends that intervenors' asphalt

batch plant is a different use that appears to fall squarely into the specific use category of "Manufacturing petroleum by-product."

We agree with petitioner that the hearings officer erred to the extent he concluded that replacing a concrete batch plant with an asphalt batch plant has no significance in verifying the nature and extent of the nonconforming use. Even if the two types of batch plants belong to the same use category, that does not mean that replacing one type of plant with another would not constitute an "alteration" of the nonconforming use. Such alterations can be approved only if the county finds that it would have no greater adverse impact on the surrounding neighborhood, pursuant to LDO 11.2.1(A) and ORS 215.130(9), and unless and until approved the alteration is not part of the lawful nonconforming use, for purposes of verifying the nature and extent of the use.

Under ORS 215.130(5) through (11), the only changes to a nonconforming use that do not require review and approval as alterations are (1) repairs or maintenance to the nonconforming use, or (2) restoration or replacement of the use after a fire or natural disaster. *See* n 7. No party contends that replacing the concrete batch plant with the asphalt batch plant qualifies as repair or maintenance, or as restoration or replacement after a fire or natural disaster. Thus, the 2001 installation of intervenors' asphalt batch plant is lawful only if it qualifies and is approved as an alteration of the nonconforming concrete batch plant.

We note also that LDO 11.2.1(B) distinguishes between alterations and "expansions," and imposes additional requirements on the latter.[9] It is possible

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[9] LDO 11.2.1(B) provides:

that the 2001 installation of the asphalt batch plant required review under LDO 11.2.1(B) as an "expansion." We note that the hearings officer found that there is no evidence in the record regarding the physical characteristics of the two types of batch plants, but the hearings officer inferred that concrete batch plants have a smaller physical profile in height, bulk, surface area and other attributes, compared to asphalt batch plants. Record 11.[10] In any case, petitioner is

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> "1) A nonconforming use, other than a single-family dwelling (see Section 11.4), aggregate, mining, or rural industrial use operation (see subsection (C) below), may not be expanded or enlarged except as provided under (2) below. For purposes of this Section, to "expand" or "enlarge" means:
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> "a) To replace a structure, in which a nonconforming use is located, with a larger structure;
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> "b) To alter the use in a way that results in more traffic, employees, or physical enlargement of an existing structure housing a nonconforming use; or
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> "c) An increase in the amount of property being used by the nonconforming use.
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> "2) Limited expansion of a nonconforming use may be approved, through a Type 3 review, provided such expansion includes improvements to the existing use to a degree that the existing use, including the proposed expansion, complies with or is more in conformance with the development standards of Chapter 9, and will have no greater adverse impacts on the surrounding neighborhood."

[10] There may also be relevant operational differences between the two batch plants. DeYoung testified that the concrete batch plant located on the property between 1988 and 2000 did not operate during the winter months, and was sometimes removed to a different site for a month or two. Record 5. Intervenors' asphalt batch plant operates on the property year round. Such

correct that unless and until the 2001 alteration or expansion is approved, that alteration or expansion cannot be verified as part of the nature and extent of the lawful nonconforming use.

In addition, we agree with petitioner that the hearings officer's approach in relying on the LDO use classification scheme to conclude that the two types of batch plants constitute the "same use" is problematic. As petitioner points out, one problem with that approach is that the use category "Manufacturing and production, high impact" is an open-ended category that includes potentially dozens of different types of manufacturing or production facilities, with the only common feature being that the facility has "high impacts." ORS 215.130(5) allows continuation of the lawful use of a structure or land as that use existed at the time contrary zoning was imposed. As explained, the only lawful changes allowed to that original use are (1) repairs and maintenance under ORS 215.130(5), (2) approved alterations under ORS 215.130(5) and (9), and (3), "restoration or replacement" of the use if made necessary by fire or other natural disaster, under ORS 215.130(6). *See* n 7. Under the hearings officer's approach in relying on the county's open-ended use classification scheme, the owner of a nonconforming high-impact manufacturing facility could potentially replace that facility with an entirely different type of high-impact manufacturing facility, even though that replacement did not qualify for

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operational differences are relevant to determining the nature and extent of the nonconforming use and the scope of any alterations, and may be relevant in determining whether such alterations also constitute expansions for purposes of LDO 11.2.1(B).

any of the three lawful changes allowed to a nonconforming use under ORS 215.130(5), (6) or (9).[11]

Another problem cited by petitioner is that intervenors' asphalt batch plant might belong to a different use category altogether, that of "Manufacturing petroleum by-product." The scope of that use category is not clear to us, but the hearings officer does not address the issue, and intervenors do not respond to petitioner's arguments on this point. Given the uncertainty and lack of evidence and argument on this point, we are not prepared to agree with petitioner that intervenors' asphalt batch plant falls under the use category of "Manufacturing petroleum byproduct." However, for present purposes, we generally agree that the uncertainty on this point makes the hearings officer's reliance on the open-ended LDO use classification scheme to conclude that the two batch plants constitute the "same use" even more suspect.

