BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEAD INDIAN MEMORIAL ROAD
NEIGHBORS, KEN OGDEN,
JAMIE PAIKEN, MARGARET SAYDAH,
and DOROTHY MITCHELL,
Petitioners,

vs.

JACKSON COUNTY,
Respondent,

and

JOSEPH DAUENHAUER,
Intervenor-Respondent.

LUBA No. 2002-089

ORDER

Before us are a motion to intervene and the county's motion to dismiss.

MOTION TO INTERVENE

Joseph Dauenhauer (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

MOTION TO DISMISS

The county moves to dismiss this appeal for lack of jurisdiction, arguing that petitioners either failed to comply with the appeal deadlines at ORS 197.830(9), ORS 197.830(4)(a) or (b), or failed to exhaust all remedies available by right, as required by ORS 197.825(2)(a).

A. Facts

We take the following facts from the record and the parties' pleadings. On April 30, 2002, the county administratively approved a quarry and associated processing activities, including rock crushing and an asphalt batch plant, on portions of a 2,874-acre parcel,

pursuant to ORS 215.416(11)(a).[1] Trucks going to and from the quarry will travel along Dead Indian Memorial Road, on which all named petitioners reside. Notice of the decision was mailed to the owners of all property within 750 feet of the subject parcel, as required by ORS 215.416(11)(a)(B) and (c).[2] Petitioner Mitchell lives within 750 feet of the subject

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[1] ORS 215.416(11)(a) provides, in relevant part:

> "(A) The hearings officer or such other person as the governing body designates may approve or deny an application for a permit without a hearing if the hearings officer or other designated person gives notice of the decision and provides an opportunity for any person who is adversely affected or aggrieved, or who is entitled to notice under paragraph (c) of this subsection, to file an appeal.
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> "(B) Written notice of the decision shall be mailed to those persons described in paragraph (c) of this subsection.
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> "(C) Notice under this subsection shall comply with ORS 197.763 (3)(a), (c), (g) and (h) and shall describe the nature of the decision. In addition, the notice shall state that any person who is adversely affected or aggrieved or who is entitled to written notice under paragraph (c) of this subsection may appeal the decision by filing a written appeal in the manner and within the time period provided in the county's land use regulations. A county may not establish an appeal period that is less than 12 days from the date the written notice of decision required by this subsection was mailed. The notice shall state that the decision will not become final until the period for filing a local appeal has expired. The notice also shall state that a person who is mailed written notice of the decision cannot appeal the decision directly to [LUBA] under ORS 197.830.
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> "(D) An appeal from a hearings officer's decision made without hearing under this subsection shall be to the planning commission or governing body of the county. An appeal from such other person as the governing body designates shall be to a hearings officer, the planning commission or the governing body. In either case, the appeal shall be to a *de novo* hearing.
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> "(E) The *de novo* hearing required by subparagraph (D) of this paragraph shall be the initial evidentiary hearing required under ORS 197.763 as the basis for an appeal to [LUBA]. At the *de novo* hearing:
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> > "(i) The applicant and other parties shall have the same opportunity to present testimony, arguments and evidence as they would have had in a hearing under subsection (3) of this section before the decision;
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> > "(ii) The presentation of testimony, arguments and evidence shall not be limited to issues raised in a notice of appeal; and
> >
> > "(iii) The decision maker shall consider all relevant testimony, arguments and evidence that are accepted at the hearing."

[2] ORS 215.416(11)(c) provides, in relevant part:

property, and received written notice of the planning department's tentative decision. Petitioners Ogden, Paiken and Saydah live more than 750 feet from the subject property, and did not receive written notice. Petitioner Dead Indian Memorial Road Neighbors (DIMRN) is a group of approximately 25 persons who live along Dead Indian Memorial Road. The county does not recognize DIMRN as a neighborhood or community organization that is entitled to notice under ORS 215.416(11)(c)(B), and no notice was provided to DIMRN.

The notice described the county's decision as a "tentative departmental approval" of:

> "Site plan review for a basalt quarry and associated processing activities, including rock crushing and an asphalt batch plant. The operation will occur within areas 'E,' 'F' and 'H,' which are zoned Aggregate Resource. A request has also been made to allow 24 hour operation of the asphalt plant." Record 96.

