

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

3  
4 WARREN TROY,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF GRANTS PASS,  
10 *Respondent.*

11  
12 LUBA No. 2001-133

13  
14 FINAL OPINION  
15 AND ORDER

16  
17 Appeal from City of Grants Pass.

18  
19 Warren G. Troy, Grants Pass, filed the petition for review and argued on his own  
20 behalf.

21  
22 Timothy J. Sercombe, Portland, and William K. Kabeiseman, Portland, filed the  
23 response brief. With them on the brief was Preston Gates and Ellis, LLP. William K.  
24 Kabeiseman argued on behalf of respondent.

25  
26 BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,  
27 participated in the decision.

28  
29 AFFIRMED 11/28/2001

30  
31 You are entitled to judicial review of this Order. Judicial review is governed by the  
32 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioner challenges a city annexation decision.

**REPLY BRIEF**

At oral argument, petitioner presented a motion to file a reply brief with the reply brief.<sup>1</sup> The reply brief responds to the city’s arguments pertaining to standing, jurisdiction and waiver.

Respondent moves to strike all or part of the reply brief. According to the city, OAR 661-010-0039 permits the filing of a reply brief only when the petitioner shows that the brief is filed as soon as possible after the response brief was filed, and the reply brief can be accepted without prejudice to the parties’ substantial rights.<sup>2</sup> In this case, the city argues, the reply brief was filed immediately prior to oral argument and almost a month after the response brief was filed. The city contends that there was no time for the city to read the reply brief and provide an appropriate response during oral argument.

The reply brief is six pages long. All of the matters addressed in the reply brief were raised for the first time in the response brief and are proper subjects for a reply brief. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 527 (1999), *aff’d as modified* 165 Or App 1, 994 P2d 1205 (2000). However, there is no dispute that the proposed reply brief, filed nearly one month after the response brief, was not filed “as soon as possible” after the response brief was filed. The proposed reply brief thus violates OAR 661-010-0039. The

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<sup>1</sup>Petitioner’s brief is entitled “Response to Respondent’s Brief.” However, it is in essence a reply brief, and we shall refer to it as such.

<sup>2</sup>OAR 661-010-0039 provides, in relevant part:

“A reply brief may not be filed unless permission is obtained from the Board. A request to file a reply brief shall be filed with the proposed reply brief \* \* \* as soon as possible after respondent’s brief is filed. A reply brief shall be confined solely to new matters raised in the respondent’s brief. \* \* \*”

1 question becomes whether that violation is merely a technical violation of our rules. OAR  
2 661-010-0005. It is not a technical violation if the late filing prejudiced the city’s substantial  
3 rights. Those rights include adequate time to respond to the motion and the matters contained  
4 within the reply brief. *See Sequoia Park Condo. Assoc. v. City of Beaverton*, 36 Or LUBA  
5 317, 322, *aff’d* 163 Or App 592, 988 P2d 422 (1999) (LUBA rejects 32-page reply brief filed  
6 two days before oral argument); and *Shaffer v. City of Salem*, 29 Or LUBA 592, 593-94  
7 (1995) (LUBA accepts a reply brief filed 27 days prior to oral argument).

8 Here, filing the reply brief the day of oral argument meant that the city had no time to  
9 review the contents of the reply brief and prepare a response prior to the commencement of  
10 oral argument. As a result, acceptance of the reply brief would prejudice the city’s substantial  
11 rights. Therefore, petitioner’s motion to file a reply brief is denied.

## 12 **STANDING**

13 The city concedes that petitioner appeared before the city and objected to the disputed  
14 annexations and, therefore, satisfies the ORS 197.830(2) standing requirements to challenge  
15 the city’s decision to LUBA.<sup>3</sup> However, citing *Utsey v. Coos County*, 176 Or App 524, 32  
16 P3d 933 (2001), the city argues “[to] the extent the Oregon Land Use Board of Appeals is  
17 considered a judicial instrument of the State of Oregon, petitioner lacks standing and the  
18 review is not justiciable[.]” Response Brief 1. As we explain in *Doob v. Josephine County*,  
19 \_\_\_ Or LUBA \_\_\_ (LUBA No. 2001-134, Order on Motion to Dismiss, November 26, 2001),  
20 LUBA is part of the executive branch; LUBA is not part of the judicial branch. The  
21 constitutional limitations on parties seeking *judicial* review, which are discussed in *Utsey*, do

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<sup>3</sup>ORS 197.830(2) provides in relevant part:

“[A] person may petition the board for review of a land use decision \* \* \* if the person:

“(a) Filed a notice of intent to appeal the decision as provided in [ORS 197.830(1)]; and

“(b) Appeared before the local government \* \* \* orally or in writing.”

