BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

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| LOGAN RAMSEY, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| CITY OF PORTLAND, | ) | LUBA No. 91-127 |
| | ) | |
| Respondent, | ) | FINAL OPINION |
| | ) | AND ORDER |
| and | ) | |
| | ) | |
| ARNOLD ROCHLIN and FRIENDS OF FOREST PARK, | ) | |
| | ) | |
| Intervenors-Respondent. | ) | |

Appeal from City of Portland.

Henry Kane, Beaverton, represented petitioner.

Peter A. Kasting, Portland, represented respondent.

Arnold Rochlin, Portland, represented himself.

Steven L. Pfeiffer, Portland, represented intervenor Friends of Forest Park.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

DISMISSED 11/07/91

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

**FACTS**

The notice of intent to appeal was filed with this Board on August 20, 1991. A stipulated extension of time to transmit the record was filed on September 6, 1991. The Board received the local record on September 17, 1991. Under OAR 661-10-030(1), the petition for review was due on October 8, 1991. On October 8, 1991, petitioner filed a motion for an extension of time to file the petition for review. On October 10, 1991, intervenor Rochlin filed a motion to dismiss this appeal.

**MOTIONS TO INTERVENE**

**A. Rochlin**

On September 23, 1991, intervenor Rochlin filed a motion to intervene on the side of respondent in this appeal. On the same date, intervenor Rochlin served copies of his motion to intervene on petitioner and respondent. The motion alleges that Rochlin is entitled to intervenor status because he gave written testimony to the city planning commission and appeared before the city council in the proceedings leading to adoption of the challenged decision.[1]

On October 28, 1991, petitioner filed objections to

[1]In addition, due to circumstances not relevant here, Rochlin filed and served a second motion to intervene, identical save for the date, on October 7, 1991.

intervenor Rochlin's motion to intervene and a motion to deny the motion to intervene. Petitioner argues that under OAR 661-10-050(2), a motion to intervene must be filed as soon as is practicable after the notice of intent to appeal is filed. Petitioner also argues that in Broetje-McLaughlin v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-056, Order on Motions to Intervene and to Dismiss, August 22, 1991) (Broetje-McLaughlin), slip op 6, this Board denied a motion to dismiss the appeal for failure to serve the notice of intent to appeal on the applicant, noting that the applicant did "not contend that [the applicant's] motion to intervene was filed as soon as possible after he learned of the existence of this appeal." (Emphasis added.)

According to petitioner, under the above cited rule and decision, a motion to intervene should be filed as soon as possible after the party learns of the existence of the appeal, and in any case not more than 10 days after being served with the notice of intent to appeal, absent exigent circumstances. Petitioner argues that intervenor Rochlin was served with the notice of intent to appeal on August 20, 1991, and has not explained the delay in filing his motion to intervene.[2] According to petitioner, intervenor

[2]Petitioner's motion to deny Rochlin's motion to intervene refers to the motion to intervene filed on October 7, 1991. However, other documents filed by petitioner in this appeal proceeding indicate petitioner is aware that Rochlin also filed a motion to intervene on September 23, 1991, and we interpret petitioner's motion as being to deny Rochlin intervenor status under either motion to intervene.

Rochlin's motion to intervene should therefore be denied as untimely filed.

Intervenor Rochlin argues that he filed his motion to intervene on September 23, 1991, only one month after he received the copy of the notice of intent to appeal served on him by petitioner, and only one week after the local record was transmitted to LUBA and served on petitioner. Intervenor Rochlin argues that this interval was necessary for consideration of whether he needed to intervene to protect his interests as an affected property owner, to consider the responsibilities he would undertake by intervening, and to review the local record and LUBA's administrative rules. Rochlin argues that his motion to intervene is not untimely under either ORS 197.830(6)(a) or OAR 661-10-050(2).

Petitioner does not dispute intervenor Rochlin's standing to intervene, only the timeliness of his motion to intervene. ORS 197.830(6)(a) provides:

> "Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)]."

