BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DON CAMPBELL and DAWN BURROW,
Petitioners

vs.

COLUMBIA COUNTY,
Respondent,

and

MICHAEL WERNER and DENISE WERNER,
Intervenors-Respondents.

LUBA No. 2012-060

FINAL OPINION
AND ORDER

Appeal from Columbia County.

Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf of petitioners.

No appearance by Columbia County.

Damien R. Hall, Lake Oswego, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief were Timothy V. Ramis and Jordan Ramis P.C.

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

AFFIRMED 01/28/2013

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

Petitioners appeal a decision approving repair and replacement of the septic system for a non-conforming mobile home park.

REPLY BRIEF

Petitioners request leave to file a reply brief to address a jurisdictional issue and a waiver issue raised in the response brief. Due to an error on LUBA's part, oral argument was scheduled before the due date to file a reply brief, which was not filed until after the date of oral argument. Intervenors-respondents (intervenors) move to strike the reply brief for reasons that do not require discussion, and for permission to file a sur-response to the reply brief. The reply brief is allowed. Because intervenors did not have an opportunity to respond to the reply brief at oral argument, their sur-response is allowed.

FACTS

A. The 1965 Building Permit

The subject property consists of tax lot 1900, 10.26 acres in size, and tax lot 2400, 5.83 acres in size, which lies to the west of tax lot 1900. In 1984, both parcels were zoned rural residential 5-acre minimum, and that remains the applicable zoning. In 1965, prior to zoning or other land use restrictions, the owners of tax lot 1900 obtained a building permit to construct a mobile home park on tax lot 1900. Pursuant to the 1965 building permit, the owners constructed the mobile home park, serviced by two septic drainfields, known here as Drainfields 1 and 2. Portions of one or both drainfields were constructed near and perhaps beyond the property line with tax lot 2400, which at that time was owned by an adjoining farmer. One of the disputes in this appeal is the date on which portions of Drainfield 2 were constructed on tax lot 2400.

B. The 1966 Building Permit and Drainfield 3

The two septic drainfields failed, causing effluent to surface onto tax lot 2400. In 1966, the county issued a second building permit authorizing a third septic drainfield located on the northern portion of tax lot 1900. In 1967, the park owners acquired tax lot 2400.

C. The 1975 Building Permit for Emergency Repairs

In the spring of 1975, the three septic drainfields failed, overloaded by an unauthorized increase in the number of mobile homes in the park. The county ordered the owner to remove all mobile homes in excess of 33 homes, and in June 1975 granted the owner a building permit to construct emergency repairs to the septic system to serve the authorized 33 homes. One of the disputes in this appeal is whether the portions of Drainfield 2 that currently exist on tax lot 2400 were constructed after June 1975 as part of those emergency repairs, as petitioners contend, or prior to June 1975, as the county found and intervenors contend. A related dispute is whether the statewide planning goals, which became effective in January 1975, have a bearing on whether portions of the septic system on tax lot 2400 were lawfully established for purposes of nonconforming use verification.

D. 1984 Zoning and 1996 Nonconforming Use Verification Decision

In 1984 RR-5 zoning was applied that made the mobile home park a non-conforming use for purposes of county land use regulations. New owners in subsequent years illegally expanded the number of mobile home units in the park from 33 to 46 units. In 1994, the then-owner applied to the county to expand the park to include 60 units. The county conducted a nonconforming use verification evaluation, and in 1996 issued a decision concluding that 33 mobile home units had been lawfully established on tax lot 1900 (hereafter, the 1996 decision). The 1996 decision approved an expansion of that non-conforming use to allow a maximum of 46 mobile home units on tax lot 1900, pursuant to Columbia County Zoning Ordinance (CCZO) 1506. One of the disputes in this appeal is

whether the 1996 decision included within the scope of the verified nonconforming mobile home park use the portions of the septic system constructed earlier on tax lot 2400.

E. The 1996 WPCF Permit

The 1996 decision focused mostly on the nonconforming use verification and the expansion from 33 to 46 units, but did address the park's septic system in two particulars. The decision noted that the park's "septic systems, which were designed for only 33 units, will need to be upgraded to current standards for 46 units." Record 320. Further, a condition of approval required the owner to repair any failing septic systems on the property within 90 days, subject to certification by DEQ. Subsequently, some repairs were made and DEQ issued a Water Pollution Control Facility (WPCF) permit for the septic system. However, the repaired system continued to experience periodic failures. Most of the problems apparently stem from Drainfield 3, constructed in 1966 on the northern portion of tax lot 1900.

