

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON

3  
4                                   SIMON TRAUTMAN,  
5   *Petitioner,*

6  
7   and

8  
9                                   NENA LOVINGER,  
10    *Intervenor-Petitioner,*

11  
12   vs.

13  
14                                   CITY OF EUGENE,  
15    *Respondent,*

16  
17   and

18  
19                                   OAKLEIGH MEADOW  
20    CO-HOUSING, LLC,  
21    *Intervenor-Respondent.*

22  
23                                   LUBA No. 2015-076

24  
25                                   PAUL CONTE,  
26    *Petitioner,*

27  
28   vs.

29  
30                                   CITY OF EUGENE,  
31    *Respondent,*

32  
33   and

34  
35                                   OAKLEIGH MEADOW  
36    CO-HOUSING, LLC,  
37    *Intervenor-Respondent.*

2  
3 FINAL OPINION  
4 AND ORDER  
5

6 Appeal from City of Eugene.  
7

8 William K. Kabeiseman, Portland, filed a petition for review and argued  
9 on behalf of petitioner Simon Trautman. With him on the brief was Garvey  
10 Schubert Barer PC.  
11

12 Paul Conte, Eugene, filed a petition for review and argued on his own  
13 behalf.  
14

15 Nena Lovinger, Fall Creek, filed a petition for review on her own behalf.  
16

17 Anne C. Davies, Assistant City Attorney, Eugene, filed a response brief  
18 and argued on behalf of respondent.  
19

20 Zack P. Mittge, Eugene, filed response briefs and argued on behalf of  
21 intervenor-respondent. With him on the briefs was Hutchinson Cox.  
22

23 RYAN, Board Member; BASSHAM, Board Chair; HOLSTUN, Board  
24 Member, participated in the decision.  
25

26 AFFIRMED 04/14/2016  
27

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

**NATURE OF THE DECISION**

Petitioners appeal a planning commission decision approving a tentative planned unit development application.

**FACTS**

We described the subject property and proposed planned unit development (PUD) in detail in *Oakleigh-McClure Neighbors v. City of Eugene*, 70 Or LUBA 132, 137-38 (2014) (*Oakleigh I*):

“[Intervenor-respondent Oakleigh Meadows Co-Housing, LLC (Meadows)] applied for tentative planned unit development (PUD) approval for a 29-unit residential development on 2.3 acres of land zoned low density residential (R-1). The only access to the subject property is via Oakleigh Lane, an east/west street that runs from its western intersection with River Road approximately 850 feet to the subject property. The subject property is located adjacent and to the south of Oakleigh Lane, and is adjacent to a city park on the east, and single family dwellings and vacant land zoned residential on its north, west, and south. Oakleigh Lane terminates at approximately the mid-point of the northern boundary of the subject property. Existing Oakleigh Lane has a 19-foot wide unstriped, paved surface and lacks curbs and gutters, storm drainage, and sidewalks.

“The PUD proposes seven buildings containing between two and five one- and two-story dwellings, for a total of 28 dwellings, and a two-story common building that also contains bedrooms and a kitchen, located in the center of the seven residential dwelling buildings. Buildings 1 and 2 are proposed to be located along the northern property boundary, and Building 1 is adjacent to Oakleigh Lane, while Building 2 is adjacent to a future proposed hammerhead turnaround at the end of Oakleigh Lane. The PUD proposes to locate on-site parking (garages and carports) and trash facilities along the western property boundary, and to screen those

1 parking and trash facilities and the buildings containing dwellings  
2 that are located in the western and southern portions of the  
3 property with an 8-foot-tall concrete wall bordered by espaliered  
4 trees. \* \* \* A garden area is proposed for the southeastern  
5 boundary of the property.

6 “[T]he city required Meadows to dedicate a 22.5 foot strip of land  
7 for right of way purposes along Oakleigh Lane, and a 13 foot strip  
8 of land from the point at which Oakleigh Lane terminates on the  
9 property boundary to the eastern property boundary, to  
10 accommodate (1) a future hammerhead turnaround to connect to  
11 the adjoining property to the north, in the event it further develops,  
12 and (2) a bike and pedestrian path to connect to the adjacent park  
13 to the east of the property. However, the city approved a  
14 temporary emergency hammerhead turnaround that is located  
15 entirely on the western portion of the subject property until the  
16 property to the north of the subject property is developed and the  
17 hammerhead turnaround can be built.” *Id.* (record citation  
18 omitted).

19 **A. LUBA’s Decision in *Oakleigh I***

20 In *Oakleigh I*, we sustained one of the petitioners’ assignments of error  
21 and remanded the decision on that basis. Petitioner Trautman (Trautman)  
22 moved to intervene on the side of the petitioners in *Oakleigh I*.  
23 We denied the motion because we concluded Trautman’s motion was filed  
24 more than 21 days after the ORS 197.830(7)(a) deadline for intervening. The  
25 Court of Appeals reversed that aspect of our decision and concluded that  
26 Trautman’s motion to intervene was timely filed. *Oakleigh-McClure Neighbors*  
27 *v. City of Eugene*, 269 Or App 176, 188, 344 P3d 503 (2013) (*Oakleigh II*). We  
28 then considered and sustained Trautman’s single assignment of error that  
29 alleged the city committed a procedural error in failing to provide him with

1 notice of the hearings officer’s decision and planning commission appeal  
2 hearing, and remanded the city’s decision on that additional basis. *Oakleigh-*  
3 *McClure Neighbors v. City of Eugene*, 71 Or LUBA 317 (2015) (*Oakleigh III*).

4 **B. The City’s Proceedings on Remand**

5 After Meadows requested the proceedings on remand commence, on July  
6 17, 2015, the city provided written notice to intervenor-petitioner Lovinger  
7 (Lovinger) and others of a planning commission hearing to be held on July 28,  
8 2015. Record 713-725. In relevant part, the notice provided that:

9 “Limited Participants

10 “\* \* \* [P]resentation of testimony will be limited to Mr. Trautman  
11 and to response by the applicant. If you are not Mr. Trautman or a  
12 representative of the applicant, you may not testify (either in  
13 writing or orally) but may attend and observe the public hearing.

14 “Limited Scope of Testimony

15 “Testimony before the Planning Commission in a local appeal  
16 hearing from the Hearings Official is limited to evidence that was  
17 presented to the Hearings Official. The Planning Commission will  
18 not accept any new evidence from Mr. Trautman in a local appeal  
19 hearing. \* \* \*” Record 713-14 (emphasis omitted).

20 The city gave Trautman the option of filing his own local appeal statement or  
21 participating in the appeal based on the November 2013 local appeal statement  
22 filed by one of the petitioners in *Oakleigh I*. Record 491-511. Trautman did not  
23 file his own appeal but chose to rely on the November 2013 appeal statement  
24 that was filed by others. Record 654.

1           On the day prior to the July 28, 2015 hearing, Trautman submitted a  
2 letter to the planning commission, with several hundred pages of attachments.  
3 Record 654-706 and Retained Exhibit (RE)-R. The letter and attachments  
4 included new evidence. As relevant here, Trautman provided evidence that  
5 only 13 to 14 feet of the 19 feet of pavement on Oakleigh Lane is located in the  
6 public right of way, and the remainder of the paved surface is located on  
7 private property. Trautman argued that Oakleigh Lane is unsafe because it does  
8 not have a 19 foot *unobstructed* pavement width, since property owners can  
9 park cars on the paved surface located on private property. Record 655.

10           During its testimony at the July 28, 2015 hearing, Meadows objected to  
11 the new evidence submitted by Trautman. The planning commission then  
12 discussed at length whether to accept the new evidence, and during the hearing  
13 voted to keep the record closed until the planning commission could receive  
14 written advice from the city attorney on how to proceed at the next planning  
15 commission hearing. RE-N (Video of July 28, 2015 hearing).

16           At the next planning commission hearing on August 17, 2015, after  
17 receiving advice from the city attorney, the planning commission voted to re-  
18 open the record to allow additional evidence from Trautman and Meadows  
19 “limited to the paving width” of Oakleigh Lane between River Road and the

1 subject property. Record 8. The planning commission established an open  
2 record period schedule.<sup>1</sup>

3 Trautman and Meadows submitted written argument and evidence during  
4 the August 17 to 31 open record period. Meadows submitted argument and  
5 evidence during the rebuttal period between September 1 and 4, and Meadows  
6 submitted its final written argument on September 11. In addition, during a  
7 period between August 15-31, other persons also submitted emails and letters  
8 to the city planner that argued that the city attorney submitted new evidence in  
9 correspondence with the planning commission and requested the opportunity to  
10 respond to that new evidence. Record 121-145 and 358.

