

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

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4                   JOHN WIDMER and WSW INVESTMENTS, LLC,  
5                                   *Petitioners,*

6  
7                                   vs.

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9                                   CITY OF TROUTDALE,  
10                                   *Respondent.*

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12                                   LUBA No. 2023-044

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14                                   ORDER

15                   On December 7, 2023, the Board received petitioners’ petition for review.<sup>1</sup>  
16                   Subsequently, oral argument was scheduled for January 9, 2024, at 1:00 p.m. On  
17                   December 28, 2023, the Board received the respondent’s brief. The respondent’s  
18                   brief includes arguments that the petition for review does not comply with OAR  
19                   661-010-0030(4)(d)’s requirement that the petition for review identify where  
20                   issues raised in an assignment of error were preserved.<sup>2</sup> Respondent’s Brief 14,  
21                   31, 38.

22                   On January 3, 2024, petitioners filed, and on January 5, 2024, the Board  
23                   received, petitioners’ motion to amend the petition for review pursuant to OAR  
24                   661-010-0030(6) (Motion to Amend), and petitioners’ motion to reschedule oral

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<sup>1</sup> On December 22, 2023, the Oregon Liquor and Cannabis Commission filed a state agency brief in support of petitioners pursuant to ORS 197.830(8) and OAR 661-010-0038.

<sup>2</sup> OAR 661-010-0030(4) lists the required contents of the petition for review.

1 argument (Motion to Extend) “to allow the [c]ity adequate time to respond to the  
2 Motion to Amend and to allow LUBA adequate time to consider the Motion to  
3 Amend prior to the hearing.” Motion to Extend 1-2.

4 OAR 661-010-0030(6) provides:

5 “A petition for review which fails to comply with section (4) of this  
6 rule may, with permission of the Board, be amended. The Board  
7 shall determine whether to allow an amended petition for review to  
8 be filed in accordance with OAR 661-010-0005.”

9 OAR 661-010-0005 provides:

10 “These rules are intended to promote the speediest practicable  
11 review of land use decisions and limited land use decisions, in  
12 accordance with ORS 197.805–197.855, while affording all  
13 interested persons reasonable notice and opportunity to intervene,  
14 reasonable time to prepare and submit their cases, and a full and fair  
15 hearing. The rules shall be interpreted to carry out these objectives  
16 and to promote justice. Technical violations not affecting the  
17 substantial rights of parties shall not interfere with the review of a  
18 land use decision or limited land use decision. Failure to comply  
19 with the time limit for filing a notice of intent to appeal under OAR  
20 661-010-0015(1) or a petition for review under OAR 661-010-  
21 0030(1) is not a technical violation.”

22 Petitioners seek to amend the petition for review to demonstrate that the  
23 issues raised in their assignments of error were preserved as required by OAR  
24 661-010-0030(4)(d), which petitioners concede the petition for review does not  
25 do. The city objects to both the Motion to Amend and the Motion to Extend. The  
26 city argues that allowing the motions will prejudice the city because it will have  
27 to file a response to the amended petition for review, and allowing the motions  
28 could delay issuance of the final opinion and order.

1           We have held that we “will allow an amendment to correct errors or  
2 omissions in a petition for review if doing so serves a purpose and will not  
3 materially interfere with either respondents’ ability to respond to the petition for  
4 review or our ability to meet the statutory deadline for our final opinion.” *Kellogg*  
5 *Lake Friends v. City of Milwaukie*, 16 Or LUBA 1093, 1095 (1988) (citing *B &*  
6 *L Holdings v. City of Corvallis*, 1 Or LUBA 204, 205 (1980)). For the reasons  
7 explained below, the Motion to Amend is granted.

8           First, allowing the amended petition for review serves a purpose in  
9 assisting LUBA in determining whether the issues presented in the assignments  
10 of error were preserved, and thus furthers the purpose of ORS 197.797(1) and  
11 ORS 197.835(3).<sup>3</sup> Petitioners seek to comply with OAR 661-010-0030(4)(d) in  
12 the manner that is provided in our rule at OAR 661-010-0030(6). Second, we do  
13 not see that allowing the amended petition for review will materially interfere  
14 with the city’s ability to respond to the petition for review. Third, it is unlikely

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<sup>3</sup> ORS 197.835(3) requires that issues before LUBA on review “shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.797, whichever is applicable.” ORS 197.797(1) in turn provides:

“An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

1 that allowing the amended petition for review will result in a delay of the issuance  
2 of our final opinion and order, which is January 31, 2024.<sup>4</sup>

3 The text of the proposed amended petition for review is included on pages  
4 five through 10 of the Motion to Amend, and we consider the amended petition  
5 for review to consist of those pages. The city shall have until January 17, 2024,  
6 to file an amended respondent's brief to respond to the amended petition for  
7 review. No reply brief to respond to an amended respondent's brief is allowed.

8 The Motion to Extend is denied. Oral argument remains scheduled for  
9 January 9, 2024, at 1:00 p.m. via video teleconference.<sup>5</sup>

10 Dated this 8th day of January 2024.

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Melissa M. Ryan  
Board Chair

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<sup>4</sup> The Board routinely advises the parties at the conclusion of oral argument that the Board will issue the final opinion and order within seven days after the deadline in ORS 197.830(14).

<sup>5</sup> OAR 661-010-0040(4) provides that “[a] state agency which has filed a brief pursuant to ORS 197.830(8) may move to argue orally before the Board. The motion shall be filed with the brief.” The state agency brief was not filed with a motion to argue orally before the Board and thus the state agency may not present oral argument to the Board.