25.6.3 Local Government Procedures – Hearings – Evidence. Where "new evidence" enters the record during a non-evidentiary remand proceeding but plays no role in the decision, such procedural error provides no basis for reversal or remand pursuant to ORS 197.835(9)(a)(B) because it could not possibly have "prejudiced the substantial rights of the petitioner." *Neighbors for Smart Growth v. Washington County*, 79 Or LUBA 1 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. A county errs in accepting with the applicant's final written argument, for purposes of determining whether at least three dwellings existed on surrounding lots or parcels on January 1, 1993, and therefore whether the subject property qualifies for a forest template dwelling under ORS 215.750, an email from a contractor who worked on one of the surrounding dwellings , even where the email is intended to provide context for evidence submitted by opponents, and thereby rebut opponents' arguments concerning that evidence. Under ORS 197.763(6)(e), new evidence may not be submitted with an applicant's final written argument and, under ORS 197.763(9), such an email is evidence rather than argument. In addition, opponents are not precluded from raising a county's admission of new evidence with the applicant's final written argument as procedural error on appeal to LUBA merely because they failed to object during the local proceedings, where the opportunity to object was provided after the county had already considered evidence, deliberated, and made its oral decision, and where the record was closed and no further testimony was allowed. *Eng v. Wallowa County*, 79 Or LUBA 421 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. A party asserting a procedural error must demonstrate that the procedural error was objected to during the proceedings below, if there was an opportunity to lodge an objection. Accordingly, where a dispute may exist regarding whether petitioners objected to the county's process during the proceedings below, LUBA will allow a motion to take evidence outside the record to consider a document for the limited purpose of allowing petitioners to cite to that document to establish, if the point is disputed in a response brief, that petitioners attempted to lodge objections to the county's process. *Eng v. Wallowa County*, 79 Or LUBA 1024 (2019).

25.6.3 Local Government Procedures – Hearings – Evidence. When a hearings officer weighs the testimony of several experts and articulates how and why he came to his decision based on the experience and findings of the experts, petitioner needs to provide adequate reason before LUBA will second-guess the hearings officer's decision. Without reason to review the hearings officer's decision LUBA will conclude that the findings are adequate and supported by substantial evidence. *Gould v. Deschutes County*, 78 Or LUBA 118 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. When petitioner disputes the findings of a hearings officer, the burden of providing sufficient evidence and showing the law was improperly applied lies with the petitioner. If the petitioner does not show the hearings officer erred, the decision will be affirmed. *Johnson v. City of Portland*, 78 Or LUBA 158 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. When a county acknowledges that no evidence in the record supports a determination that an adequate flow of water exists, and essentially follows the third *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992), option, it must comply with all of the third *Rhyne* option and defer its decision making to a proceeding that provides the statutorily required notice and hearing. *Wachal v. Linn County*, 78 Or LUBA 227 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. A limited land use decision may be approved through a notice and comment process, and a local government may provide a right of local appeal. ORS 197.195(5). In such an appeal, the appeal hearing may be based on the existing administrative record or new evidence may be allowed. Should an appeal hearing allow the introduction of new evidence, the hearing is subject to the quasi-judicial hearing procedures set forth in ORS 197.763. In such a situation, a hearings officer may properly consider new evidence and analysis offered by the local government, as well as a petitioner's response, and LUBA's review includes the hearings officer's consideration of that evidence and those issues. *Hill v. City of Portland*, 77 Or LUBA 317 (2018).

25.6.3 Local Government Procedures – Hearings – Evidence. Any party may request an opportunity under ORS 197.763(6)(c) to respond to "additional written evidence" that was submitted during an open record period prior to the conclusion of the initial evidentiary hearing. But that response must be limited to responding to the "additional written evidence" that is submitted during the open record period. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a party's evidentiary response to "additional written evidence" that was submitted during the initial open record period at the conclusion of the initial evidentiary hearing pursuant to ORS 197.763(6)(c) includes additional evidence that goes beyond responding to that "additional written evidence" that was submitted during the initial open record period, a local government must either reject the additional evidence or give all parties an opportunity to rebut the additional evidence. *Grahn v. City of Yamhill*, 76 Or LUBA 258 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. A city may err in introducing a copy of the application into the record after the close of the evidentiary record before the city council, the final decision maker. However, the procedural error does not provide a basis for

