

1 challenge to the part of the hearings officer’s 2002 decision where the hearings officer found that
2 petitioner did not qualify for a replacement dwelling under ORS 215.213(1)(t). 44 Or LUBA 44.
3 With regard to the adequacy of the county’s rejection of petitioner’s contention that the existing
4 dwelling qualifies as a nonconforming use, we sustained petitioner’s second and third assignments of
5 error.

6 Washington County Community Development Code (CDC) 440-4 provides that a
7 nonconforming use may not be resumed if it “is discontinued or abandoned for than one (1) year * *
8 *.” We sustained the second and third assignments of error because the hearings officer cited and
9 appeared to rely heavily on certain photographs in the record to corroborate other non-
10 photographic evidence that use of the dwelling was discontinued for more than one year before June
11 20, 1995.¹ The hearings officer mistakenly understood that those photographs were taken in 1995
12 when they were all actually taken after 1995. We explained that certain photographs that were
13 taken in 1995 apparently were attached “to a prior application in this matter that that was submitted
14 in 1998, but for some reason those 1995 photographs are not in the record in this appeal.” 44 Or
15 LUBA at 47. Because the hearings officer erroneously assumed the photographs in the record
16 were taken in 1995, we remanded the decision:

17 “We cannot tell from the decision and the record whether [the hearings officer]
18 would have decided the question about pre-1995 interruption of residential use in
19 the same way if he had recognized that the photographs were recent photographs
20 rather than photographs that were taken in 1995. A remand is necessary for the
21 hearings officer to decide that question with a correct understanding of the dates
22 those photographs were taken.” *Id.* at 48 (footnote omitted).

¹ The non-photographic evidence the hearings officer relied on was set out in footnote 12 of our decision:

“That evidence includes: (1) an April 26, 2002 letter from a neighbor in which he states ‘I have never seen anyone occupy the house in the 11 years I have lived here;’ (2) an April 26, 2002 letter from another neighbor in which he states the dwelling ‘has not been occupied since the late 1980’s and certainly not anytime after 1990;’ (3) a general appraisal information sheet that includes a remark that the house is abandoned; (4) planning staff’s explanation of that remark; and (5) a planning staff report that states that petitioner indicated in a 1996 meeting ‘that no one had lived in the structure since 1990.’” 44 Or LUBA at 46 n 12 (record citations omitted).

1 On remand, the hearings officer reviewed the evidence listed in n 12 in our decision in
2 *Bradley I*, and quoted in n 1 in this order, “with the understanding that the photos in the record
3 were taken after 1995.” Record 6.² The hearings officer acknowledged petitioner’s criticism of
4 that evidence but nevertheless ultimately concluded, based on that evidence, that “residential use of
5 the dwelling was ‘abandoned or discontinued’ for more than one year prior to 1995.” Record 8.
6 Based on that finding, petitioner’s application was denied for a second time. This appeal followed.

7 **RECORD OBJECTION AND MOTION TO TAKE EVIDENCE NOT IN THE**
8 **RECORD**

9 The record that the county filed in this appeal is made up of the proceedings on remand
10 (Record 1-10) and the Prior Record (Record 11-421). Petitioner objects to the Record.
11 Petitioner also requests that we consider extra-record evidence to resolve a “dispute concerning the
12 content of the record” and “a procedural irregularity, which if established, would warrant reversal or
13 remand.”³ Record Objection and Motion to Take Evidence 3.

14 Petitioner’s record objection and motion both concern certain photographs that were
15 submitted with petitioner’s first application for approval for a replacement dwelling on October 23,
16 1998 (hereafter the 1995 photographs). These are the same photographs that we noted in *Bradley*

² We refer to the record that the county filed in *Bradley I* as the “Prior Record” and we refer to the record that the county filed in response to this appeal of the hearings officer’s decision following our remand in *Bradley I* as “Record.” The Record in this appeal includes the Prior Record. Record 11-421. Only the first 10 pages of the Record pertain to the county’s proceedings on remand.

