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

ROGUE ADVOCATES, Petitioner,	)	LUBA No. 2014-100
v.	)	
JACKSON COUNTY, Respondent, and	)	PETITION FOR REVIEW
PAUL MEYER and KRISTEN MEYER, Intervenor-Respondents.	)	

PETITION FOR REVIEW

SUBMITTED BY ROGUE ADVOCATES

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1 # I. PETITIONER'S STANDING

2 Petitioner Rogue Advocates has standing to petition the Land Use Board of
3 Appeals ("LUBA") to hear this appeal because Petitioner filed a timely notice of
4 intent to appeal the Jackson County decision on November 7, 2014, and because
5 Petitioner appeared before the local government by submitting written and oral
6 testimony during the remand proceeding and comment period for the decision. *See*
7 Rec. 203-07.

8 # I. STATEMENT OF THE CASE

9 ## A. Nature of Decision and Relief Requested

10 This appeal is the second challenge brought by Petitioner to this Board on
11 the Intervenor's application seeking verification of a nonconforming asphalt batch
12 plant use, and the third in a series of appeals brought to challenge land use
13 decisions relating to an asphalt batch plant operation on the property identified as
14 Tax lot 600, Township 38 South, Range 1 West, Section 24 in Jackson County.
15 The decision under review is Respondent Jackson County's Hearings Officer
16 Decision and Final Order in Case No. ZON2012-01173_NC REMAND, which
17 became final on October 28, 2014. The decision was made after a remand order
18 from this Board in *Rogue Advocates v. Jackson County,* ______ Or LUBA _____
19 (LUBA No. 2013-103, April 22, 2014) (*Rogue I*) directing Respondent to verify
20 the nature and extent of the concrete batch plant use that existed on the property in

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1 1992. The decision on remand denied the application to verify the asphalt batch
2 plant as a nonconforming use on the basis that conversion from a concrete batch
3 plant to an asphalt batch plant requires review and approval as an alteration of a
4 nonconforming use. The Hearings Officer then directed the Applicant to file a new
5 application for an alteration of the concrete batch plant use. A copy of the
6 challenged remand decision is included with this petition as Appendix A.

7 The application on review in *Rogue I*, and again here, sought verification of
8 a nonconforming asphalt batch plant use as it existed in 2012. That application has
9 now twice been denied by the Hearings Officer on the basis that the existing
10 asphalt plant constitutes, either in whole or in part, an alteration or expansion of
11 the original nonconforming use. However, each denial has had the practical effect
12 of making a more limited nonconforming use determination. Since the application
13 was filed and the evidentiary record was developed, the relevant question has
14 shifted to a verification of the nature and extent of the nonconforming concrete
15 batch plant that existed on the property in 1992. In effect, Jackson County is
16 attempting to approve a use that has never been applied for.

17 Due to the shift in the relevant land use determination, and the Hearings
18 Officer's failure to make the necessary and adequate findings required for that
19 determination, Petitioner respectfully requests that LUBA affirm the Hearings
20 Officer's decision to deny the nonconforming use application on alternative

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grounds. Specifically, Petitioner requests that the application to verify the nonconforming asphalt batch plant use be denied on the basis that the Applicant has failed to meet its burden to demonstrate the existence, continuity, nature and extent of the nonconforming use.

B. Summary of Arguments

In the first assignment of error, Petitioner argues that the Hearings Officer exceeded the scope of review established for the remand proceedings in *Rogue I*. LUBA remanded Respondent's nonconforming use determination on the Applicant's asphalt batch plant use and directed the Hearings Officer to verify the nature and extent of the nonconforming concrete batch plant use that existed on the property in 1992, "without considering as part of the verified use any unapproved alterations that occurred in 2001 or at other relevant times since 1992." Petitioner argues that the Hearings Officer exceeded the scope of LUBA's remand order by relying on evidence relating to the asphalt batch plant from 2001 onward to make findings and conclusions related to the 1992 concrete batch plant use.

In the second assignment of error, Petitioner argues that the Hearings Officer erred in applying the standard for alteration of a nonconforming use to make a determination of the nature and extent of a nonconforming use. The decision misconstrues the law by improperly applying the requirement that an alteration must have "no greater impacts on the surrounding community" to make a

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1 determination on the nature and extent of the original nonconforming use.
2 Petitioner argues that while verification of a nonconforming use requires a
3 determination of the impacts that use had on the surrounding community, it was
4 not appropriate at this stage for the Hearings Officer to engage in a comparison of
5 those impacts to a future alteration. No alteration application has been submitted;
6 therefore, the Hearings Officer erred in making determinations related to an
7 alteration of the nonconforming use.
8 In the third assignment of error, Petitioner challenges the Hearings Officer's
9 findings on the nature and extent of the 1992 concrete batch plant use. Petitioner
10 argues that the findings are inadequate because they do not rise to the level of
11 specificity required. Additionally, Petitioner argues that the Hearings Officer's
12 findings on the nature and extent of the concrete batch plant use are unsupported
13 by substantial evidence in the whole record. Petitioner challenges Respondent's
14 ability to make adequate findings on the nature and extent of the concrete batch
15 plant use because the pending application seeks verification of a different use, the
16 asphalt batch plant use.
17 In the fourth assignment of error, Petitioner argues that the Hearings Officer
18 erred in failing to consider whether the original nonconforming use has been
19 discontinued. LDO 11.8.1(A) requires an application for verification of a
20 nonconforming use to prove that the nonconforming use has not been discontinued

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or abandoned. The Hearings Officer's decision fails to include any analysis or determination of whether or not the change from a concrete batch plant use to an asphalt batch plant use in 2001 constitutes a discontinuance of the lawful nonconforming use.

Although LUBA may reverse or remand the Hearings Officer decision for the assigned errors, Petitioner requests that LUBA affirm the decision to deny the nonconforming use application on the alternative ground that the Applicant has failed to meet its burden to demonstrate the nature, extent and continuity of the 1992 concrete batch plant use. The nature and extent of the 1992 concrete batch plant use cannot be determined based on a nonconforming use application and evidentiary record submitted for the purpose of verifying a 2012 asphalt batch plant use.

