

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. LUBA will reject arguments that a proposed field sports park allowed as a conditional use in an acknowledged rural residential zone is an urban use that requires taking an exception to Goal 14, where the issue of whether the facility is an urban use was resolved adversely to petitioner in an earlier phase of the appeal, and not challenged further, and thus that issue is a resolved issue under the “law of the case” doctrine. In any case, such an argument is an impermissible attack on the acknowledged status of the rural residential zone. *Jones v. Clackamas County*, LUBA No 2021-040 (Nov 29, 2021).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where on remand a city accepts new evidence and adopts new findings regarding a planned unit development (PUD) approval standard, the issue of whether the new findings conflict with re-adopted but unchanged findings addressing other standards was not, and could not have been, resolved in the appeal of the city’s initial PUD approval, and thus the “law of the case” principle under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not preclude a petitioner from raising that issue on appeal of the remand decision. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A petitioner may challenge new findings adopted on remand, but is precluded by the “law of the case” principle in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), from challenging long-settled interpretations of approval standards that are embodied in unchanged, re-adopted findings from the initial proceeding. *Conte v. City of Eugene*, 77 Or LUBA 69 (2018).

28.6.3 LUBA Scope of Review - Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. A county decision interpreting a condition of approval to be satisfied by an agreement between the county and only one of two owners of a common tract is not a “collateral attack” on a prior LUBA decision, in which LUBA assumed, but did not decide, that the same condition of approval would be satisfied by an agreement between the two current owners of the common tract. *Kuhn v. Deschutes County*, 74 Or LUBA 190 (2016).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. The “law of the case” doctrine described in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), does not apply to bar consideration of an issue raised on appeal of a decision on remand, if the issue is substantially the same as an issue raised in an unresolved assignment of error in the appeal of the original decision. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Issue preclusion bars relitigation of an issue in subsequent proceedings when the issue has been determined by a valid and final determination in a prior proceeding, but issue preclusion only applies if all of the five requirements set out in *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993) are met. Those five factors are as follows: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in

privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Widgi Creek Homeowners Association v. Deschutes County*, 71 Or LUBA 321 (2015).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. In an appeal of a decision modifying a permit approval, a petitioner’s arguments that prior unappealed decisions extending that permit approval were wrongly decided are viewed as collateral attacks on decisions that were not before the local government in processing the modification, and are not before LUBA on appeal of that modification decision. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Even if prior permit extension decisions are not land use decisions that could have been appealed to LUBA, they are nonetheless final decisions to extend the permit, not intermediate or interlocutory decisions that can be challenged in an appeal of a subsequent decision modifying the permit. *McLaughlin v. Douglas County*, 70 Or LUBA 314 (2014).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where the only issue that was resolved in an initial LUBA appeal was whether the record included any evidence concerning whether the effluent to be generated by a proposal would be residential strength, and the applicant thereafter collects evidence concerning the effluent from one of the two sources that were discussed in the first LUBA appeal, LUBA will reject the applicant’s contention that parties are estopped from arguing in the second appeal that the applicant’s evidence from one source is inadequate and that evidence from the other source is required. *Teen Challenge v. Lane County*, 67 Or LUBA 300 (2013).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), to preserve an issue on appeal, the issue must be raised at all stages in the appeal proceedings where it can be raised, and failure to raise the issue during the first appeal proceedings precludes LUBA’s review of that issue. The *Beck* waiver doctrine is not limited to issues actually raised and resolved in the initial appeal proceedings. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. The waiver doctrine articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), applies both to legislative and quasi-judicial land use decisions. *Hatley v. Umatilla County*, 66 Or LUBA 265 (2012).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Even if all of the assignments of error challenging a decision on remand are barred from relitigation or waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), and thus not within LUBA’s scope of review, that only means LUBA will affirm the decision, not that the decision on remand is not within LUBA’s jurisdiction. *Hatley v. Umatilla County*, 66 Or LUBA 427 (2012).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where in its initial decision the county applies the old Goal 5 rule at OAR chapter 660, division 016, instead of the new Goal 5 rule, and no issue was raised about that position in the first appeal to LUBA, the county is arguably constrained on appeal of its decision on remand from arguing that the old Goal 5 rule does not apply and instead the new Goal 5 rule applies. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), a party at LUBA fails to preserve an issue for review if, in a prior stage of a *single proceeding*, that issue is decided adversely to the party or that issue could have been raised and was not raised. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. When an issue has been decided in a prior proceeding, the prior decision on that issue may preclude relitigation of the issue in a subsequent proceeding if the five requirements set out at *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 103, 104, 862 P2d 1293 (1993), are met. Those requirements are: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. In two decisions LUBA has concluded that issue preclusion does not apply in the land use context, based on the fifth factor in *Nelson v. Emerald People’s Utility Dist.* However, the Court of Appeals reserved its opinion on that issue in *Lawrence v. Clackamas County*, 180 Or App 495, 504, 43 P3d 1192 (2002). *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under the second of the five factors that must be present for there to be issue preclusion in an administrative proceedings under *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 103, 104, 862 P2d 1293 (1993), an issue must have been “actually litigated and * * * essential to a final decision on the merits in the prior proceeding.” Where a 2003 conditional use permit merely imposed a condition of approval that the home occupation authorized by that permit must be operated in compliance with county limits on home occupations, whether the approved home occupation in fact complied with county and statutory limits on home occupations was not “actually litigated” and for that reason issues regarding whether an expanded home occupation under a 2010 conditional use permit complies with county and statutory limits on home occupations are not precluded by issue preclusion. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Under the first of the five factors that must be present for there to be issue preclusion in an administrative proceedings under *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 103,

