

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

3
4 JODY McCaffree,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF NORTH BEND,
10 *Respondent,*

11 and

12
13
14 PACIFIC CONNECTOR GAS PIPELINE, LP,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-005

18 ORDER

19 **BACKGROUND**

20 On December 11, 2018, intervenor-respondent Pacific Connector Gas
21 Pipeline, LP (intervenor) requested from the city a Land Use Compatibility
22 Statement (LUCS) required by the Department of Environmental Quality (DEQ)
23 for a DEQ permit authorizing intervenor to install a natural gas pipeline. On
24 December 13, 2018, without public notice or hearing, a city planner issued LUCS
25 17-18, determining that the pipeline project requires an estuarine permit,
26 floodplain development permit, and engineering permits. Record 13.

27 On December 21, 2018, petitioner received notice of the planner’s decision
28 in LUCS 17-18 when the city responded to her public records request. Petitioner
29 attempted to file a local appeal, which the city rejected. On January 11, 2019,

1 petitioner filed a notice of intent to appeal (NITA) with LUBA. On February 1,
2 2019, LUBA received the record from the city. On February 15, 2019, petitioner
3 filed precautionary record objections. In those objections, petitioner took the
4 position that her NITA appealed both LUCS 17-18 and the city’s decision
5 denying her local appeal. On March 1, 2019, intervenor filed a response. On
6 March 8, 2019, petitioner filed a reply. On March 18, 2019, the city filed a
7 surreply to petitioner’s reply to intervenor’s response.

8 On April 26, 2019, the Board issued an order directing petitioner to notify
9 the Board in writing of her election to appeal only the underlying LUCS decision
10 or submit a separate NITA and separate filing fee and deposit for costs for the
11 appeal of the city’s decision denying her local appeal. On May 13, 2019, the
12 Board received petitioner’s written election, in which she elected to proceed on
13 the single appeal of the city’s decision to issue LUCS 17-18. We now resolve the
14 outstanding record objections in this appeal.

15 **RECORD OBJECTIONS**

16 Petitioner’s February 15, 2019 record objections alleged that “items are
17 missing from the record” including documents and correspondence related to the
18 notice of the decision and attempted appeal and documents related to the
19 preliminary project review. Record Objection 1. Petitioner did not specify what
20 items she believed were improperly omitted from the transmitted record. Instead,
21 petitioner stated that if she was unable to resolve the record objections with the
22 city, she “anticipate[d] submitting a supplemental record objection listing any

1 new objections and further brief the basis for all objections or submit declarations
2 in support.” *Id.* In her March 8, 2019 reply, petitioner lists seven categories of
3 materials she believes should have been included in the record:

4 (1) Email correspondence from the city dated December 14,
5 2018, regarding filing of applications and direction to complete a
6 public records request;

7 (2) Correspondence and public records request;

8 (3) Documents responsive to the public records request,
9 including email correspondence dated December 24, 2018, and
10 attachments:

11 (a) preliminary project review application dated April 16,
12 2018, with attachments,

13 (b) correspondence from a law firm received on October
14 18, 2018, and

15 (c) LUCS 6-18 and attached correspondence;

16 (4) Documentation received by the city related to preliminary
17 project review which occurred before issuing the LUCS;

18 (5) Notice of appeal dated December 26, 2018;

19 (6) Petitioner’s correspondence filed in support of her appeal
20 dated December 26, 2018; and

21 (7) City planner decision denying the local appeal.

22 Petitioner states she filed general precautionary record objections hoping
23 to “avoid having to list the specific documents in writing” in the event that the
24 city conceded her objections and agreed to supplement the record. Reply 1. The
25 city explains that, on February 13, 2019, petitioner sent the city attorney an email

1 with six documents attached “for discussion regarding adding them to the
2 record.” City Response to Precautionary Objections 2. On March 8, 2019, the
3 city’s attorney spoke with petitioner’s attorney and that same day petitioner sent
4 the city attorney a list of specific documents petitioner argued should be included
5 in the record. The documents listed in that email match the documents listed in
6 petitioner’s reply. *Id.*

7 Intervenor and the city (collectively, respondents) argue that petitioner’s
8 approach to filing her record objections is procedurally improper, and that the
9 record objections should be denied for that reason. Respondents also provide
10 substantive responses disputing the specific record objections contained in
11 petitioner’s reply. For the reasons explained below, we agree with respondents
12 both on procedure and, alternatively, on substance.

13 We process appeals consistently with the legislative mandate that “time is
14 of the essence in reaching final decisions in matters involving land use.” ORS
15 197.805. Our rules provide that objections to the record must be filed with LUBA
16 within 14 days of the date of transmittal OAR 661-010-0026(2).¹ It is the

¹ 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:

1 objecting party’s ultimate burden to specifically identify noncompliant portions
2 of the record and bases for objections. *Home Builders Association v. City of*
3 *Eugene*, 58 Or LUBA 688 (2009); *Curl v. City of Bend*, 56 Or LUBA 794, *aff’d*,
4 224 Or App 477, 200 P3d 180 (2008), *rev den*, 346 Or 65 (2009). “A party may
5 file a record objection while continuing to resolve objections with the governing
6 body’s legal counsel.” OAR 661-010-0026(2); n 1. However, it is not
7 “appropriate or consistent with our rules to allow petitioners unlimited time and
8 opportunity to add new and ever-evolving record objections.” *Kane v. City of*
9 *Beaverton*, 55 Or LUBA 669, 671 (2007); *see also Claus v. City of Sherwood*, 61
10 Or LUBA 505 (2010). We agree with respondents that our rules do not allow a
11 party to file timely vague and broad record objections and later supplement those

“(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).”

