BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

PAUL MEYER and KRISTEN MEYER,
Intervenors-Respondents.

LUBA No. 2014-100

FINAL OPINION
AND ORDER

Appeal from Jackson County.

Maura Fahey and Courtney Johnson, Portland, filed the petition for review and argued on behalf of petitioner. With them on the brief was Crag Law Center.

Joel Benton, County Counsel, Medford, filed a response brief and argued on behalf of respondent.

H. M. Zamudio, Medford, filed a response brief and argued on behalf of intervenors-respondents. With her on the brief were Daniel O'Connor and Huycke O'Connor Jarvis, LLP.

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

AFFIRMED 03/06/2015

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision denying an application to verify an asphalt batch plant operation as a lawfully established nonconforming use.

MOTION TO INTERVENE

Paul Meyer and Kristen Meyer (intervenors), the applicants below, move to intervene on the side of the county. The motion is granted.

FACTS

The challenged decision is the hearings officer's decision on remand from *Rogue Advocates v. Jackson County*, __ Or LUBA __ (LUBA No. 2013-103, April 22, 2014) (*Rogue I*). *Rogue I* comprehensively sets out the facts relevant to this appeal. *Id*. at slip op 3-6. We briefly restate the pertinent facts here. From 1988 to approximately 2000, a concrete batch plant operated on property owned by intervenors, as an unverified nonconforming use, because a batch plant is not an allowed use in the Rural Residential-5 zone. Sometime prior to April 2001, the concrete batch plant was removed, and intervenors located an asphalt batch plant operation on the property. Subsequently, intervenors made other unapproved alterations to the asphalt batch plant operation. In 2012, intervenors applied to the county to verify the asphalt batch plant as it existed in 2012 as a lawful nonconforming use. The hearings officer denied the application after concluding that the post-2001 changes to the operation constituted unapproved alterations, which could not be evaluated until intervenors applied for approval of those changes as alterations. The hearings officer concluded, however, that an asphalt batch plant is essentially the same use as a concrete batch plant, and hence the 2001 change from a

concrete to an asphalt batch plant did not constitute an alteration of the lawful nonconforming use. As relevant here, in *Rogue I*, we disagreed with the hearings officer, concluding that replacing the concrete batch plant with an asphalt batch plant in 2001 was an "alteration" of the nonconforming batch plant, and that that alteration of the concrete batch plant to an asphalt batch plant therefore cannot be considered part of the verified nonconforming batch plant use until it is approved as an alteration.[1] We remanded the hearings officer's decision to "verify the nature and extent of the lawful nonconforming batch plant use, without considering as part of the verified use any unapproved alterations that occurred in 2001 or at other relevant times since 1992." *Id*. at slip op 22.

On remand, the hearings officer again denied intervenors' application to verify the current asphalt batch plant as part of the verified nonconforming use. This appeal followed.

FIRST THROUGH THIRD ASSIGNMENTS OF ERROR

The posture of this appeal is somewhat unusual because the hearings officer denied the intervenors' application for verification of the asphalt batch plant, and in so doing appears to have reached the result urged by petitioner below. However, petitioner nevertheless appealed the decision to LUBA, and now asks LUBA to *affirm* that denial decision. Petition for Review 28.

Although separately presented, petitioner's first through third assignments of error essentially seek review of the hearings officer's decision to deny the application because petitioner believes that the hearings officer's

---

[1] Jackson County Land Development Ordinance (LDO) 11.1.3(D) provides that no alteration or expansion of a nonconforming use is allowed unless specifically approved by the county.

decision to deny verification of the current *asphalt* batch plant amounts to a decision under LDO 11.8.1 to verify the "nature and extent" of the *concrete* batch plant use as that plant existed in 1992.[2] Petitioner argues that to the extent the decision verifies the nature and extent of the concrete batch plant use, that verification decision is not supported by substantial evidence because the decision improperly considers evidence related to the unapproved alterations of the batch plant. Intervenor appears to agree with petitioner that the hearings officer's decision determines the "nature and extent" of the concrete batch plant as it existed in 1992. Intervenor-Respondent's Brief 16, 20, 26-28.

It is fair to say that the hearings officer's decision could have clearer on this point. The hearings officer's decision comments on the paucity of evidence regarding the nature and extent of the concrete batch plant as it existed in 1992, and describes that evidence as follows:

> "The existence of a permanent concrete batch plant use on the Property in 1992 is not in dispute, but the Applicant's evidence paints only a partial picture of the operation. 'Throughout the 1990's…I estimate Best Concrete, at a minimum, produced approximately 40,000 tons of material annually.' Statement of Howard DeYoung, the former site owner * * *. This volume exceeds the Applicant's production of asphalt by nearly 23,000 tons in his most productive year and by over 28,000 tons annually since 2002. * * * 'It would not surprise me if tonnage being produced by Best concrete … was 2x or 3x as much tonnage as produced by Mountain View Paving. There was often a continuous line of trucks at the site for delivery of raw materials and for the transportation of the finished product.' Statement of Bill Monroe * * *. There is no indication in the Record of how much traffic is generated by the Applicant's use. Best Concrete

---

[2] LDO 11.8.1 sets out the process for verification of a nonconforming use.

> did not operate in the winter months * * * but the Applicant's plant operated year round. * * *
>
> "The Appellant also relies on aerial photographs of the site over the years. However, that evidence is variously either unreliable or not relevant. It is unreliable since, as the Applicant points out, one aerial taken in late 2001 shows no batch plant on the Property even though the applicant's batch plant had been there since at least July of that year. Most of the aerials, however, are not relevant because, as determined in the initial hearings officer decision on the Application, they were taken for an earlier gravel operation on property that adjoins this site to the north. In other words, those aerials are of a different site altogether." Record 188.

