

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

3 KELLOGG LAKE FRIENDS, an Oregon)
 Non-profit Corporation,)

4 Petitioner,)

5 v.)

6 CITY OF MILWAUKIE,)

7 Respondent,)

8 and)

9 FIRST WESTERN SERVICE)
10 CORPORATION,)

11 Intervenor-Respondent.)

LUBA No. 88-022

ORDER ON MOTION TO FILE
AN AMENDED STATEMENT OF
STANDING OF PETITIONER

12 Pursuant to OAR 661-10-030(4),¹ petitioner moves to amend
13 the statement of standing in its petition for review.
14 Petitioner seeks to add allegations that (1) the city
15 recognized the interests of petitioner and its members, (2)
16 petitioner's president appealed the planning commission
17 decision to the city council, (3) petitioner, through its
18 attorney and members, testified on the merits of respondent's
19 application, (4) the decision made by the city council was
20 contrary to petitioner's position, and (5) petitioner is
21 aggrieved by the city council's decision.

22 The inadvertent omission of an allegation of standing
23 wholly supported by the record is merely a technical violation
24 of LUBA's rules, according to petitioner. Petitioner argues
25 that amending the petition to add the proposed allegations is
26 consistent with OAR 661-10-005 because it will not prejudice

1 respondents or delay LUBA's review. Petitioner also claims
2 respondent conceded in its brief that petitioner is aggrieved
3 by the city's decision.²

4 In its brief, intervenor-respondent (respondent) challenged
5 petitioner's standing based on the allegations contained in
6 petitioner's original petition for review. Petitioner's motion
7 to amend its statement of standing was filed five days after
8 respondent's brief was filed and nine days before the scheduled
9 date of oral argument on this appeal. Respondent filed a
10 written response in opposition to petitioner's motion two days
11 before the oral argument on this appeal.

12 Respondent argues that petitioner's motion is untimely
13 because it was filed after petitioner's standing was challenged
14 by respondent, on a date when oral argument had originally been
15 scheduled³ and not until almost a week after petitioner
16 received respondent's brief. Respondent also argues that
17 petitioner's motion should not be allowed because petitioner
18 has not shown any reason why it was unable to make a complete
19 claim of standing in its original petition for review.

20 Respondent further argues that petitioner's omission of the
21 proposed allegations of standing is "substantive," rather than
22 "technical." Respondent contends the provision of OAR
23 661-10-030(4) allowing amendments to petitions for failure to
24 comply with subsections (2) or (3) of that rule should be
25 interpreted to apply to technical requirements only. Finally,
26 respondent argues that the proposed amendments to the petition

1 for review "would severely prejudice respondent's interests, in
2 that this case otherwise would be dismissed." Respondent's
3 Memorandum at 4.

4 Under OAR 661-10-030(4), LUBA determines whether to allow
5 amendment of a petition for review in accordance with
6 OAR 661-10-005. OAR 661-10-005 provides:

7 "These rules are intended to promote the speediest
8 practicable review of land use decisions, in
9 accordance with ORS 197.805-197.855, while affording
10 all interested persons reasonable notice and
11 opportunity to intervene, reasonable time to prepare
12 and submit their cases, and a full and fair hearing.
13 The rules shall be interpreted to carry out these
14 objectives and to promote justice. Technical
15 violations not affecting the substantial rights of
16 parties shall not interfere with the review of a land
17 use decision. Failure to comply with the time limit
18 for filing a Notice of Intent to Appeal under OAR
19 661-10-015(1) or a Petition for Review under OAR
20 661-10-030(1) is not a technical violation."

21 LUBA will not allow amendment of a petition for review if
22 the amendment is unnecessary or would serve no purpose.⁴
23 LUBA will also deny motions to amend petitions for review if
24 allowing the amendment would or could delay our review
25 proceeding.⁵

26 On the other hand, LUBA will allow an amendment to correct
errors or omissions in a petition for review if doing so serves
a purpose and will not materially interfere with either
repondents' ability to respond to the petition for review or
our ability to meet the statutory deadline for our final
opinion.⁶ B & L Holdings v. City of Corvallis, 1 Or LUBA
204, 205 (1980).

1 In this case it is clear that the proposed amendment of the
2 petition would serve a purpose. Petitioner's original
3 allegations are inadequate to establish standing based on
4 adverse effect.⁷ Respondent stated at oral argument that it
5 does not contest the accuracy or adequacy of the allegations of
6 standing based on aggrievement which petitioner seeks to add to
7 its petition for review.

8 Most importantly, it is clear that in this case allowing
9 the motion to amend the petition for review will not delay our
10 review proceeding. The city and respondent had an adequate
11 opportunity to reply orally and in writing to petitioner's
12 motion.⁸ As respondent does not contest the content of
13 petitioner's additional allegations of standing, it does not
14 require additional time to respond to the amended petition.
15 Thus, the issuance of LUBA's final opinion will not be delayed.

16 Finally, respondent's substantial rights are not prejudiced
17 by allowing the motion. The "substantial rights of parties"
18 referred to in OAR 661-10-005 are those identified elsewhere in
19 that rule as "the speediest practicable review" and "reasonable
20 notice and opportunity to intervene, reasonable time to prepare
21 and submit their cases, and a full and fair hearing," not a
22 right to a particular outcome of the appeal proceeding.
23 Respondent does not claim that allowing the proposed amendments
24 to petitioner's allegations of standing will deny respondent a
25 reasonable opportunity to intervene or to prepare and submit
26 its case, a full and fair hearing or a prompt decision in this

1 appeal.

