

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 BARBARA JOSEPH DION,
4 *Petitioner,*

5
6 vs.

7
8 BAKER COUNTY,
9 *Respondent,*

10
11 and

12
13 KERRY GULICK and LINDA MCEWAN,
14 *Intervenors-Respondents.*

15
16 LUBA No. 2015-052

17
18 FINAL OPINION
19 AND ORDER

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21 Appeal from Baker County.

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23 Paul R. Hribernick, Portland, filed the petition for review and argued on
24 behalf of petitioner. With him on the brief was Black Helterline LLP.

25
26 No appearance by Baker County.

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28 Dan Terrell, Eugene, filed the response brief and argued on behalf of
29 intervenors-respondents. With him on the brief was the Law Office of Bill
30 Kloos.

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32 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN Board
33 Member, participated in the decision.

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35 AFFIRMED

36 11/02/2015

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

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NATURE OF THE DECISION

Petitioner appeals a county board of commissioners’ decision approving a modification to a conditional use permit for an existing rock quarry.

MOTION TO INTERVENE

Kerry Gulick and Linda McEwan (intervenors), the applicants below, move to intervene. The motion is granted.

FACTS

The challenged decision follows a LUBA remand. *Dion v. Baker County*, 70 Or LUBA 438 (2014). As noted in that opinion, the subject property is a 15-acre portion of a 280-acre parcel that is zoned exclusive farm use (EFU). In 1998, the county granted a conditional use permit for intervenors to operate a rock quarry on the 15-acre site. The parcels in the surrounding area are zoned for agricultural use, and are generally used for livestock grazing, including the portions of the parent parcel outside the 15-acre quarry site. Petitioner owns a residence that is located 1,200 feet from the southeast corner of the quarry, and several other residences are located between 1,200 and 2,500 feet from the quarry.

1 In 2013, intervenors applied to the county to modify the conditions of
2 approval of the 1998 conditional use permit, to facilitate both temporary and
3 permanent intensification of the quarry. Prior to petitioner’s first LUBA appeal,
4 the planning commission held a hearing on the conditional use permit
5 application and approved the proposed modifications. Petitioner appealed the
6 planning commission decision to the county board of commissioners. The
7 board of commissioners conducted a hearing and, on February 4, 2014, issued
8 its decision upholding the approval, with amended conditions.

9 Petitioner timely appealed to LUBA, and we remanded the decision due
10 to the county’s failure to adequately address two approval criteria: Baker
11 County Zoning and Subdivision Ordinance (ZSO) 602.B and 301.06.F.1. We
12 remanded for the county to address the comparison required by ZSO 602.B,
13 which requires a finding that:

14 “Taking into account location, size, design and operating
15 characteristics, the proposal will have a minimal adverse impact
16 on the (1) livability, (2) value, and (3) appropriate development of
17 abutting properties and the surrounding area compared to the
18 impact of development that is permitted outright.” *Dion*, 70 Or
19 LUBA at 440.

20 We observed that this required comparison would “almost certainly require
21 new evidence and findings[.]” *Id.* at 441. In addition, we remanded based on
22 ZSO 301.06.F.1, requiring the county to more adequately “provide an

1 '[e]xplanation acceptable to the County' demonstrating that '[e]xisting public
2 services, utilities, and road systems are adequate to accommodate the proposed
3 use * * *.'" *Id.* at 445 (*quoting* ZSO 301.06(F)(1)).

4 In response to the remand, on June 10, 2015, the planning commission
5 held a hearing in which it accepted new evidence and testimony. At the
6 conclusion of the hearing the planning commission approved the modification
7 to intervenors' conditional use permit, adopting a 38-page decision with
8 findings and conditions. Record 82-120. Petitioner appealed the planning
9 commission decision to the county board of commissioners. ZSO 1104.02
10 provides that the notice of appeal shall state the "reasons for the appeal based
11 on the decision making criteria and findings." To appeal a planning
12 commission decision, the county provides a two-page appeal form, which
13 petitioner completed and submitted to the county. The appeal form includes a
14 section that provides a space to write in an appellant's "Reasons for Appeal[.]"
15 Record 65. In that section, petitioner wrote three reasons for her appeal:

- 16 1. "The Planning Commission's failure to address all elements
17 of the LUBA Remand (2014-021)[.]"
- 18 2. "The Planning Commission's failure to address all
19 provisions of applicable Baker County Approval Criteria[.]"
- 20 3. "The Planning Commission's failure to adopt findings based
21 on substantial evidence in the record with regard to each

1 remand matter and applicable Baker County approval
2 criteria[.]” *Id.*

3 On July 8, 2015, the board of commissioners held a hearing, limited to the
4 record of the planning commission. Petitioner did not appear at the hearing,
5 although the commissioners accepted an e-mail from petitioner, after redacting
6 portions that the commissioners deemed to constitute new evidence. At the
7 conclusion of the hearing the commissioners voted to deny the appeal and
8 uphold the planning commission’s decision. The commissioners adopted a 13-
9 page decision. The findings in the commissioners’ decision attempt to address
10 the three reasons for appeal listed in the notice of appeal. The county first
11 concluded that each reason for the appeal was not stated with sufficient
12 specificity to afford the county an adequate opportunity to respond. Regarding
13 the first reason for appeal, the county found that:

14 “The first argument for appeal is not specific or based on decision
15 making criteria and findings * * * the appeal did not provide
16 sufficient evidence or statements enough to allow the Board of
17 Commissioners an opportunity to respond to the issue.” Record
18 25.

19 For the second reason for appeal, the county found that:

20 “The appellant does not specify what ‘Baker County Approval
21 Criteria’ were not addressed, or even if the criteria being referred
22 to is limited to the criteria within the Baker County Subdivision
23 and Zoning Ordinance * * * [the] appeal is not specific or based
24 on decision making criteria and findings. * * * [T]he appeal is not

1 specific enough or supported by statements or evidence sufficient
2 to afford the Board of Commissioners adequate opportunity to
3 respond to the issue(s).” Record 25-26.

4 For the third reason for appeal, the county found that:

5 “The notice of appeal and appeal application submitted by the
6 petitioner does not explain or cite the basis for the challenge or
7 why a reasonable person could not reach the conclusions as the
8 Baker County Planning Commission. * * * The Board of
9 Commissioners find the appeal fails to identify the reasons why
10 the appellant believes the Planning Commission did not base their
11 decision on the substantial evidence in the record * * *. [T]he
12 appellant has failed to identify the challenged findings and explain
13 why a reasonable person could not reach the same conclusion
14 based on all of the evidence in the record. * * * The appellant has
15 not provided the Board of Commissioners, the decision maker,
16 information with sufficient specificity to allow the Board to
17 respond to the issue, but in review of the record, the Board finds
18 no area to uphold this element of the appeal.” Record 27.

19 In alternative findings, the county attempted to address the three reasons for the
20 appeal stated in the notice, to the extent the county understood them, and
21 determined none of them warranted a denial of the application.

22 This appeal followed.

23 **ASSIGNMENTS OF ERROR AND WAIVER**

24 Petitioner raises three assignments of error. Intervenors respond,
25 initially, that petitioner failed to preserve the issues raised in the three
26 assignments of error, by failing to specify those issues in the local notice of

1 appeal to the board of county commissioners, as required by ORS
2 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d
3 382 (2003). Relatedly, intervenor argues that petitioner failed to challenge the
4 county's primary findings that the three issues identified in the local notice of
5 appeal were not stated with sufficient specificity to allow the county and
6 intervenor the opportunity to respond. Intervenor contends that petitioner's
7 failure to challenge those primary findings on appeal to LUBA means that
8 petitioner cannot successfully challenge either the commissioners' alternative
9 findings attempting to address the three issues listed in the notice of appeal, or
10 the planning commission findings incorporated into the commissioners'
11 decision. For the following reasons, we agree with intervenor that the issues
12 raised in petitioner's three assignments of error are not within our scope of
13 review.

14 We first set out petitioner's three assignments of error:

- 15 • First Assignment of Error: "[Under ZSO 602.B] the County
16 failed to adopt findings that addressed the actual inquiry
17 proposed by the standard: a comparison of adverse impacts
18 of the proposed use with the impacts of all development
19 permitted outright in the EFU Zone." Petition for Review 5.
- 20 • Second Assignment of Error: "The County findings are not
21 supported by substantial evidence. Not only does the
22 County badly misconstrue the applicant's 'supporting'

1 evidence, the only evidence, in multiple instances,
2 contradicts the County’s findings.” Petition for Review 11.
3 The substance of the second assignment of error challenges
4 the planning commission findings regarding adverse
5 impacts, including reduced property values, caused by dust
6 and noise.

