

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

3
4 CITIZENS FOR RENEWABLES,
5 NATALIE RANKER, and JODY McCAFFREE,
6 *Petitioners,*

7
8 vs.

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

12
13 and

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

17
18 LUBA No. 2019-120

19
20 ORDER

21 **MOTION TO INTERVENE**

22 Pacific Connector Gas Pipeline, LP (intervenor) moves to intervene on the
23 side of respondent. The motion is unopposed and is granted.

24 **RECORD OBJECTIONS**

25 On November 20, 2019, LUBA received the record from the city in this
26 appeal. Petitioners filed record objections, and the city filed a response.
27 Petitioners then filed a reply to the city’s response. We now resolve the
28 objections.

1 **A. “Attempt to Resolve”**

2 The city first argues that LUBA should deny all of petitioners objections
3 because petitioners failed to satisfy the requirement in OAR 661-010-0026(1)
4 that a party attempt to resolve objections prior to filing objections.¹ The city
5 argues that petitioners did not provide the objections in a timely manner in
6 conformance with our rule, and that the objections should therefore be denied.
7 According to the city, petitioners’ counsel sent five emails to the city’s attorney
8 setting forth petitioners’ record objections on December 3, 2019: one email at
9 1:39 p.m., and four emails after 5:00 p.m. on December 3, 2019, and in the
10 morning on December 4, 2019. Response 2. The city’s attorney replied to
11 petitioners’ counsel and explained she would need to discuss the objections with
12 her client. Petitioners’ counsel confirmed receipt of the city’s response and filed
13 the record objections later that day, December 4, 2019.

14 We have construed OAR 661-010-0026(1) to require a “good faith” effort
15 to resolve record objections prior to filing those objections with LUBA. *Bishop*
16 *v. Deschutes County*, ___ Or LUBA ___ (LUBA No 2018-111/112, Order, Jan

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 9, 2019) (slip op at 8). “A good faith effort to resolve objections must, at a
2 minimum, include presenting the local government legal counsel with reasonably
3 specific objections prior to filing objections with LUBA.” *Id.* Here, the city
4 concedes petitioners “provided extensive detail to Respondent,” but argues that
5 petitioners “waited until right before their deadline to provide them.” Response
6 2. The city argues that petitioners’ conferral was insufficient because they
7 provided “half the objections the afternoon prior and the other half on the day
8 those objections [were] due.” Response 2-3.

9 Some records are voluminous, and in that circumstance, we have
10 recognized the difficulty petitioners face in reviewing and identifying any
11 deficiencies in such a voluminous record and attempting to resolve those
12 deficiencies with the local government’s counsel before filing objections to the
13 record, all within the 14 days allowed in OAR 661-010-0026(2). The record in
14 this appeal is approximately 7,300 pages long. By providing the city with specific
15 objections in writing one day prior to and in the morning of the day they were
16 due to be filed with LUBA, petitioners met the requirements of OAR 661-010-
17 0026(1). *LO 138, LLC v. City of Lake Oswego*, 70 Or LUBA 538, 539 (2014)
18 (concluding that although “there was some reason to believe” that the petitioners
19 had failed to make a good faith effort to comply with OAR 661-010-0026(1)
20 when they emailed the city’s attorney “late on” the day that record objections
21 were due to advise the city that petitioners had objections to the record, where

1 the record in the appeal exceeded 5,000 pages and was the result of a complex
2 review proceeding, the petitioners had not failed to comply with the rule).

3 **B. Conceded and Withdrawn Objections**

4 **1. Omitted Documents (Objections 1, 2)**

5 Petitioners argue documents were improperly omitted from the record. The
6 city concedes that the documents identified in record objections 1 and 2 were
7 improperly omitted and agrees to provide a supplemental record which will
8 include those documents. These objections are resolved.

9 **2. Technical Objections (Objections 8, 10, 11, 16)**

10 Petitioners argue the record does not conform to LUBA's rules for the
11 specifications of the record. The city concedes these objections and agrees to
12 provide a supplemental record making the requested changes. These objections
13 are resolved.

14 **3. Withdrawn Objections (Objections 13-14)**

15 Petitioners have withdrawn these objections.

16 **C. Remaining Objections (Objections 3-7, 9, 12, 15, 17)**

17 **1. Objection 3**

18 Petitioners argue a document submitted by petitioner Jody McCaffree
19 (McCaffree) related to her authority to speak on behalf of petitioner Citizens for
20 Renewables (Citizens) during the planning commission proceedings was
21 improperly omitted from the record. The city responds that the document was
22 never placed before the final decision maker and therefore is not part of the

1 record. OAR 661-010-0025(1)(b).² However, the city agrees that McCaffree was
2 speaking on behalf of Citizens at the planning commission meeting. Response 3.
3 Petitioners do not respond to the city’s contention that the document was never
4 placed before the final decision maker. Accordingly, we defer to the local
5 decision maker as the custodian of the record. *Curl v. City of Bend*, 55 Or LUBA
6 719, 725 (2008).

