

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument in a response brief that LUBA should deny assignments of error alleging that findings addressing an approval criterion are inadequate, due to the petitioners’ failure to challenge other, allegedly related findings, is a new matter that warrants a reply brief. *Wal-Mart Stores, Inc. v. City of Gresham*, 54 Or LUBA 16 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the petition for review assigns error to a county’s failure to impose conditions of approval based on certain recommendations in a forest plan, an argument in the response brief that the challenged decision implicitly requires compliance with all recommendations in a forest plan is a “new matter” that warrants a reply brief. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument in the response brief that disputes petitioners’ interpretation of how two code provisions should be applied is not a “new matter” that warrants a reply brief. *Central Oregon Landwatch v. Deschutes County*, 53 Or LUBA 290 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Argument presented in a petitioner’s post-oral argument letter is not timely submitted where that argument could have been included in the petitioner’s reply brief. *Rinhart v. Umatilla County*, 53 Or LUBA 402 (2007).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument that petitioner failed to raise an issue during the local proceedings does not provide a basis to deny petitioner’s reply brief, although it may provide a basis to deny the related assignment of error. *Anderson v. Coos County*, 51 Or LUBA 454 (2006).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief that is filed one day after oral argument and nine days after the response brief is filed is not filed “as soon as possible” after the response brief is filed, pursuant to OAR 661-010-0039. *Jacobsen v. City of Winston*, 51 Or LUBA 602 (2006).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not consider an argument that is presented for the first time in petitioner’s reply brief, where that argument is not presented in response to a new issue raised in the respondent’s brief. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a local code imposes a reduced mitigation obligation as the percentage of all trees on the property with a diameter over 12 inches to be saved increases, a local government does not err in allowing an inventory of trees to be retained and removed to utilize whole numbers when measuring the diameter of trees to be removed and trees to be saved. *Frewing v. City of Tigard*, 50 Or LUBA 226 (2005).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will reject, as untimely and prejudicial to the parties’ substantial rights, a 15-page reply brief with 39 pages of appendices filed 14 days after the response brief and one day before oral argument. *Kane v. City of Beaverton*, 49 Or LUBA (512).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not strike a petitioner’s reply to a respondent’s response to record objections where the reply addresses new issues raised in the response. *Papadopoulos v. Benton County*, 48 Or LUBA 634 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A petitioner may not assert a new basis for reversal or remand in the reply brief, or change the legal theory under which the petitioner seeks reversal or remand. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. ORS 197.835(4) does not excuse petitioner’s failure to raise issues of compliance with a code approval standard based on the city’s failure to list that standard in the notice of hearing, where the staff report and planning commission decision both cite and quote the standard as an applicable approval criterion, and petitioner offers no reason why issues of compliance with that standard could not have been raised before the city. *Cove at Brookings Homeowners Assoc. v. City of Brookings*, 47 Or LUBA 1 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a five-page reply brief is filed eleven days after intervenors’ brief and intervenors receive a copy approximately 48 hours before oral argument, intervenors’ substantial rights are not prejudiced. *Friends of Yamhill County v. Yamhill County*, 47 Or LUBA 508 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. When a petition for review alleges a local government committed multiple procedural errors that prejudiced substantial rights and the response brief faults the petition for review for failing to demonstrate that each procedural error prejudiced substantial rights, a reply brief is warranted to respond to that assertion. *Naumes Properties, LLC v. City of Central Point*, 46 Or LUBA 304 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief filed 12 days after the response brief was filed, and four days after oral argument, is not filed “as soon as possible” after the filing of the respondent’s brief, as required by OAR 661-010-0039. *Cotter v. City of Portland*, 46 Or LUBA 612 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a petition for review provides a bare or nominal statement of jurisdiction, a reply brief is generally warranted to respond to a jurisdictional challenge in the response brief, and LUBA’s resolution of the jurisdictional challenge is not limited to the specific bases for jurisdiction specified in the petition for review. *Sievers v. Hood River County*, 46 Or LUBA 635 (2004).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA’s unwillingness to conduct an unaided search of a 40-page reply brief to identify specifically the parts of the reply brief that inappropriately go beyond responding “to new matters raised in the respondent’s brief” does not mean that additional legal theories for remand that are presented for the first time in the reply brief ripen into assignments of error or legal theories that are properly presented in a LUBA appeal. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the petition for review assumes that the challenged decision is quasi-judicial in character and the response brief challenges that assumption, and the correct characterization of the challenged decision may affect LUBA’s analysis of petitioner’s challenge to the adequacy of the county’s findings, a reply brief is warranted to respond to the challenge in the response brief. *Manning v. Marion County*, 42 Or LUBA 56.

