36.1 Nonconforming Uses – Generally. An applicant need not necessarily submit evidence of physical or visible changes to the land in order to demonstrate the existence or establishment of a nonconforming use before the relevant date, and nothing in ORS 215.130 authorizes a county to reject verification of a nonconforming use that was established prior to adoption of contrary zoning because the county deems the size or scope of the use to be too small. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. The scope of a nonconforming use is confined to the uses that occur on the subject property; off-site activities, i.e., those that occur on other properties, such as leaving the property to purchase supplies or inputs for the nonconforming use, play no role in verifying the existence, nature, etc. of the nonconforming use on the subject property and are not subject to analysis or regulation as part of the nonconforming use. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. A local government does not err by (1) treating the activities of bringing automobiles purchased off-site onto the subject property and storing them on-site until such time as they are repaired and then sold not as a separate and distinct land use but, instead, as the stockpiling and storage of raw inputs that are the first step in the larger nonconforming auto yard use operation or (2) concluding that a temporary hiatus in that first step, while the operator relies on existing stockpiles of automobiles to continue the nonconforming use, does not mean that the first step or any part of the nonconforming use has been discontinued. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. In verifying a nonconforming auto yard use, a local government errs in failing to describe the nature and extent of the auto yard use in a way that imposes an upper limit on the number of vehicles stored on-site, consistent with the upper number present at or approximate to the relevant date. Limiting the physical extent of the auto yard use to that which is visible in an aerial photograph from the relevant year and limiting annual sales of vehicles to the approximate number sold in the relevant year are not sufficient to prevent unauthorized expansion or alteration of the nonconforming use where the operator could stockpile more vehicles on-site, for example, by parking them at tighter intervals or stacking them, than were present in the relevant year. *Morgan v. Jackson County*, 80 Or LUBA 59 (2019).

36.1 Nonconforming Uses – Generally. Where an applicant has conducted both festival-related uses and non-festival-related park and campground uses on property zoned Rural Residential and Impacted Forest, where the festival-related uses are verified nonconforming uses, and where the applicant applies for a special use permit to legalize the non-festival-related park and campground uses, LUBA will affirm the county's interpretation that its nonconforming use provisions do not apply to the special use permit application where the county expressly explains that the special use permit does not authorize festival-related uses and where the petitioners identify no law preventing the county from issuing permits that have the effect of legalizing special uses that have been occurring independent of a preexisting nonconforming uses. *Klein v. Lane County*, 80 Or LUBA 287 (2019).

36.1 Nonconforming Uses – Generally. When an opponent provides evidence sufficient to rebut the presumption under ORS 215.130(10)(a) regarding the existence, continuity, nature and extent

of the proposed nonconforming use, the applicant has the burden of demonstrating that the use proposed for verification has existed and continued in its current nature and extent from the date the use became nonconforming, or 20 years prior to the date of application, whichever date is applicable. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

36.1 Nonconforming Uses – Generally. ORS 215.130(11) prohibits a challenge to the lawful establishment element of a nonconforming use which would compel the applicant to submit evidence regarding the nature and extent of the use during periods that are more than 20 years prior to the date of application. A hearings officer cannot adopt findings based on impermissible evidence. *Morgan v. Jackson County*, 78 Or LUBA 188 (2018).

36.1 Nonconforming Uses – Generally. A hearings officer's decision that an applicant has a nonconforming use right to grow up to 18 marijuana plants for medical purposes under the Oregon Medical Marijuana Act is supported by substantial evidence in the record, and LUBA will reject an assignment of error that argues that the hearings officer's decision is not supported by substantial evidence in the whole record, where (1) the record includes copies of at least twelve cards issued by the Oregon Health Authority (OHA), administrator of the medical marijuana program, some of which are expired, duplicates, or outside of the relevant consideration dates; (2) the hearings officer relied on some of those OHA cards to reach his conclusion about the number of plants allowed; (3) the hearings officer adopted eight pages of findings explaining his decision and his understanding of the evidence; and (4) petitioner fails to challenge those findings or explain why the evidence supports his application. *Feetham v. Jackson County*, 77 Or LUBA 296 (2018).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) requirement that a use protected as a nonconforming use be a "lawful use" at the time contrary zoning is applied refers not only to whether the use complies with state or local land use laws, but also concerns whether the use complies with state, federal, or local non-land use laws, regulations or licensing requirements that are either (1) integrally related to zoning or land use or (2) for some other reason must be satisfied for a use to be "lawful." *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) "lawful use" requirement cannot be concerned only with whether the use complied with zoning and land use regulations at the time the use became nonconforming, because for uses that predate a local government's first application of zoning or land use regulations that would render the "lawful use" inquiry a nullity. *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.1 Nonconforming Uses – Generally. Where a statute applicable at the time an "auto yard" use became nonconforming required the operator to obtain a Department of Motor Vehicles (DMV) dealer license prior to selling cars, subject to criminal penalties, and it is undisputed that the operator failed to obtain a DMV license prior to the use becoming nonconforming, the use was not a "lawful use" within the meaning of ORS 215.130(5). *Morgan v. Jackson County*, 76 Or LUBA 170 (2017).

