

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

THOMAS STADELMAN,
Petitioner,

vs.

CITY OF BANDON,
Respondent.

LUBA No. 2020-113

FINAL OPINION
AND ORDER

Appeal from City of Bandon.

Zack P. Mittge and William H. Sherlock represented petitioner.

Frederick J. Carleton and Bill Kloos represented respondent.

RUDD, Board Chair; RYAN, Board Member; ZAMUDIO, Board
Member, participated in the decision.

DISMISSED 05/10/2021

You are entitled to judicial review of this Order. Judicial review is
governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner challenges the city's adoption of Ordinance No. 1636, which amends the city's code to remove zone-specific geotechnical reporting requirements and to adopt a hazard overlay zone.

FACTS

On June 16, 2020, and August 27, 2020, the planning commission held work sessions on the ordinance. On October 22, 2020, the planning commission held a public hearing and voted to recommend adoption of the ordinance to the city council. On November 2, 2020, the city council held a public hearing on the ordinance, which began at 7:00 p.m. At the conclusion of the November 2, 2020 public hearing, the city council voted to adopt the ordinance. Record 11.

This appeal followed.

MOTION TO DISMISS

ORS 197.830(2) sets out the requirements for standing to appeal to LUBA:

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

"(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and

"(b) Appeared before the local government, special district or state agency orally or in writing."

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

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

3 On March 9, 2021, the city filed a motion to dismiss the appeal because,
4 according to the city, petitioner did not appear below. For the reasons explained
5 below, the motion is granted.

6 In our March 3, 2021 order resolving petitioner's record objections, we
7 denied petitioner's objection that the record should include a letter that petitioner
8 emailed to the mayor, the city manager, and the city's attorney on November 2,
9 2020, the date that the city council held its only public hearing on the ordinance.
10 The city explains in its motion to dismiss that this letter provided the only basis
11 for petitioner's claim to have met the appearance requirement at ORS
12 197.830(2)(b). In denying petitioner's objection, we explained:

13 "Unless LUBA otherwise orders, or the parties otherwise agree in
14 writing, the record must include '[a]ll written testimony and all
15 exhibits, maps, documents or other materials specifically
16 incorporated into the record or placed before, and not rejected by,
17 the final decision maker, during the course of the proceedings before
18 the final decision maker.' OAR 661-010-0026(1)(b).

19 "* * * * *

20 "The city responds that, while petitioner emailed the letter to the city
21 manager and the city's attorney before the public hearing started,
22 because petitioner did so at 5:35 p.m.—after close of business—
23 neither person saw the email or physically placed it before the city
24 council before the record was closed during the meeting. The city
25 also responds that petitioner did not email the letter to the mayor
26 until 8:41 p.m.—after the hearing had concluded. Further, the city
27 responds that the public notice for the hearing directed participants

1 to email comments to a specific email address: ‘Written comments
2 are encouraged and may be submitted to the planning department by
3 mail, by emailing planning@cityofbandon.org, or in-person at City
4 Hall.’ Record 85. Thus, the city responds that the letter was not
5 ‘placed before * * * the final decision maker, during the course of
6 the proceedings before the final decision maker.’ OAR 661-010-
7 0026(1)(b).

8 “In *Neighbors 4 Responsible Growth v. City of Veneta*, the public
9 notice for the city’s hearing provided similar instructions for how
10 comments were to be submitted, as well as a deadline for submitting
11 such comments. 50 Or LUBA 745, 754 (2005). Although a
12 participant emailed comments to the correct email address, they did
13 so after the deadline. *Id.* at 753-54. We repeated the three most
14 common ways to place documents before a decision maker:

15 “‘Items are placed before the local decision maker if (1) they
16 are physically placed before the decision maker prior to the
17 adoption of the final decision; (2) they are submitted to the
18 decision maker through means specified in local regulations
19 or through appropriate means in response to a request by the
20 decision maker for submittal of additional evidence; or (3)
21 local regulations require that the item (*e.g.*, record of a lower
22 level decision maker’s proceeding) be placed before the
23 decision maker.’ *Id.* at 754 (quoting *ONRC v. City of Oregon*
24 *City*, 28 Or LUBA 775, 778 (1994)).