C. Summary of Material Facts

The facts in this case are identical to the facts presented in LUBA No. 2013-102/103. *See Rogue Advocates v. Jackson County,* ____ Or LUBA ____ (LUBA No. 2013-102/103, April 22, 2014) (*Rogue I*); Rec. 295-298. On October 17, 2013, Petitioner Rogue Advocates appealed the Jackson County Hearings Officer's decision to deny an application to verify an asphalt batch plant operation, as it existed in 2012, as a lawful nonconforming use. *Id.* Although the Hearings Officer had denied the nonconforming use application, the practical effect of the

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decision was to verify a limited asphalt batch plant operation, as that operation existed in 2001, as a nonconforming use.

LUBA upheld the Hearings Officer's determination that the applicant had met its burden in establishing the existence of a batch plant on the property in 1973, the date that use became nonconforming. Rec. 302. LUBA also held that substantial evidence supported the finding that a 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). *Id.*

However, LUBA called into question the Hearings Officer's determination that a concrete batch plant and an asphalt batch plant are the same use for purposes of verifying a nonconforming use. Rec. 307-14. While LUBA did not expressly rule that concrete and asphalt batch plants are not the same use, it agreed with Petitioner that the Hearings Officer erred in concluding that replacing a concrete batch plant with an asphalt batch plant had no significance in verifying the nature and extent of the nonconforming use. Rec. 310.

LUBA stated:

> "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.

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* * *

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."

Id., Rec. 314.

Based on this determination LUBA remanded the nonconforming use decision to the Jackson County Hearings Officer with specific instructions 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." *Id.* (emphasis added). On remand the Hearings Officer was tasked with determining the nature and extent of the concrete batch plant use that was determined to have existed on the property in 1992, and only in 1992. The purpose of this task was to verify the original nonconforming use at the property, which could then form the basis for a potential future application seeking approval of an alteration or expansion of that nonconforming use, specifically the current asphalt batch plant.

On remand, at the request of the Applicant, the Hearings Officer elected to conduct its review based on the record that was established during the Jackson County appeal process leading up to the Hearings Officer's decision on appeal in *Rogue I.* Rec. 275, 292. Based on that record, which was developed on an application to verify an asphalt batch plant use that existed in 2012, the Hearings

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Officer's only finding that relates to the nature and extent of 1992 concrete batch plant use is that it "did not impose significant impacts on the neighboring residential community…." Rec. 189. This finding was made by comparing the evidence in the record relating to the nature and extent of the 2012 asphalt batch plant use to the lack of any evidence in the record regarding the nature and extent of the 1992 concrete batch plant use. *See* Rec. 188-89.

Respondent's only conclusion of law on remand was that "[t]he conversion of the concrete batch plant to an asphalt batch plant requires review and approval as an alteration of a nonconforming use," a determination which this Board already made in *Rogue I.* The Hearings Officer again denied the application to verify the asphalt batch plant as a nonconforming use. The apparent practical effect of the Hearings Officer's decision was to verify the 1992 concrete batch plant use and to define the nature and extent of that use as having "a strong indication of similarity" with the 2012 asphalt batch plant. Rec. 188.

II. LUBA'S JURISDICTION

Under ORS 197.825(1), LUBA has exclusive jurisdiction to review land use decisions. Land use decisions include final decisions made by a local government concerning the amendment or application of statewide planning goals, local comprehensive plans or land use regulations. ORS 197.015(10)(a)(A). The challenged decision applies and interprets provisions of the Jackson County

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Comprehensive Plan and Jackson County Land Development Ordinance. *See* Rec. 185-90. This appeal is subject to LUBA's jurisdiction.

III. ARGUMENTS

A. FIRST ASSIGNMENT OF ERROR: Respondent Misconstrued and Exceeded the Scope of the Remand Ordered by LUBA.

1. Preservation of Error

Petitioner identified and set out the scope of the remand proceeding, as established by LUBA's Order in *Rogue I*, before the Hearings Officer. Rec. 205. Petitioner also raised concern over Respondent's ability to make a nonconforming use determination, based on the evidence in the record, without exceeding the scope of the remand order. Rec. 215.

2. Standard of Review

Where a county misconstrues, and acts outside, its permissible scope of review on remand, LUBA will again remand the decision back to the county. *Louisiana Pacific v. Umatilla County,* 28 Or LUBA 32, 35 (1994).

3. Argument

The permissible scope of local proceedings following a LUBA remand of a local government's decision is framed by LUBA's resolution of the assignments of error in the first appeal. *Louisiana Pacific*, 28 Or LUBA at 35. The Hearings Officer's decision on remand misconstrued and exceeded the scope of LUBA's remand order in *Rogue I*.

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1 In its Opinion and Final Order in *Rogue I*, this Board remanded the decision
2 to Respondent Jackson County for a determination of the nature and extent of the
3 concrete batch plant use that was determined by the Hearings Officer and LUBA to
4 have existed on the subject property in 1992. LUBA determined that the existing
5 asphalt batch plant constituted, "at a minimum, an alteration" of a nonconforming
6 use that would require separate land use review and approval. Rec. 314. LUBA
7 explicitly stated that, "any such alteration, unless approved, is not part of the
8 lawful nonconforming use." *Id.* LUBA directed Respondent to review and verify
9 the nature and extent of the 1992 concrete batch plant use "without considering as
10 part of the verified use any unapproved alterations that occurred in 2001 or at other
11 relevant times since 1992." *Id.*
12 The Hearings Officer began its decision by taking note of LUBA's remand
13 order and limited scope of review for verifying the 1992 nonconforming use, but
14 then disregarded that order and made findings related to the current asphalt batch
15 plant use. Rec. 186, 188. For instance, the findings state, "the evidence
16 established that the objectionable aspects of the asphalt batch plant operation did
17 not begin until approximately 4 or 5 years prior to when the statements were
18 prepared in June 2013." Rec. 188. The Hearings Officer then relied on evidence
19 relating to the asphalt batch plant to conclude that because the record is void of any
20 complaints regarding "objectionable aspects" of the 1992 concrete use that "the

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1 Best Concrete batch plant did not impose significant impacts on the neighboring
2 residential community." Rec. 188-89.
3 This analysis, relying on evidence and testimony relating to the asphalt batch
4 plant from 2001 and onward as support for its findings on the nature and extent of
5 the 1992 concrete batch plant, is contrary to and exceeds the scope of LUBA's
6 remand order. Petitioner acknowledges that a local government has discretion to
7 expand a remand proceeding to consider unresolved issues that may fall outside the
8 scope of a remand order by LUBA. *CCCOG v. Columbia County,* 44 Or LUBA
9 438 (2003). However, in this case, the Hearings Officer expanded LUBA's
10 specific evidentiary limitation placed on the resolution of a single issue, that is the
11 analysis of the nature and extent of the 1992 concrete batch plant use.
12 Respondent acted outside of its authority by exceeding the scope of LUBA's
13 remand order and failing to follow instructions to make a nonconforming use
14 determination "<u>without considering as part of the verified use any unapproved</u>
15 <u>alterations that occurred in 2001 or at other relevant times since 1992</u>." Rec. 314
16 (emphasis added). In exceeding the scope of the remand order, and relying on the
17 absence of evidence regarding the 1992 use, Respondent's process denied
18 community members any opportunity to provide evidence that would have
19 established the nature and extent of the use in 1992. Petitioner respectfully

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requests that LUBA reject the Hearings Officer's analysis as outside the scope of the remand.

