

1 Petitioner argues that the land sale contract is not substantiated or
2 authenticated, does not include required signatures, and there is no indication
3 that it was ever recorded. Petitioner also notes that the contract includes the
4 language “Additional parcel release: See reverse hereof[,]” but the copy of the
5 document in the record includes no reverse side. Further, petitioner notes that
6 the document includes several strikeouts, redactions, and hand-written
7 notations. Based on these alleged deficiencies, petitioner argues that the
8 county erred in relying on the copy of the land sale contract to make the
9 challenged lot of record decision, and requests that the land sale contract be
10 removed from the record.

11 As the ground for invoking LUBA’s authority under OAR 661-010-
12 0045(1) to take evidence not in the record, petitioner argues that the county
13 committed “procedural irregularities not shown in the record and which, if
14 proved, would warrant reversal or remand of the decision.” Specifically,
15 petitioner argues that the county “willfully suppress[ed]” the reverse side of the

“Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties’ briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. The Board may also upon motion or at its discretion take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845.”

1 land sale contract, which according to petitioner invokes a presumption
2 favorable to petitioner under the Oregon Rules of Evidence.²

3 There are a number of problems with petitioner’s arguments, starting
4 with the failure to request that LUBA consider any evidence outside the record.
5 As its preliminary clause suggests, OAR 661-010-0045(1) authorizes LUBA to
6 take and consider evidence outside the local evidentiary record, for one or more
7 of the stated purposes. Petitioner instead seeks to *strike* a document from the
8 local evidentiary record. While one of the stated grounds to take extra-record
9 evidence (not invoked by petitioner) is to resolve disputes regarding the
10 content of the local evidentiary record, there is no dispute here that the land

² Petitioner cites ORS 40.120, Rule of Evidence 308, which is entitled
“Presumptions in civil proceedings” and provides:

“In civil actions and proceedings, a presumption imposes on the
party against whom it is directed the burden of proving that the
nonexistence of the presumed fact is more probable than its
existence.”

Petitioner also cites ORS 40.135, Rule of Evidence 311, entitled
“Presumptions,” which provides in relevant part:

“(1) The following are presumptions:

“ * * * * *

“(c) Evidence willfully suppressed would be adverse to
the party suppressing it.”

1 sale contract at Record 21 was placed before the final decision maker and
2 properly belongs in the record.³

3 The ground to take evidence under OAR 661-010-0045(1) that petitioner
4 does invoke (“procedural irregularities not shown in the record and which, if
5 proved, would warrant reversal or remand of the decision”) is unavailing to
6 petitioner. Petitioner identifies no procedural irregularity not shown in the
7 record. Even if the land sale contract at Record 21 has the deficiencies
8 petitioner cites, such deficiencies do not constitute “procedural irregularities”
9 within the meaning of OAR 661-010-0045(1). Petitioner’s attempt to invoke
10 the presumption at ORS 40.135 is equally unavailing. The Oregon Rules of
11 Evidence are not applicable to LUBA review proceedings, which are not “civil
12 proceedings” or “civil actions” as used in that chapter.

13 What petitioner truly objects to, apparently, is the county’s reliance on
14 the land sale contract, with its alleged deficiencies, to support the lot of record
15 verification. But that argument goes to the merits of the appeal, whether the
16 county’s decision is supported by substantial evidence, or perhaps whether the
17 county committed an error of law in relying on the land sale contract, not any
18 procedural irregularity or dispute over the content of the record that might

³ The county responded to petitioner’s motion with a declaration that the single-sided copy of the land sale contract at Record 21 is a true and correct copy of the document submitted by intervenor for his lot of record verification application. The declaration states that the county is not in possession of any other parts or pages of the land sale contract, if any exist.

1 warrant taking evidence outside the record. Because petitioner does not
2 establish any basis for a motion to take evidence under OAR 661-010-0045, the
3 motion is denied.

4 Filing of a motion for an evidentiary hearing suspends the deadlines for
5 the appeal. We now establish the briefing schedule. OAR 661-010-0045(9).
6 The petition for review is due 21 days, and the response brief due 42 days, from
7 the date of this order. The Board's final opinion and order is due 77 days from
8 the date of this order.

9 Dated this 13th day of July, 2016.

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Tod A. Bassham
Board Member