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

PAUL MEYER and KRISTEN MEYER,	)	
Petitioners,	)	LUBA No. 2015-073
vs.	)	Jackson County
	)	File No. 439-15-00097-ZON
JACKSON COUNTY,	)	
Respondent,	)	
And	)	
ROGUE ADVOCATES,	)	
Intervenor-Respondent.	)	

PETITION FOR REVIEW

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1 **I. STANDING**

2 Petitioners have standing because the Petitioners are the land owners and
3 applicants in File No. 439-15-00097-ZON. Petitioners appeared before the
4 Hearings Officer and Petitioners are adversely affected by Decision.

5 **II. STATEMENT OF THE CASE**

6 **A.** ***Nature of decision and relief sought***

7 Petitioners challenge the Jackson County Hearing Officer's denial of
8 their application for an alteration of a nonconforming use from a concrete batch
9 plant use to an asphalt batch plant use.

10 Petitioners applied to alter the partially verified nonconforming concrete
11 batch plant use on their property to an asphalt batch plant use as it existed in
12 2001. Record in LUBA No. 2015-073 (R) 703 (Alteration Application).
13 Planning staff approved. R 682. Intervenor Rogue Advocates appealed that
14 approval to the Hearings Officer. The Hearings Officer verified the nature and
15 extent of the nonconforming concrete batch plant use and denied the Alteration
16 Application. Appendix (App) A, Decision and Final Order File No. 439-15-
17 00097-ZON (Decision). Petitioners appeal from that denial and seek a remand.

18 In the Decision, the Hearings Officer applied Jackson County Land
19 Development Ordinance (LDO) Sections 11.1 (general policy regarding
20 nonconformities); 11.2 (nonconforming uses); and 11.8 (verification of
21 nonconforming status). App B, LDO Chapter 11. LDO Chapter 11 implements

and mirrors ORS 215.130(5) (permits continuation and alteration of nonconforming use) and ORS 215.130(9) (governs alteration of a nonconforming use). Those provisions are set forth at length in this brief in the assignments of error section.

In applying those governing regulations, the Hearings Officer applied a judicial rule of strict construction from *Parks v. Tillamook County*, 11 Or App 177, 501 P2d 85 (1972), which Intervenor invoked in their appeal statement. R 348. Specifically, the Hearings Officer reasoned:

> “Nonconforming uses are allowed under Oregon law and, to a limited extent, encouraged by the LDO.[2] However, they are disfavored and subject to strict scrutiny under state law. The Court of Appeals requires that they meet a high bar, having held in *Parks v. Board of County Comm'rs*, 11 Or App 177, 196-97 (1972), ‘provisions for the continuation of nonconforming uses are strictly construed against continuation of the use, and, conversely, provisions for limiting nonconforming uses are liberally construed to prevent the continuation or expansion of nonconforming uses as much as possible.’ Alteration of a nonconforming use is held to the same standard, and this decision reflects the guidance of *Parks*.”
>
> ---
>
> “[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).”

App A-5.

Based on the prior proceedings in this matter (including three LUBA decisions), the Hearings Officer determined that his decision on the application

required the verification of the nature and extent of the concrete batch plant use as a necessary predicate to evaluating the alteration. App A-6.

The Hearings Officer made the following findings with respect to the nature and extent of the concrete batch plant. The physical area of the concrete batch plant is the same as the area that was used by the asphalt batch plant in 2001. App A-23; App A-31. The equipment, structures, and stockpiles for the concrete batch plant included a rock crusher; batching machine; sand screen and wash plant; multiple stockpiles of concrete components; office; heavy equipment such as trucks and loaders; multiple fuel tanks; generator; and multiple storage buildings and cargo containers. App A-23. The concrete batch plant used two roads, one along the western edge and one along the eastern edge of the subject property. App A-24. The concrete batch plant employed 15 full-time equivalent employees. App A-24. The concrete batch plant presented a risk of fire and explosion based on operations other than the actual batching of concrete. App A-24. The concrete operation discharged dust and silica, and silica is associated with silicosis and lung cancer. App A-25. The record does not conclusively establish the concrete batch plant's hours of operation. App A-25. The concrete batch plant consistently did not operate from the subject property in November and December. App A-25.

The Hearings Officer ultimately concluded that "[t]he nature and extent of the nonconforming concrete batch plant is incompletely verified, specifically

with regard to the hours of operation, the storage structures and the fuel storage tanks that were a part of that use." App A-41.

After describing the nature and extent of the concrete batch plant use, the Hearings Officer reasoned:

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

App A-26 (quoting LDO 11.2.1).

> "Adequately describing the nature and extent of a nonconforming use provides the baseline of intensity of use and of adverse impacts for determining whether any feature occasioned by the altered use is more intense or presents a greater adverse impact. If the altered use is more intensive than the prior nonconforming use, it cannot be approved. Similarly, any adverse impact which is found to be greater—or not to have been presented by the prior nonconforming use—deprives the altered use of approval.
>
> "At least three aspects of the asphalt batch plant use fail against these criteria: the level of employment, the possibility of fire and explosion, and the year-round operation of the asphalt batch plant."

App A-27. In assessing the impacts to the surrounding neighborhood, the Hearings Officer considered Mountain View Estates, a mobile home park, to be situated "approximately 250 feet from the asphalt batch plant site." App A-29. The Hearings Office expressly assessed and ultimately denied the Alteration Application "following the guidance of *Parks*." App A-28.

1 The Hearings Officer found that the equipment, structures, and stockpiles
2 at the asphalt batch plant in 2001 consisted of the following: scale shed; office;
3 porta potty; asphalt batching plant; control shack; generator and 500-gallon
4 gasoline tank; gravel bins and ramp; three cargo containers; rock crusher; and
5 multiple stockpiles. App A-31. The Hearings Officer determined that the
6 equipment, structures, and stockpiles at the asphalt batch plant "compare
7 closely with the equipment, structures, and stockpiles at the concrete batch
8 plant." App A-32. The Hearings Officer determined that the asphalt use is less
9 intense than the concrete use with respect to roads and traffic. App A-32-33.
10 The Hearings Officer found that the asphalt batch plant operates year-round.
11 App A-40.

12 The Hearings Officer determined that "there is more fuel present for the
13 asphalt batch plant" and that the "stored fuel is an increased risk" from the fuel
14 present on the concrete batch plant. App A-36. The Hearings Officer concluded
15 that the asphalt batching process itself presents a risk of fire and explosion that
16 is not present at a concrete batching plant. App A-36. The Hearings Officer
17 based that conclusion, in part, on evidence that certain types of asphalt
18 materials have a flashpoint as low as 250°F and Petitioners heat their rock to
19 340°F before it is mixed with the asphalt oil. App A-34. The Hearings Officer
20 also concluded that Petitioners produce cold mix asphalt and that cold-mix
21 asphalt presents a "greater risk of fire." App A-35. The Hearings Officer

1 speculated that the potential "concussive force" and "products of combustion"
2 from a fire or explosion at the Petitioners' batch plant would adversely impact
3 neighboring residents. App A-37. The Hearings Officer concluded that "the
4 risks of fire and explosion related to the fuels, the heat and the volatility of the
5 petroleum products necessary for asphalt batching constitute a greater adverse
6 impact on the surrounding neighborhood." App A-37.
7 With respect to employment level, the Hearings Officer found that the
8 asphalt batch plant employs 12-15 full-time employees. The Hearings Officer
9 contradicted his earlier finding that the concrete batch plant employed 15 full-
10 time equivalent employees, App A-24, and, instead, compared the 12-15 asphalt
11 employees to "roughly 3 full-time employees of the concrete batch plant." App
12 A-33; 1-40. The Hearings Officer appeared to infer that the asphalt batch plant
13 also employs a significant number of independent contractor truckers. App A-
14 33. The Hearings Officer concluded that "the presence of up to 5 times more
15 employees on the Property is a more intensive use than that established by the
16 concrete batch plant" and, thus, the alteration could not be approved. App A-40-
17 41.
18 The Hearing Officer's third reason for denying the Alteration Application
19 was, because (1) the concrete batch plant closed in November and December,
20 and (2) the asphalt batch plant operated year-round in 2001, the asphalt batch

plant use was "more intensive" and could not be approved as an alteration to the nonconforming concrete batch plant use. App A-40-41.

For all of those reasons, the Hearings Officer denied the Alteration Application. On review, Petitioners seek reversal or remand of the Decision for the reasons explained below.

B. *Summary of arguments*

1. The Hearings Officer erred in failing to verify the hours of operation, storage structures, and fuel storage tanks as part of the concrete batch plant nonconforming use.

2. The Hearings Officer's conclusion that the proposed alteration represented a greater risk of fire and explosion is unsupported by adequate findings.

3. The Hearings Officer failed to apply the interpretive rule in LDO 13.1.1(D) and misconstrued and misapplied LDO 11.1, 11.2.1, 11.8, and ORS 215.130.

4. The Hearings Officer made material findings of fact that are not supported by substantial evidence in the record.

As explained, the Hearings Officer provided three reasons for denying the Alteration Application: (1) the risk of fire and explosion at the asphalt batch plant is a new and greater adverse impact to the surrounding neighborhood; (2) the level of employment of the asphalt batch plant is a more intensive nonconforming use; and (3) the year-round operation of the asphalt batch plant results in a more intensive nonconforming use. Petitioners challenge all of the Hearings Officer's bases for denial.

