BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RUSSELL LEACH and LORI LEACH,
Petitioners,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2003-090

LARRY OKRAY and KRISTIN OKRAY,
Petitioners,

vs.

LANE COUNTY,
Respondent.

LUBA No. 2003-091

FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioners Leach. With him on the brief was the law office of Bill Kloos, PC.

Douglas DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners Okray. With him on the brief was Hutchinson, Cox, Coons & DuPriest PC.

Steven L. Vorhes, Assistant County Counsel, Eugene, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 11/14/2003

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

In these consolidated appeals, petitioners challenge a county decision verifying portions of an existing racetrack as a nonconforming use.

REPLY BRIEFS

Petitioners Russell Leach and Lori Leach (the Leaches) move to file a reply brief in LUBA No. 2003-090, pursuant to OAR 661-010-0039. Petitioners Larry Okray and Kristin Okray (the Okrays) move to file a reply brief in LUBA No. 2003-091. Both of the proposed reply briefs respond to an argument in the county's response brief that the challenged decision is moot, and that these appeals should be dismissed. We allow both reply briefs.

MOTION TO TAKE EVIDENCE

The Leaches move to take evidence not in the record pursuant to OAR 661-010-0045. The evidence consists of five documents: (1) a copy of the final order of the Lane County Local Government Boundary Commission annexing the subject property into the City of Cottage Grove; (2) an excerpt from the Cottage Grove Comprehensive Land Use Plan; (3) a table showing the status of 13 citations issued by Lane County with respect to the challenged raceway operation; (4) copies of the 13 citations; and (5) a September 4, 2003 order by the county hearings officer denying the Leaches' motion for summary dismissal of six of the 13 citations. According to the Leaches, the foregoing documents are material to the question of whether and to what extent actions that postdate the challenged decision have mooted this appeal, a question raised in the county's response brief and resolved in our opinion, below.

No party objects to our consideration of the foregoing documents. Generally, where a party requests that we consider documents outside the record, and no party objects to that request, we will consider such documents for the purposes proffered without a formal order under OAR 661-010-0045. *Horizon Construction, Inc. v. City of Newberg*, 25 Or LUBA 656, 661-62 (1993). Accordingly, we shall consider the proffered documents for purposes of

resolving the mootness question before us. The motion to take evidence is denied, as unnecessary.

FACTS

The subject property is a 17-acre parcel zoned Agriculture, Grazing, Timber Raising District (AGT-5). At the time the challenged decision was rendered, the subject property was located within the City of Cottage Grove urban growth boundary, just outside the city limits. The property is bounded on the north and west by the coast fork of the Willamette River. Across the river lie the city limits, Highway 99E and property zoned for residential use. The adjoining lands to the south and east are within the city limits, and are developed with the city fairgrounds, the city wastewater treatment facility and Interstate 5.

A racetrack was built on the subject property in 1956, and has operated continuously during summer months ever since. The property was first zoned AGT-5 in 1976. The AGT-5 zone allows a racetrack as a conditional use. No conditional use permit has been sought or obtained for the racetrack.

The Leaches acquired the subject property in August 2001 and, in April 2002, applied to the county to verify the racetrack operation and its existing components as a nonconforming use. The structural components existing in 2002 consisted of: (1) a 1/4 mile oval dirt-surfaced racetrack; (2) a service pit or participant parking area north of the racetrack; (3) five sets of bleachers, including a main grandstand; (4) concession stands; (5) a business office; (6) bathrooms; (7) a spectator parking area; (8) a track lighting system; and (9) a public address system. Portions of the property, and several existing structures, are located within the Willamette Greenway. The Leaches presented evidence, pursuant to ORS 215.130(11), of the scope of the racetrack operation and the structures that existed 20 years prior to their 2002 application.[1]

[1] ORS 215.130 provides, in relevant part:

"(5) The lawful use of any building, structure or land at the time of the enactment or amendment of any zoning ordinance or regulation may be continued. Alteration of any such use may be permitted subject to subsection (9) of this section. Alteration of any such use shall be permitted when necessary to comply with any lawful requirement for alteration in the use. Except as provided in ORS 215.215, a county shall not place conditions upon the continuation or alteration of a use described under this subsection when necessary to comply with state or local health or safety requirements, or to maintain in good repair the existing structures associated with the use. A change of ownership or occupancy shall be permitted.

"(6) Restoration or replacement of any use described in subsection (5) of this section may be permitted when the restoration is made necessary by fire, other casualty or natural disaster. Restoration or replacement shall be commenced within one year from the occurrence of the fire, casualty or natural disaster. If restoration or replacement is necessary under this subsection, restoration or replacement shall be done in compliance with ORS 195.260 (1)(c).

"* * * * *

"(8) Any proposal for the verification or alteration of a use under subsection (5) of this section, except an alteration necessary to comply with a lawful requirement, for the restoration or replacement of a use under subsection (6) of this section or for the resumption of a use under subsection (7) of this section shall be subject to the provisions of ORS 215.416. An initial decision by the county or its designate on a proposal for the alteration of a use described in subsection (5) of this section shall be made as an administrative decision without public hearing in the manner provided in ORS 215.416 (11).

"(9) As used in this section, 'alteration' of a nonconforming use includes:

"(a) A change in the use of no greater adverse impact to the neighborhood; and

"(b) A change in the structure or physical improvements of no greater adverse impact to the neighborhood.

"(10) A local government may adopt standards and procedures to implement the provisions of this section. The standards and procedures may include but are not limited to the following:

"(a) For purposes of verifying a use under subsection (5) of this section, a county may adopt procedures that allow an applicant for verification to prove the existence, continuity, nature and extent of the use only for the 10-year period immediately preceding the date of application. Evidence proving the existence, continuity, nature and extent of the use for the 10-year period preceding application creates a rebuttable presumption that the use, as proven, lawfully existed at the time the applicable zoning ordinance or regulation was adopted and has continued uninterrupted until the date of application;

"(b) Establishing criteria to determine when a use has been interrupted or abandoned under subsection (7) of this section; or

The county planning director denied the application in its entirety. The Leaches appealed that decision to the county hearings officer, who conducted a hearing October 3, 2002, and affirmed the planning director's denial. The Leaches appealed the hearings officer's decision to the county board of commissioners. The hearings officer elected to reconsider the matter, and conducted a second hearing on January 30, 2003. On March 31, 2003, the hearings officer issued the first reconsidered decision, verifying the racetrack operation and most of its associated structures.

