

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the Board of Commissioners'
4 dismissal as moot of an appeal of the denial of a farm
5 dwelling application. The effect of the dismissal is to
6 reinstate an earlier, rescinded approval of the application.

7 **MOTION TO INTERVENE**

8 Jeremiah Geaney (intervenor), the applicant below,
9 moves to intervene on the side of respondent. There is no
10 opposition to the motion, and it is allowed.

11 **FACTS**

12 On November 13, 1995, intervenor applied to the county
13 for approval of a farm management dwelling. Under the
14 Klamath County Land Development Ordinance (LDO) 54.060,
15 intervenor's application required a Type II review. Under
16 LDO 22.040, a Type II review generally requires that the
17 planning director issue a written determination within ten
18 days of application, after which notice and an opportunity
19 to appeal is provided to those within the prescribed notice
20 area. The Type II review process also allows either the
21 planning director or an individual affected by the proposed
22 action to refer review of the application to a Type III
23 review.¹

¹The process for review and decision under a Type II review is stated in
LDO 22.040(B):

1 On November 20, 1995, the county planning director
2 issued a written determination, approving the application.
3 Immediately after receiving written notice of the
4 determination, petitioner, who owns property adjoining that
5 of intervenor, came to the planning office to appeal the
6 determination on the grounds that it was based on erroneous
7 facts. The planning director advised petitioner that
8 because the determination contained erroneous factual
9 findings, an appeal was not necessary, but rather the
10 planning director would further review the facts.

11 On November 22, 1995, a county senior planner sent a
12 letter to intervenor, which states:

13 "Staff review of your application forms indicates
14 the findings upon which the Planning Director made
15 his decision may be in error.

16 "Specifically, but not only, it is not clear
17 whether the Schedule 'F' forwarded reflects income
18 received from other properties not inclusive of
19 the application.

20 "Also, a Site Plan reflecting the location and

"1. The Planning Director or his/her designee shall review the application within 10 days of receipt of a complete application and determine its compliance with applicable provisions of this Code.

"2. * * * [T]he Planning Director or his/her designee shall reduce a decision to writing within 10 working days of receipt of a complete application.

"3. The Planning Director, at his/her discretion, or if requested by a person demonstrably affected by the proposed action, may refer review of the application to the Type III Review procedure, or to an appropriate review body for a full quasi-judicial hearing.

1 construction of the proposed residence was not
2 received.

3 "Accordingly, the effective date of this approval
4 is delayed pursuant to confirmation of the
5 information contained in the application until
6 December 4, 1995.

7 "An amended decision will be made based on the
8 information on file and any you may care to add in
9 the interim." Record 30.

10 All parties agree this letter had the effect of
11 rescinding the November 20, 1995 decision. Intervenor did
12 not challenge this decision or the planning director's
13 authority to make it. Intervenor did, however, provide
14 supplemental information in response to the November 22,
15 1995 letter, but did not supplement or submit an additional
16 Schedule "F." LDO 54.060(5)(b) refers to an IRS Schedule
17 "F" as the means to establish the farm income of the
18 property.²

²LDO 54.060(5)(b) states:

"The tract in which the parcel is located passes one of the following tests. Income information should be presented to the Planning Director by way of Federal Income Tax Schedule 5.

** * * * *

"b. Income test. A farm passes the income test if either:

- "1) The tract which includes the farm is not high-value farmland, and the farm produced in the last two years or three of the last five years at least \$50,000 (1994 dollars) in gross annual income from the sale of farm products. In determining gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract.

1 On December 4, 1995, the senior planner again
2 requested, in writing, that intervenor provide information
3 to establish compliance with LDO 54.060(5)(b) by December
4 11, 1995. Record 29. Intervenor did not provide additional
5 information and, on December 11, 1995, the Planning Director
6 issued a "revised" determination in which he denied the
7 application.

8 Intervenor appealed the denial of his application to
9 the board of commissioners (board). In the letter of
10 appeal, intervenor states as the basis for his appeal:

11 "The Planning Director incorrectly applied the
12 type of proof of farm income. The Code does not
13 require a CPA statement or Schedule F pertaining
14 only to the specific parcel. The evidence
15 presented was sufficient." Record 23.

