36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. An alteration to a nonconforming use is, in essence, a permissible continuation of the original nonconforming use. The alteration analysis under ORS 215.130(9) requires a comparison between the proposed alteration and the original nonconforming use, to which the right to continue is attached, and subsequent lawful alterations. *Underwood v. Clackamas County*, 80 Or LUBA 542 (2019).

36.5 Nonconforming Uses – Alteration/Change. While a circuit court has exclusive authority to modify a 1976 decree recognizing a vested right to development, where in 2013 the applicant seeks county approval to alter or expand that vested right and the county enters into a stipulation with the applicant approving the proposed alteration or expansion, that the circuit court agrees to modify the 1976 decree to reflect the stipulation does not change the fact that the stipulation itself is an alteration or expansion of a nonconforming use, and hence a land use decision subject to LUBA's exclusive jurisdiction. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

36.5 Nonconforming Uses – Alteration/Change. A stipulation entered into between a vested rights holder and a county that (1) revives a right to construct several buildings that had otherwise expired, (2) authorizes development in a different part of the property than formerly authorized, (3) approves a 200-unit hotel as a previously authorized "lodge with bunkhouse," and (4) declares that all development allowed under the stipulation is allowed notwithstanding county land use regulations to the contrary is, in effect, a decision to approve alterations or expansions to a nonconforming use, and therefore the county must apply the statutory and code standards applicable to alterations and expansions to a nonconforming use. *Rogue Advocates v. Jackson County*, 74 Or LUBA 38 (2016).

36.5 Nonconforming Uses – Alteration/Change. LUBA will remand rather than reverse a county decision that erroneously concludes that a 2005 permit is still valid to authorize issuance of building permits for what is now a nonconforming use, where the applicant originally filed for a vested rights determination, and planning staff originally evaluated the application as one for alteration of a nonconforming use, but those theories were not addressed in the county's final decision. *Landwatch Lane County v. Lane County,* 74 Or LUBA 299 (2016).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. Where a hearings officer concludes that an application for nonconforming use verification does not include a request to approve alterations to the nonconforming use, but the hearings officer also observes that future applications for alterations are unlikely to be approved under the county code standards that apply to alterations, the observation is dicta, and not a basis for reversal or remand. *Grabhorn v. Washington County*, 73 Or LUBA 27 (2016).

36.5 Nonconforming Uses – Alteration/Change. A stipulation between a county and a property owner to modify the location of development allowed as a vested right and nonconforming use is in all but name an alteration of a nonconforming use, and as such the stipulation concerns the application of land use regulations governing nonconforming uses, and is therefore a "land use decision" as defined at ORS 197.015(10)(a). *Rogue Advocates v. Jackson County*, 73 Or LUBA 382 (2016).

36.5 Nonconforming Uses – Alteration/Change. The statutory framework governing nonconforming uses and alteration of those uses makes clear that an alteration of a nonconforming use amounts to a continuation of the use, and therefore cannot be a discontinuance of the same use. *Rogue Advocates v. Jackson County*, 71 Or LUBA 148 (2015).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. ORS 197.015(10)(b)(H)(ii) excludes from the definition of "land use decision" any land use compatibility statements determining that the proposed state agency action is "allowed without review" under local comprehensive plan and regulations. 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 expansion is accomplished by verifying and altering the scope of the nonconforming use, which necessarily requires discretionary review. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130(5) provides that a county shall approve an alteration of a nonconforming use that is necessary to comply with any lawful requirement for alteration in the use, and prohibits counties from conditioning an alteration that is necessary to comply with state or local health or safety requirements. Where the Department of Environmental Quality (DEQ) threatens enforcement against a nonconforming manufactured dwelling park and requires the park to fix its failing septic system to avoid health hazards, the alteration qualifies as both a "lawful requirement" and "health and safety" type of alterations. That the applicant has some choice in how the required septic improvements are designed does not disqualify the alterations as "lawful requirement" or "health and safety" types of alterations. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. A condition of a 1996 decision verifying a nonconforming manufactured dwelling park that prohibits "further expansion" of the park is not intended to prohibit expansion of the septic system that serves the existing approved dwellings, where the number or type of dwellings or uses served by the septic system is not expanded. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. An assignment of error that a decision maker erroneously characterized a nonconforming use application as an application to "change" rather than "expand" the nonconforming use does not provide a basis for reversal or remand, where the local approval criteria for both changes and expansions require a finding of no greater adverse impacts, and petitioner does not challenge findings that the proposed change/expansion results in greater adverse impacts. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

36.5 Nonconforming Uses – Alteration/Change. It is harmless error to rely on new evidence that is accepted after the close of the record regarding water quality impacts of a proposed alteration to

a nonconforming use, where the hearings officer also denied the proposed alteration based on fire safety impacts, and the petitioner/applicant does not challenge that basis for denial. *Campers Cove Resort v. Jackson County*, 61 Or LUBA 62 (2010).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. Even if a prior conditional use permit implicitly approved reconstruction of the first floor of an existing building used for a nonconforming use, failure to appeal the prior decision would not necessarily preclude petitioner from arguing on appeal of a subsequent building permit to reconstruct the first floor that the building permit requires nonconforming use review, where the first floor plan authorized in the building permit approval proposes expansions and alterations not depicted on the first floor plan submitted as part of the prior conditional use application. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

36.5 Nonconforming Uses – Alteration/Change. Merely because some aspects of a proposed expansion/alteration of a nonconforming use are necessary to comply with Americans with Disabilities Act (ADA) requirements and thus allowed without nonconforming use review does not mean that other aspects of the proposal that are not related to ADA requirements are exempt from nonconforming use review. *VanSpeybroeck v. Tillamook County*, 56 Or LUBA 184 (2008).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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 under ORS 215.130(5), even if a few original timbers are reused. *Leach v. Lane County*, 45 Or LUBA 580 (2003).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. A proposal to reconstruct a 35,987-square-foot fruit processing facility with a 46,856-square-foot facility, with extensive new paving, driveway and septic facilities, is properly regarded as an expansion or alteration rather than replacement of the smaller facility. *Hiebenthal v. Polk County*, 41 Or LUBA 316 (2002).

