BEFORE THE LAND USE BOARD OF APPEALS

FOR THE STATE OF OREGON

ROGUE ADVOCATES, Petitioner, vs. JACKSON COUNTY, Respondent, and PAUL MEYER AND KRISTEN MEYER, Intervenor-Respondents.	LUBA NO. 2013-102/103 INTERVENOR-RESPONDENTS' BRIEF

INTERVENOR-RESPONDENTS' BRIEF

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I. STANDING

Intervenor-Respondents Paul Meyer and Kristen Meyer ("Intervenor-Respondents") have standing in that Intervenor-Respondents are the applicants in the land use decisions which are the subject matter of the appeals. Intervenor-Respondents accept that Petitioner Rogue Advocates ("Petitioner") has standing to bring these appeals.

II. STATEMENT OF THE CASE

A. Nature of Decision and Relief Sought.

Intervenor-Respondents submitted a land use application (File No. ZON2012-01173-NC) with Respondent Jackson County ("Respondent") seeking verification of a nonconforming use pursuant to Chapter 11 of the Jackson County Land Development Ordinance (LDO) relating to the historical use of the subject property for batch plant purposes ("the Nonconforming Use Application"). *Rec-NC*, 1053.[1] Intervenor-Respondents also submitted a land use application (File No. ZON2012-01172-FP) in conjunction with the Nonconforming Use Application concerning the structures/apparatus utilized in conjunction with the batch plant use located within the Flood Hazard Area ("the Floodplain Application"). For the purposes of this brief, the Nonconforming Use Application and the Floodplain Application shall be collectively referred to herein as "the Applications". The Applications were approved by Respondent and appealed by Petitioner at the local level. *Rec-NC*, 837, 1156; *Rec-FP*, 511, 653. Public hearings for the appeals of the Applications were conducted before the Jackson County Hearings Officer ("the Hearings Officer") on June 24, 2013. *Supplemental Record*, 1. The Hearings Officer issued a

[1] In order to be consistent with Petitioner's Brief, Record references relating to the Nonconforming Use Application Record are cited herein as "*Rec-NC*" and Record references relating to the Floodplain Application Record are cited herein as "*Rec-FP*".

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written decision on September 26, 2013, denying the Nonconforming Use Application but recognizing the batch plant use as a lawfully established nonconforming use ("the Nonconforming Use Decision"). *Rec-NC*, 1-22. The Hearings Officer issued a written decision on September 26, 2013, declaring the Floodplain Application and the appeals thereof "moot" and vacating the staff decision approving the Floodplain Application ("the Floodplain Decision"). *Rec-FP*, 1-3. For the purposes of this brief, the Nonconforming Use Decision and the Floodplain Decision shall be collectively referred to herein as "the Decisions". Intervenor-Respondents respectfully request that the Decisions be affirmed.

B. Summary of Arguments.

Intervenor-Respondents' arguments are summarized as follows:

1. There is substantial evidence in the *Rec-NC*, as a whole, to support the Hearing Officer's findings that the batch plant use was lawfully established on the subject property at the time zoning commenced.

2. The Decision properly concluded that the LDO does not distinguish between concrete and batch plant uses.

3. The Decision properly concluded that the batch plant use was lawfully established pursuant to LDO Chapter 11 which governs nonconforming uses and LDO 13.3(141) which defines "lawfully established".

4. The Decision properly concluded that LDO 11.2.1(C) was not applicable to the Nonconforming Use Application. LDO 11.2.1(C) governs the expansion of nonconforming aggregate and mining operations but not permanent batch plant operations.

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5. The appeal of the Floodplain Decision will have no practical effect and, therefore, the appeal is moot.

C. Summary of Material Facts.

Intervenor-Respondents supplement, modify and dispute Petitioner's Summary of Material Facts as follows:

Intervenor-Respondents are the owners of certain real property located in Jackson County, Oregon, and commonly known as Township 38 South, Range 1 West, Section 24, Tax Lot 600 ("the subject property"). *Rec-NC*, 1057. The subject property is approximately 10.98 acres in size, is zoned Rural Residential (RR-5) and is located in the Urban Growth Boundary for the City of Talent. *Rec-NC*, 1058. The subject property lies in close proximity to Bear Creek which is located just to the west. *Rec-NC*, 1073. At its nearest point, the western boundary line of the subject property is located approximately 80 feet from the eastern bank of Bear Creek. *Rec-NC*, 1058. Consequently, a substantial portion of the western part of the subject property is located within the designated Floodway and the remainder of the subject property, except for a de minimis portion, is located within the 100-year Floodplain. *Rec-NC*, 1073. A map depicting the subject property and surrounding properties is attached hereto as Appendix 1-1.

