

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

JIPR, LLC,
Petitioner,

vs.

CITY OF CARLTON,
Respondent,

and

FELIX MADRID,
Intervenor-Respondent.

LUBA No. 2025-088

FINAL OPINION
AND ORDER

Appeal from City of Carlton.

Nicholas A. Rhoten filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Matheny Law, LLC.

Tyler C. Yeoman-Millette filed the respondent's brief and argued on behalf of respondent.

Andrew Mulkey filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent.

BASSHAM, Board Member; ZAMUDIO, Board Chair; WILSON, Board Member, participated in the decision.

REMANDED

07/22/2026

You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city council decision denying its application for a fuel station and convenience store, and associated applications for site design review and a floodplain development permit.

FACTS

The subject property is a 1.17-acre parcel zoned Commercial Business (CB), which allows various kinds of retail uses as conditional uses, subject to site design review. The parcel is the only property in the immediate area zoned CB. All other surrounding properties are zoned for residential or agricultural use. Adjacent property to the east, south, and northwest are zoned “Agricultural Holding” (AH). Adjoining to the east and south are vineyards and a winery operation that are owned by intervenor-respondent (intervenor). Hawn Creek crosses the western third of the property.

Petitioner applied for a conditional use permit for a fuel station with convenience store. The proposal includes eight pumps under a canopy, a 4,264-square foot convenience store with parking, and stormwater facilities that include placement of riprap for a stormwater outfall within the floodplain of Hawn Creek. Along with the application for a conditional use permit, petitioner submitted an application for site design review and a floodplain development permit for the proposed riprap.

1 City staff recommended approval of the applications. The planning
2 commission conducted the initial public hearing on October 13, 2025, at which a
3 number of individuals appeared in opposition. The planning commission
4 established a seven-day open record period ending October 20, 2025, during
5 which any person could submit additional argument or evidence. Any materials
6 submitted during the open record period would be distributed to the parties on
7 October 21, 2025, and the planning commission would meet the next day,
8 October 22, 2025, for deliberations. On October 20, 2025, petitioner objected to
9 the post-hearing schedule, requesting an opportunity to submit rebuttal evidence
10 to any submissions during the open record period, and a seven-day period to
11 provide final written argument. Approximately 200 pages of materials were
12 submitted during the open record period ending October 20, 2025, and distributed
13 to petitioner and others on October 21, 2025.

14 The planning commission met for deliberations on October 22, 2025.
15 Petitioner's counsel repeated its request for an opportunity to respond to evidence
16 submitted during the open record period, and for a seven-day period to provide
17 final written argument. To accommodate those requests, petitioner offered to
18 extend by 21 days the 120-day deadline to issue the final decision. However, the
19 planning commission proceeded to deliberations, and voted to deny the
20 applications.

21 Petitioner appealed the planning commission denial to the city council,
22 requesting *de novo* review based on new evidentiary proceedings, to cure alleged

1 procedural errors in the planning commission's process. However, the city
2 council chose to conduct the appeal based on review of the record before the
3 planning commission. Petitioner objected to the participation of a city councilor,
4 Turrell, based on bias, as evidenced by comments the councilor wrote in a
5 petition submitted to the planning commission opposing the applications.
6 However, Councilor Turrell declined to recuse herself, and stated that she could
7 be impartial in her decision-making. The city council ultimately voted to deny
8 the applications.

9 This appeal followed.

10 **MOTION TO STRIKE AND MOTION TO TAKE EVIDENCE**

11 In the petition for review filed on May 4, 2026, petitioner alleges that
12 Councilor Turrell was biased and prejudged the applications, and further that a
13 planning commission member had undisclosed conflicts of interest. In support of
14 these assignments, petitioner refers to three documents not in the record.¹ The

¹ The three documents consist of (1) a printout of an article from the October 17, 2024 *Yamhill County News-Register*, a local newspaper, which includes a candidate statement from Councilor Turrell, who was then running for a seat on the City of Carlton City Council; (2) a copy of the City of Carlton Planning Commission minutes, dated August 12, 2024, in which Turrell, as a citizen, expressed opposition to the proposed gas station, which was then in pre-application status; and (3) and a judicial "Register of Actions," regarding a divorce proceeding initiated in 2001 between intervenor and Annette Fernandez-Madrid, an individual who was a member of the planning commission during the proceedings on petitioner's application for the gas station. See Petition for Review 14-17.

1 cited extra-record documents were not attached to the petition for review, or in
2 any contemporaneously filed pleading. On May 18, 2026, intervenor filed a
3 motion to strike all references to these extra-record documents, arguing that in
4 the absence of a successful motion to take evidence, there is no basis for LUBA
5 to consider the three extra-record documents.

6 The next day, May 19, 2026, petitioner filed a response to the motion to
7 strike, arguing in part that LUBA's rules do not contemplate filing a motion to
8 take evidence, or even providing the parties copies of the referenced extra-record
9 documents, until after the respondent's brief is filed. However, petitioner states
10 that on May 19, 2026, copies of the disputed documents were emailed, as a
11 courtesy, to counsel for intervenor and the city. Petitioner's Response to Motion
12 to Strike 7-8.

13 On May 27, 2026, the city and intervenor filed their responsive briefing.
14 Thereafter, on June 2, 2026, petitioner filed a motion to take evidence outside the
15 record, pursuant to OAR 661-010-0045, requesting that LUBA consider the three
16 extra-record documents referenced in the petition for review.² Attached to the

² 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

1 motion are the disputed extra-record documents, as well as an affidavit of
2 petitioner's attorney, averring to the alleged prejudice caused by the planning
3 commission's refusal to allow petitioner final written argument and to submit
4 evidence in rebuttal of new evidence submitted during the open record period.
5 On June 16, 2026, intervenor and the city filed separate responses opposing the
6 motion to take evidence.

7 **A. Motion to Strike**

8 In the motion to strike, intervenor faults petitioner for failing to attach the
9 referenced documents to the petition for review, or to a contemporaneously filed

other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.

“(2) Motions to Take Evidence:

“(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. The motion to take evidence shall be filed as a separate document and shall not be contained within a brief or other filing.

“(b) A motion to take evidence shall be accompanied by:

“(A) An affidavit or documentation that sets forth the facts the moving party seeks to establish[.]”

