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

3	SAVE OTTER ROCK'S,)	
	ENVIRONMENT, et al,)	
4)	LUBA No. 80-150
	Petitioners,)	
5)	FINAL OPINION
	vs.)	AND ORDER
6)	(ORDER OF DISMISSAL)
	LINCOLN COUNTY,)	
7)	
	Respondent.)	

9 Appeal from Lincoln County.

10 Robert A. Taylor, Eugene, Oregon, attorney for Petitioners.

11 Frederick J. Ronnau, Lincoln County Legal Counsel, Newport,
12 Oregon.

13 Kenneth L. Schmit, Portland, attorney for Applicant
Consolidated Shelters, Inc.

14 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;
15 participated in this decision.

16 DISMISSED 1/05//81

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18 You are entitled to judicial review of this Order.
19 Judicial review is governed by the provisions of Oregon Laws
20 1979, ch 772, sec 6(a).
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1 REYNOLDS, Chief Referee

2 This matter is before the Board on the motions to dismiss
3 filed by respondents Lincoln County and Consolidated Shelters.
4 The motions state three reasons why the appeal should be
5 dismissed:

6 (1) The Notice of Intent to Appeal was not filed
7 within 30 days of the date of the decision being
8 appealed;

9 (2) Petitioners are estopped from challenging the
10 tentative subdivision approval because it complies
11 with Lincoln County's comprehensive plan, which plan
12 was not challenged by petitioners within the time
13 provided for such an appeal;

14 (3) Petitioners lack standing because (a)
15 petitioners failed to appeal the planning commission
16 decision and thus, failed to "appear" before the
17 governing body, and (b) by failing to appeal the
18 planning commission's decision, petitioners failed to
19 exhaust their administrative remedies, which
20 exhaustion is a prerequisite to having standing to
21 file an appeal.

22 The basic facts relative to the motions to dismiss are not
23 in dispute. The Lincoln County Planning Commission gave
24 tentative approval to Consolidated Shelters' application for
25 tentative subdivision approval on August 11, 1980. This
26 decision was reduced to writing and signed by the planning
director on August 14, 1980. Consolidated Shelters filed an
appeal of the planning commission's approval to the Board of
Commissioners, challenging certain conditions which the
planning commission had attached to the approval. Petitioners
Save Otter Rock's Environment, et al, appeared before the
planning commission and participated in the planning

1 commission's decision making process, but did not appeal the
2 planning commission's approval of the tentative subdivision
3 plan.

4 On October 1, 1980, the date scheduled for the hearing on
5 the appeal before the Lincoln County Board of Commissioners,
6 petitioners appeared and were prepared to argue all issues
7 concerning the planning commission's approval of the tentative
8 subdivision plan. Petitioners had been informed by the Lincoln
9 County Planning Director that an appeal before the county of a
10 planning commission decision was not limited solely to the
11 issues raised by the one filing the appeal. Petitioners,
12 therefore, did not believe that it was necessary to file their
13 own appeal of the planning commission's decision in order to be
14 able to argue before the county Board of Commissioners that the
15 planning commission's approval was in error.

16 Unbeknownst to petitioners, however, Consolidated Shelters,
17 by letter to the Board of Commissioners, withdrew its appeal of
18 the planning commission's decision. On October 1, 1980, the
19 Board of Commissioners advised the petitioners that in view of
20 the applicant's letter withdrawing its appeal the appeal
21 hearing would be "cancelled."

22 Petitioners then attempted on October 8, 1980, to file
23 their own appeal with the planning department of the planning
24 commission's tentative approval of August 14, 1980. However,
25 the planning director denied the appeal request by letter dated
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1 October 10, 1980, on the basis that the appeal had not been
2 filed with the planning department within 30 days of the
3 decision. Although the county's ordinances permit an appeal to
4 the Board of Commissioners of a decision such as the one made
5 by the planning director, petitioners did not appeal the
6 planning director's October 10, 1980 letter decision. Instead,
7 petitioners filed their Notice of Intent to Appeal with this
8 Board on October 27, 1980, seeking to challenge the planning
9 commission's August 14, 1980 tentative approval.

10 The first reason in support of the motion to dismiss is
11 that the Notice of Intent to Appeal was not filed within 30
12 days of the date the decision being appealed was made. The
13 decision in this case, according to respondents, is the
14 planning commission's tentative approval of the subdivision
15 plan which decision was made on August 14, 1980. Inasmuch as
16 petitioners' Notice of Intent to Appeal was not filed until
17 October 27, 1980, respondents argue the appeal was not filed
18 within 30 days of the day of that decision as required by
19 Oregon Laws 1979, ch 772, sec 4.

20 Petitioners argue that Lincoln County's Subdivision
21 Ordinance No. 36, section V.B.3, states that a planning
22 commission decision approving a tentative subdivision plan
23 becomes final 31 days after the date of the decision unless
24 that decision is appealed to the Board of Commissioners.
25 Petitioners contend that because the planning commission's
26 decision in this case was appealed to the Board of

1 Commissioners the planning commission's decision was prevented
2 from becoming final until the Board of Commissioners
3 "cancelled" the appeal as a result of the applicant's
4 withdrawal of the appeal.¹ Petitioners argue:

5 "Under respondent's theory, when an appeal is
6 filed, the date of final decision would stretch
7 forward in time, only suddenly to snap backward to the
8 starting point if the Board of Commissioners should
9 choose to conclude an appeal by 'cancelling' it.
Without anything in the County's ordinances to give
rise to such theory, the Board should reject it out of
hand.

