BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TODD B. BALLOU, LISA M. BALLOU,
THOMAS J. MAURER and TAMMY E. LENZ-MAURER,
Petitioners,

vs.

DOUGLAS COUNTY,
Respondent,

and

JOCK JOUVENAT, TERRY F. HOLING,
JOHN E. HOLING, ANN K. GRIDLEY,
JOHN R. GRIDLEY, HARRY WINSTON,
EVA REYNOLDS and HARVEY F. REYNOLDS,
Intervenors-Respondent.

LUBA No. 2001-066

FINAL OPINION
AND ORDER

Appeal from Douglas County.

James R. Dole, Grants Pass, filed a petition for review and a cross-respondent's brief and argued on behalf of petitioners.

Paul E. Meyer, County Counsel, Roseburg, filed a response brief and argued on behalf of respondent.

Bill Kloos, Eugene, filed a cross-petition for review and a response brief and argued on behalf of intervenor-respondent Jock Jouvenat.

Corinne C. Sherton, Salem, filed a response brief and argued on behalf of intervenor-respondent Harry Winston.

Amanda Walkup, Eugene, represented intervenors-respondent Ann K. Gridley and John R. Gridley.

Terry F. Holing, John E. Holing, Eva Reynolds and Harvey F. Reynolds, Glide, represented themselves.

BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,

participated in the decision.

DISMISSED 09/17/2001

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioners appeal a county decision that denies their request for conditional use approval to mine and process mineral resources on an 80-acre parcel that is zoned for exclusive farm use.

MOTION TO DISMISS

On July 27, 2001, we entered an order denying three motions to dismiss this appeal.[1] On August 9, 2001, intervenor-respondent Winston (Winston) filed another motion to dismiss. Intervenor-respondent Jouvenat (Jouvenat) joins in Winston's motion to dismiss.[2] Intervenors-respondent Gridley (Gridley) renew their earlier-filed motion to dismiss and join in Winston's motion to dismiss. For the reasons that follow, we agree with intervenors-respondent that our earlier order denying the motion to dismiss was erroneous. As explained below, because petitioners filed their petition for review more than 21 days after the record was settled and without the written consent of all parties in this appeal to extend the 21-day deadline, our rules require that this appeal be dismissed. *Ramsey v. City of Portland*, 22 Or LUBA 295, 301 (1991).

The critical facts in resolving the motions to dismiss are not in dispute. To facilitate our discussion, relevant events are listed below chronologically, next to the dates those events occurred.

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[1]A fourth motion to dismiss was denied because the person who filed the motion had not moved to intervene in this appeal.

[2]We note that Jouvenat is both an intervenor-respondent and a cross-petitioner, petitioners are also cross-respondents, and respondent is also a cross-respondent. Those designations are not important and are not further noted in this appeal when we refer to those parties.

Jouvenat is represented by counsel. Although intervenors Winston and Gridley are now represented by counsel, at the time in this appeal that is relevant in resolving the motion to dismiss, intervenors Winston and Gridley and the other intervenors-respondent were not represented by counsel. We refer individually to Jouvenat and the remaining intervenors-respondent by their last names. We collectively refer to the intervenors-respondent who were not represented by counsel as the *pro se* intervenors.

