BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

STANDARD INSURANCE COMPANY, an Oregon corporation, Petitioner, vs. CITY OF HILLSBORO, Respondent, and HILLMAN POWELL COMPANY and ALBERTSON'S, INC., Intervenors-Respondent.	LUBA No. 89-012 FINAL OPINION AND ORDER

Appeal from City of Hillsboro.

Jack L. Orchard, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Ball, Janik & Novack.

Lawrence R. Derr, Portland, filed a response brief and argued on behalf of respondent and intervenors-respondent. With him on the brief was Weiss, DesCamp & Botteri.

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

REMANDED 06/21/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals City of Hillsboro Ordinance No. 3813, which designates a ten acre tract at the intersection of N.W. Walker Road and 185th Avenue as Commercial on the city's Comprehensive Plan Land Use Map.

MOTION TO INTERVENE

Hillman Powell Company and Albertson's, Inc. move to intervene on the side of respondent in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

This is the fifth time a comprehensive plan map amendment for the subject property has been appealed to LUBA. The previous four appeals concerned amendments from Washington County's (county's) Industrial (IND) plan map designation to the county's Neighborhood Commercial (NC) plan map designation. Our first two reviews resulted in decisions remanding that amendment. Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020, September 1, 1987) (Standard I); Standard Insurance Company v. Washington County, ____ Or LUBA ___ (LUBA No. 88-005, June 7, 1988) (Standard II).[1]

Our decision in Standard II was appealed to the Court of Appeals, which issued an opinion affirming our decision on Serptember 14, 1988. Standard Insurance Company v. Washington County, 93 Or App 78, 761 P2d 534 (1988). The Court of Appeals

issued its appellate judgment in Standard II on February 3, 1989.

Prior to issuance of the Court of Appeals' appellate judgment, the county commenced proceedings to address the deficiencies in its decision identified by the Court of Appeals and this Board in Standard II. On November 8, 1988, the Washington County Board of Commissioners (board of commissioners) adopted a resolution and order reapproving the plan amendment. Petitions for reconsideration of that decision were filed with the board of commissioners on November 8 and 9, 1988. On November 9, 1988, the subject property was annexed by the City of Hillsboro. Under the Washington County Community Development Code (CDC), the county's decision became final on November 23, 1988, when the county mailed notice of its denial of the petitions for reconsideration.

The county's decision was reversed by us in Standard Insurance Company v. Washington County, ___ Or LUBA ___ (LUBA No. 88-109, April 26, 1989) (Standard IV). The alternative grounds for reversal were (1) the county lacked jurisdiction over the subject plan amendment decision while an appeal of that decision was pending before the Court of Appeals, and (2) the county lacked jurisdiction to approve the subject amendment after the subject property had been annexed to the City of Hillsboro. Our decision in Standard IV is currently before the Court of Appeals.

On December 20, 1988, the Hillsboro City Council (city

council), acting in the belief that the annexation of the subject property to the city entitled it to step into the "shoes" of the county board of commissioners, also denied the petitions for reconsideration that were filed with the board of commissioners on November 8 and 9, 1988. We reversed the city's decision in Standard Insurance Company v. City of Hillsboro, ___ Or LUBA ___ (LUBA No. 88-120, April 26, 1989) (Standard V). The alternative grounds for reversal were (1) the city lacked jurisdiction over the subject plan amendment decision while an appeal of that decision was pending before the Court of Appeals, and (2) the city's decision relied on county plan amendment proceedings which were void for lack of jurisdiction. Our decision in Standard V is also before the Court of Appeals.

