

**36.2 Nonconforming Uses – Definition.** An asphalt batch plant that received a conditional use permit under the conditional use permit criteria that applied at the time the plant was approved is not a nonconforming use, and the local code provisions that govern discontinuance of a nonconforming use do not apply to an application that seeks a comprehensive plan text and zoning map amendment to add additional property that is adjacent to the conditional use to the county’s inventory of significant aggregate sites. *Pioneer Asphalt, Inc. v. Umatilla County*, 71 Or LUBA 65 (2015).

**36.2 Nonconforming Uses – Definition.** Where a landfill is a permitted use in a Public Works zone subject to site design review, the portion of an existing landfill that was approved prior to the requirement for site design review is not a non-conforming use simply because it did not receive site design review, and therefore a proposed expansion of that landfill does not require review and approval as an alteration to a non-conforming use. *McPhillips Farm Inc. v. Yamhill County*, 66 Or LUBA 355 (2012).

**36.2 Nonconforming Uses – Definition.** A use that was established in contravention of any existing land use laws and therefore did not exist “lawfully” at the time the law changed is not saved by ORS 215.130(5), simply because it *existed* when the zoning or other regulation was first enacted or later amended. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** ORS 215.130(10)(a) authorizes counties to adopt a procedure whereby an applicant may limit its proof of the “existence, continuity, nature and extent” of an alleged nonconforming use to the 10 years that precede the application. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** The rebuttable presumption that is authorized by ORS 215.130(10)(a) applies to both parts of the inquiry that is necessary under ORS 215.130(5) to verify a nonconforming use, *i.e.* that the use existed on that date and that its existence was lawful. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** Because ORS 215.130(11) does not unambiguously prohibit a county from requiring proof that a use was a lawful use when it came into existence more than 20 years ago or that it existed when the land use laws changed to prohibit the use, it is appropriate to consider legislative history of that statute. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** The legislative history of ORS 215.130(11) makes clear that the statute operates to apply a 20-year proof limitation to any requirement of proof of existence as an element of continuity but it does not apply the 20-proof limitation to any requirement of proof of existence, as an element of lawfulness at the time the use became nonconforming. *Aguilar v. Washington County*, 49 Or LUBA 364 (2005).

**36.2 Nonconforming Uses – Definition.** A county’s determination that the nature and extent of a nonconforming dog kennel is a function of the kennel’s capacity rather than

its actual use is inconsistent with ORS 215.130(5), which defines the nature of the nonconforming use as a matter of how the structure is used, not the nature of the structure itself. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

**36.2 Nonconforming Uses – Definition.** The nature and scope of a nonconforming use is governed only by the *actual* use of the subject property when the use became nonconforming, not by the use that *would have been authorized* under applicable regulations. *Spurgin v. Josephine County*, 28 Or LUBA 383 (1994).

**36.2 Nonconforming Uses – Definition.** Where the county code defines "nonconforming use" to mean a use that was legally established prior to adoption of any code provision "with which the \* \* \* use does not comply," the county may properly determine that a mobile home is no longer a nonconforming use because its owners obtained approval of a temporary permit, making use of the mobile home as a residence lawful under county zoning regulations. *Morris v. Clackamas County*, 27 Or LUBA 438 (1994).

**36.2 Nonconforming Uses – Definition.** Where a county code does not allow new dwellings as a permitted use in a particular zone, but allows "maintenance, repair or replacement of existing dwellings" as a permitted use in that zone, lawfully established existing dwellings are not nonconforming uses in that zone. *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993).

**36.2 Nonconforming Uses – Definition.** ORS 215.130(5) and (9) provide a limited authorization for counties to approve the expansion of nonconforming uses which, by definition, are contrary to provisions of county plans and land use regulations and, therefore, must be construed narrowly. *Bertea/Aviation, Inc. v. Benton County*, 22 Or LUBA 424 (1991).

**36.2 Nonconforming Uses – Definition.** A use is "lawful," in the sense that term is used in ORS 215.130(5), and therefore eligible to be considered a nonconforming use when zoning or land use regulations change, only if it complies with applicable zoning and other land use regulations on the date they are changed. Where zoning and land use regulations do not themselves require that a structure be maintained in conformance with all building and fire code requirements, that a building may not have conformed in all respects with the building code and fire code does not mean the use is "unlawful," and therefore ineligible for the protections accorded by ORS 215.130(5). *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**36.2 Nonconforming Uses – Definition.** That a nonconforming use is inconsistent with comprehensive plan provisions that did not exist or apply on the date the use became nonconforming provides no basis for reversal or remand, because ORS 215.130(5) provides the use may continue notwithstanding such inconsistency. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**36.2 Nonconforming Uses – Definition.** Under *Polk County v. Martin*, 292 Or 69, 636 P2d 952 (1981), a sporadic and intermittent use may qualify as a nonconforming use and

may continue to operate as a sporadic and intermittent use. *Coonse v. Crook County*, 22 Or LUBA 138 (1991).

**36.2 Nonconforming Uses – Definition.** A use that existed lawfully prior to enactment of restrictive regulations, and which may therefore be continued after such regulations become effective, although it does not comply with the applicable restrictions, is termed a nonconforming use. *Schmaltz v. City of Hood River*, 22 Or LUBA 115 (1991).

**36.2 Nonconforming Uses – Definition.** A nonconforming use is by definition a use that is contrary to provisions of a local government's comprehensive plan and land use regulations. *Scott v. Josephine County*, 22 Or LUBA 82 (1991).

**36.2 Nonconforming Uses – Definition.** The nature and extent of the lawful use in existence at the time the use became nonconforming are the reference points for determining the scope of permissible continued use. The proponent of a nonconforming use bears the burden of establishing whether the nonconforming use was lawfully established. *Sabin v. Clackamas County*, 20 Or LUBA 23 (1990).