Both the Leaches and the Okrays, who had appeared in opposition, appealed the first reconsidered decision. The hearings officer denied the Leaches' request for reconsideration but granted the Okrays' request. On April 22, 2003, the hearings officer issued the second reconsidered decision, which reduces the scope of the structures and uses verified in the first reconsideration. The April 22, 2003 decision verifies the following operations and structures:

(1) A racing season extending from the first weekend in May through the Labor Day holiday, with a maximum of 28 race days per season. Hours of operation are noon to 11:00 p.m. on Fridays and Saturdays and noon to 10:00 p.m. on all other days. No more than 40 vehicles on any race day except for three holidays, when 60 vehicles may participate.

(2) The racetrack in its current configuration.

(3) The main grandstands minus the additional seating capacity created by post-1982 structural changes, limited to 1,500-person capacity.

(4) One permanent concession stand and two portable concession stands.

"(c) Conditioning approval of the alteration of a use in a manner calculated to ensure mitigation of adverse impacts as described in subsection (9) of this section.

"(11) For purposes of verifying a use under subsection (5) of this section, a county may not require an applicant for verification to prove the existence, continuity, nature and extent of the use for a period exceeding 20 years immediately preceding the date of application."

(5) The women's bathroom.

(6) The business office.

(7) Spectator parking up to 1,700 spectators, plus participant parking.

The April 22, 2003 decision found that the other structures, the four other sets of bleachers, the men's bathroom, the lighting system and public address system, had either been built after 1982 or replaced after 1982. The decision does not verify those structures. The Leaches' application requested only verification of racetrack operations and structures; it did not request that the hearings officer approve non-verified operations or structures as alterations or expansions of the nonconforming use, nor did the Leaches seek a conditional use permit for such non-verified operations or structures.

The Leaches and the Okrays appealed the April 22, 2003 decision to the county board of commissioners. The hearings officer declined to reconsider the April 22, 2003 decision. On May 14, 2003, the board of commissioners declined to review the hearings officer's decision. This appeal followed.

MOOTNESS

The county notes in its response brief that on August 7, 2003, after these appeals were filed with LUBA, the City of Cottage Grove adopted a decision annexing the subject property, among others, into the city limits. The county argues that city annexation of the subject property renders these appeals moot, because if the challenged decision is remanded the county will be unable to take any action on remand.

The Leaches agree that city annexation renders the Okrays' appeal moot, but argues that the Leaches' appeal is not necessarily moot. The Leaches contend that following issuance of the challenged decision but prior to city annexation the county cited and imposed fines on the Leaches for operation of the racetrack beyond that authorized by the April 22, 2003 decision. The Leaches appealed those citations to the county hearings officer, arguing that the April 22, 2003 decision was incorrect. According to the Leaches, if any part of the

Leaches' appeal to LUBA is successful, LUBA's decision will be directly relevant to the county enforcement proceeding and any subsequent appeals of the hearings officer decision to the circuit court.

We disagree with the county and the Leaches that city annexation of the subject property renders either appeal moot. Typically, an appeal to LUBA may be moot where the decision expires by its own terms, or some action subsequent to adoption of the challenged decision supplants, revokes or rescinds the decision. *Rest Haven Memorial Park v. City of Eugene*, 44 Or LUBA 231, 238, *aff'd* 189 Or App 150, __ P3d ___ (2003); *Davis v. City of Bandon*, 19 Or LUBA 526, 529 (1990); *Heiller v. Josephine County*, 25 Or LUBA 555, 556 (1993). In such circumstances, LUBA's review would have no practical effect. However, absent code provisions to the contrary, an action that leaves the challenged decision in place does not moot an appeal of that decision to LUBA. *Davis v. City of Bandon*, 28 Or LUBA 38, 44 (1994) (withdrawal of a permit application subsequent to issuance of the permit does not moot appeal, where it is not clear that withdrawal of the application has any legal effect on the permit); *Berg v. Linn County*, 22 Or LUBA 507, 509 (1992) (same).

In the present case, it is not clear that city annexation of the subject property has any legal effect on the county's decision, much less that city annexation supplants, rescinds or revokes that decision. While the role of the April 22, 2003 decision in any future enforcement proceeding or land use review may be open to question, the city or the parties to such proceedings might well take the position that that decision is effective, that it establishes the scope of the Leaches' nonconforming use, and that it cannot be collaterally attacked. Whatever the merits of that position, we cannot say that it is clear that city annexation of the subject property in this case renders our decision on these appeals of no practical effect. We therefore decline to dismiss these appeals as moot.

FIRST ASSIGNMENT OF ERROR (OKRAYS)

A. Racetrack Operation

The Okrays argue that the county's verification of the scope and intensity of the racetrack operation, particularly the number and type of races, the number and type of vehicles, and the hours of operation, among other aspects, is not supported by substantial evidence. According to the Okrays, the hearings officer erred in failing to rely exclusively on the evidence regarding the scope and intensity of the racetrack use as it existed in 1982, and conversely erred in relying on expansions or alterations of the racetrack use that occurred after 1982.[2]

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[2] The hearings officer's findings state, in relevant part:

> "Over the years, various classes of racing cars have been utilized at the Cottage Grove Speedway. Finals for each class are determined by heats and the number of heats is determined by the number of entrants in each class. Generally, a racing event begins with a practice session (hot laps) where ten or fewer cars in the same class run at high speed for five or six laps. Qualifying occurs next where each car runs one high speed lap on the track to establish heat race positions and trophy dash lineups. Trophy dashes generally follow where usually six cars in each class run six laps. Heats follow the trophy dashes and there usually is a 10-car limit per heat. No more than 10 laps are run per heat. Following the heats are the 'mains' ('A', 'B' and 'C') which generally are limited to a maximum of 20 cars running 12 to 15 laps in the 'B' and 'C' mains and 25 to 30 laps for the 'A' mains. (January 29, 2003 affidavit of Ernest Lee Owen). As a practical limitation, only about 20 to 25 cars can compete on the track at any one time. (Testimony of Larry Roberts and various articles from the Cottage Grove Sentinel).
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> "In the 1960s and 1970s, stock cars, modified stock cars, super stocks and motorcycles were the predominant vehicles racing. Go-carts also raced and on occasion there were destruction derbies. In 1980, sprint cars made their first appearance at the speedway. (See July 23 and July 30, 1980 issues of the Cottage Grove Sentinel). It appears that this class of vehicle was sensitive to poor-track conditions and experienced more cancelled races than the stocks and super stocks during the early 1980s. According to the racing program for the speedway's 1982 season, sprints were considered a special event, like mini cars. * * *
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> "The number of spectators observing the races was relatively constant through the 1960s through the early 1980s. At the start of the season, crowds were likely to be between 300 and 600. Regular events might attract 1,000 people and special events, held only once or twice a season, might attract up to 1,700 people. (August 10, 1983). The seating capacity of the grandstands was about 1,500 in 1982 but portable bleachers were sometimes rented (Exhibit 42F) and it was not unusual for overflow crowds to sit on the ground or to stand." Record 149-50.
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> "The 1982 Riverside Speedway racing schedule was as follows: Super Stock cars were scheduled to race on the following Saturdays: May 1, May 8, May 15, May 29, June 12, June

