

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   ROGUE ADVOCATES  
5                                   and CHRISTINE HUDSON,  
6                                   *Petitioners,*

7  
8                                   vs.

9  
10                                  JACKSON COUNTY,  
11                                  *Respondent,*

12  
13                                  and

14  
15                                  PAUL MEYER and KRISTEN MEYER,  
16                                  *Intervenors-Respondents.*

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18                                  LUBA No. 2014-015

19  
20                                  FINAL OPINION  
21                                  AND ORDER

22  
23                                  Appeal from Jackson County.

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25                                  Maura C. Fahey, Portland, filed the petition for review and argued on  
26                                  behalf of petitioners. With her on the brief were Courtney Johnson and Crag  
27                                  Law Center.

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29                                  No appearance by Jackson County.

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31                                  Daniel O'Connor, Medford, represented intervenors-respondents.

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

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36                                  REMANDED                                  08/26/2014

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

**NATURE OF THE DECISION**

Petitioner appeals a planning department decision approving a floodplain development permit for an asphalt batch plant within the 100-year floodplain.

**INTRODUCTION**

The property is a 10.98-acre parcel zoned Rural Residential-5 (RR-5). Significant portions of the property are located within the floodway and the 100-year floodplain of Bear Creek. Intervenors were the applicants for the disputed floodplain development permit. Mountain View Estates is a mobile home park located across Bear Creek in the vicinity of the subject property. Members of petitioner Rogue Advocates live in the Mountain View Estates and petitioner Hudson is “the manager and owner of the Mountain View Estates property.” Petition for Review 5. A central dispute between the parties and intervenors is whether intervenors’ existing asphalt batch plant qualifies as a legal nonconforming use.

The decision that is the subject of this appeal follows an earlier hearings officer’s decision regarding the nonconforming use status of intervenors’ asphalt batch plant. That earlier hearings officer decision was remanded by LUBA in *Rogue Advocates v. Jackson County*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 2013-102 and 2013-103 (*Rogue I*)). The manner in which the floodplain permit decision that is the subject of this appeal played out locally at the same time the hearings officer’s nonconforming use decision was under review by LUBA in *Rogue I* has a bearing on LUBA’s jurisdiction in this matter, as well as the merits of this appeal. We therefore discuss those events briefly below before

1 turning to the jurisdictional question and the merits, omitting events that are  
2 not significant in this appeal and simplifying where possible.

3 **A. The Hearings Officer’s Nonconforming Use Verification**

4 Prior to 1988, batch plants were operated on the subject property by  
5 intervenors’ predecessors. At the time the first batch plant was established on  
6 the property, the property was not subject to zoning or other land use  
7 regulations. Neither the zoning that was first applied to the property, nor the  
8 RR-5 zoning that currently applies to the property, allow batch plants. The  
9 Jackson County Land Development Ordinance (LDO) allows such preexisting  
10 uses to continue as nonconforming uses, even if the LDO would now preclude  
11 establishment of such uses. In 1988, another of intervenors’ predecessor’s  
12 (Best Concrete) began operating a concrete batch plant on the property.<sup>1</sup> Best  
13 Concrete operated that concrete batch plant until approximately 2001 when  
14 intervenors replaced the concrete batch plant with an asphalt batch plant.  
15 Intervenors have operated an asphalt batch plant on the property ever since.

16 On September 26, 2012, intervenors sought verification from the county  
17 that their asphalt batch plant (as it existed in 2012) is a legal nonconforming  
18 use and concurrently applied for floodplain development permits. On March

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<sup>1</sup> As we noted in our decision in *Rogue I*, it was not clear from the record whether the batch plants that operated on the subject property prior to 1988 were asphalt batch plants or concrete batch plants. *Rogue I*, slip op 4, n 1. Regardless, under ORS 215.130(11), “a county may not require an applicant for verification [of a nonconforming use] to prove the existence, continuity, nature and extent of a use for a period exceeding 20 years immediately preceding the date of the application [for verification of a nonconforming use].” The batch plant that was operating on the property 20 years prior to the September 12, 2012 application was the Best Concrete concrete batch plant.

1 25, 2013, planning staff determined that the asphalt batch plant does qualify as  
2 a nonconforming use and approved the requested floodplain development  
3 permits. Petitioners appealed that planning staff decision to the county  
4 hearings officer. On September 26, 2013, the hearings officer found that the  
5 asphalt batch plant use qualifies as a nonconforming use and that conversion of  
6 the prior concrete batch plant to an asphalt batch plant in 2001 did not require  
7 county approval as an alteration of the nonconforming concrete batch plant  
8 use.<sup>2</sup> However, the hearings officer also found that a shop structure and certain  
9 other structures on the property that were apparently constructed after 2001 and  
10 which were present in 2012 were unauthorized expansions of the  
11 nonconforming use.<sup>3</sup> Because the application did not seek county approval of  
12 those unauthorized expansions, the hearings officer denied the requested  
13 nonconforming use verification and vacated the floodplain development  
14 permits that had been approved by planning staff.

