

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

3
4 THOMAS BISHOP, DORBINA BISHOP,
5 and TRUSTEES OF THE BISHOP
6 FAMILY TRUST,
7 *Petitioners,*

01/09/19 AM 9:36 LUBA

8
9 and

10
11 PAUL LIPSCOMB, ARCHIE BLEYER,
12 KEN GRAHAM, GISELA RYTER,
13 JANET SLEATH, PAUL SLEATH,
14 CENTRAL OREGON LANDWATCH,
15 ROY DWYER, SUSAN STRAUSS,
16 JEFF COUGHENOUR and SUSAN COUGHENOUR,
17 *Intervenors-Petitioners,*

18
19 vs.

20
21 DESCHUTES COUNTY,
22 *Respondent,*

23
24 and

25
26 TANAGER DEVELOPMENT, LLC,
27 and KC DEVELOPMENT GROUP, LLC,
28 *Intervenors-Respondents.*

29
30 LUBA Nos. 2018-111 and 2018-112

31
32 ORDER

33 Before the Board are petitioners' motion to strike and the parties'
34 objections to the record.

1 **MOTION TO STRIKE**

2 On November 6, 2018, the county transmitted to LUBA the 12,579-page
3 record, with a 27-page table of contents. Both petitioners and intervenors-
4 respondents (intervenors) filed timely objections to the record. On November
5 30, 2018, the county filed a status report on the objections. On the same date,
6 intervenors filed a response to petitioners' record objections. On December 7,
7 2018, petitioners filed (1) a motion to strike intervenors' response, and (2) a
8 motion to file a reply to intervenors' response, accompanied by a reply to both
9 the county's status update and intervenors' response. In the motion to strike,
10 petitioners argue that intervenors' response includes new or additional
11 arguments in support of intervenors' record objections. Intervenors filed a
12 response to petitioners' motion to strike.

13 The motion to strike is denied. Intervenors' response refers briefly to
14 their record objections but those brief citations do not constitute new or
15 additional record objections and do not warrant striking what is an otherwise
16 appropriate response to petitioners' objections. Petitioners' motion to file a
17 reply is granted.

18 **INTERVENORS' RECORD OBJECTIONS**

19 Intervenors object to the omission of a video recording, an audio
20 recording, certain documents submitted at an August 8, 2018 meeting, and a
21 September 14, 2017 e-mail. Intervenors also object that Exhibits A through H
22 attached to the application are not the correct exhibits, and request that the

1 county amend the record to remove the incorrect exhibits and include the
2 correct exhibits at the appropriate locations in the record, with adjusted
3 pagination.

4 Petitioners do not respond to intervenors' record objections. The
5 county's status letter states that the county anticipates resolving intervenors'
6 objections. We understand the county intends to supplement or amend the
7 record in the manner agreed between the county and intervenors. Accordingly,
8 intervenors' objections are sustained.

9 **PETITIONERS' RECORD OBJECTIONS**

10 Petitioners' 16-page record objection details a number of objections,
11 falling into four categories: (1) improperly omitted documents, (2) improperly
12 included documents, (3) failure to arrange the record in inverse chronological
13 order, and (4) miscellaneous typographical and organizational errors.

14 Initially, the county argues that petitioners failed to first "attempt to
15 resolve the matter with the governing body's legal counsel" before filing the
16 objections, as required by OAR 661-010-0026(1).¹ As noted, the county
17 transmitted the record to LUBA on November 6, 2018. OAR 661-010-0026(2)

¹ 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 requires that objections to the record must be filed with LUBA within 14 days
2 of the date of transmittal.² On the afternoon of November 15, 2018,³ counsel
3 for petitioners phoned the assistant county counsel and stated that “there were

² OAR 661-010-0026(2) provides:

“An objection to the record or an objection to an amendment or supplement to the record shall be filed with the Board within 14 days of the date appearing on the notice of record transmittal sent to the parties by the Board. A party may file a record objection while continuing to resolve objections with the governing body’s legal counsel. Objections may be made on the following grounds:

- “(a) The record does not include all materials included as part of the record during the proceedings before the final decision maker. The omitted item(s) shall be specified, as well as the basis for the claim that the item(s) are part of the record.
- “(b) The record contains material not included as part of the record during the proceedings before the final decision maker. The item(s) not included as part of the record during the proceedings before the final decision maker shall be specified, as well as the bases for the claim that the item(s) are not part of the record.
- “(c) The minutes or transcripts of meetings or hearings are incomplete or do not accurately reflect the proceedings.
- “(d) The record does not conform to the requirements of OAR 661-010-0025(4).”

