BEFORE THE LAND USE BOARD OF APPEALS

FOR THE STATE OF OREGON

ROGUE ADVOCATES, Petitioner, vs. JACKSON COUNTY, Respondent, and PAUL MEYER AND KRISTEN MEYER, Intervenor-Respondents.	)	LUBA NO.: 2014-100 INTERVENOR-RESPONDENTS' BRIEF

INTERVENOR-RESPONDENTS' BRIEF

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I. STANDING

Intervenor-Respondents accept that Petitioner Rogue Advocates ("Petitioner") has standing to bring this appeal. Intervenor-Respondents Paul Meyer and Kristen Meyer ("Intervenor-Respondents") have standing in that Intervenor-Respondents are the applicants in the land use decision that is the subject matter of this appeal.

II. STATEMENT OF THE CASE

A. *Nature of Decision and Relief Sought*

The decision on review is Respondent Jackson County's Hearings Officer's Decision and Final Order in Case No. ZON2012-01173-NC REMAND ("Remand Decision"). Petitioner's Appendix (Pet App) A. The decision was made on remand from this Board, *Rogue Advocates v. Jackson County*, ___ Or LUBA ___ (LUBA No. 2013-103, April 22, 2014) (*Rogue I*), Record (R) 293, remanding, in part, the Decision and Final Order in Case No. ZON2012-01173NC ("Nonconforming Use Decision"), R 218. As described in greater detail in the Summary of Material Facts, the Nonconforming Use Decision verified a pavement batching nonconforming use. On appeal in LUBA No. 2013-103, this Board affirmed that verification, but remanded for the Hearings Officer to describe the nature and extent of the verified nonconforming use. Thus, the Remand Decision described the nature and

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extent of a previously verified nonconforming concrete batch plant use on the subject property.

As a threshold matter, Intervenor-Respondents dispute Petitioner's major premise regarding the nature of the decision on review. Petitioner argues that "In effect, Jackson County is attempting to approve a use that has never been applied for." Petitioner's Brief (PB) 2. Based on that premise, Petitioner contends, in essence, that the decision appealed from is void. For reasons amplified below, that premise and corollary contentions are incorrect given the nature of this proceeding and this Board's prior related decisions. For related reasons, Petitioner's request for relief is inappropriate.

On appeal, Petitioner asserts, *inter alia*, that the Hearings Officer failed to make necessary and adequate findings regarding the nature and extent of the concrete batch plant use. Petitioner does not request that this Board reverse or remand the appealed decision. Instead, Petitioner requests that this Board affirm the decision to deny the application for a verification of the nonconforming asphalt batch plant use on alternative grounds--*viz.*, that the applicant has failed to meet its burden to demonstrate the existence, continuity, nature and extent of the nonconforming concrete batch plant use.

Petitioner's request for relief is problematic for two primary reasons: First, and most importantly, Petitioner asks this Board to revisit determinations that have already been conclusively decided against it. Secondly, Petitioner's

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argument is inconsistent with the requested relief. Determining the nature and extent of the verified nonconforming concrete batch plant use in this case requires factual findings. Factual findings are entirely within the Hearings Officer's purview and function. If the Hearings Officer's factual determinations are inadequate as a matter of law, then the appropriate remedy is remand. Affirmance on alternative grounds is neither available nor appropriate relief for the asserted errors. If this Board determines that the Hearings Officer's findings and conclusions--with respect to the nature and extent of the verified nonconforming concrete batch plant use--were legally insufficient (however onerous at this stage in the proceedings) the proper disposition would be for this Board to, again, remand the Hearings Officer's decision. OAR 661-010-0071(2)(a).

In all events, Intervenor-Respondents request that this Board affirm the challenged decision. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991) (explaining that if a petition for review does not set out facts and legal argument sufficient to persuade LUBA that there is a basis for reversal or remand of the challenged decision, then LUBA simply affirms the decision). Intervenor-Respondents accept this Board's holding that, while concrete and asphalt batching are similar uses for purposes of nonconforming use verification, Intervenor-Respondents must apply for review and approval for an alteration of the nonconforming use. Affirmance of the Remand Decision will allow the

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parties to move forward with those applications with a determined baseline. *See* ORS 197.805 ("It is the policy of the Legislative Assembly that time is of the essence in reaching final decisions in matters involving land use and that those decisions be made consistently with sound principles governing judicial review."). Accordingly, Intervenor-Respondents respectfully request that this Board affirm the Remand Decision.

B. *Summary of Arguments*

The parties agree that this Board sets out the applicable inquiry in *Spurgin v. Josephine County*,

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

28 Or LUBA 383, 390-91 (1994) (footnote omitted).

LDO 11.2.1(A) provides that an applicant may apply to change a verified nonconforming use to "another, no more intensive nonconforming use" and that such an application "must show that the proposed new use will have no greater adverse impact on the surrounding neighborhood." App A 3. Thus, the required level of specificity of findings regarding the nature and extent of the

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prior concrete batch plant nonconforming use is the standard set forth in *Tylka v. Clackamas County*,

> "the county's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which aspects of intervenors' proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use that intervenors have a right to continue."
>
> 28 Or LUBA 417, 429 (1994).

It is settled that a concrete batch plant use is a verified nonconforming use on the subject property. Nonconforming Use Decision; LUBA No. 2013-103. That determination encompasses the following determinations: (1) the concrete batch plant nonconforming use existed when the use became nonconforming; (2) the nonconforming use is continuous; and (3) the concrete batch plant nonconforming use had *some* nature, extent, intensity, impact, etc. The remand order required the county to define the nature and extent of the concrete batch plant use.

Thus, in this appeal, what is *not* at issue is that the concrete batch plant use exists, is continuous, and has some nature and extent that does not include the 2001 conversion to an asphalt batch plant. The only issue before this Board on appeal is: Are the Hearings Officer's findings regarding the nature and extent of the concrete batch plant sufficient to avoid another remand? Intervenor-Respondents argue that they are sufficient and supported by

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substantial evidence in the record. In the alternative, if this Board determines that the Hearings Officer's findings and conclusions in the Remand Decision are inadequate, the only available relief is yet another remand.

Intervenor-Respondents' responses to Petitioner's assignments of error are summarized as follows:

1. (a) Petitioner waived the issue; (b) Petitioner's request for relief is inappropriate; (c) Assuming the issue is reviewable, the Hearings Officer did not exceed the scope of the remand order; (d) Assuming that the Hearings Officer did exceed the scope of the remand order, he did not err in expanding the scope of the remand; (e) Assuming that the Hearings Officer did err in expanding or exceeding the scope of the remand order, that error was harmless with respect to the Hearings Officer's findings and conclusions regarding the matters within the scope of the remand order.

2. (a) The Hearings Officer did not err in applying LDO 11.2.1; (b) Any error in applying LDO 11.2.1 was harmless.

3. The Hearings Officer's findings on the nature and extent of the concrete batch plant nonconforming use are adequate and supported by substantial evidence in the whole record.

4. The Hearings Officer did not err in failing to determine whether the original nonconforming use has been discontinued: (a) Petitioner waived the issue by failing to raise it in prior proceedings; or (b) the issue was resolved

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against Petitioner in LUBA No. 2013-103 and, thus, that issue is not available for review in this appeal; and (c) as a matter of law, an alteration of a nonconforming use does not constitute a discontinuance of the nonconforming use.