36.5 Nonconforming Uses – Alteration/Change. A determination by a hearings officer that, based on conflicting testimony and evidence, the impacts from a proposed alteration to a nonconforming use would be greater than the allowed nonconforming use does not allow opponents to "effectively veto" the alteration, where the decision identifies the evidence considered by the hearings officer and articulates the reasons why the hearings officer found certain testimony more credible than other testimony. *Hal's Construction, Inc. v. Clackamas County*, 39 Or LUBA 616 (2001).

36.5 Nonconforming Uses – Alteration/Change. The county may not rely on a previous decision approving design review for a 50-dog kennel to establish the existence of nonconforming use rights for intervenors' current kennel operations. Under ORS 215.130, before the county may grant intervenors an alteration to a nonconforming use, intervenors must satisfy their burden of establishing the existence of that nonconforming use. *Marquam Farms Corp. v. Multnomah County*, 32 Or LUBA 240 (1996).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. It is unreasonable for a local hearings officer to interpret a code provision prohibiting "unit enlargements or expansions" of existing mobile home parks unless they are "made to conform substantially with all requirements for new construction" as inherently inapplicable to any proposed alteration of a nonconforming mobile home park, because such an interpretation would make this code provision a nullity. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. 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).

36.5 Nonconforming Uses – Alteration/Change. It is within a county's authority under ORS 215.130(5), (6) and (9) to adopt code provisions treating "replacement" of a nonconforming structure as a potentially allowable alteration of a nonconforming use, so long as the code requires that the replacement reasonably continues the nonconforming use and has no greater adverse impact on the neighborhood. *McKay Creek Valley Assoc. v. Washington County*, 25 Or LUBA 283 (1993).

36.5 Nonconforming Uses – Alteration/Change. Where petitioners referred several times during local proceedings to a nonconforming parking lot as having only 22 spaces, petitioners did not waive their right to challenge a city decision approving changes in the nonconforming parking lot to allow 32 spaces. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

36.5 Nonconforming Uses – Alteration/Change. Where a city decision includes findings suggesting the city thought it was allowing a change in a nonconforming parking lot without increasing the number of parking spaces, and those findings are not supported by substantial evidence, but the decision makes it clear that the city's basis for concluding the criteria governing changes in nonconforming uses were met did not depend on the number of parking spaces when the parking lot first became nonconforming, the decision will be affirmed. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

36.5 Nonconforming Uses – Alteration/Change. Adding an additional fuel storage facility to an airport fuel farm is a *type* of alteration which reasonably continues the existing nonconforming fuel farm use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. Under ORS 215.130(5) and (9) and similarly worded local regulations, if a proposed alteration (including an expansion) of a nonconforming use is of a type that "reasonably continues" the nonconforming use, it may be allowed so long as it will have no greater adverse impact on the surrounding neighborhood than the existing nonconforming use. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130(5) and (9) provide a limited authorization for counties to approve the expansion of nonconforming uses that, 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).

36.5 Nonconforming Uses – Alteration/Change. That a proposed alteration or expansion of a nonconforming use will increase the potential for fire and explosion constitutes a "greater adverse impact on the neighborhood" within the meaning of ORS 215.130(9). *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

36.5 Nonconforming Uses – Alteration/Change. Business related changes in the volume or intensity of a use generally do not constitute an impermissible change in a nonconforming use, where such changes are attributable to market growth or fluctuation in business conditions and are not accompanied by changes in the nature of the use or structural alterations. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

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

36.5 Nonconforming Uses – Alteration/Change. Where a previous local decision approved alteration of a nonconforming use for only two years, a request to remove that limitation is a request for a new approval for alteration of a nonconforming use, and the local government must apply its code criteria for alteration of a nonconforming use to such a request. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

36.5 Nonconforming Uses – Alteration/Change. ORS 215.130, and county regulations adopted pursuant thereto, provide limited authorization for counties to approve alterations to nonconforming uses which are contrary to provisions of their comprehensive plans and land use regulations. Therefore, plan policies are not approval standards for alteration of a nonconforming use. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

36.5 Nonconforming Uses – Alteration/Change. The nature of a city's obligation to adopt findings in support of its approval of a modification of a "nonconforming situation" depends on the scope of the modification approved. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

36.5 Nonconforming Uses – Alteration/Change. A city is not required to adopt findings explaining why structural modifications to a "nonconforming situation" are consistent with standards governing such structural modifications, where the disputed structural modifications are neither proposed by the applicant nor approved by the city. *Strawn v. City of Albany*, 21 Or LUBA 172 (1991).

36.5 Nonconforming Uses – Alteration/Change. Expansion of the lawful nonconforming park use of a four-acre parcel to an adjoining 11-acre parcel not already subject to such nonconforming use does not "reasonably continue" the park use of the four-acre parcel and cannot be considered an "alteration" of the existing nonconforming use. *Komning v. Grant County*, 20 Or LUBA 355 (1990).

36.5 Nonconforming Uses – Alteration/Change. Where the local code provides that any change in a nonconforming use which results in emissions having greater adverse impacts constitutes an alteration of such nonconforming use and, therefore, requires a conditional use permit, it is error for the local government to decide that a proposed change to an existing nonconforming use does not require a conditional use permit without finding that the resulting emissions will not have greater adverse impacts. *Bloomer v. Baker County*, 19 Or LUBA 319 (1990).