

1 BEFORE THE LAND USE BOARD OF APPEALS
2
3 OF THE STATE OF OREGON
4

5 JAMES NICITA,
6 *Petitioner,*

7
8 vs.
9

10 CITY OF OREGON CITY,
11 *Respondent,*

12
13 and
14

15 HACKETT HOSPITALITY, LLC,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2018-038
19

20 ORDER

21 On July 18, 2018, petitioner filed a petition for review. On August 7,
22 2018, petitioner filed a motion to take evidence not in the record. OAR 661-
23 010-0045.¹ On August 8, 2018, intervenor filed a response brief and a separate

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

1 response to petitioner’s motion. Also, on August 8, 2018, the city filed a
2 response brief, which included a motion to take evidence not in the record. In
3 an order dated August 13, 2018, the Board denied petitioner’s August 7, 2018
4 motion to take evidence not in the record after concluding that petitioner had
5 not established a basis to take evidence. *Nicita v. City of Oregon City*, __ Or
6 LUBA __ (LUBA No 2018-038, Order, Aug 13, 2018).

7 On August 27, 2018, petitioner filed an amended petition for review. On
8 August 28, 2018, the Board issued an order disallowing the amended petition
9 for review. Oral argument was then held, as previously scheduled, on August
10 30, 2018. After oral argument, on August 31, 2018, the Board received
11 petitioner’s renewed motion to amend the petition for review. On September 4,
12 2018, the Board received petitioner’s renewed motion to take evidence not in
13 the record. Also, on September 4, 2018, the Board received intervenor’s
14 response opposing both petitioner’s renewed motion to amend the petition for
15 review and renewed motion to take evidence not in the record. On September
16 10, 2018, the Board received petitioner’s motion for extension of time for
17 LUBA to exceed the stipulated deadline for issuing its final opinion and order.²
18 On September 12, 2018, the Board received petitioner’s motion to file a

content of the record, requests for stays, attorney fees, or actual
damages under ORS 197.845.”

² The pending motions to take evidence “suspended the time limits for all
other events in the review proceeding, including the issuance of the Board’s
final order.” OAR 661-010-0045(9).

1 memorandum of additional points and authorities and petitioner's
2 memorandum. On September 13, 2018, the Board received intervenor's
3 response to petitioner's motion for extension of time.

4 On September 13, 2018, the Board issued an order stating that "LUBA
5 will not consider any further pleading or document that is filed in this appeal
6 unless LUBA has first granted permission to file the pleading or document."

7 On November 26, 2018, the Board received from petitioner a supplemental
8 motion to take evidence not in the record accompanied by an affidavit and
9 reproductions of photographs. On November 30, 2018, the Board received
10 from intervenor a motion to file a response to petitioner's supplemental motion
11 to take evidence.

12 We now address those pending matters.³

13 **PETITIONER'S RENEWED AND SUPPLEMENTAL MOTIONS TO**
14 **TAKE EVIDENCE**

15 Petitioner's renewed motion does not persuade us that the motion to take
16 evidence should be granted or that we erred in denying his original motion.
17 Petitioner's renewed motion to take evidence is denied.

18 Petitioner's supplemental motion to take evidence supplements and
19 incorporates by reference petitioner's renewed motion and seeks to submit

³ In a separate opinion issued this same date, we affirmed the city's decisions. *Nicita v. City of Oregon City*, __ Or LUBA __ (LUBA No 2018-038, Nov 30, 2018).

1 additional evidence. The Board grants permission to file the motion and
2 attached documents but denies the motion to take evidence because, like
3 petitioner’s other motions to take evidence, the supplemental motion fails to
4 identify a basis under OAR 661-010-0045(1) to take evidence not in the
5 record.⁴

6 **RESPONDENT’S MOTION TO TAKE EVIDENCE**

7 The city moves the board to take evidence not in the record consisting of
8 the agendas and minutes from two meetings at which the city commission
9 adopted appeal fee resolutions and an affidavit of the city recorder setting out
10 “the circumstances surrounding the provision of notice for these meetings.”
11 Respondent’s Response Brief 8. The city also seeks to introduce an affidavit of
12 the city attorney explaining the accounting for the actual attorney fees charged
13 to petitioner for the local appeal in response to petitioner’s arguments in the
14 petition for review challenging those fees. Petitioner did not respond or object
15 to the city’s motion.

16 The city asserts generally that the new evidence relates to disputed facts
17 concerning “other procedural irregularities not shown in the record.” OAR 661-
18 010-0045(1); Respondent’s Response Brief 8. The city does not assert that the
19 city’s prior procedures in adopting local appeal fees constitute “procedural
20 irregularities not shown in the record and which, if proved, would warrant

⁴ Because we deny petitioner’s supplemental motion to take evidence, we do not reach intervenor’s motion to file a response.

1 reversal or remand of the decision.” OAR 661-010-0045(1); see n 1. The city
2 does not explain on what grounds the Board can consider new evidence of the
3 actual attorney fees for the local appeal and we perceive none. *See* OAR 661-
4 010-0045(2)(a) (“A motion to take evidence shall contain a statement
5 explaining with particularity what facts the moving party seeks to establish,
6 how those facts pertain to the grounds to take evidence specified in section (1)
7 of this rule, and how those facts will affect the outcome of the review
8 proceeding.”). We conclude that the evidence the city seeks to introduce does
9 not fall within the grounds to take evidence under OAR 661-010-0045.

