

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a county’s Goal 5 ESEE analysis and program make a decision to fully allow uses that conflict with inventoried wildlife habitat, and the county zones the property to fully allow those conflicting uses, the county is not required to remove the property from its wildlife habitat inventory. But where the county does remove the property from its wildlife habitat inventory and LUBA rejects all challenges to the Goal 5 ESEE analysis and program and remands on a different issue, in a subsequent appeal of the county’s decision on remand a petitioner may not assign error to the county’s removal of the property from its wildlife habitat inventory because that is a resolved issue under *Beck v. Tillamook County*, 313 Or 148, 153, 831 P2d 678 (1992). *Wood v. Crook County*, 74 Or LUBA 278 (2016).

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Where LUBA remands a decision and identifies two courses of action the local government may take to resolve the issue that led to remand, and the local government selects one of those course of action on remand, in a subsequent appeal a petitioner may not assign error based on an issue that is outside the scope of the chosen course of action. *Wood v. Crook County*, 74 Or LUBA 278 (2016).

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The law of the case doctrine is not applicable in appeals of legislative land use decisions. *Graser-Lindsey v. City of Oregon City*, 74 Or LUBA 488 (2016).

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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).

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Where the applicant for a vested right determination argued below that it had not lost its vested right and argued for an interpretation of the vested rights standard that would result in a conclusion that the vested right had not been discontinued, on appeal to LUBA the applicant has not waived the ability to challenge the interpretation the local government adopted to support its conclusion that the vested right had been discontinued, even if the applicant’s specific arguments against that interpretation were not raised below. *Wal-Mart Stores, Inc. v. City of Hood River*, 72 Or LUBA 1 (2015).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The holding in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), precludes a petitioner at LUBA from arguing that in adopting a decision after remand from LUBA, the local government erred in amending the location of the coastal shorelands boundary on the acknowledged comprehensive plan map without processing the decision as a post-acknowledgement plan amendment (PAPA) pursuant to the requirements in ORS 197.610, where the issue could have been, but was not, raised during the appeal of the local government’s initial decision approving a tentative master plan and subdivision. *Oregon Coast Alliance v. Curry County*, 68 Or LUBA 233 (2013).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where on remand from LUBA a county addresses the remand issues by adopting different ordinances at different times for each separate remand issue, a challenge to a setback adjustment provision adopted in one remand ordinance is not waived under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), by the petitioner’s failure to raise that challenge in an earlier appeal of a different remand ordinance that did not adopt the setback adjustment provision. *Iberdrola Renewables v. Umatilla County*, 67 Or LUBA 149 (2013).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Under the reasoning in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), a petitioner is precluded from raising issues in a subsequent appeal of a decision made after a voluntary remand. The law of the case doctrine is not dependent on whether LUBA reached a decision on the merits in the prior appeal; rather, the doctrine precludes issues from being raised piecemeal throughout the course of appellate review. *Poto v. Linn County*, 67 Or LUBA 162 (2013).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), precludes a petitioner from challenging the terms of a condition imposed on remand that is identical to a condition imposed in the original decision, whose terms were not challenged in the initial appeal to LUBA. That the identical terms were embodied in a nominally “new” condition does not allow the petitioner to advance challenges to the decision on remand that could have been, but were not, advanced in the initial appeal. *Devin Oil Co. v. Morrow County*, 65 Or LUBA 104 (2012).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where on remand a county relies for the first time on signalization of an intersection to ensure compliance with the Transportation Planning Rule, the issue of whether the county could rely on signalization could not have been raised in the initial appeal, and is not waived under *Beck v. City*

of *Tillamook*, 313 Or 148, 153, 831 P2d 678 (2002). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The law of the case doctrine in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (2002), operates even against persons who did not, but could have, participated in the first appeal, and precludes such persons from raising issues that could have been raised in the first appeal, but were not raised. *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Arguments that a permit applicant failed to raise any issue concerning a refund of permit fees in his appeal of the permit denial provide no basis for a motion to dismiss. Waiver of issues for failure to raise those issues in a local proceeding or prior LUBA appeals may affect LUBA’s scope of review, but such waiver does not affect LUBA’s jurisdiction to review a decision that qualifies as a land use decision. *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a county does not appear to defend its decision and LUBA concludes in an unappealed decision that the county lacks authority under its development code to condition final partition plat approval on the applicant first executing an agreement and providing financial guarantees to construct roads within the partition, the county may not in its decision on remand again impose that condition of approval and include a belated interpretation of its development code to assert such authority. Under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), a county is bound in its proceedings on remand by all issues that were resolved against the county in LUBA’s first decision. *Sperber v. Coos County*, 60 Or LUBA 44 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

