

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. An applicant’s failure to appeal a partition approval does not bar that applicant from later filing an application to modify a condition of partition approval, based on changed factual circumstances. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where a petitioner’s broad interpretation of a code provision requiring protection of trees was rejected in an earlier LUBA appeal and petitioner’s challenge to the adequacy of a proposal for cutting and saving trees was rejected in that earlier appeal, those issues are resolved and may not be raised again in a subsequent appeal of the local government’s decision on remand. However, where some trees that were to be saved in the prior proposal are now to be removed and some trees that were to be cut in the proposal are now to be saved, the issue of the adequacy of the new proposal was not resolved in the prior appeal and may be raised in the second appeal to LUBA. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where LUBA determines that a city acts within its interpretive discretion in interpreting a code provision that requires that 20 percent of a development site be landscaped to allow open space to be left in its natural state to count toward the 20 percent landscaping requirement, that interpretation may not be challenged in a subsequent appeal of a modified version of the proposal that led to the first appeal. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A Land Conservation and Development Commission (LCDC) periodic review order that merely makes assumptions about a local ordinance, but does not attempt to resolve an ambiguity, is not identical to an issue before LUBA regarding the proper interpretation of that ambiguous ordinance, and issue preclusion does not bar LUBA’s consideration of the interpretive issue. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A minor dispute, which was withdrawn before a decision was made, regarding the zoning of 2.2 acres in a Land Conservation and Development Commission (LCDC) periodic review order concerning the rural community designation of a large interchange area is not essential to a final decision on the merits in the order. Therefore, issue preclusion does not bar LUBA’s consideration of the issue. *Flying J. Inc. v. Marion County*, 49 Or LUBA 28 (2005).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. When an earlier decision was remanded by LUBA based on issues regarding the safety of a proposed road design, and the local government specifically limits the remand proceedings to the issues remanded by LUBA, petitioners may not challenge the proposed road’s location under the local government’s transportation

system plan when that locational issue could have been, but was not raised, in the earlier appeal. *McCulloh v. City of Jacksonville*, 49 Or LUBA 345 (2005).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where LUBA affirms a county’s findings that it may authorize repairs and replacements to existing structures without reviewing the nonconforming use status of those structures, but remands the decision for other reasons, on remand petitioners cannot raise issues regarding the nonconforming use status of structures that were resolved in LUBA’s prior decision. *Friends of the Metolius v. Jefferson County*, 48 Or LUBA 466 (2005).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under the *Beck v. City of Tillamook* waiver principle, issues that have been conclusively resolved at a prior point in a single continuous land use proceeding are not reviewable for a second time by LUBA or an appellate court at a later point in that proceeding. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. When LUBA remands a decision, the issues before the local government include any new issues that are presented as a result of the remand, but any old issues that were conclusively resolved in earlier proceedings are not before the local government. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the question of whether a property qualifies as agricultural land, so that it cannot be considered for a comprehensive plan Rural Use map designation, is governed by the same legal standard that governed a prior local government finding in an earlier decision on the same application that the subject property does not qualify as agricultural land subject to Goal 3, the same issue is presented. If that issue was conclusively resolved in the earlier decision, a different resolution of that issue in the later decision is barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the question of whether a property qualifies as forest land so that it may not be considered for a comprehensive plan Rural Use map designation is not governed by the same legal standard that governed the county’s finding in a prior decision on the same application that the subject property does not qualify as forest land subject to Goal 4, the same issue is not presented. Therefore, even if the Goal 4 issue was conclusively resolved in the earlier decision, a different decision concerning whether the property qualifies as forest land in the second decision is not barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the issue of whether a property qualified as agricultural land under Goal 3 or forest land under Goal 4 in a local government’s first decision on an application

was legally irrelevant, that issue was not dispositively resolved in the first decision and a local government's different conclusion about whether land qualifies as agricultural land or forest land in a second decision on the same application is not barred by the *Beck v. City of Tillamook* waiver principle. *Rutigliano v. Jackson County*, 47 Or LUBA 470 (2004).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Generally, issues that were conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where a final discretionary permit approval resolved issues regarding how “lot area” is determined for purposes of calculating the number of parking spaces for proposed development, those issues cannot be revisited and applied as a basis to deny a subsequent parking lot application that is consistent with the earlier final discretionary decision. Such a denial is an impermissible collateral attack on the earlier decision. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489 (2004).