C. *Summary of Material Facts*

Intervenor-Respondents supplement, modify and dispute Petitioner's Summary of Material Facts. The relevant historical facts are identical to those in LUBA No. 2013-103, and record references related to the record in that appeal, which has been incorporated into this appeal, are cited as "RNC."

Intervenor-Respondents are the owners of certain real property located in Jackson County, Oregon, and commonly known as Township 38 South, Range 1 West, Section 24, Tax Lot 600 ("the subject property"). RNC 1057. The subject property is approximately 10.98 acres in size, is zoned Rural Residential (RR-5) and is located in the Urban Growth Boundary for the City of Talent. RNC 1058. The subject property lies in close proximity to Bear Creek. RNC 1073. At the time of the Remand Decision, the subject property was developed with an asphalt batch plant, a crusher, a stockpile of aggregate materials, and several accessory structures. RNC 1058, 1073. Mountain View Paving, Inc., an Oregon corporation ("Mountain View Paving"),[1] is and has been operating a

[1] Intervenor-Respondents are the sole shareholders of Mountain View Paving, Inc.

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permanent batch plant and crusher on the subject property for the purpose of manufacturing and selling asphalt products since April, 2001. RNC 1057-58. Specifically, raw material is delivered to the subject property where it is temporarily stored in stockpiles on-site. RNC 1061. Some of the raw materials are then further refined through the crusher located on the subject property. RNC 1061. The batch plant is used to manufacture asphalt from said materials. RNC 1061. The finished asphalt product is then transported for use on public and private paving projects in the region. RNC 1061.

The 1973 Jackson County Zoning Ordinance became effective on September 1, 1973. RNC 1061. The initial zoning for the subject property (September 1, 1973) was Open Space Development (OSD-5) pursuant to the 1973 Zoning Map. *Rec-NC*, 1093. The Open Space Development (OSD-5) zoning ordinance (1973) did not allow the batch plant use as an independent use. RNC 1094-98. In 1982, the zoning of the subject property was changed from Open Space Development (OSD-5) to Rural Residential (RR-5), which remains the current zoning of the subject property. RNC 1061, 1099. The Rural Residential (RR-5) zoning district did not and does not allow the batch plant use. RNC 1061, 1100-02.

The record in LUBA No. 2013-103 (and LUBA No. 2014-100) contains extensive testimony and written evidence concerning the commencement, scope and duration of the prior batching operations on the subject property. Those

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facts are summarized in Appendix (App) B. Intervenor-Respondents also direct this Board to the supporting evidence, and record cites, previously identified in a memorandum to the Hearings Officer on remand. R 51-58. That evidence also addressed the scope and duration of prior batching operations on the subject property.

Because details of prior decisions in this land use proceeding are germane to this Board's consideration of the assignments of error on review, Intervenor-Respondents recount parts of those decisions in detail here. In 2012, Intervenor-Respondents submitted a land use application with Respondent Jackson County ("Respondent") seeking verification of a nonconforming use pursuant to Chapter 11 of the Jackson County Land Development Ordinance (LDO), attached herein as Appendix (App) A, relating to the historical use of the subject property for batch plant purposes. RNC 1053. Intervenor-Respondents also submitted a land use application concerning the apparatuses utilized in conjunction with the batch plant use located within the Flood Hazard Area. Those Applications were approved by Respondent, and Petitioner appealed.

In the September 26, 2013 Nonconforming Use Decision, the Jackson County Hearings Officer addressed the existence, continuity, nature and extent of the verified nonconforming use. R 232. With respect to existence, the Hearings Officer concluded that "there has been a batch plant on the Property

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for the period of 1963 through the present, and the LDO does not require more than that the activity be batching." R 232. The Hearings Officer also determined that the nonconforming use had continued over more than a 20-year period "based on the Best Concrete and Mountain View Paving[2] activity alone[,]" and that "evidence that an asphalt batch plant was not present during that period does not deprive the use of continuity because the LDO does not distinguish between batch plant operations." R 232-33. Based on that determination that concrete batching and asphalt batching are the same use, the Hearings Officer determined that the nature of the nonconforming use--*viz.*, pavement batching--was established and continued for the legally relevant period.

The Hearings Officer observed "the unusual characteristic of a batch plant use: It is not located within a single structure, *per se*, but is conducted on a site with specialized installations, which are supported by other more-conventional structures. The entire set of those elements constitutes the batch plant use[.]" R 237. Notwithstanding that observation, the Hearings Officer determined that the batch plant, as it existed in 2012, had been expanded from the concrete batching use in 1992, in that new structures had been placed on the property at some time after 2000 or 2003. R 234-35. Accordingly, the

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2 Best Concrete operated a concrete batch plant on the site from approximately 1988 through the fall of 2000.

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Hearings Officer concluded that the expansion of the physical area of the subject property occupied by the batch plant use is an expansion or enlargement of the lawfully established nonconforming use and denied the application because Intervenor-Respondents had not applied for review under the LDO provision applicable to expansions, LDO 11.2.1. R 237-39; App A-3.

The Nonconforming Use Decision verified the nonconforming pavement batching plant use without respect to a distinction between concrete batching and asphalt batching. Petitioner appealed. On review in *Rogue I*, this Board described the Nonconforming Use Decision:

> "[The Nonconforming Use Decision] concludes that a batch plant use on the subject property is a lawful non-conforming use, that the accessory structures on the property and some of the physical area occupied by the current batch plant operation as it existed in 2012 represent unapproved alterations or expansions. Because [Intervenor-Respondents] had not requested approval of any alterations or expansions in their application, the hearings officer denied the application to verify the batch plant operation as it existed in 2012 as a lawful nonconforming use. The practical effect of [the Nonconforming Use Decision] was to verify a limited asphalt batch plant operation, as that operation existed in 2001, as a nonconforming use."

R 297. This Board affirmed the Hearing Officer's conclusion that a batch plant existed on the property when the use became nonconforming. R 301-303. Thus, this Board affirmed the Hearing Officer's conclusion that the nonconforming batch-plant use was lawfully established. R 303-306. This Board implicitly affirmed the Hearing Officer's conclusion that the nonconforming use was continuous. However, with respect to the 2001

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conversion from concrete batching to asphalt batching, this Board concluded that the Hearing Officer

> "erred to the extent he concluded that replacing a concrete batch plant with an asphalt batch plant has no significance in verifying the nature and extent of the nonconforming use. * * * [U]nless and until approved the alteration is not part of the lawful nonconforming use, for purposes of verifying the nature and extent of the use. * * * Thus, the 2001 installation of [Intervenor-Respondents'] asphalt batch plant is lawful only if it qualifies and is approved as an alteration of the nonconforming concrete batch plant."
>
> "* * * * *
>
> "For purposes of verifying the nature and extent of the original nonconforming use any such alteration, unless approved, is not part of the lawful nonconforming use.
>
> "In sum, remand is necessary for the hearings officer to verify the nature and extent of the lawful nonconforming batch plant use, without considering as part of the verified use any approved alterations that occurred in 2001 or at other relevant times since 1992."

R 310-14. In so holding, this Board affirmed that the nonconforming concrete batch plant use was lawfully established and continuous. This Board remanded the decision solely to allow the Hearings Officer to make necessary factual findings regarding the nature and extent of the verified nonconforming concrete batch plant use.