10 Respondent’s motion to take evidence is denied.⁵

⁵ As mentioned above, after oral argument in this matter, petitioner filed a motion for extension of time and requested that LUBA exceed the stipulated deadline for issuing its final opinion and order in this case pursuant to ORS 197.840, which permits LUBA to extend the Board’s final decision deadline if the Board finds that “the ends of justice served by granting the continuance outweigh the best interests of the public and the other parties in a decision within the 77 days.” ORS 197.840(2). The deadline for issuing LUBA’s final opinion and order in this case was suspended by the parties’ motions to take evidence. *See* OAR 661-010-0045(9) (“Effect on Time Limits: Unless the Board orders otherwise, the filing of a motion to take evidence shall suspend the time limits for all other events in the review proceeding, including the issuance of the Board’s final order.”). We resolve those motions here and issue a separate final opinion and order on the city’s underlying decisions on this same date. Accordingly, petitioner’s motion for extension of time has no effect and we do not address it.

1 **RENEWED MOTION TO AMEND PETITION FOR REVIEW**

2 As noted, on August 27, 2018, petitioner filed an amended petition for
3 review, and on August 28, 2018, the Board issued an order disallowing the
4 amended petition for review. On August 31, 2018, LUBA received a renewed
5 motion to amend the petition for review. In that motion, petitioner states that he
6 seeks to amend the petition for review “in order to correct technical
7 deficiencies, adding allegations in his second assignment of error, and to assist
8 the Board’s review by adding record and case citations and by clarifying and
9 refining text.” Petitioner’s (Renewed) Motion to Amend Petition for Review 3.
10 Petitioner generally asserts that the amendments are either “technical”
11 corrections allowable under OAR 661-010-0005 or that respondent and
12 intervenor “have had ample notice” of the new material.⁶ *Id.* at 12. Petitioner
13 also argues that the parties’ right to a speedy hearing will not be compromised

⁶ OAR 661-010-0005 provides a general policy statement governing the application of our rules:

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

1 because deadlines in this appeal have been suspended by the city’s and
2 petitioner’s motions to take evidence not in the record. *Id.* at 13.

3 Petitioner relies in large part on *Kellogg Lake Friends v. City of*
4 *Milwaukie*, 16 Or LUBA 1093 (1988), a case in which the Board allowed the
5 petitioner to amend the statement of standing in the petition for review. The
6 Board explained that “LUBA will allow an amendment to correct errors or
7 omissions in a petition for review if doing so serves a purpose and will not
8 materially interfere with either respondents’ ability to respond to the petition
9 for review or our ability to meet the statutory deadline for our final opinion.”
10 *Id.* at 1095; *see also Zippel v. Josephine County*, 26 Or LUBA 626 (1994)
11 (LUBA may allow the filing of an amended petition for review to cure failures
12 regarding specifications and content requirements for petitions for review,
13 where doing so would neither materially interfere with respondents’ ability to
14 respond to the petition for review nor delay issuance of LUBA’s final opinion
15 and order). “A petitioner may not, after the petition for review has been filed
16 and the deadline for filing the petition for review expires, supplement the
17 arguments presented therein.” *Taylor v. City of Canyonville*, 55 Or LUBA 681
18 (2007) (citing *Fechtig v. City of Albany*, 27 Or LUBA 480, 483, *aff’d* 130 Or
19 App 433, 882 P2d 138 (1994), *rev den*, 320 Or 507 (1995)).

20 In determining whether to allow an amended petition for review, LUBA
21 will consider the reason petitioner gives for requesting to amend the original
22 petition for review. *See Kellogg Lake Friends*, 16 Or LUBA at 1097 n 6 (so

1 stating). We conclude that granting petitioner’s request to amend his petition
2 for review would materially interfere with the respondents’ ability to respond
3 to the petition for review and substantially prejudice their rights. Petitioner
4 filed his amended petition for review 23 days after the response briefs were
5 filed and two days before oral argument. Petitioner filed his renewed motion to
6 amend his petition for review on the same date as oral argument.⁷ We reject
7 petitioner’s request that the Board allow what amounts to another round of
8 briefing in this case. To do so would not be fair or promote the speediest
9 practicable review of land use decisions and would materially interfere with
10 respondents’ ability to respond to the petition for review.

11 Petitioner’s renewed motion to file an amended petition for review is
12 denied.

13 **PETITIONER’S MOTION TO FILE A MEMORANDUM OF**
14 **ADDITIONAL POINTS AND AUTHORITIES**

15 On September 8, 2018, petitioner filed a motion to file a memorandum of
16 additional points and authorities. In that motion, petitioner explains the motion
17 is an effort to ensure consideration of the additional points and authorities he
18 submitted in his amended petition for review. We deny that motion for the

⁷ Petitioner also filed two separate overlength reply briefs to respond to the city’s and intervenor’s response briefs and we have allowed those reply briefs in our separate final opinion and order issued this date.

1 same reasons that we denied petitioner's renewed motion to amend the petition
2 for review.

3 Dated this 30th day of November, 2018.

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H. M. Zamudio

9 Board Member