1 objections with additional or more specific objections. That procedure is not
2 consistent with our rules. Such a procedure would often, if not always, result in
3 delaying our review and final decision, as an appeal is not set for briefing until
4 after the record is settled. OAR 661-010-0026(6).²

5 Petitioner’s record objections are denied because the original
6 precautionary record objections failed to specify the omitted items and the basis
7 for the claim that the items are part of the record. OAR 661-010-0026(2)(a); n 1.
8 Petitioner’s supplemental, more specific record objections asserted in her later
9 reply are procedurally improper. In the alternative, even assuming that
10 petitioner’s record objections were properly pleaded, we deny petitioner’s record
11 objections for the following substantive reasons.

12 **A. Objections 5, 6, and 7**

13 The record must include “All written testimony and all exhibits, maps,
14 documents or other materials specifically incorporated into the record or placed
15 before, and not rejected by, the final decision maker, during the course of the
16 proceedings before the final decision maker.” OAR 661-010-0025(1)(b); *see also*
17 OAR 661-010-0026(2)(a) (providing a basis for a record objection that “[t]he

² OAR 661-010-0026(6) provides, in part:

“If an objection to the record is filed, the time limits for all further
procedures under these rules shall be suspended. When the objection
is resolved, the Board shall issue an order declaring the record
settled and setting forth the schedule for subsequent events. * * *”

1 record does not include all materials included as part of the record during the
2 proceedings before the final decision maker”). Petitioner objects that the
3 transmitted record does not include her local notice of appeal, correspondence in
4 support of the local appeal, and the city’s decision denying her local appeal. All
5 of those documents post-date LUCS 17-18. Petitioner has elected to not appeal
6 the city’s decision to deny her local appeal. Accordingly, petitioner’s objections
7 5, 6, and 7 are denied because they do not refer to documents included as part of
8 the record during the city’s decision in LUCS 17-18.

9 **B. Objection 4**

10 Petitioner objects that the record does not include documents received by
11 the city related to the preliminary project review which occurred before the city
12 issued LUCS 17-18. Intervenor responds that intervenor did not participate in a
13 pre-application conference with the city for the LUCS 17-18 application, but
14 instead presumes petitioner is referring to the pre-application conference city
15 staff held with intervenor regarding intervenor’s request for land use permits to
16 implement the project identified in the LUCS, and which separate decision is still
17 pending before the city. Accordingly, intervenor argues these documents are not
18 part of the record in this matter, and the record objection should be denied. We
19 agree. Petitioner has not established that those disputed materials were
20 “specifically incorporated into the record or placed before, and not rejected by,
21 the final decision maker” in the LUCS 17-18 decision or otherwise specify a basis
22 for the claim that the items are part of the record. OAR 661-010-0025(1)(b); *see*

1 *also* OAR 661-010-0026(2)(a) (“The omitted item(s) shall be specified, as well
2 as the basis for the claim that the item(s) are part of the record.”). Petitioner’s
3 objection 4 is denied.

4 **C. Objections 1, 2, and 3**

5 Petitioner objects that the record should include public records requests,
6 email correspondence about public records requests, and documents responsive
7 to public records requests, including email correspondence dated December 24,
8 2018, and attachments. Petitioner does not contend that those materials were
9 “specifically incorporated into the record or placed before, and not rejected by,
10 the final decision maker” or otherwise specify a basis for the claim that the items
11 are part of the record. OAR 661-010-0025(1)(b); OAR 661-010-0026(2)(a).
12 Petitioner’s objections 1, 2, and 3 are denied.

13 **BRIEFING SCHEDULE**

14 LUBA’s jurisdiction is limited to review of land use decisions as defined
15 in ORS 197.015(10). It is not obvious to us that the city’s LUCS decision
16 challenged in this appeal is a land use decision subject to our jurisdiction. In her
17 petition for review, petitioner must explain why the challenged decision is a land
18 use decision subject to the Board’s jurisdiction. *See* OAR 661-010-0030(4)(c)
19 (providing that the petition for review “shall * * * [s]tate why the challenged
20 decision is a land use decision or a limited land use decision subject to the Board’s

1 jurisdiction”). All parties should address whether the challenged LUCS decision
2 falls under an exception to our jurisdiction in ORS 197.015(10)(b)(H).³

3 The record is settled as of the date of this order. The petition for review
4 shall be due 21 days after the date of this order. The respondent’s brief shall be
5 due 42 days after the date of this order. The final opinion and order shall be due
6 77 days after the date of this order.

³ ORS 197.015(10)(b)(H) provides:

“‘Land use decision’ * * * [d]oes not include a decision of a local government:

“* * * * *

“(H) That a proposed state agency action subject to ORS 197.180(1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:

“(i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;

“(ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or

“(iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan.”

1 Dated this 7th day of June, 2019.

2

3

4

5

6

H. M. Zamudio

7 Board Member