1 motion to take evidence. Intervenor argues that petitioner’s failure to provide that
2 documentation before or contemporaneously with the petition for review
3 deprives intervenor and the city (together, respondents) of the ability to review
4 that evidence and address it in the responsive briefing. Intervenor argues that the
5 failure to provide the parties copies of the referenced documents caused
6 intervenor to conduct a search outside the record and pleadings trying to locate
7 the referenced documents, so intervenor could determine whether the facts
8 alleged are disputed. Intervenor argues that, in analogous circumstances, LUBA
9 has rejected preservation statements in the petition for review that forced other
10 parties to review over a hundred pages in the record to determine whether the
11 asserted arguments were in fact preserved. *Rosewood Neighborhood Association*
12 *v. City of Lake Oswego*, LUBA No. 2023-035 (Nov 1, 2023) (overbroad citations
13 in a preservation statement was not a “technical violation” of LUBA’s rules that
14 could be overlooked) (slip op at 7-8). Similarly, intervenor argues that LUBA
15 should strike the references in the petition for review—and deny the belatedly
16 filed motion to take evidence—given the prejudice caused to intervenor’s
17 substantial rights.

18 Petitioner responds that no LUBA rule requires that a motion to take
19 evidence be contemporaneously filed with the petition for review or at any
20 particular time. If anything, petitioner argues, LUBA’s rules suggest that a
21 motion to take evidence is not ripe until the responsive briefing is filed that
22 disputes factual allegations made in the petition for review based on extra-record

1 sources. *See* OAR 661-010-0045(1) (LUBA may, upon written motion, take
2 evidence not in the record in the case of disputed factual allegations in the parties'
3 briefs). Even if LUBA's rules implicitly require that a petitioner who cites extra-
4 record documents in the petition for review provide the parties with copies of
5 those documents via a contemporaneously filed motion to take evidence,
6 petitioner argues that intervenor suffered no prejudice from having to locate the
7 documents, which are all readily available from public sources.

8 Petitioner's narrow reading of OAR 661-010-0045(1) is not compelled by
9 its text, and is inconsistent with the overarching purpose of LUBA's rules, to
10 "promote the speediest practicable review of land use decisions and limited land
11 use decisions, in accordance with ORS 197.805-197.855, while affording all
12 interested persons reasonable notice and opportunity to intervene, reasonable
13 time to prepare and submit their cases, and a full and fair hearing." OAR 661-
14 010-0005 (Jan 15, 2025).³ OAR 661-010-0045 does not mandate any particular

³ OAR 661-010-0005 (Jan 15, 2025) provides:

"These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR

1 time or juncture to file a motion to take evidence, and the term “briefs” is not
2 limited to the parties’ briefs on the merits. Depending on the relevance of the
3 extra-record evidence, the appropriate time to file a motion to take evidence may
4 occur early in the appeal, for example when resolving a motion for stay or an
5 objection to the record, or very late in the appeal, when resolving a motion for
6 attorney fees or damages. OAR 661-010-0045(1). For extra-record evidence that
7 a petitioner cites in support of an assignment of error, the practice most consistent
8 with the text and intent of the rule is to file the motion to take evidence
9 contemporaneously with the brief citing that evidence, here, the petition for
10 review.

11 As petitioner notes, we have long expressed a preference for waiting to
12 resolve motions to take evidence that support assignments of error until *after*
13 briefing on the merits has been filed. *Halvorson Mason Corp. v. City of Depoe*
14 *Bay*, 38 Or LUBA 949, 952 (2000). That is because, without some understanding
15 of the merits of the appeal, we often lack the context and background needed to
16 efficiently resolve such a motion to take evidence. However, our preference for
17 when we *resolve* a motion to take evidence that goes to the merits of an
18 assignment of error does not mean that the proponent should delay *filing* the
19 motion to take evidence until after the responsive briefing is filed, as petitioner
20 argues.

661-010-0015(1) or a petition for review under OAR 661-010-
0030(1) is not a technical violation.”

1 Nor does it mean that the proponent should delay filing and serving copies
2 of the disputed extra-record documents with the parties and LUBA until after the
3 responsive briefing is filed. While petitioner provided respondents with courtesy
4 e-mail copies of the disputed documents two weeks after filing the petition for
5 review, no copies were filed with LUBA, or served on the parties, until a month
6 after the petition for review was filed, and less than two weeks before oral
7 argument was scheduled. That delayed filing and service is not consistent with
8 the speediest practicable review or affording other parties a reasonable time to
9 prepare and submit their cases.

10 In sum, we agree with intervenor that petitioner's citation of extra-record
11 documents in the petition for review, accompanied by a month's delay in filing
12 the motion to take evidence necessary for LUBA to consider those documents,
13 and its related delay in filing and serving the disputed documents to allow review
14 by the parties and LUBA, is inconsistent with the text and intent of OAR 661-
15 010-0045, among other rules. The remaining question is whether the rule
16 violations prejudiced other parties' substantial rights in this appeal, and thus
17 warrant remedial action.

18 OAR 661-010-0005 (Jan 15, 2025) provides that "[t]echnical violations
19 not affecting the substantial rights of parties shall not interfere with the review of
20 a land use decision or limited land use decision." The substantial rights referred
21 to are "reasonable notice and opportunity to intervene, reasonable time to prepare
22 and submit their cases, and a full and fair hearing." *Id.*

1 We disagree with intervenor that petitioner's delay in filing the motion to
2 take evidence resulted in prejudice analogous to the prejudice that we identified
3 and relied on in *Rosewood*. Facts regarding bias and conflicts are either supported
4 by evidence or not. If the party alleging bias and conflicts of interest does not
5 support the alleged facts with evidence, then a responding party is not obligated
6 to conduct an exhaustive search outside the record and pleadings to locate the
7 referenced documents. They can respond that the party alleging bias has not
8 supported the allegations with evidence. That is a different and lesser burden than
9 searching a large record to determine whether an issue was raised. Indeed, in the
10 motion to strike, intervenor argued that petitioner's assertions of bias in the
11 petition for review were unsupported by evidence and that "[i]f, at some point,
12 petitioner does decide to submit a motion to take extra record evidence,
13 [intervenor] will respond and demonstrate that petitioner's assertions have no
14 basis in fact." Motion to Strike 5.

15 We conclude that, despite the unsupported citations to extra-record
16 evidence, and the delayed service of the cited documents, intervenor has not
17 established that petitioner's violations of LUBA's rules prejudiced intervenor's
18 ability to prepare and submit their cases, and a full and fair hearing. Despite the
19 delay, intervenor was provided with courtesy copies of the disputed documents,
20 and was able to file appropriate pleadings and responses. Intervenor had
21 meaningful opportunities to respond to the assignments of error asserting bias
22 and to oppose the motion to take evidence asserting evidence of bias.

1 Accordingly, petitioner's rule violations "shall not interfere" with our
2 review. OAR 661-010-0005 (Jan 15, 2025). Intervenor's motion to strike is
3 denied. We next consider whether the motion to take evidence establishes a basis
4 for LUBA to consider the extra-record documents cited in the petition for review.

