

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

3
4 1000 FRIENDS OF OREGON, NEIGHBORS FOR CLEAN AIR,
5 and NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF PORTLAND,
11 *Respondent,*

12
13 and

14
15 FASTER PERMITS and PROLOGIS,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2023-088

19
20 ORDER

21 The challenged decision is a November 28, 2023, commercial building
22 permit issued to intervenors-respondents (intervenors) for a “New tilt-up concrete
23 tilt-up semi-heated warehouse building with one office tenant space; including
24 associated site work” (Warehouse). Record 1. On June 26, 2024, LUBA received
25 petitioners’ petition for review. The petition for review includes a section that
26 “state[s] the facts establishing petitioners’ standing,” as required by OAR 661-
27 010-0030(4)(a). It provides:

28 “Petitioners 1000 Friends of Oregon, Neighbors for Clean Air, and
29 Northwest Environmental Defense Center (collectively,
30 ‘Petitioners’) have standing to petition the Land Use Board of
31 Appeals (‘LUBA’) to hear this appeal under ORS 197.830. There
32 was no public hearing on the land use decision, but Petitioners are

1 adversely affected by the decision. ORS 197.830(3).
2 Notwithstanding the lack of notice, Petitioners filed a timely notice
3 of intent to appeal, pursuant to ORS 197.830(2), for the City of
4 Portland’s land use decision ‘Commercial Building Permit #22-
5 123645-000-00-CO’ (‘Permit’) on December 19, 2023.” Petition for
6 Review 1.

7 On July 16, 2024, LUBA received intervenors’ brief.¹ Intervenors’ brief
8 argues that LUBA should dismiss the appeal because petitioners have not
9 established that they are “a person adversely affected” by the challenged building
10 permit decision, as required by ORS 197.830(3). Intervenor-Respondent’s Brief
11 1-3. We treated intervenors’ argument as a motion to dismiss the appeal and we
12 suspended the appeal to allow petitioners time to file a response.² Petitioners then
13 filed a response (Response) and a motion to take evidence not in the record
14 (Motion). For the reasons explained below, intervenors’ motion is denied.

15 **MOTION TO TAKE EVIDENCE**

16 In conjunction with their Response, petitioners move to take evidence not
17 in the record to establish their standing, consisting of eight declarations. LUBA’s
18 review is generally limited to the record that was compiled by the local
19 government whose decision is on appeal at LUBA. ORS 197.835(2)(a).
20 However, ORS 197.835(2)(b) provides:

21 “In the case of *disputed allegations of standing*, unconstitutionality

¹ On July 18, 2024, LUBA received the city’s response brief.

² On July 1, 2024, LUBA received a motion to dismiss the appeal filed by the city, and that motion is under advisement.

1 of the decision, ex parte contacts, actions described in [ORS
2 197.835](10)(a)(B) * * * or other procedural irregularities not
3 shown in the record that, if proved, would warrant reversal or
4 remand, the board may take evidence and make findings of fact on
5 those allegations.” (Emphasis added.)

6 The Motion states that Declarations 1 through 5 are submitted to demonstrate that
7 “Petitioners’ members are ‘adversely affected’ by the land use decision” and that
8 Declarations 6 through 8 demonstrate “Petitioner Organizations’ purpose,
9 demonstrating that the challenge at issue seeks to protect interests germane to
10 Petitioners’ organizational purpose, thereby satisfying Petitioners’ obligations
11 for representational standing.” Motion 2. The Response also refers to
12 Declarations 6 through 8 in support of petitioners’ assertion that all petitioners
13 appeared orally before the city during the proceedings that led to the decision.
14 Response 2.

15 We conclude below that petitioners satisfy the requirements of ORS
16 197.830(2)(b), and accordingly, they are not required to demonstrate that they are
17 “adversely affected” for purposes of ORS 197.830(3). Petitioners motion to take
18 evidence is granted for the limited purpose of considering Declaration 6.³

19 **STANDING**

20 ORS 197.830(3) provides:

21 “If a local government makes a land use decision without providing
22 a hearing, except as provided under ORS 215.416(11) or

³ Declaration 6 is the Declaration of the Executive Director of 1000 Friends of Oregon.

1 227.175(10), or the local government makes a land use decision that
2 is different from the proposal described in the notice of hearing to
3 such a degree that the notice of the proposed action did not
4 reasonably describe the local government’s final actions, a person
5 adversely affected by the decision may appeal the decision to the
6 board under this section * * * [.]”

7 It is undisputed that the city did not hold a hearing prior to adopting the
8 challenged decision. Intervenors move to dismiss the appeal, arguing that
9 petitioners lack standing under ORS 197.830(3) because petitioners are not
10 “adversely affected” by the decision.⁴

11 ORS 197.830(2) provides:

12 “Except as provided in ORS 197.620, a person may petition the
13 board for review of a land use decision or limited land use decision
14 if the person:

15 “* * * * *

16 “(b) Appeared before the local government, special district or state
17 agency orally or in writing.”⁵

18 We have explained that “[a] bare neutral appearance,” meaning “[a]n oral or
19 written statement of almost any kind,” will satisfy the “appearance” requirement

⁴ It is fair to say that petitioners’ theory for establishing standing to appeal the decision has evolved between the time they filed their petition for review and the time they filed their Response.

