BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AMRU ZEITOUN,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

MARJORIE WEIGEL, CHARLIE PARR II
and EDWIN R. SHARER,
Intervenors-Respondents.

LUBA No. 2009-088

FINAL OPINION
AND ORDER

Appeal from Yamhill County.

Samuel R. Justice, McMinnville, filed the petition for review and argued on behalf of petitioner. With him on the brief was Haugeberg, Rueter, Gowell, Fredricks, Higgins & McKeegan P.C.

No appearance by Yamhill County.

Andrew H. Stamp, Lake Oswego, filed the response brief and argued on behalf of intervenors-respondents. With him on the brief was Andrew H. Stamp, P.C.

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

AFFIRMED 11/19/2009

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 decision by the county approving a nonfarm dwelling.

MOTION TO INTERVENE

Marjorie Weigel, Charlie Parr II and Edwin R. Sharer (intervenors) move to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

REPLY BRIEF

Petitioner moves for permission to file a reply brief to respond to new matters raised in the response brief. There is no objection to the reply brief. The reply brief is allowed.

FACTS

Intervenor Marjorie Weigel on behalf of Addie Mae's, LLC, applied to site a non-farm dwelling on a 1.04-acre property zoned Exclusive Farm Use (EF-40) along Burch Hill Road.[1] The subject property is a portion of a larger tax lot (Tax Lot 2200) totaling 25 acres that contains an existing dwelling. Petitioner owns an organic vineyard near the subject property.

The planning commission approved the dwelling, and petitioner appealed that approval to the board of county commissioners. The board of county commissioners affirmed the planning commission's decision approving the dwelling. This appeal followed.

WAIVER

Citing *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), intervenors argue that many of petitioner's assignments of error are beyond LUBA's scope of review under ORS 197.825(2)(a).[2] In *Miles*, opponents of a grocery store appealed the planning

[1] According to the application, intervenor Charlie (also called Charles in the record and in this opinion) Parr II is a member of Addie Mae's, LLC, the owner of the subject property. Record 218.

[2] ORS 197.825(2)(a) provides that LUBA's jurisdiction:

commission's approval to the city council. The local code required opponents to specify the grounds for their appeal. The opponents in *Miles* listed four grounds for their appeal. After the city affirmed the planning commission's decision, the opponents appealed the decision to LUBA. At LUBA, some of petitioner's assignments of error raised issues that were different from the four grounds of appeal specified in the notice of local appeal that initiated the appeal of the planning commission's decision to the city council. LUBA remanded the decision, based on an assignment of error that raised an issue that had not been included in the notice of local appeal, finding that because the issue had been raised before the planning commission, the petitioners therefore satisfied the raise it or waive it requirement of ORS 197.763(1) and 197.835(3). While the Court of Appeals agreed that raising the issue before the planning commission satisfied the raise it or waive it requirement of ORS 197.763(1) and 197.835(3), the Court also held that the exhaustion of remedies requirement of ORS 197.825(2)(a) was not satisfied:

> "In the land use area, we have applied waiver analysis to issues in other contexts that were initially raised and adequately preserved. Consistently with the exhaustion principle expressed in ORS 197.825(2)(a), and to give that principle force, parties should be required to pursue their available local remedies *and* to present their substantive claims to the local appeal body; their failure to do so should be deemed to be a waiver of those claims. Requiring parties to pursue a local appeal process, without also requiring them to raise issues that they later raise to LUBA as a basis to invalidate the local decision, would permit parties to 'step [] through the motions' of the local appeal process without presenting the substance of their objections to the local body." *Id*. at 508-09 (emphasis in original, citation omitted).

Similar to the City of Florence code provision at issue in *Miles*, Yamhill County Zoning Ordinance (YCZO) Section 1404.03(B) requires that "[a]ny appeal [of a planning commission decision] * * * shall explain the basis of the appeal and shall include * * * [r]easons why the decision is factually or legally incorrect." YCZO Section 1405.01 requires

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> "Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]"

appeals to be made on forms prescribed by the planning director. Petitioner submitted his appeal on the form provided by the county planning department. That form contains in relevant part two instructions to appellants. The first provides "[i]f you are an affected party, please explain how you are aggrieved or adversely affected by the decision * * *" and includes several lines for response. We refer to that instruction as the "standing section." In the lines for the response, petitioner hand wrote "(see attachment)." The second instruction directs the appellant to

> "[p]lease describe the basis upon which the decision is being appealed. Indicate which ordinance, Comprehensive Plan, or other regulatory provisions have not been satisfied or have been violated by the decision. Use extra paper if necessary"

and also includes several lines for the response. Petitioner wrote "(see attachment)" in the lines for the response. Record 53-54.

