

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MICHAEL ENG and MONICA ENG,
5 *Petitioners,*

6
7 vs.

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9 WALLOWA COUNTY,
10 *Respondent,*

11
12 and

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14 STEVEN BILBEN,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-085

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19 ORDER

20 **MOTION TO TAKE EVIDENCE**

21 On December 20, 2018, petitioners filed a motion to take evidence outside
22 the record, pursuant to OAR 661-010-0045.¹ Petitioners seek to place before

¹ 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 * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *

“(2) Motions to Take Evidence:

1 LUBA an April 26, 2018 e-mail exchange between petitioner Michael Eng and
2 County Counsel. The April 26, 2018 e-mail from Michael Eng explains the
3 difficulties petitioners have with the process the county was following for
4 obtaining and submitting evidence related to the application pending before the
5 county. County counsel did not place the email before the final decision-maker
6 or place it in the record of the county’s proceedings on the application.

7 In their motion to take evidence, we understand petitioners to cite as
8 grounds for the motion “disputed factual allegations in the parties’ briefs
9 concerning * * * procedural irregularities not shown in the record and which, if
10 proved, would warrant reversal or remand of the decision.” However, petitioners
11 have not identified a “procedural irregularity,” or attempted to demonstrate that
12 there are any “disputed factual allegations” regarding any procedural irregularity.
13 Petitioners have also not attempted to demonstrate that any procedural
14 irregularity is “not shown in the record.” If the alleged procedural irregularity is

“(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[.]”

1 the process the county employed to accept and distribute evidence submitted as
2 part of the proceeding on the application, petitioners appear to concede that the
3 facts about that process and petitioners' difficulties with that process are already
4 documented in the record.²

5 That said, we note that there may be a dispute regarding whether
6 petitioners objected to the county's process during the proceedings below.
7 LUBA has long held that a party asserting a procedural error must demonstrate
8 that the procedural error was objected to during the proceedings below, if there
9 was opportunity to lodge an objection. *Mazeski v. Wasco County*, 26 Or LUBA
10 226, 232 (1993); *Dobaj v. Beaverton*, 1 Or LUBA 237, 241 (1980).

11 In his response to the motion to take evidence, intervenor-respondent Steve
12 Bilben (intervenor) states that "petitioners failed to object to the alleged
13 procedural irregularity before the evidentiary hearing was closed in the
14 proceedings below, thereby waiving their ability to raise such an objection now."

² Petitioners state in their motion, in relevant part:

"The [r]ecord already documents the complete absence of an application and any reference by the applicant or the County's notices to any type of dwelling or approval criteria recognized by the code prior to the April 18th hearing. The record documents petitioners' objections to the difficulties they encountered obtaining the applicant's documents, the hurdles encountered obtaining documents from county offices and other evidence needed to rebut the applicant's assertions, the short time frame of the post-hearing open record period, and the fact that the County Counsel set herself up as the gate-keeper to the record." Motion to Take Evidence 5-6.

1 Response 2. In our December 7, 2018 order on record objections we concluded
2 that the April 28, 2018 email was not included in the local record. However, we
3 stated:

4 “It is also possible that in response to an argument that petitioners
5 failed to preserve a procedural assignment of error by objecting to
6 the error below, petitioners can request that LUBA consider the
7 April 26, 2018 email for that limited purpose, if necessary pursuant
8 to a motion to take evidence outside the record under OAR 661-010-
9 0045.” *Eng v. Wallowa County*, __ Or LUBA __ (LUBA No 2018-
10 085, Order, Dec 7, 2018) (slip op at 3).

11 Accordingly, we grant petitioners’ motion to take evidence to consider the
12 April 28, 2018 email for the limited purpose of allowing petitioners to cite to that
13 document to establish, if the point is disputed in a response brief, that petitioners
14 attempted to lodge objections to the county’s process.

15 The motion to take evidence is granted, in part.

16 **BRIEFING SCHEDULE**

17 The next event in this appeal proceeding is the filing of the petition for
18 review. Accordingly, the petition for review is due 21 days, and the response
19 briefs 42 days, from the date of this order. The Board’s final opinion and order
20 is due 77 days from the date of this order.

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23 Dated this 28th day of January 2019.

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Tod A. Bassham
Board Member