

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.

9
10 JEFFERSON COUNTY,
11 *Respondent.*

12
13 LUBA No. 2010-080

14
15 MONTGOMERY SHORES PARTNERSHIP,
16 *Petitioner,*

17
18 vs.

19
20 JEFFERSON COUNTY,
21 *Respondent.*

22
23 LUBA No. 2010-083

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

29
30 vs.

31
32 JEFFERSON COUNTY,
33 *Respondent.*

34
35 LUBA No. 2010-084

36 ORDER

37 **MOTION TO EXTEND TIME TO FILE RESPONSE BRIEF**

38 The county moves to extend the time to file its response brief(s), from November 22,
39 2010 to December 3, 2010, citing the complexity of the issues presented and the need to

1 respond to three petitions for review. The county states that the petitioners in each appeal do
2 not object to the extension of time. The county's motion is granted.

3 Oral argument is currently scheduled for December 9, 2010, only six days from the
4 date the response brief(s) are due under the 12-day extension granted above. Given mailing
5 delays and the intervening weekend, that is insufficient time for petitioners to receive the
6 brief(s) and prepare for oral argument on December 9, 2010. Therefore we deem it necessary
7 to reschedule oral argument. The next available time slot is December 23, 2010, at 11:00
8 a.m., and oral argument is hereby rescheduled to that date and time. If the parties desire a
9 different date or time for oral argument, they may contact LUBA staff to determine other
10 available dates or times.

11 **MOTION TO APPEAR AS AMICUS**

12 In an order dated November 3, 2010, the Board denied Montgomery Shores
13 Partnership's (Montgomery Shores) motions to intervene in LUBA Nos. 2010-080 and 2010-
14 084, as untimely filed. Montgomery Shores is the applicant for the decision at issue in these
15 three consolidated appeals, and is the petitioner in LUBA No. 2010-083. The other two
16 appeals were filed by opponents to the application.

17 On November 12, 2010, Montgomery Shores filed a motion to appear as amicus in
18 LUBA Nos. 2010-080 and 2010-084, aligned with the interests of respondent in those
19 appeals, pursuant to OAR 661-010-0052.¹ The motion states:

¹ 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

1 “* * * The movant’s brief will respond to arguments raised by Petitioners that
2 the County may not. It is important to note that the County Counsel has 3
3 briefs to respond to in a period of 21 days, which is arguably not much time,
4 and to address all of the issues raised in the three Petitioners’ briefs would be
5 a significant feat. Although it is speculative as to what extent the County will
6 address the arguments of Petitioners [in LUBA Nos. 2010-080 and 2010-084],
7 if the movants wait until the [response] brief is, or for some reason is not,
8 filed, the motion to appear as *amicus* would be untimely. In that event, the
9 Board would have only one perspective (that of Petitioners) on the relevant
10 facts and legal issues in this case. The applicant below has already prepared
11 for and responded to the arguments raised in the Petitioners’ brief and
12 presented those arguments to the County. Therefore, the Board will be aided
13 by the participation of the *amicus* in the arguments opposing the approval of
14 the conditional use permit. The *amicus* brief will be timely filed and will not
15 frustrate or delay the established briefing schedule * * *.” Motion to Appear
16 and Argue as Amicus, 2.

17 The petitioners in LUBA Nos. 2010-080 and 2010-084 oppose the motion to appear
18 as amicus.

19 After the legislature amended ORS 197.830(7) in 1997 to require that LUBA deny
20 motions to intervene that are not filed within 21 days of the date the notice of intent to appeal
21 is filed, the options for potential intervenors who miss that deadline, but who nonetheless
22 wish to participate in the LUBA appeal, have been very limited. *See Grahn v. City of*
23 *Newberg*, 49 Or LUBA 762, 766 (2005) (that the legislature chose to spell out the
24 consequences for untimely filing of a motion to intervene indicates that the legislature
25 wanted that deadline to be rigorously enforced and, by implication, not extended). One
26 relatively unsatisfactory alternative for a person or organization in that position is to seek to
27 appear before LUBA as amicus under OAR 661-010-0052.² Generally, LUBA has allowed a

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.”

² Unsatisfactory to the potential amicus because an amicus has no right to present oral argument, is not a party to the appeal, cannot file motions, and generally cannot advance new arguments for or against reversal or remand that are not made by parties to which its interests are aligned. For example, LUBA will not reverse or remand a decision based on an assignment of error from an amicus aligned with the petitioner. *Concerned Citizens v. Malheur County*, 47 Or LUBA 208, 216 (2004).

1 person or organization to appear as amicus if the potential amicus demonstrates that amicus
2 participation would aid, and not delay, LUBA's review. The typical amicus is a person or
3 organization that has no direct interest in the matter, but is in possession of views or
4 perspectives that may assist LUBA to correctly decide the legal issues. An example in the
5 land use review context is amicus participation by the Farm Bureau or a similar advocacy
6 organization, which has a general view or expertise on how state or local land use regulations
7 governing agricultural land should be understood and applied, and whose view or expertise
8 might assist LUBA in interpreting those regulations. *See Home Builders Association of Lane*
9 *County v. City of Eugene*, 59 Or LUBA 116 (2009) (granting the amicus motion of The
10 Oregon Homebuilders Association and the National Association of Homebuilders).

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

1 In the present case, the county obviously intends to file response brief(s) in LUBA
2 Nos. 2010-080 and 2010-084. Montgomery Shores argues that the county’s response briefs
3 may not adequately respond to the arguments in the petitions for review, but does not explain
4 why. We conclude that Montgomery Shores has not demonstrated that its participation as
5 amicus in LUBA Nos. 2010-080 and 2010-084 would significantly aid LUBA’s review. The
6 motion is denied.

7 Dated this 1st day of December, 2010.

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Tod A. Bassham
Board Member