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

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ROLLAND SLATTER and HELEN)
SLATTER,)
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Petitioners,)
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and)
)
JOHN FOGERTY,)
)
Participant-)
Petitioner,)
)
vs.)
)
WALLOWA COUNTY,)
)
Respondent,)
)
and)
)
MARK HEMSTREET,)
)
Participant-)
Respondent.)

LUBA No. 87-105

FINAL OPINION
AND ORDER

Appeal from Wallowa County.

Roland W. Johnson, Wallowa, and Raymond S. Baum, La Grande
filed a joint petition for review and argued on behalf of
petitioners and participant-petitioner.

Jonel K. Ricker, Enterprise, filed a response brief and
argued on behalf of participant-respondent Mark Hemstreet.

No appearance by Wallowa County.

HOLSTUN, Referee; BAGG, Chief Referee; SHERTON, Referee,
participated in the decision.

REMANDED 04/15/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners and participant-petitioner Fogerty appeal a
4 Wallowa County order approving a conditional use permit (CUP)
5 to allow construction of a motel, restaurant, bar and
6 recreational vehicle park on 7.5 acres adjacent to the Grande
7 Ronde River near the unincorporated village of Troy, Oregon.

8 FACTS

9 The participant-respondent (respondent) in this proceeding
10 was the applicant below. The 7.5 acre site is located between
11 a county road on the west and the Grande Ronde River to the
12 east. The proposal calls for a small island adjacent to the
13 existing upland portion of the site to be developed with 20
14 recreational vehicle spaces and a restroom and shower
15 facility. A 24-unit motel and lounge would be developed on the
16 upland portion of the property, adjacent to the Grande Ronde
17 River.

18 The property is zoned Timber/Grazing (TG). Recreational
19 facilities are allowed as a conditional use in the TG Zone.
20 The unincorporated village of Troy, located immediately to the
21 south, is zoned Rural Service (R-3). The proposed use is
22 permitted outright in the R-3 Zone.

23 During the county planning commission's deliberations on
24 the CUP, the then owner of the Little River Inn, located in
25 Troy, objected to the proposal stating the market area would
26 not support both his business and the proposed development.

1 Other persons testified regarding flood hazards. The flood
2 hazard maps adopted by the county do not show the property to
3 be within an area of flood hazard. However, a more recent map
4 prepared under the Federal Flood Insurance Program shows the
5 proposed site to be within the flood plain.

6 Prior to the planning commission's decision, one planning
7 commission member, who ultimately voted in favor of the
8 conditional use permit, announced that her husband was a
9 realtor representing the owner of the property. She declared
10 her husband's interest in the property would not affect her
11 decision, and she declined to abstain. The planning commission
12 acted to approve the conditional use permit; five commissioners
13 voting to approve, two voting to deny and one member abstaining.

14 Petitioners and participant-petitioner appealed the
15 planning commission decision to the county court. Prior to the
16 county court hearing, a local newspaper reported respondent had
17 purchased the Little River Inn in Troy, and also reported
18 respondent had stated:

19 "It is doubtful that he will ever build a lodge on the
20 seven acres outside the township for which he obtained
a conditional use permit last month." Record 49.

21 The notice preceeding the county court's hearing stated the
22 hearing would be on the record and that no new evidence would
23 be allowed. Petitioners requested an evidentiary hearing
24 before the county court or remand to the planning commission,
25 based on respondent's acquisition of the Little River Inn and
26 statements regarding his plans for use of the property subject

1 to the conditional use permit.

2 Petitioners' request for a new evidentiary hearing or
3 remand to the planning commission was denied. A letter from
4 the District Attorney stated:

5 "The County Court does not agree that the
6 'developments' you referred to since granting the
7 permit are relevant in the appeal process." Supp.
8 Record 1.

9 The county court conducted its on the record review
10 proceeding on October 7, 1987, and at its November 4, 1987
11 meeting adopted the order appealed in this proceeding. In its
12 decision the county imposed a condition that the applicant
13 retain a licensed engineer or hydrologist to identify the 100
14 year flood level and required that the lowest inhabitable floor
15 of any new structures be elevated one foot above the 100 year
16 flood level.

