

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

3  
4                   SHELLEY WETHERELL,  
5                   *Petitioner,*

6  
7                   vs.

8  
9                   DOUGLAS COUNTY,  
10                  *Respondent.*

11  
12                  LUBA No. 2018-033

13  
14                  ORDER

15           The petition for review in this appeal was filed on May 14, 2018. The  
16 response brief was due on June 4, 2018. The county has not filed a response  
17 brief. On June 3, 2018, Coles Valley Church, the applicant for the decision  
18 challenged in the appeal (Applicant) filed a “Motion of Coles Valley Church  
19 To Intervene on the Side of Respondent or, In the Alternative, To Appear as  
20 Amicus [O.A.R. 661-010-0050 & 661-010-0052]” (Motion). The Motion  
21 includes a 15-page “memorandum of points and authorities,” two declarations  
22 in support of the Motion, and several other exhibits.

23           In a previous order, we suspended all deadlines in the appeal in order to  
24 allow petitioner to respond to Applicant’s Motion and to consider Applicant’s  
25 Motion. Petitioner objects to the Motion. We now resolve the Motion.

26   **MOTION TO INTERVENE**

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

06/27/18 PM12:10 LUBA

1 “(a) *Within 21 days after a notice of intent to appeal has been*  
2 *filed with the board under subsection (1) of this section, any*  
3 *person described in paragraph (b) of this subsection may*  
4 *intervene in and be made a party to the review proceeding*  
5 *by filing a motion to intervene and by paying a filing fee of*  
6 *\$100.*

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

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

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

14 “(c) *Failure to comply with the deadline or to pay the filing fee*  
15 *set forth in paragraph (a) of this subsection shall result in*  
16 *denial of a motion to intervene.”* (Emphases added.)

17 The Notice of Intent to Appeal was filed on March 29, 2018, and therefore the  
18 deadline to intervene was April 18, 2018. Applicant argues that its motion to  
19 intervene was timely filed, citing OAR 661-010-0050(6)(b).<sup>1</sup> OAR 661-010-  
20 0050(6)(b) sets out the deadlines for filing an intervenor’s brief, depending on  
21 whether intervention is sought as a petitioner, in which case the brief is due  
22 within the time limit for filing the petition for review, or as a respondent, in  
23 which case the brief is due within the time limit for filing the response brief.  
24 However, OAR 661-010-0050(6)(b) has no bearing on the deadline for filing a

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<sup>1</sup> Applicant also cites and relies on Federal Rule of Civil Procedure 24(a)(2), which does not apply to proceedings before LUBA.

1 motion to intervene. That deadline is set out at OAR 661-010-0050(2) and is  
2 the same deadline set forth in ORS 197.830(7)(a).

3 Applicant's Motion was filed on June 3, 2018, 66 days after the Notice  
4 of Intent to Appeal was filed. The Motion is therefore untimely. An untimely  
5 motion to intervene must be denied, without regard to whether any party's  
6 substantial rights are prejudiced by the late filing. *Grant v. City of Depoe Bay*,  
7 52 Or LUBA 811, 813 (2006) (*citing Leach v. Lane County*, 45 Or LUBA 733,  
8 735 (2003)); *see also Grahn v. City of Newberg*, 49 Or LUBA 762, 766 (2005)  
9 (that the legislature chose to spell out the consequences for untimely filing of a  
10 motion to intervene indicates that the legislature wanted that deadline to be  
11 rigorously enforced and, by implication, not extended). Applicant does not  
12 allege any basis for allowing a motion to intervene that is filed later than the  
13 deadline in ORS 197.830(7)(a).

14 The motion to intervene is denied.

#### 15 **MOTION TO APPEAR AS AMICUS**

16 In the alternative, Applicant seeks permission to participate as an amicus  
17 on the side of the respondent. LUBA's rules regarding amicus participation are  
18 found at OAR 661-010-0052, which provides:

19 “(1) A person or organization may appear as amicus only by  
20 permission of the Board on written motion. The motion  
21 shall set forth the interest of the movant and state reasons  
22 why a review of relevant issues would be significantly aided  
23 by participation of the amicus. A copy of the motion shall  
24 be served on all parties to the proceeding.

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

12     In some circumstances, LUBA has allowed a person or organization to appear  
13     as amicus if the potential amicus demonstrates that amicus participation would  
14     aid, and not delay, LUBA's review. *Home Builders Association of Lane County*  
15     *v. City of Eugene*, 59 Or LUBA 116 (2009) (granting the amicus motion of the  
16     Oregon Homebuilders Association and the National Association of  
17     Homebuilders). As we explained in *Central Oregon Landwatch v. Jefferson*  
18     *County*, 62 Or LUBA 530, 533 (2010):

19       “The typical amicus is a person or organization that has no direct  
20       interest in the matter, but is in possession of views or perspectives  
21       that may assist LUBA to correctly decide the legal issues. An  
22       example in the land use review context is amicus participation by  
23       the Farm Bureau or a similar advocacy organization, which has a  
24       general view or expertise on how state or local land use  
25       regulations governing agricultural land should be understood and  
26       applied, and whose view or expertise might assist LUBA in  
27       interpreting those regulations.” *Id.* (citing *Home Builders*  
28       *Association of Lane County*, 59 Or LUBA 116).