1 As a threshold and overarching matter, the Hearings Officer applied an
2 erroneous interpretive rule that resulted in the denial of the Alteration
3 Application. The Hearings Officer's conclusion that the asphalt batch plant
4 presents a greater risk of fire and explosion is unsupported by substantial
5 evidence in the record. The Hearings Officer's conclusion that the asphalt batch
6 plant employs more people than the concrete batch plant is unsupported by
7 substantial evidence in the record. In all events, even if the asphalt batch plant
8 employed more people in 2001 than the concrete batch plant employed in 1992,
9 the Hearings Officer was not required to deny the Alteration Application;
10 rather, the Hearings Officer could consider conditions of approval that would
11 bring the employment level within the verified nonconforming use. Finally, the
12 Hearings Officer was not required to deny the Alteration Application based on
13 the year-round operation of the asphalt batch plant; rather, the Hearings Officer
14 could consider conditions of approval that would bring the operation period
15 within the verified nonconforming use.

16 **C.** ***Summary of material facts***

17 This is (at least) the fourth time that this nonconforming use has been
18 before this Board. The facts in this case are substantially the same as those in
19 *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (2014) (LUBA Nos.
20 2013-103/104) (April 22, 2014) (*Rogue I*); *Rogue Advocates v. Jackson County*,
21 ___Or LUBA ___ (LUBA No. 2014-015) (August 26, 2014) (*Rogue II*); and

Rogue Advocates v. Jackson County, ___Or LUBA ___ (LUBA No. 2014-100) (March 6, 2015) (*Rogue III*).

In *Rogue III*, the Board summarized the facts and procedural history in this case as follows:

> "From 1988 to approximately 2000, a concrete batch plant operated on property owned by intervenors, as an unverified nonconforming use, because a batch plant is not an allowed use in the Rural Residential-5 zone. Sometime prior to April 2001, the concrete batch plant was removed, and intervenors located an asphalt batch plant operation on the property. Subsequently, intervenors made other unapproved alterations to the asphalt batch plant operation. In 2012, intervenors applied to the county to verify the asphalt batch plant as it existed in 2012 as a lawful nonconforming use. The hearings officer denied the application after concluding that the post-2001 changes to the operation constituted unapproved alterations, which could not be evaluated until intervenors applied for approval of those changes as alterations. The hearings officer concluded, however, that an asphalt batch plant is essentially the same use as a concrete batch plant, and hence the 2001 change from a concrete to an asphalt batch plant did not constitute an alteration of the lawful nonconforming use. As relevant here, in *Rogue I*, we disagreed with the hearings officer, concluding that replacing the concrete batch plant with an asphalt batch plant in 2001 was an 'alteration' of the nonconforming batch plant, and that that alteration of the concrete batch plant to an asphalt batch plant therefore cannot be considered part of the verified nonconforming batch plant use until it is approved as an alteration."

Rogue III, slip op at 3-4 (footnote omitted).

On January 29, 2015, Petitioners filed the Alteration Application. On March 19, planning staff issued a tentative approval. That planning staff decision was appealed. On September 24, the Hearings Officer issued the Decision denying the Alteration Application. On October 13, Petitioners filed this appeal.

The facts in the record for the Alteration Application relate to the concrete batch plant use in 1992 and the asphalt batch plant use in 2001.

In addition to the Hearings Officer's findings outlined above, evidence in the record establishes that the concrete batch plant used three fuel storage tanks: (1) 500-gallon fuel storage tank to operate the concrete batch plant; (2) 150-gallon fuel storage tank to operate the water pump on the wash plant; (3) 4,000-gallon fuel tank to operate the rock crusher and refuel vehicles. R 195-197. The asphalt batch plant utilizes a diesel generator with a 500-gallon fuel tank and the batch plant itself utilizes a 1,500-gallon fuel tank. R 154; R 201.

The concrete batch plant refueled vehicles and equipment on site; the asphalt plant does not and has never refueled vehicles on site. *See* R 152 ("Fire and explosions at asphalt and concrete batch plants are most often caused by supporting equipment such as loaders and refueling stations."). Petitioners' asphalt batch plant does not utilize a drum batching system, an asphalt processing technique that led to an explosion at the Knife River Plant in early 2015. R 199, Letter of Paul Meyer (June 15, 2015) ("Newer asphalt batch plants, such as those operated by Knife River and reported in the Medford Mail Tribune Article, 'Explosion at Knife River plant blows top off tank,' January 29, 2015, heat rock and oil in the same drum. Mountain View Paving does not heat rock and oil in the same drum. Instead, Mountain View Paving heats the rock and oil separately and the preheated materials are mixed in a separate

1 drum."); *see also* R 218, Letter of Tad S. Blanton (May 29, 2013) ("The unique
2 properties of Mountain View's batch-type plant allow it to run coated rock
3 products whereas the drum-type plants can run up against a superheating
4 condition that can potentially pose explosion hazards."). Petitioners heat the
5 rock in the asphalt production to 340°F. R 620.

6 The concrete batch plant operated intermittently and closed in at least
7 November and December. The asphalt batch plant is a year-round operation.
8 The estimated truck traffic for the concrete batch plant in 1992 was
9 approximately 19,000 trips per year. R, Audio Record for Hearing before the
10 Jackson County Hearings Officer in File No. 439-15-00097-ZON (June 1,
11 2015) at 9:43 AM, Testimony of Paul Meyer. The estimated truck traffic for the
12 asphalt batch plant in 2001 was less than 800 trips per year. *Id.*

13 The asphalt plant is located approximately 527 feet from the closest
14 building in Mountain View Estates. R 153. Not all residents of Mountain View
15 estates are disturbed by or opposed the Alteration Application. R 140.

16 **D. *Statement of jurisdiction***

17 The Board has exclusive jurisdiction to review the Decision, which is a
18 final decision made by a local government that concerns the application of land
19 use goals and regulations. ORS 197.825(1); ORS 197.015(10)(a)(A). The
20 Decision was issued and became final on September 24, 2015. A notice of
21 intent to appeal the Decision was timely filed on October 13, 2015.

III. ASSIGNMENTS OF ERROR

A. *Applicable law*

Nonconforming uses are governed by ORS 215.130, which provides, in pertinent part:

> "(5) 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.* * *
>
> "* * * * *
>
> "(9) 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.
>
> "(10) 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:
>
> > "* * * * *
> >
> > "(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."

LDO Chapter 11 implements ORS 215.130. The Hearings Officer determined that the applicable criteria are LDO 11.1 (general provisions applicable to nonconforming uses) and 11.2 (alterations to nonconforming uses). App B.

LDO 11.1.3 provides, in part:

"(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.

"(B) **Authority to Continue**
Nonconformities will be allowed to continue in accordance with the regulations of this Chapter. * * *"

LDO 11.2.1 provides, in part:

"**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;

“(b) To alter the use in a way that results in more traffic, employees, or physical enlargement of an existing structure housing a nonconforming use; or

“(c) An increase in the amount of property being used by the nonconforming use.

LDO 13.1.1(D) provides:

“**Approval Criteria and Impacts**
Unless otherwise stated in the Jackson County Comprehensive Plan, or State or Federal law, the terms ‘no adverse impact or effect,’ ‘no greater adverse impact,’ ‘compatible,’ ‘will not interfere,’ and other similar terms contained in the approval criteria of this Ordinance are not intended to be construed to establish an absolute test of noninterference or adverse effects of any type whatsoever with adjacent uses resulting from a proposed land development or division action, nor are they construed to shift the burden of proof to the County. Such terms and phrases are intended to allow the County to consider and require mitigating measures that will minimize any potential incompatibility or adverse consequences of development in light of the purpose of the zoning district and the reasonable expectations of other people who own or use property for permitted uses in the area.”

App C.

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B. *Petitioners' first assignment of error*

The Hearings Officer erred in failing to verify the hours of operation, storage structures, and fuel storage tanks that were part of the concrete batch plant nonconforming use.

1. *Preservation*

The Hearings Officer applied LDO section 11.8 to verify the nature and extent of the concrete batch plant nonconforming use. App A-41 ("LDO Section 11.8 is an applicable criterion to the extent of establishing the nature and extent of the nonconforming concrete batch plant use[.]").

2. *Standard of review*

The Board shall remand a decision when the decision improperly construes the applicable law. ORS 197.835(9)(a)(D); OAR 661-010-0071(2)(d).

3. *Argument*

The Board clarified the applicable standard in *Rogue III*:

> "*See Spurgin v. Josephine County*, 28 Or LUBA 383, 390-91 (1994) ('[a]t 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[]'); *Tylka v. Clackamas County*, 28 Or LUBA 417, 435 (1994) ('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')."

Rogue III, slip op at 7. The Board explained that the Hearings Officer's consideration of an alteration application "will necessitate a reasonably precise verification of the nature and extent of the concrete batch plant use as it existed in 1992." *Id.*

Based on the evidence before him, the Hearings Officer could have inferred that the concrete batch plant operated, *at least*, between the hours of 6:00 a.m. and 5:00 p.m. based solely on evidence that the concrete batch plant operated and supplied construction work, which generally occurs during day-time working hours. In all events, a specific finding of hours of operation was not necessary to a "reasonably precise verification of the nature and extent of the concrete batch plant use."