16 On January 23, 1996, the board held a public hearing on
17 intervenor's appeal. At the hearing, intervenor's attorney
18 raised the issue that because the planning director's
19 original, November 20, 1995 determination had not been
20 appealed to the board, the original determination of the
21 planning director was final and could not be modified.
22 Notwithstanding that the application had been processed

"2) The tract which includes the farm is high-value farmland, and the farm produced in the last two years or three of the last five years at least \$80,000 (1994 dollars) of gross annual income from the sale of farm products. In determining gross income, the cost of purchased livestock shall be deducted from the total gross income attributed to the tract."

1 under a Type II review, intervenor's attorney orally
2 discussed the issue as follows:

3 "There's a number of issues that I think we need
4 to clear up. The first point, [intervenor]
5 believes that he has a permit. The permit was
6 issued on November 20th. No appeal was filed
7 against that permit, nor was an order entered by
8 the Planning Director that I can find setting
9 aside his previous approval. He just merely then
10 almost two weeks later or more than two weeks
11 later, three weeks later, denied it and issued a
12 denial. There is no procedure for that in the
13 Code. [Intervenor] already has his permit. * * *
14 The only way that anyone could have challenged
15 this would have been to have filed an appeal and
16 brought the matter before you. That was not done
17 on the initial permit. This is a Type I review
18 under Article 22, and it specifically provides
19 that there is no notice or public hearing on that
20 type of review. The decision is made and that's
21 mailed out, and anyone wanting to challenge it has
22 seven days to file an appeal. That was not done.
23 It, therefore, is a final decision and it is
24 binding.

25 " * * * * " Record 6. (Emphasis added.)

26 Intervenor also addressed the merits of the appeal of the
27 denial, essentially arguing that the Schedule "F" was not
28 required, and that there was no requirement that intervenor
29 prove that he had \$40,000 annual income.

30 Following the public testimony, the board's discussion
31 centered on the planning director's authority to rescind the
32 initial decision and issue a revised decision. In advising
33 the board, the county counsel described the county's Type I
34 review process and concluded that the original approval
35 could not be rescinded or further reviewed absent an appeal

1 to the commission.³ At no point during the discussion was
2 the board informed that the application had been processed
3 under a Type II rather than a Type I review, nor were the
4 commissioners informed of the procedures applicable to a
5 Type II decision.

6 The board did not rule on the merits of intervenor's
7 appeal. Rather, they determined that since the original,
8 November 20, 1995 planning director approval was not
9 appealed within seven days of the decision, that decision
10 was final, and intervenor's appeal was moot. The board made
11 no findings on the planning director's authority to rescind
12 the decision. Rather, ignoring that rescission, the board
13 dismissed the appeal, concluding:

14 "The Board concludes that appellant's application
15 was approved by the Planning Director on November
16 20, 1995 by a written decision which was processed
17 in accordance with the provisions of Article 22.
18 No appeal of that decision was filed within seven
19 (7) days of the mailing of that decision, and
20 there is no provision within the Klamath County

³The process for review and decision under a Type I review is stated in LDO 22.030(B) as follows:

- "1. The Planning Director and his/her designee shall review the application within 10 days of receipt of a complete application and determine its compliance with applicable provisions of this code.
- "2. An authorized signature showing compliance or non-compliance shall constitute the final decision.
- "3. The Planning Director, at his/her discretion, may refer review of the application to the Type II or III Review procedure, or to an appropriate review body for a full quasi-judicial hearing."

1 Land Development Code for the Planning Director to
2 have entered the subsequent December 11, 1995
3 decision denying the application. Because the
4 original decision was not appealed within the time
5 allowed by the Code, that decision is final and
6 the appeal of the decision denying the application
7 is moot since there is a final approval of the
8 application." Record 2.

9 Petitioner appeals the dismissal of intervenor's
10 appeal.

11 **ASSIGNMENTS OF ERROR**

12 Petitioner makes two assignments of error: that the
13 commissioners misconstrued the county's code requirements,
14 and that the decision is flawed by procedural errors that
15 prejudice petitioner's substantial rights. Petitioner
16 argues that the county's code allows for the process used by
17 the planning director to rescind his initial decision and
18 grant a revised decision based on more accurate factual
19 information, and that the commissioners' decision, which was
20 based on an issue that was not stated in the appeal,
21 misconstrued the county's code authorizing the procedure
22 used by the planning director.

