BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

WINDLINX RANCH TRUST,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

HODGE KERR and DEBORA KERR,
Intervenors-Respondents.

LUBA No. 2023-079

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Christopher P. Koback filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Hathaway Larson LLP.

No appearance by Deschutes County.

Wendie L. Kellington filed the intervenors-respondents' brief and argued on behalf of intervenors-respondents.

RYAN, Board Chair; RUDD, Board Member; ZAMUDIO, Board Member, participated in the decision.

AFFIRMED 02/29/2024

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a hearings officer decision approving, on remand, a forest template dwelling application.

FACTS

The challenged decision is the hearings officer's decision on remand from our decision in *Windlinx Ranch Trust v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2022-022, July 7, 2022) (*Windlinx I*), *aff'd*, 323 Or App 319 (2022) (nonprecedential memorandum opinion) (*Windlinx II*).[1] We summarize only the facts from *Windlinx I* that are necessary to understand the background and our decision here.

Intervenors-respondents (intervenors) own an approximately 6.7-acre parcel that is vacant and zoned Forest Use (F-2). In 2021, intervenors applied for approval of a forest template dwelling on the subject property, pursuant to ORS 215.750. Original Record 36.[2] Under ORS 215.750(3)(b)(A), intervenors were

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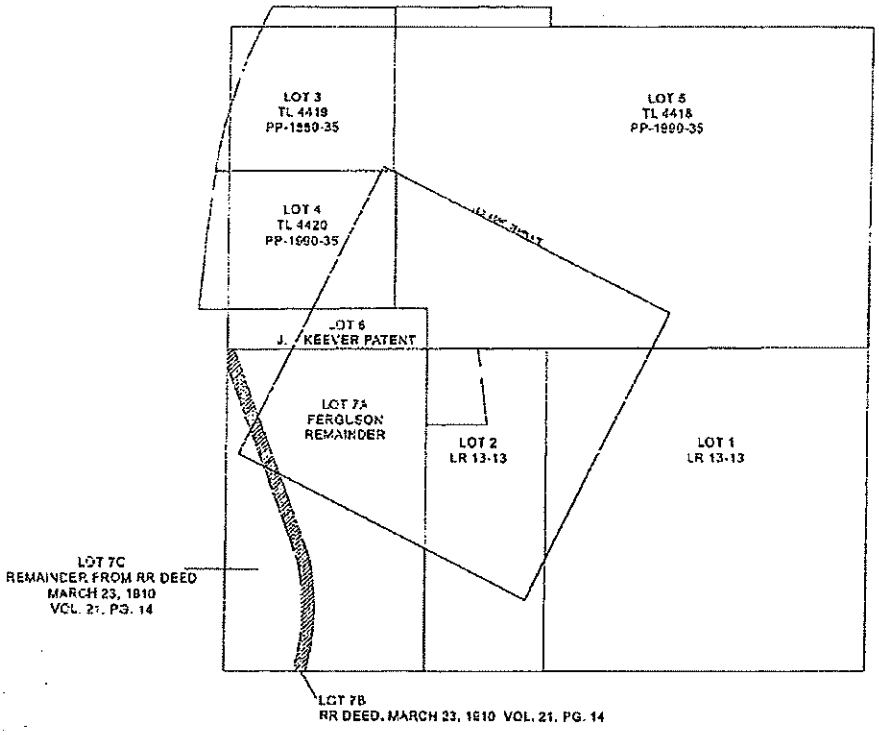
[1] After we issued *Windlinx I*, the parties each sought judicial review by the Court of Appeals and the court issued two separate nonprecedential memorandum opinions. *Windlinx Ranch Trust v. Deschutes County*, 323 Or App 290 (2022) (nonprecedential memorandum opinion) resolved intervenors-respondents' appeal of issues related to Lot 6, which are not at issue in the present appeal, and affirmed our decision. *Windlinx II*, 323 Or App 319, resolved petitioner's appeal of the issues that are described in more detail below.