At the time of the Decisions, the subject property was developed with an asphalt batch plant, a crusher, a stockpile of aggregate materials, several accessory structures including a 3,220 square foot shop, 256 square foot building housing a generator, a 276 square foot building on skids used as an office, a 200 square foot storage building, a 52 square foot building located adjacent to the truck scale, a propane tank, a diesel tank and a septic tank which was pumped regularly (i.e. no drain field). *Rec-NC*, 1058, 1073. Mountain View Paving, Inc., an Oregon

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corporation ("Mountain View Paving"), is and has been operating a permanent batch plant and crusher on the subject property for the purpose of manufacturing and selling asphalt products since April, 2001. *Rec-NC*, 1057-58.[2] Specifically, raw material is delivered to the subject property where it is temporarily stored in stockpiles on-site. *Rec-NC*, 1061. Then some of the raw materials are then further refined through the crusher located on the subject property. *Id.* The batch plant is then used to manufacture asphalt from said materials. *Id.* The finished asphalt product is then transported for use on governmental and private paving projects in the region. *Id.*

The 1973 Jackson County Zoning Ordinance became effective on September 1, 1973. *Rec-NC*, 1061. The initial zoning for the subject property (September 1, 1973) was Open Space Development (OSD-5) pursuant to the 1973 Zoning Map. *Rec-NC*, 1093. The Open Space Development (OSD-5) zoning ordinance (1973) did not allow the batch plant use as an independent use. *Rec-NC*, 1094-1098. On December 15, 1982, the 1982 Zoning Ordinance became effective pursuant to Ordinance #82-33, which was acknowledged by the State. *Rec-NC*, 1061. In 1982, the zoning of the subject property was changed from Open Space Development (OSD-5) to Rural Residential (RR-5), which remains the current zoning of the subject property. *Rec-NC*, 1061, 1099. The Rural Residential (RR-5) zoning district did not and does not allow the batch plant use. *Rec-NC*, 1061, 1100-02.

The *Rec-NC* contains extensive testimony and written evidence concerning the commencement, scope and duration of the batching operation on the subject property. Specifically, the *Rec-NC* consists of 1,185 pages.

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[2] Intervenor-Respondents are the sole shareholders of Mountain View Paving, Inc. *Rec-NC*, 1057.

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Intervenor-Respondents reject the legal arguments set forth in Petitioner's Summary of Material Facts. Intervenor-Respondents also dispute the following statement which is not supported by most of the *Rec-NC* references cited:

> 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. Petitioner's Brief, Pg. 4.

Rec-NC 347 consists of a written log from Shawnna Morrow who does not reside in Mountain View Estates ("the Morrow Log"). *Rec-NC*, 260. Furthermore, the earliest entry in the Morrow Log is June 3, 2013. *Rec-NC*, 347. *Rec-NC*, 348 consists of a letter from Mary Hamilton, which asserts that she has only lived in the "surrounding neighborhood since July of 2012". *Rec-NC*, 348. *Rec-NC* 349 consists of another letter from Mary Hamilton asserting that she began noticing fumes from the asphalt batch plant in August, 2012. *Rec-NC*, 349. *Rec-NC*, 446 consists of an Affidavit of Frank Falsarella asserting that he was the mayor of the City of Talent from 1989 to 1999 ("the Falsarella Affidavit"). However, there is no evidence that Mr. Falsarella ever resided in Mountain View Estates and there is no assertion in the Falsarella Affidavit relating to noise, dust, odors and associated health impacts relating to the batch plant on the subject property. *Rec-NC* 455 consists of a letter from Scott Johnson which is unrelated to noise, dust, odors and associated health impacts relating to the batch plant on the subject property. *Rec-NC*, 455. *Rec-NC* 456-462 consist of a letter and affidavits that are unrelated to noise, dust, odors and associated health impacts relating to the batch plant on the subject property. *Rec-NC*, 456-462. *Rec-NC 463* consists of an Affidavit of Meri Walker which specifically references "air pollution that began late in the summer of 2012". *Rec-NC*, 464.