36.1 Nonconforming Uses – Generally. Where petitioner's assignment of error in an appeal of a county decision denying his request that the county reconsider a previously denied application for verification of a nonconforming use is directed at the merits of the original decision that denied

his application for verification of a nonconforming use, rather than the merits of the subsequent county decision that denied petitioner's request to reconsider the same application that had earlier been denied, the assignment of error provides no basis for reversal or remand where the decision whether to reconsider the original decision is governed by different criteria than the original denial decision. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

36.1 Nonconforming Uses – Generally. Where a development code permits an applicant to resubmit the same application for verification of a nonconforming use less than two years after it was denied if the denial decision was based on a material mistake of fact, a hearings officer does not misconstrue the code in concluding that a denial decision that is based on conflicting evidence is not the same thing as a decision that is based on a material mistake of fact. *Kartavykh v. Clackamas County*, 74 Or LUBA 518 (2016).

36.1 Nonconforming Uses – Generally. In attempting to determine the scope and nature of a concrete batch plant nonconforming use, a hearings officer does not err by failing to infer that the concrete batch plant operated at least between the hours of 6:00 a.m. and 5 p.m. based solely on evidence that the batch plant supplied construction work. While that might be a permissible inference, it is not an inference that is required by the fact that the concrete batch plant supplied construction sites when it was in operation. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. Where a hearings officer does not take the position that his inability to verify the nature and extent of certain aspects of a prior concrete batch plant makes it impossible to determine whether an application to alter that prior nonconforming concrete batch plant will result in a more intensive use or result in greater adverse impact on the surrounding neighborhood, but intervenor does not file a cross-petition for review to assign error to that aspect of the hearings officer's decision, LUBA will not consider whether that position could provide an independent basis for denying the requested alteration. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. It is likely that the Court of Appeals would not require that a land use hearings officer ruling on a request to alter a nonconforming use must apply the legal principle stated in *Parks v. Tillamook Co. Comm./Spliid*, 11 Or App 177, 196-97, 501 P2d 85 (1972), that nonconforming uses are disfavored and subject to strict scrutiny under state law. However, where it does not appear that the *Parks* principle played any role in the hearings officer's decision, the hearings officer's citation to *Parks* provides no basis for reversal or remand. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. Where an assignment of error itself can be read to allege that a hearings officer committed a particular analytical error in reviewing an application to alter a nonconforming use, but the arguments that are put forth in support of the assignment of error have nothing to do with that arguable analytical error, petitioners fail to adequately state and develop a challenge to the analytical error. In that circumstance, LUBA will limit its review to the arguments petitioners actually present. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. Where there is conflicting believable evidence regarding whether a proposal to replace a concrete batch plant with an asphalt batch plant would present a

greater risk of explosions and damage to surrounding properties, a hearings officer's conclusion that the asphalt batch plant poses a greater risk of explosions and damage is supported by substantial evidence. *Meyer v. Jackson County*, 73 Or LUBA 1 (2016).

36.1 Nonconforming Uses – Generally. A hearings officer does not err in finding that a 1991 decision verifying a landfill as a lawful nonconforming use did not include a composting facility within the scope of verification for the landfill, where the 1991 decision does not mention composting or a composting facility, and the application to verify the landfill does not mention composting or seek to include a composting facility with the scope of verification. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.1 Nonconforming Uses – Generally. A county errs in granting a floodplain development permit for an existing asphalt batch plant before first responding to LUBA's remand of an earlier county decision declaring the scope and nature of asphalt batch plant that qualifies as a nonconforming use. *Rogue Advocates v. Jackson County*, 70 Or LUBA 163 (2014).