remand under ORS 197.835(9)(a)(B) where the petitioner does not demonstrate that the procedural error played a role in the final decision, or otherwise prejudiced the petitioner's substantial rights. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. Where during deliberations on an application for an annexation under a new state statute, a city councilor mentions a city attorney letter discussing the costs of joining litigation to challenge the statute, the letter is exempt from disclosure as an *ex parte* communication under ORS 227.180(4), and the city commits no procedural error in failing to include the letter in the record of the annexation proceeding. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. While it might constitute procedural error for a local government to accept new evidence late in the proceedings without providing other parties a reasonable opportunity to respond to that new evidence, no error occurs where the alleged new evidence was introduced early in the final hearing, and the petitioner had an opportunity to respond to that evidence during the hearing. *J4J Misc PAC v. City of Jefferson*, 75 Or LUBA 120 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. Under ORS 197.763(6)(b) or (c), where a party requests in writing the opportunity to respond to new evidence submitted at a continued hearing or during an open record period, any such opportunity is limited to responses to new evidence submitted during the continued hearing or the first open record period. A hearings officer is not compelled by ORS 197.763(6)(b) or (c) to allow a party to submit, during a second open record period, responses to evidence submitted during the initial evidentiary hearing. *Landwatch Lane County v. Lane County*, 75 Or LUBA 302 (2017).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government does not run afoul of ORS 197.763(6)(e) when it allows an applicant to present as part of its final argument an argument that the needed housing statutes at ORS 197.303 prohibit the city from applying criteria that are not "clear and objective," because the argument is not "evidence" within the meaning of ORS 197.763(9)(b). *Talbott v. City of Happy Valley*, 74 Or LUBA 143 (2016).

25.6.3 Local Government Procedures – Hearings – Evidence. Where on remand a planning commission elects to reopen the record and accept new evidence, arguments, and testimony, and persons subsequently provide evidence, arguments, and testimony that is accepted into the record and not rejected, pursuant to ORS 197.763(7), any party may raise new issues related to that new evidence, testimony, and argument and criteria for decision-making which apply to the matter at issue. *Trautman v. City of Eugene*, 73 Or LUBA 209 (2016).

25.6.3 Local Government Procedures – Hearings – Evidence. Where as part of final written argument the applicant submits five letters from experts that include new evidence, a general objection that the five letters include new evidence is sufficient to preserve that objection before LUBA. Because expert testimony almost always includes new professional opinion, even if limited to commenting on other evidence already in the record, an opponent need not specify which portions of the expert testimony the opponent believes constitutes new evidence, in order to satisfy

the "raise it or waive it" requirement of ORS 197.763(1). *Rogue Advocates v. Josephine County*, 72 Or LUBA 275 (2015).

25.6.3 Local Government Procedures – Hearings – Evidence. A land use regulation that assigns the burden of proof to the permit "applicant" does not require that "only the applicant" carry the burden of proof. Assigning the burden of proof to the applicant does not preclude other parties from presenting evidence and legal positions or preclude the decision maker from relying on such evidence. *Pacificorp v. Deschutes County*, 70 Or LUBA 89 (2014).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government does not err in rejecting as "new evidence" annotated site plans and calculations that were submitted after the close of the record in order to rebut the applicant's testimony that the proposed development complies with lot coverage standards. *Knapp v. City of Jacksonville*, 70 Or LUBA 259 (2014).

25.6.3 Local Government Procedures – Hearings – Evidence. A governing body errs in relying upon the personal knowledge of its members who are farmers to resolve a disputed issue regarding whether proposed disturbances to topsoil would render the subject property unfit for future agricultural use. The effect of topsoil disturbance on agricultural productivity is an arcane subject, and even if the farmer/commissioners have expert personal knowledge of that subject, it is inappropriate to approve or deny an application based on the decision-makers' personal knowledge of disputed facts rather than on the evidence submitted during the evidentiary proceeding. *Hood River Valley PRD v. Hood River County*, 67 Or LUBA 314 (2013).