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The only evidence supporting Petitioner's statement is the Affidavit of Chris Hudson, being the owner of Mountain View Estates (*Rec-NC*, 354-357, 451-454) and the Affidavit of Jack Harkin (*Rec-NC*, 448-450).[3]

III. JURISDICTION

Intervenor-Respondents concur that the Board has exclusive jurisdiction because the Decision is a land use decision as defined by ORS 197.015(10)(a)(A). ORS 197.825(1).

IV. RESPONSES TO ASSIGNMENTS OF ERROR

1. Response to Petitioner's 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.

The Land Use Board of Appeals ("the Board") may reverse or remand the Decision if the Decision is "not supported by substantial evidence in the whole record." *Younger v. City of Portland*, 305 Or 346, 348 (1988), *citing*, ORS 197.835(8)(a)(C). In short, the Decison must be supported by substantial evidence demonstrating compliance with the approval criteria. "Substantial evidence" is evidence a reasonable person would accept as adequate to support a conclusion. *Reeves v. Washington County*, 24 Or LUBA 483, 490 (1993). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179 (1993), *citing*, ORS 183.482(8)(c). Evidence is considered "substantial evidence" even though it is possible for a reasonable person to draw different conclusions from the same evidence. *Adler v. City of Portland*, 25 Or LUBA 546, 554 (1993).

[3] Mountain View Estates is the mobile home park located on the western side of Bear Creek. Rec-NC, 254.

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In the event of conflicting evidence, the decision maker is entitled to choose between conflicting believable evidence as long as a reasonable person could reach the same decision the decision maker does, considering the evidence in the record as a whole. *McConnell v. City of Grants Pass*, 55 Or LUBA 280, 285-286 (2007). In *Mingo v. Morrow County*, the Board stated:

> When LUBA reviews land use decisions for substantial evidence under ORS 197.835(9)(a)(C) and it finds that the decision on review is supported by evidence in the record that a reasonable person would believe, it rejects the substantial evidence challenge and affirms the decision. *Younger v. City of Portland,* 305 Or 346, 358-60, 752 P2d 262 (1988). LUBA affirms in such cases even if other reasonable persons or LUBA might have resolved evidentiary conflicts differently, if they had been the land use decision maker, so long as LUBA concludes a reasonable person could also have resolved the evidentiary conflicts as the decision maker did. *Id.*; *Douglas v. Multnomah County,* 18 Or LUBA 607, 617-18 (1990). In performing substantial evidence review, LUBA is solely to determine if the evidence is such that a reasonable decision maker would rely on the evidence; LUBA is not to conduct its own reweighing of the evidence, and LUBA does not duplicate the role of the original decision maker. Mingo v. Morrow County, 63 Or LUBA 357, 367-368 (2011), *citing*, *1000 Friends of Oregon v. Marion County,* 116 Or App 584, 586-88, 842 P2d 441 (1992).

Intervenor-Respondents acknowledge that the proponent of a nonconforming use bears the burden of demonstrating that the use was lawfully established and continued without interruption. LDO 11.1.3(C); *Fraley v. Deschutes County*, 31 Or LUBA 566, 569 (1996). However, Intervenor-Respondents disagree with Petitioner's assertion that the applicant's burden is heightened and "provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible". Petitioner's Brief, 8, *citing*, *Parks v. Board of County Comm'rs*, 11 Or App 177, 196-197, 501 P2d 85, 95 (1972). Such a position is inconsistent with state statute and the LDO. ORS 215.130(5) protects lawful uses that existed at the time that a zoning restriction became effective. *Cyrus v. Deschutes*

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County, 194 Or App 716, 717 (2004), *citing*, *Polk County v. Martin*, 292 Or 69, 74-76 (1981). In *Polk County v. Martin*, the court stated:

> Neither ORS 215.130 nor Clackamas Co. v. Holmes, supra, require that anything beyond the requirements of present ORS 215.130(5) be shown in order for a landowner to have the right to continue use of property in the same condition and at the same level as was the case at the time of the enactment of the zoning legislation. *Polk County v. Martin*, 292 Or 69, 82 (1981).