April 4, 2001	Petitioners file their notice of intent to appeal.
April 5, 2001	Through one of his attorneys, Jouvenat moves to intervene on the side of respondent.
April 17, 2001	Between April 17 and April 20, 2001 seven more individuals separately move to intervene on the side of respondent. Each motion to intervene states the moving party is "not presently represented by an attorney." The certificates of service attached to each of the seven motions to intervene state that copies of the motion were served on petitioners' attorney, the county's attorney and Jouvenat's attorney.
May 14, 2001	Petitioners object to the record. The certificate of service attached to petitioners' record objection states it was separately served on all eight intervenors-respondent by mail. According to the certificate of service, the record objection was mailed directly to Jouvenat and was not mailed to his attorney.
May 18, 2001	Petitioners file a second certificate of service stating that the May 14, 2001 record objection was served on Jouvenat's attorney.
June 14, 2001	LUBA issues an order allowing the previously filed motions to intervene and denying petitioners' record objection. LUBA's order specifically notes that the intervenors-respondent filed separate motions to intervene. The certificate of service attached to LUBA's order states it was separately served on the *pro se* intervenors and Jouvenat's attorney. The order establishes a July 5, 2001 deadline for filing the petition for review.
July 2, 2001	Petitioners file a motion requesting that the July 5, 2001 deadline for filing the petition for review be extended to July 19, 2001. The motion does not include the written consent of all intervenors.[3] The motion is served on

[3]Petitioners' July 2, 2001 motion does not include written consent by *any* party. Rather, the motion states that "[c]ounsel for respondent" and counsel for "lead intervenors" have "no opposition" to the request. July 2, 2001 Motion for Extension of Time 2. The county and Jouvenat subsequently submitted written consent to the requested extension of time to file the petition for review. The *pro se* intervenors have not consented to the extension.

The reference in the July 2, 2001 motion to "counsel for 'lead intervenors'" is unclear. Our current rules provide for designation of a "lead petitioner" in appeals where multiple petitioners are not represented by an attorney, but do not explicitly provide for designation of a lead intervenor where there are multiple

	Jouvenat's attorney and is separately served on the *pro se* intervenors.
July 3, 2001	One of the attorneys representing Jouvenat advises petitioners' attorney by phone that he and his co-counsel only represent Jouvenat and do not represent the *pro se* intervenors.[4]
July 5, 2001	Jouvenat files a cross-petition for review.
July 10, 2001	The Gridleys file their motion to dismiss. Intervenors Terry Holing (Holing) and Eva Reynolds (Reynolds) separately move to dismiss on July 12, 2001.
July 11, 2001	Petitioners file their petition for review.
July 27, 2001	LUBA denies the Gridleys', Holing's and Reynold's motions to dismiss.

At LUBA, the deadlines for filing the notice of intent to appeal and the petition for review are two deadlines that are treated differently than all others.[5] The deadline for filing a notice of intent to appeal is set by statute and cannot be extended in any event. OAR 661-010-0067(1). Although the deadline for filing the petition for review can be extended, "in no event shall the time limit for the filing of the petition for review be extended without the written consent of all parties." OAR 661-010-0067(2). As relevant, OAR 661-010-0030(1)

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unrepresented intervenors. OAR 661-010-0015(3)(f)(A); 661-010-0075(7). As we explain later in this opinion, when petitioners filed the July 2, 2001 motion they apparently believed they had oral consent for the extension from Jouvenat's attorney on behalf of Jouvenat and the remaining *pro se* intervenors.

[4]Petitioners' attorney describes this phone call in an affidavit that is attached to his July 11, 2001 memorandum opposing the motions to dismiss. That affidavit is somewhat confusing, but the memorandum itself makes it clear that petitioners' attorney was advised on July 3, 2001, by one of Jouvenat's attorneys that they did not represent the *pro se* intervenors:

> "* * * Counsel for Jouvenat had represented several different persons through the course of the local hearings, but only as of July 3, 2001, did they advise [petitioners' attorney] that they, in fact, did not represent the remaining intervenors. * * * By this date it was too late to obtain their express consent. Had counsel disaffirmed any relationship with intervenors prior to this time, petitioners' counsel could have filed a petition for review." July 11, 2001 Opposition to Motion to Dismiss 2.

[5]OAR 661-010-0005 makes it clear that a party's technical violation of our rules will not provide a basis for dismissing an appeal if such a violation does not affect the substantial rights of the other parties. However, OAR 661-010-0005 also makes it clear that failure to comply with the deadline for filing a notice of intent to appeal and the petition for review is not treated as a mere technical violation. *Bloomer v. Baker County*, 19 Or LUBA 90, 92 n 2 (1990).

provides that the petition for review is due 21 days after the record is settled and further provides that

> "[f]ailure 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."

