BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAUL MEYER and KRISTEN MEYER,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

ROGUE ADVOCATES,
Intervenor-Respondent.

LUBA No. 2015-073

FINAL OPINION
AND ORDER

Appeal from Jackson County.

H. M. Zamudio, Medford, filed the petition for review and argued on behalf of petitioners. With her on the brief was Huycke O'Connor Jarvis, LLP.

No appearance by Jackson County.

Maura C. Fahey, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief was Crag Law Center.

HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN Board Member, participated in the decision.

AFFIRMED 01/11/2016

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county hearings officer's decision that denies their request for approval of an alteration of a nonconforming concrete batch plant to convert that concrete batch plant to an asphalt batch plant. The alteration was accomplished in 2001, and petitioners seek after-the-fact approval for that alteration.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new matters in the intervenor's response brief. Intervenor objects that the response brief is not limited to responding to new matters. Intervenor is correct, in part, but the reply brief assists the Board in understanding the underlying decision and the parties' arguments, and for that reason the reply brief is allowed.

INTRODUCTION

The batch plant that is the subject of this appeal is located on a 10.98 acre property located in Jackson County, on the west side of Interstate 5 and east of Bear Creek. Land use decisions concerning the batch plant have been appealed to LUBA three times before. *Rogue Advocates v. Jackson County*, ___ Or LUBA ___ (March 6, 2015) (*Rogue III*); *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014) (*Rogue II*); *Rogue Advocates v. Jackson County*, 69 Or LUBA 271 (2014) (*Rogue I*). A number of legal and factual disagreements between the parties have been resolved in *Rogue I*, *II* and *III*.

That a concrete batch plant of some sort existed on the subject property in 1992 was established in *Rogue I*. Following our decision in *Rogue III*, the county hearings officer first set out to complete the task of verifying the nature and extent of the concrete batch plant that existed on the property in 1992.[1] In the decision that is before us in this appeal, the hearings officer verified the nature and extent of the 1992 concrete batch plant, except with regard to (1) "the size, number and location of fuel storage tanks," (2) "the size number and location of storage buildings," (3) "the presence or absence of a 'control shack'" and (4) "hours of operation." Record 23, 25.

Despite the incomplete verification of the nature and extent of the 1992 concrete batch plant, the hearings officer nevertheless proceeded to determine, after-the-fact, whether the conversion of the concrete batch plant to an asphalt batch plant in 2001 complied with applicable law.[2] Under applicable county

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[1] Under ORS 215.130(11) "a county may not require an applicant for verification [of the existence of a nonconforming use] to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of the application." Since petitioners submitted their application for verification of the nonconforming use in 2012, the nature and extent of the nonconforming concrete batch plant that existed on the property in 1992 was the first question the hearings officer attempted to answer following our remand in *Rogue III*.

[2] As we understand it, petitioners are seeking approval for the asphalt batch plant, as it existed in 2001, because petitioners either already have removed or plan to remove any features of the existing asphalt batch plant that were added after 2001, when the concrete batch plant was converted to an asphalt batch plant.

law, an existing nonconforming use may be changed "to another, no more intensive nonconforming use" if "the proposed new use will have no greater adverse impact on the surrounding neighborhood." Jackson County Land Development Ordinance (LDO) 11.2.1(A).[3] The hearings officer applied the "no more intensive nonconforming use" and "no greater adverse impact on the surrounding neighborhood" language as imposing separately cognizable standards. As we explain in more detail below in our resolution of the second assignment of error, petitioners do not assign error to the hearings officer's interpretation of LDO 11.2.1 as imposing separately cognizable standards.

The hearings officer first concluded that the asphalt batch plant is more intensive than the prior concrete batch plant in two ways: (1) number of employees, and (2) continuity of the batching operation during the year.[4] Record 41. The hearings officer then concluded that the asphalt batch plant also has a greater adverse impact on the surrounding neighborhood, due to the

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[3] LDO 11.2.1(A) provides:

> "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*. (Emphases added.)

[4] The current asphalt batch plant operates year round. The concrete batch plant did not operate on the site for at least two months of the year and some years did not operate on the site for up to four months of the year.

increased risk of explosion associated with the asphalt batching process, as compared to the concrete batching process. In this appeal petitioners assign error to those findings, as well as some other findings the hearings officer adopted in explaining how he went about reaching his decision in this matter. Intervenor, who opposes the batch plant, has intervened in this appeal to defend the hearings officer's decision.

