BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOLGER T. SOMMER, LYNDA SPANGLER,
RAYMOND KONOPA, MIKE WALKER,
WAYNE McKY and HAL B. ANTHONY,
Petitioners,

vs.

JOSEPHINE COUNTY,
Respondent,

and

ORVILLE F. MEADE,
Intervenor-Respondent.

LUBA No. 2006-209

FINAL OPINION
AND ORDER

Appeal from Josephine County.

Holger T. Sommer, Raymond Konopa, Lynda Spangler, City of Merlin, and Michael L. Walker, Wayne McKy, Hal B. Anthony, City of Grants Pass, filed the petition for review. Holger T. Sommer argued on behalf of petitioners.

No appearance by Josephine County.

Duane Wm. Schultz, City of Grants Pass, filed the response brief and argued on behalf of intervenor-respondent.

HOLSTUN, Board Chair; BASSHAM, Board Member, participated in the decision.

RYAN, Board Member, did not participate in the decision.

AFFIRMED 06/27/2007

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a county decision on remand that approves comprehensive plan and zoning map amendments.

FACTS

Intervenor-respondent (intervenor) seeks a comprehensive plan map amendment to change the subject property's designation from Agriculture to Residential and a zoning map amendment from Farm Resource to Rural Residential 5-Acre. The county originally approved the application in 2004. Petitioners appealed that decision to LUBA, and we remanded the county's decision. *Sommer v. Josephine County*, 49 Or LUBA 134 (2005) (*Sommer I*). In *Sommer I*, we rejected all of petitioners' assignments of error except one. Intervenor's request requires that he establish that the subject property is not resource land. In order to demonstrate that the subject property is not resource land, intervenor must demonstrate that the property is not agricultural or forest lands. The county previously applied the Josephine County Comprehensive Plan (JCCP) Goal 11, Policy 3(B) and found that the subject property is not forest land. In *Sommer I*, we held that the county should have applied JCCP Goal 11, Policy (3)(B)(2) instead of JCCP Goal 11, Policy (3)(B)(1). *Id*. at 154-55. On remand, the county limited the scope of the proceedings to consideration of JCCP Goal 11, Policy (3)(B)(2) and approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the county's decision is not based on substantial evidence because the board of county commissioners never read LUBA's opinion in *Sommer I* before making the decision that is now before LUBA. According to petitioners, if the board of commissioners had read *Sommer I* then they would have not made the mistakes petitioners allege in their other assignments of error in this appeal.

Petitioners cite no authority for their proposition that decision makers on remand are required to establish that they in fact personally read the LUBA decision that remanded their earlier decision, and we are aware of none. It is not error for decision makers to rely on their legal counsel and planning staff to determine what steps need to be taken to respond to a LUBA remand. If the decision makers, or their legal staff or planners, misread a LUBA opinion and thereby make mistakes on remand, it is those mistakes that potentially provide a basis for assignments of error in a subsequent appeal – not the decision maker's failure to read LUBA's decision. Petitioners' arguments under the first assignment of error do not provide a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As discussed earlier, in *Sommer I* we remanded the county's decision to address JCCP Goal 11, Policy (3)(B)(2), which is also codified at Rural Land Development Code (RLDC) 46.050(B)(2). RLDC 46.050(B) provides:

"The land within the lot or parcel is non-forest land because:

"(1) It is not included within the following definition of forest land:

> "A lot or parcel is considered forest land when the predominant (more than 50%) soil or soils on the parcel have an internal rate of return of 3.50 or higher (if a single forest-rated soil is present), or composite internal rate of return of 3.50 or higher (if multiple forest-rated soils are present).
>
> "For the purpose of this criterion, any evaluation of the internal rates of return for forest soils shall be made pursuant to the document entitled, *Using The Internal Rate Of Return To Rate Forest Soils For Applications In Land Use Planning (1985)*, by Lawrence F. Brown, as amended; or

"(2) If a determination cannot be made using the internal rate of return system as described in subsection B(1) above, the land is shown to be unsuitable for commercial forest uses based upon a combination of proofs, to include (but not limited to) the site index or cubic foot calculations, the testimony of expert witnesses, information contained in scientific studies or reports from public and private sources, historic

> market data for the relevant timber economy, and any other substantive testimony or evidence regarding the commercial productivity of the subject land, which taken together demonstrate the land is not protected by Statewide Goal 4 ; and
>
> "(3) The land is not necessary to permit farm practices or forest operations to continue or occur on adjacent or nearby resource zoned lands, subject to the rules and procedures as set forth in subsection C below."

In *Sommer I*, the county took the position that RLDC 46.050(B)(1), not RLDC 46.050(B)(2), was the relevant subsection for determining whether land is forest land. In our decision in *Sommer I*, we held that the county was wrong and that RLDC 46.050(B)(2), not RLDC 46.050(B)(1), is the applicable subsection in the circumstances presented in this appeal. Pursuant to our opinion in *Sommer I*, the county limited the scope of the remand hearing to consideration of RLDC 46.050(B)(2). Petitioners argue that the county was also obligated to allow arguments regarding RLDC 46.050(B)(3) and whether that subsection independently requires that the subject property retain its Agricultural and Farm Resource designations. The county refused to consider petitioners' arguments considering RLDC 46.050(B)(3), finding that those arguments exceeded the limited scope of review on remand, and petitioners argue that the county erred in this regard.

