

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 GERALD POE and STEPHANIE POE,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF WARRENTON,  
10 *Respondent,*

11 and

12  
13 TERRY MILLER,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2011-069

17  
18 ORDER

19 Intervenor-respondent (intervenor) moves the Board to dismiss this appeal on the  
20 grounds that petitioner failed to timely file the petition for review, as required by OAR 661-  
21 010-0030(1).<sup>1</sup>

22 The petition for review was due on August 25, 2011. On August 24, 2011, petitioner  
23 filed with LUBA a motion for extension of time to file the petition for review for seven days,  
24 until September 1, 2011. The motion stated that “[t]he new filing date was mutually agreed  
25 upon and consented to by each party to this appeal. A written stipulation is attached hereto.”  
26 The motion stated that the city’s attorney had no objection to the extension but was unable to

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<sup>1</sup> OAR 661-010-0030(1) provides in relevant part:

“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. See OAR 661 010-0025(2) and 661-010-0026(6). \* \* \* Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or 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. See OAR 661 010 0075(1)(c).”

1 sign the stipulation due to a medical emergency.<sup>2</sup> On a signature line for “Ron Miller, For  
2 Intervenor-Respondent Terry Miller” and beneath a heading “It is so stipulated” was a  
3 handwritten notation “to be filed.” On August 25, 2011, a LUBA board member signed an  
4 added page to the motion under the heading “IT IS SO ORDERED” and served the order on  
5 the parties.

6 On August 25, 2011, petitioner filed an amended motion for extension, which LUBA  
7 received August 29, 2011, stating in relevant part that “Ronald Miller, attorney for  
8 Intervenor-Respondent Terry Miller, had agreed to execute a stipulation to this request but  
9 felt unable to do so after his client objected.” The petition for review was filed on August  
10 31, 2011.

11 On September 7, 2011, intervenor’s attorney Ronald Miller filed a motion to dismiss  
12 this appeal, arguing that intervenor Terry Miller had at no time agreed to extend the deadline  
13 for the petition for review beyond August 25, 2011. OAR 661-010-0067(2) provides in  
14 relevant part that:

15 “Except as provided in this section and OAR 661-010-0045(9), in no event  
16 shall the time limit for the filing of the petition for review be extended without  
17 the written consent of all parties. Written consent may include facsimile  
18 signatures. \* \* \*”

19 The motion was supported by the affidavit of intervenor Terry Miller, stating that “I did not,  
20 have not and do not agree to or authorize any extension of time.”

21 Petitioners respond that intervenor’s attorney Ronald Miller agreed to sign the  
22 stipulated extension on his client’s behalf, petitioners relied upon that agreement to seek and  
23 obtain an extension from LUBA, and under these circumstances dismissal of this appeal

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<sup>2</sup> The city’s attorney subsequently signed a written stipulation to extend the due date. That the city’s written consent was not submitted until after the deadline for filing the petition for review had passed is not an impediment to extending the deadline for filing the petition for review. *See Ackerley Communications, Inc. v. City of Portland*, 12 Or LUBA 407, 408 (1984) (where all parties orally agree to an extension, that the written consents are not submitted to LUBA until after the deadline passes is not a basis to dismiss the appeal); *Rabe v. City of Tualatin*, 22 Or LUBA 832, 835 (1992) (same).

1 would be inappropriate. Petitioners' response is supported by the declaration of petitioners'  
2 attorney, which describes a computer accident on August 22, 2011, that caused the loss of the  
3 initial draft of the petition for review, and the subsequent communications between  
4 petitioners' attorney and intervenor's attorney regarding an extension.<sup>3</sup> Specifically,

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<sup>3</sup> The declaration states, in relevant part:

"2. The petition for review was prepared prior to my departure on vacation August 12, 2011. During my vacation I made changes to a hard copy of the petition that I brought with me.

"3. I returned on the morning of August 22, 2011 to discover that my secretary's computer had fallen from a mounting bracket and was not functioning. The hard drive on this computer contained the petition for review. After trying for several hours I was unable to recover any documents from the hard drive.

"4. I purchased a new computer and attempted to transfer the contents of the hard drive to the new computer until about 10:00 a.m. on August 23<sup>rd</sup>.

"5. I then called Ron Miller, attorney for the intervenor, to request a seven-day continuance. *Mr. Miller told me that he would consent to a seven-day continuance and would execute a stipulation to that effect.* Based on this assurance I drafted a motion including a written stipulation that was sent by facsimile to Mr. Miller's office on the 23<sup>rd</sup>. I received no return from Miller on the 23<sup>rd</sup> or the morning of the 24<sup>th</sup> so a copy of the motion was emailed to Miller on August 24, 2011. \* \* \*

"\* \* \* \* \*

"7. On August 23<sup>rd</sup>, when I discussed this matter with Mr. Miller, it would have been possible to retype and file the petition for review with the Board by August 25<sup>th</sup>. However I did not do so based upon Mr. Miller's agreement to an extension of the filing date.