On review of a subsequently approved floodplain development permit for the subject property, ___ Or LUBA ___ (LUBA No. 2014-015, August, 26, 2014) this Board recapitulated its holding in *Rogue I*:

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> "In remanding the hearings officer's nonconforming use verification decision, LUBA agreed with the hearings officer in part. Among other things, the hearings officer found the disputed batch plant: (1) was 'lawfully established,' (2) satisfies the state and local requirements for continued, uninterrupted existence, and (3) that the batch plant did not have to be approved as an 'expansion of nonconforming aggregate and mining operations.' LUBA rejected petitioner Rogue Advocates' challenges to these three aspects of [the Nonconforming Use Decision]. But LUBA found that the conversion of the concrete batch plant to an asphalt batch plant in 2001 required approval as an alteration of the nonconforming concrete batch plant and that the hearings officer erred in concluding that the conversion did not require approval as an alteration. We remanded so that the hearings officer could verify the nonconforming use 'without considering as part of the verified use any unapproved alterations that occurred in 2001 or at other relevant times since 1992.'"

R 10 (internal citations omitted). In that same opinion, this Board clarified,

> "our decision in *Rogue I* concludes that the nonconforming use only includes the *concrete* batch plant, and any related structures, that were on the property in 1992, and that the conversion to an *asphalt* batch plant in 2001 can be approved only as an alteration of the lawful nonconforming *concrete* batch plant use."

R 13 (emphases in original).

In the Remand Decision, the Hearings Officer reiterated that the existence and continuity of the underlying nonconforming use were not at issue. Pet App A-3, 2 n 2. The Hearings Officer then considered evidence related to the nature and extent of the concrete batch plant nonconforming use. Pet App A 2. The Hearings Officer reconfirmed evidence from the record in the Nonconforming Use Decision regarding Best Concrete's use, including the following: (1) Best Concrete produced, at a minimum, approximately 40,000 tons of material annually; (2) Best Concrete produced heavy truck traffic in the

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area transporting materials to and from the subject property; (3) Best Concrete operated most of the year, but not always in the winter months. Pet App A 4. With respect to impacts on the neighboring residential community, the Hearings Officer cited evidence that during the relevant period, between 1990 to 1992, at least one neighbor was "constantly disturbed by the sand and gravel plant." Pet App A 5. Based, in part, on that evidence the Hearings Officer concluded that "Best Concrete's batch plant did not impose significant impacts on the neighboring residential community" and that the asphalt batch plant operations "did not do so either until approximately 4 or 5 years prior to 2013." Pet App A 5.

Notwithstanding his findings regarding the similarities of the nature and extent of the uses and impacts between the two types of batch plants, the Hearings Officer again denied the application after accepting Intervenor-Respondents' concession that the Hearings Officer was not authorized to render a decision verifying the *asphalt* batch plant use as an allowed alteration to the verified nonconforming *concrete* batch plant use. Pet App A 5.

The Remand Decision defined the nature and extent of the verified concrete batch plant nonconforming use and denied the application because the current asphalt batch plant use is an alteration of the verified nonconforming use. As Intervenor-Respondents understand it, in this appeal, Petitioner challenges the verification of the nonconforming concrete batch plant use.

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III. JURISDICTION

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

IV. RESPONSES TO ASSIGNMENTS OF ERROR

A. Response to Petitioner's First Assignment of Error: (a) Petitioner waived the issue; (b) Petitioner's request for relief is inappropriate; (c) Assuming the issue is reviewable, the Hearings Officer did not exceed the scope of the remand order; (d) Assuming that the Hearings Officer did exceed the scope of the remand order, he did not err in expanding the scope of the remand; (e) Assuming that the Hearings Officer did err in expanding or exceeding the scope of the remand order, that error was harmless with respect to the Hearings Officer's findings and conclusions regarding the matters within the scope of the remand order.

1. *Preservation of Error*

Petitioner waived the issue.

2. *Standard of Review and Available Relief*

In determining the nature and scope of the challenged decision, the language of a prior and related determination and the challenged decision itself are instructive. *Woosley v. Marion County*, 24 Or LUBA 231 (1992). This Board will deny assignments of error where this Board lacks authority to grant the relief that is requested under those assignments of error. *See, e.g., Mingo v. Morrow County*, 65 Or LUBA 122 (2012). Where a county misapplies the test that this Board determined must be applied in an earlier appeal but explains its conclusion in a manner consistent with the correct test, misapplication of the

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identified test is not a basis for reversal or remand. *Anderson v. Coos County*, 62 Or LUBA 38 (2010). Where a county misconstrues and acts outside the scope of review on remand, LUBA will again remand the decision back to the county. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994).

3. *Argument*

a. Petitioner waived the issue.

Petitioner urged the Hearings Officer to exceed the scope of the remand order in the remand proceedings. Accordingly, the Petitioner waived the argument that the Remand Decision is flawed because the Hearings Officer exceeded the scope of the remand order. In a letter to the Hearings Officer on remand, the Petitioner asserted that

> "LUBA has narrowed the scope of this remand proceeding to consideration of the nature and extent of the concrete batch plant in 1992. However, the determination of the nature and extent of the nonconforming use in 1992 is only relevant for purposes of determining whether the current asphalt batch plant is a lawful nonconforming use. * * *
>
> "In order to determine whether the asphalt batch plant is a lawful nonconforming use, *the Hearings Officer must go beyond the stated scope of the remand* and determine whether the Applicant has met its burden in demonstrating that the asphalt batch plant operation was lawfully established at the time the zoning regulations that currently prohibit it on this property went into effect, and that the use has not been discontinued or abandoned since that time. * * *"

R 205-206 (emphasis added). The Petitioner also urged the Hearings Officer to consider aspects of the nonconforming asphalt batch plant use that were outside

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the scope of the remand order, including which local use category an asphalt batch plant falls within, R 210, and whether the change of use on the property from asphalt batching to concrete batching in 1974, or the change from concrete batching to asphalt batching in 2001, constituted a discontinuance of the nonconforming use. R 215-16. Accordingly, because the Petitioner repeatedly urged the Hearings Officer to exceed the scope of the remand order, Petitioner waived the argument that the Hearings Officer erred by exceeding the scope of the remand order. That error, if any, was invited by the Petitioner. This Board should deny the first assignment of error because it was waived.

b. Petitioner's requested relief is inappropriate.

In its first assignment of error, Petitioner argues that the Hearings Officer misconstrued and exceeded the scope of the remand order. PB 9. Specifically, Petitioner contends that the Hearings Officer's reliance on evidence and testimony relating to the asphalt batch plant from 2001 and onward as support for its findings on the nature and extent of the concrete batch plant operations is contrary to and exceeds the scope of LUBA's remand order. As relief for the first assignment of error, Petitioner requests that this Board reject the Hearings Officer's analysis, but does not ask that this Board reverse or remand the Remand Decision. Where a county misconstrues and acts outside the scope of review on remand, LUBA will again remand the decision back to the county. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32, 35 (1994). This Board

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should deny the assignment of error because the requested relief is inappropriate.

c. Assuming the issue is reviewable, the Hearings Officer did not exceed the scope of the remand order.

The remand order states that, on remand, the Hearings Officer should not consider "*any unapproved alterations* that occurred in 2001 or at other relevant times since 1992." R 10 (emphasis added). That instruction indicates that, although the legal baseline for the nonconforming use is 1992, the period between 1992 and 2001, during which Best Concrete operated its nonconforming concrete batch plant, and later dates, are also relevant to the Hearings Officers' findings with respect to the nature and extent of the concrete batch plant nonconforming use. The remand order simply removes any unapproved alterations from the Hearings Officers consideration of the nature and extent of the nonconforming use. That is, the Hearings Officer was prohibited from verifying unapproved alterations as part of the extent of the concrete batch plant. Thus, so long as he did not violate that prohibition, any consideration the Hearings Officer gave to evidence of use on the Property beyond 1992 was within the scope of the remand order. This Board should deny the first assignment of error because the Hearings Officer did not impermissibly exceed the scope of the remand order

d. The Hearings Officer appropriately expanded the scope of remand.