36.1 Nonconforming Uses – Generally. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a 30-foot setback requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. Even if a structure qualifies as a nonconforming structure with regard to a general 20-foot setback required in the applicable zoning district, that does not obviate a land use code off-street parking requirement for schools, where the use of the structure is to be converted for the first time to a school. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. Where LUBA concludes that applicable local nonconforming use law might not regulate a change from one conforming use to another conforming use in a nonconforming structure, but no party challenges a hearings officer's conclusion that local nonconforming use law does regulate such a change of use, LUBA will consider petitioner's challenge to the adequacy of the hearings officer's findings that an existing structure qualifies as a nonconforming use and that the proposal may be approved as an alteration of a nonconforming use. However, LUBA will not preclude the hearings officer from considering on remand whether the nonconforming use regulations apply in that circumstance. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. In applying a local nonconforming use standard that requires that a change in nonconforming use must have "no greater adverse impact to the neighborhood," a hearings officer errs in comparing the expected adverse impacts of the changed nonconforming use with the adverse impacts of other uses that are allowed in the zoning district. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. A hearings officer's decision to recognize an existing structure as a nonconforming structure and to approve a new school use of that structure as an alteration of a nonconforming use, where there was no prior notice that the local government's

nonconforming use regulations would be applied, constitutes a procedural error that prejudiced petitioner's substantial rights. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

36.1 Nonconforming Uses – Generally. A local government correctly construes its local code as not requiring an applicant for a plan amendment and zone change that would have the effect of legalizing some uses of the property to demonstrate compliance with code provisions governing nonconforming uses. *Ooten v. Clackamas County*, 70 Or LUBA 338 (2014).

36.1 Nonconforming Uses – Generally. ORS 197.015(10)(b)(H)(i) excludes from the definition of "land use decision" land use compatibility statements determining that a prior local government land use decision authorized a use that "encompasses" the proposed state agency action. However, that exclusion is not met where the proposed state agency action is to expand the septic system for a nonconforming manufactured dwelling park, and the prior local government decision merely verified a portion of the nonconforming use, but that verification did not authorize or "encompass" the proposed septic expansion. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.1 Nonconforming Uses – Generally. Nothing in the current language of ORS 215.130, governing non-conforming uses, prohibits a local government from authorizing an expansion of a lawful nonconforming use onto an adjacent property. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.1 Nonconforming Uses – Generally. A city correctly interprets its development code to permit a change of use, without requiring that the nonconforming development on the site be brought into conformance with current development code standards, where the land use code expressly distinguishes between nonconforming uses and nonconforming development and the permit applicant proposed no change in the nonconforming development, only a change from one permitted use to another permitted use. *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

36.1 Nonconforming Uses – Generally. A city does not err in finding that an existing development qualifies as a protected nonconforming development in the process of a permit proceeding, notwithstanding that no application specifically requesting approval as a nonconforming development was before the city, where there was no dispute that the development qualified as nonconforming development and the evidentiary record supports the city's finding. *Nielsen v. City of Gresham*, 66 Or LUBA 24 (2012).

36.1 Nonconforming Uses – Generally. Where a landfill is a permitted use in a Public Works zone subject to site design review, the portion of an existing landfill that was approved prior to the requirement for site design review is not a non-conforming use simply because it did not receive site design review, and therefore a proposed expansion of that landfill does not require review and approval as an alteration to a non-conforming use. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

36.1 Nonconforming Uses – Generally. Under Section 5(3) of Ballot Measure 49 (2007), a property owner may complete construction of a use that was authorized under a previously issued Ballot Measure 37 (2004) waiver, if the property owner can establish that he or she has a common law vested right to complete construction of a use that was authorized under a Ballot Measure 37

waiver. Under ORS 195.318(1), LUBA would likely not have jurisdiction to review a vested right determination under Subsection 5(3) of Measure 49, however, where the property owner claims to have a vested right based on a previously issued building permit, not a Ballot Measure 37 waiver, LUBA has review jurisdiction over a county decision that the property owner does not have a vested right under the building permit. *Crosley v. Columbia County*, 65 Or LUBA 164 (2012).

