BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL AND KRISTEN MEYER	)	
	)	
Petitioners,	)	
	)	LUBA No. 2015-073
vs.	)	
	)	
JACKSON COUNTY,	)	**INTERVENOR-RESPONDENT'S BRIEF**
	)	
Respondent.	)	
	)	
and	)	
	)	
ROGUE ADVOCATES,	)	
	)	
Intervenor-Respondent.	)	

ROGUE ADVOCATES' RESPONSE BRIEF

H.M. Zamudio
Huycke O'Connor Jarvis, LLP
823 Alder Creek Drive
Medford, Oregon 97504
Tel. (541) 774-1977
Email: hmzamudio@medfordlaw.net
Attorney for Petitioners

Joel Benton
Jackson County Counsel
10 S. Oakdale, Room 214
Medford, Oregon 97501
Tel. (541) 774-6163
Email: bentonjc@jacksoncounty.org
Attorney for Respondent

Maura Fahey
Crag Law Center
917 SW Oak, Suite 417
Portland, Oregon 97205
Tel. (503) 525-2722
Email: maura@crag.org
Attorney for Intervenor-Respondent

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I. STANDING

Intervenor-Respondent Rogue Advocates ("Rogue Advocates") accepts that Petitioners Paul and Kristen Meyer ("Petitioners") have standing to bring this appeal. Rogue Advocates has standing because they participated before the local government by submitting written and oral testimony into the record for the decision that is the subject of this appeal. *See* Rec. 164–173, 285–289, 343–372.

II. STATEMENT OF THE CASE

A. Nature of Decision and Relief Requested

The decision on review is Respondent Jackson County's Hearings Officer's Decision and Final Order in Case No. 439-15-00097-ZON ("Decision") denying Petitioners' application for an alteration of a nonconforming use from a concrete batch plant use to asphalt batch plant use. Rec. 1–41. The Hearings Officer provided four reasons for denying the application; in addition to the three reasons acknowledged by Petitioners, the Hearings Officer also denied the Application because Petitioners had not met their burden in demonstrating the nature and extent of the concrete batch plant use. Rec. 41.

Rogue Advocates disputes Petitioners' representation of the nature of the decision. Most importantly, the Hearings Officer did not verify the nature and extent of the nonconforming concrete batch plant use. *See* Petition for Review

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1 ("Pet.") at 1.[1] Rather, the Hearings Officer concluded that a number of aspects of
2 the concrete batch plant use could not be verified because there was not substantial
3 evidence to make findings with the level of specificity required by LUBA. Rec.
4 22–25 (finding evidence of equipment, structures, and stockpiles of use and hours
5 of operation inadequate for comparison to asphalt batch plant). For those aspects
6 of the concrete batch plant use that the Hearings Officer was able to make findings
7 for, many of them were sufficient only for the purpose of comparing the concrete
8 batch plant to Petitioners' asphalt batch plant, but did not meet the requirements set
9 forth in *Spurgin* and *Tylka* for verification of nature and extent of a nonconforming
10 use.

11 For example, the Hearings Officer concluded that with respect to the
12 physical area of the property occupied by the concrete batch plant use "[i]t is not
13 possible to tell . . . how much of the site was used for the concrete batch plant as
14 distinct from the aggregate operation that was being conducted there by Mr.
15 DeYoung." Rec. 13. Regarding traffic associated with the concrete plant, the
16 Hearings Officer concluded "[t]he traffic was extensive, but it is not quantified."
17 Rec. 18. When evaluating the number of employees associated with the concrete
18 batch plant use, the Hearings Officer noted that the available evidence "makes it

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[1] Petitioners' later appear to acknowledge that the concrete batch plant was not verified by raising an assignment of error that the Hearings Officer failed to verify certain aspects of the prior nonconforming use. *See* Pet. at 15–16.

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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." Rec. 19. With respect to the intermittency of operations for the concrete plant the Hearings Officer found inconsistencies in the available evidence and could only conclude that the concrete batch plant ceased operating every November and December, in some years it was not there in January and February, and "somewhere between occasional[ly] and not unusual[ly]" the concrete plant left the property to serve other jobs. Rec. 25.

While these descriptions may have been sufficient to allow the Hearings Officer to determine, based on general comparison, that Petitioner's asphalt plant is an unlawful alteration, they do not meet the level of specificity required for verification of the nature and extent of a nonconforming use. The only aspects of the prior concrete batch plant use that were clearly described are those related to the batching process, the roads associated with the use, the risk of fire and explosion from the use, airborne pollutants from the concrete processing, and a list of equipment used in the concrete batching operation. Rec. 13, 18, 19, 20, 23. These findings, without knowing the frequency of the operation, the number of employees or amount of traffic, or the extent of the use in terms of size and equipment, are insufficient to verify a nonconforming use. Verification of the nature and extent of the prior nonconforming concrete batch plant use was a

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prerequisite to the consideration of Petitioners' alteration application. *See* Rec. 10; LDO 11.2.1. The inability to fully verify the nature and extent of the concrete batch plant use was an independent basis for the Hearings Officer's denial of Petitioners' application. *See* Rec. 22, 41.

On appeal, Petitioners raise several challenges to the Hearings Officers' findings including substantial evidence and adequate findings challenges and arguments that the Hearings Officer misconstrued the law. Based on those assignments of error, Petitioners request that the Decision be reversed or remanded. However, Petitioners have not presented any argument that provides a basis for the Board to reverse or remand the decision. For the reasons stated below Rogue Advocates respectfully requests that the Board affirm the Decision.

B. Summary of Arguments

Rogue Advocates' responses to Petitioners' assignments of error are summarized as follows:

1. The Hearings Officer did not err in failing to verify the nature and extent of the nonconforming concrete batch plant use with respect to the hours of operation, storage structures, and fuel storage tanks. The Hearings Officer properly concluded that there was not substantial evidence in the record to define those aspects of the nature and extent of the use as is required by *Tylka*.

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1 2. The Hearings Officer did not misconstrue or misapply LDO Chapter
2 11 or ORS 215.130. The interpretive rule in LDO 13.1.1(D) did not impose any
3 additional standard or procedure that the Hearings Officer was required to apply to
4 Petitioners' alteration application.

5 3. The Hearings Officer's conclusion that the proposed alteration
6 presents a greater risk of fire and explosion is supported by adequate findings.

7 4. The Hearings Officer's findings of fact are supported by substantial
8 evidence in the record.

9 **C. Summary of Material Facts**

10 The material facts of this case are substantially similar to the facts in
11 previous appeals before this Board. *See Rogue Advocates v. Jackson County,* 69
12 Or LUBA 271 (2014) ("*Rogue I*"); *Rogue Advocates v. Jackson County,* ___ Or
13 LUBA ___ (LUBA No. 2014-015) (August 26, 2014) ("*Rogue II*"); and *Rogue*
14 *Advocates v. Jackson County,* ___ Or LUBA ___ (LUBA No. 2014-100) (March 6,
15 2015) ("*Rogue III*"). Rogue Advocates accepts Petitioners' incorporation by
16 reference of those decisions and their discussion of the procedural facts of the
17 application on review. Pet. at 8–9. Rogue Advocates further disputes,
18 supplements and modifies Petitioners' Summary of Material Facts.