B. SECOND ASSIGNMENT OF ERROR: Respondent Misconstrued the Law by Applying the Standard for Alteration of a Nonconforming Use to an Application to Verify a Nonconforming Use.

1. Preservation of Error

Petitioner identified the relevant standards and provisions that apply to verification of a nonconforming use before the Hearings Officer on remand. Rec. 207, 211.

2. Standard of Review

LUBA will reverse or remand a decision of the local government where it improperly construes the applicable law. ORS 197.835(9)(a)(D).

3. Argument

ORS 215.130 provides, in relevant part: "(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 subject to subsection (9) of this section." Jackson County Land Development Ordinance ("LDO") Chapter 11 provides the local mechanisms for evaluating and recognizing nonconforming uses, implementing and substantially mirroring the state statute. Specifically, LDO 11.8 governs verification of nonconforming status.

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1 LDO 11.1.3(C) and 11.8.1 place the burden on the applicant for verification
2 of a nonconforming use to prove the existence, continuity, nature and extent of the
3 use by providing evidence that demonstrates 1) the date the use was established; 2)
4 that the use was lawfully established at the time it became nonconforming; and 3)
5 that the use has not been discontinued or abandoned. Respondent concluded, and
6 LUBA affirmed in *Rogue I*, that the Applicant has established that a batch plant
7 was a lawfully established nonconforming use in 1973, when contrary zoning went
8 into effect on the subject property. Rec. 302. LUBA also found that a batch plant
9 use had existed on the subject property from 1992 to 2012, the relevant 20-year
10 review period as set forth in ORS 215.130(11). *Id.* However, the property had
11 been used for a concrete batch plant prior to 2001, when it was changed to an
12 asphalt batch plant. Rec. 301.
13 In *Rogue I*, LUBA called into question the second step in the nonconforming
14 use verification process: whether the use continued uninterrupted for the relevant
15 20-year time period such that the current asphalt batch plant use could be verified
16 as a lawful nonconforming use. This question requires a determination of the
17 nature and extent of the 1992 concrete batch plant use. Only then can the existing
18 asphalt batch plant use be measured against the original nonconforming use for a
19 determination of whether the current use qualifies as a lawful alteration or
20 expansion of that use. *See* LDO 11.2.1.

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1 Jackson County Planning Staff entered into the record a list of the applicable
2 criteria for the remand proceeding following LUBA's order in *Rogue I.* Rec. 321.
3 That list included LDO sections 11.1, 11.2, and 11.8. *Id.* However, the
4 "Applicable Criteria" section of the Hearing Officer's decision on remand cites
5 only LDO 11.2.1, which governs alterations to nonconforming uses. Rec. 186.
6 The application at issue in *Rogue I,* and again here, sought verification of an
7 asphalt batch plant as a lawfully established nonconforming use. Rec. 185. The
8 application did not seek approval for an alteration or expansion of any
9 nonconforming use. *Id.*
10 After citing the LDO criteria for alteration of a nonconforming use, the
11 Hearings Officer began its discussion with nonconforming use verification
12 standards by citing to LUBA cases that provide the level of analysis required for
13 determining the nature and extent of a nonconforming use. Rec. 187. However,
14 the Hearings Officer then skipped over any analysis of the nature and extent of the
15 1992 concrete batch plant use and instead went into an analysis of whether or not
16 the current asphalt batch plant constitutes an alteration. *Id.*
17 For instance, the Hearings Officer's findings state, "LUBA provides
18 guidance on how specifically the nature and extent of the lawfully established
19 nonconforming use must be characterized." Rec. 187 (*citing Spurgin v. Josephine*

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1 *County,* 28 Or LUBA 383, 390-391 (1994), and *Tylka v. Clackamas County,* 28 Or

2 LUBA 417, 429 (1994)). But then the Hearings Officer went on:

3 Both the LDO and applicable ORS provisions key the extent of
4 allowable changes to 'no greater impacts on the surrounding
5 neighborhood' (LDO 11.2.1(A) and an alteration of the use "in a way
6 that results in more traffic, employees, or physical enlargement of an
7 existing structure housing a nonconforming use' (LDO
8 11.2.1(B)(1)(c)).
9
10 Here, the Applicant must provide evidence that establishes a 1992
11 baseline from which this comparison is made. ORS 215.130(11)[.]
12 The direction of LUBA's remand order reflects this requirement, and
13 it excludes any 'unapproved alterations' since that year. Since there
14 have been no approved alterations since 1992, the use that must be
15 described is the one that existed in 1992.
16
17 * * *
18
19 There is a strong indication of similarity between the previous
20 concrete batch plant use and the Applicant's asphalt batching
21 operation found in the statements of opponents to the Application. * *
22 * These statements lead to the conclusion that the Best Concrete batch
23 plant did not impose significant impacts on the neighboring residential
24 community and that the Applicant's asphalt operation did not do so
25 either until approximately 4 or 5 years prior to 2013.
26
27 Rec. 187–189 (footnotes omitted)

28 The Hearings Officer relied on the standard for an alteration – *i.e.* "no

29 greater impacts on the surrounding neighborhood" – to make a determination of

30 the "1992 baseline" for verification of the nonconforming use. *Id.* While a

31 consideration of the impacts of a nonconforming use are relevant to determining

32 the nature and extent of that use, a comparison of those impacts to the impacts of a

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1 proposed alteration is not. *See Tylka v. Clackamas County,* 28 Or LUBA 417, 435
2 (1994) (description of nature and extent must be adequate to allow for comparison
3 of impacts required for approval of an alteration of a nonconforming use). By
4 applying the alteration standard to this verification application, the Hearings
5 Officer turned the legal standards and the nonconforming use review procedure on
6 its head.