FIRST ASSIGNMENT OF ERROR

In their first assignment of error, petitioners contend the hearings officer misconstrued the applicable law, in adopting an incomplete verification of the nature and extent of the nonconforming concrete batch plant. ORS 197.835(9)(a)(D); OAR 661-010-0071(2)(d).[5]

In our decision in *Rogue III*, we stated that approving the change of the concrete batch plant to an asphalt batch plant "will necessitate a reasonably precise verification of the nature and extent of the concrete batch plant use as it existed in 1992." *Rogue III*, slip op at 7. It is important to recognize that this verification is not necessary to allow the concrete batch plant to continue to operate, since the concrete batch plant no longer exists on the site, and has not existed on the site since 2001. Rather that first step is necessary because under county law that we discuss later in this opinion, as interpreted by the hearings

[5] ORS 197.835 sets out LUBA's scope of review. ORS 197.835(9)(a)(D) provides that LUBA is to reverse or remand a decision if it finds the decision maker "[i]mproperly construed the applicable law." OAR 661-010-0071(2)(d) includes nearly identical language.

officer, he was required to determine whether the asphalt batch plant is more intense or has a greater adverse impact on the surrounding neighborhood, as compared to the prior concrete batch plant. Making those determinations requires an understanding of the nature and extent of the concrete batch plant.

A. Hours of Operation

As noted earlier, the hearings officer concluded that, based on the evidentiary record, he could not verify the hours of operation of the concrete batch plant. Petitioners argue:

> "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 daytime 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.'" Petition for Review 16.

We do not agree that the hearings officer erred by failing to infer that the concrete batch plant operated at least between the hours of 6:00 a.m. and 5:00 p.m. While that might be a *permissible* inference, it is certainly not an inference that is *required* by the fact that the concrete batch plant supplied construction sites when it was in operation.

We turn to petitioners' second point, that "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.'" The hearings officer apparently

felt otherwise, and petitioners present no basis for LUBA to second-guess the hearings officer on that point.

Finally, it does not appear to us that the lack of evidence regarding the hours of operation played any role in the hearings officer's decision regarding the requested approval to change or alter the concrete batch plant to an asphalt batch plant, which appears to be petitioners' ultimate objective in this matter. As we explain later, the hearings officer apparently concluded that he had sufficient information about the nature and extent of the concrete batch plant to proceed to consider whether the change to an asphalt batch plant could be approved, even without knowledge of the precise operating hours of the concrete batch plant. It is true that the hearings officer, in doing so, found that he could not make a meaningful comparison between the operating hours of the concrete batch plant and the asphalt batch plant. Record 25, 40. However, that lack of evidence regarding the hours of operation of the concrete batch plant was not cited by the hearings officer as a reason for denying the requested approval for the change to an asphalt batch plant. As previously noted, the hearings officer relied on the increased intensity of the asphalt batch plant (due to the greater number of employees and continuous operation throughout the year) and the greater adverse impact (due to increased risk of explosion at the asphalt batch plant).

Petitioners' challenge to the hearings officer's findings regarding hours of operation provides no basis for reversal or remand.

B. Fuel Tanks, Buildings and Control Shack

Petitioners next argue that the evidence that appears at Record 195-97 is sufficient to provide a reasonably precise description of the nature and extent of the fuel tanks and buildings on the property when the concrete batch plant operated on the property.

The evidence that appears at Record 195-97 is a June 15, 2015 letter from Howard DeYoung to the hearings officer. Howard DeYoung operated a concrete batch plant on the subject property in the past. Among other things, the hearings officer specifically addressed three letters from Mr. DeYoung, which he referred to as the first, second and third DeYoung Letters. Record 14. The June 15, 2015 letter, which is cited by petitioners, is the third DeYoung Letter. After noting discrepancies in the three letters' descriptions of storage buildings, fuel tanks and the control shack, the hearings officer explained:

> "Mr. DeYoung's letters are the Applicant's primary evidence [of] 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'?" Record 15.

Petitioners apparently are arguing that the third DeYoung letter is such compelling evidence regarding the nature and location of the concrete batch plant fuel tanks, stockpiles and buildings that petitioners either carried their burden as a matter of law, or that the hearings officer committed legal error, in not accepting that letter as sufficient to establish the nature and location of the

concrete batch plant fuel tanks, stockpiles and buildings. Whatever the case, we reject the argument. That letter was but one piece of evidence the hearings officer considered, and the hearings officer explained there are discrepancies between that De Young letter, and other De Young letters. That letter must be viewed in context with other evidence and the hearings officer's explanation for why he did not assign dispositive weight to that letter. Viewed in that way, the letter does not come anywhere near establishing the nature and location of the concrete batch plant fuel tanks, stockpiles and buildings as a matter of law, or that the hearings officer committed legal error in not relying on the letter to establish the nature and location of those features of the concrete batch plant.

Petitioners' challenge to the hearings officer's findings regarding the nature and location of the concrete batch plant fuel tanks, stockpiles and buildings is denied.