11 On September 8, petitioner Conte (Conte) submitted a written objection  
12 to new evidence submitted by Meadows during the second open record period  
13 (between September 1 and September 4), requested that he be allowed to  
14 respond to Meadows' evidence, and submitted responding evidence. During its  
15 September 28, 2015 hearing, the planning commission rejected Conte's

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<sup>1</sup> At the hearing, the planning commission set out the following schedule:

August 17 – August 31 Record open for Trautman and Meadows to submit evidence on the right of way pavement width of Oakleigh Lane off of the subject property.

September 1 – September 4 Record open to submit rebuttal (including rebuttal evidence) to any new evidence submitted by Trautman and Meadows between August 17-31.

September 4 –September 11 Applicant's final argument, not including evidence. RE-M (1:43:50-1:44:35).

1 September 8 request to submit evidence into the record and to respond to  
2 evidence submitted by Meadows during the second open record period. Record  
3 117-119. The planning commission subsequently approved Meadows’  
4 application with conditions.

5 These appeals followed.

6 **REPLY BRIEFS**

7 Conte and Lovinger each move for permission to file two reply briefs to  
8 respond to alleged new matters raised in the city’s and Meadows’ response  
9 briefs. Trautman moves for permission to file a single reply brief to respond to  
10 alleged new matters raised in the city’s and Meadows’ response briefs.  
11 Meadows moves to strike portions of the reply briefs, arguing that the three  
12 reply briefs do not respond to “new matters” raised in Meadows’ response  
13 briefs. OAR 661-010-0039. Trautman, Conte and Lovinger respond to  
14 Meadows, arguing that the reply briefs are limited to “new matters” and should  
15 be allowed.

16 The city does not object to the reply briefs. We tend to agree with  
17 Meadows that some portions of each reply brief address responses in the  
18 response briefs that are not appropriately characterized as “new matters” within  
19 the meaning of OAR 661-010-0039. However, the disputed responses and  
20 replies are somewhat peripheral to resolving the merits of these appeals, and  
21 the effort necessary to separate wheat from chaff would benefit no party.

1 Accordingly, the motions to strike are denied, and the disputed reply briefs are  
2 allowed.

3 **LOVINGER’S ASSIGNMENT OF ERROR**

4 ORS 197.835(9)(a)(B) provides that LUBA may reverse or remand a  
5 land use decision if the local government “[f]ailed to follow the procedures  
6 applicable to the matter before it in a manner that prejudiced the substantial  
7 rights of the petitioner[.]”<sup>2</sup> Lovinger argues that the city committed procedural  
8 errors in its proceedings on remand that prejudiced her substantial rights. We  
9 set out Lovinger’s assignment of error below:

10 “The City provided inaccurate notice and information regarding  
11 the ability of persons to testify, and failed to provide [Lovinger]  
12 notice of the city’s decisions to allow additional testimony and  
13 evidence, thereby prejudicing [Lovinger’s] substantial rights to  
14 participate in the remand proceedings.” Petition for Review 16.

15 Lovinger argues that the city committed a procedural error when the planning  
16 commission varied from the closed record/limited participation procedure  
17 described in the July 17, 2015 notice of hearing that the city provided to her  
18 and others, and voted to accept new evidence from Trautman and Meadows  
19 without providing her with individual written notice that it had decided to do

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<sup>2</sup> Lovinger moves to take evidence not in the record, in the form of an affidavit from Lovinger that avers that Lovinger would have submitted testimony and evidence into the record if the city had provided written notice to her that during its August 17, 2015 hearing the planning commission decided to reopen the evidentiary record. No party objects to Lovinger’s motion to take evidence and accordingly we allow it. OAR 661-010-0045.

1 so.<sup>3</sup> Petition for Review 19, 22, 23, 24. Lovinger argues that the city erred in  
2 failing to adhere to the procedures announced in the July 17, 2015 notice or  
3 provide a second notice that the planning commission reopened the evidentiary  
4 record, and that error prejudiced her substantial right to respond to new  
5 testimony and evidence from Meadows that was submitted during the open  
6 record period.<sup>4</sup>

7 In order to prevail on a claim of procedural error, a petitioner must  
8 identify the procedure allegedly violated. *Stoloff v. City of Portland*, 51 Or  
9 LUBA 560, 563 (2006). Meadows responds that Lovinger has failed to identify  
10 any applicable procedure that required the city to provide Lovinger, or anyone  
11 else, with individual written notice that the city had decided to reopen the  
12 record to allow new evidence. Lovinger responds that ORS 197.763(7), ORS  
13 197.835(9)(a)(B), ORS 197.830(3), and “due process concerns” required the  
14 city to either adhere to the procedures set out in the notice of hearing or notify  
15 her in writing that the planning commission had reopened the evidentiary

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<sup>3</sup> The city provided the July 17, 2015 notice of the planning commission hearing to all persons who participated at any level of the initial local proceedings, including Lovinger. City’s Response Brief 9; Record 715-725.

<sup>4</sup> In the Conclusion section of her petition for review, Lovinger requests that “\* \* \* LUBA must remand the decision with instructions to the City to provide a hearing for [Lovinger] to provide testimony in opposition to the Hearings Official’s decision.” Petition for Review 27.

1 record.<sup>5</sup> Lovinger Petition for Review 21-22; Lovinger Reply Brief to  
2 Meadows 2.

3 We conclude that Lovinger has failed to identify a procedure that the city  
4 violated in varying from the procedure described in the notice. Nothing in any  
5 of the statutes cited by Lovinger requires the city to adhere to the procedure set  
6 out in the initial notice of hearing or to provide individual written notice to  
7 Lovinger that the planning commission continued the hearing and that it  
8 ultimately voted to reopen the evidentiary record.

9 ORS 197.763(7) prescribes the procedure for reopening the record and  
10 allowing new evidence after the record has closed.<sup>6</sup> That statute does not  
11 prohibit a local government from reopening a record, and it does not require a  
12 local government to provide individual written notice when the local  
13 government decides to reopen a record that was previously closed. ORS  
14 197.835(9)(a)(B) provides the standard of review by which LUBA reviews

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<sup>5</sup> In her reply brief, Lovinger takes the position that in addition to ORS 197.763(7), she “has specified ORS 197.830(3) and ORS 197.835(9)(a)(B) as statutory procedures the City failed to follow, as well as raising due process concerns.” Lovinger Reply Brief to Meadows 2.

<sup>6</sup> ORS 197.763(7) provides that “[w]hen a local [decision maker] reopens a record to admit new evidence, arguments, or testimony, any person may raise new issues which relate to the new evidence, arguments, testimony, or criteria for decision-making which apply to the matter at issue.”

1 procedural assignments of error, and does not apply to the city’s proceedings at  
2 all.

3 ORS 197.830(3) provides that a person who is “adversely affected” by a  
4 decision may file an appeal at LUBA (1) outside of the timelines otherwise set  
5 out in ORS 197.830(9), and (2) without the necessity of establishing that the  
6 party “appeared” during the proceedings before the local government as  
7 otherwise required by ORS 197.830(2), if the proposal described in the notice  
8 of hearing did not reasonably describe the local government’s final actions.  
9 However, ORS 197.830(3) does not require the city to provide notice to  
10 Lovinger, or other persons who were given the July 17, 2015 notice of hearing  
11 and chose not to attend the hearing, that it was reopening the record.

12 Lovinger’s arguments that “due process concerns” required notice to her  
13 or adherence to the procedure set out in the July 17, 2015 notice are not  
14 sufficiently developed to demonstrate that the city committed a procedural  
15 error. Finally, Lovinger does not point to any provision of the Eugene Code  
16 (EC) that the city violated when the planning commission decided to vary from  
17 the procedure announced in the July 17, 2015 notice and reopen the record.<sup>7</sup>

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<sup>7</sup> Lovinger cites EC 9.7655(2) in her petition for review. Lovinger Petition for Review 4, 19. EC 9.7655(2) provides in relevant part that “[n]o new evidence pertaining to appeal issues shall be accepted” by the planning commission.

In her Reply to the City’s Response Brief, Lovinger states that she “referenced EC 9.7655 only as evidence that it was reasonable for [her] to rely on the City’s remand notice stating no new evidence would be allowed.”

