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, Intervenor-Respondents.	)	LUBA No. 2013-102/103 (Consolidated) PETITION FOR REVIEW

PETITION FOR REVIEW

SUBMITTED BY ROGUE ADVOCATES

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I. PETITIONER'S STANDING

Petitioner Rogue Advocates has standing to petition the Land Use Board of Appeals ("LUBA") to hear this consolidated appeal because Petitioner filed timely notices of intent to appeal the two Jackson County decisions on October 17, 2013, and because Petitioner appeared before the local government by submitting written and oral testimony during the public comment periods for the decisions. Rec-NC[1] 125–175, 359–503, 837, 901–970; Rec-FP 088–160, 233–332, 511, 582–588; ORS 197.830(2).

II. STATEMENT OF THE CASE

A. Nature of Decision and Relief Requested

This consolidated appeal involves two decisions related to the same activity on the same parcel of land. The first decision under review is Respondent Jackson County's Hearings Officer Decision and Final Order in Case No. ZON2012-01173_NC, which became final on September 26, 2013, finding that a batch plant is a lawfully established nonconforming use on the property identified as Tax lot 600, Township 38 South, Range 1 West, Section 24 in Jackson County (Applicant Paul Meyer, Appellants Rogue Advocates and City of Talent). The decision granted the appeals of Rogue Advocates and the City of Talent to the extent that the Applicant's operations include an expansion or enlargement of the lawfully established nonconforming use. A copy of the challenged decision is included with this petition as Appendix A. The second decision under review is Respondent Jackson County's Hearings Officer Decision and Final Order in Case No. ZON2012-01172_FP, which became final on September 26, 2013, finding that the appeals of the floodplain permit

[1] The two cases were consolidated by LUBA's order dated October 21, 2013. Petitioner uses "Rec-NC" to refer to the record filed by Respondent in LUBA No. 2013-103 (the appeal of the Nonconforming Use Decision) and "Rec-FP" to refer to the record filed in LUBA No. 2013-102 (the appeal of the Floodplain Permit Decision). Petitioner uses "Supp. Rec." to refer to the supplemental record filed by Respondent on December 30, 2013.

application for the asphalt batch plant are moot and dismissing the appeals without further consideration. A copy of this decision is attached as Appendix B.

Petitioner respectfully requests reversal or remand of the decisions because the decisions fail to comply with state and local law and contain inadequate findings not supported by substantial evidence in the whole record.

B. Summary of Arguments

In the first assignment of error, Petitioner challenges the Nonconforming Use Decision. Petitioner argues that the Hearings Officer erred in determining that the batch plant was a lawfully established nonconforming use on the property. The decision relies on the local code definition of "batch plant" to include both concrete and asphalt production in order to conclude that a batch plant has been a continuous operation on the property. Petitioner asserts that this conclusion misconstrues the applicable law because it fails to properly construe and apply statutory and local code provisions related to nonconforming uses and increased impacts to neighbors from nonconforming uses. Petitioner argues that the findings are inadequate and not based on substantial evidence.

The second assignment of error also addresses the Nonconforming Use Decision. Petitioner argues that the Hearings Officer erred in failing to determine the extent of expansion and analyze whether that expansion complies with the relevant legal standards for expansion. The practical effect of this failure is the continued operation of the plant without a determination of the lawfulness of the expanded operations. Petitioner requests that LUBA reverse or remand the decision for consideration of scope and extent of operations in 1992 and the legality of the asphalt plant expansion.

In the third assignment of error, Petitioner challenges the Nonconforming Use Decision, and argues that the Hearings Officer erred in concluding that provisions of LDO 11.2.1(C), governing expansion of aggregate operations, do not apply to this application.

Petitioner asserts that LDO 11.2.1(C) governs situations where an applicant includes new structures or new processing methods on an aggregate operation, and these provisions apply here. Petitioner requests that LUBA remand the decision for consideration of compliance with all relevant provisions.

In the fourth assignment of error, Petitioner challenges the Floodplain Permit Decision. Petitioner argues that the Hearings Officer erred in concluding that the floodplain application and appeals are moot. The Hearings Officer's decision offers little by way of explanation for this conclusion, stating only 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." Rec-FP 3. Petitioner argues that because the Nonconforming Use Application found that the batch plant was a lawfully established nonconforming use, and because Respondent has interpreted that decision as allowing the continuation of the use on the property, the floodplain applications were not moot, and the appeals should have been decided. Petitioner requests that LUBA reverse the decision and remand for the Hearings Officer to make a determination on the Floodplain Development Permit appeal.

C. Summary of Material Facts

The Applicant, Paul Meyer, has operated an asphalt batch plant at the property since 2001. Rec-NC 3. The subject property is currently zoned Rural Residential (RR-5). Rec-NC 4, 1099. Aggregate operations and asphalt production operations are not currently allowed under the 2004 LDO. *Id.* at 1100–1101. At no time since 2001 has the operation of an asphalt batch plant been a permitted use—conditionally or otherwise—of the subject property. *Id.* Prior to the RR-5 designation and beginning in 1973, the property was zoned as Open Space Development (OSD-5). Rec-NC 1093. Aggregate operations, including processing or batching, were not an allowed use in the OSD-5 zone. Rec-NC 1094–1097.

Mountain View Estates is a mobile home park located directly across Bear Creek from the subject property. Rec-NC 354. Petitioner's members include residents of Mountain View Estates. Since 2001, when the Applicant began asphalt operations at the site, residents of Mountain View Estates have noticed and complained of noise, dust, odors, and associated health impacts from the asphalt operations. *See* Rec-NC 347–350, 354–357, 446–465. Complaints have been filed with Jackson County and with the Oregon Department of Environmental Quality. Rec-NC 347–350. Chris Hudson, manager of Mountain View Estates, notes in her sworn affidavit, "Prior to 2001, there had been intermittent dust and noise from the aggregate operation. But, over the last several years, especially the last two years, there has been an escalation of complaints about noxious asphalt fumes, heavy particulate matter and increased noise from the manufacture of asphalt at the subject property." Rec. 453.

The entire property is located within the mapped flood hazard overlay of Bear Creek. Rec-NC 3. A portion of the property is located within the mapped floodway of Bear Creek. *Id.* A floodplain development permit is required under the Jackson County LDO "prior to initiating development activities in any area of Special Flood Hazard." LDO 7.2.2(C). The Floodplain Overlay ordinance is clear that "[n]othing in Section 7.2 is intended to allow uses or structures that are otherwise prohibited by the zoning ordinance or Specialty Codes." LDO 7.2.2.

The previous property owner, Howard De Young, first sought nonconforming use verification for an aggregate operation in 2001. That attempt failed because the owner applied through the lawful parcel review process, rather than the nonconforming use verification process. *See* Rec-NC 386. The application was deemed incomplete and remained incomplete for 180 days after it was submitted. Nonconforming use status was

never established. *Id.* Jackson County did not pursue enforcement action against the operation of aggregate operations within a RR5 zone at that time.