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From the foregoing, the issue remains whether the Hearings Officer erred by considering evidence related to the nature, extent, and neighborhood impacts of the unapproved asphalt batch plant from 2001 to 2012. As Petitioner concedes, a local government has discretion to expand a remand proceeding to consider unresolved issues that may fall outside the scope of the remand order from LUBA. *CCCOG v. Columbia County*, 44 Or LUBA 438 (2003). Part of the ongoing dispute is whether the current asphalt batch plant use imposes greater adverse impacts on the surrounding neighborhood. LDO 11.2.1; ORS 215.130(9). Impacts to the neighboring community are part of the nature and extent of the use. *Tylka v. Clackamas County*, 28 Or LUBA 417, 429 (1994). On remand, the Hearings Officer permissibly exceeded the scope of the remand to consider the impacts from the asphalt batch plant to compare those impacts to the impacts to the neighboring community from the concrete batch plant. For example, if neighbors of the operating asphalt batch plant between the period of 2001 to 2012 reported noise and traffic in the area from that operation, the Hearings Officer could conclude that neighbors who lived in the community during Best Concrete's operating years were within an area that would be affected by noise and traffic from operation on the Property. That is a permissible conclusion about the past based on more recent evidence. This

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Board should deny the first assignment of error because the Hearings Officer permissibly expanded the scope of the remand order.

e. Any error in exceeding the scope of the remand order was harmless.

In the alternative, if this Board determines that the Hearings Officer impermissibly exceeded the scope of the remand order, Intervenor-Respondents argue that the error was harmless because the Hearings Officer also found and relied on evidence that is patently within the scope of the remand order, even applying the narrow restrictions advocated by Petitioner. Specifically, the Hearings Officer determined that Best Concrete's use involved production of approximately 40,000 tons of material annually; Best Concrete produced heavy truck traffic in the area transporting materials to and from the Property; Best Concrete operated most of the year; and Best Concrete's batch plant did not impose significant impacts on the neighboring residential community. Pet App A 5. The Hearings Officers conclusions in that regard are substantiated by evidence in the record regarding the period advocated by Petitioner. Accordingly, any impermissible reliance on evidence outside of the applicable period was harmless. This Board should deny the first assignment of error because the asserted error was harmless.

B. Response to Petitioner's Second Assignment of Error. (a) The Hearings Officer did not err in applying LDO 11.2.1; (b) Any error in applying LDO 11.2.1 was harmless.

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1. *Preservation of Error*

Intervenor-Respondents concede that this issue is preserved for review.

2. *Standard of Review and Available Relief*

This Board will remand a land use decision for further proceedings where the decision improperly construes the applicable law, but is not prohibited as a matter of law. ORS 197.835; OAR 661-010-0071(2)(d). Where a county misapplies the test that this Board determined must be applied in an earlier appeal but explains its conclusion in a manner consistent with the correct test, misapplication of the identified test is not a basis for reversal or remand. *Anderson v. Coos County*, 62 Or LUBA 38 (2010).

3. *Argument*

a. Petitioner failed to request relief based on its second assignment of error.

Petitioner contends that the Hearings Officer erred by applying the criteria governing alteration of a nonconforming use, LDO 11.2.1. Petitioner asserts that application of LDO 11.2.1 was premature in the absence of a final determination of the nonconforming status for any use on the subject property. PB 16. Petitioner does not argue that the alleged error requires reversal or remand of the Remand Decision. Instead, Petitioner blankly asserts that "Respondent's decision misconstrued the law in applying standards for alteration of a nonconforming use to an application for a verification of a

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nonconforming use." This Board should deny the second assignment of error because it does not request any available relief. *See Dolan v. City of Tigard*, 20 Or LUBA 411 (1991) (explaining that if a petition for review does not set out facts and legal argument sufficient to persuade LUBA that there is a basis for reversal or remand of the challenged decision, then LUBA simply affirms the decision).

b. The Hearings Officer did not err in applying LDO 11.2.1.

In all events, the cited applicable criteria, LDO 11.2.1, includes and incorporates the criteria applicable to the verification of nonconforming uses, LDO 11.8:

> "An alteration of a nonconforming use may include a change in the use that may or may not require a change in any structure or physical improvements associated with it. An application for an alteration of a nonconforming use must show either that the use has nonconforming status, as provided in Section 11.8, or that the County previously has issued a determination of nonconforming status for the use and the use was not subsequently discontinued as provided in section 11.2.2."

LDO 11.2.1(A), App A 3. Accordingly, any application of LDO 11.2.1 necessarily includes an application of LDO 11.8.[3]

[3] LDO 11.8.1(A) provides that an applicant for verification of a nonconforming use must establish the approximate date that use was established; proof that the use was lawfully established at the time it became nonconforming; and proof that the use has not been discontinued or abandoned. App A 6. Those requirements comport with the requirements in ORS 215.130.

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As pertinent to this proceeding, the underlying nonconforming use criteria, LDO 11.8 had already been applied by the local government in the Nonconforming Use Decision. The limited purpose of the remand proceeding was to determine the nature and extent of the concrete batch plant nonconforming use. Part of the nature and extent of that use includes consideration of the intensity of the use and impacts on the neighboring community. In applying LDO 11.2.1 the Hearings Officer considered the impact to the neighboring community, which, in turned required consideration of the intensity and extent of the concrete batch plant use. Those considerations and determinations, while distinct legal concepts, are intertwined factual inquires. In the circumstances of this proceeding, the Hearings Officer did not err in basing his inquiry on LDO 11.2.1.

c. Any error in applying LDO 11.2.1 was harmless.

For the foregoing reasons, any error in applying LDO 11.2.1 was harmless, because the Hearing Officer's application of LDO 11.2.1 included consideration of the nature and extent of the verified nonconforming concrete batch plant use. *See Anderson v. Coos County*, 62 Or LUBA 38 (2010) (where a county explains its conclusion in a manner consistent with the correct test application of an incorrect test is not a basis for reversal or remand). This Board should deny the second assignment of error.

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C. Response to Petitioner's Third Assignment of Error: The Hearings Officer's findings on the nature and extent of the concrete batch plant nonconforming use are adequate and supported by substantial evidence in the whole record.

1. *Preservation of Error*

The issue is preserved in part and waived in part.

2. *Standard of Review and Available Relief*

This Board may reverse or remand a decision that is "not supported by substantial evidence in the whole record." *Younger v. City of Portland*, 305 Or 346, 348 (1988), *citing*, ORS 197.835(8)(a)(C). "Substantial evidence" is evidence a reasonable person would accept as adequate to support a conclusion. *Reeves v. Washington County*, 24 Or LUBA 483, 490 (1993). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County*, 317 Or 172, 179 (1993); ORS 183.482(8)(c).

