

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 STEVE DOOB, ALBERT DEVINE
5 and PAUL SIMON,
6 *Petitioners,*

7
8 vs.

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10 JOSEPHINE COUNTY,
11 *Respondent,*

12
13 and

14
15 GARY WALLACE
16 and LBI ENTERPRISES, LLC,
17 *Intervenors-Respondent.*

18
19 LUBA No. 2005-022

20 ORDER

21 **MOTIONS TO INTERVENE**

22 Gary Wallace and LBI Enterprises, LLC, move to intervene on the side of respondent.

23 There is no opposition to the motion, and it is allowed.

24 Holger T. Sommer (Sommer) moves to intervene on the side of petitioners. Gary Wallace
25 and LBI Enterprises, LLC (intervenors), object to the motion to intervene.

26 Josephine County Rural Land Development Code (RLDC) 33.130.B.1 limits participation
27 in LUBA remand hearings to those persons who were parties to the LUBA appeal from which the
28 matter was remanded.¹ Intervenors argue that Sommer's motion to intervene should be denied

¹ RLDC 33.130.B provides:

"Participation in the rehearing shall be strictly limited to those persons or organizations who were parties to the LUBA appeal. Therefore:

"1. Notice of the rehearing required by Article 32 shall be given only to persons who were parties to the LUBA appeal; and

1 because the hearing that preceded the decision challenged in this appeal was a remand hearing from
2 a previous LUBA appeal, and Sommer was not a party to that previous LUBA appeal.

3 Sommer contends that RLDC 33.130.B.2 provides that parties to the LUBA appeal may
4 present “evidence, witnesses, testimony or arguments” at the remand hearing. He asserts that he
5 was called as an expert witness by a party to the previous proceeding (petitioner Paul Simon in this
6 appeal) pursuant to that code provision. A person may intervene in a LUBA appeal, he contends, if
7 that person has “*appeared* before the local government * * * orally or in writing.” ORS
8 197.830(7)(b)(B) (emphasis added); *see also* OAR 661-010-0050.² Sommer argues that he
9 participated orally as a witness in the local proceeding and that he therefore has a right to intervene
10 pursuant to ORS 197.830(7)(b)(B).

11 The “appearance” requirement for standing to appeal to LUBA is identical to the
12 “appearance” requirement for intervention in a LUBA appeal. *Compare* ORS 197.830(2)(b) and

“2. Only parties to the LUBA appeal may present evidence, witnesses, testimony or arguments in the rehearing. Josephine County shall be considered a participant in the rehearing even if it did not directly appear in the LUBA appeal.”

² ORS 197.830(7) provides, in pertinent part:

“(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 may intervene in and be made a party to the review proceeding upon a showing of compliance with subsection (2) of this section.

“(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.”

OAR 661-010-0050(1) provides:

“Standing to Intervene: The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board. Status as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time.”

1 ORS 197.830(7)(b)(B).³ Accordingly, cases interpreting the “appearance” requirement in ORS
2 197.830(2)(b) apply here as well. We have not addressed directly the issue presented in this case,
3 *i.e.*, whether a person who is called as an expert by a party to the local proceeding has “appeared”
4 before the local government for purposes of ORS 197.830(7)(b)(B). However, we have held that
5 an individual who testifies on behalf of an organization and does not clearly state that she is
6 appearing on her own behalf, as well as on behalf of the organization, has not “appeared” before the
7 local government for purposes of ORS 197.830(2)(b). *Friends of Douglas County v. Douglas*
8 *County*, 39 Or LUBA 156, 162-63 (2000); *see also Schatz v. City of Jacksonville*, 20 Or
9 LUBA 546, 548-49 (1991) (written material authored by mayor prior to initiation of subject
10 moratorium proceeding and included in the record at request of a party does not satisfy
11 “appearance” requirement sufficient to allow mayor standing to intervene at LUBA).

12 The record in this case is clear that Sommer initially attempted to testify on his own behalf
13 during the remand hearing. Record 18. He was informed that he had not been a party to the
14 LUBA appeal and therefore did not have standing to testify. At the county’s continued hearing eight
15 days later, petitioner Simon called Sommer as a witness. Record 12. It was clear to all involved,
16 including Sommer, that the local regulations prohibited him from testifying on his own behalf and that
17 his testimony was presented only as a witness for petitioner Simon. Record 12-13.

18 Under Sommer’s view of the “appearance” requirement, an expert witness such as a soils
19 scientist or traffic engineer would be able to intervene in a LUBA appeal even though his testimony
20 at the local hearing was presented on behalf of an applicant or opponent and not on his own behalf.

³ ORS 197.830(2) provides:

“Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

- “(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
- “(b) Appeared before the local government, special district or state agency orally or in writing.”

1 In this particular instance, Sommer’s interpretation of the “appearance” requirement would allow
2 him to circumvent RLDC 33.130.B, which was intended to limit participants at local remand
3 hearings to parties to the initial LUBA appeal. Sommer’s expert testimony, offered on behalf of a
4 party to the proceeding, is not an oral appearance by or on his own behalf. Indeed, the county
5 code prohibited Sommer from appearing on his own behalf. Accordingly, his oral testimony is not
6 an “appearance” that satisfies the intervention standing requirement under ORS 197.830(7)(b)(B).

7 Sommer’s motion to intervene is denied.

8 **MOTION TO TAKE EVIDENCE**

9 Sommer also filed a Motion to Take Evidence. Because we deny his motion to intervene,
10 he does not have standing to file the Motion to Take Evidence, and we do not address his Motion
11 to Take Evidence further.

12 **RECORD OBJECTION**

13 On February 14, 2005, petitioner Steve Doob filed an Objection to the Record. Pursuant
14 to our rules, a party has 14 days to respond to a record objection. OAR 661-010-0026(4).
15 However, our rules also provide that the filing of a Motion to Take Evidence suspends the appeal.
16 OAR 661-010-0045(9).⁴ Petitioner Doob’s Record Objection was filed February 14, 2005.
17 Sommer’s Motion to Take Evidence, which suspended the appeal, was filed February 24, 2005,
18 four days before a response to the record objection would have been due. The county and
19 intervenors shall have fourteen (14) days from the date of this order to file responses to the record
20 objection.

⁴ OAR 661-010-0045(9) provides:

“Effect on Time Limits: The filing of a motion to take evidence shall suspend the time limits for all other events in the review proceeding, including the issuance of the Board’s final order. If the Board grants the motion, the time limits for other events shall remain suspended until the Board issues its findings. Unless the parties agree otherwise, the Board shall schedule any evidentiary hearing not less than ten days after the order granting the motion to take evidence is issued. If the Board denies a motion to take evidence, the time for all other events will begin to run on the date the Board issues its order denying the motion, or on such other date as is specified in that order.”

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Dated this 13th day of April, 2005.

Anne C. Davies
Board Member