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

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THOMAS M. TEUFEL and )  
THOMAS P. FALK, )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
WASHINGTON COUNTY, MELVIN A. )  
and ANN S. HOLZNAGEL, WILCOX- )  
ERICKSON WESTERN CORPORATION, )  
CHUCK SCHMOKEL, EDWARD and )  
JUDITH TIMM, 1,000 FRIENDS )  
OF OREGON, JOHN M. BARR and )  
JIM NESTER, )  
 )  
Respondents. )

LUBA No. 85-006  
FINAL OPINION  
AND ORDER

Appeal from Washington County.

J. Phillip Holcomb, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners. With him on the brief were Neihaus, Hanna, Murphy, Green, Osaka & Dunn.

Alan S. Bachman, Hillsboro, filed a response brief and argued the cause on behalf of Respondent County.

DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee; participated in the decision.

AFFIRMED 04/23/85

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

1 Opinion by DuBay.

2 NATURE OF DECISION

3 This is an appeal from an order upholding the county  
4 planning commission's denial of a request for a comprehensive  
5 plan and zone change. Petitioners claim the board of county  
6 commissioners failed to make a decision in the manner required  
7 by the county's home rule charter and zoning ordinance.

8 FACTS

9 Petitioners applied to the county for a zone change and a  
10 change in the county's comprehensive plan for approximately 68  
11 acres. The planning commission denied the application, and the  
12 decision was appealed to the county commissioners. The  
13 hearing, held on September 18, 1984, was attended by three of  
14 the five county commissioners. After hearing the testimony,  
15 they voted on a motion to affirm the planning commission  
16 decision. The vote was 2 to 1 in favor of the motion.

17 The county home rule charter provides for five members on  
18 the board of county commissioners. However, under Section  
19 33(b) of the charter, the concurrence of three commissioners is  
20 required to take any action.<sup>1</sup>

21 Even though the county commissioners voted on no motion  
22 other than the motion resulting in the 2 to 1 vote, the  
23 chairman signed an order denying the application. Petitioners  
24 requested the board to reconsider its order, and the matter  
25 again came before the commissioners at a meeting attended by  
26 the full board on November 6, 1984. The proceedings were

1 continued to a later time to address the request for  
2 reconsideration, but at the same meeting an amended order was  
3 approved by the affirmative vote of three commissioners. This  
4 amended order, (also dated September 18, 1984), interpreted the  
5 original 2 to 1 vote as a failure to take action, stating "the  
6 matter died, thus leaving the planning commission decision as  
7 the decision of Washington County...." The commissioners did  
8 not later grant petitioners' request for reconsideration.<sup>2</sup>

9 ASSIGNMENT OF ERROR

10 Petitioners' sole assignment of error challenges the  
11 validity of the board's order based on the 2 to 1 vote.  
12 Section 207 of the county zoning ordinance, according to  
13 petitioners, requires the commissioners to take some action  
14 when reviewing an order of the planning commission.<sup>3</sup>  
15 Petitioners say that action, in accordance with Section 33(b)  
16 of the county charter, must be by three concurring  
17 commissioners. They argue the 2 to 1 vote constitutes failure  
18 to take action under the county's charter and ordinances.  
19 Consequently, they claim we must remand the decision for  
20 further proceedings. Petitioners do not challenge the decision  
21 of the planning commission on the merits.

22 The county filed a motion to dismiss the appeal, saying  
23 petitioners have alleged that no decision has been made. If  
24 that is the allegation, the county reasons, then this Board has  
25 no jurisdiction, since LUBA may only review a final decision or  
26 determination by a local governing body.<sup>4</sup> If the appeal is

1 not dismissed on this ground, the county's position is that any  
2 procedural irregularity was cured on November 6 when three  
3 commissioners took action on the appeal in accordance with the  
4 county charter. The county claims the order approved by the  
5 three commissioners is the order we are to review in this  
6 appeal.