1 In sum, Lovinger has failed to point to any procedure that required the  
2 city to (1) adhere to the procedure announced in the July 17, 2015 notice, or (2)  
3 notify Lovinger in writing that the planning commission reopened the record to  
4 accept new evidence.

5 Finally, in portions of her petition for review, Lovinger appears to argue  
6 that the city committed a procedural error in failing to provide Lovinger with  
7 notice that the planning commission accepted new testimony during the open  
8 record period from persons *other than* Trautman and Meadows. Petition for  
9 Review 19, 20, 25 n 14; Record 121-145, 358. However, in her Reply to the  
10 City’s Response Brief, Lovinger explains that she does not allege that her  
11 substantial rights were prejudiced by that alleged procedural error:

12 “[Lovinger] has not, and does not, claim that [her] rights were  
13 prejudiced because the City ‘accepted testimony from Conte and  
14 others.’ The prejudice resulted from the city accepting new  
15 evidence from the *applicant* without providing notice or allowing  
16 [her] to respond, and then the City relying on applicant’s new  
17 evidence in its decision. As explained in [case citation omitted],  
18 that was an error and it prejudiced [Lovinger’s] right to participate  
19 before the final decision maker and requires remand.” Lovinger  
20 Reply to City’s Response Brief 5 (emphasis in original).

21 Accordingly, to the extent Lovinger argues that the city committed a procedural  
22 error in failing to notify Lovinger that the planning commission accepted  
23 evidence from persons other than Meadows and Trautman, absent any

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Lovinger’s Reply to City’s Response Brief 2. Accordingly, we do not understand Lovinger to argue that the city violated EC 9.7655(2) in accepting new evidence before the planning commission.

1 allegation of prejudice to her substantial rights resulting from that procedural  
2 error, Lovinger’s argument would provide no basis for reversal or remand of  
3 the decision.

4 Before turning to the remaining assignments of error, we note that we are  
5 not entirely unsympathetic to the principle that underlies Lovinger’s  
6 assignment of error—that interested persons should be able to rely on a notice  
7 that a hearing will be on the record and limited to specified parties to determine  
8 that no purpose would be served by that person attending the hearing. But  
9 there are other interests that must be considered as well. Land use hearings are  
10 dynamic, and events at a land use hearing may dictate deviations from the  
11 procedures set out in a prehearing notice in order to avoid reversible error. The  
12 legislature has specifically recognized that records may need to be reopened  
13 and has specified consequences when that happens, but has not required a  
14 second notice of hearing. ORS 197.763(7); *see* n 6. As a practical matter, given  
15 the statutory deadlines that govern permit and zone change proceedings,  
16 suspending proceedings to repeat notices of hearing each time a need arises to  
17 deviate from the procedures described in the original notice of hearing would  
18 likely result in violations of the statutory deadlines for final action on permit  
19 and zone change applications or on remands from LUBA of appeals of those  
20 decisions, as in this case. ORS 215.427(1); ORS 215.435(1); ORS 227.178(1);  
21 ORS 227.181(1). Persons who want to ensure that they preserve their rights to  
22 participate at a hearing, in ways that may go beyond the procedures described

1 in the pre-hearing written notice, have an obligation to attend or otherwise keep  
2 apprised of events that occur at the hearing. If the rule were otherwise, cities  
3 and counties would simply have to add a caveat at the end of every notice of  
4 hearing that explained that the procedure anticipated in the notice of hearing  
5 may change without additional notice once the hearing is underway, and all  
6 interested persons should attend the hearing to ensure they can act accordingly  
7 to protect their rights. We believe that caveat is already implied by the nature of  
8 and statutory constraints imposed on quasi-judicial land use hearings.

9 Lovinger’s assignment of error is denied.

10 **CONTE’S FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

11 **A. Motion to Take Evidence**

12 Conte moves to take evidence not in the record pursuant to OAR 661-  
13 010-0045.<sup>8</sup> We set out and describe the proceedings below before we resolve  
14 Conte’s motion to take evidence and his assignments of error.

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<sup>8</sup> OAR 661-010-0045 provides, in relevant part:

“(1) Grounds for Motion to Take Evidence Not in the Record:  
The Board may, upon written motion, take evidence not in  
the record in the case of disputed factual allegations in the  
parties’ briefs concerning unconstitutionality of the  
decision, standing, ex parte contacts, actions for the purpose  
of avoiding the requirements of ORS 215.427 or 227.178, or  
other procedural irregularities not shown in the record and  
which, if proved, would warrant reversal or remand of the  
decision.\* \* \*

“(2) Motions to Take Evidence:

1           As we describe in detail above, during its August 17 hearing, the  
2 planning commission voted to reopen the evidentiary record “for the submittal  
3 of evidence related to the paving width of Oakleigh Lane” between River Road  
4 and the subject property. Record 8. At that meeting, the planning commission  
5 established a schedule for submission of new evidence related to the paved  
6 width of the Oakleigh Lane right of way (August 17 – August 31) and for  
7 rebuttal to any evidence submitted before August 31 (September 1 – September  
8 4). Meadows was allowed to submit the applicant’s final written argument  
9 between September 4 and September 11, 2015.

10           On August 31, 2015 Trautman submitted testimony that contained two  
11 arguments that are relevant here. First, Trautman argued that the Eugene Fire  
12 Code (EFC) requires Oakleigh Lane between River Road and the subject  
13 property to qualify as a “fire apparatus access road” constructed according to  
14 the standards specified in the EFC, and requires the hammerhead turnaround  
15 and the driveway entrance to meet specified turning radii standards set out in

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“(a) A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding.”

1 the EFC.<sup>9</sup> Second, Trautman argued that some of the proposed buildings within  
2 the PUD exceed 30 feet in height and therefore the EFC requires the buildings  
3 to include “additional measures for fire apparatus and hose access.” Record  
4 153-162.

5 In rebuttal, on September 4, 2015, Meadows submitted (1) a copy of the  
6 site plan depicting the turning radius of the hammerhead turnaround, to  
7 establish that it satisfies the EFC turning radius requirement (Record 397); (2)  
8 elevation drawings showing that building heights did not exceed 30 feet  
9 (Record 398-404); and (3) evidence that Meadows has designed the buildings  
10 to be constructed with sprinkler systems (Record 409), and accordingly under  
11 the relevant EFC provisions, the city could waive or not apply the EFC  
12 standards requiring a fire apparatus access road. Meadows also argued that the  
13 provisions of the EFC do not apply at the time of PUD approval.

14 On September 8, 2015, Conte submitted an email to the planning  
15 director. That email included new evidence, and also requested the opportunity  
16 to respond to the rebuttal evidence submitted by Meadows on September, 4,  
17 2015 described above. During its September 28, 2015 hearing, the planning  
18 commission voted to accept materials submitted into the record by Trautman,  
19 Meadows, and others that were submitted prior to and during the open record

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<sup>9</sup> As we explain in more detail below, EC 8.010 authorizes the city manager to adopt “technical codes,” including a fire code. Pursuant to that authority, the city has adopted the 2014 Oregon Fire Code (2014 OFC) as its fire code.

1 submittal and rebuttal period, between August 15 and September 4, 2015. The  
2 planning commission also accepted Meadows' final written argument  
3 submitted on September 11, 2015. Based on the advice of the city attorney, the  
4 planning commission rejected Conte's September 8, 2015 submission,  
5 including his request to respond to evidence submitted by Meadows on  
6 September 4, 2015, that is described above. Record 98, 116.

7         The evidence that Conte moves LUBA to consider is the September 8  
8 email that the planning commission rejected at its September 28, 2015 hearing,  
9 a copy of which is attached to his petition for review as Exhibit B. Meadows  
10 opposes the motion and responds that there is no disputed factual allegation in  
11 either of the response briefs or in Conte's petition for review that (1) Conte  
12 submitted the email to the planning director on September 8 and (2) that the  
13 planning commission rejected that evidence at its September 28, 2015 hearing.  
14 Meadows argues that the planning commission's rejection is "shown in the  
15 record" within the meaning of OAR 661-010-0045(1). Record 8, 25-26.

16         We agree with Meadows. There appears to be no disputed factual  
17 allegation not shown in the record since Conte, the city, and Meadows all agree  
18 that (1) Conte submitted an email to the planning director on September 8 and  
19 that email was rejected by the planning commission at its September 28, 2015  
20 hearing and (2) that action is shown in the record. Conte's motion to take  
21 evidence is denied.

