

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

3
4 LORENE HUNT and JONATHAN HUNT,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF THE DALLES,
10 *Respondent.*

11
12 LUBA No. 2019-076

13
14 ORDER

15 The challenged decision is the city’s decision on remand again approving
16 an adjustment to the minimum lot size for an existing parcel. *Hunt v. City of The*
17 *Dalles*, __ Or LUBA __ (LUBA No 2018-090, Apr 4, 2019) (*Hunt I*).

18 **RECORD OBJECTIONS**

19 On August 26, 2019, LUBA received the city’s 91-page paper record.¹ On
20 September 9, 2019, petitioners filed objections to the record. Petitioners object
21 that the record does not include an audio recording of a July 8, 2019 city council
22 hearing and object to the accuracy of the meeting minutes that are included in the
23 record. For the reasons that follow, petitioners’ objections are denied.

24 OAR 661-010-0026(1) provides in relevant part:

25 “Before filing an objection to the record, a party shall attempt to
26 resolve the matter with the governing body’s legal counsel. The

¹ The record transmitted by the city also includes the record previously settled
in *Hunt I*.

1 objecting party shall include a statement of compliance with this
2 section at the same time the objection is filed. The Board may deny
3 any objection to the record that does not comply with this rule.”

4 We have construed OAR 661-010-0026(1) to require a “good faith” effort to
5 resolve record objections prior to filing those objections with LUBA. *Casey*
6 *Jones v. City of Lowell*, 33 Or LUBA 812, 813 (1997). We also recently explained
7 that:

8 “[t]he intent of the relevant provisions of OAR 661-010-0026(1), (2)
9 and (4) is to encourage the parties to resolve record objections,
10 where that is possible, without LUBA’s involvement. This process
11 of attempting to resolve objections prior to invoking LUBA’s
12 involvement is not an empty procedural exercise, but is an important
13 means to prevent the Board from being overwhelmed by disputes
14 over record objections, and consequently missing important
15 statutory deadlines.” *Bishop v. Deschutes County*, _ Or LUBA _
16 (LUBA Nos. 2018-111/112, Order, Jan 9, 2019) (slip op at 7)
17 (*Bishop*).

18 Petitioners’ September 9, 2019 objection states that “[p]ursuant to OAR
19 661-010-0026(1), Petitioners contacted Respondent by email on September 9,
20 2019 to explain objections below and resolve the matter. At the time of filing,
21 Petitioners have emailed the City of The Dalles.” Petitioners’ Objection to the
22 Record 1. The city’s September 12, 2019 response to petitioners’ objections
23 argues that petitioners’ single email sent to the city’s attorney at 4:27 p.m. on
24 September 9, 2019, the date that objections were filed by certified mail, is
25 insufficient to comply with the OAR 661-010-0026(1) requirement that “[b]efore
26 filing an objection to the record, a party shall attempt to resolve the matter with

1 the governing body’s legal counsel * * *.” In the circumstances presented here,
2 we agree with the city.

3 Some records are voluminous, and in that circumstance, we have
4 recognized the difficulty petitioners face in reviewing and identifying any
5 deficiencies in such a voluminous record and attempting to resolve those
6 deficiencies with the local government’s counsel before filing objections to the
7 record, all within the 14 days allowed in OAR 661-010-0026(2). *LO 138, LLC*
8 *v. City of Lake Oswego*, 70 Or LUBA 538, 539 (2014) (concluding that although
9 “there was some reason to believe” that the petitioners had failed to make a good
10 faith effort to comply with OAR 661-010-0026(1) when they emailed the city’s
11 attorney “late on” the day that record objections were due to advise the city that
12 petitioners had objections to the record, where the record in the appeal exceeded
13 5,000 pages and was the result of a complex review proceeding, the petitioners
14 had not failed to comply with the rule). Differently, the record in this appeal is
15 not voluminous, at 91 pages. Accordingly, we conclude that an email sent to the
16 local government’s attorney 33 minutes prior to the close of business on the date
17 that objections to a 91-page record are due to be filed is not a good faith attempt
18 to resolve the objections before filing those objections. Even where the
19 communication sets out the objections in detail, such a last-minute attempt at
20 contacting the local government’s attorney is close to an “empty procedural
21 exercise,” because it is unlikely to resolve the objections before the objections
22 are due to be filed. *Bishop*, slip op at 7. It follows that such a late communication

1 will almost always fail to produce a resolution prior to the close of business on
2 the day that objections are due to be filed, and result in a petitioner filing
3 objections and consequently involving LUBA, in contravention of the intent and
4 purpose of the rule.

5 A “good faith” attempt to resolve objections to the record necessarily
6 includes allowing sufficient time for the petitioner and the governing body’s
7 counsel to resolve the objections. The amount of time that is sufficient will vary
8 depending on the length and complexity of the record and the number and
9 complexity of objections to the record. In this case, the record is short and
10 petitioners’ record objections are few and relatively straightforward. However,
11 petitioners’ last-minute email to the city attorney allowed virtually no time for
12 the city attorney to respond and did not provide an adequate opportunity for the
13 parties to attempt to resolve the objections. Under those circumstances, we have
14 no trouble concluding that petitioners’ email to the city’s attorney sent 33 minutes
15 prior to the close of business on the day that objections were due to be filed failed
16 to satisfy their obligation to make a good faith attempt to resolve the objections
17 before filing objections.² Accordingly, we exercise our discretion to deny the
18 objections. OAR 661-010-0026(1).

² We are also not persuaded by petitioners’ reply to the city’s response that argues that “the exact same procedure was followed * * *” during the proceedings in *Hunt I* without argument from the city that petitioners had failed to comply with OAR 661-010-0026(1). Reply in Support of Record Objections 1.

1 For the reasons set out above, petitioners’ objections are denied.

2 **BRIEFING SCHEDULE**

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 response brief shall be due
5 42 days after the date of this order. The final opinion and order shall be due 77
6 days after the date of this order.

7 Dated this 22nd day of October 2019.

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Melissa M. Ryan

13 Board Member