On October 11, 1988, the city planning commission initiated an amendment to the City of Hillsboro Comprehensive Plan (plan) to designate the subject property Commercial on the city's plan map. Record 5. On January 10, 1989, after a public hearing which included testimony from petitioner's attorney, the planning commission voted to recommend approval of the subject plan map amendment to the city council. Record 57-58. On January 12, 1989, a planning commission resolution making such recommendation was signed. Record 53. The city sent a memo, dated January 11, 1989, to "Interested Persons," informing them of the planning commission's decision and of the right to appeal to the city council by filing written notice within 15

days of the commission's action. Record 62. This notice was not sent to petitioner or to petitioner's attorney.

On February 7, 1989, petitioner filed with the city a notice of appeal of the planning commission's January 10, 1989 recommendation of approval for the subject plan amendment. Record 78-79. Also on February 7, 1989, the city council considered the subject plan map amendment, without a public hearing, and adopted the challenged ordinance approving the subject plan map amendment.[2] This appeal followed.

MOTIONS TO DISMISS

The city and intervenor (respondents) move that this appeal be dismissed for lack of jurisdiction because petitioner failed to exhaust all remedies available to it by right before petitioning the Board for review.[3] ORS 197.825(2)(a).

Respondents argue that plan 1(V)(B) ("Minor Changes") governs the city proceedings concerning the subject plan amendment. Respondents assert that plan 1(V)(B)(9) provides that appeals of planning commission decisions with regard to minor plan changes shall be similar to those under City of Hillsboro Zoning Ordinance (HZO) 118 for amendments to the HZO. According to respondents, HZO 118 provides that the planning commission's decisions may be appealed to the city council by filing a written notice of appeal within 15 days after the planning commission "rendered its decision."

Respondents further argue that under ORS 197.825(2)(a), petitioner's failure to exercise its right to appeal the

planning commission's decision to the city council pursuant to plan 1(V)(B)(9) and HZO 118 results in this Board lacking jurisdiction over petitioner's appeal of the city council's decision, citing Knight v. City of Coos Bay, 15 Or LUBA 122 (1986); Zarkoff v. Marion County, 14 Or LUBA 61, 76 Or App 403 (1985); Lyke v. Lane County, 11 Or LUBA 117, 70 Or App 82 (1984). Respondents argue that petitioner's obligation to present its case to all available levels of local government was clearly stated in Portland Audubon Society v. Clackamas County, 77 Or App 277, 281, 712 P2d 839 (1986).

Respondents maintain that petitioner's failure to present its case to the city council was especially significant here because petitioner did not raise any objection to the proposed plan amendment in its appearance before the planning commission. According to respondents, petitioner merely "alluded to a controversy between Petitioner, the City and the property owners in another forum." Intervenors' Motion to Dismiss 3.

Respondents distinguish this case from Colwell v. Washington County, 79 Or App 82, 718 P2d 747, rev den 301 Or 338 (1986) (failure to perfect appeal of county planning commission decision on plan amendment to board of commissioners does not preclude LUBA jurisdiction under ORS 197.825(2)(a)). According to respondents, in Colwell, the Court of Appeals found that because the petitioners' appeal would only have required the board of commissioners (1) to consider the plan

amendment at a public hearing, and (2) to adopt the plan amendment itself, actions independently required by ORS 215.050 and 215.060, petitioners were not required to exhaust a redundant remedy.

Respondents argue that, unlike the county governing body's decision in Colwell v. Washington County, the city council's decision on the subject plan amendment is not governed by ORS 215.050 and 215.060. According to respondents, although ORS 197.010(1) and 197.015(5) require the city's comprehensive plan to be adopted by the city council, no statute requires the city council to hold a public hearing on a proposed plan amendment. Respondents argue that plan 1(V)(B)(7) provides that the city council may conduct a public hearing on a proposed plan amendment, but the city council is only required to do so, under plan 1(V)(B)(9) and HZO 118, if an appeal of the planning commission recommendation is properly filed.

Respondents argue that, with regard to the requirement of ORS 197.825(2)(a) for exhaustion of available remedies, a defective attempt to appeal is the same as no appeal, citing Cope v. City of Cannon Beach, 15 Or LUBA 558, 560-561 (1987). According to respondents, the city properly refused to accept petitioner's untimely February 7, 1989 notice of appeal.