7 Although we have been cited to no charter or ordinance  
8 provisions which might explain the effect of a 2 to 1 vote on a  
9 motion to uphold the decision of the planning commission, a  
10 similar issue was considered in Eastgate Theater v. Board of  
11 County Commissioners of Washington County, 37 Or App 745, 588  
12 P2d 640 (1978). There, Washington County Commissioners  
13 reviewed a planning commission decision about a comprehensive  
14 plan map change. The planning commission recommended denial,  
15 but when the board of commissioners considered the matter,  
16 there was a divided 2 to 1 vote in favor of the proposed  
17 change. In its analysis of the effect to be given the divided  
18 vote, the Court said:

19 "Petitioners applied for a change they were entitled  
20 to apply for, the commission completed its action on  
21 the application and petitioners did not receive the  
22 change they applied for. The commissioners' action is  
23 therefore effectively a denial of petitioners'  
24 application and must be deemed such for purposes of  
25 review. To do otherwise and to accept respondent's  
26 characterization of the board's action as no action,  
would be to place petitioners in a perpetual  
procedural limbo in which their rights would never be  
resolved." Eastgate Theater, supra, at 749.

25 The Court's analysis in Eastgate Theater is reflected in  
26 the county's amended order in this appeal and is sufficient to

1   repel petitioners' challenge. The amended order states in part:

2           "Resolved and ordered that as a result of the two to  
3           one vote, the board took no action thereby allowing  
4           the planning commission decision and findings denying  
5           Petition No. 84-142-M for a plan amendment...to  
6           stand...."

7           Petitioners seem to argue, however, that the Eastgate  
8           Theater approach is incorrect because the county commission was  
9           required to take affirmative "action" (i.e., one concurred in  
10          by three members) in disposing of the appeal.<sup>5</sup> We disagree.  
11          We do not read Section 207 of the zoning ordinance to limit the  
12          method by which the commissions may approve or deny an  
13          application. It is possible under the Eastgate Theater  
14          analysis for denial of the application, as described in Section  
15          207, to be effected by means other than taking "action" in  
16          accordance with Section 33(b) of the charter. As explained in  
17          the amended order, the failure to obtain the concurrence of  
18          three commissioners on a motion means the motion is not  
19          adopted, and the failure to adopt the motion results in letting  
20          the decision under review stand. Letting it stand effects a  
21          denial of the application.

22          We therefore believe the county made a reviewable decision,  
23          and we deny the county's motion to dismiss. The decision is  
24          affirmed.

25                 AFFIRMED.

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FOOTNOTES

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Section 33(b) of the Washington County Charter states:

"Attendance of three of five commissioners shall be necessary to transact county business. Approval of at least three commissioners in attendance is required for any action."

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On November 13, 1984 the county commissioners voted on the question of reconsideration. Four votes are required to approve a motion to reconsider. Petitioners' request failed to receive the necessary four votes.

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Section 207 of the Washington County Development Code provides:

"207-1 Decision Types

"After review of all evidence submitted into the record the Review Authority may:

"207-1.1 Approve or deny all or a part of the application;

"207-1.2 Approve all or part with modifications or conditions of approval as described in Section 207-6;

"207-1.3 Defer a decision as provided in Section 207-1;

"207-1.4 Remand to correct a procedural error."

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ORS 197.825 gives the Board "exclusive jurisdiction to review any land use decision of a local government...."

ORS 197.015(10)(a)(A) states a land use decision includes:

"A final decision or determination made by a local government or special district that concerns the

1 adoption, amendment or application of:

2 "(i) The goals;

3 "(ii) A comprehensive plan provision;

4 "(iii) A land use regulation; or

5 "(iv) A new land use regulation;...."

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7 We reject petitioners' argument that Eastgate Theater  
8 categorized the decision as a denial for procedural purposes  
9 only. The court did not make any distinction in its opinion  
10 between procedural and substantive effects of the 2 to 1 vote.  
11 After remanding the matter to the county for the entry of  
12 findings, the court focused on the abstention from voting by  
13 two county commissioners. The court explained that the two  
14 commission members' withdrawal from decisionmaking was not  
15 required for the reasons advanced by the abstainers and that  
16 such withdrawal denied the petitioners their right to any  
17 tribunal at all. We do not read Eastgate Theater to recognize  
18 a procedural/substantive distinction in connection with a 2 to  
19 1 vote by the Washington County Commissioners.  
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