36.1 Nonconforming Uses – Generally. 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).

36.1 Nonconforming Uses – Generally. Oregon Department of Environmental Quality documents about the number of recreational vehicle (RV) sites authorized to be connected to an RV park's septic system and the number of mobile homes on-site in the mid-1990s are sufficient to rebut a presumption under ORS 215.130(10)(a), based on more recent evidence, that the larger number of RV sites that are currently connected to the septic system and the larger number of mobile homes currently on the site were present when the RV Park first became nonconforming in 1980. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.1 Nonconforming Uses – Generally. Where a hearings officer's finding that an applicant has a nonconforming use right to a recreational vehicle (RV) park fails to extend that nonconforming use right to a number of dry RV spaces (spaces that are not connected to the RV park septic system) that the evidence the hearings officer relies on shows were in existence shortly before the RV park became nonconforming, remand is required for the hearings officer to better explain his decision regarding the dry RV spaces. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.1 Nonconforming Uses – Generally. Where a hearings officer finds that an applicant has a nonconforming use right to continue a recreational vehicle park in an area of the county where RV parks are now prohibited, but must bring all those RV sites into full compliance with current county regulations concerning RV site standards and occupancy, but the evidence the hearings officer relies on to make his nonconforming use finding indicates that some of those sites were used for periods of time that exceed current occupancy standards and did not fully comply with current RV site standards at the time they became nonconforming, remand is required so that the hearings officer can consider whether the applicant may have a nonconforming use right to continue to use any such sites without having to bring them into compliance with the current RV park standards. *Resources Northwest Inc. v. Clatsop County*, 65 Or LUBA 313 (2012).

36.1 Nonconforming Uses – Generally. The good faith *Holmes* factor considering whether a landowner acted in good faith in making expenditures prior to a change in zoning is intended to discourage the landowner from racing to establish the basis for a non-conforming use, after the landowner receives notice of the change in zoning, and is not concerned with actions taken after the use becomes non-conforming. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.1 Nonconforming Uses – Generally. When in reviewing an application to expand a nonconforming campground to permit installation of 13 new park model recreational vehicle (RV) units, a hearings officer also concludes that 22 park model RV units previously installed pursuant to county building permits require goal exceptions to be lawful, that conclusion is non-binding *dictum* and does not provide a basis for remand, where the decision does not purport to revoke or invalidate the building permits, or impose any conditions or make binding determinations with respect to the 22 previously installed RV units. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

36.1 Nonconforming Uses – Generally. An ordinance that applies a new Airport zone to an existing airport that is a nonconforming use in the former industrial zone may "significantly affect" nearby transportation facilities within the meaning of the Transportation Planning Rule (TPR), where under the former industrial zone it would be difficult to expand the nonconforming use airport and under the new zone an airport is an outright permitted use that can be easily expanded or intensified. *Barnes v. City of Hillsboro*, 61 Or LUBA 375 (2010).

36.1 Nonconforming Uses – Generally. ORS 215.130(5) applies where an "enactment or amendment of any zoning ordinance or regulation" has occurred that places the "lawful use of any building, structure or land" into doubt. Where there is no allegation that the enactment or amendment of any zoning ordinance or regulation has occurred that has created a question as to the lawful status of an existing manufactured dwelling under a previous permit, ORS 215.130(5) does not apply. *Just v. Linn County*, 59 Or LUBA 233 (2009).

36.1 Nonconforming Uses – Generally. A hearings officer does not err in concluding that residential use of recreational vehicles (RV) at an RV park is not a lawful part of the nonconforming use, where the applicant submitted evidence that residential RV use occurred during the 10-year period preceding the 2007 application, but evidence from the 20-year period preceding the application establishes by a preponderance of the evidence that residential use did not begin until 1990, thereby rebutting the presumption established under ORS 215.130(10)(a) based on the 10-year period preceding the application. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. 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).