5 **B. Motion to Take Evidence**

6 The evidence that petitioner seeks to place before the Board falls into three
7 categories: (1) evidence that Councilor Turrell made public statements opposed
8 to the proposed gas station, which are offered in partial support of the fourth
9 assignment of error, alleging bias and prejudgment on the part of Councilor
10 Turrell; (2) evidence that Commissioner Madrid had an undisclosed actual or
11 potential conflict of interest, offered in support of the fifth assignment of error;
12 and (3) evidence that the planning commission's failure to provide petitioner with
13 an opportunity for evidentiary rebuttal and final written argument prejudiced
14 petitioner's substantial rights, offered in support of the first, second, and third
15 assignments of error. We address each category of evidence in turn.

16 **1. Bias and Prejudgment**

17 Based in part on evidence in the record, petitioner argues in the fourth
18 assignment of error that Councilor Turrell was biased and prejudged the
19 application. The evidence in the record consists of an online petition opposing
20 the application, to which Turrell added comments explaining her opposition.
21 Record 740. As noted, the arguments under the fourth assignment of error also
22 rely on two documents not in the record, (1) statements about the proposed gas

1 station that Councilor Turrell submitted for a *Yamhill County News-Register*
2 article on city council candidates, and (2) the minutes of an August 12, 2024
3 planning commission meeting indicating that Councilor Turrell appeared in
4 person to express concerns about the proposed gas station, which was then in pre-
5 application status.

6 To prevail on the motion to take evidence, petitioner must (1) establish that
7 the facts in the proffered evidence fit within one or more of the grounds to take
8 evidence specified in OAR 661-010-0045(1); and (2) show “how those facts will
9 affect the outcome of the review proceeding.” OAR 661-010-0045(2).
10 Respondents do not dispute that alleged bias and prejudgment is an appropriate
11 ground to take extra-record evidence. Answering the second question requires
12 considering whether the proffered evidence will play a material role in the
13 outcome of the appeal. We understand respondents to argue that OAR 661-010-
14 0045(2) requires the movant to show that the proffered evidence, *by itself*, will
15 result in reversal or remand. However, that is not the test. An assignment of error
16 seeking reversal or remand may rest on a theory with multiple elements, and may
17 require cumulative evaluation of all relevant evidence. The proffered evidence
18 may go to a specific element, or supply material weight to the totality of the
19 evidence. That the proffered evidence, considered in isolation, may not in itself
20 suffice to meet the high evidentiary bar to establish bias and prejudgment is not
21 a basis to reject a motion to take evidence that offers relevant, material evidence
22 to the totality of the evidence regarding bias and prejudgment.

Turning to the present allegations, we agree with petitioner that the proffered documents provide relevant, material evidence supporting petitioner's arguments under the fourth assignment of error. The two proffered documents indicate that Councilor Turrell was committed enough to her opposition to the proposed gas station that she appeared in person at a planning commission meeting to oppose it, even though the proposal was then in pre-application status and not before the planning commission. Further, it indicates then-candidate Turrell was willing to make opposition to the proposed gas station a central feature of her campaign for city council. That evidence lends significant weight to the other evidence cited in the fourth assignment of error regarding bias and prejudice. Accordingly, we grant the motion to take evidence with respect to these two documents.

2. Conflict of Interest

The second category of evidence consists of judicial records regarding the divorce proceedings between intervenor and a planning commission member, which petitioner argues can be understood to suggest a current financial relationship between intervenor and Commissioner Fernandez-Madrid with respect to child support. If so, petitioner argues under the fifth assignment of error, Commissioner Fernandez-Madrid erred in failing to comply with ORS

1 244.120(2) (2023), which imposes obligations on public decision makers
2 regarding actual and potential conflicts of interest.⁴

3 However, the cited judicial records do not indicate a current financial
4 relationship between intervenor and the commissioner regarding child support
5 obligations. Petitioner merely speculates, from the absence of evidence on this
6 point, that ongoing obligations might exist. In addition, intervenor offers a
7 declaration that the child support obligations described in the judicial records

⁴ ORS 244.120(2) (2023) states:

“(2) An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

“(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

“(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

“(A) Except as provided in subparagraph (B) or (C) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

“(B) If any public official’s vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.”

1 ended in 2015, along with a notice of intent to close the case issued by the Child
2 Support Program of the Oregon Department of Justice. *See* Declaration in
3 Support of Intervenor's Response to Motion to Take Evidence 2. We agree with
4 respondents that the proffered documents do not establish that there is a current
5 financial relationship between intervenor and the commissioner, the fact for
6 which they are offered. The motion to take evidence regarding these documents
7 is denied.

8 **3. Prejudice to Petitioner**

9 The first, second, and third assignments of error allege procedural errors
10 in failing to allow petitioner final written argument, and in failing to allow
11 petitioner an opportunity to rebut evidence submitted during the open record
12 period. In partial response, the city argues that petitioner has not demonstrated
13 that it was actually prejudiced by the alleged procedural errors, because
14 subsequent proceedings cured any prejudice. Respondent's Brief 11-12; *see* ORS
15 197.835(9)(a)(B) (LUBA shall reverse or remand if the local government failed
16 to follow the applicable procedures in a manner that prejudiced the substantial
17 rights of the petitioner). In the motion to take evidence, petitioner offers the
18 affidavit of its attorney, which in part describes the kind of evidence it would
19 have submitted had the planning commission granted its request for evidentiary
20 rebuttal, and the impacts on petitioner of not having an opportunity to submit
21 final written argument. Attached to the affidavit is a November 11, 2025 email
22 between petitioner's attorney and the city attorney sent during the proceedings

1 below, describing the types of evidence that petitioner would submit, if allowed.
2 Motion to Take Evidence Ex D, at 2-3.

3 Respondents oppose LUBA's consideration of the affidavit on several
4 grounds. With respect to final written argument, respondents argue that the
5 affidavit includes no "disputed *factual* allegations," only arguments. With respect
6 to evidentiary rebuttal, respondents argue there are no *disputed* factual allegations
7 regarding what type of evidence petitioner might have submitted in rebuttal.
8 Respondents do not dispute that petitioner would have submitted evidence
9 similar to that described in the November 11, 2025 email, if given the
10 opportunity. The city requests that, to the extent the motion to take evidence is
11 granted with respect to the affidavit and email, it should include only the list of
12 evidence that petitioner would have submitted, not the argument in the affidavit
13 and email that accompany that list.

14 We agree with respondents that petitioner has not established a basis under
15 OAR 661-010-0045 to take into evidence the arguments that are included in the
16 affidavit or the attached November 11, 2025 email. However, we will consider
17 the list of evidence in the email that petitioner would have submitted if given the
18 opportunity, as having a bearing on the disputed factual issue of whether the
19 city's actions prejudiced petitioner's substantial rights, which in turn may affect
20 the outcome of this appeal. Accordingly, the motion to take evidence is denied
21 with respect to the affidavit, but granted with respect to the list of evidence in the
22 November 11, 2025 email.