19 Petitioners have operated their asphalt batch plant on the subject property
20 since 2001. Rec. 402–03. The property is 10.98 acres and is zoned Rural

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1 Residential (RR-5). Rec. 828. Asphalt batch plants are not an allowed use in the
2 RR-5 zone. The property is entirely within the floodplain and partially within the
3 floodway of Bear Creek, a tributary of the Rogue River. Rec. 724, 822.
4 Petitioners' property is just outside the city limits of the City of Talent and is
5 within the Talent UGB. Rec. 694, 724.
6 Just inside the Talent city limits and adjacent to Petitioners' property to the
7 west is the Mountain View Estates community, a 164-unit mobile home retirement
8 community with over 200 residents. Rec. 317–18, 610–13, 695, 724, 780.
9 Mountain View Estates is roughly 250-300 feet from Petitioners' property. Rec.
10 241, 339, 823, 824. Residents of Mountain View Estates are subjected to noise,
11 particulate matter, smoke, and noxious asphalt fumes from Petitioners' operations.
12 Rec. 612, 317–318, 321–23, 325–35, 614–18. Nearby residents fear the potential
13 harm they would face as a result of a fire or explosion at Petitioners' plant. Rec.
14 318, 325, 326, 327, 328, 330. Petitioners' operations impact nearby residents' use
15 and enjoyment of their private properties, the surrounding area, and adversely
16 affects their health. *Id.*
17 Other than the Mountain View Estates community, Petitioners' property is
18 surrounded by a number of high traffic public areas. Just north of Petitioners'
19 property lies the Lyn Newbry Park, a public park owned by the City of Talent.
20 Rec. 334, 724. To the west, running along side Petitioners' property, is the Bear

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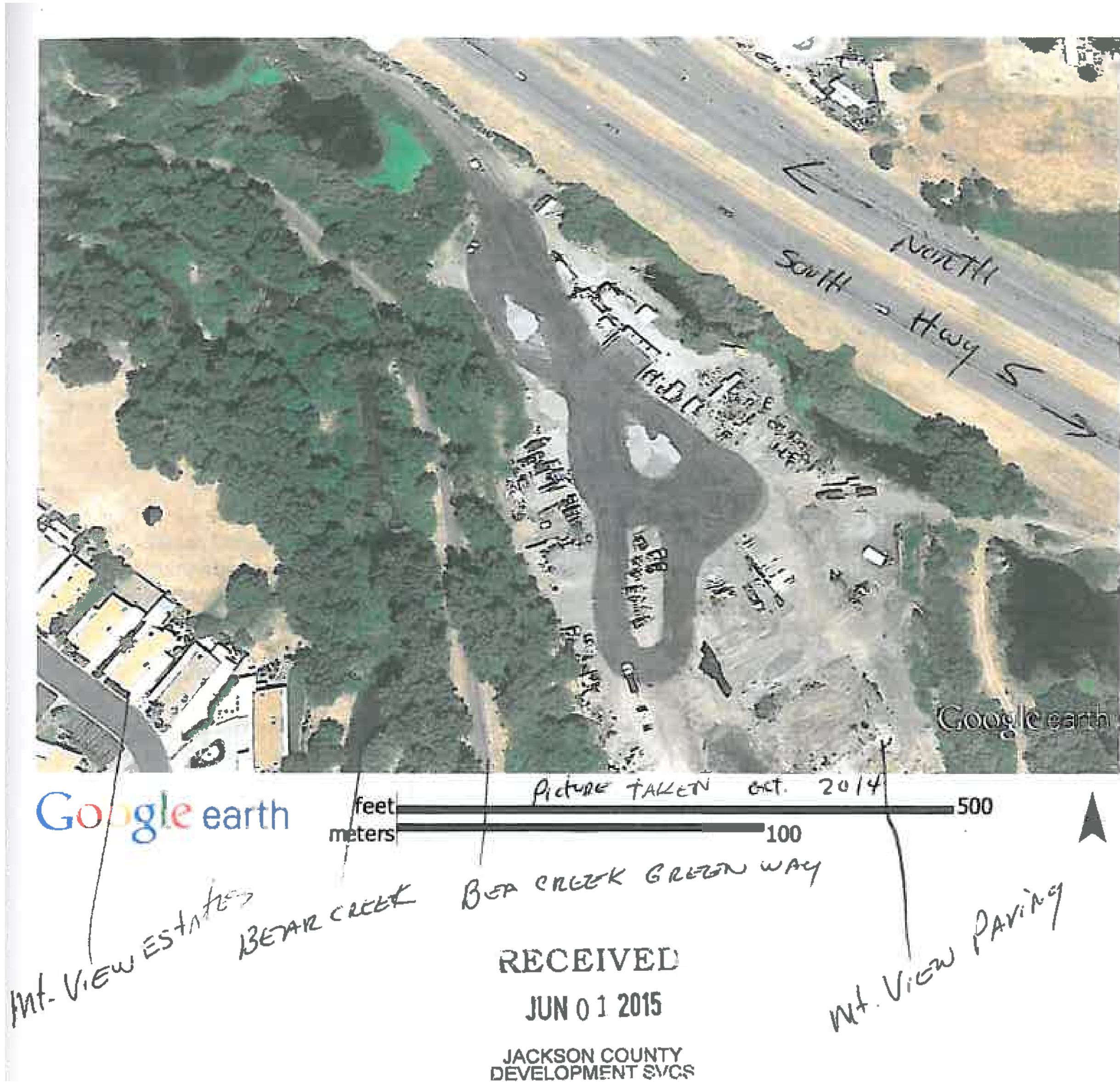
Creek Greenway and recreational trail. Rec. 334, 339, 724, 824. To the east, also running alongside Petitioners' property is Interstate Highway 5. Rec. 339, 695, 824. These diverse features make up the community surrounding Petitioners' property and asphalt batch plant operation. Rec. 29.



Rec. 339.

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Petitioners present a number of facts that they contend are established in the record. Pet. at 10. While those facts may be reflective of evidence that Petitioners submitted into the record, they are not in themselves "established" by the record. A number of the facts contained in Petitioners' statement of facts were disputed by other evidence in the record or were based on evidence the Hearings Officer deemed unreliable. Rogue Advocates' responses to Petitioners' specific factual assertions are discussed below in response to the assignments of error.

With respect to Petitioners' evidence the Hearings Officer made the following observation:

> "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 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 they used. * * * 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 [ ], that is, some 14 to 52 years ago. Time takes 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 of material stockpiles and the number and size of storage tanks for fuel, among others. Further, these

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inconsistencies occur in statements that have been made in the course of presenting this application to Staff and to the Hearings Officer."

Rec. 11–12. The Hearings Officer noted the difficulty in adequately defining the elements of both the prior concrete batch plant use and Petitioners' asphalt batch plant use based on Petitioners' evidence throughout the Decision.

III. JURISDICTION

Rogue Advocates concurs that the Board has exclusive jurisdiction because the Decision is a land use decision as defined by ORS 197.015(10)(a)(A). ORS 197.825(1).

IV. RESPONSE TO ASSIGNMENTS OF ERROR

A. Response to Petitioners' First Assignment of Error

The Hearings Officer properly construed the law in finding that there was not substantial evidence in the record to fully verify the nature and extent of the nonconforming concrete batch plant use with respect to the hours of operation, storage structures, and fuel storage tanks associated with the use. Petitioners failed to meet their burden to present evidence demonstrating the nature and extent of the nonconforming use to allow the Hearings Officer to fully verify the nonconforming concrete batch plant use.

Petitioners frame their first assignment of error as one regarding a misconstruction of the applicable law; however, Petitioners also appear to make a

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substantial evidence challenge to the Hearings Officer's findings. *See* Pet. at 16.

1. *Preservation of Error*

Petitioners' preservation of error statement does not demonstrate how Petitioners preserved an argument regarding the Hearings Officers' construction of the applicable law. *See* Pet. at 15. Rogue Advocates understands Petitioners' first assignment of error as an argument that the Hearings Officer had some independent duty to make a "reasonably precise" verification of the nonconforming concrete batch plant use notwithstanding the lack of substantial evidence in the record to support any such findings. Pet. at 15–16. Rogue Advocates raised arguments regarding Petitioners' failure to meet their burden of proof several times in the local appeal. Rec. 168–70; 288; 349–50; 360–63. At no point during the appeal did Petitioners refute their burden or argue that the Hearings Officer had an independent duty to make findings on the nature and extent of the nonconforming use beyond the evidence that Petitioners had provided. Thus, Petitioners have waived their first assignment of error.