1           **B. Fifth Assignment of Error**

2           In his fifth assignment of error, Conte argues that the city committed  
3 procedural errors that prejudiced his substantial rights. ORS 197.835(9)(a)(B).  
4 Conte argues that the city committed a procedural error when the planning  
5 director failed to provide his September 8, 2015 email to the planning  
6 commission. Conte Petition for Review 40 (“[t]he city erred by accepting  
7 relevant evidence that was submitted in accordance with local law and then  
8 failing to provide that relevant evidence to the Eugene Planning Commission”).  
9 As Conte views it, his submission of testimony according to the procedure  
10 established for submitting documents into the record by email to the planning  
11 director was sufficient to require the city’s planning staff to provide a copy of  
12 Conte’s submission to the planning commission. As we understand Conte’s  
13 argument, it is that the city planning director’s failure to provide the planning  
14 commission with a copy of Conte’s September 8 submission prejudiced his  
15 substantial rights to have his submission considered by the planning  
16 commission.<sup>10</sup> Conte Petition for Review 44. Conte requests remand in order  
17 for the city to provide his September 8 submission to the planning commission.  
18 Conte Petition for Review 44-45.

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<sup>10</sup> The city and Meadows understand Conte’s argument to be that the planning commission erred in rejecting Conte’s September 8, 2015 email. We understand Conte’s argument to be a slight variation from that argument.

1           In support of his argument, Conte cites *Montgomery v. City of Dunes*  
2 *City*, 60 Or LUBA 274, *rev'd on other grounds* 236 Or App 194, 226 P3d 750  
3 (2010). In *Montgomery*, the city council denied petitioner's applications for a  
4 subdivision and a variance after the city council concluded that the petitioner  
5 had failed to submit evidence to demonstrate that all approval criteria were met.  
6 The petitioner had submitted evidence during the evidentiary phase of the  
7 proceedings by transmitting that evidence to the city's planning staff, but the  
8 planning staff did not provide the city council with that evidence. We sustained  
9 the petitioner's assignment of error that argued that the city planning staff's  
10 failure to transmit that evidence to the city council was a procedural error that  
11 prejudiced the petitioner's substantial rights. *Id.* at 278-80 (*citing Nez Perce*  
12 *Tribe v. Wallowa County*, 47 Or LUBA 419, 424, *aff'd* 196 Or App 787, 106  
13 P3d 699 (2004) (a local government commits error by refusing to accept  
14 relevant evidence that is presented to it during the evidentiary phase of its  
15 hearings on a land use application)).

16           *Montgomery* differs from the present case for two reasons. First, unlike  
17 the petitioner in *Montgomery* who bore the burden of proof as the applicant for  
18 permit approval, Conte is not the applicant and does not bear the burden of  
19 proof in demonstrating that applicable approval criteria are met. Second, and  
20 more importantly, Conte's evidence was not submitted during the evidentiary  
21 phase of the proceeding, but after the record had closed for new evidence. For  
22 those reasons, our decision in *Montgomery* does not assist Conte.

1           Conte’s September 8, 2015 email was submitted after the close of the  
2 evidentiary record. Conte identifies nothing in the EC or any other statute or  
3 rule that requires the city’s planning staff to provide to the planning  
4 commission a document that was submitted after the evidentiary record closed.  
5 To the extent Conte argues that the planning commission erred in rejecting  
6 Conte’s email, Conte does not point to anything in the EC or any other statute  
7 or rule that prohibits the planning commission from rejecting testimony and  
8 evidence submitted after the record closed.

9           Additionally, as we explain below in our resolution of Conte’s third and  
10 fourth assignments of error, the standards contained in the EFC are not  
11 applicable to the PUD application. Accordingly, any failure of the city to  
12 consider Conte’s September 8 submission does not provide a basis for reversal  
13 or remand of the decision. *Farrell v. Jackson County*, 41 Or LUBA 1, 6 (2001);  
14 *Donnell v. Union County*, 40 Or LUBA 455, 470 (2001).

15           Conte’s fifth assignment of error is denied.

16           **C. Sixth Assignment of Error**

17           In his sixth assignment of error, Conte argues that the city committed  
18 procedural errors that prejudiced his substantial rights. ORS 197.835(9)(a)(B).  
19 In Conte’s sixth assignment of error, he argues that the city committed a  
20 procedural error in accepting Meadows’ September 4, 2015 submission into the  
21 record. According to Conte, Meadows’ September 4 submission constitutes a  
22 substantially revised PUD plan, and it was a procedural error for the city to

1 accept that substantially revised PUD plan without allowing Conte an  
2 opportunity to respond to the revised PUD plan.

3 The city and Meadows each respond that Meadows' September 4  
4 submission was not a revised PUD plan. We agree. We have reviewed the  
5 materials submitted by Meadows on September 4 and they are not anything  
6 close to a revised PUD plan. Record 395-423, RE-K and RE-L. The materials  
7 submitted are limited to rebutting Trautman's August 31 arguments regarding  
8 the PUD's and Oakleigh Lane's compliance with the EFC standards, and do not  
9 involve any design changes to the proposed PUD.

10 Finally, Conte does not have the right to surrebuttal of rebuttal evidence  
11 submitted during the rebuttal period specified by the planning commission.  
12 *Rice v. City of Monmouth*, 53 Or LUBA 55, 60 (2006), *aff'd* 211 Or App 250,  
13 154 P3d 786 (2007). Accordingly, the city did not err in refusing to allow  
14 Conte to rebut Meadows' September 4 submission.

15 Conte's sixth assignment of error is denied.

16 Conte's fifth and sixth assignments of error are denied.

17 **TRAUTMAN'S FIRST ASSIGNMENT OF ERROR/CONTE'S FIRST**  
18 **ASSIGNMENT OF ERROR**

19 EC 9.8320(5) requires the city to find that "[t]he PUD provides safe and  
20 adequate transportation systems through compliance with the following:

21 "(a) EC 9.6800 through EC 9.6875 Standards for Streets, Alleys,  
22 and Other Public Ways (not subject to modifications set  
23 forth in subsection (11) below).

1           “(b) Pedestrian, bicycle and transit circulation, including related  
2 facilities, as needed among buildings and related uses on the  
3 development site, as well as to adjacent and nearby  
4 residential areas, transit stops, neighborhood activity  
5 centers, office parks, and industrial parks, provided the city  
6 makes findings to demonstrate consistency with  
7 constitutional requirements. ‘Nearby’ means uses within  
8 1/4 mile that can reasonably be expected to be used by  
9 pedestrians, and uses within 2 miles that can reasonably be  
10 expected to be used by bicyclists.

11           “(c) The provisions of the Traffic Impact Analysis Review of EC  
12 9.8650 through 9.8680 where applicable.”

13 Conte’s first assignment of error and Trautman’s first assignment of error each  
14 challenge the city’s finding that the PUD meets the requirements of EC  
15 9.8320(5).

16           **A. Conte’s First Assignment of Error**

17           Oakleigh Lane between River Road and the subject property has a 20-  
18 foot right of way and a 19-foot paved surface, with between 5 and 6 feet of the  
19 paved surface located outside of the 20-foot right of way. The issue presented  
20 in Conte’s first assignment of error is whether EC 9.8320(5)(a) requires  
21 Oakleigh Lane between River Road and the subject property to meet the  
22 standards in EC 9.6800 through EC 9.6875, which specify standards for streets  
23 to be dedicated to the public as a condition of development approval. EC  
24 9.6805 allows the city:

25           “As a condition of any development [to] require dedication of  
26 public ways for bicycle and/or pedestrian use as well as for streets  
27 and alleys, provided the city makes findings to demonstrate  
28 consistency with constitutional requirements. Public ways for

1 pedestrian and bicycle accessways, streets and alleys *to be*  
2 *dedicated to the public by the applicant shall conform with the*  
3 *adopted Street Right of way Map, and EC Table 9.6870.”*  
4 (Emphasis added.)

5 In his decision, the hearings officer interpreted EC 9.8320(5)(a) as not  
6 requiring an existing street to meet the standards in EC 9.6870 in order for the  
7 PUD to be approved.<sup>11</sup> The hearings officer relied on the text of EC

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<sup>11</sup> The hearings officer found:

“EC 9.8320(5)(a) requires an applicant to demonstrate that it is possible, when necessary, for the applicant to ‘dedicate’ sufficient land to accommodate public ways, including right-of-way for streets under EC 9.6800-8675. The purpose of those sections of the code are set forth in EC 9.6800 and states: ‘[s]ections 9.6800 through 9.6875 establish standards for the dedication, design and location of public ways to address the purpose of this land use code contained in EC 9.0020 Purpose.’ The pertinent sections of EC 9.6800 are EC 9.6805 and EC 9.6870. Importantly, EC 9.6805 allows the city to ‘require dedication of public ways for bicycle and/or pedestrian use as well as for streets and alleys \* \* \*.’ EC 9.6870 sets forth the ‘width’ of the right-of-way and paved service to be ‘dedicated’ in order to conform to the standards set forth in Table 9.6870.

