

ROUGH NOTES: EFFECTIVE LAND USE TESTIMONY

June 19, 2013

II. EFFECTIVE LAND USE TESTIMONY

II.9. HOW TO WRITE ASSIGNMENTS OF ERRORS (Appendix V.A.2. Statutes & Rules: LUBA Scope Of Review)

The focus on this section is how to write AOE's. Even so, there are some terms and ideas we need to address before we get into the specifics and example AOE's, especially the procedures and rules of the Oregon Land Use Board of Appeals (LUBA). Our main strategy of how to write AOE's is dependent on LUBA rules.

a) LUBA Procedures & Rules

(1) Parties The parties in a LUBA appeal are the "Petitioner," the "Respondent" (local government decision) and persons who "Intervene" on the side of either. In an appeal the Petitioner will have to submit a "Petition for Review" (petition or brief) to LUBA. This is the equivalent of filing a suit against the local government in the local district court.

(2) Appeal The petitioner is suing the local government for its land use decision. LUBA is like an appellate court. It is not a political body. This means that LUBA's procedures are more formal and its role is more technical than the role of local government decision makers. When you file a LUBA appeal, you are challenging the *legal sufficiency of the local government's decision* based on the evidence that was before the local government. A LUBA appeal is not an opportunity to present new evidence (LUBA Frequently Asked Question (FAQ) No. 12, Appendix V.A.1.3).

(3) LUBA Hearing As a general rule, LUBA holds only one hearing in each appeal. The hearing is for legal argument based on the briefs already filed by the parties, *not* for the presentation of evidence by witnesses. (See FAQ

Question 13, step 5; Appendix V.A.1.4.). This is a major difference from most local hearings.

Expert Witnesses When applicant has expert witnesses and the petitioners do not, they usually sway the “substantial” evidence criteria.!

(4) Oregon Legislative Rules For LUBA The Oregon legislature has limited LUBA’s role in two important ways.

1. The general rule is that LUBA *cannot* consider evidence that was not considered by the local decision makers. Keep this in mind when you present a case to LUBA. The only evidence that LUBA can consider is *the evidence already in the record of the decision*.
2. LUBA cannot overturn a decision merely because the LUBA Board members disagree with the decision or think it is unwise.

(5) Petition For Review (PFR), Petition, Or Brief The Petition sets forth the reasons why the land use decision or limited land use decision should be reversed or remanded by LUBA. The Petition not including appendices, can not exceed 50 pages at LUBA. There are no limits for local testimony. In preparing the Brief, keep in mind the bases on which LUBA may reverse or remand a decision (LUBA FAQ question No. 12, Appendix V.A.1.3). LUBA’s rules describe the form and content of a Petition. You can get samples of PRFs from previous cases by calling LUBA (Appendix V.A.1.3). The contents of a Petition follow (Appendix V.A.2.).

1. Table of Contents.
2. Facts That Establish Petitioner’s Standing.
3. Clear and Concise Statement of the Case.
 - . The Nature of Decision and the Relief Sought
 - . Summary of the Arguments.
 - . Summary of the Material Facts.
4. Why Decision Is a Decision Subject to LUBA’s Jurisdiction.
5. **Set forth each assignment of error under a separate heading.**

6. Contain a Copy of the Challenged Decision, including any adopted findings of fact and conclusions of law.
7. Contain a Copy of Any Comprehensive Plan Provision, Ordinance or Other Provision of Local Law Cited in the Petition, unless the provision is quoted verbatim in the petition.
8. Any Appendices.

(6) LUBA Headnotes As A Resource There are two main headnote sections that cover LUBA’s Petitions and AOE (i.e., LUBA’s procedures, rules, and scope of review). Understanding these headnotes can be very helpful in developing your brief (i.e., petition for review, PFR, or petition).

Headnotes 27. LUBA Procedures/Rules

Headnotes 28. LUBA Scope of Review

(7) LUBA Headnotes Indexes There are many LUBA headnotes for numerous cases on its procedures, rules, and scope of review for a PFR. For example, LUBA headnote sections 27 and 28 are significant.