To the extent Petitioners raise a substantial evidence challenge to the Hearings Officer's findings on the nature and extent of the concrete batch plant use, Petitioners also waived any argument regarding the Hearings Officer's findings on the hours of operation of the concrete batch plant use. Rogue Advocates expressly pointed out to the Hearings Officer that verification of the

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nature and extent of the concrete batch plant use required a consideration of the intensity of the use "including the hours, days, and months of operation . . . " and argued that Petitioners had not met their burden in demonstrating those aspects of the use. Rec. 170, 361. Petitioners did not present any evidence into the record regarding the hours of operation of the concrete batch plant and thus have waived any assignment of error regarding the Hearing Officer's findings of fact on that point. Should the Board nevertheless determine that this error was properly preserved, Rogue Advocates provides the following response.

2. *Standard of Review and Available Relief*

This Board will remand a land use decision for further proceedings where the decision improperly construes the applicable law, but is not prohibited as a matter of law. ORS 197.835; OAR 661-010-0071(2)(d). However, to "overcome a denial of a permit on evidentiary grounds, a petitioner must demonstrate that the burden of proof was met as a matter of law." *Adams v. Jackson County,* 54 Or LUBA 103, 107 (2007) (citing *Wal-Mart Stores, Inc. v. City of Hillsboro,* 46 Or LUBA 680, 699–700, *aff'd* 194 Or App 211 (2004)).

3. *Argument*

While it is true that in order to verify the nature and extent of a nonconforming use, the county's description "must be specific enough to provide an adequate basis for determining which aspects of [the use] constitute an

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alteration," that requirement does not impose a burden on the county. *See Tylka v. Clackamas County,* 28 Or LUBA 417, 435 (1994). Rather, "it is the proponents of a nonconforming use that have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use." *Id.* at 434 (citation omitted). Petitioners seem to interpret the standard from *Tylka* and the Board's statement from *Rogue III* that the Hearings Officer's consideration of the application "will necessitate a reasonably precise verification of the nature and extent of the concrete batch plant use…" as creating a burden for the Hearings Officer to define the nature and extent of the nonconforming concrete batch plant use based on inference and a strained view of the available evidence. Pet. at 16. However, "[t]he burden of establishing that a nonconformity lawfully exists will be on the owner, not the County." LDO 11.1.3(C).

The Hearings Officer did not err in concluding that the nature and extent of the nonconforming concrete batch plant use could not be verified. The Hearings Officer was not required to make findings of fact where Petitioners failed to meet their burden to present substantial evidence to support the type of "reasonably precise" descriptions that are required. Specifically, the Hearings Officer properly concluded that there was not sufficient evidence in the record to verify the concrete

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1 batch plant use with respect to the hours of operation, the storage structures and
2 fuel storage tanks that were associated with the use.

3 With respect to the hours of operation of the prior concrete batch plant use,
4 Petitioners suggest that, "the Hearings Officer could have inferred that the concrete
5 batch plant operated, *at least*, between the hours of 6:00 a.m. and 5:00 p.m. based
6 solely on evidence that the concrete batch plant operated and supplied construction
7 work, which generally occurs during day-time working hours." Pet. at 16
8 (emphasis in original). This argument fails to articulate a basis for a remand.
9 First, Petitioners do not cite to <u>any</u> evidence in the record that they purport would
10 support such an inference. In fact, the Hearings Officer noted, "the Record
11 provides <u>no information</u> regarding the hours of operation or the days on which the
12 concrete batch plant operated in 1992." Rec. 25 (emphasis added). Second,
13 Petitioners do not provide support for the argument that such an inference, despite
14 a complete lack of evidence in the record, would be permissible under this Board's
15 substantial evidence standards. Petitioners have failed to demonstrate that they
16 met their burden of proof as a matter of law. *See Adams v. Jackson County,* 54 Or
17 LUBA 103 (2007).

18 Petitioners alternatively argue that a finding of the hours of operation for the
19 concrete batch plant use was "not necessary to a 'reasonably precise verification of
20 the nature and extent of the [use].'" Pet. at 16. However, a "reasonably precise"

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1 verification is one which provides an adequate basis for comparison to Petitioners'
2 altered nonconforming use and for comparing the impacts of the existing asphalt
3 batch plant use to the prior nonconforming concrete batch plant use. *See Tylka,* 28
4 Or LUBA at 435. Here, where the surrounding uses include the residences at Mt.
5 View Estates, as well as public park and greenway areas, the hours of operation
6 and thus the duration and frequency at which the use imposed impacts from dust
7 and noise on the surrounding community is an important consideration in
8 evaluating an alteration to a nonconforming use. *See* Rec. 321, 334 (examples of
9 residents impacted by Petitioners' hours of operation). Therefore, the Hearings
10 Officer properly concluded that the lack of evidence regarding the hours of
11 operation of the concrete batch plant use "does not provide the basis for a
12 meaningful comparison to the Applicant's asphalt batch plant." Rec. 25; *see also*
13 Rec. 40 (finding comparison of hours of operation "impossible to reach").
14 Petitioners also challenge the Hearings Officer's evidentiary findings
15 regarding the number and location of associated structures, stockpiles and fuel
16 tanks for the concrete batch plant use. Pet. at 16. Petitioners argue that the
17 evidence in the record was sufficient to provide the type of "reasonably precise"
18 description required under *Tylka* and *Spurgin v. Josephine County,* 28 Or LUBA
19 383 (1994). *Id.* This argument does not provide a basis for remand. First,
20 Petitioners ignore the Hearings Officer's conclusion that the available evidence

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1 also left unknown the size of any fuel tanks and the size of any storage buildings
2 associated with the concrete batch plant use. Rec. 25. The size, number and
3 location of structures associated with a nonconforming use are recognized in the
4 LDO as indicators that a nonconforming use has been altered. *See* LDO 11.2.1.
5 Thus, in order for the Hearings Officer to determine which aspects of Petitioners'
6 asphalt batch plant use constitute an alteration, it is necessary to know the size of
7 structures associated with the prior nonconforming use. The Hearings Officer did
8 not err in concluding that the available evidence did not provide a sufficient basis
9 for verifying those aspects of the concrete use.
10 Moreover, the Hearings Officer concluded that Petitioners' evidence
11 regarding the specifics of the various stockpiles, fuel tanks and storage buildings
12 was not reliable. The Hearings Officer noted that letters from Mr. DeYoung, the
13 previous owner of the property, were Petitioners' "primary evidence" of the
14 structures and tanks associated with the concrete batch plant use. Rec. 15. The
15 Hearings Officer found Mr. DeYoung's letters to be of "considerable variability"
16 that resulted in "inconsistent characterizations of the nature and extent" of the
17 concrete batch plant such that "[i]t is difficult to get an accurate understanding of
18 the equipment, structures and stockpiles that were in use by the concrete batch
19 plant in 1992." Rec. 11, 13. Thus, to the extent that Petitioners raise a substantial
20 evidence challenge to the Hearings Officer's findings regarding those aspects of

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the use, the Hearings Officer clearly explained why he did not find Petitioners' evidence to be substantial evidence that a reasonable person would rely on. In an evidentiary challenge to a hearings officer's denial of an application, "petitioners can prevail . . . only if they demonstrate that no reasonable person could reach the conclusion that the hearings officer did, considering the evidence in the whole record." *Ehler v. Washington County,* 52 Or LUBA 663, 672 (2006). Petitioners have made no such showing.