Petitioner attached seven single spaced typewritten pages to the appeal form. On the first page of his attachment, petitioner copied and underlined the standing section of the appeal form. The first page and the following three and one half pages contain petitioner's criticisms of the planning director, the planning commission, the proposal and the planning commission's approval, as well as references to conflicts of interest. Those pages also contain references to the title history of the subject property and the adjacent property and references to runoff from the proposed dwelling. Finally, those pages quote YCZO 402.03(I)(1), which we set out and discuss below.

Beginning on the middle of the fifth page of his attachment, petitioner copied and underlined the second instruction quoted above, requiring the appellant to "describe the basis upon which the decision is being appealed * * *." The fifth page and the next one and one-half pages of petitioner's attachment contain references to YCZO provisions, state statutes, the county's land division ordinance, a 2009 Oregon House of Representatives bill, and

county procedural rules for public hearings, all of which presumably were intended to be the "basis upon which the decision is being appealed" as referenced in the appeal form.

Intervenors argue that because the arguments set forth in many of the assignments of error are not found in the section of petitioner's attachment that "describe[s] the basis upon which the decision is being appealed," but rather are found only in the standing section of petitioner's attachment, petitioner did not adequately present his issues to the board of county commissioners as required by *Miles*. Intervenors essentially argue that petitioner did not catalogue his grievances in the proper place on the appeal form that is required under YCZO 1405.01, and that failure results in waiver of those grievances under *Miles* and ORS 197.825(2)(a). We reject that argument. First, neither YCZO 1404.03(B) nor YCZO 1405.01 require that an appellant provide the information requested on an appeal form in a particular place on the appeal form, and neither code section specifies that the failure to do so is a jurisdictional defect or results in a waiver of the right to raise issues at LUBA. Further, we decline to assign such a hyper-technical reading to the Court's decision in *Miles*. The Court in *Miles* was concerned with providing an opportunity to the local review body to be advised of the issues a local appellant intends to raise in the local appeal. In the present appeal, petitioner provided his arguments challenging the planning commission decision as an attachment to the appeal form, a procedure that is suggested by the appeal form itself. For those reasons, we reject intervenors' arguments that petitioner is precluded by *Miles* and ORS 197.825(2) from raising the issues set forth in petition for review because petitioner failed to list his grievances in the proper location on the appeal form.

However, intervenors also argue that petitioner failed to raise many of the issues set forth in his assignments of error in any part of his appeal statement, and for that reason, intervenors argue, petitioner has not satisfied the exhaustion requirement of ORS 197.825(2) as explained in *Miles*. As we explain below, we agree with intervenors regarding some of petitioner's assignments of error.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

YCZO 402.03(I)(1) through (7) set out county standards for approval of a nonfarm dwelling in the county's EFU zone. In these assignments of error, petitioner challenges the county's decision that the application satisfies YCZO 402.03(I)(4), which is sometimes referred to as the "stability of the overall land use pattern" standard. YCZO 402.03(I)(4) provides in relevant part that a nonfarm dwelling may be approved on land zoned EFU if:

> "(4) The dwelling will not materially alter the stability of the overall land use pattern of the area. In determining whether a proposed nonfarm dwelling will alter the stability of the land use pattern of the area, the cumulative impact of possible new nonfarm dwellings on other lots or parcels in the area similarly situated shall be considered. To address this standard, the county shall:
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> " * * * * *
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> "(c) Determine whether approval of the proposed nonfarm/lot-of-record dwellings together with existing nonfarm dwellings will materially alter the stability of the land use pattern in the area. The stability of the land use pattern will be materially altered if the cumulative effect of the existing and potential nonfarm dwellings will make it more difficult for the existing types of farms in the area to continue operation due to diminished opportunities to expand, purchase or lease farmland, acquire water rights or diminish the number of tracts or acreage in farm use in a manner that will destabilize the overall character of the study area."

In the first assignment of error, petitioner argues that the county failed to consider whether the proposed nonfarm dwelling will alter the stability of the land use pattern in the area by failing to consider the impact of the new well proposed for the subject property and failing to consider whether the proposed dwelling will make it more difficult to acquire water rights. In the second assignment of error, petitioner argues that the county failed to consider whether the dwelling will materially alter the stability of the land use pattern in the area by increasing property values and diminishing opportunities to expand farm operations. In the third assignment of error, petitioner argues that the county failed to consider whether the

proposed dwelling will materially alter the stability of the land use pattern in the area by diminishing the number of tracts or acreage in farm use.