Evidence in the record identified the number and location of associated structures, stockpiles, and fuel tanks. R 195-197. That evidence was sufficient to comply with *Spurgin*, *Tylka*, and *Rogue III*'s standard that the description of the nature and extent of the nonconforming use be "reasonably precise." The Hearings Officer erred in concluding that the evidence before him did not meet the applicable standard.

The Board should remand the Decision with instruction for the Hearings Officer to fully verify the concrete batch plant nonconforming use.

/ / /

/ / /

1 **C. *Petitioners' second assignment of error***

2 The Hearings Officer failed to apply the interpretive rule in LDO
3 13.1.1(D) and misconstrued and misapplied LDO 11.1, 11.2.1, 11.8, and ORS
4 215.130.

5 **1. *Preservation***

6 The Hearings Officer applied LDO sections 11.1, 11.2, and 11.8. App A-
7 2 ("The criteria which apply to this appeal are set forth in the 2004 Jackson
8 County Land Development Ordinance, as amended ('LDO') in Sections 11.1
9 and 11.2 (the 'Applicable Criteria')."); App A-41 ("LDO Section 11.8 is an
10 applicable criterion to the extent of establishing the nature and extent of the
11 nonconforming concrete batch plant use[.]"). Those sections implement ORS
12 215.130(5) and (9).

13 Petitioners consistently argued that the dispositive inquiry is simply
14 whether the proposed alteration will have a greater adverse impact on the
15 surrounding neighborhood. For example, at the June 1, 2015 hearing before the
16 Hearing Officer, counsel for Petitioners argued that the only substantive
17 criterion for a general alteration is the requirement derived from ORS
18 215.130(9) that the alteration impose "no greater adverse impact to the
19 surrounding neighborhood." R, Audio Record for Hearing before the Jackson
20 County Hearings Officer in File No. 439-15-00097-ZON (June 1, 2015) at 9:07-
21 08 AM, Testimony of attorney for Applicants, Daniel O'Connor (citing

1 *Campbell v. Columbia County*, 67 Or LUBA 53, 70 n 8 (2013) (stating that "the
2 'no greater adverse impact' test embodied in ORS 215.130(9) * * * is the only
3 substantive statutory criterion for a general alteration").

4 Again, in their rebuttal memorandum, Petitioners argued:

5 "The applicable inquiry is not whether the proposed alteration to a
6 nonconforming use poses any threat; the applicable inquiry is whether the
7 proposed alteration will have a 'greater adverse impact *on the*
8 *surrounding neighborhood*." LDO 11.2.1 (emphasis added).
9 Accordingly, Applicants need not demonstrate that their proposed use
10 poses no adverse impacts, but whether any adverse impact on the
11 surrounding community is greater than the prior nonconforming use. *See*
12 *also* LDO 13.1.1(D) Rules of Interpretation: Approval Criteria and
13 Impacts ('the terms "no adverse impact or effect," "no greater adverse
14 impact," "compatible," "will not interfere," and other similar terms
15 contained in the approval criteria of this Ordinance are not intended to be
16 construed to establish an absolute test of noninterference or adverse
17 effects of any type whatsoever with adjacent uses resulting from a
18 proposed land development or division action * * *[.] Such terms and
19 phrases are intended to allow the County to consider and require
20 mitigating measures that will minimize any potential incompatibility or
21 adverse consequences of development[.]')."

22 R 71. Petitioners also argued that any greater adverse impacts could be
23 subjected to appropriate mitigation measures under ORS 215.130. R 76.

24 In its opposition to Petitioners' motion for stay of the Decision in this
25 appeal, Intervenors argued that Petitioners have waived any assignment of error
26 regarding the application of *Parks*. Petitioners anticipate that Intervenors will
27 raise that waiver argument again in their response brief. The issue of the proper
28 application and interpretation of ORS 215.130 and, in turn, LDO 11.1 and 11.2
29 were properly raised below. Indeed, the issue of the proper interpretation and

application of ORS 215.130(9) and LDO 11.2 was clearly the fundamental issue before the Hearings Officer.

As this Board held in *DLCD v. Tillamook County*, 34 Or LUBA 586, 591 (1998), “The statutory restrictions to raising issues on appeal do not apply to new arguments on appeal regarding issues that were raised below.” Moreover, there was no indication that the Hearings Officer would adopt Intervenors’ erroneous reliance on the interpretive rule from *Parks* until the Hearings Officer issued his final decision. *Accord DLCD v. Tillamook County*, 34 Or LUBA at 591 (holding that a petitioner is not required to raise issues regarding interpretive findings made in a decision prior to the issuance of the decision). Given that Petitioners did not know that the Hearings Officer’s decision would rely on the interpretive rule set out in *Parks*, a challenge to that interpretation is not precluded by waiver principles. *See also Boldt v. Clackamas County*, 107 Or App 619 (1991) (“the dynamics of local land use proceedings are not susceptible to the kind of specificity that is required to preserve issues in the courts”).

2. *Standard of review*

The Board will review the first assignment of error for errors of law. The Board shall remand a decision when the decision improperly construes the applicable law. ORS 197.835(9)(a)(D); OAR 661-010-0071(2)(d). The Board owes no deference to the Hearings Officer’s interpretation of local regulations

that are inconsistent with state law or the language of the local regulation. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994).

3. *Argument*

a. The Hearings Officer erred by applying a judicial rule of strict construction enunciated in *Parks*.

ORS 215.130, which governs nonconforming uses, provides (1) that a nonconforming use "may continue," ORS 215.130(5); (2) that a nonconforming use may be altered, so long as the alteration does not result in greater adverse impacts to the neighborhood, ORS 215.130(9); and (3) that any potential adverse impacts from a proposed alteration to a nonconforming use may be subject to mitigation measures required by the local government, ORS 215.130(10)(c).

Nothing beyond the requirements of ORS 215.130 need be shown for a landowner to have the right to continue a nonconforming use. *See Polk County v. Martin*, 292 Or 69, 82, 636 P2d 952 (1981) (holding that neither land use statutes nor case law "require that anything beyond the requirements of present ORS 215.130(5) be shown" in order for a landowner to have the right to continue a nonconforming use); *see also Eagle Creek Rock Products, Inc. v. Clackamas County*, 27 Or App 371, 374, 556 P2d 150 (1976), *overruled on other grounds by Forman v. Clatsop County*, 63 Or App 617, 665 P2d 365 (1983), *aff'd*, 297 Or 129, 681 P2d 786 (1984) ("The right to continue a nonconforming use is a property right specifically, established by ORS

215.130([5])[.] * * * As such, the existence of a nonconforming use depends only upon whether the use of the land meets the state standards established by ORS 215.130([5]).").

As Petitioners argued to the Hearings Officer, ORS 215.130(9) is the only substantive criterion for a general alteration. *See Campbell v. Columbia County*, 67 Or LUBA 53, 70 n 8 (2013). Nothing in ORS 215.130(9) implies that alterations to nonconforming uses are disfavored by law. In *Gibson v. Deschutes County*, 17 Or LUBA 692, 702 (1989), LUBA rejected a claim that expansions of nonconforming uses are prohibited by ORS 215.130:

> "ORS 215.130(9), quoted supra, defines 'alteration' of a nonconforming use to include changes to the use, structure or physical improvements 'of no greater adverse impact to the neighborhood.' This definition specifically includes additions to the physical improvements of a nonconforming use, such as proposed in this case, so long as the change would not have greater adverse impacts on the neighborhood. The statute imposes no other limitation on the changes which may be defined as potentially permissible alterations to nonconforming uses."

ORS 215.130(5) and (9) are consistent with the interpretive principles set forth in LDO 11.1.3 ("It is the general policy of the County to allow nonconformities to continue to exist and be put to productive use[.]); *id.* ("Nonconformities will be allowed to continue in accordance with the regulations of this Chapter."). The application of LDO 11.2.1 is governed by the general policy in LDO 11.1.3. In sum, neither the verification of a

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1 nonconforming use, nor the alteration of a nonconforming use is subject to the
2 rule of strict construction in *Parks*.[1]

3 Moreover, as Petitioners argued below, the Hearings Officer was
4 required to apply the rule of interpretation in LDO 13.1.1, which provides that
5 the term "no greater adverse impact" is "not intended to be construed to
6 establish an absolute test of noninterference or adverse effects of any type
7 whatsoever with adjacent uses resulting from a proposed land development[.]"
8 Instead, when applying the approval criteria of "no greater adverse impact," the
9 LDO expressly intends that the decision maker "consider and require mitigating
10 measures that will minimize any potential incompatibility or adverse
11 consequences of development." LDO 13.1.1(D); *accord* ORS 215.130(10)(c).
12 That rule of interpretation does not require strict construction favoring denial of
13 verification and alteration of a nonconforming use.

