

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

3
4 RICHARD SOMMER and JANICE TETREAULT,
5 *Petitioners,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent.*

11
12 LUBA No. 2009-067

13 ORDER

14 **MOTION TO DISMISS**

15 The challenged decision adopts comprehensive plan map and text amendments with
16 respect to a dredge material disposal site. The county planning commission conducted a
17 hearing on the application, at which petitioners Richard Sommer and Janice Tetreault
18 appeared. The planning commission approved the application, and petitioner Sommer
19 appealed the planning commission decision to the county board of commissioners. Under
20 Douglas County Land Use and Development Ordinance (LUDO) 2.700.8, the board of
21 commissioners' review of the local appeal on the challenged comprehensive plan amendment
22 is discretionary, and the commissioners may either elect to conduct a hearing on the appeal
23 or decline to review it, effectively affirming the underlying planning commission decision.
24 In the present case, the commissioners declined to review the appeal and did not conduct a
25 hearing. On May 13, 2009, the commissioners issued a decision declining review and
26 adopting the planning commission decision as its own. Petitioners Sommer and Tetreault
27 subsequently filed with LUBA a joint notice of intent to appeal the county's decision.

28 The county moves to dismiss petitioner Tetreault from this appeal for failure to
29 exhaust all local remedies. Because Tetreault did not file her own appeal of the planning
30 commission decision to the board of commissioners, and did not appear before the board of
31 commissioners, the county argues that the board of commissioners was not given a fair

1 opportunity to correct whatever errors Tetreault might seek to allege against the planning
2 commission decision.

3 LUBA's jurisdiction is limited under ORS 197.825(2)(a) "to those cases in which the
4 petitioner has exhausted all remedies available by right before petitioning [LUBA] for
5 review." The county does not dispute that petitioner Sommer exhausted all available
6 administrative remedies. In response to the motion to dismiss, petitioner Tetreault argues
7 that LUBA has long held that the exhaustion requirement of ORS 197.825(2)(a) is met as to
8 all petitioners "if at least one petitioner exhausts all available administrative remedies."
9 *Choban v. Washington County*, 25 Or LUBA 572, 578, *aff'd* 117 Or App 211, 843 P2d 992
10 (1993); *Goose Hollow Foothills League v. City of Portland*, 24 Or LUBA 69, 71 (1992);
11 *McConnell v. City of West Linn*, 17 Or LUBA 502, 506 (1989). In addition, Tetreault filed a
12 precautionary motion to intervene on the side of petitioner, in case LUBA grants the motion
13 to dismiss her from this appeal as a petitioner.

14 The county replies that the above line of cases can be distinguished because in the
15 present case Tetreault did not appear before the board of commissioners. The county cites
16 *Dead Indian Memorial Rd. Neigh. v. Jackson County*, 43 Or LUBA 597 (2002), *aff'd* 188 Or
17 App 503, 72 P3d 648 (2003), for the proposition that to exhaust administrative remedies a
18 person who relies on another person's local appeal to satisfy ORS 197.825(2)(a) must at least
19 appear at the hearing held before the local appeal body. In *Dead Indian Memorial Rd.*
20 *Neigh.*, we declined to dismiss an appeal for failure to exhaust administrative remedies,
21 where a third person filed the local appeal, the hearings officer conducted a hearing at which
22 the petitioners appeared and testified. However, the third person appellant subsequently
23 withdrew the local appeal, causing the hearings officer to dismiss the local appeal, which had
24 the effect of adopting the underlying planning director's decision as the county's final

1 decision. We held that the exhaustion requirement was satisfied under those circumstances.¹

2 The Court of Appeals affirmed that conclusion, stating that “where a hearing was
3 requested and commenced, the individual respondent neighbors appeared at the hearing, but
4 the hearing concluded prematurely because of the action of another petitioner over whom the
5 other individual neighbors had no control, it is only reasonable to conclude, as did LUBA,
6 that the exhaustion requirement was satisfied.” 188 Or App at 510.

7 The fact that the LUBA petitioners in *Dead Indian Memorial Rd. Neigh.* appeared at
8 the local appeal hearing played an important role in our conclusion that the exhaustion
9 requirement had been satisfied, notwithstanding subsequent dismissal of the local appeal.
10 However, in the present case the board of commissioners did not conduct a local appeal
11 hearing or any other public proceeding at which Tetreault could have appeared. As noted,
12 the commissioners declined review of the planning commission decision and summarily
13 adopted that decision as the county’s final decision, without conducting a public hearing. It
14 is difficult to fault Tetreault for failing to appear at the appeal hearing, where no hearing was
15 held due to the actions of the board of commissioners, over which Tetreault obviously has no
16 control. Under LUDO 2.700.8, the commissioners’ decision to hold a hearing or decline
17 review is entirely within their discretion. Tetreault explains that she visited county planning
18 staff after Sommer filed his local appeal to find out how she could participate in the appeal,
19 and there seems little reason to doubt that if the commissioners had elected to conduct a

¹ We stated:

“Our research reveals no cases where a local appeal under ORS 215.416(11) or 227.175(10) has been withdrawn or aborted prior to reaching a decision on the merits. It is apparently a relatively rare circumstance. We see no reason to interpret ORS 197.825(2)(a) to require, in these rare circumstances, that a petitioner must file its own local appeal in order to satisfy the exhaustion requirement, when the result of announcing such a requirement would be that many parties in more ordinary circumstances will file multiple, and probably unnecessary and redundant, local appeals. A local appeal was filed in the present case, and petitioner Mitchell appeared at the hearing on that appeal, which resulted in a decision by the county’s highest decision maker. That decision effectively adopts the tentative decision as the county’s final decision. Under these circumstances, we do not interpret ORS 197.825(2)(a) to require more.” 43 Or LUBA at 611 (footnote omitted).

1 public hearing Tetreault would have appeared at the hearing. Under these circumstances, we
2 decline to extend the reasoning in *Dead Indian Memorial Rd. Neigh.* to require that Tetreault
3 be dismissed from this appeal for failure to make an appearance in the local appeal.

4 The county's motion to dismiss petitioner Tetreault from this appeal is denied.

5 **PRECAUTIONARY MOTION TO INTERVENE**

6 Because we deny the county's motion to dismiss, we need not address Tetreault's
7 precautionary motion to intervene on the side of petitioner.

8 Dated this 10th day of July, 2009.
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16 Tod A. Bassham
Board Chair