7 An applicant for an alteration of a nonconforming use must demonstrate
8 either that the use has nonconforming status, or that the County previously issued a
9 determination of nonconforming status for the use and that use has not been
10 discontinued. LDO 11.2.1. There is yet to be any final determination of
11 nonconforming status for any use of the subject property. Therefore, it is
12 premature for Respondent to consider whether there has been an alteration of a
13 nonconforming use at the property. Without a verified nonconforming use, there is
14 no nonconforming use to alter. Respondent's decision misconstrued the law in
15 applying the standards for alteration of a nonconforming use to an application for
16 verification of a nonconforming use.

17 //

18 //

19 //

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C. THIRD ASSIGNMENT OF ERROR: Respondent's Findings on the Nature and Extent of the 1992 Concrete Batch Plant Use are Inadequate and are Not Supported by Substantial Evidence in the Whole Record.

1. Preservation of Error

Petitioner raised the issue that the evidence in the record did not support Respondent's ability to make the necessary and adequate findings during the remand proceedings. *See* Rec. 212–15.

2. Standard of Review

LUBA will reverse or remand a local government's decision where the decision is not supported by substantial evidence in the whole record and where the findings are inadequate. ORS 197.835(9)(a)(C), (11)(b).

3. Argument

The applicant bears the burden of providing evidence to establish the existence, continuity, nature and extent of a nonconforming use. LDO 11.1.3(C). Determining the nature and extent of a nonconforming use is an important step in the verification process, as it serves to define the parameters of the nonconforming use right that is protected. *Tylka,* 28 Or LUBA at 435. Because the pending application has at all times sought verification of an asphalt batch plant, the record was limited to evidence related to that use. Thus far, no opportunity has been provided to the public to review an application for verification of a concrete batch plant or submit evidence related to that use of property in 1992.

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During the remand hearing, Petitioner argued that based on the absence of evidence in the record regarding the nature and extent of the 1992 concrete batch plant use, it would be impossible to make the necessary findings to verify the nonconforming concrete batch plant use. Rec. 212. Petitioner argued that the Applicant had not met its burden to provide the required evidence and that the application to verify the nonconforming use should be denied on that basis. *Id.*

To illustrate this point, Petitioner argued that the nature and extent of the 1992 concrete batch plant could only be inferred by engaging in a comparison of the wealth of evidence in the record regarding the existing asphalt batch plant to the lack of evidence regarding any former concrete batch plant. *Id.* Petitioner cautioned the Hearings Officer that such an analysis would not satisfy Respondent's legal obligation to define the nature and extent of the use in specific terms. Rec. 215. Nevertheless, in the absence of evidence identifying the nature and extent of the use in 1992, the Hearings Officer adopted findings inferring from evidence that was submitted on an application to verify an *asphalt batch plant* as probative on the nature and extent of a *concrete batch plant*. *See* Rec. 188-89.

i. First Sub-Assignment of Error: Respondent's Findings on the Nature and Extent of the 1992 Concrete Batch Plant Use are Inadequate.

A local government's findings, to be adequate, must set out the facts which are believed and relied upon and explain how those facts led to the decision. *Sunnyside Neighborhood v. Clackamas County Comm.,* 280 Or 3, 20-12 (1977).

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Respondent's findings are inadequate because they fail to identify any facts that relate specifically to the 1992 concrete batch plant use. Instead, Respondent relied entirely on facts relating to the 2012 asphalt batch plant use and conjectural statements regarding the concrete batch plant use as support for its findings on the nature and extent of the concrete use. The results are broad findings that the two batch plant uses have a "strong indication of similarity" and that the concrete batch plant use "did not impose significant impacts on the neighboring residential community." Rec. 188-89. These findings hardly rise to the level of specificity required when determining the nature and extent of a nonconforming use.

This Board has previously considered the level of specificity required by a county in determining the nature and extent of a nonconforming use. As LUBA has explained:

> [A] county has some flexibility in the manner and precision with which it describes the scope and nature of a nonconforming use. However, [a] county may not, by means of an imprecise description of the scope and nature of the nonconforming use, authorize de facto alteration or expansion of the nonconforming use. At a minimum, the description of the scope and nature of the nonconforming use must be sufficient to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions.

Spurgin v. Josphine County, 28 Or LUBA 383, 390-91 (1994) (footnote omitted).

LUBA expanded on this discussion in *Tylka v. Clackamas County:*

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1 Under ORS 215.130(9) and ZDO 1206.06A(2), an alteration of a
2 nonconforming use may be allowed only if it has 'no greater adverse
3 impact on the neighborhood.' Therefore, in this case, the county's
4 description of the nature and extent of the nonconforming use must be
5 specific enough to provide an adequate basis for determining which
6 aspects of intervenors' proposal constitute an alteration of the
7 nonconforming use, and for comparing the impacts of the proposal to
8 the impacts of the nonconforming use that intervenors have a right to
9 continue.

10 28 Or LUBA 417, 435 (1994).

11 Respondent has done precisely what LUBA sought to avoid as explained in
12 *Tylka*. The Hearings Officer has made imprecise findings on the nature and extent
13 of the 1992 concrete batch plant use, such that there is no basis for determining
14 which aspects of the existing asphalt batch plant use constitute an alteration of the
15 original nonconforming use. The findings on the nature and extent of the 1992
16 concrete batch plant use include no determination of the physical size and extent of
17 the use; the number of employees engaged in the use; the specific hours, days, or
18 even months of operation; the accompanying structures present at the site; the
19 frequency at which the batch plant was moved off-site; whether the operations
20 required or had been issued air quality or water quality permits; or the actual
21 impacts the use had on the surrounding community. These are the types of facts
22 that must be established in order for the Applicant to move forward with an
23 alteration application. *See* LDO 11.2.1(A).

24 The only "facts" provided on the nature and extent of the concrete batch
25 plant are an "estimate" from Howard DeYoung, that "[t]hroughout the

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1990's…Best Concrete, at a minimum, produced approximately 40,000 tons of material annually" and a statement that "[t]here was often a continuous line of trucks at the site for delivery of raw materials and for the transportation of the finished product." Rec. 188. Such vague and uncertain statements cannot satisfy the level of specificity required in defining the nature and extent of the use.

