

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner fails to satisfy OAR 661-010-0030(4)(d) or to establish that the issues raised in its six assignments of error were raised as required by ORS 197.763(1) and ORS 197.835(3) where the petitioner broadly cites its submittals into the record during the proceedings before the local government. Such a broad citation is not a technical violation where it interferes with the substantial rights of the parties by improperly shifting the burden to the respondents to review over one hundred pages of the record to determine whether the issues raised in six assignments of error in an overlength, 68-page petition for review have been preserved. *H2D2 Properties, LLC v. Deschutes County*, 80 Or LUBA 528 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not required to anticipate erroneous findings or interpretations in a final decision in order to challenge them at LUBA. Where petitioner raised an issue before the city council regarding fees and argued that the local appeal was invalid because of an allegedly invalid fee waiver decision, petitioner could not have anticipated the city’s decision along with its attendant findings and interpretations, until the city issued its final decision. Accordingly, petitioner did not have the opportunity to raise specific challenges to the city’s decision regarding the fee waiver during the local proceeding and therefore may raise them for the first time on appeal to LUBA. *Riverview Abbey Mausoleum Company v. City of Portland*, 79 Or LUBA 38 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(4)(a), where a staff report confirms that the subject property is in an overlay district where “development is allowed to have limited lengths of steeper grades,” but where the applicable approval criteria for that overlay district are not cited in any notices sent or staff reports prepared by the local government, a petitioner may raise the argument that the local government erred in failing to adopt findings regarding compliance with those criteria for the first time on appeal to LUBA. *Roten v. City of Turner*, 79 Or LUBA 124 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A county errs in accepting with the applicant’s final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings, even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents’ arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant’s final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county’s admission of new evidence with the applicant’s final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A county errs in accepting with the applicant’s final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and

therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings, even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While the “raise it or waive it” requirement of ORS 197.763(1) and 197.835(3) does not apply to legislative proceedings, where a party has an opportunity to object to a procedural error during a legislative proceeding, the party must do so in order to seek remand based on that error. *McCaffree v. Coos County*, 79 Or LUBA 512 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner argues the county committed a procedural error that prejudiced his substantial rights when the board of county commissioners failed to consider a written statement that petitioner submitted to the board of commissioners at the hearing, but petitioner does not establish that the board of county commissioners actually failed to consider petitioner's written statement, and petitioner failed to object to the alleged procedural error below, petitioner has not established that the county committed a procedural error or violated an applicable legal standard. *Carkulis v. Lincoln County*, 79 Or LUBA 610 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will reject a county's interpretation of its code—that a code provision which sets forth approval criteria regarding an application for a variance to the minimum lot size requirements within the county's urban growth area may not apply to the county's decision because it only applies to decisions made by the county's planning director but not to decisions made by the planning commission or board of county commissioners—that was made for the first time in its response brief, because that interpretation is not reflected in the decision and is therefore not an interpretation by the local government. *City of Albany v. Linn County*, 78 Or LUBA 1 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Relying upon a local government staff report’s citation to local code provisions is insufficient to “raise” an “issue” for purposes of bringing an appeal before LUBA under those code provisions pursuant to ORS 197.763(1) and 197.835(3) because no party to the proceedings below would understand from the staff report that an “issue” had been “raise[d]” regarding compliance with those code provisions. *McAndrew v. Washington County*, 78 Or LUBA 21 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA’s review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *Kamps-Hughes v. City of Eugene*, 78 Or LUBA 457 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that the issue raised in an assignment of error is waived is not a basis to dismiss the appeal as moot. If LUBA agrees with that argument, the appropriate disposition would be to deny the assignment of error and affirm the local government’s decision, not to dismiss the appeal as moot. *McNichols v. City of Canby*, 78 Or LUBA 1090 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city might be obligated to reopen the evidentiary record to accept relevant local legislative history in interpreting local law in an on-the-record hearing, but where petitioner never took the position that it had relevant legislative history to offer and at LUBA merely suggested that such legislative history might exist, the city did not err by limiting its remand proceedings to the evidentiary record that was submitted to LUBA in the appeal that led to remand. *McLoughlin Neighborhood Association v. City of Oregon City*, 77 Or LUBA 377 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The issue that proposed dwellings do not qualify for historic preservation incentives on the merits is a different issue than whether the proposed dwellings are even eligible for consideration for an award of historic preservation incentives. And raising the first issue does not give fair notice to decision makers regarding a need to address the second issue. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Arguments that a city erred by failing to adopt findings that address particular spacing and orientation guidelines provide no basis for remand, where petitioners failed to raise any issue concerning those guidelines before the close of the evidentiary record and failed to identify those guidelines in their local notice of appeal. *Friends of Canemah v. City of Oregon City*, 77 Or LUBA 434 (2018).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner does not waive his right to assign procedural error at LUBA by failing to object to the procedural error below, where the alleged procedural error occurred after the close of the evidentiary record, and the city council meeting to adopt the final decision did not include an

opportunity for parties to lodge procedural objections. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The issue of whether a county erred in adopting a reasons exception to Statewide Planning Goal 3 under both the catch-all provision at OAR 660-004-0022(1) and the specific provisions for rural industrial use at OAR 660-004-0022(3) was adequately raised below for purposes of ORS 197.763(1), where a participant argued below that the county cannot adopt exceptions under both provisions but must choose one or the other. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The issue of whether a proposed solar facility qualifies as “industrial development” for purposes of standards at OAR 660-004-0022(3) for adopting a reasons exception for industrial uses was sufficiently raised below, where a party expressed uncertainty whether the proposed facility qualifies as an industrial use, the decision-maker recognized that a potential issue had been raised, and the decision-maker adopted responsive findings concluding that the use is an industrial use. *1000 Friends of Oregon v. Jackson County*, 76 Or LUBA 270 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where during the hearing a party objects that a city councilor disclosed the existence, but not the substance, of *ex parte* communications, the objection is sufficient under ORS 197.763(1) to raise an issue regarding the adequacy of the disclosure. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A petitioner fails to raise an issue with the specificity that is required by ORS 197.763(1) when the arguments in the cited record pages merely allege without developed explanation that the subject parcel was created by partition in 1980 as a sub-standard size parcel in the FF-20 zone, and therefore may not raise the issue that the post-partition zoning of the property to a zone that requires a 20-acre minimum parcel size means that the one-acre parcels approved by the county in 1980 were not lawfully created. *Landwatch Lane County v. Lane County*, 75 Or LUBA 151 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.835(4), where a local government fails to list an applicable permit approval standard in its notice of hearing, a petitioner is generally entitled to raise issues for the first time at LUBA based on the standard omitted from the notice. But under the last sentence of ORS 197.835(4), LUBA may refuse to allow a petitioner to raise a new issue in that circumstance, where LUBA finds the omitted standard was discussed during the local proceedings and petitioner could have raised issues concerning that standard during the local proceedings. *Rawson v. Hood River County*, 75 Or LUBA 200 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A general assertion before the city that an applicant failed to demonstrate that a proposed subdivision complies with Title I of the Metro Urban Growth Management Functional Plan is sufficient to preserve the right to raise an issue at LUBA regarding the “Housing Capacity” section of Title I,

because that is the only substantive section of Title I. But that general assertion might be insufficient if Title I was a lengthy, multi-section Title. *Housing Land Advocates v. City of Happy Valley*, 75 Or LUBA 227 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner’s right to raise an issue concerning an applicable approval criterion that is not listed in the prehearing notice required by ORS 197.763(3) is a qualified right under ORS 197.835(4), and LUBA may refuse to consider that issue if LUBA finds that notwithstanding the notice failure “the issues could have been raised before the local government[.]” *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner does not raise an issue clearly, and at one point in the local proceedings takes the opposite position concerning that issue that petitioner takes in its brief at LUBA, the petitioner did not adequately preserve the issue for LUBA review. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a city adopts findings that express four different reasons why the city concluded a “change in the neighborhood” criterion for rezoning was met, and petitioner fails to challenge all of those reasons, petitioner fails to demonstrate a basis for remand under the “change in the neighborhood” criterion. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a city should demand more of an applicant than “just minimally” complying with rezoning standards is not sufficient to preserve a right to argue that the proposed rezoning violates those rezoning standards. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city’s error in failing to provide petitioner with a copy of a land use application, when requested, does not result in prejudice to petitioner’s substantial rights where petitioner had access to the copy of the application at the planning department throughout the city planning commission’s and city council’s proceedings and after the city provided petitioner a copy of the application seven days before the city council hearing, petitioner made no request for additional time to present his arguments. *Long v. City of Tigard*, 75 Or LUBA 390 (2017).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner argues that an issue was raised during two planning commission meetings, but provides only a general cite to the minutes and DVD recordings of the meetings, without a more specific record cite the petitioner has failed to establish that the issue was raised during the proceedings below. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. General expressions of concern that traffic from additional rural residential development would degrade the quality of a rural residential neighborhood are insufficient under ORS 197.763(1) to raise issues regarding consistency with comprehensive plan policies that promote rural residential

neighborhoods, absent specific citation to such policies during the proceedings below. *Neil v. Columbia County*, 74 Or LUBA 442 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A general argument raised below that the applicant to expand a destination resort failed to provide a comprehensive wildlife management plan does not provide fair notice of specific issues raised on appeal regarding noncompliance with code standards that require “no net loss” of wildlife resources and imposition of a conservation easement. *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not required to anticipate that a city will adopt allegedly erroneous interpretations and object to those interpretations to preserve a right to assign error at LUBA based on those allegedly erroneous interpretations. And assuming a city is legally required to impose a specific condition of approval, a petitioner is not required to anticipate a city will fail to impose the condition of approval in its final written decision and object to that failure during the proceedings that lead to that written decision. *Fernandez v. City of Portland*, 73 Or LUBA 107 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the challenged decision annexed both a parcel and a portion of a county road, and the notice of public hearing that the city provided described the application for annexation as including only the parcel and did not reference in any way the portion of the county road that was annexed, the notice of public hearing did not reasonably describe the city’s final action, and ORS 197.835(4)(b) allows petitioner to raise new issues. *Altamont Homeowners’ Assoc., Inc. v. City of Happy Valley*, 73 Or LUBA 126 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because ORS 197.835(3) limits LUBA’s review to issues raised before the “local hearings body,” issues raised only to a local appeal body that did not conduct a hearing are insufficient to demonstrate that the issues were raised before the local hearings body for purposes of ORS 197.835(3). *Kliwer v. City of Bend*, 73 Or LUBA 321 (2016).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. 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).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an applicant submits a supplemental burden of proof just prior to a hearing on remand, to clarify that a proposed mine would operate year round rather than only during a four month period as had been previously understood by LUBA and the other parties, and that supplemental burden of proof is not made available to the parties until the beginning of the hearing on remand, those

opposing parties cannot be expected to discover the longer proposed operating time and object to the modification prior to the close of hearing on remand. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 45 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the applicant’s supplemental burden of proof clarifying that a proposed mine will operate year round rather than only four months a year, as was previously understood, was submitted too late on remand to allow opponents time to object prior to the close of the hearing on remand, but the record was held open for 12 days after the hearing at opponents’ request and they fail to raise any issue regarding the change to a year round operation, they may not raise that issue at LUBA. *Central Oregon Landwatch v. Deschutes County*, 72 Or LUBA 45 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Explanations contained in staff reports and at planning commission and city council hearings that the city processed applications for a zone change, planned development and variance according to a consolidated procedure under the city’s code and that the city council would make the final decision on all three applications are not sufficient to raise an “issue” within the meaning of ORS 197.763(1) that the city exceeded its jurisdiction under the city’s code when it consolidated the three applications, and the issue is waived. *Harrison v. City of Cannon Beach*, 72 Or LUBA 182 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.763(1) requires that issues that “may be the basis for an appeal to the Land Use Board of Appeals” must be raised locally to preserve them for review at LUBA. ORS 197.835(3) limits LUBA review to preserved issues. But the issues addressed by those statutes are limited to issues that “may be the basis for an appeal to” LUBA and those statutes do not apply to limit the defenses a local government may raise in defending its decision at LUBA in responding to preserved issues that are raised by petitioners at LUBA. *Bend/Sisters Garden RV Resort, LLC v. City of Sisters*, 72 Or LUBA 200 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where as part of final written argument the applicant submits five letters from experts that include new evidence, a general objection that the five letters include new evidence is sufficient to preserve that objection before LUBA. Because expert testimony almost always includes new professional opinion, even if limited to commenting on other evidence already in the record, an opponent need not specify which portions of the expert testimony the opponent believes constitutes new evidence, in order to satisfy the “raise it or waive it” requirement of ORS 197.763(1). *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