C. Intervenor's Argument

Intervenor contends that if LUBA denies the first assignment of error, it should affirm the hearings officer's denial of the application without considering petitioners' other assignments of error which challenge the alteration decision. We understand intervenor to contend that the hearings officer's conclusion that the evidence in the record did not allow him to *fully* verify the nature and extent of the concrete batch plant use provides a sufficient, independent basis for LUBA to affirm the denial of the application for an alteration of the use. Intervenor contends "the incomplete verification of

the concrete batch plant was, in itself, a sufficient basis for the Hearings Officer to deny Petitioners' application" to change the concrete batch plant to an asphalt batch plant. Intervenor-Respondent's Brief 16.

Assuming without deciding that the incomplete verification of the nature and extent of the concrete batch plant could have provided an independent reason for denying the requested alteration from a concrete batch plant to an asphalt batch plant, the hearings officer ultimately did not take that position. In some places in the decision, the hearings officer appears to suggest that unless the concrete batch plant is fully verified as a nonconforming use, it is not possible to approve an alteration. For example, the hearings officer states "[f]ailing to provide substantial evidence that allows such a description deprives an application for an alteration of success." Record 11. But later in his decision, at the beginning of his discussion of the requested alteration, the hearings officer appears to conclude that a fully verified nonconforming use is not required to consider the requested alteration:

> "* * * 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.'" Record 26 (emphasis added).

It is reasonably clear that the hearings officer's decision does not take the position that the incomplete verification of the nature and extent of the nonconforming concrete batch plant necessarily means the requested alteration must be denied. In the above-quoted text, the hearings officer appears to reject that position. If intervenor believes the hearings officer's decision erred in this regard, it could have filed a cross-petition for review and assigned error to this aspect of the hearings officer's decision. OAR 661-010-0030(7). Intervenor did not do so, and its failure to do so makes it unnecessary for LUBA to decide if the incomplete verification could be or was an independent basis for denial of the requested change to an asphalt batch plant.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners' second assignment of error is actually four loosely connected subassignments of error. We discuss those subassignments of error separately below.

A. Error to Apply a Judicial Rule of Strict Construction of Laws Limiting Nonconforming Uses

At the beginning of his decision, under a heading entitled "Rules of Interpretation," the hearings officer adopted the following findings:

> "Nonconforming uses are allowed under Oregon law and, to a limited extent, encouraged by the LDO. 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. [Tillamook Co. Comm./Spliid]*, 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*." (Record 5; footnote omitted).[6]

Petitioners contend the sole standard for approving alteration of nonconforming uses is set out at ORS 215.130(5) and (9). ORS 215.130(5) provides that nonconforming uses may be continued and altered, notwithstanding an application or change of zoning that renders the use impermissible. ORS 215.130(9) provides that "'alteration' of a nonconforming use incudes * * * [a] change in the use of no greater adverse impact to the neighborhood[.]"[7] At the time *Parks* was decided in 1972, the statutes did not explicitly authorize *alterations* of nonconforming uses. ORS 215.130(5) was amended and ORS 215.130(9) was enacted after *Parks* was decided. Petitioners contend neither of those statutes impose the strict/liberal standard set out in *Parks*. In addition, petitioners argue, LDO 11.2.1(A) similarly authorizes continuation of nonconforming uses and changes in nonconforming uses, so

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[6] We will refer to the *Parks* standard to "strictly construe[] against continuation of the use," and liberally construe "provisions for limiting nonconforming uses" "to prevent the continuation or expansion of nonconforming uses as much as possible" as the *Parks* strict/liberal standard.

[7] As we have already noted, and explain in more detail later, the hearings officer found county nonconforming use law, in addition to imposing the no greater adverse impact standard in ORS 215.130(9), requires that a change to a nonconforming cannot not be more intense, at least when processed as a Type 2 review, which is the case here. *See* n 3.

long as the changed nonconforming use will not have "greater adverse impacts." *See* n 3. It is also important, petitioners argue, that the LDO has its own rule of interpretation for the no greater adverse effect standard and petitioners contend it is different from the *Parks* strict/liberal standard. LDO 13.1.1(D) provides that the "no greater adverse impact" standard is not an absolute standard.[8] Petitioners argue the hearing officer erred in citing and relying on the strict/liberal interpretive rule in *Parks*, rather than LDO 13.1.1(D), in adopting the challenged decision.[9]

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[8] LDO 13.1.1(D) provides:

> "**Approval Criteria and Impacts**
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> "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."