Intervenors respond by arguing that petitioner is precluded under ORS 197.825(2)(a) and *Miles* from raising issues regarding the "stability standard" that are presented in the first, second, and third assignments of error because petitioner failed to adequately identify those issues in his appeal statement.

The appeal statement contains various statements and assertions regarding problems caused by water runoff from the subject property to petitioner's property, Record 57 and 58, and contains a statement that a new well could reduce the amount of water available to farms. Record 59. The appeal statement includes the following:

> "* * * [T]ax lot 2200 already has a well. Any new digging must be set back properly from the drainage in the Right of Way at the corner of Amity [Road] and Burch Hill RD. New wells for non-farm developments in the Ground Water Limited Area could reduce our access to consistent and sizable amounts of clean water. This access is essential for us to meet the needs of our farm business since our water is an irreplaceable resource. In Groundwater Limited Areas, restrictions are supposed to be implemented on future uses of groundwater. Eventually, new wells will reduce the amount of water available to farms. If we were to rely on having clean, non-chlorinated water delivered regularly by truck to meet our production needs, the costs would be prohibitive. According to the ordinance criteria section 402.03(I) of the YCZO, '*the dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use.*' * * *" Record 58-59 (Emphasis in original).

The appeal statement also contains the following in the section that is supposed to "describe the basis upon which the decision is being appealed":

> "**Section 402.03(I) of the YCZO** has not been satisfied. Applicant has not proven, '[*t]he dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use.*'" Record 59 (bold and italics in original).[3]

[3] The quoted language appears at YCZO 402.03(I)(1).

Intervenors argue that because petitioner quoted and cited to the YCZO 402.03(I)(1) impact on "accepted farming or forest practices" standard in his appeal statement, petitioner did not properly preserve any issue related to subsection (c) of the YCZO 402.03(I)(4) "stability of the overall land use pattern" standard that he now raises in the first through third assignments of error.

In his reply brief, petitioner responds by citing to the language in the appeal statement that we have described and quoted above and by citing to other pages in the record where issues regarding potential for increased runoff were raised during the planning commission hearing. However, the reply brief does not respond to intervenors' argument that petitioner failed to properly preserve the issues that are presented in the first, second, and third assignments of error challenging the county's findings regarding the YCZO 402.03(I)(4) "stability of the overall land use pattern" standard.

Nonfarm dwelling applications must satisfy YCZO 402.03(I)(1) through (7). As we have already explained, YCZO 402.03(I)(4) is sometimes referred to as the "stability of the overall land use pattern" standard, and provides that a non farm dwelling may be approved if:

> "The dwelling or activities associated with the dwelling will not force a significant change in or significantly increase the cost of accepted farming or forest practices on nearby lands devoted to farm or forest use."

As we have explained, petitioner's appeal statement quoted YCZO Section 402.03(I)(1) in two different places, and took the position that the application did not satisfy that subsection of YCZO 402.03(I) because of increased runoff and the impact of a new well on the property. Nowhere in the appeal statement did petitioner take the position that the application fails to satisfy the "stability of the overall land use pattern" standard or otherwise explain how the application failed to satisfy that standard, the issue that is presented in the first through third assignments of error. As the Court of Appeals explained in *Miles*,

> "[P]arties should be required to pursue their available local remedies *and* to present their substantive claims to the local appeal body; their failure to do so should be deemed to be a waiver of those claims. Requiring parties to pursue

> a local appeal process, without also requiring them to raise issues that they later raise to LUBA as a basis to invalidate the local decision, would permit parties to 'step [] through the motions' of the local appeal process without presenting the substance of their objections to the local body. * * *" 190 Or App at 509.

We do not think that petitioner adequately presented the substance of his objections set forth in the first through third assignments of error to the board of commissioners. Although petitioner never expressly cited any of the seven subsections of YCZO 402.03(I) by subsection number, the text of YCZO 402.03(I)(1) was quoted twice and the text of YCZO 402.03(I)(4) is never mentioned. The issues that petitioner raised in his appeal statement were tied directly to YCZO 402.03(I)(1) and asserted that certain aspects of the proposed dwelling (such as increased runoff and a new well) would significantly increase the cost of his farming practices. YCZO 402.03(I)(1) requires a very different analysis than the analysis required to determine whether a non-farm dwelling complies with the YCZO 402.03(I)(4)(c) "stability of the overall land use pattern" standard. The board of county commissioners adopted findings addressing YCZO 402.03(I)(1), and petitioner does not challenge those findings. We agree with intervenors that the issues presented in the first through third assignments of error were not properly preserved for our review under *Miles*, and as such those assignments of error provide no basis for reversal or remand of the decision.[4]

The first, second and third assignments of error are denied.