³ In e-mails between petitioners’ counsel and county counsel, petitioners state that the phone call occurred in the afternoon of Thursday, November 15, 2018. In a footnote to their reply, petitioners state that the phone call actually occurred on Wednesday, November 14, 2018. This factual discrepancy makes no difference as far as we can tell.

1 so many problems that I would be filing a record objection.” Status Report,
2 Exhibit A-3. The assistant county counsel requested that petitioners’ counsel
3 send a copy of the draft record objection as soon as possible, and petitioners’
4 counsel agreed to do so by the next day, Friday, November 15, 2018. County
5 counsel also requested that petitioners participate in a collaborative process
6 with intervenors’ counsel to identify and resolve objections that may be
7 common to both sets of parties. Petitioners declined that request.

8 The following day, Friday, November 16, 2018, petitioners mailed their
9 record objections to LUBA and contemporaneously mailed service copies of
10 their objections to the county and intervenors.⁴ However, petitioners did not
11 provide county counsel with a copy of the draft objections prior to filing the
12 objections, as petitioners had agreed to do. However, on the next business day,
13 Monday, November 19, 2018, petitioners e-mailed the county a copy of the
14 filed objections. On November 19, 2018, intervenors filed “precautionary”
15 objections to the record.⁵

⁴ Under OAR 661-010-0075(2)(a), the filing of most documents in a LUBA appeal is accomplished either by delivery to LUBA or by mailing the document on or before the date due by first class mail. Under OAR 661-010-0075(2)(b), documents filed with the Board must be contemporaneously served on all parties, and service may be accomplished in person or by first class mail.

⁵ LUBA’s rules no longer expressly authorize parties to file record objections that are labeled as “precautionary.” However, that practice continues, and it can be a useful indication to LUBA that the objector has and will continue efforts to resolve objections. There is no dispute in the present

1 On November 30, 2018, the county filed a status report on the record
2 objections, as required by OAR 661-010-0026(4).⁶ The status report does not
3 respond to petitioners' objections, but rather argues only that petitioners failed
4 to attempt to resolve record objections with the county legal counsel, as
5 required by OAR 661-010-0026(1). The county contends that petitioners'
6 efforts to resolve their record objections prior to filing their objections with
7 LUBA on Friday, November 16, 2018, consisted of a single phone call, in
8 which petitioners did not discuss the specifics of any objections, but simply
9 informed the county that there were too many objections to discuss, and that
10 petitioners intended to file objections with LUBA. In the status report, the
11 county also argues that petitioners have declined county counsel's repeated
12 invitations to participate in a collaborative process with intervenors' counsel to
13 identify and resolve common objections in the two set of objections. We
14 understand the county to argue that petitioners' post-objection refusals to
15 participate in that process is inconsistent with the intent of OAR 661-010-

case that intervenors complied with the requirements of OAR 661-010-0026(1) and (2) both before and after filing their objections.

⁶ OAR 661-010-0026(4) provides:

“A party may, within 14 days from the date of service of a record objection, file a response. The governing body's legal counsel shall, within 14 days of the filing of a record objection, either file a response to the record objection or advise the Board in writing of the status of the parties' efforts to resolve the record objection.”

1 0026(2), which provides that “[a] party may file a record objection while
2 continuing to resolve objections with the governing body’s legal counsel.”

3 The intent of the relevant provisions of OAR 661-010-0026(1), (2) and
4 (4) is to encourage the parties to resolve record objections, where that is
5 possible, without LUBA’s involvement. This process of attempting to resolve
6 objections prior to invoking LUBA’s involvement is not an empty procedural
7 exercise, but is an important means to prevent the Board from being
8 overwhelmed by disputes over record objections, and consequently missing
9 important statutory deadlines. As explained below, petitioners have not acted
10 consistently with the requirements or the intent of OAR 661-010-0026(1) and
11 (2).

