

February 16, 2016

Hearing Officer
Jackson County
10 S. Oakdale Ave.
Medford, OR 97501

Reference: February 16, 2016 Jackson County Code Enforcement Violation Citation Hearing

Dear Hearing Officer:

My name is Michael L. Walker. I am the Vice-President of Rogue Advocates and I represent it here today. Rogue Advocates has members who participated in Jackson County code violations applicable to this hearing (i.e., Chris Hudson and Mary Hamilton). Its position is that there are three major conclusions applicable to today's code enforcement violation citation hearing for your consideration.

Conclusion 1. First, this is the end of a long complex decision-making process and now the county needs to implement the decision, in the most efficient manner ahead of possible enforcement by the Oregon Department of Environmental Quality, or a Federal injunction for floodplain (FP) development violations.

On September 24, 2015 the Jackson County Hearing Officer's Order, with Findings of Fact and Conclusions of Law, denied a request for approval of an alteration of a nonconforming concrete batch plant, to convert that concrete batch plant to an asphalt batch plant. This order was confirmed by the Oregon Land Use Board of Appeals' (LUBA) Final Opinion And Order (LUBA 2015-073 *Meyer v. Jackson County*, January 11, 2016). The 21 day right to appeal to the Oregon Court of Appeals has expired.

An important question now is how Jackson County enforces its own decision. It appears there are two options: 1. county's authority to issue citations, and 2. county's authority to seek an injunction in district court.

Jackson County has already issued code citations that are the subject of this hearing. In order to enforce the violations the county may impose fines and request an injunction in circuit court if the owner refuses to cease commercial activities on the parcel zoned RR5. The series of Mountain View Paving (MVP) applications have all been denied; MVP failed to obtain land use authorization through the "Verification of Nonconforming Use" applications. It is apparent MVP has no intention to cease commercial operations by its paving company's continuing operations on the RR5 parcel, and a court injunction is the only effective means the county has to enforce its land development ordinances.

Conclusion 2. Second, it is probably moot at this point, but any claim that activities of the nonconforming concrete batch plant were a pre-existing non-conforming "use" not subject to FP permits (i.e., "grandfathered" and don't need a FP permit) has failed to be verified by the applicant or the county.

Per *Meyer v. Jackson County*, *Rogue III*, and *Rogue II*, the FP application cannot be processed until the nature and extent of any nonconforming concrete batch plant "uses" have been verified. In the Jackson County Hearing Officer's September 24, 2015 decision, confirmed by *Meyer v. Jackson*

County, specific key elements of the nature and extent of the “uses” failed to be verified. In this case, in order to support a FP application the concrete batch plant must have been first established as a preexisting verified non-conforming use.

Meyer v. Jackson County 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 16 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 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. (*Meyer v. Jackson County*, pps 5 - 6).

Rogue II We understand petitioners to contend the county does not have authority to grant floodplain permits for the existing asphalt batch plant, until the scope and nature of the legal nonconforming batch plant has been determined by the county, consistent with our remand in *Rogue I*. We agree with petitioners. Once the county has identified the scope and nature of the nonconforming batch plant that existed on the property prior to its conversion to an asphalt batch plant in 2001, it will be in a position to grant floodplain development permits for the verified nonconforming use. If the intervenors desire a floodplain development permit for the current asphalt batch plant, they will first need to seek approval for any alterations to the nonconforming concrete batch plant that have occurred since 1992, particularly those alterations made in 2001 or thereafter that were made to convert that concrete batch plant to the current asphalt batch plant. (*Rogue Advocates v. Jackson 19 County*, 70 Or LUBA 163 (2014) (*Rogue II*, pps. 8-9).

The last FP application approval, processed as a Type 1 review, was remanded by LUBA with specific instructions to the county not to process any further FP applications until MVP obtained land use authorization. MVP has failed in that attempt. Nowhere does LUBA or the county state any use is exempt from FP permits.

Conclusion 3. The last point is that under applicable county 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 (*Meyer v. Jackson County*, p. 4).

In this case, the altered asphalt batch plant use “viewed as a whole” has been determined by the county and upheld by LUBA to have a greater adverse impact than the preceding concrete plant use. This applies to the code criteria of “no more intensive nonconforming use” and the “will not have greater adverse impacts,” as well as the code citation approach of breaking the non-conformance into several code violations.

Thank you for this opportunity to testify.

Sincerely,

Mike :)

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