

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.**

The principle of exhaustion/waiver set out in *Miles v. v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), does not require a party that *prevailed* before the planning commission to appeal the planning commission decision to the governing body, in order to preserve or exhaust issues that the planning commission did not address and could not have been raised in the opposing party’s local appeal of the planning commission decision. *Olstedt v. Clatsop County*, 62 Or LUBA 131 (2010).

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Where the local notice of appeal fails to identify any issue regarding whether a proposed farm relative dwelling is “necessary,” that issue cannot be raised on appeal to LUBA, pursuant to ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

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The main purpose of the exhaustion/waiver doctrine articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) is to ensure that the final decision maker has the initial opportunity to address issues that may become the basis for appeal to LUBA. *Miles* is not concerned that findings are adopted addressing approval criteria, and the fact that the final decision includes a finding of compliance with an approval criterion is not sufficient to allow the petitioner to raise the issue of compliance with that criterion to LUBA, if that issue was not identified in the local notice of appeal. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

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A statement in the local notice of appeal that the planning commission “has not followed the law” is insufficient to identify any particular issue for purposes of the exhaustion/waiver doctrine articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

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Even assuming LUBA has authority to reject an otherwise meritorious exhaustion/waiver challenge based on the argument that the county is equitably estopped from asserting exhaustion/waiver due to alleged erroneous advice from county planning staff in accepting the local notice of appeal, the argument fails where based on petitioners’ affidavits the best that can be said with confidence is that there was mutual misunderstanding and miscommunication regarding the sufficiency of the local notice of appeal and what issues petitioners wished to raise therein. *Wellet v. Douglas County*, 62 Or LUBA 372 (2010).

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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).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.** Issues raised before LUBA are waived under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003), where a county code requires that the local notice of appeal specify the grounds for appeal, and the local notice of appeal makes no mention of the issues that petitioner wishes to raise before LUBA. *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.** An assertion in the local notice of appeal that the proposal is inconsistent with Goals 16 and 17, with reference to the appellant’s written testimony on those issues that was submitted to the planning commission, is sufficient to inform the governing body and other participants of the specific grounds the appellant wishes to raise on appeal, and avoid waiver of those issues under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003). *Sommer v. Douglas County*, 60 Or LUBA 32 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.** When a petitioner was required to raise local appeal issues below pursuant to *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), raising the issue that approval of a nonfarm dwelling would significantly increase the cost of farming practices is not sufficient to raise any issue concerning impacts on the stability of the overall land use pattern, and the petitioner may not raise the stability standard at LUBA. *Zeitoun v. Yamhill County*, 60 Or LUBA 111 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.** Raising in the local notice of appeal the issue of compliance with OAR 660-012-0065(3)(a) and (b) regarding transportation improvements that are allowed or conditionally allowed under certain statutes or rules is not sufficient to raise the issue of compliance with 660-012-0065(3)(o) regarding other transportation facilities, services, or improvements that serve local travel needs. Therefore, the issue may not be raised at LUBA. *Sepulvado v. Douglas County*, 60 Or LUBA 364 (2010).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.** Where a local code requires a notice of review to contain “the specific grounds relied on in the petition request for review,” and petitioners challenged a planning commission decision on the grounds that the county failed to identify other available industrially-zoned properties throughout the county, petitioners may not on appeal to LUBA challenge the decision on different grounds that the county did not properly identify available industrially-zoned lands within the specific rural community in which the applicant proposes the plan amendment. *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003). *Kinnett v. Douglas County*, 59 Or LUBA 293 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.** *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) did not overrule or modify *Colwell v. Washington County*, 79 Or App 82, 91, 718 P2d 747 (1986) and similar cases holding that the ORS 197.825(2)(a) exhaustion requirement does not require a petitioner to file a local appeal of a lower body’s initial comprehensive plan amendment decision to the governing body, because applicable statutes require the governing body to conduct a

hearing on the amendment in any event. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.**

Notwithstanding that a county’s code provides that the planning commission’s decision on a comprehensive plan amendment is “final” unless a local appeal is filed, under ORS 215.060 the county governing body must hold a public hearing on the plan amendment and take final action, and therefore the planning commission’s initial decision on the plan amendment is not “final” in any meaningful sense. *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.**

Even where a county’s code provides for local appeal as one of three possible paths by which a governing body will review the planning commission’s initial decision on a comprehensive plan amendment, because ORS 215.060 requires the governing body to hold a public hearing on a plan amendment at which testimony and issues can be raised, in that circumstance a petitioner before LUBA is not required to file a local appeal and specify issues in a notice of local appeal in order to exhaust administrative remedies or avoid waiver under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *Wetherell v. Douglas County*, 58 Or LUBA 638 (2009).

**28.6.4 LUBA Scope of Review – Waiver of Issues – Failure to Raise in Local Appeal.**

Even if the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 283 (2003), extends to the proceedings on remand and requires the petitioner to raise below on remand the issues that are presented to LUBA on remand, that requirement is satisfied where the issues before LUBA are the same issues in the first appeal and on remand the petitioner submitted a letter to the city renewing the arguments made in the first appeal. *Coquille Citizens for Resp. Growth v. City of Coquille*, 55 Or LUBA 155 (2007).