OAR 660-023-0180(7) requires that a local government conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses within the impact area of a Goal 5 resource. Where a petitioner raised general issues of compliance with OAR 660-023-0180(7) during the proceedings below, but in its findings the county declined to conduct an ESEE analysis to determine whether to allow, limit or prevent new conflicting uses, on appeal to LUBA the petitioner may challenge the county’s finding that it need not conduct an ESEE analysis. The

petitioner is not required to anticipate that the county will adopt findings concluding that no ESEE analysis is required. *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioner was not given required written notice of hearing but learned of the hearing and appeared at the hearing and participated, he may not assign error to the failure to give notice where he had an opportunity to object to the notice failure and did not do so. That failure to object constitutes a waiver of the issue under ORS 197.763(1) and a failure preserve the right to assign procedural error. *Pennock v. City of Bandon*, 72 Or LUBA 379 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a petitioner argues below that the proposal is not consistent with the comprehensive plan for reasons that are relevant considerations under several applicable comprehensive plan policies, the petitioner may challenge the adequacy of the findings that were ultimately adopted to establish consistency with those plan policies, even if the petitioner failed to cite the plan policies specifically. *Kine v. City of Bend*, 72 Or LUBA 423 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The petitioner failed to raise the issue below that the upland portion of a creek should be included within the coastal shoreland boundary as a riparian resource, where the only arguments made below regarding the creek concerned flooding and the only arguments regarding the shoreland boundary and riparian resources did not concern the creek. *Oregon Coast Alliance v. City of Brookings*, 71 Or LUBA 14 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under the law of the case principle articulated in *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the parties in a LUBA appeal of a decision following LUBA’s remand of an earlier decision may not revisit legal issues that were resolved by LUBA in the prior appeal. Where the board of county commissioners could have reviewed the first decision and resolved interpretive issues differently than the hearings officer did in the first decision, but did not do so prior to the first LUBA appeal, the board of commissioners may not revisit resolved interpretive issues in the decision following remand and is not entitled to the deferential standard of review required by ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), in the second appeal. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

As a general proposition, a board of commissioners is free to interpret its land use regulations. But a hearings officer would not be free to interpret county land use regulations differently than LUBA did following a LUBA remand of the hearings officer’s initial decision, and the board of commissioners is also not free to do so in a local appeal of the hearings officer’s decision following LUBA’s remand. *Gould v. Deschutes County*, 71 Or LUBA 78 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A hearings officer’s decision on a property owner’s request for an interpretation as to whether approving a floating home development in a zone that allows such development requires an exception to Goal 14 is a quasi-judicial decision rather than a legislative decision. Consequently,

the “raise it or waive it” provisions of ORS 197.763(1) apply. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The issue of whether repeal and re-adoption of the county’s land use ordinances had the effect of *eliminating* the acknowledged status of the readopted ordinances was not raised with the specificity required by ORS 197.763(1), where during the proceedings below the petitioner made the very different argument that repeal and re-adoption did not have the effect of *acknowledging* one of readopted land use ordinances. *Squier v. Multnomah County*, 71 Or LUBA 98 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under OAR 661-010-0030(4)(d), a party must demonstrate that an issue raised in an assignment of error was preserved during the proceedings below. Although failure to demonstrate such might be viewed as a “technical violation” under OAR 661-010-0005, and need not interfere with LUBA’s review proceeding so long as preservation of the issue is addressed elsewhere in the petition for review, a reply brief, or at oral argument, but a complete failure to address preservation of an issue amounts to an effective waiver of that issue. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Once a party has withdrawn a local appeal it has “affirmatively waived” the issues presented in that local appeal, and a *different* party may not subsequently advance such affirmatively waived issues before LUBA absent a demonstration that the party incorporated or asserted the affirmatively waived issues below in a manner that informed the local government and parties that the issues remain live issues that need to be addressed. *Mackenzie v. City of Portland*, 71 Or LUBA 155 (2015).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Because it is common for a multi-phased tentative subdivision approval to include conditions of approval that apply only to certain phases of development, it is incumbent on a petitioner to raise at the local proceeding any issues involving a legal standard that requires either (1) independent approval of a particular phase of development or (2) the conditioning of construction of an earlier phase of development on fulfillment of conditions applicable to a subsequent phase. *Carver v. Washington County*, 70 Or LUBA 23 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Code procedures and submittal requirements for a pre-application conference are not “applicable criteria” for purposes of ORS 197.835(4)(a), which allows a petitioner to raise new issues regarding applicable approval criteria that a local government omits from the notice of hearing, and the local government’s failure to list pre-application conference code provisions in the notice of hearing does not allow a petitioner to avoid the raise it or waive it requirements of ORS 197.763(1). *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 215.416(11)(a)(D) and (E) do not provide authority for LUBA to consider issues that were not raised prior to the close of the initial evidentiary hearing. ORS 215.416(11)(a)(D) operate at

the initial de novo evidentiary hearing to allow all issues to be raised, not after that evidentiary hearing to allow issues not raised at the de novo hearing to be raised at LUBA. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. In circumstances where the local government makes a decision without holding a hearing, ORS 197.835(3) does not apply to limit the issues that LUBA may consider in an appeal of that decision. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 420 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government adopts findings that a specific issue has been waived, on appeal to LUBA a petitioner cannot assign error to the merits of the issue without first successfully challenging the finding that the issue was waived. *Dion v. Baker County*, 70 Or LUBA 438 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the petitioner argued below only that comprehensive plan transportation policies require construction of bike lines on streets adjoining proposed development, but on appeal to LUBA argues instead that the city’s code should be interpreted to require construction of bike lanes, the issue of whether the city’s code requires construction of bike lanes was not raised below in a manner that allowed the city and applicant to respond, and the issue is waived. *SCAN v. City of Salem*, 70 Or LUBA 468 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(3) does not apply to limit the issues that LUBA may consider when the challenged decision is issued by the local government without holding a hearing, because there was no local “hearings body” within the meaning of ORS 197.835(3) to raise an issue before, and no “land use hearing[]” within the meaning of ORS 197.763(1) to which the procedures in ORS 197.763 would apply. *Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 512 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will deny an objection that the minutes of a city council hearing are incomplete, because the minutes fail to summarize the oral arguments of petitioner’s attorney, where the same arguments are found in writing elsewhere in the record, and petitioner’s argument that the defect in the minutes is “material” rests on speculation that petitioner will advance assignments of error to which, petitioner speculates, the respondent might raise waiver challenges. *Port of Umatilla v. City of Umatilla*, 70 Or LUBA 527 (2014).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Raising a general transportation issue under a local zoning change approval criterion that addresses a number of concerns, without citing the transportation planning rule (TPR) or any of the substantive requirements of the TPR, is not sufficient to preserve a technical TPR argument for review at LUBA. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where planning staff initially takes a position that a zoning amendment proposal does not comply with an applicable approval standard, but later changes its position and takes the position that the

proposal complies with the approval standard, the planning staff's initial position may be sufficient to preserve the issue of whether the proposal complies with the applicable approval standard for LUBA review. But where planning staff takes the position that a proposed zone change complies with the transportation planning rule (TPR) and never changes its position regarding the TPR, the staff position is not sufficient to preserve an issue of TPR compliance for LUBA review. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(3)(b) requires a local government's notice of quasi-judicial land use hearing "[l]ist the applicable criteria from the ordinance and the plan that apply to the application at issue." The transportation planning rule (TPR) is not part of a local government's "ordinance" or "plan" and a local government's failure to list the TPR in its notice of hearing does not excuse petitioner's failure to preserve her issue concerning the TPR for LUBA review by raising it before the local government. *Savage v. City of Astoria*, 68 Or LUBA 225 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The technical support for level of service figures in a traffic impact study (TIS) is a critical part of the TIC and the fact that the draft TIS does not include that technical support in the TIS appendix might require remand so that the final TIS with the technical support appendix could be added to the record. However, where no issue was raised before the local government concerning the missing technical support appendix, the issue is waived. *Lowery v. City of Portland*, 68 Or LUBA 339 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a fee imposed on development is actually a "franchise fee" and therefore subject to a 20-year term is a different issue than an argument that the city has no legal authority to require the developer to pay the fee and therefore cannot consider the fee as a "benefit" for purposes of an approval criterion requiring that the development be consistent with the overall needs of the community. Raising the first issue did not give the city and applicant fair notice of the second issue, and therefore the second issue is waived under ORS 197.763(1). *STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360 (2013).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument below that the challenged ordinance should be conditioned to require rededication of vacated rights-of-way as proposed by the applicant is sufficient to raise the issue of whether a condition requiring rededication is necessary to ensure that the rights-of-way are rededicated. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the planning staff reports to the planning commission and to the city council both took the position that a comprehensive plan right-of-way vacation policy established criteria that must be applied in granting a proposed right-of-way vacation, the staff reports were sufficient to raise the issue of whether the city council was obligated to at least adopt findings addressing the comprehensive plan right-of-way vacation policy and petitioner was not required to separately raise that issue to preserve the issue for appeal to LUBA. *Heitsch v. City of Salem*, 65 Or LUBA 187 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner waives an assignment of error arguing that the hearings officer committed procedural error in accepting new evidence after the close of the evidentiary record, where the petitioner could have objected to the alleged error in the appeal of the hearings officer’s decision to the planning commission, but did not. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To preserve an issue under the particular terms of a superseded ordinance governing nonconforming uses, it is insufficient to make general arguments that the right to expand the nonconforming use had been lost through abandonment or discontinuance. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner adequately raises the issue of whether a vested right to construct an expansion of a nonconforming use was lost through discontinuance based on common law and local code provisions, notwithstanding that most of petitioner’s arguments below were based on a statute that applies only to counties, where the petitioner’s discontinuance argument was not limited to the statute, and the applicant understood petitioner to be raising discontinuance under other authorities and responded to the issue. *Hood River Citizens for a Local Economy v. City of Hood River*, 65 Or LUBA 392 (2012).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To raise an issue of constitutional violation with sufficient specificity for purposes of ORS 197.763(1), at a minimum the constitutional provision at issue must be cited or the substance of the constitutional provision argued to the decision maker. A claim for relief from setbacks required under a wetland protection zone is not sufficient to put the decision maker on notice that the petitioner believes that denial of relief would violate the federal Takings Clause. *Bundy v. City of West Linn*, 63 Or LUBA 113 (2011).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city’s findings that a 40-foot right-of-way is sufficient to accommodate a 14-foot one-way travel surface and two 11-foot shoulders for on-street parking are sufficient to satisfy a criterion that a setback reduction will not “create traffic hazard,” where opponents failed to argue below that wider than normal vehicles might not be able to park on the eleven-foot shoulders without extending onto the 14-foot travel surface. *Burton v. City of Cannon Beach*, 63 Or LUBA 300 (2011).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. To preserve an argument challenging the adequacy or evidentiary support of findings made pursuant to an approval standard, a party must demonstrate that the issue of compliance with that standard was raised below with the specificity required under ORS 197.763(1). *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A general statement of concern that a proposed campground would cause “interactions between livestock and people” is insufficient under ORS 197.763(1) to raise the issue of compliance with

a local code analogue to the ORS 215.296(1) that requires a finding that the proposed use will not force a significant change in or significantly increase the cost of accepted farm practices on surrounding lands devoted to farm use. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Local planning staff are considered “participants” in an ORS 197.763 hearing and can in some circumstances raise issues for purposes of ORS 197.763(1). Where planning staff raise an issue below regarding whether the subject parcel was legally created for purposes of an applicable approval criterion and propose a resolution, and that resolution is adopted in the county’s final decision, parties may challenge the county’s resolution of the issue, even if no party other than staff raised that issue below. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.835(4)(a), a party may raise “new issues” to LUBA if the notice of hearing under ORS 197.763(3) failed to list an applicable approval criterion that the local government applied in making its land use decision. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a petitioner notes a code provision below requiring that subdivisions comply with lot size and dimensions requirements, but does not argue that including internal roads in the calculation of lot size violates the five-acre minimum lot size, the issue of how internal roads affect calculation of lot size is not raised with the specificity required by ORS 197.763(1) and is waived. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An argument raised below that the application fails to address a general code section that includes a sub-section requiring that private roads be vested in a homeowner’s association is insufficient to raise with the specificity required by ORS 197.763(1) the issue of whether proposed private roads located on easements must have the underlying fee vested in the homeowner’s association. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When a respondent argues that an issue raised in an assignment of error was not raised below and the petitioner does not respond to the argument or identify in the record where the issue was raised, LUBA will not search the record on the petitioner’s behalf, and will deny the assignment of error. *Brockman v. Columbia County*, 62 Or LUBA 394 (2011).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The issue of compliance with a local procedural rule requiring the local government to offer participants the opportunity to request a continuance of a hearing that is not the initial evidentiary hearing was not raised below with sufficient specificity, where the petitioner did not cite the local rule to the decision maker, but instead requested a continuance only under ORS 197.763(6), which applies only to the initial evidentiary hearing. *Pliska v. Umatilla County*, 61 Or LUBA 429 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