F. The 2011 WPCF Permit Modification Application

In 2003, intervenors acquired the mobile home park. In 2011, intervenors applied to DEQ to modify the WPCF permit to allow for extensive septic improvements on both tax lots 1900 and 2400. Among other things, intervenor proposed to add equipment to divert effluent away from Drainfield 3 toward the other two drainfields. A new hydrosplitter was to be installed on tax lot 1900, which allows diverted effluent from Drainfield 3 to be directed through a new pipe to a new drainfield consisting of six new trenches located on tax lot 2400. Record 700. As far as we can tell, the new drainfield is not an extension of, or connected to, the portions of Drainfield 1 or 2 located on tax lot 2400 or any other infrastructure located on tax lot 2400. *See* Record 700 (as built details of construction of new drainfield on tax lot 2400). The new drainfield on tax lot 2400 would replace Drainfield 3's function as one of the park's three primary drainfields. However, Drainfield 3 would not be decommissioned. As proposed, Drainfield 3 will be rested and rehabilitated, and new piping installed to allow

Drainfield 3 to function as a "repair" drainfield in the event of future problems with the three other drainfields or to allow those drainfields to rest.

G. The 2012 LUCS Decision

Under DEQ administrative rules, a modification to a WPCF permit may require a Land Use Compatibility Statement (LUCS) from the county, confirming that the proposed state agency action is compatible with the county's comprehensive plan and land use regulations. OAR 340-018-0050(2)(b). Intervenors applied to the county for a LUCS determination.

On November 3, 2011, a county planner approved the LUCS. The next day, DEQ approved the modified WPCF permit based on the staff-approved LUCS, and allowed intervenors to construct the proposed septic improvements.[1] On November 10, 2011, petitioners filed a local appeal of the staff LUCS decision, and the county board of commissioners conducted appeal proceedings. Petitioners raised a number of objections, including arguments that tax lot 2400 is not within the scope of the lawful nonconforming park use verified in the 1996 decision, and that the septic trenches on tax lot 2400 were constructed in violation of law and thus cannot be verified as part of the lawful nonconforming use.

On August 1, 2012, the commissioners issued the county's final decision approving the LUCS. In relevant part, the commissioners concluded that the new septic improvements, including the new drainfield on tax lot 2400, are compatible with the county's land use regulations, because the 1996 decision verified the entire mobile home park, including the septic trenches previously constructed on tax lot 2400, as a lawful nonconforming use. Alternatively, the county concluded that if the 1996 decision did not verify the previously

[1] OAR 340-018-0050(2)(a)(G) authorizes DEQ to continue processing the permit after it receives a LUCS, even if that LUCS is subsequently appealed, unless ordered otherwise by LUBA or a court of law.

constructed septic trenches on tax lot 2400, those were lawfully established prior to 1984, when county zoning was applied, and prior to 1975, when the statewide planning goals applied, and are therefore verified in the county's current decision as part of the lawful nonconforming park use. Finally, the county applied the criteria at ORS 215.130(5) and (9) and corresponding county code provisions to approve the proposed septic improvements as an "alteration" of the mobile home park nonconforming use.

This appeal followed.

JURISDICTION

In the response brief, intervenors raise several jurisdictional or scope of review issues, as discussed below.

A. ORS 197.015(10)(b)(H)

Intervenors first argue that the challenged LUCS decision is excluded from LUBA's jurisdiction pursuant to ORS 197.015(10)(b)(H), which excludes from the statutory definition of "land use decision" a decision that a proposed state agency action is compatible with a local government's acknowledged comprehensive plan and land use regulations (*i.e.*, a LUCS decision), where that compatibility determination is based on one of three specified determinations. Specifically, ORS 197.015(10)(b)(H) provides that "land use decision" does not include a decision:

> "That a proposed state agency action subject to ORS 197.180 (1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:
>
> "(i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;
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> "(ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or

> "(iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan[.]"

Intervenors contend that the challenged decision falls within the first and second exclusions. With respect to the first exclusion, intervenors argue that the 1996 decision verified the park's septic system as part of the lawful nonconforming park use, the proposed state agency action authorizes repairs and improvements to that septic system, and therefore the 1996 decision represents "a land use decision authorizing a use or activity that encompasses the proposed state agency action." With respect to the second exclusion, intervenors argue that the county found that the proposed septic improvements constitute a "repair" of the existing septic system, and according to intervenors such repairs are allowed without review under the county's land use regulations. For these reasons, intervenors argue, LUBA should conclude that the challenged LUCS decision falls within the first or second exclusion at ORS 197.015(10)(b)(H)(i) or (ii), and dismiss this appeal.

While the challenged decision does address whether the 1996 decision verified the existing septic system, and does conclude that the proposed septic improvements constitute a "repair" of the existing septic system, the decision does far more than conclude that the proposed modification to the WPCF permit is compatible with the county's land use regulations. Among other things, the county's decision (1) verified the existing septic improvements on tax lot 2400 as part of the lawful nonconforming park use, and (2) approved the septic improvements as alterations of the nonconforming mobile home park use. Absent an exclusion, a decision that verifies a nonconforming use or approves an alteration of a nonconforming use is generally a land use decision. However, such a decision does not fit within any of the three exclusions at ORS 197.015(10)(b)(H). The problem occurs when a decision makes multiple determinations, some of which allegedly fall within one of the three exclusions at ORS 197.015(10)(b)(H), and some of which apply

discretionary land use standards to approve the development of land, something that clearly does not fall within the exclusions at ORS 197.015(10)(b)(H).[2] Arguably, the exclusions at ORS 197.015(10)(b)(H) govern only when the local government limits its LUCS determination to one or more of the three exclusions, and does not rely on other bases to conclude that the proposed state agency action is compatible with the local government's plan and land use regulations.