1 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

2 In the first assignment of error, petitioner argues that the planning
3 commission committed procedural error in refusing to provide an opportunity to
4 rebut the evidence submitted during the open record period, as required by ORS
5 197.797(6)(c).⁵ Similarly, in the second assignment of error, petitioner contends

⁵ ORS 197.797(6) provides, in relevant part:

“(a) Prior to the conclusion of the initial evidentiary hearing, any participant may request an opportunity to present additional evidence, arguments or testimony regarding the application. The local hearings authority shall grant such request by continuing the public hearing pursuant to paragraph (b) of this subsection or leaving the record open for additional written evidence, arguments or testimony pursuant to paragraph (c) of this subsection.

“* * * * *

“(c) If the hearings authority leaves the record open for additional written evidence, arguments or testimony, the record shall be left open for at least seven days. Any participant may file a written request with the local government for an opportunity to respond to new evidence submitted during the period the record was left open. If such a request is filed, the hearings authority shall reopen the record pursuant to subsection (7) of this section.

“(d) A continuance or extension granted pursuant to this section shall be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179, unless the continuance or extension is requested or agreed to by the applicant.”

1 that the planning commission erred in refusing to allow petitioner seven days to
2 submit final written argument, as required by ORS 197.797(6)(e).⁶

3 **A. Opportunity to Rebut Evidence**

4 ORS 197.797(6)(c) provides that if the local government leaves the record
5 open for additional written evidence, arguments or testimony, any participant
6 may file a written request with the local government for an opportunity to respond
7 to new evidence submitted during the open record period. Almost 200 pages of
8 material were submitted during the seven-day open record period ending October
9 20, 2025. According to petitioner, that new material included evidence,
10 arguments and testimony regarding a range of issues, including noise, light, odor,
11 environmental and wetland concerns, health concerns, traffic, turning radius,
12 driveway access, fire safety, concerns regarding storage tank leaks, and other
13 issues. Record 141-329. That mass of new material was distributed to petitioner
14 the next day, on October 21, 2025, with deliberations previously scheduled for
15 the evening of October 22, 2025.

⁶ ORS 197.797(6)(e) provides:

“(e) Unless waived by the applicant, the local government shall allow the applicant at least seven days after the record is closed to all other parties to submit final written arguments in support of the application. The applicant’s final submittal shall be considered part of the record, but shall not include any new evidence. This seven-day period shall not be subject to the limitations of ORS 215.427 or 227.178 and ORS 215.429 or 227.179.”

1 Petitioner argues that on October 20, 2025, the last day of the open record
2 period, its attorney submitted via email an initial written request for an
3 opportunity to respond to the new material. Record 248.⁷ On October 22, 2025,
4 several hours prior to the scheduled planning commission deliberations,
5 petitioner's attorney sent two emails specifically requesting a seven-day rebuttal
6 period. Record 107, 108. Planning staff issued a revised staff report
7 recommending that the planning commission provide petitioner with an
8 opportunity for rebuttal. Record 131. During the October 22, 2025 planning
9 commission meeting that evening, petitioner orally repeated their request for a
10 seven-day rebuttal period. The planning commission proceeded to deliberations.

⁷ Petitioner's October 20, 2025 letter to the city stated, in relevant part:

“We believe the applications should be approved based on the applicable criteria, as discussed in this letter. In the event the applications are not approved on October 22, however, we also wanted to use this letter as an opportunity to raise several legal objections for the record: First, pursuant to ORS 197.797(6)(e) state law provides the Applicant a seven-day period for ‘final written argument’ after the record closes. Here, the record is closing on October 20, and deliberation is taking place on October 22. In the event the applications are not approved, this is an issue. Similarly, pursuant to ORS 197.797(6)(c), the Applicant would be entitled to submit rebuttal evidence to new evidence submitted during the open record period. We do not presently know what, if any, new evidence is or will be submitted during the open record period, but if the applications are not approved, we also object based on the failure to allow rebuttal evidence.” Record 248 (footnote 1).

1 Petitioner argues that the planning commission's failure to grant the requested
2 opportunity for rebuttal is a clear violation of ORS 197.797(6)(c).

3 The city argues that while petitioner's October 20, 2025 letter objected to
4 the lack of opportunity for rebuttal, and served to preserve that objection, the
5 letter did not include an explicit *request* to re-open the record to allow rebuttal to
6 the new material submitted during the open record period. The city argues that
7 no formal written request was submitted to city staff until after the close of the
8 open record period. The city argues that ORS 197.797(6)(c) impliedly limits valid
9 requests for rebuttal to those made within the open record period.

10 We disagree with the city that the October 20, 2025 letter is fairly read to
11 lodge only an objection to an anticipated procedural error, and does not constitute
12 a request for re-opening the record for rebuttal. The letter states or at least clearly
13 implies that if new evidence is submitted during the open record period
14 (something that was not known at that point), petitioner expects the city to
15 provide an opportunity to rebut that new evidence. That implied request became
16 explicit in the follow-up emails, with the clarification that petitioner was now
17 requesting a seven-day period to review the almost 200 pages of new evidence
18 and submit rebuttal. City staff clearly understood that petitioner had requested an
19 opportunity for rebuttal, as staff recommended that the planning commission
20 provide that opportunity. Even if the city is correct that ORS 197.797(6)(c)
21 impliedly requires that a request for rebuttal be filed no later than the end of the

1 open record period, a point we need not and do not decide, petitioner's request
2 was timely filed.

3 Intervenor responds that, while the planning commission may have erred
4 in refusing to allow petitioner's request for rebuttal, any error did not prejudice
5 petitioner's substantial rights, because petitioner had the opportunity to request a
6 *de novo* evidentiary hearing before the city council. While petitioner did in fact
7 request a *de novo* evidentiary hearing on appeal, intervenor argues that the city
8 council declined that request, and chose to conduct the appeal based on the
9 planning commission record, because petitioner refused to grant any extension to
10 the 120-day deadline for issuing the city's final decision, required by ORS
11 227.178. Intervenor argues that petitioner's refusal to grant any extension to the
12 120-day deadline, and possibly obtain a *de novo* evidentiary hearing on appeal
13 that would cure the planning commission's procedural error, means that that error
14 did not prejudice petitioner's substantial rights.

