

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

3
4 JACK L. LINDSEY
5 and DELMER C. BRINK,
6 *Petitioners,*

7
8 and

9
10 HOLGER T. SOMMER
11 and CECIL E. WALDRON,
12 *Intervenor-Petitioners,*

13
14 vs.

15
16 JOSEPHINE COUNTY,
17 *Respondent,*

18
19 and

20
21 COPELAND SAND & GRAVEL, INC.,
22 *Intervenor-Respondent.*

23
24 LUBA No. 2005-112

25 ORDER

26 **MOTIONS TO INTERVENE**

27 Copeland Sand & Gravel, Inc. moves to intervene on the side of respondent in this
28 appeal. There is no opposition to the motion, and it is allowed.

29 Holger T. Sommer and Cecil E. Waldron separately move to intervene on the side of
30 petitioners in this appeal. There is no opposition to the motions, and they are allowed.¹

¹As we explained in an August 16, 2005 order, intervenor-petitioner Sommer is not the *lead* intervenor-petitioner in this appeal. Intervenor-petitioner Sommer and intervenor-petitioner Waldron filed separate motions to intervene rather than a single, joint motion to intervene. Therefore, OAR 661-010-0050(2), which requires designation of a lead intervenor, does not apply. In documents filed with LUBA since our August 16, 2005 order, intervenor-petitioner Sommer continues to refer to himself as lead intervenor-petitioner. Lead intervenor-petitioners have special responsibilities and the requirements for service of documents would be different if intervenor-petitioner Sommer was a lead intervenor-petitioner. OAR 661-010-0075(7)(b); 661-010-0075(2)(b)(A). To avoid the possibility for confusion and misunderstanding, intervenor-petitioner Sommer will stop referring to himself as lead intervenor-petitioner.

1 **RECORD OBJECTIONS**

2 **A. Failure to Consult**

3 Lead petitioner Lindsey and intervenor-petitioner Sommer (hereafter petitioners)
4 object to the record filed by the city in this appeal. Respondent first objects that petitioners
5 did not attempt to resolve their record objections with the county before filing those record
6 objections with LUBA, as required by OAR 661-010-0026(1).²

7 The requirement that parties first attempt to resolve their record objections with the
8 local government's legal counsel before filing those objections with LUBA is frequently
9 violated, and LUBA has not been entirely consistent in how it treats violations of that
10 requirement. In some cases LUBA has expressed frustration with those violations, explained
11 the purpose that is served by the consultation requirement, but nevertheless considered the
12 record objections. *Casey Jones v. City of Lowell*, 33 Or LUBA 812, 812-13 (1997);
13 *Nicholson/Keever v. Clatsop County*, 31 Or LUBA 535, 536 (1996). In one case, which
14 involved intervenor-petitioner Sommer, we declined to rule on record objections until the
15 required consultation had occurred. *Ghena v. City of Grants Pass*, ___ Or LUBA ___
16 (LUBA No. 2005-072, July 6, 2005, Order on Record Objection). However, in most cases
17 we have analyzed violations of the consultation requirement as a procedural or technical
18 error and overlooked the error where no party's substantial rights were violated. *Roberts v.*
19 *Clatsop County*, 43 Or LUBA 617, 619 (2002); *Murphy Citizens Advisory Comm. v.*
20 *Josephine County*, 33 Or LUBA 882, 888 (1997); *Dorgan v. City of Albany*, 26 Or LUBA

² OAR 661-010-0026(1) provides:

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

1 621, 622 (1994); *Dickas v. City of Beaverton*, 17 Or LUBA 1027, 1028 (1988).³

2 Most of our decisions that have analyzed failures to consult as procedural or technical
3 errors predate the 1998 amendments to OAR 661-010-0026(1). *See* n 3. However, our
4 decision in *Roberts v. Clatsop County* postdates those amendments and observes that
5 violations of OAR 661-010-0026(1) are a “technical” violation that will be overlooked absent
6 a showing “that substantial rights have been prejudiced.” 43 Or LUBA at 619 n 2. We now
7 question that observation to the extent it can be read to *require* a showing that substantial
8 rights have been prejudiced. However, we continue to believe that the existence or
9 nonexistence of prejudice to substantial rights may be a relevant consideration, along with
10 other relevant considerations, in deciding the appropriate remedy for violations of OAR 661-
11 010-0026(1).