12 We start by noting that because the record was transmitted to LUBA on
13 November 6, 2018, the parties had 14 days, until November 20, 2018, to
14 comply with the consultation requirement of OAR 661-010-0026(1), prior to
15 filing record objections.⁷ The totality of petitioners’ attempts to resolve

⁷ Because the county mailed the record to LUBA and the parties on November 1, 2018, the parties may have operated under the assumption that the 14-day deadline to file objections with LUBA expired on November 15, 2018. However, the 14-day deadline (and other deadlines) are established by transmittal of the record to LUBA, which is accomplished on the date the record is delivered or received by the Board, as reflected in the notice of record transmittal. OAR 661-010-0025(2)(a); 661-010-0026(2). As reflected in the notice of record transmittal sent to the parties, LUBA received the record on November 6, 2018, which means the deadline for filing objections expired November 20, 2018.

1 objections with the county prior to filing record objections with LUBA as
2 required by OAR 661-010-0026(1) consisted of the single phone call on
3 November 15, 2018, in which petitioners did not discuss any objections with
4 specificity. Petitioners agreed to send their draft objections to county counsel
5 prior to filing objections, but failed to do so, and did not send a courtesy copy
6 of the objections by e-mail until November 19, 2018, by which time the county
7 may have already received by mail the service copy of the objections.

8 We have construed OAR 661-010-0026(1) to require a “good faith”
9 effort to resolve record objections prior to filing those objections with LUBA.
10 *Casey Jones v. City of Lowell*, 33 Or LUBA 812 (1997). A good faith effort to
11 resolve objections must, at a minimum, include presenting the local government
12 legal counsel with reasonably specific objections prior to filing objections with
13 LUBA. Had petitioners emailed the county with a copy of the draft objections
14 on November 16, 2018, prior to filing objections with LUBA, petitioners might
15 have (minimally) met the requirements of OAR 661-010-0026(1). However, at
16 no time prior to filing objections with LUBA did petitioners provide the county
17 with any specific objections, verbally or in writing. A bare phone call notifying

In this case, it turned out that the last day for filing objections (and for satisfying the consultation requirement) was even later than November 20, 2018, because on November 16, 2018, LUBA issued an order that in relevant part settled the record and established a briefing schedule as of the date of that order. As a consequence, the deadline to file record objections was 14 days from November 16, 2018.

1 the county that petitioners intended to file objections was insufficient to satisfy
2 OAR 661-010-0026(1). *See, e.g., Sommer v. City of Cave Junction*, 55 Or
3 LUBA 665, 667 (2007) (OAR 661-010-0026(1) is violated where a petitioner
4 faxed the county stating that petitioner had unspecified objections, but did not
5 respond to the county’s request for specific objections, and thereafter filed
6 objections with LUBA without any attempt to provide specific objections).

7 Under OAR 661-010-0026(1), LUBA “may deny any objection to the
8 record that does not comply with this rule.” Petitioners’ noncompliance with
9 OAR 661-010-0026(1) is not necessarily fatal to petitioners’ objections. LUBA
10 will consider the “totality” of the party’s actions in deciding whether to exercise
11 its discretion to summarily deny the objections. *Sommer*, 55 Or LUBA at 667.
12 In the present case, two additional considerations play a role in the calculus.
13 One is that, as mentioned, the deadline to file objections did not expire until
14 Tuesday, November 20, 2018. For whatever reason, petitioners chose to file
15 their objections with LUBA four days earlier than the deadline, on Friday,
16 November 16, 2018, which significantly and unnecessarily abbreviated
17 opportunities to resolve objections prior to filing those objections with LUBA.
18 Had petitioners made a belated attempt to resolve the objections with the county
19 between the November 16, 2018 filing of the objections and the November 20,
20 2018 deadline, such an attempt might have gone some way to ameliorate their
21 failure to consult prior to filing the objections. However, the only action

1 petitioners took during this period was to (belatedly) email the county a copy of
2 the objections filed three days earlier.