In 2011, the current property owner applied again for nonconforming use verification. Rec-NC 374. The 2011 application asserted that aggregate removal operations were the lawfully established nonconforming use. In the course of 2011 application, county planning staff found:

> [A]n aggregate use existed on the subject property since prior to 1972. Crushing, stockpiling, washing and sorting uses are covered under the surface mine exemption. The issue is if that mining use included a processing plant. Based on findings under Section 11.8.1, the processing plant was not documented to exist on site until 2001.

Rec-NC 376. After the initial review, staff requested the Applicant modify the aggregate nonconforming use application to include expansion of the use to allow the asphalt batch plant. Rogue Advocates also appealed this revised application, but the Applicant withdrew the application after an appeal hearing but prior to a final decision by the County Hearings Officer.

Also in 2011, County Code Enforcement issued a Warning of Violation (COD2011-00138) for an unauthorized expansion of the uses on the property. Rec-NC 383. Specifically, Code Enforcement found that several new structures had been placed on the property, including a 500+ square foot commercial building on cargo containers, a new asphalt plant, commercial office on skids, an electrical feeder and plumbing. *Id.* Code Enforcement also identified an excavated pond within the operating area and floodway that had been filled with unspecified material. Code Enforcement found no permits for these structures on file with the County. These violations were identified by a comparison of aerial photographs from 2001–2003 and 2010. *Id.* Because there was a code enforcement warning of violation pending, the property owner was required to submit a verification of

nonconforming use status application and a floodplain development permit application concurrently. Rec-NC 385–386.

The current owner Paul Meyer again applied for nonconforming use verification and a floodplain development permit on September 26, 2012. Rec-NC 1053; Rec-FP 641. As described in the application: "Applicant is seeking verification of nonconforming use for the processing, stockpiling, batching/manufacturing, sale and transport of asphalt materials." Rec-NC 1057. As part of the application, Mr. Meyer submitted a letter describing the establishment of his current asphalt operations on the property:

> For three years I kidded with Howard DeYoung about putting a plant at his rock pit. In the year of 2000, Howard DeYoung agreed to help me put in a plant, money wise, and site wise along with Gary Angell and Casey Caspirer.
>
> We decided to find a small portable plant that would be efficient to operate in the wintertime. I bought a small plant from the state of Wyo. We set up the plant in late March early April in 2001 at Howard DeYoung's pit, and even hired a land use planner.
>
> ***
>
> In 2003 the rock pit was about to be mined out, and pulling rock from bear creek, which we were still permitted to do was increasingly more difficult to do, due to fish runs and water quality.

Rec-NC 1139–40. Also included with the application was an affidavit from Howard De Young, the previous property owner, dated February 16, 2001, stating:

> I acquired the property in 1963, and began an aggregate mining operation on the site. The operation included aggregate extraction, crushing, screening and processing, an asphalt batching plant, and other processing facilities such as a sand slurry plant. *** I hereby certify that the operation, which includes aggregate mining, crushing, screening and processing, including *intermittent asphalt batching*, has been in continuous operation since the operation commenced in 1963. While there have been periods of inactivity, none have exceeded 90 days ***

Rec-NC 1141 (emphasis added). Mr. De Young did not specify whether various components of the operation individually or collectively were in continuous operation.

Mr. De Young later clarified his statement regarding the intermittent nature of batching operations: "I used the word 'intermittent' to mean that most of the batch operators

and especially Best Concrete did not batch in the winter months ***." Rec-NC 177. Mr. De Young's clarification letter does not describe or reference asphalt production, or use the word "asphalt" anywhere in describing prior operations on the site. Instead, the letter refers more generally to "batch plants" operated by Rogue River Paving Company and Best Concrete. *Id.*

On March 25, 2013, County Planning Staff issued the tentative staff decisions approving both applications without holding a public hearing. Rec-NC 303, 1156–1164; Rec-FC 527, 653–661. Rogue Advocates and the City of Talent timely appealed both applications. Rec-NC 837–840, 835–836; Rec-FP 511–513, 509–510. On June 24, 2013, Respondent held public hearings on both appeals before Jackson County Hearings Officer Donald Rubenstein. Supp. Rec. 1. After an extended open record period, the Hearings Officer issued the challenged Decisions and Final Orders on September 26, 2013. Rec-NC 1–22; Rec-FP 1–3. Petitioner timely appealed the decisions to LUBA on October 17, 2013. LUBA consolidated the appeals by Order dated October 21, 2013.

III. 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 Comprehensive Plan and Jackson County Land Development Ordinance. *See* Rec-NC 2–3; Rec-FP 2. This appeal is subject to LUBA's jurisdiction.

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IV. ARGUMENTS

Petitioner challenges both the Nonconforming Use Decision and the Floodplain Development Permit Decision. The first, second, and third assignments of error relate to the Nonconforming Use; the fourth assignment of error relates to the Floodplain Permit.

A. FIRST ASSIGNMENT OF ERROR: Respondent Misconstrued the Law and Made Findings Not Supported By Substantial Evidence in Finding that the Asphalt Batch Plant is a Lawfully Established Nonconforming Use of the Property.

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 Use Ordinance ("LDO") Chapter 11 provides the local mechanisms for evaluating and recognizing nonconforming uses, implementing and substantially mirroring the state statute. The subject property is zoned Rural-Residential 5 (RR-5). Neither the processing of aggregate nor the production of asphalt is a permitted use (outright or conditionally) on the property as it is currently zoned. LDO 6.2.2. These uses may only be continued on the property if recognized as a valid nonconforming use, and any additional structures or activities on the site may only remain if they can be shown to be a legal expansion or alteration of the non-conforming use. ORS 215.130.

Nonconforming uses are disfavored in the law because, by definition, they undermine the effectiveness of comprehensive land use planning goals adopted by the State of Oregon. *Parks v. Board of County Comm'rs*, 11 Or App 177, 196–197, 501 P2d 85, 95 (1972). Accordingly, "provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as

much as possible." *Id.* at 197. A nonconforming use cannot be changed to a new and different use and continue to be protected. *Id.*

The applicant for nonconforming use verification bears the burden of demonstrating that the use was lawfully established prior to the adoption of the zoning ordinance or regulation that prohibits the use. LDO 11.1.3(C). The applicant must also prove that the use has not been discontinued or abandoned. *See Aguilar v. Washington County*, 201 Or App 640, 648 (2005) (explaining that an applicant for non-conforming use verification must establish two things: 1) the use continued uninterrupted for the specific period of time, and 2) the use was lawful at the time the zoning ordinance or regulation went into effect). However, under ORS 215.130(10)(a) and LDO 11.8.1(B), a county may 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. Such evidence "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[.]" Once that presumption is established, the presumption stands unless rebutted by a preponderance of the evidence in the record. *Lawrence v. Clackamas County*, 164 Or App 462, 992 P2d 933 (1999). An applicant may establish a presumption that the intensity of the use was the same at the time the use became non-conforming as it was during the 10-year period preceding the application. However, that presumption is rebutted where a preponderance of the evidence shows that a use was significantly less intense prior to the 10-year period. *Hal's Construction v. Clackamas County*, 39 Or LUBA 616 (2001). Proof by a preponderance of the evidence means that the fact finder "must believe that the facts asserted are more probably true than false." *Cook v. Michael*, 214 Or 513, 527, 330 P2d 1026, 1032 (1958).