The above could be understood as an attempt to determine the nature and extent of the concrete batch plant as it existed in 1992, based on the limited evidence in the record. That evidence is limited because intervenor's application did not seek to verify the nature and extent of the concrete batch plant as it existed in 1992; intervenor instead sought nonconforming use verification of the asphalt batch plant as it existed in 2012. The hearings officer denied that application, both initially and again on remand, because the asphalt batch plant can be approved only pursuant to an application for an alteration, which intervenors had apparently not filed on the date of the decision. That application for an alteration will necessarily include evidence focused on the nature and extent of the concrete batch plant as it existed in 1992, because that is the basis from which any alteration must be evaluated. Viewed in this light, we believe the better characterization of the hearings officer's decision on remand is that it did not attempt to delineate the precise nature and extent of the 1992 batch concrete plant, for purposes of a future application for an alteration.

We think that the above-quoted language from the decision merely recites the few scraps of evidence in the present record regarding the nature and extent of the concrete batch plant use as it existed in 1992. Neither the above-quoted passage nor anything else in the decision appears to have been intended to describe the nature and extent of the concrete batch plant use with the specificity that is required in order for the county to consider a proposal to alter that nonconforming use. *See Spurgin v. Josephine County*, 28 Or LUBA 383, 390-91 (1994) ("[a]t a minimum, the description of the scope and nature of the nonconforming use must be sufficient to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions[]"); *Tylka v. Clackamas County*, 28 Or LUBA 417, 435 (1994) ("the county's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which aspects of intervenors' proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use that intervenors have a right to continue"). At best, the description of the evidence regarding the concrete batch plant quoted above is dicta; it is not essential to the decision to deny the application before the hearings officer. Perhaps prematurely, the language merely cites to evidence that the hearings officer might consider relevant in considering a future application to approve the asphalt batch plant as an alteration of the batch plant use, which will necessitate a reasonably precise verification of the nature and extent of the concrete batch plant use as it existed in 1992.

Under the county's code, an applicant for an alteration can use that application as a vehicle to verify the nature and extent of the lawful nonconforming use.[3] In other words, neither the county's code nor our remand required the hearings officer to delineate, in *this* proceeding on *this* application, the precise nature and extent of the concrete batch plant operation as it existed in 1992. The hearings officer could, and we believe did, defer that analysis to a future application for an alteration of the concrete batch plant operation, which will provide the parties an opportunity to present evidence focused on the nature and extent of the concrete batch plant operation as it existed in 1992, evidence mostly lacking from the current record.

After the passage quoted above, the hearings officer's decision at Record 188-89 also discusses evidence that the hearings officer might consider relevant in considering an application to alter a verified concrete batch plant use, should that application come before the county. However, as with the language quoted above, the discussion of that evidence is best characterized as dicta that is not essential to the decision and that prematurely points to evidence that might be relevant in considering whether to approve an alteration of a verified concrete batch plant use, should that application be filed with the county.

---

[3] LDO 11.2.1 allows an applicant for alteration of a nonconforming use to show "either that the use has nonconforming status, as provided in Section 11.8 [Verification of Nonconforming Status], or that the County previously issued a determination of nonconforming status for the use and that the use was not subsequently discontinued as provided in Section 11.2.2. * * *"

Accordingly, petitioner's arguments under the first through third assignments of error do not provide a basis for reversal or remand. The first through third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

LDO 11.8.1(A) requires an application for verification of a nonconforming use to demonstrate that the use has not been "discontinued or abandoned[.]" Discontinuance is described in LDO 11.2.2(A) as the cessation of the nonconforming use for a period of two years or more. In its fourth assignment of error, petitioner argues that the hearings officer erred in failing to conclude that the conversion from a concrete batch plant to an asphalt batch plant in 2001 was a discontinuance of the nonconforming batch plant use.

Intervenor and the county (respondents) respond that having failed to raise this issue in *Rogue I*, petitioner is precluded under the law of the case principle set out in *Beck v. City of Tillamook*, 313 Or 148, 153 (1982), from raising the issue in this appeal. In its reply brief, petitioner responds that the question of whether the change from a concrete batch plant to an asphalt batch plant was a discontinuance of the nonconforming batch plant use was not "a relevant issue" in *Rogue I*. Reply Brief 5.

On the merits, respondents also respond that an alteration of a nonconforming use cannot be a discontinuance of that use. Respondents cite ORS 215.130(5) and (9), and the LDO counterpart provisions, and argue that an alteration of a lawful nonconforming use cannot constitute an abandonment of that use.[4]

[4] ORS 215.130 provides, in relevant part:

We agree with respondents that petitioner is precluded under *Beck* from raising the issue that it raises in the fourth assignment of error. We see no reason why that issue could not have been raised in *Rogue I*. However, even if petitioner was not precluded from raising the issue, we agree with respondents that the statutory framework governing nonconforming uses and alteration of those uses makes clear that an alteration of a nonconforming use amounts to a *continuation* of the use, and therefore cannot be a *discontinuance* of the same use. ORS 215.130(5) allows alteration of a lawful nonconforming use subject to ORS 215.130(9), which requires that the "change in the use [be] of no greater impact to the neighborhood[.]"[5] If a nonconforming use is altered, then it has continued, albeit in a different form.

The fourth assignment of error is denied.

> "(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*. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. * * *
>
> "(9) As used in this section, 'alteration' of a nonconforming use includes:
>
> "(a) A change in the use of no greater adverse impact to the neighborhood; and
>
> "(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood." (Emphasis added.)

[5] ORS 215.130(7)(a) for its part precludes a nonconforming use from being resumed after a period of "interruption or abandonment[.]"

The county's decision is affirmed.