"8. On August 24, 2011, I called Mr. Miller's office several times to confirm his receipt of the fax and email but received no answer. As a result, I filed the motion to continue without Mr. Miller's signature.

"9. I did not hear from Mr. Miller again until August 25<sup>th</sup>. On that day, he indicated that his client did not want him to execute a stipulation for extension. Miller therefore refused to do so. At this point, it was no longer possible for me to retype the brief, make copies, bind it and file the briefs in order to meet the August 25, 2011 filing date.

"10. On August 23, 2011 both Ron Miller, attorney for intervenor, and Janice Snow, attorney for the City of Warrenton, agreed, to stipulate to a seven-day extension of the filing date. Petitioners' brief was filed with the Board on August 31, 2011 one day before that extended time limit expired. Had petitioner not received the parties'

1 petitioners state that on August 23, 2011 intervenor’s attorney verbally agreed to sign the  
2 stipulation, and that on August 23, 2011 there was still time to retype the petition for review  
3 and timely file it with LUBA, but that on August 25, 2011, the date the petition was due,  
4 intervenor’s attorney informed petitioners’ attorney that his client would not agree to the  
5 extension and he would not sign the stipulation, leaving insufficient time to file the petition  
6 for review.

7 Intervenor’s attorney filed a reply stating in relevant part that “[a]s attorney for  
8 intervenor I could not approve a time extension over my client’s objection and without  
9 permission from my client.” Intervenor’s attorney also states that “[a]ny confusion over the  
10 stipulation of the parties was resolved a full day before the petition was due.”

11 Significantly, intervenor’s attorney does not dispute that on August 23, 2011, he  
12 agreed to sign the stipulation.<sup>4</sup> Further, we do not understand intervenor’s attorney to  
13 dispute the chronology of communications in the declaration of petitioners’ attorney. It is  
14 not clear what intervenor’s attorney means in asserting that “[a]ny confusion over the  
15 stipulation of the parties was resolved a full day before the petition was due.” That can be  
16 read to suggest that intervenor’s attorney had informed petitioners’ attorney on August 24,  
17 2011, one day before the petition for review was due, that intervenor’s attorney would not  
18 sign the stipulation, notwithstanding the agreement to do so on August 23, 2011. However,  
19 intervenor’s attorney does not clearly state that, or otherwise contradict the express  
20 statements in the declaration of petitioners’ attorney. We therefore accept the statements and

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agreement to extend the due date a petition for review would have been filed by  
August 25, 2011.” Declaration of Blair J. Henningsgard (emphasis added).

<sup>4</sup> Intervenor’s attorney does not allege that his verbal agreement was expressly conditioned in any way on checking with his client or otherwise obtaining intervenor’s concurrence. That is significant, because petitioners could not reasonably rely on an expressly conditional or tentative agreement to extend the deadline. *See Ballou v. Douglas County*, 40 Or LUBA 377 (2001) (dismissing the appeal for failure to obtain the written consent of all parties, where the petitioners knew or should have known that the attorney for some intervenors who consented to the extension did not represent all intervenors, some of whom were *pro se*, and who never consented to the extension).

1 chronology in petitioner’s attorney’s declaration to be undisputed.

2           The declaration establishes that (1) on August 23, 2011, intervenor through his  
3 attorney agreed to consent in writing to a seven-day extension of time; (2) on that date there  
4 was sufficient time for petitioners’ attorney to re-type and file the petition for review by the  
5 original due date, August 25, 2011; (3) intervenor’s attorney did not inform petitioners’  
6 attorney that he would not honor that agreement until August 25, 2011; and (4), by the time  
7 intervenor’s attorney so informed petitioners’ attorney, there was insufficient time to retype  
8 the petition for review and timely file it with LUBA. For the reasons below, we conclude  
9 based on these undisputed facts that intervenor is in no position to insist on enforcement of  
10 the OAR 661-010-0067(2) requirement that all parties consent in writing to an extension of  
11 the deadline for filing the petition for review.

12           OAR 661-010-0067(2) states that “in no event shall the time limit for the filing of the  
13 petition for review be extended without the written consent of all parties.” That rule serves a  
14 very important function in support of the OAR 661-010-0030(1) requirement that the petition  
15 for review be filed within the time provided in our rules. However, violations of OAR 661-  
16 010-0067(2) and OAR 661-010-0030(1) are treated differently under our rules.

17           Under OAR 661-010-0005, “[t]echnical violations not affecting the substantial rights  
18 of parties shall not interfere with the review of a land use decision or limited land use  
19 decision.”<sup>5</sup> However, “[f]ailure to comply with the time limit for filing \* \* \* a petition for

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<sup>5</sup> OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. Failure to comply with the time limit for filing a notice of intent to appeal under OAR 661010-0015(1) or a petition for review under 661-010-0030(1) is not a technical violation.”