25.6.3 Local Government Procedures – Hearings – Evidence. The fact that a city believed it was making a decision on the last day allowed by the ORS 227.181 for a decision after remand does not absolve the city from following the procedures applicable to quasi-judicial hearings, including giving all parties the opportunity to respond to new evidence submitted at the hearing. The city could have rejected the new evidence and avoided the procedural conundrum that it apparently believed it faced or could have left the record open to respond to the new evidence under ORS 197.763(4)(b). *Poe v. City of Warrenton*, 66 Or LUBA 108 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. A letter from the applicant that simply requests withdrawal of a request to vacate a portion of a right-of-way does not constitute "evidence" as defined at ORS 197.763(9)(b), because it does not constitute facts or information offered to demonstrate compliance or noncompliance with the standards believed to be relevant to the decision. *Conte v. City of Eugene*, 66 Or LUBA 334 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. ORS 197.763 sets out the minimum procedures the county is required to follow in the conduct of quasi-judicial land use hearings under ORS Chapter 215, and ORS 197.763 does not require that the county provide an applicant with prior copies or notice of the evidence that the county submits at the initial evidentiary hearing on a permit application. *Emmert v. Clackamas County*, 65 Or LUBA 1 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. A petitioner waives an assignment of error arguing that the hearings officer committed procedural error in accepting new evidence after the close of the evidentiary record, where the petitioner could have objected to the

alleged error in the appeal of the hearings officer's decision to the planning commission, but did not. *Conte v. City of Eugene*, 65 Or LUBA 326 (2012).

25.6.3 Local Government Procedures – Hearings – Evidence. Where an applicant's final written argument rebuts evidence submitted by opponents regarding three mining sites by discussing information about the three sites from the county's inventory of mining sites already in the record, that rebuttal does not introduce "new evidence" into the record contrary to ORS 197.763(6)(e). *Setniker v. Polk County*, 63 Or LUBA 38 (2011).

25.6.3 Local Government Procedures – Hearings – Evidence. A city council hearing on a planning commission recommendation to approve a planned unit development application is not a "continued" evidentiary hearing for purposes of a code provision implementing ORS 197.763(6) that allows participants to request the opportunity to respond to new evidence submitted at a continued hearing. *Claus v. City of Sherwood*, 62 Or LUBA 67 (2010).

25.6.3 Local Government Procedures – Hearings – Evidence. An argument that the county erred in accepting "new evidence" in the applicant's final written argument contrary to ORS 197.763(6)(e) does not provide a basis for reversal or remand, where the petitioner makes no effort to demonstrate that the alleged new evidence is in fact new evidence, or challenge the county's findings that the final written argument included no new evidence. *Burness v. Douglas County*, 62 Or LUBA 182 (2010).

25.6.3 Local Government Procedures – Hearings – Evidence. Because ORS 197.763(6)(e) allows an applicant the opportunity to submit final written argument, which may include proposed findings, it is consistent with the statutory scheme to allow an applicant to submit revised proposed findings or conditions of approval and arguments in favor of those revised findings or conditions of approval after the decision maker's tentative oral decision in circumstances where planning staff has objected to some proposed findings or conditions and suggested modified findings or conditions. *Columbia Riverkeeper v. Clatsop County*, 58 Or LUBA 190 (2009).

25.6.3 Local Government Procedures – Hearings – Evidence. A staff memorandum submitted after the close of the evidentiary proceedings that includes only staff advice regarding what conclusions the city council could reach based on the evidence in the record is not itself "new evidence" that might trigger the obligation to re-open the record to allow other participants an opportunity to respond. *Gooley v. City of Mt. Angel*, 56 Or LUBA 319 (2008).

25.6.3 Local Government Procedures – Hearings – Evidence. In resolving an evidentiary challenge, LUBA will not consider evidence supporting the application (1) that was submitted as part of final legal argument after the evidentiary record closed, and (2) that the hearings officer declined to consider for that reason. *Lenox v. Jackson County*, 54 Or LUBA 272 (2007).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the local government on remand allows the permit applicant an opportunity to rebut the permit opponent's response to the new evidence, it must allow other parties an opportunity to rebut the permit opponent's response; but the local government is not obligated on remand to allow other permit opponents an additional

opportunity to enhance their evidentiary presentation. *Rice v. City of Monmouth*, 53 Or LUBA 55 (2006).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government errs in accepting new information into the record after the public hearing on a matter is closed without allowing other parties an adequate opportunity to respond to the new evidence. *Gunzel v. City of Silverton*, 53 Or LUBA 174 (2006).

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

25.6.3 Local Government Procedures – Hearings – Evidence. Where the evidentiary record has closed and a party believes a local government has improperly allowed legal argument that includes new testimonial evidence, a party arguing that such an impropriety warrants remand by LUBA must (1) adequately identify the objectionable testimony, (2) explain why that testimony goes beyond legal argument or commentary on evidence that is already in the record or for some other reason constitutes new evidence and (3) offer some substantial reason to believe the objectionable testimony had some effect on the ultimate decision. *City of Damascus v. Metro*, 51 Or LUBA 210 (2006).

