

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

3  
4                               JEROME GRANT,  
5                               *Petitioner,*

6  
7                               vs.

8  
9                               CITY OF DEPOE BAY,  
10                              *Respondent.*

11  
12                             LUBA No. 2006-145

13  
14                             ORDER

15   **MOTIONS TO INTERVENE**

16               The notice of intent to appeal (NITA) was filed on August 8, 2006 and received by  
17   the Board on August 9, 2006. On August 30, 2006, the city filed a motion to extend the time  
18   to intervene for an additional 21 days, to September 20, 2006. An affidavit attached to that  
19   motion states that the city wishes to preserve the opportunity to have the applicant move to  
20   intervene and defend the challenged decision.

21               On September 18, 2006, the applicant, Waldport Seafood Company, LLC (Waldport)  
22   filed a motion to intervene on the side of respondent. On September 25, 2006, Fran Recht  
23   (Recht) filed a motion to intervene on the side of petitioner.

24               The city objects to Recht's motion to intervene as untimely. ORS 197.830(7)(c)  
25   states that failure to file a motion to intervene with LUBA within 21 days after the notice of  
26   intent to appeal is filed "shall result in denial of the motion to intervene."<sup>1</sup> The city argues

---

<sup>1</sup> ORS 197.830(7) provides:

- “(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:

1 that pursuant to its August 30, 2006 request to extend the deadline to intervene, that deadline  
2 expired no later than September 20, 2006. Because Recht's motion was filed after that date,  
3 the city contends, Recht's intervention must be denied as untimely. *Slusser v. Polk County*,  
4 37 Or LUBA 1062, 1063 (2000); *Wolverton v. Crook County*, 34 Or LUBA 515, 517 (1998).

5 We granted a motion to intervene that was filed after the 21-day deadline specified in  
6 ORS 197.830(7)(c), where the late filing of the motion to intervene was attributable to the  
7 petitioner's failure to serve a copy of the NITA on the applicant intervenor. *Mountain West*  
8 *Investment Corp. v. City of Silverton*, 38 Or LUBA 932, 934 (2000) (LUBA will not deny the  
9 applicant's motion to intervene filed 53 days after the NITA is filed, where the petitioner  
10 failed to serve a copy of the NITA on the applicant). However absent such a failure on the  
11 part of the petitioner or some other adequate reason to excuse a party's failure to comply with  
12 the 21-day deadline specified in ORS 197.830(7)(c), ORS 197.830(7)(c) clearly requires  
13 denial of any motion to intervene filed more than 21 days after the notice of intent to appeal  
14 is filed.

15 Recht's motion to intervene was filed more than 21 days after the date the notice of  
16 intent to appeal was filed, and is therefore untimely. Recht argues that the purpose of the 21-  
17 day deadline at ORS 197.830(7) is to ensure that anyone desiring to intervene on the side of  
18 the petitioner does so before the deadline for filing the petition for review is set. Because  
19 there is a pending record objection, Recht argues, the deadline for filing the petition for  
20 review has not yet been set, and therefore there is no harm in allowing Recht's untimely  
21 intervention. According to Recht, the delay in filing the motion to intervene has prejudiced

---

“(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 no parties' substantial rights.

2       ORS 197.830(7) does not state the intended purpose of the 21-day deadline to file the  
3 motion to intervene, but we suspect that the purpose of that deadline is not to ensure that  
4 intervenors-petitioner have a full 21 days to write a petition for review. The 21-day deadline  
5 applies to all potential intervenors, and we have held that ORS 197.830(7)(c) requires that  
6 untimely motions to intervene be denied, even if granting an untimely motion would not  
7 prejudice other parties' substantial rights or delay LUBA's review proceedings. *Leach v.*  
8 *Lane County*, 45 Or LUBA 733, 735 (2003). Accordingly, Recht's motion to intervene is  
9 denied.

10       Although no party has objected to Waldport's motion to intervene, it is obvious that  
11 Waldport's motion, filed September 18, 2006, is also late and also must be denied, unless we  
12 grant the city's August 30, 2006 motion to extend the time to file motions to intervene.

13       The city cites to OAR 661-010-0067(3), which provides that all time limits other than  
14 the deadlines for filing the notice of intent to appeal and the petition for review "may be  
15 extended upon \* \* \* motion of a party." That rule must be interpreted in a manner consistent  
16 with ORS 197.830(7), which as noted above mandates denial of a motion to intervene filed  
17 more than 21 days after the notice of intent to appeal is filed. The city had not cited any  
18 basis consistent with ORS 197.830(7) for the Board to grant the city's motion to extend the  
19 deadline for filing motions to intervene in this case. Accordingly, the city's motion and  
20 Waldport's motion to intervene must be denied.

## 21 **RECORD OBJECTIONS**

22       On September 7, 2006, petitioner filed objections to the record, citing two omissions.  
23 The city submitted a supplemental record, to which petitioner objected. We now resolve the  
24 outstanding objections.

1           **A.       Sheet of Photographs**

2           Petitioner objected to the omission of a sheet of copied photographs that one city  
3   councilor passed around to other councilors during deliberations. In response, the city  
4   submitted a supplemental record that consists of a single sheet of photographs labeled  
5   “Supplemental Record.” Petitioner objects that the supplemental record is not paginated and  
6   does not conform to the requirements for a record.

7           Petitioner is correct that the supplemental record does not conform to the  
8   requirements of OAR 661-010-0025(4). On the other hand, we see no difficulty in  
9   incorporating a single sheet of paper into the original record. The original record is bound in  
10   a three-ring binder with pockets. LUBA has placed the supplemental record into one of the  
11   pockets, and it is recommended that the parties do the same. The one page supplemental  
12   record may be cited simply as “Supplemental Record.” With that understanding, this  
13   objection is denied.

14           **B.       Transcript of July 17, 2006 city council meeting**

15           Petitioner objects that the transcript of the July 17, 2006 city council meeting is  
16   inaccurate, and requests that a partial transcript prepared by petitioner and attached to the  
17   record objection be included in the record as part of the supplemental record.

18           OAR 661-010-0026(3) authorizes LUBA to order the city to prepare a transcript of  
19   hearings where a party demonstrates that the minutes of the hearing are incomplete or  
20   inaccurate. However, petitioner has not demonstrated that the minutes are incomplete or  
21   inaccurate and, in any case, our rules do not authorize parties other than the local government  
22   to prepare transcripts to be placed into the official local record. Therefore, this objection is  
23   denied. That said, petitioner may attach the transcript he prepared to the petition for review,  
24   in aid of any assignment of error. OAR 661-010-0030(5).

1           The record is settled as of the date of this order. The petition for review is due 21  
2 days, and the response brief due 42 days, from the date of this order. The Board's final  
3 opinion and order is due 77 days from the date of this order.

4           Dated this 20th day of October, 2006.  
5  
6  
7  
8  
9

10           \_\_\_\_\_  
11           Tod A. Bassham  
              Board Chair