Furthermore, in Jackson County, there is no extraordinary burden on an applicant to demonstrate the establishment, existence and continuance of a nonconforming use and nonconforming uses are not disfavored by the LDO. To the contrary, LDO 11.1.3(A) states as follows:

> ***General Policy***
> The County recognizes the interests of property owners in continuing to use their property. 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(A).

LDO 11.1.3(C), which sets forth the party responsible for meeting the burden of proof concerning a land use application for verification of nonconforming use, simply states:

> ***Verification of Nonconformity Status***
> The burden of establishing that a nonconformity lawfully exists will be on the owner, not the County. (See Section 11.8). LDO 11.1.3(C).

Consequently, the Nonconforming Use Application is subject to the normal application evidentiary burden requirements set forth above.

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A. Response to Petitioner's 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 Decision's conclusion that a batch plant use was established on the subject property at the time zoning commenced and was continued thereafter is supported by substantial evidence in the *Rec-NC*. In the Decision the Hearings Officer sets forth detailed and extensive findings concerning the evidence in the *Rec-NC* relating to the establishment and continuous nature of the batch plant use. *Rec-NC*, 4-11. Specifically, the Hearings Officer sets forth evidence in support of the contention, sets forth the evidence against the contention and then resolves the conflict. *Id.* In particular, the Decision states, in part, as follows:

> The evidentiary conflict is significant, but it can be resolved. The hearings officer takes the DeYoung Letter, all of the statements and the Reports to be accurate and honest and concludes that there has been a batch plant on the Property for the period starting in 1963 through the present. However, for most of those years it was not an asphalt batch plant. From the time Rogue River Paving ceased operations until 2000 the Property was occupied by concrete batch plants, and from 2001 until now has been occupied by Mountain View Paving's asphalt batch plant. DeYoung who owned and operated an aggregate business on the Property and the many individuals who bout concrete at the Property historically must be taken to know that it was available there in those years.
>
> The Reports can be reconciled with this conclusion on the basis of the fact that they were for the specific purpose of determining whether an asphalt batch plant occupied the Property. Their conclusion that one was not there is consistent with the DeYoung Letter and its supporting statements which represent only that a concrete batch plant operated from 1988 to 2000. *Rec-NC*, 10-11.

Petitioner identifies specific evidence to support its position that the Decision is unsupported by substantial evidence. In particular, Petitioner argues that the Hearings Officer misinterpreted evidence submitted by Snow Peak Consultants, which is supported by a

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statement from the Jackson County Code Enforcement Officer asserting "the property has not historically had an asphalt batch plant". Petitioner's Brief, 11-12. However, such a position ignores extensive evidence in the *Rec-NC* supporting the Hearing Officer's conclusion concerning the existence of the batch plant use. There is substantial evidence in the *Rec-NC* to support the Hearing Officer's conclusion whether or not Petitioner agrees with the Hearings Officer's resolution of the conflicting evidence. In particular, the Decision states:

> These reports together with the statement in the DeYoung Letter that "[d]uring my ownership of [the Property] there has always been a batch plant or batch plants on the subject property," provide substantial evidence that a batch plant was operated on the Property from 1963 (before the advent of zoning) until present. *Rec-NC*, 6.

As set forth above, if the Decision is supported by evidence in the record that a reasonable person would believe, the Board should reject the substantial evidence challenge. *Mingo v. Morrow County*, 63 Or LUBA 357, 367-368 (2011), *citing*, *1000 Friends of Oregon v. Marion County,* 116 Or App 584, 586-88, 842 P2d 441 (1992). This remains true even if other reasonable persons or the Board might have resolved the evidentiary conflicts differently. *Id.* Consequently, Intervenor-Respondents contend that the substantial evidence challenge set forth in Petitioner's *First Sub-Assignment of Error* should be denied.

B. Response to Petitioner's Second Sub-Assignment of Error.

RESPONDENT MISCONSTRUED THE LAW IN DETERMINING THE NATURE OF THE USE THAT EXISTED ON THE PROPERTY.

