

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local government may allow public testimony and materials to be submitted into the record for the limited purpose of determining whether the proposed decision properly describes a prior oral decision, even if that testimony and materials relate to the merits of the underlying decision, *if* the local government makes clear that the scope of the hearing is limited to that narrow issue. *Thompson v. Jackson County*, 53 Or LUBA 317 (2007).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A hearings officer’s refusal to leave the record open to allow the petitioners to respond to alleged “new evidence” that was submitted during the final evidentiary hearing is not a basis to reverse or remand the decision, where petitioners fail to establish that in fact “new evidence” was submitted or that there is anything to rebut under the hearings officer’s unchallenged interpretation of the applicable code provision. *Angius v. Washington County*, 52 Or LUBA 222 (2006).

**25.6.2 Local Government Procedures - Hearings - Limitations on Presentation.** A city council does not err in denying an applicant’s request for a *de novo* appeal hearing before the city council, where the city code provides that local appeals are limited to the record before the planning commission and a zoning ordinance provision that permits the city council to hear appeals *de novo* does not limit the city council’s discretion in determining whether it will do so. *Smith v. City of St. Paul*, 45 Or LUBA 281 (2003).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** If a county rejects evidence that was submitted after the close of the record, and does not consider that evidence in making its decision, the county’s refusal to permit rebuttal of that late submittal does not provide a basis for reversal or remand. *Sheppard v. Clackamas County*, 45 Or LUBA 507 (2003).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where it is clear that a decision maker considered evidence that was submitted after the close of the record, and that the decision maker may have relied on that evidence in making its decision, the decision maker errs in refusing to allow rebuttal to that evidence, notwithstanding a statement in the final decision document that the disputed evidence was rejected. *Sheppard v. Clackamas County*, 45 Or LUBA 507 (2003).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local government properly rejects evidence submitted after the close of the evidentiary record, where the proponent of the evidence did not adequately request or preserve the opportunity to submit additional evidence. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Action After Remand. Even where no specific statutory or local provisions govern limits on presentation of evidence on remand from LUBA, the parties have a fundamental right during an evidentiary proceeding to present and rebut evidence. An evidentiary proceeding on remand that fails to offer any opportunity to rebut new evidence submitted on remand is

inconsistent with *Fasano v. Washington Co. Comm.*, 264 Or 574, 503 P2d 23 (1973). *Crowley v. City of Bandon*, 43 Or LUBA 79 (2002).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local government does not commit reversible error by limiting a party to two minutes of testimonial rebuttal where (1) the party agreed to the two-minute limit, (2) there is no legal obligation for the city to hold the record open or continue the evidentiary hearing to allow written rebuttal, and (3) the party does not demonstrate to LUBA that the evidence the party wishes to rebut is relevant. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where a party and the party’s attorney are given an adequate opportunity to rebut the substance of a short letter, the local government commits no error in refusing to provide an additional hearing for the party to offer further rebuttal of the letter. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local code providing that the scope of review for an appeal of a planning commission decision to the city council is a “Record Hearing,” and defining a “Record Hearing” as a hearing limited to review of the existing record or evidence previously submitted, does not limit the *legal issues* or arguments that may be presented on appeal; only the *evidence* that may be considered. *Haug v. City of Newberg*, 42 Or LUBA 411.

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local appellate body may, on its own, raise issues that are not presented in the notice of local appeal, where the local code does not specifically limit the scope of review on appeal to the issues identified in the notice of local appeal. *Haug v. City of Newberg*, 42 Or LUBA 411.

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where a local government departs from the procedures for continuing a hearing set out in ORS 197.763(6)(a)-(c), the revised procedures must be clearly communicated to all parties and, preferably, reduced to writing. *Hawman v. Umatilla County*, 42 Or LUBA 223.

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where the circumstances under which oral testimony would be allowed at a continued hearing are not clearly defined, and petitioners allege that they were prejudiced by being denied an opportunity to present oral testimony at the continued hearing based on the ambiguity of the procedures, remand is appropriate to ensure that petitioners receive an opportunity to present that oral testimony. *Hawman v. Umatilla County*, 42 Or LUBA 223.

