BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARK WOMBLE,
Petitioner,

vs.

WASCO COUNTY,
Respondent,

and

UPC WIND MANAGEMENT, LLC,
Intervenor-Respondent.

LUBA No. 2006-240

GARY CASADY and LINDA CASADY,
Petitioners,

vs.

WASCO COUNTY,
Respondent,

and

UPC WIND MANAGEMENT LLC,
Intervenor-Respondent.

LUBA No. 2006-241

FINAL OPINION
AND ORDER

Appeal from Wasco County.

Mark S. Womble, Hood River, filed a petition for review and argued on his own behalf.

Gary Casady and Linda Casady, The Dalles, filed a petition for review on their own behalf.

No appearance by Wasco County.

Elaine R. Albrich, Portland, filed the response brief and argued on behalf of intervenor-respondent. With her on the brief were Michelle Rudd and Stoel Rives, LLP.

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

RYAN, Board Member, did not participate in the decision.

REMANDED 04/10/2007

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal two county decisions. One decision approves a temporary use permit for two wind measurement devices on an EFU (A-1) zoned property. That decision is the subject of *Womble v. Wasco County*, LUBA No. 2006-240 (*Womble*). The other decision approves a temporary use permit for two wind measurement devices on a Forest (F-2) zoned property. That decision is the subject of *Casady v. Wasco County*, LUBA No. 2006-241 (*Casady*). The wind measurement devices would be sited on top of four newly constructed towers that are 164 to 197 feet high.

The county considered both applications together and the decisions in *Womble* and *Casady* are nearly identical. Although LUBA Nos. 2006-240 and 2006-241 were consolidated for LUBA review, the County submitted a separate record for each appeal. Those records also are nearly identical. Although petitioners in *Womble* and *Casady* submitted separate 17-page petitions for review, they are nearly identical. The county did not submit a brief, and intervenor-respondent (intervenor) submitted a single response brief to respond to both petitions for review. Because the parties make little attempt to distinguish between the two cases, we generally do not do so either. Except where indicated otherwise, all discussion of the petition for review and all record citations in this opinion are to the petition for review and record in *Womble*.

FACTS

The disputed wind measurement devices and the towers they will be sited on are referred to in the record as meteorological towers or "met towers."[1] Intervenor consulted with the county before submitting the disputed applications and was told to submit

[1] The challenged decision and the parties in this appeal use the terms "met tower" and "wind measurement devices" interchangeably. As defined by the Wasco County Land Use and Development Ordinance, a wind measurement device includes the tower it sits on. *See* n 5. Therefore, a met tower is the same thing as a wind measurement device.

applications for conditional use review. Intervenor submitted applications for conditional use review. However, the planning director later determined that the four towers could be approved as temporary uses under Wasco County Land Use and Development Ordinance (LUDO) Chapter 8. That decision was appealed to the county planning commission, which held a hearing and ultimately affirmed the decisions on November 7, 2006. Petitioners appealed the planning commission's decisions to the county court, which held a hearing limited to the evidentiary record that was compiled by the planning commission, and affirmed the planning commission's decisions on December 6, 2006. These appeals followed.

INTRODUCTION

The terminology used in the LUDO for different kinds of energy-related uses can be confusing. The A-1 zone authorizes uses that are permitted outright (LUDO 3.210(B)) and conditional uses (LUDO 3.210(C)). One of the conditional uses authorized in the A-1 zone by LUDO 3.210(C) is "[c]ommercial utility facilities for the purpose of generating power for public use by sale." As defined by the LUDO, "commercial utility facilities" include both "commercial energy facilities" and "energy facilities."[2] Commercial energy facilities are large energy facilities.[3] Energy facilities are smaller energy facilities.[4] Wind energy facilities are a type of energy facility.[5]

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[2] The F-2 zone uses slightly different terminology than the A-1 zone and authorizes "[u]tility facilities for the purpose of generating power." LUDO 3.120(D)(9). However, the LUDO does not distinguish between commercial utility facilities and utility facilities and only defines the term "commercial utility facility." There is no separate definition for "utility facility." We assume they are the same thing and that "utility facilities," like "commercial utility facilities," include both "commercial energy facilities" and "energy facilities."

