BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOUGLAS WELLET, REBECCA WELLET,
ALBERT SATTERLA and DAVID CRANE,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent.

LUBA No. 2010-049

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Zack P. Mittge, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr and Sherlock, P.C.

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

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

AFFIRMED 12/23/2010

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a county decision approving a "relative" farm dwelling on property used for agricultural purposes.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief addressing the county's argument that the two issues raised in the petition for review are beyond LUBA's scope of review under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), because they were not raised in the statement of local appeal of the planning commission's decision. The reply brief is allowed.

Petitioners also attach to the reply brief affidavits of two of the petitioners. The county does not object to the inclusion of the affidavits as attachments to the reply brief but moves to submit a counter-affidavit if the affidavits are allowed. The affidavits attached to the reply brief are disallowed for the reasons we explain in our resolution of the first assignment of error.

FACTS

The subject property is approximately 118 acres and zoned for Exclusive Farm Use–Cropland. The property, which includes an existing farm dwelling and an agricultural building, is used primarily for grass seed production. The Umpqua River borders the subject property along its northern boundary.

In October 2009, the property owner applied to the county to build a second dwelling on the property, to be occupied by the owner's son, under code provisions implementing the "relative dwelling" provisions of ORS 215.283(1)(d). The county planning director administratively approved the application, and petitioners appealed to the planning commission for a *de novo* hearing. The planning commission held a public hearing and affirmed the planning director's decision, adopting additional findings and conditions. One of the petitioners in this appeal, Albert Satterla, filed an appeal of the planning commission

decision to the board of commissioners. The board of commissioners, however, declined to review the planning commission's decision.[1] This appeal followed.

FIRST ASSIGNMENT OF ERROR

LUDO 3.4.075(3)(c) requires a finding that the proposed relative dwelling "is necessary for the farm operation[.]" Petitioners argue that the county's finding that the assistance of the property owner's son in the management of the farm operation is "necessary for the farm operation" is inadequate, misconstrues the applicable law, and is not supported by substantial evidence.

The county does not respond to the merits of this assignment of error, but instead argues that any issue regarding compliance with LUDO 3.4.075(3)(c) is not within LUBA's scope of review, because petitioners failed to identify any such issue in the local appeal of the planning commission decision to the board of commissioners. ORS 197.825(2)(a); *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003).

ORS 197.825(2)(a) limits the jurisdiction of the Board to "to those cases in which the petitioner has exhausted all remedies available by right before petitioning [LUBA] for review." The Court of Appeals held in *Miles* that ORS 197.825(2)(a) "codifies traditional exhaustion principles" and those principles "traditionally require not only that an avenue of review be pursued, but also that the particular claims that form the basis for a challenge be presented to the administrative or local government body whose review must be exhausted." *Miles*, 190 Or App at 506. In other words, under ORS 197.825(2)(a) as interpreted by the Court of Appeals in *Miles*, LUBA's scope of review does not include issues that were not identified below as the basis for the local appeal. Because the principle in *Miles* combines elements of exhaustion and waiver, it is sometimes referred to as "exhaustion" waiver, to

[1] Douglas County Land Use and Development Ordinance ("LUDO") Section 2.700.8 provides for discretionary review by the board of commissioners. When the board declines review, LUDO 2.700.8 provides that "the lower decision shall stand" and that the "Board shall adopt an order so stating, but the order need not state any reason for the Board's decision to decline review."

distinguish it from the ORS 197.763(1) requirement to raises issues below prior to the close of the final evidentiary hearing.[2]

In the present case, LUDO 2.500.5(c) requires that a "notice of review" that is filed to initiate an appeal of a planning commission decision to the board of commissioners include "[t]he specific grounds relied upon in the petition request for review[.]" LUDO 2.700(2) limits the board of commissioners' review to the grounds stated in the petition for local review.[3] Pursuant to LUDO 2.500.5(c), petitioner Satterla submitted a two-page, handwritten "notice of review," which identifies the following two issues as the grounds on which review is requested:

> "My understanding of the zoning which is designated Agriculture (AGC) by the Douglas County Comprehensive Plan and is subject to the 100 year floodplain does not approve of any more than 1 dwelling per 120 acres.
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> "It is my opinion that the Planning Commission has not followed the law in any respect regarding [the applicant]." Record 27.

The county is correct that the notice of review does not mention LUDO 3.4.075(3)(c) or the "necessary" standard, or identify any cognizable issue under that standard.

In their reply brief, petitioners first argue that the exhaustion/waiver principle articulated in *Miles* does not apply to the present case. According to petitioners, the Court in *Miles* was concerned with circumstances where the petitioners attempt to bring before LUBA an "entirely new issue" different from the issues raised below, and therefore an issue the

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[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."