3 The second consideration involves petitioners' other post-filing actions,
4 or lack thereof. OAR 661-010-0026(2) clarifies that "[a] party may file a
5 record objection while continuing to resolve objections with the governing
6 body's legal counsel." Read in context with OAR 661-010-0026(1), OAR 661-
7 010-0026(2) imposes the expectation, if not the obligation, that parties will
8 continue good faith efforts to resolve objections even if it is deemed necessary
9 to file objections with LUBA as a precaution or to preserve the right to object.
10 *Sommer*, 55 Or LUBA at 667 (the obligation to attempt to resolve record
11 objections is an ongoing obligation that does not cease when one party files
12 record objections or the period for filing expires).

13 Here, petitioners' post-filing communications with county counsel did
14 nothing, as far as we can tell, to advance resolution of the objections.
15 Petitioners argue, and we agree, that petitioners were not obligated to
16 participate in the collaborative process with intervenors' counsel that the county
17 proposed. But that does not mean that petitioners had no obligation to continue
18 to make good faith efforts with county counsel to resolve petitioners'
19 objections. Petitioners argue that county counsel made it clear that he was
20 unwilling to discuss petitioners' objections outside the collaborative process he
21 proposed. We have reviewed the emails and other information provided by
22 both parties, and it appears to be the case that county counsel strongly preferred

1 the collaborative process he proposed. However, we see no indication that
2 county counsel would not have agreed to discuss petitioners' specific objections
3 individually with petitioner's counsel, had such a discussion been proposed.
4 Instead, petitioners' post-filing contacts with county counsel did not include any
5 attempt to discuss the objections, or even a proposal to discuss the objections.

6 In an e-mail to county counsel sent Tuesday, November 27, 2018,
7 petitioners' counsel stated that "Petitioners' record objection stands on its own,
8 and we will work through LUBA's rules and process to resolve the content of
9 the record." Status Report, Exhibit A-5. In a subsequent e-mail sent that day,
10 petitioners' counsel objected again to the proposed collaborative process, and
11 requested that "If the County is agreeing to make all of the changes in
12 [petitioners'] record objection, please let me know." Status Report, Exhibit A-
13 3. In a subsequent e-mail sent Wednesday, November 28, 2018, petitioners'
14 counsel stated that after the conferral phone call made on November 15, 2018,
15 "further discussion would have served no purpose[.]" and that "LUBA's normal
16 process for settling the record should be allowed to proceed." Status Report,
17 Exhibit A-2. Read as a whole, these emails make it reasonably clear that
18 petitioners did not attempt to discuss and resolve specific objections, apparently
19 because petitioners believed that further discussion would serve no purpose.

20 While the county can be faulted for pushing the proposed collaborative
21 process long after it was clear that petitioners would not participate, the fact
22 remains that under LUBA's rules the primary obligation to consult and attempt

1 to resolve objections both before and after filing falls on the party making the
2 objection. Even in the face of the county's inappropriate insistence on the
3 collaborative process, petitioners had a good faith obligation to at least *propose*
4 a discussion about resolving petitioners' objections. Petitioners apparently
5 made no such proposal at any time, and instead seemed willing to rely entirely
6 upon "LUBA's normal process" to resolve their objections, which we
7 understand to mean relying on LUBA to resolve those objections.

8 Viewed in their totality, petitioners' actions both before and after filing
9 their objections are inconsistent with the requirements and purposes of OAR
10 661-010-0026(1) and (2), and further in our view warrant summary denial of
11 their objections. Accordingly, petitioners' objections are denied.

12 **CONCLUSION**

13 Within 21 days of the date of this order, the county shall file a
14 supplemental or replacement record, as appropriate, that reflects the county's
15 resolution of intervenors' record objections. On receipt of the supplemental or
16 replacement record, LUBA will issue an order setting forth a briefing schedule.

17 Dated this 9th day of January, 2019.

18
19
20
21


22 _____
23 Tod A. Bassham
Board Member