29       To preserve the legislative intent in requiring timely intervention, LUBA  
30     has generally declined to grant amicus participation to interested parties to the  
31     proceedings below who simply missed the deadline to intervene, and who

1 argue only that LUBA's review would be aided by their participation because  
2 they are interested parties. *Cotter v. Clackamas County*, 35 Or LUBA 749, 750  
3 (1998) (a property owner's interest in property is not sufficient, in itself, to  
4 show that LUBA's review would be significantly aided by the property owner's  
5 participation as an amicus). One exception LUBA has recognized is  
6 circumstances where the respondent has informed LUBA that it does not intend  
7 to file a response brief. However, even in that circumstance, a movant must still  
8 establish that LUBA's review would be "significantly aided" by the movant's  
9 participation as amicus, and that briefing would not be delayed.

10 Applicant argues that allowing Applicant to appear as an amicus would  
11 "aid LUBA greatly in reviewing the relevant issues of substantial burden and  
12 equal terms under [the Religious Land Use and Institutionalized Persons Act]  
13 RLUIPA – and specifically, why overturning Respondent's decision would  
14 violate that federal law." Motion 13. Petitioner responds that allowing amicus  
15 participation will delay LUBA's review by delaying the briefing schedule and  
16 oral argument, and that LUBA's review will not be significantly aided by  
17 amicus participation. Petitioner argues that at least one of petitioner's  
18 assignments of error alleges that the county committed a procedural error in  
19 failing to provide notice of the decision in accordance with the procedures at  
20 ORS 215.416 for issuing permits, and that LUBA's consideration of that  
21 assignment of error does not implicate RLUIPA in any way.

1       We conclude that allowing Applicant to appear as amicus would not  
2 significantly aid our review of the relevant issues in the appeal. First, LUBA's  
3 review has already been delayed by the filing of the Motion, which caused  
4 LUBA to suspend the deadlines in the appeal, and allowing Applicant to appear  
5 as amicus will result in further delay of the appeal in order to give petitioner  
6 time to file a reply brief to respond to new issues that are raised in the Motion.

7       Second, Applicant was entitled to intervene in the appeal pursuant to  
8 ORS 197.830(7)(b)(A), but failed to do so. Allowing Applicant to participate  
9 as an amicus in this appeal would effectively allow Applicant to participate as  
10 an intervenor-respondent and file what is in substance a response brief to the  
11 petition for review, without meeting the statutory deadline for intervention and  
12 without payment of an intervenor fee as set out in ORS 197.830(7)(a).

13       Finally, LUBA's review is limited to the record of the proceeding, and  
14 LUBA will not allow or consider additional evidence submitted by an amicus,  
15 including the declarations and exhibits that are attached to the Motion.  
16 Moreover, LUBA will generally not consider new issues, new bases for  
17 remand, or new defenses raised solely in an amicus brief. *Kinnett v. Douglas*  
18 *County*, 57 Or LUBA 184, 186-87 (2008). The Motion includes new evidence,  
19 as well as new issues and new defenses in support of the decision that are  
20 raised solely in their memorandum and that are not raised in the petition for  
21 review or the decision.

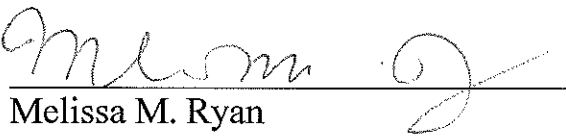
1 Accordingly, for the reasons set forth above, we conclude that Applicant  
2 has not established that “a review of relevant issues would be significantly  
3 aided by participation of the amicus.” OAR 661-010-0052(1).

4 The motion to appear as amicus is denied.

5 **ORAL ARGUMENT**

6 Oral argument will be rescheduled by separate letter, in accordance with  
7 the Board’s customary practice.

8 Dated this 27<sup>th</sup> day of June, 2018.

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13 Melissa M. Ryan  
14 Board Chair

## Certificate of Mailing

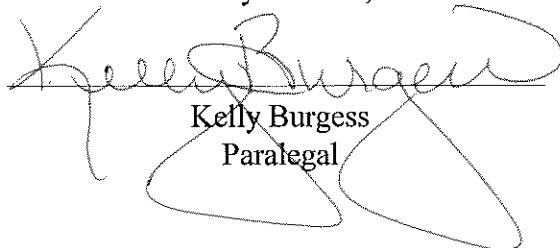
I hereby certify that I served the foregoing Order for LUBA No. 2018-033 on June 27, 2018, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 27th day of June, 2018.



Kelly Burgess  
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