As no petition for review has yet been filed with this Board, it is clear that the Rochlin motion to intervene is not untimely under ORS 197.830(6)(a).

In addition, OAR 661-10-050(2) provides:

"Motion to Intervene: In the interests of

> promoting timely resolutions of appeals, a motion to intervene shall be filed as soon as is practicable after the Notice of Intent to Appeal is filed. * * *"

Nothing in this rule or in our cited order in Broetje-McLaughlin requires a motion to intervene to be filed "as soon as possible" after a party is served with the notice of intent to appeal or learns of the existence of an appeal.[3] As a practical matter, a certain amount of time is required to decide whether the nature and facts of a particular appeal and a person's interests therein warrant participation as an intervenor. We believe that filing a motion to intervene within one month of receiving a copy of the notice of intent to appeal and within one week of transmittal of the local record to this Board complies with the requirement of OAR 661-10-050(2) that a motion to intervene be filed "as soon as is practicable."

However, even if the motion to intervene were not filed "as soon as is practicable after the Notice of Intent to

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[3]In Broetje-McLaughlin, we considered whether we are required to grant an applicant/intervenor's motion to dismiss an appeal where the applicant/intervenor had not been served with the notice of intent to appeal. There were no objections to the intervention itself, but there were uncontroverted allegations the applicant/intervenor was aware of the appeal for a considerable time before the motion to intervene and dismiss was filed. Therefore, with regard to the motion to dismiss, we found it significant that the intervenor argued his substantial rights would be prejudiced by delaying the proceedings to allow him to participate, but did not contend he had minimized the need to delay the proceedings by filing his motion to intervene "as soon as possible after he learned of the existence of the appeal." Id. The quoted comment from Broetje-McLaughlin had nothing to do with whether the motion to intervene was timely filed.

Appeal is filed," as required by OAR 661-10-050(2), that would be a technical violation of our rules. See Columbia Steel Castings Co. v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-058, Order on Motion to Intervene, March 9, 1990). Technical violations of our rules not affecting the substantial rights of parties do not interfere with our review. OAR 661-10-005. The "substantial rights of parties" are the rights identified in the rule itself as "the speediest practicable review" and "reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing," not the right to a particular result in an appeal proceeding Kellogg Lake Friends v. City of Milwaukie, 16 Or LUBA 1093, 1095 (1988). The filing of intervenor Rochlin's motion to intervene on the side of respondent, one week after the local record was transmitted to the Board, did not in itself delay this Board's review or deny the other parties a reasonable time to prepare and submit their cases or a fair hearing.

The Rochlin motion to intervene is granted. Petitioner's motion to deny the Rochlin motion to intervene is denied.

**B. Friends of Forest Park**

On October 18, 1991, Friends of Forest Park (FOFP) filed a motion to intervene on the side of respondent in this proceeding.

On October 28, 1991, petitioner filed a motion to deny FOFP's motion to intervene. Petitioner's arguments are the same as those made with regard to intervenor Rochlin's motion to intervene.

FOFP's motion to intervene was filed 59 days after the notice of intent to appeal in this case was filed, but before any petition for review was filed. Therefore, FOFP's motion to intervene is not untimely under ORS 197.830(6)(a).

Additionally, whether FOFP's motion to intervene was filed "as soon as is practicable after the Notice of Intent to Appeal is filed," as required by OAR 661-10-050(2), need not be determined, because if the rule was violated, it is a technical violation not affecting the substantial rights of the parties. Regardless of whether we (1) deny petitioner's motion for extension of time to file the petition for review and grant intervenor Rochlin's motion to dismiss, or (2) grant petitioner's motion for extension of time to file the petition for review and deny intervenor Rochlin's motion to dismiss (see following section), granting FOFP's motion to intervene will not cause a delay of this review proceeding or prevent the parties from having a reasonable time to prepare and submit their cases.

The FOFP motion to intervene is granted. Petitioner's motion to deny the FOFP motion to intervene is denied.

