

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH
5 and FRIENDS OF THE METOLIUS,
6 *Petitioners,*

7
8 vs.

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10 JEFFERSON COUNTY,
11 *Respondent.*

12 LUBA No. 2010-080

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14 MONTGOMERY SHORES PARTNERSHIP,
15 *Petitioner,*

16
17 vs.

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19 JEFFERSON COUNTY,
20 *Respondent.*

21 LUBA No. 2010-083

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23 CONFEDERATED TRIBES OF THE
24 WARM SPRINGS RESERVATION
25 OF OREGON,
26 *Petitioner,*

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28 vs.

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30 JEFFERSON COUNTY,
31 *Respondent.*

32 LUBA No. 2010-084

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34 ORDER ON MOTIONS TO INTERVENE

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37 This consolidated review proceeding involves three appeals, which appeal the same
38 county decision approving, with conditions, the application of Montgomery Shores
39 Partnership (Montgomery Shores) for a conditional use permit for a fishing lodge. Central
40 Oregon Land Watch and Friends of the Metolius (together, COLW), the petitioners in LUBA
41 No. 2010-080, move to intervene on the side of the county in LUBA No. 2010-083, which is

1 the appeal filed by the applicant Montgomery Shores. The Confederated Tribes of the Warm
2 Springs Reservation (Confederated Tribes), the petitioner in LUBA No. 2010-084, also
3 moves to intervene on the side of the county in LUBA No. 2010-083. There is no opposition
4 to either motion, and they are allowed.

5 On October 11, 2010, Montgomery Shores filed separate motions to intervene on the
6 side of the county in LUBA Nos. 2010-080 and 2010-084, the appeals filed by COLW and
7 the Confederated Tribes, respectively. COLW objected to the motion to intervene in LUBA
8 No. 2010-080 as being untimely, under ORS 197.830(7) and OAR 661-010-0050(2).¹ The
9 statute and rule require that the motion to intervene be filed within 21 days of the date the
10 notice of intent to appeal is filed with LUBA. COLW argues that their notice of intent to
11 appeal was filed by certified mail with LUBA on September 8, 2010, but Montgomery
12 Shore's motion to intervene was not filed with LUBA until 33 days later, on October 11,
13 2010. Montgomery Shores has not responded to COLW's objection, and we agree with
14 COLW that Montgomery Shore's motion to intervene in LUBA No. 2010-080 was untimely.
15 That motion is denied. ORS 197.830(7)(c).

¹ ORS 197.830(7) provides:

“(a) Within 21 days after a notice of intent to appeal has been filed with the board under [ORS 197.830(1)], any person described in paragraph (b) of this subsection may intervene in and be made a party to the review proceeding by filing a motion to intervene and by paying a filing fee of \$100.

“(b) Persons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:

“(A) The applicant who initiated the action before the local government, special district or state agency; or

“(B) Persons who appeared before the local government, special district or state agency, orally or in writing.

“(c) Failure to comply with the deadline or to pay the filing fee set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene.”

1 The Confederated Tribes also object that Montgomery Shore’s motion to intervene in
2 its appeal, LUBA No. 2010-084, was untimely. The Confederated Tribes’ notice of intent to
3 appeal was filed with LUBA by certified mail on September 17, 2010. OAR 661-010-
4 0015(1)(b) (the date the notice of intent to appeal is filed with LUBA is the date the notice
5 was received by LUBA, or the date it was mailed, provided it is mailed by registered or
6 certified mail). According to the Confederated Tribes, the October 11, 2010 motion to
7 intervene in LUBA No. 2010-084 was filed 24 days after their notice of intent to appeal was
8 filed, three days late.

9 Montgomery Shores responds to the Confederated Tribes’ objection by arguing that
10 on October 11, 2010, the assistant for its attorney telephoned LUBA to verify the date that
11 the Confederated Tribes’ notice of intent to appeal was filed. According to an affidavit
12 attached to the response, LUBA staff informed the assistant that the Confederated Tribe’s
13 notice of intent to appeal was filed with LUBA on September 20, 2010.² We understand
14 Montgomery Shores to argue that the alleged miscommunication between the assistant and
15 LUBA staff on October 11, 2010, provides a basis for LUBA to allow the motion to
16 intervene, notwithstanding ORS 197.830(7)(a) and (c). We disagree, for the following
17 reasons.

18 First, Montgomery Shores does not dispute that its attorney was timely served a copy
19 of the Confederated Tribes’ notice of intent to appeal, attached to which was a certificate of
20 filing stating that the notice was filed with LUBA on September 17, 2010, by certified mail.
21 Montgomery Shores thus knew or should have known that the deadline for filing the motion
22 to intervene was 21 days from September 17, 2010, even without a phone call to LUBA.
23 Second, even assuming LUBA staff erroneously informed the assistant that the *Confederated*

² September 20, 2010 was the date that Montgomery Shores filed its notice of intent to appeal, in LUBA No. 2010-083. It appears that either the assistant misstated the question or LUBA staff misunderstood the question to concern the date when *Montgomery Shores’* appeal was filed, not the date the Confederated Tribes’ appeal was filed.

1 *Tribe's* notice was filed on September 20, 2010, Montgomery Shores cites no authority for
2 the proposition that such a miscommunication is a basis to toll the statutory deadline at ORS
3 197.830(7)(a). Finally, even if such authority were cited, Montgomery Shores would
4 presumably have to show that the miscommunication caused Montgomery Shores to miss the
5 statutory deadline. However, Montgomery Shores did not call LUBA staff until October 11,
6 2010, three days after the deadline to intervene in LUBA No. 2010-084 had passed, and any
7 miscommunication on that date could not have caused Montgomery Shores to miss the
8 deadline.

9 Montgomery Shores' motion to intervene in LUBA No. 2010-084 is denied. ORS
10 197.830(7)(c).

11 Dated this 3rd day of November, 2010.

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Tod A. Bassham
Board Member