

36.4 Nonconforming Uses – Abandonment/Interruption. Because a vested right is a species of nonconforming use, the general principles of nonconforming use (including discontinuance) apply to vested rights determinations, at least in counties subject to ORS 215.130. Under ORS 215.130, to determine whether a nonconforming use or vested right to complete a nonconforming has been lost through discontinuance, the local government must look back in time. Depending on the facts, it is possible that a nonconforming use or vested right could be lost through discontinuance prior to the date that the applicant seeks verification of the nonconforming use or vested right. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

36.4 Nonconforming Uses – Abandonment/Interruption. ORS 215.750 and OAR 660-006-0027(3) authorize local governments to approve forest template dwellings if at least three dwellings existed within a specified 160-acre area and those dwellings continue to exist at the time forest template dwelling approval is requested. Where the record supports a hearings officer's finding that a dwelling that was constructed in 1906 has been unoccupied for many years prior to an application for approval of a forest template dwelling, the hearings officer correctly found that the 1906 dwelling was a nonconforming use in the county's forest zone that was first applied long after the 1906 dwelling was constructed. And the hearings officer correctly found that under local laws adopted to implement ORS 215.750 and OAR 660-006-0027(3), the forest template dwelling applicant must establish that the right to continue residential use of the 1906 dwelling was not lost through interruption or abandonment for two years or more before the 1906 dwelling could be counted as a dwelling that "continues to exist" at the time the application for approval of a forest template dwelling was filed. *West v. Multnomah County*, 70 Or LUBA 235 (2014).

36.4 Nonconforming Uses – Abandonment/Interruption. Under the Court of Appeals' decision in *Fountain Village Development Co. v. Multnomah Cty.*, 176 Or App 213, 224, 31 P3d 458 (2001), statutory and local government regulations that specify that nonconforming use rights are lost if the nonconforming use is abandoned, interrupted or discontinued for the requisite period of time also apply to vested rights, which are properly viewed as inchoate nonconforming uses. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. While the maintenance activities that are actually taken to maintain a nonconforming use could have some indirect bearing on whether a property owner has abandoned, discontinued or interrupted a nonconforming use, it does not follow that *any* maintenance of a nonconforming use will be sufficient to establish that the property owner has not abandoned, discontinued or interrupted a nonconforming use. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. The right that the holder of a vested right has is the right to continue "construction" of a proposed use until construction of that proposed use is complete and the vested right (an inchoate nonconforming use) is converted to a nonconforming use that is fully established. It is the continued "construction" of an inchoate nonconforming use that must not be abandoned,

discontinued or interrupted for more than the time specified for nonconforming uses, to avoid losing a vested right to continue construction of that vested right. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a county finds that a property owner discontinued construction of a house for at least one year during a 30 year period, even if the property owner is given the benefit of the doubt in his contentions that over that 30 year period at unspecified times he repaired concrete scaling and did some plumbing work, framing, grading and road construction, the county’s finding is supported by substantial evidence where other evidence shows there was almost no construction activity during that 30-year period. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner’s arguments below were based on a statute that applies only to counties, where the petitioner’s discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue.

36.4 Nonconforming Uses – Abandonment/Interruption. Remand is necessary where a city concludes that an applicant has a vested right to construct an expansion of a nonconforming use, but the city fails to resolve issues fairly raised below regarding whether the vested right has been lost through discontinuance under the common law cases that the city’s vested right conclusion rests upon, or through the city’s nonconforming use code. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.4 Nonconforming Uses – Abandonment/Interruption. ORS 215.130(11), which prohibits a county from requiring a nonconforming use application to prove the “existence, continuity, nature and extent” of the use for a period exceeding 20 years from the date of application, affects the evidentiary burden not only with respect to continuity but also “nature and extent.” As a practical matter, any expansions or alterations that occurred more than 20 years prior to the date of application are part of the “nature and extent” of the use, even if such expansions or alterations were made without required approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.4 Nonconforming Uses – Abandonment/Interruption. Where LUBA concludes that the evidence in the local government record regarding whether use of a nonconforming

dwelling was abandoned for more than one year was “hardly overwhelming” but was nevertheless such that a reasonable decision maker could either find that the use was discontinued or find that the use was not discontinued, the hearings officer’s finding that the nonconforming use was discontinued is supported by substantial evidence. *Bradley v. Washington County*, 47 Or LUBA 11 (2004).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the evidence concerning whether a dwelling had been abandoned or interrupted before 1995 is conflicting and the hearings officer relies heavily on photographs of the dwelling that he mistakenly believed were taken in 1995 rather than years later to conclude that use of the dwelling was abandoned or interrupted for more than one-year before 1995, the hearings officer’s decision is not supported by substantial evidence and must be remanded so that the hearings officer can render a decision with a correct understanding of the date the photographs were taken. *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

36.4 Nonconforming Uses – Abandonment/Interruption. A hearings officer’s finding that use of a nonconforming dwelling was “abandoned” for more than one year without requiring proof that there was intent to relinquish a known right provides no independent basis for remand where the hearings officer also found that use of the dwelling was discontinued for more than one year. A local discontinuance standard, like the statutory nonconforming use “interruption” standard, does not require proof of intent to relinquish a known right. *Bradley v. Washington County*, 44 Or LUBA 36 (2003).

