

**Appendix II.B.9.d) Example Assignment of Error (AOE)
Local Findings Must Address Relevant Issues Raised by Public**

June 19, 2013

Assignments of Error (AOEs) have four sections.

1. Potential Assignment of Error
2. Standards & Criteria, Relevant Laws & Rules
3. Analysis of Facts
4. Conclusion Statement

Example 2004 AOE to LUBA

Local Findings Must: Respond to specific issues relevant to compliance with applicable approval standards and criteria that were raised by citizens in the proceedings.

IV. ASSIGNMENTS OF ERROR

The county's decision lacks findings sufficient to support the decision, is not supported by substantial evidence in the whole record, and fails to address legitimate issues concerning a comprehensive plan amendment and a zone change raised in a quasi-judicial land use proceeding concerning relevant approval criteria. ORS 197.835; OAR 661-010-0071.

A. FIRST ASSIGNMENT OF ERROR

The County's Findings Are Inadequate Because They Fail to Address Legitimate Issues Concerning a Comprehensive Plan Amendment and a Zone Change Raised in a Quasi-judicial Land Use Proceeding Concerning Relevant Approval Criteria.

Josephine County in its decision and findings is required to address legitimate issues raised in a quasi-judicial land use proceeding by petitioners concerning relevant approval criteria. *Knight v. City of Eugene*, 41, Or LUBA 279 (2002); *Boly v. City of Portland*, 40 Or LUBA 537 (2001); *Dayton Prairie Water Assoc. v. Yamhill County*, 38 Or LUBA 14 (2000); *Wood v. Crook County*, 36 Or LUBA 143 (1999).

ORS 197.835(11) provides, in relevant part:

“(b) Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action.”

County Findings II.E., F., G., M., states:

“E. Written testimony from Wayne McKy regarding the Internal Rate of Return stating that the system does not adequately protect forest land.” Rec. 17.

“F. Written and oral testimony from Mike Walker challenging the suitability of the Internal Rate of Return system to protect forest land.” Rec. 17.

“G. Written and oral testimony from Hal Anthony stating that the Internal Rate of Return stating system does not adequately protect forest land.” Rec. 17.

“M. Documents from the Hugo Neighborhood Association & Historical Society received March 22, 2004, April 12, 2004 as offered by Wayne McKy, Mike Walker, and Hal Anthony” Rec. 18.

County Finding III.F., states, in relevant part:

“The Board also considers the written testimony from Mr. McKy regarding the objections to the IRR system and finds that notwithstanding his objections that the systems was considered during the adoption of the Comprehensive Plan to adequately protect forest lands within Josephine County and the subsequent acknowledgment supports the Boards conclusion. The Board further finds the arguments against the IRR system are not relevant and the system meets the requirements of state law.” Rec. 20.

County Finding III.Y., states:

“Y. The Board considered the objections to the use of the Internal Rate of Return and finds that the objections are essentially the same objections that were presented during the adoption of the Comprehensive Plan and the amendments to the Comprehensive Plan during periodic review. While the objections were reviewed and considered, the Board finds that the adopted Comprehensive Plan meets the requirements of the state law. The Board also finds that objections to the adopted regulations were not filed as an objection to the periodic review task that reaffirmed the IRR system with modifications as meeting state laws for the protection of forest land as part of the legislative review of applicable regulations. The Board finds that the objections are not to the application of the IRR system but to the system itself. The Board finds that the testimony in the record in the form of oral testimony and written documents that the IRR system was correctly applied from the standards of the adopted regulations.” Rec 24.

This land use request to change the comprehensive plan from agriculture to residential and zone change from farm resource to rural residential came before the Josephine County Board of County Commissioners (BCC) on November 5, 2003 and November 12, 2003 which resulted in an oral decision by the BCC to approve the request. Rec 458. A new document entitled, “*Josephine County Internal Rate of Return, Legislative History,*” was prepared by the Josephine County Planning Department January 2004. Prior to the findings being signed by the BCC the

applicant requested the BCC to re-open the land use hearing to allow the new evidence, the “*IRR Legislative History*,” to be included in the record for the comprehensive plan change decision from agriculture to residential. The request to re-open the land use hearing to allow new evidence was approved and the BCC held additional hearings to add documents to the record as they related to the legislative history of the IRR: March 3, 2004, March 24, 2004, April 14, 2004, and April 28, 2004. Rec 31.