16 STANDING

17 Respondent challenges the standing of petitioners on the
18 ground that petitioners' appeal was not filed with the county
19 clerk. Respondent challenges participant-petitioner's standing
20 on the grounds he did not participate before the planning
21 commission and did not file his appeal within the time required
22 by the Wallowa County Zoning Ordinance (WCZO).

23 Petitioners appeared before the planning commission and the
24 county court. Participant-petitioner Fogerty mailed a letter
25 opposing the application to the planning commission four days
26 before its decision; however, that letter was not received

1 until one day after the planning commission rendered its
2 decision.

3 The planning commission's decision was dated August 28,
4 1987. Under WCZO Sec. 10.050, appeal of that decision was
5 required to be filed with the county clerk within 15 days
6 thereafter. Under WCZO Sec. 10.050, if an appeal is not filed
7 within 15 days, the planning commission's decision is final.

8 The planning commission's decision erroneously stated the
9 last day for filing an appeal to the county court was
10 September 7, 1987. Petitioners point out the correct deadline
11 for filing an appeal to the county court was September 12,
12 1987. Since September 7, 1987 was Labor Day, a legal holiday
13 on which county offices were closed, petitioners asked the
14 county planning department how to file their appeal on
15 September 7. The planning department, after consulting with
16 the District Attorney, advised petitioners the deadline for
17 filing the appeal could not be extended past September 7, 1987,
18 but said the appeal could be filed at the sheriff's office,
19 which would be open on Labor Day. Petitioners filed their
20 appeal at the sheriff's office on September 7.

21 Participant-petitioner Fogarty did not file his appeal of the
22 planning commission's decision until October 1, 1987.

23 Respondent does not dispute that petitioners and
24 participant-petitioner appeared before the county court and
25 took positions adverse to the decision adopted by the county.
26 Neither does respondent dispute that petitioners and

1 participant-petitioner are adversely affected by the county's
2 decision. The county apparently, although not expressly,
3 rejected respondent's argument that the petitioners' appeal of
4 the planning commission decision was not properly or timely
5 filed when it proceeded to review the planning commission's
6 decision on the merits.

7 The petitioners filed their appeal as instructed by the
8 county. We conclude the county was well within its discretion
9 to proceed with the appeal even though the appeal was not filed
10 with the the county clerk. Respondent provides no basis for us
11 to conclude filing with the county clerk was jurisdictional or
12 that he was prejudiced by the county's decision to allow the
13 Sheriff to accept the appeal.¹ To the extent petitioners'
14 filing of the appeal with the Sheriff was error, it was a
15 technical procedural error and respondent claims no prejudice.
16 See ORS 197.835(8)(a)(B).

17 We conclude petitioners and participant-petitioner Fogerty
18 have standing before LUBA. The WCZO requires the county court
19 to hold a public hearing. As appellants, petitioners were
20 entitled to notice of the hearing. Petitioners and
21 participant-petitioner appeared at the hearing before the
22 county court and took positions contrary to the decision
23 ultimately adopted by the county court. Accordingly,
24 petitioners and participant-petitioner satisfy the test for
25 standing before this Board on the basis of aggrievement, as
26 described in Jefferson Landfill Comm. v. Marion Co., 297 Or

1 280, 284, 686 P2d 310 (1984).²

2 FIRST ASSIGNMENT OF ERROR

3 "The County Court's decision to review the record de
4 novo and to not reopen the record or remand the
5 proceeding [sic] to the Planning Commission for a new
6 hearing violated Petitioner's due process rights in
7 that at the original hearing before the Planning
8 Commission a Planning Commission member had a direct
9 financial interest in the proceeding in violation of
10 ORS 215.035."

11 Petitioners argue the record shows one planning commission
12 member's husband had a direct financial interest (potential
13 real estate commission) in the decision. Petitioners argue
14 this planning commission member's decision to participate in
15 the decision violates ORS 215.035³ and their right to a
16 hearing before an unbiased decisionmaker, i.e., one without an
17 improper financial interest in the outcome.