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).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a permit applicant claims in his appeal of a county permit decision on the merits that he is entitled to a refund of his permit application fees under ORS 215.427(8) based on the county's failure to take timely action in his application for permit approval, and LUBA rejects that claim, the permit applicant's appeal of a subsequent county decision that denies his request for a refund of his permit application fee under the statute is not precluded where LUBA concluded in petitioner's appeal of the permit on the merits that the challenged initial permit decision took no position regarding whether petitioner was entitled to a refund of his permit application fee under ORS 215.427(8). *Sperber v. Coos County*, 61 Or LUBA 477 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When a local government argues in its response brief that a petitioner is precluded from advancing particular assignments of error because the local government ruled below that the issues presented in those assignments of error were not preserved for the local appeal, a petitioner may file a reply brief responding to the potentially "new matter" that the assignments of error are waived, but a petitioner may not use the reply brief as a vehicle to allege that the local government erred in limiting the issues it considered during the local appeal. *Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the petitioner submits written testimony that the proposal is inconsistent with Goal 16, an argument that presumes Goal 16 is applicable, and the planning commission responds to that testimony with a finding that Goal 16 is inapplicable, the issue of whether Goal 16 is applicable has been sufficiently raised for purposes of ORS 197.763(1) and 197.835(3). The petitioner is not required to anticipate how the local government will respond in its findings to issues raised below. *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When a petitioner waits until the rebuttal portion of oral argument to respond to an argument that issues were waived under ORS 197.763(1) and 197.835(3) and provides only a general response that does not include citations to the record, LUBA will rule on the waiver argument as if there had been no response at all. *Boucot v. City of Corvallis*, 60 Or LUBA 57 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where an issue arises whether a petitioner waived his right to raise an issue at LUBA regarding whether a county erroneously found that land is not "other lands" that are suitable for farm use considering the factors set out at OAR 660-033-0020(1)(a)(B), a petitioner may not respond that the applicant raised that issue by addressing those factors below. The only issue raised by the applicant was whether the land *does not qualify* as such lands; the applicant did not raise the issue of whether the land *does qualify* as such other land. *Just v. Linn County*, 60 Or LUBA 74 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government’s findings rely heavily on particular factors set out in OAR 660-033-0020(1)(a)(B) to conclude that land does not qualify as “other lands” that are suitable for farm use under OAR 660-033-0020(1)(a)(B), and petitioner waived his right to challenge the findings concerning those particular factors because petitioner raised no issue below concerning those particular factors, LUBA will deny an assignment of error that challenges the adequacy of the county’s OAR 660-033-0020(1)(a)(B) findings. *Just v. Linn County*, 60 Or LUBA 74 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A petitioner is not precluded by *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), and ORS 197.825(2) from raising issues at LUBA merely because he failed to list local appeal issues in the proper location on a local appeal form, when the local code does not specify that such failure is a jurisdictional defect or results in a waiver of the right to raise those issues at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When the issue raised in the petition for review is whether existing ponds could eliminate or reduce the need for a water system that is listed in an expert study on the costs of farming, merely raising the issue that the ponds could meet some of the livestock watering needs is not sufficient to give fair notice to the county and thus the issue may not be raised at LUBA for the first time. *Wetherell v. Douglas County*, 60 Or LUBA 131 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government makes an explicit finding that a particular issue has been waived or is otherwise not properly before the local government, but as a precaution adopts alternative findings addressing the merits of the issue, a petitioner cannot invoke LUBA’s review authority to challenge the alternative findings on the merits unless the petitioner assigns error to the explicit finding that the issue was waived or otherwise not properly before the local government, and demonstrates that the finding is erroneous. *McGovern v. Crook County*, 60 Or LUBA 177 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When the state administrative rules applicable to a comprehensive plan amendment are amended during the local proceedings, raising the issue of compliance with the old administrative rules is not sufficient under ORS 197.763(1) and ORS 197.835(3) to raise the issue of whether the application complies with the new provisions of the amended rules. *Walker v. Josephine County*, 60 Or LUBA 186 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Although ORS 197.835(4) provides an exception to the “raise it or waive it” rule, it only allows a petitioner to raise new issues based upon applicable criteria that were omitted from the notice. A local provision that tentative approval will expire if not completed and the ORS 227.178(5) limit on the number of days an applicant may extend the deadline for a local government to make a final decision on an application are not “applicable criteria.” Therefore, a petitioner may not raise issues concerning the statutes and local provision for the first time at LUBA, even though they were not listed in the notice. *Oh v. City of Gold Beach*, 60 Or LUBA 356 (2010).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Testimony that the applicant has not shown why a parcel formerly part of a larger ranch cannot be used in conjunction with adjacent and nearby farm properties is sufficient to raise the issue of compliance with OAR 660-033-0030(3), notwithstanding that the petitioner failed to cite the rule. *Wetherell v. Douglas County*, 58 Or LUBA 101 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a city denies a partition application based on a code provision that was not listed as an approval standard in the notice of hearing and not discussed until late in the hearing, the petitioner’s failure to raise issues below regarding application of that code provision does not preclude petitioner from challenging denial under that code provision before LUBA. *Stewart v. City of Salem*, 58 Or LUBA 605 (2009).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a county adopts both irrevocably committed and physically developed exceptions to the statewide planning goals, but the only issues raised below were directed at the physically developed exceptions, ORS 197.763(1) precludes the petitioner from challenging the irrevocably committed exceptions for the first time at LUBA. *Landwatch Lane County v. Lane County*, 56 Or LUBA 408 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

While the distinction between “issues” and “arguments” is somewhat imprecise, where a petitioner raises an issue regarding the alleged adequacy of public facilities to satisfy annexation approval standards, raising that issue is not sufficient to also raise an issue regarding the adequacy of the application to meet permit application information requirements. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the issue petitioners raised a city concerned the adequacy of public facilities to serve an annexed area when it urbanized, petitioners may not raise an issue for the first time at LUBA concerning whether existing public services are adequate to serve the limited level of development that will be permitted prior to the time the annexed property is planned and zoned for urban development. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners’ arguments to LUBA that a local government failed to give notice of its annexation decision within the deadlines specified by statute and by a regional government provide no basis for reversal or remand, where petitioners raised no issue below concerning the adequacy of the notice and petitioners do not allege that the claimed late notice prejudiced petitioners’ substantial rights. *Graser-Lindsey v. City of Oregon City*, 56 Or LUBA 504 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a petitioner raises issues regarding compliance with code sidewalk provisions, ORS 197.763(1) does not require the petitioner to anticipate that the city would respond to those issues by “overriding” those code provisions based on recommendations in a transportation study, in

order to challenge the city's reliance on the transportation study. *Soares v. City of Corvallis*, 56 Or LUBA 551 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners adequately raise the issue of compliance with an approval criterion governing groundwater impacts where they argued below that the proposed development should be denied due to groundwater impacts and in response to those arguments the county identifies the approval criterion as applicable and adopts findings addressing it. *Gardener v. Marion County*, 56 Or LUBA 583 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A statement in the staff report that the subject property is located within a “woodland transition” area and therefore does not require an exception to Goal 4 to rezone it for non-forest use raises no cognizable “issue” under ORS 197.763(1) that the property's elevation and location within the watershed actually places it in a “principal forest land environment” subject to Goal 4. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A county counsel's memorandum answering a staff question regarding whether the comprehensive plan rural residential designation requires an exception to Goal 4 notwithstanding that the land is not protected by Goal 4 is insufficient to raise the issue of whether a Goal 4 exception is required by other, unrelated comprehensive plan provisions. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where planning staff recognize an ambiguity in an approval standard, and request and receive a written interpretation from the local government's legal counsel, an issue has been raised regarding the meaning of that approval standard and arguments challenging the local government's view of that standard are not waived under ORS 197.763(1). *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Arguments that the county road is inadequate are insufficient to raise with sufficient specificity an argument that the road cannot be improved without amending the county's transportation system plan. *Lofgren v. Jackson County*, 55 Or LUBA 126 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An argument that a party is a “permit holder” and thus entitled to initiate a declaratory ruling request under one subsection of the city's code is insufficient to also raise the issue that the party is a “property owner” entitled to initiate a declaratory ruling under a different subsection of the code. *Cushman v. City of Bend*, 55 Or LUBA 234 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where respondents argue that issues that are raised in the petition for review were not raised below and for that reason are waived, petitioner should respond to such waiver arguments in a reply brief

or in their opening argument at oral argument. *Pete's Mtn. Home Owners Assoc. v. Clackamas County*, 55 Or LUBA 287 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government objects that a petitioner at LUBA waived an issue by failing to raise that issue before the local government, and the petitioner does not identify where the issue was raised below, either in a reply brief or at oral argument, LUBA will sustain the objection and find that the issue was waived. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Unless a petitioner at LUBA raised some issue before the local government concerning whether a proposed rezoning complies with rezoning criteria, that petitioner may not challenge the adequacy of the local government's findings in support of the rezoning decision in an appeal at LUBA. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The date that a land use decision becomes final for purposes of appeal to LUBA and the date that a land use decision becomes effective need not be the same. *Citizens Against Annexation v. City of Florence*, 55 Or LUBA 407 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the Oregon Department of Transportation (ODOT) recommends that conditions of approval be imposed requiring the improvements identified in a traffic impact analysis, and the city's decision states that it will impose the conditions but in fact does not, the petitioner may assign error to the city's failure to impose the conditions, notwithstanding that the petitioner raised no issues below regarding the improvements or the conditions, because ODOT adequately raised the issue. *Nygaard v. City of Warrenton*, 55 Or LUBA 648 (2008).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A letter from city transportation staff stating that a traffic study and an agreement about timing and cost responsibilities for transferring a private road to the city must be in place prior to city acceptance of the dedication is not sufficient to raise issues regarding the adequacy of a 2004 traffic study of the road. *Broken Top Community Assoc. v. Deschutes County*, 54 Or LUBA 84 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A hearings officer errs in concluding that an issue was first raised in a letter that was submitted at a stage of the local proceedings where new issues could not be raised, where the same issue was fairly raised earlier in the local proceedings, albeit less clearly and less precisely than in the later letter. *Meadow Neighborhood Assoc. v. Washington County*, 54 Or LUBA 124 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A member of the decision making body is not a "participant before the local hearings body" for purposes of the raise it or waive it rule at ORS 197.763(1), and questions asked by a city councilor during deliberations regarding application of a floor-area ratio (FAR) standard do not permit

