

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HOLGER T. SOMMER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF CAVE JUNCTION,
10 *Respondent.*

11
12 LUBA No. 2007-120

13 ORDER SETTLING RECORD

14 The record in this appeal was received by the Board on July 30, 2007. On August 13,
15 2007, petitioner filed an objection to the record.¹ On August 23, 2007, the city filed a
16 response to petitioner's objections. Petitioner has not responded to the city's response.

17 The city argues that petitioner's record objections should be denied because petitioner
18 failed to attempt to resolve his record objections with respondent's legal counsel before filing
19 his objections to the record, as required by OAR 661-010-0026(1). OAR 661-010-0026(1)
20 provides:

21 "Before filing an objection to the record, a party shall attempt to resolve the
22 matter with the governing body's legal counsel. The objecting party shall
23 include a statement of compliance with this section at the same time the
24 objection is filed. The Board may deny any objection to the record that does
25 not comply with this rule."

26 Respondent explains that on August 2, 2007, petitioner faxed the city's attorney a letter in
27 which petitioner stated the following objections to the record:

28 "1) several items in the record have never been in front of the City Council
29 when it was in public session;

¹ In that objection, petitioner stated:

"[Petitioner], pursuant to OAR 661-010-0026(1), made an attempt to resolve these Record issues with the City Attorney. Because of time constraints these issues could not be resolved but the parties are in communication." Objection to Record 1.

1 “2) several items which were produced during the public hearing are
2 missing from the record;

3 “3) The Record is chronologically not correct.” Respondent’s Response,
4 Exhibit 1.

5 On August 6, 2007, the city’s attorney sent a letter to petitioner in which he requested
6 that petitioner communicate his precise objections so that the city could consider them.
7 Respondent’s Response, Exhibit 2. On August 8, 2007, petitioner sent the city’s attorney an
8 electronic mail message that read:

9 “I noticed the applicant did not intervene in this matter. Will the City of Cave
10 Junction take an active role in this case and spend the money to defend the
11 zone change triggered by the annexation? If not, I will no longer insist in
12 correcting the record and prepare the petition for review to LUBA.”
13 Respondent’s Response, Exhibit 3.

14 On Friday, August 10, 2007, the city’s attorney responded to petitioner’s electronic mail
15 message by sending an electronic mail message to him in which he indicated that, in keeping
16 with the city’s standard policy concerning LUBA appeals, the city would not be taking an
17 active role in defending the decision. Respondent’s Response, Exhibit 4. As noted above,
18 on August 13, 2007, the last day for filing objections to the record under LUBA’s rules,
19 petitioner filed objections to the record.

20 The rule requiring that a party “attempt to resolve” issues with the record prior to
21 filing a record objection is intended to facilitate timely and efficient resolution of appeals.
22 ORS 197.805; *Nicholson v. Clatsop County*, 31 Or LUBA 535 (1996). Lack of adherence to
23 the rule frustrates this purpose. *Ghena v. Josephine County*, 51 Or LUBA 820, 821 (2006).
24 We have also construed OAR 661-010-0026(1) as requiring a *good faith* attempt to resolve
25 record objections. *Casey Jones v. City of Lowell*, 33 Or LUBA 812, 813 (1997). Moreover,
26 the obligation to attempt to resolve record objections is an ongoing obligation that does not
27 cease when one party files record objections or the period for filing expires. *Nicholson*, 31
28 Or LUBA at 536.

1 In this case, viewing the totality of petitioner’s actions, we conclude that petitioner
2 did not comply with the rule’s requirement that petitioner “attempt to resolve” record
3 objections. As discussed above, eleven days prior to the deadline for filing record
4 objections, petitioner faxed a letter to the city’s attorney stating his general disagreement
5 with the record and requesting a brief meeting. Even though the record objections were not
6 specific as required by OAR 661-010-0026(2), that initial communication with the city’s
7 attorney, viewed in isolation, may have been sufficient to satisfy the rule’s requirement that
8 petitioner “attempt to resolve” record objections before filing precautionary record
9 objections.

10 However, petitioner’s subsequent actions are inconsistent with the policy that
11 underlies the rule and in fact frustrated that policy. As noted above, rather than actually
12 attempting to resolve his record objections by communicating with the city’s attorney to
13 clarify his specific objections, petitioner instead sent the electronic mail message quoted
14 above in which he attempted to secure a promise from the city that the city would not
15 participate in the appeal in exchange for petitioner’s assurance that he would not object to the
16 record. After the city advised petitioner that it would not be participating in the appeal,
17 petitioner nevertheless filed record objections, without ever responding to the city’s request
18 that petitioner more specifically identify his record objections.

19 Petitioner’s actions were not an “attempt to resolve” petitioner’s objections to the
20 record, within the meaning OAR 661-010-0026(1). Because petitioner did not “attempt to
21 resolve” whatever record objections petitioner may have had prior to filing his record
22 objections, we exercise our discretion under OAR 661-010-0026 to deny petitioner’s
23 objections.

24 The record is settled as of the date of this order. The petition for review shall be due
25 21 days after the date of this order. The respondent’s brief shall be due 42 days after the date
26 of this order. The final opinion and order shall be due 77 days after the date of this order.

1
2
3
4
5
6
7
8
9

Dated this 3rd day of October, 2007.

Melissa M. Ryan
Board Member