15 Petitioner replies that in fact it did offer to waive the 120-day deadline to
16 allow the city council to provide a *de novo* evidentiary review. Reply Brief 3
17 (citing to audio of the December 9, 2025 city council hearing). Petitioner argues
18 that despite that offer, and similar offers made earlier before the planning
19 commission, the city council declined to conduct a *de novo* evidentiary hearing
20 and, instead, proceeded to resolve the appeal based on the flawed planning
21 commission record. We agree with the parties that a *de novo* evidentiary city
22 council proceeding might well have cured any error by the planning commission

1 in applying ORS 197.797(6)(c). However, the city council's choice to proceed
2 on the record does not appear to have been driven by concern about the 120-day
3 deadline. Even if it was, it is not clear to us why petitioner's exercise of its choice
4 to waive or not waive the 120-day deadline means that the planning commission's
5 violation of ORS 197.797(6)(c) did not prejudice petitioner's substantial rights.

6 We agree with petitioner that the city violated ORS 197.797(6)(c) in
7 refusing petitioner's timely request for an opportunity to provide evidentiary
8 rebuttal to the new argument, evidence and testimony submitted during the open
9 record period, and that violation prejudiced petitioner's substantial rights.

10 **B. Final Written Argument**

11 ORS 197.797(6)(e) entitles the applicant to at least seven days after the
12 record is closed to all other parties to submit final written arguments in support
13 of the application. *See* n 6. That period to submit final written argument is not
14 subject to the 120-day deadline at ORS 227.178. ORS 197.797(6)(e). Petitioner
15 argues that the planning commission violated ORS 197.797(6)(e) by refusing to
16 allow a seven-day period to submit final written argument after the close of the
17 evidentiary record, and that violation prejudiced petitioner's substantial rights.

18 The city responds that petitioner did not request time to prepare final
19 written argument until two days before the planning commission's continued
20 hearing. However, ORS 197.797(6)(e) does not require the applicant to request
21 final written argument. Unless that right is waived, the city must provide the

1 requisite period and opportunity, and that obligation is not contingent upon a
2 request from the applicant.

3 The city also argues that petitioner has not demonstrated that any violation
4 of ORS 197.797(6)(e) prejudiced its substantial rights, given that it was allowed
5 far more than seven days to provide written argument in its appeal of the planning
6 commission decision to the city council. However, we agree with petitioner that
7 the lost opportunity to persuade the planning commission to approve the
8 application, based on a minimum seven-day period to review all the evidence in
9 the record after it was closed to all other parties, was not cured by petitioner's
10 ability to provide written argument in support of its appeal of the planning
11 commission's decision. The focus of the appeal was necessarily on challenging
12 errors in the planning commission's denial, not providing final written arguments
13 for why the planning commission should approve the application, or proposing
14 conditions to respond to issues raised in the open record period. And arguing that
15 the city council should overturn the planning commission decision, and approve
16 the application, places petitioner in a more difficult posture with a more difficult
17 burden. Petitioner was prejudiced by the planning commission's violation of
18 ORS 197.797(6)(e), and we do not see that the appeal to city council cured that
19 prejudice.

1 **C. Conclusion**

2 The planning commission's violations of ORS 197.797(6)(c) and (e)
3 require remand for remedial proceedings consistent with those statutory
4 obligations.

5 The first and second assignments of error are sustained.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioner argues that two planning commission members failed to disclose
8 *ex parte* contacts and relied on evidence outside the record in deliberating and
9 voting to deny the application, in violation of ORS 227.180(3).⁸ Petitioner argues
10 that it timely objected to the alleged violation of ORS 227.180(3), but the
11 planning commission refused petitioner's request for an opportunity to rebut the
12 alleged *ex parte* contacts. Further, petitioner contends that the planning

⁸ ORS 227.180(3) provides:

“No decision or action of a planning commission or city governing body shall be invalid due to *ex parte* contact or bias resulting from *ex parte* contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:

“(a) Places on the record the substance of any written or oral *ex parte* communications concerning the decision or action; and

“(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related.”

1 commission's violations of ORS 227.180(3) were not cured by the city council's
2 on-the-record review.

3 **A. Commissioner Chavez**

4 One set of allegations concerns Commissioner Chavez, who during the
5 October 22, 2025 deliberations revealed that he had conducted a site visit the
6 week before, to view the subject property from the adjoining property owned by
7 intervenor Madrid, after obtaining permission from intervenor.⁹ Later,
8 Commissioner Chavez referenced his site visit in discussing noise.¹⁰ Petitioner
9 contends that the information gained from the site visit, including any *ex parte*

⁹ Petitioner quotes Commissioner Chavez from the audio of the October 22, 2025 deliberations:

"I took the liberty last week to go and check the site in person. And I didn't want to trespass that property where the new gas station is being proposed, so I went and asked Mr. Felix Madrid, allow me access to see the property, the gas station property, from his property, and definitely he has a nice area for wine tasting. * * * I will say it will destroy Mr. Madrid's winery." Petition for Review 12 n 7.

¹⁰ Petitioner quotes Commissioner Chavez from the audio of the October 22, 2025 deliberations:

"[N]oise—noise, it's a big deal. * * * You have people, you know, with big mufflers coming. You have people with loud radios and music playing slamming doors. Like I said, I went to that property next to it, and it was pretty quiet and nice, even though it's a highway right there. I mean, he has a lot of trees, and somehow they kind of like help with the noise. And I don't think that six feet tall wall is going to help." Petition for Review 13 n 8.

1 communications with intervenor, should have been disclosed at the public
2 hearing, and petitioner should have been provided an opportunity to provide
3 evidentiary rebuttal to the information conveyed in the disclosure.

4 The city responds that a site visit is not in itself an “*ex parte* contact” for
5 purposes of ORS 227.180(3), unless the site visit also happens to include *ex parte*
6 communications, citing *Carrigg v. City of Enterprise*, 48 Or LUBA 328 (2004).

7 The city argues that to constitute an “*ex parte* contact” the communication must
8 concern factual or legal assertions regarding the substance of the land use matter
9 before the planning commission. In the present case, the city argues that
10 petitioner has not established that Commissioner Chavez did more than ask
11 intervenor for permission to view the subject property from intervenor’s
12 adjoining winery.

13 We agree with the city that if the communication between intervenor and
14 Commissioner Chavez consisted solely of asking and obtaining permission to
15 enter intervenor’s property in order to view the subject site, then ORS 227.180(3)
16 does not require disclosure of such communications. The content of such
17 communication would have no bearing on the approval criteria or other
18 substantive matters. But Commissioner Chavez did not state that his conversation
19 with intervenor was limited to asking permission, and the timing of the
20 disclosure, during deliberations, did not allow opportunity for petitioner or other
21 parties to ask the commissioner to clarify the content of the conversation with
22 intervenor. Further, as we noted in *Carrigg*, case law, independent of ORS

1 227.178(3), requires timely disclosure of information gained from a site visit, and
2 an opportunity to rebut that information. 48 Or LUBA at 333, n 4 (citing *Fasano*
3 *v. Washington Co. Comm.*, 264 Or 574, 507 P2d 23 (1973)). As petitioner argues,
4 the planning commission denied the application in part based on impacts to
5 adjoining properties and the character of the area. Commissioner Chavez
6 appeared to gain information from the site visit that he cited in discussing impacts
7 to adjoining property and the character of the area. Petitioner objected to lack of
8 timely disclosure of the site visit and requested an opportunity to rebut
9 information gained from the site visit, including regarding noise impacts. We
10 agree with petitioner that the city erred in refusing that request. Petitioner's
11 substantial rights were prejudiced thereby, and the city council's subsequent on-
12 the-record review and decision based in part on the planning commission's
13 findings did not cure that error and prejudice.