As we have stated on numerous occasions, we strictly adhere to these two deadlines. *See Bauer v. City of Portland*, 37 Or LUBA 489, 491 (2000) (failure to timely file petition for review and failure to obtain intervenor's consent to extension); *Oak Lodge Water District v. Clackamas County*, 18 Or LUBA 643, 644 (1990) (untimely notice of intent to appeal); *Beckwith v. City of Portland*, 16 Or LUBA 792, 794 (1988) (citing cases dismissing appeals for failure to comply with these deadlines).

There is no dispute in this appeal that under OAR 661-010-0030(1) and LUBA's June 14, 2001 order settling the record, the petition for review was due 21 days later, on July 5, 2001. There is also no dispute that the only written consents that petitioners have obtained and submitted to LUBA are signed by the county's attorney and Jouvenat's attorney. None of the *pro se* intervenors has consented in writing, or otherwise. Winston, the Gridleys, Holing, and Reynolds expressly do not consent. Because petitioners do not have the written consent of the *pro se* intervenors to extend the deadline for filing the petition for review past July 5, 2001, it would appear that under OAR 661-010-0030(1) this appeal must be dismissed. We consider below the reasons petitioners have advanced for not dismissing this appeal, even though the petition for review was filed after the July 5, 2001 deadline and the *pro se* intervenors do not consent to an extended deadline.

A. Petitioners Relied on LUBA's July 6, 2001 Order Granting the Requested Deadline Extension

Our July 27, 2001 order denying the initial motions to dismiss relies heavily on our decision in *Pereira v. Columbia County*, 39 Or LUBA 760, *aff'd* 175 Or App 291, ___ P3d ___ (2001). Our July 27, 2001 order explains:

> "[A]s was the case in *Pereira*, [LUBA] issued an order allowing the extension of time, and petitioners have the right to rely on the extended deadline established in the order. Rescinding our order now, and dismissing the appeal, would result in substantial prejudice to petitioners' rights." Slip op 4.[6]

However, as Winston correctly argues in his motion to dismiss, there are three significant differences between this case and *Pereira* that we agree make the principle we articulated in *Pereira* inapposite here. First, the petitioner in *Pereira* did secure the consent of all *known* parties before he filed his request for an extension. In that case, the motion to intervene was received later that same day *after* the motion requesting the extension had been filed.[7] Here, on July 2, 2001, petitioners clearly were aware that Jouvenat and the *pro se* intervenors were parties.[8]

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[6]We explained the facts and our decision in *Pereira* in our July 27, 2001 order:

> "In *Pereira v. Columbia County*, 39 Or LUBA 760 (2001), we denied a motion to dismiss based on the petitioner's failure to obtain written consent from all of the parties to extend the time for filing the petition for review. There, the petitioner and the county stipulated to an extension of time to file the petition for review. LUBA issued its order granting the extension of time on the same day the Board received a motion to intervene by intervenor-respondent. The order extending the time to file the petition for review was mailed in the morning, and the motion to intervene was received in the afternoon. The intervenor-respondent argued that because it was a party to the appeal on the day it filed its motion to intervene, that is, the day it was mailed, petitioner had to obtain its consent for the extension of time in order to avoid dismissal of the appeal.
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> "We rejected that argument and explained:
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> > "'Where a motion to intervene has been filed and served but not yet received by LUBA and the parties, and an order extending the deadline for filing the petition for review is entered based on the mistaken understanding that all parties consent to the extension, the intervening party may thereafter object to the extension. In that circumstance, the objecting intervenor is entitled to have the original deadline for filing the petition for review reestablished, if that can be done without prejudicing petitioner's substantial right to rely on the deadline that was established in the order. Where the original deadline cannot be reestablished without prejudicing petitioner's substantial rights, LUBA will consider establishing a shortened deadline for filing the petition for review that is consistent with petitioner's and intervenor's respective substantial rights.' 39 Or LUBA at 765." Slip op at 3.