10 "Respondent also implies that the fact that the
11 petitioners did not file a discretionary cross appeal
12 with the Board of Commissioners somehow also affected
13 the date of finality for that aspect of the decision
14 not specifically mentioned in the applicant's appeal
15 notice. Nothing in the County's subdivision ordinance
16 supports splitting the date of decision into two parts
17 in this fashion, and in fact the Lincoln County
18 Planning Director, charged with interpreting the
19 ordinance in the first instance, has interpreted the
20 subdivision ordinance in such a fashion that whenever
21 an appeal is filed, the entire question is open to
22 reconsideration before the Board of Commissioners."

23 Whether the date of the planning commission's decision is
24 the date its order was entered or the date the withdrawal of
25 the appeal and acknowledgement of that withdrawal is made by
26 the Board of Commissioners, it is the planning commission's
decision which is the one being appealed. This is acknowledged
by the petitioners in their Notice of Intent to Appeal. We
have previously held, however, that a petitioner may not appeal
a planning commission decision without exhausting his appeal
rights before the governing body. See Griffiths v. City of
Portland, ___ Or LUBA ___ (LUBA No. 79-011, 1980). In that case

1 we interpreted the phrase "final decision or determination"
2 used in the definition of land use decision in Oregon Laws
3 1979, ch 772 to contain, essentially, a built in exhaustion
4 requirement before the local governing body.

5 Petitioners in the present case did not appeal the planning
6 commission's decision to the Board of Commissioners within 30
7 days of the date of that decision. In view of the appeal which
8 had already been filed by Consolidated Shelters and the
9 planning director's statements to petitioners that petitioners
10 would be able to raise before the Board of Commissioners any
11 issues petitioners desired to raise concerning the validity of
12 the planning commission's decision, petitioners may have
13 believed it was unnecessary for them to file their own appeal
14 to ensure that issues of concern to them would be aired before
15 the Board of Commissioners. The fact of the matter is,
16 however, the Board of Commissioners dismissed the appeal upon
17 motion by Consolidated Shelters. Not only have petitioners not
18 appealed this dismissal, they did not appeal the county's
19 October 10, 1980 action denying their appeal of the planning
20 commission's decision. If petitioners believed they were
21 wronged by the county's dismissal of the appeal filed by
22 Consolidated Shelters, petitioners should have sought review of
23 that decision. We cannot, however, consider the merits of the
24 county's action in dismissing the appeal under the
25 circumstances presented in this case because petitioners did
26 not attempt to appeal that decision.

1 The dismissal by the Board of Commissioners of the appeal
2 filed by Consolidated Shelters terminated whatever grace period
3 may have been created by filing the appeal with respect to the
4 effective date of the planning commission's decision. The
5 effect of the dismissal was not to have the decision of the
6 planning commission become that of the Board of Commissioners.
7 Petitioners have failed to appeal any decision of the Board of
8 Commissioners to this Board, and have failed, therefore, to
9 appeal a final decision or determination of Lincoln County
10 within the meaning of Oregon Laws 1979, ch 772. Griffiths v.
11 City of Portland, supra.

12 Petitioners urge this Board to hold that the exhaustion
13 requirement does not apply or should not be applied in this
14 case because to appeal the decision to the governing body would
15 have been futile. Petitioners argue that the basis for such an
16 appeal would have been the planning commission's failure to
17 apply the statewide goals to the tentative approval. They
18 assert such an argument would, essentially, have fallen on
19 "deaf ears" because the governing body would have concluded the
20 goals need not have been applied. The evidence cited by
21 petitioners to support this assertion is the position taken by
22 the county's counsel in this case, as set forth in the motion
23 to dismiss, that the goals were not required to be applied
24 specifically to the approval because the approval complies with
25 the comprehensive plan and the plan complies with the goals.

26 The fact that the county's counsel now asserts that the

1 goals did not have to be applied to the subdivision approval is
2 not proof positive that the Board of County Commissioners would
3 have so held, nor that this would necessarily have been the
4 position of the county's counsel if the issue had come before
5 the Board of Commissioners in due course. In any event, the
6 fact that the county's legal counsel takes a position contrary
7 to that of the petitioners' should not in and of itself be
8 grounds for holding an appeal to the Board of Commissioners is
9 futile.

10 In summary, the Board lacks jurisdiction to consider
11 petitioners' appeal. The decision of Lincoln County's planning
12 commission is not a final decision or determination within the
13 meaning of Oregon Laws 1979, ch 772.

14 Dismissed.

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FOOTNOTE

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Ordinance No. 36, section V.B.3. provides as follows:

"Unless appealed, the decision of the planning
commission shall become effective on the 31st day
after rendered."