14 The Hearings Officer's analysis was erroneous because it imposed more
15 rigorous requirements relating to the verification, continuation, and alteration of
16 the nonconforming use than required by applicable regulations. The Hearings
17 Officer expressly relied on the rule of strict construction in *Parks* at the outset
18 of the Decision, noting that "this decision reflects the guidance of *Parks*." App

[1] As this Board explained in *Gibson*, prior to 1977, ORS 215.130(5) (then codified as ORS 215.130(4)) did not permit alteration of a nonconforming use without bringing the use into conformity with applicable zoning regulations. In 1977, the legislature amended ORS 215.130(5) to allow alterations to nonconforming uses. 17 Or LUBA at 699. *Parks*, which was decided in 1972, predated those substantive amendments to ORS 215.130.

A-5. The Hearings Officer expressly applied the rule of strict construction in *Parks* to the "greater adverse impacts" analysis. *See* App A-28 ("These principles are applied following the guidance of *Parks*.").

The rule in *Parks* contravenes the language of ORS 215.130 and the Court of Appeals subsequent holding in *Polk* that nothing more than the statutory requirements of ORS 215.130 need be met to approve a nonconforming use. With respect to the "no greater adverse impacts" alteration inquiry under ORS 215.130(9) and LDO 11.2, LDO 11.1.3 and LDO 13.1.1(D) provide the proper rule of interpretation. The Hearings Officer's erred in applying *Parks*, because application of that rule of interpretation imposed more rigorous requirements relating to the continuance and alteration of the nonconforming use than is required by the applicable criteria. The Hearings Officer's application of *Parks* expressly resulted in the denial of the Alteration Application.

Further, the Hearings Officer erred in applying LDO 11.2.1(B), the standards governing expansion and enlargement, to prohibit a finding of a greater number of employees or intermittency of the operation without first determining that these changes to the use have "a greater impact on the neighborhood" as required by ORS 215.130(9).

With regard to employees, the Hearings Officer found that "the number of employees implies that the [asphalt batch plant] is a more intensive use. App

A-33. The Hearings Officer made no finding that the traffic generated by these employees was greater and therefore, impacted the neighborhood. To the contrary, the Hearings Officer found that "the Applicant's use of the Property for asphalt batching generates less traffic than had the concrete batch plant." App A-32.

The final basis for the Hearings Officer's denial was that the asphalt batch plant runs all year, whereas the concrete plant ceased operation during the months of November and December. App A-39. Whether or not the altered asphalt use runs a greater number of days during a year is not a basis to find an expansion or an enlargement set forth in LDO 11.2.1(B), where the elements of expansion are limited to altering a structure or increases in traffic or employees. To the extent that the Hearings Officer relied on LDO 11.2.1(B) to find that the additional days resulted in an enlargement, the interpretation was incorrect.

Moreover, the only way that the additional days of operation could be found to be an impermissible alteration is if they constituted a change in use that had a greater adverse impact to the neighborhood and again, no such finding was made. Rather, the Hearings Officer reasoned:

> "It is important to understand the significance of the extent to which neighbors of the asphalt batch plant have been aware of possible adverse impacts. There is substantial evidence to establish that when the asphalt batch plant started operation in 2001, none of the neighbors noticed any change. They were not aware of any greater intensity of the use or any increase in the impacts by virtue of the change in use."

App A-27.

Unlike the risk of explosion, if there were additional employees and additional days of operation resulting from the altered batch plant use, they had no adverse impact on the neighbors because they did not impact or increase the risk of anything. Merely finding a greater intensity in the use as a basis for denying this alteration request represents a misapplication of the express limitations of ORS 215.130(5) and (9) and LDO 11.2.1.

The Board will remand a land use decision when the decision improperly construes the applicable law. The Board should remand the challenged Decision because Hearings Officer misconstrued and misapplied ORS 215.130 and LDO Chapter 11.

b. The Hearings Officer erroneously concluded that any finding of greater intensity of use required denial of the Alteration Application.

The Hearings Officer concluded, as a general rule, that "[i]f the altered use is more intensive than the prior nonconforming use, it *cannot be approved*." App A-27 (emphasis added). The Hearings Officer specifically concluded that (1) "The asphalt batch plant *cannot be approved* as a lawful alteration of the preceding nonconforming concrete batch plant use because its year-round operation makes it a use of greater intensity"; and (2) "[t]he asphalt batch plant *cannot be approved* as a lawful alteration of the preceding nonconforming concrete batch plant use because the level of employment that characterizes it makes it a use of greater intensity." App A-41 (emphases added). The Hearings

1 Officer thereby applied the wrong standard under LDO Chapter 11, which does
2 not *require* denial of an alteration application upon any finding of greater
3 intensity of use. As pointed out above, ORS 215.130(5) and (9) prohibit this
4 approach.

5 LDO 11.2.1(A) provides that a nonconforming use may be changed to a
6 "no more intensive" nonconforming use under Type 2 review. LDO 11.2.1(B)
7 provides that a nonconforming use may not be expanded or enlarged under
8 Type 2 review, which is the type of review at issue in this case. As pertinent
9 here, LDO 11.2.1(B)(1)(b) provides that "expand" or "enlarge" means to alter
10 the use in a way that results in more traffic or employees. Petitioners understand
11 the Hearings Officer to have concluded that year-round operation results in
12 more traffic or employees utilizing the site when use is measured on an annual
13 basis. However, the Hearings Officer expressly found that the asphalt operation
14 generates less traffic than the concrete batch plant, and evidence in the record
15 establishes that the asphalt batch plant, even with its year-round operation,
16 generates less than half of the traffic generated by the concrete batch plant.

17 In all events, even if the Hearings Officer could have concluded, based
18 on the evidence in the record, that year-round operation results in more traffic
19 or employees utilizing the site when use is measured on an annual basis, that
20 finding does not require denial of the Alteration Application. Rather, the
21 Hearings Officer could condition approval and prohibit or limit asphalt

operations during November and December—the months when the concrete batch was found to have not operated.

Petitioners argue later in this brief that the Hearings Officer's finding that level of employment is increased by the alteration is not based on adequate findings supported by substantial evidence in the record. In all events, the finding that the asphalt batch plant employs more people than the concrete batch plant does not require denial of the Application. Rather, the Hearings Officer could provide a condition of approval that limits asphalt batch plant employment to the concrete batch plant level.

Intervenors may argue that the asserted error constitutes harmless error because the Hearings Officer was *permitted* to deny the Alteration Application based on a finding of a more intensive use. However, the Hearings Officer's analysis clearly misconstrued the applicable law by concluding that the Hearings Officer had no discretion to approve the Alteration Application with conditions. Accordingly, the asserted error is not harmless.

The Board will remand a land use decision when the decision improperly construes the applicable law. The Decision should be remanded because the Hearings Officer misconstrued and misapplied applicable law.

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1 **c. The Hearings Officer erroneously concluded that any finding of**
2 **greater adverse impact required denial of the Alteration**
3 **Application.**

4 The Hearings Officer concluded that "any adverse impact which is found
5 to be greater—or not to have been presented by the prior nonconforming use—
6 deprives the altered use of approval." App A-27. The Hearings Officer
7 specifically concluded that "[t]he asphalt batch plant *cannot be approved* as a
8 lawful alteration of the preceding nonconforming concrete batch plant use
9 because the threat of risk of fire and explosion presented by the asphalt batching
10 process itself is a new risk and a greater adverse impact." App A-41 (emphasis
11 added). Petitioners argue later in this brief that the Hearings Officer's findings
12 regarding the risk of fire and explosion is not supported by adequate findings
13 based on substantial evidence in the record. In all events, the Hearings Officer
14 applied an erroneous standard. ORS 215.130 and LDO Chapter 11 do not
15 *require* denial of an alteration application upon any finding of greater adverse
16 impacts. ORS 215.130(10) and LDO 13.1.1(D) expressly *allow for* mitigation
17 of adverse impacts of an altered nonconforming use. That is, the Hearings
18 Officer was not *required* to deny the Application, even if his findings in support
19 of the denial were sufficiently supported by evidence in the record.

20 Intervenors may argue that the asserted error constitutes harmless error
21 because the Hearings Officer was *permitted* to deny the Alteration Application
22 based on a finding of greater adverse impact. However, the Hearings Officer's

analysis clearly misconstrued the applicable law by concluding that the Hearings Officer had no discretion to approve the application with conditions. Accordingly, the asserted error is not harmless.

The Board will remand a land use decision when the decision improperly construes the applicable law. The Decision should be remanded because the Hearings Officer misconstrued and misapplied applicable law.

D. *Petitioners' third assignment of error*

The Hearings Officer's conclusion that the proposed alteration represented a greater risk of fire and explosion is unsupported by adequate findings.

1. *Preservation*

The unique properties of the Petitioners batch-type asphalt plant were raised throughout the proceeding before the Hearings Officer. R 143, 199, 218. This evidence distinguished the subject operation from examples that the Hearings Officer relied on to find a risk of fire and explosion and yet the findings make no mention of these distinguishing characteristics. Raising these elements was sufficient to preserve this challenge on appeal.

2. *Standard of review*

Local government findings of compliance with an applicable approval standard must state the facts the local government relies on and explain why those facts lead to the conclusion that the standard is satisfied. *Sunnyside*

1 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21 (1977); *Reeves v.*

2 *Yamhill County*, 28 Or LUBA 123 (1994). Findings must address and respond

3 to specific issues relevant to compliance with approval standards that were

4 raised in the local proceedings. *Norvell v. Portland Area LGBC*, 43 Or App

5 849, 853 (1979). The County's findings fail with regard to both points.