The applicant for non-conforming use verification must demonstrate the nature and extent of the use as a non-conforming use. ORS 215.130(11) provides that in verifying a non-conforming use, "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." The effect of this provision is to render "legally irrelevant" evidence regarding the existence, continuity, or nature and extent of the use for the period exceeding 20 years from the date of application. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 515 (2001), *aff'd* 180 Or App 495 (2002) (evidence that a nonconforming use was discontinued more than 20 years prior to the date of the application is legally irrelevant and not a basis to deny the nonconforming use verification). Therefore, the relevant period of review as to the existence, continuity, and nature and extent of the asphalt batching use is the period from September 1992 to September 2012. However, ORS 215.130(11) does not remove the requirement that an applicant demonstrate that the use it seeks to verify was lawfully established at the time of zoning. In other words, the lawful establishment of the use must be reviewed at the time zoning went into effect, even if that date exceeds the 20-year look back set forth in ORS 215.130(11). *Aguilar v. Washington County*, 201 Or App 640, 645–51 (2005).

Here, the Hearings Officer concluded that a batch plant was a lawfully established nonconforming use in 1972, and that the current asphalt production batch plant is the "same use" as prior concrete batch plant uses on the property, allowing the current asphalt production to continue. Rec-NC 12, 13, 21.

1. First Sub-Assignment of Error: Respondent's Conclusion that a Batch Plant Use Was Lawfully Existing on the Property in 1973 is Not Supported By Substantial Evidence.

The Hearings Officer reviewed testimony and reports of prior employees of the Oregon Department of Geology and Mineral Industries (DOGAMI), including Frank

Schnitzer, who conclude that there was no asphalt batch plant on the property over the years of DOGAMI inspection from 1969 through 2000. Rec-NC 6–10. The Hearings Officer concluded that taken together, the DOGAMI reports and additional statements "constitute substantial evidence that there was no asphalt batch plant on the Property over the years." Rec-NC 10.[2] This finding is consistent with documentation in the record from Jackson County Code Enforcement Officer Tod Miller, who commented, "property has not historically had an asphalt batch plant. I have observed property for 27 years. Asphalt plant only there a few years." Rec-NC 389.

The Hearings Officer also reviewed statements of the prior property owner Howard De Young and other community members who testified that there were concrete slurry operations on the property between 1988 and 2000. Finding an apparent conflict in the testimony, the Hearings Officer concluded that the DOGAMI reports could be reconciled with the testimony of Mr. De Young on the basis that the DOGAMI reports considered only whether there was an asphalt batch plant on the property, and not whether there was a concrete batch plant on the property. The Hearings Officer found 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." Rec-NC 10. This finding is not supported by evidence in the whole record.

The aerial photographs in the record from 1969, 1976, 1979 show "no mine equipment, vehicles, buildings or other structures on site." Rec-NC 392, 395, 396. The 1977 safety report for the site stated "The surface plant consisted solely of one trailer mounted crusher and sizer." Rec 392. The report documents that there was no asphalt plant or other secondary mineral processing. *Id.*

[2] Petitioner does not challenge this conclusion. Rather, Petitioner challenges Respondents' ultimate conclusion that despite this finding, supported by substantial evidence, the asphalt batch was nevertheless a lawfully established nonconforming use on the property.

Frank Schnitzer, who reviewed the DOGAMI files and aerial photographs, summarized his review of reports between 1988 and 2000: "None of these inspections described the presence of a batch plant or any kind of secondary processing. Since the presence of a batch plant is a notable change from a simple crushing operation, this issue would have been included in a DOGAMI inspection report." Rec-NC 125. Addressing whether his review might have omitted concrete batch plants, Mr. Schnitzer wrote, "I clarify that my conclusions and statements equally apply to a concrete batch plant. Most importantly, the photographic record does not show large pieces of stationary equipment to indicate that a portable plant was consistently used." Rec-NC 126. This testimony explicitly refutes and undermines the Hearings Officer's conclusion that Mr. Schnitzer's report did not address whether a concrete batch plant was located on the property. The Hearings Officer's conclusions that a batch plant was lawfully established on the property and had not been discontinued are therefore not supported by substantial evidence.

2. Second Sub-Assignment of Error: Respondent Misconstrued the Law in Determining the Nature of the Use that Existed on the Property.

Even if the evidence supported a finding that a concrete batch plant use was established on the property in 1973 and not discontinued, this finding does not support verification of the current asphalt batch plant as a nonconforming use.[3] Petitioner argues that the Applicant was required to demonstrate that the use it sought to verify, the asphalt operation, was lawfully established on this property prior to the adoption of the zoning ordinance or regulation that now prohibits the use. This question can be further broken into

[3] Respondent's findings contain some inconsistencies regarding whether the current operation is a lawful nonconforming use or an expansion or alteration of a nonconforming use. *Compare* Rec-NC 21 ("The batch plant is a lawfully established nonconforming use;") *with* Rec-NC 22 ("Applicant's batch plant use is an expansion or enlargement of the lawfully established nonconforming use."). The practical effect of the decision has been the continued operation of the asphalt batch plant on the property, absent a determination that the expansion of the use is lawful under ORS 215.130 and LDO 11.2. Therefore, Petitioner challenges the findings that support a conclusion that the asphalt plant may continue as a lawful nonconforming use.

two parts: 1) was the asphalt batch plant established prior to the zoning ordinance or regulation; and 2) was it lawful?

Fundamental to the Hearings Officer's decision was the finding that concrete batch plants and asphalt batch plants are "the same use." Rec-NC 12. As the decision correctly notes, "[i]f they are not the same use, the Applicant cannot claim that his use relates back to the lawful[] establishment of batching operations on the Property." *Id.*

Before the Hearings Officer, Petitioner offered evidence demonstrating that asphalt and concrete are distinct processes. *See* Rec-NC 129, 137, 138, 156. Specifically, the evidence shows that according to the North American Industry Classification System (NAICS) and Standard Industrial Classification (SIC) code descriptions, asphalt production is classified within the petroleum industry classification, whereas concrete production is classified as nonmetallic mineral product manufacturing. Rec-NC 137, 138. More generally, "asphalt" is defined as "a dark bituminous substance that is found in natural beds and is also obtained as a residue in petroleum refining and that consists chiefly of hydrocarbons." *Merriam-Webster Online*, http://www.merriam-webster.com/dictionary/asphalt. In contrast, "concrete" can be defined as "a hard, strong material that is used for building and made by mixing cement, sand, and broken rocks with water." *Id.* http://www.merriam-webster.com/dictionary/concrete.[4] The Hearings Officer did not address the evidence distinguishing asphalt production from concrete production in his findings, and instead relied on the definition of "batch plant" and the general Use Classifications in the LDO to conclude that asphalt and concrete production are the same use.