Petitioner argues that in this case ORS 197.825(2)(a) does not require that it appeal the planning commission's decision to the city council because, under the plan and HZO, the planning commission's action constituted no more than a

recommendation to the city council. Petitioner argues that a plan amendment must be finally adopted by the city council, and the city council always has the option of holding a hearing on a proposed plan amendment, regardless of whether an appeal of the planning commission's recommendation is filed. Thus, according to petitioner, there was no requirement or necessity for petitioner to file an appeal in order to have the proposed plan amendment reviewed by the city council.

Petitioner contends it did express opposition to the proposed plan amendment during its appearance before the planning commission. Petitioner further argues, given that the existence of a county NC plan designation for the subject property was the sole basis advanced to justify the proposed plan amendment and petitioner challenged the application of the NC designation vigorously in the city proceedings leading to the plan amendment decision challenged in Standard V, "it strains credibility to urge that petitioner's position was anything other than opposition to [the] Planning Commission's recommended action." Memorandum in Opposition to Intervenors' Motion to Dismiss 4. Petitioner also argues that the city improperly refused to accept the notice of appeal to the city council which petitioner filed on February 7, 1989.

The parties agree that plan 1(V)(B) ("Minor Changes") governs the appealed plan amendment. They also agree that under plan 1(V)(B)(6),[4] the planning commission decision on the proposed plan amendment was simply a recommendation of approval

and that under ORS 197.010(1) and 197.015(5),[5] the adoption of an amendment to the city's plan must be performed by the city council. They further agree that under plan 1(V)(B)(7) and (9) and HZO 118,[6] the city council may hold a hearing on a proposed plan amendment, but is not required to do so unless an appeal of the planning commission's recommendation is filed.

ORS 197.825(2)(a) provides:

"The jurisdiction of the board:

"(a) Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review;"

We distinguish the present case from those cases cited by respondents where we found that under ORS 197.825(2)(a), failure to exercise an appeal right precluded our jurisdiction, Knight v. City of Coos Bay, supra; Zarkoff v. Marion County, supra; Lyke v. Lane County, supra. The decisions which petitioners failed to appeal in these cases were decisions of planning commissions or hearings officers, on permits or zone changes, which would become final decisions of the local government if an appeal to the governing body were not filed. In other words, unlike the present situation, the governing body was not required in those cases to consider the lower body's action and make the final decision in the matter.

This case is much closer to the situation in Colwell v. Washington County, supra, where the court held that petitioners' failure to perfect an appeal of a county planning commission's decision on a proposed plan amendment to the board

of commissioners does not preclude LUBA jurisdiction under ORS 197.825(2)(a). In that case, the court said

> " * * * the question here is whether the 'remedy' the county maintains that petitioners did not exhaust is a remedy at all, in the sense of being a procedure which petitioners had to initiate rather than an action the governing body was required to undertake - with or without petitioners' involvement - to effect an amendment of the plan. * * * " Id. at 87.

The court found "under ORS 215.050 and the relevant provisions of ORS chapter 197, small-tract plan amendments * * * must be adopted by the governing body of the planning jurisdiction," and concluded that ORS 197.825(2)(a) did not apply because

> " * * * petitioners' pursuit of the county remedies that they did not exhaust could have achieved nothing except convincing the governing body to do what ORS 215.050 and 215.060 already required it to do. * * * " Id. at 91.

The distinction between Colwell v. Washington County and the present case, as pointed out by respondents, is that in Colwell the statutes applicable to county plan adoption and amendment relied on by the court required not only that the governing body enact a plan amendment, but also that it hold one or more public hearings on the proposed amendment before doing so. See ORS 215.060. In this case, plan 1(V)(B)(7) requires the city council to consider a proposed minor plan amendment, but neither statute nor plan requires the city council to hold a hearing on a proposed plan amendment if an appeal of the planning commission recommendation is not filed.