The Okrays cite to evidence that in 1982: (1) 22 races were scheduled at the racetrack, but only 10 actually took place; (2) all races were held on Saturdays, except for three holiday weekends; (3) all races began around 6:00 p.m. and ended at 10:00 p.m.; (4) all races in 1982 featured between eight and 12 vehicles per race; (5) the number of "special events" at the racetrack was limited; and (6) "sprint car" races were infrequent and treated as special events.[3] The hearings officer thus erred, the Okrays argue, in verifying more than 10 races per season, on days other than Saturdays and holidays, during hours other than between 6:00 and 10:00 p.m., with more than 12 vehicles per race, and with no limits on the number of special events or "sprint car" races.

The county responds that the hearings officer's findings accurately identify the scope of the racetrack operation in 1982 and are supported by substantial evidence.[4] However, the county does not cite us to any evidence supporting the hearings officer's decision on the

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> 19, June 26, July 3, July 17, July 31, August 14, August 21, August 28 and tentatively on September 4. Super Stock cars were scheduled to race on the following Fridays: July 16 and tentatively on September 3; and on the following Sundays: May 30, July 4 and tentatively on September 5. Finally, there was a tentative Super Stock race scheduled for September 6.
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> "In 1982, Sprint cars were scheduled to race on the following Fridays: June 4, August 6, and tentatively on September 3; and on the following Saturdays: June 5, July 10, August 7 and September 4. They were also scheduled to race on Wednesday July 7, and tentatively on Sunday September 5 and Monday September 6.
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> "In 1982, go-carts were raced on Wednesday, July 21 and Sunday, September 5 and a Destruction Derby was scheduled for Sunday, July 18, 1982.
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> "In summary, during the 1982 racing season at the Riverside Speedway there were between 25 (Exhibit 46) and 28 (Exhibit 54) race days. The racing season went from May 5 until September 8 (Labor Day). The total number of vehicles participating in the races and the number of races per race day varied. For instance, only 25 vehicles rac[ed] on May 15. On the last racing day of the 1982 racing season there were eleven races, including heats at Riverside Speedway. Generally, the number of race participants in this period of time (1979-1979) varied from between 30 and 40. At special events, usually Memorial Day, Fourth of July and Labor Day weekends, the number of race participants reached 60." Record 151.

[3] The Okrays also advance arguments contesting the verification of the main grandstands. We address those arguments under the second assignment of error.

[4] While the Leaches intervened in LUBA No. 2003-091 on the side of respondent, they did not file a brief responding to the Okray's petition for review.

challenged points. It may well be that there is substantial evidence in the record supporting the hearings officer's description of the scope of the nonconforming racetrack use, but without some assistance we will not search the 1,700-page record to find that evidence. While the portion of the hearings officer's decision quoted at n 2 cites to some testimony, that testimony does not address the points petitioners raise. Further, even if we accept as established fact each of the findings quoted at n 2, we tend to agree with petitioners that the hearings officer verified a more intensive racetrack operation than existed during the relevant time frame, in at least *some* particulars. For example, the findings reflect that in 1982 races were almost always scheduled for Saturday, with the exception of holiday weekends, four Friday races, and an isolated Wednesday go-cart race. The findings do not recite any evidence that races occurred every day of the week during any relevant time frame. The hearings officer thus appears to have erred in verifying race days on all days of the week. Further, the findings state that sprint car races were infrequent and treated as special events. Despite that finding, the hearings officer's decision does not limit the number of sprint car races or special events per season.

In short, we agree with the Okrays that the portions of the record cited to us do not support the disputed findings regarding the scope of the racetrack operation during the relevant period.

B. Service Pits and Spectator Parking

The Okrays also argue that the hearings officer erred in verifying the current location and scope of the service pit/participant parking area and the spectator parking area. The Okrays cite to evidence that in 1982 the service pit was primarily located inside the racetrack oval and in 1983 was moved to the north end of the property, where race participants parked. By combining the service pits and the participant parking area, the Okrays argue, the physical extent of the nonconforming use of the north end of the property was impermissibly expanded. The Okrays cite to a 1982 photo showing that the north end of the property was

largely vegetated, and to more recent photos showing that the north end of the property is largely devoid of vegetation, as evidence that the physical extent of the nonconforming use as verified by the hearings officer has expanded since 1982.

The hearings officer also verified parking for 1,700 spectators on the adjoining city-owned fairgrounds. The Okrays argue that the hearings officer exceeded his authority by verifying spectator parking on property not owned by the Leaches and not described by the application or public notices. In addition, the Okrays contend that there has been an expansion of the number of spectators and the area used for spectator parking since 1982.

The hearings officer found, in relevant part:

> "The area north of the racetrack was originally used for participant parking and overflow pitting. In the early 1980s, all pit activity was moved to this location for safety reasons. Spectator parking has occurred to the south of the racetrack on the fairgrounds property since 1972. All available space in this area has been utilized." Record 155 (footnotes omitted).

> "Pit/participant parking area: Numerous affidavits support the conclusion that the scope and intensity of the spectator parking area and the pit/participant parking areas have remained largely unchanged since 1982. There has been a longstanding agreement between the fairgrounds and the owners of the racetrack where the latter could use the fairgrounds for spectator parking. During large events, almost the entire fairgrounds parking area has been utilized for this purpose. The use of the spectator parking area and the pit/participant parking areas is verified for a capacity of 1,700 spectators plus race drivers and the driver's attendants." Record 167.

We disagree with the Okrays that the hearings officer erred in verifying use of the pit/participant parking area at the north end of the property. It is undisputed that that area was used for service pits and participant parking in 1982, although "pitting" primarily occurred within the racetrack oval. We do not think that combining two service pit areas into one service pit area constitutes an expansion of a nonconforming use, absent evidence that the combined area significantly exceeds the total geographic extent or intensity of the former separate areas. We are cited to no such evidence.

Similarly, we do not think the hearings officer erred in verifying use of the fairgrounds property for spectator parking, limited to 1,700 spectators. According to the record, the racetrack owners used the fairgrounds property under a series of oral and written agreements. We see no error in verifying the scope of nonconforming uses that include licenses or easements to use adjoining property. Petitioners do not dispute that in 1982 parking for 1,700 spectators was provided on the fairgrounds property. That larger numbers of spectators may have used the fairgrounds in later years does not demonstrate that the hearings officer erred in verifying parking in that area, limited to 1,700 spectators.