In any case, we disagree with intervenors that neither of the exclusions at ORS 197.015(10)(b)(H)(i) or (ii) apply. With respect to the first exclusion, the county did not purport to find that the 1996 decision "authoriz[ed] a use or activity that encompasses the proposed state agency action," and any such finding would not be supported by the record. The 1996 decision included a condition of approval requiring DEQ certified repairs to the park's septic system, and later in 1996 such repairs were made and certified by DEQ. The 1996 decision did not authorize or require the extensive septic improvements that are the subject of the 2011 WPCF permit modification application, which involve new piping, new tanks, a new treatment system, and construction of a new drainfield, among other things. While the findings supporting the 1996 decision noted the need to upgrade the septic system, the decision did not discuss, much less require an upgrade, and therefore we believe the 1996 decision did not authorize a use that "encompasses" the proposed DEQ action, in the words of ORS 197.015(10)(b)(H)(i).

[2] In a footnote, intervenors argue that if LUBA concludes that the proposed septic improvements do require "review," it follows that such review will be accomplished in a future land use decision, and therefore the *third* exclusion at ORS 197.015(b)(H)(iii) applies. The third exclusion at ORS 197.015(b)(H)(iii) applies when the local government concludes that a proposed agency action is compatible with its land use regulations because the agency action "requires a future land use review." However, ORS 197.015(b)(H)(iii) obviously does not apply when the local government, in adopting the LUCS decision, conducts the required review and issues required land use determinations and approvals. As discussed below, that is essentially what happened in the present case, when the county conducted a nonconforming use verification and approved the proposed septic improvements as "alterations" under ORS 215.130(5) and (9), and pursuant to applicable CCZO 1506 criteria.

With respect to the second exclusion, intervenors argue that the county correctly found that the proposed septic improvements qualify as the "normal maintenance and repair" of a nonconforming use under CCZO 1506.2(A), and that under the county's code such "repairs" are allowed "without review." However, intervenors do not substantiate their argument that "repairs" of a nonconforming use under CCZO 1506.2(A) are allowed "without review" under the county's code, and the county made no such findings. Instead, the county's findings recite that the county chose to process the LUCS request pursuant to ORS 215.416(11), part of the statutory procedures governing approval of discretionary permit decisions. Record 19. That was almost certainly appropriate, given that in making the LUCS determination the county engaged in discretionary determinations regarding verification and alteration of a nonconforming use. ORS 215.130(8) provides that a proposal for verification or alteration of a use under ORS 215.130(5) shall be processed under the provisions of ORS 215.416. *See* n 5, below. Even if under other circumstances the "normal maintenance and repair" of a non-conforming use is allowed "without review" under the county's code, something intervenors have not established, it is clear in the present case that the LUCS required and received significant review in order to determine whether the proposed septic improvements are compatible with the county's land use regulations. Therefore, the exclusion at ORS 197.015(10)(b)(H)(ii) does not apply.

B. Mootness

Intervenors next argue that under DEQ regulations it is possible that no LUCS decision was required in the first place. Further, intervenors contend that because DEQ issued the modified WPCF permit pursuant to the staff-approved LUCS, and the septic improvements are already installed, this appeal is moot because the appeal would be of no practical effect.

DEQ regulations at OAR 341-018-0050(2)(b) provide that renewal or modification of a DEQ permit requires a LUCS if it involves a substantial modification or intensification of

the permitted activity. Intervenors argue that it is possible that no LUCS was required in the first place, because DEQ could conclude that the proposed septic improvements do not involve a substantial modification or intensification of the permitted activity. That may be, but the fact is that DEQ did not waive the requirement to obtain a LUCS, intervenors duly sought a LUCS from the county, the county issued the LUCS, and DEQ relied upon the LUCS to modify the WPCF permit. Intervenors' speculation that DEQ might have concluded that no LUCS was required in the first place does not affect our jurisdiction or scope of review.

Similarly, we disagree with intervenors that DEQ issuance of the modified WPCF and construction of the septic improvements means that LUBA's review of the LUCS decision would be of no practical effect. OAR 341-018-0050(2)(a)(H) provides that if a LUCS decision is successfully appealed after DEQ has issued its permit, DEQ may revoke the permit. If LUBA ultimately reverses or remands the LUCS decision, DEQ presumably has authority to revoke the modified WPCF permit or require modifications to the park's septic system that are compatible with the county's acknowledged comprehensive plan and land use regulations. Therefore, this appeal would have a practical effect on the parties, and is not moot.