As far as we can tell, the county took the position in *Sommer I* that in order to comply with RLDC 46.050(B), if an applicant demonstrates under RLDC 46.050(B)(1) that the predominant soils on the property do not have an internal rate of return of 3.50 or higher, the applicant need not apply RLDC 46.050(B)(2) *or* RLDC 46.050(B)(3). Because the county found the subject property qualifies as nonresource land under RLDC 46.050(B)(1) in *Sommer I*, it did not consider petitioners' arguments regarding RLDC 46.050(B)(2) or (3). Because the county did not consider petitioner's arguments regarding RLDC 46.050(B)(3) in *Sommer I*, petitioners argue the county was obligated to consider such arguments in its proceedings on remand.

Petitioners appear to be correct that RLDC 46.050(B)(3) applies in addition to RLDC 46.050(B)(1) and (2). While RLDC 46.050(B)(1) and (2) clearly are alternative standards, RLDC 46.050(B)(3) appears to apply regardless of the county's choice between subsections RLDC 46.050(B)(1) and (2). However, in *Sommer I*, petitioners did not raise that argument in their assignment of error. That issue could have been raised in *Sommer I*. Issues that could have been raised but were not raised in a prior LUBA appeal cannot be raised in a subsequent LUBA appeal of the decision on remand. *Beck v. City of Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992). The only basis for our remand in *Sommer I* was for the county to apply RLDC 46.050(B)(2). Petitioners are precluded from arguing in the present appeal that the county should also have applied RLDC 36.050(B)(3).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Determining what to do with petitioners' third assignment of error is problematic at best. The argument in support of that assignment of error rambles for over 40 pages. Not only is the numbering and presentation confusing, it is nearly impossible to ascertain what, if anything, petitioners are actually arguing in any particular portion of the brief. In general, LUBA does its best to ascertain a petitioner's legal theory for reversal or remand from the arguments presented in the petition for review. *Freedom v. City of Ashland*, 37 Or LUBA 123, 124-25 (1999). In the present case, however, it would be unreasonable to require the intervenor to respond to the often disjointed arguments that are presented by petitioners in support of this assignment of error. It would also be unfair for LUBA to attempt to restate petitioners' arguments so that they could be resolved. LUBA would essentially be forced to make petitioners' arguments for them, hope that intervenor understood and responded to the same arguments, and then address the merits of those arguments. The arguments presented in support of this assignment of error are so poorly stated and developed that the overwhelming majority of it cannot reasonably be responded to.

We note that a substantial portion of the argument in support of the third assignment of error does not appear to be directed at RLDC 46.050(B)(2). As explained earlier, the only issue properly before the county below and now before LUBA is whether the subject property qualifies as nonresource land under subsection RLDC 46.050(B)(2). Any arguments that are directed at other approval criteria or raise new issues, cannot provide a basis for reversal or remand. No further discussion of those issues is warranted.

The only issue on remand was whether, pursuant to RLDC 46.050(B)(2), "the land is shown to be unsuitable for commercial forest uses based upon a combination of proofs." RLDC 46.050(B)(2) then provides a list of possible proofs for demonstrating that the criterion is met. Intervenor submitted expert testimony from a number of specialists explaining why, in their expert opinion, the land is unsuitable for commercial forest uses. To the extent petitioners' arguments are directed towards the content of those reports, they rely for the most part on Goal 4 (Forest Lands), administrative rules that were adopted to implement Goal 4, and cases involving Goal 4 and its administrative rules, without making any attempt to explain why petitioners believe those authorities have any direct or indirect bearing on application of RLDC 46.050(B)(2). Our decision in *Sommer I* remanded the county's earlier decision so that it could apply RLDC 46.050(B)(2) in place of RLDC 46.050(B)(1). Therefore, the question on remand was not whether the county's decision correctly applies Goal 4 or its implementing administrative rules. Similarly, the question on remand was not whether the county's decision on remand was consistent with LUBA and appellate court decisions that concern Goal 4 and its implementing rules. The question in this appeal is whether the county's decision correctly applies RLDC 46.050(B)(2). Because petitioners' arguments do not recognize the relevant question in this appeal, those arguments are inadequate to demonstrate that the county erred in applying RLDC 46.050(B)(2).

LUBA is authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial

evidence is evidence a reasonable person would rely on in reaching the decision on appeal. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). To the extent petitioners argue that the expert witnesses and reports that the county relied upon in reaching its decision on remand do not constitute substantial evidence that the subject property is unsuitable for commercial forest uses, we find that the county's findings are supported by substantial evidence.[1]

The third assignment of error is denied.

The county's decision is affirmed.

[1] As the county explained throughout its decision, the reports and testimony the county chose to rely on were developed from investigation of the subject property and the evidence that petitioners argued the county should rely on instead is far more general.