36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming, for purposes of verifying the lawful existence of the proposed nonconforming use, is harmless error, where the hearings officer concluded, based on substantial evidence, that a composting operation

did not exist at all on the property until 1990. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. A hearings officer's error in identifying 1984 instead of 1962 as the date a composting operation became nonconforming did not prejudice the applicant's substantial rights to present evidence regarding the lawful existence of the use prior to the date the use became nonconforming. Any remand to correct the erroneous citation to 1984 would focus on the correct date of nonconformity, 1962, and the applicant had a full opportunity to present evidence that the operation lawfully existed in 1962. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. A reasonable decision-maker could infer from the lack of any mention of composting on the subject property in any contemporaneous documentation prior to the 1990s that composting did not occur on the property prior to the period, notwithstanding conflicting testimony from the applicant that composting occurred prior to 1962, the date a composting facility became nonconforming on the property. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A declaration in a 2011 franchise authorization that a composting facility is a lawful nonconforming use is not binding or controlling in a later proceeding on a land use application filed to determine whether the composting facility is a lawful nonconforming use, where the applicant agreed in a subsequent 2014 franchise agreement to file a nonconforming use verification application to demonstrate that the composting facility is a lawful land use. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. Issuance of a Department of Environmental Quality (DEQ) permit to operate a composting facility does not preempt a county from later concluding, in an application to verify whether the composting facility is a lawful nonconforming use, that the facility is not lawful nonconforming use, where the DEQ permit was issued based on a franchise authorization decision that was on appeal and that did not definitely resolve the issue of whether the composting facility is a lawful nonconforming use. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. LUBA will deny a motion to take evidence outside the record, intended to establish that a nonconforming compost facility was operating on the property in 1984 when the property was zoned EFU, where the basis for the motion to take evidence is an argument that the hearings officer committed a "procedural irregularity" not shown in the record in finding that the date the EFU zone was applied is the relevant date for determining whether the nonconforming use was in existence. If the hearings officer erred in determining the relevant date that contrary zoning was applied, that error might provide a basis for remand, but would not constitute a "procedural irregularity" not shown in the record that would allow the movant to submit new evidence to LUBA intended to establish that the use existed in 1984. *Grabhorn v. Washington County*, 72 Or LUBA 443 (2015).

36.3 Nonconforming Uses – Determination of Existence. Where findings explain that a 1996 flood destroyed some county permit records, but staff testifies that the flood did not destroy older building permit records because the older records were stored above the flood damage area, substantial evidence exists to support the finding that the county permit records are complete through that period, as well as the inference that the absence of a building permit for a second dwelling means that the dwelling was constructed without a building permit approval, and therefore was not lawfully established. *Macfarlane v. Clackamas County*, 70 Or LUBA 126 (2014).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A 1996 decision verifying a nonconforming manufactured dwelling park is properly understood to also verify all portions of the existing septic system that supports the park, even those portions that extend onto an adjoining parcel, where the 1996 decision clearly intended to verify the park's septic system, and there is no indication that the decision intended to verify only the portion of the septic system on the same parcel as the nonconforming use. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. An argument that a county must verify the existence of alleged nonconforming uses, with specific reference to the location of certain structures within a setback, in the course of approving a site plan to expand an existing tourist facility, is insufficient to raise issues regarding (1) the alleged need to follow a separate procedure for verifying nonconforming uses and (2) alleged nonconforming commercial activities on the property. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

36.3 Nonconforming Uses – Determination of Existence. Minor relocations of nonconforming electrical transmission line poles that do not alter the nature or geographic extent of the line are not "alterations" for purposes of a code provision that requires the applicant for verification of a nonconforming use to demonstrate that alterations made since the date the use became nonconforming complied with applicable criteria. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.3 Nonconforming Uses – Determination of Existence. Where a distribution line was added to a nonconforming electrical transmission line, the hearings officer must consider whether that additional line is an "alteration" of the nonconforming use, under a code provision that requires the applicant for verification of a nonconforming use to demonstrate that alterations made since the date the use became nonconforming complied with applicable criteria. *Cyrus v. Deschutes County*, 46 Or LUBA 703 (2004).

