

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

3
4 HOLLIS LUNDEEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF WALDPORT,
10 *Respondent,*

11 and

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13
14 TIDEWATER DEVELOPMENT LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2020-071

18
19 ORDER

20 **MOTION TO INTERVENE**

21 Tidewater Development LLC (intervenor) moves to intervene on the side
22 of the city. The motion is unopposed and is allowed.

23 **BACKGROUND**

24 Petitioner appeals a city council decision on remand that again approves a
25 preliminary plan for a planned development. This is the third time that this land
26 use dispute has been before LUBA. We have twice remanded the city’s prior
27 approvals. *Lundeen v. City of Waldport*, 78 Or LUBA 95 (2018) (*Lundeen I* or
28 LUBA No 2018-030); *Lundeen v. City of Waldport*, ___ Or LUBA ___ (LUBA
29 No 2019-046, Oct 24, 2019) (*Lundeen II* or LUBA No 2019-046).

1 The challenged decision became final on June 12, 2020. On July 28, 2020,
2 LUBA received the record in this appeal. The record was transmitted to the
3 Board, petitioner, and intervenor in paper format, but also includes a compact
4 disc that contains the local records in *Lundeen I* and *Lundeen II*.

5 On August 7, 2020, petitioner filed record objections. On August 20, 2020,
6 intervenor filed a response to petitioner’s record objections. On August 21, 2020,
7 the city filed a response to petitioner’s record objections. On August 31, 2020,
8 petitioner filed a reply to the city’s response. On September 8, 2020, intervenor
9 filed an objection to petitioner’s reply.

10 **MOTION TO IMPOSE PENALTY**

11 LUBA’s rules provide that “[t]he governing body shall, within 21 days
12 after service of the [NITA] on the governing body, transmit to the Board a * * *
13 copy of the record of the proceedings under review” and contemporaneously
14 serve a copy of the record on the petitioner. OAR 661-010-0025(2)(a), (3)(a).
15 Petitioner argues that the record was untimely transmitted six days late because
16 she served the NITA on July 1, 2020, the city mailed the record transmittal on
17 July 27, 2020, and LUBA and petitioner received the record on July 28, 2020.
18 Petitioner moves the Board to impose a penalty on the city for transmitting the
19 record late. Intervenor and the city (collectively, respondents) respond that the
20 record was not transmitted late and that, even if the record was transmitted late,
21 petitioner’s motion to impose a penalty should be denied because petitioner has
22 not alleged or demonstrated any prejudice to her substantial rights.

1 Petitioner does not specify the type of penalty she believes LUBA should
2 impose and cites no statute or rule that provides a penalty for untimely
3 transmission of the record. We have previously opined that, even assuming that
4 we could impose a penalty for untimely transmission of the record, petitioner
5 must demonstrate substantial prejudice to their rights. *Petersen v. Columbia*
6 *County*, 39 Or LUBA 799, 802-03 (2001) (citing *McCrystal v. Polk County*, 8 Or
7 LUBA 436, 437 (1983)). Petitioner has not made that showing here. We deny
8 petitioner’s motion to impose a penalty. *See* OAR 661-010-0005 (“Technical
9 violations not affecting the substantial rights of parties shall not interfere with the
10 review of a land use decision or limited land use decision.”).

11 **RECORD OBJECTIONS**

12 Petitioner objects that the record transmittal improperly omits the
13 following items:

- 14 1) City council meeting minutes for December 13, 2019,
15 February 13, 2020, and April 23, 2020;
- 16 2) Planning commission meeting minutes for November 18,
17 2019, and February 24, 2020;
- 18 3) Draft approval for June 22, 2020;
- 19 4) Draft approval for July 9, 2020;
- 20 5) Petitioner’s letter to the city, dated August 3, 2020, regarding
21 activity taking place on the subject property;
- 22 6) Petitioner’s public records request to the city dated August 3,
23 2020, and an email response from the city manager; and

1 7) The supplemental records from *Lundeen I* and *Lundeen II*,
2 which petitioner “notes” are indexed but not included in the
3 record in this appeal.

4 **A. Conceded Objection**

5 Respondents concede that the record improperly omits minutes from a
6 February 13, 2020 city council meeting. The city requests that the Board issue an
7 order requiring the city to transmit a supplemental record containing those
8 minutes.