1 not apply to parties seeking *administrative* review of local government land use decisions at  
2 LUBA. *Doob*, slip op 3.

3 **FACTS**

4 The challenged decision approves the annexation of 16 areas into the City of Grants  
5 Pass. The proposed annexation includes 260 tax lots and 258 acres in diverse ownership. A  
6 substantial minority of the properties are subject to annexation agreements. The remainder  
7 are subject to annexation under other statutory and city provisions governing annexations.

8 During the proceedings before the city council, petitioner testified against the  
9 annexations. Petitioner contended that the evidence the city was relying upon to make its  
10 decision did not sufficiently detail the impact the proposed annexations would have on the  
11 provision of municipal services, nor did it provide sufficient information for the voters to  
12 consider at the time the annexations were voted upon at an election. The council disagreed,  
13 and adopted the annexation ordinance. This appeal followed.

14 **INTRODUCTION**

15 As described above, the challenged decision annexes 16 different areas, with multiple  
16 owners and development characteristics. Therefore, the decision is properly characterized as  
17 legislative, rather than quasi-judicial. As a result, the “raise it or waive it” provisions of ORS  
18 197.763(1) do not apply.<sup>4</sup> In addition, absent local requirements to the contrary, the city’s  
19 legislative decision need not be supported by findings. *Johnson v. City of La Grande*, 37 Or  
20 LUBA 380, 388 (1999), *aff’d* 167 Or App 35, 1 P3d 1036 (2000). However, it must be  
21 supported by substantial evidence. *Id.*

22 As relevant to this appeal, the Grants Pass Development Code (GPDC) sets out two  
23 procedures to annex property into the city. In the first procedure, the city reviews and  
24 approves an annexation agreement between the city and the owner of the property to be

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<sup>4</sup>Therefore, we do not address the city’s contention that petitioner waived all or part of his assignments of error by not raising them below.

1 annexed. The annexation agreement approval process includes land use review to ensure the  
2 proposed annexation complies with code and statutory requirements and land use planning  
3 requirements. GPDC 5.042.<sup>5</sup> The annexation itself is accomplished later through adoption of  
4 the annexation ordinance. GPDC 5.052.<sup>6</sup> In the second procedure, the city makes its land use

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<sup>5</sup>The criteria for approving an annexation agreement pursuant to GPDC 5.042 are:

“The applicant must provide proof that all the following standards have been met in order to receive approval of requests for annexation agreement[s]:

- “(1) The proposed property to be annexed is located within the Grants Pass Urban Growth Boundary Area.
- “(2) The proposed property is already developed or proposed to be developed consistent with development standards mutually adopted by the City of Grants Pass and Josephine County.
- “(3) The proposal is consistent with [Land Conservation and Development Commission] Goals and Guidelines, or consistent with the City’s Comprehensive Plan[.]
- “(4) The existing or proposed land uses are consistent with [the GPDC].
- “(5) The development or proposal has minimized any detrimental environmental or neighborhood impacts.
- “(6) The proposal is consistent with the provisions of Oregon Revised Statutes.
- “(7) The proposal is consistent with the general welfare of the City and its residents, as specified in the standards of [the GPDC].
- “(8) The City of Grants Pass does or reasonably expects to have sufficient capacity to provide the property with urban services as defined in [the GPDC].
- “(9) The property owner agrees to pay out-of-City surcharges for services rendered.
- “(10) The property owner acknowledges that entering into the annexation agreement is not a final commitment on annexation. Prior to actual annexation, the Council will review the requirements and conditions of the annexation agreement to determine compliance therewith prior to processing the annexation. In addition, the applicant will be required to meet any new conditions that may be required as a result of judicial or state or federal legislative acts.
- “(11) The annexation, as approved, would not constitute an illogical extension of City boundaries and would not jeopardize the adequate quality and quantity of public services nor undermine the financial integrity of the City.”

