

**Appendix II.B.9.d) Summary Carrying Capacity AOE
For Local & LUBA Land Use Testimony.
June 19, 2013**

Assignments of Error (AOEs) have four sections.

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

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

The following are examples of section 1, Assignment of Error(s).

2006 - 2007 Example AOE Before Planning Commission

Local Testimony Has Nine AOE You brainstorm and your local testimony reflects the following concerns and AOE.

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| 1 st AOE | Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Analysis of the Ground Water Availability By Aquifer And Tax Lot |
| 2 nd 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 |
| 3 rd AOE | Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Transportation Analysis by Travelshed and Tax Lot |
| 4 th AOE | Carrying Capacity Demonstration Inadequate And Not Supported By Substantial Evidence: Carrying Capacity Analysis of Avoiding Air Pollution by Airshed And Tax Lot |
| 5 th 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

2008 Example AOE's Before Board Of County Commissioners

Local Testimony Has Seven 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

2009 Example AOE's In Appeal (Petition) To LUBA

State Testimony Has Five AOE's You were not successful in your local testimony to the Josephine County Board of County Commissioners and you eventually appealed to LUBA. You settled on five AOE's of your original nine that you thought had the greatest potential to prevail at LUBA. The summaries of those arguments follow.

- 1st AOE The county's findings are inadequate and the decision is not supported by substantial evidence in the whole record. The county erred in not addressing the new Goal 4 rules. Therefore, the county's decision should be remanded. ORS 197.835(9)(a)(C); 197.835(11).
- 2nd AOE The county's conclusion that the subject property is not forest lands necessary to permit forest operations or practices on adjacent or nearby lands is contrary to applicable law and is based on inadequate findings not supported by substantial evidence in the whole record. Therefore, the county's decision should be remanded. ORS 197.835(9)(a)(C); 197.835(11).
- 3rd AOE The county failed to make the required finding that the subject property is not "other forested lands that maintain soil, air, water and fish and wildlife resources." There is not substantial evidence in the record to establish that the subject does not maintain soil, air, water, fish and wildlife resources. The county's conclusion that the subject property is not "managed for other forest uses such as watershed protection or wildlife of fisheries habitat" does not address applicable law and is not supported by substantial evidence in the whole record. Therefore the county's decision should be remanded. ORS 197.835(6); 197.835(7)(a); 197.835(8); 197.835(9)(a)(C); 197.835(11).
- 4th AOE The county's findings that the carrying capacity of the land's groundwater supply has adequate carrying capacity to support the allowed densities and uses are inadequate and not supported by substantial evidence in the whole record. The county made no findings concerning the carrying capacity of the land to support densities and uses allowed by the amendment in addition to existing and allowed uses in the surrounding area. The county's findings fail to explain how the

evidence in the record supports its conclusion that available groundwater supplies are available to support the allowed densities and uses on the subject property. There is not substantial evidence in the record to support the county's conclusion that the carrying capacity of the groundwater resource is adequate to support the allowed densities and uses. Therefore, the county's decision should be remanded. ORS 197.835(9)(a)(D); ORS 197.835(9)(a)(C); ORS 197.835(11).

5th AOE 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 Josephine County Transportation System Plan (TSP) and RLDC are inadequate and not supported by substantial evidence in the whole record. The findings are insufficient to demonstrate compliance with OAR 660-012-0060, RLDC 11.030, and RLDC 46.040.A. and C. Therefore, the county's decision should be remanded. ORS 197.835(9)(a)(C); 197.835(11).
(see Appendix II.B.9.d) AOE for Transportation)

2009 LUBA Opinion

LUBA Opinion Remands One AOE LUBA did not agree with four of your AOE's. On December 15, 2009 LUBA agreed with one AOE on transportation and remanded the appeal back to the local government (see Appendix II.B.9.d) AOE for Transportation).

December 15, 2009. Walker v. Josephine County, 60 Or LUBA 186 (2009)

<http://www.oregon.gov/LUBA/docs/opinions/2009/12-09/08224.pdf>

Walker et al v. Josephine County. 2008-224 (2009)

LUBA Headnote 45.1 Conditions of Approval – Generally. When relying on a condition of development under OAR 660-012-0060(2)(e) to approve development that would significantly affect a transportation facility, a local government cannot rely on a suggestion in a letter from ODOT when the suggestion is not reflected as a condition of approval. *Walker v. Josephine County, 60 Or LUBA 186 (2009).*

As of June 19, 2013 this 2009 win was still before the local government pending a local remand hearing. This is a worst case real scenario as this “general” land use application is the longest we are aware of at almost 20 years with the same applicant and most of the same neighbors as LUBA petitioners.

Local Remand Hearing

2013 Local Remand Hearing Pending?

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