petitioners to raise issues regarding the FAR standard for the first time at LUBA. *Fleming v. City of Albany*, 54 Or LUBA 168 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A staff statement that staff had reached agreement with the applicant with respect to a particular method of demonstrating compliance with a code floor-area ratio (FAR) standard is insufficient to “raise” an issue regarding that method or allow petitioners to challenge it before LUBA, where the statement was presented as a resolved, agreed-upon issue, and no participant questioned that agreement or raised any issue regarding how FAR should be calculated. *Fleming v. City of Albany*, 54 Or LUBA 168 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) requires a party to have raised an *issue* regarding a proposal’s compliance with an approval criterion with sufficient specificity to afford other parties the opportunity to respond. But ORS 197.763(1) does not require a party to raise the precise *argument* below that they assert on appeal to LUBA. *Friends of Linn County v. Linn County*, 54 Or LUBA 191 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A local government errs in finding that an appeal of a denial of a sign permit involves only a “request for interpretation” rather than a “permit” to which the provisions of ORS 227.175(10) applied to require a *de novo* hearing that is not limited to issues raised by the appellant in an appeal statement. *Lamar Advertising Company v. City of Eugene*, 54 Or LUBA 295 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner is not required to have personally raised an issue below in order to preserve the right to raise that issue at LUBA, provided the issue was raised by someone else below. Where a local government argues the issue was waived, however, the petitioner must identify where in the record the issue was raised by someone else in order to raise the issue at LUBA. *Santiam Water Control District v. City of Stayton*, 54 Or LUBA 561 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A local government is not required to list statutory or administrative rule criteria in the notice of a quasi-judicial land use hearing required by ORS 197.763(3)(b). *Rhinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA will consider the issues that a petitioner raises on appeal where no party argues that petitioner waived those issues by failing to raise them below, even if it is not clear that petitioner raised those issues below. *Ettro v. City of Warrenton*, 53 Or LUBA 485 (2007).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The waiver principle in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), applies to require that a petitioner at LUBA have raised an issue in the local notice of appeal, notwithstanding that the issue may have been raised earlier in the local land use proceeding. That waiver principle does not apply where consideration of a local application for land use approval does not include a local right of appeal. *Wasserburg v. City of Dunes City*, 52 Or LUBA 70 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument in an intervenor-respondent’s brief that the challenged decision must be reversed based on alleged error is, in essence, an assignment of error or cross-assignment of error. However, LUBA will decline to address such arguments where intervenor-respondent fails to demonstrate that the issues raised under such arguments were raised during the proceedings below. *Krishchenko v. City of Canby*, 52 Or LUBA 290 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the issue raised at LUBA is the adequacy of a city’s findings to address specific planning requirements of LCDC’s Goal 9 rule, but no party mentioned the Goal 9 rule or otherwise raised any issues regarding the substantive requirements of the Goal 9 rule, that issue was waived and may not be raised for the first time at LUBA. *Cornelius First v. City of Cornelius*, 52 Or LUBA 486 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. When a respondent argues that an issue raised in an assignment of error was not raised below and the petitioner does not respond to the argument or identify in the record where the issue was raised, LUBA will not search the record on the petitioner’s behalf and will deny the assignment of error. *Williamson v. City of Salem*, 52 Or LUBA 615 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a notice of local appeal appeals related subdivision and planned unit development (PUD) approvals, but refers to “residential subdivision” in challenging the type of residential use allowed under both approvals, the local government errs in concluding that the appeal raises issues only with respect to the subdivision and not the PUD, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003). *Concerned Homeowners v. City of Creswell*, 52 Or LUBA 620 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an intervenor-respondent accurately describes the issue that forms the basis for a petitioner’s assignment of error and argues that the issue was not raised below, and petitioner’s only answer to the waiver argument is not responsive to that argument and petitioner does not identify where the issue was raised below, the issue is waived under ORS 197.763(1) and 197.835(3). *Holloway v. Clatsop County*, 52 Or LUBA 644 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner may not fail to assign error to a finding that certain issues were not preserved and are not within the hearings officer’s scope of review, and instead on appeal to LUBA, simply assign error with respect to the same issues that the hearings officer found were not preserved. *Franzke v. Tigard*, 52 Or LUBA 761 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners arguments during the city’s local proceedings were all directed a preliminary public facility agreement and whether that agreement had expired making preliminary subdivision plan approval impossible, petitioners may not argue for the first time in their appeal to LUBA that

the final public facility agreement is a requirement of preliminary subdivision plan approval. *Lockwood v. City of Salem*, 51 Or LUBA 334 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where no statute or other authority provides otherwise, a code provision that limits local appeal issues to those issues raised in the notice of local appeal also limits the issues that can be raised before LUBA. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.835(4)(a) allows a petitioner to raise new issues before LUBA, notwithstanding petitioner’s failure to raise those issues below, but only new issues that relate to applicable criteria omitted from notices required under ORS 197.195 or 197.763. *Ray v. Josephine County*, 51 Or LUBA 443 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioner bears the burden of establishing that an issue was raised during the local proceedings, and where a respondent argues that petitioner failed to raise an issue during the local proceedings, petitioner may not merely state, without citation to the record, that she recalls raising the issue. *Wetherell v. Douglas County*, 51 Or LUBA 699 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a city’s notice preceding annexation makes no mention that the annexation will result in repeal of all county comprehensive plan and land use regulations that apply to the annexed property, the notice does not reasonably describe the final action and petitioners may raise issues that were not raised during the local proceedings before the city. *Friends of Bull Mountain v. City of Tigard*, 51 Or LUBA 759 (2006).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A letter from the Oregon Department of Transportation agreeing with county staff’s proposal to require the applicant to provide a bond to pay for needed transportation improvements does not raise any issue regarding whether the affected intersection can be made “adequate in a timely manner.” *City of Damascus v. Clackamas County*, 50 Or LUBA 514 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

To comply with ORS 197.763(3)(b), a notice of hearing must identify the applicable approval criteria by code number or similar means of identification sufficient to direct the recipient to the actual code or plan provisions that the city deems to be approval criteria. Reference to a code provision that itself merely requires “conformance with the comprehensive plan” is insufficient to provide effective notice of any comprehensive plan provisions. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The city’s failure to list certain plan policies as approval criteria in the notice of hearing does not allow petitioner to raise new issues regarding those plan policies under ORS 197.835(4)(a), where two staff reports and a planning commission decision address the plan policies as approval criteria

and petitioner is given ample constructive notice that the city believed the policies to be approval criteria. *Kingsley v. City of Sutherlin*, 49 Or LUBA 242 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a petitioner wishes to raise an issue concerning an approval criterion that was not listed in the notice of local hearing, the final sentence in ORS 197.835(4)(a) requires that LUBA consider whether, notwithstanding the local government’s failure to list the criteria that give rise to an issue a petitioner seeks to raise for the first time at LUBA, the petitioner nevertheless could have raised that issue and, for that reason, should not be allowed to raise the issue at LUBA. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where approval criteria are not listed in the notice of local hearing, but those approval criteria are expressly referenced in approval criteria that were listed in the notice, and those references are stated in terms that seem to say the referenced criteria operate as approval criteria, petitioner should have raised an issue concerning the referenced approval criteria below, and under the final sentence of ORS 197.835(4)(a), LUBA will not allow petitioner to raise that issue for the first time at LUBA. *Burke v. Crook County*, 48 Or LUBA 23 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

LUBA will not extend the ORS 197.763(1) “raise it or waive it” requirement to legislative proceedings, and a failure to raise an issue under ORS 197.763 is not correctly characterized as a failure to exhaust administrative remedies. *Roads End Sanitary District v. City of Lincoln City*, 48 Or LUBA 126 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A party may affirmatively waive an issue by specifically agreeing below that the issue is waived or by expressly abandoning the issue. However, a statement by an application opponent that she is “not opposed to protection of personal property” and a discussion of alternatives is neither a specific agreement that the proposed walls are allowed in the applicable zone, nor an express abandonment of that issue. *Moreland v. City of Depoe Bay*, 48 Or LUBA 136 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An issue regarding compliance with an approval criterion is waived if not raised below, unless the petitioner demonstrates that the local government failed to list the criterion in the notice of hearing under ORS 197.835(4). However, LUBA will not address an issue under ORS 197.835(4) where the petitioner fails to explain why the notice of hearing is defective. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An assertion in a local notice of appeal that the planning commission erroneously interpreted the comprehensive plan to require preservation of an overlay zoning on the subject property is sufficient to raise an issue, under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), regarding whether the overlay zone had expired. *Staus v. City of Corvallis*, 48 Or LUBA 254 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.763(1), an objection that a traffic impact analysis is not necessary to demonstrate compliance with a code provision governing the “orderly extension of key urban facilities” is insufficient to raise the issue of whether transportation facilities are “key urban facilities.” *Knutson Family LLC v. City of Eugene*, 48 Or LUBA 399 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Language in a subarea plan that allows submittal of master plan application with fewer than all of the owners of affected property and requires a particular planning focus for property not controlled by the applicant is a mandatory approval criterion that must be listed in the hearing notice because the city could deny or require modification of the application based on that language. *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where language in master plan that is a mandatory approval criterion was not listed in the hearing notice, no criterion listed in the notice reasonably would have led petitioners to that language, and petitioners otherwise could not have anticipated the issue because the city’s final decision was the first notice petitioners had that the master plan language applied, petitioners did not waive the issue by failing to raise it at the local level. *Lowery v. City of Keizer*, 48 Or LUBA 568 (2005).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(4) does not excuse petitioner’s failure to raise issues of compliance with a code approval standard based on the city’s failure to list that standard in the notice of hearing, where the staff report and planning commission decision both cite and quote the standard as an applicable approval criterion, and petitioner offers no reason why issues of compliance with that standard could not have been raised before the city. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Testimony that the city’s tree cutting ordinance will ensure that any tree removal that occurs under a proposed conditional use permit modification will be consistent with the tree cutting ordinance falls far short of alerting the city that petitioners believe that the tree cutting ordinance will protect adjoining property from windthrow and runoff to the same extent as the original permit. *Wiper v. City of Eugene*, 47 Or LUBA 21 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Testimony criticizing the city’s determination that commercial zoning regulations apply to a proposed highway project in a commercially zoned area that borders on or includes a small portion of residentially zoned land is insufficient to raise an issue as to whether the highway project is a prohibited use in the residential zone. *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A city’s alleged misinterpretation of a code provision does not provide a basis for reversal or remand, where the only significance petitioner attaches to the misinterpretation relates to an issue that was not raised below and is therefore beyond LUBA’s review. *Comrie v. City of Pendleton*, 47 Or LUBA 38 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioner testified in opposition to a fish channel associated with a proposed mining expansion, but failed to raise any issue below regarding whether (1) the fish channel is a permitted accessory use or (2) the fish channel is itself a mining activity prohibited in the applicable zone, those issues are waived. *Wynn v. Polk County*, 47 Or LUBA 73 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Although a petitioner waived its right to challenge a decision for failure to apply Goal 12 (Transportation) or the Transportation Planning Rule, LUBA will consider the legal arguments that the petitioner presents under that assignment of error when LUBA considers petitioner's arguments concerning nearly identically worded county code transportation standards under a different assignment of error. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

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).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioner filed a local appeal statement that raised issues that were accompanied by statements sufficient to enable a reasonable decision maker to understand the nature of those issues, those issues are not waived. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A petitioner may not argue at LUBA that a county erred by applying a 25-foot setback rather than a setback that is derived from an individualized multi-factor site investigation, where both planning staff and petitioner discussed the adequacy of the 25-foot buffer and petitioner did not argue before the county that the setback must be based on an individualized site investigation. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

In applying a standard that requires that development within 100 feet of a wetland minimize wildlife impacts, a county commits no error in finding that it is uncertain whether there are wetlands present and imposing a condition of approval that the subdivision applicant prepare a wetlands study and demonstrate that the standard is satisfied in a subsequent quasi-judicial administrative review before final plat approval. *Willhite v. Clackamas County*, 46 Or LUBA 340 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An argument that unspecified land use regulations and siting standards must be complied with prior to approving a church on EFU-zoned lands is insufficient to apprise the decision maker that petitioner believes that the county must consider an exception to the administrative rule prohibition on churches on high-value farmland before considering whether that prohibition is inconsistent with federal law. *1000 Friends of Oregon v. Clackamas County*, 46 Or LUBA 375 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a tie vote of a committee at the conclusion of a *de novo* appeal of a permit decision under ORS 227.175(10)(a)(A) and (D) occurs after the evidentiary hearing is closed and after the public portion of the local appeal has concluded, and the committee relies on a committee rule to deny the local appeal based on the tie vote, the local appellant did not have an opportunity to object to the rule and may challenge the rule at LUBA. Under ORS 197.763(1) and 197.835(3), that local appellant is not required to anticipate that the final vote might be a tie, and enter a precautionary objection, to preserve its right to challenge the committee rule at LUBA. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Before the “raise it or waive it” provisions now codified at ORS 197.763(1) and 197.835(3) were adopted, LUBA required that a petitioner who asserts procedural error at LUBA must have raised the procedural error below. While the obligation to object locally to procedural errors overlaps with ORS 197.763(1) and 197.835(3), it exists independently and may require that a petitioner enter an objection after the close of the final evidentiary hearing. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