The Board should deny Petitioners' first assignment of error and affirm the decision of the Hearings Officer to deny Petitioners' application for an alteration of a nonconforming use. Without verification of the nature and extent of the prior nonconforming concrete batch plant use it would be impossible for the Hearings Officer to approve Petitioners' application for alteration of a nonconforming use. *See Spurgin,* 28 Or LUBA at 390-91; *Tylka,* 28 Or LUBA at 435; *see also* LDO 11.2.1 ("An application for alteration of a nonconforming use must show [ ] that the use has nonconforming status, as provided in Section 11.8"). Thus, the incomplete verification of the concrete batch plant was, in itself, a sufficient basis for the Hearings Officer to deny Petitioners' application. A local government need only adopt one sustainable basis to deny a request for permit approval. *Lee v. City of Oregon City,* 34 Or LUBA 691 (1998). Therefore, if the Board rejects Petitioners' first assignment of error it is not necessary to go any further in

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reviewing Petitioners' other assignments of error. *See Wal-Mart Stores, Inc. v. Hood River County,* 47 Or LUBA 256, 265-66 (2004) (Once the Board has rejected all assignments of error directed at one of several alternative bases for denial, LUBA will not reach other assignments of error, absent a showing that resolving such assignments of error in petitioners' favor would provide a basis for reversal or remand).

B. Response to Petitioners' Second Assignment of Error

The Hearings Officer properly applied the applicable law in concluding that Petitioners' application for alteration of a nonconforming use could not be approved because Petitioners' asphalt batch plant operation presents greater adverse impacts to the surrounding community and is more intensive than the prior nonconforming concrete batch plant use.

1. *Preservation of Error*

Petitioners' assignment of error is waived in part and preserved in part.

Petitioners have waived any assignment of error regarding the Hearings Officer's reliance on the rule of construction set out in *Parks*. Rogue Advocates cited *Parks* as a relevant case in its initial appeal statement before the Hearings Officer. Rec. 348. At no point throughout the county appeal process did Petitioners argue that *Parks* was inapplicable or contrary to the LDO provisions. Petitioners rely on *DLCD v. Tillamook County,* 34 Or LUBA 586, 591 (1998), as

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excusing them from raising issues regarding the relevant interpretive rules for the application. However, that case involved a challenge to a question of interpretation of a local provision where the petitioner could not be expected to raise issues with the county's interpretive findings before they were issued. Petitioners' issue here does not involve an interpretive finding; rather it challenges the Hearings Officer's reliance on a rule of construction that was clearly presented during the local proceedings. Petitioners' attempt to overcome their waiver of this issue fails. To the extent the Board finds this argument was properly preserved, Rogue Advocates provides the following response.

2. *Standard of Review and Available Relief*

The Board will remand a land use decision for further proceedings where the decision misconstrues the applicable law, but is not prohibited as a matter of law. ORS 197.835; OAR 661-010-0071(2)(d).

3. *Argument*

Petitioners' second assignment of error contains several sub-assignments of error, with individual arguments repeated throughout those sub-assignments. Rogue Advocates understands Petitioners' second assignment of error to raise the following challenges:

1) The Hearings Officer erred in relying on the rule of strict construction contained in *Parks v. Tillamook County,* 11 Or App 177, 196–97 (1971).

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2) The Hearings Officer erred in concluding that the findings of greater intensity of Petitioners' asphalt batch plant use, with respect to the number of employees and frequency of operations, required denial of the alteration application.

3) The Hearings Officer erred in applying the standards in LDO 11.2.1(B) governing expansion and enlargement of a nonconforming use.

4) The Hearings Officer erred in failing to impose mitigation measures or conditions of approval pursuant to LDO 13.1.1(D) in order to minimize any adverse impacts of Petitioners' asphalt batch plant use.

Rogue Advocates addresses these challenges in that order in response to Petitioners' three sub-assignment headings.

a. The Hearings Officer did not err in applying the rule of strict construction enunciated in *Parks*.

Petitioners argue that the Hearings Officer erred in referring to the rule of strict construction set out in *Parks v. Tillamook County*, 11 Or App 177, 196-97 (1972). Petitioners argue that ORS 215.130(9) is the only substantive criteria for an alteration to a nonconforming use and the Hearings Officer erred because he "imposed more rigorous requirements relating to the verification, continuation, and alteration of the nonconforming use than required by the applicable regulations." Pet. at 22. Petitioners' argument does not identify what "more rigorous requirements" they believe the Hearings Officer applied to their application.

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While the Hearings Officer did state that his findings and decision reflected "the guidance of *Parks*," there is no indication that the Hearings Officer imposed any additional criteria or requirements on Petitioners' application outside ORS 215.130 and LDO Chapter 11. *See* Rec. 2–3. The rule of construction articulated in *Parks* is not an approval criterion or requirement of an application; rather, it simply provides a lens through which the Hearings Officer reviewed Petitioners' application. Nothing in the challenged decision indicates that the Hearings Officer in any way went outside the requirements of ORS 215.130 in finding that Petitioners' application could not be approved.

ORS 215.130(9) provides that an "alteration of a nonconforming use includes: (A) A change in the use of no greater adverse impact to the surrounding neighborhood." LDO Chapter 11 implements ORS 215.130 and provides that an application for a nonconforming use "must show that the proposed new use will have no greater adverse impact on the surrounding neighborhood." LDO 11.2.1(A) (emphasis added). LDO 11.2.1(A) also provides that a nonconforming use may only be changed to another "no more intensive nonconforming use." (emphasis added). The County's "general policy . . . to allow nonconformities to continue to exist and be put to productive use" does not outweigh the specific limitations on nonconforming uses contained in the statute and LDO. *See* LDO

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11.1.3; *see also Sparks v. City of Bandon,* 30 Or LUBA 69, 72 (1995) (the general ordinance provision is controlled by the more specific provision).

In accordance with ORS 215.130(9) and LDO 11.2.1(A), the Hearings Officer denied Petitioners' application after concluding that Petitioners' asphalt batch plant has greater adverse impacts on the surrounding neighborhood and is more intensive than the prior nonconforming concrete batch plant. Rec. 40. Petitioners do not point to any specific additional hurdles that the Hearings Officer required them to clear. Contrary to Petitioners' assertion, it was not the Hearings Officer's application of *Parks* that "expressly resulted in the denial of the Alteration Application," rather, it was the nature of Petitioners' use in comparison to the prior nonconforming use that resulted in the denial. *See* Pet. at 23. Thus, the Hearings Officer did not err in referring to *Parks*.

b. <u>The Hearings Officer did not err in concluding that a finding of greater intensity of use required the denial of Petitioners' Alteration Application.</u>

LDO 11.2.1(A) provides that a nonconforming use may be changed to another "no more intensive use" under the county's Type 2 review procedures. The Hearings Officer interpreted this provision to mean that "[i]f the altered use is more intensive than the prior nonconforming use, it cannot be approved." Rec. 27. This interpretation is consistent with the language and policy of ORS 215.130(9) and (10) and LDO Chapter 11; the interpretation is therefore plausible. *Siporen v.*

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1 *City of Medford,* 349 Or. 247, 259 (2010).[2] The Hearings Officer concluded that
2 Petitioners' asphalt batch plant was a more intensive use than the prior concrete
3 batch plant because of its year-round operations and greater number of employees.
4 Rec. 41. Based on these findings the Hearings Officer concluded that Petitioners'
5 "asphalt batch plant cannot be approved as a lawful alteration of the preceding
6 nonconforming concrete batch plant use." *Id.* (emphasis added).
7 Petitioners acknowledge that a nonconforming use may only be changed to a
8 "no more intensive" use. Pet. at 26. However, Petitioners go on to argue that the
9 Hearings Officer erred in finding that the more intensive nature of their asphalt
10 batch plant use required denial of the application. Though somewhat difficult to
11 understand, Petitioners' argument reads as a facial challenge to the requirements of
12 LDO 11.2.1(A). Petitioners contend that the "only substantive criterion for a
13 general alteration" is that it imposes "no greater adverse impact to the surrounding
14 neighborhood." Pet. at 17 (emphasis added). However, LDO 11.2.1(A), which
15 implements and carries out ORS 215.130(9) includes an additional criterion – that
16 a change in use alteration be "no more intensive" than the prior use. To the extent
17 Petitioners argue that the "no more intensive" requirement in LDO 11.2.1(A) is
18 inconsistent with ORS 215.130(9), that argument is an impermissible collateral

[2] In any case, Petitioners do not argue that the Hearings Officer's interpretation of LDO 11.2.1(A) is not plausible.

