

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

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4                                   DANIEL PEREIRA,  
5                                   *Petitioner,*

6  
7                                   vs.

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9                                   COLUMBIA COUNTY,  
10                                  *Respondent,*

11                                  and

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14                                  SBA TOWERS, INC.,  
15                                  *Intervenor-Respondent.*

16  
17                                  LUBA No. 2000-173

18                                  ORDER

19   **MOTION TO INTERVENE**

20                    SBA Towers, Inc. (hereafter SBA), the applicant below, moves to intervene on the  
21 side of respondent. There is no opposition to the motion, and it is allowed.

22   **MOTION TO DISMISS**

23                    Based on a stipulation that was signed by petitioner and respondent and  
24 hand-delivered to LUBA on November 14, 2000, the deadline for filing the petition for  
25 review was extended from November 27, 2000, to January 12, 2001.<sup>1</sup> LUBA’s order  
26 granting the stipulated extension is comprised of the stipulated motion, with an added page  
27 that is signed by a LUBA Board Member and states “IT IS SO ORDERED.” LUBA’s order  
28 was mailed on November 14, 2000, to petitioner and respondent; but it was not mailed to  
29 SBA.

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<sup>1</sup>As explained below, SBA did not sign the stipulation.

1 SBA's motion to intervene, which was filed by mail on November 13, 2000, was  
2 received by LUBA on November 14, 2000.<sup>2</sup> On November 15, 2000, LUBA sent a letter to  
3 all parties acknowledging that the motion to intervene was "filed with LUBA on November  
4 13, 2000." That letter makes no reference to the November 14, 2000 order allowing the  
5 extension of time to file the petition for review that was issued the previous day.

6 SBA did not learn of petitioner's and respondent's stipulation or LUBA's order  
7 granting the extension until December 20 or 21, 2000.<sup>3</sup> On December 28, 2000, SBA filed a  
8 motion to dismiss this appeal. According to SBA, the deadline for filing the petition for  
9 review may not be extended without the agreement of *all* parties.<sup>4</sup> SBA argues it became a  
10 party when its motion to intervene was filed on November 13, 2000.<sup>5</sup> Because SBA did not  
11 sign the November 14, 2000 stipulation, SBA contends the deadline for filing the petition for  
12 review could not properly be extended under OAR 661-010-0067(2). SBA argues the

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<sup>2</sup>The motion to intervene was stamped as received by LUBA at 2:55 p.m. on November 14, 2000. The hand-delivered stipulation was stamped as received by LUBA approximately four hours earlier, at 11:01 a.m. on November 14, 2000.

<sup>3</sup>SBA claims to have learned of the stipulation and order from respondent's attorney. SBA also claims that it never received a copy of LUBA's November 14, 2000 order "[d]espite repeated requests to LUBA administrative staff[.]" Motion to Dismiss 3 n 3. SBA's requests to LUBA came during the week before Christmas, a time when one LUBA administrative staff position was vacant and the LUBA administrative staff person who occupies the other administrative staff position was on vacation. On December 21 and 26, 2000, LUBA administrative functions were being performed by LUBA Board members and a part-time temporary employee. LUBA's records indicate that LUBA made two attempts to fax documents to SBA on December 21, 2000, and made one attempt on December 26, 2000. Those records indicate the December 26, 2000 fax was not successful and only one of the December 21, 2000 attempts was successful. We understand SBA to take the position that the document that was faxed to SBA by LUBA on December 21, 2000, does not include the "IT IS SO ORDERED" page with the Board Member's signature. The LUBA persons who were attempting to send those faxes are not experienced operators of the fax machine, and we assume SBA is correct.

<sup>4</sup>As relevant, OAR 661-010-0067(2) provides:

"[I]n no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties.\* \* \*"

<sup>5</sup>OAR 661-010-0050(1) provides:

"Standing to Intervene: The applicant and any person who appeared before the local government, special district or state agency may intervene in a review proceeding before the Board. Status as an intervenor is recognized when a motion to intervene is filed, but the Board may deny that status at any time."

1 deadline for filing the petition for review therefore expired on November 27, 2000, and this  
2 appeal must be dismissed.<sup>6</sup>

3 Most of SBA's arguments reflect a correct reading of our rules. Intervenors become  
4 parties on the date a motion to intervene is filed, subject to the motion being denied at a later  
5 time.<sup>7</sup> *Ramsey v. City of Portland*, 22 Or LUBA 295, 302-03 (1991). Where the motion to  
6 intervene is filed by mail, status as an intervening party is achieved on the date the motion to  
7 intervene is filed by mail. All parties, including any intervenors, must consent to a request to  
8 extend the deadline for filing the petition for review. *Id.* at 301. SBA is also correct that  
9 where an intervenor does not consent to such a request, LUBA will deny the request. *Id.*  
10 However, SBA's argument that "[t]he facts in this case are nearly identical to those in  
11 *Ramsey*," and that the same result is called for here, is not correct.