The first assignment of error (Okrays) is sustained, in part.

SECOND ASSIGNMENT OF ERROR (OKRAYS)

The Okrays argue that the hearings officer erred in verifying the main grandstand.[5] According to the Okrays, it is undisputed that the main grandstand that existed in 1982 was almost totally rebuilt in 2001, retaining only a few original timbers. While the 2001 grandstand covers the same footprint as the 1982 grandstand, it has narrower benches, which increase seating capacity from 1,470 persons to between 1,800 and 1,950 persons. Further, the Okrays argue, the 2001 grandstand features skyboxes, plywood partitions built over existing benches, that were not present on the 1982 structure.

The hearings officer reasoned that the 2001 rebuilding of the main grandstands constituted "repair" of an existing structure, permissible under ORS 215.130(5) without any county land use review, rather than replacement or alteration under ORS 216.130(6) or (9),

[5] The Okrays also argue that it is unclear whether the hearings officer verified the Turn 1 bleachers or not. If so, the Okrays argue, the hearings officer erred in doing so, because those bleachers were significantly expanded after 1982. However, the Turn 1 bleachers were not listed among the structures that the hearings officer verified. Record 156. We do not read the hearings officer's decision as implicitly verifying structures not listed as verified. Accordingly, we do not address the Okrays' arguments regarding the Turn 1 bleachers.

with the exception of the additional seating capacity provided by narrower benches.[6] The hearings officer did not explicitly address the skyboxes.

The Okrays argue that reusing a few timbers in the course of almost total reconstruction of a structure does not constitute maintaining an "existing structure" in "good repair" within the meaning of ORS 215.130(5).[7] We agree. Wherever the lines are located between "repair," "replacement" and "alteration" under the statute, tearing a structure down to the foundations and rebuilding it does not constitute maintaining an "existing structure" in "good repair" for purposes of ORS 215.130(5). It may or may not constitute a replacement or alteration, but the Leaches did not seek, and the hearings officer did not grant, approval of the main grandstands as either a replacement or alteration. It may also be that reconstruction of the grandstands in 2001 was permissible under ORS 215.130(5) without county approval because it was "necessary to comply with state or local health or safety requirements." However, the hearings officer found no evidence that any structural alterations after 1982

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[6] The hearings officer's decision states, in relevant part:

> "ORS 215.130(5) prohibits a County from placing conditions on, and by implication, disallowing, the maintenance of a structure associated with a nonconforming use in good repair. * * * This particular language of ORS 215.130(5) is mandatory and the County may not condition or limit repairs to an existing nonconforming structure. The key term, I believe, is 'existing structures,' Repair, by definition, does not mean alteration or replacement of structure, but rather the renovation or restoration of a structure to an earlier condition.
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> "* * * * *
>
> "Main Grandstands: In regard to the verification request at hand, the main grandstands were almost totally rebuilt in 2001 but retain the same footprint and some of the initial timbers as the original. The additional benches created by the narrowing of the bleacher seats, however, represent an alteration that is not supported by [county code]." Record 164.

[7] Much of the Okrays' argument under this assignment of error is based on county code provisions governing nonconforming uses. As discussed below, the county code is more restrictive than ORS 215.130(5) through (11) in a number of ways. However, the hearings officer found that the statute preempted the county code to the extent the statute allows "repair" of the main grandstand and the code would not. Record 164. No party challenges that finding. Accordingly, we address the Okrays' challenges to verification of the grandstands under the statute and do not address whether the grandstands could be verified under the code.

were necessary to comply with state or local health or safety requirements, and no party challenges that finding. Record 163.

The second assignment of error (Okrays) is sustained.

THIRD ASSIGNMENT OF ERROR (OKRAYS)

Lane Code (LC) 10.305-25 allows for continued use of a structure and premises as a nonconforming use under prescribed circumstances.[8] The Okrays argue that because the several structures associated with the racetrack were built or expanded unlawfully or without required permits, LC 10.305-25 requires that no part of the racetrack operation be verified as a nonconforming use.

The hearings officer did not address this contention and, curiously, neither does the county's response brief. However, we do not believe LC 10.305-25 is properly interpreted to require denial of an application to verify the otherwise lawful portions of a nonconforming use simply because some part of the use or a structure associated with it is unlawful and cannot be verified. Whatever the language emphasized in LC 10.305-25, quoted at n 8, is intended to mean, we do not think it requires such a harsh result. Further, we question whether, if it were so interpreted, LC 10.305-25 would be consistent with ORS 215.130(5) through (11). *See* n 1.

The third assignment of error is denied.

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[8] LC 10.305-25 provides, in relevant part:

> "If a lawful use of a structure, or of structure or premises in combination, exists at the effective date of adoption or amendment of this chapter, that would not be allowed in the district under the terms of this chapter, the lawful use may be continued *so long as it remains otherwise lawful*, subject to the following provisions:
>
> "(1) No existing structure devoted to a use not permitted by this chapter in the district in which it is located shall be enlarged, extended, constructed, reconstructed, moved, or structurally altered, except as allowed in this section * * *. (Emphasis added).

However, as discussed below, the scope of alterations allowed under LC 10.305-25 is very limited. For all practical purposes, the code prohibits alterations to a nonconforming use or structure.

FOURTH ASSIGNMENT OF ERROR (OKRAYS)

The Okrays argue that, as a matter of public policy, an application for a nonconforming use verification should be denied in its entirety where, as the Okrays allege here, the nonconforming use has been significantly and unlawfully expanded after the use became nonconforming.

The Okrays acknowledge that we held to the contrary in *Bennett v. Linn Co. Board of Commissioners*, 14 Or LUBA 217 (1986), but argue that that case was wrongly decided or should be limited to its facts. In *Bennett*, we held that expansions of a nonconforming use could not be verified as part of the nonconforming use and were subject to abatement, but that the underlying nonconforming use could nonetheless continue. *Id.* at 227-28, (citing *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981)). The Okrays argue that, properly understood, *Polk County v. Martin* does not support the view expressed in *Bennett*.

Petitioners are correct that in *Polk County v. Martin*, the Supreme Court did not resolve the question of whether unlawful expansions or alterations of a nonconforming use require abatement of the entire use.[9] Nonetheless, one of the reasons the Court declined to reach that question was that "appropriate relief" was available if the landowner uses the land at a level in excess of the lawful nonconforming use. That language does not suggest that the Court believes unlawful expansion of a nonconforming use renders the entire underlying nonconforming use unlawful.