[9] We note that as far as we can tell the interpretive rule in LDO 13.1.1(D), *see* n 8, was first cited to the hearings officer in petitioners' final rebuttal. Record 71. That is likely the reason that the hearings officer does not

The Court of Appeals' published *Parks* decision is 40 pages long. The principle for which the hearings officer cited *Parks* is a very minor part of the opinion in *Parks*. The Court of Appeals had interpreted the county zoning ordinance in *Parks* to permit development of one house on each of 11 nonconforming, previously recorded lots. 11 Or App at 193. One of the issues in *Parks* was whether the county zoning ordinance should be interpreted broadly to grant the property owner an additional right—a right to build eleven condominium units in a way that effectively ignored the lot lines. Citing cases from other jurisdictions that had addressed similar questions, the Court of Appeals concluded the Tillamook County zoning ordinance should not be broadly interpreted to grant that additional right. 11 Or App at 194-96. The Court of Appeals then cited zoning common law regarding nonconforming uses generally and ORS 215.130(5) as further support. 11 Or App at 196-97. ORS 215.130(5) at the time authorized continuation of lawful uses that are rendered nonconforming, but did not authorize alterations. It was in the context of this reference to nonconforming use law generally and statutory limits on nonconforming uses, as further support for its decision, that the court in *Parks* cited the strict/liberal standard the hearings officer cited. It is entirely possible

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specifically acknowledge the interpretive rule in LDO 13.1.1(D) in his decision. However, intervenor does not argue that petitioners' failure to raise any issue concerning LDO 13.1.1(D) means that issue was waived under ORS 197.835(3) and 197.763(1).

the Court of Appeals would characterize the language the hearings officer cited from *Parks* as dicta, as far as this case is concerned.

Parks is a 43 year old decision that has never again been cited by the Court of Appeals for the principle that the hearings officer cites it for. *Parks* has only been cited for that principle by LUBA once, over 30 years ago. *Portland City Temple v. Clackamas Cty*., 11 Or LUBA 70, 74 (1984). While *Parks* has never been expressly overruled, we think it is highly unlikely that Oregon's appellate courts would apply, or require that a land use hearings officer apply, the strict/liberal standard of construction cited by the hearings officer, given that *Parks* relied on four decisions by courts in other states in articulating the principle the hearings officer cites and given that *Parks* predates the Oregon Statewide Planning Program, which has dramatically altered land use regulation in this state, with the result that Oregon has a largely unique land use regulatory system. *Parks* also predates the current statutory authorization for *altering* nonconforming uses. Moreover, statutory interpretation today focuses much more on the actual language of statutes and local land use regulations themselves, rather than land use common law embodied in decisions rendered by other state courts that rely on principles governing the regulation of nonconforming uses generally. As petitioners correctly note, neither the county nonconforming use regulations nor the statutory standards governing alteration of nonconforming uses call for the

strict construction of "provisions for the continuation of nonconforming uses" or the liberal construction of "provisions for limiting nonconforming uses."

Nevertheless, we do not agree with petitioners that the hearings officer's citation to *Parks* and discussion of that case requires remand. First, the hearings officer's discussion of *Parks* is entirely in the abstract. At no point in his decision does the hearings officer expressly apply *Parks* strict/liberal standard of construction to justify adopting an interpretation he would not have adopted without applying *Parks*. That is not particularly surprising in this case, because the principle articulated in *Parks* is a principle of *interpretation of law*. For the most part, the hearings officer's decision in this case is an exhaustive attempt to find *facts* about the nature and extent of a concrete batch plant that ceased operations 14 years ago rather than an attempt to interpret ambiguous applicable law. And it is those findings of fact that are at the heart of the parties' dispute. To the extent petitioners raise issues that qualify as issues of interpretation of law, there is no suggestion that *Parks* played any role in the hearings officer's interpretation, and petitioners make no attempt to show that it did, beyond citing the hearings officer's abstract discussion of *Parks* and his general claim that his decision was guided by the principle in *Parks*. Record 5, 28.

While the interpretive principle in *Parks* that the hearings officer cites is likely no longer required or viable when interpreting local and statutory nonconforming use laws, if it ever was, petitioners have not established that the

interpretive principle in *Parks* actually played a role in the hearings officer's decision, and it does not appear that it did. Therefore, even if we assume the interpretive principle in *Parks* is no longer a viable or required standard in rendering decisions regarding alteration of nonconforming uses in Oregon, the hearings officer's citation of *Parks* in this case provides no basis for reversal or remand of the decision.

This subassignment of error is denied.

B. The Hearings Officer's Greater Intensity Findings

C. The Hearings Officer's Greater Adverse Impact Findings

We set out the complete text of petitioners' subassignments of error B and C below:

> "b. The Hearings Officer erroneously concluded that *any* finding of greater intensity of use required denial of the Alteration Application." Petition for Review 25 (emphasis added).

> "c. The Hearings Officer erroneously concluded that *any* finding of greater adverse impact required denial of the Alteration Application." Petition for Review 28 (emphasis added).

