

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

3
4 RICHARD SOMMER and JANICE TETREAULT,
5 *Petitioners,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2009-067

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from Douglas County.

18
19 Janice Tetreault, Reedsport, filed the petition for review and argued on her own
20 behalf. Richard Sommer, Roseburg, represented himself.

21
22 Paul E. Meyer, County Counsel, Roseburg, filed the response brief and argued on
23 behalf of respondent.

24
25 BASSHAM, Board Chair; HOLSTUN, Board Member; RYAN, Board Member,
26 participated in the decision.

27
28 AFFIRMED

10/22/2009

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal county approval of comprehensive plan text amendment and zoning map changes to remove a Dredge Material Disposal (DMD) overlay on industrial-zoned land.

FACTS

The subject property is a four-acre portion of a 14-acre parcel located on Bolon Island, in the Umpqua River near the City of Reedsport. The entire island is zoned for industrial use. The four-acre portion at issue is identified in a county comprehensive plan inventory of dredge disposal sites as Site VI, and is subject to the DMD overlay zone, which restricts use of the site to dredge material disposal. Site VI has been filled to capacity with dredge material.

The county planning department filed an application to remove Site VI from the comprehensive plan inventory and to remove the overlay zone, in order to facilitate potential future development of Site VI with a wood pellet mill, a permitted use in the underlying industrial zone. The county planning commission conducted a hearing and approved the application. Petitioner Sommer appealed the planning commission decision to the county board of commissioners, which declined to hear the appeal and affirmed the planning commission decision. This appeal followed.

FIRST, SECOND AND FIFTH ASSIGNMENTS OF ERROR

The county argues, initially, that all five assignments of error in petitioner Tetreault's¹ petition for review concern issues that were not raised in the local notice of

¹ Petitioner Sommer and Tetreault both appealed the county's final decision to LUBA; however, petitioner Tetreault explains that prior to the deadline for filing the petition for review Sommer died, and petitioner Tetreault filed the petition for review on her own behalf. Accordingly, further references to "petitioner" in this opinion are to petitioner Tetreault. In an earlier order, LUBA denied the county's motion to dismiss Tetreault from this appeal for lack of standing. __ Or LUBA __ (LUBA No. 2009-067, Order, July 10, 2009).

1 appeal to the board of commissioners, and therefore are beyond LUBA’s scope of review,
2 under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003). In
3 *Miles*, the Court of Appeals held that where a local ordinance requires that an appellant
4 specify the grounds for local appeal, “a party may not raise an issue before LUBA when that
5 party could have specified it as a ground for appeal before the local body, but did not do so.”
6 *Id.* at 510.

7 Douglas County Land Use and Development Code (LUDO) 2.500.5.c requires that
8 the local notice of review shall include “[t]he specific grounds relied upon,” while LUDO
9 2.700.2 limits the board of commissioners’ review to those issues “relied upon in the notice
10 of review[.]” As noted, petitioner Sommer appealed the planning commission decision to the
11 board of commissioners. Sommer’s notice of review included a number of assertions, but the
12 county argues that at best only two of the issues raised in the five assignments of error in the
13 petition for review were specified in Sommer’s two-page notice of review. In relevant part,
14 Sommer’s notice of review stated:

15 “On April 16, 2009 at a Douglas County Commission meeting I submitted
16 written testimony in opposition to the siting of a pellet mill on wetlands that is
17 inconsistent with statewide planning goals such [as] Goal 1 CITIZEN
18 INVOLVMENT, Goal 2 LAND USE PLANNING, Goal 16 ESTUARINE
19 RESOURCES, and in parts goal 17 COASTAL SHORELANDS and Goal 19
20 OCEAN RESOURCES.

21 “Nothing specific in these last two goals 16 and 19 really addresses the
22 estuarine biota such as anadromous, resident fishes, clams, crabs,
23 sticklebacks, land and terrestrial plants such as *Sidalcea hendersoni* (listing
24 pending), the two eelgrasses, the black brant that eats almost nothing else, the
25 herring that depends on eelgrass beds for spawning, the sturgeon who almost
26 like to suck mud and of course the long gone expatriated chum salmon that
27 loves coastal streams near tidewater and the native oyster gone, and of course
28 the two surf smelts that are beach spawners * * *.” Record 35-36 (bold in
29 original omitted).