FOURTH ASSIGNMENT OF ERROR

As explained above, the subject property is adjacent to a 24-acre parcel which, together with the subject property, make up a single tax lot (tax lot 2200). The western 24-acre portion of tax lot 2200 is owned by Charles Parr II. Record 109. The subject property is owned by Addie Mae's, LLC, of which Charles Parr II is a member. Record 230. YCZO

[4] Intervenor also argues that petitioner is precluded from raising the issues presented in those assignments of error by ORS 197.763(1) and ORS 197.835(3). Because we determine that petitioner failed to preserve the issues presented in the first through third assignments of error as required by ORS 197.825(2)(a), as explained in Miles, we need not address intervenor's other waiver challenges.

402.03(I)(6) provides that a nonfarm dwelling may be approved if "[t]he tract on which the dwelling is to be sited does not include a dwelling." The term "tract" is not defined in the YCZO, but ORS 215.010(2) defines "tract" for purposes of ORS Chapter 215 as "one or more contiguous lots or parcels under the same ownership."[5] In the fourth assignment of error, petitioner argues that the subject property is part of a "tract" and therefore the county erred in approving the dwelling.

Intervenors first respond that petitioner failed to raise the issue in a way that was sufficient to allow the board of county commissioners to respond to the issue, as required by ORS 197.763(1).[6] Intervenors also respond that petitioner's arguments that the subject property is part of a tract are without merit because the record is clear that the two parcels are not under the "same ownership," a requirement for establishing a "tract."

We tend to disagree with intervenors that petitioner did not raise the issue set forth in the fourth assignment of error with enough specificity to allow the governing body a chance to respond to it.[7] Although petitioner couched his argument in terms of "tax lots," petitioner

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[5] YCZO 402.03(I) implements ORS 215.284, and the ORS 215.010(2) definition of "tract" applies to ORS 215.284 .

[6] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals 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."

[7] In support of his assignment of error, petitioner cites Record 55, which contains the following statement:

> "The commission's decision * * * was poorly researched. A review of the applicant's property indicates that tax lot #5426-2200, as well as the 1.04-acre subject parcel, are considered a contiguous property – and one tax lot. This would seem to preclude a second house on the property. According to the County Tax Assessor (as of May 19, 2009) Charles Parr II pays the taxes on #2200. Parr would not be entitled to build another non-farm dwelling. It is all (the 1.04 acre parcel) and 25-acre adjoining property) *the same* tax lot. Another non-farm dwelling, another well, and another septic already exist on tax lot #2200. If another non-farm dwelling were approved, then there would be two houses on one contiguous property." Record 55 (Emphasis in original).

also argued that the properties are "contiguous" and that a dwelling is already located on the western property. We think a reasonable decision maker would recognize that petitioner was arguing that the subject property is part of a "tract."

However, we need not resolve that issue because we agree with intervenors that the subject property is not part of a tract. Under ORS 215.010(2), in order for more than one contiguous parcel to be considered a single "tract," the contiguous parcels must be under the same ownership. The evidence in the record establishes that the subject property is not contiguous to a property that is in the same ownership. The subject property is owned by a limited liability company and the adjacent 24 acres are owned by intervenor Charlie Parr II. Absent any additional explanation or theory from petitioner as to why the subject property and the adjacent property together constitute a tract, the assignment of error provides no basis for reversal or remand.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

YCZO 402.03(I)(2) provides that the county may approve a nonfarm dwelling if "[t]he dwelling will be sited on a lot or parcel that is predominantly composed of Class IV through VIII soils that would not, when irrigated, be classified as prime, unique, Class I or II soils." In the fifth assignment of error, petitioner argues that the county's findings regarding YCZO 402.03(I)(2) are inadequate and are not supported by substantial evidence in the record because the challenged decision approves a dwelling on "tax lot 2200" and, according to petitioner, fails to limit the location of the dwelling to the one-acre portion of tax lot 2200. We understand petitioner to argue that because the soils report that the county relied on does not include soils information for the 24-acre parcel that is adjacent to the subject 1.04-acre property, the county erred in concluding that "[t]he dwelling will be sited on a * * * parcel that is * * * composed of Class IV through VIII soils."