36.3 Nonconforming Uses – Determination of Existence. A decision verifying the scope and intensity of a nonconforming racetrack operation is not supported by substantial evidence, where no party identifies supporting evidence in the record, and the decision's recitation of facts indicates that the use as verified exceeds the scope and intensity of the racetrack on the date it became nonconforming in at least some particulars. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Combining two smaller service areas on the subject property into one larger service area does not constitute an alteration or expansion of a nonconforming use, absent evidence that the combined area significantly exceeds the total geographic extent or intensity of the former separate areas. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Tearing a structure down to the foundations and rebuilding it does not constitute maintaining an "existing structure" in "good repair" for purposes of verifying a nonconforming structure unde r ORS 215.130(5), even if a few original timbers are reused. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. Noise from a nonconforming racetrack use is an adverse impact of that use, not part of the use itself. Reductions in noise due to technological improvements since the time the racetrack became nonconforming cannot be applied to offset increases in the intensity of racetrack operations, for purposes of verifying the scope and intensity of the nonconforming use at the time it became nonconforming. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A decision that analyzes numerous aspects of a proposed alteration of a nonconforming use compared to the historic use of the property is sufficient to establish the scope and nature of the nonconforming use where the petitioner does not challenge that analysis. *Ankarberg v. Clackamas County*, 41 Or LUBA 504 (2002).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A presumption that the intensity of a nonconforming use at the time the use became nonconforming is the same as the intensity of the use in the 10 years preceding the nonconforming use verification proceeding is rebutted where a preponderance of the evidence shows that the nonconforming use at the time the use became nonconforming was significantly less intense. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001).

36.3 Nonconforming Uses – Determination of Existence. The burden of proof to show the legitimacy of a nonconforming use rests with the party asserting the existence of the use. LUBA will not substitute its judgment for that of the local decision maker where a reasonable person could find a beach house is not a valid nonconforming use. *Crook v. Curry County*, 38 Or LUBA 677 (2000).

36.3 Nonconforming Uses – Determination of Existence. Even though the city initiated the enforcement proceedings that gave rise to the issue of a nonconforming use, the burden of proving the existence of a nonconforming use will fall on the party asserting it. *ODOT v. City of Mosier*, 36 Or LUBA 666 (1999).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A property owner may not decrease the scope and intensity of a nonconforming use to minimal levels for 20 years, and then resume the nonconforming use at the scope and intensity that existed at the time it became nonconforming, absent evidence that fluctuations in scope and intensity are a product of seasonal or other business changes rather than a decrease in scope and intensity for other reasons that remained relatively

constant for a long period of time. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A local government's decision regarding the scope of an alleged nonconforming use is supported by substantial evidence, where the evidence the local government relies on is credible, and the opposing evidence does not so undermine the evidence relied upon as to render the local government's reliance on supporting evidence unreasonable. *Aman v. City of Tigard*, 35 Or LUBA 353 (1998).

36.3 Nonconforming Uses – Determination of Existence. Where a hearings officer's decision on a previous application for design review on the subject property determined that no nonconforming use existed, but specifically left the door open for intervenors to establish such a legal use, the hearings officer in a subsequent proceeding is not bound by the earlier determination. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.3 Nonconforming Uses – Determination of Existence. Although it may be more difficult in most cases to establish the nature and extent of a nonconforming use that existed years ago, the requirement is not reduced in proportion to the difficulty one has in satisfying it. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

36.3 Nonconforming Uses – Determination of Existence. The proponent of a nonconforming use carries the burden to demonstrate the use was lawfully established and continued without interruption. *Fraley v. Deschutes County*, 31 Or LUBA 566 (1996).

36.3 Nonconforming Uses – Determination of Existence. The city's affirmation of the status of an existing use as a nonconforming use requires the application of the city's zoning ordinance and is therefore a land use decision over which LUBA has jurisdiction. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

36.3 Nonconforming Uses – Determination of Existence. Where the city's zoning code requires a structure or use be lawfully existing at the time the ordinance making it nonconforming was adopted, the city may not find an existing use to be nonconforming until it determines, based on substantial evidence, that the use was lawfully existing at the time the ordinance making it nonconforming was adopted. *Smith v. City of Phoenix*, 31 Or LUBA 358 (1996).