The findings also fail to adequately explain the basis for rejecting the limited evidence that may be relevant to the 1992 use. For example, on remand, the Hearings Officer dismissed any consideration of the aerial photos on the basis that they are either "unreliable or not relevant." Rec. 188. The Hearings Officer further stated that "[m]ost of the aerials…are not relevant because, as determined in the initial hearings officer decision…those aerials are of a different site altogether." This finding contradicts the Hearings Officer's first decision on this application, where he did consider aerial photographs as reliable and relevant evidence. In the prior decision, the Hearings Officer stated, "based on a comparison to the Applicant's own aerial photographs…the aerial photographs accompanying each DOGAMI report…clearly show activity within [the subject property]…." Rec. 225–26.

Respondent also fails to engage in any explanation of how these "facts" led to the conclusion made. The Hearings Officer has done nothing more than refer to a few pieces of evidence from the record and proclaim a conclusion that does not

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1 appear to be in any way related to or derived from that evidence. Additionally,
2 these findings are in direct contradiction to the Hearings Officer's findings in
3 *Rogue I* which stated, "[t]here is no evidence regarding the physical similarities of
4 concrete batch plants and asphalt batch plants, but the hearings officer infers that
5 concrete operations must have a smaller physical profile in height, bulk, surface
6 area or other attributes than do asphalt plants." Rec. 228.

7 The Hearings Officer acknowledged that the evidence in the record was
8 insufficient to establish the nature and extent of the 1992 concrete batch plant use
9 by stating that "[t]he facts lie somewhere between" the characterizations that there
10 is "overwhelming lack of evidence in the record" and "the evidence in the record
11 clearly demonstrates" the nature and extent of the use. Rec. 187. The Hearings
12 Officer went on to state, "the Applicant's evidence paints only a partial picture of
13 the [concrete batch plant] operation." Rec. 188. The findings fail to explain how
14 the "partial" evidence in the record that actually pertains to the concrete batch plant
15 use is reliable; the findings also fail to explain how evidence relating to the 2012
16 asphalt batch plant use is reliable evidence of the nature and extent of the 1992
17 concrete batch plant use. Petitioner respectfully requests that LUBA reject these
18 findings as inadequate.
19 //

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ii. Second Sub-Assignment of Error: Respondent's Conclusion that the 1992 Concrete Batch Plant did Not Impose Significant Impacts on the Surrounding Community is Not Supported by Substantial Evidence.

Respondent's findings that do purport to go to the nature and extent of the 1992 concrete batch plant use are unsupported by substantial evidence. Under *Armstrong v. Arsten-Hill Co.,* 90 Or App 200, 752 P2d 312 (1988), the substantial evidence standard is not satisfied when "the credible evidence apparently weighs overwhelmingly in favor of one finding and the [decision maker] finds the other without giving a persuasive explanation." *Wal-Mart Stores, Inc. v. City of Bend,* 52 Or LUBA 261, 274–75 (2006). In this case, Respondent was required to weigh the evidence presented by the Applicant against the standards established in the LDO and by this Board for defining the nature and extent of a nonconforming use.

During the remand proceeding, Petitioner specifically pointed out that there was a "lack of evidence in the record regarding the nature and extent of the concrete batch plant use prior to 2001." Rec. 212. This is to be expected when the land use application at issue seeks verification of an asphalt batch plant that didn't begin operating until 2001. In effect, the Hearings Officer attempted to make a nonconforming use verification for one use by relying solely on the evidence offered in support of the verification of a different use. For example, the Hearings Officer relied on statements in the record that were offered to demonstrate the impacts from the asphalt batch plant as evidence of the impacts from the concrete

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batch plant. The findings state, "[t]hese statements lead to the conclusion that the Best Concrete batch plant did not impose significant impacts on the residential community…." Rec. 189. This is a clear error, as it is the Applicant's burden to demonstrate that each of the nonconforming use factors are established and the Hearings Officer may not rely on the absence of complaints regarding impacts as substantial evidence that there were none. *Parsely v. Jackson County,* 34 Or LUBA 540, 547–48 (1998); *River City Disposal v. City of Portland,* 35 Or LUBA 360, 371–72 (1998).

The limited evidence in the record of the use of this parcel in 1992 was submitted for purposes of establishing continuity of a batch plant, but was not specific to establishing the nature and extent of the use of land at that time. No evidence has been entered into the record for the purpose of establishing the nature and extent of the 1992 concrete batch plant use, the relevant issue on remand. As a result, the Applicant failed to meet its burden to demonstrate the nature and extent of the nonconforming use and the nonconforming use application should have been denied on that basis alone. Petitioner respectfully requests that LUBA reject Respondent's findings regarding the nature and extent of the 1992 concrete batch plant, including that the 1992 concrete batch plant did not pose a significant impact on the neighboring community.

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1 **D. FOURTH ASSIGNMENT OF ERROR: Respondent Misconstrued**
2 **the Law by Failing to Consider Whether the Nonconforming Use has**
3 **Been Discontinued.**
4
5 *1. Preservation of Error*

6 Petitioner raised arguments before the Hearings Officer during the remand
7 proceeding that the change from a concrete batch plant use to the current asphalt
8 bath plant use constituted a discontinuance of the lawful nonconforming use and
9 therefore, the application to verify the asphalt batch plant use must be denied. Rec.
10 215-17.

11 *2. Standard of Review*

12 LUBA will reverse or remand a decision of the local government where it
13 improperly construes the applicable law. ORS 197.835(9)(a)(D).

14 *3. Argument*

15 Verification of a nonconforming use requires an applicant to demonstrate the
16 existence, continuity, nature and extent of the nonconforming use for a period of
17 20 years preceding the date of the application. ORS 215.130(11); LDO 11.1.3(C),
18 11.1.8(B). An important component of the verification process is a demonstration
19 that the use has not been discontinued or abandoned. LDO 11.8.1(A). LDO
20 11.2.2(A) provides, "[i]f a nonconforming use…is discontinued for a period of
21 more than two (2) years, the subsequent use of the lot or parcel will conform to the
22 regulations and provisions of this Ordinance applicable to that lot or parcel." *See*

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1 *also* ORS 215.130(7)(a). The Hearings Officer failed to conduct any analysis, or
2 to make any findings, on whether or not the 1992 concrete batch plant use has been
3 discontinued. The nonconforming concrete batch plant use cannot be verified
4 without such an analysis.