Intervenors respond, and we agree, that the county reasonably concluded that the parcel on which the dwelling will be sited, the 1.04 acre parcel, is composed of Class VI soils. Record 4. The county's decision makes clear that the county approved the request to site a dwelling on a 1.04 acre property that is a part of Tax Lot 2200. Record 2.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

YCZO 402.03(I)(3) provides that a dwelling may be approved if "[t]he dwelling will be sited on a lot or parcel created before January 1, 1993." The county found that YCZO 402.03(I)(3) was met: "[t]he applicant submitted a deed, Book 114 Page 462, dated May 19, 1939, which describes the lot. The request complies with the requirements of criterion 3." Record 4. We understand petitioner to argue that the evidence in the record indicates that even if the subject property was created by deed in 1939, other evidence in the record calls into question whether the 1.04 acre parcel continued to exist as a separate parcel from 1939 through January 1, 1993.

Intervenors respond that petitioner is precluded under *Miles* and ORS 197.825(2)(a) from raising the issue that is presented in the sixth assignment of error. Petitioner's appeal statement included the following language, which was set out earlier at n 7:

> "The commission's decision * * * was poorly researched. A review of the applicant's property indicates that tax lot #5426-2200, as well as the 1.04-acre subject parcel, are considered a contiguous property – and one tax lot. This would seem to preclude a second house on the property. According to the County Tax Assessor (as of May 19, 2009) Charles Parr II pays the taxes on #2200. Parr would not be entitled to build another non-farm dwelling. It is all (the 1.04 acre parcel) and 25-acre adjoining property) *the same* tax lot. Another non-farm dwelling, another well, and another septic already exist on tax lot #2200. If another non-farm dwelling were approved, then there would be two houses on one contiguous property." Record 55 (Emphasis in original).

The only relevant issue that is fairly raised by the above-quoted language from petitioner's appeal statement is whether the entire 25-acre tax lot 2200, which is made up of a 24-acre parcel and a 1.04 acre parcel qualifies as a single tract because the 24 acres and 1.04 acres

are owned by the same person. That is not the issue that is raised by the sixth assignment of error. The issued raised by the sixth assignment of error is whether the approximately 1.04 acre parcel that was transferred to the Oregon State Highway Commission in 1939 continued to exist as a separate parcel until 1993 so that the proposed dwelling complies with YCZO 402.03(I)(3), which requires that "[t]he dwelling will be sited on a lot or parcel created before January 1, 1993."

Petitioner's appeal statement also included the following statement:

> "The applicant's ownership of the 1.04-acre parcel seems unproven. The Warranty deed from June 7, 1939 (provided by the applicants) suggests that the 1.04 acre parcel was sold to the State of Oregon * * * for the sum of $47.25. When was the property transferred from the State of Oregon back to Parr or the previous owners? The Warranty Deed of Larry Turner to Larry Turner and Lydia Turner Trustees from May 6, 2002 seems to suggest that is *was not* transferred back. * * *" Record 56 (Emphasis in original).

Intervenors argue, and we agree, that the issue that petitioner raises in the above-quoted passage is whether the applicant owns the subject 1.04-acre parcel, not whether that 1.04-acre parcel has continued to exist as a parcel separate from the 24-acre parcel since it was created in 1939. Accordingly, we agree with intervenors that petitioner may not raise an issue regarding the creation and continued existence of the subject property under YCZO 402.03(I)(3) for the first time at LUBA. ORS 197.825(2)(a).

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

The county's application form for nonfarm dwellings requires that the applicant be identified and that the property owner also be identified if the property owner is not the applicant. The application form also has a space for the applicant to sign and a space for the owner to sign, if the applicant is not the owner. The application is signed by Charles E. Parr II as a member of Addie Mae's, LLC. The spaces on the application for identifying the owner and for the owner's signature are blank. Record 218. YCZO 402.03(I)(5) allows a dwelling to be approved if "[t]he dwelling complies with other conditions the county

considers necessary, including but not limited to provision for sewage disposal, emergency vehicle access, and public road approach." We understand petitioner to argue that the county erred in failing to impose a condition of approval requiring proof of ownership of the subject property.

First, YCZO 402.03(I)(5) seems unrelated to any issue regarding whether the application is signed by the property owner. And while the county's nonfarm dwelling application form includes spaces to identify the property owner, it does not require any particular proof of ownership and the application form itself does not impose a legal requirement that the application materials include proof of ownership.

In addition, the deed by which Charles Parr II conveyed the 1.04 acre parcel to Addie Mae's, LLC is in the record. Record 230. Charles Parr II signed the application as "member" of the owner. Record 218. The application form contains a sworn declaration of Charles Parr II indicating that "the above information is true and correct to the best of [his] knowledge." Record 218. We agree with intervenors that a reasonable decision maker could rely on that evidence to conclude that the person signing the application was authorized to do so on behalf of the owner of the property. The county did not need to impose a condition of approval requiring proof of ownership.

The seventh assignment of error is denied.

The county's decision is affirmed.