14 Petitioner also argues that during deliberations Commissioner Chavez,
15 who is an engineer, relied on his professional background to express views
16 regarding traffic safety and fuel-truck turning radius, views that contradicted
17 petitioner's expert evidence, and that petitioner would have rebutted with
18 additional expert testimony if given the opportunity. The city responds that land
19 use decision-makers are not expected to leave their real-world experiences and
20 knowledge behind when they walk into a land use hearing. While that is true,
21 land use decision-makers are expected to make decisions based solely on
22 evidence submitted during the public process. Generally, a land use decision-

1 maker should avoid offering evidence or testimony that bears on approval or
2 denial of a land use application, particularly on technical matters subject to expert
3 testimony. If a decision-maker decides to offer such evidence, it is incumbent on
4 the local government to ensure that that evidence is submitted during a portion of
5 the public process that offers an opportunity for response or rebuttal. We agree
6 with petitioner that the city erred in refusing petitioner an opportunity to rebut
7 Commissioner Chavez's statements regarding traffic safety and fuel-truck
8 turning radius.

9 **B. Commissioner Fernandez-Madrid**

10 During deliberations, Commissioner Fernandez-Madrid referenced a
11 recent newspaper article about a fatal vehicle/pedestrian accident in discussing
12 traffic safety issues with the proposed gas station. The newspaper article is not in
13 the record. Commissioner Fernandez-Madrid also referenced her personal
14 experience driving by a different gas station owned by petitioner. Petitioner
15 argues that the city erred in refusing petitioner an opportunity to respond to the
16 referenced evidence. Again, the city responds that land use decision-makers need
17 not leave their personal experiences at the door. However, as discussed above, if
18 a decisionmaker introduces into the record evidence outside the record that
19 relates to approval or denial of an application, the local government must provide
20 an opportunity for participants to challenge or rebut that evidence.

21 Finally, petitioner argues that Commissioner Fernandez-Madrid failed to
22 disclose actual or potential conflicts of interest with respect to the adjoining

1 property owner, intervenor Felix Madrid. However, as discussed earlier in
2 addressing petitioner's motion to take evidence, petitioner has not pointed to any
3 evidence that demonstrates the asserted potential conflict of interest and, thus,
4 has not established that the commissioner was obligated to disclose any alleged
5 conflicts of interest with respect to intervenor.

6 **C. Conclusion**

7 As with the first two assignments of error, the city must conduct remedial
8 evidentiary proceedings on remand to correct the identified procedural errors. As
9 noted, the scope and procedures employed in those proceedings may differ
10 depending on whether the matter is returned to the planning commission, or
11 retained by the city council.

12 The third assignment of error is sustained, in part.

13 **FOURTH ASSIGNMENT OF ERROR**

14 Petitioner argues that the city failed to provide an impartial tribunal,
15 because both disclosed documents in the record and undisclosed documents
16 outside the record demonstrate that Councilor Turrell was biased against the
17 application.

18 The city responds, initially, that petitioner failed to timely object to
19 Councilor Turrell's participation. The city argues that at the beginning of the
20 December 9, 2025 city council hearing, staff called for disclosure of any *ex parte*

1 contacts or bias.¹¹ Councilor Turrell disclosed that prior to being elected to the
2 City Council she had signed an online petition regarding the application.
3 Councilor Turrell then stated that she would be basing her decision on the
4 applicable criteria and the information in the record. City staff called for any
5 challenges to participation, but no one objected or challenged at that time. The
6 city council then proceeded to hear public testimony and argument, with
7 petitioner's counsel speaking last. The mayor then closed the public portion of
8 the hearing, and opened deliberations. Commissioner Turrell spoke first and
9 ultimately moved to affirm the planning commission denial. During discussion
10 on Turrell's motion, petitioner's counsel interjected with a bias challenge to
11 Councilor Turrell's participation. Respondent's Brief 16 (citing audio of the
12 December 9, 2025 hearing at 03:03:39 to 03:04:02). Staff rejected that challenge
13 as untimely. The city then proceeded to vote on Turrell's motion, which passed
14 6-1.

15 The city argues that petitioner's failure to object earlier in the hearing,
16 when staff called for objections or challenges, means that petitioner failed to
17 timely preserve the issue for appeal. Petitioner replies that Councilor Turrell's
18 disclosure of the online petition was misleading and inadequate, failing to

¹¹ City of Carlton Development Code (CDC) 17.196.020(A)(4) requires that during the public hearing on a land use matter, the decision-makers must "declare any bias, conflicts of interest or ex parte contacts."

1 describe the content of her comments in opposition to the application.¹² Further,
2 petitioner argues that the councilor failed entirely to disclose her statements as a
3 candidate in opposition to the application, as discussed in the motion to take
4 evidence,¹³ as well as her personal appearance at the August 24, 2024 planning
5 commission in opposition to the proposed gas station, which was then in pre-
6 application status. We understand petitioner to argue that the commissioner's
7 inadequate disclosure and failure to disclose obviates any requirement for a more
8 timely challenge. In any case, petitioner contends that its objection was timely
9 enough, in that it was made prior to the city council vote and thus allowed
10 opportunity for the city council to address the challenge prior to the vote.

11 The city cites nothing in the CDC or elsewhere indicating that an objection
12 based on bias must be lodged no later than the public call at the hearing for

¹² Councilor Turrell wrote in the online petition:

“This gas station will be adjacent to our creek and be an unnecessary risk to our waterways. This is an inappropriate business to site adjacent to wetlands and Hawn Creek as well as an unnecessary health risk for residents in the vicinity.” Record 740.

¹³ In the *Yamhill County News-Register* article, then-candidate Turrell stated that a top concern for the city council would be “explosive and poorly regulated growth including the potential gas station on the banks of Hawn Creek. Carlton has failed our residents by allowing fueling stations as a conditional use on Hawn Creek. I will ensure that our City follows the lead of other cities who restrict the operations and siting of fuel stations and prevent polluted stormwater runoff from entering waterways.” Petition for Review 17.