25.6.3 Local Government Procedures – Hearings – Evidence. Remand is necessary where a decision maker engages in a conversation with the applicant during a site visit regarding a fact in dispute, and later discloses the conversation but does not disclose its content or allow petitioner an opportunity for rebuttal. *Gordon v. Polk County*, 50 Or LUBA 502 (2005).

25.6.3 Local Government Procedures – Hearings – Evidence. The time to reject or accept new evidence that is submitted after the close of the evidentiary record is before the decision maker deliberates and reaches a tentative decision. A local government cannot accept such untimely evidence, reach a tentative decision based on the entire record, and then adopt a final written decision that belatedly rejects or purports not to rely on the evidence. *Ploeg v. Tillamook County*, 50 Or LUBA 608 (2005).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioners are in no position to fault the city for accepting new evidence during a non-evidentiary hearing, where petitioners were the only persons who testified and were the persons who submitted the new evidence. That the city accepted petitioners' evidence did not convert the hearing into an evidentiary hearing, or require the city to renotice the hearing and provide additional opportunities to present evidence. *Patterson v. City of Independence*, 49 Or LUBA 589 (2005).

25.6.3 Local Government Procedures – Hearings – Evidence. A site visit is not in itself an *ex parte* contact subject to ORS 227.180(3) or ORS 215.422(3), unless it involves communication

between a decision maker and a party or other interested person. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. The case law requirement that a decision maker disclose information gained from a site visit and offer an opportunity to rebut that information serves a similar purpose to the statutory requirements regarding *ex parte* contacts: to ensure that land use decisions are based on information received during the public process, and not based on information received outside the public process. *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. Any right that a party may have to rebut new evidence under *Fasano* or ORS 197.763(6)(b) requires that the party contemporaneously assert that right of rebuttal at the time the new evidence is submitted, so that the local government can rule on the merits of the request and allow an appropriate opportunity for rebuttal where such an opportunity is warranted. *Frewing v. City of Tigard*, 47 Or LUBA 331 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. LUBA is unable to perform its review function and remand is required where the county rejects, without any explanation, evidence that is arguably relevant to an applicable criterion. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

25.6.3 Local Government Procedures – Hearings – Evidence. ORS 215.422(4), which excludes certain contacts between planning staff and the local decision maker from the definition of *ex parte* contacts, does not authorize a decision maker to rely on evidence provided by planning staff that it specifically refuses to include in the record, after the close of the record, without providing an opportunity for rebuttal. *Nez Perce Tribe v. Wallowa County*, 47 Or LUBA 419 (2004).

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

25.6.3 Local Government Procedures – Hearings – Evidence. Where a staff report and evidentiary hearings focus on an area within 500 feet of the subject property as the relevant "impact area" for purposes of conducting the conflicts identification and ESEE analysis required by OAR 660-016-0005 and 660-016-0010, the county may not deny an application under Goal 5 based on conflicts in a 15-square-mile area that is identified for the first time in its final decision, without offering the applicant an opportunity to submit evidence and argument responsive to the larger impact area. *Hegele v. Crook County*, 44 Or LUBA 357 (2003).

25.6.3 Local Government Procedures – Hearings – Evidence. A blanket request to leave the record open in the event new evidence is submitted sometime in the future is insufficient to invoke any right to a continued evidentiary proceeding. To adequately assert such a right, a party must

identify the alleged new evidence and request that the record be left open to respond to that identified evidence. *Doty v. Jackson County*, 43 Or LUBA 34 (2002).

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

25.6.3 Local Government Procedures – Hearings – Evidence. That certain documents may not have been provided to the planning commission provides no basis for remand, where the planning commission decision was appealed to the city governing body, the governing body adopted the city's final decision and there is no contention that the disputed documents were provided to the city governing body. *Lord v. City of Oregon City*, 43 Or LUBA 361 (2002).