In performing substantial evidence review, LUBA is solely to determine if the evidence is such that a reasonable decision maker would rely on the evidence; LUBA is not to conduct its own reweighing of the evidence, and LUBA does not duplicate the role of the original decision maker. *Mingo v. Morrow County*, 63 Or LUBA 357, 367-68 (2011), *citing*, *1000 Friends of Oregon v. Marion County,* 116 Or App 584, 586-88 (1992). While LUBA need not piece together evidence which could explain the county's conclusion, it

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must consider evidence identified by Intervenor-Respondents in its brief that support the county's findings that an applicable standard has been met. *Canby Quality of Life Committee v. City of Canby*, 30 Or LUBA 166 (1995).

3. *Argument*

a. Response to first sub-assignment of error: The Hearings Officer's findings on the nature and extent of the concrete batch plant nonconforming use are adequate.

The parties agree that this Board set out the proper inquiry in *Spurgin v. Josephine County*,

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

28 Or LUBA 383, 390-91 (1994) (footnote omitted).

LDO 11.2.1(A) provides that an applicant may apply to change a verified nonconforming use to "another, no more intensive nonconforming use" and that such an application "must show that the proposed new use will have no greater adverse impact on the surrounding neighborhood." App A 3. Thus, the required level of specificity of findings regarding the nature and extent of the

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prior concrete batch nonconforming use is the standard set forth in *Tylka v. Clackamas County*,

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

28 Or LUBA 417, 429 (1994). The Hearings Officer's description met those standards.

Specifically, the Hearings Officer described the nature and extent of the nonconforming use to include an annual minimum production of 40,000 tons of batched material. Pet App 4. The Hearings Officer noted that amount was two to three times more material than the asphalt batch plant produces. Pet App 4. The Hearings Officer described the "continuous line of trucks at the site for delivery of raw materials and for the transportation of the finished product." Pet App 4. The Hearings Officer described the seasonality of the concrete batch plant, in that it did not always operate during the winter months. Pet App 4. In comparing the impacts to the neighboring residential community, the Hearings Officer determined that nonconforming concrete batch plant did not impose significant impacts on the residential community. Pet App 4. Those descriptions are sufficient to meet the *Tylka* standard for specificity for purposes of comparing the current use to the verified nonconforming use.

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While the Hearings Officers findings with respect to the physical extent that the nonconforming use utilized the subject property were admittedly thin, as the Hearings Officer observed in the Nonconforming Use Decision, a batch plant operation requires an entire set of installations, including offices, cargo containers, aggregate piles, fuel storage tanks, shops, offices, *etc.*, in addition to the batching machine itself. R 237. The precise sizes and configurations of those structures need not be determined in order to meet the *Tylka* standard.

b. Response to second sub-assignment of error: The Hearings Officer's findings on the nature and extent of the concrete batch plant nonconforming use are supported by substantial evidence in the whole record.

Under this sub-assignment of error, Petitioner contends that, in concluding that the concrete batch plant did not impose significant impacts to the neighboring community, the Hearings Officer impermissibly relied on a negative inference based on a relative absence of reports of negative impacts in the record. Petitioner waived that argument because during the remand proceeding, Petitioner argued in support of such a negative inference. Specifically, Petitioner argued, "It can only be inferred from a comparison of the wealth of evidence in the record regarding impacts of the current asphalt batch plant and the lack of evidence regarding impacts from a concrete batch plant that any impacts experienced from the concrete batch plant use were minimal." R 212. Petitioner further argued, "Based on a review of the

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evidence, it seems that the impacts of the concrete batch plant use were so discrete that many local residences and neighbors did not even notice that a concrete batch plant existed on the property." R 212.

Petitioner made those arguments in support of its more general argument that the current asphalt batch plant has a greater impact on the neighboring community than did the concrete batch plant. The Hearings Officer determined that the two plants imposed similarly insignificant impacts on the neighboring residential community. Pet App A 5. Now, on review, Petitioner challenges the negative inference that the Hearings Officer relied on, in part, to determine the nature and extent of the concrete batch plant use. Because Petitioner urged the Hearings Officer to adopt the same negative inference that Petitioner now challenges, Petitioner waived that challenge.

c. The Hearings Officer properly referred to the nature and extent of the unverified asphalt batching nonconforming use to infer the nature and extent of the prior, verified concrete batching nonconforming use.

Under the circumstances of this case, the challenged negative inference is permissible. An earlier example is apt here: If neighbors of the operating asphalt batch plant between the period of 2001 to 2012 reported noise and traffic in the area from that operation, the Hearings Officer could conclude that neighbors who lived in the community during Best Concrete's operating years would also have been affected by any noise and traffic from operation on the

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subject property. Because there was testimony from witnesses who lived in the neighboring residential community during the period of Best Concrete's operation, and very few of those witnesses testified that they experienced significant impacts from the operation of the concrete batch plant, a reasonable person could rely on that absence of evidence to conclude that the concrete batch plant did not have significant impacts on the neighboring residential community.

d. Even if the Hearings Officer erred, the nature and extent of the concrete batch plant nonconforming use is established by substantial evidence in the whole record.

Even if this Board determines that the Hearings Officer's findings are deficient with respect to the physical aspects of the concrete batch plant, there is substantial evidence in the record to support the conclusion that the concrete batch plant utilized a similar amount of equipment and storage as the asphalt batch plant:

> "The amount of equipment/storage located on the subject property in conjunction with the current [asphalt] batch operation appears to be similar to the amount of equipment/storage located on the subject property when Best Concrete was operating their batch plant."

R 54, RNC 956-57, Letter Dated July 11, 2013, Howard DeYoung. That statement is supported by comparing an aerial photo from 1991, RNC 404, to relatively recent aerial photo derived from Google Maps, RNC 730. As the Hearings Officer determined in the Nonconforming Use Decision, a batch plant

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"is not located within a single structure, *per se*, but is conducted on a site with specialized installations, which are supported by other more-conventional structures. The entire set of those elements constitutes the batch plant use[.]" R 237. Accordingly, the proper referent for comparing the asphalt batch plant to the concrete batch plant is the area used for performing the nonconforming use--that is, the area of land utilized for the equipment and material storage associated with and necessary to the batching operation.

LDO 11.2.1(A) provides that "An alteration of a nonconforming use may include a change in the use *that may or may not require a change in any structure or physical improvements associated with it*" (emphasis added) App A 2. Additionally, LDO 11.2.1(E) provides that a nonconforming use may be moved in whole or part to any other portion of the lot or parcel on which it is located if such a reconfiguration will not result in greater adverse impacts to the surrounding neighborhood. App A 4.

Here, the subject property has been continuously used for aggregate mining and batching operations since 1963. The precise configuration of the equipment and stored materials is not necessary to defining the nature and extent of the nonconforming use. Under LDO 11.2.1(A) and (E), batching equipment and material may be reconfigured so long as any reconfiguration does not result in greater adverse impacts to the surrounding neighborhood.

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It is undisputed that Best Concrete operated a batch plant on the subject property between 1988 and 2001. The above cited evidence establishes that Best Concrete's operation required batching equipment and material storage similar to the batching equipment and material storage used by Mountain View Paving. Accordingly, evidence in the record is sufficient to establish the physical nature and extent of the concrete batch plant nonconforming use.

D. Response to Petitioner's Fourth Assignment of Error. The Hearings Officer did not err in failing to determine whether the original nonconforming use has been discontinued.

1. *Preservation of Error*

Intervenor-Respondents argue, alternatively, that (a) (a) Petitioner waived the issue by failing to raise it in prior proceedings; or (b) the issue was resolved against Petitioner in LUBA No. 2013-103 and, thus, that issue is not available for review in this appeal.