5 In *Rogue I*, LUBA upheld the Hearings Officer's determination that a batch
6 plant use had existed on the property for the relevant 20-year period. Rec. 302.[1]
7 LUBA did not reach a conclusion as to whether or not a concrete batch plant use
8 and an asphalt batch plant use are the same use for purposes of a nonconforming
9 use verification. LUBA did, however, raise concerns with the Hearings Officer's
10 analysis to find that the two batch plants constitute the "same use." Rec. 312–14.

11 The relevant question before the Hearings Officer and this Board in *Rogue I*
12 was whether or not the Applicant could claim that the current asphalt batch plant
13 use related back to the lawful establishment of batching operation on the Property.
14 Rec. 229, 307. That question shifted upon LUBA's determination that replacing
15 one type of batch plant with another constituted, *at a minimum*, an alteration of the
16 original nonconforming use. Rec. 314. Respondent mistakenly states that "LUBA
17 clearly held that whatever the similarities between the two batch plant uses, the

[1] LUBA's finding appears to make a clerical error in stating, "Substantial evidence also supports the finding that a *concrete* plant existed on the property during the 20 year period from 1992 to 2012…" Rec. 302 (emphasis added). It is uncontested that as of 2001, the use of the property was for an asphalt batch plant, not a concrete plant.

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1 initiation of the asphalt batching use in 2001 constitutes an alteration of the
2 acknowledged nonconforming concrete batch plant use." Rec. 189. LUBA did not
3 find that the change from a concrete batch plant to an asphalt batch plant was
4 absolutely an alteration, rather than an expansion or discontinuance of the
5 nonconforming use.

6 Therefore, the relevant question on remand became whether or not the
7 Applicant could verify the nonconforming concrete batch plant use as it existed in
8 1992. *Id.* A necessary aspect of the nonconforming use verification analysis is a
9 determination of whether or not the use has been discontinued or abandoned. LDO
10 11.8.1(A). The findings fail to include any analysis of whether the change from a
11 concrete batch plant to an asphalt batch plant in 2001 constituted an abandonment
12 of the original nonconforming use. Instead, the findings assume that the asphalt
13 batch plant represents an alteration of the nonconforming use, without
14 consideration of whether the change marked a discontinuance of the use.

15 While it is possible that the County may make a discontinuance
16 determination during some later proceeding, it is a determination that must be
17 made prior to any approval of an alteration or expansion. Petitioner argues that the
18 nonconforming use verification process is the appropriate time for such an
19 analysis. If this application is to be relied upon to verify a concrete batch plant as a
20 nonconforming use, Respondent must determine the nature and extent of that use

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as of 1992, and determine whether that use has been discontinued. Petitioner respectfully requests that LUBA reject the Hearings Officer's findings to the extent that they verify a nonconforming concrete batch plant use.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Board affirm the decision of the County denying the nonconforming use verification application, not for the reasons adopted by the Hearings Officer, but on the alternative grounds that the Applicant has failed to meet its burden to demonstrate the existence, continuity, nature and extent of the 1992 nonconforming concrete batch plant use.

Dated: December 19, 2014

Respectfully Submitted,

____

Maura C. Fahey, OSB No. 133549
Of Attorneys for Petitioner
Rogue Advocates

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CERTIFICATE OF FILING

I hereby certify that, on December 19, 2014, I filed the original and four copies of this **Petition for Review** with the Land Use Board of Appeals, at DSL Building, 775 Summer Street NE, Suite 330, Salem, Oregon 97301, by first class mail.

DATED: This 19th day of December, 2014

By: ___________________________
Maura C. Fahey
Crag Law Center

CERTIFICATE OF SERVICE

I further certify that, on December 19, 2014, I served a true and correct copy of this **Petition for Review** on the other parties to this appeal, by first class mail as follows:

Joel Benton
Jackson County Counsel
10 S Oakdale, Room 214
Medford, OR 97501

Daniel O'Connor
Huycke O'Connor Jarvis, LLP
823 Alder Creek Drive
Medford, OR 97504

DATED: This 19th day of December, 2014

By: ___________________________
Maura C. Fahey
Crag Law Center

BEFORE THE HEARINGS OFFICER FOR JACKSON COUNTY, OREGON

In the matter of an appeal from the Decision of the Jackson County Planning Division approving an application for nonconforming use on Tax Lot 600, Township 38 South, Range 1 West, Section 24, in Jackson County Applicant: Paul Meyer Appellant: Rogue Advocates	Case No. ZON2012-001173- NC REMAND **DECISION AND FINAL ORDER**

THE APPEAL IS GRANTED AND THE APPLICATION IS DENIED.

NATURE OF APPLICATION

On September 26, 2012, Paul Meyer, owner together with Kristen Meyer of Mountain View Paving (the "Applicant") filed an application seeking verification of an asphalt batch plant as a lawfully established nonconforming use (the "Application") on Tax Lot 600,Township 38 South, Range 1 West, Section 24 in Jackson County (the "Property" or "Tax Lot 600"). The Application did not seek approval for an alteration or expansion of the established nonconforming use. The Property consists of 10.98 acres and is zoned Rural Residential-5 ("RR-5"). It is located at 530 West Valley View Road, Talent, Oregon in Jackson County.

The Jackson County Planning Division Staff (the "Staff") approved the Application, and an appeal filed by Rogue Advocates and the City of Talent to the Hearings officer followed. The Hearings officer issued a decision on September 26, 2013, concluding that a batch plant use was lawfully established nonconforming use and that it has existed continuously since 1963. However, the Hearings officer determined that the asphalt batch plant use had expanded beyond the physical limits of the established nonconforming use. On that ground the Application was denied (the "Decision").

Rogue Advocates (the "Appellant") appealed the Decision to LUBA which supported the determination that the use was lawfully established and that it was continuous. However, LUBA took exception to the determination that the asphalt batch plant use is the same use as the lawfully established

1 use which had been a concrete batch plant, and remanded the Decision for focused findings. Specifically,
2 LUBA requires the following:

3 > "...[T]he two facilities are at least very similar uses. It is not clear to us, however, that
4 > that means that the two types of batch plants are the 'same use,' or more importantly,
> what a finding to that effect means for the purposes of verifying the nature and extent
5 > of a nonconforming use. ...[E]ven if the two types of batch plants constitute the 'same
> use,' replacing one with the other constitutes, at a minimum, an alteration that requires
6 > 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
7 > lawful nonconforming use.
8 > "...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
9 > use any unapproved alterations that occurred in 2001 or at other relevant times since
> 1992." *Rogue Advocates v. Jackson County* ____ Or LUBA _____, LUBA No. 2013-
10 > 103, April 22, 2014 at 21-22 (footnote omitted).