[7]Under OAR 661-010-0050(1) "[s]tatus as an intervenor is recognized when the motion to intervene is filed * * *." Therefore, while the intervenor in *Pereira* was not known to the petitioner or LUBA at the time the

A second difference is that on the day LUBA's order was issued extending the deadline in *Pereira*, LUBA, like the petitioner in *Pereria*, was not aware that an additional party who would not consent to the requested extension had filed a motion to intervene that would be received later that day. That is not the case here.[9]

A final difference is that in *Pereira* the petitioner reasonably relied on our order extending the deadline for filing the petition for review when he did not file the petition for review on or before the original deadline expired. In this case, the inference in our July 27, 2001 order that petitioners may have been relying on LUBA's July 6, 2001 order granting the requested deadline extension when they failed to file their petition for review on or before July 5, 2001, is clearly wrong. Petitioners *could not* have been relying on LUBA's July 6, 2001 order, which erroneously extended the July 5, 2001 deadline, since that order was not issued until one day *after* the July 5, 2001 deadline expired.[10] Petitioners clearly relied on their mistaken understanding about whether Jouvenat's attorneys also represented the *pro se* intervenors in this appeal and therefore consented to the desired extension on their behalf.

We agree with intervenors that our reliance on *Pereira* in our July 27, 2001 order to deny the initial motions to dismiss was misplaced. We also agree that our July 6, 2001 order provides no basis for excusing petitioners' failure to file their petition for review on July 5, 2001, or obtain the written consent of all parties to extend that deadline.

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petition for review deadline extension was requested and granted, the applicant technically became an intervenor earlier when its motion was filed the prior day by mail.

[8]As noted earlier, petitioners separately served copies of their May 14, 2001 record objection on all the intervenors. That action confirms that petitioners were aware of their intervention as parties.

[9]As noted earlier, LUBA issued an order on June 14, 2001 allowing the eight intervenors' motions to intervene and was aware of those other parties. LUBA's issuance of the July 6, 2001 order without the consent of all parties was an error.

[10]Relatedly, our July 27, 2001 order denying the motions to dismiss was in error when we stated "[p]etitioners contend that Jouvenat's attorney did not correct petitioners' mistaken impression until after July 5, 2001." *Ballou v. Douglas County*, ___ Or LUBA ___ (LUBA No. 2001-066, Order on Motions to Dismiss, July 27, 2001), slip op 2. Petitioners learned that Jouvenat's attorneys did not represent the *pro se* intervenors on July 3, 2001, two days before the deadline expired on July 5, 2001. *See* n 4 and related text.

B. Actions by Jouvenat's Attorneys

Petitioners contend that during the local proceedings Jouvenat's attorneys acted in ways that reasonably led petitioners to believe those attorneys also represented other opponents. We agree with petitioners that it is not altogether clear whether Jouvenat's attorneys represented only Jouvenat or whether they also represented other opponents.[11] There are pages in the record that would support either inference.[12]

It is clear now that Jouvenat's attorneys do not represent the *pro se* intervenors in this appeal and did not represent them when petitioners filed their motion to extend the deadline for filing the petition for review on July 2, 2001. However, for purposes of resolving the pending motions to dismiss, we assume without deciding that dismissal of this appeal nevertheless would *not* be appropriate if petitioners' attorney reasonably but erroneously believed that Jouvenat's attorneys' consent to the extension also represented consent by the *pro se* intervenors.