Before turning to these subassignments of error, we note that the hearings officer identified a number of separate aspects of the two types of batch plant (concrete vs. asphalt) and proceeded to determine separately if any of those separate aspects of the asphalt batch plant represented a greater intensity or had a greater adverse impact on the neighborhood than that aspect of the concrete batch plant. We see nothing wrong with proceeding in this

manner as a way to break a somewhat complicated question into more manageable pieces. But the relevant inquiry under both county law and the relevant statutes is whether the change or alteration in *use* will result in a greater adverse impact. The relevant inquiry is not whether *any separately identifiable aspect* of the altered or changed use will have a greater adverse impact. Similarly, under county law as interpreted by the hearings officer, the question is whether the changed use is more intense, not whether *any separately identifiable aspect* of the changed use is more intense. Stated more directly, neither county law nor the relevant statutes require a request to alter or change a nonconforming use to be denied if any separately identifiable aspect of the changed or altered nonconforming use is more intense or has a greater adverse impact. It is the changed use *viewed as a whole* that the county and statutory standards apply to, and it is the changed use *viewed as a whole* that must not be more intense or have greater adverse impact. While neither the statutes nor the LDO expressly say it is the use "viewed as a whole" that may not be more intense or have a greater adverse impact, that is clearly what the statute and LDO require. [10]

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[10] An example will demonstrate why the hearings officer's approach is inconsistent with purpose of the local and statutory authorizations for nonconforming use alteration/change. Assume an application to alter an existing nonconforming large outdoor recycling and composting facility that generates significant noise and odors to smaller, modern indoor facililty that generates far less noise and odors so that it will have far few adverse impacts,

We do not mean to suggest that the hearings officer's failure to expressly consider the intensity of the proposed use *as a whole* or the adverse impact on the neighborhood of the changed or altered use *as a whole* necessarily resulted in an incorrect result here. This is one of several instances where it is far from clear whether abstract legal principles that are cited by the hearings officer actually were applied in making his decision. And in this case, petitioners do not assign error to the hearings officer's failure to consider in any express way the intensity or the adverse impacts of the asphalt batch plant *as a whole*, making it unnecessary for us to consider this issue further. But this aspect of the hearings officer's analysis certainly had the potential to result in an erroneous decision by analyzing individual trees (aspects of the batch plant) instead of the forest (the batch plants) as a whole.

As we have just noted, it is the altered asphalt batch plant use *viewed as a whole* that may not be more intense or have greater adverse impacts than the concrete batch plant, not *each separately identifiable aspect* of the proposed alteration. While the two subassignments of error quoted above can be read to challenge the analytical error that we have just concluded likely could require

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as compared to the existing nonconforming recycling and composting facility viewed as a whole. That application would likely have to be denied under the hearings officer's analysis if any individual aspect of the new facility, for example the number of employees, would be more intense or have greater adverse impacts on the neighborhood than the number of employees of the existing facility. This would be true even though the new industrial use viewed as whole would be far less intense and have dramatically fewer adverse impacts on the neighborhood.

remand, the arguments petitioners present in support of those subassignments of error are entirely different arguments. Petition for Review 25-29. We therefore conclude that petitioners fail to adequately state and develop a challenge to that possible analytical error, and we do not consider it further. We consider below the arguments that petitioners actually make under subassignments of error B and C.

1. ORS 215.130(5) and (9) Prohibit Denying the Application Solely Because it Will Result in a More Intense Use

Beginning on line 15 of page 25 of the petition for review and continuing over to line 4 on page 26 of the petition for review, petitioners first argue that the hearings officer denied the application, in part, because he found the concrete batch plant's year-round operation and increased number of employees make it "a use of greater intensity." Petition for Review 25. Petitioners then contend the LDO does not require denial in that circumstance and that "ORS 215.130(5) and (9) prohibit this approach." Petition for Review 26.

The precise nature of the above argument is exceedingly unclear. Intervenor understood it to be an argument that the LDO 11.2.1(A) "no greater intensity" prong is inconsistent with ORS 215.130(5) and (9), which does not include a "no greater intensity" prong.[11] In their reply brief, petitioners contend

[11] LDO 11.2.1(A) is set out at n 3. ORS 215.130(5) and (9) are set out in relevant part below:

they "do not challenge the validity of LDO 11.2.1," and instead meant to argue the hearings officer's reliance on the *Parks* strict/liberal standard of interpretation is inconsistent with the statutes. Reply Brief 2-3.

As we have already explained, we do not understand the hearings officer to have relied on the strict/liberal standard in *Parks* to adopt any interpretations of law that he would not have adopted without such reliance.

The argument provides no basis for reversal or remand.

2. Expansion or Enlargement

On page 26 of the petition for review, between lines 5 and 16, petitioners assume the hearings officer denied the proposal, finding that it is an expansion or enlargement of the concrete batch plant. LDO 11.2.1(B)(1)(b) defines an expansion or enlargement to include "[t]o alter the use in a way that results in more traffic, employees, or physical enlargement of an existing structure housing a nonconforming use[.]" Petitioners contend the asphalt batch plant

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> "(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. * * *[.]"
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> "(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[.]"

will have "less than half the traffic generated by the concrete batch plant." Petition for Review 26.

