

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 TODD B. BALLOU, LISA M. BALLOU,
5 THOMAS J. MAURER and TAMMY LENZ-MAURER,
6 *Petitioners,*
7

8 vs.
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10 DOUGLAS COUNTY,
11 *Respondent,*
12

13 and
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15 JOCK JOUVENAT,
16 *Intervenor-Respondent, Cross-Petitioner,*
17

18 and
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20 TERRY F. HOLING,
21 JOHN E. HOLING, ANN K. GRIDLEY,
22 JOHN R. GRIDLEY, HARRY WINSTON,
23 EVA REYNOLDS and HARVEY F. REYNOLDS,
24 *Intervenors-Respondent.*
25

26 LUBA No. 2001-066

27 ORDER ON MOTIONS TO DISMISS

28 Pursuant to an order issued by the Board on June 14, 2001, the petition for review in
29 this appeal was due on July 5, 2001. *Ballou v. Douglas County*, __ Or LUBA __ (Order, June
30 14, 2001). On the date the petition for review was due, LUBA received a motion requesting
31 an extension of time to file the petition for review. The motion was dated July 2, 2001. The
32 motion was not signed by all of the parties, as is required by OAR 661-010-0067.¹ Instead,

¹OAR 6610-010-0067 provides, in relevant part:

“(2) * * * in no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties. * * *

“* * *

1 the motion stated:

2 “The parties, by and through their counsel, move the [Board] for an extension
3 of time of 14 days from July 5, 2001, to July 19, 2001, within which to serve
4 and file petitioner[s’] Petition for Review in this case.

5 “The reason for this extension is to evaluate legislative history underlying
6 ORS 197.835(10)(a)(B). * * *

7 “Counsel for respondent has indicated no opposition, nor have counsel for the
8 lead intervenors.” Motion for Extension of Time 1-2.

9 On July 6, 2001, the Board issued an order allowing the extension of time. On July 7,
10 2001, Jouvenat’s attorney filed a memorandum regarding the motion for extension of time. In
11 that memorandum, Jouvenat’s attorney explained that he represented Jouvenat only, and that
12 his consent to the extension of time on Jouvenat’s behalf did not mean that other intervenors-
13 respondent (intervenors) also consented to the extension of time. On July 10, 2001,
14 intervenors Ann K. Gridley and John R. Gridley moved to dismiss the appeal, because the
15 petition for review had not been filed by July 5, 2001, nor had they consented in writing to an
16 extension of time.² The petition for review was filed on July 11, 2001.

17 Petitioners argue that we should deny the motions to dismiss because petitioners
18 understood that Jouvenat’s attorney represented all intervenors. According to petitioners, that
19 understanding was reasonable, given the representational status of the parties during the
20 proceedings below.³ Petitioners contend that Jouvenat’s attorney did not correct petitioners’
21 mistaken impression until after July 5, 2001. Therefore, petitioners argue, the

“(4) A motion for extension of time shall state the reasons for granting the extension and must be filed with the Board within the time required for performance of the act for which an extension of time is requested.”

²On July 12, 2001, Terry F. Holing, Eva Reynolds and Flossie Irene Knight separately filed motions to dismiss. Their motions are identical to the motion filed by intervenors Gridley. However, Flossie Irene Knight did not file a motion to intervene in this appeal and, therefore, we disregard her motion.

³The parties dispute whether Jouvenat’s attorney actually represented the other intervenors during the proceedings below. On July 18, 2001, petitioners moved for an order taking evidence outside the record to support their contention that Jouvenat’s attorney does in fact represent all of the intervenors. The represented status of the parties does not affect our resolution of the motions to dismiss. Therefore, petitioners’ motion to take evidence not in the record is denied.

1 misrepresentation or, at least, Jouvenat’s attorney’s failure to clarify representational status,
2 should not result in a dismissal of the appeal.

3 Intervenor’s argue that petitioners’ failure to obtain a stipulation signed by all of the
4 parties to extend the time for filing the petition for review requires dismissal. According to
5 Jouvenat, a letter was sent to petitioners on June 26, 2001, where Jouvenat’s attorney agreed
6 to the extension of time on Jouvenat’s behalf. Jouvenat argues that there is nothing in that
7 letter that indicates that the attorney represented other intervenors, or that a stipulated
8 extension of time by Jouvenat would serve as a stipulation by all of the intervenors.

9 In *Pereira v. Columbia County*, 39 Or LUBA 760 (2001), we denied a motion to
10 dismiss based on the petitioner’s failure to obtain written consent from all of the parties to
11 extend the time for filing the petition for review. There, the petitioner and the county
12 stipulated to an extension of time to file the petition for review. LUBA issued its order
13 granting the extension of time on the same day the Board received a motion to intervene by
14 intervenor-respondent. The order extending the time to file the petition for review was mailed
15 in the morning, and the motion to intervene was received in the afternoon. The intervenor-
16 respondent argued that because it was a party to the appeal on the day it filed its motion to
17 intervene, that is, the day it was mailed, petitioner had to obtain its consent for the extension
18 of time in order to avoid dismissal of the appeal.

19 We rejected that argument and explained:

20 “Where a motion to intervene has been filed and served but not yet received
21 by LUBA and the parties, and an order extending the deadline for filing the
22 petition for review is entered based on the mistaken understanding that all
23 parties consent to the extension, the intervening party may thereafter object to
24 the extension. In that circumstance, the objecting intervenor is entitled to have
25 the original deadline for filing the petition for review reestablished, if that can
26 be done without prejudicing petitioner’s substantial right to rely on the
27 deadline that was established in the order. Where the original deadline cannot
28 be reestablished without prejudicing petitioner’s substantial rights, LUBA will
29 consider establishing a shortened deadline for filing the petition for review
30 that is consistent with petitioner’s and intervenor’s respective substantial
31 rights.” 39 Or LUBA at 765.

1 The facts in this appeal present a much closer question. Here, intervenors filed their
2 motions to intervene before the motion to extend the time for filing the petition for review
3 was drafted. Indeed, our June 14, 2001 order expressly states that the intervenors moved to
4 intervene individually, and that those motions to intervene were allowed. *Ballou v. Douglas*
5 *County*, __ Or LUBA __ (Order, June 14, 2001) 1. However, as was the case in *Pereira*, the
6 Board issued an order allowing the extension of time, and petitioners have the right to rely on
7 the extended deadline established in the order. Rescinding our order now, and dismissing the
8 appeal, would result in substantial prejudice to petitioners' rights. The petition for review has
9 been filed, and the appeal has been suspended pending our ruling on the motions to dismiss.
10 Therefore, respondent and intervenors' substantial rights will not be prejudiced by denying
11 the motions to dismiss and reactivating the appeal at this time.

12 Intervenors' motions to dismiss are denied. Response and cross-response briefs are
13 due 21 days from the date of this order.

14 Dated this 27th day of July, 2001.

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Anne Corcoran Briggs
Board Chair