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[9] The relevant portion of *Polk County v. Martin* states:

> "The plaintiff asserts that the defendant has no permitted nonconforming use because (a) the prior use was too sporadic and intermittent to give rise to any right to continue the use, (b) there was an interruption of use after the zoning law became effective, and (c) that the defendant's post-ordinance use of the land was an unauthorized 'enlargement or prohibited increase of use.' We do not consider the latter point. We limit our inquiry to points (a) and (b) because plaintiff's complaint made no claim of an enlarged use, the trial court apparently found no use in excess of the prior use, and because appropriate relief is available to the plaintiff or others if the defendant uses his land at a level in excess of the lawful use established under ORS 215.130(7)." 292 Or at 73-74.

In any case, absent some compelling authority, we see no reason to overrule or limit *Bennett*. For one thing, until the scope of the nonconforming use is verified, it is often difficult to distinguish between an expansion, which requires county review and approval, and independent portions of the underlying nonconforming use. *See Marquam Farms Corp. v. Multnomah County*, 147 Or App 368, 381, 936 P2d 990 (1997) (county erred in approving requested expansion without determining the scope and nature of the nonconforming use). Adoption of petitioners' view would discourage owners of nonconforming uses from seeking verification where some part of the use may be an unapproved expansion. It would also discourage persons who acquire a nonconforming use from applying to the county for *post-hoc* approval of expansions created by previous owners. Further, it would cast even more economic uncertainty over nonconforming uses, contrary to the basic principle of ORS 215.130(5), that lawful nonconforming uses may continue. Even if it would be consistent with ORS 215.130(5) through (11) to adopt petitioners' view, that view is not compelled by the statutory text and context, and we see no reason to adopt it.

The fourth assignment of error (Okrays) is denied.

FIFTH ASSIGNMENT OF ERROR (OKRAYS)

The Okrays argue that noise from racing events represents the major adverse impact of the racetrack, and that the hearings officer properly found that racetrack operations should be limited to the noise levels present in 1982. However, the Okrays argue that the hearings officer failed to establish the level of noise generated in 1982 as a baseline and further argue that the hearings officer verified uses that are more intensive and will generate more noise than was generated in 1982.

The hearings officer found that there was no objective evidence of the noise intensity of the racetrack as it existed in 1982, but that it was clear that noise levels in more recent

years had substantially increased over earlier years.[10] The hearings officer recited some of the variables that might explain the increased noise in recent years; some of the variables are

[10] The hearings officer's findings state, in relevant part:

> "The issue of noise has been the primary concern regarding the speedway * * *. Noise from the Speedway first began to substantially intrude on the lives of surrounding residents during the mid-to-late 1990s, about the time the Eugene Speedway closed (1996) and several of its events moved to the Cottage Grove Speedway. * * * The noise level noticeably increased again during the 2002 racing season. * * *
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> "Noise at the Speedway was measured with a decibel gun starting in 1989. Records of decibel readings from most races during the 2001 and 2002 season were introduced into the record. * * * No information is provided regarding how often this device was calibrated, how it was used and whether [the operators] knew how to calibrate it. There is testimony that all races conducted at the Cottage Grove Speedway during the 2002 racing season were monitored for sound and that cars making more than 90 dBA were banned until their exhaust systems were modified to comply with that standard. However, an examination of the sound records for the 2000 through 2002 seasons show [that] numerous instances of a 95 or higher dBA readings were recorded and contradict[s] testimony that the races have gotten quieter during the last season. * * *
>
> "The best and most thorough noise testing of the Speedway has been conducted by the Appellant Okrays, with the assistance of an acoustical engineer. These tests measured the impact of the Speedway noise on properties at distances that varied between 0.2 and 1.2 miles from the race track. * * * The results indicate that * * * noise from the Speedway exceeded the ambient noise from as little as 5.2 dBA (L1) to as much as 21.2 dBA (L1). * * *" Record 152-53.
>
> "The cars that race today at the Speedway are quieter than those raced there in 1982. There are several reasons for this transition. First, the DEQ noise regulations had only been introduced a year or so earlier and most drivers did not have mufflers installed during the 1982 and 1983 racing seasons. * * * As new motors were developed that ran better with restrictions on exhaust, mufflers started appearing. Also, the technology to build mufflers that would reduce sound without handicapping the racer was in its infancy in 1982 and the equipment was not generally available. The serious focus on noise reduction has driven muffler technology and because the technology is now widely available, no driver is penalized for using efficient muffling devices. * * *
>
> Second, the engine size of many categories of racing cars has been reduced and is now standardized. * * * Sprint cars, widely acknowledged as the noisiest cars at the Speedway, now have their engines standardized at 360 cubic inches at the Speedway. In 1982, the engines these cars used were 410 cubic inches or larger in size.
>
> [Third,] compliance with DEQ noise regulations has been more consistent. For instance, [a former owner] testified that although he posted the 95 dBA standard he actually enforced the DEQ 105 dBA standard in 1982. Current practice, and the practice for five or more years at the Speedway, has been to strictly monitor noise generation for compliance with DEQ regulations.

under the applicant's control and some are not. The hearings officer ultimately concluded that the racetrack operation as verified, with a relatively short racing season and limited number of racing participants, combined with technological improvements to mufflers, tires and engines developed over the last two decades, would likely not exceed 1982 noise levels.[11]

As explained below, noise from a nonconforming use is properly viewed as an adverse impact of that use rather than part of the nonconforming use itself, for purposes of verifying the scope of that use. That being the case, the hearings officer's findings regarding noise are largely irrelevant, except to the extent they bear on the question of the scope and

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> "[Finally,] since 1982, some vegetation that might have provided buffering for the light and noise that escape the Speedway has been reduced [on adjacent properties]." Record 154-55.