We do not understand the argument. The three circumstances that can result in an expansion or enlargement are stated in the alternative and petitioners only address one of them here.[12] More importantly, the hearings officer did not analyze the proposal as an "Expansion or Enlargement" under LDO 11.2.1(B). Rather, the hearings officer analyzed the proposed alteration as a "Change in Use" under LDO 11.2.1(A).

Petitioners' argument provides no basis for reversal or remand.

3. Conditions of Approval

On pages 26 and 27 of the petition for review, petitioners next argue that even if the evidentiary record supported a finding that the proposed asphalt batch plant will result in increased traffic or employees, the hearings officer was not required to deny the proposal as a more intense use than the concrete batch plant, because he could have imposed conditions of approval to reduce traffic and the number of employees.

At pages 28-29 of the petition for review, petitioners similarly argue the hearings officer was not required to deny the proposal based on his findings that the threat of risk and fire associated with the asphalt batch plant results in

[12] Petitioners later challenge the hearings officers finding regarding the number of employees at the asphalt batch plant and the evidentiary support for those findings.

an increased adverse impact because the hearings officer could have imposed mitigating conditions of approval.

Intervenor responds that petitioners proposed no conditions of approval to reduce the number of employees or mitigate traffic or adverse impacts from the risk of fires or explosions, and that the hearings officer was not obligated develop and impose such conditions of approval.

In their reply brief, petitioners argue:

> "* * * Petitioners do not argue that the Hearings Officer had an affirmative obligation to craft and impose conditions to approve the Alteration Application. Rather, Petitioners argue that mitigation of any substantiated 'greater adverse impacts' is encouraged by the policy in LDO 11.1.3 and permissible under ORS 215.130(9) and 215.130(10)(c). Thus, the Hearings Officer was not *required* to deny the Alteration Application upon any finding of greater adverse impacts." Reply Brief 5.

To the extent we understand petitioners' argument, it merely makes an abstract point that, in view of the facts in this case, provides no basis for reversal or remand. Petitioners concede that the hearings officer was not obligated to take the initiative to craft conditions of approval to make the proposal approvable. Petitioners do not argue that they proposed any conditions of approval that the hearings officer failed to consider, which would have rendered the proposal less intense or reduced adverse impacts. Without such conditions, the hearing officer merely found the proposed alteration in this case does not satisfy one or more of the applicable criteria. Petitioners' arguments here do not demonstrate error in the hearings officer's decision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Under their third assignment of error, petitioners challenge the adequacy of the hearings officer's findings regarding a greater risk of fire and explosion from the asphalt batch plant, as compared to the concrete batch plant. In their fourth assignment of error, petitioners argue that these same findings, as well as findings concerning fuel storage, distance from the asphalt batch plant to the surrounding neighborhood and comparative number of employees at the two types of batch plants are not supported by substantial evidence.

Turning first to petitioners' findings challenge, the gist of petitioners' findings challenge is that the hearings officer's findings concerning the increased risk of fire and explosion from the asphalt batch plant as compared to the concrete batch plant improperly rely on evidence submitted by opponents, primarily an AFSCME report and a Schoenleber affidavit, without acknowledging the applicants' evidence at Record 142-43 (Zilman), Record 199-200 (Meyer) and 218 (Blanton) that petitioners' asphalt batch plant operates differently than asphalt batch plants where there have been fires and explosions. The hearings officer's findings on the question of explosion are extensive and are set forth below. And contrary to petitioners' argument, they do acknowledge the applicants' testimony about differences in the manner of operation at petitioners' facility. In the findings quoted below we have added bold face to indicate where the hearings officer recognizes evidence and

arguments submitted by petitioners and added underlining to indicate findings that respond to that evidence and argument.

"*Risk of Fire and Explosion*

> "The parties are in conflict about whether there is a risk of fire and explosion presented by the asphalt batch plant, the extent of that risk and, importantly, whether a similar risk was presented by the preceding concrete batch plant. There is substantial evidence from which to conclude that asphalt hatching 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. (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.' 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.'
>
> "* * *The Applicant stated in a February 27, 2015, affidavit, 'd) The mixture then goes into a dryer, where the rock is heated to 340 degrees, and then discharged onto an elevator. e) **The mixture is then placed in a mixing chamber, where oil is added and then deposited into the truck bed.' Elsewhere, the Applicant states that the asphalt oil itself is heated before being mixed with the rock. 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 [an] 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]. 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.' Emphasis added.**

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

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

"What the Applicant *typically* does at the asphalt batch plant is not dispositive of the concern. Typical processing techniques and temperature 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.

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

> "'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.'

"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].

"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 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**.'

