Appendix II.B.9.d) Example Assignment of Error (AOE) For Local Government Land Use Fee And Appeal Increases: Increases Must Show Actual Or Average Costs

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Assignments of Error (AOEs) have four specific separate section headings.

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

Local Testimony Like many times in the past, in 2006 the Rogue Advocates, Hugo Neighborhood Association & Historical Society, and Goal One Coalition were co-sponsors on submitting testimony to a local decision maker. In this case they jointly authored a paper and submitted local testimony.

> Land Use Committee, Hugo Neighborhood Association & Historical Society, & Goal One Coalition, & Rogue Advocates. December 22, 2006. *Legislative History of Statutory Provisions Regulating Fees for Local Land Use Applications, Land Use Appeals and Transcripts*. Hugo, OR (http://www.hugoneighborhood.org/regulatingfees2.htm)

Eight citizens without a lawyer eventually jointly represented themselves as individuals (i.e., Petitioners) in an appeal to LUBA: Holger T. Sommer, Hal B. Anthony, Mike Walker, Ron Ray, Phyllis Ray, Jean Mount, Herbert Neelund and Valerie Neelund.

Sommer v. Josephine County. LUBA Opinion No. 2006-150. March 2009
(http://www.oregon.gov/LUBA/docs/opinions/2009/03-09/06150.pdf)

In the following real life example AOE the Petitioners did not separate the AOE into its four component parts. It is noted that this PRF which won a remand from LUBA was written a decade ago. Today the Petitioners would have separated their AOE into its four component parts for clarity. OAR 661-010-0030(4)(d) requires that each assignment of error be identified under a separate heading. The idea is to keep it simple for the LUBA administrative law judges; don't confuse them by making the arguments too complex (e.g., use of specific separate section headings makes it crystal clear what Petitioners are trying to express).

The lack of cognizable assignments of error makes it more difficult to read and respond to the Petition. Noncompliance with OAR 661-010-0030(4)(d) is somewhat self-penalizing, in that LUBA cannot reverse or remand a decision based on AOEs that it does not understand.

2006 Example AOE

1. Assignment of Error An AOE generally consists of a summary sentence or short paragraph that briefly identifies: 1. 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.

2. Standards & Criteria, Relevant Laws & Rules This section is the "standard of review" or quotes of the applicable standards and criteria without argument that Petitioners believe are applicable to the appeal (i.e., the proposed land use application must comply with the standards and criteria). The local government must list the applicable criteria from the local ordinance and the plan that apply to the application at issue, but does not have to list state or federal standards and/or criteria.

3. Analysis of Facts The analysis of facts are 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 that the finding/decision is erroneous and the error(s) warrants reversal or remand.

- Quotes the applicable findings/decision of local government being challenged.
- Applicable facts.
- Arguments why the local government's decision fails to adequately address the standards and criteria (i.e., what omission or aspect of the decision is being challenged with citations of law or court cases?)

"Evidence" means facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed to be relevant to the findings/decision.

4. Conclusion Statement Is a summary of the previous three components that identifies a one sentence summary AOE which includes the challenged finding/decision and why it is not in compliance with the standards and/or criteria. Include the legal citations or bases on which LUBA is urged to conclude that the decision should be remanded or reversed.

Use the applicable LUBA phrases for reversals and/or remands (i.e., exceeded its jurisdiction, unconstitutional, violates a provision of applicable law, findings are insufficient, not supported by substantial evidence, flawed by procedural errors that prejudice the substantial rights of the petitioner(s), and/or decision improperly construes the applicable law.

LUBA shall reverse a land use decision when:

1. The governing body exceeded its jurisdiction;
2. The decision is unconstitutional; or
3. The decision violates a provision of applicable law and is prohibited as a matter of law.

LUBA shall remand a land use decision for further proceedings when:

1. The findings are insufficient to support the decision.
2. The decision is not supported by substantial evidence in the whole record.
3. The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
4. The decision improperly construes the applicable law, but is not prohibited as a matter of law.

EXAMPLE AOE TO LUBA: JANUARY 2006

The findings do not demonstrate that the proposed fee increases for local land use application and appeals are reasonable and not more than the actual or average cost of such applications and appeals.

ORS 197.015(10)(A). The challenged decision concerns amendments of Josephine County's land use regulations. A county decision regarding local land use applications and appeals fees is a land use decision subject to LUBA's jurisdiction(*Landwatch Lane County v. Lane County* LUBA 200-039, June 27, 2006; *Doty v. City of Bandon*, 49 Or LUBA 411, 417 (2005); *Friends of Linn County v. City of Lebanon*, 45 Or LUBA 408, 416 (2003), aff'd 193 Or App 151, 88 P3d 322 (2004). Thus, this appeal is subject to LUBA's jurisdiction.