The other basis cited for the hearings officer's conclusion that a concrete batch plant and an asphalt batch plant are the "same use" is that the LDO includes both types of batch plants within the definition of "batch plant," and the applicable LDO regulations do not appear to distinguish between the two types of batch plants. The hearings officer is correct that the common LDO definition and the fact that the LDO applies the same land use regulations to both concrete batch plants and asphalt batch plants suggests that the two

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[11] We note that LDO 11.2.1(A) provides that "[a]pplications to change a nonconforming use to another, no more intensive nonconforming use are processed as a Type 2 review." The hearings officer did not rely on LDO 11.2.1(A), and the parties do not discuss it. However, to the extent LDO 11.2.1(A) purports to authorize the replacement of one nonconforming use with a different nonconforming use in circumstances not authorized by ORS 215.130(5), (6) or (9), then LDO 11.2.1(A) is inconsistent with the statute.

facilities are at least very similar uses.[12] It is not clear to us, however, that that means that the two types of batch plants are the "same use," or more importantly, what a finding to that effect means for purposes of verifying the nature and extent of a nonconforming use. As explained above, even if the two types of batch plants constitute the "same use," replacing one with the other constitutes, at a minimum, an alteration that requires county review and approval. For purposes of verifying the nature and extent of the original nonconforming use any such alteration, unless approved, is not part of the lawful nonconforming use.

In sum, remand is necessary for the hearings officer to verify the nature and extent of the lawful nonconforming batch plant use, without considering as part of the verified use any unapproved alterations that occurred in 2001 or at other relevant times since 1992.

The second assignment of error, and the second sub-assignment to the first assignment of error, are sustained.

THIRD ASSIGNMENT OF ERROR

LDO 11.2.1(C) is part of the LDO provisions governing nonconforming uses, and references applicable LDO standards for "[e]xpansion of nonconforming aggregate and mining operations."[13] Under LDO 11.2.1(C)

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[12] Petitioner argues that concrete and asphalt batch plants may be regulated differently under state and federal regulations. *See e.g.*, OAR 340-236-0400 (regulations governing air emissions from hot mix asphalt batch plants); OAR 340-238-0060 (adopting federal regulations by reference that separately address "Portland cement plants" and "Hot mix asphalt facilities").

[13] LDO 11.2.1(C) provides:

expanded use of land for aggregate removal, mining or quarry operations, including the "processing of materials," is subject to additional standards. LDO 13.3(6) defines aggregate and mineral "processing" to include the "batching and blending of [mineral and aggregate resources] into asphalt and portland cement". Further, as explained above, LDO Table 6.2-1 lists "processing (e.g. batch plants)" as part of the Mineral and Aggregate Resource use category.

Petitioner argues that the 2001 installation of intervenors' asphalt batch plant was an "expansion" of the nonconforming aggregate mining operation that formerly existed on the property and an adjoining property, and thus LDO 11.2.1(C) requires that the asphalt batch plant be reviewed under the standards at LDO 4.2.8, 4.4.8, and 6.3.4(A).

> "In all zoning districts except AR, any expanded use of property for aggregate removal, mining or quarry operations, or the processing of materials is subject to all of the provisions of this Ordinance, including the aggregate mining standards of Sections 4.2.8, 4.4.8, and 6.3.4(A). Aggregate and mining operations in the AR District are subject solely to the standards in Section 4.4. For purposes of this Section, an "expanded use" means:
>
> "1) Additional facilities or equipment not previously used at the site (except for replacement equipment); or
>
> "2) The commencement of methods or procedures of processing such as crushing or blasting not previously performed on-site; or
>
> "3) Any extension of the operation to land not owned, leased, or under license on the effective date of this Ordinance; or
>
> "4) Expanded or new operations within the 100-year floodplain and/or floodway."

The hearings officer rejected that argument, concluding that LDO 11.2.1(C) only applies to expansion of a nonconforming aggregate mining operation, but that intervenors' asphalt batch plant is not accessory to any aggregate mining operation, but is instead a stand-alone permanent batch plant that is categorized as an industrial/manufacturing use. As explained above, LDO 13.2.2(C) excludes from the description of accessory uses to mineral and aggregate resources "[p]ermanent concrete and asphalt batch plants" and classifies such batch plants as industrial/manufacturing.