[3] LUDO 2.700(2) provides:

> "Review by the Board shall be a de novo review of the record limited to the grounds relied upon in the notice of review, or cross review, if the review is initiated by such notice."

local government had no opportunity to address in its decision. Petitioners' Reply Brief 1. In the present case, petitioners argue, the planning commission decision that became the county's final decision, adopted findings addressing compliance with LUDO 3.4.075(3)(c), concluding that the second dwelling is "necessary" for the farm operation. Record 12.[4] That and related findings are what is challenged in the first assignment of error. Therefore, we understand petitioners to argue, the issue raised under the first assignment of error on appeal is not a "new" issue, but rather an issue that was recognized as an issue by the county's final decision maker and addressed in the county's findings. Under these circumstances, we understand petitioners to argue, the purpose underlying the "exhaustion/waiver" principle in *Miles* is satisfied, and petitioner's failure to identify the issue of compliance with LUDO 3.4.075(3)(c) in the local notice of review should not preclude LUBA's review of the first assignment of error.

We disagree with petitioners. *Miles* involved an issue regarding street frontage that was raised to the planning commission prior to the close of the final evidentiary hearing before the planning commission, but was not among the four issues listed in the local notice of appeal to the city council, and the city council decision presumably adopted no findings addressing the frontage issue. In the present case, the county's final decision does include findings addressing LUDO 3.4.075(3)(c). However, the exhaustion/waiver principle is intended to do more than ensure that findings are adopted to address applicable approval criteria. Its main purpose is to ensure that the final local decision maker has an opportunity to address the issues that may become the basis for appeal to LUBA. That purpose is achieved only if the appellant identifies the appellant's particular concerns with the underlying decision in the notice of local appeal or otherwise as allowed by local code. That

[4] The county does not dispute that issues regarding whether the relative dwelling is "necessary" were raised to the planning commission, for purposes of waiver under ORS 197.763(1). Record 110-11 (testimony of Greg Miller).

purpose is not met in the present case, because petitioners were required to, but did not, identify in the notice of local appeal to the final decision maker the issue that they now wish to raise before LUBA. Therefore, the board of county commissioners had no way to know that petitioners had concerns with the planning commission's application of LUDO 3.4.075(3)(c). If it had, it is at least theoretically possible that the board of county commissioners would have accepted review and agreed with petitioners that the planning commission erred in its application of LUDO 3.4.075(3)(c) in this case.

Petitioners next argue that the notice of review adequately identifies the issue of compliance with LUDO 3.4.075(3)(c), when it states as a ground for appeal "the Planning Commission has not followed the law in any respect regarding [the applicant]." Record 33. Petitioners note that the notice of review also indicated that it represents the views of three other named persons, and argues that read in context the statement that the planning commission "has not followed the law" should be understood to refer to or incorporate the issues or arguments those persons raised to the planning commission.

Again, we disagree. The statement that the planning commission "has not followed the law" is insufficient to identify any particular issue for purposes of *Miles*, and the mere reference to the views of other persons is not sufficient to incorporate into the notice of review the particular arguments that were earlier made by those persons to the planning commission. As petitioners note, the requirement under *Miles* to identify issues that are the basis for the local appeal is not a technical pleading requirement, but the appellant must nonetheless identify the issue in a manner sufficient for a reasonable decision-maker to recognize the issue being raised. In *Zeitoun v. Yamhill County*, 60 Or LUBA 111, 114 (2009), for example, the notice of appeal document referred, saying "see attached," to an attached document that reasonably identified a number of issues, and LUBA rejected arguments that the issues need be stated in the notice of appeal document itself. Here, however, the notice of review does not mention LUDO 3.4.075(3)(c) or the "necessary"

standard, and nothing is attached or incorporated by reference into the notice of review that identifies any issues.

Finally, petitioners argue that two petitioners attempted to attach copies of petitioners' planning commission testimony to the notice of review, which testimony raised a number of issues, but county staff advised them that it was unnecessary to do so. Petitioners attach to their reply brief affidavits from petitioners Albert Satterla and Douglas Wellet to that effect, describing their version of a conversation with a county planner. According to petitioners, because the county planner erroneously advised them that there was no need to attach copies of their planning commission testimony to the notice of review, the county is equitably estopped from asserting exhaustion/waiver based on deficiencies in the notice of review.[5]

The county disputes petitioners' version of the conversation between petitioners and the county planner, and if LUBA considers petitioners' affidavits, the county moves under OAR 661-010-0045 to take evidence outside the record to consider an affidavit of the county planner, which sets out his version of the conversation. The county's objection to petitioners' affidavits and its contingent motion to take evidence was filed November 23, 2010, one day after oral argument.