23 Intervenor responds that the "proper" question in this
24 case "is to determine if the Code provides any authority for
25 the planning director to rescind an earlier formal
26 approval." Response Brief 2-3. Intervenor argues that the
27 planning director had no authority to rescind the November
28 20, 1995 approval, and that since petitioner did not appeal
29 that initial approval, it became final and not subject to

1 further review. According to intervenor, the subsequent
2 rescission on November 22, 1995 had no legal effect and,
3 therefore, the commissioners were entitled to ignore it.
4 Intervenor further argues he was not required to raise what
5 he refers to as "the mootness issue" in his appeal of the
6 December 11, 1995 denial because the planning director's
7 lack of authority to rescind the November 20, 1995 approval
8 was not relevant to issues related to the denial.

9 The bulk of the parties' arguments address whether,
10 under the Type II procedure, the planning director had
11 authority to rescind his initial determination. The
12 challenged decision does not address that issue. Instead,
13 the decision is premised on an incorrect assumption that the
14 challenged decision resulted from a Type I process. As an
15 initial comment, we note that because the board's decision
16 regarding the authority of the planning director was based
17 upon an analysis of the incorrect procedure, the
18 commission's analysis is flawed. However, we need not
19 discuss the requirements of the Type II process, because the
20 question is not properly before us.⁴

21 The threshold problem we have with the county's
22 decision is captured in what intervenor argues is the
23 "proper" question in this case: intervenor's question

⁴Even if it were properly before us, remand would be in order to allow the county to evaluate the requirements of the Type II process in the first instance.

1 challenges the November 22, 1995 decision by the planning
2 director to rescind the November 20, 1995 approval.
3 Intervenor's argument that he was not required to raise "the
4 mootness issue" in his local appeal of the December 11, 1995
5 denial because the planning director's lack of authority to
6 rescind the November 20, 1995 approval was not relevant to
7 issues related to the denial, clearly illustrates the
8 collateral nature of intervenor's local appeal: intervenor
9 was not challenging a basis for the December 11, 1995
10 denial; he was challenging a separate, earlier decision of
11 November 22, 1995.

12 Neither intervenor, nor any other party, timely
13 challenged the planning director's authority to rescind the
14 November 20, 1995 approval. Indeed, intervenor complied, in
15 part, with the requests contained in the November 22, 1995
16 letter without any apparent objection. It was only well
17 after the December 11, 1995 denial that intervenor ever
18 questioned the planning director's authority to rescind the
19 November 20, 1995 decision, and even then it was not in the
20 form of a properly filed appeal. Thus, contrary to
21 intervenor's conclusion, the November 22, 1995 rescission
22 decision does have legal effect, and the board did not have
23 the authority to ignore it or find the appeal of the
24 December 11, 1995 decision moot. The November 22, 1995
25 rescission superseded the November 20, 1995 decision, and
26 the revised, December 11, 1995 determination became the

1 planning director's decision.

2 Intervenor's challenge to the planning director's
3 authority to rescind the November 20, 1995 decision through
4 an appeal of the December 11, 1995 decision is an
5 impermissible collateral attack on the unappealed, November
6 22, 1995 rescission decision. Whether the planning director
7 had authority to rescind the November 20, 1995 approval was
8 beyond the scope of the board's review during the appeal of
9 the December 11, 1995 decision, since that authority was
10 never timely challenged. The question of the planning
11 director's authority to rescind the November 20, 1995
12 approval was not timely appealed to the board. Therefore,
13 the board exceeded its jurisdiction by retroactively
14 reinstating the rescinded, November 20, 1995 decision and
15 finding the appeal of the December 11, 1995 denial moot.⁵

16 The assignments of error are sustained.

17 The county's decision is remanded for consideration of
18 the merits of intervenor's local appeal of the December 11,

⁵Intervenor also argues that, procedurally, petitioner's substantial rights have not been violated by the county's process because after the commissioners determined that the revised decision was moot, she did not attempt to appeal the November 20, 1995 decision. We understand this argument to be that petitioner's appeal is untimely because petitioner failed to exhaust her local administrative remedies before appealing to this Board. If the question of the planning director's authority been properly before it, and if the county's decision had affirmatively reinstated the initial decision in order to provide for a timely appeal of that decision, intervenor's argument might have merit. However, since the basis of the county's decision was to find the appeal moot because the initial decision had not been appealed in November, in no event would petitioner have been required to go through the futile exercise of attempting to appeal that same decision in January.

1 1995 denial.

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