

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

3
4 PATRICIA J. ROBERTS,
5 MARY ANN DICKEY, WILLIAM J. FURNISH,
6 DEANNA MANCILL and PHIL MANCILL,
7 *Petitioners,*

8
9 vs.

10
11 CLATSOP COUNTY,
12 *Respondent,*

13
14 and

15
16 M.K. DEVELOPMENT, INC.,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2002-123

20 ORDER

21 Before the Board are intervenor's motion to dismiss and petitioners' record
22 objection.¹

23 **INTRODUCTION**

24 In a letter dated October 2, 2002, LUBA notified the parties that LUBA had received
25 the record on October 1, 2002. Pursuant to OAR 661-010-0026(2), parties have 14 days to
26 file any record objections. If no record objections are filed, the petition for review is due 21
27 days after the record is received. If record objections are filed, the deadlines for further
28 procedures, including the deadline for filing the petition for review, are suspended. OAR
29 661-010-0026(6). On October 11, 2002, petitioners filed an objection to the record.
30 Intervenor responds that the record objection is frivolous and that the appeal should be
31 dismissed.

¹ Intervenor requested oral argument, but we do not feel oral argument is necessary to decide the matter.

1 **MOTION TO DISMISS**

2 Initially, intervenor argues that counsel for petitioners did not adequately attempt to
3 resolve the matter with the local government before filing the record objection. OAR 661-
4 010-0026(1) provides:

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

10 Petitioners’ counsel called county counsel on October 11, 2002, 10 days after LUBA
11 received the record. County counsel was out of the office and not expected back until the
12 next week, and petitioners’ counsel left a message concerning the objection to the record.
13 Petitioners’ counsel filed her record objection with LUBA that day. The next week, on
14 October 14, 2002, county counsel returned petitioners’ counsel’s call, and they discussed the
15 record objection.

16 In *Casey Jones v. City of Lowell*, 33 Or LUBA 812 (1997), we stated that a good faith
17 attempt to resolve record objections should consist of more than a single letter without
18 follow-up. In the present case, however, in addition to the initial call, petitioners’ counsel
19 later discussed the record objection in detail with county counsel. According to petitioners’
20 counsel, county counsel was to look into the matter and get back to her, but he never did. We
21 find petitioners’ counsel made a good faith effort to resolve the matter with the local
22 government. Furthermore, even if we were to find that petitioners’ counsel did not make a
23 good faith effort, the rule itself states that failure to attempt to resolve the matter is a ground
24 for denying the record objection, not for dismissing the appeal.²

² We also note that a violation of OAR 661-010-0026(1) is a technical violation of our rules, and intervenor has not demonstrated how its substantial rights have been prejudiced. *Dorgan v. City of Albany*, 26 Or LUBA 621 (1994).

1 Intervenor also argues that the record objection itself is frivolous and should result in
2 dismissal of the appeal. In *Cole v. Columbia County*, 27 Or LUBA 701 (1994), the petitioner
3 filed record objections on the date the petition for review was due. We suspended the
4 deadline for filing the petition for review to resolve the record objections, and the intervenor
5 sought to have the appeal dismissed. We denied the motion to dismiss, stating:

6 “We leave open the possibility that dismissal of an appeal might be
7 appropriate where it is shown that a record objection is without merit and was
8 filed solely for the purpose of obtaining additional time to prepare the petition
9 for review. Neither of those circumstances exist here.” *Id.* at 702.