18 In its decision, the county court rejected petitioners'
19 argument, that the conflict of interest of the planning
20 commission member required remand of the decision, on two
21 bases. First, the county court questioned whether the real
22 estate commission was dependent on the conditional use permit
23 approval. Second, the county court determined that because it
24 reviewed the planning commission record de novo and entered its
25 own findings and conclusions, the final decision was not
26 affected by whatever conflict of interest the planning
27 commission member may have had.

28 Respondent agrees with the county and adds the planning
29 commission member's participation was minimal and petitioners

1 waived their right to object to that participation based on the
2 planning commissioner's asserted financial interest because
3 they failed to object following disclosure of that interest by
4 the planning commission member.

5 We reject respondent's suggestion that participation
6 otherwise proscribed by the 14th Amendment would be acceptable
7 if the participation was minimal. However, for purposes of
8 this assignment of error, we need not determine whether the
9 planning commission member had an actual financial interest
10 such that, under ORS 215.035 and federal 14th Amendment
11 standards of due process, she should not have participated in
12 this decision. See 1000 Friends of Oregon v. Wasco County
13 Court, 304 Or 76, 88, 742 P2d 39 (1987) (establishing a three
14 part inquiry for determining whether the 14th Amendment
15 requires disqualification of a decisionmaker in a
16 quasi-judicial proceeding). We agree with respondent that
17 petitioners should have raised their objections at the time the
18 planning commission member announced her interest in the
19 property. See Union Station Business Community Association v.
20 City of Portland, 14 Or LUBA 556, 558 (1986); Younger v. City
21 of Portland, 15 Or LUBA 616, 617 (1987). By failing to do so,
22 petitioners and participant-petitioner waived their rights to
23 object to her participation.

24 Even if petitioners and participant-petitioner did not
25 waive their right to argue they were denied a hearing before an
26 impartial tribunal, the first assignment of error must be

1 denied. While the county court's review was on the record, it
2 was a de novo review of the record. We agree with the county
3 that the county court's de novo review of the planning
4 commission's decision gave petitioners the hearing before an
5 impartial decisionmaker that they are entitled to under the
6 14th Amendment. In Utah International v. Wallowa County, 7 Or
7 LUBA 77 (1983), we held the county court's de novo review of
8 the planning commission record, resulting in a county court
9 order with its own findings and conclusions, operated to cure
10 any impermissible bias on the part of the planning commission,
11 absent a "fatal link between the alleged lack of fairness at
12 the planning commission level and the county court decision
13 * * *." Id. at 83.

14 Petitioners attempt to distinguish our decision in Utah
15 International, claiming that case involved actual bias rather
16 than a financial interest or a violation of ORS 215.035.
17 Petitioners also claim that to allow such errors by the
18 planning commission to be cured by de novo review renders their
19 rights under the due process clause and ORS 215.035 of no
20 effect because virtually all planning commission decisions are
21 reviewable by the county governing body.

22 We find petitioners' attempt to distinguish Utah
23 International unpersuasive. In our view, any different type of
24 interest present in the decisionmakers in that case and the
25 fact county planning commission decisions typically may be
26 appealed to the county governing body for de novo review,

1 provide an insufficient basis for following a different rule in
2 this case. Nothing in ORS 215.035 or the general statutory
3 provisions concerning government ethics at ORS 244.010 et seq.
4 specify that the remedy for violations of conflict of interest
5 provisions must be remand or reversal of the decision. While a
6 violation of 14th Amendment guarantees could provide a basis
7 for reversal or remand, as far as we can tell, petitioners
8 received a hearing and decision from the county court that
9 fully comports with 14th Amendment due process protection as
10 explained by the Supreme Court in 1000 Friends v. Wasco County
11 Court, supra at 80-88.

12 We decline petitioners' invitation to depart from our
13 decision in Utah International. The first assignment of error
14 is denied.

15 SECOND AND THIRD ASSIGNMENTS OF ERROR

16 "It was error for the County Court to refuse to hold a
17 new public hearing to supplement the Record with the
18 events which occurred after the Planning Commission
19 hearing (and prior to the County Court's review
20 hearing) and which were material and could not have
21 been, with reasonable diligence, presented to the
22 Planning Commission.

23 "The County Court's refusal to hold a public hearing
24 was in error in that it was contrary to the provisions
25 of section 10.050 of the County Zoning Code and, under
26 the circumstances herein, Goal II, Policy 7, page 17
of the County Land Use Plan."

