

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

3
4 KENNETH SLUSSER and KATHRYN SLUSSER,
5 *Petitioners,*

6
7 vs.

8
9 POLK COUNTY,
10 *Respondent.*

11
12 LUBA No. 2000-009

13 ORDER

14 Before the Board are Gerald Hogevoll’s motion for extension of time to intervene and
15 motion to intervene, and petitioners’ objections to the record.

16 **MOTION FOR EXTENSION OF TIME TO INTERVENE**
17 **MOTION TO INTERVENE**

18 The notice of intent to appeal in this case was filed on January 19, 2000. On
19 February 18, 2000, Gerald Hogevoll, the applicant below, filed a Motion for Extension of
20 Time to Intervene and Motion to Intervene. The motions state in relevant part:

21 “Petitioners Kenneth and Kathryn Slusser had actual knowledge that Hogevoll
22 was represented by an attorney [Murch] at the hearing before the County
23 Commissioners on December 1, 1999 (Rec 105), but apparently did not
24 inform their counsel on appeal. The Respondent did not include Murch on its
25 certificate of mailing (Rec 9 and 10), which appears to be the source for
26 Petitioners’ Certificate (Rec 14 and 15). No copy of Petitioners’ Notice was
27 received at Murch’s office. Murch has had recent hip surgery and was unable
28 to deal with this situation until now.

29 “* * * * *

30 “OAR 661-010-0067(3) allows for this Motion and this Motion is made in the
31 interest of justice, will not prejudice any of Petitioners’ rights or Respondent’s
32 rights and is the best way of correcting this record as to the faulty Certificate
33 of Mailing on the Decision and the Notice of Intent to Appeal. ORCP 12(b).”
34 Motion for Extension of Time and Motion to Intervene 1-2.

35 ORS 197.830(6) was amended in 1997 to require that a motion to intervene be filed
36 with LUBA within 21 days of the date the notice of intent to appeal is filed with LUBA. A

1 motion to intervene filed in violation of the deadline at ORS 197.830(6) must be denied.
2 ORS 197.830(6)(c); *Wolverton v. Crook County*, 34 Or LUBA 515, 517 (1998).

3 The difficulty with Hogevoll's argument is that the record shows that, in addition to
4 his attorney, Hogevoll himself appeared before the county, and the county sent the decision
5 directly to Hogevoll on the date it was issued. Record 9. Moreover, Hogevoll does not
6 dispute that petitioners served Hogevoll himself with a copy of the notice of intent to appeal,
7 as OAR 661-010-0015(2) requires. Under these circumstances, the fact that petitioners did
8 not serve the notice of intent to appeal on his attorney cannot provide a basis for Hogevoll
9 himself to intervene beyond the date specified in ORS 197.830(6) and OAR 661-010-
10 0050(2).

11 The motion to extend the time to file the motion to intervene is denied. Because the
12 motion to intervene was untimely filed, it is also denied.

13 **RECORD OBJECTIONS**

14 Petitioners filed three objections to the record on February 22, 2000. The county has
15 not responded.

16 **A. Objection 1**

17 Petitioners object to the inclusion of a letter at page 201 of the record. Petitioners
18 argue that they reviewed the county's file and that the letter was never in the file during the
19 local proceedings.

20 The letter at Record 201 is an undated letter addressed to the Polk County Board of
21 Commissioners regarding the permit that is the subject of this appeal. It is stamped as
22 received by the county Community Development department on November 23, 1999.
23 Petitioners' claim that they never saw the letter in the county's file is not sufficient to show
24 that a letter addressed to the final decision maker and received by the county during the
25 proceedings below was not "placed before" the board of commissioners during those
26 proceedings. OAR 661-010-0025(1)(b). The letter is properly included in the record.

1 Objection 1 is denied.

2 **Objection 2**

3 Petitioners next contend that they submitted a petition in opposition to the application
4 to the Board of Commissioners during the December 1, 1999 hearing that is improperly
5 omitted from the record. The county's lack of response gives us no reason to doubt
6 petitioners' assertion that the petition in opposition was placed before the final decision
7 maker during the proceedings below.

8 Objection 2 is sustained.

9 **Objection 3**

10 Finally, petitioners argue that page 338 of the record contains a reference that has
11 been blacked out since the record was closed. Petitioners attach to their motion an
12 unamended copy of the document at Record 338 and request that we order the county to
13 replace the document at Record 338 with the unamended copy of that document.

14 We cannot determine which version of the document at Record 338 was originally
15 submitted to the county. However, the county's lack of response gives us no reason to doubt
16 petitioners' assertion that the document was amended after it was submitted to the county.
17 Accordingly, we agree with petitioners that the county must include in the record an
18 unamended copy of the document at Record 338.

19 Objection 3 is sustained.

20 The record will be settled when the Board receives from the county a supplemental
21 record responsive to the objections sustained above.

22 Dated this 10th day of April, 2000.

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Tod A. Bassham
Board Chair