HEADNOTE 27. LUBA PROCEDURES/RULES: LUBA HEADNOTES

- 27.1 Generally
- 27.4 Petition for Review
- 27.4.1 Generally
- 27.5 Briefs
- 27.5.1 Generally

HEADNOTE 28. LUBA SCOPE OF REVIEW: LUBA HEADNOTES

- 28.1 Generally
- 28.6 Waiver of Issues
- 28.8 Grounds for Reversal/Remand
 - 28.8.1 Generally
 - 28.8.2 Lack of Jurisdiction
 - 28.8.3 Unconstitutionality
 - 28.8.4 Procedural Errors
 - 28.8.5 Noncompliance with Applicable Law
 - 28.8.6 Inadequate Findings
 - 28.8.7 Unsupported by Substantial Evidence

b) Assignments of Error

(1) Legal Requirement for AOE LUBA’s definition of a petition for review (PFR) has many elements, including assignments of error (AOEs; Appendix V.A.2. OAR 661-010-0030 Petition For Review). Oregon Administrative Rule (OAR) 661-010-0030 for a PFR specifically requires AOEs under its contents of a petition section: OAR 661-010-0030(4)(d) identifies the requirements for AOEs.

OAR 661-010-0030(4)(d)

“(4) Contents of Petition: The petition for review shall:”

“(d) **Set forth each assignment of error** under a separate heading.

Where several assignments of error present essentially the same legal questions, the argument in support of those assignments of error shall be combined;”

(2) General Definition of AOE

An assignment of error generally consists of a sentence or short paragraph that briefly (1) identifies the finding, omission or aspect of the decision that is challenged and (2) cites one or more bases on which LUBA is urged to conclude that the decision is erroneous and the error(s) warrants reversal or remand. The specific numbered elements of local plans and zoning ordinances, ORSs, and OARs are not identified. An assignment of error is typically followed by supporting arguments that include discussion of the standard of review, the applicable law and the evidence in the record that has some bearing on that applicable law. The lack of cognizable assignments of error makes it more difficult for LUBA to read and respond to the petition for review (i.e., PFR, Petition, Brief). Noncompliance with OAR 661-010-0030(4)(d) is somewhat self-penalizing, in that LUBA cannot reverse or remand a decision based on assignments of error that it does not understand.

The above suggests that the AOE and the arguments are separate and the Petition could be written that way.

Appx. V.A.3. LUBA Headnotes Index

Appx. V.A.3. LUBA Headnotes 27.4.1 Procedural Rules - Petition for Review - Generally

Appx. V.A.3. LUBA Headnotes 27.5.1 Procedures/Rules – Briefs – Generally
Appx. V.A.3. LUBA Headnotes 28.8.1 Reversal/Remand (R/R) Grounds - Generally
Appx. V.A.3. LUBA Headnotes 28.8.2 Reversal/Remand Grounds - Lack of Jurisdiction
Appx. V.A.3. LUBA Headnotes 28.8.3 Reversal/Remand Grounds- Unconstitutionality
Appx. V.A.3. LUBA Headnotes 28.8.4 Reversal/Remand Grounds - Procedural Errors
Appx. V.A.3. LUBA Headnotes 28.8.5 R/R Grounds - Noncompliance Applicable Law
Appx. V.A.3. LUBA Headnotes 28.8.6 Reversal/Remand Grounds - Inadequate Findings
Appx. V.A.3. LUBA Headnotes 28.8.7 LUBA Scope of Review – Grounds for Reversal/Remand
– Unsupported by Substantial Evidence

(3) Local & LUBA Testimony Include AOEs Local testimony (i.e., written or oral) before the local government include assignments of error (AOEs) which are structured after LUBA’s legal scope of review and its grounds for a reversal or remand.

(4) Four Sections To An AOE Per the training sponsor’s recommendation, assignments of Error (AOEs) for local government or LUBA have four sections. (Appendix II.B.9.1. Assignments of Error)

1. Assignment of Error
2. Standards & Criteria, Relevant Laws & Rules (quotes without analysis)
3. Analysis of Facts (Applicable Findings, Facts without analysis and Arguments)
4. Conclusion Statement

c) How To Write Assignments of Error

There is an art to writing AOE’s. I have not yet mastered the “art”. My land use mentor, Jim Just, Past Executive Director, Goal One Coalition, was an expert at writing AOE’s. He always told me to keep it simple for the LUBA administrative law judges; don’t confuse them by making the arguments too complex.