25 “We observed that, although the city did not have generally
26 applicable rules governing pre-hearing submittal of comments, the
27 instructions in the public notice nonetheless implicated the second
28 of the above-described methods. *Id.* We remarked that, if the
29 comments had been sent to and received by the city before the
30 deadline, and city staff thereafter failed to provide those comments
31 to the decision maker, we likely would have agreed that the
32 comments were placed before the decision maker within the
33 meaning of OAR 661-010-0025(1)(b). *Id.* However, because the
34 sender did not follow the instructions in the public notice, we
35 concluded that their comments could only have been placed before
36 the decision maker if city staff or petitioner physically placed the

1 comments before the decision maker. *Id.* at 754-55. That there was
2 an additional business day between when the comments were
3 submitted and when the hearing was held and that the sender also
4 sent the comments to other city staff were not by themselves
5 sufficient. *Id.* at 753, 753 n 3. Had any staff that received a copy of
6 the comments physically placed them before the decision maker,
7 then they would have been part of the record. *Id.* at 754-55. Because
8 that did not happen, however, we concluded that the comments were
9 not part of the record. *Id.*

10 “Similarly, here, the public notice of the November 2 public hearing
11 specified how and to whom comments were to be submitted.
12 Accordingly, because petitioner did not comply with those
13 instructions, we agree with the city that the email was not placed
14 before the decision maker and is not part of the record.” Slip op at
15 8-10.

16 In their response to the motion to dismiss, petitioner renews their argument
17 that they appeared before the local government by emailing their comments to
18 the mayor at 5:48 p.m. on November 2, 2020, before the public hearing began at
19 7:00 p.m., and argues that, because the mayor did not reject the testimony, their
20 comments are part of the record and petitioner satisfied the appearance
21 requirement. Response to Motion to Dismiss 1-2. The city disputes that petitioner
22 emailed the mayor before the public hearing began. The city’s January 19, 2021
23 response to the record objections included a declaration made by the mayor. The
24 time stamp on a copy of petitioner’s email that is attached to that declaration
25 states that the email was “Sent: Monday, November 2, 2020 8:41pm.” On
26 February 1, 2021, the city filed a supplemental declaration made by the mayor,
27 which states, “I did not receive an email from [petitioner] at 5:35 pm on
28 November 2, 2020 or any time prior to the email that I received and responded to

1 at 8:41 pm on that date, as stated in my initial declaration.” However, whether or
2 not petitioner *emailed* the mayor before the November 2, 2020 public hearing
3 began at 7:00 p.m., the mayor did not *receive* the email before the hearing.

4 More importantly, petitioner has not established that sending an email to
5 one member of the city council, the mayor, is sufficient to place that email before
6 the entire decision making body. We have repeatedly held that documents which
7 are presented to individual decision makers, but not to the entire decision making
8 body, and which are not physically placed before the entire decision making body
9 by any of the individual recipients, are not “placed before” the final decision
10 maker for purposes of OAR 661-010-0025(1)(b) and are not part of the record.
11 *Restore Oregon v. City of Portland*, 79 Or LUBA 1041, 1047 (2019); *Van Dyke*
12 *v. Yamhill County*, 78 Or LUBA 1036, 1047-48 (2018). Petitioner does not
13 explain how the email was placed before the final decision maker in this case, the
14 city council.

15 In the alternative, citing *Rice v. Monmouth*, 52 Or LUBA 780 (2006),
16 petitioner argues that the mayor’s “refusal to allow Petitioner to appear by
17 submitting his written testimony into the record of this proceeding obviates the
18 requirement that Petitioner appear in the proceeding below.” Response to Motion
19 to Dismiss 2. In *Rice*, the city allowed only one of the petitioners to submit
20 comments during a hearing following LUBA’s remand of a decision. We denied
21 a motion to dismiss the non-appearing petitioners from the appeal, explaining,
22 “While we need not and do not determine here whether the city erred by refusing

1 to allow petitioners other than petitioner Brown to appear below, that refusal
2 obviates the ORS 197.830(2) appearance requirement for those petitioners who
3 the city prevented from making an appearance.” *Rice*, 52 Or LUBA at 781. *Rice*
4 does not assist petitioner here because the city did not prevent petitioner from
5 making an appearance. Petitioner simply failed to comply with the procedures
6 for making an appearance that were set forth in the city’s public notice of the
7 November 2, 2020 hearing.

8 For the reasons explained above, we conclude that petitioner did not appear
9 before the local government as required by ORS 197.830(2)(b).

10 The appeal is dismissed.