[2] The record includes the record in *Windlinx I*, which we refer to here as the Original Record, and the record on remand, which we refer to here as the Remand Record.

required to demonstrate that "[a]ll or part of at least seven other lots or parcels that existed on January 1, 1993, are within a 160-acre square centered on the center of the subject tract[.]" We refer to that 160-acre square centered on the center of the subject property as the Template. Thus, the statute requires an applicant to demonstrate that (i) all or part of at least seven lots or parcels (ii) existed on January 1, 1993, and (iii) are located within the Template. In making that demonstration, as we explained in *Windlinx I*, only parcels that are lawfully created may be counted towards the minimum seven parcels. ___ Or LUBA at ___ (citing *Friends of Yamhill County v. Yamhill County*, 229 Or App 188, 198, 211 P3d 297 (2009)) (slip op at 13). Thus, we explained in *Windlinx I*:

> "[I]ntervenors were required to identify at least seven qualifying parcels. Intervenors identified a minimum of seven and a maximum of nine parcels that intervenors argued were lawfully created 'lots or parcels.' Intervenors referred to those parcels as Lots 1 through 7 and, more specifically, referred to Lot 7 as Lots 7a, 7b, and 7c. The hearings officer concluded that intervenors established that there exist nine lawfully created parcels within the template. Intervenors' template and the lots are shown below:



> "The subject property is not numbered, but it is within the template, in the upper left-hand corner of Lot 2." *Windlinx I*, ___ Or LUBA at ___ (internal record citations and footnote omitted) (slip op at 16-17).

On remand, as we explain in more detail below, the hearings officer concluded that seven lots or parcels that existed on January 1, 1993, are within the Template, and approved the application. This appeal followed.

FIRST AND THIRD ASSIGNMENTS OF ERROR

A. *Windlinx I*

In *Windlinx I*, we summarized petitioner's fourth assignment of error:

> "In its fourth assignment of error, we understand petitioner to argue that the hearings officer's conclusion that there exist at least seven lawfully created parcels within the template is not supported by substantial evidence in the whole record *because there is no evidence in the record that Lots 2, 6, and 7, including Lots 7a, 7b,*

> *and 7c, were created in a manner described in ORS 215.010(1)(a).* We also understand petitioner to argue that the hearings officer's decision improperly construes [ORS 215.750(3)(b)]." ___ Or LUBA at ___ (emphasis added) (slip op at 17).

We denied the portion of petitioner's fourth assignment of error that argued that a 1910 document transferred only an easement and not a fee interest in Lot 7b and therefore Lot 7b was not a lawfully created parcel. *Id.* at ___ (slip op at 28). However, we sustained a portion of petitioner's fourth assignment of error, because we agreed with petitioner that the hearings officer's findings were inadequate to explain the hearings officer's conclusion that Lot 7a and Lot 7c were lawfully created in a manner described in ORS 215.010(1)(a). We held that "[o]n remand, the hearings officer should determine whether Lots 7a and 7c are lawfully created parcels under ORS 215.010(1)(a)."[3] *Id.* at ___ (slip op at 29).

B. *Windlinx II*

Petitioner appealed our decision in *Windlinx I* to the Court of Appeals and raised four assignments of error. *See* n 1. *Windlinx II*, 323 Or App 319.[4] Two of

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[3] Relatedly, petitioner's sixth assignment of error argued that the hearings officer's decision that intervenors' expert's evidence was sufficient to identify the Template location was not supported by substantial evidence in the whole record, because petitioner's evidence supported a different location for the Template. *Windlinx I*, ___ Or LUBA at ___ (slip op at 34). We denied the sixth assignment of error because we concluded that a reasonable decision maker could rely on the evidence on which the hearings officer relied to identify the location of the Template. *Id.* at ___ (slip op at 36).

[4] Petitioner's first two assignments of error to the court challenged our decision affirming the hearings officer's finding that intervenors' land could

petitioner's assignments of error argued that our resolution of the fourth assignment of error, that challenged whether Lot 7b was lawfully created, applied an incorrect standard of review. *Windlinx II*, 323 Or App at 321. The court affirmed our decision, explaining:

> "[T]he hearings officer was not asked to make a conclusive legal determination about property rights involved in the 1910 document and the 1994 easement. An application for a forest template dwelling and its related hearing is not the forum for those kinds of determinations. *See, e.g., McNichols v. City of Canby*, 79 Or LUBA 139, 146 (2019) ('[F]inal and authoritative determinations regarding the intent and scope of deeds, easements and similar real estate documents can be obtained only in circuit court, based on application of real estate law.'). Instead, the hearings officer was tasked with making factual determinations; specifically, whether there were sufficient lots or parcels within the template to allow construction of the forest dwelling, and whether there was access to the land in question. The hearings officer relied on the evidence in the record of the 1910 document and the 1994 easement to make those factual determinations. Because the issues were ones of fact, LUBA correctly used the substantial evidence standard to review the hearings officer's decisions." *Id.*

C. The Remand Proceedings

As explained above, our decision in *Windlinx I* sustained a portion of petitioner's fourth assignment of error and remanded the hearings officer's decision in order for "the hearings officer [to] determine whether Lots 7a and 7c are lawfully created parcels under ORS 215.010(1)(a)." ___ Or LUBA at ___

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produce less than 50 cubic feet of fiber annually. Those arguments are not at issue here.

(slip op at 29). On remand, petitioner argued to the hearings officer that Lot 7b and Lot 7c are not located within the Template. The hearings officer noted that petitioner's arguments were outside the scope of our remand in *Windlinx I*. Remand Record 35 n 6, 39.

The hearings officer concluded that the issue of whether Lot 7b and Lot 7c are located within the Template is a "settled matter." Remand Record 39, 42. The hearings officer also adopted alternative, precautionary findings that concluded that Lot 7c is within the Template.[5] Remand Record 42-43.

D. First and Third Assignments of Error

Petitioner's first assignment of error is that the hearings officer's conclusion that the issue of whether Lot 7b and Lot 7c are located within the Template is a "settled matter" improperly construes the applicable law. ORS 197.835(9)(a)(D). Petitioner's third, related assignment of error alleges that the hearings officer's alternative, precautionary finding that Lot 7c is located within the Template is not supported by substantial evidence in the whole record. ORS 197.835(9)(a)(C).

1. Law of the Case Doctrine

Under the law of the case doctrine, a party at LUBA fails to preserve an issue for review by LUBA if, in a prior stage of a single proceeding, that issue is

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[5] The hearings officer concluded that Lot 1, Lot 3, Lot 4, Lot 5, combined Lots 2 and 7a, Lot 7b, and Lot 7c existed on January 1, 1993, and are lawfully created parcels. Remand Record 44. Petitioner does not challenge that conclusion.

decided adversely to the party, or that issue could have been raised and was not raised. The law of the case doctrine precludes issues from being raised piecemeal throughout the course of appellate review, and is supported by the legislative policy at ORS 197.805 that "time is of the essence in reaching final decisions in matters involving land use."

In *Mill Creek Glen Protec. Assn. v. Umatilla County*, 15 Or LUBA 563, *aff'd*, 88 Or App 522, 746 P2d 728 (1987), the petitioners appealed a county commissioners' decision approving a conditional use permit for gravel extraction and processing on remand, after we remanded the decision in *Allen v. Umatilla County*, 14 Or LUBA 749 (1986). In *Mill Creek Glen*, we concluded that the law of the case doctrine precluded our review of the issues that the petitioners raised to us in that appeal, because they were issues which could have been raised but were not raised in *Allen*. *Id.* at 566 (citing *Portland Audubon v. Clackamas County*, 14 Or LUBA 433, *aff'd*, 80 Or App 593, 722 P2d 745 (1986)).

The Court of Appeals affirmed our decision, holding that the law of the case doctrine barred the petitioners from raising issues in a second appeal to LUBA that could have been but were not raised in a first appeal from the same land use decision. *Mill Creek Glen Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 526-27, 746 P2d 728 (1987). In *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992), the Supreme Court reviewed a number of statutes that govern LUBA review and judicial review of LUBA decisions, and concluded that issues that LUBA decides in an earlier unappealed final opinion in the same case may

not be the subject of assignments of error in a later final opinion in the same case. The Supreme Court cited *Mill Creek Glen Protection Assoc.*, 88 Or App at 527, with approval.[6] *Beck*, 313 Or at 153 n 2.

