

1 BEFORE THE HEARINGS OFFICER FOR JACKSON COUNTY, OREGON

2
3 In the matter of an appeal from the Decision of)
4 the Jackson County Planning Division approving an)
5 application for a nonconforming use alteration on)
6 Tax Lot 600, Township 38 South, Range 1 West,)
7 Section 24, in Jackson County)

Case No. 439-15-00097-ZON

**DECISION AND
FINAL ORDER**

8 Applicant: Paul and Kristen Meyer)

9 Appellant: Rogue Advocates)

10 **THE APPEAL IS GRANTED AND THE APPLICATION IS DENIED.**

11 **NATURE OF APPLICATION**

12 On January 29, 2015, Paul and Kristen Meyer (the "Applicant") filed an application seeking
13 approval of an alteration of a nonconforming use on Tax Lot 600, Township 38 South, Range 1 West,
14 Section 24 (the "Property") within Jackson County (the "Application"). The Applicant is represented by
15 Huycke, O'Connor and Jarvis LLP of Medford. The Property consists of 10.98 acres and is zoned RR-5
16 and is within the Urban Growth Boundary of the City of Talent. The Property is nearly entirely within the
17 100-year floodplain of Bear Creek, a major tributary of the Rogue River.

18 On March 19, 2015, following review and analysis, the Jackson County Planning Division Staff
19 (the "Staff") issued a Tentative Decision approving the Application subject to conditions (the "Staff
20 Decision").

21 On March 31, 2015, Rogue Advocates, a regional nonprofit advocacy organization (the
22 "Appellant") filed a timely appeal of the Staff Decision. The Appellant is represented by the Crag Law
23 Center of Portland. The grounds for appeal were identified as compliance decision notice requirements,
24 compliance with numerous of the Applicable Criteria, the possibility that public health and safety will be
25 compromised, and "relevant regulations established by Federal, State and local agencies are not met" (the
26 "Appeal"). Not all of these stated grounds were pursued and others were added.

1 Staff provided proper notice of the hearing to the public which the Hearings Officer conducted on,
2 June 1, 2015 , following which the Hearing was closed and the Record was held open for three distinct
3 periods: the First Open Record Period for all participants to submit evidence and argument relating to the
4 record; the Second Open Record Period for all participants to submit evidence and argument in response to
5 submittals made in First Open Record Period, and the Third Open Record Period exclusively for rebuttal
6 argument from the Applicant.

7 The matter is now properly before the Hearings Officer for decision.

8 APPLICABLE CRITERIA

9 The criteria which apply to this appeal are set forth in the 2004 Jackson County Land Development
10 Ordinance, as amended (“LDO”) in Sections 11.1 and 11.2 (the “Applicable Criteria”).¹

11 Staff applied Section 11.3, Nonconforming Structures, using its provisions as the primary criteria
12 against which the Application was assessed. The Appellant argues that using this provision as a criterion is
13 error because it is the changed use that is nonconforming and represents the alteration, not the structures
14 and equipment that enable the use. Alterations in use are regulated by Section 11.2, which Staff also
15 applied to some degree. As the Appellant points out, the nonconforming structures section is concerned
16 with structures that “do not comply with the locational or dimensional requirements of this Ordinance, or []
17 [the] intended use or purpose [of which structures] is not consistent with the zoning district in which they
18 are located.” Section 11.3. In fact, section 11.3 only concerns itself with “[a]ny alteration to a
19 nonconforming structure that proposes reconstruction not in compliance with the standards of [the LDO].”
20 Specifically, this section deals with “Enlargement or Modification” and the “Damage or Destruction” of
21 such structures.

22 The Application does not turn on whether the structures and equipment that were utilized by the
23 prior nonconforming use of the Property have been enlarged or modified, and there is nothing in the record
24 to indicate that it was damaged or destroyed. What is at the heart of this matter is that the use of the
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26

¹ All references to code sections herein are to the LDO unless otherwise indicated.

1 Property was changed, and the LDO regulates such changes in Section 11.2.1, Nonconforming Use
2 Alterations.

3 The approval criteria of Section 11.2 are more demanding than those of Section 11.3. The latter
4 only requires analysis of whether the changed structures or equipment impose a greater adverse impact on
5 the surrounding neighborhood. This is also a requirement of approval under Section 11.2 which also
6 requires a determination of whether the altered use is "no more intensive" than the nonconforming use that
7 preceded it. The issues raised by the fact that some of the equipment needed for the new asphalt batching
8 use is different from that needed for the prior nonconforming concrete batching operation can be analyzed
9 under Section 11.2

10 Section 11.3 is not appropriately applied to the Application, and approval based on that provision
11 cannot be supported.

12 The Appellant sought to have Section 11.8, Verification of Nonconforming Use Status, added as an
13 applicable criterion, arguing the Application is entirely separate from the prior application and the resultant
14 LUBA Opinions and Orders that had partially verified the nonconforming concrete batch plant use. The
15 argument urges the Hearings Officer to verify afresh the nonconforming use which preceded the
16 Applicant's use. Such a process would require evidence for a different period than the period that applies
17 to the earlier application, that is, for a period of the 20 years preceding the filing date of the Application in
18 2015. For reasons that are developed below, the Hearings Officer is persuaded that the nonconforming
19 existence and continuity of that prior concrete batch plant use was verified in the decisions and the appeals
20 of his earlier application, ZON2012-01173. The nature and extent of that use, however, was not
21 determined in the earlier application, but the Land Use Board of Appeals ("LUBA") ruled in its reviews of
22 that case that an application for alteration of a nonconforming use can serve as the basis for that
23 determination.

24 The request to include Section 11.8 as an applicable criterion is denied.

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1 **DISCUSSION AND FINDINGS OF FACT**

2 **ORDER OF SECTIONS**

3 A. Rules of Interpretation

4 B. Verification of Nonconforming Use

5 C. Nature and Extent

6 1. The Batching Process

7 2. Physical Area

8 3. Equipment, Structures and Stockpiles

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10 5. Roads

11 6. Employees

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13 8. Airborne Pollutants of Process

14 9. Hours of Operation

15 10. Intermittency of Operation

16 D. Summary of Nature and Extent and Determination of Adequacy of Descriptions

17 1. The Batching Process

18 2. Equipment, Structures and Stockpiles

19 3. Traffic

20 4. Roads

21 5. Employees

22 6. Fire and Explosion

23 7. Airborne Pollutants of Process

24 8. Hours of Operation

25 9. Intermittency of Operation

26 E. Alteration of Use

1. Applicable Criteria and LUBA Guidance

2. The Surrounding Neighborhood

3. The Batching Process

4. Equipment, Structures and Stockpiles

5. Traffic

6. Roads

7. Employees

8. Fire and Explosion

9. Airborne Pollutants of Process

10. Hours of Operation

11. Intermittency of Operation

F. Alteration Determination

1. Nature and Extent

2. Intensity of Use and Adverse Impacts

G. Conclusions of Law

H. Order

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1 **Rules of Interpretation**

2 Nonconforming uses are allowed under Oregon law and, to a limited extent, encouraged by the
3 LDO². However, they are disfavored and subject to strict scrutiny under state law. The Court of Appeals
4 requires that they meet a high bar, having held in *Parks v. Board of County Comm'rs*, 11 Or App177, 196-
5 97 (1972), "provisions for the continuation of nonconforming uses are strictly construed against
6 continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed
7 to prevent the continuation or expansion of nonconforming uses as much as possible." Alteration of a
8 nonconforming use is held to the same standard, and this decision reflects the guidance of *Parks*.

9 **Verification of Nonconforming Use**

10 In *Rogue Advocates v. Jackson County*, LUBA No. 2013-102/103 (2014) ("*Rogue I*") LUBA
11 confirmed the Hearings Officer's determination by the Hearings Officer in ZON2012-01173 (the
12 "Nonconforming Use Decision") that the preceding concrete batch plant on the Property was a lawfully
13 established and continuous nonconforming use, dating to its commencement as a concrete batch plant in
14 approximately 1988. Regarding continuity, LUBA stated, "Substantial evidence also supports the finding
15 that a concrete batch plant existed on the property during the 20 year period from 1992 to 2012." *Rogue I*
16 Slip op 10. However, that decision rejected the Hearings Officer's "same use" approach that eliminated
17 the need to establish the nature and extent of the asphalt batch plant. Instead, LUBA remanded the matter
18 specifically "to verify the nature and extent of the lawful nonconforming batch plant use, without
19 considering as part of the verified use any unapproved alteration that occurred in 2001 or at any other
20 relevant times since 1992." *Ibid*, Slip op 22. LUBA reinforced its determination that the nature and
21 extent of the concrete batch plant had not been described and established in *Rogue Advocates v. Jackson*
22 *County*, LUBA No. 2014-100 (2015) ("*Rogue III*"). "[N]either the county's code nor our remand required
23 the hearings officer to delineate, in *this* proceeding on *this* application, the precise nature and extent of the
24 concrete batch plant operation as it existed in 1992. The hearings officer could, and we believe, did defer
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26 ² "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 as is reasonably possible." Section 11.1.3(A).

1 that analysis to a future application for an alteration of the concrete batch plant operation as it existed in
2 1992.” *Rogue III*, Slip op 7-8. Emphasis original.

3 In sum, LUBA has determined that the prior concrete batch plant use existed and was lawfully
4 created. It further concluded that the use was continuous, having specifically rejected the Appellants
5 argument that the alteration of the use into an asphalt batch plant in 2001 constituted a discontinuation.
6 “[A]n alteration of a nonconforming use amounts to a use....If a nonconforming use is altered, then it has
7 continued, albeit in a different form.” *Rogue III*, Slip op 10.

8 It is entirely clear that only the nature and extent of the nonconforming concrete batch plant use
9 remains to be determined.

10 The Appellant urges a more basic inquiry and showing here. Specifically, it argues that the prior
11 determinations are irrelevant, that no nonconforming use has been verified and that the Applicant must
12 prove up all elements again. It also specifically urges that Section 11.8 – Verification of Nonconforming
13 Use Status – be deemed an applicable criterion, but that request is denied above.

14 The Appellant’s position that no nonconforming use has been fully verified is accurate only to a
15 degree. The nature and extent of the concrete batch plant has not been determined yet. However, the
16 Appellant goes farther, asserting that since this is a new application, the Applicant must provide anew
17 substantial evidence of all elements required for the verification of a nonconforming use and that that
18 evidence must relate back to a different, more recent time period than that considered in the
19 Nonconforming Use Decision and in *Rogue I* and *III*. Further, the Appellant presented both evidence and
20 testimony in an effort to establish the there *never* has been a concrete batch plant on the Property. That
21 evidence is relevant and allowable only if the Hearings Officer rules that the concrete batch plant must
22 again be verified in full and that Section 11.8 is an applicable criterion.