**MOTION FOR EXTENSION OF TIME / MOTION TO DISMISS**

On October 8, 1991, the date the petition for review in

this appeal was due, petitioner filed a motion requesting an extension of time until October 31, 1991 to file the petition for review. The motion bears respondent's written consent. The motion was not contemporaneously served on intervenor Rochlin.[4] Petitioner argues the extension of time is warranted because of the size of the record, the complexity of the constitutional issues involved in this appeal, and the press of other litigation in which petitioner's attorney is currently engaged.

On October 10, 1991, intervenor Rochlin filed an objection to petitioner's motion for extension of time and a motion to dismiss the appeal. Intervenor Rochlin states he learned of the existence of petitioner's motion for extension of time on October 9, 1991. Intervenor Rochlin further states he does not consent to the extension, as is required by OAR 661-10-067(2) and, therefore, argues the motion must be denied. Intervenor Rochlin also moves to dismiss the appeal on the ground that petitioner failed to file a petition for review within the time required by OAR 661-10-030(1).

Section (2) of OAR 661-10-067 (Extensions of Time) provides:

> "In no event shall the time limit for the filing of the petition for review be extended without the

[4]The motion was eventually served on intervenor Rochlin on October 19, 1991.

> written consent of all parties." (Emphasis added.)

Further, OAR 661-10-030(1) provides in relevant part:

> "Filing and Service of Petition: The petition for review shall be filed with the Board within 21 days after the date the record is received by the Board. * * * Failure to file a petition for review within the time required by this section, and any extensions of that time under * * * OAR 661-10-067(2), shall result in dismissal of the appeal * * *." (Emphasis added.)

Finally, OAR 661-10-005 (Purpose) provides in relevant part:

> "* * * Technical violations not affecting the substantial rights of parties shall not interfere with [the Board's] review of a land use decision. Failure to comply with the time limit for filing * * * a Petition for Review under OAR 661-10-030(1) is not a technical violation." (Emphasis added.)

It is clear that under the above quoted rules, if petitioner's motion for extension of time to file the petition for review does not satisfy the requirement of OAR 661-10-067(2) for the written consent of all parties, and the petition for review was not filed within 21 days after the date the Board received the record, then this appeal must be dismissed. Petitioner presents two arguments relevant to these issues. First, petitioner argues that intervenor Rochlin was not a "party" at the time petitioner's motion for extension of time was filed. Second, petitioner argues that OAR 661-10-067(2) exceeds the

Board's statutory authority.[5]

**A. Party Status of Intervenor Rochlin**

OAR 661-10-010(7) defines "party" as:

> "* * * the petitioner, the governing body, and any person who intervenes as provided in OAR 661-10-050. * * *"

OAR 661-10-050(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 prior to its issuance of its final order." (Emphasis added.)

In addition, ORS 197.830(6)(a) provides:

> "Within a reasonable time after a petition for review has been filed with the board, any person may intervene in and be made a party to the review proceeding upon a showing of compliance with [ORS 197.830(2)]." (Emphasis added.)

Petitioner argues that he did not seek intervenor Rochlin's written consent to his motion for extension of time because he assumed Rochlin was not granted party status until the Board issued an appropriate order. Petitioner argues that under the above emphasized portion of ORS 197.830(6)(a), the mere filing of a motion to intervene is not sufficient to make a person a "party;" rather

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[5]We note petitioner does not contend intervenor Rochlin's motion to intervene was not served on him, or that for some other valid reason petitioner was unaware that intervenor Rochlin had filed a motion to intervene when petitioner filed his motion for extension of time to file the petition for review.

additional action by this Board is required. According to petitioner, the legislature did not intend that any person who filed a motion to intervene would automatically become a "party," and LUBA cannot ignore this portion of the statute. Petitioner further argues that under ORCP 33, a court is required to take affirmative action to recognize a person as an intervenor and party to a court proceeding.[6]