36.4 Nonconforming Uses – Abandonment/Interruption. A county hearings officer did not err in determining that a nonconforming wrecking yard business was discontinued where the evidence showed that (1) the last lessee operating the wrecking yard business ceased all business operations on the property for more than a year; (2) only incidental files and vehicle parts were left on the property after the lessee ceased operations; and (3) vehicles that were abandoned in front of the locked gates on the property and were later pulled onto the property by the property owner were not part of an inventory used to reactivate the wrecking yard business. *Cory v. Clackamas County*, 44 Or LUBA 733 (2003).

36.4 Nonconforming Uses - Abandonment/Interruption. Once restoration or replacement of a nonconforming use is begun, ORS 215.130(7)(a) requires that restoration or replacement not be interrupted for a period of more than one year. *Jordan v. Columbia County*, 42 Or LUBA 341.

36.4 Nonconforming Uses - Abandonment/Interruption. Where a nonconforming clubhouse is destroyed by fire and restoration or replacement is commenced within 10 years is periodic fundraising activity to complete the restoration, the right to restore or replace the nonconforming clubhouse is lost under ORS 215.130(7)(a). *Jordan v. Columbia County*, 42 Or LUBA 341.

36.4 Nonconforming Uses – Abandonment/Interruption. A prior local government decision that a nonconforming use had not been discontinued may constitute substantial

evidence in support of a subsequent land use decision that, as of the date of the prior decision, the nonconforming use had not been discontinued. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

36.4 Nonconforming Uses – Abandonment/Interruption. A city does not err by applying its more stringent nonconforming use criteria to a portion of a property located within city limits and concluding that a nonconforming use on city property has been lost, notwithstanding a county decision that the portion of the property lying outside of city limits retains its nonconforming use status based on the application of county nonconforming use standards. *ODOT v. City of Mosier*, 41 Or LUBA 73 (2001).

36.4 Nonconforming Uses – Abandonment/Interruption. The 20-year look-back provision of ORS 215.130(11) limits the time period for which an applicant must prove the continuous operation of a nonconforming use to no more than 20 years before the date of application. Any evidence of abandonment or discontinuance that may have occurred more than 20 years before the date of application is irrelevant. *Lawrence v. Clackamas County*, 40 Or LUBA 507 (2001).

36.4 Nonconforming Uses – Abandonment/Interruption. Statutory provisions governing nonconforming uses at ORS 215.130 also govern vested rights, including the delegation of authority to counties to establish criteria under which such rights have been interrupted or abandoned. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.4 Nonconforming Uses – Abandonment/Interruption. Abandonment of a vested right, like abandonment of a nonconforming use, requires evidence of intent to relinquish a known right. Where the only evidence relevant to intent shows that the landowner maintained the uncompleted structure during the relevant period, the county errs in determining that the landowner has abandoned the right to complete and use the structure. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the county views a vested right to be discontinued under its code if there is discontinuance of substantial effort to finish the development for any reason for more than two years, evidence that the landowner maintained an uncompleted structure but made no effort to finish the structure for three years was sufficient to support a finding of discontinuance. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.4 Nonconforming Uses – Abandonment/Interruption. When considering whether a nonconforming use right was lost because the nonconforming use was discontinued, the city must consider the entirety of the nonconforming use rather than only the small portion of the nonconforming use that is located within the city limits. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. When determining the existence of a nonconforming use on land that lies partially within city limits, the city must apply the statutes and regulations applicable to the county for that portion of property lying outside the city limits. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. The nature and extent of the nonconforming use do not depend on whether the entity performing the activity is a landowner, permittee or licensee, but rather on the nature and extent of the nonconforming activities themselves. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. The rebuttable presumption provided by ORS 215.130(10)(a) creates the possibility of verifying the lawful creation and continued existence of a nonconforming use by proving the continued existence of the use for the past 10 years only. However, once the presumption has been rebutted, the applicant must show the use existed at the time of zoning and has continued, uninterrupted, since that date. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.4 Nonconforming Uses – Abandonment/Interruption. Evidence of stockpiled rock in an otherwise unused and unmaintained quarry does not constitute an ongoing quarry operation, but supports a conclusion that the site has been discontinued or interrupted for the purposes of ORS 215.130. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. Because abandonment is established through an active intent to discontinue the use, petitioner's lease of a quarry site to an unrelated business is evidence of intent to abandon the site as a quarry. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. To demonstrate a nonconforming use was not interrupted under ORS 215.130, the evidence must establish that the business was operational on an ongoing basis. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. A decision denying a requested nonconforming use determination is supported by substantial evidence, where the applicant's evidence had gaps and inconsistencies and the opponent's evidence was uniform. *Tigard Sand and Gravel v. Clackamas County*, 33 Or LUBA 124 (1997).