[11] The hearings officer's findings state, in relevant part:

> "The noise tests conducted on single vehicles only tells part of the story, however. Noise from a number of sources can be additive and can raise the noise level several dB,A. Second, noise intrusion can be measured in terms of noise dose or total noise delivered to a community as well as through maximum sound levels. Thus, the frequency of races (including heats), the number of cars participating in a race, and the number of race days per season all contribute to the noise dose delivered to the community by the Speedway. It is in this regard that the difference in intensity between the 1982 racing season and the 2002 racing season varies most greatly.
>
> "The 1982 racing season went from May 5 through September 8 and included somewhere between 25 and 28 race days. Often there were as few as 25 cars participating at a racing event. This situation should be contrasted with the 2002 racing season, which started March 23 and ended September 28. This season contained 43 race days and on September 21 there were 114 cars racing. * * *
>
> "* * * The record establishes that in 1982, the racing seasons generally ran from early May to early September. There were between 25 and 28 race days during the season and races attracted between 30 and 40 drivers. The number of heats may have been similar in 1982 as in 2002 but the number of vehicles per heat/race was larger in the latter racing season.
>
> "* * * I believe that it has also been established that the noise intensity of the Speedway increased in the late-1990s and substantially increased in 2002. There is no objective evidence of the noise intensity of the Speedway as it existed in 1982 and we can speculate only that individual cars were noisier than today's cars. We also know that the noisiest cars, the Sprint cars, were just being introduced and now play a more prominent role in racing. We also know that the race season was substantially shorter in 1982, from early May to early September (Labor Day), and that the number of racing participants were fewer, somewhere between 30 and 40. This is the intensity that can be verified for this nonconforming use." Record 159-60.

intensity of the nonconforming use itself during the relevant time frame. We therefore address the Okrays' challenges to those findings only to the extent we discern some bearing on that question.

We disagree with the Okrays that failure to establish a baseline level of noise in 1982 is essential in verifying the level of use at the time the racetrack operation became nonconforming. As all parties acknowledge, there is no objective data indicating the level of noise generated by the racetrack in 1982. Lacking objective data, the hearings officer attempted to limit noise to 1982 levels by limiting the scope and intensity of racetrack operations to something approximating the 1982 racing season. To the extent noise levels are relevant, we see no error in taking that approach.

The Okrays also challenge the hearings officer's conclusion that individual cars are quieter today than in 1982, due to improvements to mufflers, tires and engines. The Okrays point to the hearings officer's finding that noise levels had increased in the 1990s and in 2002 over 1982 levels, and argue that the decision is inconsistent on this point. However, the hearings officer attributed increased noise levels to increases in the number of races and the number of vehicles participating. To the extent it is relevant, we do not see that the hearings officer's findings on these points are inconsistent or that the finding that individual cars are quieter today than in 1982 lacks support in the record.

However, we agree with the Okrays that the scope and levels of uses verified by the hearings officer are more intensive than uses present in 1982. The hearings officer recognized that, even if individual vehicles are quieter than in 1982, more frequent races with more numerous participants and different types of cars can significantly increase noise levels. Nonetheless, while limiting the racing season, number of racing days, and number of total vehicles participating per race day, the hearings officer made no attempt to limit to 1982 levels the number of (1) races or heats held on each racing day; (2) vehicles per race or heat; (3) special events; or (4) sprint car races, which the hearings officer found to be the noisiest

type of race. The hearings officer *appears* to reason that increases in intensity of these parameters are permissible, at least as far as noise is concerned, because the hearings officer believed that that increase is *offset* by quieter individual vehicles and other improvements regarding noise since 1982. However, noise itself is not a use; it is an adverse impact from the putative nonconforming use. Evaluating increases or decreases in an adverse impact from a nonconforming use, like noise, may be relevant in approving or denying an alteration or expansion of a nonconforming use, under ORS 215.130(9). For purposes of verifying the scope and intensity of the use itself, however, we do not see that reductions in noise due to technological or other improvements since the time the use became nonconforming can be applied to "offset" increases in the scope and intensity of the use since that time. We agree with the Okrays that the hearings officer erred in failing to consider whether limitations to the number of races or heats held on each racing day, vehicles per race or heat, special events, and sprint car races are necessary to ensure that the verified use does not exceed the scope or level of intensity present in 1982.

The fifth assignment of error (Okrays)is sustained, in part.

FIRST AND SECOND ASSIGNMENTS OF ERROR (LEACHES)

The Leaches argue that the hearings officer erred in failing to verify the Turn 1 bleachers and the Turn 4 bleachers as lawful nonconforming structures.

A. Turn 1 Bleachers

The hearings officer described the current Turn 1 bleachers as portable, metal frame bleachers located southeast of the main grandstands. The hearings officer did not include the Turn 1 bleachers among the structures verified as existing in 1982, notwithstanding findings suggesting that bleachers of some kind were located at that approximate location in that

year.[12] The decision otherwise contains no discussion of the Turn 1 bleachers, and no explanation for why they were not verified as nonconforming structures.

It may be that the hearings officer believed that the current Turn 1 bleachers had been replaced, altered or expanded since 1982, and thus the current structure was not subject to verification as a nonconforming use, in the absence of an application pursuant to ORS 215.130(6) or (9). However, we agree with the Leaches that remand is necessary to adopt findings addressing the Turn 1 bleachers and determining whether or not the current structures can be verified as a nonconforming structure.

B. Turn 4 Bleachers

The hearings officer declined to verify the current Turn 4 bleachers, after finding that the portable, metal Turn 4 bleachers in existence in 1982 had been replaced by an entirely new set of permanent, wooden bleachers sometime after 1982.[13] The Leaches challenge the finding that the current Turn 4 bleachers consist of a "permanent, wooden structure," and point us to photographs in the record showing that the current Turn 4 bleachers have a metal

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[12] The hearings officer's findings state, in relevant part:

> "A 1982 aerial photograph, dated 4/21/82 and flown by WAC Corporation, Inc., shows the racetrack, the main grandstand, spectator and participant parking, *bleacher grandstands to the south of the main grandstands*, and small buildings (probably concession stands) west of the entrance drive into the racetrack facility. Using the driveway access road located north of the main grandstands as a benchmark, it does not appear that the portable bleachers located at the northwest and north ends of the racetrack had been erected." Record 149.

[13] The hearings officer's findings state, in relevant part:

> "Turn-4 Bleacher. This portable, metal frame bleacher [is] in the same location as in 1982. [The bleacher in 1982] was 100 feet long, 30 feet wide and 12 feet high and was located southwest of the Family bleachers and northeast of the Main Grandstands. The seating capacity of this bleacher was thought to be about 1300 people. It was replaced with a permanent wooden bleacher in the late 1990s or early 2000." Record 147.
>
> "Bleachers: The North/Pit and Turn-4 bleachers were originally portable metal frame bleachers that were replaced by wooden bleachers. By definition, the wholesale replacement of these nonconforming structures cannot be considered to be repairs and, at best, must be considered to be alterations. Alterations of this nature are not supported by Lane Code 10.305-25." Record 164.

understructure that, the Leaches allege, is portable. However, the Leaches do not appear to dispute the finding that the Turn 4 bleachers in existence in 1982 were entirely replaced by a new structure after 1982. Even if the 1982 structure was replaced with an identical portable, metal set of bleachers, that structure cannot be verified as a nonconforming structure, under the hearings officer's unchallenged view that a structure that has been entirely replaced is an alteration and cannot be verified as a nonconforming structure. Because the Leaches do not cite us to any evidence suggesting that the Turn 4 bleachers were not entirely replaced after 1982, their challenge to the hearings officer's findings does not provide a basis for reversal or remand.