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

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioners fail to establish that they are entitled to a new evidentiary hearing to respond to an interpretation setting an unanticipated evidentiary standard, where petitioners do not describe what additional evidence responsive to the unanticipated interpretation they would produce, or how that evidence differs in substance from evidence already in the record. *Stahl v. Tillamook County*, 43 Or LUBA 518 (2003).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a county holds the record open to permit opponents of an application to submit additional evidence and allows additional time for the applicant to respond to any new evidence submitted, in the absence of a request by the opponents for an opportunity to submit surrebuttal evidence, ORS 197.763(6)(c) does not require that the county provide such an opportunity and the county's failure to provide such an opportunity is not error. *Van Nalts v. Benton County*, 42 Or LUBA 497 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. A county errs to the extent it declares that the county's rural address map is the only source of evidence it will consider in determining the number of existing dwellings in the relevant area. A county may not refuse to consider petitioners' evidence that fewer dwellings exist in the area than shown on the rural address map. *Matiaco v. Columbia County*, 42 Or LUBA 277 (2002).

25.6.3 Local Government Procedures – Hearings – Evidence. Where, on remand from LUBA, the local government adopts a procedure that is proposed by the parties and that allows all sides to submit written evidence and written rebuttals, but limits oral testimony at the evidentiary hearing before the local government to summaries and explanations of previous submittals, the procedure is not correctly interpreted to prohibit an oral explanation of previously submitted evidence that includes additional supportive facts in response to the previously submitted written rebuttal. *Terra v. City of Newport*, 40 Or LUBA 286 (2001).

25.6.3 Local Government Procedures – Hearings – Evidence. When a local government accepts and relies on evidence submitted after the close of the record, without offering participants an opportunity for rebuttal, the decision will be remanded even though a petitioner mistakenly characterizes the procedural error as improper *ex parte* contact. *DLCD v. Umatilla County*, 39 Or LUBA 715 (2001).

25.6.3 Local Government Procedures – Hearings – Evidence. A city governing body is not required to apply the Oregon Rules of Evidence in its land use proceedings and may rely on hearsay evidence in a planning staff report to reach a conclusion regarding representations that were made to a permit applicant. *Reagan v. City of Oregon City*, 39 Or LUBA 672 (2001).

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

25.6.3 Local Government Procedures – Hearings – Evidence. Absent a state or local provision to the contrary, once the local record is closed to new evidence the local government is not compelled to reopen the record to accept new evidence, no matter how relevant that evidence is to the local government's decision. *Utsey v. Coos County*, 38 Or LUBA 516 (2000).

25.6.3 Local Government Procedures – Hearings – Evidence. A governing body's refusal to admit audio tapes of the planning commission proceedings into the record on appeal is not reversible error, where the party seeking to enter the tapes into the record fails to demonstrate that the refusal to admit the audio tapes in some way prejudiced the party's participation in the local proceedings. *Friends of Linn County v. Linn County*, 37 Or LUBA 297 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a partial transcript of a planning commission hearing contains relevant testimony, a local governing body errs by refusing to accept that partial transcript during its *de novo* appeal hearing. That the local governing body's review is *de novo* does not mean the local governing body may refuse to accept relevant evidence simply because the evidence was also submitted to a lower level decision maker. *Friends of Linn County v. Linn County*, 37 Or LUBA 280 (1999).

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

25.6.3 Local Government Procedures – Hearings – Evidence. A city errs in accepting new evidence from the applicant as part of the applicant's final written argument under ORS 197.763(6)(e), without offering other parties an opportunity to respond to that new evidence. *Brome v. City of Corvallis*, 36 Or LUBA 225 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government does not violate any statutory or local procedural requirement by allowing an engineer to testify on behalf of the applicant, notwithstanding that the notice of hearing limited the presentation of evidence to applicant and petitioners. *DeShazer v. Columbia County*, 35 Or LUBA 689 (1999).

25.6.3 Local Government Procedures – Hearings – Evidence. Even though the county's admission of evidence may have violated the procedures described in its written notice of hearing, that procedural error does not prejudice petitioners' substantial rights where petitioners had ample opportunity to rebut or object to the admission of that evidence but failed to do so. *DeShazer v. Columbia County*, 35 Or LUBA 689 (1999).

