

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 HAL'S CONSTRUCTION, INC.,  
5 *Petitioner,*

6  
7 vs.

8  
9 CLACKAMAS COUNTY,  
10 *Respondent,*

11 and

12  
13 RUTH BARBER and GARY RHEINSBURG,  
14 *Intervenors-Respondent.*

15  
16 LUBA No. 98-209

17  
18 ORDER

19 Before us are petitioner's record objection and motion to take evidence not in the  
20 record, filed December 30, 1999. The county has not responded to petitioner's motions.

21 **RECORD OBJECTION**

22 Petitioner objects to the county's failure to include the tapes of proceedings before the  
23 county hearings officer. The record includes a transcript of those tapes; however, petitioner  
24 argues that the tapes do not contain a record of the entire proceedings. According to  
25 petitioner, a portion of the tapes may be inaudible but, nevertheless, the tapes exist and  
26 should be included in the record. Petitioner argues that, to the extent the county relies on the  
27 transcript as a substitute for the tapes, that reliance is misplaced.

28 OAR 661-010-0025(1)(c) provides in relevant part:

29 "Minutes and tape recordings of the meetings conducted by the final decision  
30 maker as required by law, or incorporated into the record by the final decision  
31 maker [shall be included in the record]. A verbatim transcript of audiotape or  
32 videotape recordings shall not be required, but if a transcript has been  
33 prepared \* \* \* it shall be included. If a verbatim transcript is included in the  
34 record, the tape recordings from which that transcript was prepared need not  
35 be included in the record, unless the accuracy of the transcript is challenged."

1           Petitioner does not argue that the transcript of the audible portions of the tapes is  
2 inaccurate. To the extent that the transcript does not include the inaudible portions of the  
3 tapes, the request to include all of the tapes in the record does not remedy the transcript's  
4 deficiencies. We see no purpose in requiring the county to submit the tapes, if they are  
5 defective. *Friends of Neabeack Hill v. City of Philomath*, 29 Or LUBA 557, 557-58 n 1  
6 (1995) (denying a record objection involving defective minutes that could not be corrected,  
7 because no tape recording of the relevant hearing existed, but noting that deficiencies in  
8 record keeping could be assigned as error).

9           Petitioner's record objection is denied.

#### 10   **MOTION TO TAKE EVIDENCE NOT IN THE RECORD**

11           Petitioner moves to take evidence not in the record because a portion of the audio  
12 tape apparently is inaudible. According to petitioner, it objected during the proceedings of  
13 the hearings officer to the credibility of certain evidence presented by opponents of the  
14 application.<sup>1</sup> However, those objections were made at a point in the hearing when the audio  
15 tapes of the hearing may have malfunctioned. Petitioner contends that its testimony made  
16 during that time is pivotal to petitioner's case, because that testimony undermines the  
17 evidence that the hearings officer relied upon to reach his conclusion to deny petitioner's  
18 application, and therefore, it is important to take evidence not in the record to establish that  
19 the evidence the hearings officer relied upon is not credible.

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<sup>1</sup> Petitioner explains

“As explained [in the motion] and as supported by the affidavit of A. Richard Vial, \* \* \* [petitioner] seeks to establish that intervenor-respondent's pictures showing alleged impacts resulting from the non-conforming use are not credible. At the hearing, [petitioner] explained to the Hearings Officer that because of the heavily wooded site, there was no way that intervenor-respondent's pictures accurately showed what could be seen on the ground from adjacent properties. [Petitioner] maintained at the hearing that the only way the Hearings Officer could make an accurate determination of the visual impacts was through a site visit. The Hearings Officer rejected [petitioner's] request for a site visit to demonstrate that the nonconforming use was not visible from adjacent properties and thus caused no visual impacts. Demonstrating no increased impacts is an approval standard that the Hearings Officer found was not met.” Petitioner's Motion to Take Evidence Not in the Record 3.

1 OAR 661-010-0045(1) provides, in relevant part:

2 “\* \* \* The Board may, upon written motion, take evidence not in the record in  
3 the case of disputed factual allegations in the parties’ briefs concerning \* \* \*  
4 procedural irregularities not shown in the record \* \* \* which, if proved, would  
5 warrant reversal or remand of the decision. The Board may also upon motion  
6 or at its direction take evidence to resolve disputes regarding the content of  
7 the record \* \* \*.”

8 Petitioner’s motion does not fit neatly within the requirements of OAR 661-010-  
9 0045(1), because the only apparent basis in our rule that would potentially authorize LUBA  
10 to consider evidence outside the record is to show “procedural irregularities not shown in the  
11 record[.]” However, we do not understand the evidence petitioner wishes to submit as being  
12 offered for that purpose. Rather, petitioner requests that we consider the proffered evidence  
13 to establish that the hearings officer’s decision is not supported by substantial evidence *in the*  
14 *record*.

15 Nevertheless, neither the county nor intervenors-respondent oppose petitioner’s  
16 motion or dispute that the exchange described above between the hearings officer and  
17 petitioner occurred. Therefore, while we deny the motion that LUBA consider evidence  
18 outside the record, we will assume that all parties agree that the alleged exchange between  
19 petitioner and the hearings officer would be disclosed by the tapes of the hearing, if they  
20 were audible. Specifically, in conducting our review of the challenged decision on the merits,  
21 we will assume that the statements petitioner alleges in its motion and attached affidavit that  
22 it made to the hearings officer were in fact made.<sup>2</sup> We also will assume that the hearings

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<sup>2</sup> The affidavit of petitioner’s attorney, A. Richard Vial, states, in part:

“4. At the hearing [before the hearings officer], intervenor[s-respondent] entered pictures into the record to show that the adjacent properties were impacted by the nonconforming use.

“5. I reviewed the photographs and pointed out to the Hearings Officer that the heavily wooded perimeter of the site made the nonconforming use not visible to adjacent properties. I asked the Hearings Officer to reject the pictures as not credible evidence and I requested a site visit to demonstrate that the nonconforming use was not visible from the adjacent properties.

1 officer refused petitioner's invitation to conduct a site visit. Of course in so doing we express  
2 no view on petitioner's suggestion that, in view of these facts, the hearings officer's decision  
3 is not supported by substantial evidence.

4 Petitioner's motion to take evidence not in the record is denied.

5 The petition for review is due 21 days, and the response brief is due 42 days, from the  
6 date of this order.

7 Dated this 24th day of February, 2000.

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Anne Corcoran Briggs  
Board Member

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"6. The Hearings Officer denied the site visit." Affidavit of A. Richard Vial 1-2.