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief filed immediately prior to oral argument and almost a month after the response brief is filed is not filed “as soon as possible,” within the meaning of OAR 661-010-0039, and will not be accepted if the failure to comply with the rule violates the opposing parties’ substantial rights. *Troy v. City of Grants Pass*, 41 Or LUBA 112 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief that is filed immediately prior to oral argument will be rejected when, as a result of the timing of the filing, opposing parties have no time to review the reply brief and prepare a response to it. *Troy v. City of Grants Pass*, 41 Or LUBA 112 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is warranted where an assignment of error argues that a code provision was misinterpreted, thus invoking LUBA’s review under ORS 197.835(9)(a)(D), and a response brief assumes the merits of that assignment but argues that it should nonetheless fail because petitioner has not made additional allegations of prejudice to petitioner’s substantial rights that are relevant only if LUBA reviews the assignment as an alleged procedural error under ORS 197.835(9)(a)(B). *Paulson v. Washington County*, 40 Or LUBA 345 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 661-010-0039 allows a reply brief if it is filed “as soon as possible” after the response briefs are filed. A reply brief filed and served three working days after the response briefs were filed is timely filed under the rule. *Central Klamath County CAT v. Klamath County*, 40 Or LUBA 111 (2001).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where petitioner alleges in the petition for review that the decision maker failed to adopt *any* findings addressing the comprehensive plan and the respondent’s brief identifies the allegedly missing findings, LUBA will not allow petitioner to file a reply brief expanding the assignment of error to challenge the *adequacy* of those findings. *Hubenthal v. City of Woodburn*, 38 Or LUBA 935 (2000).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Responses warranting a reply brief pursuant to OAR 661-010-0039 tend to be arguments that assignments of error should fail regardless of the merits, based on facts or authority extrinsic to those merits. Arguments in a response brief that a proposed facility is “grandfathered in” and that petitioner is collaterally estopped from raising certain issues by virtue of a prior decision allowing that facility are new matters warranting a reply brief. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Untimely submission of a motion to file a reply brief is not a technical violation of LUBA’s rules where the length of the proposed reply brief and the proximity of oral argument is such that respondents do not have adequate time to respond to the motion and prepare to respond to the proposed reply brief at oral argument. A 32-page reply brief filed two days before oral argument violates respondents’ substantial rights to the speediest practicable review of the land use decision. *Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA 317 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the response brief points out that the petition for review challenges only one of the county’s alternative bases for modifying an approval standard, the response brief has not raised a “new matter” within the meaning of OAR 661-010-0039. A reply brief is not a means to assign error to findings that were not challenged in the petition for review, and arguments in the response brief based on such findings are not new matters warranting a reply brief. *Hard Rock Enterprises v. Washington County*, 36 Or LUBA 106 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. If a reply brief includes positions that go beyond those that are properly included in a reply brief under OAR 661-010-0039, those positions are subject to a motion to strike. Where there is time to raise such objections in a motion to strike before oral argument, it is not appropriate to delay raising such objections until oral argument. *The Friends of Clean Living v. Polk County*, 35 Or LUBA 830 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A response brief raises "new matters" within the meaning of OAR 661-010-0039 when it argues that assignments of error in the petition for review should fail, regardless of the merits of those assignments, based on facts or authority not involved in those assignments. Where the response brief responds to the merits of an assignment of error, that response is not a "new matter" for purposes of OAR 661-010-0039. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516 (1999).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. An argument in the response brief that the Transportation Planning Rule does not require amendments to the city’s transportation plan until that plan has been formally adopted is a "new matter" warranting a reply brief pursuant to OAR 661-060-0039. *Citizens for Florence v. City of Florence*, 35 Or LUBA 255 (1998).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where a respondent moves for permission to file a supplemental brief but suggests no basis under LUBA’s rules for

allowing what appears to be additional argument, the motion will be denied. *Dept. of Transportation v. Douglas County*, 34 Or LUBA 608 (1998).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is not allowed pursuant to OAR 661-010-0039 where the brief merely embellishes 20 pages of argument regarding jurisdiction and standing in the petition for review, rather than responding to issues raised for the first time in the respondent's brief. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263 (1998).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Petitioner's request to submit a reply brief will not be allowed under OAR 661-10-039, where petitioner does not address new issues raised by respondent's brief, and the reply brief simply embellishes arguments already advanced in the petition for review. *Lindstedt v. City of Cannon Beach*, 33 Or LUBA 516 (1997).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 660-10-039 allows petitioner to file a reply brief when a new matter is raised in the response brief, notwithstanding intervenor-respondent's belief that petitioner should have anticipated that the matter would be raised in the response brief. *Koo v. Polk County*, 33 Or LUBA 487 (1997).