

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

3  
4                                   JAN DILLEY and JODY McCaffree,  
5   *Petitioners,*

6  
7   vs.

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9                                   CITY OF NORTH BEND,  
10   *Respondent,*

11   and

12  
13  
14                                   SHN CONSULTING ENGINEERS  
15   & GEOLOGISTS, INC.,  
16   *Intervenor-Respondent.*

17  
18   LUBA No. 2014-061

19  
20   FINAL OPINION  
21   AND ORDER

22  
23                                   Appeal from City of North Bend.

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25                                   Jan Dilley and Jody McCaffree, North Bend, filed the petition for review  
26 and argued on their own behalf.

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28                                   Michael Stebbins, North Bend, filed a joint response brief on behalf of  
29 respondent. With him on the brief were Stebbins, Coffey & Collins and Perkins  
30 Coie LLP.

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32                                   Seth J. King, Portland, filed a joint response brief and argued on behalf  
33 of intervenor-respondent. With him on the brief were Perkins Coie LLP and  
34 Stebbins, Coffey & Collins.

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36                                   RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board  
37 Member, participated in the decision.

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39                                   REMANDED

01/27/2015

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

**NATURE OF THE DECISION**

Petitioners appeal a city council decision dismissing petitioner Dilley’s appeal of a planning commission decision.

**FACTS**

SHN Consulting Engineers and Geologists, Inc. (intervenor) applied for a conditional use permit and variance for temporary housing for 2,000 construction workers, on 49 acres of property located to the west of Simpson Park and Ferry Road Park, which are city-owned parks. The construction workers would work on a liquefied natural gas terminal and pipeline approved in other decisions.

On March 17, 2014, the planning commission held a hearing on the applications. Petitioner McCaffree provided oral and written testimony. At the conclusion of the March 17, 2014 hearing, the planning commission left the record open for 7 days for submission of new evidence and testimony, and then allowed intervenor an additional 7 days to respond to any new evidence provided during the open record period, and 7 additional days for intervenor to provide its final arguments. With the evidentiary record closed, the planning commission then scheduled a decision on the applications to be made at an April 21, 2014 planning commission meeting. Supplemental Record 118.

At the beginning of the April 21, 2014 planning commission meeting, prior to the commencement of deliberations on intervenor’s applications, McCaffree, Dilley and one other member of the public testified during the “public comment” portion of the meeting. In connection with her testimony, Dilley provided her name and address on the “City of North Bend Public Comment Sign In Sheet.” Supplemental Record 108. After the public

1 comment portion of the meeting, the planning commission opened  
2 deliberations on the applications, and voted to approve the applications with  
3 conditions.

4 Dilley and McCaffrey subsequently received mailed notice of the  
5 planning commission’s decision. Supplemental Record 108. Dilley appealed  
6 the planning commission’s decision to the city council. Intervenor moved to  
7 dismiss Dilley’s appeal of the planning commission decision, arguing that  
8 Dilley failed to satisfy the requirement of North Bend City Code (NBCC)  
9 18.92.020(2) that requires in relevant part that an appellant establish “party  
10 status.” The city council determined that Dilley failed to establish “party  
11 status” and dismissed Dilley’s appeal. This appeal followed.

12 **FIRST ASSIGNMENT OF ERROR**

13 NBCC 18.92.020 provides the requirements for appealing a planning  
14 commission decision:

15 “Appeals from discretionary land use decisions of the hearings  
16 officer or planning director go to the planning commission and  
17 appeals from the planning commission go to the city council.  
18 Appeal hearings shall be conducted as de novo hearings and shall  
19 be taken under the following procedures:

20 “ \* \* \* \* \*

21 “(2) The notice of appeal *shall establish the appellant’s party*  
22 *status* and raise all appeal issues relied on with sufficient  
23 specificity as to afford the planning commission or city  
24 council and other parties an adequate opportunity to respond  
25 to and resolve each issue. An issue which may be the basis  
26 for an appeal shall be raised during the applicable public  
27 comment period for the decision. Such issues shall be raised  
28 and accompanied by statements or evidence sufficient to  
29 afford the planning commission or city council an  
30 opportunity to respond to each issue.” (Emphasis added.)

