**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** An asphalt batch plant that received a conditional use permit under the conditional use permit criteria that applied at the time the plant was approved is not a nonconforming use, and the local code provisions that govern discontinuance of a nonconforming use do not apply to an application that seeks a comprehensive plan text and zoning map amendment to add additional property that is adjacent to the conditional use to the county's inventory of significant aggregate sites. *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** A use that was established in contravention of any existing land use laws and therefore did not exist "lawfully" at the time the law changed is not saved by ORS 215.130(5), simply because it *existed* when the zoning or other regulation was first enacted or later amended. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** 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).

**36.2 Nonconforming Uses – Definition.** Because ORS 215.130(11) does not unambiguously prohibit a county from requiring proof that a use was a lawful use when it came into existence more than 20 years ago or that it existed when the land use laws changed to prohibit the use, it is appropriate to consider legislative history of that statute. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** The legislative history of ORS 215.130(11) makes clear that the statute operates to apply a 20-year proof limitation to any requirement of proof of existence as an element of continuity but it does not apply the 20-year limitation to any requirement of proof of existence, as an element of lawfulness at the time the use became nonconforming. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** A county's determination that the nature and extent of a nonconforming dog kennel is a function of the kennel's capacity rather than its actual use is inconsistent with ORS 215.130(5), which defines the nature of the nonconforming use as a matter of how the structure is used, not the nature of the structure itself. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

**36.2 Nonconforming Uses – Definition.** The nature and scope of a nonconforming use is governed only by the *actual* use of the subject property when the use became nonconforming, not by the use that *would have been authorized* under applicable regulations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

**36.2 Nonconforming Uses – Definition.** Where the county code defines "nonconforming use" to mean a use that was legally established prior to adoption of any code provision "with which the * * * use does not comply," the county may properly determine that a mobile home is no longer a nonconforming use because its owners obtained approval of a temporary permit, making use of the mobile home as a residence lawful under county zoning regulations. *Morris v. Clackamas County*, 27 Or LUBA 438 (1994).

**36.2 Nonconforming Uses – Definition.** Where a county code does not allow new dwellings as a permitted use in a particular zone, but allows "maintenance, repair or replacement of existing dwellings" as a permitted use in that zone, lawfully established existing dwellings are not nonconforming uses in that zone. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

**36.2 Nonconforming Uses – Definition.** ORS 215.130(5) and (9) provide a limited authorization for counties to approve the expansion of nonconforming uses which, by definition, are contrary to provisions of county plans and land use regulations and, therefore, must be construed narrowly. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

**36.2 Nonconforming Uses – Definition.** A use is "lawful," in the sense that term is used in ORS 215.130(5), and therefore eligible to be considered a nonconforming use when zoning or land use regulations change, only if it complies with applicable zoning and other land use regulations on the date they are changed. Where zoning and land use regulations do not themselves require that a structure be maintained in conformance with all building and fire code requirements, that a building may not have conformed in all respects with the building code and fire code does not mean the use is "unlawful," and therefore ineligible for the protections accorded by ORS 215.130(5). *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**36.2 Nonconforming Uses – Definition.** That a nonconforming use is inconsistent with comprehensive plan provisions that did not exist or apply on the date the use became nonconforming provides no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistency. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**36.2 Nonconforming Uses – Definition.** Under *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981), a sporadic and intermittent use may qualify as a nonconforming use and may continue to operate as a sporadic and intermittent use. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**36.2 Nonconforming Uses – Definition.** A use that existed lawfully prior to enactment of restrictive regulations, and which may therefore be continued after such regulations become effective, although it does not comply with the applicable restrictions, is termed a nonconforming use. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

**36.2 Nonconforming Uses – Definition.** A nonconforming use is by definition a use that is contrary to provisions of a local government's comprehensive plan and land use regulations. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

**36.2 Nonconforming Uses – Definition.** The nature and extent of the lawful use in existence at the time the use became nonconforming are the reference points for determining the scope of permissible continued use. The proponent of a nonconforming use bears the burden of establishing whether the nonconforming use was lawfully established. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).