2. *Standard of Review and Available Relief*

A party is bound on remand by all issues that were resolved against it in LUBA's first decision. *Sperber v. Coos County*, 60 Or LUBA 44 (2009). Where the county approves a decision, and that decision is appealed and remanded by LUBA, and the same decision is approved again on remand, and appealed a second time, those appeals are two phases of the same case, and the issues that LUBA decided in its first decision may not be the subject of assignments of error in the appeal of the remand decision. *Welch v. Yamhill*

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County, 58 Or LUBA 29 (2008). Where a party does not seek appellate court review of LUBA's initial decision, it may not argue that same issue in a subsequent appeal. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004). Furthermore, issues that were resolved, or could have been raised but were not raised and resolved, cannot be raised to challenge a subsequent application for approvals necessary to carry out the earlier decision. Such challenge is an impermissible collateral attack on the earlier decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

3. *Argument*

a. Petitioner waived its argument with respect to continuity of the nonconforming use.

A party in a land use proceeding waives review of an issue when that party could have and failed to raise that same issue in a prior appeal. *Beck v. City of Tillamook*, 313 Or 148, 153 (1982). The issue Petitioner raises in its fourth assignment of error relates to the continuity of the nonconforming use on the subject property. Petitioner could have, and failed to raise that issue in the local proceedings that resulted in the Nonconforming Use Decision. Petitioner also did not raise that issue in its initial appeal in LUBA No. 2013-103.

In the local proceedings that resulted in the Nonconforming Use Decision, Petitioner alternatively argued: (1) the applicants had failed to establish a general batching plant nonconforming existed on the subject

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property; (2) the batching plant use was intermittent and, therefore, not continuous; and (3) concrete batching and asphalt batching are different uses. RNC 127-31. Petitioner could have, but did not, argue that historical transitions between asphalt batching and concrete batching constituted discontinuance of the nonconforming use.[4]

In the Nonconforming Use Decision, the Hearings Officer decided that a nonconforming batch plant use was continuous on the subject property from at least 1963 to the present. R 223, 227-28, 228 n 7, 232, 233, 238. On appeal from that decision, Petitioner argued that the Nonconforming Use Decision was flawed in myriad ways. However, Petitioner did not argue that the nonconforming use--whether it was concrete batching or asphalt batching--was discontinued or interrupted by virtue of a conversion from asphalt batching to concrete batching and back to asphalt batching. *See* R 215-16 (making that argument for the first time during the local remand proceeding). That issue was "plainly cognizable" at the local nonconforming use proceeding. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008). Addtionally, Petitioner could have attempted to raise that argument in their appeal in LUBA No. 2013-103, but Petitioner failed to do so. *See* LUBA No. 2013-103, R 307 ("We understand

[4] The City of Talent, which is not a party to this appeal and was not a party to the appeal in LUBA No. 2013-103, did appear to approach that argument in a letter to the Hearings Officer dated July 31, 2013. RNC 84. However, Petitioner did not assign as error in LUBA No. 2013-103 the Hearings Officer's implicit rejection of that argument.

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petitioner to argue that replacing one kind of batch plant with another kind represents an 'alteration' of the original use that must be approved as such[.]"). Under *Beck*, Petitioner is precluded from raising that argument on review in this appeal. *See also Wetherell v. Douglass County*, 60 Or LUBA 131 (2009) (an issue that was not raised in the initial appeal, and was not one of the issues on remand, cannot be raised for the first time in a challenge to the county's decision on remand); *Angius v. Washington County*, 52 Or App 222 (2006) (explaining LUBA remanded local decision to identify evidence does not open the door to raise new issues that could have been but were not raised in the initial appeal).

b. In the alternative, the issue was decided adversely to Petitioner in LUBA No. 2013-103.

Petitioner is bound on remand, and review from the remand, on all issues that were resolved against it in LUBA No. 2013-103. In LUBA No. 2013-103 this Board affirmed the Hearings Officer's decision that the nonconforming use was continuous, notwithstanding this Board's conclusion that the conversion to an asphalt batch plant constitutes an *alteration* of the concrete batch plant nonconforming use. Accordingly, Petitioner's argument on review in this case--that that conversion constitutes an interruption or discontinuance of the nonconforming concrete batch plant use--has already been decided against it in LUBA's first decision in this proceeding. Accordingly, Petitioner's fourth

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assignment of error must fail. *See Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007) (where LUBA rejects an issue but remands a decision on other grounds, the petitioner may not raise the rejected issue for a second time in the local government's decision on remand).

c. As a matter of law, an alteration of a nonconforming use does not constitute a discontinuance of the nonconforming use.

If this Board reaches the issue, the Board should hold that, as a matter of law, an alteration of a nonconforming use does not constitute a discontinuance of the nonconforming use.

ORS 215.130(5) provides, in part,

> "The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section."

ORS 215.130(9) provides,

> "As used in this section, alteration of a nonconforming use includes:
>
> "(a) A change in the use of no greater adverse impact to the neighborhood; and
>
> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood."

ORS 215.130(7)(a) provides

> "Any use described in subsection (5) of this section may not be resumed after a period of interruption or abandonment unless the resumed use conforms with the requirements of zoning ordinances or regulations applicable at the time of the proposed resumption.

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ORS 215.130(10) provides:

> "A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:
>
> "(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;
>
> "(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or
>
> "(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section."

Petitioner's fourth assignment of error raises an issue of statutory interpretation: Whether an "alteration" of a nonconforming allowable under ORS 215.130(5) and 215.130(9) can constitute "interruption or abandonment" under ORS 215.130(7)(a). It cannot.[5]

"Alteration" under ORS 215.130(5) refers to an alteration of a lawfully verifiable nonconforming use. ORS 215.130(5) ("*The lawful use* of any

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[5] ORS 215.130 does not specifically refer to "expansion" of a nonconforming use. Under LDO 11.2.1, "expansion or enlargement" of a nonconforming use is a subtype of "alterations" to nonconforming uses. App A 3. LDO 11.2.2 (A) describes "discontinuance" as a "cessation" of the nonconforming use. App A 3.

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building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation *may be continued*. Alteration *of any such use* may be permitted subject to subsection (9) of this section." (Emphases added.)). Accordingly, any alteration that is allowable under ORS 215.130(5) is necessarily founded on a lawful continuing nonconforming use. Thus, any alteration that may be permitted under ORS 215.130(9) is a *continuation* of a nonconforming use, and cannot be a *discontinuation* of a lawful nonconforming use.

Moreover, a local government can only verify a nonconforming use that has been established as a continuous use. Because a nonconforming use must be continuous to be verified under ORS 215.130(5), it is illogical that an alteration to a verified nonconforming use that is permitted under ORS 215.130(9) could ever constitute an "interruption or abandonment" of the nonconforming use under ORS 215.130(7). Any change that could constitute a "period of interruption or abandonment" could not also be confirmed as an alteration.

Petitioner invokes this Board's language in LUBA No. 2013-103 that "even if the two types of batch plants constitute the 'same use,' replacing one with the other constitutes, at a minimum, an alteration that requires county review and approval." R 314. Relying on that language, Petitioner asserts that "LUBA did not find that the change from the concrete batch plant to an asphalt

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batch plant was absolutely an alteration, rather than an expansion or discontinuance of the nonconforming use." PB 27. Simply put, Petitioner puts more weight on the ambiguity inherent in this Board's "at a minimum" clause than that ambiguity will bear. This Board concluded in LUBA No. 2013-103 that the 2001 conversion constituted an alteration of the verified nonconforming concrete batch plant use. This Board explicitly recognized that conclusion in LUBA No. 2014-015 when describing the holdings and effect of the prior decision in LUBA No. 2013-103:

> "LUBA found that the conversion of the concrete batch plant to an asphalt batch plant in 2001 required approval *as an alteration* of the nonconforming concrete batch plant and the hearings officer erred in concluding that the conversion did not require approval *as an alteration*."

