

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 DAVID HOLMBERG and MADELEINE HOLMBERG,
5 *Petitioners,*
6
7 vs.
8
9 DESCHUTES COUNTY,
10 *Respondent.*
11
12 LUBA No. 2017-082

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14 ORDER ON MOTION TO INTERVENE

15 Petitioners filed the notice of intent to appeal by certified mail on
16 September 6, 2017, and LUBA received the notice of intent to appeal on
17 September 8, 2017. Linda Ripsch, Karl Johnson and Guinevere Johnson move
18 to intervene on the side of respondent. Ripsch was the applicant below; the
19 Johnsons are the owners of the property for which the county approved a
20 temporary medical hardship permit. All the moving parties appeared before the
21 county in this matter. The motion to intervene was filed on September 28,
22 2017.

23 Intervention in a LUBA appeal is governed by ORS 197.830(7), which
24 provides:

25 “(a) Within 21 days after a notice of intent to appeal has been
26 filed with the board under subsection (1) of this section, any
27 person described in paragraph (b) of this subsection may
28 intervene in and be made a party to the review proceeding
29 by filing a motion to intervene and by paying a filing fee of
30 \$100.

1 “(b) Persons who may intervene in and be made a party to the
2 review proceedings, as set forth in subsection (1) of this
3 section, are:

4 “(A) The applicant who initiated the action before the local
5 government, special district or state agency; or

6 “(B) Persons who appeared before the local government,
7 special district or state agency, orally or in writing.

8 “(c) Failure to comply with the deadline or to pay the filing fee
9 set forth in paragraph (a) of this subsection shall result in
10 denial of a motion to intervene.”

11 Ripsch and the Johnsons qualify as persons who may intervene under
12 ORS 197.830(7)(b). If the notice of intent to appeal was filed on September 6,
13 2017, on the date it was mailed certified mail to LUBA, the September 28,
14 2017 motion to intervene was filed one day late, and ORS 197.830(7)(c)
15 requires that the motion to intervene be denied. *Grant v. City of Depoe Bay*, 52
16 Or LUBA 811, 812 (2006) (ORS 197.830(7)(c) specifies the consequence for
17 failure to timely file a motion to intervene). We have allowed late motions to
18 intervene where failure to comply with the 21-day deadline is caused by some
19 failure on the part of petitioner. *Id.*; *Mountain West Investment Corp. v. City of*
20 *Silverton*, 38 Or LUBA 932, 934 (2000). However, in this appeal the delay in
21 filing the motion to intervene was not caused by any failure on the part of
22 petitioner.

23 Ripsch and the Johnsons contend the motion to intervene was timely
24 filed under OAR 661-010-0015(1)(b), because the date of *filing* of the notice of
25 intent to appeal was either the date it was *mailed* by certified mail on

1 September 6, 2017 or the date it was *received* by LUBA, September 8, 2017.
2 Measured from the date the notice of intent to appeal was received by LUBA,
3 Ripsch and the Johnsons argue the motion to intervene was timely filed 20 days
4 later. Ripsch and the Johnsons misread OAR 661-010-0015(1)(b), which
5 provides:

6 “The date of filing a notice of intent to appeal is the date the
7 Notice is received by the Board, or the date the Notice is mailed,
8 provided it is mailed by registered or certified mail, and the party
9 filing the Notice has proof from the post office of such mailing
10 date. If the date of mailing is relied upon as the date of filing, the
11 date of the receipt stamped by the United States Postal Service
12 showing the date mailed and the certified or registered number is
13 the date of filing.”

14 OAR 660-010-0015(1)(b) does not set out two dates of filing, either of
15 which may be relied upon as the date of filing. Instead, the rule makes the date
16 of *filing* the date of *mailing*, so long as the mailing is accomplished in the
17 manner specified by the rule, as it was in this case. In all other circumstances,
18 under OAR 660-010-0015(1)(b), the date of *filing* is “the date the [notice of
19 intent to appeal] is *received* by [LUBA].” (Emphasis added.)

20 Ripsch and the Johnsons also argue: “In the alternative, if the language
21 of the rule is ambiguous the Board should grant Intervenors-Respondents[']
22 motion because the Petitioners have not been prejudiced and fairness and
23 justice would dictate granting the motion.” Response to Objection to Motion to
24 Intervene 2.

1 We do not agree that the rule is ambiguous. And ORS 197.830(7)(c)
2 requires that an untimely motion to intervene must be denied even if granting
3 the untimely motion to intervene would not prejudice the substantial rights of
4 any other party. *Grant*, 52 Or LUBA at 813 (citing *Leach v. Lane County*, 45
5 Or LUBA 733, 735 (2003).

6 The motion to intervene is denied. The briefing schedule remains as
7 established by our September 29, 2017 letter.

8 Dated this 17th day of October, 2017.

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Michael A. Holstun
Board Member