

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

ROGUE ADVOCATES)	
Petitioners,)	
vs.)	LUBA No. 2014-100
)	
JACKSON COUNTY,)	
Respondent, and)	
)	
PAUL MEYER and KRISTEN MEYERS,)	
Intervenor-Respondents.)	

RESPONDENT'S BRIEF FOR JACKSON COUNTY

Maura Fahey, OSB #133549
Courtney Johnson, OSB# 077221
Crag Law Center
917 SW Oak, Ste 417
Portland, OR 97205
Telephone: 503-525-2722

Attorney for Respondent

Daniel O'Connor, OSB #950444
Huycke O'Connor Jarvis, LLP
823 Alder Greek Drive
Medford OR 97504
Telephone: 541-772-1977

Attorney for Intervenor-Respondent

Joel C. Benton, OSB #110727
Jackson County Counsel
10 S. Oakdale Avenue, Room 214
Medford, OR 97501
Telephone: 541-774-6160

Attorney for Petitioners

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1 **I. PETITIONER STANDING TO APPEAL**

2 Respondent does not object to Petitioners' Statement of Standing.

3 **II. STATEMENT OF THE CASE**

4 **A. NATURE OF THE LAND USE DECISION AND RELIEF**
5 **SOUGHT**

6 Respondent concurs with Intervenor-Respondents' Nature of Decision
7 and Relief Sought. Respondent additionally objects to Petitioner's requested
8 relief for the following reason. Petitioner's request that the decision of the
9 Jackson County Hearings Officer be affirmed, but on alternative grounds to
10 those set forth in the decision of the Hearings Officer in this case, is not an
11 appropriate form of relief.

12 In Petitioner's Brief, Petitioner cites no authority for the Board to affirm
13 the decision of Respondent, but on alternative grounds. In fact, the Board has
14 previously held that if a party asserts an alternative theory for affirming a
15 challenged decision, and the alternative theory does not appear in the
16 challenged findings, the Board will decline to affirm the decision and will
17 remand to allow the local government to consider the alternative theory. *See*
18 *Anderson v. Coos County*, 51 Or LUBA 454 (2006); *Douglas v. City of Salem*,
19 53 Or LUBA 567 (2007); *Friends of Yamhill County v. City of Newberg*; 62 Or
20 LUBA 5 (2010).

21

1 In Case No. ZON2012-001173-NC, the application at issue was the
2 verification of an asphalt batch plant as a lawfully established nonconforming
3 use. Record, p. 185. The Hearings Officer denied the application and adopted
4 findings that the application should be denied. Record, pp. 186-190. The
5 Hearings Officer’s findings include that the application of for the verification of
6 the asphalt batch plant as a lawful, nonconforming use must be denied because
7 the asphalt batch plant was an alteration of a preexisting concrete batch plant,
8 and that such a change requires review and approval as an alteration. Record, p.
9 190. The Hearings Officer’s findings do not include that the applicant failed to
10 meet its burden to demonstrate the nature, extent and continuity of the 1992
11 concrete batch plant. Therefore, if the Board determines that the findings
12 adopted by Respondent in rendering the decision are insufficient to support the
13 decision, the appropriate remedy is to remand the decision to Respondent.

14 **B. SUMMARY OF ARGUMENTS**

15 1. First, Second and Third Assignments of Error

16 Respondent takes no position on the First, Second and Third
17 Assignments of Error.

18 2. Fourth Assignment of Error

19 Petitioner asserts that Respondent erred in failing to consider whether or
20 not the alternation of a nonconforming use was discontinued in denying an
21 application to verify the use as a lawfully established nonconforming use.

1 However, Respondent did not err. The Respondent was not required to make a
2 finding related to the whether the alteration of the nonconforming use
3 discontinued the nonconforming use to deny the application for the verification
4 of the use as a lawfully established nonconforming use.

5 Alternatively, if the Respondent was required to make a finding on
6 whether or not an alternation to a nonconforming use was a discontinuance of
7 that nonconforming use to deny an application for the verification of that use,
8 Petitioner either failed to raise the issue during a previous appeal to LUBA, and
9 thus waived the issue, or the issue was resolved in that appeal or, as a matter of
10 law, the mere alteration of a nonconforming use does not constitute a
11 discontinuance of the nonconforming use.

12 C. SUMMARY OF MATERIAL FACTS

13 Respondent concurs with Intervenor-Respondents' Summary of Material
14 Facts.

15 III. JURISDICTION

16 Respondent concurs with Petitioners' statement of jurisdiction.

17 IV. ARGUMENT

18 A. RESPONSE TO FIRST, SECOND AND THIRD

19 ASSIGNMENT OF ERROR:

20 Respondent takes no position on the First, Second and Third
21 Assignments of Error.

1 **B. RESPONSE TO FOURTH ASSIGNMENT OF ERROR:**

2 Petitioner asserts that Respondent erred when Respondent failed to make
3 a finding on whether or not the alteration of the concrete batch plant to an
4 asphalt batch plant constituted a discontinuance of the nonconforming use when
5 Respondent denied Intervenor-Respondent's application to verify the asphalt
6 batch plant as a lawfully established nonconforming use. Pet. for Rev., p. 25.
7 Respondent did not err in not making such a finding as Respondent did not have
8 a legal requirement to do so in denying Intervenor-Respondents' application.
9 Because, in denying an application, Respondent is only required to present one
10 sustainable basis for denying the application. *Onsite Advertising Services LLC*
11 *v. Washington County*, 63 Or LUBA 414 (2011).