Intervenor Rochlin contends he attained party status in this appeal on September 23, 1991, when his motion to intervene was filed. Intervenor Rochlin argues that rather than ignoring the portion of ORS 197.830(6)(a) emphasized in the above quote, LUBA has implemented it by providing in OAR 661-10-050(1) that "[s]tatus as an intervenor is recognized when a motion to intervene is filed." Intervenor Rochlin argues the statute does not preclude LUBA from granting status as an intervenor through a procedure, rather than individual acts of the Board. Intervenor Rochlin contends that the rights of other parties are protected through the requirement of OAR 661-10-050(2)(c) that they be served with a motion to intervene and the opportunity under

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[6]In addition, petitioner argues that intervenor Rochlin was not treated as a party when respondent submitted the local record, in that a copy of the record was not served on intervenor Rochlin. Petitioner also complains that intervenor Rochlin has not filed a brief in this appeal. However, we point out that under OAR 661-10-025(3), respondent is not required to serve the record on parties other than petitioner unless such other parties request it, and under OAR 661-10-050(3)(b), an intervenor-respondent's brief is due when the respondent's brief is due. On October 29, 1991, we issued an order suspending the briefing schedule in this appeal. Thus, the deadline for filing respondents' briefs has not yet passed.

OAR 661-10-065(2) to object to the intervention. Intervenor Rochlin also argues that court procedures are not applicable to a state agency such as LUBA; but, even if ORCP 33 does apply, it does not preclude LUBA from granting permission to intervene in the manner established by OAR 661-10-050(1).

We agree with intervenor Rochlin that there is no inconsistency between the provision of ORS 197.630(6)(a) that a person "may intervene in and be made a party to [a LUBA] review proceeding" and the process established by OAR 661-10-050(1) recognizing party status as an intervenor when a motion to intervene is filed, subject to a subsequent decision by the Board to deny intervenor status.[7] The legislature has also established a policy that "time is of the essence in reaching final decisions" in LUBA appeals. ORS 197.805. The disputed provisions of OAR 661-10-050(1) were adopted in part to implement that policy. If status as an intervenor were not recognized when a motion to intervene is filed, but rather depended upon action by the Board, taken after the time to file responses to the motion to intervene expired and any disputes regarding intervention were resolved, the Board would end up frequently having to extend review proceedings to afford intervenors adequate time to prepare and submit their cases.

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[7]We also agree with intervenor Rochlin that ORCP 33 does not govern our proceedings but, even if it did, it would not be inconsistent with OAR 661-10-050(1).

We conclude that intervenor Rochlin was a party to this appeal proceeding at the time petitioner's motion for extension of time was filed.

**B. Authority to Adopt OAR 661-10-067(2)**

Petitioner argues this Board has only those powers granted by the legislature or necessarily implied by a grant by the legislature. Ore. Newspaper Pub. v. Petersen, 244 Or 116, 415 P2d 21 (1966). Petitioner argues that in Ore. Newspaper Pub. v. Petersen, the Supreme Court held that the Board of Pharmacy's statutory authority to adopt regulations governing the practice of pharmacy and sale of poisons and dangerous drugs did not give that board authority to adopt regulations prohibiting the advertising of prescription drugs. Petitioner argues that similarly, because OAR 661-10-067(2) is not expressly authorized by any statute, it exceeds this Board's statutory authority.

Petitioner also argues that this Board lacks authority to adopt a rule which purports to give a private party veto power over the Board's authority to grant an extension of time to file the petition for review. Petitioner contends OAR 661-10-067(2) impermissibly delegates, to a private party, the legislative power which the legislature delegated within limits to this Board. Petitioner contends this impermissible delegation of power allows a private party to prevent the Board from exercising its authority to grant a meritorious extension of time for filing a petition for

review. According to petitioner, "[i]t is elementary law that an agency cannot delegate its powers to private parties." Petitioner's Response to Rochlin Objection to Request for Extension of Time 5.