2. Petitioner Could Have Raised the Issue in *Windlinx I* that it Now Raises

Intervenors argue that petitioner is precluded from raising the issues raised in the first and third assignments of error under the law of the case doctrine. Intervenors argue that petitioner could have but did not raise the issue of whether Lot 7b and Lot 7c are located within the Template during their appeal of the hearings officer's original decision that led to *Windlinx I*, and therefore petitioner

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[6] In *Beck v. City of Tillamook*, 18 Or LUBA 587 (1990), we remanded a city council decision approving a conditional use permit for an emergency shelter. No party sough judicial review of our decision and the remand proceedings commenced. On remand, the city council again approved a conditional use permit for the emergency shelter. The petitioners appealed the second decision to us, and we affirmed the decision, concluding that our previous resolution of the same issues in our prior decision was correct. *Beck v. City of Tillamook*, 20 Or LUBA 178 (1990), *aff'd*, 105 or App 276, 805 P2d 144 (1991), *rev'd on other grounds*, 313 Or 148, 831 P2d 678 (1992).

Petitioners appealed that decision to the Court of Appeals. *Beck v. City of Tillamook*, 105 Or App 276, 805 P2d 144 (1991). The Court of Appeals concluded that the petitioners' assignments of error that challenged issues that were conclusively decided against them in our initial decision were not reviewable in the appeal to the Court of Appeals under the law of the case doctrine.

The Supreme Court affirmed that portion of the Court of Appeals' decision. *Beck*, 313 Or 148.

is precluded under *Mill Creek Glen Protection* from raising the issue in this appeal. Intervenor-Respondent's Brief 32-33. Intervenors point out that the hearings officer's original decision concluded that nine parcels were located within the Template and that all were lawfully created, and that petitioner only challenged at LUBA the findings that the parcels were lawfully created. Intervenors maintain that petitioner did not raise any issue regarding the location of Lot 7b and Lot 7c within or outside of the Template in *Windlinx I*.[7] Intervenors argue that the only issue petitioner raised in *Windlinx I* with respect to Lot 7b and Lot 7c was whether those units of land were lawfully created.[8]

Citing *Morgan v. Jackson County*, 80 Or LUBA 59, 73-74, *aff'd*, 300 Or App 582, 452 P3d 1088 (2019), petitioner argues that the law of the case doctrine does not preclude them from raising the issue of whether Lot 7b and Lot 7c are within the Template because according to petitioner, "the law of the case doctrine

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[7] The hearings officer's original decision that was appealed to us in *Windlinx I* found:

> "Based on the foregoing findings and the existence of nine lawfully created lots as presented by [intervenors], all or part of at least seven other lots or parcels that existed on January 1, 1993, are within a 160 acre square centered on the subject tract and [ORS 215.750(3)(b)] is satisfied." Original Record 51.

[8] Intervenors point out that petitioner's sixth assignment of error in *Windlinx I* specifically argued that the location of the Template was not supported by substantial evidence, and that was petitioner's only challenge to the Template. *See* n 3.

does not apply where the issue was not clearly decided and the subject of focused findings." Petition for Review 15. We disagree with petitioner's explanation of the law of the case doctrine. In *Mill Creek Glen Protection*, cited with approval in *Beck*, the Court of Appeals made clear that issues that could have been raised but were not raised in a prior appeal are not reviewable by LUBA in a second appeal. 88 Or App at 526-27; *see also Devin Oil Co. v. Morrow County*, 252 Or App 101, 112-13, 286 P3d 925 (2012) (the petitioner's challenge to a limitation on the uses on the site could have been and was not raised in the petitioner's first appeal in the same case, and accordingly the petitioner waived challenging the limitation on uses on the site in a second appeal).[9]

We also disagree with petitioner that *Morgan* is apposite. In *Morgan*, we explained that we had previously remanded the hearings officer's original decision for a "plenary evidentiary re-evaluation of the elements of a nonconforming use verification" and we explained that our remand "required a broad evidentiary re-evaluation, with focus on the nature and extent of the auto yard use in 1996." 80 Or LUBA at 64, 74. We noted that the "open-ended disposition did not preclude consideration of very many issues, especially of an evidentiary nature" and rejected both parties' attempts to invoke the law of the

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[9] In *McKay Creek Valley v. Washington County*, 122 Or App 59, 64, 857 P2d 167 (1993), the Court of Appeals described the overriding principle in *Beck*: that is "issues in land use cases must be brought to finality at the earliest available opportunity."

case doctrine. *Id.* at 64. Differently, here, our remand in *Windlinx I* was narrow, for "the hearings officer [to] determine whether Lots 7a and 7c are lawfully created parcels under ORS 215.010(1)(a)." ___ Or LUBA at ___ (slip op at 29).