“The opponents arguments fundamentally misconstrue the requirement of EC 9.8320(5)(a) which is to ensure that a proposed development is capable of dedicating sufficient land along the property frontage to meet the right-of-way width requirements for that street designation. A ‘dedication’ is a form of legal ‘taking’ of property for public use that is intended to provide for public safety and offset impacts imposed by development. Because EC 9.8320(5)(a) is concerned with the dedication of land for a street, neither that provision nor EC 9.6800-9.6875 set forth standards that an existing street must meet in order to serve a proposed development. By its nature, a dedication only applies to the land

1 9.8320(5)(a) and the purpose of the referenced standards in EC 9.6800-6870: to  
2 establish standards for the dedication, design and location of public ways that  
3 are required as a condition of development. The hearings officer also relied on

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that is subject to the given land-use application. Therefore, Staff have properly applied EC 9.8320(5)(a) by considering and requiring sufficient dedication of land to meet the right of-way requirements for either an access lane or a low volume residential street - along the frontage of the subject property. Whether or not Staff have miscategorized Oakleigh Lane as a low volume residential street, and the Hearings Official does not agree that a mistake was made, is of no consequence because Table 9.6870 shows right-of-ways in the range of 40' to 55' for both access lanes and low volume residential streets. The Hearings Official considers Staffs categorization to be more accurate given the increase in ADT moves the lane into the 250-750 ADT range. But, in any case, the record amply demonstrates that the applicant is both willing and able to dedicate land along the northwest corner of the subject property and adjacent to Oakleigh Lane for the purpose of providing sufficient right away and a public accessway. Nothing more is required by EC 9.8320(5)(a).

“Based on the above interpretation of EC 9.8320(5)(a), the opponents arguments as set forth above are not relevant to whether the applicant has met the requirement to dedicate sufficient land to create a 45 foot right-of-way along Oakleigh Lane. Although eloquently argued, Mr. Conte’s substantial analysis of the Staff findings are well outside the scope of EC 9.8320(5)(a), EC 9.6805 and EC 9.6870. Oakleigh Lane need not have a dedicated 45 foot right-of-way and associated paved surface from River Road to the subject property in order to meet EC 9.8320(5)(a) because that provision is a standard for the ‘dedication’ of land, not a ‘service’ standard akin to level of service - LOS. Neither does EC 9.8320(5)(a) require the neighbors to now dedicate a portion of their property to the widening of the right-of-way or paved surface of Oakleigh Lane.” Record 537-38.

1 the language of EC 9.6805 that refers to the street dedication and design  
2 standards with reference to land “to be dedicated to the public by the applicant”  
3 as a condition of development. In its initial decision, the planning commission  
4 agreed with the hearings officer’s interpretation of EC 9.8320(5)(a) as not  
5 requiring existing streets to meet the standards in EC 9.6870 and adopted the  
6 hearings officer’s findings.<sup>12</sup> On remand, the planning commission adopted the  
7 same findings. Record 10.

8 In his first assignment of error, Conte argues that EC 9.8320(5)(a)  
9 requires the entirety of Oakleigh Lane to meet the standards in EC 9.6870, and  
10 requires Oakleigh Lane’s existing right of way to be widened to 45 feet.<sup>13</sup>  
11 Conte argues that context provided by EC 9.8320(5)(b), which includes a

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<sup>12</sup> In its first decision, the planning commission found:

“[T]he [planning commission] agrees that neither EC 9.8320(5)(a) nor EC 9.6800 through 9.6875 require that an existing street must meet certain standards in order to serve a proposed development. EC 9.6870 only provides the required paving widths for certain types of streets when and if those streets are fully improved to City standards.” Record 581.

<sup>13</sup> EC 9.6870 provides:

“Street Width. Unless an alternative width is approved through use of other procedures in this code, the right-of-way width and paving width of streets and alleys dedicated shall conform to those designated on the adopted Street Right-of-Way map. \* \* \*”

Oakleigh Lane is a low volume residential local street and the street right of way map designates the right of way width between 45-55 feet.

1 definition of “nearby” that refers to off-site uses, supports the interpretation  
2 that he urges.

3 In *Oakleigh I*, we denied a similar assignment of error. 70 Or LUBA at  
4 154. We see nothing in Conte’s first assignment of error that convinces us to  
5 vary from that decision. Conte’s contextual arguments are unpersuasive,  
6 because EC 9.8320(5)(b) is a different standard that allows the city to ensure  
7 adequate bicycle, pedestrian and transit connectivity between the PUD and  
8 other nearby uses. EC 9.8320(5)(a), when read in context with the provisions  
9 referenced in it—particularly EC 9.6805 and EC 9.6870—ensures that streets,  
10 alleys and other public rights of way “to be dedicated” “by the applicant” as a  
11 condition of development will meet minimum city standards prior to  
12 acceptance of them by the city. It does not require the entirety of Oakleigh  
13 Lane to meet the standards in EC 9.6870 in order for the PUD to be approved.

14 Conte’s first assignment of error is denied.

15 **B. Trautman’s First Assignment of Error**

16 EC 9.6870 requires a 45-foot right of way for low volume residential  
17 streets in the city. Oakleigh Lane is a low volume residential street. The  
18 existing right of way of Oakleigh Lane where it meets the subject property is  
19 located entirely on the adjacent parcel to the north of the subject property, and  
20 is 20 feet wide. As a condition of development approval, the city required  
21 Meadows to dedicate a 22.5-foot strip of land (one-half of the required width of

1 45 feet) on the subject property, to the south of existing Oakleigh Lane, for  
2 right of way purposes.

3 The issue presented in Trautman’s first assignment of error is whether  
4 the city erred in concluding that EC 9.8320(5) is met when Oakleigh Lane  
5 adjacent to the subject property will have a 42.5 foot, and not a 45 foot, right of  
6 way when the PUD is developed. Alternatively, Trautman argues it was error  
7 for the city to not impose a condition of approval requiring Oakleigh Lane  
8 adjacent to the subject property to have a 45-foot right of way prior to final  
9 PUD approval.<sup>14</sup> Trautman’s assignment of error is premised on his  
10 understanding of a report from the city’s public works department (Public  
11 Works Report) that Trautman alleges supports only a conclusion that a right of  
12 way that is not at least 45 feet wide does not provide a “safe and adequate  
13 transportation system” within the meaning of EC 9.8320(5).<sup>15</sup> As we explained

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<sup>14</sup> Trautman’s first assignment of error is substantially similar to a portion of Conte’s first assignment of error that we denied in *Oakleigh I*. 70 Or LUBA at 157.

<sup>15</sup> We quote the relevant portions of the Public Works Report below. The section addressing EC 9.6805 provides in relevant part:

“As discussed in EC 9.6815 and EC 9.6870, which are incorporated by reference, the required right-of-way width in Oakleigh Lane is 45’ through the east side of the development’s entry drive aisle and 33’ beyond the development’s entry drive aisle in an easterly direction to a line that is 117’ beyond the end of the existing right-of-way. These required right-of-way widths are consistent with the applicant’s alternate street plan and are the

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minimum right-of-way widths necessary to ensure that development of the neighboring TL 200 is not precluded.

“It is in the public’s interest to have Oakleigh Lane consist of 45 feet of right-of-way through the development site’s entry drive aisle and to consist of 33 feet beyond the drive aisle to the terminus of the street in order to ensure safety for pedestrians, bicyclists and motorists traveling on Oakleigh Lane (a low-volume street), to ensure the efficient provision of emergency services and to guarantee that the proposed development and adjacent properties are accessible via Oakleigh Lane.