11 On August 25, 2014, the Hearings officer conducted a properly noticed remand hearing on the
12 limited issue required by LUBA. The hearing was strictly limited to evidence that was in the record of the
13 Decision. There was no objection from the parties, although some who desired to testify or provide
14 information beyond that limitation were frustrated by the restriction. The parties each made submittals
15 during the open record period that followed the remand hearing. The matter is now properly before the
16 Hearings officer for decision.

17 **APPLICABLE CRITERIA**

18 The criteria which apply to this appeal are set forth in the 2004 Jackson County Land Development
19 Ordinance, as amended ("LDO") in section 11.2.1 governing alterations to nonconforming uses (the
20 "Applicable Criteria").[1]

21 **DISCUSSION AND FINDINGS OF FACT**

22 Factually, this matter turns on a determination of the nature and extent of the concrete batch plant
23 use that preceded the Applicant's establishment of the asphalt batch plant use on the Property in 2001.[2] As
24
25
[1] All references to code sections herein are to the LDO unless otherwise indicated.
26 [2] An applicant's showing must also include an adequate showing as to the existence and continuity of the nonconforming use, but those issues have already been determined by the Hearings officer in the Applicant's favor. The Appellant's assignments of error challenging those determinations were denied by LUBA.

1 the Appellant points out, LUBA provides guidance on how specifically the nature and extent of the
2 lawfully established nonconforming use must be characterized.

3
4
5
6

> "At a minimum, the description of the scope and nature of the nonconforming use must be sufficient to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions." *Spurgin v. Josephine County*, 28 Or LUBA 383, 390-391 (1994) (footnote omitted).

7
8 Further instruction is provided in *Tykla v. Clackamas County,* 28 Or LUBA 417, 429 (1994)

9
10
11

> "[T]he county's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which aspects of [an applicant's] proposal constitute an alteration of the nonconforming use, and for comparing the impacts of the proposal to the impacts of the nonconforming use [an applicant] has the right to continue."

12 Both the LDO and applicable ORS provisions key the extent of allowable changes to "no greater impacts
13 on the surrounding neighborhood" (LDO 11.2.1(A) and an alteration of the use "in a way that results in
14 more traffic, employees, or physical enlargement of an existing structure housing a nonconforming use"
15 (LDO 11.2.1(B)(1)(c)).

16 Here, the Applicant must provide evidence that establishes a 1992 baseline from which this
17 comparison is made. ORS215.130(11) The direction of LUBA's remand order reflects this requirement,
18 and it excludes any "unapproved alterations" since that year.[3] Since there have been no approved
19 alterations since 1992, the use that must be described is the one that existed in 1992.

20 It is the Applicant's burden to provide substantial evidence that meets the requirements of *Spurgin*
21 and *Tykla*. The Appellant argues that "there is an overwhelming lack of evidence in the record regarding
22 the nature and extent of the concrete batch plant use prior to 2001." Record 85. For the Applicant's part,
23 he states that "the evidence in the record clearly demonstrates the…nature and extent of the permanent
24 batch plant use [in 1992]." The facts lie somewhere between these characterizations.
25
26

[3] LUBA's reference to 2001 reflects the year in which the Applicant initiated the asphalt batch plant use.

The existence of a permanent concrete batch plant use on the Property in 1992 is not in dispute, but the Applicant's evidence paints only a partial picture of the operation. "Throughout the 1990's…I estimate Best Concrete, at a minimum, produced approximately 40,000 tons of material annually." Statement of Howard DeYoung, the former site owner, at Record 66. This volume exceeds the Applicant's production of asphalt by nearly 23,000 tons in his most productive year and by over 28,000 tons annually since 2002. Record 68. "It would not surprise me if tonnage being produced by Best concrete…was 2x or3x as much tonnage as produced by Mountain View Paving. There was often a continuous line of trucks at the site for delivery of raw materials and for the transportation of the finished product." Statement of Bill Monroe at Record 68-69. There is no indication in the Record of how much traffic is generated by the Applicant's use. Best Concrete did not operate in the winter months (Record 66) but the Applicant's plant operates year round. *Ibid.*

The Appellant also relies on aerial photographs of the site over the years. However, that evidence is variously either unreliable or not relevant. It is unreliable since, as the Applicant points out, one aerial taken in late 2001 shows no batch plant on the Property even though the Applicant's batch plant had been there since at least July of that year. Most of the aerials, however, are not relevant because, as determined in the initial hearings officer decision on the Application, they were taken for an earlier gravel operation on property that adjoins this site to the north. In other words, those aerials are of a different site altogether.

There is a strong indication of similarity between the previous concrete batch plant use and the Applicant's asphalt batching operation found in the statements of opponents to the Application.[4] Some of those opponents lived in Mountain View Estates, a residential development that is immediately adjacent to the Applicant's plant, at the time it was initiated in 2001. Their statements expressly indicated that they were not aware of the change in the operation for years after 2001. In fact, the evidence establishes that the objectionable aspects of the asphalt batch plant operation did not begin until approximately 4 or 5 years prior to when the statements were prepared in June 2013. The Record establishes that the Applicant's operation prior to that time imposed no greater burden or impact on that adjacent use.

[4] These statements were submitted to the record of the initial hearing on this matter, and they are dated in June 2013.

> "From May, 1993 until June, 2002,...I would walk the Bear Creek Greenway several times a week....This is right past the place where Mountain View Paving is now located. I did not see, nor did I hear the noise or smell the smells associated with an asphalt plant.
> ...
>
> "Within a year or two of our moving to Mountain View Estates (June, 2002), the noise and smell got progressively worse. It has been especially bad and present in the last year. I have also noticed a dramatic increase in the structures and trash piles at Mountain View Paving." (clarification added by Applicant) Record 256. [5]
>
> "My parent's house in Mountain View Estates was the closest home to Howard DeYoung's sand and gravel plant. My parents occupied their...home...from February 1990 until July 13, 2010.... During [that] time..., I made numerous trips every week to their home. My parents were constantly disturbed by the manufacture process by the sand & gravel plant, however, never once did any of us ever smell asphalt from the spring of 1990 through the summer of 2012." (italics omitted) Record 255.
>
> "In June 2002, I moved to Mountain View Estates. When I moved in there was no hint of asphalt in the air so I never gave it a thought. In the past few years (clarified as the last 4 or 5 years) it (the use) has doubled in size it has increased in sound and black billowing smoke." Original Public Hearing; 1:43. (explanation added)." *Ibid.*
>
> "I moved to Mountain View Estates in June 2002, no hint of asphalt production....In the past few years, this asphalt-paving industry has more than doubled in size, as I watched huge equipment clearing large patches of ground..., with additional equipment accumulating at the site." *Ibid.*

These statements lead to the conclusion that the Best Concrete batch plant did not impose significant impacts on the neighboring residential community and that the Applicant's asphalt operation did not do so either until approximately 4 or 5 years prior to 2013.