12 In this case, Respondent denied Intervenor-Respondents' application to
13 verify the asphalt batch plant as a lawfully established nonconforming use on
14 the basis that the asphalt batch plant was an alteration of the concrete batch
15 plant use. Record, p. 188. As the asphalt batch plant was an alteration, the
16 asphalt batch plant required review and approval as an alteration and not as a
17 verification of a lawfully established nonconforming use. Record, p. 189.
18 Therefore, the application to verify the asphalt batch plant as a lawfully
19 established nonconforming use was denied. Record, p. 190.

20 Petitioner appears to concede the issue that Respondent was not required
21 to make a determination on whether the alteration of the nonconforming use

1 constituted a discontinuance of the use to deny Intervenor-Respondents'
2 application. In Petitioner's Petition for Review, Petitioner writes that "is it
3 possible that the County may make a discontinuance during some later
4 proceeding." Pet. for Review, p.27. Petitioner merely believes that this
5 "nonconforming use verification process" would be an appropriate time to
6 conduct such analysis. Pet. for Review, p. 27. Therefore, Respondent did not
7 err, which Petitioner appears to concede, when not making a finding as to
8 whether or not the alteration was a discontinuance of the nonconforming use
9 when denying Intervenor-Respondents' application for verification of a
10 nonconforming use.

11 Alternatively, if the Board determines that the Respondent was required
12 to determine whether or not the nonconforming use was discontinued in its
13 denial of the application for the verification of an asphalt batch plant as a
14 lawfully established nonconforming use, Respondent concurs with Intervenor-
15 Respondent's Response to the Fourth Assignment of Error that Petitioner either
16 failed to raise the issue during the appeal in LUBA No. 2013-013, and thus
17 waived the issue or the issue was resolved in the appeal in LUBA NO. 2013-
18 013.

19 Furthermore, Respondent concurs with Intervenor-Respondent that, as a
20 matter of law, an alteration of a nonconforming use does not constitute a
21 discontinuance of the nonconforming use. In addition to the reasons set forth in

1 Intervenor-Respondents' Brief, this Board previously upheld that a
2 discontinuance occurs when the evidence shows that all business operations on
3 a property have ceased for more than a year. *Cory v. Clackamas County*, 44 Or
4 LUBA 733 (2003). Thus, since an alteration of a nonconforming use cannot
5 constitute the discontinuance of the nonconforming use, as a matter of law,
6 Respondent did not err when it failed to make a finding as to whether or not the
7 alteration of the nonconforming use was a discontinuance of the nonconforming
8 use when deciding Intervenor-Respondents' application.

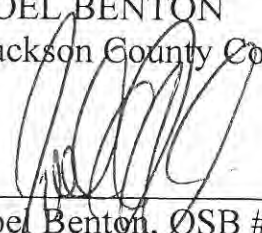
9 **V. CONCLUSION**

10 For the reasons provided, Respondent requests that LUBA affirm the
11 Jackson County's Hearings Officer decision.

12 DATED 16, January, 2015.

13 Respectfully submitted,

14 JOEL BENTON
15 Jackson County Counsel

16 
17 _____
18 Joel Benton, OSB #110727
19 Attorney for Respondent, Jackson
20 County
21

CERTIFICATE OF FILING AND SERVICE

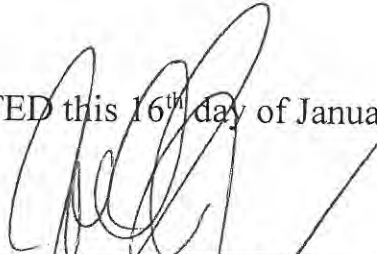
I hereby certify that on this 16th day of January, 2015, I filed the original, together with four copies of the RESPONDENT'S BRIEF FOR JACKSON COUNTY with the Land Use Board of Appeals, DSL Building, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283, by first class mail.

I also certify that on this 16th day of January, 2015, I served a copy of RESPONDENT'S BRIEF FOR JACKSON COUNTY to the following persons by first class mail:

Crag Law Center
Maura Fahey & Courtney Johnson
917 SW Oak, Ste 417
Portland, OR 97205
Attorney for Respondent

Huycke O'Connor Jarvis, LLP
Daniel O'Connor
823 Alder Greek Drive
Medford OR 97504
Attorney for Intervenor-Respondent

DATED this 16th day of January 2015.



Joel Benton, OSB #110727
Attorney for Respondent, Jackson County