

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

3
4 JEANNE BIGGERSTAFF and CARR BIGGERSTAFF,
5 *Petitioners,*

6
7 vs.

8
9 YAMHILL COUNTY,
10 *Respondent,*

11
12 and

13
14 RANDY HOPP,
15 *Intervenor-Respondent.*

16
17 LUBA Nos. 2008-109, 2008-110, 2008-111 and 2008-112

18 ORDER ON MOTION TO APPEAR AS AMICUS

19 On February 2, 2009, Ralph Johnson and Norma Johnson filed a motion to appear as
20 amicus, together with an amicus brief. The appeal challenges the county’s issuance of
21 multiple permits for replacement dwellings on land that was owned by Ralph Johnson at the
22 time the permits were issued.

23 OAR 661-010-0052(1) provides:

24 “A person or organization may appear as amicus only by permission of the
25 Board on written motion. The motion shall set forth the interest of the movant
26 and state reasons why a review of relevant issues would be significantly aided
27 by participation of the amicus. A copy of the motion shall be served on all
28 parties to the proceeding.”

29 The two requirements under the rule in order to appear as *amicus* are: (1) the Johnsons must
30 set forth their interest; and (2) the Johnsons must state reasons why LUBA’s review of the
31 relevant issues would be significantly aided by participation of the *amicus*. *Nelson v. Curry*
32 *County*, 48 Or LUBA 178, 179 (2004).¹

¹ As we discussed in our December 2, 2008 order granting intervenor Hopp’s motion to intervene and denying the county’s motion to dismiss the appeal, Ralph Johnson initially applied for the permits and later sold the property to Norma Johnson and another party.

1 Turning to the second requirement, the Johnsons state:

2 “The Board’s review of the issues presented in this appeal would be
3 significantly aided by the Johnsons’ participation: the Johnsons have first
4 hand knowledge of the history of the property, the events leading up to the
5 original application for the building permit, the application for the
6 replacement dwelling and the events that followed, and the details and history
7 of the Johnsons’ Measure 37 waiver and the vested rights determination under
8 Measure 49. In sum, the Johnsons would provide valuable knowledge on
9 events leading up to, and happening after, the date this appeal was filed.”
10 Motion to Appear as Amicus 2.

11 We have allowed amicus participation in cases where the Board would be faced with making
12 a decision without the benefit of a response brief. Intervenor filed his response brief on
13 February 3, 2009. The response brief is due not later than February 9, 2009. We do not
14 know whether the county intends to file a response brief.

15 More problematic is Johnsons’ belief that their participation would provide the Board
16 with “knowledge on events leading up to, and happening after, the date this appeal was
17 filed.” We are not sure what knowledge the Johnsons believe they possess about events that
18 may have occurred either before or after the date the NITA was filed. However, except in
19 limited circumstances LUBA may not consider evidence that is outside of the record filed by
20 the county in this appeal. Given the participation in this appeal by intervenor, and the
21 likelihood that the arguments that the Johnsons will seek to present to LUBA are based on
22 matters outside our scope of review, the Johnsons have not established that our review would
23 be significantly aided by the Johnsons’ participation in the appeal.

24 The motion to appear as an amicus is denied.

1
2
3
4
5
6
7

Dated this 6th day of February, 2009.

Melissa M. Ryan
Board Member