“There is a nexus between the requirement to dedicate 22.5 feet of right-of-way through the drive aisle and to dedicate 13 feet of right-of-way east of the drive aisle to the end of the proposed turnaround and the public interest at issue. *The 22.5 feet of right-of-way will result in one-half of the 45 feet of right-of-way which is necessary to construct Oakleigh Lane to the City’s minimum street design standards which have been established for a low-volume street. \* \* \* Because 45 feet of right-of-way is the minimum amount of right-of-way necessary to construct Oakleigh Lane in this manner as a low-volume street, \* \* \* the public interest in safe vehicular, pedestrian and bicycle travel and emergency response and access will be at risk if the 22.5 foot \* \* \* of right-of-way are not dedicated.*

“The requirement to dedicate 22.5 feet of right-of-way from the westerly boundary of the proposed development through the primary drive aisle \* \* \* is roughly proportional to the impact that the proposed development will have on the City’s transportation facilities. The proposed development will result in 29 new residential units. These residential units will be accessible only from Oakleigh Lane. Currently, 25 lots, consisting of a mix of residential, general office and commercial zoning have structures that take access onto Oakleigh Lane; thus, the additional 29 residential units will increase the number of structures that access this Oakleigh Lane by over 100 percent. The construction of the new structures will result in an increase of vehicular traffic onto

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Oakleigh Lane by approximately 168 new vehicular trips per day.  
\* \* \* Without the additional right-of-way, Oakleigh Lane cannot be improved to the City's minimum street design standards and the 168 new vehicle trips per day generated by the proposed development, along with the additional pedestrian and bicycle traffic generated by the proposed development will not be assured of safe access via Oakleigh Lane. This is the last opportunity that the City will have to require the dedication of the right-of-way prior to the City needing the right-of-way for street construction." *Oakleigh I* Record 1256-57 (emphasis added).

The section of the report addressing EC 9.6870, which the section addressing EC 9.8320(5) quoted above incorporates, provides:

"Pursuant to EC 9.6870, when a street segment right-of-way width is not designated on the adopted Street Right-of-Way map, the required street width shall be the minimum width shown for its type in Table 9.6870 Right-of-Way and Paving Widths, although a greater width can be required based on adopted plans and policies, adopted Design Standards and Guidelines for Eugene Streets, Sidewalks, Bikeways and Accessways or other factors which in the judgment of the planning and public works director necessitate a greater street width.

\* \* \* \* \*

"Per Table 9.6870 the minimum right-of-way width for low-volume streets is 45'. The existing right-of-way in Oakleigh Lane is 20', which was dedicated by the properties to the north per the Plat of Oakleigh in 1927. Staff notes that the southerly margin of this 1927 dedication forms the centerline of Oakleigh Lane and that any additional dedications would necessarily be based on this centerline.

"Based on the right right-of-way requirement of 45' and the existing right-of-way width (which as noted, is located entirely north of centerline), an additional 22.5' south of the centerline is required. This dedication would satisfy the right-of-way

1 in *Oakleigh I*, the opponents of the PUD, including Trautman, read the Public  
2 Works Report differently than the hearings officer and the planning  
3 commission did. 70 Or LUBA at 156. The opponents read the Public Works  
4 Report to support a conclusion that Oakleigh Lane adjacent to the subject  
5 property must have a 45-foot right of way in order to provide a “safe and  
6 adequate transportation system” pursuant to EC 9.8320(5)(a).

7 The hearings officer and planning commission, and the city and  
8 Meadows in their response briefs, understand the Public Works Report to  
9 support a conclusion that until the remaining 2.5 feet of right of way is  
10 obtained at the time of development of the property to the north, Oakleigh Lane  
11 will provide safe and adequate transportation system with a 42.5 foot right of  
12 way. Record 540, 582. In its initial decision and in its decision on remand, the  
13 planning commission understood the Public Works Report section addressing  
14 the need for a 45-foot right of way for Oakleigh Lane to address constitutional  
15 requirements for exacting a portion of Meadows’ property for widening of  
16 Oakleigh Lane onto the subject property, and found that the comments do not  
17 provide evidence that Oakleigh Lane is unsafe:

18 “The [planning commission] finds that the constitutional findings  
19 in the Public Works referral comments are limited to justification  
20 for a proportional right of way exaction along the frontage of the

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requirement for the properties south of centerline, with the remainder of the 45’ right-of-way being required from the properties on the north side of the centerline.” *Oakleigh I* Record 1263-64.

1 subject property that would accommodate future public street  
2 improvements. The constitutional findings address a future need  
3 for street improvements abutting the property, rather than any  
4 immediate need, based on safety issues or otherwise associated  
5 with the proposed PUD. The PC concludes that no additional  
6 right-of-way dedication is necessary to meet the approval criteria.”  
7 Record 11, 582.

8 We have reviewed again the Public Works Report at *Oakleigh I* Record 1255-  
9 76, and we again conclude that the hearings officer’s, planning commission’s,  
10 and the city and Meadows’ description and understanding of the comments and  
11 the evidence provided in them regarding whether the PUD satisfies EC  
12 9.8320(5)(a) is the accurate one. It is also evidence that a reasonable person  
13 would rely on in reaching a decision. *City of Portland v. Bureau of Labor and*  
14 *Industries*, 298 Or 104, 119, 690 P2d 475 (1984).

15 Trautman’s first assignment of error is denied.

16 **CONTE’S THIRD ASSIGNMENT OF ERROR**

17 EC 9.8320(7) requires the city to determine that “adequate public  
18 facilities and services are available to serve the site.”<sup>16</sup> In his third assignment  
19 of error, Conte argues that the city’s decision that adequate emergency services  
20 are available to serve the subject property within the meaning of EC 9.8320(7)  
21 is not supported by substantial evidence in the record. According to Conte,

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<sup>16</sup> In *Oakleigh I*, the hearings officer concluded that EC 9.8320(7) was satisfied. Record 544. No one challenged that aspect of the hearings officer’s decision, and the planning commission adopted the hearings officer’s findings in its first decision and adopted the same findings on remand. Record 9, 580.

1 adequate emergency services are not available to serve the PUD because  
2 Oakleigh Lane between River Road and the subject property does not meet the  
3 pavement width standard for a “fire apparatus access road” that is contained in  
4 the EFC. Conte Petition for Review 30, 37: Conte Reply Brief to Meadows’  
5 Response Brief 3.

6 **A. Waiver**

7 The city and Meadows respond initially that no issue challenging the  
8 PUD’s compliance with EC 9.8320(7) was raised in the notice of local appeal  
9 that Trautman relied on, and therefore Conte is precluded from raising the issue  
10 for the first time at LUBA. Under ORS 197.825(2)(a), as explained in *Miles v.*  
11 *City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003), where applicable  
12 local law requires that the issues to be raised in a local appeal must be stated in  
13 the notice of local appeal, those issues must be identified in the local notice of  
14 appeal or the issues are not preserved for review by LUBA.<sup>17</sup>

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<sup>17</sup> EC 9.7655(3) provides that for an appeal of a hearings officer’s decision:

“The appeal shall include a statement of issues on appeal, be based on the record, and be limited to the issues raised in the record that are set out in the filed statement of issues. The appeal statement shall explain specifically how and hearings official or historic review board failed to properly evaluate the application or make a decision consistent with applicable criteria. The basis of the appeal is limited to the issues raised during the review of the original application.”

1           Conte does not take the position that the issues raised in his third  
2 assignment of error are raised in the local appeal statement, and we agree with  
3 the city and Meadows that the issues raised in Conte’s third and fourth  
4 assignments of error were not raised in the appeal statement. If ORS  
5 197.825(2)(a) and the court’s holding in *Miles* were the only applicable legal  
6 theories for determining whether Conte may raise the issues raised in the third  
7 and fourth assignments of error, we would agree that Conte is precluded from  
8 raising the issues.

9           However, in his reply briefs, Conte relies on ORS 197.763(7) to argue  
10 that he is not precluded from raising the issues raised in his third and fourth  
11 assignments of error. *See* n 6. On remand the planning commission elected to  
12 reopen the record and accepted “new evidence, arguments, [and] testimony.”  
13 Record 8. Trautman provided evidence, arguments, and testimony regarding  
14 whether Oakleigh Lane and other features of the PUD meet the standards  
15 specified in the EFC, and the planning commission did not reject that evidence  
16 on the grounds that it exceeded the scope of the evidentiary proceedings on  
17 remand. Accordingly, pursuant to ORS 197.763(7), Conte may raise new issues  
18 related to that new evidence, testimony, and argument and “criteria for  
19 decision-making which apply to the matter at issue.” EC 9.8320(7) is one of the  
20 criteria for decision making that applies to the PUD application. However, for  
21 the reasons explained below, Conte’s argument that the PUD fails to comply  
22 with EC 9.8320(7) provides no basis for reversal or remand of the decision,

1 because the arguments are entirely dependent on Conte’s premise that in order  
2 to establish compliance with EC 9.8320(7), Meadows was required to  
3 demonstrate compliance with the EFC standards.