The findings rely on LDO 13.3(2), general definitions of terms, which defines "batch plant" as "[a]n apparatus used in the mixing of asphalt or cement products, including an

[4] "Cement" can mean the same thing as concrete but can be more specifically defined as "a powder of alumina, silica, lime, iron oxide, and magnesium oxide burned together in a kiln and finely pulverized and used as an ingredient of mortar and concrete;" http://www.merriam-webster.com/dictionary/cement.

auxiliary apparatus used in such mixing process. Batch plants may be sited as either permanent or temporary facilities." The Hearings Officer erred in relying on the definition of a batch plant, which refers to "an apparatus" as a stand-in for the nature and extent of a nonconforming *use* on the property. While a "batch plant" may indeed be a generic term for a particular piece of equipment used in manufacturing of asphalt or cement, this definition does not justify a conclusion that any activities in which a batch plant apparatus are involved are the "same use." This conclusion is inconsistent with information in the record regarding the impacts of asphalt production, as well as the Hearings Officer's own finding that the footprint, or physical profile of a concrete batch plant is smaller than that of an asphalt batch plant. Rec-NC 11.

In addition, the findings rely on the Jackson County LDO Use Classifications found at LDO Section 13.2. Rec-NC 12. Section 13.2.1(A) states that the purpose of the use classifications is to organize land uses into general "use categories" and specific "use types." Section 13.2(B) explains the applicability of the use classifications:

> The use classifications in this Section refer to uses allowed in the general use districts set forth in Chapter 5 of this Ordinance and uses allowed in the resource districts set forth in Chapter 4. This Section is intended to be used in conjunction with the use tables appearing in Chapters 4 and 6. Where a specific definition is required for consistency with State law (e.g., golf course) the term has been appropriately referenced. In cases where State land use law or administrative rules (i.e., OAR 660) provide a specific definition or description of uses allowed in a zoning district, the statutory definitions and descriptions will be used to guide land use decision-making.

This section does not indicate that the use classifications are intended to be used to determine the nature and extent of a nonconforming use. Nonconforming uses are governed by Chapter 11 of the LDO. It is unclear whether use classifications have any utility in determining whether a use is nonconforming, because by definition a nonconforming use is one that would not otherwise be allowed on a particular property.

Assuming that LDO 13.2 is applicable to the determination of the scope of a nonconforming use, the Hearings Officer's decision misconstrues the use classifications. The findings state that within the Use Classifications, "the LDO recognizes only two types of manufacturing and production uses into which batch plant operations might fall," Manufacturing and Production, High Impact and Manufacturing and Production, Low Impact. Rec-NC 13. *See also* Rec-NC 21 ("The batch plant use is an Industrial/Manufacturing use under the LDO, specifically a Manufacturing and Production, High Impact use."). The findings conclude:

> The LDO does not distinguish between concrete and asphalt batch plants. They are the same Manufacturing and Production, High Impact use despite the fact that they generate different products. The evidence supports the conclusion that a batch plant was lawfully established and in active use at the time the zoning was applied to the Property in 1973.

Rec-NC 13.

Within the Use Classifications, the LDO classifies mineral and aggregate uses, including processing, as resource uses, but "[p]ermanent concrete and asphalt batch plants are classified as Industrial/Manufacturing uses." LDO 13.2.2(C)(2). The Use Classification that applies to batch plants appears to be found at LDO 13.2.5(C) Industrial/Manufacturing Uses: Manufacturing and Production. Respondent's decision does not reference or discuss this section, which describes the general use category of "firms involved in the manufacturing, processing, fabrication, packaging, or assembly of goods." *Id.* Instead, the Hearings Officer pointed to the definition of terms in Section 13.3, and determined that "batch plants, regardless of type are clearly a High Impact Manufacturing and Production Use." Rec-NC 13 (citing LDO Section 13.3(155)).

The Hearings Officer's conclusion that all batch plants, regardless of type, are High Impact Manufacturing and Production Use, and are therefore "the same use" misconstrues the applicable law. First, the findings fail to note that asphalt production may be classified as

"manufacturing petroleum by-product" within the Industrial Use classifications of the LDO. Jackson County LDO Use Table 6.2-1 contains a distinct use type for "manufacturing petroleum by-product" within the Industrial Use classifications. Appendix C at 4.[5] As discussed above, evidence in the record demonstrates that asphalt production is a petroleum byproduct manufacturing process. In fact, the findings correctly state, "Mountain View Paving blends petroleum products with aggregate and other materials to create asphalt." Rec-NC 3. The Hearings Officer erred in failing to consider the applicability of the "manufacturing petroleum by-product" use type. Because the "manufacturing petroleum by-product" use accurately describes asphalt production, but not concrete production (because concrete does not contain petroleum by-products), asphalt production is a different use than concrete production under the LDO use classifications. The findings fail to address this use type or acknowledge this more specific use description. Respondent's decision misconstrues the applicable law in concluding that the LDO does not distinguish between asphalt and concrete uses.

Second, the Hearings Officer's analysis would mean that any use falling within the Manufacturing/Industrial High Impact Use Category would be allowed where any other use within that category were shown to be lawfully established on the property at the time of zoning. But demonstrating that one nonconforming use was legally established on the property does not automatically authorize other uses in the same use category that may subsequently have been established on the property. *See River City Disposal and Recycling v. City of Portland*, 35 Or LUBA 360, 364 (1998). To the contrary, uses may change only

[5] LDO Table 6.2-1 lists five use types within the use category of Manufacturing & Production: Firewood processing/sales; Manufacturing and production, low-impact; Manufacturing and production, high-impact; Manufacturing paper and allied products; and Manufacturing petroleum by-product. The Manufacturing of petroleum by-product is subject to Type 3 review, while low and high impact uses are subject to Type 1 or 2 review. All of these use types are cross-referenced to LDO 6.3.4 "Industrial Uses."

where the use is "of no greater adverse impact to the neighborhood" as set forth in ORS 215.130(5); (9)(a), (b) and LDO 11.2.1(B)(2).

Third, the decision fails to identify the nature and extent of the use with sufficient specificity to determine whether the use has been expanded or whether there are increased adverse impacts to the neighborhood as a result of expansion. 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. Josephine County, 28 Or LUBA 383, 390–91 (1994) (footnote omitted). LUBA expanded on this discussion in *Tylka v. Clackamas County*, 28 Or LUBA 417, 429 (1994):

> Under ORS 215.130(9) and ZDO 1206.06A(2), an alteration of a nonconforming use may be allowed only if it has 'no greater adverse impact on the neighborhood.' Therefore, in this case, the 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 intervenors' proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use that intervenors have a right to continue.