The first assignment of error (Leaches) is sustained, in part. The second assignment of error (Leaches) is denied.

THIRD AND FOURTH ASSIGNMENTS OF ERROR (LEACHES)

The Leaches contend that the hearings officer erred in failing to verify the current lighting system and current public address system, or at least the remnants of the original public address system, as lawful nonconforming uses or structures.

The hearings officer found that the lighting system and public address system had been entirely replaced by new systems since 1982 and that the new systems were more efficient and had fewer off-site adverse impacts than the systems in place in 1982.[14]

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[14] The hearings officer found, in relevant part:

> "In 1982, lighting was on 11 poles of 25 feet in height; supporting a total of 53 light fixtures. This lighting system was replaced by two eighty-foot high steel poles in the center of the track, each with 12 fixtures, and five wooden light poles on the west side of the track, east of the main grandstands, each with three fixtures for a total of 39 fixtures. The 11 poles removed in 1998 were 25 to 30 feet tall and were aimed 70-80 feet or 21 to 23 degrees. The 80-foot tall poles [erected in 1998] were aimed 130 to 150 feet or 29 to 32 degrees. Off-site spill light was reduced by 25 to 30 percent. The taller poles increase aiming angles that, in turn, reduce the amount of light loss from the reflector. Indeed, the reflectors are able to re-direct spill light so that it increases the illumination on the target area and reduces the amount of light that is visible off the property." Record 154.
>
> "In 1982, the Speedway's public address (PA) system consisted of 20 speakers, four of which were large 2000-watt Electro-Voice horn speakers, and [16] smaller circular speakers. The

Nonetheless, the hearings officer did not verify the lighting system or public address system, or any part of them, under the view that the new systems were alterations that are prohibited by LC 10.305-25, relevant portions of which are quoted above at n 8. The hearings officer rejected the Leaches' arguments that (1) ORS 215.130(5) through (11) preempt LC 10.305.25 with respect to alterations and (2) alterations that reduce adverse impacts necessarily reduce the scope of the nonconforming use and are thus not "alterations" under the statute. The Leaches challenge both conclusions.

A. Preemption

The hearings officer relied on *Gibson v. Deschutes County*, 17 Or LUBA 692, 701 (1989), to conclude that ORS 215.130(5) through (11) grants counties the discretion to regulate alterations to nonconforming uses or structures more stringently than the statute, or even to prohibit alterations entirely.[15]

> former speakers were located in the fir trees adjacent to and west of the main grandstands. These speakers were located high in the trees, above the height of the grandstands, and were pointed to the east, towards the golf course and the freeway. The large speakers were quite inefficient and had a rating of 2000 watts into a 780.7-volt line. The smaller speakers were mounted on poles facing the grandstands and at a lower elevation than the four large speaker horns.
>
> "In the early 1990s, the 20 speakers were replaced with 10 new speakers. These new speakers, which generally face to the west away from the freeway, are smaller than the original speakers. The new speakers have a rating of 32 watts to a 70.7 volt line and are more efficient than the older units. They also have a tighter control over their sound pattern than the older speakers. That is, they aim the sound more efficiently.
>
> "* * * * *
>
> "The new PA system is aimed towards the grandstands, an entirely different direction than the old system. In this regard, there are a couple of apartment buildings and a mobile home park [to the west]. However, the overall loudness of the PA system has been reduced and there has been no testimony from residents of the apartment buildings or the mobile home park that the new PA system has had a greater impact on their location than the old system." Record 153-54.

[15] The hearings officer concluded that ORS 215.130(5) confers absolute rights regarding (1) the continuation of a nonconforming use; (2) alteration necessary to comply with any lawful requirement for alteration in the use; (3) alteration necessary to comply with state or local health or safety requirements; and (4) maintenance of existing structures in good repair. Record 163. To the extent LC 10.305-25 is inconsistent with the statute on these points, the hearings officer found, the statute preempts the code. *Id.*

Gibson involved an expansion of a nonconforming mobile home park under county regulations that, like LC 10.305-25, essentially prohibited alterations or expansions of a nonconforming use. The county ignored the local code prohibition and approved the expansion, relying on ORS 215.130(5), which at that time stated that "[a]lterations of [a lawful nonconforming use] may be permitted to reasonably continue the use." ORS 215.130(5) (1989). We held that, while other portions of the statute *required* the county to approve certain types of alterations, the above-quoted sentence simply granted the county the *authority* to adopt ordinance provisions allowing approval of an alteration if the alteration is necessary to reasonably continue the use. 17 Or LUBA at 701. Because the county had not exercised that authority and adopted such an ordinance provision, we held, the county had to apply its existing ordinance provisions that did not allow alteration to reasonably continue the use. *Id.*

The hearings officer correctly understood *Gibson* to stand for the proposition that a county may regulate alteration of a nonconforming use or structure more stringently than provided in the statute, and may even prohibit alteration outright, at least where the statute does not require the county to approve certain types of alterations, for example those necessary to comply with health or safety requirements. The Leaches argue, however, that even if *Gibson* is a correct statement of ORS 215.130(5) as it existed in 1989, statutory amendments in 1997 have significantly eroded the county's authority to adopt more stringent regulations governing alterations. According to the Leaches, local regulations that prohibit alterations to a nonconforming use are preempted by the current statute. Therefore, the Leaches argue, the hearings officer should have applied the statute rather than the code in addressing whether or not to verify the lighting system and public address system as part of the nonconforming use.

We need not resolve the Leaches' challenge to the hearings officer's conclusion that LC 10.305-25 is not preempted with respect to regulation of alterations. The question before

the hearings officer was whether the lighting system and public address system could be verified as part of the original nonconforming use or whether those systems were unapproved alterations to the nonconforming use (and, therefore, not verifiable). As relevant here, we do not understand LC 10.305-25 to differ from the statute with respect to verification of nonconforming uses or the related question of what is an alteration and what is not, although the statute and code certainly differ with respect to the consequences that flow from a determination that a nonconforming use or structure has been altered. Under the code, such alterations are prohibited in almost all cases and can never be approved. Under the statute, any alteration can be approved if it does not increase adverse impacts. However, the issues of what structures can be verified and what structural changes constitute an alteration are, as far as we can tell, resolved the same under the code and statute.

Accordingly, we analyze the Leaches' arguments that because the post-1982 changes to the lighting system and public address system do not constitute "alterations," they may be verified as part of the nonconforming use, under the statute.