FIRST ASSIGNMENT OF ERROR

In four sub-assignments of error, petitioners challenge the county's findings regarding the existing portions of Drainfield 2 that are located on tax lot 2400. In response to issues raised below regarding the legality of the existing septic infrastructure on tax lot 2400, the county concluded (1) that the 1996 decision verified the existing portions of the septic system on tax lot 2400 as part of the lawful nonconforming park use and, alternatively (2) that the existing portions of the septic system on tax lot 2400 were lawfully established prior to 1975 and therefore were verified in the present LUCS decision as part of the lawful nonconforming mobile home park use.

Petitioners contend to the contrary that the 1996 decision was limited only to the mobile home park and the portions of the septic system located on tax lot 1900, and that the 1996 decision did not include tax lot 2400 or the portions of the septic system located on tax lot 2400 within the scope of the verified nonconforming use. With respect to verification, petitioners argue that the septic trenches on tax lot 2400 were constructed after January 1975, after adoption of the Statewide Planning Goals and in violation of those goals, and the trenches were thus not "lawfully established" and therefore should not have been verified in the present LUCS decision as part of the lawful nonconforming park use.

A. Alteration of the Nonconforming Use to Expand Onto Tax Lot 2400

We first address a potentially significant threshold argument that petitioners briefly state in the first sub-assignment of error. Petitioners argue that the county "violated the principle of non-conforming use law that a non-conforming use is not allowed to expand onto a new lot or parcel of land," citing *Komning v. Grant County*, 20 Or LUBA 355 (1990), and *Portland City Temple, Inc. v. Clackamas County*, 11 Or LUBA 70 (1984). Petition for Review 21. If petitioners are correct on this point, then the proposed new drainfield cannot be extended from tax lot 1900 onto tax lot 2400, even as an "alteration" approved under ORS 215.130(9), and even if the county is correct that the previously constructed septic trenches on tax lot 2400 are part of the lawful non-conforming park use.

However, *Komning* and *Portland City Temple, Inc.* do not support such a "principle," at least in those broad terms. Notably, both cases were decided under a version of ORS 215.130(5) providing that "[a]lteration of any such [nonconforming] use may be permitted to reasonably continue the use." The "reasonably continue the use" limitation is absent from the current version of ORS 215.130(5), which simply states that "[a]lteration of any such use may be permitted subject to subsection (9) of this section."

In addition, the circumstances in both cases are distinguishable. *Portland City Temple, Inc.* involved a nonconforming dwelling that was physically moved to a new parcel

and thereby lost its claim to be treated as a nonconforming use. We fail to see how the facts or reasoning in that case support a categorical prohibition on obtaining county approval to expand a nonconforming use across property boundaries to an adjoining property.

Komning comes closer. *Komning* involved a state park established prior to the adoption of EFU zoning, after which the park use required conditional use approval. The state park sought to construct a caretaker dwelling on an adjoining parcel that had been acquired after the adoption of EFU zoning and on which the park use had never existed. LUBA concluded in relevant part that the dwelling required conditional use approval, and could not be approved as an alteration of the adjoining nonconforming park use under *former* ORS 215.130(5), because the dwelling did not "reasonably continue" the park use. 20 Or LUBA at 362. We went on to state that "[w]e do not believe that an 'alteration' of a lawful nonconforming use includes expansion of the lawful nonconforming use to include an adjacent piece of property not already subject to such nonconforming use, as is proposed in this case." *Id.* (footnote omitted). Presumably, that is the language that petitioners rely upon in the present case. However, that broad conclusion was *dicta*, since we had just concluded that the proposed dwelling did not qualify under the "reasonably continue" limitation. Further, the quoted conclusion apparently reflects an application of the "reasonably continue" limitation in *former* ORS 215.130(5). There is no such limitation in the present statute, and no language in ORS 215.130 or elsewhere cited to us that can be read to prohibit counties from approving the alteration of a lawful nonconforming use to allow that use to be expanded onto adjoining property, as long as the alteration otherwise complies with ORS 215.130(9). Accordingly, we disagree with petitioners that the county is categorically prohibited from approving an alteration that expands the nonconforming use on tax lot 1900 to the tax lot 2400.

B. 1996 Decision

Although petitioners never clearly articulate why, they take the position that the LUCS decision is properly issued in the affirmative only if the county establishes that tax lot 2400 is legally part of the lawful nonconforming mobile home park use. Petitioners then argue that the only way tax lot 2400 can be part of the lawful nonconforming park use is if the existing septic trenches on tax lot 2400 were either (1) constructed prior to 1975 or (2) constructed after 1975 pursuant to a decision that demonstrated compliance with the statewide planning goals. With the issues thus framed, petitioners challenge in the first assignment of error the county's findings and conclusions regarding the existing septic trenches on tax lot 2400.

