

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 KENDRA LOUKS and JOHN LOUKS,  
5 *Petitioners,*

6  
7 vs.

8  
9 JACKSON COUNTY,  
10 *Respondent.*

11  
12 LUBA No. 2011-085

13 ORDER

14 **MOTION TO INTERVENE**

15 John Duke, a Trustee of the Duke Family Trust, the applicant below (the applicant),  
16 filed a motion to intervene on the side of respondent in this appeal. Petitioners objected that  
17 the motion to intervene was filed more than 21 days after the notice of intent to filed, and is  
18 thus untimely. OAR 661-010-0050(2); ORS 197.830(7).<sup>1</sup> The applicant concedes that the  
19 motion to intervene was untimely filed and withdraws the motion.

20 **MOTION TO APPEAR AS AMICUS**

21 Following withdrawal of the motion to intervene, the applicant filed a motion to  
22 appear as amicus on the side of respondent, pursuant to OAR 661-010-0052(1), which  
23 provides that:

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<sup>1</sup> ORS 197.830(7) provides:

“(a) Within 21 days after a notice of intent to appeal has been filed with the board under subsection (1) of this section, 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.

“\* \* \* \* \*

“(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       “A person or organization may appear as amicus only by permission of the  
2       Board on written motion. The motion shall set forth the interest of the movant  
3       and state reasons why a review of relevant issues would be significantly aided  
4       by participation of the amicus. \* \* \*”

5       The applicant states:

6       “Amicus is interested in this appeal in that Amicus is the applicant in the  
7       underlying land use application and is the owner of the subject property  
8       involving said land use application. Amicus participation will significantly  
9       aid the Board’s review by providing the Board with a better understanding of  
10      the underlying land use application’s compliance with the Jackson County  
11      Land Development Ordinance (LDO), specifically LDO 3.4.3, the  
12      inapplicability of LDO 8.92, and petitioners’ collateral challenge of a prior  
13      land use decision involving the subject property. Allowing Amicus  
14      participation will provide for a full and complete discussion of the issues in  
15      this appeal.” Motion to File Amicus Brief 1-2.

16      Petitioners object to the motion, arguing that the applicant has not demonstrated that  
17      LUBA’s review would be “significantly aided” by allowing the applicant to participate as  
18      amicus. According to petitioners, the applicant does not explain why the amicus brief would  
19      add anything to the arguments that the applicant has already presented in the record.

20      In *Central Oregon Landwatch v. Deschutes County*, 633 Or LUBA \_\_, *aff’d* 245 Or  
21      App 166, \_\_ P3d \_\_ (2011), we stated:

22      “To preserve the legislative intent in requiring timely intervention, LUBA has  
23      generally declined to grant amicus participation to interested parties to the  
24      proceedings below who simply missed the deadline to intervene, and who  
25      argue only that LUBA’s review would be aided by their participation because  
26      they are interested parties. *Cotter v. Clackamas County*, 35 Or LUBA 749,  
27      750 (1998) (a property owner’s interest in property is not sufficient, in itself,  
28      to show that LUBA’s review would be significantly aided by the property  
29      owner’s participation as an amicus). One exception LUBA has recognized is  
30      circumstances where the respondent has informed LUBA that it does not  
31      intend to file a response brief, in which case no response brief would be filed  
32      at all and LUBA’s review would be limited to the arguments made in the  
33      petition for review. *Coquille Citizens for Responsible Growth v. City of*  
34      *Coquille*, \_\_ Or LUBA \_\_ (LUBA No. 2006-111, Order, September 15, 2006)  
35      (allowing the applicant to appear as amicus, and file a brief defending the  
36      decision, where amicus participation would not delay review and otherwise no  
37      response brief would be filed); *Stern v. Josephine County*, \_\_ Or LUBA \_\_  
38      (LUBA No. 2008-171, Order, January 30, 2009) (same).”

1 Here, it is not clear whether the county intends to file a response brief defending the  
2 decision. If it does not, we tend to agree with the applicant that allowing amicus  
3 participation would significantly aid LUBA's review, because otherwise LUBA would not  
4 have the benefit of a response to the issues raised in the petition for review from a party  
5 familiar with the events that led to the appeal. However, if the county does intend to file a  
6 response brief to address the assignments of error raised in the petition for review, we tend to  
7 agree with petitioners that the applicant has not demonstrated that a second response brief  
8 filed by amicus would add to respondent's brief in a way that would significantly aid  
9 LUBA's review. Because it is unknown at present whether or not the county intends to file a  
10 response brief, the motion to appear as amicus is denied, with leave to refile the motion if the  
11 county advises LUBA that it intends to limit its participation in this appeal.

#### 12 **OBJECTIONS TO THE RECORD**

13 LUBA received the record on September 22, 2011. On September 30, 2011,  
14 petitioners filed objections to the record. Petitioners state the county inadvertently delayed  
15 service of the record on petitioners for approximately one week. Petitioners state they have  
16 had inadequate time to review the record, but cite to indications that the record may include  
17 documents that do not belong in the record. However, petitioners do not identify any  
18 specific documents at issue. Petitioners have now had opportunity to review the record and  
19 clarify what documents they believe do not belong in the record, but have not done so.  
20 Absent such clarification, the objection is denied.

21 The record is settled as of the date of this order. The petition for review is due 21  
22 days, and the response brief due 42 days, from the date of this order. The Board's final  
23 opinion and order is due 77 days from the date of this order.

24 Dated this 7th day of November, 2011.

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27 \_\_\_\_\_  
28 Tod A. Bassham  
Board Member