23 The Hearings Officer denies the Appellant’s request in that regard for the reasons developed below.

24 That position is problematic for two reasons: It is a collateral attack on a prior final determination,
25 and it is based on information that could have been presented in earlier proceedings that resulted in a final
26 determination.

1 The Appellant presents several arguments: That the Applicant cannot rely on the evidence and
2 rulings in the prior proceedings because, since this is a new application, they are “irrelevant”; that the
3 existence of the concrete batch plant in the hearings officer’s earlier decision in ZPN2012-01173 (the
4 “Nonconforming Use Decision”) was predicated on its being the same use as the asphalt batch plant, and
5 that the earlier findings “did not purport to address whether the concrete batch plant was a lawful
6 nonconforming use.” Record 291.

7 These arguments cannot be supported for numerous reasons including, dispositively, because the
8 issues are settled. In *Rogue Advocates v. Jackson County*, LUBA 2014-015 (2014) (“*Rogue II*”), a case
9 that is related to Nonconforming Use Decision and *Rogue I*, LUBA confirmed the following from its
10 *Rogue I* decision:

11 “In remanding the hearings officer’s nonconforming use verification decision, LUBA
12 agreed with the hearings officer in part. Among other things, the hearings officer found
13 the disputed batch plant: (1) was ‘lawfully established,’ (2) satisfies the state and local
14 requirements for continued, uninterrupted existence,³ and (3) that the batch plant did
15 not have to be approved as an ‘[e]xpansion of nonconforming aggregate and mining
16 operations.’ LUBA rejected petitioner *Rogue Advocates*’ challenges to these three
17 aspects of the hearings officer’s decision. But LUBA found that the conversion of the
18 concrete batch plant to an asphalt batch plant in 2001 required approval as an alteration
19 of the nonconforming concrete batch plant and that the hearings officer erred in
20 concluding that the conversion did not require approval as an alteration.” Citations to
21 page references from *Rogue I* omitted.

22 The Appellant seeks to deny the Applicant the ability to rely on the determinations that were concluded in
23 its favor in these earlier decisions.⁴

24 The Appellant argues that LUBA’s determination that the concrete batch plant was a “continued,
25 uninterrupted” use is in error. “[T]hat determination was based on the Hearings Officer’s problematic
26 treatment of concrete and asphalt batching as the ‘same use’ for purposes of nonconforming use
27 verification.” Record 293. This position itself is in error. The determination that the concrete batch plant

³ This use of “uninterrupted” refers to its presence on the Property from year to year. It is not an indication that the concrete batch plant never left the Property to operate elsewhere during some portions of any given year.

⁴ Additionally, the Appellant opens an entirely new issue by providing evidence to dispute the conclusion that a concrete batch plant *ever* existed on the Property. Since the Hearings Officer declines to reopen the entire verification inquiry, the adequacy of this evidence is not addressed in this decision. The Hearings Officer notes, however, that the proffered evidence could have been presented in earlier proceedings in any case.

1 was continuous and uninterrupted was not predicated on the problematic treatment of concrete and asphalt
2 batching as the same use. It was based on substantial evidence that the concrete batch plant use continued,
3 uninterrupted, for the requisite period of years.

4 “Substantial evidence also supports the finding that a concrete batch plant existed on
5 the property during the 20 year period from 1992 to 2012, the relevant period for ORS
6 215.139(11). That the hearings officer might have reached the opposite conclusion
7 based on other evidence in the whole record does not provide a basis for reversal or
8 remand, as long as the conclusion the hearings officer reached is one that a reasonable
9 person would reach. We conclude that it is.” *Rogue I* Slip op at 10.

8 Additionally, in *Rogue II* LUBA specifically rejected the Appellant’s argument that the asphalt batch plant
9 is not a continuation of a batch plant use even if it is an alteration. Further, if the Appellant believed that
10 LUBA committed error in that conclusion, it was incumbent upon the Appellant to appeal it to the Court of
11 Appeals, which it did not do. The issue of continuity of use is settled.⁵

12 In part the Appellant takes this tack based on its having mistakenly characterized the Application as
13 one that “seeks approval of the 2015 asphalt batch plant as an alteration of the previously existing
14 nonconforming concrete batch plant use.” Record 286. Emphasis added. From this the Appellant urges
15 the Hearings Officer to require an entirely new evidentiary showing. However, the Application is express
16 in seeking approval for the 2001 asphalt batch plant that altered the concrete batch plant use. Record 33.
17 Although some of the Applicant’s evidence recites the equipment that is *currently* in use on the Property, it
18 is not attempting to tie the alteration to the current time period. Indeed, the Applicant takes pains in parts
19 of its argument to distinguish the relevant characteristics of the asphalt batch plant use in 2001 from some
20 of those that presently characterize the operation.⁶

21 In seeking to deny the Applicant the benefit of the prior determinations the Appellant relies on
22 *Lawrence v. Clackamas County*, 180 Or. App 495, 503 (2002) affirming *Lawrence v. Clackamas County*,

24 ⁵ The issue that is settled is that there was some type of lawfully established concrete batch plant use on the Property over the
25 requisite number of years. What was not settled by earlier decisions is the nature and extent of that use. That issue is addressed
26 in detail elsewhere in this decision.

⁶ Evidence of more recent impacts on the surrounding neighborhood of current aspects of the asphalt batch plant are problematic
and raise the possibility that the 2001 asphalt batch plant use has been altered in recent years. However, that issue is not
presented or reached here.

1 203 Or LUBA, 138 (2003), and it distinguishes *Safeway v. City of North Bend*, LUBA 2004-088.
2 *Lawrence* focused largely on the issues of claim and issue preclusion in affirming LUBA. Notably,
3 though, it addressed the opportunity of an applicant to refile an application following denial of an earlier
4 application. There, as here, the applications turned on nearly identical facts.⁷ The Court of Appeals held
5 “The general doctrine of claim preclusion does not deny an applicant the right to file a successive
6 application that an ordinance specifically permits to be filed.” *Lawrence v. Clackamas County*, 180 Or.
7 App 495, 503 (2002) affirming *Lawrence v. Clackamas County*, 40 Or. LUBA 507 (2001) (which held at
8 pages 518-19, “If one proposal for development is denied, land use ordinances anticipate and allow for
9 additional attempts for modified, or even the same, development. ZDO 1305.02(E) specifically anticipates
10 and allows applications to be refiled.”)⁸

11 In *Safeway*, LUBA considered the denial of an application that followed an earlier approved
12 application.⁹ The Appellant distinguishes *Safeway* because there the initial application had been approved
13 in a final land use determination. However, LUBA did not focus centrally on the fact that that
14 determination had been an approval. It focused on its having been a final land use decision.

15 Here, the Applicant relies on the final land use decision reached in the Nonconforming Use
16 Decision and affirmed, in part, by *Rogue I*. Even though the effect of these decisions requires the
17 Applicant to refile the application as one for an alteration of a nonconforming use, in the end it was a “final
18 land use decision” with respect to the issues determined by the Hearings Officer and affirmed by LUBA.
19 The Applicant is entitled to rely on the favorable rulings that those determinations contain as it moves
20 forward in the continuing effort to secure approval of the asphalt batch plant use. It is equally entitled to
21 that reliance as is the Appellant to rely on the portions of those decisions that favor its own positions. (See
22 the discussion *supra* regarding the requirement that the Applicant establish the nature and extent of the
23 concrete batch plant in 1992.

24 ⁷ To the extent that the applications did not rely on the same facts, LUBA in *Lawrence* barred the city from revisiting the
25 difference since they had been the subject of a previous final land use decision. The facts in this matter are nearly
indistinguishable in this regard.

26 ⁸ Although the LDO does not expressly authorize refiling of an application that has been denied, there is no limitation on such
an action and the County appears to accept refilings as a matter of practice.

⁹ In *Safeway*, the local jurisdiction denied the second, related application, and LUBA reversed the denial.

1 The Hearings Officer declines to revisit the earlier determinations that the concrete batch plant was
2 a lawfully established, that it existed as such in 1992 and that a batch plant use was continuous until at least
3 2001, the date that the current asphalt batch plant use was initiated. In so doing he relies on the affirmation
4 of those matters in *Rogue I*.

5 **Nature and Extent**

6 “Under the county’s code, an applicant for an alteration can use that application as a vehicle to
7 verify the nature and extent of the lawful nonconforming use[.]” *Rogue III* Slip op at 7. The inquiry
8 begins with an understanding of “nature and extent” – an elusive concept. LUBA affirmed that the nature
9 of the use that preceded the asphalt batch plant was a nonconforming concrete batch plant. *Rogue I* Slip op
10 at 18. However, it ruled that “remand is necessary for the hearings officer to verify the nature and extent of
11 the lawful nonconforming batch plant use....” *Ibid* at 22.

12 In *Rogue III* LUBA provided specific guidance on the specificity that is required. Commenting on
13 the inadequacy of the general characterization of the nature and extent of the uses that had been set forth in
14 the Hearings Officer’s decision on the remand of the Nonconforming Use Decision, LUBA quoted its
15 earlier decision in *Spurgin v. Josephine County*, 28 Or LUBA 383, 390-091 (1994):

16
17 “[a]t a minimum, the description of the scope and nature of the nonconforming use
18 must be sufficient to avoid improperly limiting the right to continue that use or
19 improperly allowing an alteration or expansion of the nonconforming use without
20 subjecting the alteration or expansion to any standards which restrict alterations or
21 expansions[.]” Omission original.

22 Continuing and quoting *Tykla v. Clackamas County*, 28 Or LUBA 417, 435 (1994), LUBA required,

23 “[T]he county’s description of the nature and extent of the nonconforming use must be
24 specific enough to provide an adequate basis for determining which aspects of the
25 intervenors’ proposal constitute an alteration of the nonconforming use and for
26 comparing the impacts of the proposal to the impacts of the nonconforming use that
intervenors have a right to continue.” *Ibid*.

More succinctly, but still somewhat vaguely, in *Rogue III* LUBA directly stated of the Hearings Officer’s
recital of facts and his unfulfilled task,

1 “[T]he language merely cites to evidence that the hearings officer might consider
2 relevant in considering a future application to approve the asphalt batch plant as an
3 alteration of the batch plant use, which will necessitate a *reasonably precise*
4 verification of the nature and extent of the concrete batch plant use as it existed in
5 1992.” Slip op 7. Emphasis added.

