

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 ON MOTION TO FILE AMICUS BRIEF

14 John Duke, acting as Trustee of the Duke Family Trust, the applicant below, renews  
15 his motion for an order allowing him to file an amicus brief in this appeal, pursuant to OAR  
16 661-010-0052.<sup>1</sup>

17 On November 7, 2011, the Board issued an order denying Duke's first motion to  
18 appear as amicus, but granting leave to renew the motion if it turns out that the county  
19 decided not to file a brief responding to the petition for review. We noted in our order that  
20 while an applicant's interest in the challenged decision is not sufficient in itself to  
21 demonstrate that the applicant's filing of an amicus brief responding to the petition for  
22 review would "significantly aid" LUBA's review, we have recognized an exception where

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<sup>1</sup> OAR 661-010-0052 provides:

- "(1) A person or organization may appear as amicus only by permission of the Board on written motion. The motion shall set forth the interest of the movant and state reasons why a review of relevant issues would be significantly aided by participation of the amicus. A copy of the motion shall be served on all parties to the proceeding.
- "(2) Appearance as amicus shall be by brief only, unless the Board specifically authorizes or requests oral argument. An amicus brief shall be subject to the same rules as those governing briefs of parties to the appeal, and shall be filed together with four copies. Where amicus is aligned with the interests of the petitioner(s), the amicus brief is due seven days after the date the petition for review is due. In all other circumstances, the amicus brief is due within the time required for filing respondent's brief. No filing fee is required. An amicus brief shall have green front and back covers."

1 the respondent informs LUBA that it does not intend to file a response brief, and otherwise  
2 no response brief would be filed at all. *Louks v. Jackson County*, \_\_ Or LUBA \_\_ (LUBA  
3 No. 2011-085, Order, November 7, 2011), slip op 2 (quoting *Central Oregon Landwatch v.*  
4 *Deschutes County*, \_\_ Or LUBA \_\_, *aff'd* 245 Or App 166, \_\_ P3d \_\_ (2011)). The county  
5 has now advised LUBA that it does not intend to file a response brief.

6         Petitioners nonetheless object to the renewed motion, arguing that the motion fails to  
7 explain why LUBA’s review would be “significantly aided” by participation of the amicus,  
8 as required by OAR 661-010-0052(1). According to petitioners, the record is replete with  
9 arguments presented by the applicant during the proceedings below, as well as staff reports  
10 and findings that address how the application complies with the applicable approval criteria,  
11 and LUBA can simply refer to those documents in the record to seek the applicant’s and  
12 county’s views regarding the issues to be raised in the petition for review. However,  
13 LUBA’s review does not work that way. We do not comb the record on our own in an  
14 unguided attempt to find arguments or evidence regarding issues raised in a petition for  
15 review. As the Court of Appeals explained in *Neighbors for Livability v. City of Beaverton*,  
16 168 Or App 501, 507, 4 P3d 765 (2000), LUBA does not review land use decisions *per se*; it  
17 reviews “the arguments that the parties make about land use decisions.” To a large extent,  
18 our review function depends upon adversarial briefing to frame the issues and to help the  
19 Board locate relevant material—evidence, findings—in the record regarding the issues on  
20 appeal that are thus framed in the briefs. In fact, our review is significantly *hampered*  
21 without such adversarial briefing, which is the reason we have generally allowed amicus  
22 participation in circumstances where otherwise no response brief would be filed.

23         Petitioners also object that the motion does not adequately “set forth the interest of  
24 the movant” as required by OAR 661-010-0052(1). However, the motion states that movant  
25 is the applicant in the underlying land use application and owner of the subject property.

1 That is sufficient to “set forth the interest of the movant” for purposes of OAR 661-010-  
2 0052(1).

3 Finally, petitioners object to amicus participation because it would allow amicus to  
4 present written and oral argument as if amicus were an intervenor-respondent, a full party to  
5 this appeal, a circumstance which petitioners allege would prejudice their substantial rights.  
6 However, amicus participation is a rather limited vehicle. An amicus is not a party to the  
7 appeal and has limited participatory rights and no statutory authority to appeal LUBA’s  
8 decision to the Court of Appeals. Appearance before LUBA is by brief only, unless the  
9 Board specifically authorizes oral argument. OAR 661-010-0052(2). Further, LUBA will  
10 generally not consider new issues, new bases for remand, or new defenses raised solely in an  
11 amicus brief. *Kinnett v. Douglas County*, 57 Or LUBA 184, 186-87 (2008). We disagree  
12 with petitioners that allowing an amicus to participate in this appeal would effectively allow  
13 amicus to function as a party, or prejudice petitioners’ substantial rights.

14 That said, we agree with petitioners that Duke has not demonstrated that allowing  
15 amicus to present oral argument would significantly aid the Board’s review. The motion to  
16 appear as amicus offers no argument or explanation on that point. Accordingly, the motion  
17 to appear as amicus is granted only to the extent of filing an amicus brief. The request to  
18 present oral argument is denied.

19 Dated this 2nd day of December, 2011.  
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24 Tod A. Bassham  
25 Board Member