1 Although the NBCC requires an appellant to establish “party status” the NBCC  
2 does not define “party status” or explicitly tell a potential appellant how to  
3 establish “party status.” The result of that lack of a definition of the phrase or  
4 either of the words used in the phrase is that the city must determine in a post  
5 hoc fashion, as it did in this case, whether an appellant has achieved “party  
6 status” in order for a filed appeal to proceed.

7 **A. The City Council’s Interpretation**

8 In order to ascertain the meaning of “party status” and determine whether  
9 Dilley had established “party status” the city council first looked at context  
10 provided by language in NBCC 18.92.020(2), and in two other NBCC  
11 provisions that the city found related to NBCC 18.92.020(2): NBCC 18.56.120  
12 and NBCC 18.60.040.<sup>1</sup> All three code provisions contain language that  
13 generally requires an issue that is the basis for an appeal must be raised prior to

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<sup>1</sup> NBCC 18.92.020(2), quoted above, requires that “[a]n issue which may be the basis for an appeal shall be raised during the applicable public comment period for the decision. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the planning commission or city council an opportunity to respond to each issue.”

NBCC 18.56.120(1)(C) provides that for an appeal of a decision involving property located within the Airport Overlay Zone “[f]ailure to raise an issue either orally or in writing at a public hearing concerning the matter precludes appeal based on that issue.”

NBCC 18.60.040 requires in relevant part that the notice of a hearing on an application for a conditional use permit must “state that a failure to raise an issue at the hearing in person or by letter or to provide sufficient specificity to afford an opportunity to respond to an issue precludes appeal on that issue[.]”

1 the close of the public record or hearing on an application.<sup>2</sup> The city council  
2 next looked at context provided in the city’s Notice of Decision that was sent to  
3 Dilley, McCaffree, and others. Supplemental Record 109-112. The Notice of  
4 Decision includes a section at the end entitled “Appeal Provisions.” That  
5 section sets out the requirements for a notice of appeal and provides in relevant  
6 part that the notice of appeal requires:

7 “2. Statement of the interest of the appellant and whether the  
8 appellant has ‘standing to appeal.’ An individual is said to  
9 have ‘standing to appeal’ if the person:

10 “a. Appeared before the Planning Commission orally or  
11 in writing or,

12 “b. was a person entitled to receive mailed notice of the  
13 hearing prior to the decision or anyone requesting  
14 notice of the decision, and was a person whose  
15 interests are adversely affected by the decision. \* \* \*”  
16 Supplemental Record 112.

17 Based on the context provided by the cited NBCC provisions and the  
18 description of “standing to appeal” in the Notice of Decision, the city council  
19 interpreted “party status” to mean that an appellant must establish that he or  
20 she: (1) appeared orally or in writing before the planning commission during  
21 the planning commission hearing on an application; (2) was entitled to receive

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<sup>2</sup> NBCC 18.92.020(2) additionally appears to include a local “exhaustion waiver” requirement that an appellant’s notice of appeal specify the appeal issues with specificity in order to afford the planning commission or city council, whichever hears the appeal, an adequate opportunity to respond to and resolve each issue. *See Miles v. City of Florence*, 190 Or App 500, 510, 79 P3d 382 (2003) (a party may not raise an issue at LUBA if no party specified the issue as a basis for appeal before the local appeal body).

1 mailed notice of the hearing prior to the hearing; or (3) requested notice of the  
2 decision and is adversely affected by the decision:

3 “In addition to the standing requirements in the NBCC, the  
4 Council finds that the City’s April 23, 2014 mailed Notice of  
5 Decision defines ‘standing to appeal’ to include the requirement  
6 that the appellant have ‘appeared before the Planning Commission  
7 orally or in writing or was entitled to receive notice or requested  
8 notice.’” Supplemental Record 29.

9 Against that interpretational backdrop, we review petitioners’ challenges to the  
10 city council’s determination that Dilley failed to establish “party status.”

11 **B. Appeared Before the Planning Commission**

12 Petitioners argue that the city council incorrectly concluded that Dilley  
13 failed to appear before the planning commission. Petitioners argue that Dilley  
14 appeared before the planning commission when she provided oral testimony in  
15 opposition to the applications during the public comment portion of the April  
16 21, 2014 planning commission meeting.