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

> "There is substantial evidence upon which to find that this is a new and different risk than that present in concrete hatching. It is also risk that is additional to the risk of fire and explosion related to loaders and other mobile equipment that is present in both processes.
>
> "This conclusion is not dependent on the year in which the asphalt batch plant commenced operation, 2001. Other adverse impacts are dependent on a comparative analysis of how the concrete batch plant affected the surrounding neighborhood in relation to the asphalt batch plant at the time it began operating. In the case of this exposure, it is present at all times that asphalt hatching is being conducted, that is, it is a constant risk. It was certainly present in 2001 as it has been ever since.
>
> "Since it is a new risk, it is an increased risk in comparison to the nonconforming concrete batch plant. Under *Bertea* the risks of fire and explosion related to the fuels, the heat and the volatility of the petroleum products necessary for asphalt batching constitute a greater adverse impact on the surrounding neighborhood." Record 33-37 (Record citations and footnotes omitted, italics and underscoring added).

It is simply not accurate to say the hearings officer's findings "make no reference to testimony presented by Petitioners" regarding "flashpoints over 400 degree F" or that petitioners heat their asphalt to 340 degrees, or that the findings "make no mention of Petitioners responses * * *. Petition for Review 31, 32. Because the hearings officer's findings are not defective in the way petitioners allege, the third assignment of error provides no basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

We address petitioners' substantial evidence challenges below, in turn.

A. Flashpoints and Heating of Asphalt Products

Petitioners contend that the hearings officer relied on the AFSCME fact sheet to conclude that because some types of asphalt have a flashpoint as low as 250 degrees Fahrenheit and that petitioners heat their asphalt to 340 degrees Fahrenheit to conclude that the asphalt batch plant will have greater risk of explosion and therefore greater adverse impact. Petitioners contend the hearings officer ignored testimony that "Petitioners only use asphalt products with flashpoints over 400 [degrees Fahrenheit] and that Petitioners heat their product to 340 [degrees Fahrenheit]." Petition for Review 34. Petitioners also pointed out below that the process they use, where rock is heated separately from the oil, differs from the process used at plants where there had been explosions, which heated oil and rock in the same drum.

As just noted, the hearings officer recognized the Zilman testimony that petitioners *typically* heat their asphalt with a flash point of over 400 degrees to only 340 degrees. However the hearings officer concluded that what petitioners typically do is not dispositive and that nothing would preclude petitioners from producing asphalt with a lower flash point. The hearings officer also noted that petitioners produce "cold mix which presents a greater risk of fire." Record 35.

While the hearings officer does not appear to have explicitly recognized the single drum vs. separate oil and rock heating distinction, we do not understand that distinction necessarily to establish as a matter of law that petitioners asphalt batch plant will be no more susceptible to explosions than

the prior concrete batch plant. For one thing, the distinction was offered to distinguish petitioners' asphalt batch plants from other asphalt batch plants where explosions had recently occurred. In this case the relevant comparison is whether the asphalt batch plant poses a greater risk of explosion *than the previous concrete batch plant*. And in any event that distinction does not address the greater risk of explosion posed by petitioners' production of "cold mix" asphalt, which was also cited by the hearing officer.

Petitioners also contend that there is no evidence of any risk of damage to the surrounding neighborhood from an explosion at the asphalt plant and that the impact of any such explosion would be contained on petitioners' property. The hearings officer dismissed that claim, concluding that petitioners offered no evidence to support that position. Record 37.

We conclude that there is conflicting believable evidence regarding whether petitioners' asphalt batch plant poses a greater risk of adverse impact than the previous concrete batch plant, due to an increased risk of explosion with a resulting increased risk of damage to surrounding properties. The hearings officer's choice of which evidence to believe regarding this issue was within his discretion, because we cannot say a reasonable decision maker could not have decided the issue in the way that the hearings officer did. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). To sustain petitioners' evidentiary challenge in this regard would require that LUBA reweigh the

conflicting evidence. LUBA is not authorized to do so. *1000 Friends of Oregon v. Marion County.*, 116 Or App 584, 588, 842 P2d 441 (1992).

This subassignment of error is denied.

B. Fuel Storage

With regard to risk of fire and explosion from the asphalt batch plant, in addition to risk associated with the asphalt batching process itself, the hearings officer also found:

> "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." Record 36.

Petitioners argue "the record contains evidence of the number, size, and location of fuel storage tanks on the preceding concrete batch plant site and establishes that the concrete batch plant stored more fuel than the asphalt batch plant. R 195-197." Petition for Review 37.