36.3 Nonconforming Uses – Determination of Existence. A local government decision that states it "reflects the historic use of" the subject property, and imposes certain limitations on the operation of a nonconforming use on that property, is not the equivalent of a determination regarding the nature and extent of the use existing on the property when restrictive zoning was first applied. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.3 Nonconforming Uses – Determination of Existence. Identifying a nonconforming use as a "variety of commercial enterprises," without identifying the nature and extent of the particular commercial enterprise that existed on the subject property at the time restrictive zoning was applied, is not an adequate determination regarding the nature and extent of the nonconforming use. *Suydam v. Deschutes County*, 29 Or LUBA 273 (1995).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. The actual use of the subject property when restrictive regulations were applied determines the extent of the protected nonconforming use right, not the owner's intent in purchasing the property. Any alteration in the nature or extent of the nonconforming use must satisfy applicable statutory and local standards for the alteration of a nonconforming use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.3 Nonconforming Uses – Determination of Existence. When determining whether a nonconforming use exists, a local government's findings must determine whether the use of the subject property existing when restrictive regulations were applied was lawfully established, and the nature and extent of such use. *Nehoda v. Coos County*, 29 Or LUBA 251 (1995).

36.3 Nonconforming Uses – Determination of Existence. Where the current uses of property are different from those described and approved by an earlier local decision determining the existence of a nonconforming use on the property, in that the applicant added a number of log trucks to his business and began hauling logs for others for hire, the city correctly determined the new activities are not allowed by or within the scope of the earlier decision. *Larson v. City of Warrenton*, 29 Or LUBA 86 (1995).

36.3 Nonconforming Uses – Determination of Existence. Where the local code gives the planning director authority to make an initial determination on the existence of a nonconforming use, that the planning director made a previous determination on the existence of the nonconforming use does not mean he lacks authority to adopt a subsequent determination, pursuant to an agreement of the parties. *Huiras v. Clackamas County*, 28 Or LUBA 667 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where a local government's zoning ordinance establishes a process for administrative actions to determine the existence of nonconforming uses, and another local ordinance gives a compliance hearings officer jurisdiction over complaints regarding violations of the zoning ordinance, it is reasonable and correct to

interpret these ordinances to require that the existence of a nonconforming use be determined through an administrative action, not raised as a defense in a compliance proceeding. *Watson v. Clackamas County*, 28 Or LUBA 602 (1995).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A code definition of "nonconforming use," together with a code provision that a "nonconforming use may be continued," embody the standards applicable to determining the existence of a protected nonconforming use sufficiently to satisfy ORS 215.416(8). A county may consider relevant legal principles concerning the existence of nonconforming uses set out in the opinions of LUBA and the Oregon appellate courts, without having to adopt such principles as county regulations. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. Where a local government determines a nonconforming use of the subject property exists together with approving an alteration of that nonconforming use, the local government's description of the nature and extent of the nonconforming use must be specific enough to provide an adequate basis for determining which aspects of the proposal constitute an alteration of the nonconforming use and for comparing the impacts of the proposal to the impacts of the nonconforming use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where the code regulates mobile home parks and RV facilities as separate and distinct uses, any nonconforming use determination that the subject property was used as both a mobile home park and an RV facility at the time restrictive zoning was applied must include determinations regarding the extent the property was used for each use. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. Past use of property adjacent to the subject property as part of a nonconforming use would not establish a right to continue, on the subject property, the part of the nonconforming use that was located on other property. Where such issue is raised during local proceedings to determine the nature and extent of the nonconforming