27 Petitioners argue the county court erred by failing to
28 conduct an evidentiary hearing to consider evidence regarding
29 the respondent's purchase of the Little River Inn in Troy.
30 This purchase followed the planning commission decision. Also,

1 petitioner argues an evidentiary hearing should have been held
2 to consider evidence that it would now be unnecessary to
3 develop the disputed 7.5 acre parcel as proposed.⁴

4 Petitioners argue that quasi-judicial decisions by their
5 very nature require the county to receive and consider all
6 relevant and material evidence. Petitioners argue that when
7 relevant and material evidence became available after the
8 planning commission rendered its decision, the county court had
9 a duty to accept and consider that evidence. More
10 specifically, petitioners argue WCZO Sec. 10.050, which
11 requires the county court to hold a "public hearing" on appeals
12 of a planning commission decision, and Goal II, Policy 7, which
13 requires decisions to be "made on a factual base," required
14 that the county court accept the new evidence petitioners
15 wished to offer.⁵

16 Respondent answers that WCZO Sec. 10.050 only requires a
17 public hearing, not necessarily an evidentiary hearing.
18 Respondent also argues it is irrelevant that the respondent
19 purchased other property that would allow the same use or that
20 respondent made statements reported by the local newspaper that
21 the property at issue might not be developed as proposed.
22 Respondent notes that he appeared at the county court hearing
23 and stated that the application was not made moot by the
24 purchase of the property in Troy.

25 The county clearly has statutory authority to require that
26 review of conditional use permit decisions by the county court

1 be limited to the record before the planning commission.
2 ORS 215.422(1)(a). However, as we read WCZO Section 10.050,
3 the type of public hearing the county court holds when it
4 reviews planning commission decisions is not clearly
5 specified. WCZO Sec. 10.050 simply says a "public hearing"
6 must be held by the county court on appeals from planning
7 commission decisions.

8 The general definition section in the zoning ordinance does
9 not define "public hearing." WCZO Sec. 1.030. However, the
10 zoning ordinance uses the term "public hearing" in other
11 contexts where evidentiary hearings clearly are envisioned.
12 The evidentiary hearing before the planning commission that led
13 to the decision at issue in this appeal was held pursuant to
14 WCZO Sec 7.030. Under WCZO Sec. 7.030, the planning commission
15 is required to conduct a "public hearing" before acting on a
16 conditional use permit. Also, when the zoning ordinance is
17 amended the WCZO requires the following procedure:

18 " * * * Before the Planning Commission may act on a
19 request for an amendment, it shall conduct a public
20 hearing at its earliest practicable meeting after it
21 is proposed and * * * after the hearing, prepare a
22 report setting forth a summary of facts and conditions
23 involved in the amendment and shall submit the same to
24 the County Court along with its recommendation for
25 approval, disapproval, or modification of the proposed
26 amendment. After receiving the recommendation of the
27 Planning Commission, the County Court may, at its own
28 discretion, hold a public hearing on the proposed
29 amendment. Final approval of the proposed amendment
30 shall be the responsibility of the County Court and
31 shall be by court order. * * *" WCZO Sec. 9.020
32 (emphasis added).
33 While the above sections are not conclusive, and the term

1 "public hearing" need not refer to an evidentiary hearing, we
2 believe the term, as used in the WCZO, means an evidentiary
3 hearing.⁶

4 As we read the county court's decision, it simply concluded
5 that respondent's purchase of property in Troy, and his
6 statements in a newspaper article that he probably would
7 develop the Troy site instead, did not affect its review of the
8 planning commission's decision. Respondent's statements were
9 equivocal. Nothing would prevent the respondent from changing
10 his mind, and respondent asked that the county court continue
11 its review.

12 If the only reason petitioners asserted for requesting an
13 evidentiary hearing was to present evidence in support of their
14 position that the county court's proceedings were rendered moot
15 by respondent's plans for his property in Troy, we would deny
16 these assignments of error. As we explain in our discussion of
17 the eleventh assignment of error, respondent's plans for
18 adjoining property, whatever those plans may have been, did not
19 render the proceedings before the county court moot. However,
20 petitioners also claimed respondent's purchase of property in
21 Troy and plans to develop that property would be relevant to
22 the issue of compliance with plan policies requiring
23 consideration of alternative sites. See discussion under fifth
24 assignment of error. We agree.