4 **B. The Eugene Fire Code**

5 EC 8.010 authorizes the city manager to adopt “technical codes,”  
6 including a one-and two-family dwelling specialty code, an electrical code, a  
7 mechanical specialty code, and, as relevant here, a fire code. Pursuant to that  
8 authority, the city has adopted the 2014 Oregon Fire Code (2014 OFC) as its  
9 fire code. The 2014 OFC provides minimum specifications for “fire apparatus  
10 access roads,” and specifies turning radii. The EFC/2014 OFC also gives the  
11 city manager or his designee the authority to grant modifications to the EFC  
12 standards or to approve alternative materials and methods, including when a  
13 building includes an automatic sprinkler system. The city and Meadows  
14 respond that the EFC is a technical code that provides standards against which  
15 an application for a building permit is reviewed and the site’s compliance with  
16 the EFC is evaluated during building permit review. Accordingly, the city and  
17 Meadows argue, the standards of the EFC do not apply to the PUD application.

18 We agree. First, ORS 197.175(2)(d) requires the city to make land use  
19 decisions “in compliance with the acknowledged plan and land use  
20 regulations.” Conte does not argue that the EFC is a “land use regulation”

1 within the meaning of ORS 197.015(12).<sup>18</sup> Second, ORS 227.173(1) requires  
2 the city to approve or deny a discretionary permit application such as the PUD  
3 application “based on standards and criteria, which shall be set forth in the  
4 development ordinance[.]” Conte has not established that the EFC is a  
5 “standard and criteria” that is “set forth in the [city’s] development ordinance,”  
6 found in EC Chapter 9, or that EC 9.8320(7) requires any consideration of the  
7 EFC standards during the tentative PUD phase of approval. Stated differently,  
8 Conte does not assert that the city’s findings regarding EC 9.8320(7)  
9 improperly construe that provision or that they are not supported by substantial  
10 evidence in the record for any reason other than his arguments that Oakleigh  
11 Lane fails to comply with EFC standards and waivers have not been obtained.  
12 For that reason, although EC 9.8320(7) applies to the PUD application, Conte’s  
13 arguments provide no basis for reversal or remand of the decision.

14 Conte’s third assignment of error is denied.

#### 15 **CONTE’S FOURTH ASSIGNMENT OF ERROR**

16 EC 9.8320(11)(k)(2009) requires the PUD to demonstrate compliance  
17 with “[a]ll other applicable development standards for features explicitly  
18 included in the application except where the applicant has shown that a  
19 proposed noncompliance is consistent with the purposes set out in EC 9.8300

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<sup>18</sup> ORS 197.015(12) defines “land use regulation” to mean “any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

1 Purpose of Planned Unit Development.”<sup>19</sup> In his fourth assignment of error,  
2 Conte argues that the city’s decision that the PUD satisfies EC  
3 9.8320(11)(k)(2009) is not supported by substantial evidence in the record,  
4 because there is no evidence in the record that the hammerhead turnaround and  
5 the corner where the PUD driveway intersects with Oakleigh Lane’s existing  
6 terminus each meet the turning radii specified in the EFC. Stated simply, Conte  
7 argues that the EFC is one of the “other applicable development standards for  
8 features explicitly included in the [PUD] application” that are referenced in EC  
9 9.8320(11)(k).

10 The city and Meadows respond initially that Conte is precluded under  
11 ORS 197.825(2) and *Miles* from raising the issue raised in the fourth  
12 assignment of error. For the same reasons we explain above in our resolution of  
13 Conte’s third assignment of error, however, ORS 197.763(7) allows Conte to  
14 raise the issues raised in the fourth assignment of error.<sup>20</sup>

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<sup>19</sup> As we explained in *Oakleigh I*, Ordinance 20521, which took effect on March 1, 2014 after the application was filed, renumbered EC 9.8320 sections (10) through (16) to sections (9) through (15). Therefore, the numbering scheme in the on-line version of EC 9.8320 is not the numbering scheme that applied at the time the decision was rendered. For example, EC 9.8320(11)(k)(2009) is now numbered EC 9.8230(10)(k)(2014). The two provisions are identical aside from the different numbering.

<sup>20</sup> Trautman argued that the hammerhead turnaround and driveway corner on the subject property do not have sufficient turning radii to meet the EFC. Record 162.

1           However, for the reasons explained below, we agree with the city’s and  
2 Meadows’ response that the provisions of the EFC are not “other applicable  
3 development standards” under EC 9.8320(11)(k). The phrase “development  
4 standards” is not defined in the EC. As Meadows explains, EC 9.8320(11)(k) is  
5 a more general standard that follows a list of specified development standards  
6 that are all contained in EC Chapter 9, the city’s development code, that the  
7 PUD is required to establish compliance with.<sup>21</sup> EC 9.8320(11)(k) also allows

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<sup>21</sup> EC 9.8320(11)(2009) provides that the applicant must demonstrate that the PUD complies with all of the following:

“(a) EC 9.2000 through 9.3915 regarding lot dimensions and density requirements for the subject zone. Within the /WR Water Resources Conservation Overlay Zone or /WQ Water Quality Overlay Zone, no new lot may be created if more than 33% of the lot, as created, would be occupied by either:

“1. The combined area of the /WR conservation setback and any portion of the Goal 5 Water Resource Site that extends landward beyond the conservation setback; or

“2. The /WQ Management Area.

“(b) EC 9.6500 through EC 9.6505 Public Improvement Standards.

“(c) EC 9.6706 Development in Flood Plains through EC 9.6709 Special Flood Hazard Areas - Standards.

“(d) EC 9.6710 Geological and Geotechnical Analysis.

“(e) EC 9.6730 Pedestrian Circulation On-Site.

1 an adjustment to a standard, pursuant to the adjustment provisions of the  
2 development code at EC 9.8015. In contrast, as explained above, the EFC  
3 allows the fire official in his discretion to adjust or waive the provisions of the  
4 EFC. Read in context with other EC Chapter 9 provisions, the phrase “other  
5 applicable development standards” means standards that are contained in the  
6 city’s development code codified in EC Chapter 9.

7 We agree with the city and Meadows that the EFC is not an “other  
8 applicable development standard” within the meaning of EC 9.8320(11)(k) for

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“(f) EC 9.6735 Public Access Required.

“(g) EC 9.6750 Special Setback Standards.

“(h) EC 9.6775 Underground Utilities.

“(i) EC 9.6780 Vision Clearance Area.

“(j) EC 9.6791 through 9.6797 regarding stormwater flood control, quality, flow control for headwaters area, oil control, source control, easements, and operation and maintenance.

“(k) All other applicable development standards for features explicitly included in the application except where the applicant has shown that a proposed noncompliance is consistent with the purposes set out in EC 9.8300 Purpose of Planned Unit Development.

“An approved adjustment to a standard pursuant to the provisions beginning at EC 9.8015 of this land use code constitutes compliance with the standard.” (Emphasis omitted).

1 the reasons explained above. Accordingly, Conte’s arguments under his fourth  
2 assignment of error provide no basis for reversal or remand of the decision.

3 Conte’s fourth assignment of error is denied.

4 **TRAUTMAN’S SECOND ASSIGNMENT OF ERROR**

5 **A. Incorporation**

6 Conte’s 49-page petition for review incorporates Trautman’s second  
7 assignment of error. Conte Petition for Review 26-27. Trautman’s second  
8 assignment of error occupies 20 pages of Trautman’s petition for review.  
9 Trautman Petition for Review 17-37. Similarly, Trautman’s 37-page petition  
10 for review incorporates “each and every argument in the briefs filed by” Conte  
11 and Lovinger “as if fully and completely set out herein.” Trautman Petition for  
12 Review 7. As noted, Conte’s petition for review is 49 pages long. Lovinger’s  
13 petition for review is 27 pages long.

14 There are two problems with the attempted incorporations described  
15 above. First, OAR 661-010-0030(2)(b) limits a petition for review to no more  
16 than 50 pages, unless permission from the Board is given for a longer petition  
17 for review. Conte’s incorporation of Trautman’s second assignment of error  
18 would result in a petition for review that exceeds 50 pages, and is disallowed.  
19 *See STOP Tigard Oswego Project, LLC v. City of West Linn*, 68 Or LUBA 360,  
20 391 (2013) (LUBA will ignore incorporations of assignments of errors in other  
21 petitions for review that cause the incorporating petition to exceed the  
22 maximum page limits). Trautman’s incorporation of every argument in

1 Lovinger’s and Conte’s petitions for review would similarly result in a petition  
2 for review that exceeds 50 pages, and is disallowed.