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attack on the ordinance and cannot be entertained by the Board. *Toler v. City of Cave Junction,* 53 Or LUBA 158, 161 (2006). Additionally, Petitioners do not assert that LDO 11.2.1(A) is outside the permissible bounds of authority granted to Jackson County to implement the provisions of ORS 215.130. *See* ORS 215.130(10) (granting authority to local governments to adopt standards and procedures to implement the section).

Petitioners also argue that the Hearings Officer erred in denying the application either because the greater intensity of the use did not constitute an "expansion" or "enlargement" under LDO 11.2.1(B)(1) or because the Hearings Officer was required to condition Petitioners' use to limit its intensity. Pet. at 26–27. These arguments are addressed below.

c. The Hearings Officer did not apply the standards in LDO 11.2.1(B) governing expansions and enlargements and thus did not err in applying those standards.

The Hearings Officer reviewed Petitioners' Type 2 application for alteration of a nonconforming use pursuant to LDO 11.2.1(A). Rec. 26. As discussed in detail above, LDO 11.2.1(A) provides that a change in use alteration may only be to a "no more intensive use" and the applicant "must show that the proposed new use will have no greater adverse impacts on the surrounding neighborhood." These are the only standards under which the Hearings Officer reviewed Petitioners' application and the standards that compelled denial.

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1 Petitioners argue that the Hearings Officer erred in applying LDO 11.2.1(B),
2 the standards governing expansion and enlargement of a nonconforming use. Pet.
3 at 23. LDO 11.2.1(B) provides that a nonconforming use may only be expanded or
4 enlarged through a Type 3 review and defines "expand" or "enlarge" to include an
5 alteration of the use "in a way that results in more traffic, employees, or physical
6 enlargement of an existing structure housing a nonconforming use . . . ." Notably,
7 the Hearings Officer did not refer to LDO 11.2.1(B) a single time in the Decision.
8 This is presumably because Petitioners submitted their application as a Type 2
9 application for alteration of a nonconforming use and did not seek approval for any
10 expansion or enlargement. *See* Rec. 703, 713.
11 Accordingly, the Hearings Officer did not conclude that the greater number
12 of employees and frequency of Petitioners' operation constituted an expansion or
13 enlargement of the prior nonconforming use. *See* Pet. at 23. Rather, the Hearings
14 Officer concluded, under the standard of LDO 11.2.1(A) that the greater number of
15 employees and frequency of the operations rendered Petitioners' alteration a more
16 intensive use than the prior nonconforming concrete batch plant use and thus could
17 not be approved. Rec. 39–40. Petitioners state that they "understand the Hearings
18 Officer to have concluded that year-round operation results in more traffic or
19 employees" pursuant to LDO 11.2.1(B)(1)(b). Pet. at 26. However, the Hearings
20 Officer's findings regarding the year-round operations of Petitioners' use do not

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contain any reference to more traffic or employees as a result of those operations. Rec. 39, 40. Nor was the Hearings Officer required to make any such findings relating Petitioners' year-round operations to an increase in traffic or employees. While the elements of a nonconforming use expansion may be limited to altering a structure or increases in traffic or employees, an increase in the intensity of an alteration of a nonconforming use has no such limitations. *See* LDO 11.2.1(A), *compare* LDO 11.2.1(B)(1).

Petitioners seem to equate the "no more intensive" requirement in LDO 11.2.1(A) with an "expansion" or "enlargement" as defined under LDO 11.2.1(B)(1)(b). Pet. at 26. Nothing in the language of these two provisions indicates that a use is only "more intensive" if it results in more traffic or employees. As discussed above, the Hearings Officer did not invoke LDO 11.2.1(B) at any point in his findings on Petitioners' application because Petitioners' did not seek approval for any expansion or enlargement and did not submit their application for Type 3 review. *See* Rec. 703–713. Petitioners' application was reviewed as a change in use alteration pursuant to LDO 11.2.1(A) and was denied based on its failure to comply with the requirements therein. Rec. 26. Therefore, the Hearings Officer did not apply LDO 11.2.1(B) and thus committed no error.

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d. <u>The Hearings Officer did not err in failing to impose mitigation measures or conditions of approval to minimize the adverse impacts and intensity of Petitioners' use.</u>

Petitioners' final argument under their second assignment of error is that the Hearings Officer erred in failing to apply the rule of interpretation set out in LDO 13.1.1(D). Petitioners argue that the Hearings Officer erred in concluding that the application "cannot be approved" because the use is of greater intensity and that, "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." Pet. at 25, 28. Petitioners' arguments are based on their contention that ORS 215.130 and LDO Chapter 11 "do not *require* denial of an alteration application upon any finding of greater intensity of use [or] * * * greater adverse impacts." *Id.* (emphasis in original). However, the plain text of LDO Chapter 11 demonstrates that it does in fact demand that an application be denied upon a finding of greater adverse impacts. LDO 11.2.1(A) provides, "[t]he application <u>must show</u> that the proposed new use will have no greater adverse impact on the surrounding neighborhood." (emphasis added). Similarly, Type 2 applications for alterations of a nonconforming use are limited to changes that are "no more intensive." LDO 11.2.1(A). In other words, it is a requirement for approval of an application for alteration of a nonconforming use that the new use be no more intensive and that there be no greater adverse impacts.

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1 Petitioners argue that, "ORS 215.130(10) and LDO 13.1.1(D) expressly

2 *allow for* mitigation of adverse impacts of an altered nonconforming use" such that

3 "the Hearings Officer was not *required* to deny the Application." Pet. at 28

4 (emphasis in original). Petitioners' argument depends on a strained reading of

5 ORS 215.130(10) and LDO 13.1.1(D).

6 ORS 215.130(10) provides,

7 > "[a] local government <u>may</u> adopt <u>standards and procedures</u> to implement the
8 > provisions of this section. The standards and procedures may include but are
9 > not limited to the following:
10 >
> * * *
11 >
> (c) Conditioning approval of the alteration of a use in a manner
12 > calculated to ensure mitigation of adverse impacts as described in
13 > subsection (9) of this section."

14

15 (emphasis added). LDO 13.1.1(D) is titled a "Rule of Interpretation" found in the

16 "Definitions" chapter of the Ordinance. It provides,

17 > "the terms 'no adverse impact or effect,' 'no greater adverse impact,' .
18 > . . and other similar terms contained in the approval criteria of this
19 > Ordinance are not intended to be construed to establish an absolute
20 > test of noninterference or adverse effect of any type whatsoever with
21 > adjacent uses resulting from a proposed land development or division
22 > action, nor are they construed to shift the burden of proof to the
23 > county. Such terms and phrases are intended <u>to allow the County</u> to
24 > consider and require mitigating measures that will minimize any
25 > potential incompatibility or adverse consequences of development in
26 > light of the purpose of the zoning district and the reasonable
27 > expectations of other people who own or use property for permitted
28 > uses in the area."