25 Because we conclude the county court incorrectly
26 interpreted WCZO Sec. 10.050 not to require an evidentiary

1 hearing, and petitioners apparently would have presented
2 evidence relevant to applicable approval criteria at such a
3 hearing, we sustain the Second and Third Assignments of Error.

4 FOURTH ASSIGNMENT OF ERROR

5 "The County Court erred in that it did not adopt
6 adequate findings, conclusions and statement of
7 reasons demonstrating that the application complied
8 with Goal VIII, Policy 6, Goal IX, Policy 2 & 4 and
9 Goal VII, Policy 9 of the County Land Use Plan."

10 Petitioners claim the county failed to identify relevant
11 criteria and failed to adopt findings, as required by
12 ORS 215.416, showing compliance with the following relevant
13 plan policies:

14 "That suitability of potential recreation development
15 be determined on the basis of location, demand,
16 carrying capacity, recreational fulfillment,
17 environmental effects, economics and related physical,
18 social and environmental concerns." Goal VIII, Policy
19 6.

20 "That encouragement and support be given to private
21 recreational developments where compatible with other
22 uses." Goal IX, Policy 2.

23 "That permit procedures be expedited for economic
24 development where compatible with other uses and
25 values." Goal IX, Policy 4.

26 "That developments which could alter or detract from
the scenic views and sites as identified in Appendix
VA and VB be publicly reviewed for compatibility."
Goal V, Policy 9.

Respondent concedes that these policies apply.

Respondent's Brief 10-11. Respondent answers, however, that
the county "need not set out the criteria verbatim."

Respondent's Brief 11. Respondent argues the county focused on
Goal VIII, Policy 6 and found there was a "demand for the type

1 of facility in the Troy area."⁷ Respondent's Brief 12.
2 Respondent cites us to numerous pages in the record which
3 respondent argues show there is a market demand for the
4 proposed facility. Respondent argues that the county
5 determined "need" for the facility is not a relevant
6 consideration.

7 Goal VIII, Policy 6 requires that the suitability of a
8 proposed recreation development be determined based on demand
9 and a number of other factors. Goal IX, Policies 2 and 4 and
10 Goal V, Policy 9 require that such development be compatible
11 with adjoining uses.

12 The county's findings simply recognize that the proposed
13 use is allowed as a conditional use in the TG zone, and that
14 there is a market demand for the facility. The closest the
15 county's findings come to addressing the plan policies cited by
16 petitioner is an unexplained conclusion that

17 "* * * the record indicates that the location of the
18 proposed use is appropriate so long as the flood plain
19 requirements are heeded. * * * There will be no
adverse environmental affects also due to the
conditions of sewage disposal approval included
herein." Record 6.

20
21 The county's conclusion that the site is appropriate is
22 insufficient, because the county failed to adopt findings
23 showing compliance with the plan standards cited by
24 petitioners. We sustain the Fourth Assignment of Error.⁸

25 FIFTH ASSIGNMENT OF ERROR

26 "The County Court erred in that it did not adopt

1 adequate findings, conclusions and statement of
2 reasons demonstrating that location of the proposed
3 use in the timber/grazing zone (rather than in the
4 adjacent R-3 zone) was consistent with Land Use Plan
5 Policies regarding preservation of resource land and
6 scenic sites."

7 Petitioners cite several plan policies requiring protection
8 of agricultural and grazing lands.

9 "That conversion of agricultural land to residential
10 or urban uses will be approved only after the
11 following have been determined:

12 "(A) There is a need consistent with related plan
13 objectives and policies.

14 "(B) That alternative locations suitable for the
15 proposed uses are unavailable.

16 "(C) That physical, social, economic and
17 environmental considerations have been taken into
18 account.

19 "(D) That the resulting uses will not likely
20 create undue interference with accepted farming
21 practices in the area, and that accepted farming
22 practices take precedence in any such disputes.