⁵ ORS 197.015(18) defines “person” to mean “any individual, partnership, corporation, association, governmental subdivision or agency or public or private organization of any kind. The Land Conservation and Development Commission or its designee is considered a person for purposes of appeal under ORS chapters 195, 197 and 197A.”

1 in ORS 197.830(2)(b). *Century Properties, LLC v. City of Corvallis*, 51 Or
2 LUBA 572, 582, 586, *aff'd*, 207 Or App 8, 139 P3d 990 (2006).

3 Nothing in the express language of ORS 197.830(3) identifies it as either
4 the exclusive or a required statutory basis to appeal a decision in cases where a
5 hearing is not provided. In *Cape v. City of Beaverton*, 40 Or LUBA 78, 83-84
6 (2001), we held that reliance on ORS 197.830(2) is not expressly limited to cases
7 where a hearing is provided:

8 “The city argues that because it held no hearing before adopting the
9 challenged ordinance, the criteria governing petitioner’s standing
10 are set forth at ORS 197.830(3) rather than ORS 197.830(2).
11 Respondent misreads the statute. While ORS 197.830(2) applies in
12 circumstances where a local government conducts a hearing, it is not
13 expressly limited to cases where a hearing is provided. Where the
14 local government does not conduct a hearing, but provides an
15 opportunity for written appearances, we see no reason why ORS
16 197.830(2) should not apply and provide standing to appeal based
17 on such written appearances. We reject respondent’s standing
18 challenge.” (Footnote omitted.)

19 *See also Devin Oil Co. Inc. v Morrow County*, 70 Or LUBA 420, 425 (2014) (so
20 stating).

21 Petitioners respond that their written comments to the city included in the
22 letter at Supplemental Record 14-15 establish that petitioners appeared before the
23 city as required by ORS 197.830(2)(b).⁶ We agree that the letter at Supplemental

⁶ We assume the “May 9, 2012” on the letter is a typo and that the date of the letter was May 9, 2022, as stated in petitioners’ Response. Response 2.

1 Record 14-15 establishes the standing of Neighbors for Clean Air and Northwest
2 Environmental Defense Center. 1000 Friends of Oregon (1000 Friends) is not a
3 signatory to the letter. The letter, addressed to the city’s Bureau of Development
4 Services (BDS) Director, begins “Neighbors for Clean Air (‘NCA’), the
5 Northwest Environmental Defense Center (‘NEDC’), and the Green Energy
6 Institute at Lewis and Clark Law School (‘GEI’) submit the following comments
7 on the Prologis Freight Warehouse proposed to be constructed in Portland’s
8 Argay Terrace Neighborhood at 12350 NE Sandy Blvd.” Supplemental Record
9 14; *see Devin Oil Co. Inc. v. Morrow County*, 70 Or LUBA 512, 516 (2014) (an
10 email from the petitioner to the planning director regarding the application that
11 was included in the record of the proceeding was sufficient to constitute an
12 “appearance” for purposes of satisfying ORS 197.830(2)(b)).

13 The Response and the Motion also take the position that representatives
14 from 1000 Friends appeared before the city orally along with the other petitioners
15 at a meeting with BDS on October 21, 2022. Response 2 (citing Supplemental
16 Record 4-13); Motion, Declaration 6, 3. Supplemental Record 4 through 13
17 contain a Power Point presentation titled “Argay-Terrace Ad Hoc Working
18 Group.” Supplemental Record 5. The members of the Working Group are not
19 listed. In the Response, however, petitioners state that 1000 Friends was one of
20 the presenters of slides. Furthermore, Supplemental Record 4 is an email from a
21 representative of petitioner Neighbors for Clean Air thanking BDS staff for
22 “meeting with us.” We understand “us” to include the individuals copied on the

1 email, including a representative from 1000 Friends. We conclude that 1000
2 Friends appeared before the city orally at the October 21, 2022, meeting.
3 Supplemental Record 4; Motion, Declaration 6.

4 We agree with petitioners that ORS 197.830(2) applies in the
5 circumstances presented in this appeal, where the city did not conduct a hearing
6 but provided an opportunity for written and oral appearances, and that petitioners
7 appeared. Having satisfied the appearance requirement in ORS 197.830(2)(b),
8 petitioners need not also satisfy the requirements of ORS 197.830(3).

9 Intervenors' motion to dismiss is denied.

10 **REPLY BRIEF AND ORAL ARGUMENT**

11 Petitioners shall have seven days from the date of this order to file any
12 reply brief. Oral argument is rescheduled for Wednesday, September 4, 2024, at
13 11:30 a.m. via video conference. Video conferencing instructions will be
14 provided to the parties in a separate letter confirming the date and time of the
15 rescheduled oral argument.

16 Dated this 14th day of August 2024.

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Melissa M. Ryan
Board Chair