[3] LUDO 1.090 includes the following definition for "commercial energy facility:"

> "**Commercial Energy Facility** - An electrical power generating plant with a nominal electrical generating capacity of more than 25,000 kilowatts or operates at more than 230 kilovolts; including, but not limited to: a thermal power plant, hydroelectric power plant, combustion turbine power plant, geothermal power plant, electric power transmission facility, or a nuclear installation, including a power reactor, re-processing plant, waste disposal facility, and any facility handling a quantity of fissionable materials sufficient to form a critical mass. A commercial power generation facility includes related or supporting facilities

Based on the above-noted definitions, "commercial utility facilities" are a broader more general category of uses, which includes "commercial energy facilities" and "energy facilities." "Wind energy facilities" are a subcategory of "energy facility."

In addition, a separate chapter of the LUDO sets out specific standards for "commercial energy facilities" and "energy facilities." LUDO Chapter 19. LUDO Chapter 19, in turn, sets out different sets of standards for approval of different kinds of "commercial energy facilities" and "energy facilities:" LUDO 19.030(A) (hydroelectric facilities as a use permitted subject to standards; LUDO 19.030(B) (transmission facilities as a use permitted subject to standards); LUDO 19.030(C) (wind facilities as a use permitted subject to standards); LUDO 19.030(D) (hydroelectric facilities as a conditional use); LUDO 19.030(E) (transmission facilities as a conditional use); LUDO 19.030(F) (wind facilities as a conditional use).[6] With that overview of the LUDO provisions for various kinds of

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including any structure adjacent to and associated with an energy facility, including associated transmission lines, reservoirs, intake structures, road and rail access, pipelines, office or industrial structures built in conjunction with and used as part of the energy facility. A commercial power generation facility does not include a portable power plant, the principal use of which is to supply power in emergency or for individual domestic use."

[4] LUDO 1.090 includes the following definition for "energy facility:"

"**Energy Facility** - A hydroelectric, wind energy, biomass, geothermal or transmission facility with a nominal electric generating capacity of 25 MW or less or carrying 230 kV or less."

[5] LUDO 1.090 provides the following additional relevant definitions:

"**Wind Energy Facility** – A WECS or group of WECS including all parts of the system except transmission lines. Such a facility has a nominal electric generating capacity of 25 MW or less."

"**WECS (Wind Energy Conversion System)** - A device that converts the kinetic energy in the wind into electric energy. The WECS includes all parts of the system except transmission lines."

"**Wind Measurement Device** - An instrument for measuring wind speed and/or direction, including the tower or pole upon which it is mounted."

[6] The usage of the term "wind facility" in LUDO Chapter 19 makes it reasonably clear that a "wind facility" is the same thing as a "wind energy facility."

commercial utility facilities generally and wind energy facilities in particular we turn to petitioners' assignments of error.

FIRST ASSIGNMENT OF ERROR

As we noted earlier, although intervenor submitted applications for conditional use review, the planning director instead approved the four met towers as temporary uses. The county's authority to approve temporary uses is set out at LUCO Chapter 8.[7] LUDO 8.020 provides the following description of the uses that may be permitted as temporary uses:

> "Temporary structures, activities or uses may be permitted, pursuant to Section 2.060(A) of this Ordinance, as necessary to provide for housing of personnel; storage and use of supplies and equipment; or provide for temporary sales offices for uses permitted in the zoning district. Other uses may include temporary signs, outdoor gatherings, short-term uses, roadside stands, or *other uses not specified in this Ordinance and not so recurrent as to require a specific or general regulation to control them.*" (Emphasis added.)

As relevant in this appeal, there are two requirements for a use to qualify as a temporary use.[8] First, the use must be a use that is "not specified in this Ordinance." Second, the use must not be "so recurrent as to require a specific or general regulation to control them." The county provided the following explanation for its decision that the disputed met towers can be approved as temporary uses:

> "The subject parcel is located entirely within the 'A-1' Exclusive Farm Use zone. *Neither this zone nor any other zone specifically lists meteorological*

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[7] LUDO 8.010 explains the purpose for temporary use permits:

> "A temporary use permit may be approved to allow the limited use of structures or activities which are temporary or seasonal in nature and do not conflict with the zoning district in which they are located. No temporary use permit shall be issued which would have the effect of permanently rezoning or granting a special privilege not shared by other properties in the same zoning district."