15 **B. Petitioners’ LUBA Appeal of the Hearings Officer’s**  
16 **Nonconforming Use Verification and Floodplain Development**  
17 **Permit Decisions**

18 On October 17, 2013, petitioners appealed both of the hearings officer’s  
19 decisions to LUBA. Six months later, in an April 22, 2014 decision, LUBA  
20 remanded the hearings officer’s nonconforming use verification decision and  
21 affirmed the hearings officer’s decision to vacate the planning department’s

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<sup>2</sup> Under ORS 215.130(9)(a) and (b), alterations of nonconforming uses and structures may be permitted, so long as the alteration will not result in “greater adverse impact to the neighborhood.”

<sup>3</sup> LDO 11.2.1(B) authorizes expansions of nonconforming uses if certain standards are met. The structures the hearings officer found to be unauthorized expansions had not been approved under LDO 11.2.1(B).

1 approval of the floodplain development permit. In remanding the hearings  
2 officer's nonconforming use verification decision, LUBA agreed with the  
3 hearings officer in part. Among other things, the hearings officer found the  
4 disputed batch plant: (1) was "lawfully established," (2) satisfies the state and  
5 local requirements for continued, uninterrupted existence, and (3) that the batch  
6 plant did not have to be approved as an "[e]xpansion of nonconforming  
7 aggregate and mining operations." Slip op at 22-24. LUBA rejected petitioner  
8 Rogue Advocates' challenges to these three aspects of the hearings officer's  
9 decision. But LUBA found that the conversion of the concrete batch plant to  
10 an asphalt batch plant in 2001 required approval as an alteration of the  
11 nonconforming concrete batch plant and that the hearings officer erred in  
12 concluding that the conversion did not require approval as an alteration. Slip  
13 op at 18. We remanded so that the hearings officer could verify the  
14 nonconforming use "without considering as part of the verified use any  
15 unapproved alterations that occurred in 2001 or at other relevant times since  
16 1992." Slip op at 22.

### 17 **C. The Second Floodplain Permit Decision**

18 On October 15, 2013 (two days before petitioner appealed the hearings  
19 officer's decisions to LUBA), the county issued code enforcement citations  
20 regarding the asphalt batch plant. On October 18, 2013 (one day after  
21 petitioner appealed the hearings officer's decisions to LUBA), the county and  
22 intervenors entered a stipulation. Record 66-69. Pursuant to that stipulation,  
23 intervenors agreed to do two things: (1) stop using and remove the structures  
24 that have not been found to be part of the lawful nonconforming batch plant  
25 use, and (2) apply for floodplain permits for the structures that have been found  
26 to qualify as part of the legally established nonconforming use.

1 While the appeals of the hearings officer's decisions were pending  
2 before LUBA between October 2013 and April 2014, intervenors submitted an  
3 application for floodplain development permit approval on October 25, 2013.  
4 On January 23, 2014, the planning department approved the October 25, 2013  
5 application following the county's Type I procedures, which allow the county  
6 to approve certain permit applications without public hearings, notice or any  
7 right for persons other than the applicant to participate. On February 13, 2014,  
8 a little more than two months before LUBA's decision in *Rogue I*, petitioners  
9 appealed the planning department's approval of the October 25, 2013  
10 application for floodplain development permit approval to LUBA. That  
11 floodplain development permit is the subject of this appeal.

## 12 **JURISDICTION**

13 Intervenors move to dismiss this appeal. Intervenors contend the  
14 challenged floodplain development permit was properly approved following  
15 the county's Type I review procedure. LDO 3.1 is entitled "Land Use  
16 Permits/Decisions." LDO 3.1.2 provides as follows:

17 **"Type 1 Land Use Authorizations, Permits and Zoning**  
18 **Information Sheet[.]** Type 1 uses are authorized by right,  
19 requiring only non-discretionary staff review to demonstrate  
20 compliance with the standards of this Ordinance. A Zoning  
21 Information Sheet may be issued to document findings or to track  
22 progress toward compliance. *Type 1 authorizations are limited to*  
23 *situations that do not require interpretation or the exercise of*  
24 *policy or legal judgment.* Type 1 authorizations are not land use  
25 decisions \* \* \*." (Italics added.)

26 Intervenors contend that because the challenged decision did "not require  
27 interpretation or the exercise of policy or legal judgment," the county correctly  
28 followed its Type I procedure and the challenged decision qualifies for the

1 exception to LUBA’s jurisdiction over land use decisions that is set out at ORS  
2 197.015(10)(b)(A).

3 The challenged decision is a final decision that applies the LDO, which  
4 is a land use regulation, so the challenged decision qualifies as a “land use  
5 decision,” as that term is defined at ORS 197.015(10)(a).<sup>4</sup> Intervenors’  
6 jurisdictional challenge relies on ORS 197.015(10)(b)(A), which excludes from  
7 LUBA’s review jurisdiction any decision “[t]hat is made under land use  
8 standards that do not require interpretation or the exercise of policy or legal  
9 judgment.”