Here, the Hearings Officer failed to identify a scope of the nonconforming use that is specific enough to provide an adequate basis for determining whether aspects of the use constitute an alteration and for comparing the impacts of the asphalt batch plant to those of a concrete batch plant. The general use classifications do not account for the off-site impact standards for nonconforming uses. For example, the Manufacturing/Production, High Impact definition states that, "these activities may impact adjacent properties by creating noise, odor, vibration, dust or hazards." LDO Section 13.3(155). The definition does not, however, purport to assume or conclude that all uses within that definition will have the same impacts

to adjacent properties. By equating asphalt production with other types of aggregate and concrete production, Respondent's decision improperly allows an alteration or expansion of the nonconforming use without subjecting the alteration to any of the standards that restrict alterations.[6]

Fourth, Respondent's decision fails to apply the specific definitions as required by the LDO. The applicability provision of the Use Classifications specifically notes that where state statutes or administrative rules require specific definitions, those will be applied. LDO Section 13.2.1(B). Not only does Oregon law distinguish between asphalt and concrete production facilities, so too does Federal law. *See* OAR 340-238-0060 "Federal Regulations Adopted by Reference" (listing separately "Portland cement plants:" Hot mix asphalt facilities;" and "Asphalt processing and asphalt roofing manufacture"). As discussed above, asphalt and concrete have different definitions both generally and specifically within standard industrial classification systems.

Finally, even the findings acknowledge a difference between use of property for asphalt production and use of property for concrete slurry production. In reviewing reports by DOGAMI inspectors as to the absence of equipment for asphalt production on the site over the years, the Hearings Officer notes that "concrete operations must have a smaller physical profile in height, bulk, surface area or other attributes than do asphalt batch plants. This inference is supported by the fact that no large equipment was ever noted in the DOGAMI inspection reports, in the Reports or in the aerials Schnitzer and Wampler analyzed." Rec-NC 11. In other words, the findings conclude that asphalt production

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[6] ORS 215.130(9) prohibits alterations of nonconforming uses that have "greater adverse impact on the neighborhood." As discussed in more detail below, Petitioner and nearby residents submitted significant and uncontested evidence of the increased intensity in operations, including increased adverse impacts to their health and enjoyment of their property as a result of the change to asphalt production from prior uses of the property. *See* Rec-NC 347–350, 354–357, 446–465.

requires equipment with a greater physical profile than concrete plants. According to LDO Section 11.2.1, "alteration of a nonconforming use may include a change in the use that may or may not require *a change in any structure or physical improvements associated with it.*" For purposes of expansion or enlargement of a use, the LDO defines "expand" or "enlarge" to include "to alter the use in any way that results in more traffic, employees, *or physical enlargement of any existing structure housing an nonconforming use; or an increase in the amount of property being used by the nonconforming use.*" LDO 11.2.1(B) (emphasis added). Accordingly, the existence of a concrete batch plant on the property when the zoning laws are applied does not establish the lawful existence of asphalt processing on the property at that time. As the findings from both this decision and the prior application conclude, the asphalt plant was not documented to exist on the property prior to 2001.

3. Third Sub-Assignment of Error: Respondent Misconstrued the Law and Made Findings Not Supported by Substantial Evidence in Determining Whether the Use was Lawfully Established.

The findings conclude that a concrete batch plant was "lawfully established" on the property in 1973 when the zoning ordinance was adopted. Before the Hearings Officer, Petitioner provided evidence showing that there were no air quality or water quality permits for industrial activities including asphalt batching on this property prior to 2001, and that such permits were required by the Oregon Department of Environmental Quality beginning in 1973. Rec-NC 470–476. 159–167. Petitioner argued that without the required permits, the asphalt plant was not a "lawfully established" use on the property.

Respondent's findings conclude that no permits were required for concrete batch plants in 1973. Rec-NC 11. This finding is not supported by substantial evidence. The record shows that beginning in 1973, Oregon was regulating industrial uses such as asphalt and concrete production for air quality, and that DEQ records do not contain any such permits for activities on this property prior to 2001. Rec-NC 132–136. DEQ record searches

included all prior known names of industrial companies on the site, including Rogue River Paving, Best Concrete, Best Transit Mix, and Mountain View Paving, and found no air or water quality permits issued for industrial activities on the property prior to 2001. *Id.*

Respondent also concluded that the absence of state regulatory permits does not deprive a use of "lawfully established" status. Rec-NC 12. Respondent relied on the definition of "lawfully created/established" in the Jackson County code as "Any building, structure, use lot or parcel that complied with 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/established under this Ordinance." LDO 13.3(141). In other words, the Hearings Officer concluded that a use must be lawful only with respect to local ordinances in effect at the time of establishment, and that whether the use complied with applicable State law is irrelevant to the determination of lawfulness of the use. This finding misconstrues the law.

In *Bennett v. Linn County*, the petitioner argued that use of the property as a slaughterhouse was unlawful when the county zoned it in 1971 because the practice of discharging wastewater required approval of state sanitary authorities and no such approval had been granted. 14 Or LUBA 217, 226 (1986). LUBA sustained this argument, finding that not only does the absence of state pollution permits render the use unlawful, but also that "the county cannot shift the burden to opponents of this decision on the lawfulness question." *Id.* at 227.

Similarly here, it is the Applicant's burden to show that the use was lawful at the time zoning was adopted. The Applicant did not provide any evidence that would confirm that state air or water quality permits were not required at the time the use was established, or if they were required, that those permits had been obtained. Rather than pointing to evidence from the Applicant that the use was lawfully established, Respondent's findings instead rely on the absence of evidence. *See* Rec-NC 11 ("In the absence of such evidence [showing that

concrete plants required permits], the hearings officer concludes that they did not.").
Respondent's findings erroneously shift the burden to Petitioner to demonstrate the use was unlawful.

The provisions of the Jackson County LDO allowing for the continuance of a lawfully established nonconforming use implement state statute. Thus, any interpretation of this provision must be consistent with the state law it implements. ORS 197.829(1)(d). "Whatever its own legislation may provide, the county's land use decisions, pertaining to nonconforming uses as well as all other matters, must comply with applicable state statutory requirements." *McKay Creek Valley Ass'n v. Washington County*, 122 Or App 28, 32 (1993) (citing *Forster v. Polk County*, 115 Or App 475, 478, (1992)).

ORS 215.130(5) provides, in part: "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." The Oregon Supreme Court has made clear that "[t]he determinative factor under ORS 215.130(5) is lawful use. . . . The nature and extent of the prior lawful use determines the boundaries of permissible continued use after the passage of the zoning ordinance." *Polk County v. Martin*, 292 Or 69, 76 (1981).