However, we do not think this distinction is a critical one. In Portland Audubon Society v. Clackamas Co., 77 Or App

277, 712 P2d 839 (1986) (discretionary rehearing is not one of the "remedies available by right" ORS 197.825(2)(a) requires petitioners to exhaust), the court discussed the legislative policy behind the exhaustion requirement as follows:

> "The primary reason why the legislature accepted the exhaustion requirement was to ensure that the responsible local bodies make the decision. Participation of local officials in matters of local concern is crucial to Oregon's land use process. See Lyke v. Lane Co., [70 Or App 82, 87, 688 P2d 411 (1984)]. * * * The legislature placed final local land use decisions in the hands of local officials. Those officials cannot place the decision whether they will even have an opportunity to consider a particular case in the hands of a private party. The petitioner in Lyke was required to present his case to all levels of the local government structure that were avaulable to him before he could seek review by LUBA.
>
> "To require a petitioner to go once to the highest local decision-maker achieves the state poicy of involving the responsible local officials in the decision. * * * " Id. at 280-281.

The court's discussion reflects a primary concern that the highest possible level of local decision-maker have an opportunity to consider and act upon a land use decision.[7] See also McConnell v. City of West Linn, ___ Or LUBA ___ (LUBA No. 88-111, March 14, 1989), slip op 6.

Thus, while the issue is not without doubt, we do not believe that in this case an appeal of the proposed plan amendment to the city council is one of the "remedies available by right" required to be exhausted by ORS 197.825(2)(a). The city council is required by statute and its own plan and land use regulations to consider and act upon proposed plan amendments, and may hold a hearing on a proposed amendment,

regardless of whether an appeal is filed. Furthermore, in this case, the propriety of the proposed plan amendment is dependent upon a single legal issue concerning which petitioner's position is known to the city council.[8] Therefore, no purpose would be served by requiring petitioner to have repeated this position at a hearing before the city council.

Because we find that an appeal to the city council was not a remedy petitioner was required to exhaust under ORS 197.825(2)(a), we conclude that we have jurisdiction over petitioner's appeal of the city council's decision regardless of whether petitioner appealed the planning commission recommendation. In these circumstances, we need not also decide, in view of possible misunderstandings concerning whether petitioner would be provided notice of the planning commission's decision, whether petitioner properly attempted to exercise its right to appeal to the city council under plan 1(V)(B)(9) and HZO 118 by filing a notice of appeal on February 7, 1989.

The motions to dismiss are denied.

STANDING OF PETITIONERS

In its petition for review, petitioner alleges it appeared in proceedings before the city concerning the appealed land use decision.

Respondents concede petitioner appeared before the city and filed a notice of intent to appeal the city's decision, as required by ORS 197.830(3)(a) and (b). However, respondents

contend petitioner does not allege facts showing it was either entitled as of right to notice and a hearing prior to the decision to be reviewed, or is aggrieved or has interests adversely affected by the decision, as required by ORS 197.830(3)(c).

The City of Hillsboro's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission. LCDC 84-ACK-058 (April 2, 1984). Thus, the challenged decision is an amendment to an acknowledged comprehensive plan.

ORS 197.620(1) provides in pertinent part:

> "Notwithstanding the requirements of ORS 197.830(2) and (3) [concerning standing to initiate appeals to LUBA], persons who participated either orally or in writing in the local government proceedings leading to the adoption of an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation may appeal the decision to the Land Use Board of Appeals under ORS 197.830 to 197.845. * * * "

Petitioner alleges in its petition for review that it participated in the city's proceedings on the appealed matter. Respondents do not challenge this allegation. Under ORS 197.620(1), this allegation is sufficient to establish petitioner's standing to appeal the city's decision. Standard V, slip op at 5.

