

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

3
4 PAUL CONTE and BRYN THOMS,
5 *Petitioners,*

01/11/18 PM 1:50 LUBA

6
7 and

8
9 RACHEL STEDMAN,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 CITY OF EUGENE,
15 *Respondent,*

16
17 and

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

21
22 ORDER

23
24 LUBA No. 2017-063
25

26 Before the Board are a number of motions filed by the parties in the
27 weeks preceding and following oral argument in this appeal, which concerns a
28 planning commission approval of a 29-unit planned unit development (PUD).
29 We address each in turn.

30 **REPLY BRIEFS**

31 Petitioners Paul Conte and Bryn Thoms move to file reply briefs to the
32 response briefs filed by the city and intervenor-respondent Oakleigh Meadow

1 Co-Housing (OMC). Intervenor-petitioner Stedman (Stedman) also moves to
2 file reply briefs to the two response briefs. Both the city and OMC object to
3 portions of the four reply briefs, arguing that they are not confined to “new
4 matters” within the meaning of OAR 661-010-0039 (limiting reply briefs to
5 “new matters” raised in the response briefs).

6 LUBA has held that “new matters” within the meaning of OAR 661-010-
7 0039 include (1) responses that an argument in the petition for review should
8 fail regardless of its stated merits (*i.e.*, something in the nature of an affirmative
9 defense), and (2) responses to assignments of error that otherwise could not
10 reasonably have been anticipated. *Foland v. Jackson County*, 61 Or LUBA 264,
11 266-67, *aff'd* 239 Or App 60, 243 P3d 830 (2010). Reply briefs that simply
12 embellish or elaborate arguments made in the petition for review, rebut direct
13 responses to the merits of arguments made in the petition for review, offer new
14 arguments in support of an assignment of error, or advance new bases for
15 reversal or remand are not authorized by OAR 661-010-0039.

16 With the exceptions set forth below, the four reply briefs filed by
17 petitioners and Stedman consist mostly of one or more of the latter type of
18 arguments that are not responsive to new matters. The exceptions are (1)
19 Section D and H of petitioners’ reply to the city’s response brief, (2) Sections
20 E, J and M of petitioners’ reply to OMC’s response brief, (3) Sections F and M
21 of Stedman’s reply to OMC’s response brief, and (4) Section M of Stedman’s
22 reply to the city’s response brief. Those portions of the reply briefs are

1 allowed. LUBA will not consider arguments in other portions of the reply
2 briefs.

3 **MOTIONS TO TAKE EVIDENCE**

4 LUBA's review is generally limited to the record. ORS 197.835(2)(a).
5 Petitioners and Stedman have filed a number of motions to take evidence
6 outside the record, pursuant to OAR 661-010-0045, which in relevant part
7 provides that LUBA may consider evidence outside the record where there are
8 "disputed factual allegations in the parties' briefs concerning * * * procedural
9 irregularities not shown in the record and which, if proved, would warrant
10 reversal or remand of the decision."¹ A motion to take evidence must be
11 supported by the arguments and documents specified in OAR 661-010-
12 0045(2).²

¹ OAR 661-010-0045(1) provides:

"Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. 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 OAR 661-010-0045(2) provides, in relevant part:

1 **A. Motions to Take Evidence Regarding Schoening Testimony**

2 In their respective petitions for review, petitioners and Stedman include
3 footnotes that include motions to take evidence to consider a partial transcript,
4 prepared by petitioners, of city engineer Mark Schoening’s statements to the
5 city council at its June 21, 2017 work session regarding the impact of new
6 development on unimproved roads. Petitioners and Stedman apparently offer
7 the transcript for its evidentiary value in undermining the planning

“(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.

“(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; or

“(B) An affidavit establishing the need to take evidence not available to the moving party, in the form of depositions or documents as provided in subsection (2)(c) or (d) of this rule.

“(c) Depositions: the Board may order the testimony of any witness to be taken by deposition where a party establishes the relevancy and materiality of the anticipated testimony to the grounds for the motion, and the necessity of a deposition to obtain the testimony. * * *

“(d) Subpoenas: the Board shall issue subpoenas to any party upon a showing that the witness or documents to be subpoenaed will provide evidence relevant and material to the grounds for the motion. * * *”

1 commission's findings in the present case involving the safety of Oakleigh
2 Lane, which is an issue under one or more approval criteria. However,
3 petitioners and Stedman make no attempt to identify any basis under OAR 661-
4 010-0045(1) for LUBA to consider the transcript. *See* n 1. Moreover, as
5 explained further below, there is no possible basis under OAR 661-010-
6 0045(1) for LUBA to consider evidence outside the record for its evidentiary
7 value in supporting or controverting findings of compliance with applicable
8 approval criteria. Accordingly, these motions are denied.