6 **3. *Argument***

7 With regard to the risk of fire and explosion, the Hearings Officer relied

8 on an AFSCME report on asphalt production and the Schoenleber Affidavit.

9 App A-36. The Hearings Officer's findings regarding the AFSCME report

10 provide:

> 11 "'There are two main hazards associated with asphalt: fire and
> 12 explosion hazards and [h]ealth hazards associated with skin contact, eye
> 13 contact, and/or inhalation of fumes and vapors." Record 416. Of the
> 14 former risk it states, 'Most of the fire and explosion hazard associated
> 15 with asphalt comes from the vapors of the solvent mixed into the asphalt,
> 16 not the asphalt itself. The hazard is determined by the flammable or
> 17 explosive nature of the solvent used and how fast it evaporates.' Record
> 18 417.
>
> 19 "The fact sheet calculates the flashpoint of three different types of
> 20 asphalt: rapid-curing asphalt, medium-curing asphalt and slow-curing
> 21 asphalt. Even slow-curing asphalt, the least volatile of the tree types, has
> 22 a flashpoint of 'over 250° F.' *Ibid.* The Applicant stated in a February 27,
> 23 2015, affidavit, 'd) The mixture then goes into a dryer, [sic] where the
> 24 rock is heated to 340 degrees, and then discharged onto an elevator. e)
> 25 The mixture is then placed in a mixing changer, [*sic*] where oil is added
> 26 and then deposited into the truck bed.' Record 228. Elsewhere, the
> 27 Applicant states that the asphalt oil itself is heated before being mixed
> 28 with the rock. Record 563. The Applicant also states here, 'Because the
> 29 process is physically different, the risk of overheating is less in my plant
> 30 that it is at Knife River's plant' which is also in Jackson County. The fact
> 31 that the risk at the Applicant's plant is relatively lower than that at

another plant does not support a conclusion that there is not a risk of fire or explosion at his facility."

App A-34.

Those findings make no reference to the testimony presented by Petitioners that they only use asphalt products with flashpoints over 400°F and when heated to 340°F, it will never reach the flashpoint identified to become combustible. R 143.

The Hearings Officer quoted portions of the Schoenleber Affidavit highlighting the following:

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

***

"[The Applicant also] produces 'cold mix' asphalt used for pot holes, etc. that does not harden like traditional asphalt. The 'cold mix' is heated like standard asphalt but is manufactured by adding diesel directly into the mixing chamber. 'Cold mix' is extreme volatile when produces; plants in Klamath Falls and in Medford had fires and explosions in 2007 and 2009 respectively that closed those plants.' Record 448."

App A-35 (footnote omitted).

The Hearings Officer similarly failed to acknowledge the Petitioners' operation is different from those identified in the Schoenleber Affidavit where explosions have occurred. Petitioners' operation coats pre-heated aggregate with asphalt oil instead of heating and mixing the aggregate and asphalt oil in

the same drum. R 199 and 218. The Hearings Officer failed to explain how he concluded that the Petitioners' plant carries the same risk of fire and explosion when the Petitioners detailed explanation distinguishing their operation from those described in the AFSME Report and the Schoenleber Affidavit.

The findings make no mention of Petitioners responses on these points. Adequate findings must respond to specific issues relevant to compliance with the applicable approval standards that were raised in the proceedings below. Adequate findings require responding to the new issues raised during the proceedings and the Hearings Officer failed to respond to the evidence presented by Petitioners. *Norvell*, 43 Or App at 853. Therefore, these findings are inadequate to support the Decision.

E. *Petitioners' fourth assignment of error*

The Hearings Officer's Decision is not supported by substantial evidence in the whole record with respect to his findings concerning greater intensity of use and greater adverse impacts.

1. *Preservation*

Any valid land use decision must be supported by substantial evidence in the record. ORS 197.835(9)(a)(B) (the board shall reverse or remand the land use decision under review if the board finds that the local government made a decision not supported by substantial evidence in the whole record). Preservation is inapposite to a substantial evidence challenge. *See Miles v. City*

1 *of Florence*, 190 Or App 500, 506 n 4, 79 P3d 382 (2003) (acknowledging a
2 general exception to preservation principles "for issues that do not arise until
3 after the close of the evidentiary hearings, such as challenges to the adequacy of
4 the findings in an order" (*citing DLCD v. City of Warrenton*, 40 Or LUBA 88,
5 95-96 (2001)); *Boldt*, 107 Or App at 624 (acknowledging that preservation
6 principles to not apply to challenges to findings that are published after a
7 hearing has closed). In all events, Petitioners continually maintained that the
8 conversion of the use to an asphalt batch plant did not subject the surrounding
9 neighborhood to any greater adverse impacts.

10 **2. *Standard of review***

11 Under the second assignment of error, the Board will review the whole
12 record to determine whether the Decision was supported by substantial
13 evidence. The Board shall remand a decision when the decision is not supported
14 by substantial evidence in the whole record. ORS 197.835(9)(a)(C); OAR 661-
15 010-0071(2)(b). A challenged finding that is not supported by substantial
16 evidence is basis for reversal or remand if the finding is critical to the
17 challenged decision. *See Territorial Neighbors v. Lane County*, 16 Or LUBA
18 641, 657 (1988); *Bonner v. City of Portland*, 11 Or LUBA 40, 52 (1984).
19 / / /
20 / / /
21 / / /

3. *Argument*

The Hearings Office made multiple critical factual findings that misstated the evidence in the record and that were not supported by substantial evidence in the record.

a. Flashpoint and heating of asphalt products

The Hearings Officer concluded that the asphalt batching process itself presents a risk of fire and explosion that is not present at a concrete batching plant. App A-36. The Hearings Officer's conclusion was based on evidence that certain types of asphalt materials have a flashpoint as low as 250°F and Petitioners heat their rock to 340°F before it is mixed with the asphalt oil. App A-34.

The Hearings Officer relied on the AFSCME Health and Safety Fact Sheet, R 481, for his conclusion that some asphalt materials have a flashpoint as low as 250°F. There is no evidence in the record to link the materials identified within the AFSCME sheet to the materials used at the Petitioners' plant. For example, there is no evidence that Petitioners produce "slow curing asphalt," which is indicated on the AFSCME sheet as having a flashpoint of over 250°F. Instead, the evidence in the record demonstrates that Petitioners only use asphalt products with flashpoints over 400°F, R 143, and that Petitioners heat their product to 340°F. R 227-228. See R 481 (explaining that the flashpoint of the asphalt materials used determines the fire or explosion hazard). Thus, the

1 evidence in the record does not support a finding that the risk of fire or
2 explosion that the Hearings Officer relied on in denying the Alteration
3 Application.

4 The Hearings Officer expressly relied on evidence of fires and explosions
5 at other asphalt batch plants. App A-36. However, as Petitioners argued below,
6 those plants are distinct from Petitioners' operation because the explosions in
7 those plants occurred in drums where aggregate and oil are heated together.
8 Such drums are subject to overheating. Petitioners' plant is a batch plant that
9 coats pre-heated aggregate with asphalt oil instead of heating and mixing the
10 aggregate and asphalt oil in the same drum. Petitioners' batch plant does not
11 have a drum mixer. More specifically, as Petitioner Paul Meyer explained in his
12 letter dated June 15, 2016:

> 13 "Newer asphalt batch plants, such as those operated by Knife River and
> 14 reported in the Medford Mail Tribune Article, 'Explosion at Knife River
> 15 plant blows top off tank,' January 29, 2015, heat rock and oil in the same
> 16 drum. Mountain View Paving does not heat rock and oil in the same
> 17 drum. Instead, Mountain View Paving heats the rock and oil separately
> 18 and the preheated materials are mixed in a separate drum."

19 R 199. See also R 218 ("The unique properties of Mountain View's batch-type
20 plant allow it to run coated rock products whereas the drum-type plants can run
21 up against an superheating condition that can potentially pose explosion
22 hazards."); R 143 (differentiating types of asphalt plants as "apples and
23 oranges").

