

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

3
4 RUSSELL LEACH and LORI LEACH,
5 *Petitioners,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent.*

11
12 LUBA No. 2003-090

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14 LARRY OKRAY and KRISTIN OKRAY,
15 *Petitioners,*

16
17 vs.

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19 LANE COUNTY,
20 *Respondent,*

21
22 and

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24 RUSSELL LEACH and LORI LEACH,
25 *Intervenors-Respondent.*

26
27 LUBA No. 2003-091

28 ORDER

29 **MOTION TO INTERVENE**

30 Russell Leach and Lori Leach move to intervene in LUBA No. 2003-091 on the side
31 of respondent. There is no opposition to the motion, and it is allowed.

32 **MOTION TO STRIKE**

33 On June 17, 2003, we consolidated these appeals, which appeal the same land use
34 decision. The challenged land use decision approves the application of petitioners Russell
35 Leach and Lori Leach (the Leaches) to verify a racetrack as a nonconforming use.
36 Petitioners Larry Okray and Kristin Okray (the Okrays) opposed that application before the
37 county. On or about July 16, 2003, the Leaches and the Okrays filed separate petitions for

1 review. On September 22, 2003, the county filed a response brief. On that same date, the
2 Okrays filed a response brief in LUBA No. 2003-090, responding to issues raised in the
3 Leaches' petition for review.

4 The Leaches move to strike the Okrays' response brief, arguing that the Okrays did
5 not file a motion to intervene in LUBA No. 2003-090, are not the respondent in that case, and
6 therefore the Okrays may not file a response brief. The Okrays respond that following the
7 Board's consolidation of LUBA No. 2003-090 and 2003-091, they need not move to
8 intervene in LUBA No. 2003-090 in order to file a response brief in that appeal. The Okrays
9 argue that once consolidation is ordered, the consolidated cases become one combined case,
10 making intervention unnecessary.

11 In the alternative, the Okrays request that the Board consider their response brief to
12 include a motion to intervene in LUBA No. 2003-090. The Okrays acknowledge that
13 ORS 197.830(7) and OAR 661-010-0050(2) require that a motion to intervene be filed within
14 21 days of the date the notice of intent to appeal is filed.¹ According to the Okrays, the late
15 filing of a motion to intervene and any formal deficiencies in that motion are merely
16 technical violations of LUBA's rules that, absent prejudice to a party's substantial rights, do
17 not affect LUBA's review. OAR 661-010-0005. The Okrays argue that viewing their

¹ ORS 197.830(7) provides:

- “(7)(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:
 - “(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 response brief as including a late-filed motion to intervene does not prejudice any party's
2 substantial rights.

3 We disagree with the Okrays' alternative argument that a late-filed motion to
4 intervene is merely a technical violation of LUBA's rules that may be ignored if no prejudice
5 results to any party's substantial rights. Absent circumstances not present here,
6 ORS 197.830(7)(c) requires that late-filed motions to intervene must be denied. *Wolverton v.*
7 *Crook County*, 34 Or LUBA 515, 517 (1998). Accordingly, to the extent the Okrays'
8 response brief is viewed as a motion to intervene, that motion is denied. ORS 197.830(7)(c).

9 We also disagree that our order consolidating LUBA No. 2003-090 and 2003-091 had
10 the effect of authorizing petitioners in LUBA No. 2003-091 to participate in LUBA No.
11 2003-090 as respondents without filing a timely motion to intervene on the side of
12 respondent in LUBA No. 2003-090. The Okrays cite no authority for that view.
13 Consolidation of separate appeals under our rules is a matter of administrative convenience
14 for the parties and the Board, and does not affect the legal relations of the parties to each
15 other or to the matters appealed. Consolidation of separate appeals does not permit a person
16 who is not a party to one of the consolidated appeals to file a brief in that appeal.

17 The Leaches' motion to strike the Okrays' response brief in LUBA No. 2003-091 is
18 granted. The Board will disregard that brief.

19 Dated this 8th day of October, 2003.

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Tod A. Bassham
Board Chair