10 As we have already noted, the disputed *asphalt* batch plant in its present  
11 configuration is only a permissible use under the LDO if it qualifies as a  
12 nonconforming use. As intervenors correctly note, the challenged floodplain  
13 development permit did not itself attempt to find that each of the separate  
14 structures authorized by the floodplain development permit qualify as a  
15 nonconforming use. Instead, the January 23, 2014 floodplain development  
16 permit simply applied the floodplain permit standards to the structures that the  
17 stipulation identified. It is somewhat unclear whether the October 18, 2013  
18 stipulation relies on an order issued by the code enforcement hearings officer to  
19 identify the structures that qualify as nonconforming uses, or whether it relies  
20 on the September 26, 2013 hearings officer’s decision to identify the scope of  
21 the structures that have legal nonconforming use status, or both.<sup>5</sup> However, the

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<sup>4</sup> As defined by ORS 197.015(10)(a) “[a] final decision” “that concerns the  
\* \* \* application of” “[a] land use regulation” is a land use decision.

<sup>5</sup> The code enforcement hearings officer and the hearings officer who issued  
the September 26, 2013 hearings officer’s decision are not the same person.

1 January 23, 2014 floodplain development permit expressly cites the hearings  
2 officer's September 26, 2013 floodplain development permit and  
3 nonconforming use determinations (ZON2012-01172\_FP and ZON2012-  
4 01173\_NC) in identifying the scope and identify of the nonconforming use  
5 structures that were granted floodplain development permit approval. Record  
6 1-2. While the hearings officer's decision essentially verifies the converted  
7 asphalt batch plant as it existed in 2012 as a legal nonconforming use, with  
8 certain exceptions, our decision in *Rogue I* concludes that the nonconforming  
9 use only includes the *concrete* batch plant, and any related structures, that were  
10 on the property in 1992, and that the conversion to an *asphalt* batch plant in  
11 2001 can be approved only as an alteration of the lawful nonconforming  
12 *concrete* batch plant use. In addition, any structures that post-date that 2001  
13 conversion either must be removed or approved as alterations of the lawful  
14 nonconforming concrete batch plant use.

15 For purposes of intervenors' jurisdictional challenge, the decision on  
16 appeal implicitly determined that the city could proceed to issue the requested  
17 floodplain permit for the 2012 configuration of the asphalt batch plant,  
18 notwithstanding that the hearings officer's decision that established the scope  
19 of that nonconforming use was on appeal to LUBA and therefore might be  
20 found to be erroneous. That implicit determination required "interpretation or  
21 the exercise of policy or legal judgment." Therefore the exception to our  
22 jurisdiction set out at ORS 197.015(10)(b)(A) does not apply.

23 Intervenors' motion to dismiss is denied.

24 **PETITIONERS' ASSIGNMENTS OF ERROR**

25 Neither the county nor intervenors have filed a brief to respond to  
26 petitioners' assignments of error. Petitioners' first assignment of error alleges

1 the floodplain development permit erroneously extends its approval to  
2 structures that may have been added in 2001 when the then-existing concrete  
3 batch plant was converted to an asphalt batch plant or thereafter. We  
4 understand petitioners to contend the county does not have authority to grant  
5 floodplain permits for the existing asphalt batch plant, until the scope and  
6 nature of the legal nonconforming batch plant has been determined by the  
7 county, consistent with our remand in *Rogue I*. We agree with petitioners.  
8 Once the county has identified the scope and nature of the nonconforming  
9 batch plant that existed on the property prior to its conversion to an asphalt  
10 batch plant in 2001, it will be in a position to grant floodplain development  
11 permits for the verified nonconforming use. If the intervenors desire a  
12 floodplain development permit for the current asphalt batch plant, they will  
13 first need to seek approval for any alterations to the nonconforming concrete  
14 batch plant that have occurred since 1992, particularly those alterations made  
15 in 2001 or thereafter that were made to convert that concrete batch plant to the  
16 current asphalt batch plant.

17 In their second assignment of error, petitioners also argue the county  
18 erred in following its Type I procedure in granting the disputed floodplain  
19 development permit. We have already concluded that the county’s decision to  
20 proceed with issuing the floodplain development permit while the nature and  
21 extent of the nonconforming batch plant remained unresolved required  
22 “interpretation or the exercise of policy or legal judgment.” Under LDO 3.1.2,  
23 quoted earlier in this opinion, the county’s Type I procedure is limited to  
24 “situations that do not require interpretation or the exercise of policy or legal  
25 judgment.” It follows that the county erred in following its Type I procedure.  
26 That procedural error warrants remand if it “prejudiced the substantial rights of

1 the petitioner.” ORS 197.835(9)(a)(B). Had the county followed the Type II  
2 procedure that petitioners contend the county should have followed, petitioners  
3 would have been entitled to notice and a right to participate. Petitioners’  
4 substantial rights that are protected by ORS 197.835(9)(a)(B) include “an  
5 adequate opportunity to prepare and submit their case and a full and fair  
6 hearing.” *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988). The county’s  
7 decision to follow its Type I procedure prejudiced petitioners’ substantial  
8 rights.

9 The county’s decision is remanded.<sup>6</sup>

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<sup>6</sup> Because the county’s decision must be remanded in any event, we need not and do not consider petitioners’ third assignment of error.