

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

3
4 KEVIN DRESSEL and GILLIAN DRESSEL,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF TIGARD,
10 *Respondent,*

11
12 and

13
14 TIGARD-TUALATIN SCHOOL DISTRICT 23J,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-080

18 ORDER

19 The decision on appeal is an August 19, 2019 hearings officer’s decision
20 approving intervenor-respondent’s (intervenor’s) partition of a 19.88-acre
21 property into two parcels (the Partition decision). On December 16, 2019,
22 petitioners filed their original petition for review and intervenor filed a contingent
23 cross petition for review. On December 19, 2019, LUBA scheduled oral
24 argument in this appeal for January 22, 2020.

25 On January 2, 2020, petitioners filed a motion to take evidence outside the
26 record that seeks to have LUBA consider a December 30, 2019 staff report issued
27 by the city’s planning staff in a pending conditional use permit (CUP) proceeding
28 to develop a school on one of the newly-created parcels, and to amend their
29 petition for review to add an additional assignment of error that challenges a

1 finding adopted by the hearings officer in the Partition decision. On January 2,
2 2020, petitioners also filed a supplemental petition for review. On January 6,
3 2020, intervenor filed its response to the original petition for review, and
4 petitioners filed their response to intervenor’s contingent cross petition for
5 review.

6 We resolve both petitioners’ motion to take evidence and motion to amend
7 the petition for review below.

8 **MOTION TO TAKE EVIDENCE**

9 In the pending CUP proceeding, the city is evaluating intervenor’s
10 application to develop a school on one of the parcels created by the Partition
11 decision. Petitioners request that we consider a copy of a December 30, 2019 staff
12 report generated by the city for the CUP proceeding. OAR 661-010-0045(1)
13 provides that:

14 “The Board may, upon written motion, take evidence not in the
15 record in the case of disputed factual allegations in the parties’ briefs
16 concerning unconstitutionality of the decision, standing, ex parte
17 contacts, actions for the purpose of avoiding the requirements of
18 ORS 215.427 or 227.178, or other procedural irregularities not
19 shown in the record and which, if proved, would warrant reversal or
20 remand of the decision. The Board may also upon motion or at its
21 discretion take evidence to resolve disputes regarding the content of
22 the record, requests for stays, attorney fees, or actual damages under
23 ORS 197.845.”

24 A motion to take evidence must explain the facts the moving party seeks to
25 establish, the relationship of those facts to the grounds to take evidence set forth
26 in OAR 661-010-0045(1) and how those facts affect the outcome of the

1 proceeding. OAR 661-010-0045(2). Petitioners assert that the staff report
2 contains evidence that certain funding mechanisms, required by local code to be
3 in effect prior to approval of a partition, have not been adopted by the city.
4 Petitioners maintain that is evidence of a “procedural irregularit[y]” in this case
5 warranting reversal or remand. Petitioners rely upon the staff report to support
6 the new assignment of error contained in their proposed amended petition for
7 review.

8 Tigid Land Development Code (TDC) 18.640.030.B provides, in relevant
9 part:

10 “Land use applications for subdivisions, partitions, planned
11 developments, site development reviews, and conditional uses may
12 be approved when the applicable standards in Subsection
13 18.640.030.E are met and when all of the [listed] funding
14 components of the River Terrace Funding Strategy have been
15 adopted by the city and are in effect[.]”

16 Petitioners maintain that city staff erred because they stated during the partition
17 proceeding that the funding mechanisms were in place as TDC 18.640.030.B
18 requires.¹ Motion to Take Evidence and To Amend Petition for Review (Motion)
19 3. The CUP staff report petitioners seek to have considered as evidence in this
20 case states that relevant River Terrace Funding Strategies have not been adopted

¹ Petitioners maintain that city staff misidentified the relevant code section but intended to cite TDC 18.640.030.B when asserting that the requisite funding mechanisms were in effect. Record 164. Petitioners do not assign error to hearings officer’s finding that the requisite funding mechanisms were in effect in the original petition for review. Motion 3 n 2.

1 by the city and are not in effect. Petitioners argue that “The Staff Report is
2 evidence of the misstatement by the City in the record that has direct bearing on
3 the approval criteria. Such a misstatement is a procedural irregularity and
4 establishes grounds for the Board to take evidence not in the record.” Motion 3.

5 Petitioners cite *Palmer v. Lane County*, 32 Or LUBA 484 (1997) in support
6 of their position. In *Palmer*, the petitioner argued that the county relied on a map
7 it knew was inaccurate as support for conclusions related to property access. The
8 petitioners did not argue that a procedural irregularity prevented them from
9 presenting evidence concerning property access, and we concluded that an
10 evidentiary hearing is not a vehicle for allowing the expansion of evidence and
11 testimony beyond that presented below.

12 Here, petitioners argue that the staff report they wish to introduce into
13 evidence establishes that the city improperly relied on an alleged misstatement
14 by staff in the partition proceeding to find that the necessary funding mechanisms
15 had been adopted. Petitioners do not allege that they were prevented from
16 submitting evidence during the proceedings that led to the Partition decision that
17 the necessary funding mechanisms had, in fact, not been adopted or challenging
18 staff’s statement that the necessary funding mechanisms were in place.
19 Petitioners do not allege that they were prevented from responding to a fee chart
20 submitted by intervenor as evidence that the requisite funding mechanisms were
21 in place.