We assume without deciding for purposes of the first assignment of error that petitioners are correct that the LUCS decision is properly issued in the affirmative only if the existing septic trenches on tax lot 2400 are part of the lawful nonconforming mobile home park use verified in the 1996 decision.[3]

Under the first sub-assignment of error, petitioners argue that the 1996 decision did not verify any nonconforming use of tax lot 2400, and in fact the 1996 decision limited the scope of the lawful nonconforming park use to the elements of the mobile home park located

[3] That assumption is open to question. It is not clear to us why the nonconforming use status of the *existing* septic trenches located on tax lot 2400 must be resolved in order to determine in the challenged LUCS decision that the *proposed* septic improvements on tax lots 1900 and 2400 are compatible with the county's land use regulations. That is because, as far as we can tell, the proposed septic improvements do not affect or change the existing septic trenches on tax lot 2400. As noted above, the most significant change involving tax lot 2400 is construction of a new drainfield to replace Drainfield 3. That new drainfield is not an extension of, or connected to, the portions of Drainfield 1 or 2 located on tax lot 2400 or any other infrastructure located on tax lot 2400. *See* Record 700 (as built details of construction of new drainfield on tax lot 2400). Petitioners appear to presume that the existence of an unverified or illegal component of an otherwise lawful verified nonconforming use precludes the county from approving an otherwise lawful alteration of a lawful component of the verified nonconforming use, for example, constructing a new drainfield to replace Drainfield 3. Arguably, such preclusion would apply only if the county had approved an expansion or alteration of the unverified or illegal component, *e.g.*, an expansion of the septic trenches of Drainfield 2 located on tax lot 2400. Petitioners cite no authority on this point, and we are aware of none. Because the parties do not brief this issue, we consider it no further.

on tax lot 1900. According to petitioners, the 1996 decision conclusively resolved the issue of whether tax lot 2400 is part of the nonconforming use in the negative, and the county cannot revisit that issue in the present decision.

Intervenors argue, to the contrary, that the 1996 decision verified the nonconforming mobile home park use, and that verification included all elements of the septic system that serves the mobile home park, including the portions of the existing septic system that are located on tax lot 2400. Intervenors contend that 1996 decision cannot be challenged in the present appeal, and petitioners' arguments under the first sub-assignment of error are an impermissible collateral attack on the 1996 decision.

Assuming for the moment that petitioners are correct that the 1996 decision implicitly concluded that the existing septic trenches located on tax lot 2400 did *not* qualify as part of the lawful mobile home park nonconforming use, we disagree with petitioners that the 1996 decision necessarily precludes the county from, in a later decision, reaching a different conclusion based on a different application. *Lawrence v. Clackamas County*, 40 Or LUBA 507, 519-20 (2001), *aff'd* 180 Or App 495, 43 P3d 1192 (2002); *Nelson v. Clackamas County*, 19 Or LUBA 131 (1990).[4]

In any case, we disagree with petitioners' premise that the 1996 decision implicitly concluded that the existing trenches on tax lot 2400 are not part of the lawful nonconforming use. The focus of the 1996 decision was on the proposed expansion of the nonconforming

[4] In *Lawrence*, LUBA held that a prior nonconforming use verification decision did not preclude the applicant from seeking a new verification decision, under a new legal standard. LUBA discussed the requirements for issue preclusion articulated in *Nelson v. Emerald People's Utility Dist*, 318 Or 99, 104, 862 P2d 1293 (1993), including the fifth requirement, that the prior proceeding was the type of proceeding to which a court will give preclusive effect. We concluded in *Lawrence*, and in our earlier *Nelson* decision, that land use proceedings are not the type of proceeding to which courts give preclusive effect, at least against an applicant seeking a new decision based on a new application. The Court of Appeals affirmed our decision in *Lawrence* on narrower grounds, concluding that other *Nelson* factors militated against issue preclusion. In the present case, petitioner does not address the five *Nelson* factors or make any attempt to demonstrate that issue preclusion should bar the county or intervenors from verifying the nonconforming use status of the portion of Drainfield 2 on tax lot 2400.

mobile home park use to 46 mobile homes, and there is no language in the 1996 decision suggesting that the county considered the nonconforming use status of the existing trenches located on tax lot 2400 separately from the existing trenches of located on tax lot 1900, or separately from the mobile home park use in general, and made a conscious decision to reject verification of the trenches located on tax lot 2400. On the contrary, the staff report supporting the 1996 decision, which was adopted as findings by the board of commissioners, notes that "[t]he septic systems, which were designed for only 33 units, will need to be upgraded to current standards for 46 units." Record 320. That does not suggest that the county intended to verify only the portion of the septic systems located on tax lot 1900. If anything, it suggests that the county intended to verify all components of the park's existing septic systems, which would include the components located on tax lot 2400.

Petitioners do not dispute that the 1996 decision verified the nonconforming use status of all septic trenches on tax lot 1900, including the trenches of Drainfield 2 located on tax lot 1900. Drainfield 2 is a single drainfield, comprised of a series of connected trenches, some of which are located on tax lot 1900 and some of which are located on tax lot 2400. Nothing cited to us in the 1996 decision suggests that the county intended to verify only a portion of Drainfield 2. The most obvious inference is that in verifying the mobile home park and its supporting septic systems, the county intended to verify the entire supporting septic system, including all septic trenches in those systems. The county so concluded, and we agree. Petitioners' arguments to the contrary are in essence collateral attacks on the 1996 decision, which cannot be challenged in this appeal.