17 As explained above, the city council concluded that one of the  
18 enumerated ways that an appellant can demonstrate “party status” is to  
19 demonstrate that an appellant “[a]ppeared before the [p]lanning [c]ommission  
20 orally or in writing[.]” Supplemental Record 112. We understand the city  
21 council to have interpreted that phrase to require an appearance while the  
22 planning commission hearings on the application remained open, and to have  
23 concluded that Dilley had not appeared before the planning commission during  
24 any public hearing, because her oral testimony was provided after the record  
25 had closed and during the public comment portion of the planning  
26 commission’s April 21, 2014 meeting. Supplemental Record 29, 30.

1           Petitioners do not challenge that interpretation. Accordingly, petitioners  
2 have not demonstrated that the city council erred in concluding that Dilley did  
3 not appear before the planning commission orally or in writing. As intervenor  
4 and the city (respondents) point out, there is no dispute that Dilley did not  
5 provide oral or written testimony prior to the close of the evidentiary record  
6 before the planning commission.<sup>3</sup> Accordingly, we agree with respondents that  
7 the city council correctly concluded that Dilley did not appear before the  
8 planning commission orally or in writing while the record of proceedings on  
9 the applications was open, and thus did not establish “party status” to file a  
10 local appeal, under that prong of the city council’s understanding of that term.

11           **C. Requested Notice of the Decision**

12           Based on context provided in the “Notice of Decision,” the city council  
13 also interpreted “party status” to mean that an appellant can establish “party  
14 status” if she requested notice of the decision and is adversely affected by the  
15 decision. Supplemental Record 12. Petitioners argue that Dilley both  
16 requested notice of the decision and alleged in her appeal statement that she is  
17 adversely affected by the decision, and that the city council erred in concluding  
18 that Dilley did not request notice of the decision. Petition for Review 16. The  
19 city council concluded that Dilley “\* \* \* \* did not request notice.”

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<sup>3</sup> A member of the planning commission stated during the public comment portion of the April 21, 2014 meeting at which Dilley provided oral comments that comments on the applications that were provided during the public comment portion of the meeting would not be “on the record” or “on the official record of the hearing.” Petition for Review App. 87-88.

1 Supplemental Record 12. Intervenor and the city (respondents) respond that  
2 there is no evidence in the record that Dilley requested notice of the decision.<sup>4</sup>

3         Petitioners argue that Dilley requested notice of the decision when she  
4 provided her name and address on the “City of North Bend Public Comment  
5 Sign In Sheet.” Supplemental Record 108. Petitioners further argue that the  
6 city understood her contact information included on the Public Comment Sign  
7 In Sheet to be a request for notice of the decision, because the city sent her  
8 notice of the decision based on that sign-in sheet request. Supplemental  
9 Record 108.

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<sup>4</sup> The city council also found:

“In response to Ms. Dilley’s comment that she is affronted by the standing requirement contained in the April 21, 2014 Notice of Decision which states ‘a person entitled to receive mailed notice ... or anyone requesting notice of the decision, and was a person whose interests are adversely affected by the decision,’ the Council finds that these are statutory notice requirements from ORS 227.175(10)(a)(C). These standing requirements apply to decisions made without a hearing. The Council finds that a hearing was held in this matter, Ms. Dilley was not entitled to receive notice, nor did she request notice, thus she does not qualify for standing under these provisions. Further, the Council finds no authority in the NBCC for this independent basis for standing.” Supplemental Record 30.

We are not sure what the city means in the above findings. If the findings are an attempt to limit an appellant’s avenue for demonstrating “standing to appeal” by demonstrating that she requested notice of the decision and is adversely affected by the decision to permit decisions made without a hearing in accordance with the requirements in ORS 227.175(10), the text of the “standing to appeal” provisions provides no support for that interpretation.

1           The document at Supplemental Record 108 is identified in the table of  
2 contents as the “Planning Commission Decision Mailing List 4/23/14.” The  
3 decision mailing list is a copy of the “City of North Bend Public Comment Sign  
4 In Sheet” for the March 17, 2014 planning commission meeting (on the top of  
5 Supplemental Record 108) and for the April 21, 2014 planning commission  
6 meeting (on the bottom of Supplemental Record 108), marked at the top with a  
7 handwritten notation “mailed 4/23/14.” Based on that decision mailing list, it  
8 is clear that that the city understood the public comment sign in sheets for the  
9 planning commission meetings at which the applications were considered to be  
10 a request for notice of the decision. Accordingly, we agree with petitioners that  
11 Dilley has established that she “requested notice of the decision,” and that the  
12 city council erred in dismissing her appeal for failure to demonstrate “party  
13 status” on that basis.