Interpreting a different statute, the Oregon Supreme Court has concluded that where the term "lawful" is used, the legislature intended that the dictionary definition serve as the meaning of the word. *See State v. Ausmus*, 336 Or 493, 503–04 (2003) (interpreting "lawful order" as used in ORS 166.025(1)(e)). In *Ausmus*, the court applied the dictionary definition of "lawful" as "conformable to law : allowed or permitted by law : enforceable in a court of law * * *." *Id.* at 504. In applying the dictionary definition, the court reasoned that "the dictionary definition is the natural and ordinary meaning" of the word, and under *PGE v. BOLI*, 317 Or 606, 616 (1993) and *State v. Gaines*, 346 Or 160 (2009), courts generally give words of common usage their plain, natural, and ordinary meaning. *Id.* The court also

reasoned that to expand the term to include *any* order would divest the word "lawful" of its substantive meaning, and ORS 174.010 requires that courts, where possible, construe statutes so as to give effect to all words contained therein. *Id.* Similarly, here the use of the term "lawful" in ORS 215.130 should be given its ordinary meaning and common definition. Nothing in the state statute indicates legislative intent to limit "lawful" uses to compliance with local codes, and not state law. As ORS 174.010 instructs, courts are not to insert what has been omitted, or omit what has been inserted in the statute. To limit "lawful" to only local code would be to insert words into the statute that do not appear there. The Hearings Officer's decision conflicts with the plain language and intent of ORS 215.130(5).

In order to be continued as a non-conforming use, the use must have been lawful at the time it was established. Here, the Applicant failed to demonstrate that asphalt or concrete production was a lawfully established use on the property in 1973 when the zoning law was adopted in Jackson County. The record shows that no permits were issued for asphalt or concrete production on the property at the time the zoning ordinance went into effect. As a result, even if the applicant could demonstrate that asphalt or concrete production was established on the property in 1973, it was not lawful, and therefore cannot be continued as a nonconforming use. As a result, Respondent's decision should be reversed.

B. SECOND ASSIGNMENT OF ERROR: Respondent Misconstrued the Law in Failing to Identify the Placement of the New Asphalt Plant as an Expansion of the Use in 2001.

Respondent's decision finds that Best Concrete ceased concrete slurry operations in the fall of 2000, and the current asphalt batch plant was placed on the property and began operations in the spring of 2001. Rec-NC 8. This is consistent with the evidence from the Applicant regarding the timing of placement of the new asphalt batch plant, and the description of its being moved from Wyoming to the subject property at that time. *See* Rec-NC 1139. The Hearings Officer also infers that "concrete operations must have a smaller

physical profile in height, bulk, surface area or other attributes than do asphalt batch plants." Rec-NC 11. Despite these findings, the Hearings Officer failed to clearly identify placement of the asphalt batch plant on the property in 2001 as an expansion or alteration of the use. The findings state:

> "The final element for which the rebuttable presumption question must be resolved is the nature and extent of the batch plant use. The Applicant's demonstration of an 11 year asphalt batch plant operation is sufficient to secure the presumption unless the nature and extent of the batch plant use is different from the batch plant use that preceded it or unless it has changed over the course of the Applicant's activity.
>
> Rogue Advocates asserts, "Here, the nature of the use the applicant seeks to verify is the production or manufacture of asphalt." Rogue Advocates is incorrect since the LDO does not require that he do more than establish a batch plant use. The Applicant has succeeded in establishing this for well longer than the requisite 20-year period.
>
> The nature of the nonconforming use is established for the entire legally relevant period.
>
> Left to consider is the question of whether the extent of the batch plant use has changed. Contained within Rogue Advocates' submittal is evidence clearly demonstrating that the Mountain View Paving use of the Property is more extensive than was the use that preceded it and than it was when it was started in 2001.
>
> ***
>
> The Record establishes by a preponderance of the evidence that the current batch plant use has expanded in relationship to the extent of the concrete batching use that occupied the Property either in September 2002 or September 1992. As the Rogue Advocates argues, the current use constitutes an expansion of nonconforming use under the LDO, and it is required to meet the applicable criteria for such alteration.

Rec-NC 16–17.

The findings then go on to evaluate evidence of accessory structures on the property as compared between the 2000 and 2003 aerials and the Applicant's consultant Site Plan, noting 16 structures and concluding that "it is not possible to determine with certainty exactly

which of these structures[7] was present in the 2000 and 2003 aerials, it is absolutely certain that some of them were not there, most notably the 46' x 70' shop." Rec-NC 18. In fact, it is clear from a review of the aerials that *most* of the structures were not on the property in 2000. The findings do not specifically identify the placement of the asphalt batch plant itself as an expansion of the use, despite the earlier findings that the asphalt batch plant replaced earlier concrete batch plants in 2001, and that the asphalt batch plant must have been larger in physical size than the concrete batch plants. Respondent's Conclusions of Law likewise do not identify the asphalt batch plant as an expansion of the nonconforming use. Rec-NC 21. The Hearings Officer erred in failing to identify the replacement of the concrete batch plant with the current asphalt batch plant as an expansion of the use.

Expansion or enlargement generally is defined by the LDO as meaning: 1) to replace a structure, in which a nonconforming use is located, with a larger structure; 2) 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 3) an increase in the amount of property being used by the nonconforming use. LDO 11.2.1(B)(1). The findings note that asphalt batch plants have a greater area or footprint than concrete batch plants (Rec-NC 11), indicating that the asphalt plant meets the general definition of expansion. There is ample and undisputed evidence in the record demonstrating that the asphalt batch plant currently located on the property was placed there in 2001. *See, e.g.*, Rec-NC 1062, 1136, 1139. Further, Mr. De Young testified that the concrete batch plant often did not operate in winter and was often moved from job to job, whereas the current asphalt plant does operate in winter and is permanent and not moved from job site to job site. *See* Rec-NC 177, 1065, 1139. Thus, the

[7] The findings include reference to the LDO definition of "structure" to include a "building or other major improvement that is built, constructed, or installed, not including minor improvements such as fences, *** that are not customarily regulated through zoning ordinances. For land use regulatory purposes, the term structure also includes gas or liquid storage tanks and anything of substantial value that requires permanent location on the ground." LDO 13.3(254). Rec-NC 18. Petitioner agrees with the Hearings Officer that the batch plant is a "structure" as that term is defined in the LDO.

placement of the asphalt plant on the property is an expansion pursuant to LDO 11.2.1(B)(1). This expansion occurred within the 20-year review period.

The Hearings Officer determined that new structures placed on the property "must be seen as requiring the same authorization under the LDO as replacement and enlarged structures." Rec-NC 19. This conclusion was based on the holding in *Parks* that "provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible." *Parks v. Bd. Of County Comm'rs*, 11 Or App 177, 197 (1972). Petitioner agrees with this conclusion. However, the Hearings Officer failed to address the replacement of the concrete batch plant with the current asphalt batch plant in 2001. Replacement of a nonconforming structure must comply with provisions permitting alteration of nonconforming uses. *See McKay Creek Valley v. Washington County*, 122 Or App 28 (1993). Respondent misconstrued the law by failing to identify the replacement of the batch plant as an alteration of the nonconforming use. As a result, the asphalt batch plant has been allowed to continue operations without evaluation as to whether the alteration complies with applicable standards.

Alterations of nonconforming uses may be permitted pursuant to ORS 215.130(9) and Jackson County LDO 11.2.1. These standards, among other things, require that any alteration of a nonconforming use be of no greater impact to the neighborhood.

