

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

3
4 FRIENDS OF DOUGLAS COUNTY
5 and SHELLY WETHERELL,
6 *Petitioners,*

7
8 vs.

9
10 DOUGLAS COUNTY,
11 *Respondent,*

12
13 and

14
15 MILLEGAN BROTHERS LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2021-075

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Douglas County.

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25 Dan Lawler filed the petition for review and reply brief and argued on
26 behalf of petitioners.

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28 No appearance by Douglas County.

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30 Steven Hultberg filed the response brief and argued on behalf of
31 intervenor-respondent. Also on the brief were Zoe Lynn Powers and Radler
32 White Parks & Alexander LLP.

33
34 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
35 Member, participated in the decision.

36
37 AFFIRMED

01/31/2022

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

NATURE OF THE DECISION

Petitioners appeal a board of county commissioners decision approving a preliminary site plan for a destination resort.

FACTS

The subject 2,813-acre property is located to the west of I-5 and is accessed from Exit 142. The property is zoned Farm Forest, Exclusive Farm Use, and Agriculture and Woodlot with a Destination Resort Overlay. Intervenor-respondent (intervenor) submitted a preliminary site plan for a destination resort that proposes an equestrian venue that will include arenas, polo fields, equestrian courses, and a 150-room hotel. Record 210.

A personal use airport is located in the northern part of the property. The airport was approved as a conditional use in 1988 (1988 CUP).¹ Record 486. The

¹ ORS 215.283(2)(h) allows to be established on land zoned exclusive farm use

“[p]ersonal-use airports for airplanes and helicopter pads, including associated hangar, maintenance and service facilities. A personal-use airport, as used in this section, means an airstrip restricted, except for aircraft emergencies, to use by the owner, and, on an infrequent and occasional basis, by invited guests, and by commercial aviation activities in connection with agricultural operations. No aircraft may be based on a personal-use airport other than those owned or controlled by the owner of the airstrip. Exceptions to the activities permitted under this definition may be granted through waiver action by the Oregon Department of Aviation in specific instances. A personal-use airport lawfully

1 1988 CUP included limitations on the number of nonagricultural flights and
2 required reapplication for any expansion of the uses. Supplemental Record 9.

3 The planning commission held hearings on the application and approved
4 the application. Petitioners appealed the planning commission's decision to the
5 board of county commissioners. Record 37-40. The board of county
6 commissioners declined review of the planning commission's decision and
7 adopted the planning commission's decision as its own. Record 1. This appeal
8 followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Douglas County Land Use and Development Ordinance (LUDO)
11 3.50.050(5) requires, as relevant here, an applicant for a preliminary site plan for
12 a destination resort to provide "proof of water rights." In their first assignment of
13 error, petitioners argue that the county's decision that LUDO 3.50.050(5) could
14 be met by imposing a condition of approval requiring the applicant to provide
15 copies of "any necessary water permits for proof of adequate water supply" is not
16 supported by substantial evidence in the record.

17 Intervenor responds, initially, that petitioners are precluded from raising
18 the issue raised in the first assignment of error under the exhaustion waiver
19 principle articulated in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382

existing as of September 13, 1975, shall continue to be permitted
subject to any applicable rules of the Oregon Department of
Aviation."

1 (2003), *rev den*, 336 Or 615 (2004), because petitioners failed to identify the issue
2 in their appeal statement. For the reasons set forth below, we agree.

3 ORS 197.825(2)(a) provides that LUBA’s jurisdiction “[i]s limited to
4 those cases in which the petitioner has exhausted all remedies available by right
5 before petitioning the board for review.” In *Miles*, the Court of Appeals held that
6 “exhaustion principles traditionally require not only that an avenue of review be
7 pursued, but also that the particular claims that form the basis for a challenge [at
8 LUBA] be presented to the administrative or local government body whose
9 review must be exhausted.” 190 Or App at 506. The court explained that “a party
10 does not exhaust his or her remedies ‘simply by stepping through the motions of
11 the administrative process without affording the [administrative or local
12 government body] an opportunity to rule on the substance of the dispute.’” *Id.* at
13 507 (quoting *Mullenaux v. Dept. of Revenue*, 293 Or 536, 541, 651 P2d 724
14 (1982) (brackets in *Miles*)).

15 Petitioners do not respond to intervenor’s exhaustion waiver argument
16 except by citing to places in the record where the issue was raised prior to the
17 close of the initial evidentiary hearing, for purposes of the statutory “raise it or
18 waive it” requirement at *former* ORS 197.763 (2019), *renumbered as* ORS
19 197.797 (2021), and ORS 197.835(3).² However, the exhaustion waiver doctrine

² ORS 197.835(3) provides the following limit on LUBA’s scope of review: “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 is different from the statutory “raise it or waive it” requirement in *former* ORS
2 197.763 (2019). The purpose of the statutory waiver requirement is to provide
3 “fair notice” of an issue, such that the decision-maker and other parties have an
4 adequate opportunity to respond to the issue. *Boldt v. Clackamas County*, 107 Or
5 App 619, 623, 813 P2d 1078 (1991). The purpose of the exhaustion waiver
6 doctrine is to ensure that the *final* local decision-maker has an opportunity to
7 address the issues that may become the basis for appeal to LUBA. That purpose
8 is achieved only if the appellant identifies the appellant’s particular concerns with
9 the underlying decision in the notice of local appeal. That purpose is not met in
10 the present case because LUDO 2.500.5(c) requires that a “notice of review” that
11 is filed to initiate an appeal of a planning commission decision to the board of
12 county commissioners include “[t]he specific grounds relied upon in the petition
13 request for review.” LUDO 2.700(2) limits the board of county commissioners’
14 review to the grounds stated in the petition for local review. Under *Miles*, a
15 petitioner must specify the issues it wishes to raise in a local notice of appeal to
16 preserve those issues for an appeal to LUBA if land use regulations require that
17 a notice of local appeal set out the issues on appeal. *Rawson v. Hood River*
18 *County*, 75 Or LUBA 200 (2017). Petitioners were required to, but did not,
19 identify in the notice of review to the final decision-maker the issue that they now
20 wish to raise before LUBA. Because petitioners failed to exhaust their
21 administrative remedies as required by ORS 197.825(2)(a) by failing to raise the