9 **B. Motions to Take Evidence Regarding Dahl**

10 On November 27, 2017, petitioners filed a motion to take evidence and
11 hold an evidentiary hearing regarding Mark Dahl, city deputy fire marshal, and
12 three documents attached as Exhibits E-1, E-2 and E-3 to the motion.³ Dahl
13 submitted testimony into the record that the planning commission relied upon
14 to find that applicable approval criteria regarding the adequacy and safety of
15 Oakleigh Lane are met. Petitioners seek to undermine that testimony, by
16 questioning Dahl under oath before LUBA in order to establish that (1) Dahl is
17 not an expert on street safety, (2) Dahl's testimony does not meet a reasonable

³ At Petition for Review 51, n 7, petitioners moved to take evidence outside the record to allow LUBA to consider two documents in Exhibits I and J, also involving Dahl. In the November 27, 2017 motion to take evidence regarding Dahl, petitioners state that that motion replaces the motion included in the petition for review at page 51, n 7. Accordingly, we do not consider n 7 or Exhibits I and J to the petition for review.

1 standard for expert testimony, (3) the documents attached to the motion to take
2 evidence will demonstrate that Dahl's testimony to the city in this case
3 conflicts with the fire department's accepted practices, and Dahl's own
4 approach in a different land use application. In short, petitioners seek to
5 discredit Dahl's testimony and thereby demonstrate that the planning
6 commission's findings relying on Dahl's testimony to establish compliance
7 with applicable approval criteria are not supported by substantial evidence.

8 The city responds that the document in Exhibit E-1 is already in the
9 record, and that no motion is necessary for the Board to consider that
10 document. With respect to the other documents and the request to question
11 Dahl under oath, the city responds that a motion to take evidence under OAR
12 661-010-0045(1) is not a permissible vehicle for petitioners to introduce
13 evidence into the record to discredit or controvert Dahl's testimony in the
14 record. *See Jones v. Lane County*, 27 Or LUBA 654 (1994) ("an evidentiary
15 hearing before LUBA is not available to permit parties an unrestricted
16 opportunity to present additional evidence that was not submitted during the
17 local proceedings."); *St. Johns Neighborhood Assn. v. City of Portland*, 33 Or
18 LUBA 836, 838 (1997) (evidentiary proceedings before LUBA do not provide
19 a mechanism to add to the local record facts that could have been, but were not,
20 submitted during the course of the local proceedings); *Johnson v. Jefferson*
21 *County*, 56 Or LUBA 72, 78, *aff'd* 221 Or App 156, 189 P3d 30 (2008) (OAR

1 661-010-0045(1) does not allow parties to “provide an evidentiary rebuttal to
2 the factual conclusions adopted by the [local decision maker] in its decision.”)

3 We agree with the city. None of the permissible bases for taking
4 evidence outside the record listed in OAR 661-010-0045(1) include submitting
5 additional evidence in order to support or controvert findings of compliance
6 with applicable approval criteria. The two bases in OAR 661-010-0045(1) that
7 petitioners cite are (1) procedural irregularities not shown in the record and (2)
8 disputes regarding the content of the record. But petitioners identify no
9 *procedure* violated with respect to Dahl’s testimony or the planning
10 commission’s reliance on that testimony. The closest petitioners come is to
11 argue that Dahl would not qualify as an expert in a judicial proceeding
12 conducted under the Oregon Evidence Code or Federal Rules of Evidence.
13 However, state and federal rules of evidence do not apply to quasi-judicial land
14 use proceedings. *See* EC 9.7072(5) (“Formal rules of evidence as used in courts
15 of law shall not apply.”); *Foland v. Jackson County*, 70 Or LUBA 247, 257
16 (2014)(“Land use proceedings are not governed by rules of evidence”); *Reagan*
17 *v. City of Oregon City*, 39 Or LUBA 672, 678-679 (2001)(“[T]he city
18 commission is not required to apply the Oregon Rules of Evidence in its land
19 use proceeding[.]”).

20 As for “disputes regarding the content of the record,” that basis allows
21 LUBA to consider extra-record evidence concerning whether and how items
22 entered the local record, in order to resolve record objections or other disputes

1 regarding the content of the record. There is no dispute about the content of
2 the record in the present case. In any case, evidence that LUBA considers
3 under OAR 661-010-0045 becomes part of LUBA's record, but does not enter
4 the local evidentiary record, and cannot be used to controvert or undermine
5 evidence that is in the local evidentiary record, or to undermine the credibility
6 of expert testimony in the record. OAR 661-010-0045 is not a vehicle for
7 parties to submit evidence in the record in order to support or controvert
8 findings of compliance with applicable approval criteria, which is essentially
9 what petitioners seek to do in this motion. Accordingly, petitioners' November
10 27, 2017 motion to take evidence outside the record regarding Dahl is denied.