9 This objection is sustained.

10 **B. “Good Faith” Conferral**

11 The city argues that we should deny petitioner’s remaining record
12 objections because petitioner failed to confer in good faith with the city as
13 required by OAR 661-010-0026(1), which provides:

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

19 This rule requires a “good faith” effort to resolve record objections prior to filing
20 them with LUBA. *Hunt v. City of The Dalles*, ___ Or LUBA ___ (LUBA No
21 2019-076, Order, Oct 22, 2019); *Casey Jones v. City of Lowell*, 33 Or LUBA 812,
22 813 (1997). LUBA will consider the totality of the parties’ actions in deciding
23 whether to exercise its discretion to summarily deny objections. *Bishop v.*
24 *Deschutes County*, ___ Or LUBA ___, ___ (LUBA No 2018-111/112, Order, Jan
25 9, 2019) (slip op at 9-12).

1 Petitioner’s record objections were due to be filed no later than August 11,
2 2020. Petitioner filed her record objections on August 7, 2020. The city submits
3 with its response an affidavit from the city’s attorney, Gintner, stating that, on the
4 afternoon of August 7, 2020, he received a phone call from petitioner and that
5 “[petitioner] began to explain her objections to the record. I asked her to send me
6 a list of her specific objections.” Affidavit of Peter Gintner 2. Petitioner did not
7 send a list of specific objections to the city’s attorney before she filed the
8 objections. Thus, the city argues that petitioner did not try in good faith to resolve
9 the record objections.

10 Petitioner filed a reply to the city’s response to petitioner’s record
11 objections explaining her effort to resolve the record objections. Intervenor
12 objects that LUBA’s rules do not allow a reply to a response to record objections.
13 Our rules do not expressly allow or disallow a reply to a local government’s
14 response to record objections. However, OAR 661-010-0026(1) requires the
15 party filing a record objection to include a statement that the party attempted to
16 resolve the objection with the governing body’s legal counsel before filing the
17 objection. OAR 661-010-0026(4) requires the local government to “file a
18 response to the record objection or advise the Board in writing of the status of the
19 parties’ efforts to resolve the record objection.” When a local government asserts
20 in its response that a party failed to confer in good faith prior to filing record
21 objections, LUBA generally will consider a reply that includes argument and
22 evidence that the objecting party did adequately attempt to confer.

1 Petitioner’s reply includes argument and evidence that petitioner attempted
2 to confer with city’s attorney prior to filing the objections, and includes
3 supplemental argument in support of the record objections. We consider the reply
4 only for purposes of determining whether petitioner attempted to confer in good
5 faith with the city’s attorney. We do not consider supplemental arguments in
6 support of petitioner’s record objections or additional objections in the reply. *See*
7 *McCaffree v. City of North Bend*, ___ Or LUBA ___ (LUBA No 2019-005,
8 Order, June 7, 2019) (slip op at 5-6) (LUBA generally will not consider
9 subsequent filings that supplement timely filed record objections).

10 In her reply, petitioner disputes the city attorney’s recollection of the phone
11 conversation on August 7, 2020. Petitioner contends that she called the city
12 attorney in the morning, and not the afternoon. Petitioner explains:

13 “Petitioners [*sic*] recollection of the conversation is contrary to that
14 of Mr. Gintner * * * [.] Petitioner greeted and stated to Mr. Gintner,
15 regarding the Record submittal for LUBA 2020-071, there were
16 documents missing from the record for 2020-071 and that as
17 required, Petitioner was contacting Mr. Gintner as per OAR 661-
18 010-0026 requirements to let him know Petitioner would be filing
19 an Objection to the Record for meeting minutes missing from the
20 record and other correspondence that related directly to the remand
21 and that Petitioner would be including it within the filing of the
22 Objection to the Record, and, for courtesy and respondent ease,
23 would include copies of the correspondence for the supplemental
24 record. Mr. Gintner did not ask Petitioner to send him a list of
25 Petitioners [*sic*] specific objections.” Petitioner’s Reply 8.

