

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

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4
5 STEVE VANSICKLE, JOHN WHITE,
6 and BART BALLARD,
7 *Petitioners,*

8
9 vs.

10
11 KLAMATH COUNTY,
12 *Respondent.*

13
14 LUBA Nos. 2018-014 and 2018-036

15
16 ORDER

17 On May 21, 2018, petitioners filed the petition for review in these
18 consolidated appeals. The response brief was due on June 11, 2018, and the
19 county previously submitted a letter stating that it will not file a response brief.
20 Oral argument is currently scheduled for July 18, 2018 at 11:00 a.m. On June
21 11, 2018, the Board received a “Motion to Appear as Amicus; Motion for
22 Extension of Time to File Amicus Brief” in LUBA No. 2018-036 from Leon
23 Whistler (Applicant), the applicant and owner of the property that is the subject
24 of the challenged decisions.

25 In a section of his motion, Applicant takes the position that LUBA
26 should grant the motion because petitioners’ Notice of Intent to Appeal (NITA)

1 failed to comply with OAR 661-010-0015(3)(g).¹ According to Applicant, the
2 NITA failed to include the correct citation to LUBA’s rules regarding
3 intervention, at OAR 661-010-0050. Rather, the NITA cited “OAR 661-10-
4 050,” omitting the initial zeros in the last two sets of digits. Notice of Intent to
5 Appeal 3 (LUBA No. 2018-036).² Applicant argues that “[m]ovant, and other
6 interested parties, would not have been able to locate the applicable
7 intervention rule to determine their obligations and timelines using the citation
8 contained in the [NITAs].” Motion to Appear as Amicus 2. However, we reject
9 that argument for a few reasons. First, Applicant has not explained the
10 relevance of any shortened citation in the NITA to LUBA’s rules regarding
11 *intervention* to our consideration of Applicant’s motion to appear as *amicus*.
12 Second, the citation in the NITA to “OAR 661-10-050” is sufficiently close to
13 the current numbering of LUBA’s rules that we seriously doubt that anyone
14 would be misled by the citation to “OAR 661-10-050.”

¹ OAR 661-010-0015(3)(g) requires a notice of intent to appeal to include “[a] statement advising all persons, other than the governing body, that in order to participate in the review proceeding a person must file a motion to intervene pursuant to OAR 661-010-0050.”

² We previously explained in an order consolidating these appeals that LUBA No. 2018-014 is an appeal of a January 25, 2018 Final Order of the board of county commissioners approving comprehensive plan amendments, and LUBA No. 2018-036 is an appeal of a January 25, 2018 Ordinance that adopts the comprehensive plan amendments approved in the Final Order. *Van Sickel v. Klamath County*, __ Or LUBA __ (LUBA Nos. 2018-014/2018-036, April 17, 2018, Order), slip op 1-2.

1 LUBA's rules regarding amicus participation are found at OAR 661-010-
2 0052, which provides:

3 “(1) A person or organization may appear as amicus only by
4 permission of the Board on written motion. The motion
5 shall set forth the interest of the movant and state reasons
6 why a review of relevant issues would be significantly aided
7 by participation of the amicus. A copy of the motion shall
8 be served on all parties to the proceeding.³

9 “(2) Appearance as amicus shall be by brief only, unless the
10 Board specifically authorizes or requests oral argument. An
11 amicus brief shall be subject to the same rules as those
12 governing briefs of parties to the appeal, and shall be filed
13 together with four copies. Where amicus is aligned with the
14 interests of the petitioner(s), the amicus brief is due seven
15 days after the date the petition for review is due. In all other
16 circumstances, the amicus brief is due within the time
17 required for filing respondent's brief. No filing fee is
18 required. An amicus brief shall have green front and back
19 covers.”

20 The legislature amended ORS 197.830(7) in 1997 to require that LUBA
21 deny motions to intervene that are not filed within 21 days of the date the
22 notice of intent to appeal is filed. *See Grahn v. City of Newberg*, 49 Or LUBA
23 762, 766 (2005) (that the legislature chose to spell out the consequences for
24 untimely filing of a motion to intervene indicates that the legislature wanted
25 that deadline to be rigorously enforced and, by implication, not extended). In
26 some circumstances, LUBA has allowed a person or organization to appear as
27 amicus if the potential amicus demonstrates that amicus participation would

³ Applicant did not serve a copy of his motion on the county.

1 aid, and not delay, LUBA’s review. As we explained in *Central Oregon*
2 *Landwatch v. Jefferson County*, 62 Or LUBA 530, 533 (2010):

3 “The typical amicus is a person or organization that has no direct
4 interest in the matter, but is in possession of views or perspectives
5 that may assist LUBA to correctly decide the legal issues. An
6 example in the land use review context is amicus participation by
7 the Farm Bureau or a similar advocacy organization, which has a
8 general view or expertise on how state or local land use
9 regulations governing agricultural land should be understood and
10 applied, and whose view or expertise might assist LUBA in
11 interpreting those regulations. See *Home Builders Association of*
12 *Lane County v. City of Eugene*, 59 Or LUBA 116 (2009) (granting
13 the amicus motion of The Oregon Homebuilders Association and
14 the National Association of Homebuilders).”

15 To preserve the legislative intent in requiring timely intervention, LUBA
16 has generally declined to grant amicus participation to interested parties to the
17 proceedings below who simply missed the deadline to intervene, and who
18 argue only that LUBA’s review would be aided by their participation because
19 they are interested parties. *Cotter v. Clackamas County*, 35 Or LUBA 749, 750
20 (1998) (a property owner’s interest in property is not sufficient, in itself, to
21 show that LUBA’s review would be significantly aided by the property owner’s
22 participation as an amicus). One exception LUBA has recognized is
23 circumstances where the respondent has informed LUBA that it does not intend
24 to file a response brief. However, even in that circumstance, a movant must still
25 establish that LUBA’s review would be “significantly aided” by the movant’s
26 participation as amicus.

27 Applicant’s motion states that:

1 “Absent Amicus participation, no brief responding to the petition
2 for review would be filed at all. Accordingly, the Petition for
3 Review and associated briefing/evidence will be the only evidence
4 upon which the Land Use Board of Appeals could consult when
5 resolving the appeal.

6 “Addition[al] evidence and briefing supporting Movant’s Motion
7 to Appear as an Amicus will be submitted by the close of business
8 on June 13, 2018.” Motion to Appear as Amicus 2.

9 We conclude that the Board’s review would not be “significantly aided” by
10 amicus participation. First, LUBA’s review is limited to the record of the
11 proceeding, and LUBA will not allow or consider “additional evidence”
12 submitted by an amicus. Second, Applicant was entitled to intervene in the
13 appeal pursuant to ORS 197.830(7)(b)(A), but failed to do so. Allowing
14 Applicant to participate as an amicus in this appeal would effectively allow
15 Applicant to participate as an intervenor-respondent and file what is in effect a
16 response brief to the petition for review, without meeting the statutory deadline
17 for intervention and without payment of an intervenor fee as set out in ORS
18 197.830(7)(a). Moreover, LUBA will generally not consider new defenses
19 raised solely in an amicus brief. *Kinnett v. Douglas County*, 57 Or LUBA 184,
20 186-87 (2008).

21 Accordingly, for the reasons set forth above, we conclude that the
22 movant has not established that “a review of relevant issues would be
23 significantly aided by participation of the amicus[.]” OAR 661-010-0052(1).

24 The motion to appear as amicus is denied.
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1 Dated this 12th day of June, 2018.

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Melissa M. Ryan

7 Board Chair