36.1 Nonconforming Uses – Generally. A 1990 site plan that depicts areas with existing RV spaces and areas where RV spaces were to be abandoned is sufficient to rebut by a preponderance of the evidence that a number of the current RV spaces at a nonconforming RV park did not exist in 1990, and are therefore not a lawful part of the nonconforming use. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. Where a code provision prohibits development approval for property that is not in full compliance with all code requirements and prior approvals, unless the approval results in the property coming into full compliance, a hearings officer does not err in interpreting the code to require the applicant to apply for all permits and approvals necessary to correct all code or permit violations as part of the development application, and to reject as insufficient the applicant's willingness to seek future permit approvals. *Reeder v. Multnomah County*, 59 Or LUBA 240 (2009).

36.1 Nonconforming Uses – Generally. Where a city's code conditionally permits cellular antennae on existing buildings, a city decision that denies a request for conditional use approval to site cellular antennae on an existing water tower simply because the water tower is an existing nonconforming structure will be remanded, where there is no language in the city's code that would permit such a limitation and the city provides no explanation for reading such a limitation into its code. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. Where a city's code distinguishes between nonconforming uses and nonconforming structures and extinguishes the right to reinstate nonconforming uses that are discontinued but allows nonconforming structures to remain in place even though their use may be discontinued, a city errs in finding that ceasing to use a water tower as part of the city's water system had the effect extinguishing the legal right of the water tower to remain in place as a legal but nonconforming structure. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. A resolution that adopts a revised franchise agreement between the county and a landfill operator does not constitute a de facto nonconforming use determination subject to LUBA's jurisdiction, where the resolution makes no determination whatsoever about the lawfulness or status of the landfill. *Kamp v. Washington County*, 54 Or LUBA 717 (2007).

36.4 Nonconforming Uses – Abandonment/Interruption. Where a city's code distinguishes between nonconforming uses and nonconforming structures and extinguishes the right to reinstate nonconforming uses that are discontinued but allows nonconforming structures to remain in place even though their use may be discontinued, a city errs in finding that ceasing to use a water tower as part of the city's water system had the effect extinguishing the legal right of the water tower to remain in place as a legal but nonconforming structure. *Caster v. City of Silverton*, 54 Or LUBA 441 (2007).

36.1 Nonconforming Uses – Generally. A planning staff decision that a proposed crematory expansion to a nonconforming mortuary use is an outright permitted use in a residential zone will be remanded, where the decision does not explain the basis for that conclusion and the city's code appears to prohibit expansions of nonconforming uses. *Hallowell v. City of Independence*, 53 Or LUBA 165 (2006).

36.1 Nonconforming Uses – Generally. Like the statutes governing nonconforming uses, ORS 197.770 does not specify what period of discontinued use as a firearms training facility disqualifies

a facility from protection under the statute, but instead leaves it to the local government to determine. Where the local government's regulations provide a period of discontinuance for nonconforming uses but not a specific period for firearms training facilities, LUBA will assume the nonconforming use period of discontinuance applies. *Citizens for Responsibility v. Lane County*, 51 Or LUBA 588 (2006).

36.1 Nonconforming Uses – Generally. ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof of the "existence, continuity, nature and extent" of an alleged nonconforming use to the 10 years that precede the application. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.1 Nonconforming Uses – Generally. The rebuttable presumption that is authorized by ORS 215.130(10)(a) applies to both parts of the inquiry that is necessary under ORS 215.130(5) to verify a nonconforming use, *i.e.*, that the use existed on that date and that its existence was lawful. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

36.1 Nonconforming Uses – Generally. When a nonconforming use application does not distinguish between commercial and noncommercial use of a nonconforming go-cart track, and the evidence submitted also does not make such a distinction, a decision maker does not err in considering both commercial and noncommercial use of the go-cart track in determining the scope of the nonconforming use. *Lawrence v. Clackamas County*, 46 Or LUBA 101 (2003).