1 The evidence in the record distinguished Petitioners' batch plant from
2 those that were provided to the Hearings Officer as examples of the risk of
3 explosion. Nothing in the record linked those example explosions to the
4 processes at the Petitioners' batch plant. Instead, the evidence in the record
5 distinguished those plants and established that the Petitioners do not heat their
6 materials to the flashpoint for those materials.
7 This is not an issue of the Hearings Officer weighing and crediting
8 conflicting evidence. There is no qualified, expert evidence in the record that
9 Petitioners' plant poses a risk of fire and explosion or that the risk of fire and
10 explosion is any greater with the existing asphalt batching operation than the
11 concrete batching plant.
12 Similarly, no evidence in the record supported the Hearings Officer
13 speculation that the potential "concussive force" and "products of combustion"
14 from a potential fire or explosion at the Petitioners' batch plant would adversely
15 impact neighboring residents. App A-37. Rather, the evidence in the record
16 establishes that 527-foot space between the asphalt batch plant and the
17 residential community is covered by an expanse of bare gravel, riparian
18 vegetation (which is naturally wet and dense year round), Bear Creek (which
19 flows year-round), more riparian vegetation, and an asphalt bike path. R 153.
20 Any potential fire or explosion at the asphalt batch plant has no way of
21 spreading to the surrounding neighborhood. R 150 (Deputy State Fire Marshal

1 stating that clearance to combustibles is satisfactory at the asphalt batch plant
2 site).
3 Accordingly, the Hearings Officer's finding that the Petitioners' batch
4 plant presents a risk of fire and explosion to the surrounding neighborhood is
5 not supported by evidence in the record.[2]

6 **b. Fuel storage**

7 The Hearings Officer erroneously concluded that "there is more fuel
8 present for the asphalt batch plant" and that the "stored fuel is an increased
9 risk" from the fuel present on the concrete batch plant. App A-36. The Hearings
10 Officer determined that he could not conclude from the evidence the number
11 and location of fuel storage tanks on the preceding concrete batch plant site.
12 App A-18, 23. However, the record contains evidence of the number, size, and
13 location of fuel storage tanks on the preceding concrete batch plant site and
14 establishes that the concrete batch plant stored more fuel than the asphalt batch
15 plant. R 195-197. Specifically, the concrete batch plant used three fuel storage
16 tanks: (1) 500-gallon fuel storage tank to operate the concrete batch plant; (2)
17 150-gallon fuel storage tank to operate the water pump on the wash plant; (3)
18 4,000-gallon fuel tank to operate the rock crusher and refuel vehicles. R 195-

[2] The Hearings Officer relied on *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991). As Petitioners argued below, *Bertea* is distinguishable on its facts. Here, on appeal, Petitioners challenge the Hearings Officers findings that and rules of interpretation that he relied on in applying *Bertea*. To the extent that the Board is concerned with *Bertea*, Petitioners renew, refer to, and incorporate their argument at R 71-75, distinguishing *Bertea* on its facts.

197. Thus, the record establishes that total fuel stored on the subject property for the concrete batch plant site was 4,650 gallons. In contrast, the record establishes that the asphalt batch plant stores up to 2,000 gallons of fuel in a diesel generator with a 500-gallon fuel tank and a 1,500-gallon fuel tank that is part of the batch plant. R 154.

Accordingly, the Hearings Officer's finding that the fuel stored at Petitioners' batch plant presents a greater risk of fire and explosion as compared to the concrete batch plant is not supported by evidence in the record.

c. Distance between asphalt batch plant and surrounding neighborhood

In assessing the purported risk to neighboring residents, the Hearings Officer incorrectly found that a mobile home park is "approximately 250 feet from the asphalt batch plant site" and "[t]he Bear Creek Greenway and Trail lie adjacent to and immediately west of the Property and plant." App A-29. Those findings are not supported by substantial evidence; instead, evidence in the record shows that the closest residence is located 527 feet from the asphalt batch plant and that the asphalt batch plant is located on the far eastern side of the Property, not adjacent to the Greenway or Trial. R 153. Those erroneous findings were critical to the Hearings Officer's assessment of the risk of the adverse impacts to the surrounding neighborhood.

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d. Employment level

In comparing the employment level of the concrete batch plant with the asphalt batch plant, the Hearings Officer incorrectly found that "The asphalt batch plant has more actual employees with 15 full-time as compared to the 2 or 3 that were needed for the concrete batch plant." App A-40. In so ruling, the Hearings Officer contradicted his earlier finding that the concrete batch plant employed 15 full-time equivalent employees, App A-24, and, instead, compared the 12-15 asphalt employees to "roughly 3 full-time employees of the concrete batch plant." App A-33, 40. The Hearings Officer appeared to infer that the asphalt batch plant also employs a significant number of independent contractor truckers. App A-33.

The Hearings Officer correctly found that the asphalt batch plant use employs 12-15 full-time employees. App A-33. There is no evidence in the record that Petitioners employ independent contractor truckers, as did the concrete batch plant. No substantial evidence in the record supports the Hearings Officer's finding that the asphalt batch plant employs more people than the concrete batch plant.

Those challenged findings were critical to the Hearings Officer's analysis and decision. Accordingly, the Alteration Application was denied based on findings that are not supported by substantial evidence in the record. The Board

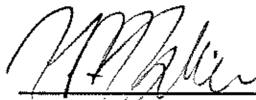
will remand a decision that is not supported by substantial evidence in the record. ORS 197.835(9)(a); OAR 661-010-0071.

III. CONCLUSION

The Hearings Officer provided three reasons for denying the Alteration Application: (1) the year-round operation of the asphalt batch plant is a more intensive nonconforming use; (2) the level of employment of the asphalt batch plant is a more intensive nonconforming use; and (3) the risk of fire and explosion at the asphalt batch plant is a new and greater adverse impact to the surrounding neighborhood. For the reasons explained at length above, all of those reasons for denying the application must fail. Petitioners respectfully request that the Board reverse or remand the Decision.

DATED November 18, 2015.

HUYCKE O'CONNOR JARVIS, LLP



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Of Attorneys for Petitioners

1 **CERTIFICATE OF FILING**

2 I hereby certify that on November 18, 2015, I filed the original of

3 PETITION FOR REVIEW, together with four (4) copies, with the Land Use

4 Board of Appeals, 775 Summer Street NE, Suite 330, Salem, OR 97301-1283,

5 by Certified Mail Return Receipt Requested.

6

7 H. M. Zamudio, OSB No. 121554

8 Of Attorneys for Petitioners

9 **CERTIFICATE OF SERVICE**

10 I hereby certify that on November 18, 2015, I served a true and correct

11 copy of PETITION FOR REVIEW on all persons listed below, by first class

12 mail, postage prepaid.

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20 *Of Attorneys for Petitioners*

BEFORE THE HEARINGS OFFICER FOR JACKSON COUNTY, OREGON

In the matter of an appeal from the Decision of the Jackson County Planning Division approving an application for a nonconforming use alteration on Tax Lot 600, Township 38 South, Range 1 West, Section 24, in Jackson County Applicant: Paul and Kristen Meyer Appellant: Rogue Advocates	Case No. 439-15-00097-ZON **DECISION AND FINAL ORDER**

THE APPEAL IS GRANTED AND THE APPLICATION IS DENIED.

NATURE OF APPLICATION

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

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

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

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

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

APPLICABLE CRITERIA

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

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

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

[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.
25 ///
26 ///

DISCUSSION AND FINDINGS OF FACT

ORDER OF SECTIONS

A. Rules of Interpretation
B. Verification of Nonconforming Use
C. Nature and Extent
   1. The Batching Process
   2. Physical Area
   3. Equipment, Structures and Stockpiles
   4. Traffic
   5. Roads
   6. Employees
   7. Fire and Explosion
   8. Airborne Pollutants of Process
   9. Hours of Operation
   10. Intermittency of Operation
D. Summary of Nature and Extent and Determination of Adequacy of Descriptions
   1. The Batching Process
   2. Equipment, Structures and Stockpiles
   3. Traffic
   4. Roads
   5. Employees
   6. Fire and Explosion
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   8. Hours of Operation
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E. Alteration of Use
   1. Applicable Criteria and LUBA Guidance
   2. The Surrounding Neighborhood
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   4. Equipment, Structures and Stockpiles
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   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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Rules of Interpretation

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

Verification of Nonconforming Use

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

[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.

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

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

> "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,[3] and (3) that the batch plant did not have to be approved as an '[e]xpansion of nonconforming aggregate and mining operations.' LUBA rejected petitioner Rogue Advocates' challenges to these three aspects of the hearings officer's 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." Citations to page references from *Rogue I* omitted.

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

The Appellant argues that LUBA's determination that the concrete batch plant was a "continued, uninterrupted" use is in error. "[T]hat determination was based on the Hearings Officer's problematic treatment of concrete and asphalt batching as the 'same use' for purposes of nonconforming use 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 uninterruptedly, 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 215.139(11). That the hearings officer might have reached the opposite conclusion
6 based on other evidence in the whole record does not provide a basis for reversal or remand, as long as the conclusion the hearings officer reached is one that a reasonable
7 person would reach. We conclude that it is." *Rogue I* Slip op at 10.

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

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

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

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

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[7] To the extent that the applications did not rely on the same facts, LUBA in *Lawrence* barred the city from revisiting the 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.

[8] Although the LDO does not expressly authorize refilling 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.

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

Nature and Extent

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

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

> "[a]t 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[]." Omission original.

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

> "[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 the 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." *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,

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

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

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

The Record presents testimony and evidence that has considerable variability, much of which is contained in personal statements made by Howard DeYoung, the owner of the Property during the period that the concrete batch plant was in existence[10] as well, to some degree, in the statements of the Applicant, Paul Meyer. These differences result in inconsistent characterizations of the nature and extent of each batch plant and the equipment that they used. The Appellant may feel that these inconsistencies are untruths, but there is nothing in the Record to support such a conclusion. The Hearings Officer observes 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.

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

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

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

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

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[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.

The Batching Process

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

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

Physical Area

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

Equipment, Structures and Stockpiles

It is difficult to get an accurate understanding of the equipment, structures and stockpiles that were 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").

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> "Mr. Meyer asked me to provide you with a letter concerning the concrete batch plant operation that occurred on the subject property throughout the 1990's. The concrete operation included the following:
>
> 1. A concrete batch plant;
> 2. A rock crusher;
> 3. Sand-screen wash plant
> 4. 3 storage tanks that were approximately 6-feet in diameter and at least 30-feet in height;
> 5. Various equipment customary with batch plant operation (e.g., trucks, loaders, excavators, bulldozer, etc.);
> 6. 2 storage buildings for equipment and supplies;
> 7. 6 stockpiles of assorted rock and sand[.]" Record 235.

