

1 available local appeal, then LUBA will affirm the city’s decision in LUBA No. 2004-047, in which
2 case the inescapable conclusion is that petitioner’s appeal of the underlying planning commission
3 decision must be dismissed, because petitioner failed to exhaust an available local appeal, as
4 required by ORS 197.825(2)(a).¹ Conversely, the city argues, if the city erred in rejecting
5 petitioner’s local appeal, then LUBA will remand the decision at issue in LUBA No. 2004-047 and
6 require the city to provide the local appeal to which petitioner is entitled. In that circumstance, the
7 city argues, petitioner has an available administrative remedy and, again, any direct appeal of the
8 planning commission decision to LUBA must be dismissed. In neither circumstance, the city
9 contends, will LUBA review the merits of the underlying planning commission decision.

10 Our April 29, 2004 order allowed petitioner leave to file a supplemental memorandum
11 responding to the city’s motion to dismiss. Petitioner did so May 13, 2004. The city filed a reply
12 on May 20, 2004. We now resolve the city’s motion to dismiss LUBA No. 2004-033.

13 Petitioner’s initial response to the city’s motion and petitioner’s supplemental response both
14 focus on the merits of the decision rejecting petitioner’s local appeal, arguing that the city erred in
15 rejecting the local appeal. However, as we explained in *Burke*, the logic of the ORS 197.825(2)(a)
16 exhaustion requirement dictates that, where the local government determines that the petitioner failed
17 to perfect an otherwise available local remedy, LUBA has no jurisdiction over an appeal of the
18 underlying decision. Under such circumstances, the petitioner’s only recourse is to appeal the
19 decision rejecting the local appeal, and demonstrate that the local government erred in determining
20 that the petitioner failed to perfect the local appeal. The merits of that decision—whether the city
21 correctly determined that petitioner failed to perfect the local appeal—is irrelevant to the question of
22 LUBA’s jurisdiction over the underlying decision.

¹ ORS 197.825(2) provides, in relevant part:

“The jurisdiction of the board:
“(a) Is limited to those cases in which the petitioner has exhausted all remedies available
by right before petitioning the board for review[.]”

1 Petitioner does argue that until the city rejected its local appeal, the underlying planning
2 commission did not become final. However, we do not see that the date the planning commission
3 decision became final has anything to do with petitioner’s obligation under ORS 197.825(2)(a), to
4 perfect and exhaust available local remedies prior to appealing to LUBA. Petitioner further argues
5 that the planning commission decision and the February 6, 2004 decision rejecting petitioner’s local
6 appeal are properly viewed as a single decision or two decisions that have become inextricably
7 merged, and therefore LUBA may review the merits of both decisions. However, that view is
8 fundamentally inconsistent with the ORS 197.825(2)(a) exhaustion requirement.

9 The city’s motion to dismiss LUBA No. 2004-033 is granted. These consolidated appeals
10 are hereby bifurcated, and LUBA No. 2004-033 will be dismissed this date in separate final
11 opinion and order.

12 The city shall file the record in LUBA No. 2004-047 within 21 days of the date of this
13 order.

14 Dated this 26th day of May, 2004.

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Tod A. Bassham
Board Member