6 The Application is that “future application” and the question is whether the Applicant has presented
7 substantial evidence of the nature and extent of the concrete batch plant use. It is important to distinguish
8 between the extent to which neighbors of the Property noticed that the use had been changed in 2001 and
9 aspects of the new use itself. The former concerns impacts of the use while the later defines or describes
10 the use itself. Impacts are not relevant to determining the nature and extend of a use. They are only
11 germane when it is necessary to determine whether an alteration can be approved.

12 An understanding of relative impacts of the asphalt batch plant is not a substitute for the
13 “reasonably precise verification” that LUBA requires. Even if those impacts are equal to or actually
14 lessen those of the preceding concrete batch plant use, the uses that produce them still must be described
15 adequately. Failing to provide substantial evidence that allows such a description deprives an application
16 for an alteration of success. Further, as the Applicant points out, “the existence and extent of adverse
17 impacts has little direct bearing on the task of verifying the scope or intensity of the nonconforming use,
18 although it has considerable bearing on whether an alteration to the nonconforming use can be
19 approved...,” citing *Leach v. Lane County*, 45 Or LUBA 588 (2003) at 608.

20 The Record presents testimony and evidence that has considerable variability, much of which is
21 contained in personal statements made by Howard DeYoung, the owner of the Property during the period
22 that the concrete batch plant was in existence¹⁰ as well, to some degree, in the statements of the Applicant,
23 Paul Meyer. These differences result in inconsistent characterizations of the nature and extent of each
24 batch plant and the equipment that they used. The Appellant may feel that these inconsistencies are
25 untruths, but there is nothing in the Record to support such a conclusion. The Hearings Officer observes
26 that Mr. DeYoung is of considerable years and that his testimony and evidence relies on recollections of
periods that range from perhaps 1963 until 2001(Record 577), that is, some 14 to 52 years ago. Time takes

¹⁰ Mr. DeYoung owned the Property at that time a leased a portion of it to a concrete batch plant operator.

1 its toll on memory and age compounds the effect. The inconsistencies in Mr. DeYoung's statements are
2 most likely innocent, but they make it difficult to get a concrete understanding of the full nature and extent
3 of the batch plant use that occupied the Property until Mr. Meyer initiated the asphalt batch plant there in
4 2001.

5 Mr. Meyer is of an age that can also impair memory, but as the Appellant points out, some of the
6 inconsistencies in his evidence have occurred in statements made about much more recent aspects of his
7 operation – the current number material stockpiles and the number and size of storage tanks for fuel,
8 among others. Further, these inconsistencies occur in statements that have been made in the course of
9 presenting this application to Staff and to the Hearings Officer. The Hearings Officer does not find any
10 ill intent in this variability, but it impairs a clear and reliable understanding of some aspects of the nature
11 and extent of the present asphalt batch plant use which, in any event, is irrelevant to the Application.

12 The Appellant points out that certain information about the concrete batch plant would be available
13 in Department of Geology and Mineral Industries ("DOGAMI") and Department of Environmental Quality
14 ("DEQ") reports the release of which, it asserts, is within Mr. DeYoung's exclusive control. The Appellant
15 raises an inference that he has something to hide from the fact that those reports have not been made
16 available. This inference is also presented in the statement of Terry Smith, a consultant to the Appellant.
17 The Applicant replies that during much of the period of the concrete batch plant operation, Mr. DeYoung's
18 operation was exempt from DOGAMI reporting. Mr. DeYoung in fact did not operate the concrete batch
19 plant on the property, and he does not control whatever reports may exist.¹¹ The Applicant further argues
20 that much of the Mr. DeYoung's operation and, perhaps, the concrete batch plant as well, were
21 unregulated.

22 The Hearings Officer draws neither conclusions nor inferences from the absence of such reports but
23 observes that the information that they might contain would be helpful if it were available.

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26 ¹¹ Mr. DeYoung had an aggregate extraction and crushing operation on the Property. As noted above, the concrete batch plant was conducted by others, under lease from Mr. DeYoung. Record 577.

1 The Batching Process

2 The concrete batching process on the Property required the combination of sand, aggregate,
3 Portland cement and water. The aggregate was washed before it is mixed, hence the presence of a wash
4 plant. The process itself does not involve heat or the inclusion of any petroleum products to the final
5 product. All of the components were imported to one extent or another. The only component material that
6 may not have been imported is the aggregate from Mr. DeYoung's sand and gravel operation adjacent to
7 the concrete batch plant. There is no indication where the requisite water came from, and it, too, may have
8 been imported. It is also possible that it came from Bear Creek which is a part of the Property.

9 The concrete batching process does not require the heating of the components. The record includes
10 statements making it clear that this is a clear distinction between concrete and asphalt batching. *See, e.g.,*
11 the statement of Tom Chasm at Record 538. Some of Mr. Chasm's statements here and elsewhere in the
12 Record are disputed by Terry Smith, an expert for the Appellant. However, this conclusion is not among
13 those.

14 Physical Area

15 Aerial photographs of the site from 1991, 1994, 1996, 2000 and 2001 show a relatively stable area
16 that was in use on the Property. Record 404, 406, 408, 410 and 413. It is not possible to tell, however,
17 how much of the site was in use for the concrete batch plant as distinct from the aggregate operation that
18 was being conducted there by Mr. DeYoung for some of that time. A significant portion of that area was
19 placed into use after 1992, the extent of the look-back period mandated by *Rogue III*. (The Applicant
20 concedes that some of that was an expansion of the verified nonconforming use, and he abandoned and
21 revegetated it in compliance with a Code Enforcement action that followed the Nonconforming Use
22 Decision.)

23
24 Equipment, Structures and Stockpiles

25 It is difficult to get an accurate understanding of the equipment, structures and stockpiles that were
26 in use by the concrete batch plant in 1992. Some of this difficulty is the result of the variability within the

1 statements of each Messrs. DeYoung and Meyer. In general terms, Mr. DeYoung states in a letter of July
2 11, 2013, (the "First DeYoung Letter") that "[t]he amount of equipment/storage located on the subject
3 property in conjunction with the current batching operation appears to be similar to the amount of
4 equipment/storage located on the subject property when [the concrete batch plant] was operating the []
5 batch plant there."¹² Record 578. Twenty months later, on March 12, 2015, during the course of Staff
6 review of the Application, Mr. DeYoung provided another letter that had a much more detailed recollection
7 of what was present during the concrete batch plant use (the "Second DeYoung Letter").

8 "Mr. Meyer asked me to provide you with a letter concerning the concrete batch plant
9 operation that occurred on the subject property throughout the 1990's. The concrete
10 operation included the following:

- 11 1. A concrete batch plant;
- 12 2. A rock crusher;
- 13 3. Sand-screen wash plant
- 14 4. 3 storage tanks that were approximately 6-feet in diameter and at least 30-feet in
15 height;
- 16 5. Various equipment customary with batch plant operation (e.g., trucks, loaders,
17 excavators, bulldozer, etc.);
- 18 6. 2 storage buildings for equipment and supplies;
- 19 7. 6 stockpiles of assorted rock and sand[.]" Record 235.

20 Approximately 3 months later following the hearing on this matter, Mr. DeYoung provided an
21 even more detailed statement dated June 15, 2015, (the "Third DeYoung Letter") specifying that
22 the concrete batch plant had

23 "at least one diesel generator, which was fueled by at least one 500-gallon fuel
24 tank[;]...a 4,000-gallon diesel fuel tank...next to the rock crusher...that serviced the
25 rock crusher as well as loaders, dozers, and trucks[;]...a 150-gallon gasoline fuel tank
26 was located near the wash plant to run a water pump. The concrete batch plant
operation also had an office trailer similar to the size of the office trailer used by
Mountain View Paving [the Applicant's asphalt batch plant]...The configuration of the
concrete batch plant operation, to the best of my recollection from first-hand
observation, is depicted on Exhibit A, attached hereto." Record 559

¹² This compares the equipment used by the concrete batch plant to that in use by the Applicant in 2013- well beyond the look-back period. However, the Applicant makes clear elsewhere that the equipment etc currently on the Property is identical to what was there in 2001.

1 Mr. DeYoung qualified the accuracy of his Exhibit A. "I am not asserting that it was exactly the
2 same as the attached illustration, but it is a very good example of what was there except the concrete batch
3 plant also included three large storage tanks. The storage tanks were approximately 6-feet in diameter and
4 at least 30-feet in height." *Ibid.*

5 His Exhibit A appears at Record 561 ("Exhibit A"). It depicts the site and identifies 13 separate
6 features of the concrete batch plant operation including some of the items set forth in the Second DeYoung
7 Letter, but conspicuously omitting at least one other, the "2 storage buildings". Further, Exhibit A and the
8 Third DeYoung Letter add major features that do not appear in his earlier submittals, most notably, all 3
9 fuel tanks. Also, Exhibit A depicts at least one element that is not detailed in the letter to which it is
10 attached, a "Control Shack." Mr. DeYoung's letters are the Applicant's primary evidence these aspects of
11 the nonconforming concrete batch plant use, and the discrepancies that they contain make it difficult to
12 understand important aspects of the nature and extent of that use: how many fuel tanks were there; how
13 many stockpiles were there; where and how many storage structures there were and whether there was a
14 "control shack"?

15 The Appellant argues that both this recollection and the other specifics Mr. DeYoung provides are
16 not reliable. More precisely, the Appellant states that they are incorrect, pointing to several aerial
17 photographs of the Property taken during the look-back years. "[A] review of the available aerial
18 photographs from 1991-2000 show [*sic*] that none of the photos depict the amount of equipment or
19 configuration of equipment illustrated in Mr. DeYoung's site plan", that is, in Exhibit A. Record 646.

20 The aerial photographs were presented during the course of the Nonconforming Use Decision and
21 resubmitted here. Some of those photographs are indistinct and do not provide a clear understanding of
22 features on the ground to an untrained eye. However, the Appellant employed E. Frank Schnitzer, a retired
23 mine regulator and mine consultant with extensive experience reviewing permit files and "most likely
24 thousands of aerial photographs" as the Lead Reclamationist for DOGAMI. Record 534. Mr. Schnitzer,
25 currently associated with Snow Peak Consultants, LLC, again reviewed the aerials in question as he had
26

1 during the prior application.¹³ He analyzed the aerials and commented on the indistinctness of some of
2 them, which he concluded limits their value. He also distinguishes the value of others that can be
3 magnified successfully. He states:

4 “[A]ll photographs of tax lot 600 from the record were reviewed again with particular
5 emphasis on aerials after 1995....[E]vidence that indicates a portable plant was
6 inconsistently used was not found. Both 1996 and 2000 aerial photographs from
7 DOGAMI (flown June 6th and April 7th respectively), and aerials taken July 24, 2000;
8 August 6, 2000; and July 23, 2001 by the National Aerial Photography Program...all
9 consistently show that large pieces of stationary equipment were not present which
10 would indicate the presence of a portable plant. None of these aerials show the
11 presence of structure large enough to be buildings that could be used for storage,
12 structures which would typically remain on the site even with a portable plant. All of
13 these photos were taken at a time of the year when most mine sites are active.