[8] In its brief, intervenor suggests the county found the proposed met towers are "short-term uses," within the meaning of LUDO 8.020, and for that independent reason they are correctly viewed temporary uses. We do not agree that the county found that the proposed met towers are "short-term uses," as LUDO 8.020 uses that term. Nowhere in the challenged decisions does the county adopt that interpretation. Moreover, given the immediate context—"temporary signs, outdoor gatherings, short-term uses, roadside stands"—we also question whether met towers that the applicant anticipates may remain for two years are properly viewed as "short-term uses." In any event, because the county did not adopt that interpretation, we do not consider it further.

> *towers as a review use.* This use is listed in [LUDO] Chapter 19 (Energy Facilities) as a use permitted subject to standards. The purpose of these towers is to gather wind and temperature data to establish the viability of the property for a future wind energy generation facility. These towers are generally temporary in nature because once the data [are] gathered they are no longer needed. Additionally, based on topography and availability of wind, there will be a limited number of properties in Wasco County that will be able to utilize this use.
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> "*Based on the findings above, staff concludes this use is justified as a temporary use because it is not so recurrent as to require a specific or general regulation to control it.*" Record 67 (emphases added).

Although it is not entirely clear, the first emphasized finding apparently was adopted to establish that the proposed met towers satisfy the LUDO 8.020 requirement that the use is "not specified in this Ordinance." The second emphasized finding appears to be the county's attempt to establish that met towers satisfy the second LUDO 8.020 requirement, *i.e.*, that a met tower is "not so recurrent as to require a specific or general regulation to control it."

As petitioners correctly point out, there are problems with both findings. First, it is true that met towers may not be specifically or separately listed as a permitted or conditional use *in the A-1 or F-2 zones*. However, as the county's findings expressly acknowledge, met towers are expressly allowed under LUDO Chapter 19. Secondly, LUDO Chapter 19 includes regulations for met towers. Specifically, LUDO 19.030(C) provides in part:

> "A WIND [ENERGY] FACILITY AS A USE PERMITTED SUBJECT TO STANDARDS. A proposed wind [energy] facility is a use permitted subject to standards if it complies with parts 19.030(C)(1) through (8). *A wind measurement device is a use permitted subject to standards if it complies with subpart 19.030(C)(3)(b) and parts (C)(5), (C)(7) and (C)(8).* In addition, a WECS and a *wind measurement device* are subject to the standards of subsection 19.040(A) through (C) and the applicable conditions of section 19.050."

It is not entirely clear to us how the county goes about determining whether the wind measurement devices that clearly are permitted under LUDO 19.030(C) are allowed in

particular zones and what additional standards may be imposed by particular zones.[9] But, given the language of LUDO 19.030(C), it is difficult to see how the county can conclude that met towers are "not specified in this Ordinance," within the meaning of LUDO 8.020. LUDO 19.030(C) expressly allows "wind measurement devices." The "Ordinance" that is referenced in LUDO 8.020 is the LUDO, and LUDO 19.030(C) is part of the LUDO. Wind measurement devices are "permitted subject to standards" by LUDO 19.030(C). Certainly, met towers are "specified in this Ordinance" in the sense that LUDO 19.030(C) permits them "subject to standards."

