36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

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 To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through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

36.6 Nonconforming Uses – Expansion. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner's arguments below were based on a statute that applies only to counties, where the petitioner's discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

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

36.6 Nonconforming Uses – Expansion. For purposes of applying the expenditure/project ratio test in *Clackamas County v. Holmes*, comparing actual expenditures to date to total project cost, it is unnecessary for the applicant to submit evidence of the actual amount of expenditures to construct a 72,000-square-foot retail store or evidence of the cost to complete the expanded 102,000-square-foot store, because by any measure the actual expenditures to date to construct the 72,000-square-foot store would far exceed the expenditures to complete the 102,000-square-foot store. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. A city is not required to interpret traditional variance language ("practical difficulty or unnecessary hardship") in accordance with the traditional strict meaning of that language, particularly when that language is not used as part of the city's variance code but instead was borrowed from the variance context to be used as a test for expanding nonconforming uses. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

36.6 Nonconforming Uses – Expansion. Findings that there is no practical commercial use of an isolated portion of a parcel, absent expansion of a nonconforming use on the parcel, are sufficient to demonstrate that the expansion is justified based on "practical difficulty" or "unnecessary hardship." *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

36.6 Nonconforming Uses – Expansion. A city is not required to find that the practical difficulty or unnecessary hardship that justifies expansion of a non-conforming use is not "self-inflicted," where nothing in the applicable code provisions requires such a finding. *Azore Enterprises, LLC v. City of Hillsboro*, 56 Or LUBA 422 (2008).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. A finding that a proposed church expansion doubling the capacity of the church will not have greater adverse traffic impacts is inadequate, where the finding relies solely on the church's current plan to consolidate multiple daily services into a single service, and fails to explain why concentrating traffic from multiple services will not result in greater impacts or to address the possibility that future growth in church membership associated with the expansion may require additional services. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

36.6 Nonconforming Uses – Expansion. A code standard requiring that expansion of existing structures be supported by the "same improvements" is not reasonably interpreted to allow expansion only where the original *unimproved* septic system supports the structure. The standard is more reasonably read to allow expansion supported by an upgraded septic system, as long as it is not a different septic system. *Weaver v. Linn County*, 40 Or LUBA 203 (2001).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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 that restrict alterations or expansions. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. LUBA will defer to a local government's interpretation of its own ordinance, that expansion of a nonconforming use onto property not currently utilized by the nonconforming use is not authorized, where that interpretation is not contrary to the express words or policy of the ordinance. *Leopold v. City of Milwaukie*, 24 Or LUBA 246 (1992).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. Whether a proposed expansion of an existing nonconforming use would have fewer adverse impacts than uses which are permitted in the zoning district is irrelevant to determining compliance with the requirement of ORS 215.130(9) that the proposed expansion 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).

36.6 Nonconforming Uses – Expansion. 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).