

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

3  
4                                   DEBRAH J. CURL and JERRY L. CURL,  
5   *Petitioners,*

6  
7   vs.

8  
9                                   CITY OF BEND,  
10   *Respondent,*

11  
12   and

13  
14                                   CELLCO PARTNERSHIP,  
15                                   DBA VERIZON WIRELESS,  
16   *Intervenor-Respondent.*

17  
18                                   LUBA No. 2020-103

19  
20   ORDER

21   **BACKGROUND**

22           The challenged decision is a hearings officer decision approving a  
23 conditional use permit, site plan, and site plan alteration for a wireless  
24 communication facility. On November 2, 2020, LUBA received the original  
25 record in this appeal in an electronic format. On November 9, 2020, LUBA  
26 received a courtesy copy of a November 6, 2020 letter from petitioners to the  
27 city, stating that they did not agree to service of the record in an electronic format  
28 instead of a paper copy. Prior agreement is required by OAR 661-010-0025(3)(b)  
29 in order for the city to serve an electronic record on a party. Petitioners requested  
30 that the city provide them with a paper copy of the record.

1           On November 12, 2020, LUBA received an amended record in this appeal,  
2 also in an electronic format. The city served a paper copy of the amended record  
3 on petitioners. On November 30, 2020, LUBA received petitioners' objections to  
4 the amended record. On December 14, 2020, LUBA received the city's response  
5 to the record objections. On December 24, 2020, LUBA received petitioners'  
6 reply to the city's response.

7           On January 29, 2021, we issued an order on the record objections. That  
8 order did two things. First, it required the city to either provide petitioners with a  
9 paper copy of the original record or provide the parties and LUBA with a detailed  
10 explanation of all of the differences between the original record and the amended  
11 record. Second, it sustained some of petitioners' objections to the amended record  
12 and required the city to transmit a replacement record including certain items and  
13 omitting others.

14           On February 8, 2021, LUBA received a copy of a cover letter from the city  
15 to petitioners, indicating that the city had provided petitioners with a paper copy  
16 of the original record. Accordingly, that part of our January 29, 2021 order has  
17 been satisfied.

18           On February 16, 2021, LUBA received the replacement record in  
19 electronic format. On March 1, 2021, LUBA received petitioners' objections to  
20 the replacement record. On March 15, 2021, LUBA received the city's response  
21 to the record objections. On March 29, 2021, LUBA received petitioners' reply

1 to the city’s response.<sup>1</sup>

2 **REPLACEMENT RECORD**

3 **A. Failure to Confer**

4 Petitioners object that the replacement record does not comply with our  
5 January 29, 2021 order in several respects.

6 The city responds that petitioners failed to confer in good faith with the  
7 city before filing their objections, as required by OAR 661-010-0026(1), and we  
8 should therefore deny petitioners’ record objections. The city explains that, on  
9 the same day that petitioners filed their objections to the replacement record by  
10 placing the objections in the mail, one of the petitioners

11 “left a voice message for the Bend City Attorney referencing one of  
12 the underlying planning file numbers but failing to state the LUBA  
13 case number *or that [they were] calling regarding record*  
14 *objections.* The City Attorney’s voicemail greeting informed callers  
15 that the City Attorney was generally only in the office on  
16 Wednesdays due to ongoing remote work. Despite being familiar  
17 with the phone numbers and email addresses of multiple members  
18 of the Bend City Attorney’s Office from multiple previous phone  
19 calls and email correspondence with those staff on the prior record  
20 objections, Petitioner[s] made no effort to contact any other staff,  
21 seemed to ignore the City Attorney’s voicemail greeting advisory

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<sup>1</sup> Although LUBA’s rules do not expressly allow for a reply to the local government’s response to record objections, we have considered the reply. *Lundeen v. City of Waldport*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2020-071, Order, Nov 20, 2020) (slip op at 5) (“When a local government asserts in its response that a party failed to confer in good faith prior to filing record objections, LUBA generally will consider a reply that includes argument and evidence that the objecting party did adequately attempt to confer.”).

1 about her availability, and left only a single non-specific message.  
2 \* \* \* Petitioner[s] placed an 11th hour phone call that was simply  
3 going through the procedural motions. \* \* \* Taking all  
4 circumstances in to account, LUBA should deny these record  
5 objections due to an inadequate conferral that was not a good faith  
6 effort to resolve objections.” Response to Objections to  
7 Replacement Record 2-3 (emphasis added).