29

30 LDO 13.1.1(D) (emphasis added).

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1 As an initial matter, LDO 13.1.1(D) is not a "standard or procedure" adopted
2 to implement ORS 215.130 and thus does not fall under the type of actions
3 contemplated in ORS 215.130(10). Rather, LDO 13.1.1(D) is a general rule of
4 interpretation and does not provide any standards or procedure for considering
5 conditions of approval for the purpose of mitigating adverse impacts. LDO
6 Chapter 11, which implements ORS 215.130 and governs nonconformities, does
7 not include <u>any</u> standards or procedures for conditioning approval of an alteration
8 of a nonconforming use. *See* Pet. App. B.
9 Additionally, even if LDO 13.1.1(D) were the type of "standard or
10 procedure" contemplated by ORS 215.130(10), it is not clear that it would apply to
11 a nonconforming use application. The discretion described in LDO 13.1.1(D)
12 allows the county to consider mitigation "in light of the purpose of the zoning
13 district and the reasonable expectations of other people who own or use property
14 for permitted uses in the area." Given that Petitioners' use is incompatible with the
15 purpose of the zoning district (a fundamental aspect of its nonconforming use
16 application), there is no mitigation that could minimize any "adverse
17 consequences" in light of the purpose of the residential zoning of Petitioners'
18 property. Petitioners fail to explain how this provision can be squared with its
19 application to allow alteration of a use that is, on its face, inconsistent with the

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purpose of the residential zoning district. LDO 13.1.1(D) is not applicable to the present nonconforming use alteration request.

Finally, while Rogue Advocates concedes that Petitioners raised the issue of mitigation in the most general sense by citing to LDO 13.1.1(D) and referring to conditions of approval pursuant to ORS 215.130(10)(c) in their final rebuttal argument, Petitioners do not point to any place in the record where they proposed specific mitigation or conditions of approval, or offered an explanation of how adverse impacts from their operations could be mitigated or minimized. *See* Pet. at 18. Even if the Hearings Officer could have reviewed or imposed conditions to mitigate the intensity and adverse impacts of Petitioners' use, there is no evidence in the record that would support a finding that those aspects of the use could be mitigated.

The Hearings Officer had no obligation to craft and impose conditions in an effort to avoid denial of Petitioners' application. *See* LDO 13.1.1(D) ("no greater adverse impact" term is not "construed to shift the burden of proof to the county."). That burden lies entirely with the applicant.

LUBA has spoken to this issue before:

> "Placing that initial burden on the local government poses a number of pragmatic difficulties that are avoided if that initial burden belongs to the applicant. The applicant is more likely to have the resources and motivation to develop conditions of approval or modifications to the proposal to make it consistent with applicable criteria. Conditions

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> developed and proposed by the applicant are likely to be acceptable to the applicant, and thus probably, if not presumptively, reasonable. Further, requiring the applicant to develop such conditions along with any necessary supporting evidence as to their efficacy, and present them during the evidentiary proceeding, allows other interested parties to object to such conditions and present opposing evidence. Under [Petitioners'] view, a local government contemplating denial during its deliberations would either have to develop conditions on its own after the evidentiary proceedings are closed or re-open the proceedings to allow evidence from the applicant or opponents."

Oien v. City of Beaverton, 46 Or LUBA 109, 126–27 (2003). Petitioners did not propose any conditions of approval and supporting evidence that could serve as an alterative to denial of their application. In reviewing this record, the Hearings Officer could only conclude that there was no basis to determine that adverse impacts could be mitigated. Thus, even if, theoretically, the Hearings Officer had the discretion to consider mitigation, the decision to deny Petitioners' application was within the bounds of that discretion and his conclusion that he was required to deny the application was correct. The Hearings Officer did not err in concluding that the greater intensity and greater adverse impacts of Petitioners' asphalt batch plant use required denial of the application. Petitioners have not articulated any basis for reversal or remand of the Hearings Officer's decision.

C. Response to Petitioners' Third Assignment of Error

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

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1 **1. *Preservation of Error***

2 Rogue Advocates concedes that the issue was preserved for review.

3 **2. *Standard of Review and Available Relief***

4 LUBA will remand a land use decision where the findings are inadequate to
5 support the decision. OAR 661-010-0071(2)(a). However, allegations of
6 inadequate findings "that are no more than a disagreement with the local
7 government's ultimate conclusion in its findings provide no basis for reversal or
8 remand of the challenged decision." *Richards-Kreitzberg v. Marion County,* 32 Or
9 LUBA 76, 89 (1996).

10 **3. *Argument***

11 Petitioners argue that the Hearings Officer's findings regarding the increased
12 adverse impacts of the asphalt batch plant use fail to address and respond to
13 Petitioners' evidence and arguments on those aspects of the use. Pet. at 32.
14 Specifically, Petitioners argue that the Hearings Officer failed to reference
15 Petitioners' testimony regarding the flashpoints of their asphalt products and
16 testimony distinguishing Petitioners' asphalt plant from those discussed in the
17 Schoenleber Affidavit. *Id*. at 31. However, a review of the findings regarding the
18 increased risk of fire and explosion from Petitioners' asphalt plant shows that the
19 Hearings Officer explicitly acknowledged the two pieces of evidence that
20 Petitioners assert were omitted. *See* Rec. 33-37.

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1 First, regarding the flashpoints of Petitioners' asphalt products, the Hearings
2 Officer noted Petitioners' letter from J.D. Zilman, Sales Manager of Albina
3 Asphalt, which stated that the asphalt products supplied to Petitioners have a flash
4 point of over 400˚F and that Petitioners typically operate below 352˚F. Rec. 35
5 (referring to Rec. 142–43). The Hearings Officer discounted that evidence from
6 being dispositive of the issue because Petitioners' "[t]ypical processing techniques
7 and temperature are not hard restrictions. They may change over time, and they
8 may not be followed consistently in any event." Rec. 35. The Hearings Officer
9 further responded to the Zilman letter by pointing out that it was limited to "hot
10 mix" asphalt production and Petitioners also produce "cold mix" asphalt, which the
11 Hearings Officer concluded, based on substantial evidence, presents a greater risk
12 of fire and explosion than hot mix asphalt production. Rec. 35-36 (referring to
13 Schoenleber Affidavit (Rec. 509–13) as challenging Zilman statement).
14 In response to the Schoenleber Affidavit, Petitioners attempted to distinguish
15 their asphalt batch plant from other asphalt plants referred to by Mr. Schoenleber
16 as examples of the fire risk presented in asphalt batching. *See* Rec. 199, 218.
17 Petitioners argue that the Hearings Officer failed to explain how he concluded that
18 Petitioners' plant poses a risk of fire and explosion despite Petitioners' attempt to
19 distinguish their operation from those described in the Schoenleber Affidavit and
20 the AFSCME Report. Pet. at 32. To the contrary, the Hearings Officer concluded

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that Petitioners' attempt to distinguish their asphalt plant was unsuccessful. Rec. 34. The Hearings Officer noted, "[t]he fact that the risk at the Applicant's plant is relatively lower than at another plant does not support a conclusion that there is not a risk of fire or explosion at his facility." *Id.* This conclusion logically flows from the fact that the Hearings Officer's consideration of fire and explosion risk was based on a comparison of Petitioners' asphalt batch plant to the prior concrete batch plant, not of Petitioners' asphalt batch plant to other asphalt batch plants in the region.

Through a comparison of Petitioners' asphalt batch plant to the prior concrete batch plant based on the evidence in the record, the Hearings Officer concluded that the risk of fire and explosion at Petitioners' asphalt plant "is a new and different risk than that present in concrete batching. It is also a risk that is additional to the risk of fire and explosion related to loaders and other mobile equipment that is present in both processes." Rec. 37. The Hearings Officer responded to the issues and evidence presented by Petitioners regarding this risk and explained why Petitioners' evidence did not outweigh the evidence relied on to support the Hearings Officer findings. The Hearings Officer was not required to address every conflict in the evidence presented or to respond to every challenge to the evidence made by Petitioners. *See Knight v. City of Eugene,* 41 Or LUBA 279, 288 (2002). Petitioners' challenge to the adequacy of the Hearings Officer's

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findings is therefore without merit and appears to be nothing more than dissatisfaction with the result of those findings rather than their adequacy. Petitioners' challenge to the Hearings Officer's findings cannot be sustained on that basis. *See Knapp v. City of Corvallis,* 55 Or LUBA 376, 381 (2007). Therefore, the Board should deny Petitioners' third assignment of error.