That a committee entertained questions from the public during its deliberations after the close of its final evidentiary hearing does not mean the committee would have allowed a legal challenge to its reliance on a committee rule, or that it would have reconsidered its decision to rely on that rule to deny a local appeal. A petitioner’s failure to object to the rule at that stage does not mean the issue is waived in a subsequent LUBA appeal. *Hayden Island, Ltd. v. City of Portland*, 46 Or LUBA 439 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.763(1), 197.835(3) and ORS 197.825(2), failure to raise an issue in a notice of local appeal of a permit decision means that issue may not be raised in a LUBA appeal of that permit decision. *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 227.175(10)(a)(E)(ii), which was adopted in response to the Court of Appeals’ decision in *Johns v. City of Lincoln City*, 146 Or App 594, 933 P2d 978 (1997), and specifically provides that a *de novo* appeal of a permit decision under 227.175(10)(a) may not be limited to issues raised in the local notice of appeal, does not apply to appeals of limited land use decisions. *McKeown v. City of Eugene*, 46 Or LUBA 494 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An argument that a county must verify the existence of alleged nonconforming uses, with specific reference to the location of certain structures within a setback, in the course of approving a site plan to expand an existing tourist facility, is insufficient to raise issues regarding (1) the alleged need to follow a separate procedure for verifying nonconforming uses and (2) alleged

nonconforming commercial activities on the property. *Friends of the Metolius v. Jefferson County*, 46 Or LUBA 509 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party fails to raise any issue during local proceedings regarding a subdivision applicant’s proposal not to include removal of dead or dying trees in computing the applicant’s mitigation obligation under a tree removal ordinance, that issue is waived and may not be raised at LUBA. The city arborist’s isolated comment that it might not be appropriate to omit dead or dying trees in computing the mitigation obligation is not sufficient to preserve the issue for appeal. *Miller v. City of Tigard*, 46 Or LUBA 536 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party is present at a rezoning hearing where a county commissioner discloses that he and a county planner made a site visit to the subject property, and that party testifies after the disclosure without objecting to the site visit, the planner’s attendance at the site visit or the adequacy of the county commissioner’s disclosure of the site visit, that party waives his right to assign error based on the site visit in an appeal at LUBA. *Mattson v. Clackamas County*, 46 Or LUBA 552 (2004).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a city fails to provide petitioner the notice of hearing required by ORS 197.763(3), it cannot argue that a petitioner waived his right to argue that an annexation decision violates the city’s comprehensive plan by failing to raise that issue during the local proceedings. *Morsman v. City of Madras*, 45 Or LUBA 16 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

In order to preserve the right before LUBA to challenge the adequacy of findings addressing an approval criterion and the supporting evidence, a petitioner must demonstrate that the proposal’s compliance with that criterion was raised below accompanied by statements or evidence sufficient to afford other parties an adequate opportunity to respond. *Bruce Packing Company v. City of Silverton*, 45 Or LUBA 334 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Arguments made during the local proceedings that a proposed mining operation is not compatible with residential and school related uses located in a nearby city are not sufficient to raise an issue with respect to compatibility of the mining operation with other existing and allowed uses within the farm and forest zone in which the mining operation will be located. *Laurance v. Douglas County*, 45 Or LUBA 393 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners waive their opportunity to raise issues regarding compliance with city comprehensive plan policies, where petitioners were put on notice during the local proceedings that the city may impose right-of-way requirements that may implicate those policies and petitioners did not identify a conflict with the right-of-way requirements and the comprehensive plan policies as an issue that the city must address. *Martin v. City of Dunes City*, 45 Or LUBA 458 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Opponents’ argument below that a proposed plant nursery should be viewed as a “commercial activity in conjunction with farm use” is not properly limited to an argument that a “retail” plant nursery should be viewed in that manner, and the opponents do not waive their right to argue in an appeal to LUBA that a wholesale nursery should be viewed as a “commercial activity in conjunction with farm use.” *Lorenz v. Deschutes County*, 45 Or LUBA 635 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners may not assign error to a city’s failure to adopt findings that address particular statutes, statewide planning goals, comprehensive plan policies or ordinance criteria, where petitioners fail to demonstrate that they raised any issue during the local proceedings concerning those statutes, goals, policies or criteria. *Durham v. City of Philomath*, 45 Or LUBA 648 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The Oregon Department of Transportation’s (ODOT’s) general observation during local proceedings that it did not believe the city had adequately addressed the requirements of OAR 660-012-0060, which was followed up with specific concerns that the city addressed to ODOT’s satisfaction, is not sufficient to allow a petitioner at LUBA to raise for the first time on appeal specific issues other than the specific concerns identified by ODOT. *Thomas v. City of Veneta*, 44 Or LUBA 5 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where an applicant identifies groundwater as a “discharge” to be considered as a conflict pursuant to OAR 660-023-0180(4)(b)(A), that applicant may not argue on appeal to LUBA that (1) groundwater is not a “discharge” within the meaning of that rule; or (2) that the impact of mining on groundwater may only be considered under OAR 660-023-0180(4)(b)(D) if the mining site is located within a critical groundwater area and is designated as such on the county’s Goal 5 inventory of significant Goal 5 sites. *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A staff report suggesting that “future development” may require review of traffic impacts from multiple access onto city streets from a large site is insufficient to raise an issue that a proposed parking lot that uses two existing access points from the site to city streets violates a city standard limiting each site to one access point. *Bagnell v. City of Corvallis*, 44 Or LUBA 284 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A party’s contention that an alternative setback must either satisfy Goal 18 or an exception must be taken to that goal is not sufficient to raise an issue regarding whether application of an alternative oceanside setback criterion requires that the city first find the standard oceanside setback is “further from the westerly property line than is required for the protection of the Foredune Management Area.” *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioner’s evidentiary challenge to a city’s conclusion that an applicable criterion is satisfied provides no basis for reversal or remand, where the challenge is based on petitioner’s interpretation

of what the criterion requires, and that interpretation was not presented during the local proceedings. *Slepack v. City of Manzanita*, 44 Or LUBA 301 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where six criteria are clearly identified as applicable permit approval criteria but a planning commission decision fails to address five of those criteria, and petitioner does not identify the planning commission’s failure to adopt findings addressing all six criteria in its local appeal to the city council and does not raise any issue concerning the planning commission’s failure to adopt such findings prior to the close of the final evidentiary hearing before the city council, the issue of the city’s failure to adopt findings addressing all six criteria is waived under ORS 197.763(1) and 197.835(3). *Miles v. City of Florence*, 44 Or LUBA 411 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a city council specifically asks a local appellant to identify a legal basis for overturning a planning commission decision approving an industrial subdivision and the local appellate fails to do so, the local appellant may not thereafter appeal the decision to LUBA and for the first time argue that the subdivision approval violates specific local code, administrative rule and statutory requirements. *Baida v. City of Medford*, 44 Or LUBA 473 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

To the extent a local code requirement can be read to preclude petitioners from raising issues before LUBA that were raised before the local government prior to the close of the record following the final evidentiary hearing, such preclusion is inconsistent with ORS 197.763(1). petitioner’s appeal is sufficient to allege prejudice to petitioner’s substantial rights. *Shaffer v. City of Happy Valley*, 44 Or LUBA 536 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where an applicant elects to proceed exclusively under one theory for approval and indicates that it chooses not to proceed on an alternative theory, the applicant has affirmatively waived any issue regarding the alternative theory, and cannot argue to LUBA that the local government should have approved the application under that theory. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A statement that a party assumes for the sake of argument that a proposed mining area is subject to a Goal 5 rule governing lands that consist of more than 35 percent soils classified as Class I or II is insufficient to raise, with the required specificity, an issue regarding whether the proportion of Class I or II soils may be less than 35 percent, and therefore that the rule does not apply to the proposed mining area. *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140 (2002).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The raise it or waive it provisions of ORS 197.763(1) apply only where the local government provides a hearing at which issues may be raised. Where the county did not provide a hearing where petitioners could raise issues, petitioners may raise issues before LUBA in the first instance. *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 511 (2003).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While ORS 197.835(4) operates as a limited defense to a waiver challenge under ORS 197.763(1) and 197.835(3), it does not obviate the requirement that a party given the opportunity to object to a procedural error below must do so in order to seek reversal or remand based on that error. *Confederated Tribes v. City of Coos Bay*, 42 Or LUBA 385 (2002).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local appeal provisions that require an appellant to specify issues in its notice of appeal to the city council have a preclusive effect on subsequent review only where the council recognizes and imposes that effect. Where the governing body appears to view petitioners' failure to specify an issue in the notice of appeal as giving the governing body the option to address or reject the issue, and the issue is then addressed, LUBA will not presume that the governing body assigned preclusive effect to petitioners' violation of the issue-specification provision. *Pearl District Neigh. Assoc. v. City of Portland*, 40 Or LUBA 436 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An argument that a county fails to comply with a requirement that a community center be operated primarily *by* the residents of the local rural community is waived where (1) the only argument below dealt with whether the community center would be operated primarily *for* the residents of the local rural community; and (2) no one at the local level challenged the applicant's reliance on city employees to staff a major use within the community center. *Hendrix v. Benton County*, 40 Or LUBA 362 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The purpose of the ORS 197.763(1) "raise it or waive it" requirement is to prevent unfair surprise. Neither the applicant nor the county should be surprised at petitioner's contention before LUBA that certain local code provisions govern the county's decision, where the application itself addresses those provisions as applicable criteria and proposes findings of compliance with those criteria. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a permit application identifies ORS 215.275 as a criterion applicable to the county's decision approving a cellular communications tower on EFU-zoned land and proposes findings of compliance with the statute, the issue of compliance with the statute was raised below and the county's failure to address the statute can be assigned as error, notwithstanding petitioners' failure to raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 129 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.835(3), LUBA's scope of review includes issues raised below "by any participant." An applicant's written assertions that local code provisions are applicable approval criteria suffice to raise an issue regarding the local government's failure to address such criteria, notwithstanding that opponents to the application did not raise that issue below. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Although a petitioner need not raise the precise argument during local proceedings that the petitioner attempts to raise at LUBA, the petitioner must have raised the issue below. Although the distinction between “issues” and “arguments” is imprecise, what is required is fair notice to parties and decision makers so that a reasonable person would know that the issue must be addressed. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The predicate to application of the “raise it or waive it” principle in ORS 197.835(3) is a local proceeding pursuant to ORS 197.195 or 197.763. That principle does not apply to proceedings to vacate county roads under ORS 368.346. *Mekkers v. Yamhill County*, 39 Or LUBA 367 (2001).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a city determines that revisions to easements within a previously approved subdivision require a replat, verbal testimony and a letter submitted by the applicants’ attorney noting that the applicants will comply with the city’s determination but consider a replat unnecessary under the statutes cited by the city are sufficient to preserve the issue for appeal to LUBA, notwithstanding that the applicants did not expressly submit the disputed replat application under protest. *Haber v. City of Gates*, 39 Or LUBA 137 (2000).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Testimony that approving aggregate extraction would compromise an inventoried Goal 5 groundwater resource in the area is sufficient to raise an issue regarding compliance with local provisions designed to protect the county’s inventoried Goal 5 resources, notwithstanding that the testimony does not specifically cite those provisions. *Jorgensen v. Union County*, 37 Or LUBA 738 (2000).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