8 In their reply, petitioners dispute the city’s premise that their attempts to  
9 contact the city attorney were insufficient to satisfy the conferral requirement at  
10 OAR 661-010-0026(1). Petitioners explain that they called and left two voice  
11 messages on the day that they filed their objections to the replacement record,  
12 assert that the second voice message provided “more information including  
13 additional call back information,” and take the position that the city should  
14 provide a transcript of their voice messages. Reply to Response to Objections to  
15 Replacement Record 10. Petitioners also reply that, by the time they received the  
16 replacement record, they had only eight days to review it and file objections  
17 before the 14-day deadline at OAR 661-010-0026(2) expired. Petitioners argue  
18 that, given that the replacement record is 1,019 pages long, and given that  
19 petitioners had to compare the replacement record to the original and amended  
20 records, which total 1,539 pages, it was sufficient for them to call the city on the  
21 day that they filed their objections.<sup>2</sup> For the reasons that follow, we conclude that  
22 petitioners have not complied with OAR 661-010-0026(1).

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<sup>2</sup> Petitioners argue that “LUBA’s rules are not date and time specific for  
Petitioner’s initiation of contact; the rules state only that Petitioner must try and  
resolve the objections, which Petitioner did at 12:30ish PM and prior to mailing

1 OAR 661-010-0026(1) provides:

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

7 We have long construed OAR 661-010-0026(1) as requiring a “good faith”  
8 attempt to resolve record objections. *Casey Jones v. City of Lowell*, 33 Or LUBA  
9 812, 813 (1997). We have previously held that an objecting party’s attempt to  
10 confer with the local government on the same day that the objections are filed  
11 may constitute a good faith effort where the record “is of sufficient length and  
12 complexity, that the 14 days provided by OAR 661-010-0026(2) to review the  
13 record and comply with the consultation requirement in OAR 661-010-0026(1)  
14 \* \* \* might not [be] sufficient.” *See, e.g., LO 138, LLC v. City of Lake Oswego*,  
15 70 Or LUBA 538, 539 (2014) (involving a 5,000-page record). However, we have  
16 also explained that

17 “[a] good faith effort to resolve objections must, at a minimum,  
18 *include presenting the local government legal counsel with*  
19 *reasonably specific objections prior to filing objections with LUBA.*  
20 *\* \* \* A bare phone call notifying the [local government] that*  
21 *petitioners intend[] to file objections [is] insufficient to satisfy OAR*  
22 *661-010-0026(1).* *See, e.g., Sommer v. City of Cave Junction*, 55 Or  
23 LUBA 665, 667 (2007) (OAR 661-010-0026(1) is violated where a  
24 petitioner faxed the county stating that petitioner had unspecified  
25 objections, but did not respond to the county’s request for specific

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the Record Objections to all parties before 5PM that afternoon.” Reply to Response to Objections to Replacement Record 6.

1 objections, and thereafter filed objections with LUBA without any  
2 attempt to provide specific objections).

3 “Under OAR 661-010-0026(1), LUBA ‘may deny any objection to  
4 the record that does not comply with this rule.’ Petitioners’  
5 noncompliance with OAR 661-010-0026(1) is not necessarily fatal  
6 to petitioners’ objections. LUBA will consider the ‘totality’ of the  
7 party’s actions in deciding whether to exercise its discretion to  
8 summarily deny the objections. *Sommer*, 55 Or LUBA at 667. \* \* \*

9 “[One] consideration involves petitioners’ \* \* \* post-filing actions,  
10 or lack thereof. OAR 661-010-0026(2) clarifies that ‘[a] party may  
11 file a record objection while continuing to resolve objections with  
12 the governing body’s legal counsel.’ Read in context with OAR 661-  
13 010-0026(1), OAR 661-010-0026(2) imposes the expectation, if not  
14 the obligation, that parties will continue good faith efforts to resolve  
15 objections even if it is deemed necessary to file objections with  
16 LUBA as a precaution or to preserve the right to object. *Sommer*, 55  
17 Or LUBA at 667 (the obligation to attempt to resolve record  
18 objections is an ongoing obligation that does not cease when one  
19 party files record objections or the period for filing expires).

20 “\* \* \* \* \*

21 “\* \* \* [U]nder LUBA’s rules[,] the primary obligation to consult  
22 and attempt to resolve objections both before and after filing falls  
23 on the party making the objection.” *Bishop v. Deschutes County*, 79  
24 Or LUBA 1007, 1013-15 (2019) (emphases added).