I am a splitter not a lumpers and it is extremely difficult for me to make it simple. Therefore, my approach is to first write the AOE(s) without restrictions and to review the results countless times. After it is final have others review the AOE’s. Finally if the Brief exceeds the maximum 50 page

standard, edit it some more. But, first start early to meet any deadlines, brainstorm, and review your results.

(1) Assignment of Error (AOE) The assignment of error is the reason why you are suing the local government. More specifically, when you provide local land use testimony, file a local appeal, or file a LUBA appeal, you are challenging the *legal sufficiency of the local government's decision* based on the evidence that was before the local government.

1. When you provide local testimony you are trying to persuade the local government to make a legal decision.
2. When you appeal a local findings/decision you are challenging the *legal sufficiency of the local government's decision* based on the evidence that was before the local government.
3. When you file a LUBA appeal, you are challenging the *legal sufficiency of the local government's decision* based on the evidence that was before the local government.

The basis for the AOE is usually a real or perceived significant adverse impact (i.e., your issue or concern). Some might feel development impacts which tend to generate the greatest concern are environmental degradation, traffic congestion, loss of open space, and school overcrowding. Regardless of your concern, you will rarely find it exactly as you understand it in the local comprehensive plan or land development ordinance (i.e., zoning ordinance or code).

Your section 1 or summary assignment of error (AOE) generally consists of a sentence or short paragraph that briefly (1) identifies the finding, omission or aspect of the decision that is challenged and (2) cites one or more bases on which LUBA is urged to conclude that the decision is erroneous and the error(s) warrants reversal or remand.

Therefore, your “legal” AOE is usually a compromise using the existing local standards and criteria which include relevant state laws and rules. Your legal AOE is a combination of your issue or concern as reflected by the standards and criteria, your analysis of the facts, and the relief you want (i.e., the reasons why LUBA will remand or reverse a local government decision).

For example, let us assume your concern is saving or preserving forest lands, in Josephine County, and your neighborhood is facing a local proposed land use application to change the present zoning of forest to residential in your neighborhood (i.e., woodlot resource to rural residential 5 acre minimum). This would be proposed through an amendment to the local comprehensive plan and zoning ordinance.

You brainstorm and your local testimony reflects the following AOE's.

- 1st AOE Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Analysis of the Ground Water Availability By Aquifer And Tax Lot

- 2nd AOE Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Development Will Not Adversely Effect Other Lands in the Area — Preserve Rural Character of Josephine County

- 3rd AOE Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Transportation Analysis by Travelshed and Tax Lot

- 4th AOE Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Analysis of Avoiding Air Pollution by Airshed And Tax Lot

- 5th AOE Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Analysis of Extreme Wildfire Hazard by Wildfire Hazard Area And Tax Lot

- 6th AOE Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Analysis of Preserving The Rural Character Of The County While Avoiding Developing Infrastructure And Public Facilities And Providing Services That Can Not Be Afforded by Geographical Area of County And Tax Lot

- 7th AOE Documented Compliance Determinations for Conditions of Approval to Meet Criteria That Determinations Are Made at a Stage That Provides Opportunity for Public Review and Comment.
- 8th AOE Oregon Statewide Goal 4 Applies LUBA erred in *Sommer v. Josephine County* upholding an interpretation of the JCCP that failed to give effect to JCCP Goal 2 Policy 7, Goal 10 Policy 1, and Goal 11 Policy 2(A). LUBA erred in upholding an interpretation of the JCCP that is inconsistent with Goal 4, when a reasonable interpretation consistent with Goal 4 was presented. The identified JCCP provisions applicable to forest land clearly implement Goal 4 and LUBA erred in upholding an interpretation of those provisions which is inconsistent with Goal 4.
- 9th AOE Expert Witness Soil Surveys Should Be Rejected as Substantial Evidence until Such Time That a Formal Comprehensive Update to the *Soil Survey* Can Be Completed by the Natural Resources Conservation Service

These local AOE's should be honest and reasonable, but are not limited by LUBA rules (e.g., 50 page limit for Petition to LUBA, etc.).