7 Objection 3 is denied.

8 **2. Objections 4–5**

9 Petitioners argue that email correspondence between the local appellants
10 and the city related to filing fees, and documents submitted by McCaffree at the
11 October 8, 2019 city council meeting regarding the costs for filing an appeal,
12 were improperly omitted. In response, the city states it has no record of
13 petitioners providing the documentation to the final decision maker. Response 4.
14 In their reply, petitioners argue the documents “should be in the record” and that
15 they “were considered by the [city] councilors,” as evidenced by the minutes of

² OAR 661-010-0025(1)(b) provides:

“Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following: * * * All written testimony and all exhibits, maps, documents or other materials specifically incorporated into the record or *placed before, and not rejected by*, the final decision maker, during the course of the proceedings before the final decision maker.” (Emphasis added.)

1 the October 8, 2019 city council meeting and documents petitioners attached to
2 their reply. Reply 3, Exhibit B; Record 176.

3 We have reviewed the minutes and the documents provided by petitioners.
4 Although it appears McCaffree addressed the topic of filing fees during the
5 October 8, 2019 city council meeting, there is no reference to McCaffree
6 providing the documents in Exhibit B to the council, and there is no evidence
7 within Exhibit B itself to indicate they were “placed before” the city council. We
8 “defer to the custodian of the record, unless petitioner supplies a sufficient reason
9 to decide otherwise.” *Curl*, 55 Or LUBA at 725. Petitioner has not provided a
10 sufficient reason for us to disbelieve the city’s response.

11 Objections 4 and 5 are denied.

12 **3. Objections 6–7**

13 Petitioners argue all correspondence “between the city council and staff
14 and/or the Hearing’s Officer,” and “any documents in the city’s files that the
15 decision-makers—city council or hearing’s officer—had access to” are “missing”
16 from the record. Record Objections 2. In response, the city argues these record
17 objections are “extraordinarily broad” and outside the scope of LUBA’s record
18 requirements. Response 4.

19 We agree with the city. OAR 661-010-0026(2) provides that an objection
20 to the record may be made when the

21 “record does not include all materials included as part of the record
22 during the proceedings before the final decision maker. *The omitted*

1 *item(s) shall be specified, as well as the basis for the claim that the*
2 *item(s) are part of the record.”* (Emphasis added).

3 Petitioners’ argument that the record improperly omits “any documents,” or
4 “correspondence” generally does not adequately specify the items petitioners
5 believe were omitted.

6 Objections 6 and 7 are denied.

7 **4. Objection 9**

8 Petitioners’ objection is difficult to follow. We understand petitioners to
9 argue the electronic versions of certain documents included in the record contain
10 bookmarks within the documents that are not linked to the correct page numbers
11 in the record transmitted by the city. In response, the city states that the
12 bookmarks were in the original document provided to the city council, and
13 therefore the city did not change them and should not be required to alter them.

14 Petitioners’ argument is one sentence long, and provides no citations to
15 any page or document in the record to help us understand and therefore resolve
16 the objection. We will not develop petitioners’ record objection for them. Absent
17 any developed argument in support of the objection, we agree with the city.

18 Objection 9 is denied.

19 **5. Objection 12**

20 Petitioners argue that the document at Record 344 is not a notice of
21 meeting, as described in the table of contents. In response, the city argues that the
22 document at Record 344 is a document evidencing that the notice of the October
23 8, 2019 city council meeting was posted and emailed. We have reviewed the

1 record and agree that the city’s description of it as a “Notice of City Council
2 Meeting 10/8), posted October 3, 2019,” in the Table of Contents appears
3 accurate.

4 Objection 12 is denied.

5 **6. Objections 15 and 17**

6 In objection 15, petitioners argue that the table of contents fails to separate
7 list attachments to Item 30 and Item 42, and misidentifies Item 30 and Item 42.
8 The city agrees to correctly identify Items 30 and 42. In addition, we agree with
9 petitioners that the table of contents must list attachments to those items.

10 Objections 15 and 17 are sustained.

11 **DISPOSITION**

12 Within 21 days of this order, the city shall provide LUBA with an amended
13 table of contents, and an amended record and/or a supplemental record that
14 complies with this order. Thereafter, the Board will issue an order settling the
15 record and establishing a briefing schedule.

16 Dated this 13th day of April 2020.

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Melissa M. Ryan
Board Member