D. Response to Petitioners' Fourth Assignment of Error

The Hearings Officer's findings regarding greater intensity of use and greater adverse impacts of Petitioners' asphalt batch plant use are supported by substantial evidence in the record.

1. *Preservation of Error*

Rogue Advocates concedes that the issues are preserved for review.

2. *Standard of Review and Available Relief*

LUBA will remand a decision that is not supported by substantial evidence in the whole record. OAR 661-010-0071(2)(b). "Substantial evidence" is evidence a reasonable person would accept as adequate to support a conclusion. *Reeves v. Washington County,* 24 Or LUBA 483, 490 (1993). Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Dodd v. Hood River County,* 317 Or 172, 179 (1993).

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

3. *Argument*

A petitioner challenging a local government's denial of its land use application on evidentiary grounds bears the burden of demonstrating that only evidence supporting the application can be believed and that, as a matter of law, such evidence establishes compliance with each of the applicable criteria. *Wiley Mtn., Inc. v. City of Albancy,* 36 Or LUBA 449, 450–51 (1999). The Hearings Officer's findings regarding various aspects of Petitioners' asphalt batch plant operation are supported by substantial evidence in the record such that a reasonable person could reach the same conclusions.

a. Flashpoint and heating of asphalt products

Petitioners contend that the Hearings Officer's finding that asphalt batching processes present a greater risk of fire and explosion was based on evidence of flashpoints of certain asphalt additives discussed in an AFSCME fact sheet contained in the record. Pet. at 34. Petitioners argue that the Hearings Officer's

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finding that Petitioners' asphalt plant presents a risk of fire and explosion relied primarily on the AFSCME fact sheet and was not supported by substantial evidence.

A review of the Hearings Officer's discussion of the risk of fire and explosion at Petitioners' plant demonstrates that the Hearings Officer considered multiple pieces of evidence in reaching his conclusion. First, while the Hearings Officer referred to the AFSCME report as stating that even the least volatile of asphalt types has a flashpoint of over 250˚F, he also acknowledged Petitioners' evidence – a letter from J.D. Zilman – stating that the flashpoint for Petitioners' asphalt products is over 400˚F and that Petitioners typically operate below 352˚F. Rec. 34-35. The Hearings Officer resolved this conflict in the evidence by reasoning that,

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

Rec. 35. It is clear that the Hearings Officer's conclusion was based on more than the AFSCME fact sheet. Specifically, the Hearings Officer discounted the weight

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of Petitioners' contrary evidence regarding its "typical operations" and found that it did not address the risks of fire and explosion associated with Petitioners' "cold mix" asphalt production. *Id.* The Hearings Officer relied on the Schoenleber Affidavit to conclude that, "cold mix" production "presents a greater risk of fire" than "hot mix." *Id.* at 35-36.

The Hearings Officer found that the "reality-in-fact" of the possibility and extent of the risk of fire and explosion at Petitioners' plant was confirmed by evidence of such events at other "cold mix" asphalt plants, as noted in the Schoenleber Affidavit. Rec. 36. Petitioners had acknowledged these events in a 2011 statement by Mr. Meyer referring to fires and explosions at "cold mix" facilities in Klamath Falls and Medford in 2007 and 2009, respectively. Rec. 402–03. Petitioners did not offer any evidence distinguishing their "cold mix" asphalt production from that at the other two facilities. Rather, Petitioner only attempted to distinguish their plant by arguing that, "because of the configuration of the asphalt batch plant, any harm would be limited to the plant itself and would not pose any danger to the neighboring community." Rec. 75. The Hearings Officer rejected that argument because Petitioners "offer[ed] no evidence to support this conclusion." Rec. 37.

Petitioners rely on the fact that "[n]othing in the record linked those example explosions to the processes at the Petitioners' batch plant." Pet. at 36. However,

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1 no such evidence was required in order for the Hearings Officer to conclude that,
2 as compared to the prior concrete batch plant, Petitioners' asphalt batch plant
3 presents a risk of fire and explosion that "is unique to asphalt batching and is
4 presented by the equipment and ingredients and the heat particular to that process."
5 Rec. 36. The Hearings Officer's conclusion is based on substantial evidence such
6 that a reasonable person could reach that conclusion. *See* Rec. 561–66.
7 Petitioners also argue that the Hearings Officer improperly "speculated"
8 about the potential impacts a fire or explosion would have on the surrounding
9 community. Pet. at 36. However, the Hearings Officer was not speculating in
10 order to make a finding of adverse impact, rather the Hearings Officer was
11 rejecting Petitioners' argument that there would be no adverse impact based on the
12 fact that Petitioners "offer[] no evidence to support this conclusion." Rec. 37. In
13 any case, there was substantial evidence to support the Hearings Officer's
14 conclusion that a fire or explosion would impose adverse impacts on the
15 neighborhood.[3] The record contained evidence that an explosion at the Knife
16 River asphalt plant caused nearby residents to lose power and experienced "smoke
17 drifting from the facility." Rec. 36 (citing Rec. 493–94). Such results would

[3] Petitioners also rely on a short statement from the Deputy State Fire Marshal stating, "clearance to combustibles was satisfactory" at Petitioners' property. Pet. at 36-37 (citing Rec. 150). This statement does not support Petitioners' contention that "any potential fire or explosion at the asphalt batch plant has no way of spreading to the surrounding community." *Id.*

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1 constitute adverse impacts to the neighborhood in the event of a fire or explosion at
2 Petitioners' plant. Based on the character of the surrounding neighborhood –
3 including not only the Mountain View Estates community but also the adjacent
4 recreational trail and Interstate Highway – it was reasonable for the Hearings
5 Officer to conclude, based on substantial evidence in the record, that the risk of fire
6 and explosion at Petitioners' plant presented a greater adverse impact than the prior
7 concrete batch plant use.[4]

8 b. Fuel storage at the asphalt batch plant

9 Petitioners challenge the Hearings Officer's finding that the fuel stored at
10 Petitioners' batch plant presents a greater risk of fire and explosion than the prior
11 concrete batch plant as unsupported by substantial evidence in the record. Pet. at
12 37–38. Petitioner argues that the evidence in the record demonstrates that there
13 was more fuel stored on the property for the concrete batch plant than there is for
14 Petitioners' asphalt batch plant.

---

[4] Petitioners also raise error regarding the Hearings Officer's reliance on *Bertea/Aviation, Inc. v. Benton County,* 22 Or LUBA 424 (1991), in a footnote and attempt to incorporate by reference their arguments made before the Hearings Officer. Petitioners' challenge to the applicability of *Bertea* before the Hearings Officer was not a substantial evidence challenge. LUBA will not consider arguments in footnotes that set out a different legal theory than presented in the assignment of error. *Frewing v. City of Tigard,* 59 Or LUBA 23, 45 (2009); *David v. City of Hillsboro,* 57 Or LUBA 112, 142 n 19 (2008).