After the petition for review is filed, petitioner must respond to allegations that issues that are raised in the petition for review were not raised during the local proceedings. If petitioner fails to do so, those issues are waived. However, petitioner is not initially obligated to specify in the petition for review where the issues that are raised in the petition for review were raised below. *Robinson v. City of Silverton*, 37 Or LUBA 521 (2000).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners’ argument during local proceedings that OAR 660-023-0180 does not prohibit a county from applying its land use regulations to a proposed mining operation is not sufficient to raise an issue that LCDC’s adoption of OAR 660-023-0180 is inconsistent with other statutory requirements. *Turner Community Association v. Marion County*, 37 Or LUBA 324 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local decision maker discloses during a local proceeding that one of the parties is her veterinarian and serves on an animal rights organization with her, petitioner’s failure to explore concerns about *ex parte* contacts with that party or possible bias precludes an evidentiary hearing at LUBA to explore such concerns. *Tri-River Investment Co. v. Clatsop County*, 36 Or LUBA 743 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A notice of hearing that fails to describe any proposed uses that could be authorized by a decision to amend the zoning of property from residential to industrial is “different from the proposal described in the notice to such a degree” that the notice does not “reasonably describe the local government’s final action” and thus petitioner may raise new issues pursuant to ORS 197.835(4)(b) notwithstanding petitioner’s failure to raise those issues during the proceedings below. *Mulford v. Town of Lakeview*, 36 Or LUBA 715 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioner may raise new issues before LUBA regarding plan provisions that were not considered by the county where the notice of hearing did not list any applicable comprehensive plan provisions. Petitioner is not obligated by ORS 197.835(4)(a) to comb through the entire comprehensive plan looking for applicable provisions omitted from the notice, in order to avoid a finding that issues regarding applicable plan provisions could have been raised below. *City of Newberg v. Yamhill County*, 36 Or LUBA 473 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A letter from an ODOT employee regarding negotiations between ODOT and the county does not constitute an affirmative waiver of issues related to minimum street width standards under OAR 660-012-0045(7), where it is unclear what was resolved between the parties and whether the county implemented the parties’ resolution. Even if petitioner ODOT had waived that issue, such waiver would not apply to petitioner DLCD. *Dept. of Transportation v. Douglas County*, 36 Or LUBA 131 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Petitioners’ argument at LUBA that using agricultural land for a golf course buffer violates the ORS 215.296(1) prohibition against forcing a significant change in farm practices on surrounding lands devoted to farm use was waived, where petitioners’ arguments during the local proceedings concerning the proposed buffers were not sufficient for the decision maker to understand and respond to that issue. *DLCD v. Jackson County*, 36 Or LUBA 88 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(3)(b) only requires that the notice of hearing list the applicable criteria from the local government’s ordinance and comprehensive plan. The failure of the notice to list applicable statutory provisions is not a violation of ORS 197.763(3), and does not excuse petitioner from the obligation to raise the issue of compliance with those statutes during the local proceedings. *Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the record shows petitioner knew or should have known of the existence and potential applicability of criteria in the county ordinance and comprehensive plan that were omitted from the notice of hearing, LUBA will conclude pursuant to ORS 197.835(4)(a) that petitioner could have raised the applicability of those criteria during the local proceedings below, and thus petitioner cannot raise new issues before LUBA regarding those criteria. *Van Dyke v. Yamhill County*, 35 Or LUBA 676 (1999).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner would not likely have noticed an arguably relevant plan provision where the plan provision was located in a different section of the plan from the plan provisions identified as relevant by the local government in their notice of hearing. Petitioner is therefore not barred by ORS 197.835(4)(a) from raising an issue concerning compliance with the plan provision. *Visher v. City of Cannon Beach*, 35 Or LUBA 74 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(3) does not require a petitioner to raise issues concerning a condition of approval, where the condition of approval first appeared in the final decision. *Deal v. City of Hermiston*, 35 Or LUBA 16 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner adequately raised the issue of whether a street would continue to function as a local street, failure to specify the TPR or comprehensive plan provision that required that the street continue to function as a local street does not result in waiver of the issue. *Hannah v. City of Eugene*, 35 Or LUBA 1 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.835(3) and 197.763 require that petitioners at LUBA have raised the issues they wish to raise at LUBA during the local proceeding. However, this statutory restriction does not apply to individual arguments regarding those issues. *DLCD v. Tillamook County*, 34 Or LUBA 586 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner did not specifically raise the issue of compliance with the Fair Housing Act (FHA) in the proceedings below, statements that his clients are disabled and that the property needs to be identified for emergency response services are not sufficient under ORS 197.763 to raise an issue that denial of the requested variance would constitute a failure to make a “reasonable accommodation” under the FHA. *Andrusko v. Clackamas County*, 34 Or LUBA 493 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A decision maker’s reference to the Fair Housing Act in a context that is unrelated to the issue that petitioner seeks to raise on appeal does not demonstrate that the issue was raised in the local proceedings with the specificity required by ORS 197.763. *Andrusko v. Clackamas County*, 34 Or LUBA 493 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioner only provides a bare reference to “equal protection” as a constitutional claim, that is not sufficient to afford the local government and the opposing parties an adequate opportunity to respond to the issue pursuant to ORS 197.763(1). *Yontz v. Multnomah County*, 34 Or LUBA 367 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a petitioner at LUBA challenges an interpretation that first appeared in the challenged

decision, petitioner need not have raised an issue concerning that interpretation during the local proceedings. *Tenly Properties Corp. v. Washington County*, 34 Or LUBA 352 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where LUBA remands a decision to a local government to adopt an interpretation of its plan and petitioner participates in those proceedings on remand but fails to raise any issue about the city council’s authority to interpret the plan without referring the matter to the planning commission, petitioner waives her right to raise that issue in a subsequent appeal of the city council’s decision on remand to LUBA. *Jebousek v. City of Newport*, 34 Or LUBA 340 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Comments during local proceedings expressing opinions about low-income residents do not adequately raise issues concerning unlawful segregation, violation of the Fair Housing Act or violation of the equal protection clause for purposes of preserving the right to raise those issues on appeal to LUBA. *St. Johns Neighborhood v. City of Portland*, 34 Or LUBA 46 (1998).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.763(1) requires the proponent of an evidentiary hearing to demonstrate that the reason facts are missing from the record is not due to the proponent’s failure to submit information sufficient to afford the local governing body the opportunity to respond. *St. Johns Neighborhood Assn v. City of Portland*, 33 Or LUBA 836 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where an issue is adequately raised below, ORS 197.763 does not limit particular arguments related to that issue on appeal. *DLCD v. Curry County*, 33 Or LUBA 728 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.763(1) and ORS 197.835(3), all petitioner must do is raise the issue before the final evidentiary hearing record is closed to enable petitioner to raise an issue before LUBA. *Central Bethany Dev. Co. v. Washington County*, 33 Or LUBA 463 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A petitioner failing to respond to a local government’s request to make his general objections more detailed fails to afford the city an opportunity to respond, may not make those objections more detailed for the first time at LUBA and waives the right to appeal based on those objections. *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

A decision maker’s finding that a petitioner has not raised an issue below with sufficient statements and evidence to enable the decision maker to respond does not compel LUBA to reach the same conclusion. . *Arnett v. City of Lake Oswego*, 33 Or LUBA 384 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a city fails to list a code criterion on a notice of hearing but the criterion precedes and is on the same page as one that was listed, and both pertain to variances, ORS 197.835(4)(b) makes it appropriate for LUBA to refuse to allow a petitioner to raise issues related to the unlisted criterion,

particularly when the petitioner does not contend it was unaware of the existence of the unlisted criterion. *Tandem Development Corp. v. City of Hillsboro*, 33 Or LUBA 335 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioner’s general references to issues during local proceedings on remand from LUBA are sufficient to avoid waiver on those issues in a subsequent LUBA appeal, where petitioner raised those issues with specificity during the initial local proceeding, the LUBA remand decision was based on them, and the county’s findings on remand discussed them in detail. *DLCD v. Curry County*, 33 Or LUBA 313 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Although a local government may narrow its own scope of review in local appeals, it cannot narrow LUBA’s scope of review over issues raised at any time below. *Laurence v. Douglas County*, 33 Or LUBA 292 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.835(4)(a), petitioners may raise new issues before LUBA if the city failed to follow applicable local procedures as required by ORS 197.195(3)(a). If the local code requires a public hearing as an applicable procedure, the city’s failure to follow that procedure would allow petitioners to raise the issue before LUBA. *Venable v. City of Albany*, 33 Or LUBA 1 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the city’s application form requests a written narrative, but petitioner does not identify an applicable legal standard or criterion that requires its submission, petitioner may not raise new issues as a result of the city’s failure to include such a criterion on the notice of hearings. *Design Home Construction v. City of Silverton*, 32 Or LUBA 452 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners contend a decision fails to address an applicable approval criterion that was not identified in the local government’s hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(4)(b). *Wicks-Snodgrass v. City of Reedsport*, 32 Or LUBA 292 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

If a notice of hearing does not mention a potentially applicable code provision and the participants below were therefore unaware of its existence or possible applicability, petitioners may raise new issues associated with that provision before LUBA. *DeBates v. Yamhill County*, 32 Or LUBA 276 (1997).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The 1995 amendment to ORS 197.763(1) adds a requirement that issues not only be raised, but also be *accompanied by statements or evidence* sufficient to afford the local decision maker an opportunity to respond. What is “sufficient” still depends upon whether the governing body,

planning commission, hearings body or hearings officer, and the parties are afforded an adequate opportunity to respond to each issue. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where defining the relevant area is an essential, stated component of the stability standard for nonfarm dwellings, petitioner must object below to the area selected by the county in order to avoid waiving the objection on appeal. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners' general statement in the local proceedings that the proposed use was inappropriate for the area did not sufficiently raise the issue of whether the definition of a solid waste disposal site could include a yard waste composting facility. Under ORS 197.835(3), petitioners waived their right to raise that issue before LUBA. *Richards-Kreitzberg v. Marion County*, 32 Or LUBA 76 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party contends petitioners have waived their right to raise a certain issue on appeal by failing to raise it below, and petitioners neither cite to the local record where that issue was raised, nor establish a violation of ORS 197.763(3)(b) related to the issue they wish to raise, petitioners have waived their right to raise the issue. *Friends of Indian Ford v. Deschutes County*, 31 Or LUBA 248 (1996).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

LUBA does not have authority to review a variance request that was never considered by the city council. *Main Auto Body v. City of Salem*, 30 Or LUBA 194 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When a petitioner was explicitly provided the opportunity to raise certain issues regarding compliance with the local zoning ordinance before the city, but did not do so, ORS 197.835(3) precludes her from doing so for the first time on appeal. *Noble v. City of Fairview*, 30 Or LUBA 180 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners' general references during the local proceedings to the density and appropriate zoning of the site were not sufficiently specific to put the governing body on notice that petitioners objected to the applicability and validity of an urban fringe management agreement between the city and the county. *Friends of Neabeack Hill v. City of Philomath*, 30 Or LUBA 46 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party contends petitioners have waived certain issues, and petitioners neither cite to the local record where those issues were raised nor establish they may raise new issues under ORS 197.835(2)(a) or (b), petitioners have waived their right to raise those issues on appeal. *Wakeman v. Jackson County*, 29 Or LUBA 521 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

When the notice of an evidentiary hearing on a local appeal is so vague that petitioners cannot

understand the proposal under review, and when the decision on the local appeal is substantially different from the administrative decision being appealed, under ORS 197.835(2)(b) petitioners may raise new issues for the first time before LUBA. *Collier v. Marion County*, 29 Or LUBA 462 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party contends petitioner has waived certain issues, and petitioner neither cites where in the local record those issues were raised nor contends it may raise new issues under ORS 197.835(2)(a) or (b), those issues have been waived. *Pend-Air Citizen’s Comm. v. City of Pendleton*, 29 Or LUBA 362 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

If the local government did not hold a land use hearing, subject to the requirements of ORS 197.763, before making the challenged decision, petitioners cannot waive the right to raise issues for the first time on appeal to LUBA, because they were not provided the forum in which to raise such issues at the local level. *Leathers v. Washington County*, 29 Or LUBA 343 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