1 Moreover, we do not think that petitioners have established that a
2 misstatement in the partition proceeding, even if we assume for purposes of this
3 order that it is in fact a misstatement, qualifies as a “procedural irregularit[y] not
4 shown in the record *and which, if proved, would warrant reversal or remand of*
5 *the decision.*” OAR 661-010-0045(1) (emphasis added). In order to satisfy OAR
6 661-010-0045(1), petitioners must establish both a “procedural irregularit[y]”
7 and that “if proved” that procedural irregularity would “warrant reversal or
8 remand of the decision.”² Petitioners do not point to any applicable procedure
9 that the city allegedly violated in misstating the status of the required funding
10 mechanisms. Petitioners also do not allege in either their original petition for
11 review or the amended petition for review that the hearings officer committed a
12 procedural error in relying upon staff representations and that such error
13 prejudiced their substantial rights. In other words, petitioners have not
14 established that a procedural irregularity occurred, or that any procedural
15 irregularity that may have occurred “would warrant reversal or remand of the
16 decision.” *Id.*

17 For the above reasons, petitioners have not provided a basis for us to accept
18 the CUP proceeding staff report as evidence not in the record.

19 The motion to take evidence is denied.

² While the phrase “procedural irregularit[y]” is not defined, it is generally understood to mean a failure to follow an applicable procedure that prejudices the substantial rights of the petitioner. ORS 197.835(9)(a)(B).

1 **MOTION TO AMEND PETITION FOR REVIEW**

2 As noted above, on December 16, 2019, petitioners filed their original
3 petition for review and intervenor filed a contingent cross petition for review. On
4 December 19, 2019, LUBA scheduled oral argument in this appeal for January
5 22, 2020. On January 6, 2020, intervenor filed its response to the original petition
6 for review, and petitioners filed their response to intervenor’s contingent cross
7 petition for review.

8 On January 2, 2020, four days before intervenor’s response brief was filed,
9 in addition to their motion take evidence petitioners filed a motion to amend their
10 petition for review to add a new, eleventh assignment of error, as noted in their
11 proposed supplemental petition:

12 “The Hearings Officer erred by finding that the ‘City has adopted
13 the funding components of the River Terrace Funding Strategy as
14 required by TDC 18.640.030.B(1)-(3)’ when the City admits that the
15 funding components identified at TDC 18.640.030.B(2) and (3)
16 have not been adopted.” Proposed Supplemental Petition 1-2
17 (footnote omitted).

18 OAR 661-010-0030(6) provides that “A petition for review which fails to
19 comply with section (4) of this rule may, with permission of the Board, be
20 amended. The Board shall determine whether to allow an amended petition for
21 review to be filed in accordance with OAR 661-010-0005.” OAR 661-010-
22 0030(4) lists the required contents of the petition for review. Petitioners do not
23 identify, and we do not see in the original petition for review, any failure to
24 comply with OAR 661-010-0030(4).

1 In determining whether to allow a petition for review to be amended, we
2 are required to consider OAR 661-010-0005. As OAR 661-010-0005 explains:

3 “These rules are intended to promote the speediest practicable
4 review of land use decisions and limited land use decisions, in
5 accordance with ORS 197.805–197.855, while affording all
6 interested persons reasonable notice and opportunity to intervene,
7 reasonable time to prepare and submit their cases, and a full and fair
8 hearing. The rules shall be interpreted to carry out these objectives
9 and to promote justice. Technical violations not affecting the
10 substantial rights of parties shall not interfere with the review of a
11 land use decision or limited land use decision. Failure to comply
12 with the time limit for filing a notice of intent to appeal under OAR
13 661-010-0015(1) or a petition for review under OAR 661-010-
14 0030(1) is not a technical violation.”

15 Petitioners argue that LUBA should allow the amended petition for review
16 because without it the city and intervenor will be allowed to “benefit from” their
17 own misstatements, in contravention of our direction to interpret our rules to
18 promote justice, and the legislative policy in ORS 197.805 requiring that our
19 decisions “be made consistently with sound principles governing judicial
20 review.” Motion 4.

21 We “will allow an amendment to correct errors or omissions in a petition
22 for review if doing so serves a purpose and will not materially interfere with
23 either respondents’ ability to respond to the petition for review or our ability to
24 meet the statutory deadline for our final opinion.” *Kellogg Lake Friends v. City*
25 *of Milwaukie*, 16 Or LUBA 1093, 1095 (1988). In *Adler v. City of Portland*, 25
26 Or LUBA 546 (1993), petitioners filed a motion to amend their petition for

1 review to add an assignment of error based on evidence not in the record of an
2 unrelated city decision. We denied the request, holding that it would result in a
3 delay of the issuance of our final opinion and order. *See also Taylor v. City of*
4 *Canyonville*, 55 Or LUBA 681 (2007) (“A petitioner may not, after the petition
5 for review has been filed and the deadline for filing the petition for review
6 expires, supplement the arguments presented therein.”).

7 The CUP staff report was issued after the petition for review was filed.
8 Petitioners do not explain, however, why they could not have challenged the
9 hearings officer’s finding that the funding mechanisms were in place based on
10 the adequacy of the evidence in the record in their original petition for review.
11 Allowing petitioners to add an additional assignment of error to their petition for
12 review after the response brief has been filed and oral argument has been
13 scheduled will require us to allow additional briefing by intervenor, reschedule
14 oral argument, and would delay issuance of our final opinion. This would
15 prejudice intervenor and would not promote the speediest practicable review of
16 the land use decision.

17 For the reasons explained above, the motion to amend the petition for
18 review is denied.

19 The previously established briefing schedule remains unaffected by
20 petitioners’ motion or this Order. Oral argument currently scheduled for January
21 22, 2020 at 1:00 pm remains scheduled for that date and time.
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1 Dated this ____ day of January 2020.

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Michelle Gates Rudd

7 Board Member