The Decision properly concluded that the LDO does not distinguish between concrete and asphalt batch plant uses. LDO 13.3(20) defines a batch plant as follows:

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> BATCH PLANT: An apparatus used in the mixing of asphalt or cement products, including any auxiliary apparatus used in such mixing process. Batch plants may be sited as either permanent or temporary facilities. LDO 13.3(20).

There is no dispute that the current batch plant and the prior batch plants were "permanent" batch plants pursuant to the LDO.[4]

LDO 13.2 organizes land uses and activities into general "use categories" and specific "use types". LDO 13.2.1(A).[5] LDO 13.2.1(A) states as follows:

> ***Purpose***
> Use classifications organize land uses and activities into general "use categories" and specific "use types" based on common functional, product, or physical characteristics, such as the type and amount of activity, the type of customers or residences, how goods or services are sold or delivered, and site conditions. The use classifications provide a systematic basis for assigning present and future land uses into appropriate zoning districts, listing uses having similar characteristics for illustrative purposes. Specific definitions of use types and general terms are found in Section 13.3. LDO 13.2.1(A).

Permanent concrete and asphalt batch plants are classified as an Industrial/Manufacturing use type pursuant to LDO 13.2.2(C), which states, in part, as follows:

> Permanent concrete and asphalt batch plants are classified as Industrial/Manufacturing uses. LDO 13.2.2(C).

LDO 13.2.5 sets forth the Industrial/Manufacturing use types, which includes Manufacturing and Production uses described as follows:

> ***Manufacturing and Production***
> 1) *Characteristics; Accessory Uses*

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[4] Section 13.3(268) defines "temporary" as follows:

> TEMPORARY: Temporary means 30 days or less in any 12-month period, unless otherwise specified by a provision of this Ordinance. LDO 13.3(268).

[5] LDO 13.2 (Use Classifications) in its entirety is attached hereto as Appendix-2.

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> Includes firms involved in the manufacturing, processing, fabrication, packaging, or assembly of goods. Natural, man-made, raw, secondary, or partially completed materials may be used. Products may be finished or semi finished and are generally made for the wholesale market, for transfer to other plants, or to order for firms or consumers. Custom industry is included (i.e., establishments primarily engaged in the on-site production of goods by hand manufacturing involving the use of hand tools and small-scale equipment). Relatively few customers come to the manufacturing site and goods are generally not sold on site, although limited display of "sample" products may occur. Accessory activities may include offices, limited retail sales, cafeterias, parking, employee recreational facilities, warehouses, storage yards, repair facilities, and truck fleets.
>
> 2) *Exclusion*
> Manufacturing of goods to be sold primarily on-site and to the general public are classified as Retail Sales and Services. LDO 13.2.5(C).

The Decision correctly classifies both asphalt batch plants and concrete batch plants as "high impact" manufacturing/production specific use type, which is defined as follows:

> MANUFACTURING/PRODUCTION, HIGH IMPACT: The manufacture or compounding process of raw materials. These activities or processes may necessitate the storage of large volumes of highly flammable, toxic matter, or explosive materials used in the manufacturing process, and may involve outdoor storage and operations. These activities may impact adjacent properties by creating noise, odor, vibration, dust, or hazards. Examples include, but are not limited to: lumber, plywood and hardboard manufacturing; rolling, drawing, or extruding of metals; and log decking, storage, and pond storage. LDO 13.3(155).

Furthermore, as set forth above, a "batch plant", by definition, is an "apparatus used in the mixing of asphalt or cement products." LDO 13.3(20). In short, the specific batch operation use type identified by the LDO includes the batching of both asphalt and cement products. Accordingly, the Decision correctly concludes that the LDO does not distinguish between concrete and asphalt batch plants.

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C. Response to Petitioner's 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.

Petitioner argues that the batch pant use was not lawfully established in 1973 because "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." Petitioner's Brief, 19. However, Petitioner's position is contrary to the controlling language of the LDO.