1 objections.¹⁴ As far as we can tell, the CDC does not specify that bias challenges
2 be lodged no later than the call for challenges, or even require that there be a call
3 for challenges at all. The nature of bias challenges means that the information
4 supporting such challenges is often not in the record and may be inadequately
5 disclosed, or not disclosed at all. We agree with petitioner that under CDC
6 17.196.020(A)(4), Councilor Turrell was obligated to disclose “any bias,” which
7 would include disclosure of her prior opposition to the application expressed in
8 the candidate statement and in her appearance at the planning commission
9 meeting. Had she timely disclosed that prior opposition, and discussed the
10 contents of the online petition that was in the planning commission record,
11 petitioner might have lodged a challenge in response to the public call for
12 objections at the hearing. Because the councilor’s failure to disclose arguably
13 affected the timing of petitioner’s challenge, we agree with petitioner that the
14 belated timing of its challenge is not a bar to LUBA’s review of this assignment
15 of error.

16 On the merits of the bias challenge, the city argues that Councilor Turrell’s
17 disclosure of the online petition was adequate, because that petition was in the
18 planning commission record and thus its contents were available to petitioner,

¹⁴ Some local government land use regulations do require that bias challenges be lodged prior to a certain stage of the proceedings. *See, e.g., Heceta Water District v. Lane County*, 24 Or LUBA 402, 424, n19 (1993) (citing such a requirement in Lane Code).

1 even if the councilor did not repeat or discuss those contents at the December 9,
2 2025 hearing. The city does not dispute that Councilor Turrell failed to disclose
3 the statements in the *Yamhill County News-Register* or her appearance in
4 opposition at the August 12, 2024 planning commission meeting. However, the
5 city argues that all of her statements in opposition are insufficient to demonstrate
6 “actual bias,” as required under *Columbia Riverkeeper v. Clatsop County*, 267 Or
7 App 578, 341 P3d 790 (2014). The city also emphasizes that Councilor Turrell
8 stated at the December 9, 2024 city council hearing that she could act impartially
9 despite her prior statements made in opposition to the application, and that she
10 could decide the matter based solely on the evidence and the applicable code
11 provisions.

12 To obtain remand based on a decision-maker’s bias, a petitioner must
13 demonstrate that the decisionmaker was actually biased against the specific
14 application before the tribunal. *Columbia Riverkeeper*, 267 Or App at 602.
15 Potential or perceived bias is insufficient. Actual bias must be demonstrated by
16 “explicit statements, pledges or commitments that the elected local official has
17 prejudged the specific matter before the tribunal.” *Id.* at 609-10. Petitioner argues
18 that the cited statements by Councilor Turrell are directed at this specific
19 proposal, and the online petition in particular was submitted into the record
20 before the planning commission in this matter, specifically to oppose the
21 application. According to petitioner, these statements taken as a whole indicate
22 that Turrell believed that development of *any* gas station at this location would

1 be “inappropriate,” regardless of whether a proposed station complied with the
2 approval criteria.

3 In our view, it is a close question whether the statements cited to us are
4 sufficient to demonstrate that Councilor Turrell prejudged the application that
5 eventually came before her as city councilor. Her statements in the online petition
6 and the newspaper article can be understood, as petitioner argues, to suggest that
7 she is opposed to any gas station development on the subject property, regardless
8 of whether it satisfies the applicable conditional use standards. Her personal
9 appearance at the planning commission meeting to express concerns about the
10 proposed gas station, even when the proposal was not then before the planning
11 commission, suggests a degree of personal advocacy and commitment that goes
12 beyond abstract policy disagreement.

13 That said, we need not and do not reach any conclusion regarding whether
14 petitioner has demonstrated that Councilor Turrell was actually biased against the
15 application. Petitioner’s bias claims also include a procedural component.
16 Petitioner argues under this assignment of error that Councilor Turrell
17 inadequately disclosed potential bias reflected in her comments on the online
18 petition, and failed entirely to disclose potential bias reflected in her statements
19 as a candidate and her advocacy before the planning commission. We understand
20 petitioner to argue that had these statements been fully disclosed, petitioner
21 would have had the opportunity to inquire further about the content of the
22 disclosures and perhaps present a more fully developed challenge to the

1 councilor's participation. In addition, Councilor Turrell would have the
2 opportunity to respond to those challenges and the city could decide how to
3 proceed on a more complete record.

4 Because the challenged decision must be remanded in any event under the
5 first, second, and third assignments of error to correct several procedural errors,
6 we conclude that the better course is to remand in part under this assignment of
7 error, to allow the city the opportunity to address, correct or avoid any prejudice
8 resulting from Councilor Turrell's inadequate or nonexistent disclosures
9 regarding bias. If the proceedings on remand include the city council, and
10 Councilor Turrell participates in those proceedings, the city should provide the
11 councilor with opportunity to fully disclose the contents of prior statements that
12 could reflect bias. Further, petitioner and other participants should be provided
13 an opportunity to inquire into the adequacy of such disclosures, and present
14 argument and evidence in support of any subsequent challenges to the councilor's
15 participation.

16 The fourth assignment of error is sustained, in part.

17 **FIFTH ASSIGNMENT OF ERROR**

18 Petitioner argues that Planning Commissioner Fernandez-Madrid failed to
19 disclose an actual or potential conflict of interest, as required by ORS 244.120(2).
20 As defined under ORS 244.020(1), an "actual" conflict of interest is one where
21 taking official action "would" be a "private pecuniary benefit or detriment" to the
22 public official or that official's relative, or any business with which the person or

1 a relative or member of the household of the person is associated. A “potential”
2 conflict of interest exists where the official act “could” result in financial benefit
3 or detriment to the same persons. ORS 244.020(13). As noted above, petitioner
4 alleges that Commissioner Fernandez-Madrid may currently receive child
5 support payments from intervenor Felix Madrid, which petitioner argues would
6 constitute either an actual or potential conflict of interest, requiring, at a
7 minimum, disclosure of the conflict.

8 However, that allegation rests entirely on speculation based on judicial
9 records that are not in the evidentiary record and that, as discussed above, do not
10 warrant taking into the LUBA record pursuant to OAR 661-010-0045.
11 Accordingly, petitioner’s arguments under this assignment of error do not
12 provide a basis for reversal or remand.

13 The fifth assignment of error is denied.

14 **SIXTH ASSIGNMENT OF ERROR**

15 ORS 227.178(1) requires the city to issue a decision on a land use permit
16 within 120 days after the application is deemed complete. That deadline can be
17 extended at the written request of the applicant. ORS 227.178(5). The city cannot
18 compel an applicant to waive the 120-day period as a condition for taking action
19 on a permit application. ORS 227.178(10). If the city fails to issue a final decision
20 within the 120-day period, as extended, then several consequences follow,
21 including refunding half of the application fees. Another consequence is that the

1 applicant can file a petition for a writ of mandamus under ORS 34.130 to compel
2 the city to approve the application. ORS 227.179(1).