14 “A 2003 aerial from the record indicates a large piece of stationary equipment on the
15 site which is most likely a rock crusher. A change in the 2005 aerial shows a sediment
16 pond southwest of the rock crusher was removed and converted to stockpiles. This
17 aerial suggests that additional large pieces of stationary equipment were also present
18 and shows smaller images which appear to be silos casting small shadows. The
19 equipment which appears to be present in the 2005 aerial is very similar to the
20 equipment listed in the March 12, 2015 letter from the prior owner that he states was
21 used for the concrete operations. This is the only photo which contains the amount of
22 equipment similar to the March 12, 2015, letter.^[14]

23 “The March 12, 2015 letter from the prior owner states in part that a concrete batch
24 plant operated on the property throughout the 1990s. Photographic and inspection
25 records for the site are not available on an annual basis for the 1990s. The available
26 aerials for the 1990s (flown in 1991, 1994, 1996 and 2000) do not support this
statement. It is unlikely but possible that the photographs and inspections could have
been completed in instances where no site activity occurred or no processing equipment
was present. To further confirm these findings a complete record of annual production
for the site is available and should be used.” Record 534-35.

“DOGAMI-MLRR (Mineral Lands Regulation and Reclamation) possess [sic] historic
records which would independently verify production of aggregate on an annual basis.
I reviewed this DOGAMI file (ID#15-0013) minus the confidential information in
2013....ORS 517.837 is administered by DOGAMI and requires permit holders to file
and annual report of mine activity....Production volumes would normally include the
tonnage of concrete produced.” Record 535.

¹³ In the Nonconforming Use Decision, the Hearings Officer determined that certain aerials did not concern the Property. Either these are different aerials or he was mistaken. These clearly include the Property.

¹⁴ The 2003 and 2005 aerials depict conditions that existed after the asphalt batch plant had begun operation on the Property and beyond the look-back period. They do not contain information regarding the concrete batch plant.

1 None of the aerials reviewed by Mr. Schnitzer has any information regarding the concrete batch
2 plant in 1992. The aerial nearest in time is from 1991, and he concludes from that photograph that no
3 concrete batch plant was on the Property at that moment. It is not possible to conclude anything about the
4 equipment, structures and stockpiles in the critical year from his analysis.

5 Mr. Schnitzer comments on the absence of these additional records, explaining that they remain
6 confidential until released by the operator to protect trade secrets. He discounts the need for any such
7 confidentiality in this matter since Mr. DeYoung's aggregate operation and the concrete batch plant both
8 ceased operation many years ago. His speculation that they have been withheld to prevent the availability
9 of "substantially different [information] than the written correspondence submitted to the county" (*Ibid.*)
10 cannot be confirmed and, as noted above, no conclusion is drawn from the fact that the Applicant chose not
11 to provide those records. The Applicant disputes the existence and availability of such reports in any case.

12 Nonetheless, whatever confirming information they might provide about the amount of concrete
13 that may have been produced on the Property, and the equipment that would have been required to produce
14 it, is not in the record. Mr. Schnitzer concludes, "From my years of experience participating in numerous
15 land use proceedings across the state, reliance on a recollection of one individual without any factual
16 evidence from historic photos, agency records or other data to corroborate the testimony is unusual." *Ibid.*

17 The presence of a concrete batch plant on the site is supported by numerous anecdotal letters from
18 contractors who used or were otherwise familiar with the concrete produced there. The statements of
19 various individuals and construction-related business owners at Record 579-584, 586-590, and 592-595
20 (the "Anecdotal Letters") all describe having direct knowledge of the concrete batch plant during various
21 years between the late 1980s and 2000. Other than for a statement of Mr. Meyer (Record 579), they do not
22 estimate the tonnage of concrete that was produced during that time.¹⁵ These statements go to the
23 existence of the concrete batch plant, but that is not a live issue in this matter. None of them provides any
24 understanding of the equipment, structures or stockpiles that characterized the concrete batch plant.

25
26

¹⁵ Mr. Meyer and Mr. DeYoung both consistently estimate that tonnage to have been at least 40,000 tons per year.

1 Sorting among the statements of Messrs. DeYoung and Meyers, a fairly precise description of the
2 equipment, structure and stockpiles that characterized the concrete batch plant can be developed. There
3 clearly was a rock crusher, a batching machine (that is, a mixer), a sand screen wash plant, various
4 stockpiles of concrete components, an office, and equipment such as trucks, dozers, loaders and other
5 mobile equipment for moving the components around the site. There were one or more fuel storage tanks
6 for the crusher, batcher, the heavy equipment as well as a generator and one or more storage buildings
7 (“cargo containers”) as well (Record 565). Even though there were fuel storage tanks for the generator, it
8 is not possible to conclude how many there were, what were their sizes or where on the site they were
9 located.¹⁶ Exhibit A indicates the presence of a control shack but that is not indicated anywhere else.

10 Traffic

11 There is only anecdotal information concerning the traffic generated by the concrete batch plant.
12 The Anecdotal Letters refer to extensive truck traffic associated with that operation, and Mr. DeYoung
13 states, “It was not uncommon for there to be a line of diesel haul trucks idling on the property waiting for
14 both import and export of material. The traffic was extensive, but it is not quantified.”

15 Roads

16 The roads that served the concrete batch plant are well described and not in dispute. Mr. DeYoung
17 stated that the concrete batch plant depended on two roads. One was on the west side provided access was
18 abandoned in the late 1990s. The other along the east side was constructed prior to 1992 and was used by
19 cement trucks exiting the site. He indicates that the use of the site was very intense because the installation
20 of fiber optic cables in the region depended on concrete slurry from this location.¹⁷ That level of use
21 necessitated a one-way, loop road system to avoid conflicts. Record 559-60.

22 ///

23 _____
24
25 ¹⁶ In one of Mr. Meyer’s statements he details the equipment that he brought to the site in 2001 when he started the asphalt batch
26 plant, including one 500 gallon diesel storage tank, but he does not compare it to what was present for the concrete batch plant
that preceded him on the site.

¹⁷ The use of concrete slurry for the installation of fiber optic cables is supported by several of the anecdotal letters at Record
579-584, 586-590, and 592-595.

1 Employees

2 Determining the number of employees at the concrete batch plant depends on a single estimate
3 made by Mr. DeYoung.

4 "To my recollection, *my gravel pit and the concrete batch plant* employed between two
5 and five full-time employees on the subject property during the period between 1992 to
6 1995. However, the concrete operation depended on independent contractor truckers to
7 move material to and from the subject property. In my estimation, the number of
8 employees on the subject property would have been closer to 30-part time employees or
9 and [sic] equivalent of 15 full-time employees when the operation was busy. Of
course, the volume of batching fluctuated, so the number of employees and independent
contractors servicing the site on any given day also fluctuated." Record 560. Emphasis
added.

10 This appears to be a rough guess, and there is no other evidence of the level of employment. Taking it a
11 face value, the concrete batch plant and the DeYoung gravel operation together required somewhere from
12 "two to five" actual employees and as many as 15 full time equivalent including the independent truckers.
13 The variability in numbers does not indicate a failure of the evidence. Rather, it indicates that employment
14 varied considerably depending on the demand for concrete. However, the manner in which the information
15 is stated, makes it impossible to know how many employees were required by the concrete batch plant in
16 1992 or at any other time during its occupancy of the site.

17 The total did not exceed 15 full-time equivalents including independent truckers for both the
18 concrete and the aggregate operations combined.

19 Risk of Fire and Explosion

20 There is only a limited risk of fire or explosion from concrete batching. According to the
21 Applicant's Terry Smith, the primary risk in that operation is presented by the mobile equipment needed to
22 move components around the site – loaders, dozers, trucks and the like – especially in connection with
23 fueling and storage of fuels. There is no risk of fire or explosion associated with the concrete batching
24 process itself since it only involves sand, aggregate Portland cement and water. Record 669.

25 ///

1 Airborne Pollutants from the Process

2 There is ample evidence to establish that the concrete batch plant produced dust and other airborne
3 elements as a byproduct of its process. It produced exhaust from the gasoline and diesel fueled equipment
4 and dust from the travel surfaces, and it produced silica dust which, as the Applicant states, “posed a
5 hazard to residents’ eyes, skin and respiratory tracts. Record 700. These risks are confirmed in a
6 publication of the federal Occupation Safety Health Administration regarding concrete production. That
7 publication also indicates that “[s]ilica dust can lead to lung injuries including silicosis and lung cancer.”
8 Record 422.

9 Engine exhaust and dust from travel surfaces is also present in the asphalt batch plant operation.
10 However, those sources do not produce silica dust.

11 Hours of Operation

12 There is no information in the Record concerning the hours of operation of the concrete batch plant
13 which makes it impossible to compare that feature of the asphalt batch plant, and it constitutes a significant
14 limitation on the ability to fully understand the nature and extent of the preceding nonconforming use.
15

16 Intermittency of Operation

17 Mr. DeYoung’s albeit imperfect recollections and the Anecdotal Letters collectively constitute
18 substantial evidence to support the conclusion that there was a concrete batch plant on the Property some of
19 the time during these years. This conclusion squares with the intermittent use indicated in Mr. Schnitzer’s
20 analysis of the aerial photographs and the DOGAMI reports.