LDO 11.1.2(A) states: "a use that *was lawfully established before the effective date of this Ordinance* but which no longer conforms to the uses or dwelling density allowed in the zoning district in which it is located, is considered nonconforming . . ." LDO 11.1.2(A) (emphasis added).[6] LDO 11.8.1(A) (Verification of Nonconforming Status) states, in part, as follows:

> The application must be accompanied by documentation that establishes the approximate date that the use, structure, or sign was established; proof that the use, structure, or sign was *lawfully established* at the time it became nonconforming . . . LDO 11.8.1(A) (emphasis added).

LDO 13.3(141) specifically defines "lawfully established" as follows:

> LAWFULLY CREATED/ESTABLISHED: 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).

Consequently, the analysis is limited to whether the use complied with "land use laws and local standards", if any, when it was established.

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[6] LDO Chapter 11 in its entirety is attached hereto as Appendix 3-3.

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Petitioner relies on *Bennett v. Linn Co. Board of Commissioners*, to support its contention that evidence of state regulatory permits from 1973 were required to demonstrate that the batch plant use was lawfully established. However, *Bennett*, does not support Petitioner's contention that every component of the use must be "lawful" when established. *Bennett*, involved the intermittent discharge of wastewater associated with a slaughter house use onto a vacant adjacent property. *Bennett*, at 222. The discharge of the wastewater onto the vacant parcel was the use for which certification of nonconforming status was sought. *Bennett*, at 219-222. In *Bennett*, the Board determined that there was insufficient evidence indicating whether or not the disposal of wastewater onto the adjacent vacant lot was lawful when the use was established.[7] *Bennett*, at 227. *Bennett*, is further distinguishable from the present case in that the Linn County Zoning Ordinance did not define "lawfully established" as is the case in the LDO. LDO 13.3(141).

To the extent that Petitioner contends that the LDO violates ORS 215.130, Intervenor-Respondents object in that the issue was not raised during the local proceeding pursuant to ORS 197.763(1). Without waiving the foregoing objection, Intervenor-Respondents respond to Petitioner's contention that LDO 13.3.(141) violates ORS 215.130(5) below.

The statute leaves to the county ordinances to further define ORS 215.130(5). *Polk County v. Martin*, 292 Or 69, 77 (1981), *citing*, *Bither v. Baker*, 249 Or 640 (1968). Furthermore, ORS 197.829 states as follows:

> **197.829 Board to affirm certain local government interpretations.** (1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

[7] The Board also concluded that there was no evidence indicating when the use was established. *Bennett*, at 227.

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> (a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> (d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
>
> (2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct. ORS 197.829 (emphasis added).

The definition of "lawfully established" set forth in LDO 13.3(141) is not contrary to ORS 125.130(5) and falls reasonably within the authority of ORS 215.130(5). *See Polk County v. Martin*, 292 Or 69, at 77. Furthermore, in *Friends of Neabeack Hill v. City of Philomath*, the court stated, in part, as follows:

> [W]e conclude that a goal or rule compliance challenge cannot be advanced under ORS 197.829(1)(d) when, however phrased, the argument necessarily depends on the thesis that the acknowledged local land use legislation itself does not comply with a goal or rule, and when a direct contention that the acknowledged legislation is contrary to the goal or rule could not be entertained under ORS 197.835. Situations undoubtedly will arise where that rule will prove difficult to apply. The line between an interpretation and the provision it interprets will not always be sharp. *Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 49 (1996).

The premise of Petitioner's argument is that LDO 13.3(141), which defines "lawfully established", violates ORS 215.130(5). Consequently, Petitioner's challenge cannot be considered. *Friends of Neabeack Hill*, at 49-50.

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2. Response to Petitioner's 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.

Intervenor-Respondents incorporate their response to *Petitioner's Second Sub-Assignment of Error* to the extent Petitioner argues that the replacement of the prior concrete batch plant with the current asphalt batch plant in 2001, in itself, constitutes an expansion of the nonconforming use.

Intervenor-Respondents dispute the following statement set forth in Petitioner's Brief:

> 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. . . . Petitioner's Brief, 27.

