

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

3
4 ICON CONSTRUCTION AND DEVELOPMENT, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF OREGON CITY,
10 *Respondent,*

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12 and

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14 PARK PLACE NEIGHBORHOOD ASSOCIATION,
15 JACKIE HAMMOND-WILLIAMS, ENOCH HUANG,
16 and ROYA MANSOURI,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2022-100

20
21 ORDER

22 Petitioner appeals a decision by the city commission denying petitioner's
23 application for a General Development Plan and associated approvals for a 92-
24 acre master planned community. On December 2, 2022, the Board received the
25 record in this matter. On December 16, 2022, petitioner filed its record
26 objections. On December 30, 2022, the city filed its response to the record
27 objections but failed to serve its response on petitioner. On January 6, 2023, we
28 issued an order directing the city to properly serve its response. On January 10,
29 2023, the city filed and properly served its response. We now address petitioner's
30 objections.

1 **RECORD OBJECTIONS**

2 Petitioner presents several objections to the record that fall into three
3 categories: (1) omission of a document that is properly part of the record and
4 inclusion of versions of documents that are not properly part of the record,
5 contrary to OAR 661-010-0025(1)(b); (2) failure to arrange the record in inverse
6 chronological order, as required by OAR 661-010-0025(4)(a)(E); and (3)
7 inclusion of a table of contents that is not compliant with the requirements of
8 OAR 661-010-0025(4)(a)(B) and OAR 661-010-0025(4)(a)(B)(i). In its
9 response, the city asks that LUBA summarily deny petitioner’s record objections
10 because petitioner failed to attempt to resolve its objections with the city’s
11 counsel prior to filing them with LUBA, as required by OAR 661-010-0026(1).

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

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

18 Petitioner states, in its objection, that it

19 “conferred by telephone with counsel for Respondent on December
20 15, 2022. This resulted in at least one issue being resolved, although
21 Respondent could not realistically be expected correct the other
22 issues in the Record before the record objection is due, given the
23 Record’s considerable size. Therefore, Petitioner files this record
24 objection out of an abundance of caution.” Record Objection 1-2.

25 Again, petitioner filed its record objection with LUBA on December 16, 2022.

26 OAR 661-010-0026(4) provides:

1 “A party may, within 14 days from the date of service of a record
2 objection, file a response. The governing body’s legal counsel shall,
3 within 14 days of the filing of a record objection or advise the Board
4 in writing of the status of the parties’ efforts to resolve the record
5 objection.”

6 The city responds, “Petitioner’s counsel did contact counsel for the City on
7 December 15, 2022, indicating that it had numerous concerns over the record[,]
8 but only one concern was identified with any particularity during that call and, as
9 Petitioner notes, that concern was resolved.” Response to Record Objection 2.
10 The city also states that petitioner has made no additional efforts to resolve its
11 objections with the city since filing them with LUBA. Petitioner has offered no
12 response to this argument.

13 We have previously held:

14 “The intent of the relevant provisions of OAR 661-010-0026(1), (2)
15 and (4) is to encourage the parties to resolve record objections,
16 where that is possible, without LUBA’s involvement. This process
17 of attempting to resolve objections prior to invoking LUBA’s
18 involvement is not an empty procedural exercise, but is an important
19 means to prevent the Board from being overwhelmed by disputes
20 over record objections, and consequently missing important
21 statutory deadlines.” *Bishop v. Deschutes County*, 79 Or LUBA
22 1007, 1012 (2019).

23 Where, under the totality of the circumstances, it appears that a party failed to
24 make a good faith effort to resolve objections prior to filing them with LUBA,
25 LUBA may summarily deny the objections, as authorized by OAR 661-010-
26 0026(1). *Id.* at 1013 (citing *Sommer v. City of Cave Junction*, 55 Or LUBA 665,

1 667 (2007)). As explained below, we conclude that petitioner has not fulfilled the
2 requirements or intent of OAR 661-010-0026(1).

3 In order to satisfy the requirements of OAR 661-010-0026(1), we have
4 held that a petitioner must undertake a “good faith” effort to confer, which must
5 at a minimum include presenting the local government’s legal counsel with
6 reasonably specific objections prior to filing objections with LUBA. *Id.* Here, the
7 city contends, with no reply from petitioner, that it only learned the details of
8 petitioner’s unresolved objections when it was served with a copy of the
9 objections that petitioner filed with LUBA. With no other evidence presented, we
10 conclude that petitioner failed to undertake a good faith effort to confer, in
11 violation of OAR 661-010-0026(1), when petitioner did not apprise the city of
12 the details of its objections with any specificity prior to filing them.

13 We established, in *Sommer*, that LUBA will consider the totality of a
14 party’s actions in deciding whether to use its discretion to summarily deny a
15 party’s objections. 55 Or LUBA at 667. OAR 661-010-0026(1) and (2) impose
16 an expectation that the parties will continue good faith efforts to resolve
17 objections, even if it is necessary to file objections with LUBA as a precaution to
18 preserve the right to object. *Id.* Here, petitioner asserts that it filed objections with
19 LUBA to preserve its rights, but it has provided no evidence that it made post-
20 filing efforts to resolve its objections with the city. The lack of continuing efforts
21 to resolve its objections beyond the single phone call made to the city a day prior

1 to the deadline to file objections, followed by no additional communication,
2 support denial of the objections.

3 Petitioner has offered no evidence that it raised its objections with any
4 specificity during the parties' phone call and, further, offers no evidence that it
5 has taken any action to resolve its objections with the city since filing them with
6 LUBA. Viewed in their totality, petitioner's actions both before and after filing
7 its objections are inconsistent with the requirements and purposes of OAR 661-
8 010-0026(1) and (2), and support denial of its objections. Accordingly,
9 petitioner's objections are denied.

10 **BRIEFING SCHEDULE**

11 The record is settled as of the date of this order. The petition for review
12 shall be due 21 days after the date of this order. The response briefs shall be due
13 42 days after the date of this order. The final opinion and order shall be due 77
14 days after the date of this order.

15 Dated this 17th day of February 2023.

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Michelle Gates Rudd
Board Member