



1 The notice of intent to appeal was filed November 10, 2003. Pursuant to  
2 ORS 197.830(7)(a), motions to intervene were due on or before December 1, 2003. The Jones’  
3 motion to intervene was filed December 5, 2003, and is thus untimely. *Wolverton v. Crook*  
4 *County*, 34 Or LUBA 515, 517 (1998). The Jones’ motion to intervene is denied.

5 **MOTION TO STRIKE RESPONSE BRIEF**

6 On November 14, 2003, the county notified LUBA and the parties by letter that it was  
7 preparing the record for transmittal. In that letter, the county stated that “[o]nce the record is final,  
8 Jefferson County will not participate further in this case[.]” The record was received December 1,  
9 2003, and no objections to the record were filed. On December 22, 2003, the date the petition for  
10 review was due, county counsel informed LUBA and the parties by letter that:

11 “As a result of the applicant’s untimely Motion to Intervene and Petitioner’s  
12 objection thereto, the County Board of Commissioners has formally decided to  
13 change its decision not to participate, and to make an appearance in the above-  
14 referenced case. \* \* \*”

15 On January 2, 2004, petitioners objected to allowing the county to file a response brief in  
16 this appeal, on two grounds.

17 **A. Affirmative Waiver**

18 Petitioners argue first that the county affirmatively waived any right to participate in this  
19 appeal other than filing the record, by so informing LUBA and the parties. *See Newcomer v.*  
20 *Clackamas County*, 92 Or App 174, 187, 758 P2d 369, *adhered to as modified* 94 Or App 33,

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- “(b) Notwithstanding the provisions of paragraph (a) of this subsection, 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 set forth in paragraph (a) of this subsection shall result in denial of a motion to intervene.”

1 764 P2d 927 (1988) (“[n]othing in the statutes or our decisions forecloses a party to a land use  
2 case from waiving an issue or sanctions his luring another party into an abbreviated presentation at  
3 the local level through the pretense of abandoning an issue”). Petitioners argue that the rationale in  
4 *Newcomer* should be extended to positions taken before LUBA, and that the county should be  
5 held to its initial position that it would not file a response brief. Otherwise, petitioners argue, the  
6 county has effectively “lured” petitioners into an abbreviated presentation before LUBA. According  
7 to petitioners, the petition for review was drafted to challenge a decision that petitioners reasonably  
8 believed would be undefended, given the county’s announced decision not to participate and the  
9 untimely motion by the applicant’s successors to intervene. Had they known the county would  
10 defend the decision, petitioners argue, they might have presented additional assignments of error and  
11 more fully developed the assignments of error they did present.

12 Even if the county has not affirmatively waived its right to file a response brief, petitioners  
13 argue, it should only be allowed to change its position on that point if there is no prejudice to other  
14 parties’ substantial rights. Petitioners contend that announcing the county’s change of position on  
15 the date the petition for review was filed prejudices petitioners’ substantial rights.

16 We decline petitioners’ request to extend the holding in *Newcomer*. That case and its  
17 progeny concern affirmative waivers of legal *issues* that lead decision makers to believe those issues  
18 have been laid to rest and to reasonably believe that the issue need not be addressed in the decision  
19 makers’ land use decision. *Newcomer* describes a limitation on the *issues* that review bodies may  
20 include in their scope of review; it does not bind parties to representations made in an early stage of  
21 a review proceeding on matters such as whether that party intends to file a brief.

22 The county could easily have believed its land use decision would be defended by the  
23 applicant and, for financial or other reasons, relied on that belief to elect not to duplicate that  
24 defense. The subsequent failure to file a timely motion to intervene on the side of respondent means  
25 the county may no longer rely on others to defend the challenged decision. Petitioners’ desire in that  
26 circumstance for an opportunity to challenge an undefended decision is understandable. However,

1 the county's desire not to allow its decision to go undefended is also understandable. When the  
2 county gave notice that it did not intend to file a brief, the deadline for filing motions to intervene had  
3 not expired and the county had no way to know that no person would file a timely motion to  
4 intervene on the side of respondent. In view of that change in circumstance and the lack of any  
5 substantial prejudice to petitioners from the county's subsequent decision to submit a brief to  
6 respond to the petition for review, we can think of no reason why the county should not be  
7 permitted to change its mind.<sup>2</sup>

8 **B. Real Party in Interest**

9 In the alternative, petitioners contend that the county is apparently appearing on behalf of  
10 the applicant's successors-in-interest, and not on its own behalf. Petitioners note that the county  
11 will be represented in this appeal by outside counsel, presumably at the expense of the applicant's  
12 successors-in-interest. Because the county is not the real party in interest, petitioners argue, it is  
13 inappropriate to allow the county to file a response brief to defend the interests of a person not a  
14 party. Petitioners contend that LUBA should be guided in this respect by Oregon Rules of Civil  
15 Procedure (ORCP) 26A, which requires that every action in circuit court shall be prosecuted in the  
16 name of the real party in interest.<sup>3</sup> See *Pfeifer v. City of Silverton*, 146 Or App 191, 195, 931

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<sup>2</sup> In our view, if petitioners elected to submit an abbreviated petition for review in this appeal they did so at their own risk. When the petition for review was filed, we had not yet ruled on petitioners' motion opposing the Jones' motion to intervene, and it was entirely foreseeable that the county might change its mind and submit a response brief if the motion to intervene was denied.

<sup>3</sup> ORCP 26A provides:

“Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that party's own name without joining the party for whose benefit the action is brought; and when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

1 P2d 833 (1997) (although LUBA is not bound by the ORCPs, those rules are “highly instructive as  
2 to what the legislature meant” in analogous statutory contexts).

3 The county responds that by statute and rule the county is a party to this review, and that no  
4 applicable case, statute or rule prohibits the county from indirectly defending others’ interests in the  
5 challenged decision in the course of defending its decision. The county notes that the outside  
6 counsel retained by the county in this appeal also represented the county during the proceedings  
7 resulting in the challenged decision. Regardless of who pays the fees of the outside counsel in this  
8 proceeding, the county argues, the county is the represented client under the statutes and rules of  
9 professional responsibility governing the practice of law in Oregon.

10 We agree with the county that ORCP 26A and the “real party in interest” limitation therein  
11 have no application to the present appeal. Petitioners do not identify what statutes governing  
12 LUBA’s review are “analogous” to ORCP 26A or what statutes or rules should be interpreted in  
13 light of that rule. The county is by statute and rule a party to this proceeding. Nothing in the  
14 applicable statutes or rules suggests that a respondent may not indirectly represent the interests of  
15 others in the challenged decision, in exercising its unquestioned right to defend its decision before  
16 LUBA.

1           Petitioners' motion to strike the response brief is denied.

2           Dated this 14th day of January, 2004.

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9           Tod A. Bassham

10          Board Chair