26 In *Bishop*, we denied the petitioners’ record objections because the
27 petitioners “did not attempt to discuss and resolve specific objections, apparently

1 because petitioners believed that further discussion would serve no purpose.” ___
2 Or LUBA at ___ (slip op at 11). We explained that, as the objectors, the
3 petitioners “had a good faith obligation to at least *propose* a discussion about
4 resolving petitioners’ objections.” *Id.* at ___ (slip op at 12) (emphasis in original);
5 *see also Hunt* ___ Or LUBA ___ (an email setting out detailed objections to a
6 91-page record sent to the local government’s attorney 33 minutes prior to the
7 close of business on the date that objections are due to be filed is not a good faith
8 attempt to resolve the objections before filing those objections); *Sommer v. City*
9 *of Cave Junction*, 55 Or LUBA 665, 667 (2007) (OAR 661-010-0026(1) is
10 violated where a petitioner faxed the county stating that petitioner had
11 unspecified objections, but did not respond to the county’s request for specific
12 objections, and thereafter filed objections with LUBA without any attempt to
13 provide specific objections).

14 We conclude that petitioner’s action in this appeal satisfied the
15 requirement to attempt in good faith to resolve the record objections prior to filing
16 objections. Petitioner did propose a discussion about resolving her record
17 objections when she called the city’s attorney on August 7, 2020. Unlike the
18 petitioners in *Hunt*, *Bishop*, and *Sommer*, petitioner contacted the city attorney to
19 discuss the particulars of her objections before filing the objections. According
20 to the city attorney, during that phone call, petitioner attempted to explain her
21 objections to the record but, instead of discussing the objections, he asked her to
22 provide specific objections in writing. Petitioner disputes that the city attorney

1 asked her to provide specific objections in writing. Thus, it is disputed and
2 unclear to us whether petitioner understood, let alone agreed, to provide specific
3 objections in writing after the phone conversation and before filing her
4 objections. We conclude that petitioner did make a minimally adequate “good
5 faith” attempt to resolve her record objections in her August 7, 2020 phone call
6 to the city attorney. The fact that the city attorney may have stated a preference
7 to receive petitioner’s objections in writing does not support summary denial. We
8 proceed to resolve the remaining objections.

9 **C. Allegedly Omitted Items**

10 The city responds that petitioner erroneously objected to the omission of
11 the following items, which are in fact included in the original record transmittal:
12 city council meeting minutes for April 23, 2020, at Record 145; planning
13 commission meeting minutes for November 18, 2019, at Record 190; and
14 planning commission meeting minutes for February 24, 2020, at Record 193. The
15 city responds that no city council meeting occurred on December 13, 2020.

16 These objections are denied.

17 **D. Items Generated After the Final Decision Issued**

18 The challenged decision became final on June 12, 2020. Petitioner objects
19 to omission of items that were generated after June 12, 2020, including “draft
20 approval for June 22, 2020”; “draft approval for July 9, 2020”; city council
21 meeting minutes for July 9, 2020; petitioner’s letter to the city dated August 3,
22 2020; and petitioner’s public records request to the city dated August 3, 2020,

1 and an email response from the city manager. Generally, the record shall include
2 “materials specifically incorporated into the record or placed before, and not
3 rejected by, the final decision maker, during the course of the proceedings before
4 the final decision maker.” OAR 661-010-0025(1)(b). Our rules do not require
5 post-decision materials that may relate to the matter on appeal to be included in
6 the record. The city responds, and we agree, that petitioner has not established
7 that those items generated after the final decision issued should be included in
8 the record.

9 These objections are denied.

10 **E. Prior Incorporated Records**

11 The table of contents for the paper record lists a compact disc containing
12 electronic records in LUBA Nos 2018-030 and 2019-046 as “Exhibit A.” LUBA
13 received from the city a compact disc that includes those listed items. In her
14 objection, petitioner states: “Note: The disc that was submitted with 2020-071
15 was unlabeled and the supplemental record for both [2018-030 and 2019-046]
16 was indexed but not included as far as I could research.” Record Objection 4. We
17 do not fully understand petitioner’s statement and respondents do not respond to
18 it. It appears to us that the city served petitioner with a copy of the same disc that
19 it transmitted to LUBA, and that petitioner’s objection is that the disc does not
20 include the supplemental records in LUBA Nos 2018-030 and 2019-046.
21 However, the disc that was transmitted to LUBA includes items identified as the
22 supplemental records for both LUBA Nos 2018-030 and 2019-046.

1 This objection is denied.

2 **ORDER**

3 Within 14 days of the date of this order, the city shall transmit and serve a
4 supplemental record containing the February 13, 2020 city council meeting
5 minutes. After the Board receives those materials, the Board will issue an order
6 settling the record and establishing a briefing schedule.

7 Dated this 20th day of November 2020.

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H. M. Zamudio
Board Member