R 10 (emphases added). Accordingly, the Hearings Officer did not err in determining that the applicants must apply for approval of the asphalt batch plant as an alteration of the nonconforming concrete batch plant use. Thus, the conversion is an alteration and, because it is an alteration, it cannot constitute a discontinuance of the nonconforming use. Petitioner's contrary argument does not accord with the law of this case or the proper interpretation of ORS 215.130.

The LDO provisions that apply to verification of a nonconforming use, and alterations to a nonconforming use, must accord with the provisions of ORS

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215.130(5), (7)(a), and (9). Accordingly, the above reasoning with respect to alteration and discontinuance apply equally under the LDO.[6]

Finally, Petitioner identifies no decisional law to support the position that an alteration or expansion can constitute discontinuance. Intervenor-Respondents also did not find any case law that supports that position. The closest case on the issue is *Leach v. Lane County*, ___ Or LUBA ___ (LUBA No. 2003-091, Nov. 14, 1983), where this Board rejected the argument that an unlawful expansion of a nonconforming use could render the entire underlying nonconforming use unlawful.

Because the conversion to an asphalt batch plant in this case constitutes either an alteration or an expansion of the concrete batch plant nonconforming use, that change cannot constitute discontinuance of the nonconforming use. Petitioner's fourth assignment of error should be denied.

CONCLUSION

For the reasons set forth above, Intervenor-Respondents respectfully request that the Remand Decision be affirmed. In the alternative, if this Board concludes that the Hearings Officer's findings with respect to the nature and extent of the verified nonconforming concrete use are inadequate, Intervenor-

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[6] Intervenor-Respondents do not assert, nor could it, that LDO 11.2.1(A) authorizes a replacement of one nonconforming use with a different nonconforming use in circumstances not authorized by ORS 215.130. Intervenor-Respondents accept that allowable changes in use must qualify as alterations or expansions of a verified nonconforming use.

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Respondents respectfully request another partial remand for the Hearings Officer to describe the nature and extent of the nonconforming concrete batch plant use in greater detail.

DATED this 15th day of January, 2015

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CERTIFICATE OF FILING

I hereby certify that on January 15, 2015, I filed the original of INTERVENOR-RESPONDENT'S BRIEF, together with four (4) copies, with the Land Use Board of Appeals, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283, by Certified Mail Return Receipt Requested.

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CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2015, I served a true and correct copy of INTERVENOR-RESPONDENT'S BRIEF on all persons listed below, by first class mail, postage prepaid.

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CHAPTER 11.[1] NONCONFORMITIES

11.1 GENERAL

11.1.1 Purpose

This Chapter governs permanent and temporary uses, structures, and signs that came into being lawfully, but do not conform to one or more requirements of this Ordinance.

11.1.2 Nonconformities Regulated

The regulations of this Chapter address the following types of situations, all of which are collectively referred to as "nonconformities" (see Ch.13 "nonconforming" definition):

A) ***Nonconforming Uses***

A use that was lawfully established before the effective date of this Ordinance but which no longer conforms to the uses or dwelling density allowed in the zoning district in which it is located, is considered nonconforming and is regulated either under Chapter 11 of this Ordinance, or Section 6.3.2(A), Manufactured Dwelling Park, where applicable.

B) ***Nonconforming Structures***

Buildings and structures, not including signs, that were lawfully established but do not comply with the dimensional and locational standards of the zoning district in which they are now located (see Table 8.2-1: "Table of Density and Dimensional Standards") are referred to as "nonconforming structures."

C) ***Nonconforming Dwellings***

A dwelling is a type of structure that may be nonconforming due to its location or use (e.g., density).

D) ***Nonconforming Lots and Parcels***

Lawfully established lots or parcels may become nonconforming as a result of changes in zoning. Generally, a lot or parcel becomes nonconforming due to size or configuration.

E) ***Nonconforming Signs***

Signs that were lawfully established but do not comply with the sign regulations of Section 9.6 are referred to as "nonconforming signs."

11.1.3 Policies

A) ***General Policy***

The County recognizes the interests of property owners in continuing to use their property. It is the general policy of the County to allow nonconformities to continue to exist and be put to productive use, while bringing as many aspects of the use or structure into conformance with this Ordinance as is reasonably practicable.

[1]Ordinance 2006-10, effective 2-18-07

B) ***Authority to Continue***
Nonconformities will be allowed to continue in accordance with the regulations of this Chapter. Structures designed for a specific use that is not currently allowed in the zoning district may continue to house the use the structure was designed to accommodate (e.g., gas station in a residential zone).

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

D) ***Repairs and Maintenance***
Repairs and normal maintenance required to keep nonconformities in a safe condition will be permitted, provided that no alteration will be allowed unless specifically permitted by this Chapter or required by law. *(See ORS 215.130 (5))*

E) ***Change of Tenancy or Ownership***
Changes of ownership, tenancy, or management of an existing nonconformity are permitted, and in such cases the nonconforming situation will continue to be subject to the standards of this Chapter.

11.2 NONCONFORMING USES

All nonconforming uses will be subject to the following standards:

11.2.1 Alterations

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

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

B) ***Expansion or Enlargement***

1) A nonconforming use, other than a single-family dwelling (see Section 11.4), aggregate, mining, or rural industrial use operation (see subsection (C) below), may not be expanded or enlarged except as provided under (2) below. For purposes of this Section, to "expand" or "enlarge" means:

   a) To replace a structure, in which a nonconforming use is located, with a larger structure;

that has been temporarily discontinued may continue to operate is subject to a Type 2 review, and a finding that the use has not been discontinued for more than two (2) years. A cessation of use that is the result of government action, court order, or land use code violation not related to the nonconforming use is not considered a discontinuance for purposes of this Section.

B) ***Exemption for Surface Mining Uses***
A nonconforming surface mining use continued under this Chapter will not be deemed to be interrupted or discontinued for any period after July 1, 1972, provided:

1) The owner or operator was issued and continuously renewed a state or local surface mining permit, or received and maintained a state or local exemption from surface mining regulations; and

2) The surface mining use was not inactive for a period of 12 consecutive years or more.

3) For purposes of this subsection, "inactive" means no aggregate materials were excavated, crushed, removed, stockpiled, or sold by the owner or operator of the surface mine. *[See ORS 215.130(7)(b)]*

11.2.3 Accessory Uses
No use that is accessory to a principal nonconforming use will continue after the principal use ceases to exist.

11.2.4 Signs
The Director may authorize on-premise signs for a nonconforming use pursuant to Section 9.6.4. Any new signage is limited to the number, location, and size provided for in the zoning district in which the use is located, as set forth in Section 9.6.

11.3 NONCONFORMING STRUCTURES

Structures may be nonconforming because they do not comply with the locational or dimensional requirements of this Ordinance, or because their intended use and purpose is not consistent with the zoning district in which they are located. Such structures are considered to be nonconforming by design. Nonconforming structures are subject to the following standards:

11.3.1 Alterations to Structures
Nonconforming structures may be altered in conformance with the development standards of this Ordinance. Any alteration to a nonconforming structure that proposes reconstruction not in compliance with the standards of this Ordinance, requires a Type 2 review to ensure no greater adverse impact to the surrounding neighborhood.