Specifically, the assertion is inconsistent with the *Rec-NC* as a whole as well as the identified *Rec-NC* citations set forth in the assertion itself. There is no dispute that the current asphalt batch plant began operating on the subject property in 2001. *Rec-NC*, 11. However, the complaints concerning impacts from the batching operation on the subject property are relatively recent. In an affidavit of Chris Hudson, the owner of Mountain View Estates, dated June 21, 2013, and cited by Petitioner above states, in part, as follows:

> My family has owned and managed Mountain View Estates in Talent for 26 years. Mountain View Estates is located across Bear Creek from the property that is subject to this appeal, Tax Lot 600, located at 530 West Valley View Road.
> ****

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> My parent's house in Mountain View Estates was the closest home to Howard DeYoung's sand & gravel plant. My parents occupied their primary home in Talent, Oregon, from February 1990 until July 13, 2010, intermittently with their second home in Carlsbad, CA, until their passing. During the time they owned their house in Mountain View Estates, 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 2010.* *Rec-NC*, 354-357, 451-454 (emphasis added).

In a letter dated June 23, 2013, Cecilia Pestlin states, in part, as follows:

> I moved to Mountain View Estates in June 2002, no hint of asphalt production. Criteria code 11.2.1(B)(1)(c). 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 on that property, with additional equipment accumulating at the site. *Rec-NC*, 744-745.

In a letter dated June 17, 2013, Lupe Walker, states, in part, as follows:

> I moved into Mt. View Estates in 2011. I understood that one of my neighbors would be a gravel pit not an asphalt plant. At that time I did not experience any fumes or noise. In the last year that has changed. I am now bothered by the fumes coming out of the plant along with the noise and dust. *Rec-NC*, 514.

Furthermore, as the evidence in the *Rec-Nc* demonstrates, the transition of production from concrete to asphalt itself, which occurred in 2000-2001, did not increase any additional off-site impact.[8] Based on written submittals into the *Rec-NC*, the prior operator, commonly known as Best Concrete, was producing a minimum of 40,000 tons per year.[9] Specifically, in a letter dated July 11, 2013, Howard DeYoung, being the owner of the subject property when Best Concrete was operating, states, in part, as follows:

> I estimate that Best Concrete, at a minimum, produced approximately 40,000 tons of materially annually. *Rec-NC*, 176-177.

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[8] The current batch plant has not produced more than 20,000 tons of material between 2001 and 2011, with the largest production year occurring in 2004. *Rec-NC*, 841.

[9] Best Concrete is the common name for the company known as Best Transit Mix and Best Transit Cement Mix. *Rec-NC*, 60. For the purposes of this brief, the common name of Best Concrete is used.

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In a letter dated July 11, 2013, Bill Monroe of I-Rock Trucking states, in part, as follows:

> The amount of batch plant related activity occurring on the Mountain View property during the 1990's was much more extensive than the Mountain View Paving batching operation. Best Concrete had the contracts for the fiber optic installations. These were large contracts in that large amounts of batch product were required. It would not surprise me if tonnage being produced by Best Concrete on the Mountain View property was 2x or 3x 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 finished product. *Rec-NC,* 188.

A letter dated July 11, 2013, by Applicant Paul Meyer states, in part, as follows:

> I estimate that Best Concrete produced at least 40,000 tons of material annually and they did not even operate during the winter months. The amount of batch related activity on the subject property in conjunction with Best Concrete was much more extensive (i.e. truck traffic) than my current operation. *Rec-NC,* 187.

The *Rec-NC* includes additional written testimony attesting to the extensive scope of batching operation on the subject property during the 1990's: (a) Ronald Kinney (*Rec-NC,* 196); (b) Patrick Elston of Elston Construction (*Rec-NC,* 198); and (c) Toby Munroe of T&M Excavation (*Rec-NC,* 200).

Based on the foregoing, Intervenor-Respondents contend that the change from a concrete batch plant to an asphalt batch did not constitute an expansion of a nonconforming use pursuant to LDO 11.2.1(B).

3. Response to Petitioner's Third Assignment of Error.

RESPONDENT MISCONSTRUED THE LAW BY DECIDING THAT LDO 11.2.1(C) IS NOT AN APPLICABLE CRITERION

The Hearings Officer was correct in determining that LDO 11.2.1(C) is not applicable to the Nonconforming Use Application. Specifically, LDO 11.2.1(C) is unrelated to a

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permanent batch plant but, instead, is limited to nonconforming aggregate and mining operations. LDO 11.2.1(C) is set forth as follows:

> C) ***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
>
> 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. LDO 11.2.1(C).

