

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 JCK ENTERPRISES, LLC,
4 and JCK RESTAURANTS, INC.,
5 *Petitioners,*

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7
8 vs.

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10 CITY OF COTTAGE GROVE,
11 *Respondent,*

12
13 and

14 JOHN DUFFIE and THOMAS
15 FOX PROPERTIES, LLC,
16 *Intervenors-Respondents.*

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19 LUBA Nos. 2011-045, 2011-046 , 2011-047 and 2011-058

20 ORDER

21 **MOTIONS TO INTERVENE**

22 John Duffie and Thomas Fox Properties, LLC (intervenors), the applicants below,
23 filed motions to intervene LUBA Nos. 2011-045, 2011-046, 2011-047 and 2011-058. No
24 party opposes the motions, and they are granted.

25 **MOTION TO CONSOLIDATE**

26 In LUBA Nos. 2011-045/046/047, petitioners appeal respectively a site design review
27 permit, a variance, and a conditional use permit, each of which became final April 25, 2011,
28 and which involve approval of intervenors' application for a restaurant. In LUBA No. 2011-
29 058, petitioners appeal a June 15, 2011 building permit to construct the approved restaurant.
30 Intervenors move to consolidate LUBA No. 2011-058 with the earlier appeals, as "closely
31 related" decisions.

32 The appeals are all closely related, and we do not understand petitioners to oppose
33 consolidation, if it does not result in undue delay. For the reasons discussed below,

1 consolidation of LUBA No. 2011-058 with the earlier appeals will not result in undue delay
2 of these consolidated appeals. The motion to consolidate is granted.

3 As explained below, the record in LUBA Nos. 2011-045/046/047 has been filed and
4 the briefing schedule is currently suspended due to objections to that record. As set out
5 below, the city shall transmit to LUBA a separate record in LUBA No. 2011-058 within 21
6 days of the date the notice of intent to appeal in that case was served on the city.

7 **RECORD OBJECTIONS AND BRIEFING SCHEDULE**

8 On June 6, 2011, the city transmitted the consolidated four-volume record in LUBA
9 Nos. 2011-045/046/047. Under LUBA's rules, objections to the record were due 14 days
10 later, on June 20, 2011. On June 17, 2011, petitioners mailed to LUBA a "precautionary"
11 record objection, while continuing to work with the city to resolve the objection. Due to
12 insufficient postage, LUBA did not receive the objection until June 22, 2011. On June 22,
13 2011, petitioners filed a withdrawal of their objection to the record in LUBA Nos. 2011-
14 045/046/047. On the same date, petitioners filed a notice of intent to appeal the building
15 permit decision at issue in LUBA No. 2011-058.

16 On June 23, 2011, intervenors filed objections to the record in LUBA Nos. 2011-
17 045/046/047—including many of the same objections petitioners had filed—and advised
18 LUBA that the city intended to file a supplemental record, in response to petitioners' record
19 objection. On June 24, 2011, the city transmitted a four-volume "amended" record, not a
20 supplemental record. The amended record presumably includes additional documents that
21 petitioners argued had been omitted from the original record, and that are also the subject of
22 intervenors' objection.

23 On June 24, 2011, petitioners responded to intervenors' record objections, arguing
24 that both petitioners' and intervenors' objections had been untimely filed, and that neither
25 objection should suspend the briefing schedule or delay LUBA's review. Petitioners
26 indicated that they intend to file the petition for review in LUBA Nos. 2011-045/046/047 by

1 the date it was originally due, June 27, 2011, and subsequently did so. Petitioners also stated
2 that they stipulate to the inclusion of the additional documents in the amended record, and
3 that those documents are not material to any of its assignments of error.

4 On June 27, 2011, intervenors replied to petitioners' response, arguing that the filing
5 of their record objections, even if three days late, had the effect of suspending the briefing
6 schedule, under OAR 661-010-0026(6).¹ Intervenors request that if LUBA consolidates the
7 four appeals that the records in the four appeals not be settled and the briefing schedule
8 commence until (1) the parties have time to review the amended record in LUBA Nos. 2011-
9 045/046/047, and (2) the city transmits the record in LUBA No. 2011-058 and any objections
10 to that record are resolved.

11 The filing of the record objections, even if untimely filed, had the effect of
12 suspending the briefing schedule. OAR 661-010-0026(6). Late filing of a record objection
13 is a technical violation of LUBA rules and does not provide a basis for denying the record
14 objection, absent prejudice to a party's substantial rights. OAR 661-010-0005; *Schaffer v.*
15 *City of Turner*, 35 Or LUBA 744, 747 (1998). Petitioners argue that the late filing of
16 intervenors' objection prejudiced their substantial rights to obtain a speedy review, and
17 therefore LUBA should promptly settle the record and resume the original briefing schedule
18 to the extent possible.

19 It seems to us that petitioners bear considerable responsibility for the present
20 confused state of the record and the briefing schedule, and we do not see that intervenors'
21 filing record objections three days late contributed much to that confusion, or will result in

¹ OAR 661-010-0026(6) provides:

"If an objection to the record is filed, the time limits for all further procedures under these rules shall be suspended. When the objection is resolved, the Board shall issue an order declaring the record settled and setting forth the schedule for subsequent events. Unless otherwise provided by the Board, the date of the Board's order shall be deemed the date of receipt of the record for purposes of computing subsequent time limits."

1 unwarranted delay. The filing of the amended record on June 24, 2011, prompted by
2 petitioners' objection, would alone result in some delay to re-settle the record. The main
3 potential for delay is the result of consolidation of LUBA Nos. 2011-045/046/047 with
4 LUBA No. 2011-058, but we do not understand petitioners to oppose consolidation, and
5 some delay is inevitable in consolidating closely related appeals issued on different dates,
6 with different records.

7 No perfect solution presents itself, but we set out the following schedule in an attempt
8 to place these consolidated appeals on the same track, settle the records, and resume the
9 briefing schedule as promptly as possible.

10 1. Record in LUBA Nos. 2011-045/046/047. Petitioners have withdrawn their
11 objections and stipulated to the amended record. Intervenors have the time allowed under
12 our rules to file objections to the amended record, *i.e.*, 14 days from June 24, 2011. OAR
13 661-010-0026(2).

14 2. Record in LUBA No. 2011-058. The city shall file a separate record in
15 LUBA No. 2011-058 within the time provided in our rules, *i.e.*, no more than 21 days from
16 service of the notice of intent to appeal. OAR 661-010-0025(2). Assuming no objections to
17 the record in LUBA Nos. 2011-045/046/047 are timely received, LUBA anticipates that upon
18 receipt of the record in LUBA No. 2011-058 it will issue an order settling both records and
19 setting a new 21-day deadline for filing the petitions for review. Subsequent filing of
20 objections to the record LUBA No. 2011-058 will suspend the deadlines set out in that order.

21 3. Briefing. Petitioners may amend their previously submitted petition for
22 review in LUBA Nos. 2011-045/046/047 to present consolidated arguments in all appeals, if
23 they choose, or allow that petition to stand unamended, and file a separate petition for review
24 in LUBA No. 2011-058.

25 Dated this 30th day of June, 2011.

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27 _____
28 Tod A. Bassham

1 Board Member