There is no meaningful difference between ORS 197.195(3)(c)(B) and 197.763(1) “raise it or waive it” requirements. *Clark v. City of Albany*, 29 Or LUBA 325 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners could have raised an issue prior to the close of the evidentiary hearing before the local governing body, but failed to do so, that petitioners were precluded from raising the issue during the earlier evidentiary hearing before the planning commission does not mean petitioners can raise the issue for the first time before LUBA. *O’Rourke v. Union County*, 29 Or LUBA 303 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Local government failure to list any applicable comprehensive plan or ordinance criterion in the written and oral notices required by ORS 197.763(3)(b) and (5)(a) constitutes a violation of ORS 197.763 which allows parties to raise new issues before LUBA, regardless of whether the new issues relate to the omitted criterion. *Mission Bottom Assoc. v. Marion County*, 29 Or LUBA 281 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where respondent contends petitioner has waived issues concerning compliance with certain legal standards, and petitioner neither cites places in the local record where compliance with those legal standards was discussed, or their operative terms were cited, nor contends she may raise new issues under ORS 197.835(2)(a) or (b), the issues have been waived. *Cox v. Yamhill County*, 29 Or LUBA 263 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Even though petitioner did not raise the issue of compliance with a particular approval criterion below, the issue was not waived if it was raised sufficiently by other parties to the local proceedings. *Mitchell v. City of Medford*, 29 Or LUBA 158 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where, during the local proceedings, no party referred to the Equal Privileges and Immunities Clause of Article I, section 20, of the Oregon Constitution, or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, by name, article and section or amendment number, or their operative terms, petitioner is precluded from raising violation of these constitutional provisions as an issue in an appeal to LUBA. ORS 197.763(1); 197.835(2). *Craven v. Jackson County*, 29 Or LUBA 125 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If issues were not raised during the local government proceedings, under ORS 197.763(1) and 197.835(2), petitioner may not raise in an appeal to LUBA the local government’s failure to address those issues in its findings. *ONRC v. City of Seaside*, 29 Or LUBA 39 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because a local code enforcement proceeding does not involve an “application” or an “applicant” in the sense those terms are used in ORS 197.763, the “raise it or waive it” provisions of ORS 197.763 and 197.835(2) do not apply to such proceedings. *Sanchez v. Clatsop County*, 29 Or LUBA 26 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1), 197.830(10) and 197.835(2) do not limit the issues which may be raised before LUBA in an appeal of a local government legislative land use decision. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. If respondents fail to claim or demonstrate that *all* petitioners affirmatively waived an issue, the principle of affirmative waiver does not apply. *Opus Development Corp. v. City of Eugene*, 28 Or LUBA 670 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners never had an opportunity to participate in the local process utilized for adopting the decision on remand, petitioners had no opportunity to raise issues during the remand proceedings and, therefore, are not limited by “raise it or waive it” rules. *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the local government’s notice of its first evidentiary hearing before the planning commission failed to list the applicable standards, as required by ORS 197.763(3)(b), petitioners may raise issues at LUBA even though such issues may not have been raised during the local proceedings. However, this procedural error provides no basis for reversal or remand of the decision where petitioners fail to establish the error caused prejudice to their substantial rights. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where during the local proceedings petitioners affirmatively waived their right to request a

continuance, petitioners cannot raise the local government's failure to provide such a continuance as a basis for reversal or remand in an appeal to LUBA. *Shapiro v. City of Talent*, 28 Or LUBA 542 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. An applicant that cites certain statutes during local proceedings, and states that those statutes do not affect the burden of proof, waives its right to argue in an appeal at LUBA that those statutes preempt local standards. *Louks v. Jackson County*, 28 Or LUBA 501 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government fails to list a single applicable approval criterion in its notice of initial evidentiary hearing, issues may be raised at LUBA even though they were not raised during the local proceedings. *Lamm v. City of Portland*, 28 Or LUBA 468 (1995).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the challenged decision includes a determination that a nonconforming use of the subject property exists, but the notice of hearing indicated the only issue to be addressed was an expansion of an existing nonconforming use, the notice of hearing failed to adequately describe the nature of the application, as required by ORS 197.763(3)(a), and failed to reasonably describe the county's final action under ORS 197.835(2)(b). Either of these deficiencies means petitioners may raise issues before LUBA regardless of whether they were raised below. *Tylka v. Clackamas County*, 28 Or LUBA 417 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under the "raise it or waive it" statute, LUBA's review is limited to arguments raised during the local proceedings only where the local government complies with the requirements of ORS 197.763. *Neuman v. City of Albany*, 28 Or LUBA 337 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Although a local government is free to adopt local code provisions narrowing the scope of review in local appeal proceedings, such local code provisions do not have the legal effect of limiting LUBA's scope of review. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA's review of limited land use decisions is limited to issues raised before the local government, unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from the proposal described in the local notice of proposed action. *ONRC v. City of Oregon City*, 28 Or LUBA 263 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where, during local comprehensive plan map amendment and zone change proceedings, petitioner advised the local government that Statewide Planning Goal 5 requires an analysis regarding only a nearby aggregate operation, petitioner affirmatively waived any Goal 5 issues unrelated to the nearby aggregate operation. *DLCD v. Curry County*, 28 Or LUBA 205 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Prior to the filing of the petition for review, LUBA cannot tell whether all issues a petitioner potentially may raise in the petition for review are barred by the “raise it or waive it” provisions of ORS 197.763 and 197.835(2). *Scholes v. Jackson County*, 28 Or LUBA 728 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Under ORS 197.830(10) and 197.835(2), LUBA’s review of both land use decisions and limited land use decisions is limited to issues raised below, unless (1) the local government did not satisfy the procedural requirements of ORS 197.763 or ORS 197.195, or (2) the land use decision or limited land use decision adopted differs significantly from what was described in the local government’s notice. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the relevant local government notices did not list the applicable approval criteria, as required by both ORS 197.763(3)(b) and 197.195(3)(c)(C), then regardless of whether the challenged decision is a land use decision or limited land use decision, issues may be raised before LUBA irrespective of whether they were raised during the proceedings below. *Tri-County Metro. Trans. Dist. v. City of Beaverton*, 28 Or LUBA 78 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) does not require petitioners to raise with specificity, prior to the close of the evidentiary hearing, issues regarding aspects of a condition of approval that were not imposed until the governing body adopted the local government’s final decision. *Beck v. City of Happy Valley*, 27 Or LUBA 631 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party is entitled to and requests a continuance under ORS 197.763(4), and the local government decision maker does not respond to the request or grant a continuance prior to the close of the evidentiary hearing portion of a quasi-judicial land use proceeding, the party does not waive its right to allege failure to grant the continuance as error in a LUBA appeal by failing to repeat the continuance request at subsequent local government meetings held to adopt a final written decision. *Historical Development Advocates v. City of Portland*, 27 Or LUBA 617 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government mistakenly believes it is adopting a limited land use decision, and for that reason fails to follow the notice and hearing requirements of ORS 197.763, no issues petitioner wishes to raise at LUBA were waived because they were not raised below. ORS 197.835(2)(a). *Fechtig v. City of Albany*, 27 Or LUBA 480 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. LUBA applies statutory waiver requirements to limited land use decisions the same way it applies them to land use decisions. LUBA’s review of limited land use decisions is limited to issues raised below unless (1) the local government did not satisfy the procedural requirements of ORS 197.195, or (2) the limited land use decision adopted differs significantly from that described in the local notice of proposed action. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The ORS 197.195(3)(c)(B) provision that only issues raised “with sufficient specificity” below may be raised before LUBA in an appeal of a limited land use decision requires only that an issue be raised sufficiently to afford the local government and other parties an opportunity to respond. *Barrick v. City of Salem*, 27 Or LUBA 417 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where respondents argue petitioners may not raise an issue in their petition for review because they failed to raise the issue below, and petitioners make no attempt to identify where in the record the issue was raised, LUBA will not consider the issue. *Davenport v. City of Tigard*, 27 Or LUBA 243 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners questioned how much of the subject property was utilized for rock quarrying purposes and how much rock was quarried during the relevant period of time, during local proceedings to determine whether a rock quarry qualifies as a nonconforming use, this is adequate to enable a reasonable decision maker to understand issues were raised concerning the size and scope of quarrying activities and the adequacy of the evidence relating to those issues. *Mazeski v. City of Mosier*, 27 Or LUBA 100 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

If a party contends an issue petitioners seek to raise before LUBA in an appeal challenging a limited land use decision was not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.195, petitioners may not raise the issue for the first time before LUBA. *Dorgan v. City of Albany*, 27 Or LUBA 64 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where respondents argue in their briefs that issues raised in a petition for review are waived under ORS 197.835(2) because they were not raised below, a petitioner may point out where in the record such issues were raised, or assert any defenses that may be available under ORS 197.835(2)(a) or (b) in response to the waiver argument, either at oral argument or in a reply brief. *Zippel v. Josephine County*, 27 Or LUBA 11 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.763(5)(a) requires that a statement listing the applicable substantive criteria from the local government comprehensive plan and code be made at the beginning of a quasi-judicial land use hearing. Where such a statement is not made, or other requirements of ORS 197.763 are not met, petitioners may raise new issues in an appeal to LUBA. *Eppich v. Clackamas County*, 26 Or LUBA 498 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.763, so long as issues are sufficiently raised locally to give the local government and other parties an opportunity to respond, those issues may be raised at LUBA. *Citizens for Resp. Growth v. City of Seaside*, 26 Or LUBA 458 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party contends that issues petitioners seek to raise before LUBA were not raised during the local proceedings, and petitioners neither identify where in the record the issues were raised below nor claim the local government failed to follow the procedures required by ORS 197.763, petitioners may not raise the issues for the first time before LUBA. *Pacific Rivers Council, Inc. v. Lane County*, 26 Or LUBA 323 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where an applicant specifically agreed during local proceedings that the local government could impose certain conditions of approval, the applicant may not later challenge those conditions of approval in an appeal of the local government’s decision at LUBA. *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 247 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.763(7) does not preclude a local government from reopening an evidentiary record for limited purposes after it has been closed. It simply provides that if the record is reopened, new issues may be raised in an appeal to LUBA with regard to the evidence accepted after the record is reopened. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners allege that a procedural error occurred *after* the close of the record following the final local government evidentiary hearing on an application, it is not possible for petitioners to raise the error below “as provided by ORS 197.763” and, therefore, ORS 197.835(2) does not preclude petitioners from raising the issue before LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.763(1) and 197.835(2) do not supersede LUBA’s prior rulings that where a party has an opportunity locally to object to a *procedural* error, at any stage of the local government proceedings, but fails to do so, that error cannot be assigned as grounds for reversal or remand of the local government’s decision in an appeal to LUBA. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners reasonably relied on a local code provision and hearing notice stating the governing body’s review is limited to the evidentiary record before the planning commission, and were unaware that materials not in the planning commission record were placed before the governing body, petitioners do not waive their right to assert this error before LUBA by failing to object to it below. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Local government failure to comply with ORS 197.763(3) notice of hearing requirements (1) means that under ORS 197.835(2)(a), LUBA may consider issues that were not raised below; and (2) is a procedural error which, under ORS 197.835(7)(a)(B), provides a basis for reversal or remand of the challenged decision only if such error prejudices petitioners’ substantial rights. *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. In order to preserve the right to challenge at LUBA the adequacy of the adopted findings to address a relevant criterion, or the evidentiary support for such findings, a petitioner must challenge the proposal’s compliance with that criterion during the local proceedings. However, the particular findings ultimately adopted or evidence ultimately relied on by the decision maker need not be anticipated and specifically challenged during the local proceedings. *Lucier v. City of Medford*, 26 Or LUBA 213 (1994).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners contend that under ORS 197.835(2)(a), they may raise new issues before LUBA because the local government failed to comply with ORS 197.763, and petitioners allege specific respects in which the local government failed to follow the procedural requirements of ORS 197.763, the local government or other respondents must demonstrate that the local government complied with the relevant requirements of ORS 197.763. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the local government’s notice of hearing did not include the list of applicable criteria or the explanation of the rights to request a continuance and to keep the record open that are required by ORS 197.763(3)(b) and (j), petitioners may raise issues in their appeal to LUBA irrespective of whether they were raised during the proceedings below. *Cummings v. Tillamook County*, 26 OR LUBA 139 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Once a local government identifies the relevant approval standards in a local quasi-judicial land use proceeding, a party may not fail to argue certain identified standards are advisory rather than mandatory, and later in an appeal to LUBA claim it could not have anticipated the local government would apply one or more of the identified standards to deny the party’s request for land use approval. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. A petitioner may challenge a local government’s interpretation of its regulations without having raised an issue during the local proceedings concerning that interpretation, where the interpretation first appears in findings prepared and adopted after the final local evidentiary hearing. *Eskandarian v. City of Portland*, 26 Or LUBA 98 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where testimony below does not refer to ORS 215.296 by its statutory citation, title or any recognized abbreviation for either, and does not employ any of the operative terms of the statute, a reasonable local decision maker would not have understood that compliance with ORS 215.296 was raised below, and petitioner may not raise this issue before LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because ORS 197.835(2) states that issues raised before LUBA “shall be limited to those raised

by *any participant* before the local hearings body,” as long as a particular issue was raised below by *some participant*, petitioners may raise that issue before LUBA. *Spiering v. Yamhill County*, 25 Or LUBA 695 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where ORS 197.763 was not in effect at the time the subject application was submitted to the local government, LUBA’s scope of review is not limited to issues raised during the local proceedings. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

While a local government has authority to regulate the conduct of local proceedings, including the conduct of local appeals, it may not limit LUBA’s review authority in ways not authorized by statute. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under the “raise it or waive it” provisions of ORS 197.763 and ORS 197.835(2), a local government’s failure to list a single relevant criterion means petitioner need not have raised an issue locally as a prerequisite for raising that issue before LUBA, even where the issue pertains to plan or land use regulation criteria that were listed in the notice required by ORS 197.763(3)(b). *Weuster v. Clackamas County*, 25 Or LUBA 425 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

LUBA’s scope of review is limited by ORS 197.835(2) and 197.763(1) to issues raised during the local government proceedings, only where the local government complies with the requirements of ORS 197.763. *Friends of the Metolius v. Jefferson County*, 25 Or LUBA 411 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