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

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> "at least one diesel generator, which was fueled by at least one 500-gallon fuel tank[;]...a 4,000-gallon diesel fuel tank...next to the rock crusher...that serviced the rock crusher as well as loaders, dozers, and trucks[;]...a 150-gallon gasoline fuel tank 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

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[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.

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

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

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

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

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

10 11 12 13 14 15 > "A 2003 aerial from the record indicates a large piece of stationary equipment on the site which is most likely a rock crusher. A change in the 2005 aerial shows a sediment pond southwest of the rock crusher was removed and converted to stockpiles. This aerial suggests that additional large pieces of stationary equipment were also present and shows smaller images which appear to be silos casting small shadows. The equipment which appears to be present in the 2005 aerial is very similar to the equipment listed in the March 12, 2015 letter from the prior owner that he states was used for the concrete operations. This is the only photo which contains the amount of equipment similar to the March 12, 2015, letter. [14]

16 17 18 19 20 > "The March 12, 2015 letter from the prior owner states in part that a concrete batch plant operated on the property throughout the 1990s. Photographic and inspection records for the site are not available on an annual basis for the 1990s. The available 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.

21 22 23 24 > "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.

25 26

[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.

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

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

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

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

[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
11 *Traffic*
12 There is only anecdotal information concerning the traffic generated by the concrete batch plant.
13 The Anecdotal Letters refer to extensive truck traffic associated with that operation, and Mr. DeYoung
14 states, "It was not uncommon for there to be a line of diesel haul trucks idling on the property waiting for
15 both import and export of material. The traffic was extensive, but it is not quantified.
16 *Roads*
17 The roads that served the concrete batch plant are well described and not in dispute. Mr. DeYoung
18 stated that the concrete batch plant depended on two roads. One was on the west side provided access was
19 abandoned in the late 1990s. The other along the east side was constructed prior to 1992 and was used by
20 cement trucks exiting the site. He indicates that the use of the site was very intense because the installation
21 of fiber optic cables in the region depended on concrete slurry from this location.[17] That level of use
22 necessitated a one-way, loop road system to avoid conflicts. Record 559-60.
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 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.
26 [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.

Employees

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

> "To my recollection, *my gravel pit and the concrete batch plant* employed between two and five full-time employees on the subject property during the period between 1992 to 1995. However, the concrete operation depended on independent contractor truckers to move material to and from the subject property. In my estimation, the number of employees on the subject property would have been closer to 30-part time employees or 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.

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

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

Risk of Fire and Explosion

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

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Airborne Pollutants from the Process

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

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

Hours of Operation

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

Intermittency of Operation

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

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

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

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

> "In 2001 I submitted an affidavit with the planning department concerning the historic uses occurring on the subject property. In that affidavit I used the word 'intermittent' concerning the batching use. As I have explained to [the Applicant's] attorney and everyone else who has asked me, I used the work [*sic*] 'intermittent' to mean that most of the batch operators and especially Best Concrete [the operator of the concrete batch 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 Best Concrete to move their batch plant to a different site for a month or two. However, I never remember the Best Concrete batch plant being gone for more than 90 days." Statement of Mr. DeYoung of July 11, 2013 at Record 578. Emphasis added.

2001 was the year in which the Applicant began his asphalt batch plant use, at most a year following the cessation of the concrete batch plant use. The nature and character of the long history of concrete batch plant on the Property – 12 years in all – would have been fresh in Mr. DeYoung's mind then. Also, his recollection is confirmed by one of the Anecdotal Letters. "I have no recollection of the batching operations being discontinued during the aforementioned period [1991 and 2001] except during the winter months." Statement of Dan May at Record 595. Mr. May may not have been aware that "it was not unusual for Beset Concrete to move their batch plant to a different site for a month or two," as Mr. 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.

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

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

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

Nature and Extent Summary and Determination of Adequacy of Descriptions

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

The Batching Process

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

1 This description is adequate to provide the basis for a meaningful comparison to the Applicant's
2 asphalt batch plant.
3
4 *Physical Area*

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

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

20 There may have been more on the concrete batch plant site, but the Record does not allow certainty about
21 what else there may have been.
22 The Applicant's limited and varying descriptions of these aspects leaves unknown such elements as
23 the size, number and location of fuel storage tanks, the size number and location of storage buildings and
24 the presence or absence of a "control shack." The absence of precision in these respects provides an
25 inadequate basis for comparison with the Applicant's asphalt batch plant use of the site.
26

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

Roads

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

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

Employees:

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

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

Risk of Fire and Explosion

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

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

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Airborne Pollutants from the Process

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

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

Hours of Operation

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

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

Intermittency of Operation

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

This description is adequate to provide the basis for a meaningful comparison to the Applicant's 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 application for an alteration of a nonconforming use must show either that the use has
7 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
8 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
9 any less conforming use.

10 "A) ***Change in Use***
11 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.)
12 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
13 proposed new use will have no greater adverse impact on the surrounding neighborhood."

14 The asphalt batch plant follows and alters the partially verified concrete batch plant nonconforming use.

15 To the extent that that verification was incomplete, that defect has been corrected by the analysis of nature

16 and extent above – at least with respect to enough aspects of the concrete batch plant to complete an

17 alteration analysis with respect to enough elements to reach a competent decision. What remains is to

18 determine whether the asphalt batch plant is "no more intensive" and whether it "will have no greater

19 adverse impact on the surrounding neighborhood."

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

21 "[T]he existence and extent of adverse impacts has little direct bearing on the task of verifying the scope

22 and or intensity of a nonconforming use, although it has considerable bearing on whether an alteration to a

23 nonconforming use can be approved...." *Leach v. Lane County*, 45 Or LUBA 580, 608 (2003).

24 "Evaluating increases or decreases in an adverse impact form a putative nonconforming use, like noise,

25 may be relevant in approving or denying an alteration or expansion of a nonconforming use," (*Ibid.* at 601)

26

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

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

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

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

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

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

[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.

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

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

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

LUBA analyzed the Commissioners analysis this way:

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

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

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

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

The Surrounding Neighborhood

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

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

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

The Batching Processes

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

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

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

> "Asphalt verses concrete batching are [*sic*] significantly different in function in both the equipment and the mixing process. Asphalt requires petroleum based products that must be misted [*sic*][22] and heated to over 300 degrees. Concrete contains no petroleum products and is not heated. The specialized asphalt batching equipment is significantly different than any concrete mixing equipment.
>
> ...
>
> Concrete requires clean washed rock that while wet produces minimal dust during the mixing operation. Asphalt requires dry rock to minimize the energy required to heat the mix and creates more dust.[23] Asphalt production requires the addition of petroleum products and heat creating strong asphalt odor and fumes not present in a concrete mix. Any emissions of particulates create a [*sic*] oil based dust or soot that can travel long distances depending on the winds." Record 447.

This description is partially confirmed by another of Appellant's witnesses, Mr. Chasm. He states, "As the aggregate is not generally washed and if not handled properly can generate dust. [*sic*] The aggregates are heated to 340 or more degrees then blended with heated asphalt oil...." Record 538.[24] Some of Mr. Chasm's statements here and elsewhere are strongly disputed by the Applicant. However, this conclusion is not among those.

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

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

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[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
15
Equipment, Structures and Stockpiles

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

18
- a scale shed
- an office
- a porta potty
- 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
- an asphalt control shack
- a generator
- a 500 gallon gasoline tank for the generator
- gravel bins and a ramp
- 3 cargo containers, presumably for storage
- a rock crusher and
- an unspecified number of stockpiles

19 20 21 22 23 24 25 26

[25] Additionally, in response to the ruling in the Nonconforming Use Decision and a subsequent county code enforcement action, 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.

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

It cannot be known whether the asphalt batch plant represents a more or less intensive use with regard to 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."

Traffic

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

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

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

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///

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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

8 *Employees*

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

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

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

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

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

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

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

> "In my estimation, based on my knowledge and experience, there is no greater risk of fire in and [*sic*] asphalt batch plant than in a concrete batch plant. The burner involved in an asphalt plant does not create a risk of fire. The best evidence of that is the lack of any fire ever occurring at the [Applicant's plant].[26] Fire and explosions at asphalt and concrete batch plants are *most often caused* by supporting equipment such as loaders 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 *Bertea*, 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,

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

> manufactured by adding diesel directly into the mixing chamber. 'Cold mix' is 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.

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

> "An explosion at the Knife River Corp. aggregate plant in an industrial park in Central Point blew the top off an asphalt tank and seared nearby power lines....Neighbors said 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.