1 review under 661-010-0030(1) is not a technical violation” of LUBA’s rules. *See* n 5. Thus,  
2 failure to timely file the petition for review as required under OAR 661-010-0030(1) cannot  
3 be overlooked pursuant to OAR 661-010-0005 as a “technical violation” of LUBA rules.  
4 OAR 661-010-0067(2), on the other hand, is not one of the two rules that OAR 661-010-  
5 0005 singles out for strict treatment. Under some circumstances, then, violation of the  
6 written consent requirement of OAR 661-010-0067 can be overlooked as a “technical  
7 violation” of LUBA’s rules that may not interfere with a review proceeding.

8         In *Pereira v. Columbia County*, 39 Or LUBA 760 (2001), *aff’d* 175 Or App 291, 27  
9 P3d 537 (2001), the petitioner filed on November 14, 2000, a request to extend the deadline  
10 to file the petition for review for a six-week period, from November 27, 2000 to January 12,  
11 2001. The request was stipulated to in writing by the respondent. LUBA issued an order  
12 approving the extension on the same date it was received, November 14, 2000.  
13 Unbeknownst to the petitioner or LUBA at the time, the intervenor-respondent had filed a  
14 motion to intervene by mail on November 13, 2000, and was a party to the appeal as of that  
15 date. Well after the original November 27, 2000 deadline to file the petition for review had  
16 passed, the intervenor-respondent moved to dismiss the appeal, arguing that its written  
17 consent was necessary to extend the deadline and because its consent had not been obtained,  
18 and the deadline passed, the appeal must be dismissed under OAR 661-010-0030(1). We  
19 declined to do so, concluding that:

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  
25 have the original deadline for filing the petition for review reestablished, if  
26 that can be done without prejudicing petitioner’s substantial right to rely on  
27 the deadline that was established in the order. Where the original deadline  
28 cannot be reestablished without prejudicing petitioner’s substantial rights,  
29 LUBA will consider establishing a shortened deadline for filing the petition  
30 for review that is consistent with petitioner’s and intervenor’s respective  
31 substantial rights.” *Id.* at 765.

1 We ultimately concluded that the original deadline could not be reestablished without  
2 prejudice to the petitioner, and allowed the petitioner an additional eight days to submit the  
3 petition for review. *Pereira* illustrates one circumstance where a party’s failure to obtain  
4 written consent of all parties in seeking an order extending the deadline for filing the petition  
5 for review can be construed as a “technical violation” of LUBA’s rules. In our view, the  
6 present case is another such circumstance.

7 In *Ackerley Communications, Inc.*, we stated that we do “not believe a party may  
8 make an agreement to an extension of time [to file the petition for review], then withdraw the  
9 agreement or claim it does not exist[.]” 12 Or LUBA at 408. In the present case, we do not  
10 believe that a party can insist on enforcement of the written consent requirement of OAR  
11 661-010-0067(2) against another party, under circumstances where the objecting party has  
12 caused the offending party to violate the rule.

13 Here, petitioners obtained the verbal agreement of all parties, or their attorneys, to  
14 grant written consent to the extension, and requested under OAR 661-010-0067(2) an order  
15 from LUBA extending the deadline for filing the petition for review for seven days,  
16 consistent with the verbal agreement of all parties. Petitioners reasonably relied on those  
17 verbal agreements from the parties’ attorneys to delay filing the petition for review until after  
18 the original deadline. However, intervenor’s attorney ultimately refused to sign the  
19 extension despite his earlier agreement to do so. Importantly, that refusal occurred at a  
20 juncture when petitioners no longer had time and opportunity to retype the petition for  
21 review and file it on time to meet the original deadline. The “written consent of all parties”  
22 requirement at OAR 661-010-0067(2) is generally strictly enforced, given the supporting role  
23 it plays in conjunction with the strict deadline for filing the petition for review at OAR 661-  
24 010-0030(1). However, LUBA will not enforce a violation of OAR 661-010-0067(2) where  
25 the violation was induced by a party’s agreement to sign the extension request. OAR 661-  
26 010-0005.

1           The practical effect of the foregoing is that the seven-day extension initially agreed to  
2 by intervenor and granted in LUBA's August 25, 2011 order remains valid. Consequently,  
3 the petition for review filed on August 30, 2011, was timely filed, and no violation of OAR  
4 661-010-0030(1) occurred. Intervenor's motion to dismiss this appeal under OAR 661-010-  
5 0030(1) is denied.

6           The next event in this review proceeding is the filing of the response brief, which is  
7 due 21 days from the date of this order. The Board's final opinion and order is due 56 days  
8 from the date of this order.

9           Dated this 28th day of October, 2011.

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Tod A. Bassham  
Board Member