21 Mr. Schnitzer’s experience qualifies him as an expert in the interpretation of site aerial
22 photographs. He is also extensively familiar with the nature and content of DOGAMI reports. His
23 statement recounts having analyzed only one aerial that is even close to this date – 1991 – and his
24 conclusion is that there was no concrete batch plant operating on the property at the time that this
25 photograph was taken.
26

1 There is no direct evidence whether the concrete batch plant was actually present on the Property in
2 1992, but Mr. Schnitzer's evidence makes clear that the concrete batch plant did not occupy the Property
3 full time during the period of 1988 through 2000. What his evidence does establish, though, is that even if
4 the concrete batch plant was operating in 1992, it had not been there in 1991, at least at the time of that the
5 aerial from that year that Mr. Schnitzer analyzed. The concrete batch plant is seen as having been
6 intermittent on the Property. It may have been there much or most of the time, but it was not there all of
7 the time.¹⁸

8 The intermittency of the concrete batch plant is clearly established by statements made by Mr.
9 DeYoung and the authors of some of the Anecdotal Letters. The First De Young Letter states,

10 "In 2001 I submitted an affidavit with the planning department concerning the historic
11 uses occurring on the subject property. In that affidavit I used the word 'intermittent'
12 concerning the batching use. As I have explained to [the Applicant's] attorney and
13 everyone else who has asked me, I used the work [*sic*] 'intermittent' to mean that most
14 of the batch operators and especially Best Concrete [the operator of the concrete batch
15 plant on the Property from 1988 until 2000] did not batch in the winter months
(December, January; sometimes November and February). Also, *it was not unusual* for
16 Best Concrete to move their batch plant to a different site for a month or two.
17 However, I never remember the Best Concrete batch plant being gone for more than 90
18 days." Statement of Mr. DeYoung of July 11, 2013 at Record 578. Emphasis added.

19 2001 was the year in which the Applicant began his asphalt batch plant use, at most a year
20 following the cessation of the concrete batch plant use. The nature and character of the long history of
21 concrete batch plant on the Property - 12 years in all - would have been fresh in Mr. DeYoung's mind
22 then. Also, his recollection is confirmed by one of the Anecdotal Letters. "I have no recollection of the
23 batching operations being discontinued during the aforementioned period [1991 and 2001] except during
24 the winter months." Statement of Dan May at Record 595. Mr. May may not have been aware that "it was
25 not unusual for Beset Concrete to move their batch plant to a different site for a month or two," as Mr.
26 DeYoung was. Elsewhere, Mr. DeYoung states, "The only exception [to the consistency of the concrete
batch plant's presence] being the few occasions they temporarily moved the main batch plant to another

¹⁸ Mr. Schnitzer's review of aerials from later years, specifically from 1994, 1996 and 2000, indicates that the concrete batch plant was not present at those moments either.

1 site for a short time for big projects.” Second DeYoung Letter at Record 559. Elsewhere, he stated that
2 those absences were never for more than 90 days at a time. What had been a frequency of “being not
3 unusual” in July 2013, had become only “the few occasions” of absence about 2 years later.

4 It is not necessary to resolve the inconsistency, but the earlier characterization of absence from the
5 Property having been “not unusual” is taken as the more accurate since it was earlier in time, and it was
6 directly related to the affidavit from 2001 in which the concept of intermittency had first been articulated.
7 In the final analysis it is a distinction without a difference because what is important is that the concrete
8 batch plant was not consistently present and operating on the Property.

9 In sum, the concrete batch plant in 1992 was a part of an on-going concrete batch plant use that was
10 present on the Property perhaps most of the time but which also was moved with some frequency to other
11 locations and which in any event did not ever operate during December and January and, in some years,
12 November and February.

13 **Nature and Extent Summary and Determination of Adequacy of Descriptions**

14 Articulating a complete “reasonably precise” description of the nature and extent of the concrete
15 batch plant use in 1992 is something of a challenge. The Applicant has been forced to rely on personal
16 recollections of facts and details that are now 23 years old, and the accounts have been provided by those
17 with aging memories. The result has left the Record with conflicting or at least variable details. Further, it
18 is difficult at times to determine the actual nature and extent of the use in 1992 with the precision required
19 by *Rogue III*. This discussion reaches as precise a description of the nature and extent of the concrete
20 batch plant that substantial evidence in the Record allows.

21 *The Batching Process*

22 The concrete batching process required the combination of sand, aggregate, Portland cement and
23 water. The aggregate was washed at the wash plant on site before it was mixed. It was a cold process, and
24 it did not incorporate any petroleum products to the final product.
25
26

1 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
2 asphalt batch plant.

3 Physical Area

4 Mr. DeYoung's recollection of the area that the concrete batch plant occupied is depicted in his site
5 map at Record 561. His statements leave some confusion regarding the extent to which his own aggregate
6 operation utilized a portion of that area, but there is no controverting evidence. The concrete batch plant is
7 taken as having occupied the entire area in 1992, that is, the area that appears at Record 561.

8
9 Equipment, Structures and Stockpiles

10 The details of this aspect of nature and extent are analyzed above. The Hearings Officer concludes that
11 there is substantial, though not in every way clear and complete evidence that the equipment, structures and
12 stockpiles that characterized the concrete batch plant use are the following:

- 13 • a rock crusher
- 14 • a batching machine (that is, a mixer)
- 15 • a wash plant and sand screen
- 16 • various stockpiles of concrete components
- 17 • an office
- 18 • equipment such as trucks, loaders and other heavy equipment for moving the components around
the site
- 19 • one or more diesel and gasoline storage tanks for the crusher, batcher, the heavy equipment
- 20 • a gasoline storage tank
- 21 • a generator
- 22 • one or more storage buildings or cargo containers.

23 There may have been more on the concrete batch plant site, but the Record does not allow certainty about
24 what else there may have been.

25 The Applicant's limited and varying descriptions of these aspects leaves unknown such elements as
26 the size, number and location of fuel storage tanks, the size number and location of storage buildings and
the presence or absence of a "control shack." The absence of precision in these respects provides an
inadequate basis for comparison with the Applicant's asphalt batch plant use of the site.

1 The description of the equipment, structures and stockpiles associated with the concrete batch plant
2 does not meet the requirements set forth in *Spurgin* and *Tykla*.

3 Roads

4 There were two roads that served the concrete batch plant in 1992, one along the western edge and
5 one along the eastern edge of the Property. The provided a loop circulation system so that entering
6 vehicles used one road and exiting vehicles used the other. The Record also establishes that one of these
7 roads was ultimately closed, but that that occurred after in the late 1990s. Record 559.

8 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
9 asphalt batch plant.

10
11 Employees:

12 The concrete batch plant together with the DeYoung gravel operation employed two to five full
13 time individuals. The concrete batch plant also relied on numerous independent truckers to import material
14 and take the concrete to consumers. The total employment of the operations was 15 full time equivalent
15 positions.

16 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
17 asphalt batch plant.

18 Risk of Fire and Explosion

19 The risk of fire and explosion from the concrete batch plant was created by the fueling and
20 operation of the mobile heavy equipment used to import and move the aggregate and other ingredients of
21 the final product. No risk of fire and explosion was created by the actual batching of concrete.

22 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
23 asphalt batch plant.

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26 ///

1 Airborne Pollutants from the Process

2 The airborne discharge from the concrete batch plant use is dust from the use of the roads and silica
3 from the batching process. Silica is associated with silicosis and lung cancer.

4 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
5 asphalt batch plant.

6 Hours of Operation

7 Other than an indication that the concrete batch plant operated at night at times, the Record
8 provides no information regarding the hours of operation or the days on which the concrete batch plant
9 operated in 1992. Generally, there were periods when it was extremely busy, but this is not a quantitative
10 measure.

11 This description does not provide the basis for a meaningful comparison to the Applicant's asphalt
12 batch plant.

13
14 Intermittency of Operation

15 The concrete batch plant ceased operating consistently every November and December. In some
16 years it was not there in January or February, depending on the weather. Additionally, the concrete batch
17 plant left the Property from time-to-time and relocated elsewhere to serve large jobs. Although the
18 frequency of those absences cannot be determined well, absence from the Property was somewhere
19 between occasional and not unusual. The concrete batch plant occupied the site consistently at all other
20 times, including during 1992.

21 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
22 asphalt batch plant.

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1 **Alteration of Use**

2 Applicable Criteria and LUBA Guidance

3 Section 11.2.1(A) governs the analysis of whether an alteration of a verified nonconforming use is
4 allowable. It provides:

5 “An alteration of a nonconforming use may include a change in the use that may or may
6 not require a change in any structure or physical improvements associated with it. An
7 application for an alteration of a nonconforming use must show either that the use has
8 nonconforming status, as provided in Section 11.8, or that the County previously issued a
9 determination of nonconforming status for the use and the use was not subsequently
10 discontinued as provided in Section 11.2.2. A nonconforming use, once modified to a
11 conforming or less intensive nonconforming use, may not thereafter be changed back to
12 any less conforming use.

13 “A) *Change in Use*

14 Applications to change a nonconforming use to a conforming use are processed in
15 accordance with the applicable provisions of the zoning district. (See Chapter 6.)
16 Applications to change a nonconforming use to another, no more intensive
17 nonconforming use are processed as a Type 2 review. The application must show that the
18 proposed new use will have no greater adverse impact on the surrounding neighborhood.”

19 The asphalt batch plant follows and alters the partially verified concrete batch plant nonconforming use.
20 To the extent that that verification was incomplete, that defect has been corrected by the analysis of nature
21 and extent above – at least with respect to enough aspects of the concrete batch plant to complete an
22 alteration analysis with respect to enough elements to reach a competent decision. What remains is to
23 determine whether the asphalt batch plant is “no more intensive” and whether it “will have no greater
24 adverse impact on the surrounding neighborhood.”

25 LUBA distinguishes between adverse impacts and nature and extent of nonconforming uses.

26 “[T]he existence and extent of adverse impacts has little direct bearing on the task of verifying the scope
and or intensity of a nonconforming use, although it has considerable bearing on whether an alteration to a
nonconforming use can be approved....” *Leach v. Lane County*, 45 Or LUBA 580, 608 (2003).

“Evaluating increases or decreases in an adverse impact from a putative nonconforming use, like noise,
may be relevant in approving or denying an alteration or expansion of a nonconforming use,” (*Ibid.* at 601)

1 but, as the Applicant asserts, "it is not essential to verification of the nature and extent of the
2 nonconforming use." Record 692.

3 Adequately describing the nature and extent of a nonconforming use provides the baseline of
4 intensity of use and of adverse impacts for determining whether any feature occasioned by the altered use
5 is more intense or presents a greater adverse impact. If the altered use is more intensive than the prior
6 nonconforming use, it cannot be approved. Similarly, any adverse impact which is found to be greater -- or
7 not to have been presented by the prior nonconforming use -- deprives the altered use of approval.

8 At least three aspects of the asphalt batch plant use fail against these criteria: the level of
9 employment, the possibility of fire and explosion, and the year-round operation of the asphalt batch plant.