When a local code provision prevents persons who were not “parties” during the initial proceedings from participating on remand from LUBA, a person who failed to challenge his classification as a “witness” rather than a “party” in the initial proceeding is precluded from raising a challenge to that classification in a subsequent LUBA appeal. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Because the issue of the adequacy of the findings addressing the seven factors of OAR 660-033-0020(1)(a)(B) was not raised in the initial appeal, and was not one of the issues on remand, the issue cannot be raised for the first time in a challenge to the county’s decision on remand. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
When a petitioner did not challenge the legality of a 2000 boundary line adjustment (BLA) in disputing when a parcel was lawfully created, that petitioner may not challenge the legality of that 2000 BLA in a subsequent LUBA appeal after LUBA remanded the decision to the county for other reasons. *McGovern v. Crook County*, 60 Or LUBA 177 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where a city approved a tri-plex without notice or hearings and the dispute in a prior LUBA appeal of that decision was whether any discretionary approval criteria applied to the decision, petitioners did not waive their right to argue in an appeal of the decision that followed notice and a hearing that the tri-plex violates a particular setback requirement, even though it might have been theoretically possible for petitioners to comb through the development code and locate that criterion in the earlier appeal. *Zirker v. City of Bend*, 59 Or LUBA 1 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where a subdivision approval decision is appealed to LUBA and remanded, and the same subdivision is approved a second time following remand and appealed a second time to LUBA, those appeals are two phases of the same case, and issues that LUBA decided in its first decision may not be the subject of assignments of error in the appeal of the second subdivision decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Petitioners do not waive their right to argue that a second subdivision approval decision that relies on Ballot Measure 37 waivers and post-dated Ballot Measure 49 was precluded by Ballot Measure 49 by failing to make that argument in their appeal of an earlier subdivision decision that predated Ballot Measure 49. The subject of that earlier appeal was the county’s pre-Ballot Measure 49 subdivision approval decision, not the county’s post-Ballot Measure 49 subdivision approval decision. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
An issue may be waived so that it cannot be raised in a second appeal regarding the same land use application where the issue is “plainly cognizable.” The possibility that a county might adopt a second decision approving a subdivision based on Ballot Measure 37 waivers after Ballot Measure 49 takes effect was not plainly cognizable in a LUBA appeal of an earlier subdivision that predated Ballot Measure 49. *Welch v. Yamhill County*, 58 Or LUBA 29 (2008).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where no issue was raised during the initial proceedings or initial appeal to LUBA regarding whether a property could be used as a “woodlot” and thus be put to “farm use” for purposes of ORS 215.203(2), that issue cannot be raised for the first time on appeal of the decision on remand, pursuant to *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where a petitioner raises an issue and LUBA rejects that issue but remands a permit decision on

other grounds, the petitioner may not raise the rejected issue for a second time in the local government's decision on remand. *Save Our Skyline v. City of Bend*, 55 Or LUBA 12 (2007).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The issue of whether logging activities prior to the application should be considered part of proposed “grading activities” is waived, where that issue could have been but was not raised in the initial LUBA appeal of the preliminary grading permit. That LUBA remanded the grading permit decision to identify evidence regarding the feasibility of complying with final grading permit standards does not open the door to raise new issues that could have been but were not raised in the initial appeal. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Issues that could have been raised but were not raised during a prior LUBA appeal cannot be raised in appeal of the decision on remand, under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). *Frewing v. City of Tigard*, 52 Or LUBA 518 (2006).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Issues that could have been, but were not, raised in the first appeal to LUBA are waived in any appeal of the decision on remand under *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992). Findings adopted on remand explaining why proposed development is allowed in a public facility zone do not open the door to allow a petitioner to raise issues regarding whether the development is consistent with Statewide Planning Goal 17 (Coastal Shorelands). *Moreland v. City of Depoe Bay*, 50 Or LUBA 44 (2005).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