A) ***Enlargement or Modification***
A nonconforming structure may be remodeled, replaced, or enlarged, or otherwise altered, provided such work is in compliance with health and safety requirements of this Ordinance and other applicable law. Proposed enlargements or modifications of a nonconforming structure that do not comply with applicable standards of this Ordinance may be allowed under a Type 2 review when the structure would be rendered no more

nonconforming and the applicant demonstrates that there will be no greater adverse impact to the surrounding neighborhood.

B) ***Relocation***
Nonconforming structures may be moved when the relocation will cause the structure to be more in compliance with applicable standards.

11.3.2 Damage or Destruction
If a nonconforming structure is damaged by fire, other casualty, or natural disaster, the structure may be repaired or reconstructed to its original square footage without compliance with the provisions of this Ordinance when such work commences under an approved permit within one (1) year of the damage. If, for any reason, permitted repair work is not completed and the permit expires, repair or reconstruction of a damaged nonconforming structure thereafter is subject to the requirements of Section 11.3.1.

11.4 NONCONFORMING DWELLINGS

11.4.1 Exemption for Single Family Dwellings
Notwithstanding any other provisions of this Chapter, a single family dwelling that is nonconforming due to its location or use (e.g., density) may be replaced, remodeled or relocated subject to the following:

A) A lawfully established single-family dwelling may be re-established after a period of interrupted use for up to four (4) years without further compliance with the requirements of this Ordinance, provided however, that access, floodplain, health, sanitation, and applicable fire safety requirements are met. In cases where a nonconforming dwelling replacement was authorized until a date certain in writing by the County prior to adoption of this Ordinance, the time period specified by the County remains valid.

11.5 NONCONFORMING LOTS AND PARCELS

Lots or parcels created in compliance with Sections: 1.7.4 (Lawfully Established [Preexisting] Nonconformities Under Prior Ordinance); 1.7.5 (Preexisting Uses and Lots); 6.3.2 (Manufactured Dwelling Park Conversion); 6.3.5 (Transportation Uses, Transportation Improvements); 8.9 (Parcel Area Reductions); 10.2 (Land Division Applicability and Jurisdiction); or 10.5 (Dedication Requirements) are lawfully created and entitled to the development rights associated with any other lot or parcel created in accordance with this Ordinance, unless otherwise stipulated in the division approval.

Lots or parcels may become nonconforming as a result of changes in zoning, but nonconforming lots and parcels may not be created through approval of a development review, except as allowed under Sections 8.9 or 10.5 of this Ordinance. The configuration of a nonconforming lot or parcel may be altered pursuant to the property line adjustment provisions of Section 3.4, and is not a division of land except as specified by OAR 660-033-0020(4) and 660-006-0005(4). Divisions of nonconforming lots or parcels may occur in certain zoning districts, subject to the provisions of Section 8.9 or 10.5.

11.6 NONCONFORMING SIGNS

11.6.1 Change of Copy; Repairs
Change of copy or the substitution of panels or faces on nonconforming permanent signs will be permitted. Repairs and maintenance of nonconforming permanent

signs, such as repainting and electrical repairs, is permitted. Nonconforming temporary signs that have fallen into disrepair or become a nuisance must be removed upon notification from the County.

11.6.2 Discontinuance

Any nonconforming sign that is removed for a period of one (1) year or more may not be replaced except in full compliance with the standards of Section 9.6. Any nonconforming sign that pertains to a business or institution that ceases operation for a period of 180 days or more may not be reused for sign purposes until it is brought into full compliance with the sign regulations of Section 9.6.

11.7 NONCONFORMITIES CREATED BY PUBLIC ACTION

When lot area or setbacks are reduced as a result of conveyance to a federal, state, or local government for a public purpose, the remaining area of the lot or parcel is deemed to be in compliance with the minimum lot size and setback standards of this Ordinance. Parcels which could be divided under the existing zoning district shall not be prohibited from such division if the parcel size falls below the minimum requirements due to dedication of right-of-way for improvement to a public road. See Sections 6.3.5 and 10.5.2

11.8 VERIFICATION OF NONCONFORMING STATUS

11.8.1 Process

Owners of nonconforming uses, structures, or signs may request a "verification of lawful nonconforming status" by filing an application with the Director in accordance with Type 2 decision-making procedures. In cases of nonconforming lots or parcels, determinations regarding lawful lot creation may be made in accordance with the provisions of Section 10.2.1. *(Amended by Ordinance 2004-12, effective 2-6-2005)*

A) The application must be accompanied by documentation that establishes the approximate date that the use, structure, or sign was established; proof that the use, structure, or sign was lawfully established at the time it became nonconforming; and proof that the use has not been discontinued or abandoned, except as provided in Section 11.8.2 below. The Director may require or provide additional information if deemed necessary to permit an accurate determination.

B) Notwithstanding subsection (A) above, the applicant will not be required to prove the existence, continuity, nature, and extent of the use for more than a consecutive 10-year period immediately preceding the date of application. Documentation showing the use existed and was continued during this time period creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application. *[ORS 215.130]*

C) Once issued, a County provided verification will be recorded in the County deed records by the applicant. Such verifications will run with the land, and their status will not be affected by changes of tenancy, ownership, or management.

11.8.2 Exemptions

Notwithstanding Section 11.8.1 above, where the contention for nonconforming use is raised in a court in any action brought to enforce this Ordinance before an

application for determination has been filed under this Section, this Section will not be applicable and the court will have jurisdiction to determine the issue.

Rogue Advocates v. Jackson County, LUBA No. 2014-100

Intervenor-Respondents' Appendix B

Table: Timeline summary of relevant facts (bold indicates change)

Year	**1963**	**1973**	**1974**	**1982**	**1988**	**1992**	**2000**	**2001**	**2002**
Owner	DeYoung	DeYoung	DeYoung	DeYoung	DeYoung	DeYoung	DeYoung	DeYoung	**Meyers**
Occupant	Rogue River Paving	Rogue River Paving	**Other batching operators**	Other batching operators	**Best Concrete**	Best Concrete	Best Concrete	**Mountain View Paving**	Mountain View Paving
Relevant Use	Pavement batching (including asphalt)	Pavement Batching (including asphalt)	Pavement Batching (including asphalt)	**Pavement batching**	**Concrete batching**	Concrete batching	Concrete batching	**Asphalt batching**	Asphalt batching
Zoning	No zoning	**OSD-5** (Prohibits batching use)	OSD-5 (Prohibits batching use)	**RR-5** (Prohibits batching use)	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)
Relevant land-use proceedings/ decisions						**20 years prior to Meyers' applications**			Meyers' applications

Year	**2012**	**2013**	**2014**	**2015**
Owner	Meyers	Meyers	Meyers	Meyers
Occupant	Mountain View Paving	Mountain View Paving	Mountain View Paving	Mountain View Paving
Relevant Use	Asphalt batching	Asphalt batching	Asphalt batching	Asphalt batching
Zoning	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)	RR-5 (Prohibits batching use)
Relevant land-use proceedings/decisions	Meyers' applications	Nonconforming Use Decision Floodplain Development Decision	LUBA Nos. 2013-102/103 LUBA No. 2014-015 Remand Decision	LUBA No. 2014-100