10 It is important to understand the significance of the extent to which neighbors of the asphalt batch
11 plant have been aware of possible adverse impacts. There is substantial evidence to establish that when the
12 asphalt batch plant started operation in 2001, none of the neighbors noticed any change. They were not
13 aware of any greater intensity of use or any increase in the impacts by virtue of the change in use.
14 However, Section 11.2.1(A) does not limit offending features exclusively to those of which the
15 surrounding neighbors are actually aware. The section provides only that the impact must be present.¹⁹

16 Consider the risk of explosion. It is simply not reasonable to conclude that that risk is not adverse
17 to the neighborhood *until* an explosion occurs. Similarly, if an altered nonconforming use presents a new
18 risk of the release of infectious agents (a risk that is not indicated here), Section 11.2.1(A) would not
19 preclude a finding of an increased adverse impact if that risk had not yet matured and resulted in infections
20 in the surrounding neighborhood. A finding of no increase in adverse risk in the face of such a threat
21 would essentially neuter the protection that this provision clearly is intended to assure.

22 LUBA considered a very similar circumstance in *Bretea/Aviation, Inc. v. Benton County*, 22 Or.
23 LUBA 242 (1991). In *Bretea* the county permitted as an expansion of a nonconforming use the installation
24 of two 12,000 gallon above ground aviation fuel tanks in a fuel tank farm adjacent to commercial rye grass

25 _____
26 ¹⁹ Certainly some impacts do not exist in the absence of awareness, for example noise or odors. However, some risks may
present nothing that is actually perceived before the risk matures, that is, there may be no awareness of the impact before some
event or condition that results from the risk presents itself.

1 fields that were not only flammable but were burned periodically in the production of grass seed. The tank
2 farm already contained two similarly sized tanks of aviation fuel, but those tanks were 50 feet farther away
3 from the nearest field. The newly approved tanks would have been within only 20 feet of that field.

4 The applicable criteria there were identical to Section 11.2.1(A), at least to the extent that the
5 expansion could impose "no greater adverse impact on the surrounding neighborhood," the criterion on
6 which LUBA decided *Breteia*.²⁰ In considering an appeal of a county planning commission decision that
7 had approved the expansion of the nonconforming use, the Benton County Commissioners applied the "no
8 greater adverse impact" criterion. They reasoned,

9 "The neighborhood includes the Corvallis Municipal Airport and adjacent fields. There
10 has been virtually no adverse impact of the existing tanks on the neighborhood. The
11 main impact of the tank farm, as it exists or after expansion, is the potential for fire or
12 explosion. There may never be an adverse impact on the neighborhood." Slip op at 10-
11.

12 LUBA analyzed the Commissioners analysis this way:

13 "The findings also recognize that the proposed expansion will double the amount of
14 flammable fuel stored above ground in the Approach Safety Zone, adding two 12,000
15 gallon above ground tanks and a containment structure to the existing fuel farm. Under
16 the approved expansion, the fuel storage facility will be significantly closer to a field
17 which is periodically burned. In such circumstances, the proposed expansion will
18 increase the potential for fire and explosion as a matter of law. We believe this
19 constitutes a "greater adverse impact on the neighborhood" within the meaning of ORS
20 215.130(9) and BCDC 53.315(1) and, therefore, we reverse the county's decision."
21 Slip op at 12.

22 Simply put, the presence of a serious potential risk that is greater than the same risk in the verified
23 nonconforming use constitutes a greater adverse impact. Put another way, an increased risk of serious
24 occurrence *is* an adverse impact. In *Breteia*, the risk was fire and explosion. Although *Berteia* does not
25 consider whether the addition of an entirely new risk by an altered as opposed to an expanded use is
26 similarly a "greater adverse impact," LUBA's logic and reasoning can be extended to compel the
27 conclusion that it is.

28 These principles are applied following the guidance of *Parks*.

29 ²⁰ There, as here, the county's ordinance mirrored ORS 215.130(9) in this regard.

1 The Surrounding Neighborhood

2 The Property and the asphalt batch plant lie in the 100-year floodplain of Bear Creek, with
3 Interstate 5 lies to their immediate east. The 2.46 acre Lyn Newbry Park, owned and operated by the City
4 of Talent, is very closely to the north. It is described on that city's website as a destination park and a
5 stopping point along the Bear Creek Greenway Trail, a regional recreational trail that stretches many miles
6 from Ashland to Central Point and beyond. The park offers parking, picnic tables and areas to view
7 wildlife. The Bear Creek Greenway and Trail lie adjacent to and immediately west of the Property and
8 plant. Bear Creek itself is immediately to the west of the Greenway. To the west of Bear Creek and
9 approximately 250 feet from the asphalt batch plant site is Mountain View Estates, a mobile home park of
10 more than 200 units.²¹

11 The surrounding neighborhood contains diverse elements including a major transportation facility,
12 a year-round stream that supports salmon and steelhead runs and other wildlife, a park with parking,
13 picnicking and wildlife viewing opportunities, a portion of a regional recreational greenway and trail and
14 more than 200 residences in a close by mobile home park.

15 The decision turns to a comparison of the nature and extent of the concrete batch plant and asphalt
16 batch plant uses and whether the altered asphalt batch plant use constitutes a more intensive use and/or
17 presents greater adverse impacts. For purposes of this decision, the dates of the comparative period are
18 1992 and 2001. It is the character and impacts of the asphalt batch plant in 2001, the year in which the
19 conversion to asphalt batching occurred, which determine whether the use meets the criteria of Section
20 11.2.1(A). Impacts that may have occurred since then go to whether the asphalt batch plant use has been
21 further altered, a circumstance that would require another nonconforming use alteration application. Such
22 impacts are not considered in this decision.

23 The Batching Processes

24 The differences between concrete and asphalt batching are described in an affidavit provided by the
25 Appellant from William Schoenleber (the "Schoenleber Affidavit"). His qualifications to make the
26

²¹ Residents as well as the owner of Mountain View Estates are vigorous opponents to the Application.

1 comparison, including 39-plus years in the asphalt and paving industry in Jackson County, are well
2 established in that affidavit. He states,

3 "Asphalt verses concrete batching are [sic] significantly different in function in both the
4 equipment and the mixing process. Asphalt requires petroleum based products that
5 must be misted [sic]²² and heated to over 300 degrees. Concrete contains no petroleum
6 products and is not heated. The specialized asphalt batching equipment is significantly
7 different than any concrete mixing equipment.

8 ...
9 Concrete requires clean washed rock that while wet produces minimal dust during the
10 mixing operation. Asphalt requires dry rock to minimize the energy required to heat
11 the mix and creates more dust.²³ Asphalt production requires the addition of petroleum
12 products and heat creating strong asphalt odor and fumes not present in a concrete mix.
13 Any emissions of particulates create a [sic] oil based dust or soot that can travel long
14 distances depending on the winds." Record 447.

15 This description is partially confirmed by another of Appellant's witnesses, Mr. Chasm. He states,

16 "As the aggregate is not generally washed and if not handled properly can generate dust. [sic] The
17 aggregates are heated to 340 or more degrees then blended with heated asphalt oil...." Record 538.²⁴

18 Some of Mr. Chasm's statements here and elsewhere are strongly disputed by the Applicant. However,
19 this conclusion is not among those.

20 The distinction between concrete and asphalt batching is considerable. Not only does asphalt
21 batching present a different process, it also requires different equipment and ingredients – e.g., heaters and
22 petroleum products.

23 The initiation of an asphalt batch plant in 2001 was an alteration of the concrete batch plant
24 nonconforming use.

25 ///

26 ///

²² The statement may in fact mean "mixed."

²³ There is substantial evidence to establish that the asphalt batch plant uses specialized equipment to limit dust emissions. Further, the air quality profile of the asphalt batch plant is regulated by DEQ, and there is no evidence that asphalt batch plant has ever failed to comply with the applicable emissions standards. Finally, the Record has substantial evidence from which to conclude that the commencement of the asphalt batch plant use in 2001 was not noticed, much less worse, in this regard than the concrete batch plant.

²⁴ The Hearings Officer observes that some of Mr. Chasm's wording is rich with emotional characterizations and some hyperbole, and he provides no information to qualify him to make numerous conclusions regarding the possible health impacts of asphalt batching. The hyperbole is disregarded as are the unqualified statements on public health.

1 Physical Area

2 The physical area occupied by the asphalt batch plant is as shown on the Applicant's site plan at
3 Record 565 (the "Applicant's Site Plan"). Based on this document, it is identical to that determined to
4 have been the physical area of the concrete batch plant. The Applicant's Site Plan is dated "as of June 8th,
5 2015[,] but the Applicant specifically states, "The current configuration of equipment and structures on
6 the subject property are the exact same amount of equipment and structures that I brought to the property in
7 2001, and in the exact locations that the equipment and structures were located in 2001, with the sole
8 exception of the office... which was previously located closer to the creek and moved to its current location
9 in 2014." Record 563.

10 The current asphalt batch plant is very similar in extent of the area that was in use to that used by
11 the concrete batch plant based on the DeYoung Site Plan.²⁵

12 The physical area occupied by the asphalt batch plant in 2001 is found to be that depicted in the
13 Applicant's Site Plan, and it is consistent with that occupied by the concrete batch plant.

14 Equipment, Structures and Stockpiles

15 The equipment, structures and stockpiles of the asphalt batch plant is found in the Applicant's Site
16 Plan which identifies the following:

- 17 • a scale shed
- 18 • an office
- 19 • a porta potty
- 20 • an asphalt plant which is taken to mean the heating and mixing equipment and the storage tanks for
the asphalt oil that is mixed with aggregate
- 21 • an asphalt control shack
- 22 • a generator
- 23 • a 500 gallon gasoline tank for the generator
- 24 • gravel bins and a ramp
- 25 • 3 cargo containers, presumably for storage
- 26 • a rock crusher and
- an unspecified number of stockpiles

25 ²⁵ Additionally, in response to the ruling in the Nonconforming Use Decision and a subsequent county code enforcement action,
26 the Applicant abandoned and revegetated a significant area into which he had unlawfully expanded his operation over the years.
That action brought the physical area occupied in 2001 down to the size and extent of the concrete batch plant use.

1 This compares closely to the equipment, structures and stockpiles that characterized the concrete batch
2 plant. However, the partial incompleteness of the description of these elements in the concrete batch plant
3 make a reasonably precise comparison is difficult.

4 It cannot be known whether the asphalt batch plant represents a more or less intensive use with
5 regard to the size, number and location of fuel storage tanks, the size number and location of storage
6 buildings and the presence or absence of a "control shack."