Although we agree with petitioners that it was not clear whether Jouvenat's attorneys at all times limited their representation to Jouvenat throughout the proceedings before the county, that does not mean it was reasonable to assume that Jouvenat's attorneys also represented the *pro se* intervenors in this subsequent LUBA appeal.[13] At most, the lack of

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[11]Because we reconsider our July 27, 2001 order denying the motions to dismiss, we also reconsider our decision in that order to deny petitioners' July 18, 2001 motion that we consider evidence outside the record. We have considered that evidence in deciding whether petitioners reasonably believed Jouvenat's attorneys represented the *pro se* intervenors. That evidence can be read to suggest that an organization called "No on North Umpqua Quarry" views Jouvenat's attorneys as "our attorneys." July 18 Motion to Take Evidence, Exhibit 1.

[12]In several places Jouvenat's attorneys make statements that seem to clearly indicate that they represent only Jouvenat. Record 130 (letter transmitting "prehearing memo of Jock Jouvenat"); 238 ("[m]y name is Bill Kloos, I represent Jock Jouvenat"); 550 ([t]his appeal is filed on behalf of Jock Jouvenat"). In other places it is much less clear. Record 232 (referring to attorney Garrison having a list of persons he is representing). The evidence described at n 10 and the control that Jouvenat's attorneys exercised over the opponents during the local proceedings could have reasonably led petitioners to believe that Jouvenat's attorneys may have acquired additional clients during the local proceedings that led to the challenged decision.

[13]We also note there is a significant leap between a suggestion in a newspaper article that the "No on North Umpqua Quarry" organization viewed Jouvenat's attorneys in this LUBA appeal as "our attorneys" and a

clarity about who those attorneys represented during the local proceedings might have provided some limited basis for petitioners to suspect on July 2, 2001, that one or more of the *pro se* intervenors might be represented by Jouvenat's attorneys. In other words, we believe it might have been reasonable for petitioners to ask Jouvenat's attorneys if they also represented one or more of the *pro se* intervenors and if they therefore could consent on their behalf to extend the deadline for filing the petition for review. However, because all motions to intervene, other than the one filed by the attorneys on Jouvenat's behalf, clearly state that the intervenor represents herself or himself as an individual and no notice of representation by counsel had subsequently been filed with LUBA by any of those *pro se* intervenors, any chance that Jouvenat's attorneys also represented all the *pro se* intervenors would seem to be remote at best. It clearly was not reasonable for petitioners simply to assume that Jouvenat's attorneys represented all the *pro se* intervenors, without first making appropriate inquiries to confirm that representation. Petitioners' mistaken assumption that they need not first obtain the consent of each of the *pro se* intervenors to extend the deadline for filing the petition for review provides no basis for excusing their failure to file a petition for review on July 5, 2001.

Our past practice has been to adhere strictly to the deadline for filing the petition for review. *Bauer*, 37 Or LUBA at 491; *Landwatch Lane County v. Lane County*, 34 Or LUBA, 348, 350 (1998); *Beckwith*, 16 Or LUBA at 794. The facts presented in this case present no reason to deviate from that past practice. Our conclusion to the contrary in our July 27, 2001 order was in error, and we now correct that error.

CONCLUSION

As we noted earlier, Jouvenat filed a cross-petition for review. However, Jouvenat subsequently joined in Winston's motion to dismiss, and does not request that we proceed to consider the cross-petition in the event we grant Winston's motion to dismiss. Moreover,

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conclusion that those attorneys also represent all of the seven *pro se* intervenors in this LUBA appeal. *See* n 11.

OAR 661-010-0030(1) appears to dictate that we dismiss this appeal if we conclude, as we do, that petitioners failed to file a timely petition for review. It is not clear to us whether we have authority in this circumstance to consider the assignments of error that are presented in the cross-petition for review.[14] In view of our questions about our authority to consider the cross-petition for review, and because neither Jouvenat nor any other party provides any argument on those questions, we decline to consider the questions further. We do not consider the cross-petition for review.

This appeal is dismissed.

[14]If we do have authority to consider the cross-petition, it is not clear whether in that event we could or must also consider petitioners' cross-respondent brief.