It would be inconsistent with the legislative policies that “time is of the essence in reaching final decisions in matters involving land use and that those decisions [should] be made consistently with sound principles governing judicial review” to allow a petitioner to fail to raise a constitutional challenge to an applicable statute in an initial LUBA appeal and, following LUBA's remand on other grounds, allow that petitioner to raise the constitutional challenge in a second LUBA appeal challenging the local government's decision on remand. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a city does not seek appellate court review of LUBA's initial decision that the city's actions to secure consents to annexation are subject to heightened scrutiny, it may not argue in a subsequent appeal of its decision on remand that its actions to secure consents to annexation are subject only to a requirement that there be a rational basis for the city's actions. *Morsman v. City of Madras*, 47 Or LUBA 80 (2004).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA 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).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where the court of appeals remands a city decision because the city failed to establish in its initial decision that its finding concerning a need for commercial land was (1) supported by substantial evidence, or (2) not critical to its initial decision, and the city finds on remand that the finding was not critical to its decision and readopts its decision, petitioners are entitled to challenge the adequacy of the remaining findings to support the city’s rezoning decision even if the adequacy of those findings were not challenged in the first appeal. *Dimone v. City of Hillsboro*, 44 Or LUBA 698 (2003).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Where LUBA finds in its first decision that it is not clear what road construction standards apply or what those standards require in considering alternative alignments under OAR 660-012-0065(5)(a), a petitioner did not waive its right to argue in a second appeal that *no* road standards apply to one of the considered alignments. *Friends of Yamhill County v. Yamhill County*, 41 Or LUBA 476 (2002).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. Although parties to a stipulated voluntary remand may be bound by an agreement to limit the issues on remand concerning a disputed parking lot, non-parties are not bound by the stipulation and such non-parties have not waived their right to raise issues under *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992), where the notice of hearing that preceded the only local hearing on the remanded decision failed to refer to the parking lot. *Boly v. City of Portland*, 40 Or LUBA 537 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal. When a city imposes a condition on development approval and relies on that condition in both its

initial approval and its reapproval after withdrawing the decision for reconsideration, a petitioner's failure to raise issues regarding the condition during the evidentiary proceedings on reconsideration precludes petitioner from challenging the adequacy or validity of the condition in a subsequent LUBA appeal of the decision on reconsideration. *DLCD v. City of Warrenton*, 40 Or LUBA 88 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The law of the case doctrine does not apply to an appeal of a new application, even if that application is similar to a prior application that resulted in a decision that was remanded by LUBA. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

A petitioner must do more than merely raise an issue concerning Goal 14 to raise an issue concerning compliance with local provisions that implement Goal 14. Failure to raise an issue concerning the local provisions below precludes a petitioner from raising an issue concerning those local provisions for the first time on appeal. *Durig v. Washington County*, 40 Or LUBA 1 (2001).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Potential parties in a LUBA appeal can reasonably foresee that the appeal may lead to the challenged decision being affirmed, reversed or remanded, as a result of a decision on the merits or a stipulation by the parties. But such potential parties cannot reasonably foresee that the parties in a LUBA appeal will stipulate that LUBA should order the local government to adopt an amended decision. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Under ORS 197.860, parties may reach a mediated settlement in a LUBA appeal and request that LUBA order the local government to adopt a particular amended decision. However, in issuing such an order, LUBA does not review the amended decision on the merits and persons who appeal the amended decision to LUBA may raise any issues on appeal that they did not waive by failing to participate in the initial LUBA appeal. *Waibel v. Crook County*, 39 Or LUBA 749 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where an issue is resolved in a prior appeal, a petitioner in a subsequent appeal of a city's decision on remand may not raise that issue again. *Schwerdt v. City of Corvallis*, 38 Or LUBA 174 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Petitioners are not precluded from raising arguments on appeal that pertain to assignments of error that were raised, but not finally decided, in a prior appeal to LUBA on the same application. *Friends of Yamhill County v. Yamhill County*, 38 Or LUBA 62 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

An argument that could have been presented in a prior LUBA appeal that led to remand, but was not, is waived in a subsequent LUBA appeal of the local government's decision on remand. *Jackson County Citizens League v. Jackson County*, 38 Or LUBA 37 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a county finds in its initial decision that the soils on a property are less productive than the same types of soils on adjoining properties due to slope and soil wetness, and no party challenges that finding, the county need not consider that issue in making a decision on remand from LUBA of its initial decision. *Carlson v. Benton County*, 37 Or LUBA 897 (2000).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

An issue that could have, but was not, raised in the initial petition for review before LUBA in an appeal that was voluntarily remanded, may not be included in an assignment of error in a later appeal of a decision following remand. *Riggs v. Douglas County*, 37 Or LUBA 432 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

