

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

Where the local appeal statement raises no issues regarding whether a particular zoning diagram should be considered in determining whether proposed zoning is consistent with the comprehensive plan map, the issue is waived under the exhaustion/waiver principle articulated in *Miles v. City of Florence*, 190 Or App 500 (2003). *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

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

An issue that was raised in a timely filed local appeal is not waived under the exhaustion/waiver principle of *Miles v. City of Florence*, 190 Or App 500 (2003), notwithstanding that the decision-maker approved a version of the local appeal statement in which that issue was redacted, where the decision-maker also accepted a revised version that included the issue, with the apparent intent of recognizing that the issue had been preserved. *Laurel Hill Valley Citizens v. City of Eugene*, 73 Or LUBA 140 (2016).

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Where a local appeal statement states issues only in general terms, such as the appealed decision failed to address all applicable standards, requiring the local appeal body and other parties to speculate which standards the appellant believes were not addressed, the local appeal has failed to exhaust or preserve any issues for purposes of appeal to LUBA, under *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d 382 (2003). *Dion v. Baker County*, 72 Or LUBA 307 (2015).

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While the issues following a LUBA on remand are often fewer and smaller in scope, in order to exhaust or preserve issues for LUBA’s review under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d 382 (2003), local appeals of decisions on remand must still identify the issues for local appeal with sufficient specificity that the local government and other parties have reasonable notice of those aspects of the underlying decision on remand the local appellant wishes to challenge. *Dion v. Baker County*, 72 Or LUBA 307 (2015).

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A petitioner does not waive her right to assign error to a hearings officer’s conclusion that a structure qualifies as a nonconforming use, and the hearings officer’s approval of an alteration of that nonconforming use, where the applicant did not apply for verification of a nonconforming use or an alteration of a nonconforming use and the notices of hearing did not identify the county’s nonconforming use regulations as applicable criteria for the decision. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

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Where an “Article” of the community development code includes 373 single spaced pages of land use regulations made up of 44 separate sections devoted to a variety of topics, a notice of hearing that identifies that article of the community development code as an applicable standard is not sufficient, under ORS 197.763(3), to provide notice of an eight-page section of that article devoted to nonconforming uses. *Kaimanu v. Washington County*, 70 Or LUBA 217 (2014).

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Where a cross petition for review challenges the local government’s application of a standard to a proposal for needed housing on the basis that the city may not apply the standard because it is not a “clear and objective standard” within the meaning of ORS 197.307(4), the cross petition for review may assign error to the city’s application of the standard only if the issue was raised in the applicant’s appeal statement appealing the hearings officer’s decision to the planning commission, under ORS 197.825(2)(a) and the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). *SE Neighbors Neighborhood Assoc. v. City of Eugene*, 68 Or LUBA 51 (2013).

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ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), do not limit the issues before LUBA to those issues specified in the local appeal to the governing body, where the local government’s appeal regulations do not require specification or limitation of issues for that type of local appeal, and the governing body allowed and considered all issues raised by any party during the appeal proceeding. *White v. Lane County*, 68 Or LUBA 423 (2013).

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To preserve the issue of whether the statewide planning goals apply to a rezoning decision and thus whether notice of hearing must be provided to DLCDD under ORS 197.610, the issue must be raised during the proceedings below to avoid waiver under ORS 197.763(1) and, additionally, specified in the local notice of appeal to avoid waiver under the exhaustion/waiver principle in *Miles v. City of Florence*, 190 Or App 500 (2003). *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

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On appeal of a planning commission decision, the issue of the city’s failure to impose a condition is waived under the reasoning in *Miles v. City of Florence*, 190 Or App 500 (2003), where the underlying hearings official’s decision also failed to impose the disputed condition, and petitioner did not specify that failure as a ground for appeal in the local notice of appeal to the planning commission. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

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).

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

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).

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

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).

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

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).

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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).