B. Alterations That Reduce Adverse Impacts

As noted, the Leaches argue that structural changes that reduce adverse impacts are not "alterations" for purposes of the statute, and therefore such changes may be verified as part of the nonconforming use.

We disagree. As the hearings officer correctly noted, the Leaches' argument confuses the questions of what is an "alteration" and what standards must be met to approve an alteration.[16] An alteration that happens to reduce off-site adverse impacts is still an

[16] The hearings officer stated, on this point:

> "The Applicants argue that if a change reduces the scope of the nonconformity then it is not an alteration. I believe that this is a misunderstanding of ORS 215.130(5) & (9). Under this statutory scheme, an 'alteration' of a nonconforming use or structure is permissible if the change has no greater adverse impact to the neighborhood. The change is still an alteration, albeit one that can be allowed. * * *" Record 164.

alteration, albeit one that almost certainly will be approved under ORS 215.130(9). ORS 215.130(9) defines "alteration" to include changes in the use or structure of no greater adverse impact to the neighborhood. By implication, changes that increase adverse impacts, and that cannot be mitigated pursuant to standards adopted under ORS 215.130(10)(c), are prohibited. The Leaches' argument that "alteration" does not include changes resulting in *fewer* adverse impacts reduces the class of "alterations" governed by the statute to those that have precisely the *same* level of adverse impacts as the unaltered use or structure. We see nothing in the statute that supports that narrow view.

The Leaches cite to *Hendgen v. Clackamas County*, 115 Or App 117, 120, 836 P2d 1369 (1992), for the proposition that, short of the point where a nonconforming use is abandoned or discontinued, the intensity of the use may be reduced without the use itself being lost. By analogy, the Leaches argue that a structural alteration to a nonconforming use that reduces adverse impacts should not result in the loss of nonconforming use status for that altered structure. Relatedly, the Leaches argue that, as a matter of public policy, alterations that reduce adverse impacts should be favored, because such alterations may reduce the scope of nonconformity and bring the use closer to compliance. According to the Leaches, requiring owners of nonconforming uses to seek county review and approval for structural alterations that reduce adverse impacts tends to burden and thus disfavor such alterations.

Again, the Leaches confuse the issue of what is an alteration and whether an alteration may be approved under the statute. As discussed earlier in this opinion, the existence and extent of adverse impacts has little direct bearing on the task of verifying the scope or intensity of a nonconforming use, although it has considerable bearing on whether an alteration to a nonconforming use can be approved under the statute. A nonconforming use with no adverse impacts is still a nonconforming use, limited in scope and intensity to the uses and structures that existed on the date the use became nonconforming. Reducing the

adverse impacts of such a use without reducing the use itself does not reduce its nonconformity. Similarly, an alteration that reduces adverse impacts is still an alteration, albeit one that will almost certainly comply with the standards at ORS 215.130(9).

As relevant here, ORS 215.130(5) through (11) recognizes several categories and subcategories of actions with respect to nonconforming uses and structures. The basic divisions are between (1) "alterations"; (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, other casualty or natural disaster. Within the category of "alterations" there are several explicit subcategories, *e.g.*, alterations necessary to comply with state or local health and safety requirements, that are subject to different procedural and substantive standards than other types of alterations. In effect, the Leaches argue for recognition of a category or subcategory not expressed in the statute: structural changes that reduce adverse impacts are neither alterations, nor restoration, nor maintenance in good repair, but rather a separate species of changes that are permitted outright by the statute without county review or approval. It follows, in the Leaches' view, that such changes must be verified as part of the original nonconforming use. However, we decline to read into the statute an implicit category of alterations that are permitted outright without county review and approval. The hearings officer correctly rejected the Leaches' argument that alterations that reduce adverse impacts are something other than alterations under the statute.

C. Maintain Existing Structures in Good Repair

There is no dispute that the lighting system in place in 1982 (lights on 11 25-foot poles around the oval) was completely removed and replaced by a different lighting system (lights on two 80-foot tall poles in the center of the oval, plus five shorter poles west of the track). The hearings officer correctly declined to verify the current lighting system as part of the nonconforming use.

However, the Leaches dispute the hearings officer's finding that the public address system was completely replaced after 1982. The Leaches cite to evidence that the public address system in 1982 consisted of four speakers mounted in trees and 16 speakers mounted on utility poles. In 2002, the speakers in the trees were removed, and six speakers on poles were removed. The majority of the ten remaining speakers were replaced by similar but more efficient speakers. According to the Leaches, the current system consists of ten speakers, most new but a few original, mounted on the original utility poles. The county's response brief argues that the hearings officer's findings with respect to the public address system is supported by substantial evidence, but does not cite us to the evidence relied upon by the hearings officer.

According to the Leaches, the changes to the public address system after 1982 "fall within the realm of repair and maintenance." Petition for Review 21. We agree with the Leaches that the evidence cited to us does not support the hearings officer's finding that the public address system was completely replaced after 1982. We also agree, based on that evidence, that the changes that occurred to the system after 1982 appear to fall within the realm of maintaining existing structures in good repair. As noted, the line between alteration and maintaining existing structures in good repair under the statute is far from clear. We do not intend here to define where that line is located. However, we believe the legislature intended maintenance of "existing structures" in "good repair" to include incremental replacement of structural components, at least where the "existing structure" as a whole is not substantively replaced and the installed components are similar in function to those replaced. As applied here, we do not think the removal of the speakers in the trees, or the removal of six speakers from the poles, has any particular bearing on the question of whether the changes occurring after 1982 constitute maintenance or alteration. The Leaches did not seek verification of those components, and it seems clear that use of those components have now been abandoned or discontinued. Thus, the relevant question is whether replacing the

majority of ten speakers mounted on original utility poles with new but otherwise similar speakers constitutes an "alteration" of the public address system as a whole. Based on the evidence cited to us by the Leaches, we do not see that it does.

Remand is necessary for the hearings officer to revisit his finding that the entire public address system was replaced and to determine whether, based on the evidence in the record, the current public address system may be verified as part of the nonconforming racetrack use.

The fourth assignment of error (Leaches) is sustained, in part. We do not resolve the Leaches' third assignment of error.

CONCLUSION

We determined above that the city's annexation of the subject property does not (1) invalidate or render the hearings officer's decision legally ineffective, or (2) provide a basis for LUBA to dismiss this appeal. The assignments of error sustained above require remand of the hearings officer's decision. We recognize that, given the city's annexation of the subject property, the county may be without jurisdiction to adopt a new decision that responds to our remand. That possibility notwithstanding, a remand to the county is required.

The county's decision is remanded.