The use on the subject property consists of a batch plant, a crusher, relatively small stockpiles of aggregate materials and several accessory structures. *Rec-NC*, 1061. Mountain View Paving is and has been operating a permanent batch plant and crusher on the subject property for the purpose of manufacturing and selling asphalt products. *Id.* Raw material is delivered to the subject property where it is temporarily stored in stockpiles on-site. *Id.* Then some of the raw materials are further processed/refined through the crusher located on the subject property. *Id.* The batch plant is then used to manufacture asphalt from said materials. *Id.* The finished asphalt product is then transported for use on governmental and private paving projects in the region. *Id.*

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A permanent batch plant operation is an industrial/manufacturing use pursuant to the LDO. LDO 13.2.2, which defines resource uses, specifically excludes batch plant operations from the definition of resource uses (i.e. mineral and aggregate uses). LDO 13.2.2(C)(2) specifically states that "permanent concrete and asphalt batch plants" are classified as industrial/manufacturing uses. LDO 13.2.2(C) is set forth as follows:

> C) ***Mineral and Aggregate***
> 1) Characteristics; Accessory Uses
> Includes activities that primarily involve extraction of mineral and aggregate materials from below the subsoil of a site. On-site accessory uses and activities may include surface stockpiling of mined materials, processing and crushing, truck scales and office or caretaker's buildings necessary to conduct, or ensure the security of, on-site mining operations.
>
> 2) Exclusion
> *Permanent* concrete and asphalt batch plants are classified as Industrial/Manufacturing uses. LDO 13.2.2(C) (emphasis added).

The current asphalt batch plant operated by Mountain View Paving and the prior concrete batch plant operated by Best Concrete were permanent batch plants. Specifically, LDO 13.3(20) defines a batch plant as follows:

> BATCH PLANT: An apparatus used in the mixing of asphalt or cement products, including any auxiliary apparatus used in such mixing process. Batch plants may be sited as either permanent or temporary facilities. LDO 13.3(20).

Section 13.3(268) defines "temporary" as follows:

> TEMPORARY: Temporary means 30 days or less in any 12-month period, unless otherwise specified by a provision of this Ordinance. LDO 13.3(268).

Therefore, the permanent batch plant use for which verification of nonconforming use status is not an aggregate mining use subject to the provisions of LDO 11.2.1(C). There is no ambiguity in the LDO concerning the classification of the permanent batch plant use.

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4. Response to Petitioner's 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.

Intervenor-Respondents concur with Petitioner's assertion that a new floodplain development permit has been issued by Respondent relating to the remaining equipment/development on the subject property ("the New Floodplain Decision"). A Notice of Intent to Appeal the New Floodplain Decision has been filed with the Board by Petitioner ("the New Appeal"). Copies of the New Floodplain Decision and the New Appeal are attached hereto as Appendices 4 and 5 respectfully.[10] The New Floodplain Decision is substantially different than the Floodplain Application in that much of the development has been removed from the subject property and all development has been removed from the designated floodway. Consequently, the Floodplain Decision is of no force or effect.

Based on the foregoing, Intervenor-Respondents contend that the appeal of the Floodplain Decision is moot. LUBA will dismiss an appeal as moot when "review would have no practical effect." *Jacobsen v. City of Winston*, 61 Or LUBA 465, 466 (2010), *citing*, *Davis v. City of Bandon*, 19 Or LUBA 526, 527 (1990).

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[10] These documents are not being submitted based on any evidentiary value. Instead, these documents are limited to the issue of mootness of the appeal of the Floodplain Decision. *Wilhoft v. City of Gold Beach*, 39 Or LUBA 743, 745-746 (2000).

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V. CONCLUSION

For the reasons set forth above, Intervenor-Respondents respectfully request that the Decision be affirmed.

DATED this 18th day of February, 2014

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CERTIFICATE OF FILING

I hereby certify that on February 18, 2014, I filed the original of INTERVENOR-RESPONDENT'S BRIEF, together with four (4) copies, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283, by Certified Mail Return Receipt Requested.

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CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, I served a true and correct copy of INTERVENOR-RESPONDENT'S BRIEF on all persons listed below, by first class mail, postage prepaid.

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