7 Traffic

8 The Record supports the conclusion that the Applicant's use of the Property for asphalt batching
9 generates less traffic than had the concrete batch plant. Mr. DeYoung states "the annual tonnage produced
10 in conjunction with the concrete operation was, at a minimum, 40,000 tons per year, which is far more
11 intensive than the current [asphalt] operation." Record 236. The annual reports filed by the Applicant with
12 DEQ contain his tonnage production, and they confirm Mr. DeYoung's comparison, specifically for 2001.
13 In that year the asphalt batch plant produced 6,492 tons over the 6-month period of his operation during
14 that year. If that were extended to annual production, it would equal only 12,984 tons or a bit more than
15 one-quarter of the concrete production.

16 Of necessity, the 40,000 tons of concrete batch plant production required substantially more truck
17 and other traffic to import aggregate, sand and Portland cement to produce 40,000 tons of cement than the
18 asphalt batch plant required for 12,986 tons in 2001. Similarly, the need to transport that much tonnage to
19 job sites also generated far more traffic. Although it is not possible to quantify the actual traffic generated
20 by the asphalt batch plant in 2001, it clearly was less than that generated by the concrete batch plant.

21 The amount of traffic generated by the asphalt batch plant in 2001 is not an alteration of the
22 concrete batch plant use.

23 ///

24 ///

25 ///

1 Roads

2 The road system required and utilized by the asphalt batch plant in 2001 (and presently) is more
3 limited than that was used by the concrete batch plant 1992. It does not constitute an increased intensity of
4 use or a greater adverse impact.

5 The road system used by the asphalt batch plant in 2001 is not an alteration of the concrete batch
6 plant use.

7 Employees

8 The concrete batch plant combined with the DeYoung aggregate operation required 2-3 full-time
9 employees and enough additional independent truckers to bring the full-time equivalency up to 15 in busy
10 periods. The Applicant states that the asphalt batch plant "employs 12-15 full-time employees" and that
11 "[t]ruck traffic depends on the volume of asphalt produced, which fluctuates with the season, state of the
12 economy, and development." Record 563.

13 The Applicant appears to separate his actual employees from the independent truckers, and the
14 asphalt batch plant is taken to employ more people than its predecessor. The difference between the
15 roughly 3 full-time employees of the concrete batch plant and the 12 to 15 full-time employees of the
16 Applicant is significant and indicates a more intensive use of the Property. Even if the production tonnage
17 of the asphalt batch plant is less than that of the concrete batch plant, the number of employees itself
18 implies that the former constitutes a more intensive use of the site. In light of this, whether the number of
19 independent truckers required for the asphalt batch plant is greater than that required for the concrete batch
20 plant is not important. The asphalt batch plant use is more intensive without reference to that statistic.

21 The asphalt batch plant is a more intensive use than the concrete batch plant.

22
23 Risk of Fire and Explosion

24 The parties are in conflict about whether there is a risk of fire and explosion presented by the
25 asphalt batch plant, the extent of that risk and, importantly, whether a similar risk was presented by the
26 preceding concrete batch plant. There is substantial evidence from which to conclude that asphalt batching

1 does present a risk of fire and explosion that was not present in the concrete batching. In 2011 the
2 American Federation of State, County and Municipal Employees published a "Health & Safety Fact Sheet"
3 on asphalt production. Record 416-421 (the "AFSCME Report"). "There are two main hazards associated
4 with asphalt: fire and explosion hazards and [h]ealth hazards associated with skin contact, eye contact,
5 and/or inhalation of fumes and vapors." Record 416. Of the former risk it states, "Most of the fire and
6 explosion hazard associated with asphalt comes from the vapors of the solvent mixed into the asphalt, not
7 the asphalt itself. The hazard is determined by the flammable or explosive nature of the solvent used and
8 how fast it evaporates." Record 417.

9 The fact sheet calculates the flashpoint of three different types of asphalt: rapid-curing asphalt,
10 medium-curing asphalt and slow-curing asphalt. Even slow-curing asphalt, the least volatile of the three
11 types, has a flashpoint of "over 250° F." *Ibid.* The Applicant stated in a February 27, 2015, affidavit, "d)
12 The mixture then goes into a dryer, [*sic*] where the rock is heated to 340 degrees, and then discharged onto
13 an elevator. e) The mixture is then placed in a mixing chamber, [*sic*] where oil is added and then deposited
14 into the truck bed." Record 228. Elsewhere, the Applicant states that the asphalt oil itself is heated before
15 being mixed with the rock. Record 563. The Applicant also states here, "Because the process is physically
16 different, the risk of overheating is less in my plant than it is at Knife River's plant" which is also in
17 Jackson County. The fact that the risk at the Applicant's plant is relatively lower than that at another plant
18 does not support a conclusion that there is not a risk of fire or explosion at his facility.

19 The Applicant provided Terry Smith, a licensed civil engineer with extensive experience in asphalt
20 batching, who states,

21 "In my estimation, based on my knowledge and experience, there is no greater risk of
22 fire in and [*sic*] asphalt batch plant than in a concrete batch plant. The burner involved
23 in an asphalt plant does not create a risk of fire. The best evidence of that is the lack of
24 any fire ever occurring at the [Applicant's plant].^[26] Fire and explosions at asphalt and
25 concrete batch plants are *most often caused* by supporting equipment such as loaders
26 and refueling stations. Those risks would be the same at a concrete or an asphalt batch
plant." Record 669. Emphasis added.

²⁶ This is precisely the same reasoning that was rejected in *Bertea*.

1 The fact that the Applicant's plant has not experienced a fire or explosion is irrelevant under *Berteau*, and
2 the conclusion that fire and explosions at both asphalt batch plants and concrete batch plants "are most
3 often caused by supporting equipment" begs the question of whether the asphalt batching process itself
4 presents an increased risk.

5 The Applicant also provided a letter from J. D. Zilman, Sales Manager of Albina Asphalt, a
6 company that supplies asphalt manufacturers. Mr. Zilman states that Albina Asphalt "currently suppl[ies]
7 [the Applicant] with the paving grade asphalt used to make hot mix for your Southern Oregon market."
8 Record 659. He continues, "The only paving asphalts ever supplied to [the Applicant's plant] by Albina
9 Asphalt are AR-4000 (obsolete) PGSB-22 and PG64-22....[T]he flash point for these products is over
10 400F....[The Applicant's] plant typically operates below 352 F." Record 660. According to the Applicant,
11 he heats his asphalt mix to 340° F.

12 What the Applicant *typically* does at the asphalt batch plant is not dispositive of the concern.
13 Typical processing techniques and temperature are not hard restrictions. They may change over time, and
14 they may not be followed consistently in any event. "Typical processing techniques" are a manner of
15 operating – a type, literally. There is nothing to limit the Applicant to that type and, as indicated below in
16 the Schoenleber Affidavit below, processing temperature itself is not the only consideration. Further, Mr.
17 Zilman's statement is limited to "hot mix" production, but the Applicant also makes cold mix which
18 presents a greater risk of fire.

19 The Appellant effectively challenges the Zilman statement with several sources, including the
20 Schoenleber Affidavit which states,

21 "The mixing chamber for asphalt or concrete requires a diesel generator to power the
22 mixer. In addition to this fuel that would be on site for either operation, asphalt
23 requires significant additional fuel to heat the mix plus the asphalt oil additive. The
24 presence of 10,000 plus gallons of diesel fuel combined with the asphalt equipment
25 heating chamber at 300 plus degrees creates a substantial hazard risk of fire or
26 explosion not present in concrete mixing.

...

26 "[The Applicant also] produces 'cold mix' asphalt used for pot holes, etc. that does not
harden like traditional asphalt. This 'cold mix' is heated like standard asphalt but is

1 manufactured by adding diesel directly into the mixing chamber. 'Cold mix' is
2 extremely volatile when produced; plants in Klamath Falls and in Medford had fires
and explosions in 2007 and 2009 respectively that closed those plants."²⁷ Record 448.

3 The Record includes evidence of an even more, albeit fairly limited recent fire and explosion at
4 another asphalt batch plant in Jackson County. As reported in the Medford Mail Tribune on January 29,
5 2015,

6 "An explosion at the Knife River Corp. aggregate plant in an industrial park in Central
7 Point blew the top off an asphalt tank and seared nearby power lines....Neighbors said
8 residences on the east side of Blackwell Road lost power shortly before they noticed
smoke drifting from the facility...."The fire was in a tank that holds liquid asphalt,"
[according to a Knife River spokesman]. Record 429-30.

9 The Hearings Officer finds that an asphalt batch plant creates three distinct risks of fire and
10 explosion. One risk relates to the loaders, dozers, trucks and other mobile equipment that is used on site.
11 This risk is similarly present in the batching of concrete. It does not constitute an increased risk or a
12 greater adverse impact.

13 A second risk is presented by the presence of fuel stored at the plant site that is needed for the
14 heating and the batching equipment. This risk is also present at a concrete batch plant, but because of the
15 need to generate heat for the asphaltting process, there is more fuel present for the asphalt batch plant. This
16 stored fuel is an increased risk.

17 The third risk of fire and explosion is the batching process itself. This risk is unique to asphalt
18 batching and is presented by the equipment and ingredients and the heat particular to that process. The
19 possibility and extent of that risk are described by the Schoenleber Affidavit and the AFSCME Report, and
20 its reality-in-fact is confirmed by the fires and explosions noted in that affidavit, referenced in the
21 Applicant's 2011 statement and reported in the 2015 newspaper article.

22 The Applicant argues that there is no risk that a fire would escape the plant. Citing the fact that the
23 fire and explosion at the Knife River plant was contained there, the Applicant concludes, "Even if the
24 Hearings Officer accepts that the asphalt batch plant poses a risk of fire and explosion, because of the
25

26 ²⁷ The Applicant also referenced these two events in a 2011 letter at Record 339.

1 configuration of the asphalt batch plant, any harm would be limited to the plant itself and would not pose
2 any danger to the neighboring community." Record 708.

3 The Applicant offers no evidence to support this conclusion. If there were a significant explosion
4 there, nothing supports a conclusion that the concussive force would not affect people on the adjacent
5 recreational trail or the vehicles on the adjacent Interstate Highway or the nearby residents of the Mountain
6 View Estates. Similarly, there is no evidence upon which to conclude that the products of combustion
7 from a significant fire would not impose an adverse impact on nearby residents. The Applicant's statement
8 is unsubstantiated.

9 There is substantial evidence upon which to find that this is a new and different risk than that
10 present in concrete batching. It is also risk that is additional to the risk of fire and explosion related to
11 loaders and other mobile equipment that is present in both processes.

