

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

3
4 PAMALA JOY and
5 KELLY MARCOTULLI,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF ASHLAND,
11 *Respondent.*

12
13 LUBA No. 2022-001

14
15 ORDER

16 On January 4, 2022, petitioners filed their notice of intent to appeal (NITA)
17 a planning commission decision approving an application for a conditional use
18 permit (CUP) and site design review for a wireless communications facility on
19 the Southern Oregon University campus. On February 2, 2022, New Cingular
20 Wireless PCS, LLC (AT&T), filed a motion to intervene on the side of the city.
21 On February 16, 2022, petitioners filed a response objecting to AT&T’s motion
22 to intervene as untimely. On February 25, 2022, the city filed a notice with LUBA
23 stating that it will not file a respondent’s brief in this appeal. On March 29, 2022,
24 we issued an order denying AT&T’s motion to intervene as untimely. The
25 petition for review was due and was filed by petitioners on April 19, 2022.

26 On April 27, 2022, AT&T filed a motion to appear as amicus on the side
27 of the city. OAR 661-010-0052(1) provides, in part, that a person or organization
28 “may appear as amicus only by permission of the Board on written motion. The

1 motion shall set forth the interest of the movant and state reasons why a review
2 of relevant issues would be significantly aided by participation of the amicus.”

3 AT&T is the applicant for the site design review and CUP.¹

4 “To preserve the legislative intent in requiring timely intervention,
5 LUBA has generally declined to grant amicus participation to
6 interested parties to the proceedings below who simply missed the
7 deadline to intervene and who argue only that LUBA’s review
8 would be aided by their participation because they are interested
9 parties. *Cotter v. Clackamas County*, 35 Or LUBA 749, 750 (1998)
10 (a property owner’s interest in property is not sufficient, in itself, to
11 show that LUBA’s review would be significantly aided by the
12 property owner’s participation as an amicus).” *Wetherell v. Douglas*
13 *County*, 77 Or LUBA 597, 600 (2018).

14 AT&T was entitled to intervene in the appeal pursuant to ORS 197.830(7)(b)(A)
15 but failed to do so in a timely manner. Allowing AT&T to participate as amicus
16 in this appeal would effectively allow it to participate as an intervenor-respondent
17 and file what is in substance an intervenor-respondent’s brief without meeting
18 the statutory deadline for intervention.

19 “One exception LUBA has recognized is circumstances where the
20 respondent has informed LUBA that it does not intend to file a response brief.”

21 *Id.* As noted, the city has notified LUBA and petitioners that it does not intend to

¹ Where an amicus is aligned with the interests of the respondent, the amicus brief is due within the time required for filing the respondent’s brief. OAR 661-010-0052(2). Here, the respondent’s brief is due not later than May 10, 2022. AT&T proposes to submit its amicus brief within the time required for filing the respondent’s brief. Accordingly, we agree with AT&T that granting its motion would not delay briefing.

1 file a respondent’s brief. “However, even in that circumstance, a movant must
2 still establish that LUBA’s review would be ‘significantly aided’ by the movant’s
3 participation as amicus, and that briefing would not be delayed.” *Id.*²

4 We conclude that AT&T has not shown that its participation would
5 significantly aid our review. It is true that, without briefing from AT&T, the
6 briefing in this appeal will be limited to that of petitioners. AT&T argues that our
7 review will be aided by its participation because the record is voluminous and
8 because the issues addressed and decided by the city are not limited to the
9 interpretation of local law. AT&T argues that the relevant issues include the
10 meaning of the Federal Telecommunications Act of 1996 as it relates to the siting
11 of wireless service facilities, Federal Communications Commission regulations,
12 federal court decisions, and “the scope and validity of multiple technical radio
13 frequency (RF) safety and property value studies originating in other US

² As we explained in *Central Oregon Landwatch v. Jefferson County*:

“The typical amicus is a person or organization that has no direct interest in the matter, but is in possession of views or perspectives that may assist LUBA to correctly decide the legal issues. An example in the land use review context is amicus participation by the Farm Bureau or a similar advocacy organization, which has a general view or expertise on how state or local land use regulations governing agricultural land should be understood and applied, and whose view or expertise might assist LUBA in interpreting those regulations. *See Home Builders Association of Lane County v. City of Eugene*, 59 Or LUBA 116 (2009) (granting the motion of The Oregon Homebuilders Association and the National Association of Homebuilders).” 62 Or LUBA 530, 533 (2010).

1 jurisdictions.” Motion to Appear as Amicus 3-4. As noted, the petition for review
2 was filed on April 19, 2022. AT&T has not identified any issues in the petition
3 for review with respect to which its expertise is necessarily relevant or helpful.
4 In addition, as we explain above, allowing AT&T to participate as amicus in this
5 appeal would effectively allow it to participate as an intervenor-respondent and
6 file what is in substance an intervenor-respondent’s brief without meeting the
7 statutory deadline for intervention.

8 We conclude that allowing AT&T to appear as amicus would not
9 significantly aid our review of the relevant issues in the appeal.

10 The motion to appear as amicus is denied.

11 Dated this 6th day of May 2022.

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Michelle Gates Rudd

17 Board Member