23 "(E) That the resulting uses will not create a
24 burden on existing water rights and uses." Goal
25 III, Policy 2:

26 "That the rural character and the open space
activities of agricultural uses be protected to
preserve the scenic attractiveness and living
conditions desirable to farm families and other county
residents." Goal III, Policy 3.

"That urban uses be separated from agricultural
activities by a transition area where development is
compatible with both urban and agricultural uses."
Goal III, Policy 4.

"That conversion of timber or grazing lands to
residential uses will be approved according to the
following guidelines: * * *

"(B) The proposed use will not interfere
seriously with the physical, social, economic and

1 environmental considerations." Goal IV, Policy 2.

2 Respondent does not argue the quoted plan policies do not
3 apply. The county adopted no findings explaining how the
4 proposed development would comply with the quoted plan
5 policies. The county, in its findings, simply notes that the
6 proposed use is a conditional use within the TG zone. That
7 notation is clearly insufficient to show that the cited
8 policies do not apply.

9 The policies cited by petitioners require a conclusion that
10 suitable alternatives to conversion of grazing land, which
11 would occur on the property at issue, do not exist. As
12 petitioners argue, land zoned to allow the proposed use
13 outright exists in Troy. While the county apparently believes
14 the proposed development would contain facilities that are
15 lacking at the site of the existing Little River Inn, there is
16 no finding that the uses proposed could not be accommodated at
17 the Little River Inn site or on other sites located within the
18 R-3 zoned area of Troy. We agree with petitioners that the
19 cited policies require such a finding.

20 The Fifth Assignment of Error is sustained.

21 SIXTH ASSIGNMENT OF ERROR

22 "The County Court's finding that there was demand for
23 the facility was in error in that it was not based
24 upon 'substantial evidence in the whole record' and
25 the County Court further erred in limiting its review
of need for the development on that site to one of
market demand for the facility."

26 Goal VIII, Policy 6, quoted supra under the fourth

1 assignment of error, requires the county to address a number of
2 considerations in determining the suitability of potential
3 recreational development. Among those considerations is
4 "demand". The county interprets the term "demand" to be market
5 demand. Record 6. We have no basis for questioning that
6 interpretation and we accept it as correct. Alluis v. Marion
7 County, 64 Or App 478, 481, 668 P2d 1242 (1983); Gordon v.
8 Clackamas County, 73 Or App 16, 20-21, 698 P2d 49 (1985).

9 Petitioners point to evidence in the record showing there
10 was insufficient market demand to support both the existing
11 Little River Inn and the proposed development. Petitioners
12 also argue the county was required by this plan policy to
13 consider, in determining market demand, why the demand could
14 not be satisfied on vacant R-3 zoned property in Troy.

15 We disagree with petitioners' argument that the county was
16 required by the cited plan policy to consider vacant but
17 appropriately zoned land. We read the plan policy only to
18 require consideration of demand for potential recreational
19 development. While we conclude in other portions of this
20 opinion that other policies do require consideration of
21 suitable alternative sites, we find no error in the county's
22 interpretation of this policy as not requiring such an inquiry.

23 Respondent emphasizes that the Little River Inn lacks
24 recreational vehicle facilities, overnight lodging, and lounge
25 facilities that would be provided in the proposed development.
26 Respondent's Brief 12. Petitioners and respondent both cite to

1 evidence in the record supporting their positions regarding
2 market demand for the proposed facility. While it is clear
3 that other policies render market demand, alone, an
4 insufficient basis on which to approve the proposed
5 development, we can not say the county erred in finding a
6 market demand exists. While we might not reach the same
7 conclusion the county reached, we cannot say the county's
8 conclusion is not supported by substantial evidence in the
9 whole record. Younger v. City of Portland, ___ Or ___, ___
10 P2d ___ (March 29, 1988).

11 The Sixth Assignment of Error is denied.

12 SEVENTH ASSIGNMENT OF ERROR

13 "The County Court erred in failing to require the
14 applicant to present scientific hydrologic data
15 establishing the elevation of 100 year probability
16 floodwaters on the site, as required by Goal VII,
17 Policy 4 (page 54) of the Land Use Plan and 44 CFR
18 60.3."