use of the subject property, it must be addressed in the local government's findings. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. Where the code does not specifically require that the county hearings officer make the initial interpretation concerning whether a nonconforming use exists and the nature and extent of that nonconforming use at the time restrictive zoning was applied, the board of commissioners is not clearly wrong in interpreting the code to grant the planning director authority to make such initial determinations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. The burden of showing an alleged nonconforming use was lawfully established at the time it became nonconforming rests with the proponent. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. At a minimum, a county's determination of the scope and nature of a nonconforming use must be precise enough to avoid improperly limiting the right to continue that use or improperly allowing an alteration or expansion of the nonconforming use without subjecting the alteration or expansion to any standards which restrict alterations or expansions. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. Where applicable rules regulating personal use airports would have allowed far more flights than the evidentiary record shows historically occurred at an airstrip when it became nonconforming, the county cannot use the administrative rule definitions as a surrogate descriptor of the nature and scope of the use at the time it became nonconforming. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where a code standard for determining nonconforming use status requires that the use "would have been allowed" under the zoning applicable when the use became nonconforming, it is reasonable and correct to interpret the code standard to require that at the time the use became nonconforming, it complied with an applicable code provision prohibiting objectionable off-site impacts. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where the city code established no process or procedure for city determinations of compliance with a provision prohibiting permitted uses from having objectionable off-site impacts, the city cannot interpret a code nonconforming use standard to require that a city determination of compliance with the impacts provision was obtained *before* the use became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.3 Nonconforming Uses – Determination of Existence. When a local government determines a use is a nonconforming use, it must establish the parameters of the nonconforming use. Any changes in the nonconforming use after it became nonconforming, are governed by the code provisions controlling changes of nonconforming uses, not by former code performance standards applicable to the use before it became nonconforming. *Spathas v. City of Portland*, 28 Or LUBA 351 (1994).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. A county can establish procedures for determinations concerning nonconforming uses as part of its zoning ordinance and, if it does so, can require parties to seek a determination regarding the existence or expansion of a nonconforming use through such zoning ordinance procedures, rather than allowing such issues to be initially determined in the county's code enforcement process. *Watson v. Clackamas County*, 27 Or LUBA 164 (1994).

36.3 Nonconforming Uses – Determination of Existence. Where petitioners questioned how much of the subject property was utilized for rock quarrying purposes and how much rock was quarried during the relevant period of time, during local proceedings to determine whether a rock quarry qualifies as a nonconforming use, this is adequate to enable a reasonable decision maker to understand issues were raised concerning the size and scope of quarrying activities and the adequacy of the evidence relating to those issues. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

36.3 Nonconforming Uses – Determination of Existence. A determination that a nonconforming quarry occupied five acres at the time it became nonconforming is not supported by substantial evidence in the whole record where the only evidence cited by the parties as establishing the size of the quarry operation at the relevant time is an undated aerial photograph. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

36.3 Nonconforming Uses – Determination of Existence. That a DOGAMI permit was not obtained does not establish that at the time a quarrying operation became nonconforming, it was removing up to 5,000 cubic yards of rock per year (the level of activity at which a DOGAMI permit is required). *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

36.3 Nonconforming Uses – Determination of Existence. Evidence that a person may have intended to maintain the nonconforming residential use of the subject property does not, alone, establish a nonconforming residential use. *Cemper v. Clackamas County*, 25 Or LUBA 486 (1993).

36.3 Nonconforming Uses – Determination of Existence. It is appropriate for a local government to interpret its code definition of the term "lot" consistently with ORS 92.017, so that individual legally established lots are recognized as such and may be individually conveyed, even though they are substandard under existing zoning regulations and are in common ownership with adjoining substandard lots. *Campbell v. Multnomah County*, 25 Or LUBA 479 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where the evidence in the record is insufficient to establish a zoning inspector's representation concerning nonconforming use status was made with knowledge of the material facts that present and certain past commercial uses of the subject property occurred without required local government approvals, the local government is not estopped from denying petitioners' application for the establishment of a nonconforming use. *Pesznecker v. City of Portland*, 25 Or LUBA 463 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where a local government correctly determines that a parking lot is a nonconforming use, and was not automatically made an approved conditional use under applicable code provisions, it commits no error in failing to apply plan and code provisions that would apply to expansion of the parking lot if it were correctly viewed as a conditional use. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

336.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. Where the local decision maker determines the existence of a nonconforming personal use airport, but the evidence concerning the scope of that nonconforming use is nonspecific, LUBA will affirm the local decision maker's determination that the scope of the nonconforming use amounts to no more than one four-hour flight per year from such airport. *Warner v. Clackamas County*, 25 Or LUBA 82 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where a local government determines that a recreational cattle roping use was lawfully established on the date restrictive zoning was applied, because it constituted a farm use allowed outright by the subject zone, LUBA will defer to that interpretation so long as it is not clearly contrary to the express words, policy or context of the ordinance. *Smith v. Lane County*, 25 Or LUBA 1 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where the characterization of an alleged nonconforming use is the primary issue during the local proceedings, to preserve for eventual appeal to LUBA the issue of whether the alleged nonconforming use includes sales of

equipment, a petitioner must do more than state in passing during the local proceedings that he maintained equipment he had a right to sell. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where determining whether an existing quarry qualifies as a nonconforming use under applicable city code provisions requires a city to determine whether the existing quarry lawfully existed at the time the existing zoning was last amended and whether the use has been discontinued for a year, the nonconforming use determination involves the exercise of significant legal and factual judgment and is a "permit" as that term is used in ORS 227.160(2). *Hood River Sand v. City of Mosier*, 24 Or LUBA 381 (1993).