30 Under the first and second assignments of error, petitioner argues, respectively, that
31 the plan and zoning map amendments do not comply with LUDO provisions governing zone
32 changes, or with Statewide Planning Goal 7 (Natural Hazards). Under the fifth assignment

1 of error, petitioner argues that the decision’s findings regarding the physical location of Site
2 VI are not supported by a legal property description and cannot be verified with a reasonable
3 degree of certainty.

4 The county argues, and we agree, that the issues raised under the first, second and
5 fifth assignments of error are not specified anywhere in the notice of review, and therefore
6 under *Miles* those issues were not preserved for our scope of review.

7 The first, second, and fifth assignments of error are denied.

8 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

9 The third assignment of error challenges the county’s findings regarding Goal 16, and
10 the fourth assignment of error challenges the county’s findings regarding Goal 17.
11 Sommer’s notice of appeal to the board of commissioners, quoted above, includes assertions
12 that the proposed amendments, or developments made possible by the proposed amendments,
13 are inconsistent with Goals 16 and 17. The county argues that a bare assertion in the local
14 notice of appeal that the proposal is “inconsistent” with Goals 16 and 17 fails to set out
15 “specific grounds” for appeal as required by LUDO 2.500.5.c, and is insufficient to avoid
16 waiver under *Miles*.

17 In the alternative, the county argues that no party raised specific issues regarding
18 Goals 16 or 17 prior to the close of the evidentiary hearing before the planning commission,
19 and therefore regardless of *Miles* the issues raised under the third and fourth assignments of
20 error were waived under ORS 197.763(1).² The county acknowledges that during the
21 planning commission proceedings both petitioners Sommer and Tetreault attempted to raise

² ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 issues regarding Goal 16. Record 325-26, 332, 334. However, the county argues, those
2 attempts were not “accompanied by statements or evidence sufficient to afford the governing
3 body, planning commission, hearings body or hearings officer, and the parties an adequate
4 opportunity to respond to each issue,” as required by ORS 197.763(1). *Boldt v. Clackamas*
5 *County*, 107 Or App 619, 623, 813 P2d 1078 (1991) (the purpose of the raise it or waive it
6 requirement is to provide “fair notice” of the issue, such that the decisionmaker and other
7 parties have an adequate opportunity to respond to the issue).

8 We turn first to the *Miles* exhaustion/waiver issue. LUDO 2.500.5.c requires the
9 notice of review to include “specific grounds” for the appeal. We note that the board of
10 commissioners’ decision declining review of the planning commission’s decision does not
11 mention LUDO 2.500.5.c, or base its decision declining to review the appeal on any
12 inadequacy in the notice of review. There is no interpretation or finding from the board of
13 commissioners explaining how specifically the “grounds” for appeal must be stated to
14 comply with LUDO 2.500.5.c. Absent such an interpretation from the county, for the reason
15 explained below, we conclude that petitioner’s identification of Goals 16 and 17 as
16 “grounds” for petitioner’s appeal, was sufficient to comply with LUDO 2.500.5.c, such that
17 petitioner did not waive her right under *Miles* to raise issues and arguments concerning Goals
18 16 and 17 to LUBA.

19 Unlike the present appeal, which involves insufficient specification of an issue, *Miles*
20 involved a complete failure to identify an issue, and therefore *Miles* does not tell us what
21 level of specificity is mandated under a code requirement like LUDO 2.500.5.c, which
22 simply requires that a local notice of appeal list the “specific grounds” for the appeal. In the
23 present case, Sommer’s notice of review referred to his written testimony submitted to the
24 planning commission, to support his claim that the proposal is inconsistent with Goals 16 and
25 17. For purposes of the *Miles* exhaustion/waiver doctrine, that is sufficient to inform the

1 county and other participants which grounds the appellant wished to raise on appeal to the
2 board of commissioners.