The county apparently attempts to avoid that conclusion by interpreting the requirement in LUDO 8.020 that limits temporary uses to uses that are not "specified in this Ordinance" to be satisfied unless the use is separately and specifically listed as a use that is allowed in any zone. Under that interpretation of LUDO 8.020, even though it seems clear that wind measurement devices are expressly allowed by LUDO 19.030(C) and presumably are allowable as commercial utility facilities or energy facilities or as an accessory use to such facilities in a number of county zones, wind measurement devices are nevertheless not "specified in this Ordinance." But in adopting that interpretation, the county makes no attempt to explain why that interpretation is defensible, viewed in context with LUDO 19.030(C). The county findings acknowledge that wind measurement devices are a use that "is listed in [LUDO] Chapter 19 (Energy Facilities) as a use permitted subject to standards." But the county makes no attempt to explain why wind measurement devices must nevertheless be "specifically listed" as a use in one or more county zoning district before

[9] For example, the county is clearly correct that met towers are not specifically mentioned in the A-1 zone as a permitted or conditional use. However, as we have already noted, the A-1 zone allows commercial utility facilities and their accessory uses as conditional uses. Commercial utility facilities include energy facilities, which in turn include WECS. *See* n 5. It is certainly possible that the disputed met towers are properly viewed as a preliminary part of a WECS or a use that could be allowed as a use that is accessory to a WECS. If so, although a met tower may not be specifically allowed in the A-1 zone, it would be allowed as a conditional use as a commercial utility facility or an accessory to a commercial utility facility.

they can be considered to be "specified in this Ordinance." While it may be that the county can provide that explanation, its failure to attempt to provide that explanation requires remand.

Intervenor also attempts to make a distinction that the county did not make in its decision. Intervenor suggests that while the A-1 zone may envision a wind measurement device as part of a WECS, intervenor is proposing a stand-alone wind measurement device. According to intervenor, the A-1 zone does not authorize met towers that are not part of a WECS.

We are not sure what to make of that argument. Given that it appears undisputed that the only purpose for the proposed met towers is to determine if the subject properties are suitable for WECS development, it seems questionable that the proposed met tower is accurately viewed as a stand-alone use, unrelated to the WECS that may follow if the site proves suitable. It is for the county to decide in the first instance if it agrees with that distinction. If it does, the county can decide whether that distinction provides any additional basis for concluding that met towers such as those that are proposed by intervenor are "not specified" in the LUDO.

Finally, for similar reasons, the county has not adequately explained why the second requirement in LUDO 8.020 is satisfied. Under the second requirement of LUDO 8.020, the use must not be "so recurrent as to require a specific or general regulation to control them." LUDO 19.030(C) expressly provides regulations to control met towers. The county's interpretive finding to the contrary cites but ignores LUDO 19.030(C). In fact, in a later part of the county's decision, the county actually applies some of the LUDO 19.030(C) standards in approving the disputed met towers. Record 69-72. The county makes no attempt to explain this apparent inconsistency.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners' contend the proposed met towers are conditional uses in the A-1 and F-2 zones and that the county erred by failing to make any attempt to demonstrate that the proposed towers comply with the applicable conditional use criteria. Petitioners' argument is based on their theory that the proposed met towers are energy facilities or accessories to energy facilities. Because energy facilities are a type of commercial utility facility, we understand petitioners to argue the met towers are only allowable as conditional uses. As we have already noted, commercial utility facilities are a conditional use in the A-1 and F-2 zone.

Intervenor disputes petitioners' underlying theory that the met towers must be viewed as part of an energy facility. Intervenor contends that the disputed met towers were approved as a stand-alone facility.

The county's theory for approving the disputed met towers without applying the A-1 and F-2 zone conditional use criteria is not clearly expressed in its decision. However, it appears to be inextricably tied to its position that the met towers can be approved as a temporary use. If that is the county's legal theory, because we sustain the first assignment of error, we must sustain the second assignment of error as well. If the county has another theory for why the disputed met towers can be approved without regard to the A-1 and F-2 zone conditional use criteria, its failure to set out that theory prevents us from reviewing it.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

LUDO 2.040 sets out who may submit an application for development approval.[10] The only subsection of LUDO 2.040(A) that potentially applies here is LUDO 2.040(A)(4).

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[10] LUDO 2.040 provides:

"**Who May Apply**

See n 10. Petitioners contend that applications in this matter were submitted by intervenor's agent on behalf of intervenor. Petitioners contend that intervenor is not a "lessee in possession" of the property and therefore the agent was not authorized to submit the disputed applications under LUDO 2.040(A)(4).