104, 862 P2d 1293 (1993), the issue in the two proceedings must be “identical.” Where a 2003 conditional use permit authorizes a home occupation that hosts weddings and other events on EFU-zoned property, and a 2010 conditional use permit authorize the home occupation to host additional events on different days, the issues raised by the 2003 and 2010 CUP are not identical and issue preclusion does not operate to bar a petitioner from raising issues in an appeal of the 2010 conditional use permit simply because those issues may be similar to issues that could have been raised in the 2003 conditional use permit proceeding. *Green v. Douglas County*, 63 Or LUBA 200 (2011).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where a local government denies an application based on one approval criterion, and LUBA remands the decision in part for the local government to consider whether additional approval standards apply, it is possible that in determining that additional approval standards apply the local government could identify additional bases for denial under the additional criteria, even if such additional bases for denial were not cited in the original decision. *Easterly v. Polk County*, 59 Or LUBA 417 (2009).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. Where LUBA affirms a county’s decision that a proposed church will require a reasons exception and, in dicta, rejects the applicant’s claim under the equal terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), that dicta does not preclude the applicant from challenging the county’s subsequent denial of the applicant’s request for a reasons exception as being inconsistent with the RLUIPA equal terms provision. *Young v. Jackson County*, 58 Or LUBA 64 (2008).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. While a local government may expand the scope of its remand proceedings to include issues in addition to those that formed the basis for remand, it cannot revisit issues that were conclusively resolved on appeal. Where an unappealed LUBA decision concludes that a code provision does not apply to the proposed development, on remand the hearings officer errs in denying the application based on a new theory as to why the code provision applies. *Curtain v. Jackson County*, 56 Or LUBA 649 (2008).

28.6.3 LUBA Scope of Review – Waiver of Issues – Issues Conclusively Resolved in Prior Appeal. An unappealed LUBA decision holding that a county cannot deny a proposed cell tower for noncompliance with county site design standards necessarily resolves the issue of whether the county can apply the site design standards at all, even in approving the tower. *Seeberger v. Yamhill County*, 56 Or LUBA 656 (2008).

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).