ASSIGNMENT OF ERROR: January 2006

The findings do not demonstrate that the proposed fee increases for local land use 10 application and appeals are reasonable and not more than the actual or average cost of such applications and appeals.

State law limits the fees that counties may charge for land use applications:

"When required or authorized by the ordinances, rules and regulations of a county, an owner of land may apply in writing to such persons as the governing body designates, for a permit, in the manner prescribed by the governing body. The governing body shall establish fees charged for processing permits at an amount no more than the actual or average cost of providing that service." ORS 215.416(1)

and for land use appeals of local land use decisions:

"The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual costs of the appeal, excluding the cost of preparation of a written transcript." ORS 215.422(1)(c).

Actual or average costs are presumed reasonable. *Friends of Linn County*, 45 Or LUBA at 417.

The adopted orders from Order No. 2006-125, dated July 26, 2006 Rec. 1-4, Resolution
30 No. 2005-041, dated June 01, 2005 Rec. 194-196 and Resolution No. 2004-045, dated
31 June 30, 2004 Rec. 218-220, increase all land use fees. As an example the fees for an appeals with previous public hearing from the Planning Commission was raised from $250 to $750 (rec. 214-D-E) by Oder 2004-045 (Rec. 218-220). In 2005 this fee was again raised from $750 to $1,250 (Rec. 195). In 2006 the fee increased continued. This time the fees after fro an Appeal After Hearing was raised to $1,550. (Rec. 1)

In written and oral testimony, Petitioners raised the issue that the record did not support the fee increases, because nothing in the record illustrated that the new fees were reasonable and that they did not exceed the actual or average cost of such appeals. Rec 9-14, Rec. 22, 25-A, 66, 213-214, 214A-E.

There are no findings with the two Resolutions, which raised the land use planning fees in 2004, 2005 (Rec. 194 and 218). The 2006 Order raises the land use fees provides brief findings (Rec. 1) but that finding statement is not supported by substantial evidence in the record.

The County does NOT address the cost of processing land use applications and appeals and does not indicate, that such data is even collected.

Commissioner Raffenburg, Rec. 17 makes the case for the Petitioners:

"Where the new, higher fees do not accurately reflect the actual cost centers and instead merely seek to average out the actual cost of operating the Planning Department, placing and unfair, higher burden on some fee payers" .

The County's motivation and reasons are provided for the land use fee increases at several locations in the record:

" is to make the make the planning office wholly fee supported beginning with 2007 - 2008" (Rec. 122)

" The fee increases are calculated to follow a 3 year plan to make the panning office nearly fee supported by the fiscal year 2006-2007" (Rec. 193, 201)

"The increase will do two important things. First, It will cover the decrease in general fund support to the Planning Office. Second, it will allow the Planning Office to hire an entry level planner." Rec.215

The County does not base its fees on actual or average cost of the requested land use action as required by law (ORS 215.416 (1) and ORS 215. 422(1)(c).

In Rec.245 (bottom) the County's Budget Committee accept the Planning Directors Memorandum from April 5, 2004 Rec. 292-297. This memorandum explains how the fee increases are calculated. The four "Principles" outlined in Rec. 293 do not address that

fees must be “at an amount no more than the actual or average cost of providing that service”, although the County refers to ORS 215.416 (1) in that same memorandum. Petitioner contents that the County calculated the land use application and appeals fees based on the need to “run the department” and not base on actual or average cost as required by law (ORS 215.426(1) and ORS 215.422(1) (c).

Even if findings are not necessarily required for a legislative decision, there must be some evidence in the record to support the decision, so that LUBA can perform its review function. Naumes Properties LLC v. City of Central Point, 46 Or LUBA 304, 314-15 (2004).

Only the county can provide the required data. This is not the situation, as in Friends of Linn County, 45 Or LUBA at 420-21, where data can could not be collected – Petitioners have filed applications and appeals of planning director decisions and appeals after hearing. Where data is available, it is the county’s burden to show that the fees are reasonable and do not exceed actual or average costs of the appeals. Doty, 49 Or LUBA at 422.

It is not Petitioner’s or any other member of the public’s responsibility to show that the fees are unreasonable or exceed actual or average costs. However, Petitioner notes that LUBA has previously found that appeals fees with a maximum of $500 were just barely reasonable in a similar case. Friends of Linn County, 45 Or LUBA at 421.

Here the appeal fees proposed are more than three times that amount. Such exorbitant appeals fees tend to discourage public participation in local land use decisions, thwarting the policies and purposes of the statewide land use laws.

Since the county did not make the legally required findings and did not base it decisions on substantial evidence in the record, the decision should be reversed or remanded in accordance with OAR 661-010-0071.