After the applications were filed, the city asked the intervenor's agent for documentation that the applicant was a lessee and that the property owners authorized the application. Record (Womble) 288; Record (Casady) 273. The agent did not provide a lease. The agent did provide a writing in which the property owners "authorize the application submitted by [intervenor's agent] on behalf of [intervenor]." Record (Womble) 292; Record (Casady) 277.

As a technical matter, we agree with petitioners that intervenor has not established that it is a "lessee in possession of the property." That means LUDO 2.040(A)(4) does not apply to authorize intervenor's agent to submit the disputed applications. We also agree with petitioners that the writing signed by the property owners stops short of saying the applications that were submitted on behalf of intervenor were also submitted on the property

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> "A. Development request may be initiated by one or more of the following:
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> "1. The owner of the property which is the subject of the application; or
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> "2. The purchaser of such property who submits a duly executed written contract, or copy thereof, which as been recorded with the Wasco County Clerk; or
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> "3. The purchaser of such property who submits a duly executed earnest money agreement stating the land use action proposed; or
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> "4. A lessee in possession of such property who submits written consent of the owner to make such application; or
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> "5. Resolution of the County Court or Commission; or
>
> "6. County Road Department, (when dealing with land involving public works projects).
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> "Any of the above may be represented by an agent who submits written authorization by his principal to make such application."

owners' behalf. Therefore, as a technical matter, LUDO 2.040(A)(1) does not apply either. As far as we can tell, the disputed applications were not authorized in any of the ways provided in LUDO 2.040(A).

The purpose of LUDO 2.040(A) appears to be to ensure that the current property owner or the purchaser of property that is the subject of a development application knows about and agrees with the application. That is clearly the case here. Also, there is nothing in the language of LUDO 2.040(A) that suggests that compliance with LUDO 2.040(A) is jurisdictional. We conclude it is a procedural requirement. Petitioners identify no prejudice that they have suffered or could suffer from the city's error in not requiring that the applications be submitted by a person who is authorized to do so in one of the ways set out in LUDO 2.040. ORS 197.835(9)(a)(B).[11] Absent prejudice, the city's procedural error provides no independent basis for reversal or remand..

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In the staff report that was available before the planning commission hearing in this matter, the county took the position that the subject properties are located in areas that are designated as *impacted* in the county's "Transitional Land Study Area." Based on that position, the subject properties would not be subject to the county's Environmental Protection District 8 – Sensitive Wildlife Habitat Overlay, even though the properties are located in the Low Elevation Big Game Winter Range and would otherwise be subject to the overlay. Record 225. After the final evidentiary hearing concluded, the county changed its mind. In the Amended Staff report the county took the position that the Environmental Protection District 8 – Sensitive Wildlife Habitat Overlay applies to the subject properties. The relevant requirement in the overlay appears at LUDO 3.920(F)(1), which provides:

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[11] Under ORS 197.835(9)(a)(B), LUBA is authorized to reverse or remand a decision based on a procedural error only where the procedural error "prejudiced the substantial rights of the petitioner."

> "For lands within the Area of Voluntary Siting Standards a meeting between the applicant and Oregon Department of Fish and Wildlife shall be required if Oregon Department of Fish and Wildlife determines that habitat values exist which may be important to discuss with the applicant. The result of the meeting shall be included as information in the county review of a land use application."

LUDO 3.920(F)(1) does not impose much of a substantive burden. The Oregon Department of Fish and Wildlife is asked to determine whether habitat values exist on the properties that are important enough to discuss with the applicant. If such habitat values exist, the property owner must meet with the Oregon Department of Fish and Wildlife and the results of that meeting must be included in the record of the land use application. The county's findings addressing LUDO 3.920(F)(1) are set out below:

> "On 28 June 2006 staff talked to Keith Kohl with the Oregon Department of Fish and Wildlife regarding wildlife issues. Mr. Kohl stated he had been working with UPC on some monitoring of game in this area but the original timeframe had been altered which may impact the value of the monitoring. Staff recommends [intervenor] contact Keith Kohl to resume the monitoring process to facilitate any subsequent application for wind energy generation facility." Record 71-72.