Intervenors argue, and we agree, that the hearings officer did not err in concluding that the standards referenced in LDO 11.2.1(C) do not apply to intervenors' asphalt batch plant. It is reasonably clear that under the LDO use classification scheme a batch plant is allowed in certain zones either as (1) an accessory use to a mineral and aggregate mining operation, or (2) a primary industrial/manufacturing use. LDO 11.2.1(C) is concerned only with the former. Under the LDO, one of the distinguishing characteristics between the two categories of batch plants is the permanency of the batch plant. Permanent batch plants are, for whatever reason, treated as industrial/manufacturing uses, not accessory uses. We understand the hearings officer to have found, and we do not understand petitioner to dispute, that the concrete batch plant in place in 1992 and intervenors' asphalt batch plant installed in 2001 are both permanent batch plants. Because the standards referenced in LDO 11.2.1(C) apply only to batch plants that are accessory to a nonconforming aggregate mining operation, and do not apply to verification of a permanent nonconforming batch plant that is not accessory to an aggregate mining operation, the hearings officer correctly did not apply those standards.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

The fourth assignment of error challenges the hearings officer's disposition of petitioner's appeal of the floodplain permit, which sought authorization for the current (2012) asphalt batch plant operation within the 100 year floodplain, which includes almost all of the subject property.

The hearings officer decision briefly explains that:

> "On March 25, 2013, the Staff approved the Nonconforming Use Application subject to conditions simultaneously with its approval of the Application. The Appellants filed appeals of that approval simultaneously with the Appeals herein. The Jackson County Hearings Officer granted those appeals and reversed the staff approval of the Nonconforming Use Application, thereby denying the Nonconforming Use Application and disallowing the use for which the Application seeks a floodplain permit." Record 2 (LUBA No. 2013-102).

The hearings officer concluded that the "denial of the Nonconforming Use Application eliminates the prospect of the development upon which the Application is predicated, and a determination of the Appeals is not required." *Id.* at 3. Accordingly, the hearings officer concluded that the application for the floodplain permit is moot, and the appeal of that permit is moot, and the hearings officer disposed of the appeal by vacating the staff decision approving the floodplain permit.

Petitioner argues that the hearings officer erred in concluding that the appeal of the floodplain permit was mooted by denial of the application to verify the current asphalt batch plant operation. As noted, the hearings officer denied the verification application as a whole because it sought to verify a batch plant that had been expanded and altered after 2001, but did not seek to approve those post-2001 expansions and alterations under the standards and procedures that apply. Petitioner argues that the practical effect of the

nonconforming use verification decision is to authorize the continued operation of a limited asphalt batch plant within the 100-year floodplain, which means that a floodplain permit is still required.

Petitioner notes that after the hearings officer's decisions intervenors applied for and the county granted a new floodplain permit that purportedly approves operation of the limited asphalt batch plant operation verified by the hearings officer within the 100-year floodplain.[14] However, petitioner argues that this second floodplain permit approval did not replace the first floodplain permit, or otherwise moot petitioner's local appeal of the first permit.

Intervenors respond that the county's issuance of the second floodplain permit for a more limited asphalt batch plant operation effectively mooted petitioner's appeal of the hearings officer's decision vacating the first floodplain permit for an expanded asphalt batch plant operation. Because resolving the merits of petitioner's appeal would have no practical effect on the parties, intervenors argue, petitioner's appeal in LUBA No. 2013-103 should be dismissed as moot.

It is not clear to us that the second floodplain decision moots the appeal of the hearings officer's decision vacating the first floodplain decision, as intervenors argue. However, we need not decide that question, because petitioner has not demonstrated that the hearings officer erred in vacating the first floodplain decision. As the hearings officer stated, the development the first floodplain permit application was predicated on—the expanded batch plant operation as it existed in 2012—was not verified and that application was

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[14] Petitioner has appealed the second floodplain permit decision to LUBA, and that appeal is pending. *Rogue Advocates v. Jackson County* (LUBA No. 2014-015).

denied. For the purposes of the floodplain permit decision, the practical effect of that denial is that intervenors must apply for and obtain a new floodplain permit for *any* development in the floodplain. Consequently, the only possible disposition of the first floodplain permit is to vacate that permit, which the hearings officer did. Petitioner does not explain what purpose would be served under these circumstances by requiring the hearings officer to review the merits of petitioner's challenges to the first floodplain permit. Petitioner's arguments do not provide a basis to reverse or remand the hearings officer's decision vacating the first floodplain permit, and accordingly we must affirm the appeal of that decision.

The fourth assignment of error is denied.

LUBA No. 2013-102 is affirmed.

LUBA No. 2013-10**3** is remanded.