10 Intervenor asserts that the possibility mentioned in *Cole* exists in the present case.

11 Petitioners’ record objection concerns minutes from a City of Gearhart city council
12 meeting.³ The record before the county is missing one of 11 pages from the city council’s
13 January 29, 2002 hearing. Petitioners’ record objection seeks to include the missing page in
14 the record. Intervenor argues that it took less than an hour for intervenor’s counsel to
15 establish with county counsel that the missing page was never placed before the county and
16 that for petitioners to have pursued the record objection was frivolous. Intervenor also
17 argues that the record objection is without merit because the minutes are not from the final
18 decision maker and are therefore not subject to a record objection under OAR 661-010-
19 0026(2)(c). Petitioners’ counsel responds that county counsel never told her that the record
20 from the city that was placed before the county was also missing the disputed page.
21 Petitioner also points out that the record objection is filed pursuant to OAR 661-010-
22 0026(2)(a), not 661-010-0026(2)(c).⁴

³ The challenged decision is a final decision of Clatsop County regarding property within the City of Gearhart’s urban growth boundary, but outside city limits. Pursuant to a joint management agreement regarding such unincorporated urban lands, the city council sends a recommendation to the county, and the county makes the final decision.

⁴ OAR 661-010-0026(2) provides in part:

“* * * Objections may be made on the following grounds:

1 We do not believe petitioners’ record objection is completely without merit. When a
2 page of the minutes of a proceeding is clearly missing, it is entirely reasonable to raise the
3 omission as a record objection pursuant to OAR 661-010-0026(2)(a). According to
4 petitioners’ counsel, she was unaware that the missing page was not submitted to the county.

5 Intervenor also argues that petitioners’ sole purpose for filing the record objection
6 was for the purpose of obtaining additional time to file the petition for review. This
7 argument is based on an allegation that when petitioners’ counsel was informed of the reason
8 for the missing page, she responded it was not a problem because “it buys [her] a little time
9 to file the petition [for review].” Motion in Opposition of Petitioners’ Objection to the
10 Record, Affidavit of Frank M. Flynn 2.

11 It is certainly one of the worst kept secrets at LUBA that filing record objections
12 extends the deadline for briefing. It is also certainly true that because of this many
13 practitioners have additional motivation other than the integrity of the record to file record
14 objections. That a party appreciates the additional time for briefing, however, does not mean
15 that the record objection is without merit or that delay was the *sole purpose* of the record
16 objection. In the present case, we do not believe petitioners’ counsel’s sole purpose in filing
17 the record objection was to obtain additional time for filing the petition for review.

18 The motion to dismiss is denied.

“(a) The record does not include all materials included as part of the record during the
 proceedings before the final decision maker. The omitted item(s) shall be specified,
 as well as the basis for the claim that the item(s) are part of the record.

“* * * * *

“(c) The minutes or transcripts of meetings or hearings are incomplete or do not
 accurately reflect the proceedings.”

1 **RECORD OBJECTION**

2 Petitioners argue that the missing page from the minutes should be included in the
3 record pursuant to OAR 661-010-0026(2)(a). *See* n 4. Intervenor initially responds that the
4 minutes cannot be included in the record because they are not minutes from a meeting or
5 hearing of the final decision maker pursuant to OAR 661-010-0026(2)(c). *See* n 4.
6 Intervenor is correct that the minutes of the city council are not required to be included in the
7 record under OAR 661-010-0026(2)(c), because the county rather than the city was the final
8 decision maker. The minutes could be included in the record, however, if they were
9 “specifically incorporated into the record or placed before, and not rejected by, the final
10 decision maker.” OAR 661-010-0025(1)(b). Petitioners, however, do not argue that the
11 minutes were specifically incorporated into the record before the county, and we will not
12 assume that they were.

13 Petitioners apparently believed that the missing page from the minutes was placed
14 before the county and that when the county record was copied to send to LUBA, the page
15 was inadvertently omitted. Intervenor responds that the missing page was never submitted to
16 the county and consequently never placed before the final decision maker. It is petitioners’
17 burden to establish why the omitted document should be included in the record. Petitioners
18 have not met that burden.

19 Petitioners’ record objection is denied.

20 **BRIEFING SCHEDULE**

21 The record is settled as of the date of this order. The petition for review is due 21
22 days from the date of this order. Response briefs are due 42 days from the date of this order.

23 Dated this 7th day of November, 2002.
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Tod A. Bassham
Board Member