- 7 • Third Assignment of Error: “The County failed to adopt
8 findings supported by substantial evidence to support its
9 conclusion that ‘road systems’ are adequate to accommodate
10 the proposed use. See ZSO 301.06.F.I.” Petition for Review
11 21.

12 Notably, all three assignments of error challenge only the planning commission
13 findings, which are incorporated into the board of commissioners’ decision.
14 No assignments of error challenge the findings set out in the commissioners’
15 decision itself, either the primary findings that the notice of appeal fails to
16 sufficiently identify the reasons for appeal, or the alternative findings that
17 attempt to address the three general reasons listed in the notice of appeal.

18 **A. *Miles* Exhaustion/ Waiver**

19 ORS 197.825(2)(a) provides that “[t]he jurisdiction of the board [i]s
20 limited to those cases which the petitioner has exhausted all remedies available
21 by right before petitioning the board for review[.]” In *Miles*, the Court of
22 Appeals held that “exhaustion principles traditionally require not only that an
23 avenue of review be pursued, but also that the particular claims that form the

1 basis for a challenge [at LUBA] be presented to the administrative or local
2 government body whose review must be exhausted. * * *.” The court
3 explained that

4 “a party does not exhaust his or her remedies ‘simply by stepping
5 through the motions of the administrative process without
6 affording the [administrative or local government body] an
7 opportunity to rule on the substance of the dispute.’” *Miles*, 190
8 Or App at 507 quoting *Mullenaux v. Dept. of Revenue*, 293 Or
9 536, 541, 651 P2d 724 (1982).

10 Intervenors argue that petitioner failed to adequately specify in her local notice
11 of appeal to the board of county commissioners the reasons for appeal as
12 required by ZSO 1104.02. According to intervenor, petitioner’s local notice of
13 appeal listed only three generally phrased “issues” that were insufficient to
14 satisfy the *Miles* obligation to provide the county with an opportunity to rule on
15 the substance of the dispute, and therefore petitioner failed to exhaust her
16 administrative remedies to resolve those issues at the local level, before
17 seeking LUBA’s review of those issues.

18 Petitioner did not file a reply brief in response to intervenor’s *Miles*
19 arguments. At oral argument during rebuttal, petitioner argued that

20 “[In the *Miles* case] there was a complete failure to raise the issue
21 in that particular instance. We don’t have that here. The statement
22 in the appeal form says that the county failed to address elements
23 of the LUBA remand. This is a remand, remember. There were

1 only two elements of that: the comparative livability analysis and
2 the road analysis. That clearly gives the county the ability to
3 deliberate. It clearly shows that the issue was raised locally. It
4 clearly sets forth the substance of the arguments.” Oral Argument
5 Recording at 38:08-38:45

6 We agree with intervenors that petitioner failed to adequately raise and
7 exhaust during the local appeal process the issues now raised before LUBA.
8 The three reasons for appeal stated in the notice of appeal were so generally
9 phrased that a reasonable decision maker could only speculate exactly what
10 aspects of the planning commission decision the petitioner wished to challenge.
11 For example, the first reason for the appeal stated that the planning commission
12 failed to “address all elements of the LUBA remand,” but provided no clue
13 which elements of the LUBA remand petitioner believed were not addressed.
14 Similarly, the second reason for the appeal stated that the planning commission
15 failed to address all applicable code provisions, but does not suggest which
16 applicable code provisions petitioner believed were not addressed. The third
17 reason for the appeal states that the planning commission decision adopted

1 findings not supported by substantial evidence, but failed to identify which
2 findings in the planning commission’s 38-page decision are being challenged.¹

3 While petitioner is correct that *Miles* involved a complete failure to
4 specify an issue in the local notice of appeal, we see no reason why the *Miles*
5 exhaustion waiver principle should not apply to issues that are so generally
6 stated that a reasonable decision maker cannot meaningfully respond to them.
7 *See Wellet v. Douglas County*, 62 Or LUBA 372, 377 (2010) (a local appeal
8 statement that provides that the planning commission has not “followed the law
9 in any respect regarding [the applicant]” does not adequately identify the issue
10 of compliance with a particular code provision).