³ As relevant, OAR 661-010-0045(1) provides:

“Grounds for Motion to Take Evidence Not in the Record: [LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning * * * procedural irregularities not shown in the record * * * which, if proved, would warrant reversal or remand of the decision. [LUBA] may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record * * *.”

Petitioner argues:

“The subject motion to take evidence relates to resolving a dispute concerning the content of the record. The subject motion also relates to a procedural irregularity, which if established, would warrant reversal or remand.” Record Objection and Motion to Take Evidence 3.

1 I were not included in the Prior Record. 44 Or LUBA 47. The parties dispute what happened to
2 the 1995 photographs.⁴ Petitioner contends that the county lost the 1995 photographs sometime
3 after they were submitted on October 23, 1998. Petitioner's Reply to County's Response 1-2.
4 The county contends that it returned the 1995 photographs to petitioner when she withdrew her
5 October 23, 1998 application in April 1999. County Response to Motion to Take Evidence not in
6 the Record 2-3. Petitioner submitted a second application on April 13, 2001 that ultimately led to
7 the hearings officer's decision in *Bradley I*. The county contends that although a number of
8 photographs were submitted to the hearings officer in the local proceedings that followed the April
9 13, 2001 application and led up to the hearings officer's August 22, 2002 decision in *Bradley I*, the
10 1995 photographs were not among those photographs. County Response to Motion to Take
11 Evidence not in the Record 3.

12 Whoever lost the 1995 photographs that petitioner submitted with her October 23, 1998
13 application, petitioner claims that after our February 20, 2003 decision in *Bradley I* was issued, she
14 found the negatives for the 1995 photographs. Petitioner argues that she made copies from those
15 negatives and provided those copies of the 1995 photographs to the county's attorney on March
16 17, 2003. Record Objection and Motion to Take Evidence 2-3. Petitioner's attorney filed a
17 written request to the hearing officer that he supplement the record with the 1995 photographs:

18 "Central to [petitioner's] appeal and LUBA's decision was the evidence relating to
19 the County's conditional use standards. One problem was the dates of the photos.
20 Part of the confusion was because [petitioner], with her 1998 application, submitted
21 photos showing the house in use prior to the home being vacated. As of the hearing
22 before you, the photos could not be located by either the County or [petitioner].
23 Since then, [petitioner] has informed us that she has located some photos that will
24 shed light on the condition of the dwelling and the discontinuance issue. Holding an
25 additional hearing will remove any confusion and ensure that the decision is based
26 on all relevant facts." Record 10.

⁴ The parties do not dispute that photographs were attached to the October 23, 1998 application. On November 5, 1998, the county requested that petitioner clarify when those photographs were taken. Record 81. In a November 10, 1998 letter, petitioner advised the county that the photographs were taken in the fall of 1995. Record 82.

1 The 1995 photographs that petitioner provided to the county's attorney were not
2 considered by the hearings officer. In his decision the hearings officer specifically declined to
3 consider any additional evidence:

4 "[Petitioner] subsequent to the remand requested a new hearing on this matter to
5 present additional evidence. The Hearings Officer does not read LUBA's opinion
6 as requiring a new hearing. The parties to this matter have had ample opportunity to
7 present evidence and argument supporting their positions and therefore the Hearings
8 Officer has not granted the request for a new hearing." Record 7.

9 Turning first to petitioner's objection that the record in this appeal should be supplemented
10 with the 1995 photographs, petitioner offers no basis for us to order the county to supplement the
11 record with the 1995 photographs. OAR 661-010-0025(1) identifies items that must be included
12 in the record.⁵ While OAR 661-010-0025(1) does not purport to be exhaustive, it is undisputed
13 that the 1995 photographs were not included in the Prior Record.⁶ Whether the 1995 photographs
14 were lost by the county or returned to the petitioner and not resubmitted when petitioner submitted
15 her April 2001 application does not change that fact. It is also undisputed that the hearings officer

⁵ OAR 661-010-0025(1) provides:

Contents of Record: Unless the Board otherwise orders, or the parties otherwise agree in writing, the record shall include at least the following:

- “(a) The final decision including any findings of fact and conclusions of law;
- “(b) All written testimony and all exhibits, maps, documents or other written materials specifically incorporated into the record or placed before, and not rejected by, the final decision maker, during the course of the proceedings before the final decision maker.
- “(c) Minutes and tape recordings of the meetings conducted by the final decision maker as required by law, or incorporated into the record by the final decision maker. * * *
- “(d) Notices of proposed action, public hearing and adoption of a final decision, if any, published, posted or mailed during the course of the land use proceeding, including affidavits of publication, posting or mailing. * * *

⁶ In fact, during our review of the hearings officer's 2002 decision in *Bradley I*, petitioner objected that the Prior Record should be supplemented with the October 23, 1998 application and all attachments, which would have included the 1995 photographs. The county submitted a supplemental record in response to this objection, and petitioner indicated that the supplemental record satisfied her objection.

1 did not consider the 1995 photographs in the county remand proceedings that followed *Bradley I*
2 and led to the current appeal. Petitioners asked that the hearings officer consider those
3 photographs, but the hearings officer declined to reopen the record to allow new evidence. If
4 petitioner believes the hearings officer erred in doing so, she may assign error to the hearings
5 officer's refusal to reopen the record on remand. However, petitioner's record objection, which
6 seeks to supplement the local record with photographs that the hearings officer clearly did not
7 consider, is not well taken. Petitioner's record objection is denied.

8 We also deny petitioner's motion to consider extra record evidence. Petitioner's motion
9 asserts two grounds for considering evidence outside the record.⁷ With regard to the first ground,
10 we have resolved the parties' dispute concerning the "content of the record," and we did not need
11 to consider the disputed 1995 photographs to do so. Neither do we understand petitioner's
12 position that LUBA needs to consider the 1995 photographs to resolve "procedural irregularities
13 not shown in the record * * * which, if proved, would warrant reversal or remand of the decision."
14 Our primary difficulty with this second ground for considering the 1995 photographs is that we do
15 not know what procedural irregularity petitioner is referring to. It may be that the alleged irregularity
16 is the hearings officer's refusal to consider the 1995 photographs. If so, we do not need to see
17 those photographs to consider an assignment of error that that the hearings officer's refusal should
18 warrant remand. It may be that the alleged irregularity is petitioner's contention that the county
19 rather than petitioner lost the 1995 photographs. If so, we fail to see how our consideration of the
20 1995 photographs will provide any assistance whatsoever in establishing who lost the 1995
21 photographs during the local proceedings that led to the hearings officer's 2002 decision.⁸ It may

⁷ See n 3 and related text above.

⁸ As things now stand, we have conflicting affidavits. In her affidavit, petitioner contends she submitted the 1995 photographs as part of her October 23, 1998 application and never got them back from the county. October 20, 2003 Affidavit of Connie Bradley. In his affidavit, a county planner contends that he returned to petitioner the entire October 23, 1998 application, including the 1995 photographs, when petitioner withdrew that October 23, 1998 application in April 1999. October 3, 2003 Affidavit of Tom Harry.

1 be that the alleged irregularity is the county's failure to follow its "practice to place all documents in
2 an application file before the decision maker." Record Objection and Motion to Take Evidence 2.
3 If so, once again, we fail to see how viewing the 1995 photographs is necessary to consider that
4 question or an assignment of error based on that failure.

5 For the reasons explained above, petitioner's record objection and motion to consider
6 extra-record evidence is denied.

7 Petitioner's motion to consider evidence outside the record suspended the deadline for filing
8 the petition for review. Our order lifts that suspension. The petition for review shall be due 21 days
9 from the date of this order. The respondent's brief shall be due 42 days from the date of this order.
10 The Board's final opinion and order shall be due 77 days from the date of this order.

11 Dated this 18th day of February, 2003.

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Michael A. Holstun
Board Member