FIRST ASSIGNMENT OF ERROR

> "The City prematurely and improperly initiated the plan amendment, thereby creating a material procedural defect in the plan amendment process relating to the subject property."

Petitioner argues that the city erred by initiating the challenged plan amendment to a city Commercial designation on October 11, 1988, "well before the property was annexed to the City and long before any county action purportedly designating the site to a commercial district had occurred." Petition for Review 5. Petitioner contends the initiation of this plan amendment was premised on the subject property having a county NC designation and, thus, the city process was "fundamentally flawed because of its inappropriate and untimely initiation." Petition for Review 6.

Although the subject property was annexed to the city before the city adopted the challenged plan amendment applying its Commercial designation, petitioner claims under this assignment of error that the plan amendment is "fundamentally flawed" because of its "premature" initiation. However, petitioner does not explain what legal principle or standard was violated by the city's initiation of a plan amendment to Commercial at a time when the property was neither in the city nor subject to a county commercial plan designation. Without a showing that an applicable legal criterion or standard has been violated by the city's decision, we cannot grant relief. Sellwood Harbor Condo Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 87-079 and 87-080, April 1, 1988), slip op 8; Lane County School District 71 v. Lane County, 15 Or LUBA 150, 153 (1986).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City's attempted action in approving the comprehensive plan amendment was premised entirely upon the validity of the actions redesignating the property Neighborhood Commercial. Because the County and City had not validly designated the property NC, the City's action in approving a Commercial designation based on such actions is likewise invalid."

Petitioner argues the city's application of its Commercial plan designation to the subject property is premised solely on the property being validly subject to the county NC designation at the time of the city's decision. Petitioner contends that, as shown by our decisions in Standard IV and Standard V, the property was not validly designated NC when it was annexed to the city, nor could the city "confirm" a county NC designation after annexation. According to petitioner, the invalidity of the county NC designation for the property likewise requires a decision that the Commercial designation applied by the city to the subject property is invalid and, therefore, the challenged decision should be reversed.

Respondents disagree with our decisions in Standard IV and Standard V reversing county and city actions applying a county NC plan designation to the subject property for lack of jurisdiction.[10] However, respondents argue that if our decisions in those cases are correct, the status of the plan designation for the subject property at the time of the appealed decision was (1) the county had adopted an amendment from IND to NC; (2) that amendment was remanded by the Court of Appeals, effective February 3, 1989; and (3) neither the county

nor the city modified or reversed that plan amendment following that remand by the Court of Appeals.

Respondents argue that the city plan policy applicable to application of city plan designations to newly annexed property required the city to apply the city designation as close as possible to that "already adopted by Washington County." Respondents contend the applicable city plan policy does not require that the plan designation adopted by the county at the time of the city's decision subsequently be affirmed on appeal. Respondents argue the city correctly found the county plan designation adopted for the subject property was NC, and that designation had not been overturned by LUBA or the courts. According to respondents, the city's finding is accurate and forms a sufficient factual basis to support the application of the city Commercial plan designation.

Respondents further argue that the city properly acted in adopting the challenged plan amendment based on the circumstances which existed at the time of its decision. Respondents argue that to require the city to second guess the outcome of pending appeals would make the city a court of review of the legal validity of previous county plan amendments.

Plan 2(III)(G) provides:

> "Upon annexation within the Area of Interest, the City will initiate Comprehensive Land Use and Transportation Map changes on recently annexed properties, to City land use designations and functional street classifications corresponding as

> closely as possible to those designations and classifications already adopted by Washington County for those properties."

The city's decision to apply its Commercial designation to the subject property is based entirely upon plan 2(III)(G), quoted above, and the following finding:

> "The County Plan designation on this site is Neighborhood Commercial in the Sunset West Community Plan, which has been acknowledged by LCDC. The County Plan designation has not been overturned by LUBA or by the Courts. The Hillsboro City Council has confirmed this designation by their action to deny Petitions for Reconsideration of the County's approval of the Neighborhood Commercial designation." Record 68.