From the above findings, it appears that the meeting required by LUDO 3.920(F)(1) has occurred. From the findings, we can infer that the Oregon Department of Fish and Wildlife determined that monitoring is warranted. Whether the Oregon Department of Fish and Wildlife felt like that monitoring is warranted by the met towers or by the wind energy facilities that might follow those met towers is unclear. Again, LUDO 3.920(F)(1) does not require very much. As relevant here, there has already been a meeting between the Oregon Department of Fish and Wildlife and intervenor. What apparently is missing is something that accurately documents the results of that meeting. We agree with petitioners that the applicant's and county's failure to document the results of that meeting violates LUDO 3.920(F)(1). On remand, the applicant and county must do so.

Petitioners also complain that the county erred by accepting new evidence regarding the wildlife overlay, without providing petitioners an opportunity to rebut that evidence.

However, petitioners do not identify any new evidence that was submitted after the close of the final evidentiary hearing. The county changed its legal position concerning the applicability of the wildlife overlay, but if that change of position was based on new evidence or if it led the county to accept additional evidence into the record, petitioners do not identify that new evidence. This part of the fifth assignment of error is denied.[12]

The fourth assignment of error is sustained in part.

FIFTH ASSIGNMENT OF ERROR

In some contexts, the LUDO only requires that a county review body provide *notice* of its decision to parties. LUDO 2.140(B)(15)(b) (decision by approving authority after a hearing); LUDO 2.180(F)(2) (decision by county court). However, in other context the LUDO requires that the county provide a copy of the *decision* itself. LUDO 2.160(K)(2) (planning commission decision on review of a planning director decision).[13] In this case the Director provided *notice* of the planning commission's decision on November 13, 2006. Record 87-92. That notice identified the Amended Staff Report as an attachment to the notice. Record 87. In fact, the only findings that support the planning commission's decision are contained in the Amended Staff Report. The Amended Staff Report essentially is the planning commission's decision. However, the Amended Staff Report was not attached to the November 13, 2006 notice of decision. Because the November 13, 2006 notice of decision did not include the Amended Staff Report, petitioners allege the county violated LUDO 2.160(K)(2) and in doing so violated their substantial rights.

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[12] Of course, the results of the meeting between the property owners (or their agent) and the Oregon Department of Fish and Wildlife that will need to be added to the record to respond to our resolution of the other part of the fourth assignments of error will probably be evidence. If so, petitioners must be given an opportunity to rebut that evidence if they wish.

[13] LUDO 2.160(K)(2) provides:

> "The Director shall send a copy of the Approving Authority's decision to all parties to the matter and a copy of such decision shall be filed in the records of the Director."

Although the county's decision does not address this question, intervenor cites discussion by the county court to the effect that it believed the notice of its decision, without the Amended Staff Report, was sufficient to provide petitioner a copy of the planning commission's decision, within the meaning of LUDO 2.160(K)(2). We do not agree. We know of no statutory requirement that the county must provide copies of its land use decisions at the time it issues them, as opposed to notice of the decision and an opportunity to obtain a copy of the decision. But LUDO 2.160(K)(2) plainly says the county must provide a copy of the planning commission's decision. In this case the county failed to do so; it omitted the most important part of the decision.

However, the county's error in this regard is procedural. As petitioners correctly point out, it is an error that could cause prejudice to petitioners' substantial rights, given the short deadline for filing an appeal with the county court to challenge a planning commission decision and the requirement that appellants specify their grounds for appeal in their petition for county court review. It clearly could be difficult or impossible for a party to prepare and file a timely appeal with the county court if the party does not have a copy of the decision he or she seeks to appeal. But in this case the Amended Staff Report does not differ much from the staff report that was issued before the planning commission hearing. Record 59-72 (Amended Staff Report); 214-226 (Original Staff Report). Petitioners offer no reason to believe they could not have immediately obtained a copy of the missing Amended Staff Report when then received notice of the county's decision, by requesting a copy of the Amended Staff Report from the planning department. Petitioners have not alleged that the county's procedural error resulted in any prejudice to petitioners.

The fifth assignment of error is denied.

The county's decisions are remanded.