11 Further, we disagree with petitioner that, in the context of a remand
12 proceeding, identifying local appeal issues only in general terms is consistent
13 with *Miles*. It is true that the scope of potential issues is often smaller in
14 remand proceedings compared to initial proceedings. However, even in the
15 context of a remand proceeding, local appeal issues must be identified with
16 sufficient specificity that the local government and other parties have

¹ We note that the unredacted portions of the e-mail did not clarify the specific issues petitioner wished to raise in the local appeal. Record 35.

1 reasonable notice of those aspects of the underlying decision the local appellant
2 wishes to challenge.

3 Despite the limited scope of the issues on remand, and the county's
4 presumed familiarity with petitioner's views on those remand issues, the county
5 struggled to surmise the substance of petitioner's challenges to the planning
6 commission decision, and to adopt alternative findings on what it thought those
7 challenges might be. We note that the commissioners' attempt to read
8 petitioner's mind apparently went unnoticed, because in the appeal to LUBA
9 petitioner ignores those alternative findings, and advances three assignments of
10 error that instead direct specific challenges to the planning commission's
11 findings. Had the board of commissioners the benefit of the much more
12 specific assignments of error that petitioner now advances to LUBA, it would
13 have had a better opportunity to address petitioner's challenges to the planning
14 commission decision. Accordingly, we agree with intervenor that the *Miles*
15 exhaustion/waiver principle applies, and that petitioner's failure to adequately
16 specify in the local notice of appeal the issues raised in this appeal means that
17 the issues raised under the three assignments of error are outside LUBA's
18 scope of review.

1 **B. Failure to Challenge the Board of Commissioners’ Decision**

2 As a second, and independent, basis for concluding that the three
3 assignments of error are outside LUBA’s scope of review, we agree with
4 intervenors that petitioner failed to assign error to the county’s primary
5 findings that the local notice of appeal fails to sufficiently identify any reason
6 for appeal. Because those findings are unchallenged, the *Miles*
7 exhaustion/waiver question would have to be resolved against petitioner, even
8 if we did not agree with intervenor on the merits regarding the *Miles*
9 exhaustion/waiver question. *Dion*, 40 Or LUBA at 443 (citing *McGovern v.*
10 *Crook County*, 60 Or LUBA 177, 183 (2009)).

11 In the present appeal, petitioner not only failed to challenge the
12 commissioners’ primary findings that the local notice of appeal fails to
13 sufficiently identify any reason for appeal, petitioner also failed to challenge
14 the commissioners’ alternative findings, which attempt to address the
15 petitioner’s challenges to the planning commission decision. Instead, the three
16 assignments of error proceed directly to challenge the merits of the planning
17 commission’s findings, as if the local appeal had never happened and the
18 commissioners’ 13-page decision did not exist.

1 To summarize, we agree with the county that petitioner’s local appeal
2 statement was inadequate, and under *Miles* exhaustion/waiver petitioner’s three
3 assignments of error are therefore outside our scope of review. We also agree
4 with intervenor that petitioner’s failure to assign error to the county’s primary
5 findings regarding *Miles* exhaustion/waiver means that *Miles*
6 exhaustion/waiver applies here, without regard to the merits of the county’s
7 position. Finally, even if *Miles* exhaustion/waiver did not apply here,
8 petitioner’s failure to acknowledge or challenge the county commissioners’
9 findings that were adopted to address the issues petitioner attempted to raise
10 below, provides a third reason why the county’s decision must be affirmed.
11 That is because the decision that LUBA reviews is the local government’s final
12 decision on the matter which, in this case, is the board of commissioners’
13 decision.

14 Because petitioner does not challenge either the waiver findings or the
15 alternative findings in the board of commissioners’ decision, for that additional
16 reason the three assignments of error in the petition for review are beyond
17 LUBA’s review. Because the petition for review states no assignments of error
18 that are within our scope of review, we affirm the county’s decision.

19 The county’s decision is affirmed.