12 This conclusion is not dependent on the year in which the asphalt batch plant commenced
13 operation, 2001. Other adverse impacts are dependent on a comparative analysis of how the concrete batch
14 plant affected the surrounding neighborhood in relation to the asphalt batch plant at the time it began
15 operating. In the case of this exposure, it is present at all times that asphalt batching is being conducted,
16 that is, it is a constant risk. It was certainly present in 2001 as it has been ever since.

17 Since it is a new risk, it is an increased risk in comparison to the nonconforming concrete batch
18 plant. Under *Bertea* the risks of fire and explosion related to the fuels, the heat and the volatility of the
19 petroleum products necessary for asphalt batching constitute a greater adverse impact on the surrounding
20 neighborhood.

21 Airborne Pollutants from the Process

22 The AFSCME Report details the gaseous discharge of asphalt processing as including benzene,
23 dioxane and toluene, depending on the particular solvent that is used. Record 419. Mr. Chasm adds
24 "formaldehyde and benzene, as well as gases containing carbon monoxide, sulfur dioxide, [and] nitrogen
25 oxides" to these. Record 652. At least some of these are malodorous as well as dangerous compounds, but
26 there is nothing in the record to quantify the risk that they may pose to the surrounding neighborhood.

1 The Record has no evidence to demonstrate that any of these compounds were detected by the
2 residents of Mountain View Estates or anyone else in 2001. To the contrary, one resident reports not
3 having been aware of the asphaltting process in 2001. Record 222. Another states that he was the manager
4 of that community from 2006 until 2012 and indicates, "From time to time there would be an asphalt odor
5 in the air but nothing significant. Specifically, I do not recall ever receiving a complaint from any of the
6 owners...concerning the asphalt batch plant..." Record 657.

7 There is substantial evidence to support a finding that the gaseous discharges from asphalt batch
8 plant did not constitute an increased adverse impact on the surrounding neighborhood when it began in
9 2001.

10 Hours of Operation

11 The Applicant states that the asphalt batch plant "generally operates between the hours of 6:00 a.m.
12 until 4:30 p.m." and that it operates for extended hours when it has a state contract. The Applicant adds
13 that he generally does not take such contracts to avoid "firing the plant at night and bringing heavy truck
14 traffic into the area..." Record 563. The Applicant does not indicate how these hours relate to those he
15 maintained in 2001. However, the Record is clear that his asphalt production as recently as 2011 is
16 significantly larger than the 2001 production – 17,049 tons versus 12,984 calculated on an annual basis
17 (Record pages 609 and 638), and it is inferred that his hours of operation in 2001 could not have exceeded
18 those he currently has.

19 The Applicant's limiting of the extent to which he operates during nighttime hours benefits the
20 surrounding neighborhood, but it is not necessarily a reduction from nighttime use by the concrete batch
21 plant which, Mr. DeYoung indicated, occurred from time to time.

22 The absence of any information regarding the daytime hours of operation of the concrete batch
23 plant makes it is impossible to compare this aspect of asphalt batch plant operations with the concrete batch
24 plant. This limitation is a failure of an adequate description of the nature and extent of the concrete batch
25 plant.

26 It is not known whether the Applicant's hours of operation constitutes a more intensive use.

1 Intermittency of Operation

2 There is no evidence in the Record indicating that the asphalt batch plant ever leaves the Property
3 or that it ceases operation at any time during the calendar year. To the contrary, there is specific evidence
4 that the asphalt batch plant did *not* cease operation in November and December of 2001. The Applicant set
5 up the asphalt plant in March or April of that year and later filed a DEQ report for Asphaltic Concrete Plant
6 for that year's operation. That report details production on a month-by-month basis and establishes that the
7 Applicants asphalt batch plant produced asphalt in *every* month from June through December in 2001.
8 Record 609.

9 The continuing occupancy and asphalt production on the Property in November and December of
10 2001 is a more intensive use than had characterized the concrete batch plant in prior years, including 1992.

11 **Alteration Determination**

12 The Applicant's effort to demonstrate that the asphalt batch plant is an allowable alteration of the
13 preceding nonconforming concrete batch plant use fails to satisfy the requirements of Section 11.2.1(A)
14 and applicable case law in several areas.

15
16 Nature and Extent

17 The Application does not provide a "reasonably precise" understanding of some aspects of the
18 nature and extent of the concrete batch plant use as required by *Spurgin* and *Tykla*. It fails by not
19 providing an adequate understanding of the equipment, structures and stockpiles of that operation. The
20 Applicant's effort in this regard relies on limited and to some extent inconsistent evidence of these features,
21 making it impossible to understand such things as the number and size of storage structures and fuel tanks
22 and capacities. The Applicant's need to rely on the variable statements of Mr. DeYoung deprives the
23 Record of this clarity. The fact that numerous aerial photographs do not support the presence of the
24 concrete batch plant during a portion of at least one critical year in the look-back period compounds this
25 inadequacy.
26

1 Additionally, the Record holds literally no information regarding the daytime hours of operation of
2 the concrete batch plant, rendering a comparison with those of the concrete batch plant impossible to reach.

3 *Intensity of Use and Adverse Impacts*

4 The asphalt batch plant constitutes a more intensive use than the concrete batch plant in two
5 respects. The asphalt batch plant has more actual employees with 15 full-time as compared to the 2 or 3
6 that were needed for the concrete batch plant. The hearings officer finds that the presence of up to 5 times
7 more employees on the Property is a more intensive use than that established by the concrete batch plant.

8 The asphalt batch plant is a year-round operation, but the concrete batch plant operated
9 intermittently, having been closed in at least November and December of every year and having moved
10 offsite periodically when large jobs required it to be present. The hearings officer finds that the year-round
11 operation of the asphalt batch plant is a more intensive use than that established by the concrete batch
12 plant.

13 The asphalt batch plant presents a risk of fire and explosion that was not present in concrete batch
14 plant operation. They both present those risks as they attend the fueling and operation of loading and other
15 mobile equipment on the site, but the actual processing of asphalt requires heat and volatile compounds
16 that are entirely absent from concrete batching. The heat and those compounds are established, and they
17 present an on-going, specific risk of fire and explosion that is not present in concrete batching. The risk
18 was present in 2001 upon the initiation of asphalt batching, and it has continued ever since.

19 This new risk affects the surrounding neighborhood, its residents and, in the cases of the Interstate
20 Highway, the park and the trail, its users. The hearings officer finds that the presence of this specific risk
21 of fire and explosion constitutes a greater adverse impact than that established by the concrete batch plant.
22

23 **CONCLUSIONS OF LAW**

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

- 26 1. LDO Section 11.2.1 concerning Nonconforming Uses is an applicable criterion;

- 1 2. The lawful establishment, existence and continuity of the nonconforming concrete batch plant use
2 were established in the decision in ZON2012-01173;
- 3 3. LDO Section 11.3 concerning Nonconforming Structures is not an applicable criterion;
- 4 4. LDO Section 11.8 is an applicable criterion to the extent of establishing the nature and extent of the
5 nonconforming concrete batch plant use;
- 6 5. The nature and extent of the nonconforming concrete batch plant is incompletely verified,
7 specifically with regard to the hours of operation, the storage structures and the fuel storage tanks
8 that were a part of that use.
- 9 6. The asphalt batch plant is an alteration of the preceding nonconforming concrete batch plant use;
- 10 7. With regard to those aspects of the preceding nonconforming concrete batch plant use that have
11 been adequately described, the risk of fire and explosion of the altered asphalt batch plant is a
12 greater adverse impact, and
- 13 8. The asphalt batch plant cannot be approved as a lawful alteration of the preceding nonconforming
14 concrete batch plant use because its year-round operation makes it a use of greater intensity.
- 15 9. The asphalt batch plant cannot be approved as a lawful alteration of the preceding nonconforming
16 concrete batch plant use because the level of employment that characterizes it makes it a use of
17 greater intensity.
- 18 10. The asphalt batch plant cannot be approved as a lawful alteration of the preceding nonconforming
19 concrete batch plant use because the threat of risk of fire and explosion presented by the asphalt
20 batching process itself is a new risk and a greater adverse impact.

21 **ORDER**

- 22 1. The Appeal is granted.
- 23 2. The Application is denied.

24 * * * * *

25
26 ///

1 Dated this 24th day of September, 2015.

2
3 
4 DONALD RUBENSTEIN
5 Hearings Officer

6 The Hearings Officer's Order is the final decision of Jackson County on this application. This decision
7 may be appealed to the Oregon Land Use Appeals Board (LUBA) within 21 days of the date it is mailed.
8 This decision is being mailed on September 24, 2015. Please contact LUBA for specific information
9 at DSL Building, 775 Summer Street NE, Suite 330. Salem, OR 97301-1283 or by phone at (503) 373-
10 1265.
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NOTARY PAGE

STATE OF OREGON)
)
COUNTY OF JACKSON)

I, Marisa J. Harris, being first duly sworn, depose and say that on behalf of Jackson County Development Services, I gave notice of the Hearing's Officer Decision and Final Order described in the attached notice by mailing a copy thereof by regular mail to each of the following named persons at their respective last known addresses, to wit: (as attached)

Each of said copies of the decision was enclosed in a sealed envelope addressed to the persons at the addresses above set forth, with postage thereon fully prepaid and was deposited in the post office at Medford, Oregon, on September 24, 2015

Marisa J. Harris
Signature

Personally appeared before me this 24th day of September 2015, the above named Marisa J. Harris, who acknowledged the foregoing affidavit to be her voluntary act and deed.



Laura A. Marshall
NOTARY PUBLIC for OREGON
My Commission Expires: 2-6-2016

NOTICE OF DECISION AND FINAL ORDER SENT TO: APPLICANT, AGENT, AFFECTED AGENCIES & PROPERTY OWNERS AS DESCRIBED IN 2004 LDO SECTION 2.7.5 (B)(2)(d).

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9/24/2015 11:49:21 AM

MAILING LIST

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| 439-15-00097-ZON-HO JONES FRANK T PO BOX 821 TALENT, OR 97540 | IP 439-15-00097-ZON-HO PADGETT GORDON L PADGETT SUSAN 205 GIBSON STREET TALENT, OR 97540 | 439-15-00097-ZON-HO JOEL BENTON COUNTY COUNSEL JACKSON COUNTY 10 S OAKDALE RM 214 MEDFORD, OR 97501 |
| 439-15-00097-ZON-HO ADEL BARBARA 13 MOUNTAIN VIEW TALENT, OR 97540 | IP 439-15-00097-ZON-HO GILCHRIST CHARLOTTE 1301 LITHIA WAY TALENT, OR 97540 | |
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