Petitioner does not explain why they could not have raised the issue they attempt to raise now regarding whether Lot 7b and Lot 7c are located within the Template during the appeal that led to our decision in *Windlinx I*. Petitioner also does not take the position that the issue was raised during the appeal that led to *Windlinx I*, and in fact argues that LUBA did not decide whether Lot 7b or Lot 7c are within the Template. Petition for Review 16-17. With that much we agree, because the issue was not raised in any of petitioner's assignments of error in *Windlinx I* and was not raised in *Windlinx II*.[10] Under the law of the case doctrine, petitioner's first and third assignments of error are waived.

The first and third assignments of error are denied.

SECOND ASSIGNMENT OF ERROR

Petitioner's second assignment of error is that the hearings officer improperly construed Deschutes County Code (DCC) 22.20.055 and DCC 20.34.040 in failing to require intervenors to submit a modified application to include Lot 7c as one of the seven Template parcels. Petition for Review 24-26.

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[10] Petitioner did not allege in any of its assignments of error to the Court of Appeals that LUBA erred in failing to decide an issue that petitioner raised.

According to petitioner, intervenors were required to modify their application on remand in order to include Lot 7c as one of the Template parcels.

In support of its argument, petitioner relies on a footnote in *Windlinx I* and argues that LUBA has expressly concluded that Lot 7c was not included in the application, and that the law of the case doctrine prevents the hearings officer from reaching a different conclusion. In *Windlinx I*, we stated in a footnote that "[i]ntervenors' application stated that they were not relying on Lot 7c to meet the required template test." ___ Or LUBA at ___ (citing Original Record 1249) (slip op at 16 n 9). However, that footnote did not resolve any question presented in *Windlinx I* regarding whether Lot 7c was included as one of the Template parcels, because no party argued that Lot 7c was not included as one of the Template parcels. More importantly, our decision in *Windlinx I* remanded the decision to the county to "determine whether Lots 7a *and 7c* are lawfully created parcels under ORS 215.010(1)(a)." *Id.* at ___ (emphasis added) (slip op at 29). That disposition defeats petitioner's argument because it recognizes that whether Lot 7c was lawfully created could have a bearing on whether the application was approved on remand. If Lot 7c was not included as one of the Template parcels, there would be no reason for the county to determine whether it was lawfully created.

Intervenors argue, again, that petitioner is precluded from raising the issue it now raises in its second assignment of error because petitioner could have and did not raise this issue during the proceedings in *Windlinx I*, that Lot 7c was not

a part of the application and could not be considered as one of the seven qualifying parcels without modifying the application. We agree with intervenors that the law of the case doctrine applies to petitioner's second assignment of error, for the same reasons as it applies to petitioner's first and third assignments of error. *Mill Creek Glen Protection*, 88 Or App at 526-27. Petitioner has not explained why it could not have raised the issue in *Windlinx I* that Lot 7c was not part of the application and that a modification of the application was necessary in order for it to count as a qualifying parcel.

In addition, on remand, the hearings officer adopted findings addressing petitioner's argument that a modification was required. Those findings conclude that while intervenors' original application submittal stated that Lot 7c was included in excess of the seven required parcels, the same record page expressly reserved the right to rely on Lot 7c if the county determined that additional lots were required. Remand Record 43. The hearings officer found that during the initial proceedings, after the county determined that intervenors' original application was incomplete, intervenors submitted additional evidence regarding Lot 7c's location within the Template, which supported a conclusion that intervenors' application included Lot 7c as one of the nine identified Template parcels. Remand Record 43-44 (citing Original Record 1048, 77). Petitioner disagrees with that conclusion, but does not present any argument explaining why the hearings officer improperly construed the applicable law, and presents no argument under DCC 22.20.055 and DCC 20.34.040.

The second assignment of error is denied.

The county's decision is affirmed.