1 issue in their notice of review to the board of county commissioners, under the
2 principle of exhaustion waiver, the issue is beyond LUBA's scope of review.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 In their second assignment of error, petitioners argue that the county's
6 decision improperly construes OAR 738-005-0010(102) and violates the 1988
7 CUP by approving use of the airport for the destination resort.³ As noted, the
8 1988 CUP imposed a condition that limited the number of nonagricultural flights
9 and a condition that required any expansion of the uses on the property to require
10 reapplication for a new conditional use permit. Petitioners maintain that the
11 county approved use of the existing airport in connection with the destination

³ OAR 738-005-0010(102) is a definition of the phrase "personal use airport" found in the Oregon Department of Aviation's rules:

"'Personal Use Airport' means a landing strip that is restricted, except for aircraft emergencies, only to:

"(a) Use by the owner; and

"(b) On an infrequent and occasional basis to the owner's invited guests; and

"(c) Commercial activities in connection with agricultural operations only. No aircraft may be based on a personal use airport other than those owned or controlled by the owner of the airport. Exceptions may be granted in writing through waiver action by the Director of the Department in appropriate circumstances."

1 resort and that the definition of “personal use airport” and the conditions of
2 approval in the 1988 CUP prohibit that use. In support of their argument that the
3 decision approves use of the existing airport in connection with the destination
4 resort, petitioners point to intervenor’s application, which identifies \$3,000,000
5 designated towards airport improvements. Record 377, 382. Relatedly,
6 petitioners argue that the county should have imposed in the challenged decision
7 a condition of approval that prohibits use of the airport in connection with the
8 destination resort and that a new conditional use permit for the airport is required,
9 consistent with the 1988 CUP condition of approval.

10 Intervenor responds that the county did not approve any use of the existing
11 airport in connection with the destination resort. Intervenor points to Findings 5,
12 6, and 7, and argues that those findings show that the county did not approve any
13 changes to the airport or use of the airport in connection with the destination
14 resort.⁴ Intervenor also responds that, while the application’s inclusion of

⁴ The decision provides:

“Finding No. 5 The Planning Commission finds, based on the staff report, supplemental staff report, and application materials, that: (1) a personal use airport exists on the subject property, which was approved by the County in 1988; the airport approval was obtained by previous owners of the property; (2) the private airport is for personal use only; (3) the applicant intends to continue the use of the airport with upgrades to the runway and adding hangars and [aircraft fuel], under the conditions and limitations under which it was originally approved; and (4) as cited in the original approval,

any expansion of the use will necessitate reapplication of the Conditional Use Permit.

“Finding No. 6 The Planning Commission finds, based on the staff report, that on May 20, 1988, the Douglas County Planning Commission issued approval of a personal use airport on the subject property (Planning Department File No. 87-196), subject to eleven conditions which included restriction of the number of operations (landings and takeoffs) to, ‘104 total per year for fixed wing aircraft, excluding agricultural operations.’ The Commission further finds that: (1) the Planning Commission 1988 decision was appealed to the Board of Commissioners who upheld the Planning Commission approval; in order to ensure that excessive use of the airport did not occur. The Board further restricted usage of the private airport by aircraft not based at the airport to no more than one round trip per week total for all such aircraft and added the condition that no commercial or public usage, other than emergency usage, shall occur at the private airport; the Board Decision notes, ‘The foregoing additional conditions and the conditions contained within the Planning Commission Findings of Fact and Decision to the extent not modified by the conditions herein are binding upon the Applicant and future owners of the land’ and (2) the Board’s Decision was appealed to [LUBA] by the People for Rural Rights; and LUBA affirmed the County’s Decision.

“Finding No. 7 The Planning Commission finds based on the April 8, 2021 staff report Finding No 1 (page 8) that: a personal use airport, approved by the County in 1988, exists on the subject property; (1) the airport approval was obtained by previous owners of the property; (2) the Board of Commissioner’s Decision in the matter states that the conditions of approval for the airport are binding upon the applicant and future owners of the land; and (3) the personal use airport approval stands, subject to the original conditions of approval imposed by the Board of County Commissioners.” Record 21.

1 \$3,000,000 in airport improvements was “inarticulate[],”the county’s decision
2 does not approve use of the airport for the destination resort, and it expressly
3 provides that the 1988 CUP remains in effect.⁵ Response Brief 19.

4 We agree with intervenor. Petitioners’ description of the county’s decision
5 is not accurate. The county expressly concluded that no changes to the airport
6 were proposed or approved and that the 1988 CUP remains in effect. Record 21.
7 Thus, the county did not do what petitioners rely on as the basis for their second
8 assignment of error. In addition, the county was not required to impose a
9 condition of approval that requires intervenor to comply with the 1988 CUP
10 because the 1988 CUP remains in effect and provides that its conditions are
11 binding on future owners of the property, including intervenor.

12 The second assignment of error is denied.

13 The county’s decision is affirmed.

⁵ Intervenor also maintains that any amount towards airport improvements would not count towards the spending required under ORS 197.445(3) (at least \$7,000,000 in 1993 dollars) because airport improvements do not qualify as “visitor-oriented accommodations” or “developed recreational facilities” as those phrases are defined in Statewide Planning Goal 8 (Recreational Needs).