16 EIGHTH ASSIGNMENT OF ERROR

17 "The County Court erred in that it did not adopt
18 adequate findings, conclusions and statement of
19 reasons as to whether the recent Flood Insurance Rate
20 Maps were maps required to be enforced under Section
21 4.050 of the County Zoning Code and Goal VII, Policy 4
22 of the Land Use Plan."

21 NINTH ASSIGNMENT OF ERROR

22 "The County Court erred in that it did not adopt
23 adequate findings, conclusions and statement of
24 reasons to demonstrate that the application complied
25 with the elevation and floodproofing standards of
26 Section 4.050 of the Zoning Code and the Land Use Plan
Policies regarding flood plain development, to wit,
Goal VII, Policies 1-7, page 54."

26 //

1 TENTH ASSIGNMENT OF ERROR

2 "It was error for the County Court to order a permit
3 condition that delegated to the agent of the applicant
4 the authority to conclusively determine the elevation
5 of the 100 year flood level on the site."

6 Petitioners cite plan policies requiring that development
7 be appropriately restricted to protect against flood damage.⁹

8 Again, respondent does not argue these policies are not
9 approval criteria for the proposed development. Rather,
10 respondent answers in his brief as follows:

11 "The county properly addressed all criteria by
12 imposition of the following condition:

13 "(1) The applicant shall, prior to construction,
14 contract a licensed engineer or hydrologist to
15 determine the elevation of the 100 year flood
16 level at the site. Any new structure shall have
17 their lowest inhabitable floor elevated one foot
18 above the 100 year flood level. (Record 7 and 8).

19 "Though not specifically stated in this condition, the
20 condition implicitly requires further county review of
21 the data in determinations made by this private
22 engineer or hydrologist." Respondent's Brief 12-13.

23 Respondent goes on to state that he agrees with petitioners
24 that the exact location of the 100 year flood level is
25 uncertain and that more specific data must be developed for the
26 proposed development. Respondent argues the county intended
27 that there be additional opportunity for petitioners to rebut
28 evidence regarding the flood elevations and specific measures
29 to be imposed by the county to satisfy the quoted plan
30 policies. Respondent requests that we clarify that this was
31 the county's intent.

1 The county's decision does not conclude the required
2 standards will be met by the proposed development. Rather, the
3 county's decision delegates to respondent's engineer the
4 obligation to make specific determinations that may result in
5 compliance with flood related plan policies. As we have
6 explained in previous cases, this approach is inappropriate.
7 See Margulis v. City of Portland, 4 Or LUBA 89, 98 (1981);
8 Lousignont v. Union County, ___ Or LUBA ___ (LUBA No. 87-065,
9 December 9, 1987).

10 Additionally, we find nothing in the county's order or the
11 WCZO to require that additional hearings or other opportunities
12 for petitioners to submit evidence rebutting the studies to be
13 prepared by respondent's engineer will be provided. We cannot
14 assume such opportunities will be provided, and we cannot
15 accept respondent's invitation that we write such opportunities
16 into the county's order. Holland v. Lane County, ___ Or
17 LUBA ___ (LUBA No. 87-106, April 13, 1988).

18 The Seventh through Tenth Assignments of Error are
19 sustained.¹⁰

20 ELEVENTH ASSIGNMENT OF ERROR

21 "It was error for the County Court to rule that the
22 application was not moot."

23 Petitioners argue the respondent's purchase of the Little
24 River Inn and his statements that he planned to construct his
25 proposed development at that site rather than the site at issue
26 in this appeal rendered the proceeding before the county court

1 moot.

2 Local government adoption of a decision that has the effect
3 of replacing or repealing a prior decision will moot a pending
4 review proceeding challenging that prior decision. In such
5 cases, a challenge to the prior decision is moot because a
6 decision on the merits would have no effect. See Multnomah
7 County v. LCDC, 43 Or App 655, 603 P2d 1238 (1979); Carmel
8 Estates, Inc. v. LCDC, 51 Or App 435, 625 P2d 1367 (1981);
9 Turner v. Washington County, 70 Or App 575, 689 P2d 1318
10 (1984).