12 In *Ramsey*, the petitioner was aware that motions to intervene had been filed, and  
13 petitioner filed a motion opposing the intervention requests over a week *before* he filed his  
14 request for additional time to file the petition for review. Just as importantly, in *Ramsey*  
15 LUBA never entered an order allowing the requested extension of time. In the current  
16 appeal, when the stipulation was filed by petitioner and respondent and LUBA issued its  
17 order on November 14, 2000, neither the parties nor LUBA were aware the motion to

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<sup>6</sup>As relevant, OAR 661-010-0030(1) provides:

"Filing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. \* \* \* The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, and any extensions of that time under \* \* \* OAR 661-010-0067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body. \* \* \*"

<sup>7</sup>OAR 661-010-0010(10) defines "party" as:

"\* \* \* the petitioner, the governing body, and any person who intervenes as provided in OAR 661-010-0050. \* \* \*"

1 intervene had been filed and would be received later that day.<sup>8</sup> Thus, at the time it was  
2 issued, there was no reason for LUBA not to issue the November 14, 2000 order. The facts  
3 in this appeal are thus quite different from the facts in *Ramsey*.

4 As we have already noted, LUBA's failure to serve a copy of its November 14, 2000  
5 order on SBA is attributable to the different times that the stipulation and the motion to  
6 intervene were received on November 14, 2000. Our rules do not require, and it is not  
7 LUBA's practice, to provide moving parties with copies of all pleadings and orders that have  
8 been filed and issued prior to receipt of a motion to intervene.

9 Petitioner apparently was aware that SBA intended to file its motion to intervene and  
10 petitioner also was aware that SBA opposed extending the deadline for filing the petition for  
11 review. Petitioner may or may not have been aware that he needed to obtain SBA's  
12 agreement to the extension, after LUBA issued its order on November 14, 2000, and that  
13 intervenor was unaware of the stipulation and order. However, even if petitioner was fully  
14 aware that SBA was *unaware* of these circumstances, the question would be whether  
15 petitioner was legally obligated to advise SBA of the circumstances or whether petitioner  
16 could remain silent and continue to rely on the deadline specified in LUBA's November 14,  
17 2000 order unless and until SBA filed a motion to challenge the order. We do not believe  
18 that SBA has established that petitioner had such a legal obligation in this matter.<sup>9</sup>

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<sup>8</sup>SBA does argue that approximately one week before November 14, 2000, petitioner knew that SBA intended to file a motion to intervene and did not consent to extending the deadline for filing the petition for review. However, we do not understand SBA to argue that the motion to intervene had been received by petitioner or respondent before they filed the stipulation on November 14, 2000.

<sup>9</sup>If the facts are as alleged by intervenor in this case, petitioner may have been less than forthcoming in his dealings with intervenor. However, that does not mean that petitioner violated any legal obligation that he owes intervenor under relevant statutes or LUBA's rules. We note that had intervenor requested copies of all previously filed pleadings and all previously issued orders at the time it filed its motion to intervene, those documents would have been provided. Therefore, intervenor's failure to learn of the November 14, 2000 stipulation and order cannot be solely attributed to petitioner's failure to inform intervenor.

1 We reject SBA's arguments that petitioner could no longer rely on LUBA's November 14,  
2 2000 order after the motion to intervene was received on November 14, 2000.<sup>10</sup> We also  
3 reject SBA's suggestion that LUBA was required to retract its November 14, 2000 order on  
4 its own motion. On November 14, 2000, 13 days remained before the original deadline for  
5 filing the petition for review would expire on November 27, 2000. Had SBA learned of the  
6 November 14, 2000 stipulation and order at the time they were filed, and issued and objected  
7 immediately, it would have been appropriate to reestablish November 27, 2000 as the  
8 deadline for filing the petition for review. However, SBA failed to learn of the November  
9 14, 2000 stipulation and order until December 21, 2000, and did not file its motion to dismiss  
10 until December 28, 2000. The question is whether, now that we know that intervenor was a  
11 party on November 14, 2000 and did not consent to the extension that was granted by our  
12 November 14, 2000 order, we must reestablish November 27, 2000 as the deadline for filing  
13 the petition for review and dismiss this appeal.

14 Where a motion to intervene has been filed and served but not yet received by LUBA  
15 and the parties, and an order extending the deadline for filing the petition for review is  
16 entered based on the mistaken understanding that all parties consent to the extension, the  
17 intervening party may thereafter object to the extension. In that circumstance, the objecting  
18 intervenor is entitled to have the original deadline for filing the petition for review  
19 reestablished, if that can be done without prejudicing petitioner's substantial right to rely on  
20 the deadline that was established in the order. Where the original deadline cannot be  
21 reestablished, without prejudicing petitioner's substantial rights, LUBA will consider  
22 establishing a shortened deadline for filing the petition for review that is consistent with  
23 petitioner's and intervenor's respective substantial rights.

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<sup>10</sup>The fact that our November 14, 2000 order was issued based on the erroneous understanding that all parties consented to the requested extension does not change the fact that the order was issued. Until that order is modified or rescinded, the deadline for filing the petition for review in this case is established by that order, which was issued pursuant to OAR 661-010-0067(2), and the petition for review is not yet due. *See* n 6.

1           In this case, reestablishing the original November 27, 2000 deadline and dismissing  
2 this appeal clearly would result in such prejudice to petitioner. Under our November 14,  
3 2000 order, the petition for review is due on January 12, 2001, or eight days from the date of  
4 this order. SBA does not argue in its December 28, 2000 motion that allowing petitioner  
5 eight additional days to file the petition for review will prejudice its substantial rights or that  
6 the January 12, 2001 deadline should be shortened. We believe that appreciably shortening  
7 that deadline would prejudice petitioner's substantial rights. Accordingly, we decline to  
8 shorten the deadline on our own motion.

9           The motion to dismiss is denied.

10          Dated this 4<sup>th</sup> day of January, 2001.

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Michael A. Holstun  
Board Member