25 Here, in determining whether petitioners’ conferral was a “good faith”  
26 effort, based on the totality of the circumstances, our considerations are threefold.  
27 The first consideration is the amount of time that petitioners allowed for good  
28 faith conferral before filing their record objections. The second consideration is

1 petitioners’ specificity in attempting to confer. The third consideration is whether  
2 petitioners made any post-filing efforts to resolve their objections with the city.<sup>3</sup>

3 While the 1,019-page replacement record might be of sufficient length and  
4 complexity to justify petitioners’ attempt to confer on the same day that they filed  
5 their record objections, the second and third considerations lead us to conclude  
6 that petitioners’ attempt to confer was not a “good faith” effort. Petitioners do not  
7 dispute the city’s characterization of their first voice message, explain what  
8 “more information” they provided in their second voice message, or explain what  
9 a transcript of their voice messages would reveal. Importantly, petitioners do not  
10 state that they advised the city in either message that they were calling regarding  
11 record objections at all, let alone that they presented the city with the “reasonably  
12 specific objections” that we have explained are required in order to satisfy the  
13 good faith obligation to attempt to resolve objections. *Bishop*, 79 Or LUBA at  
14 1013 (citing *Sommer*, 55 Or LUBA at 667).

15 Finally, petitioners do not allege that they made any efforts to advance the  
16 resolution of their objections with the city after those objections were filed. It is  
17 *petitioners’* obligation, under OAR 661-010-0026(1), to attempt a good faith  
18 conferral with the city. As we have explained, that obligation is ongoing and does

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<sup>3</sup> We explicitly emphasized the parties’ continuing obligation to attempt to resolve objections to the record in our January 29, 2021 order. *Curl v. City of Bend*, \_\_\_ Or LUBA \_\_\_, \_\_\_ (LUBA No 2020-103, Order, Jan 29, 2021) (slip op at 11).

1 not end because record objections have been filed. *Sommer*, 55 Or LUBA at 667.  
2 Viewed in their totality, petitioners’ actions both before and after filing the  
3 objections do not constitute a good faith effort to resolve the objections and are  
4 inconsistent with the requirements and purposes of OAR 661-010-0026(1) and  
5 (2). Accordingly, petitioners’ objections are denied.

6 **B. Replacement Record Non-Compliance with January 29, 2021**  
7 **Order**

8 The replacement record does not comply with our January 29, 2021 order  
9 in the following respect.

10 One of petitioners’ objections to the amended record was that a completed,  
11 unsigned “Site Plan and Design Review Application for New Development” was  
12 “not included as part of the record during the proceedings before the final  
13 decision maker,” and its inclusion in the amended record was therefore improper.  
14 OAR 661-010-0026(2)(b). In its December 9, 2020 response, the city stated that  
15 “[t]he parties were able to resolve [this] objection.” Response to Objections to  
16 Amended Record 2. With that response, we understood the city to concede that  
17 that document was not properly part of the record. Accordingly, we sustained the  
18 objection and, in our January 29, 2021 order, required the city to omit the “Site  
19 Plan and Design Review Application for New Development” from the  
20 replacement record.

21 However, the document that our January 29, 2021 order required to be  
22 omitted from the replacement record is included in the replacement record as Item



1 79. In transmitting the replacement record to LUBA, the city included a cover  
2 letter, which takes the position that “[t]his document was included in the record  
3 before the decision maker, and is included in this replacement record as item 79.  
4 By previously stating petitioner’s objection to this item had been resolved, the  
5 City believed petitioner accepted that item 79 should be included in the record.”

6 The city has not cited any authority for the proposition that it may disregard  
7 our January 29, 2021 order resolving the objections to the amended record. The  
8 place for the city to have argued to LUBA that that document was properly  
9 included in the record was its response to petitioners’ objections to the amended  
10 record, not in its letter transmitting the replacement record to LUBA.

11 Ordinarily, we would give the city 14 days in which to transmit a second  
12 replacement record which omits that document, consistent with our January 29,  
13 2021 order. However, this appeal is already long-delayed and, accordingly, rather  
14 than order the city to transmit a second replacement record, we will consider Item  
15 79 as stricken from the replacement record. The parties shall disregard Item 79  
16 at Replacement Record 649 to 653 and shall neither cite to nor rely on that  
17 document in their briefing.

18 **BRIEFING SCHEDULE**

19 The record is settled as of the date of this order. The petition for review  
20 shall be due 21 days after the date of this order. The response briefs shall be due  
21 42 days after the date of this order. The final opinion and order shall be due 77  
22 days after the date of this order.

1 Dated this 3rd day of May 2021.

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Melissa M. Ryan

7 Board Member