11 As we discussed under the second and third assignments of
12 error, respondent appeared before the county court and argued
13 that it should affirm the planning commission's approval of the
14 conditional use permit. Respondent urges that we affirm the
15 county court's decision in this proceeding. The fact he has
16 purchased an alternative site, and made statements reported in
17 the newspaper that he might not build on the subject site, does
18 not show the conditional use permit application was moot when
19 the county court reviewed the planning commission's decision.
20 The doctrine of mootness does not apply in such
21 circumstances.

22 The Eleventh Assignment of Error is denied.

23 The decision of Wallowa County is remanded.
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FOOTNOTES

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4 Neither has respondent raised this issue in a cross
petition as provided in OAR 661-10-075(3).

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6 Because participant-petitioner participated in the appeal
7 before the county court and we conclude that appeal was
8 properly conducted, we need not determine whether in view of
9 participant-petitioner's late filing of his notice of appeal or
a late receipt of his letter to the planning commission,
participant-petitioner lacked an independent right under WCZO
Section 10.050 to appeal the planning commission's decision to
the county court.

10 3
11 ORS 215.035 provides as follows:

12 "A member of a planning commission shall not participate in
13 any commission proceeding or action in which any of the
following has a direct or substantial interest:

14 " * * * the member's spouse * * * ."

15 4
16 The evidence to which petitioners refer is a newspaper
17 article in which respondent is quoted as saying that with his
18 purchase of the Little River Inn site in the City of Troy, it
is "doubtful" he will develop the disputed site. Record 49.

19 5
20 WCZO Sec. 10.050 and Goal II, Policy 7 provide in pertinent
part:

21 " * * * If an appeal is filed regarding an action of
22 the Commission pursuant to Article 1 - 8 of this
23 ordinance, the County Court shall receive a report and
recommendation thereon from the Planning Commission
and shall hold a public hearing on the appeal." WCZO
Sec. 10.050.

24 "That planning decisions be made on a factual base."
25 Goal II, Policy 7.

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Even if we only viewed the county's use of the term "public hearing" to be ambiguous, we noted in Orr v. Eugene, 6 Or LUBA 206 (1982) that a local government has an obligation to advise parties at what steps in its proceedings they will be allowed to present evidence. Id. at 212. We conclude WCZO Sec. 10.050 is not sufficient to advise parties they will not be permitted to present evidence to the county court in an appeal of a planning commission decision on a conditional use permit.

7

We address under the sixth assignment of error petitioners' separate challenge to the county's findings regarding demand under Goal VIII, Policy 6.

8

Because we conclude the county's findings are inadequate to demonstrate compliance with the plan policies, there would be no point in considering petitioners' argument that the record lacks substantial evidence upon which to conclude the policies are met. See e.g. McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986).

9

The policies petitioner relies on are as follows:

- "1. That developments not be planned nor located in areas likely subject to major damage or that could result in loss of life.
- "2. That flood proofing construction of utilities and structures be utilized in areas of likely inundation.
- "3. That flood-plains be used primarily for non-structural and non-residential purposes, e.g. recreation or agricultural operations which will not suffer major damage by periodic inundation.
- "4. That the National Flood Insurance Program and amendments thereto be used as the guide for future development in flood-plain areas.
- "5. That soils information be used to determine potential flood hazards and related characteristics which might affect functioning of subsurface sewage disposal systems, road and foundation construction, and other development factors.

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"6. That flood-plain uses which will not likely need protection by dams, dikes, and/or levies, will be preferred over uses which may need such protection.

"7. That it is more desirable (and cheaper), to prevent development from occurring within flood-plains than to allow such development and to construct protective devices as may be needed to prevent hazards." Goal VII.

10

We recognize the possibility that the county may lack the technical staff required to develop data necessary to properly apply the standards in policies one through seven quoted in footnote seven. One way to address those standards is to require applicants to develop the required technical data and submit that data for county review. However, because the county is ultimately responsible for determining compliance with the policies, it must require submission of such technical studies prior to approval, or at least submission of sufficient technical information to enable it to conclude that the standard will be met if reasonably detailed and objective conditions are imposed and satisfied. See Meyer v. City of Portland, 67 Or App 274, 678 P2d 741, aff'd 297 Or 82 (1984). Under such a procedure, petitioners would have an opportunity to address the issues they raise in these assignments of error and rebut the technical studies in an evidentiary hearing.