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. The timeline imposed by our rules affecting reply briefs is intended less to provide a second opportunity for respondents to research issues already argued in their own brief than to provide a reasonable opportunity for respondents and this Board to review the reply brief. *Lett v. Yamhill County*, 32 Or LUBA 98 (1996).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Petitioner's motion to file a reply brief will be denied under OAR 661-10-039 where the county does not raise a new issue for petitioner to address in the reply brief. *Still v. Marion County*, 32 Or LUBA 40 (1996).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. If the respondent's brief challenges the petitioner's standing and LUBA's jurisdiction, LUBA will allow a reply brief. *Boom v. Columbia County*, 31 Or LUBA 318 (1996).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Failure to file a request to file a reply brief "as soon as possible" after the respondents' brief is filed is a technical violation of LUBA's rules which, under OAR 661-10-005, does not affect LUBA's review unless the substantial rights of the parties are prejudiced. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. When a contention that LUBA lacks jurisdiction is made for the first time in the respondent's brief, a reply brief concerning the subject of LUBA's jurisdiction is warranted. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Petitioners may not make a new challenge to the appealed decision in a reply brief, and thereby effectively add an assignment of error to the petition for review. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the petition for review includes allegations concerning the content of a tape in the record, and respondents object that petitioner failed to attach a transcript of the relevant portions of the tape to the petition for review, LUBA will allow petitioner to submit a transcript in a reply brief, so long as respondents have adequate time to review the tape and transcript prior to oral argument. *Shaffer v. City of Salem*, 29 Or LUBA 592 (1995).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Arguments contained in respondents' briefs, that petitioner failed to exhaust local appeals and is precluded from raising particular issues before this Board, are new matters not contained in the petition for review which warrant the filing of a reply brief. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the respondent's brief contains arguments that petitioner waived certain issues raised in the petition for review, petitioner will be allowed to file a reply brief to respond to those waiver arguments. *Caine v. Tillamook County*, 24 Or LUBA 627 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Arguments in respondent's brief that petitioner waived issues raised in the petition for review by failing to raise those issues during the local proceedings constitute new matters that petitioners could not have anticipated in the petition for review, thus warranting the allowance of a reply brief. *Glisan Street Associates v. City of Portland*, 24 Or LUBA 621 (1993).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Under OAR 661-10-039, it is appropriate to grant a motion to file a reply brief to allow petitioner to respond to issues raised in respondents' briefs concerning standing, jurisdiction, and attachment of documents not in the record. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. LUBA will not reject as untimely a motion to file a reply brief that is filed 17 days after the response briefs were filed, because having to review and prepare to respond to a seven page reply brief received four days before oral argument does not prejudice respondents' substantial rights. OAR 661-10-005. *Sparrows v. Clackamas County*, 24 Or LUBA 318 (1992).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Where the respondent's brief includes arguments that code sections relied upon in the petition for review are inapplicable, a motion to file a reply brief will be allowed. *Murray v. Clackamas County*, 22 Or LUBA 247 (1991).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. After the petition for review is filed, respondents may, in their response brief or in a motion to dismiss, identify disputed allegations of fact, and explain why under their version of the facts petitioners lack standing. Petitioners may then request permission to file a reply brief to respond to respondent's legal arguments, move for an evidentiary hearing to present facts establishing standing or do both. *Citizens Concerned v. City of Sherwood*, 20 Or LUBA 550 (1991).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Argument in respondent's brief that the remedy petitioners seek is unclear, or that petitioners failed to object to statutes, and citation in respondent's brief of cases which petitioners believe irrelevant are not new matters which warrant the filing of a reply brief, but rather are matters to which petitioners can adequately respond at oral argument. *Dolan v. City of Tigard*, 20 Or LUBA 411 (1991).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. A reply brief is unwarranted under OAR 661-10-039, if it simply embellishes arguments advanced in the petition for review. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. OAR 661-10-039 requires petitioners to demonstrate a need for a reply brief. Although it is desirable to have a full explanation of the need for a reply brief in petitioner's motion to file a reply brief, LUBA will also consider oral argument in support of the motion in determining whether the need for a reply brief has been demonstrated. *Knapp v. City of Jacksonville*, 20 Or LUBA 189 (1990).

27.5.5 LUBA Procedures/Rules – Briefs – Reply. Excerpts of transcripts of the local government's proceedings below, which are submitted to LUBA for the first time as attachments to respondent's brief, are "new matters raised in the respondent's brief" to which petitioner may respond in a reply brief. OAR 661-10-039. *Columbia Steel Castings v. City of Portland*, 19 Or LUBA 338 (1990).