Respondent failed to adopt findings addressing whether the expansion of the nonconforming use complies with the relevant standards. However, evidence in the record demonstrates that the impacts to neighbors from the addition of the asphalt manufacturing use of the property have been greater, and more adverse, than were the impacts of the prior uses of the property. *See* Rec-NC 347–350, 354–357, 446–465. No evidence in the record contradicts or conflicts with the testimony of neighbors regarding impacts to them. As a result, even if the gravel extraction activities, or concrete production activities, could be

determined to be a lawful non-conforming use, the asphalt production cannot meet the standards for alteration of a nonconforming use. Respondent misconstrued the law and failed to adopt findings regarding asphalt production as an expansion or alteration of a nonconforming use, and LUBA should reverse or remand the decision.

C. THIRD ASSIGNMENT OF ERROR: Respondent Misconstrued the Law by Deciding that LDO 11.2.1(C) is Not an Applicable Criterion.

Before the Hearings Officer, the City of Talent argued that the asphalt operation must be evaluated for compliance with LDO 11.2.1(C), governing the "expansion of nonconforming aggregate and mining operations." The Hearings Officer denied that request, finding that the Applicant's operation, "blends petroleum products with aggregate and other materials to create asphalt. Such operations are specifically excluded from aggregate and mineral uses, and there is no basis upon which to consider this batch plant application under Section 11.2.1(C)." Rec-NC 3 (citing LDO 13.2.2(C)). This finding of law misconstrues the applicable ordinance provisions.

Expansion or alteration of a nonconforming use is governed by LDO Section 11.2.1.[8] More specifically, the LDO regulates expansion of nonconforming aggregate and mining operations. LDO 11.2.1(C) provides, in full:

> Expansion of Nonconforming Aggregate and Mining Operations
> 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

[8] The asphalt production cannot be continued as an accessory use to the primary aggregate and mining operations because those operations ceased prior to the establishment of the Applicant's use. As the findings acknowledge, the property was initially used for aggregate extraction and processing, and the extraction "continued until the resource was exhausted sometime shortly prior to the initiation of the Applicant's asphalt batching use on the Property in 2001." Rec-NC 4. Pursuant to LDO 11.2.3, "[n]o use that is accessory to a principal nonconforming use will continue after the principal use ceases to exist."

> 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 LDO clearly shows that the county intended to regulate and impose conditions on "any expanded use of property for … processing of materials" and more specifically, "[t]he commencement of methods or procedures of processing *** not previously performed on-site." LDO 11.2.1(C)(2). LDO 13.3(6)(f) defines aggregate and mineral "processing" as "extraction, washing, crushing, milling, screening, handling, and conveying of mineral and aggregate resources, *and the batching and blending of such resources into asphalt and portland cement*." (emphasis added). *See also* LDO Use Table 6.2-1 (listing "Aggregate or surface mining, stock-piling or processing (e.g., batch plants)" within the "Mineral and aggregate" use category).

The Hearings Officer failed to acknowledge that the ordinance definition of "aggregate and mineral resources" "processing" includes production of asphalt. LDO 13.3(6)(f). Instead, the findings rely on the provision in LDO 13.2.2(C) which states "[p]ermanent concrete and asphalt batch plants are classified as Industrial/Manufacturing uses." This apparent inconsistency can be resolved by reading the provisions in context. LDO 13.3.3(6)(f) is a specific definition of the aggregate and mineral resources use type. See LDO 13.2.1(A) ("Specific definitions of use types and general terms are found in Section 13.3."). In contrast, LDO 13.2.2(C) is a description of "common characteristics" of the use category and exclusions, which are "[u]ses that are not included in the Principal Use category…." LDO 3.2.1(E) (describing the structure of the ordinance section).

The LDO explains how to resolve situations where multiple definitions occur within the ordinance. "When two (2) or more definitions of the same term, word or phrase occur in this Ordinance only the most directly applicable definition applies." LDO 13.1.1(A). In this case, the provision of the nonconforming use LDO section includes aggregate processing. The definition of "processing" of aggregate includes asphalt batching. This is the more specific definition, directly applicable to the nonconforming use issue. In contrast, the exclusion of batch plants from the general use category is not specific to the nonconforming use provisions in the LDO.

The findings of County Planning Staff on the prior application are consistent with this interpretation of the code. Planning Staff found, "The asphalt plant is a material processing facility subject to Section 11.2.1(C). Documentation [sic] the asphalt plant was moved onto the property in 2001 has been clearly documented and is an expanded use subject to the additional operational standard of Section 4.2.8(D)." Rec-NC 673. Nothing in the record indicates that the uses on the property have changed between the date of the 2011 application and the 2012 application. The only change is in the Applicant's characterization of the use. The Hearings Officer misconstrued the law in concluding that the provisions of LDO 11.2.1(C), expansion of an aggregate use, do not apply to this nonconforming use verification application.

If the aggregate and mining operations on the property were a continuing and valid nonconforming use when the asphalt plant was installed in 2001, then applicant's use of the property for production of asphalt meets the definition of expanded nonconforming aggregate operations. The previous property owner, Mr. De Young, described his use of the property as "a retail sand and gravel operation on the subject property which included some aggregate

extraction.... The processing of aggregate materials (i.e., crushing, screening, etc.) primarily occurred on the subject property...."[9] Rec-NC 176.

The 2001 asphalt batch plant is a facility that was not previously used on the property. Rec-NC 1139–40. LDO 11.2.1(C)(1). The Hearings Officer concluded that the equipment used for asphalt production is different than that used for concrete production. Rec-NC 11. The addition of asphalt production on the property was the beginning of "methods or procedures of processing" that had not been performed on the site previously. LDO 11.2.1(C)(2). As a result, the addition of asphalt batching on the property in 2001 was an expansion of an aggregate nonconforming use, subject to the provisions of 11.2.1(C). That section requires the applicant to prove verification of the nonconforming use and compliance with the requirements of LDO 4.2.8, 4.4.8, and 6.3.4(A). Respondent failed to make any findings of compliance with these sections, and LUBA should, at a minimum, remand the decision for review consistent with these provisions.

D. FOURTH ASSIGNMENT OF ERROR: Respondent's Finding that the Floodplain Permit Application and Appeals are Moot is Inadequate and is Not in Conformance with Applicable Law.

The Hearings Officer dismissed the appeals of the Floodplain Development Permit Application on the basis that the appeals and the application were moot. Rec-FP 3. The only finding the Hearings Officer made in support of this conclusion was that "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.* This finding is inadequate and warrants remand by LUBA. Additionally, the decision of the Hearings Officer is not in conformance with the applicable law because the Floodplain Development Permit Application and appeals are not moot.

[9] The subject property included extensive mining since 1992. The DOGAMI permits, inspections, and aerial photos document the large pond excavation at the Northern section of the parcel, as well as other new ponds apparent in the historic aerials. *See* Rec-NC 392–394.