LUBA clearly held that whatever the similarities between the two batch plant uses, the initiation of the asphalt batching use in 2001 constitutes an alteration of the acknowledged nonconforming concrete batch plant use, and that such an alteration requires review and approval. In the Applicant's final rebuttal, he acknowledges this: "Applicants [6] concede that the Hearings Officer is not authorized [by LUBA] to render a decision recognizing that the conversion to an asphalt batch plant in 2001 as an allowed alteration." Record 282. "[T]he actual physical change of equipment (i.e., the conversion from a concrete

[5] Original record citations for this and the following quoted statements are omitted.
[6] "Applicants" includes Kristen Meyer, Paul Meyer's wife.

Appendix A

Development Services

ZONING

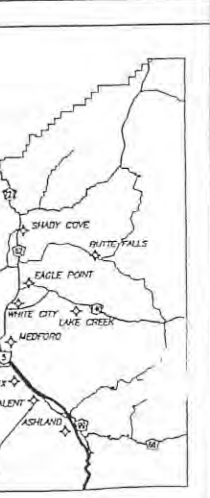
APPLICANT:
MEYER REMAND
38-1W-24 TL 600
38-1W-24C
TL 1300 & 1400
ZON2012-01173

This map is based on a digital database compiled by Jackson County from a variety of sources. Jackson County cannot accept responsibility for errors, omissions, or positional accuracy. There are no warranties, expressed or implied.

SUBJECT
SUBJECT
EFU
RR-5
GC
Bear Creek
Jeffery Creek
Talent Canal
SUNCREST RD
W VALLEY VIEW RD
SISKIYOU VIEW
MOUNTAIN VIEW DR
LITHIA WY
ROGUE RIVER PW
CREEL RD
E RAPP RD

Jackson County Hearings Officer
File No. ZON2012-01173(RM) Exhibit # 2.
Offered by: Staff
Date: 8-14-2014 Received by: [illegible]

Appendix A



SITE PLAN TABLE

NO.	DESCRIPTION
1	SCALE SHED – 8.5'x10'
2	SCALE SHED – 6.5'x8'
3	OFFICE – 12'x23'
ST	SEPTIC TANK
4	FUEL TANKS –TWO
5	ASPHALT PLANT
6	ASPHALT PLANT OFFICE
7	GENERATOR – 16'x16'
8	GRAVEL BINS & RAMP
9	CARGO CONTAINER
10	CARGO CONTAINER
11	CARGO CONTAINER
12	CARGO CONTAINER
13	CARGO CONTAINER
14	CARGO CONTAINER
15	CARGO CONTAINER
16	SHOP – 46'x70'
17	TIN SHED – 10'x20'
18	CRUSHER
19	CARGO CONTAINER
20	STOCK PILES

VICINITY MAP

ABREVIATIONS

BFE	BASE FLOOD ELEVATION	FIRM	FLOOD INSURANCE RATE MAP
EXIST.	EXISTING	FFE	FINISH FLOOR ELEVATION
ELEV	ELEVATION	JCLDO	JACKSON COUNTY LAND DEVELOPMENT ORDINANCE
EL	ELEVATION	LAG	LOWEST ADJACENT GRADE
FEMA	FEDERAL EMERGENCY MANAGEMENT AGENCY	OSSC	Oregon Structural Specialty Code
		REF.	REFERENCE
		TYP.	TYPICAL

GENERAL NOTES

The Engineer has shown an approximate property line for general orientation purposes. Contact a Licensed Land surveyor to determine actual location of the property boundary.

SITE PLAN - MOUNTAIN VIEW PAVING

T38S R1W S24 TL600

Conditionally Approved (✓)
Approved ( )
Denied ( )

By: [signature] Date 3/25/2013
Jackson County Planning & Development

RECEIVED OCT 10 2012

JOB NO. 12-046
FILE: FLOOD STATE.DWG

DRAWN:	mpt
DATE:	9/19/2012
	REVISIONS

REGISTERED PROFESSIONAL ENGINEER 14,896 OREGON MAY 22, 1990 MICHAEL P. THORNTON
Electronic Reduced Copy
RENEWAL DATE: 6/30/2014

THORNTON ENGINEERING
p.o. box 476
260 north 3rd street
jacksonville, oregon 97530
(541) 899-1489 (541) 899-3419 fax

SITE PLAN - MOUNTAIN VIEW PAVING
BEAR CREEK, JACKSON COUNTY
530 W. VALLEY VIEW ROAD
TALENT, OREGON

SHEET B1

SUBMITTED BY APPLICANT _nc

Jackson County Hearings Officer
File No. ZON2012-01173(RM) Exhibit # 3.
Offered by Applicant
Date: 8-14-2014 Received by: [initials]

batch plant to an asphalt batch plant) will require an application for an alteration of the nonconforming use pursuant to LDO 11.2.1." Record 283.

The Application cannot succeed, and the Applicant is left to file a new application for an alteration in the acknowledged batch plant use.

CONCLUSIONS OF LAW

Having reviewed all of the evidence and testimony and weighed it against the applicable criteria, the Hearings officer makes the following conclusions of law:

1. The conversion of the concrete batch plant to an asphalt batch plant requires review and approval as an alteration of a nonconforming use.

ORDER

1. The Appeal is granted, and
2. The Application is denied.

* * * * * *

Dated this 28th day of October, 2014.

DONALD RUBENSTEIN
Hearings Officer

The Hearings officer's Order is the final decision of Jackson County on this application. This decision may be appealed to the Oregon Land Use Appeals Board (LUBA) within 21 days of the date it is mailed. This decision is being mailed on October 28 , 2014. Please contact LUBA for specific information at DSL Building, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283 or by phone at (503) 373-1265.