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

25.6.3 Local Government Procedures – Hearings – Evidence. The county violates ORS 215.422 when it reopens the record to accept a report received by a commissioner from intervenor, but does not provide an opportunity for other parties to rebut the substance of the *ex parte* communication. *Brown v. Union County*, 32 Or LUBA 168 (1996).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners are denied the opportunity to rebut evidence that is potentially relevant to applicable approval standards in a quasi-judicial land use proceeding, their substantial rights are prejudiced and the challenged decision must be remanded. *Jackman v. City of Tillamook*, 29 Or LUBA 391 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners allege the planning commission denied them an opportunity to submit evidence relevant to a proposed comprehensive plan amendment, but petitioners were able to submit the evidence during a *de novo* hearing on the proposed plan amendment before the governing body, the alleged error in the planning commission proceedings was cured by the governing body's *de novo* review. *O'Rourke v. Union County*, 29 Or LUBA 303 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local government decision includes a determination that an existing use of the subject property is lawful, it was improper for the local government to refuse to accept evidence or argument on this issue during the local proceedings. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local governing body improperly accepts potentially relevant new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced, and the local government's decision must be remanded. *Penland v. Josephine County*, 29 Or LUBA 213 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners were allowed to submit evidence to the planning commission, and do not identify any additional evidence they tried to submit which was refused by the governing body, any error by the governing body in conducting its hearing "on the record" did not prejudice petitioners' substantial rights. *Skrepetos v. Jackson County*, 29 Or LUBA 193 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners submitted an additional proposal after the local evidentiary record was closed, but petitioners' proposal was nevertheless accepted into the local record, the decision maker did not err by also accepting a staff response to petitioners' proposal. *Neuman v. Benton County*, 29 Or LUBA 172 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioner's argument that it was denied a meaningful opportunity to rebut evidence presented at a local government hearing does not provide a basis for remand, if petitioner does not identify any evidence relevant to applicable approval standards that was submitted at the hearing and which petitioner was denied an opportunity to rebut. *ONRC v. City of Oregon City*, 29 Or LUBA 90 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. The improper exclusion of evidence relevant to an arguably applicable approval standard is a prejudicial procedural error, where LUBA is unable to determine the improperly excluded evidence could not have affected the decision reached. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the local governing body improperly accepts new evidence while conducting an on-the-record review of a lower level decision maker's decision, and does not provide petitioners an opportunity to rebut that new evidence, petitioners' substantial rights are prejudiced. *Wicks v. City of Reedsport*, 29 Or LUBA 8 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners do not identify any code, statute or regulation provision requiring a local government to allow parties in land use proceedings to incorporate items into the local record by reference, the local government's refusal to do so is not error. *Salem Golf Club v. City of Salem*, 28 Or LUBA 561 (1995).