Intervenor Rochlin argues that this Board is authorized to adopt administrative rules governing extensions of time for filing a petition for review by ORS 197.820(4) and 197.830(10) and (12). According to intervenor Rochlin, Ore. Newspaper Pub. v. Petersen is inapposite because it deals with an attempt by the Board of Pharmacy to regulate advertising, a function outside of its legislative mandate, whereas this Board is specifically authorized by statute to adopt rules governing its procedures. Furthermore, according to intervenor Rochlin, the Supreme Court indicated its approval of LUBA's rule requiring the consent of all parties for granting extensions of time to file petitions for review in Gordon v. City of Beaverton, 292 Or 228, 231, 637 P2d 125 (1981).

Intervenor Rochlin also argues that OAR 661-10-067(2) does not impermissibly delegate the Board's power to private parties. Intervenor Rochlin argues that the granting of an extension of time is discretionary, and this Board is not precluded from setting conditions or standards for its exercise of discretion, including a requirement that the consent of other parties to an extension be obtained.

ORS 197.820(4) provides:

"The board shall adopt rules governing the conduct of review proceedings brought before it under ORS 197.830 to 197.845."

ORS 187.830 provides in relevant part:

"* * * * *

"(10) A petition for review of the land use decision and supporting brief shall be filed with the board as required by the board under subsection (12) of this section. * * *

"* * * * *

"(12) The board shall adopt rules establishing deadlines for filing petitions and briefs and for oral argument.

"* * * * *"

The above quoted statutes expressly give this Board authority to adopt rules establishing deadlines for filing petitions for review. This authority necessarily includes the authority to determine when extensions of such deadlines will be granted. We agree with intervenor Rochlin that this situation is different from that presented by Ore. Newspaper Pub. v. Petersen, where the subject agency attempted to regulate by rule an activity outside of its statutory authority.

Given that this board has the authority to adopt rules governing when it will grant extensions to deadlines for filing petitions for review, we are aware of no reason why requiring the movant to obtain the written consent of the other parties to the proceeding is an impermissible

requirement.[8] As we stated above, the legislature has adopted the policy that "time is of the essence" in resolving appeals of land use decisions. The statute establishes strict deadlines for the filing of notices of intent to appeal and the issuance of this Board's final opinions and orders. ORS 197.830(8) and (14). Because the filing of a petition for review is essential to the progression of a LUBA review proceeding, it is consistent with this statutory policy to allow extensions of time to file petitions for review only where all parties consent to such extensions.

We conclude that the adoption of OAR 661-10-067(2) does not exceed this Board's authority.

Petitioner's motion for extension of time to file the

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[8]The Court of Appeals decision reviewed by the Supreme Court in Gordon v. City of Beaverton, supra, affirmed LUBA's dismissal of an appeal where the petition for review was filed one day late, and held that under Oregon Laws 1979, chapter 772, section 4(6) (requiring that a petition for review be filed with LUBA within 20 days after transmittal of the local record), LUBA had no authority to extend the statutory period for filing the petition for review. The Supreme Court allowed review to consider whether that holding "unnecessarily restricted the procedural authority of the board * * *." Id. at 230. The Supreme Court noted LUBA had adopted an administrative rule "under which the time for filing the petition and brief could be extended upon written stipulation of all parties." Id. The Supreme Court upheld the dismissal in Gordon v. City of Beaverton "not because LUBA had no authority to forgive a one-day delay in filing, but because LUBA was not legally obliged to do so, [as] its rule required the consent of all other parties for any extension of the filing deadline." Hoffman v. City of Portland, 294 Or 150, 153, 654 P2d 1106 (1982). While we agree with petitioner that the validity of LUBA's rule requiring the consent of all parties to extend a deadline for filing the petition for review was not directly challenged in Gordon v. City of Beaverton, we believe the Supreme Court's resolution of that case would have been different if such a requirement is inherently impermissible, as petitioner argues.

petition for review is denied.

Intervenor's motion to dismiss is granted.

This appeal is dismissed.