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

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

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

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

[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

22 *Airborne Pollutants from the Process*

23 The AFSCME Report details the gaseous discharge of asphalt processing as including benzene,
24 dioxane and toluene, depending on the particular solvent that is used. Record 419. Mr. Chasm adds
25 "formaldehyde and benzene, as well as gases containing carbon monoxide, sulfur dioxide, [and] nitrogen
26 oxides" to these. Record 652. At least some of these are malodorous as well as dangerous compounds, but
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 asphalting 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
11 *Hours of Operation*
12 The Applicant states that the asphalt batch plant "generally operates between the hours of 6:00 a.m.
13 until 4:30 p.m." and that it operates for extended hours when it has a state contract. The Applicant adds
14 that he generally does not take such contracts to avoid "firing the plant at night and bringing heavy truck
15 traffic into the area...." Record 563. The Applicant does not indicate how these hours relate to those he
16 maintained in 2001. However, the Record is clear that his asphalt production as recently as 2011 is
17 significantly larger than the 2001 production – 17,049 tons versus 12,984 calculated on an annual basis
18 (Record pages 609 and 638), and it is inferred that his hours of operation in 2001 could not have exceeded
19 those he currently has.
20 The Applicant's limiting of the extent to which he operates during nighttime hours benefits the
21 surrounding neighborhood, but it is not necessarily a reduction from nighttime use by the concrete batch
22 plant which, Mr. DeYoung indicated, occurred from time to time.
23 The absence of any information regarding the daytime hours of operation of the concrete batch
24 plant makes it is impossible to compare this aspect of asphalt batch plant operations with the concrete batch
25 plant. This limitation is a failure of an adequate description of the nature and extent of the concrete batch
26 plant.
It is not known whether the Applicant's hours of operation constitutes a more intensive use.

Intermittency of Operation

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

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

Alteration Determination

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

Nature and Extent

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

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
4 *Intensity of Use and Adverse Impacts*

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

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

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

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

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

ORDER

1. The Appeal is granted.
2. The Application is denied.

* * * * * *

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1 Dated this 24 th day of September, 2015.

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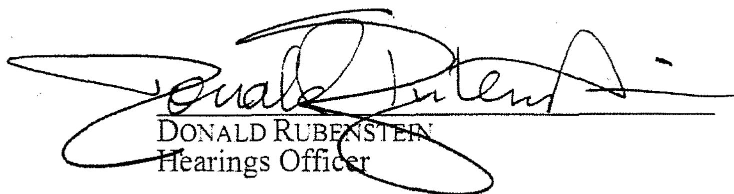

DONALD RUBENSTEIN
Hearings Officer

5

6 The Hearings Officer's Order is the final decision of Jackson County on this application. This decision may be appealed to the Oregon Land Use Appeals Board (LUBA) within 21 days of the date it is mailed.
7 This decision is being mailed on September 24 , 2015. Please contact LUBA for specific information at DSL Building, 775 Summer Street NE, Suite 330, Salem. OR 97301-1283 or by phone at (503) 373-
8 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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CHAPTER 11. NONCONFORMITIES

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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.

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[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;

b) To alter the use in a way that results in more traffic, employees, or physical enlargement of an existing structure housing a nonconforming use; or

c) An increase in the amount of property being used by the nonconforming use.

2) Limited expansion of a nonconforming use may be approved, through a Type 3 review, provided such expansion includes improvements to the existing use to a degree that the existing use, including the proposed expansion, complies with or is more in conformance with the development standards of Chapter 9, and will have no greater adverse impacts on the surrounding neighborhood.

C) ***Expansion of Nonconforming Aggregate and Mining Operations***
In all zoning districts except AR, any expanded use of property for aggregate removal, mining or quarry operations, or the processing of materials is subject to all of the provisions of this Ordinance, including the aggregate mining standards of Sections 4.2.8, 4.4.8, and 6.3.4(A). Aggregate and mining operations in the AR District are subject solely to the standards in Section 4.4. For purposes of this Section, an "expanded use" means:

1) Additional facilities or equipment not previously used at the site (except for replacement equipment); or

2) The commencement of methods or procedures of processing such as crushing or blasting not previously performed on-site; or

3) Any extension of the operation to land not owned, leased, or under license on the effective date of this Ordinance; or

4) Expanded or new operations within the 100-year floodplain and/or floodway.

D) ***Expansion of Nonconforming Rural Industrial Operations***
Lawfully established nonconforming industrial operations may only be expanded or enlarged through a minor zoning map amendment to Rural Limited Industrial (RLI). (See Section 3.7.3(C))

E) ***Relocation***
No nonconforming use may be moved in whole or in part to any other portion of the lot or parcel on which it is located unless such reconfiguration will have no greater adverse impact on the surrounding neighborhood. A nonconforming use may not be relocated to another lot or parcel, unless the use will be in conformance with the use regulations of the zoning district into which it is moved.

11.2.2 Discontinuance

A) ***General Rule***
If a nonconforming use, other than a use specified in this Section, or a single family dwelling as provided in Section 11.4.1(B), is discontinued for a period of more than two (2) years, the subsequent use of the lot or parcel will conform to the regulations and provisions of this Ordinance applicable to that lot or parcel. An application for a determination that a nonconforming use

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.

CHAPTER 13.[1] DEFINITIONS

13.1 GENERAL PROVISIONS

The definitions contained in this Chapter apply to the entire Ordinance unless otherwise specified. Words used in the masculine include the feminine. Words used in the present tense include the future, and the singular includes the plural. The word "shall" is mandatory and is contextually synonymous with "will" and "must." Although Oregon Administrative Rules (OAR) Chapter 814, Division 23 separately define and distinguish between "manufactured home" and "mobile home" according to federal or state construction codes for such dwellings, the term "manufactured home" is considered synonymous with "mobile home" for land development regulatory purposes under this Ordinance unless otherwise specified within specific Ordinance provisions. Likewise, unless contextually necessary, the terms "street" and "road," and "lot" and "parcel" are synonymous throughout this Ordinance.

Where terms or words are not defined in this Ordinance, the Jackson County Comprehensive Plan, building codes, or State or Federal land use law, they are construed to have their ordinary accepted meanings in the context of their use. The contemporary edition of *Webster's Third New International Dictionary* (unabridged) (Merriam-Webster, Inc. Springfield MA 1986) as supplemented, is to be used as the source for these accepted meanings. Nothing in this Ordinance is meant to supersede definitions appearing in State or Federal land use law, which may also be directly applicable in land use decision-making.

13.1.1 Rules of Interpretation

A) ***Multiple Definitions***

When terms, words or phrases are defined in more than one (1) way in this Chapter, or when terms, words or phrases are also defined within another Chapter of this Ordinance, the definition that is specifically associated with the Ordinance provision in question is the definition that applies to it. When two (2) or more definitions of the same term, word or phrase occur in this Ordinance only the most directly applicable definition applies. If appropriate, specific terms, words or phrases that are not defined in this Chapter but are otherwise defined in this Ordinance, the Comprehensive Plan, State or Federal land use law may be applied to general situations.

B) ***Conflicting Definitions***

When terms, words or phrases as defined in this Ordinance conflict with terms, words or phrases that are also defined in the Jackson County Comprehensive Plan, or applicable State or Federal land use law, the Comprehensive Plan or statutory definition supersedes any definition in this Ordinance. Multiple definitions may be applied simultaneously when words, terms, and phrases defined in this Ordinance do not conflict with definitions in the Jackson County Comprehensive Plan, or State and Federal land use law.

[1] Ordinance 2006-10, effective 2-18-07; Ordinance 2009-1, effective 8-16-2009; Ordinance 2010-9, effective 2-13-2011; Ordinance 2010-2a, effective 6-26-11; Ordinance 2012-2, effective 7-29-2012; Ordinance 2015-6, effective 7-26-2015

C) ***Interpreting Words, Terms, and Phrases***

When a word, term or phrase is not defined, or where multiple definitions may apply to a situation, the Director is authorized to interpret or define such words, terms, and phrases. When such an interpretation involves discretion in resolving apparent definitional conflicts, the interpretation will be made in accordance with Section 3.9. In making any interpretation or definition, the Director may consult secondary sources related to the planning profession, such as *A Survey of Zoning Definitions - Planning Advisory Service Report Number 421*, edited by Tracy Burrows (American Planning Association Chicago, Il 1989); and *The Illustrated Book of Development Definitions* by Harvey S. Moskowitz and Carl G. Lindbloom (Center for Urban Policy Research, Rutgers University NJ 3rd edition 1987) for technical words, terms and phrases; or *Webster's Third New International Dictionary* (unabridged) (Merriam-Webster, Inc. Springfield MA 1986) as supplemented. Grammatical interpretation should be based on standardized American grammar as described in *The Gregg Reference Manual, Seventh Edition* (Glencoe/McGraw-Hill 1995).

D) ***Approval Criteria and Impacts***

Unless otherwise stated in the Jackson County Comprehensive Plan, or State or Federal law, the terms "*no adverse impact or effect*," "*no greater adverse impact*," "*compatible*," "*will not interfere*," and other similar terms contained in the approval criteria of this Ordinance are not intended to be construed to establish an absolute test of noninterference or adverse effects of any type whatsoever with adjacent uses resulting from a proposed land development or division action, nor are they construed to shift the burden of proof to the County. Such terms and phrases are intended to allow the County to consider and require mitigating measures that will minimize any potential incompatibility or adverse consequences of development in light of the purpose of the zoning district and the reasonable expectations of other people who own or use property for permitted uses in the area.

13.2 USE CLASSIFICATIONS

13.2.1 General

A) ***Purpose***

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

B) ***Applicability***

The use classifications in this Section refer to uses allowed in the general use districts set forth in Chapter 5 of this Ordinance and uses