To summarize, the 1996 decision does not, as petitioners contend, preclude the county from approving septic improvements on tax lot 2400. On the contrary, the 1996 decision required repairs to the existing septic system, and cited the need for an upgrade to the system. Nothing cited to us in the 1996 decision precludes the county from approving tax lot 2400 as the location for some components of those upgrades.

The first sub-assignment of error is denied. Our resolution of the first subassignment of error makes it unnecessary to resolve petitioners' remaining subassignments of error under the first assignment of error, because those subassignments of error all challenge alternative bases for the county's conclusion that the existing drainfield improvements on tax lot 2400 are part of the lawful nonconforming mobile home park use.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The second assignment of error alleges that the county failed to correctly identify the approval standards and laws that would have applied at the time the trenches on tax lot 2400 were constructed. As explained above, the 1996 decision, which was not appealed, verified that the existing improvements on tax lot 2400 are a legal nonconforming use, and that 1996 decision cannot be collaterally challenged in this appeal. Resolving the second assignment of error would provide no basis for reversal or remand of the county's LUCS decision and for that reason is denied.

THIRD AND FIFTH ASSIGNMENTS OF ERROR

The second sentence of ORS 215.130(5) provides that "alteration" of a lawful nonconforming use may be permitted, subject to ORS 215.130(9).[5] The latter subsection

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[5] 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. * * *
>
> "* * * * *
>
> "(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, * * *

defines "alteration" to include changes in the use or structures of no greater adverse impact on the neighborhood. *See* n 5. In this opinion, we refer to the class of alterations described in the second sentence of ORS 215.130(5) as "general" alterations.

The third and fourth sentences of ORS 215.130(5) limit the ability of local governments to deny or condition alterations of a lawful nonconforming use in three specific circumstances: when the alteration is (1) "necessary to comply with any lawful requirement for alteration in the use," (2) "necessary to comply with state or local health or safety requirements," or (3) necessary "to maintain in good repair the existing structures associated with the use." *Id.* In this opinion, we refer to these three circumstances or types of alterations as "lawful requirement," "health and safety," and "repair" alterations, respectively.

In the challenged decision, the county applied ORS 215.130(5) and ORS 215.130(9) and the CCZO 1506 standards implementing those statutes, and approved the proposed septic improvements as an "alteration" of the lawful nonconforming mobile home park use.[6] The

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> 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).
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> "(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."

[6] The county adopted or incorporated the following relevant findings:

> "As explained in the Supplemental Staff Report dated March 5, 2012, ORS 215.130(5) protects nonconforming uses and requires approval of alterations to nonconforming uses that are necessary to comply with state or local health or safety requirements, as long as those alterations are of no greater adverse impact to the neighborhood. The Board finds that the modifications to the septic system here are repairs. Such repairs are alterations that are necessary to comply with state health and safety requirements, namely DEQ wastewater treatment regulations. A failing septic system is a threat to public health, and as DEQ stated in its letter dated February 17, 2012, that the repairs are necessary to address 'a public health hazard.'

findings generally characterize the proposed improvements as "repairs" necessary to satisfy health and safety requirements, and thus appear to approve the improvements as lawful requirement, health and safety, or repair type of alteration. However, the findings also discuss and apply the "no greater adverse impact to the neighborhood" test at ORS 215.130(9), and conclude that the proposed septic improvements will cause no greater adverse impact to the neighborhood. Petitioners do not challenge the county's conclusion

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> "The Board also finds that the repaired system will create no greater adverse impact to the neighborhood. Rather, the repairs will mitigate the effects of the failing system. To ensure that the repaired system creates no greater adverse impact, the Board's approval contains conditions to limit the use of the north drainfield and to cap the amount of wastewater flow or pollutant concentration.
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> "The repair and maintenance nature of the proposed activities also satisfies the County code pertaining to nonconforming use maintenance. Under CCZO Section 1605.2(A), normal maintenance and repairs are allowed [quoting code]. Here, * * * the repairs are acceptable if they are normal maintenance of a use. It is a normal part of septic maintenance to both construct repair drainfields, and to periodically install more technologically advanced equipment within a system. Repairs such as these comprise the proposed activity. The activity thus satisfies state statutes for alterations of a nonconforming use. Highly pertinent, too, is that the activity will not result in expanding the number of homesites to be served by the apparatus. Thus, the Board concludes the repairs comply with the CCZO rules for maintaining nonconforming uses." Record 13-14.
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> "The modifications described in the [February 15, 2012] staff report and the recent adjustments to the approved plan * * * are 'alterations' under ORS 215.130(9). They are physical improvements, and for the reasons set forth in Finding 7 of the staff report and the written comments from DEQ, they will have no greater adverse impact to the surrounding area. They neither authorize expansion of the number of units in the mobile home park nor authorize any increase in wastewater flow or pollutant concentration limits. Rather, the modifications and subsequent adjustments will ensure the best treatment of the wastewater from the existing mobile home park." Record 65-66.
>
> "The modification and subsequent adjustments are repairs that are necessary to comply with state health and safety requirements and to maintain in good repair the existing structures associated with the mobile home park use. According to DEQ, 'construction was required' to replace the north drainfield, which 'was failing and creating a public health hazard.' Moreover, as [DEQ] explained, 'one of the considerations for construction is to set aside sufficient drainfield area for future use as a repair drainfield should the one being used fail.' * * * Based on DEQ's description of the purpose for the originally approved modifications and subsequent adjustments, staff finds that those modifications and adjustments are necessary to comply with state health and safety requirements. * * *" Record 66.