On December 8, 2010, petitioners filed a response to the county's contingent motion to take evidence. The response (1) argues that no motion to take evidence is necessary for LUBA to consider the affidavits, because LUBA will consider extra-record evidence to evaluate jurisdictional challenges without a motion to take evidence, and (2), in the alternative, moves for LUBA to consider the affidavits under OAR 661-010-0045. The response also includes new affidavits from petitioners Satterla and Wellet disputing the

[5] LUBA has previously questioned whether it has authority to apply the doctrine of equitable estoppel. *See Sparks v. City of Bandon*, 30 Or LUBA 69, 73 (1995) (questioning whether LUBA has authority to reverse a land use decision based on equitable estoppel); *Pesznecker v. City of Portland*, 25 Or LUBA 463, 466 (1993) (same); *Lemke v. Lane County*, 3 Or LUBA 11, 15, n 2 (1981) (same).

county planner's affidavit. In turn, the county filed an objection to petitioners' response, attached to which is yet another affidavit from the county planner disputing the second round of petitioners' affidavits.

LUBA's evidentiary review is confined to the local record. ORS 197.835(2)(a). Where a party demonstrates that there are "disputed factual allegations" regarding standing, unconstitutionality of the decision, ex parte contacts, or procedural irregularities not shown in the record that, if proved, would warrant reversal or remand, ORS 197.835(2)(b) and OAR 661-010-0045 allow LUBA to consider evidence outside the record.[6] Initially, we disagree with petitioners that no motion to take evidence is necessary to seek LUBA's consideration of petitioners' affidavits, because the dispute concerns LUBA's jurisdiction. LUBA indisputably has *jurisdiction* over the challenged decision. The dispute concerns LUBA's *scope of review* concerning the two assignments of error. Petitioners cite no case suggesting that LUBA may consider disputed extra-record evidence without granting a motion to take evidence, where the dispute merely concerns LUBA's scope of review over particular assignments of error.

Turning to petitioners' motion to take evidence that is embedded in their response to the county's motion, petitioners argue first that the affidavits demonstrate that the county's decision is "unconstitutional," because petitioners were denied "due process." Second,

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[6] OAR 661-010-0045 provides, in relevant part:

> "(1) Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *
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> "(2) Motions to Take Evidence:
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> > "(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

petitioners argue that the affidavits demonstrate a "procedural irregularity" not shown in the record that, if proved, would warrant reversal or remand of the decision. It seems highly doubtful that petitioners have sufficiently alleged and adequately developed grounds to allow LUBA to consider extra-record evidence under OAR 661-010-0045. However, given that the disputed factual allegations have arisen after the petition for review was filed and in response to the county's waiver arguments, rather than in conjunction with petitioners' arguments on the merits, we elect to grant the motions to consider extra-record evidence and have considered all the affidavits.

Even if actions by county planning staff in accepting a local notice of appeal could in some circumstances result in a denial of due process or other error warranting reversal or remand, and even if equitable estoppel might be a basis for LUBA to reject the county's exhaustion/waiver challenge, the parties' affidavits do not demonstrate that there was a denial of due process or that the elements of equitable estoppel are met. Even if we limit our consideration to petitioners' affidavits, the most that can be said with any confidence is that there was mutual misunderstanding and miscommunication between petitioners and the county planner regarding the sufficiency of the notice of review and what issues petitioners intended to raise to the board of commissioners. Such miscommunication falls far short of a denial of due process or the false representation and one-sided knowledge of the facts that are among the elements necessary to establish equitable estoppel. *See Coos County v. State of Oregon*, 303 Or 173, 180-81, 734 P2d 1348 (1987) (describing elements of equitable estoppel).

In sum, the issue raised under this assignment of error was not identified in the local appeal to the board of commissioners, and under the reasoning in *Miles* that issue is beyond LUBA's scope of review.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue that the county erred in approving the relative dwelling within the Umpqua River floodway. According to petitioners, county code provisions at LUDO 3.30.520(1) prohibit development within the floodway, unless an engineer certifies that the development does not result in any increase in flood levels.

Again, the county does not address the merits of petitioners' argument, but argues that code floodway restrictions are not specified anywhere in petitioners' notice of review that initiated the appeal of the planning commission decision to the board of commissioners. Accordingly, respondent argues that the exhaustion requirements of *Miles* have not been met and the Board must deny the second assignment of error. In their reply brief, petitioners respond, again, that *Miles* does not apply and that in any event the county is estopped from relying on exhaustion/waiver. We reject those arguments for the reasons set out above.

Petitioners also respond that the notice of review mentions that the subject property is located within the 100-year floodplain. As noted, petitioner Satterla identified as one ground for appeal:

> "My understanding of the zoning which is designated Agriculture (AGC) by the Douglas County Comprehensive Plan and is subject to the 100 year floodplain does not approve of any more than 1 dwelling per 120 acres."

However, the above assertion raises no cognizable issue regarding the floodplain (or the floodway, if that is different), except perhaps a contention that the Agricultural plan designation and/or the fact that the property is within the 100-year floodplain limits the property to one dwelling per 120 acres. That particular contention is not advanced on appeal. The subject of the second assignment of error is an alleged inconsistency with LUDO 3.30.520(1), and the failure to provide an engineer's certification necessary to develop within the floodway. That issue, however, was not identified as an issue in the notice of review, and thus is not within our scope of review under *Miles*, for the reasons set out above.

The second assignment of error is denied.

The county's decision is affirmed.