25.6.3 Local Government Procedures – Hearings – Evidence. Where (1) a local decision maker makes a procedural error in allowing new evidence to be submitted during an on-the-record review; (2) petitioners object to receipt of that new evidence; and (3) the local decision maker does not provide petitioners with an opportunity to rebut the new evidence; LUBA will remand the challenged decision for the local decision maker to provide the required opportunity for rebuttal. *Tucker v. Douglas County*, 28 Or LUBA 134 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. If the applicant presented new *evidence* relevant to the applicable approval standards during the rebuttal period of the local government hearing, and petitioner was denied an opportunity to rebut that evidence, petitioner's substantial rights were prejudiced. *Woodstock Neigh. Assoc. v. City of Portland*, 28 Or LUBA 146 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government may specify the methodology for making documents that are not submitted at the local hearings part of the local record in the local code, or may identify the methodology during the course of the local proceedings. *Home Builders Assoc. v. City of Portland*, 28 Or LUBA 725 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. ORS 197.763(4)(b) establishes a remedy for failure to comply with ORS 197.763(4)(a). Where a document supporting a land use application was not available for review prior to the initial local evidentiary hearing, as required by ORS 197.763(4)(a), but the local government continued the hearing to a later date and made a copy of the document available for review in its planning office prior to the continued hearing, the local government complied with ORS 197.763(4)(b). *Bates v. Josephine County*, 28 Or LUBA 21 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. Although a local governing body may be authorized to conduct a *de novo* review of a development application, its refusal to allow petitioner to submit the planning commission decision and staff report on the subject application into the record as relevant evidence prejudices petitioner's substantial right to submit evidence. *Furler v. Curry County*, 27 Or LUBA 497 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government's failure to make available all evidence in support of a quasi-judicial land use application at the time the notice of hearing is provided, as required by ORS 197.763(4)(a), is a procedural error. However, if such evidence is made available prior to or at the hearing and the hearing record is left open for seven days to allow time for additional written testimony from the parties, petitioners' substantial rights are not violated. *Edwards v. City of Portland*, 27 Or LUBA 262 (1994).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners are denied the opportunity to rebut evidence that is relevant to applicable approval standards in a quasi-judicial land use proceeding, their substantial rights are prejudiced and the challenged decision must be remanded. ORS 197.835(7)(a)(B). *Mazeski v. Wasco County*, 26 Or LUBA 226 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. There is no basis for the application of the "exclusionary rule," which applies to criminal proceedings, to local land use proceedings. *Choban v. Washington County*, 25 Or LUBA 572 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. In the absence of a local code requirement to the contrary, a local government is not required to allow parties to rebut staff summaries of evidence in the record. *McInnis v. City of Portland*, 25 Or LUBA 376 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. A local government is free to disregard or give little weight to a party's allegations concerning the substance of a telephone conversation between that party and another person not present at the local hearing. *Decuman v. Clackamas County*, 25 Or LUBA 152 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. Even though a city may have committed error in accepting evidence concerning traffic impacts, if the issue of traffic impacts was not properly before the city, such a procedural error would provide no basis for reversal or remand. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. LUBA will not look past the written decision to determine whether local government decision makers were influenced by improperly accepted evidence, where the written decision takes the position that the issue to which the disputed evidence relates was not subject to review and that determination concerning the local scope of review is not dependent on the disputed evidence. *Westlake Homeowners Assoc. v. City of Lake Oswego*, 25 Or LUBA 145 (1993).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners identify no provision of state statute or local ordinance requiring parties to a quasi-judicial land use proceeding to serve documents they submit to the local government on other parties, another party's failure to serve such documents on petitioners does not violate petitioners' *Fasano* right to rebut evidence. *Chauncey v. Multnomah County*, 23 Or LUBA 599 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Rejection of relevant evidence by a local decision maker is, at most, a procedural error. Where a planning commission improperly rejected relevant evidence offered by petitioner, but the governing body conducted a *de novo* evidentiary hearing and petitioner did not attempt to submit the evidence to the governing body, petitioner's substantial right to submit evidence was not prejudiced. *Heiller v. Josephine County*, 23 Or LUBA 551 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local code provision prohibits submission of an application for a conditional use permit for a use previously denied within one year of denial, it is error for the local government to refuse to accept evidence concerning whether a proposed conditional use is the same as the conditional use previously denied. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Where a local government improperly rejected relevant evidence during its proceeding below, LUBA must remand the challenged decision. *Silani v. Klamath County*, 22 Or LUBA 735 (1992).

25.6.3 Local Government Procedures – Hearings – Evidence. Where petitioners failed to take advantage of an opportunity to rebut evidence presented in proceedings below, they did not establish how the local decision maker's alleged procedural error in admitting such evidence caused harm to their substantial rights. ORS 197.835(7)(a)(B). *White v. City of Oregon City*, 20 Or LUBA 470 (1991).

25.6.3 Local Government Procedures – Hearings – Evidence. Regardless of whether a local government informed participants of their right under ORS 197.763(6) to request that the record remain open after the close of the initial evidentiary hearing, if the local government did *not* leave the record open, it was not obliged to accept a subsequently offered letter as part of the local record. *Wissusik v. Yamhill County*, 20 Or LUBA 246 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. Petitioner's delivery of evidence to the county counsel's office is adequate to place those materials before the county decision maker and make them part of the local record subject to LUBA review, where (1) the procedures for submitting evidence at times other than during county hearings are not specified in the county code or regulations and were not identified during the course of the proceedings below, (2) the county failed to respond to petitioners' previous request for information regarding the proper procedure for submitting evidence, and (3) petitioner had previously submitted evidence to the county counsel's office, and that material was included in the local record. *Wade v. Lane County*, 20 Or LUBA 499 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. Where the local code requires that the governing body remand an appeal to the planning commission if evidence is presented which could not have been presented to the planning commission, and parties offer to the governing body relevant evidence that the planning commission refused to consider, it is error for the governing body not to remand the appeal to the planning commission to consider such evidence. *Bloomer v. Baker County*, 19 Or LUBA 319 (1990).

25.6.3 Local Government Procedures – Hearings – Evidence. A hearings officer's acceptance of evidence submitted after the deadline established by local code provides no basis for reversal or remand where petitioner did not request a continuance, and petitioner fails to explain how he was prejudiced by the hearings officer's action. *Reed v. Lane County*, 19 Or LUBA 276 (1990).