that the proposed septic improvements will cause no greater adverse impact to the neighborhood.

Instead, in the third and fifth assignments of error, petitioners challenge the county's conclusions that the proposed septic improvements fit within the categories of alterations described in the third and fourth sentences of ORS 215.130(5) and implementing CCZO provisions, that is, "lawful requirement" alterations, "health and safety" alterations, and "repair" alterations.[7] As noted, ORS 215.130(5) limits the county's ability to deny or condition these specific types of alterations. We understand petitioners to argue that, because the proposed improvements do not qualify as any of the three specific types of alterations described in the third and fourth sentences of ORS 215.130(5), the septic improvements can be approved only as a "general" alteration under the second sentence of ORS 215.130(5), subject to the "no greater adverse impact" standard at ORS 215.130(9).[8]

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[7] In the response brief, intervenors argue that petitioners failed to adequately preserve below the issues regarding ORS 215.130(5) and CCZO 1506 raised in these assignments of error, and those issues are waived under ORS 197.763(1). Petitioners reply by quoting portions of their testimony below that cite ORS 215.130(5) and discuss whether the proposed improvements constitute an expansion or repair. Intervenors dispute that the cited testimony raises the issues advanced in the third and fifth assignments of error with sufficient specificity. We agree with petitioners that the issues were adequately raised below regarding the correct characterization of the proposed septic improvements under ORS 215.130(5) and CCZO 1506. As discussed below, the county's findings address that issue at some length.

[8] Petitioners' arguments seem to presume that the county did *not* approve the improvements as a "general" alteration subject to ORS 215.130(9). This presumption is puzzling, because the county's findings clearly apply the "no greater adverse impact" test embodied in ORS 215.130(9), which is the only substantive statutory criterion for a general alteration. *See* n 5. In addition, the county imposed a condition of approval regarding the septic improvements, which is something the county is not supposed to do for alterations that are necessary to comply with state or local health or safety requirements, or to maintain existing structures in good repair, but which is permissible for a "general" alteration. Moreover, the county applied discretionary code standards at CCZO 1506.5 that arguably apply only to "general" alterations. Record 27-29. Thus, despite findings that characterize the proposed improvements as one of the three specific types of alterations described in the third and fourth sentences of ORS 215.130(5), the county in fact seemed to treat the proposal as one for a "general" alteration, subject to ORS 215.130(9) and corresponding code provisions. If that is the case, any error the county might have committed in characterizing the proposed improvements as one of the three specific types of alterations described in the third and fourth sentences of ORS 215.130(5) is arguably harmless error, given that petitioners do not dispute that the standards applicable to a "general" alteration are satisfied.

However, for purposes of this opinion we will assume without deciding that the challenged decision did *not* approve the septic improvements as a "general" alteration under the second sentence of ORS 215.130(5), and

Petitioners may be correct that at least some of the proposed septic improvements on tax lots 1900 and 2400 exceed the permissible scope of an alteration that simply "maintain[s] in good repair the existing structures associated with the use," or "[n]ormal [m]aintenance and [r]epairs" in the phrasing of CCZO 1506.2. Adding a fourth drainfield to replace Drainfield 3, yet keeping Drainfield 3 in commission as an extra or "repair" drainfield, arguably does more than maintain an existing structure in good repair.

However, we disagree with petitioners that the proposed septic improvements do not qualify as either (1) "necessary to comply with [a] lawful requirement for alteration in the use" or (2) "necessary to comply with state or local health or safety requirements." There is no dispute that DEQ required intervenors to comply with state health requirements and take steps to fix the problems with failing Drainfield 3, which DEQ found to constitute a health hazard. While DEQ did not mandate the specific improvements proposed in the 2011 WPCF permit modification application, we do not believe these two types of alterations require that a state agency must mandate a specific design or improvement.