<sup>6</sup>GPDC 5.052 provides:

1 compliance determinations as part of the annexation ordinance. GPDC 5.053.<sup>7</sup> In both cases,  
2 the planning director is required to document any conditions of approval that implicate the  
3 development of the property, or otherwise affect the application of the provisions of the  
4 GPDC and other city standards. GPDC 5.043(2) and 5.054(2).<sup>8</sup> For annexation agreements,

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“If the proposed property is subject to a [previously approved] annexation agreement, then the applicant must prove the following [before the annexation may be approved]:

- “(1) All the conditions and requirements of the annexation agreement have been met.
- “(2) Any additional conditions or requirements made necessary by subsequent judicial or state or federal or legislative acts have been met.”

<sup>7</sup>GPDC 5.053 provides, in relevant part:

“If the proposed property is not subject to an annexation agreement, the applicant must prove that the following standards have been met to receive approval of annexation:

- “(1) The proposed property is located within the Grants Pass Urban Growth Boundary Area and the area is contiguous with the existing City boundary.
- “(2) The proposed property is developed or will be developed consistent with City standards.
- “(3) The proposal is consistent with the City’s Comprehensive Plan \* \* \*.
- “(4) The proposal is consistent with [the GPDC].
- “(5) The proposal is consistent with the provisions of the Oregon Revised Statutes.
- “(6) The City of Grants Pass has sufficient capacity to provide the property with basic urban services, such as municipal water, sanitary sewer, fire protection, and police protection.”

<sup>8</sup>GPDC 5.043 provides, in relevant part:

“The procedure for processing an annexation agreement request shall be as follows:

“\* \* \* \* \*

- “(2) The Director prepares the full Annexation Study, which shall include:
  - “(a) Applicant request.
  - “(b) Property description, Comprehensive Plan and Zoning designations, existing land use, physical characteristics, and existing facilities and services.

1 the annexation documentation must also include the estimated cost of providing city services  
2 to the property and expected revenues from the property as a result of annexation. GPDC  
3 5.043(2)(d) and (f).

4 In the present case, the city’s decision does not approve any annexation agreements  
5 under GPDC 5.042. Instead, it accomplishes the annexation of certain property subject to  
6 previously approved annexation agreements under GPDC 5.052 and annexes other properties  
7 under GPDC 5.053.

8 With this background, we now turn to petitioner’s assignments of error.

9 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

10 Petitioner’s first and second assignments of error challenge the legal and evidentiary  
11 bases for the city’s annexation decision. In petitioner’s view, the city council may not make a  
12 final decision approving an annexation until the record contains all of the documentation  
13 required by GPDC 5.042, 5.043, 5.053 and 5.054. *See* ns 5, 7 and 8. Petitioner contends that  
14 the city erred in making a decision without requiring that the annexation studies and  
15 compliance reports required by GPDC 5.043(2) and GPDC 5.054(2), respectively, be

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- “(c) Proposed use.
  - “(d) Capital improvements and their costs for water, sewer, street and storm drain services required in public right-of-way or easements prior to development and/or prior to final annexation.
  - “(e) Cost for fire and police protection, if available, prior to annexation.
  - “(f) Summary of service costs and revenues to the City at full development.
  - “(g) Minimum conditions of annexation.
  - “(h) Proposed partition, subdivision and/or development site plan.”

GPDC 5.054(2) provides:

“The Director shall prepare a compliance report indicating the degree of compliance of the subject property with the provisions of this Code and other City standards, and compliance with any conditions subject to development of the property, and shall review the compliance report with the property owner in conference.”

1 included in the record. *See* n 8. In the third assignment of error, petitioner contends that the  
2 city’s failure to include the documentation required by GPDC 5.043(2) and 5.054(2) violates  
3 a city code provision that implements Statewide Planning Goals 2 (Land Use Planning) and  
4 14 (Urbanization) because the city fails to follow its own code provisions pertaining to  
5 annexations as outlined above.