2 Accordingly, petitioner's motion to file an amended
3 statement of standing is granted.

4 Dated this 13th day of June, 1988.

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Corinne C. Sherton by *[Signature]*
Corinne C. Sherton
Referee

FOOTNOTES

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OAR 661-10-030(4) provides as follows:

4 "Amended Petition: A petition for review which fails
5 to comply with subsections (2) or (3) of this section
6 may, with permission of the Board, be amended. The
7 Board shall determine whether to allow an amended
8 petition for review to be filed in accordance with
9 OAR 661-10-005."

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12 In its response to petitioner's original allegations of
13 standing, respondent states it

14 " * * * recognizes that Petitioner may be 'aggrieved'
15 by the City's decision, Jefferson Landfill Committee
16 v. Marion County, 297 Or 280, 686 P2d 310 (1984),
17 League of Women Voters of Coos County v. Coos County,
18 76 Or App 705, 712 P2d 111 (1985)." Respondent's
19 Brief at 5.

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22 Oral argument in this case was rescheduled three times,
23 with the agreement of all parties, because of schedule
24 conflicts of respondent's attorney, petitioner's attorney and
25 petitioner's members.

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28 In 1000 Friends of Oregon v. Wasco County Court, LUBA No.
29 81-132 (Order on Motion to Amend Petition for Review and Brief;
30 November 13, 1985), a motion to amend a petition for review to
31 add facts associated with an alleged procedural error was
32 denied because a detailed statement of each factual element of
33 an alleged procedural error in the petition for review is not
34 necessary. In Worcester v. City of Cannon Beach, 9 Or LUBA
35 307, 311 (1983), we said that the proposed additional
36 allegations of standing were not necessary because the original
37 allegations in the petition for review were sufficient to
38 establish petitioner's standing. In Lydon v. City of Salem, 4
39 Or LUBA 127, 130 (1981), an amendment to allegations of
40 standing in the petition for review was not allowed where the
41 additional allegations would not remedy the defect in the
42 original allegations.

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In Graap v. City of Portland, 11 Or LUBA 1, 5 (1984), we declined to allow a motion to amend a petition for review to add allegations of standing when the motion was made on the day of oral argument and allowing it would expose the appeal to possible delays, contrary to LUBA's statutory obligation. In Worcester v. City of Cannon Beach, 9 Or LUBA at 312, we denied a motion to amend the petition for review to include new allegations of standing because allowing the motion could delay respondent's brief and interfere with the scheduling of oral argument or with LUBA meeting the statutory deadline for its final opinion. In Barnes v. Polk County, 6 Or LUBA 220, 224 (1982), we said that to grant the requested amendment of the petition for review would not allow LUBA to accomplish the objective of its rules to provide the speediest practicable review while providing a full and fair opportunity for participation by interested parties.

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An additional factor to be considered in determining whether to allow a motion to amend the allegations of standing in a petition for review is the reason petitioner gives for failing to make an accurate and complete claim of standing in its original petition. Graap v. City of Portland, 11 Or LUBA at 5; Worcester v. City of Cannon Beach, 9 Or LUBA at 312. However, this factor is not determinative. Our rule allowing amended petitions for review must be balanced against the statutory and rule requirement for a speedy review process. Worcester v. City of Cannon Beach, 9 Or LUBA at 312.

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Petitioner originally alleged in its petition for review (1) it exists for the purpose of protecting Kellogg Lake, (2) it appeared in the proceeding below through its attorney and various members, and (3) its "interests in protecting Kellogg Lake as a significant natural area are adversely affected by the decision of the Milwaukie City Council." Petition for Review at 1. These allegations are insufficient to establish standing by virtue of adverse effects because they do not set out facts demonstrating how petitioner's interests are adversely affected by the city's decision. See Owyhee Conservationists v. Malheur County, 6 Or LUBA 244, 247-248 (1982); Thede v. Polk County, 3 Or LUBA 335, 337 (1981).

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The city offers no response to petitioner's motion to amend the petition for review.

1 CERTIFICATE OF MAILING

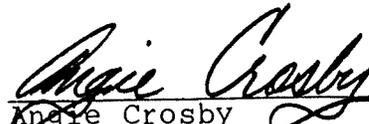
2 I hereby certify that I served the foregoing Order on
3 Motion to File an Amended Statement of Standing of Petitioner
4 for LUBA No. 88-022, on June 13, 1988, by mailing to said
5 parties or their attorney a true copy thereof contained in a
6 sealed envelope with postage prepaid addressed to said parties
7 or their attorney as follows:

8 Robert C. Shoemaker
9 Jack L. Landau
10 Lindsay, Hart, Neil & Weigler
11 222 SW Columbia, S-1800
12 Portland, OR 97204

13 Greg Eades
14 County Counsel
15 City of Milwaukie
16 10722 SE Main St.
17 Milwaukie, OR 97222

18 Mark J. Greenfield
19 Mitchell, Lang & Smith
20 101 SW Main Street
21 2000 One Main Place
22 Portland, OR 97204

23 Dated this 13th day of June, 1988.

24 
25 Angie Crosby
26 Administrative Assistant