14           In her appeal statement, Dilley alleged she is adversely affected by the  
15 planning commission’s decision because she resides nearby the project site and  
16 the decision impinges on her right to enjoy the Simpson Park-Ferry Park  
17 network of wooded trails. Supplemental Record 82. The city council did not  
18 reach the question of whether Dilley is “adversely affected” by the decision,  
19 because it concluded that she had not “requested notice of the decision,” and so  
20 failed to satisfy that prong. The NBCC does not define the phrase “adversely  
21 affected” and the Notice of Decision also does not explain the meaning of the  
22 phrase. The question of whether Dilley is “adversely affected” by the decision  
23 is properly addressed by the city council in the first instance.<sup>5</sup>

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<sup>5</sup> In *Burke v. Crook County*, 46 Or LUBA 413, 426-27 (2004), we concluded that where the county’s code required a showing that an appellant was “adversely affected by a land use decision as defined in the ORS,” the meaning

1 The first assignment of error is sustained, in part.

2 **SECOND ASSIGNMENT OF ERROR**

3 During the city council hearing that led to the city council’s dismissal of  
4 the appeal, McCaffree argued that McCaffree was a co-appellant with Dilley.  
5 Supplemental Record 19. The city council concluded that McCaffree was not a  
6 co-appellant:

7 “The ‘from line’ at the top of the notice states ‘Fm: Jan Dilley’

8 “Across the top of every signature page is written ‘I endorse an  
9 appeal against it, filed by Jan Dilley.’

10 “The regarding line in Ms. McCaffree’s letter states ‘RE: Support  
11 Documentation for Jan Dilley’s Appeal.’” Supplemental Record  
12 13.

13 In their second assignment of error, we understand petitioners to argue that the  
14 city council’s conclusion that McCaffree did not join in Dilley’s appeal is not  
15 supported by substantial evidence in the record. ORS 197.835(9)(a)(C).  
16 According to petitioners, evidence in the record demonstrates that McCaffree  
17 was a co-appellant with Dilley in filing a single appeal of the planning  
18 commission’s decision. In support, petitioners point to a petition that includes  
19 6 pages of names, addresses, and signatures for 61 people, including  
20 McCaffree, that Dilley attached to her appeal statement. At the top of each  
21 page of names is the following statement:

22 “I am opposed to the temporary housing for 2,000 workers  
23 planned for Simpson Heights. I endorse an appeal against it, filed  
24 by Jan Dilley.” Supplemental Record 94-99.

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most likely intended was the longstanding meaning of that term that has existed in the land use context at least since LUBA’s enabling statute was enacted in 1979, *citing Jefferson Landfill Committee v. Marion County*, 297 Or 280, 283, 686 P2d 310 (1984).

1           Neither petitioners nor respondents cite any city standards that authorize  
2 persons, who may or may not have party status, to join an appeal that is filed by  
3 someone who has party status to appeal. We agree with respondents that  
4 petitioners have not established that McCaffree or any of the other 60 persons  
5 must be joined as appellants with Dilley, simply because they stated that they  
6 “endorse” or “[s]upport” Dilley’s appeal.

7           The second assignment of error is denied.

8           **THIRD ASSIGNMENT OF ERROR**

9           In their first three subassignments of error under their third assignment  
10 of error, petitioners argue that the city and/or the planning commission  
11 committed procedural errors in failing to (1) continue the March 17, 2014  
12 public hearing after McCaffree requested that the record be left open; (2)  
13 include Simpson Park and Ferry Park Road within the project boundary for  
14 purposes of determining who was entitled to receive pre-hearing notice of the  
15 hearing on the applications; and (3) adequately manage and account for  
16 documents submitted into the record. In their fourth subassignment of error,  
17 petitioners argue that the city council erred in accepting a document submitted  
18 to the city council in support of the applications into the record after the record  
19 was closed. In their fifth subassignment of error, petitioners argue that the  
20 planning commission members and city council members committed  
21 procedural error in failing to disclose any ex parte contacts or declare bias at  
22 the hearings on the applications.

23           Because we conclude that Dilley has established that she requested  
24 notice of the decision, the appropriate disposition is to remand the decision to  
25 the city council. Accordingly, it would be premature for us to address

1 petitioners' assignments of error that argue procedural errors were committed  
2 by the planning commission and the city council.

3 We do not reach the third assignment of error.

4 The city's decision is remanded.