

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 STEVEN SMITH,
5 *Petitioner,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2022-034

13
14 ORDER

15 **BACKGROUND**

16 We state the following facts from the record. On February 4, 2022, the
17 county planning director issued a decision (director decision) that tentatively
18 approves a partition of land. On February 12, 2022, petitioner filed with LUBA
19 a motion (LUBA motion) requesting that LUBA suspend the statutory deadline
20 for filing a notice of intent to appeal the director decision and stating that
21 petitioner intended for the motion to also satisfy the county provisions governing
22 an appeal of the director decision. That same day, petitioner mailed the LUBA
23 motion to county counsel. Petitioner sent county counsel a letter dated February
24 23, 2022, inquiring whether the county accepted the “LUBA motion as satisfying
25 local notice of appeal requirements.” Record 6. After further correspondence,
26 county counsel sent petitioner a letter dated March 23, 2022 (county counsel
27 decision), in which county counsel concluded that petitioner had not filed a

1 timely local appeal of the director decision and denied petitioner a local appeal
2 of the director decision. Record 1.

3 On April 11, 2022, the Board received petitioner’s original notice of intent
4 to appeal (NITA). The original NITA did not comply with OAR 661-010-0015
5 in multiple respects, one of which was that the original NITA attempted to appeal
6 both the director decision and the county counsel decision. On April 13, 2022,
7 we issued an order instructing petitioner to either (1) notify the Board in writing
8 that they elect to appeal only one decision, and identify which decision, pursuant
9 to OAR 661-010-0015(1)(d) or (2) submit a new, separate NITA and separate
10 filing fee for the appeal of the additional decision. On April 25, 2022, the Board
11 received petitioner’s corrected NITA, in which petitioner appeals only the county
12 counsel decision. Thus, the county counsel decision is the decision challenged in
13 this appeal.

14 On May 13, 2022, LUBA received the record in this appeal. On May 23,
15 2022, petitioner filed objections to the record. On May 31, 2022, the county filed
16 a response to the objections. On June 3, 2022, petitioner filed a motion to strike
17 a footnote in the response to the objections.

18 **RECORD OBJECTIONS**

19 The record shall include “[a]ll written testimony and all exhibits, maps,
20 documents or other materials specifically incorporated into the record or placed
21 before, and not rejected by, the final decision maker, during the course of the
22 proceedings before the final decision maker.” OAR 661-010-0025(1)(b).

1 The director decision is in the record. Petitioner observes that the findings
2 of fact supporting the director decision refer to written statements received from
3 Douglas County Fire District No. 2 and two other persons. Record 28, 29.
4 Petitioner objects that the complete written statements from the fire district and
5 the other persons are omitted from the record.

6 The county responds, initially, that the Board should deny the objections
7 because petitioner did not attempt, in good faith, to resolve the objections with
8 county counsel before filing them, as required by LUBA’s rules. OAR 661-010-
9 0026(1) provides:

10 “Before filing an objection to the record, a party shall attempt to
11 resolve the matter with the governing body’s legal counsel. The
12 objecting party shall include a statement of compliance with this
13 section at the same time the objection is filed. The Board may deny
14 any objection to the record that does not comply with this rule.”

15 We have construed OAR 661-010-0026(1) to require a “good faith” effort to
16 resolve record objections prior to filing them with LUBA. *Casey Jones v. City of*
17 *Lowell*, 33 Or LUBA 812, 812 (1997). We have explained:

18 “The intent of the relevant provisions of OAR 661-010-0026(1), (2)
19 and (4) is to encourage the parties to resolve record objections,
20 where that is possible, without LUBA’s involvement. This process
21 of attempting to resolve objections prior to invoking LUBA’s
22 involvement is not an empty procedural exercise, but is an important
23 means to prevent the Board from being overwhelmed by disputes
24 over record objections, and consequently missing important
25 statutory deadlines.” *Bishop v. Deschutes County*, 79 Or LUBA
26 1007, 1012 (2019).

27 We have further explained:

1 “A ‘good faith’ attempt to resolve objections to the record
2 necessarily includes allowing sufficient time for the petitioner and
3 the governing body’s counsel to resolve the objections. The amount
4 of time that is sufficient will vary depending on the length and
5 complexity of the record and the number and complexity of
6 objections to the record.” *Hunt v. City of The Dalles*, ___ Or LUBA
7 ___, ___ (LUBA No 2019-076, Oct 22, 2019) (slip op at 4).

8 The objections state, “Petitioner attempted resolution on May 20, 2022 by
9 letter to Douglas County Counsel; no resolution has been reached as of this date.”
10 The county responds that petitioner’s Friday, May 20, 2022 letter does not
11 constitute a good faith attempt to resolve the objections because the form and
12 timing of that correspondence did not provide county counsel any opportunity to
13 respond before petitioner filed the objections on Monday, May 23, 2022.¹ County
14 counsel received petitioner’s letter on Tuesday, May 24, 2022, after petitioner
15 had already filed the objections. On May 25, 2022, county counsel sent petitioner
16 a letter responding to the objections.

17 The record is short at 88 pages. The objections are few and straightforward.
18 LUBA received the record on May 13, 2022. Thus, the deadline to file objections
19 was May 27, 2022. OAR 661-010-0026(2). Petitioner had between May 13, 2022,
20 and May 27, 2022, to communicate with county counsel in an attempt to resolve
21 the objections. We agree with the county that petitioner’s May 20, 2022 letter did
22 not provide county counsel any opportunity to consider the objections and

¹ The county notes that county counsel’s telephone number and email address are available to the general public online.

1 respond before petitioner filed them and, thus, petitioner failed to satisfy their
2 obligation to make a good faith attempt to resolve the objections before filing
3 them. Accordingly, we exercise our discretion to deny the objections. OAR 661-
4 010-0026(1).

5 The record objections are denied.

6 **MOTION TO STRIKE**

7 Petitioner moves to strike footnote 2 in the response to the objections,
8 which states that petitioner has filed various actions in Oregon circuit and
9 appellate courts. Petitioner argues that that footnote is irrelevant, inaccurate, and
10 prejudicial. Our review of decisions is generally confined to evidence in the
11 record. ORS 197.835(2)(a). The information at footnote 2 of the response to the
12 objections is based on evidence outside of the record and not subject to any
13 motion to take evidence outside the record. The motion to strike is granted.
14 LUBA will disregard footnote 2 in the response to the objections.

15 **BRIEFING SCHEDULE**

16 The record is settled as of the date of this order. The petition for review
17 shall be due 21 days after the date of this order. The respondent's brief shall be
18 due 42 days after the date of this order. The final opinion and order shall be due
19 77 days after the date of this order.

20 Dated this 22nd day of July 2022.

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Melissa M. Ryan
Board Member