In Standard IV and Standard V, we decided that the county's November 23, 1988 decision and the city's December 20, 1988 decision applying the county NC plan designation to the subject property were invalid because the county and city lacked jurisdiction over that plan amendment decision while it was on appeal to the Court of Appeals in Standard II. Neither the county nor the city could have jurisdiction over the plan amendment decision until the Court of Appeals issued its appellate judgment affirming our order remanding the county's decision in Standard II on February 3, 1989. Thus, we agree with respondents' analysis that the status of the plan designation for the subject property on February 7, 1989, when the city made the decision challenged in this appeal, was that the county's amendment from IND to NC had been remanded by the Court of Appeals, and neither the county nor the city had taken further action on that plan amendment.

In Standard Insurance Company v. Washington County, 93 Or App at 278, the Court of Appeals said the Board's and the court's decisions to remand the plan amendment proceeding in Standard II "have the effect of returning [intervenor's plan] amendment application to the county for further proceedings." This means that on February 7, 1989, the county's NC plan designation was not in effect on the subject property. See Perkins v. Rajneeshpuram, 10 Or LUBA 88, 94 (1984) (remand of county order approving petition for incorporation rendered petition ineffective); Gearhard v. Klamath County, 7 Or LUBA 27, 31 (1982) (remand of conditional use permit meant no lawful use existed when county considered matter on remand).

Thus, the city misconstrued the applicable law when it adopted its plan amendment to the city Commercial designation on February 7, 1989, based on the erroneous belief that the county NC designation applied to the subject property. It does not help the city to argue that on February 7, 1989 it could not know that we would subsequently find that the plan amendments from IND to NC adopted by the county and city in November and December of 1988, upon which the city depended in making the appealed decision, were invalid for lack of jurisdiction. We must apply the law as it exists when we make our decision. To hold otherwise would mean that an invalid land use decision could be effectively insulated from challenge, despite filing of a timely appeal, simply by making another decision which depends on the invalid decision before

the appeal of the first decision results in its remand or reversal.[10]

The second assignment of error is sustained.

The city's decision is remanded.

FOOTNOTES

1

In addition, development review approval for a supermarket on the subject property was appealed to us in Standard Insurance Company v. Washington County, LUBA No. 88-015 (Standard III). We initially issued an order reversing that approval. However, our decision was appealed to the Court of Appeals, and in Standard Insurance Company v. Washington County, 93 Or App 276, 761 P2d 1348 (1988), the court directed that we change our disposition of the case to a remand. See Standard III, ___ Or LUBA ___ (LUBA No. 88-015, Order on Remand from Court of Appeals, January 13, 1989). On February 21, 1989, subsequent to annexation of the property to the City of Hillsboro, the City approved reissuance of these development review approvals. That decision was appealed in Standard Insurance Company v. City of Hillsboro, LUBA No. 89-017 (Standard VII). A separate final opinion and order in that appeal is issued this date.

2

Although petitioner's February 7, 1989 notice of appeal is included in the record of the city's proceedings filed with LUBA, neither the decision adopted by the city council on February 7, 1989, nor the city council's minutes mention receipt on that date of petitioner's notice of appeal. However, on March 1, 1989, the city planning director sent petitioner a letter stating that the city was unable to accept petitioner's notice of appeal because the 15 day appeal period had expired on January 25, 1989. Record 81-82.

3

We reject petitioner's contention that because the alleged failure to comply with ORS 197.825(2)(a) has been known to respondents since February 28, 1989, when petitioner's notice of intent to appeal was filed with LUBA, respondents' motions to dismiss were not timely filed under OAR 660-10-065(2). OAR 661-10-065(2) requires a party seeking to challenge the failure of an opposing party to comply with requirements of statutes or Board rules to serve such a motion on the adverse party within ten days after the moving party learns of the alleged failure. However, a challenge to our jurisdiction may be brought at any time and is not subject to the ten day requirement of OAR 661-10-065(2). Tournier v. City of Portland, ___ Or LUBA ___ (LUBA No. 87-111, April 6, 1988), slip op 4; Osborne v. Lane County, 4 Or LUBA 368, 369 (1981). The motions to dismiss were, therefore, timely filed.