The document that petitioners cite as establishing that the concrete batch plant had more stored fuel on-site than the asphalt batch plant is the third DeYoung letter that the hearings officer said contained discrepancies with two other DeYoung letters, which led the hearings officer to conclude it was not reliable evidence of the amount of fuel stored on the property when the concrete batch plant was in operation. The hearings officer relied on a finding that the asphalt batching process requires additional fuel as compared to the

concrete batching process. In making an evidentiary challenge to the hearings officer's finding concerning danger from additional on-site fuel storage, petitioners must do more than cite to evidence submitted by petitioner Meyer, which the hearings officer found to be unreliable due to inconsistencies with other evidence offered by petitioner Meyer.

This subassignment of error is denied.

C. Distance Between Asphalt Batch Plant and Surrounding Neighborhood

We set out below petitioners' entire argument under this subassignment of error:

> "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.' 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 Tr[ai]l. Those erroneous findings were critical to the Hearings Officer's assessment of the risk of the adverse impacts to the surrounding neighborhood." Petition for Review 38.

Petitioners apparently understand the hearings officer to have found that the asphalt batch plant is only 250 feet from the mobile home park and that the asphalt batch plant is located adjacent to the Bear Creek Greenway and trail. However, that is not what the hearings officer found. The hearings officer found that the 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." (Emphases added.) Measured from the property's western boundary, the mobile home park is approximately 250 feet away. Record 823. And the Bear Creek Greenway and trail are located adjacent to the property's western boundary. *Id*. It is true that because the asphalt batch plant is located near the eastern boundary of the property, the asphalt batch plant itself is approximately 527 feet from the mobile home park and approximately 200 feet from the Bear Creek Greenway and trail. Record 153. However, as intervenor points, out, the maps at Record 153 and 823 clearly show the proximity of the asphalt batch plant and the mobile home park and Bear Creek Greenway and trail. There are other maps that also show those proximities. Record 339, 691, 695, 828. The hearings officer's imprecision in referring to the asphalt batch plant itself and the property's boundary does not mean the hearings officer was under any misapprehension about how close the asphalt batch plant was to the nearby mobile home park and Bear Creek Greenway and trail.

Petitioners' evidentiary challenge regarding the proximity of the asphalt batch plant to the nearby mobile home park and Bear Creek Greenway and trail provides no basis for reversal or remand.

This subassignment of error is denied.

D. Number of Employees

Petitioners' final evidentiary challenge concerns the hearings officer's findings concerning the number of employees at the concrete batch plant and the number of employees at the asphalt batch plant.

The hearings officer found that the concrete batch plant employed "15 full time equivalent positions." Record 24. That estimate was based on "two to five full time individuals," and "numerous independent truckers to import material and take the concrete to customers." *Id*.

The hearings officer's findings regarding the asphalt batch plant employees are set out below:

> "The Applicant appears to separate his actual employees from the independent truckers, and the asphalt batch plant is taken to employ more people than its predecessor. The difference between the roughly 3 full-time employees of the concrete batch plant and the 12 to 15 full-time employees of the Applicant is significant and indicates a more intensive use of the Property. Even if the production tonnage of the asphalt batch plant is less than that of the concrete batch plant, the number of employees itself implies that the former constitutes a more intensive use of the site. In light of this, whether the number of independent truckers required for the asphalt batch plant is greater than that required for the concrete batch plant is not important. The asphalt batch plant use is more intensive without reference to that statistic." Record 33.

Petitioners fault the hearings officer for inferring that "the asphalt batch plant also employs a significant number of independent contractor truckers," and contend there is no evidence in the record that such is the case. Petition for Review 39.

As far as we can tell, the hearings officer compared the full-time onsite employees for the concrete batch plant (two to five) with the full-time onsite employees for the asphalt batch plant (12 to 15) and concluded that the asphalt batch plant's greater number of full-time onsite employees constitutes a more intense nonconforming use, as compared to the concrete batch plant's number of full-time onsite employees. The hearings officer appears not to have considered the relative number of independent contractor truckers needed to haul material to and from the site. Stated differently, the hearing officer's conclusion that, based on the number of full-time onsite employees, the asphalt batch plant is more intense than the concrete batch plant, does not consider the respective number of truck drivers.

Petitioners fault the hearings officer for making an inference he does not make (that the asphalt batch plant employs a significant number of independent contractor truckers). And petitioners do not argue that the 12 to 15 full time employees they concede are employed at the asphalt batch plant include any truck drivers such that the 12-15 full-time onsite employees at the asphalt batch plant does not represent an increase over the "15 full time equivalent positions" at the concrete batch plant. Therefore, petitioners' arguments under this subassignment of error provide no basis for reversal or remand.

This subassignment of error is denied.

The fourth assignment of error is denied.

DISPOSITION OF STAY

In an Order dated October 20, 2015 we granted petitioners' motion requesting a stay of the hearings officer's decision pending a final opinion by LUBA in this appeal. With the issuance of this order, our stay is dissolved. *Save Amazon Coalition v. City of Eugene*, 29 Or LUBA 335, 342 (1995).

The county's decision is affirmed.