LUBA has jurisdiction to review a statutory challenge to a plan amendment even though the statutory challenge was not raised in a LUBA appeal when the plan was originally adopted, where the statutory question presented when the plan was first adopted is different from the statutory question presented by the plan amendment decision. *Commercial Real Estate Economic Coalition v. Metro*, 37 Or LUBA 171 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where petitioner could have but did not challenge coordinated city population projections in its initial appeal before LUBA, petitioner waives the right to challenge those projections in its appeal of the decision on remand. *DLCD v. Douglas County*, 37 Or LUBA 129 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The law of the case doctrine does not bar petitioners from raising issues that were resolved or could have been raised in a prior decision approving the challenged land use proposal, where the challenged decision revisits, on a *de novo* basis, certain issues resolved in a prior decision, and the issues raised in the present appeal all pertain to matters that the challenged decision revisited. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Petitioners may not raise issues concerning a landscaping approval standard in an appeal to LUBA following remand of an earlier city decision by LUBA, where LUBA’s remand was based on a more general “adverse impact” standard. Petitioners waived their right to raise issues under the landscaping standard by failing to raise any issue regarding that standard in the first LUBA appeal. *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Principles of *res judicata* do not prohibit petitioner from raising issues before LUBA regarding the nonconforming use status of a proposed dog kennel, even if those issues could have been raised in an earlier, unappealed county decision approving site design review for the kennel, because the nonconforming use status of the proposed use was not at issue during the site design review proceedings. *Marquam Farms Corp. v. Multnomah County*, 35 Or LUBA 392 (1999).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The law of the case doctrine does not bar petitioner from arguing that the city’s action on remand

from LUBA so altered the proposed development that the city must revisit a variance granted in the original decision. *Dodds v. City of West Linn*, 35 Or LUBA 101 (1998).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

A local government’s decision following remand from LUBA that a modified site plan complies with conditions of approval that were imposed by its initial decision that led to the first LUBA appeal raises new issues that petitioners may challenge in a subsequent LUBA appeal challenging the local decision on remand. *Winkler v. City of Cottage Grove*, 33 Or LUBA 543 (1997).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where an issue raised by petitioners regarding the county’s decision to include intervenor’s site in its Goal 5 inventory was decided in a prior LUBA appeal of the same decision, that issue cannot be raised again. *O’Rourke v. Union County*, 31 Or LUBA 174 (1996).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

When a local government limits its remand proceedings to issues that were the basis for LUBA’s remand order, issues that were not raised in the first appeal, and are not within the scope of the issues that were the basis for LUBA’s remand, cannot be raised in a subsequent appeal to LUBA. *O’Rourke v. Union County*, 31 Or LUBA 174 (1996).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Law of the case only applies where an issue has been resolved in an earlier appeal. The county cannot rely on petitioners’ failure to assign error under Goal 3 in a previous appeal to conclude that LUBA has made a de facto determination that the county’s findings establish compliance with its own agricultural lands goal. *Brown v. Coos County*, 31 Or LUBA 142 (1996).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The doctrine of waiver does not apply to issues that were the basis of a LUBA remand, but rather only to issues that were decided adversely to petitioners or that petitioners failed to raise in the prior LUBA appeal. *Collins v. Klamath County*, 28 Or LUBA 553 (1995).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a local government’s decision is remanded, but the local government’s failure to adopt findings defining certain relevant terms in its land use regulation is not the basis for the remand, petitioners may not raise the local government’s failure to adopt such definitional findings in a second appeal to LUBA challenging the local governments decision on remand. *Mazeski v. Wasco County*, 28 Or LUBA 159 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Unresolved issues, which may be considered in a local government proceeding on remand from LUBA, and raised in a subsequent appeal to LUBA from a local decision on remand, include (1) issues presented in the first appeal that LUBA either sustains or does not consider, and (2) issues that could not have been raised in the first LUBA appeal. *Louisiana Pacific v. Umatilla County*, 28 Or LUBA 32 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where petitioner did not appeal a previous LUBA decision concerning a related matter to the court of appeals, petitioner may not collaterally attack that previous LUBA decision in a subsequent appeal to LUBA. *McKenzie v. Multnomah County*, 27 Or LUBA 523 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
In a second appeal to LUBA, challenging a local government decision made on remand after a first LUBA appeal, petitioner cannot raise arguments which were not, but could have been, made in the first LUBA appeal. *Laine v. City of Rockaway Beach*. 27 Or LUBA 493 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where petitioner failed to raise an issue concerning compliance with DEQ noise standards in his first appeal of a decision approving an auto repair home occupation permit, he may not raise that issue in an appeal of the local government’s decision following remand. *Wuester v. Clackamas County*, 27 Or LUBA 314 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Neither law of the case nor issue preclusion applies in a LUBA appeal of a land use decision made after a prior remand by LUBA, where the second appeal involves different parties and a new application for a revised project was submitted after remand. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where petitioner failed to raise the issue of compliance with a particular comprehensive plan provision in its first appeal to LUBA, and failure to comply with that plan provision was not a basis for LUBA’s remand of the local government’s first decision, petitioner may not raise that issue for the first time in a subsequent appeal to LUBA from the local government decision adopted after remand. *ODOT v. Clackamas County*, 27 Or LUBA 141 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where petitioners seek to challenge a local government interpretation that a code standard is satisfied because the number of a certain type of uses in an area is “not unusual,” petitioners did not waive their argument by failing to raise it in a previous appeal to LUBA, where the previous decision simply noted there is “nothing unusual” about the concentration of the use in the area, but did not express the challenged interpretation. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where a local government limits its remand proceedings to the issues that were the basis for LUBA’s remand, issues that were not raised in the first appeal, and are not within the scope of the issues that were the basis for LUBA’s remand, cannot be raised in a subsequent appeal to LUBA. *Wilson Park Neigh. Assoc. v. City of Portland*, 27 Or LUBA 106 (1994).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.
Where LUBA remands a local government decision for an interpretation of ambiguous code provisions, and no appeal is taken from LUBA’s determination concerning the code’s ambiguity,