3 Second, we have held that a petitioner’s assertion of prejudice to another  
4 person’s substantial rights does not provide a basis for remand. *Bauer v. City of*  
5 *Portland*, 38 Or LUBA 432, 436 (2000). Accordingly, to the extent Trautman  
6 attempts to incorporate arguments or assignments of error in a different petition  
7 for review that allege procedural errors that prejudiced the substantial rights of  
8 the petitioner who filed that petition for review, that incorporation, even if  
9 allowed, would not result in remandable error based on Trautman’s petition for  
10 review.

11 **B. Assignment of Error**

12 EC 9.8320(6) requires the city to find in relevant part that “[t]he PUD  
13 will not be \* \* \* an impediment to emergency response.” The hearings officer  
14 found that the PUD satisfied EC 9.8320(6). Record 543. In its initial decision,  
15 the planning commission incorporated the hearings officer’s findings and  
16 adopted findings that the PUD satisfies EC 9.8320(6). Record 582-83.

17 During the remand proceedings, Trautman presented and the city  
18 accepted evidence and argument that only 13 to 14 feet of the 19 feet of  
19 pavement on Oakleigh Lane is actually located in the public right of way, and  
20 the remainder of the paved surface is located on private property. Trautman  
21 argued that a 13 to 14 foot wide paved surface is an “impediment to emergency  
22 response” and that the PUD does not meet EC 9.8320(6). Meadows presented

1 evidence from its traffic expert, Weishar, that the 14-foot wide paved surface  
2 that is located within the public right of way is adequate to accommodate  
3 emergency vehicles that are approximately 9 to 10 feet wide, and is not an  
4 impediment to emergency response. Record 363-365.

5 The planning commission relied on evidence and testimony from  
6 Meadows' traffic expert, and provisions in the city's "Design Standards and  
7 Guidelines for Eugene Streets" (Design Guidelines) that describe the traffic  
8 calming effect of a single 14-foot traffic lane and adopted findings that  
9 conclude that a 14-foot wide paved surface is adequate to accommodate  
10 emergency vehicles.<sup>22</sup> The planning commission imposed a new condition of

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<sup>22</sup> The planning commission found in relevant part:

"Although the existing paving and the amount of paving that lies outside the dedicated right of way varies along the length of Oakleigh Lane, the paving width that lies within the dedicated right of way measures at least 14 feet in most places. Mr. Weishar provides expert testimony that, even assuming only 13 feet of paving is available for travel by the public, this would adequately accommodate emergency vehicles. In support of his opinion, Mr. Weishar relies on the following language found in the [Design Guidelines]:

"On local residential streets with traffic volumes of less than 750 vehicles per day, a single 14' traffic lane may be permitted for both directions of vehicular travel. The single lane is intended to create a 'queuing street' such that when opposing vehicles meet, one of the vehicles must yield by pulling into a vacant portion of the adjacent parking lane. This queuing effect has been found to be an effective and safe method to reduce speeds and non-local traffic.'

1 approval that requires Meadows to improve Oakleigh Lane to ensure a  
2 minimum paved right of way surface of 14 feet in a small area where the paved  
3 right of way is currently 13'6". Record 13.

4 In his second assignment of error, Trautman argues that the planning  
5 commission's decision improperly construes the applicable law and is not  
6 supported by substantial evidence in the record. ORS 197.835(9)(a)(C) and  
7 (D). Trautman challenges the planning commission's conclusion on three  
8 bases. First, Trautman alleges that Oakleigh Lane is "an impediment to  
9 emergency response" because it does not satisfy the right of way width  
10 standards in EC 9.6870. Second, Trautman argues that Oakleigh Lane is an  
11 impediment to emergency response because it does not meet the EFC standards  
12 for a "fire apparatus access road." Finally, Trautman alleges that Meadows'  
13 traffic expert's evidence and testimony does not support his conclusion that the  
14 PUD is not an "impediment to emergency response" because according to  
15 Trautman, the Design Guidelines, as well as the "Eugene Local Street Plan,"  
16 provide that a 14-foot wide paved surface is acceptable only when that 14-foot

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"Evidence in the record, including color photographs, video footage and written submittals demonstrate that, for most of the length of Oakleigh Lane, there are gravel parking areas that provide opportunities for vehicles to pull over and allow other vehicles to pass, as called for in the language quoted above. These gravel areas and the approximately 6 feet of paving that lies outside the right of way on the south side of Oakleigh Lane will provide any necessary 'parking lanes.'" Record 12.

1 wide paved surface is part of a larger 21 foot wide paved surface that includes a  
2 7-foot wide parking and pass-by lane. Trautman Petition for Review 33.

3 Meadows responds initially that Trautman is precluded from raising the  
4 issue regarding the PUD’s compliance with the EFC that is raised in his second  
5 assignment of error under ORS 197.825(2), as explained in *Miles*. In his reply  
6 brief, Trautman responds by citing to a statement in the notice of local appeal  
7 that alleges that “[t]he hearings official provided no evaluation of [the Public  
8 Works Department’s] own analysis that ‘emergency response and access will  
9 be at risk’ unless Oakleigh Lane’s right of way was widened and the road  
10 improved.” Record 499. That statement is not sufficient to raise the issue raised  
11 in the second assignment of error that alleges that Oakleigh Lane fails to satisfy  
12 standards in the EFC. However, for the reasons we explain above in our  
13 resolution of Conte’s third and fourth assignments of error, ORS 197.763(7)  
14 allows Trautman to raise the issue because the planning commission accepted  
15 “evidence, arguments and testimony” related to the issue of “the paving width  
16 of Oakleigh Lane,” including whether Oakleigh Lane meet the standards  
17 specified in the EFC.

18 The city and Meadows next respond that nothing in EC 9.8320(6)  
19 requires the city to determine that the right of way width of Oakleigh Lane  
20 satisfies the standards in EC 9.6870 in order to conclude that the PUD will not  
21 be an impediment to emergency response. For the reasons discussed in our

1 resolution of Conte’s first assignment of error, we agree. Oakleigh Lane is not  
2 required to satisfy the EC 9.6870 right of way width standards.

3 The city and Meadows also respond that nothing in EC 9.8320(6)  
4 requires Meadows to demonstrate that Oakleigh Lane meets the standards in  
5 the EFC in order to conclude that the PUD will not be an impediment to  
6 emergency response. For the reasons explained in our resolution of Conte’s  
7 third and fourth assignments of error, we agree. The standards in the EFC are  
8 not approval criteria that apply to the PUD application, and Trautman has not  
9 established that EC 9.8320(6) requires the city to consider the EFC standards  
10 for fire apparatus access roads in determining whether the PUD will be an  
11 impediment to emergency response.

12 Finally, the city and Meadows respond that the planning commission’s  
13 decision is supported by evidence in the record from Weishar that Oakleigh  
14 Lane at its current 14-foot paved width can safely accommodate emergency  
15 vehicles. Weishar relied on the fact that other streets in the city have similar  
16 traffic capacity and also lack sidewalks, gutters, and curbs and provide a single  
17 14-foot wide traffic lane. Record 364. Weishar also opined that the city’s  
18 Design Guidelines allow for narrower (queuing) streets with low volumes of  
19 traffic and that suggests they are not an impediment to emergency response.  
20 Record 364.

21 Trautman relies on language in the Design Guidelines (and the Eugene  
22 Local Street Plan on which the Design Guidelines are based) to argue that

1 narrow streets such as Oakleigh Lane “unequivocally require” at least 21 feet in  
2 width in order to function as queuing streets. Trautman Petition for Review 34.  
3 However, we reject that argument for two reasons. First, the language from the  
4 Design Guidelines that Trautman cites is not mandatory and certainly does not  
5 “unequivocally require” the 21 feet of width that Trautman alleges. Record  
6 416. More importantly, Weishar did not testify that Oakleigh Lane meets the  
7 standards set out in the Design Guidelines for queuing streets, but rather cited  
8 the Design Guidelines as support for his position that the city allows narrow  
9 streets in other parts of the city. Although Trautman disagrees with Weishar’s  
10 conclusions, we agree with the city and Meadows that nothing in Trautman’s  
11 arguments or the Design Guidelines undercuts that evidence and testimony. It  
12 is evidence that a reasonable person would rely on to conclude that a 14-foot  
13 wide paved surface is not an impediment to emergency response.

14 Trautman’s second assignment of error is denied.

15 The city’s decision is affirmed.