[4] Plan 1(V)(B)(6) provides:

"After hearing the proposed change, the Planning Commission shall deny or forward a recommendation of approval or approval with modifications to the City Council."

[5] ORS 197.010(1) and 197.015(5) provide, as relevant:

"* * * These comprehensive plans:

"(1) Must be adopted by the appropriate governing body at the local and state levels;"

"(5) 'Comprehensive plan' means a generalized, coordinated land use map and policy statement of the governing body of a local government * * * "

[6] Plan 1(V)(B)(7) and (9) provide, as relevant:

"(7) That the City Council may hold a hearing on the proposed [plan] change. * * * After consideration of a proposal, the city council may adopt or deny the minor [plan] change."

"(9) Appeal regarding Planning Commission decisions shall be similar to that as outlined in Section 118 of Zoning Ordinance No. 1945."

HZO 118 provides, in relevant part:

"Appeal to the City Council. Any action or ruling of the City Planning Commission * * * may be appealed to the City Council, within 15 days after the City Planning Commission * * * has rendered its decision, by filing written notice with the City Recorder. * * *

"* * * * *

"If an appeal is filed, the City Council shall hold a hearing at least for argument on the matter, and shall receive as testimony the recommendation or decision of the Planning Commission, * * * together with the documentation supporting the decision. * * * "

[7] We would be more inclined to find that availing oneself of any opportunity to have a hearing before the highest level of local decision-maker, as opposed to merely obtaining consideration of the proposed decision by the highest level of local decision-maker, were necessary to satisfy the exhaustion requirement of ORS 197.825(2)(a), if petitioners were required to raise particular issues at such a hearing in order to be able to raise them to this Board in a subsequent appeal. However, except in circumstances which are not argued to be applicable here (see ORS 197.762), petitioners may raise substantive issues in an appeal to this Board which they did not raise before the local decision-maker. See McNulty v. City of Lake Oswego, 14 Or LUBA 366, 369-370 (1986).

[8] As discussed more fully under the second assignment of error, the propriety of the city's application of its Commercial plan designation to the subject property after annexation depends on what the existing county plan designation for the property is. In Standard V, as well as in Standard I, II and IV (where the county was the respondent), petitioner was seeking, and later obtained, reversal of a city decision to change the plan designation of the subject property from county IND to county NC. Petitioner referred to this ongoing controversy in its testimony before the planning commission. Record 57. While petitioner's testimony could have been clearer, we believe it was sufficient in these circumstances, to inform the city of its position that the county plan designation for the property was actually IND rather than NC.

[9] Intervenor appealed our decisions in Standard IV and Standard V to the Court of Appeals, where review is currently pending.

[10] We note that in Standard Insurance Company v. Washington County, 93 Or App at 278, the court agreed with us that the county's development review approval for a use which could not be permitted on the subject property without the plan amendment remanded by the court in Standard Insurance Company v. Washington County, 93 Or App 78, 761 P2d 534 (1988), must itself be reversed or remanded. The situation in these cases was similar to that in this case because the county could not know, when it issued the development approvals, that we and the court would subsequently remand the plan amendment upon which

the development approvals depended. See also Families for Resp. Govt. v. Marion Co., 65 Or App 8, 670 P2d 615, rev den 296 Or 237 (1983) (although LUBA decision was correct at the time it was made, subsequent appellate decision remanding LCDC acknowledgment order, upon which LUBA decision depended, required Court of Appeals to remand decision to LUBA for further proceedings).