petitioner is barred from arguing before LUBA that the disputed code provision is unambiguous, in an appeal from the local decision on remand. *McGowan v. City of Eugene*, 26 Or LUBA 9 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where LUBA, in its final opinion and order, rejects an argument made by petitioners and petitioners do not appeal LUBA’s decision, under the doctrine of waiver, LUBA cannot consider that issue in a subsequent appeal from the local government’s decision on remand. However, LUBA may review issues that could not have been raised in the prior appeal. *Simmons v. Marion County*, 25 Or LUBA 647 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where petitioners’ arguments in a LUBA petition for review challenging a local government’s decision on remand after a prior LUBA appeal either were raised or could have been raised during the prior LUBA proceedings, such arguments may not be raised in the LUBA appeal after remand. *Adler v. City of Portland*, 25 Or LUBA 546 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where petitioners argue a city cannot approve an amendment to a PUD development plan on remand from LUBA, because the underlying development plan approval expired *after* LUBA remanded the initial city decision approving the amendment, petitioners did not waive this issue. The issue was not ripe to be raised at the time of the city’s initial proceedings on the amendment or during petitioners’ first appeal to LUBA. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where LUBA’s decision on petitioners’ first appeal found the local government erred by failing to interpret and apply certain code provisions to the subject application, and petitioners did not appeal that LUBA decision, petitioners have waived the argument that a separate application is required to give the local government jurisdiction to apply the code provisions in question. *Gage v. City of Portland*, 25 Or LUBA 449 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a petitioner mentions an issue in passing in its petition for review, but does not specifically assign the issue as error, LUBA does not address that issue in its final opinion and order remanding the challenged decision, and petitioner does not seek judicial review of LUBA’s decision, petitioner cannot assign that issue as error in a subsequent appeal to LUBA from the local government decision on remand. *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

A local government’s failure to comply with procedural requirements of ORS 197.763 on remand from LUBA does not allow a petitioner to raise issues in a second appeal to LUBA that are otherwise barred by the doctrine of waiver articulated in *Mill Creek Glen Protection Assoc. v. Umatilla County*, 88 Or App 522, 527, 746 P2d 728 (1987). *Caine v. Tillamook County*, 25 Or LUBA 209 (1993).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where a local government made determinations regarding the application of certain code provisions to a proposed use in its initial decision on a permit application, and that decision is remanded by LUBA for other unrelated reasons, compliance of the proposed use with those code provisions is an old, resolved issue that cannot be raised in an appeal of a new decision made by the local government after remand. *Tylka v. Clackamas County*, 24 Or LUBA 296 (1992).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

Where LUBA determines that a code section is not an applicable approval criterion but remands a land use decision on other grounds, a petitioner may not fail to appeal LUBA’s decision and then reassert the applicability of the code section in a subsequent LUBA appeal of the decision on remand. *Davenport v. City of Tigard*, 23 Or LUBA 565 (1992).

28.6.1 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Prior LUBA Appeal.

The “law of the case” or “waiver” doctrine does not limit a local government’s ability to adopt a different decision, or different findings in support of its decision, after its initial decision is remanded by LUBA. *Eckis v. Linn County*, 22 Or LUBA 27 (1991).