36.4 Nonconforming Uses – Abandonment/Interruption. LUBA will remand the county's expansion of a nonconforming use where the county fails to make the requisite findings regarding the level of intensity of use that existed when the use became nonconforming, and the level of intensity that has continued, uninterrupted, since that time. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the county's interpretation of a local ordinance regarding nonconforming uses allows an abandoned nonconforming dog kennel use to be reinstated, that interpretation violates OAR 660-33-120, which prohibits new kennels on high-value farmland. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.4 Nonconforming Uses – Abandonment/Interruption. That a nonconforming use was interrupted or abandoned during a period when the subject property was in receivership has no bearing on whether it may be resumed. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

36.4 Nonconforming Uses – Abandonment/Interruption. Where, during a local government proceeding regarding the existence of a nonconforming use, specific issues were raised concerning whether a complete or partial interruption or abandonment of any nonconforming use of the subject property had occurred, findings that simply state use of the property has not been interrupted or abandoned are impermissibly conclusory. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.4 Nonconforming Uses – Abandonment/Interruption. So long as a nonconforming use has not been abandoned or discontinued, as provided by local ordinance, the nonconforming use has a right to continue, regardless of whether it complies with local regulations that would govern a new, conforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.4 Nonconforming Uses – Abandonment/Interruption. In determining whether to approve a proposed use as an alteration of a nonconforming use, where the local government has not previously determined that a nonconforming use exists, the local government must determine (1) whether the use was lawfully established when restrictive zoning was first applied; (2) the nature and extent of such use when it became nonconforming; (3) whether the use has been discontinued or abandoned; and (4) whether any proposed alteration of the nonconforming use complies with standards governing alterations of nonconforming uses. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. A local government generally must make four inquiries in determining if an existing use has a right to continue as a nonconforming use. Did the use lawfully exist when restrictive zoning was first applied? What was the nature and extent of the use when it became nonconforming? Has the use since been discontinued or abandoned? If the nature and extent of the present use represents an alteration of that in existence when the use became nonconforming, does the alteration comply with the standards governing alteration of nonconforming uses? *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a county and a property owner agree the owner will not conduct a disputed nonconforming use until the issue is resolved through appropriate county proceedings, and the agreement specifically provides the owner's nonconforming use rights will not be lost as a result of complying with the agreement, nonuse pursuant to that agreement cannot extinguish the nonconforming use. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the local code provides that nonconforming use rights are lost if the site of a nonconforming use is "vacant" for two continuous years, and also provides that words used in the code have

their normal dictionary meaning, the local government may interpret "vacant" to mean "free from activity" consistent with the nonconforming use rights, but cannot embellish that definition by adding a requirement for the absence of "a bona fide effort to provide goods and services for profit." *Rhine v. City of Portland*, 27 Or LUBA 86 (1994).

36.4 Nonconforming Uses – Abandonment/Interruption. A local government determination that occasionally staying on the subject property in a travel trailer is not residential use of the property for purposes of determining whether a nonconforming residential use has been "discontinued," is not a clearly wrong interpretation of the code, and LUBA will defer to it. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a nonconforming use is a business, and that business ceases operations during bankruptcy proceedings for more than the period of time specified in the local code for discontinuance of a nonconforming use and is liquidated by the bankruptcy trustee, the nonconforming use is lost. *Hendgen v. Clackamas County*, 23 Or LUBA 285 (1992).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a nonconforming use is significantly reduced in scope by relocating significant aspects of the use to another location for two years, the relocation represents a partial interruption or discontinuance of the nonconforming use, and the property owner may not, five years later, unilaterally resume the nonconforming use at its former scope and intensity. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

36.4 Nonconforming Uses – Abandonment/Interruption. Where the local code provides that a nonconforming use cannot be resumed if it has been "discontinued" for more than a specified period of time, a nonconforming use is lost if not used for that period of time, regardless of whether the use was "abandoned" or there was a subjective intent to continue the use at sometime in the future. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.4 Nonconforming Uses – Abandonment/Interruption. Neither the fact of a particular kind of property tax assessment nor that petitioners had paid taxes on the basis of a particular kind of property tax assessment, of itself, establishes that petitioners have demonstrated a nonconforming residential use of the subject property which has not been discontinued. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).