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1 However, Petitioner acknowledges that the Hearings Officer concluded that
2 the evidence in the record did not allow for a clear determination of the number,
3 size and location of fuel storage tanks associated with the concrete batch plant use.
4 Rec. 14-15, 23. The Hearings Officer rejected Petitioners' evidence regarding fuel
5 tanks at the concrete batch plant because Petitioners' "limited and varying
6 descriptions . . . leaves unknown such elements as the size, number, and location of
7 fuel storage tanks . . . ." Rec. 23. Nonetheless, the Hearings Officer concluded
8 that the asphalt batch plant use requires more fuel than the concrete batch plant use
9 because of the need to generate heat for the asphalt batching process. Rec. 36.
10 While the Hearings Officer could have been more explicit in his findings, there is
11 substantial evidence in the record to support the conclusion that the asphalt plant
12 required more fuel and thus presented a greater risk of fire than the concrete batch
13 plant. The Hearings Officer appears to have relied on the statement by Mr.
14 Schoenleber regarding the amount of fuel required for the two types of batch
15 plants:

16 "The mixing chamber for asphalt or concrete requires a diesel
17 generator to power the mixer. In addition to this fuel that would be on
18 site for either operation, asphalt requires significant additional fuel to
19 heat the mix plus the asphalt oil additive. The presence of 10,000 plus
20 gallons of diesel fuel combined with the asphalt equipment heating
21 chamber at 300 plus degrees creates a substantial hazard risk of fire or
22 explosion not present in concrete."
23
24 Rec. 512; *see* Rec. 35.

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(503) 525-2722

It was reasonable for the Hearings Officer to conclude, on the one hand, that there was not substantial evidence in the record to find the specific size, number and location of fuel storage tanks for the concrete batch plant use and, on the other hand, find that Petitioners' asphalt batch plant use requires more fuel than the concrete batch plant would have because of the need to generate heat for the asphalt batching process. Both conclusions are supported by substantial evidence in the record. *See* Rec. 174–75, 511–12.

c. Relationship between asphalt batch plant and the surrounding community

Petitioners argue that the Hearings Officer's findings 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" are not supported by substantial evidence. Pet. at 38. Petitioners argue that those factual findings "were critical to the Hearings Officer's assessment of the risk of the adverse impacts to the surrounding neighborhood." *Id.*

First, Petitioners' challenge comes down to semantics; Petitioners argue that evidence in the record shows that the distance from the batch plant structure to the nearest residence is actually 527 feet and that the Greenway trail is not adjacent to the batch plant itself, but only the edge of Petitioners' property. Pet. at 38. The Hearings Officer's findings were not so precise as Petitioners attempt to make

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them. The Hearings Officer's description of elements of the surrounding community was that in relation to Petitioners' property, not only the physical batch plant structure. Several maps in the record show that the Mountain View Estates community is "approximately 250 feet" from Petitioners' property. Rec. 153, 339, 691, 695, 823, 828. Those maps also show that the Bear Creek Greenway and trail lie adjacent to Petitioners' property to the west. Rec. 153, 339, 824. The Hearings Officer's findings are supported by substantial evidence in the record.

Moreover, Petitioners fail to articulate how the Hearings Officer's factual description of the spatial proximity of the nearby Mountain View Estates community and Bear Creek Greenway path bear any direct relationship to the Hearings Officer's assessment of the adverse impacts to the surrounding community. Petitioners merely assert that the Hearings Officers findings were "critical" to the assessment of risk and adverse impacts.

The Hearings Officer described the surrounding neighborhood as having

> "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."

Rec. 29. The Hearings Officer appeared to consider each of these features when assessing the impacts of Petitioners' use to the surrounding neighborhood. None of the Hearings Officer's findings with respect to the impacts from the asphalt

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1 batch plant use are predicated on the precise distance from the batch plant to the
2 nearest residence or the Greenway trail. *See* Rec. 33–37. Petitioners fail to
3 articulate how the Hearings Officer's generalized description of the surrounding
4 neighborhood was "critical" to the assessment of adverse impacts. Where
5 petitioners challenge the evidentiary support for a finding, but fail to show how the
6 finding is critical to the decision, the challenge provides no basis for remand. *Day*
7 *v. City of Portland,* 25 Or LUBA 468, 472 (1993).

8 d. Employees associated with the asphalt batch plant use

9 Petitioners' final substantial evidence challenge is that the Hearings
10 Officer's finding that Petitioners' asphalt batch plant has more employees than the
11 prior concrete batch plant is not support by substantial evidence in the record. Pet.
12 at 39. Petitioners argue that the Hearings Officer's findings rely on inference that
13 the asphalt batch plant also employs a number of independent contractor truckers,
14 despite there being no evidence in the record of that fact. *Id.* However, a review
15 of the Hearings Officers findings demonstrates that no such inference was made or
16 required to conclude that the number of employees associated with Petitioners' use
17 make it more intensive than the prior concrete batch plant use.

18 With respect to the prior concrete batch plant use, the Hearings Officer
19 found, based on a statement by Howard DeYoung that, "the concrete batch plant
20 and the DeYoung gravel operation together required somewhere from 'two to five'

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1 actual employees and as many as 15 full time equivalent including the independent

2 truckers." Rec. 19 (citing Rec. 196) (emphasis added). Petitioners presented

3 evidence that the asphalt batch plant "employs 12-15 full-time employees." Rec.

4 199. When comparing the number of employees at the concrete plant to

5 Petitioners' asphalt plant the Hearings Officer concluded, "[t]he difference

6 between the roughly 3 full-time employees of the concrete batch plant and the 12

7 to 15 full-time employees of the Applicant is significant and indicates a more

8 intensive use of the Property." Rec. 33.

9 Regarding the number of independent truckers that Petitioners may or may

10 not employ, the Hearings Officer stated,

11 "Even if the production tonnage of the asphalt batch plant is less than
12 that of the concrete batch plant, the number of employees itself
13 implies that the former constitutes a more intensive use of the site. In
14 light of this, whether the number of independent truckers required for
15 the asphalt batch plant is greater than that required for the concrete
16 batch plant is not important. The asphalt batch plant use is more
17 intensive without reference to that statistic."
18
19 *Id.* (emphasis added). The Hearings Officer's findings on the number of

20 employees were based only on a comparison of the base employees associated with

21 each batching operation and without reference to the number of independent

22 trucking employees associated with either use. Those findings are supported by

23 substantial evidence in the record and thus do not require a remand.

24 //

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917 SW Oak St., Suite 417
Portland, OR 97205
(503) 525-2722

1 ## V. CONCLUSION

2 The Hearings Officer provided four separate bases for denying Petitioners'
3 application. *See* Rec. 41. A local government need only adopt one sustainable
4 basis to deny a request for permit approval. *Lee v. City of Oregon City,* 34 Or
5 LUBA 691 (1998). Rogue Advocates has demonstrated above that each basis is in
6 accordance with the applicable law and is supported with adequate findings and
7 substantial evidence in the record. For the reasons stated above, Rogue Advocates
8 respectfully requests the Board affirm the Hearings Officer's decision denying
9 Petitioners' application for alteration of a nonconforming use.

10 Dated: December 2, 2015

11 Respectfully Submitted,
12
13
14 ______________________________
15 Maura C. Fahey, OSB No. 133549
16 Of Attorneys for Intervenor-Respondent
17 Rogue Advocates

Crag Law Center
917 SW Oak St., Suite 417
Portland, OR 97205
(503) 525-2722

CERTIFICATE OF FILING

I hereby certify that, on December 2, 2015, I filed the original and four copies of this **Intervenor-Respondent's Brief** with the Land Use Board of Appeals, at DSL Building, 775 Summer Street NE, Suite 330, Salem, Oregon 97301, by first class mail.

DATED: This 2nd day of December, 2015

By: ____________________________
Maura C. Fahey
Crag Law Center

CERTIFICATE OF SERVICE

I further certify that, on December 2, 2015, I served a true and correct copy of this **Intervenor-Respondent's Brief** on the other parties to this appeal, by first class mail as follows:

Joel Benton
Jackson County Counsel
10 S Oakdale, Room 214
Medford, OR 97501

H.M. Zamudio
Huycke O'Connor Jarvis, LLP
823 Alder Creek Drive
Medford, OR 97504

DATED: This 2nd day of December, 2015

By: ____________________________
Maura C. Fahey
Crag Law Center