36.3 Nonconforming Uses – Determination of Existence. Where storage is part of a lawful nonconforming use, and such storage use continues after other business operations which may be connected with the storage use cease, in the absence of the discontinuation of the storage use, such storage use may itself be a nonconforming use. *Hendgen v. Clackamas County*, 24 Or LUBA 355 (1992).

36.3 Nonconforming Uses – Determination of Existence. It is the nature and extent of the prior lawfully established use which determines the boundaries of permissible continued nonconforming use after the application of a restrictive zoning ordinance. *Hendgen v. Clackamas County*, 23 Or LUBA 285 (1992).

36.3 Nonconforming Uses – Determination of Existence. In determining whether a nonconforming use has been established, the decision of the Supreme Court in *Polk County v. Martin* requires a local government to (1) ascertain the scope and nature of the use occurring on the property at the time restrictive zoning was applied, and (2) determine whether those uses were lawful at the time the restrictive zoning was imposed. Thereafter, those uses may be continued at the level established, unless interrupted or abandoned. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where, at the time of the imposition of restrictive zoning, there was a lawful intermittent airport use of property, it is incorrect for a local government to conclude such use cannot constitute a nonconforming use because it was recreational, intermittent and did not involve the investment of substantial sums of money. *Warner v. Clackamas County*, 22 Or LUBA 220 (1991).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. Evidence submitted by an applicant regarding the nature and scope of activities occurring on his property during a particular period of time can constitute substantial evidence, unless other evidence in the record so undermines his evidence that a reasonable person would not rely upon it. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where the applicant for a nonconforming use determination represents that current use of the subject property is substantially identical to the scope of the use existing at the time of imposition of restrictive zoning, opponents' evidence of events occurring on subject property after restrictive zoning was imposed is relevant to show the current use is more intense than the use of the property on the date the use became nonconforming. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where the applicant for a nonconforming use determination presents evidence that is inconsistent and vague, such evidence is not substantial evidence to establish the existence of a nonconforming use. *Smith v. Lane County*, 21 Or LUBA 228 (1991).

36.3 Nonconforming Uses – Determination of Existence. Where a county adopted no findings, and the parties fail to identify evidence clearly supporting a determination that there was a nonconforming park use occurring on the subject parcel when the restrictive zoning was imposed, the county erred in determining a lawful nonconforming park use of the parcel exists. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

36.3 Nonconforming Uses – Determination of Existence. The proponent of a nonconforming use bears the burden of proving that the nonconforming use was lawfully established. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

36.3 Nonconforming Uses – Determination of Existence. In order to overturn a county determination that a nonconforming use does not exist on evidentiary grounds, it is not sufficient for petitioner to show there is substantial evidence in the record to support its position, rather the evidence must be such that a reasonable trier of fact could only say petitioner's evidence should be believed. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

36.3 Nonconforming Uses – Determination of Existence. Where testimony in support of the existence of a nonconforming use is nonspecific with regard to the dates, nature and extent of the alleged use, LUBA will not conclude that a reasonable trier of fact could only find that this evidence is adequate to establish the existence of a nonconforming use. *J and D Fertilizers v. Clackamas County*, 20 Or LUBA 44 (1990).

36.3 Nonconforming Uses – Determination of Existence. Where the issue of the existence of a nonconforming use was raised below, and the appealed local government order states a position

on that issue adverse to petitioners, the order includes a decision on the merits of the nonconforming use issue presented. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.3 Nonconforming Uses – Determination of Existence. 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).

36.3 Nonconforming Uses – Determination of Existence. 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 that has not been discontinued. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).

36.3 Nonconforming Uses – Determination of Existence. A zoning clearance approval that requires determinations on whether a proposed use is incidental and subordinate to an existing use, and whether and the extent to which an existing use is a lawful nonconforming use, requires interpretation and the exercise of judgment within the meaning of ORS 197.015(10)(b)(A) and (C) and, therefore, is a "permit" under ORS 215.402(4). *Komning v. Grant County*, 20 Or LUBA 481 (1990).