The *IRR Legislative History* document is a series of 34 documents related to Josephine County’s IRR methodology and massive at 220 pages. The 34 documents are listed in its table of contents, but the legislative history document includes many other new stand alone documents as part of the 34 listed. The first new document attempts to tie together most of the other documents. It is a May 8, 2002 “Finding of Fact on Remand” of Leonhardt’s land use application to amend the Josephine County Comprehensive Plan from Forest to Rural Residential. This *new evidence* being made part of the record was prepared after adoption of the comprehensive plan and the amendments to the comprehensive plan during the two periodic reviews and is not part of those comprehensive planning records. It was also not part of the November 12, 2003 oral decision by the BCC to approve the request. Rec 459.

Intervenors-petitioners raised numerous issues in testimony concerning the “new evidence” before the BCC to which the county failed to respond to any in its findings. The intervenors-petitioners’ own significant sized testimony (Recs. 262 - 300, 301 - 380) was in direct response to the never seen before new evidence in the enormous 220 page *IRR Legislative History document*. Recs. 38 - 261. The issues relate to Josephine County’s implementation of its IRR system acknowledged by the Oregon Land Conservation and Development Commission (LCDC). The implementation of the IRR system is invalid because: 1. as the sole standard it is in violation of Oregon Statewide Goal 4 - Forest Lands, and 2. it is improperly being implemented in violation of the Josephine County Comprehensive Plan (JCCP). See assignments of error 2 - 4.

The findings failed to address 11 issues concerning a comprehensive plan amendment and a zone change raised in a quasi-judicial land use proceeding concerning relevant approval criteria.

1. Commercial agriculture for determining an exception to Goal 3 - Agricultural Lands is not the test. Recs. 305 - 308.
2. Forest lands protected by Goal 4 - Forest Lands are not limited to soils identified in Table 6 of the *Josephine County Soil Survey*. Recs. 309 - 312.
3. Agricultural soils being farmed and/or agricultural soils that have value for forest production are also forest lands and have the protection of Goal 4 - Forest Lands. Recs. 313 - 316.
4. Commercial forest soils that are high elevation soils and predominately managed by the U. S. Forest Service and/or the Bureau of Land Management are protected by Goal 4 - Forest Lands. Recs. 317 - 319.
5. The IRR/CIRR system is not the sole criterion for identifying forest lands protected by Goal 4 - Forest Lands. Recs. 320 - 326.
6. Josephine County Comprehensive Plan (JCCP), Goal 11, Policy 3.B.[1] is not the sole criterion for demonstrating when land is not Goal 4 - Forest Lands and, therefore, are non-resource lands. Rec 327 - 330.

7. JCCP, Goal 11, Policy 3.B.[2] on its face is not limited to “new” soils not identified as one of the 111 soils identified in the *Soil Survey*. Recs. 331 - 333
8. A compliance determination with Oregon Statewide Goal 4 - Forest Lands must be made for the 55 soils in the *Soil Survey* without an IRR rating (unrated soils). Recs. 334 - 344.
9. Negotiated agreements between Josephine County and the Oregon Department of Land Conservation and Development during periodic review do not preempt compliance with Oregon Statewide Goal 4 - Forest Lands. Recs. 345 - 349.
10. Acknowledgment of the Josephine County Comprehensive Plan and Rural Land Development Code by the Oregon Land Conservation and Development Commission does not preempt compliance with Goal 4 - Forest Lands when determining future plan amendments from resource to non-resource lands. Recs. 350 - 355.
11. The IRR system and IRR ratings are not valid when using information that has not been updated for 20 years when not supported by substantial evidence. Recs. 356 - 361.

Finding of Fact III.Y. identified that objections to implementation of the IRR are essentially the same objections that were presented during the adoption of the comprehensive plan and the amendments to the plan during periodic review, and that they were not filed as objections to the periodic review task that reaffirmed the IRR system. It is difficult to understand how the findings can have it both ways in determining that the intervenors-petitioners’ testimony was, in effect, “old testimony” and was the same as that submitted during the adoption of the plan and during the two periodic reviews and, therefore, did not need to be addressed, yet this same evidence was “new evidence” supporting the July 14, 2004 findings and decision that also did not need to be addressed.

In contrast to the Finding of Fact III.Y. (Rec. 24) where “*The Board finds that the objections are not to the application of the IRR system but to the system itself.*”, the intervenors’ testimony is wholly about the implementation of the IRR system being invalid because: 1. as the sole standard it is in violation of Oregon Statewide Goal 4 - Forest Lands, and 2. it is improperly being implemented in violation of the JCCP.

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. ORS 197.835(11).