12 There are overlapping time pressures after the record is transmitted to LUBA. Under
13 OAR 661-010-0030(1), the petition for review must be filed within 21 days. Under OAR
14 661-010-0026(2), any objections to the record must be filed within 14 days. Given those
15 overlapping time pressures, it is perhaps understandable that in some cases it may be difficult
16 to engage in meaningful consultation with the local government’s counsel before filing
17 record objections. *See Barton v. Friends of Linn County*, ___ Or LUBA ___ (LUBA Nos.
18 2003-003, 2003-004 and 2003-005, Order, February 25, 2003) (two phone messages left with
19 county attorney on the same day record objections filed with LUBA held to comply with
20 OAR 661-010-0026(1) where record was 1600 pages long); *Hammons v. City of Happy*
21 *Valley*, ___ Or LUBA ___ (LUBA No. 2004-117, Order on Motion to Intervene and Order
22 on Record Objection, October 22, 2004) (one phone call the day before record objections
23 were filed with LUBA found to satisfy the rule). Nevertheless, OAR 661-010-0026(2)

³ OAR 661-010-0026(1) was amended in 1998 to add the last two sentences that now appear in the rule. *See* n 2. Under the amended rule a statement of compliance is required and the Board “may deny” an objection that does not comply with the rule.

1 requires such consultation before filing record objections to facilitate making any needed
2 corrections to the record and to avoid unnecessary delay.

3 In this case, it might well be appropriate to deny petitioners' record objections
4 summarily for failure to consult with the county under OAR 661-010-0026(2), given
5 intervenor-petitioner Sommer's recent failure to consult in *Ghena*. Since intervenor-
6 petitioner Sommer clearly knew of the consultation requirement, it might be reasonable to
7 assume that he made a conscious decision not to comply with the consultation requirement.
8 Such a conscious decision not to comply with the consultation requirement likely would
9 warrant summary denial of record objections under OAR 661-010-0026(1), absent sufficient
10 mitigating circumstances. Even if we were to make such an assumption in this case
11 regarding intervenor-petitioner Sommer, however, we do not think it would be reasonable to
12 make the same assumption regarding petitioner Lindsey's failure to consult. We also note
13 that the county did not file the record in this appeal until 77 days after it was due. Any
14 additional delay in settling the record that can reasonably be attributed to petitioners' failure
15 to consult falls far short of that 77-day delay. We therefore exercise our discretion under
16 OAR 661-010-0026(2) and do not deny the record objections based on petitioners' failure to
17 consult with the county. *See Ramsey v. Multnomah County*, ___ Or LUBA ___ (LUBA No.
18 2001-171, April 24, 2002, Order on Record Objections) (declining to summarily deny record
19 objections where record was large and filed late). In addition to objecting to petitioners'
20 failure to consult, the county also responded to the record objections and submitted a
21 supplemental record. That response by the county allows us to resolve the pending record
22 objections in this order. We now turn to those record objections.

23 **B. Petitioners' Record Objections**

24 Petitioners' objections concerning pages 380 and 508 of the record and their
25 objections concerning color maps and photographs are denied, for the reasons explained in
26 the county's Response to Petitioner[s'] Record Objections.

1 Petitioners' two remaining objections are resolved by the supplemental record that
2 has been submitted by the county. However, rather than treat that supplemental record as a
3 separate document, it will be incorporated into the original record filed by the county. All
4 parties and LUBA shall replace pages iii, iv and v of the record with pages iii, iv and v of the
5 Supplemental Record. All parties and LUBA will insert page 500-A of the supplemental
6 record after page 500 of the record.

7 The record shall be considered settled as of the date of this order. The petitions for
8 review shall be due 21 days from the date of this order. The response briefs shall be due 42
9 days from the date of this order. The Board's final opinion and order shall be due 77 days
10 from the date of this order.

11 Dated this 8th day of December, 2005.

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18 _____
19 Michael A. Holstun
 Board Member