6 The city responds that GPDC 5.042 and 5.043 apply to the approval of annexation  
7 agreements only, and not to the adoption of the ordinance that approves the annexation of the  
8 property subject to the annexation agreements. According to the city, the only criteria that  
9 pertain to any part of the city’s annexation decision are found in GPDC 5.052 and 5.053. *See*  
10 ns 6 and 7. In this case, the city cites to evidence in the record that demonstrates that these  
11 criteria have been satisfied.

12 The city argues that, contrary to petitioner’s understanding of the ordinance, GPDC  
13 5.052 does not require that the city council conduct a review of the evidence in the record to  
14 determine if all of the provisions of GPDC 5.042 pertaining to previously approved  
15 annexation agreements continue to be met. The city contends that the review by the city  
16 council is limited under GPDC 5.052 to considering (1) whether any specific development  
17 conditions that modify a particular annexation agreement have been satisfied; and (2)  
18 whether any post-annexation agreement changes to the legal standards affecting the  
19 agreement or the city’s annexation procedures have been met. To the extent petitioner seeks  
20 to challenge the annexation agreement decisions themselves, the city contends that petitioner  
21 cannot do so through an appeal of the final annexation decision. According to the city, the  
22 time to appeal those annexation agreement decisions has long passed.

23 We agree with the city that GPDC 5.052 does not require that the record before the  
24 city council contain all of the evidence necessary to find that the annexation agreements  
25 comply with the provisions of GPDC 5.042. GPDC 5.052 requires a determination that  
26 “conditions and requirements” imposed by the annexation agreement or by changes in legal



1 standards are met. It does not require a *de novo* determination by the city council that the  
2 annexation agreements continue to comply with GPDC 5.042, nor does it require that the  
3 record before the city council contain the annexation studies the city relied upon to approve  
4 those individual annexation agreements. Petitioner does not argue that the annexation  
5 agreements contain conditions of approval that must be met prior to finalizing the  
6 annexation, or that the legal standards pertaining to the annexations have changed in ways  
7 that impose new development requirements on the property to be annexed. Accordingly,  
8 petitioner provides no basis for LUBA to question the city’s determination that GPDC 5.052  
9 has been met.<sup>9</sup>

10 With respect to the annexations completed under GPDC 5.053, we understand  
11 petitioner to argue that the compliance report required by GPDC 5.054(2) is not in the record  
12 and, absent that report, there is *no* documentation in the record to support a finding that  
13 GPDC 5.053(2) and (3) are satisfied. The city argues that the compliance report required by  
14 GPDC 5.054 is set out at Record 59 through 455, and contains evidence and findings  
15 demonstrating that the provisions of GPDC 5.053 have been met. The city contends that the  
16 compliance report is adequate to support the city’s decision to annex the properties subject to  
17 GPDC 5.053, in the absence of any specific challenge to that report by petitioner. Petitioner  
18 does not provide a focussed challenge to the city’s contention. Nor does petitioner challenge  
19 the city’s argument that the evidence provided in the compliance report is adequate to  
20 support the city’s conclusion that GPDC 5.053(2) and (3) are met.

21 In his third assignment of error, petitioner contends that the city’s decision does not  
22 comply with GPDC 1.031, which requires that development “comply with the applicable  
23 criteria and standards of [the GPDC],” because the city failed to consider the provisions of

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<sup>9</sup>We also agree with the city that petitioner may not challenge the city’s decisions to approve the annexation agreements as a part of his appeal of the subject decision. *Smith v. Douglas County*, 17 Or LUBA 809, 816, *aff’d* 98 Or App 379, 780 P2d 232 (1989).

1 GPDC Article 5 that petitioner argues apply. For the same reasons discussed above, we  
2 conclude the city applied the relevant code provisions to its annexation decision, and that its  
3 decision is supported by substantial evidence.<sup>10</sup>

4 The first, second and third assignments of error are denied.

5 The city's decision is affirmed.

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<sup>10</sup>We agree with the city that, to the extent petitioner's assignment of error challenges the city's compliance with the statewide planning goals, petitioner has not demonstrated that the goals are directly applicable to the challenged decision. *Byrd v. Stringer*, 295 Or 311, 313, 666 P2d 1332 (1983); *City of Corvallis v. Benton County*, 16 Or LUBA 488, 500 (1988).