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where, on remand from LUBA, the local government adopts a procedure that is proposed by the parties and that allows all sides to submit written evidence and written rebuttals, but limits oral testimony at the evidentiary hearing before the local government to

summaries and explanations of previous submittals, the procedure is not correctly interpreted to prohibit an oral explanation of previously submitted evidence that includes additional supportive facts in response to the previously submitted written rebuttal. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Under ORS 197.763(6)(e), a local government may consider final written legal argument. However, a local government may not consider new factual allegations, as part of legal arguments submitted under ORS 197.763(6)(a), without providing an opportunity for rebuttal. *Dept. of Transportation v. City of Eugene*, 38 Or LUBA 814 (2000).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Where a city allows one party more time to present oral testimony during a land use hearing than is allowed another party, the unequal allocation of time will not constitute error so long as the city's decision explains the reason for the differentiation, there is an unlimited opportunity to submit written testimony, and the unequal allocation of time does not cause substantial prejudice. *Kane v. City of Beaverton*, 38 Or LUBA 183 (2000).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

A local government may limit oral testimony if adequate opportunity is provided for the submission of written testimony. *Wild Rose Ranch Enterprises v. Benton County*, 37 Or LUBA 368 (1999).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Under ORS 215.416(11)(a), a hearings officer is obligated to conduct a *de novo* hearing that allows the introduction and consideration of all relevant evidence notwithstanding that the evidence could have been presented to the initial decision maker, but was not. *Johnson v. Clackamas County*, 37 Or LUBA 73 (1999).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Absent land use regulations that specify a particular procedure when a decision is withdrawn for reconsideration pursuant to OAR 661-010-0021, the procedures that govern depend on what stage in the process the local government returns to on reconsideration. Procedures governing evidentiary hearings are not applicable when the local government does not reopen the evidentiary record during the reconsideration proceedings. *McElroy v. City of Corvallis*, 36 Or LUBA 185 (1999).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

A staff recommendation regarding appropriate conditions of approval that is submitted after the close of the evidentiary hearing is not new "evidence" that might, if submitted by one of the parties, trigger an obligation to reopen the record for rebuttal. *Hunt v. City of Ashland*, 35 Or LUBA 467 (1999).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

ORS 197.763(6)(c) requires a participant to file a written request with the local government for an opportunity to respond to new evidence submitted during the period

after a hearing that the record is left open. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** ORS 197.763(6)(e) allows an applicant seven days after the record is closed to all other parties to submit final written arguments in support of the application. *Brown v. City of Ontario*, 33 Or LUBA 180 (1997).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where a continuance required by ORS 197.753(4)(b) to allow opponents to respond to new evidence was not granted before the city and county planning commissions made their recommendation to the city council and county commissioners, a procedural error occurred, but that error is no basis for remand when the opponents submitted a detailed rebuttal during the year-long interim between the date of the recommendation and the decision of the governing bodies, who considered additional evidence and testimony as part of a de novo review of the applications. *Concerned Citizens v. Jackson County*, 33 Or LUBA 70 (1997).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local government commits procedural error when it does not allow petitioners the opportunity to address the applicability of an ordinance that had not been identified as an applicable criterion, and then adopts findings based on that ordinance. If the ordinance is extrinsic to the applicable criteria, then it is evidence which the parties have the right to rebut; if the ordinance is an applicable criterion, then it must be identified in the hearing notice with greater specificity than "all other adopted county ordinances." *Nicholson v. Clatsop County*, 32 Or LUBA 399 (1997).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where petitioners are qualified participants in a local appeal, but are denied the opportunity to respond to issues raised in the local appeal, their substantial rights are prejudiced and the challenged decision must be remanded. *Spencer Creek Neighbors v. Lane County*, 32 Or LUBA 349 (1997).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Under ORS 197.763(6), the local government is only obligated to leave the record open for seven days after the *initial* evidentiary hearing; language in a local hearing notice to the contrary cannot create additional requirements under that statute. *Gross v. City of Tigard*, 32 Or LUBA 93 (1996).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** The city council's notice of hearing stating that any participant "may request" that the record remain open for seven days after the hearing does not bind the city to grant such a request when it is not otherwise required by statute, and petitioner is not deprived of procedural due process rights where the city denies his request that the record be left open. *Gross v. City of Tigard*, 32 Or LUBA 93 (1996).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Although the county's refusal to permit a party below to participate in a hearing on remand prejudiced that party's substantial rights, ORS 197.835(9)(a)(B) permits remand only where the failure to satisfy applicable procedural requirements prejudiced the substantial rights of the *petitioner*. *Fraley v. Deschutes County*, 32 Or LUBA 27 (1996).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Statements by city staff at a local appeal hearing regarding evidence already in the record do not give petitioner a right to rebuttal. *Thornton v. City of St. Helens*, 31 Or LUBA 287 (1996).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Where a local ordinance specifies that board of commissioner hearings are conducted on the record, and where petitioners establish no violation of any statutory notice requirement, petitioners establish no basis for relief in alleging that they relied on various notices, which appeared to petitioners to be contradictory, to conclude they were not required to present all evidence before the planning commission, but would be able to present their case *de novo* before the board of commissioners. *Canfield v. Yamhill County*, 31 Or LUBA 25 (1996).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