LUBA will not consider allegations that a “similar use” ruling should have been sought below, where the local government alleges no issue was raised below concerning the necessity for such a “similar use” ruling and petitioner provides no citations to the record showing the issue was raised below. *Cooley v. Deschutes County*, 25 Or LUBA 350 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a letter submitted below makes several statements arguing that a proposed dwelling is not “necessary for” forest use of the subject property, but mentions only in passing the “accessory to” portion of the local government “necessary for and accessory to a permitted forest use” standard, the “accessory to” issue was not raised specifically enough to give respondents a reasonable opportunity to respond and, therefore, is waived. *DLCD v. Coos County*, 25 Or LUBA 158 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners referred several times during local proceedings to a nonconforming parking lot as having only 22 spaces, petitioners did not waive their right to challenge a city decision approving changes in the nonconforming parking lot to allow 32 spaces. *Glisan Street Assoc., Ltd. v. City of Portland*, 25 Or LUBA 116 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Local government provisions narrowing the scope of review during local appeals do not similarly narrow LUBA’s scope of review under ORS 197.763(1) and 197.835(2). *Davenport v. City of Tigard*, 25 Or LUBA 67 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners contend a decision fails to address an applicable approval criterion that was *not* identified in the local government’s hearing notice as required by ORS 197.763(3)(b), and respondents contend petitioners cannot raise this issue because they failed to raise it below, LUBA must decide whether the provision in question establishes an approval criterion for the subject application, in which case petitioners may raise the new issue before LUBA pursuant to ORS 197.835(2)(a). *O’Mara v. Douglas County*, 25 Or LUBA 25 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because a constitutional taking claim is not dependent upon a local government’s adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 25 Or LUBA 18 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where the characterization of an alleged nonconforming use is the primary issue during the local proceedings, to preserve for eventual appeal to LUBA the issue of whether the alleged nonconforming use includes sales of equipment, a petitioner must do more than state in passing during the local proceedings that he maintained equipment he had a right to sell. *Rhine v. City of Portland*, 24 Or LUBA 557 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners could not reasonably have known a local government would adopt a particular interpretation of local ordinances, petitioners are not required by ORS 197.835(2) and 197.763(1) to have challenged the interpretation during the local proceedings below in order to challenge the interpretation before LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Because a constitutional taking claim is not dependent upon a local government’s adoption of a particular interpretation of an ordinance, in that denial of an application for development approval is a reasonably foreseeable possibility, a petitioner is required to raise taking claims during the local proceedings or waive the right to raise those issues at LUBA. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. While a local government is not *obliged* to respond to a taking claim raised during the local proceedings, the local government should, in the first instance, have an opportunity to respond to a taking issue during the local proceedings. Where there is more than one possible interpretation of the local approval standards, the local government should at least have the opportunity, if

possible, to adopt an interpretation that is constitutional. *Larson v. Multnomah County*, 24 Or LUBA 629 (1993).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government fails to adopt any findings addressing apparently applicable statewide planning goal, administrative rule and comprehensive plan criteria, the local government may not avoid a remand by arguing petitioner failed to preserve its ability to raise the issue of compliance with those provisions by not raising the issue with sufficient specificity during the local proceedings. In such circumstances, it is the failure to adopt findings that necessitates remand. *ODOT v. City of Waldport*, 24 Or LUBA 344 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the petition for review has not yet been filed, LUBA will not, in ruling on a motion to dismiss, determine whether issues that may be raised in the petition for review were waived under ORS 197.763(1) and 197.835(2). *Glisan Street Assoc. v. City of Portland*, 24 Or LUBA 600 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local planning official refuses to accept petitioner’s local appeal of a hearings officer’s decision on a permit application, but another local appeal of the same decision is processed, the refusal is either (1) a final land use decision, in which case a NITA must be timely filed with LUBA; or (2) part of the ongoing local proceedings on the subject application, in which case in an appeal of the local government’s final decision, LUBA can only consider issues concerning the refusal to accept petitioner’s appeal if those issues were raised below. *Wilson Park Neigh. Assoc. v. City of Portland*, 24 Or LUBA 98 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.830(10) and 197.835(2) do not limit the issues which may be raised before LUBA in an appeal of a local government legislative land use decision. *DLCD v. Columbia County*, 24 Or LUBA 32 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where respondents contend petitioners did not raise an issue in the local proceedings, and petitioners cite nothing in the record establishing they raised the disputed issue in the local proceedings, petitioners may not raise that issue for the first time in an appeal to LUBA. *Larson v. Wallowa County*, 23 Or LUBA 527 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the local government fails to identify the relevant plan and land use regulation standards in the notice of hearing, a petitioner is free to raise noncompliance with those standards in an appeal to LUBA, even though compliance with such standards was not raised as an issue below. *Ruff v. Harney County*, 23 Or LUBA 521 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

An issue is waived if it is not sufficiently raised below to enable a reasonable decision maker to understand the nature of the issue. Where no party below ever referred to OAR 660-12-060 by its

title, rule number or by any recognized abbreviation of either, a reasonable local decision maker would not have understood that the applicability of OAR 660-12-060 had been raised as an issue. *ODOT v. Clackamas County*, 23 Or LUBA 370 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where the local code contains separate sections imposing an identical standard on decisions approving farm dwellings on existing parcels and decisions approving partitions creating new farm parcels, a petitioner who raised an issue concerning compliance with that standard during local proceedings does not waive its right to raise that issue in an appeal at LUBA simply because petitioner cited the wrong code section. *DLCD v. Yamhill County*, 23 Or LUBA 361 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government’s notice of hearing does not comply with ORS 197.763(3)(b) because it fails to identify an applicable statewide planning goal as an approval criterion, petitioners may raise the local government’s failure either to comply with or to adopt an exception from that goal as an issue in a LUBA appeal proceeding. *Murray v. Marion County*, 23 Or LUBA 269 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Under ORS 197.763(1) and 197.835(2), if a party does not raise issues concerning a local government’s authority or jurisdiction to render the challenged decision during the local proceedings, LUBA lacks authority to review such issues. *Neste Resins Corp. v. City of Eugene*, 23 Or LUBA 55 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government contends an issue was not raised below, and the petitioner fails to cite any portions of the record which he contends demonstrate that he raised the issue during the local proceedings, under ORS 197.763(1) and 197.835(2) that issue may not be raised in an appeal to LUBA. *Coyner v. City of Portland*, 23 Or LUBA 79 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a petitioner failed to raise below any issue concerning a local government’s obligation to coordinate its decision with other jurisdictions under ORS 92.044(1)(c), petitioner may not raise the issue for the first time in an appeal to LUBA. *Southwood Homeowners Assoc. v. City of Philomath*, 22 Or LUBA 742 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where petitioners had the opportunity to object to alleged procedural errors in the local proceeding in an appeal to the governing body, but did not do so, they may not assign the alleged procedural errors as a basis for reversal or remand by LUBA. *Simmons v. Marion County*, 22 Or LUBA 759 (1992).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a party alleges petitioners failed to raise an issue during the local proceedings, and petitioners neither contend they raised the issue below nor claim the local government failed to follow the procedures required by ORS 197.763, petitioner may not raise the issue for the first

time at LUBA. ORS 197.763(1); 197.835(2). *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Petitioners cannot raise the issue of whether the subject proposal constitutes a “new structure” prohibited by the local code, when testimony below did not cite the relevant code provision, use its operative terms or otherwise afford the other parties an opportunity to respond to this issue. *Broetje-McLaughlin v. Clackamas County*, 22 Or LUBA 198 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government contends issues were not raised during the local proceedings, and petitioner fails to provide record citations establishing that the disputed issues were raised below, LUBA will not review the disputed issues. *Cummins v. Washington County*, 22 Or LUBA 129 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

The issue of whether the local government must consider impacts of all uses potentially allowed by a plan and zone map amendment was adequately raised during local proceedings pursuant to ORS 197.763(1), where petitioners informed the local government that they believed any use allowable under the proposed plan and zone designations could occur on the subject site, notwithstanding petitioners’ failure to explain below what they believed the legal consequences of this theory to be. *Brown & Cole, Inc. v. City of Estacada*, 21 Or LUBA 392 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Read together, ORS 197.763(1) and 197.835(2) provide a two-step analysis for determining whether an issue is raised locally for purposes of an appeal on that issue to LUBA. First, issues must be raised “no later than the close of the record at or following the final evidentiary hearing on the proposal before the local government.” Second, issues need only be raised before *one* of the local decision makers listed in ORS 197.763(1) sufficiently to enable the parties and the decision maker to respond to the issue. *Tice v. Josephine County*, 21 Or LUBA 371 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Expressions of general concerns about street system safety during local proceedings are not adequate to raise issues concerning compliance with local code standards governing right-of-way and street pavement widths with “sufficient specificity so as to afford the governing body * * * and the parties an adequate opportunity to respond to each issue.” ORS 197.763(1). *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local code standard which petitioners allege is violated by the challenged decision was not identified as an applicable standard in the local government’s notices of hearing, as required by ORS 197.763(3)(b), petitioners may raise the issue of compliance with that local code standard in a LUBA appeal, even though they did not raise the issue during the local proceedings. ORS 197.835(2)(a). *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. ORS 197.763(1) does not require that arguments *identical* to those in the petition for review have been presented during local proceedings, but rather that the arguments presented in the local proceedings sufficiently raise the issue sought to be raised in the petition for review, so that the local government and other parties had a chance to respond to that issue in the local proceedings. *Hale v. City of Beaverton*, 21 Or LUBA 249 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a party alleges petitioner failed to raise an issue during local proceedings, and petitioner neither contends he raised the issue below nor claims the local government failed to follow the procedures required by ORS 197.763, petitioner may not raise the issue for the first time at LUBA. ORS 197.763(1); 197.835(2). *Wethers v. City of Portland*, 21 Or LUBA 78 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a particular interpretation of certain code provisions was advanced in the applicant’s proposed findings, but was not discussed during the local proceedings, and was not adopted by the local government prior to the challenged decision, petitioners could not reasonably have known the local government would adopt the disputed interpretation and, therefore, are not required by ORS 197.763(1) to have challenged that interpretation below in order to challenge it before LUBA. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. The purpose of the “raise it or waive it” requirement of ORS 197.763(1) is to prevent the unfair surprise that would result if a petitioner did not raise issues locally and then raised those issues for the first time at LUBA. However, ORS 197.763(1) does not require that petitioners have presented precisely the same arguments during local proceedings that they present at LUBA. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners used the operative term contained in a code criterion in their testimony, and the local government understood that the code criterion applied and adopted findings addressing that criterion, petitioners did not waive their right to raise the issue of compliance with that criterion at LUBA by failing to cite the code criterion specifically by number *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where petitioners fail to cite anything in the local proceedings which shows that an issue was raised concerning compliance with a particular code criterion, petitioners may not argue for the first time at LUBA that the challenged decision violated that criterion. *Boldt v. Clackamas County*, 21 Or LUBA 40 (1991).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings. Where a local government’s notice of hearing, rather than listing applicable approval criteria, states the applicable criteria “are attached to this notice,” but the record does not include any such attachment, LUBA will conclude the notice does not comply with the requirement of ORS

197.763(3)(b) to list applicable criteria and will review issues raised by petitioners regardless of whether they were raised below. *Thormahlen v. City of Ashland*, 20 Or LUBA 218 (1990).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a local government’s notice of hearing did not comply with ORS 197.763(3)(b), in that it failed to identify an approval criterion relevant to the proposed development, petitioners may raise the local government’s failure to require compliance with that approval criterion as an issue in a LUBA appeal proceeding. ORS 197.835(2)(a). *Neuenschwander v. City of Ashland*, 20 Or LUBA 144 (1990).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

ORS 197.763 and 197.835(2) represent a quid pro quo, whereby local governments are required to give broader and more detailed notice of quasi-judicial land use hearings and make staff reports available in advance of such hearings, in exchange for participants being required to raise an issue during the local proceedings in order to be able to raise that issue before LUBA. *1000 Friends of Oregon v. Benton County*, 20 Or LUBA 7 (1990).

28.6.2 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Proceedings.

Where a petitioner did not raise an issue during local proceedings and does not contend the notice given by the local government fails to comply with the notice requirements of ORS 197.763 or 197.835(2)(b) or that the other procedural requirements of ORS 197.763 were not observed, the issue is waived and not within LUBA’s scope of review. ORS 197.835(2). *Keudell v. Union County*, 19 Or LUBA 394 (1990).