11 **C. Motion to Take Evidence Regarding Weishar**

12 OMC's traffic engineer, Weishar, provided testimony during the 2015
13 and 2017 evidentiary proceedings, on which the planning commission relied to
14 establish compliance with certain approval criteria. As with Dahl, petitioners
15 move for LUBA to consider extra-record evidence, including an evidentiary
16 hearing so that petitioners can question Weishar, in order to undermine
17 Weishar's credibility as an expert. Petitioners argue that Weishar's testimony
18 does not meet minimum standards necessary to be regarded as "expert"
19 testimony. Petitioners also seek to take into evidence a September 2017 draft
20 document entitled "Vision Zero Eugene," which they seek to question Weishar
21 about during the requested evidentiary hearing. Petitioners argue that the draft

1 “Vision Zero Eugene” document undermines Weishar’s testimony regarding
2 the safety of Oakleigh Lane.

3 However, as with the motion regarding Dahl, petitioners identify no
4 basis under OAR 661-010-0045(1) that would authorize LUBA to conduct
5 evidentiary proceedings to allow petitioners to establish that Weishar is not a
6 credible expert. Petitioners have not established the existence of any
7 “procedural irregularities not shown in the record,” or “disputes regarding the
8 content of the record,” or any other basis for LUBA to consider, or to allow
9 petitioners to produce, extra-record evidence. In addition, as explained above,
10 OAR 661-010-0045 is not a vehicle for parties to submit evidence in the record
11 in order to support or controvert findings of compliance with applicable
12 approval criteria, which is essentially what petitioners seek to do in this
13 motion. Accordingly, petitioners’ motion to take evidence and conduct an
14 evidentiary hearing to question Weishar is denied.

15 **D. Motion to Take Evidence Regarding the Capital Drive PUD**

16 On November 28, 2017, petitioners filed a motion to take evidence not in
17 the record, along with petitioners’ reply to Oakleigh Meadow’s response briefs,
18 arguing that LUBA should consider “Exhibit A,” a copy of an e-mail thread
19 among petitioner Conte and several city staff members regarding a different
20 PUD application that involves a street called Capital Drive, and proposed
21 improvements to that street. Petitioners argue that in that e-mail
22 correspondence city staff confirmed that proposed improvements to Capital

1 Drive would be subject to a process conducted by the city engineer known as
2 “Privately Engineered Public Improvements” (PEPI). Petitioners contend that
3 the e-mail correspondence supports an argument under their second assignment
4 of error, that increasing the paved width of Oakleigh Lane in the present case,
5 pursuant to a condition of approval, would also be subject to the PEPI process.

6 OMC responds, and we agree, that petitioners have failed to establish
7 that the proffered e-mail correspondence has any basis in OAR 661-010-
8 0045(1). Petitioners do not cite any basis for the motion under OAR 661-010-
9 0045(1), and we see none that would authorize LUBA to consider the e-mail
10 correspondence. We note also that whether the required improvements to
11 Oakleigh Lane will be subject to the PEPI process is a question of law, not fact,
12 and indeed not even a disputed question of law, since we do not understand the
13 city or OMC to dispute that privately engineered improvements will be subject
14 to whatever process is required by the city engineer, potentially including the
15 PEPI process.

16 Petitioners’ November 28, 2017 motion to take evidence regarding the
17 Capital Drive PUD is denied.

18 **MOTIONS TO TAKE OFFICIAL NOTICE**

19 On November 27, 2017, petitioners filed a motion to take official notice
20 of City of Eugene Resolution No. 5143, attached as Exhibit B1 to the motion.
21 Adopted on November 18, 2015, Resolution No. 5143 adopts as “official

1 policy Vision Zero’s goal of zero fatalities or serious injuries on our
2 transportation system.”

3 In response, the city does not object to LUBA’s taking official notice of
4 Exhibit B1, Resolution No. 5143. However, as the city correctly points out,
5 when LUBA takes official notice of a document, that document does not
6 become part of the local evidentiary record and may not be used “to provide
7 evidentiary support or countervailing evidence with respect to an applicable
8 approval criterion that is at issue in the challenged decision.” *Tualatin*
9 *Riverkeepers v. ODEQ*, 55 Or LUBA 688, 692 (2007); *Wal-Mart Stores, Inc. v.*
10 *City of Medford*, 47 Or LUBA 650, 656 (2004). Petitioners’ motion to take
11 official notice of Resolution No. 5143, attached to the motion as Exhibit B1, is
12 granted.