When the city council did not attempt to limit the issues addressed by petitioner at a city council hearing on appeal from the planning commission, petitioner may raise at LUBA any issues raised before the city council. *Thompson v. City of St. Helens*, 30 Or LUBA 339 (1996).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Where a local governing body is authorized to limit issues on appeal to issues raised before the planning commission but the local government failed to keep an adequate record of the planning commission proceedings, and LUBA cannot determine whether the governing body correctly limited its review to two particular issues, LUBA will remand the governing body's decision. *Andrews v. City of Prineville*, 28 Or LUBA 653 (1995).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

A local government commits error by approving a modified partition application after the local evidentiary hearing is closed and refusing petitioner an opportunity to comment on the modified application before approving it. *Tognoli v. Crook County*, 28 Or LUBA 527 (1995).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.**

Where a decision maker improperly refuses to allow relevant testimony, and it is not clear whether the decision maker's later allowance of expanded oral and written testimony rendered the initial error harmless, the decision will be remanded. *Salem-Keizer School Dist. 24-J v. City of Salem*, 27 Or LUBA 351 (1994).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** ORS 197.763(7) does not preclude a local government from reopening an evidentiary record for limited purposes after it has been closed. It simply provides that if the record is reopened, new issues may be raised in an appeal to LUBA with regard to the evidence accepted after the record is reopened. *Sorte v. City of Newport*, 26 Or LUBA 236 (1993).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where a local government denies a person the right to present testimony on her own behalf, that person "appeared" within the meaning of ORS 197.830(6) and OAR 661-10-050(1), at least for the purpose of challenging the local government's decision to limit testimony. *Sorte v. City of Newport*, 25 Or LUBA 828 (1993).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local government decision maker is entitled to consult with its attorney regarding evidence submitted during the evidentiary phase of the local proceeding and interpretive issues. Parties have no right to rebut the substance of a local government attorney's advice to the local government decision maker. *Linebarger v. City of The Dalles*, 24 Or LUBA 91 (1992).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A local government may limit its proceedings on remand from LUBA to correcting the deficiencies that led to the remand and, unless the local code so requires, need not repeat the entire process it followed in making the initial decision. *Bartels v. City of Portland*, 23 Or LUBA 182 (1992).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** An uncontroverted allegation that a party was provided *no opportunity* to rebut evidence placed before the decision maker through ex parte contacts and site observations is sufficient to demonstrate prejudice to that party's substantial rights. *Angel v. City of Portland*, 21 Or LUBA 1 (1991).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where the local record indicates a petitioner was not allowed to speak at a hearing because his testimony would include new evidence, the acceptance of which would indisputably have been improper, and petitioners do not claim that his testimony would *not* have included new evidence, petitioners fail to identify a basis upon which LUBA may grant relief. *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where petitioners have adequate notice of hearing, and are not surprised by a modified application or by newly applicable standards, the right to rebut evidence does not require the county to continue its hearings to provide petitioners more time to develop a rebuttal. *Stefan v. Yamhill County*, 18 Or LUBA 820 (1990).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** Where a city is not required under its code to allow surrebuttal if rebuttal is limited to

nonevidentiary testimony and evidence already in the local record, parties asserting city denial of surrebuttal as reversible error must show that the rebuttal included new evidence and that denial of an opportunity to rebut such evidence prejudices their substantial rights. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).

**25.6.2 Local Government Procedures – Hearings – Limitations on Presentation.** A city does not commit error in refusing to accept irrelevant evidence. A petitioner challenging a city's refusal to accept evidence on the basis of irrelevancy must demonstrate that the offered evidence is relevant to the approval criteria. *Walker v. City of Beaverton*, 18 Or LUBA 712 (1990).