3 As noted earlier, respondent also contends that without regard to *Miles*
4 waiver/exhaustion, petitioners failed to raise issues concerning Goals 16 and 17 with the
5 specificity required by ORS 197.763(1) prior to the close of the final evidentiary hearing in
6 this matter, and for that reason here Goal 16 and 17 issues are beyond LUBA scope of review
7 under ORS 197.835(3).³ With respect to Goal 17, the county argues that Sommer’s written
8 testimony does not mention Goal 17, and in fact no participant during the planning
9 commission proceedings raised any cognizable issue under Goal 17. Based on our review of
10 the record, the county is correct. Petitioner has identified no place in the record where
11 Sommer, or any other party, raised *any* issues regarding Goal 17. Accordingly, we agree
12 with the county that the issue raised under the fourth assignment of error is waived under
13 ORS 197.763(1), and is beyond our scope of review.

14 The third assignment of error challenges the county’s finding that Goal 16 does not
15 apply to the proposed plan and zoning amendments, because Site VI is far enough inland
16 from estuarine waters that the goal is not implicated. In the petition for review, petitioner
17 argues that several comprehensive plan policies and LUDO provisions suggest that dredge
18 material disposal sites such as Site VI are subject to Goal 16, and the county erred in
19 concluding otherwise.

20 In his written testimony, Sommer wrote that “These zone changes are inconsistent
21 with * * * goal 16 estuarine resources.” Record 325. Sommer added that “These estuarine
22 resources are much more valuable for anadromous fisheries and nursery grounds, eel beds for

³ ORS 197.763(1) was set out earlier in this opinion. See n 2. ORS 197.835(3) limits the issues that LUBA may consider on appeal and provides:

“Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 herring, sticklebacks, and many others. The black brant has almost disappeared because they
2 eat plant[s] only and eel grass is its main diet.” *Id.*

3 In addition, petitioner submitted written testimony to the planning commission
4 arguing that “Goal 16 has still not been addressed in spite of the obvious effects of more
5 development upon the estuary,” and requesting that the planning commission “[a]ddress Goal
6 16 in regards to protection of the estuary.” Record 332, 334. Based on that testimony, it is
7 fair to say that both Sommer and Tetreault believed that development of Site VI would be
8 inconsistent with Goal 16 and, implicitly but necessarily, that Goal 16 applied to the
9 proposed amendments. In an apparent response to those arguments, the planning
10 commission found that “DMD Site VI, as identified in the County Coastal Plan document, is
11 far enough inland from the estuarine area that it has not been identified as having any
12 estuarine designation.” Record 7. The planning commission also adopted by reference a
13 staff report finding that “Goal 16 does not apply to this proposed amendment.” Record 79.
14 Those are the findings that petitioner challenges in the fourth assignment of error.

15 In our view, the testimony of Sommer and Tetreault is sufficient to preserve the issue
16 presented in the third assignment of error, for purposes of ORS 197.763(1) and 197.835(3).
17 That issue is essentially the adequacy and accuracy of the planning commission findings
18 regarding Goal 16. As the Court noted in *Miles*, there is an exception to ORS 197.763(1) for
19 issues that do not arise until after the close of the evidentiary hearing, such as challenges to
20 the adequacy of the findings in the final decision. 190 Or App at 506, n 4 (*citing DLCD v.*
21 *City of Warrenton*, 40 Or LUBA 88, 95-96 (2001)). Where issues regarding an approval
22 criterion are raised during the evidentiary proceedings, ORS 197.763(1) does not require the
23 petitioner to anticipate how the local government will respond to those issues in its findings.
24 Here, both Sommer and Tetreault raised issues of compliance with Goal 16, predicated
25 clearly on the presumption that Goal 16 applied to the proposed amendments. The county
26 responded with a finding that Goal 16 does not apply, because Site VI is not part of the

1 estuary and thus not subject to Goal 16. For the reasons set out above, neither
2 ORS 197.763(1) nor *Miles* precludes petitioner from challenging that finding in this appeal.

3 Turning to the merits of the third assignment of error, we agree with the county that
4 petitioner has not demonstrated that the planning commission erred in concluding that plan
5 and zoning amendments to allow development of Site VI do not implicate Goal 16.
6 Petitioner quotes various provisions from the Coastal Element of the county comprehensive
7 plan and a LUDO provision governing overlay districts, but nothing cited to us suggests that
8 Site VI is part of the estuary or otherwise subject to Goal 16. Absent a more developed
9 argument from petitioner, the third assignment of error does not demonstrate a basis for
10 reversal or remand.

11 The third and fourth assignments of error are denied.

12 The county's decision is affirmed.