Petitioners cite *Cyrus v. Deschutes County*, 194 Or App 716, 96 P3d 858 (2004), for the proposition that the scope of the "lawful requirement" alteration is narrow, and where the applicant has some choice in determining how the requirement is met the applicant's choice is outside the scope of the "lawful requirement" alteration. However, petitioners read *Cyrus* much too broadly. In *Cyrus* the Court of Appeals held that a general statutory requirement for electric utilities to provide adequate service is not a "lawful requirement" mandating that the applicant, an electric utility, upgrade an existing nonconforming use transmission line to a higher voltage line, and the upgrade therefore did not fall within the category of an alteration "necessary to comply with [a] lawful requirement for alteration in the use" for purposes of the third sentence of ORS 215.130(5). Notably, the Court discussed legislative

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that it is legally significant whether the proposed improvements qualify as one of the three specific types of alterations described in the third and fourth sentences of ORS 215.130(5).

history indicating that the legislature intended the "lawful requirement" language to prevent local governments from forcing the abandonment of the use when a governmental agency requires some alteration. *Id.* at 724. In the present case, petitioners argue that one possible way to fix the problem created by the failing Drainfield 3 is to simply abandon part of the verified nonconforming use and reduce the number of dwellings in the park to a level that the existing septic system can accommodate. Because the partial abandonment option is available, petitioners argue, there is no "lawful requirement" to fix the failing septic system.

However, the legislative history cited in *Cyrus* does not support that proposition, and we do not believe that the possibility of partial abandonment of the nonconforming use—which is always a possibility—precludes a "lawful requirement" alteration. Intervenors in the present case were faced with the threat of DEQ enforcement, and DEQ unequivocally required them to fix the failing septic system and the associated health hazard on the property. That is sufficient to constitute a "lawful requirement" for the alteration. Further, given the undisputed health hazard aspect of the problem, it is sufficient to constitute an alteration "necessary to comply with state or local health or safety requirements." The fact that intervenors had some choice in how the required septic improvements were designed and located does not mean that those improvements do not qualify as either a "lawful requirement" or "health and safety" alteration.

The other case petitioners cite in support of their proposition is also distinguishable. In *Michael v. Clackamas County*, 2 Or LUBA 285 (1981), a regulatory agency ordered the owner of a nonconforming mill to provide handwashing facilities near the mill building's toilets. The owner constructed a new two-story building with handwashing facilities, a lunchroom, and offices, and after construction the owner sought approval of the building as an alteration of the nonconforming mill use. The county rejected the new building as a "general" alteration under the "no greater adverse impact" code language implementing ORS 215.130(9). Not surprisingly, the county also rejected the owner's claim that the new

building was authorized as a "lawful requirement" alteration, because the new building, with lunchroom and offices, far exceeded the regulatory agency's requirement for handwashing facilities, which could have been satisfied with a simple sink. LUBA affirmed. By contrast, in the present case, DEQ reviewed and approved under its permitting requirements *all* components of the proposed septic improvements.

In sum, petitioners have not demonstrated that the county erred in approving the septic improvements on tax lots 1900 and 2400 as either a "lawful requirement" alteration or a "health and safety" alteration.

The third and fifth assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

As noted, the 1996 decision authorized an additional 13 mobile home dwelling units at the mobile home park, pursuant to CCZO 1506.9, which provides that a nonconforming use may be "expanded" one time to a maximum of 40 percent of the "square footage of the ground level of the existing structure." The 1996 decision apparently evaluated the expansion in terms of mobile home park spaces instead of square footage. Condition 5 of the 1996 decision states that "[n]o further expansion of the mobile home park may be approved under these sections of the Zoning Ordinance" and "no further development" of tax lot 1900 "may occur under the present zoning of the parcels." Supplemental Record 300.

Under the fourth assignment of error, petitioners argue that the "no further expansion" and "no further development" language of Condition 5 must be understood as a complete prohibition of any further construction in the mobile home park. According to petitioners, the approved septic improvements on tax lots 1900 and 2400 constitute "further expansion" and "further development" prohibited by Condition 5.

Intervenors respond, and we agree, that Condition 5 is not properly understood to prohibit the proposed septic improvements on tax lots 1900 and 2400. The focus of the 1996 decision was rejecting the applicant's request for 60 mobile home units, but allowing the

expansion of the mobile home park from the previously authorized 33 units to the existing 46 units pursuant to CCZO 1506.9. In this context, the "further" expansion or development referenced in Condition 5 is most reasonably understood to refer to expansion or development of additional mobile home units. That is consistent with CCZO 1506.9, which allows a one-time expansion of a non-conforming use not to exceed 40 percent of the "square footage on the ground level of the existing structure[.]" CCZO 1506.9 is concerned with expansions of structures, and Condition 5 was presumably imposed to implement the 40 percent limitation. Further, as noted above, the findings to the 1996 decision contemplate that the existing septic system will need to be upgraded to accommodate the authorized 46 units. Condition 3 of the 1996 decision requires that the septic system must be repaired and certified by DEQ. Read in this context, Condition 5 cannot be reasonably understood to prohibit the DEQ-required improvements to the park's septic system.

The fourth assignment of error is denied.

The county's decision is affirmed.