36.1 Nonconforming Uses – Generally. The ORS 215.130(5) requirement that local governments allow alterations to a nonconforming use "necessary to comply with any lawful requirement for alteration in the use" applies to circumstances where a regulatory agency or similar authority requires changes to a nonconforming use in order to continue the use, not to circumstances where the operator of the nonconforming use is subject to general, open-ended statutory or regulatory obligations. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.1 Nonconforming Uses – Generally. A 1962 order from the Public Utility Commission granting a public utility its service area and statutes generally requiring that public utilities provide safe and reliable electrical service within their service areas do not constitute "lawful requirements for alteration of the use" under ORS 215.130(5) sufficient to mandate county approval of proposed alterations to upgrade the capacity of a nonconforming electrical transmission line. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.1 Nonconforming Uses – Generally. An appeal of a county decision verifying a nonconforming use is not necessarily moot simply because the subject property is annexed into a city after the appeal to LUBA is filed. Although city annexation means that the county loses jurisdiction over the subject property, annexation does not affect the validity of the county decision, and LUBA's review of the county decision will continue to have a practical effect on the parties. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. ORS 215.130(5) through (11) recognizes (1) "alterations" to a nonconforming use, (2) maintenance of existing structures associated with the use in good repair, and (3) restoration or replacement of a nonconforming use made necessary by

fire or other casualty. The statute does not include an implicit fourth category of changes to nonconforming uses that reduce adverse impacts from that use. Such changes are "alterations" that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. Maintenance of existing structures associated with a nonconforming use in good repair under ORS 215.130(5) includes incremental replacement of structural components, at least where the structure as a whole is not substantively replaced and the installed components are similar in function to those replaced. Such incremental replacements are not alterations that require county review and approval under ORS 215.130(9). *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.1 Nonconforming Uses – Generally. In determining that an applicant failed to carry his burden to demonstrate that a proposed home occupation would be carried out inside a building and in a manner that would not unreasonably interfere with other uses, the county did not err by considering existing and past conditions on the property. *Hick v. Marion County*, 43 Or LUBA 483 (2003).

36.1 Nonconforming Uses – Generally. 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).

36.1 Nonconforming Uses – Generally. Statutory nonconforming use provisions at ORS 215.130 do not prohibit rezoning land to allow uses that would not be allowed to continue as nonconforming uses. Nor is the statute violated or undermined by the county's consideration of a history of illegal commercial uses, in applying a plan provision that allows land that has an "historical commitment" to commercial uses to be rezoned for commercial use. *Huff v. Clackamas County*, 40 Or LUBA 264 (2001).

36.1 Nonconforming Uses – Generally. ORS 215.130(10) and (11) authorize a county to adopt a process to document a preexisting nonconforming use, within certain parameters. The statute does not prohibit persons other than the proponent of the nonconforming use from providing evidence regarding the existence of the nonconforming use. *Besseling v. Douglas County*, 39 Or LUBA 410 (2001).

36.1 Nonconforming Uses – Generally. A vested right based upon substantial expenditures toward construction of a building is properly viewed as an inchoate nonconforming use, not as a distinct entitlement immune from all limitations applicable to nonconforming uses. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.1 Nonconforming Uses – Generally. Vested rights, like nonconforming use rights, may be lost where the holder fails to diligently exercise those rights, *i.e.*, the holder must continue development of the nonconforming use and not abandon or discontinue efforts to complete development. *Fountain Village Dev. Co. v. Multnomah County*, 39 Or LUBA 207 (2000).

36.1 Nonconforming Uses – Generally. 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).

36.1 Nonconforming Uses – Generally. Nothing in ORS 215.130(10)(a) requires that the rebuttable presumption provided by that statute can only be rebutted by "clear and convincing" evidence. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. The rebuttable presumption provided by ORS 215.130(10)(a) does not shift the applicant's ultimate burden of proof to demonstrate compliance with all applicable approval criteria. Where a party produces sufficient evidence of the continued existence of a nonconforming use for the prior 10-year period, the statute then shifts the burden of going forward with countering evidence to the county or any party opposing the nonconforming use. When sufficient evidence is produced showing that the nonconforming use was interrupted during some period, the applicant may no longer rely on the presumption with regard to that period of interruption. *Lawrence v. Clackamas County*, 36 Or LUBA 273 (1999).

36.1 Nonconforming Uses – Generally. Where provisions allowing enforcement of the city's ordinance only specifically authorize judicial remedies, the city's interpretation of the enforcement provisions as allowing the city to conduct quasi-judicial proceedings to determine nonconforming use status is inconsistent with the terms of that provision and not entitled to deference under *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992), or ORS 197.829(1). *Dept. of Transportation v. City of Mosier*, 35 Or LUBA 701 (1999).