(2) Standards & Criteria, Relevant Laws & Rules

One of the hardest parts of writing an AOE is first understanding what is being proposed (i.e., the specifics of the land use application) and identifying the proposal's applicable local, state, and federal compliance standards and criteria, which included relevant laws, and rules. Remember the local government's land use findings and decision must be in compliance with all laws, but it is required to only list the applicable local laws in "notices" to the public.

This section is relatively easy after the standards and criteria have been identified. Just quote the applicable standards and criteria in this section of the AOE.

For a LUBA appeal you will also have to provide an exact copy of the challenged decision, including any adopted findings of fact and conclusions of law, including an exact copy of any comprehensive plan provision, ordinance or other provision of local law cited in the petition, unless the provision is quoted verbatim in the petition. This includes copies of all applicable state and federal laws and rules.

(3) Analysis of Facts

The analysis of facts section has three parts: 1. Applicable Findings - Decision, 2. the facts and 3. the analysis of the facts (i.e., arguments).

(a) Applicable Findings - Decisions The applicable findings/decision include the following.

1. When you provide local testimony you are trying to persuade the local government to make a legal decision (i.e., future findings/decision). Your AOE is designed to anticipate future findings/decisions.
2. When you appeal a local findings/decision you are challenging the *legal sufficiency of the local government's decision* (i.e., findings/decision) based on the evidence that was before the local government. Your AOE must quote the applicable findings/decisions you are appealing to the local government.
3. When you file a LUBA appeal, you are challenging the *legal sufficiency of the local government's decision* (i.e., findings/decision) based on the evidence that was before the local government. Your AOE must quote the applicable findings/decisions you are appealing to LUBA.

(b) Facts What are the undisputable facts?

(c) Analysis of the Facts (i.e., Arguments) Remember that LUBA cannot overturn a decision merely because the LUBA Board Members disagree with the decision or think it is unwise. The Oregon Legislature identified the types of reasons for overturning an appealed decision in ORS 197.835 (land use decision) and ORS 197.828 (limited land use decision). Keep these reasons in mind when presenting local land use testimony, appealing local decision, or appealing to LUBA. The three generic analyses of fact arguments include:

- 1. The Local Officials Failed to Follow the Correct Procedures in Making the Decision, and the Procedural Error Deprived the Petitioner of a Substantial Right.** [Note: Petitioners' "substantial rights" are the rights to a reasonable opportunity to prepare and submit their cases and a full and fair hearing, *not* the right to a particular outcome.] (Appendix II.B.9.3. LUBA 28.8.4 Reversal/Remand Grounds - Procedural Errors Headnotes)

Remand LUBA will remand a decision if the local government fails to follow proper procedures to such an extent that the failure “prejudiced the substantial rights of the petitioner.” Land use participants commonly feel they have been treated unfairly, but LUBA remands very few decisions under this standard. Only when serious procedural errors were made is a remand likely. Procedural problems, which can range from minor flaws in the notice procedure to a hostile planning staff or decision maker, but which have no provable effect on the outcome of the case, do not provide a basis for remand.

2. The Decision Violates a Constitutional Guarantee, a State Law (E.g., Statute, Statewide Planning Goal) or a Local Law (E.g., Comprehensive Plan Policy, Zoning Ordinance).

(Appendix II.B.9.3. LUBA 28.8.3 Reversal/Remand Grounds- Unconstitutionality Headnotes; Appendix II.B.9.3. LUBA 28.8.5 R/R Grounds - Noncompliance Applicable Law Headnotes)

Reversals are rare.

3. The Land Use Decision Misconstrues Applicable Law And/Or Is Not Supported by "Substantial Evidence in the Whole Record;" or
If the decision is a limited land use decision, it is not supported by "substantial evidence in the record." ORS 197.828(2)

(Appendix II.B.9.3. LUBA 28.8.6 Reversal/Remand Grounds - Inadequate Findings Headnotes; Appendix II.B.9.3. LUBA 28.8.7 R/R Grounds - Unsupported Substantial Evidence Headnotes)

Remand - Misconstrues Applicable Law & Lacks Substantial Evidence

By law, local decision makers can choose which evidence they wish to believe, so long as the evidence they rely on is "substantial evidence." Substantial evidence is evidence that a reasonable person could rely on to support a conclusion.