13 **OTHER MOTIONS**

14 **A. Motion and Amended Motion to Refuse to Consider OMC’s**
15 **Response Brief and Oral Arguments**

16 On November 21, 2017, OMC filed a 37-page response brief to
17 petitioners’ petition for review and an 18-page response brief to Stedman’s
18 petition for review, but the response briefs did not include the certificates of
19 compliance required by OAR 661-010-0030(2)(j), certifying, among other
20 things, that the brief does not exceed 14,000 words. On November 28, 2017,
21 LUBA issued an order requiring OMC to file and serve the certificates of
22 compliance required by OAR 661-010-0030(2)(j) within three days of the date
23 of the order. Subsequently, OMC filed certificates of compliance regarding

1 both response briefs with LUBA. The relevant certificate states that OMC's
2 response to Stedman's petition has 5,104 words. OMC's November 30, 2017
3 filings did not include the certificate of service required by OAR 661-010-
4 0075(2)(b), but were accompanied by a cover letter indicating that the letter
5 and its enclosures were copied to petitioners and Stedman.

6 On December 4, 2017, Stedman filed a "Motion to Not Consider
7 [OMC's] Response Brief and Not Allow Oral Arguments Based on that
8 Response Brief," arguing that because Stedman had not yet received the service
9 copy of the certificate of compliance and there was no indication it was ever
10 served as required by the Board's November 28, 2017 order, the necessary
11 consequence is that the Board must strike OMC's response brief and not allow
12 OMC to make oral argument, scheduled for December 5, 2017.

13 On December 8, 2017, Stedman filed an amended motion, accompanied
14 by a motion to take evidence, requesting that LUBA consider the affidavits of
15 Stedman and petitioner Conte, and an e-mail between Conte and the city
16 attorney, to demonstrate that Stedman, Conte and the city attorney had not
17 received the Stedman certificate of compliance. The affidavits state Stedman's
18 and Conte's beliefs that in fact OMC had not placed the certificate in the mail,
19 and thus had not "served" the other parties as required under LUBA's rules and
20 our November 28, 2017 order. On December 14, 2017, OMC filed a response
21 to Stedman's original and amended motion. On December 21, 2017, Stedman
22 filed a reply complaining that OMC's November 30, 2017 filing was not

1 accompanied by a certificate of service. On December 21, 2017, OMC
2 responded with an affidavit averring that the certificate of compliance was
3 placed in the mail to Stedman on November 30, 2017, as OMC's cover letter
4 indicated. OMC's response also includes another copy of the certificate of
5 compliance, and includes a certificate of service.

6 Under OAR 661-010-0075(2)(b)(B) a document is served on other
7 parties by person or by first class mail, and mail service is complete on deposit
8 in the mail. Proof of mailing is not required, and receipt is not necessary to
9 complete service. Under our rules, service of the certificate of compliance on
10 Stedman was accomplished on December 21, 2017, if not before that date, and
11 therefore no more corrective action is required.

12 Stedman argues, nonetheless, that OMC's alleged violations of LUBA's
13 rules in failing to timely (1) serve the certificate of compliance on Stedman and
14 (2) file a certificate of service with LUBA are more than "technical violations"
15 of LUBA's rules. OAR 661-010-0005 (technical violations not affecting the
16 substantial rights of parties shall not interfere with the review of a land use
17 decision or limited land use decision). Stedman continues to insist that the
18 only remedy for those untimely filings is to strike OMC's response brief and its
19 oral argument. However, Stedman makes no attempt to establish that any delay
20 in service or filing of any pleading prejudiced her substantial rights in this
21 appeal, and we see no prejudice. Accordingly, Stedman's motion and amended
22 motion are denied.

1 **B. Petitioners' Motion to Accept Partial Transcript**

2 On December 7, 2017, two days after oral argument, petitioners filed a
3 motion to submit a partial transcript of a recording of a planning commission
4 meeting in this appeal. The city opposes the motion and the transcript, arguing
5 that while OAR 661-010-0030(5) allows a petitioner to prepare and submit a
6 verbatim transcript as an attachment to the petition for review, LUBA's rules
7 do not allow a petitioner to prepare a *non-verbatim* transcript and submit it to
8 LUBA *after oral argument*. The city argues that the late filing of a non-
9 verbatim transcript prejudiced the city's ability to evaluate the accuracy of the
10 partial transcript.

11 We agree with the city that the time to submit a transcript to LUBA in
12 support of an argument in the petition for review is when the petition for
13 review is filed. Submitting such a transcript after the deadline for filing the
14 petition for review is essentially amending the petition for review. Amending
15 the petition for review long after the deadline for filing the petition, indeed,
16 after oral argument, is inherently prejudicial to the other parties' substantial
17 rights in this appeal. The motion to accept the partial transcript is denied.

18 Dated this 11th day of January, 2018.

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23 _____
24 Tod A. Bassham
 Board Member