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, 20–21 (1977). The findings fail to adequately explain the basis on which the Hearings Officer determined the appeals to be moot. Although the Hearings Officer denied the application for the Nonconforming Use Verification, ZON2012-01173_NC, he did so on the basis that the Applicant's current asphalt batch plant operations included expansion of the lawfully established nonconforming batch plant use. Rec-NC 21. The Hearings Officer's findings with respect to the Floodplain Development Permit mistake the practical effect of that decision. While the Nonconforming Use Application was denied, the development that formed the basis of that application has not been "eliminated." *See* Rec-FP 3. In fact, the development upon which the Floodplain Development Permit Application was predicated is virtually unaltered by the denial of the Nonconforming Use Application and continues operating, except for a change in its designation to a lawfully established nonconforming use. Indeed, the asphalt batch plant use, whether classified as a lawfully established nonconforming use or a verified nonconforming use, constitutes "development" requiring a Floodplain Development Permit under the Jackson County LDO. *See* LDO 13.3(100)(o); 7.2.2(c).

The Floodplain Development Permit decision findings do not adequately explain why the denial of the Nonconforming Use Application eliminates the need for a Floodplain Development Permit for that use. The Nonconforming Use decision contains conflicting findings as to whether the current operation is lawful or is an expansion or alteration of a nonconforming use. *Compare* Rec-NC 21 ("The batch plant is a lawfully established nonconforming use;") *with* Rec-NC 22 ("Applicant's batch plant use is an expansion or enlargement of the lawfully established nonconforming use."). Given that the practical effect of the Nonconforming Use decision is the continued operation of the asphalt batch plant, the

Floodplain Development Permit remains entirely relevant. The Floodplain Development Permit decision does not provide any explanation of how the Nonconforming Use decision impacts the Floodplain analysis.

Adequate findings are required to "enable participants to understand the basis for the local government's decision and to determine whether an appeal is warranted." *Gonzalez v. Lane County*, 24 Or LUBA 251, 256 (1992). Where findings are inadequate to allow review of a local government's decision, LUBA will remand the decision. *Seger v. City of Portland*, 22 Or LUBA 162 (1991). Petitioner can only speculate as to the reasoning behind the Hearings Officer's decision to dismiss the appeals and application as moot. Without having adequate findings to support the decision, Petitioner attempts to formulate a response to the Hearings Officer's bare conclusions to demonstrate to the Board that the application is not moot and that the findings were not in accordance with applicable law.

The Hearings Officer's findings in support of the decision to dismiss the appeals and application for a Floodplain Development Permit are not in accordance with the applicable law because neither the application itself nor the appeals of the Staff Decision are moot. Mootness is a question of whether there remains a justiciable controversy for a court or reviewing body to consider such that a "decision in the matter will have some practical effect on the rights of the parties to the controversy." *Brumnett v. Psychiatric Sec. Review Bd.*, 315 Or. 402, 405–406 (1993); *see also Forest Highlands Neigh. Assoc. v. City of Lake Oswego*, 24 Or LUBA 215 (1992) (In determining whether a land use decision is moot, the question is whether a decision by LUBA on the merits would resolve merely an abstract question and be without practical effect). If a decision will have a practical effect, the controversy is not moot. *Warren v. Lane County*, 297 Or 290 (1984). Here, a decision on the merits of the Floodplain Development Permit Application would have a practical effect because the

asphalt batch plant use constitutes "development" that is operating today and requires a Floodplain Development Permit under the LDO.

Development is defined as "[a]ny man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials located within the area of special flood hazard." LDO 13.3(100)(o). It is established that the batch plant operation is located in the Special Flood Hazard Area and is "development activity" subject to the Floodplain Development Permit requirements. Rec-FP 647. The Hearings Officer's determination that the batch plant is a lawfully established nonconforming use does not release the operation from those requirements. "It is the general policy of the County to allow nonconformities to continue to exist and be put to productive use, while bringing as many aspects of the use or structure into conformance with this Ordinance as is reasonably practicable." LDO 11.1.3. Therefore, the need for a Floodplain Development permit was not mooted by the denial of the Nonconforming Use Verification Application. Further, the appeals raised questions as to the proper delineation of the floodway boundary based on grading and excavating since 1992 that have dramatically altered the topographic elevations that form the basis of the FEMA Flood Insurance Study mapping, activities including the excavation and fill of a pond noted in the Code Enforcement action, and other issues whose resolution will have a practical effect on the permitting and operating of the batch plant and the health and safety of neighbors. *See* Rec-FP 56–87, 88–103, 233–332.

Petitioner understands that the Applicant recently filed a new Floodplain Development Permit Application with Jackson County as required by a stipulated agreement between the Applicant and the County, and that application has recently been approved pursuant to a Type 1 process. Although LUBA may consider documents that are not included in the record when deciding whether an appeal is moot, *Willhoft v. City of Gold Beach*, 39 Or

LUBA 743, 745–46 (2000), the newly filed permit application does not cause this appeal or the Floodplain Permit Application at issue to be moot. Where a new permit is issued prior to an appeal of a previous permit decision, such that the new permit decision "completely replaces the old," LUBA deems a later appeal of the previous permit to be moot. *1000 Friends of Oregon v. DEQ*, 7 Or LUBA 84, 86 (1982). That is not the situation here where the Applicant submitted its new Floodplain Development Permit Application while these appeals were ongoing. Thus, the Floodplain Permit Application at issue in this appeal has not been replaced and it still presents a live controversy that must be resolved.

LUBA should reverse and remand this decision to Respondent to make a decision on the merits of the Floodplain Permit Application. First, the appeal is not moot, as discussed above. Second, allowing the recently filed Floodplain Development Permit Application to take the place of the Application at issue in this appeal effectively allows the County to delay providing petitioners with a judicially reviewable decision on the merits regarding approval of the Floodplain Permit. *See Dexter Lost Valley Community Ass'n v. Lane County*, 255 Or App 701, 706 (2013). Petitioners have invested substantial time and resources into raising their concerns at each level of review of the Floodplain Permit Application. Dismissing the application and appeals as moot goes against the policy considerations that the Court of Appeals referred to in deciding *Dexter*. An appellant's rights should not be so vulnerable to a local government's discretion to initiate a new permitting process or reconsider a decision after the appellant has incurred substantial costs in preparing its appeal. *Id.* at 707–708.

V. CONCLUSION

For the above reasons, Petitioner respectfully requests reversal or remand of the decisions because the decisions do not comply with State and local law and contain inadequate findings unsupported by substantial evidence in the record.

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Dated: January 28, 2013.

Respectfully Submitted,

Courtney Johnson, OSB No. 077221
Of Attorneys for Petitioner
Rogue Advocates

CERTIFICATE OF FILING

I hereby certify that, on January 28, 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 28th day of January, 2014

By: _____
Courtney Johnson
Crag Law Center

CERTIFICATE OF SERVICE

I further certify that, on January 28, 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
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DATED: This 28th day of January, 2014

By: _____
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