LUBA will remand a decision that improperly construes applicable law. Many decisions are remanded under this standard. Also, many local decisions are defective in only one or two respects, which are correctable, but comply with the law otherwise. This fact accounts for many remands.

LUBA will remand a decision that is not "supported by substantial evidence in the whole record." This means that LUBA will send a decision back to the local government if:

1. there was virtually no evidence to support the decision, or
2. the supporting evidence was so undermined by other evidence that it was unreasonable for the local government to decide as it did.

The "supported by substantial evidence in the whole record" standard favors of the local government's interpretation, especially when the applicant has expert witnesses.

Remand - Insufficient Findings & Prejudiced Substantial Rights Land use decisions often involve valid evidence both for and against a given proposal. It is up to the local government, and not LUBA, to decide which evidence deserves more weight in these cases. Likewise, evidence may be subject to more than one legitimate interpretation, in which case a reasonable interpretation by the local government controls.

Insufficient Findings The local government is required to adopt written “findings” that explain the criteria which apply to its decision and say how those criteria have been satisfied. This is a very important requirement which local governments often fail to meet. LUBA will remand when there are inadequate findings to allow review of the decision.

Prejudiced Substantial Rights

(4) CONCLUSION STATEMENT

The section 4 topics of a conclusion statement are very much like the brief section 1 AOE statement. It is not unusual for them to be much more detailed in including information.

The following are examples of conclusion statements.

Example Conclusion Statement “In summary, intervenors-petitioner identified numerous issues relating to the decision criteria and the decision and findings failed to respond to any of these issues except in the most cursory way (see County Findings II.E., F., G., M.; III.F., and III.Y.). The record is not sufficient to allow review. Because the county’s findings are inadequate in addressing legitimate issues raised in a quasi-judicial land use proceeding concerning relevant approval criteria, LUBA must remand for the county to consider the issues raised.”

This example of the conclusion statement is very much like the brief AOE description.

Example Conclusion Statement “A county finding that the proposed development is consistent with the character of the surrounding area and compatible with the existing land use pattern, and development will not adversely effect other lands in the area without a carrying capacity, will misconstrue the applicable law, be inadequate, and will not be supported by substantial evidence. ORS 197.835(9)(a)(D); ORS 197.835(9)(a)(C); ORS 197.835(11).”

The above statement is anticipating an adverse negative finding/decision to your issue or concern and trying to persuade the local government to make a legal decision (i.e., future findings/decision).

Example Conclusion Statement The county’s findings that the carrying capacity of the transportation system is met and that all transportation infrastructure and public facilities and services are adequate and that the project meets the standards as established in the JCCP and RLDC, including the TPR, are inadequate and not supported by substantial evidence in the whole record. The findings are insufficient to demonstrate compliance with ORS 197.835(6); ORS 197.835(7)(a); ORS 197.835(8); ORS 197.835(9)(a)(C); ORS 197.835(9)(a)(D); Oregon Statewide Goal 12 - Transportation Planning, OAR 660-012-0060; JCCP Goal 11, Policy 2.A; JCCP Goal 11, Policy 2.C; RLDC 11.030; and RLDC 46.040.A. and C. Therefore, the county’s decision should be remanded. ORS 197.835(9)(a)(D); ORS 197.835(9)(a)(C); ORS 197.835(11)

d) Example Assignments of Error

Several example of AOE's were available. This list will continue to be expanded.

- 2004 Findings Must Address Relevant Issues Raised by Public
- 2006 Carrying Capacity Standards
- 2006 Example AOE's For Local Land Use Testimony
- 2006 Land Use Fee And Appeal Increases
- 2008 Preserve Rural Character
- 2008 Statewide Goal 4 Forestry Rules
- 2008 Ground Water
- 2008 Necessary Forest Lands
- 2008 Other Forested Lands
- 2008 Transportation

In this case it was felt that the Preserve Rural Character AOE (i.e., Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Development Will Not Adversely Effect Other Lands in the Area — Preserve Rural Character of Josephine County) was must applicable and group spent a substantial amount of time on this AOE (Appendix II.B.9.d)).