3 If the local government denies the permit application within the 120-day
4 period, but that denial was “for the purpose of avoiding the requirements” of ORS
5 227.178, then LUBA is authorized to reverse the local government decision and
6 order the local government to grant approval of the application. ORS
7 197.835(10)(a).¹⁵ In that event, LUBA must award attorney fees to the applicant
8 and against the local government. ORS 197.835(10)(b). ORS 197.835(10)(a) is
9 intended to protect applicants, by discouraging local governments from spurious,
10 bad faith denials prior to the 120th day. *Miller v. Multnomah County*, 33 Or
11 LUBA 644 (1997), *aff’d*, 153 Or App 30, 956 P2d 209 (1998); *Wal-Mart Stores*,

¹⁵ ORS 197.835(10) provides, in relevant part:

“(a) [LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:

“* * *

“(B) That the local government’s action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.

“(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government.”

1 *Inc. v. City of Central Point*, 49 Or LUBA 697, 708 (2005). Conversely, ORS
2 197.835(10)(a)(B) does not apply where the local government denial, timely or
3 untimely, is based on the merits of the application. *Wal-Mart Stores, Inc.*, 49 Or
4 LUBA at 707-08.

5 In the present case, petitioner argues that when the planning commission
6 rejected petitioner's request for evidentiary rebuttal and an opportunity to submit
7 final written argument, as required by ORS 197.797(6)(c) and (e), it did so in an
8 attempt to expedite the process and ensure that the city rendered a decision within
9 the 120-day deadline set out in ORS 227.178(1). Petitioner argues that the
10 planning commission's actions in refusing to allow rebuttal and final written
11 argument were for the "purpose of avoiding the requirements of" ORS
12 227.178(1) (or more precisely avoiding the consequences of violating the
13 statute), thus invoking ORS 197.835(10)(a)(B).

14 The city and intervenor both respond that petitioner failed to preserve this
15 issue below, by failing to argue that refusing to allow rebuttal or final argument,
16 and proceeding to deliberate and approve or deny the application, would
17 constitute an action "for the purpose of avoiding the requirements of" ORS
18 227.178(1), pursuant to ORS 197.835(10)(a)(B). ORS 197.797(1).¹⁶

¹⁶ ORS 197.797(1) provides:

"An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government.

1 In addition, intervenor argues that petitioner failed to exhaust this issue, by
2 failing to specify the issue as a basis for appeal in its appeal to the city council.
3 ORS 197.825(2)(a).¹⁷ See *Miles v. City of Florence*, 190 Or App 500, 509-10, 79
4 P3d 382 (2003) (where the local code requires the appellant to specify the
5 grounds for appeal, failure to specify an issue in the local appeal means that that
6 issue has not been “exhausted” for purposes of ORS 197.825(2)(a)).

7 While petitioner raised issues below under ORS 197.797(6)(c) and (e), and
8 referred at various times to the 120-day deadline set out in ORS 227.178(1),
9 respondents argue that at no point did petitioner cite ORS 197.835(10)(a)(B) or
10 connect the dots between ORS 197.797(6)(c) and (e) and the 120-day deadline
11 into the issue presented under this assignment of error.

12 The reply brief includes no response to respondents’ waiver or exhaustion
13 challenges under this assignment of error.¹⁸ We agree with respondents that

Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

¹⁷ ORS 197.825(2)(a) provides that LUBA’s jurisdiction is “limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]”

¹⁸ In the rebuttal portion of oral argument, petitioner did offer a verbal response, arguing that in raising issues under ORS 197.797(6)(c) and (e), petitioner had sufficiently raised below the same “issue” raised in this assignment of error, notwithstanding failure to cite ORS 197.835(10)(a)(B) and failure to argue that denial of the application without providing rebuttal and final written argument would constitute taking action to avoid the requirements of ORS

1 petitioner has not established that the issue presented in this assignment of error
2 was preserved below, or explained why preservation is not required. The
3 preservation section of this assignment does not cite to any place in the record
4 where this issue was fairly raised below. *Boldt v. Clackamas County*, 107 Or App
5 619, 622, 813 P2d 1978 (1991) (the “raise-it-or-waive-it” principle embodied in
6 ORS 197.797(1) (*former* ORS 197.763(1)) requires “fair notice” to the
7 decisionmaker and parties). The theory presented under this assignment of
8 error—that refusing to provide procedures required by ORS 197.797(6)(c) and
9 (e), and then proceeding to deny the application on the merits, constitute a
10 spurious, bad-faith denial in an attempt to avoid the requirements of ORS
11 227.178(1)—was not raised at all below, as far as petitioner has demonstrated.
12 Petitioner has also not explained why preservation is not required for this issue.
13 Accordingly, the issue presented in this assignment of error is waived under ORS
14 197.797(1). Further, because petitioner has not demonstrated that that issue was
15 specified in petitioner’s local appeal to the city council, that issue has not been
16 “exhausted” for purposes of ORS 197.825(2)(a).

227.181(1). However, it is generally inappropriate to wait until the rebuttal portion of oral argument to respond to waiver challenges in the response brief. *Boucot v. City of Corvallis*, 60 Or LUBA 57, 70 n 11 (2009). Such responses should be made in a reply brief, or at the latest in the opening portion of oral argument. In any case, we agree with respondents that the issue raised in this assignment of error is a qualitatively different issue than compliance with the procedural issues raised below under ORS 197.797(6)(c) and (e). *Willamette Oaks, LLC v. City of Eugene*, 295 Or App 757, 766, 437 P3d 314, *rev den*, 365 Or 192 (2019).

1 The sixth assignment of error is denied.

2 **SEVENTH, EIGHTH, AND NINTH ASSIGNMENTS OF ERROR**

3 The seventh, eighth, and ninth assignments of error challenge the merits of
4 the city's denial of the conditional use permit, site design permit, and floodplain
5 development permit, respectively. However, as explained under the first, second,
6 third, and fourth assignments of error, remand is necessary for the city to conduct
7 new evidentiary proceedings to correct several procedural errors, and to adopt a
8 new decision, supported by a different evidentiary record and, likely, different
9 findings, approving or denying the three permit applications. Accordingly, no
10 purpose would be served by resolving the current challenges to the evidence and
11 findings supporting the city's denials of those permits.

12 We do not reach the seventh, eighth, or ninth assignments of error.

13 The city's decision is remanded.

Certificate of Mailing

I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 2025-088 on July 22, 2026, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 22nd day of July, 2026.



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