36.1 Nonconforming Uses – Generally. LUBA owes no deference to a county's interpretation of ORS 215.130, governing nonconforming uses, or ordinance provisions that implement the statute. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Where LUBA determined in an earlier appeal of the county's approval of a nonconforming use that the nonconforming use was not established by a prior county decision approving site design review for that use, the law of the case doctrine prohibits the county, on remand, from revisiting the issue decided by LUBA. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Principles of *res judicata* do not prohibit petitioner from raising issues before LUBA regarding the nonconforming use status of a proposed dog kennel, even if those issues could have been raised in an earlier, unappealed county decision approving site design review for the kennel, because the nonconforming use status of the proposed use was not at issue during the site design review proceedings. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. A county is not equitably estopped from denying the nonconforming use status of a dog kennel because of the applicant's reliance on a previous county decision approving site design for a dog kennel. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.1 Nonconforming Uses – Generally. Demonstrating that one nonconforming use was legally established on a property does not automatically authorize other uses in the same use category that may subsequently have been established on the property. *River City Disposal v. City of Portland*, 35 Or LUBA 360 (1998).

36.1 Nonconforming Uses – Generally. That a use is authorized under a zoning ordinance or granted building or zoning permits does not, alone, shield the use from later-adopted zoning ordinance amendments that prohibit the use or impose a requirement for additional permits. *Rochlin v. Multnomah County*, 35 Or LUBA 333 (1998).

36.1 Nonconforming Uses – Generally. 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).

36.1 Nonconforming Uses – Generally. The protected right to continue a nonconforming use is a right to continue the nature and extent of use that existed at the time the use became nonconforming. The proponents of a nonconforming use have the burden of producing evidence from which a local government can make an adequate determination of the nature and extent of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.1 Nonconforming Uses – Generally. Where applicants wish to establish the scope of a nonconforming use, they have the burden of producing evidence from which the local decision maker can determine the scope of the nonconforming use. If applicants present nonspecific information, they run the risk that reasonable people, including the local decision maker, will disagree with them concerning the scope of the nonconforming use. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

36.1 Nonconforming Uses – Generally. Where the challenged decision characterizes an alleged nonconforming use as a "reprographics, blueprint and printing business," and petitioner does not challenge that characterization in his petition for review, petitioner may not challenge the characterization for the first time in post oral argument memoranda. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

36.1 Nonconforming Uses – Generally. The statutory provisions set out at ORS 215.130 governing regulation of nonconforming uses apply to counties, not to cities. *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

36.1 Nonconforming Uses – Generally. Neither ORS 215.130 nor 215.215 authorizes the creation of new parcels for nonconforming uses. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

36.1 Nonconforming Uses – Generally. Because a nonconforming use is tied to the land on which it was lawfully established, it essentially belongs to the property owner, and there is no inherent reason why a tenant, with the permission of the property owner, may not apply to the local government for permission to expand the nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.1 Nonconforming Uses – Generally. In reviewing a local government decision concerning a nonconforming use, LUBA may consider a letter which was not submitted to the decision maker during the local proceedings leading to adoption of the *initial* decision, but was submitted to and considered by the decision maker during *reconsideration* proceedings. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.1 Nonconforming Uses – Generally. Where the local code distinguishes between, and imposes different criteria on, nonconforming uses and nonconforming structures, a change from one conforming use to another conforming use need not comply with the criteria applicable to changes in nonconforming uses, even though the existing structure may be nonconforming. *Tarbell v. Jefferson County*, 21 Or LUBA 294 (1991).

36.1 Nonconforming Uses – Generally. Whether a proposed dwelling (1) is permitted outright in an EFU zone, (2) is "accessory" to an underlying nonconforming use, and (3) complies with ORS 215.296(1), are determinations which require "interpretation or the exercise of factual, policy or legal judgment" within the meaning of ORS 197.015(10)(b)(A) and (C). *Komning v. Grant County*, 20 Or LUBA 481 (1990).

36.1 Nonconforming Uses – Generally. Since the reference in ORS 215.130(5) to the right to continue a lawful use after "the enactment or amendment of any zoning ordinance or regulation" refers to *county* regulations, ORS 215.130(5) does not apply to the continuation of nonconforming uses within *cities*. *Goodman v. City of Portland*, 19 Or LUBA 289 (1990).