The notice also stated: "You have the right to request a quasi-judicial hearing on the tentative Departmental decision. If a hearing is requested, the County's final decision will be made by the hearings body." *Id.* The notice specified that the request for a hearing must be received no later than May 13, 2002.[3]

> "(A) Notice of a decision under paragraph (a) of this subsection shall be provided to the applicant and to the owners of record of property on the most recent property tax assessment roll where such property is located:
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> "* * * * *
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> "(iii) Within 750 feet of the property that is the subject of the notice when the subject property is within a farm or forest zone.
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> "(B) Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site."

[3] Jackson County Land Development Ordinance (LDO) 285.110 prescribes the procedures for a "tentative departmental approval," which apparently corresponds to and implements the statutory procedures for rendering a permit decision without a hearing. LDO 285.110 provides, in relevant part:

> "1. The Department shall render a tentative decision in writing on an application for a land use permit in accordance with the provisions of applicable law.
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> "2. A notice in substantially the following form shall be mailed to the applicant and to owners of record of nearby property on the most recent tax assessment roll. * * * Where the subject property is located * * * within a farm or forest zone, notice shall be mailed to owners of property within 750 feet. Notice shall also be sent to any neighborhood or community organization recognized by the Board [of

On May 13, 2002, a person named Nancy Wojtas filed a written request for a hearing on the county's decision. The county scheduled a public hearing before a hearings officer on June 17, 2002. Under LDO 285.050, the hearings officer's decision on an appeal of a tentative departmental decision is the county's final decision, subject to exceptions not present here. Two days before the hearing, on June 15, 2002, someone distributed flyers describing intervenor's application and the coming public hearing to persons living along Dead Indian Memorial Road, including petitioners Ogden, Paiken and Saydah. At the June 17, 2002 hearing all named petitioners appeared, submitted written comments and spoke on the record in opposition to intervenor's application. During the hearing, intervenor challenged Nancy Wojtas' standing to request a hearing on the planning department's tentative decision. The hearings officer treated the objection as a motion to dismiss, and continued the hearing until July 15, 2002, to allow time for intervenor and Wojtas to brief the issue. The next day, June 18, 2002, Wojtas submitted a letter to the county withdrawing her request for a public hearing.

On July 1, 2002, the hearings officer issued an "Order Dismissing the Request for Hearing." The order stated, in relevant part:

> "The parties (applicant and Ms. Wojtas) were given further opportunity to present written memoranda in support of their respective positions on the motion to dismiss with the stipulation that the Hearings Officer would rule on

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> Commissioners] and whose boundaries include the subject property. [Setting forth the required content of the notice].
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> "3. Anyone entitled to notice under [LDO] 285.110(2) may request a public hearing on the Department's tentative decision. The request for public hearing must be made in writing and must be received by the Department at the address listed in the notice no later than 12 calendar days from the date of the notice. The request for public hearing must be accompanied by the required fee published by the Department. * * * Requests for hearing that are not timely filed or that are not accompanied by the required fee will not be accepted.
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> "4. If a request for hearing is timely filed and is accompanied by the required fee, the Department shall not issue a permit and shall set the application for public hearing to be held pursuant to procedures set forth in Chapter 286 of this Ordinance. If a request for hearing is not received or does not meet with the requirements of [LDO] 285.110(3), the Department's decision shall be final."

> the motion by July 9, 2002. If the motion to dismiss were granted, the continued public hearing would be canceled on the ground the Hearings Officer would have no jurisdiction to proceed.
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> "On June 18, 2002, Nancy C. Wojtas * * * filed a letter [withdrawing her request for a public hearing].
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> "* * * * *
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> "Based upon the foregoing, it is ordered the request for hearing filed by Nancy C. Wojtas on May 13, 2002, is dismissed. In the absence of a request for hearing, the Hearings Officer lacks jurisdiction to proceed and the public hearing continued to July 15, 2002, is canceled." Record 163-64.

The county mailed notice of the hearings officer's order to persons who participated in the June 17, 2002 hearing, including petitioners. Two days later, on July 3, 2002, petitioners filed a notice of intent to appeal (NITA) with LUBA, appealing the county's April 30, 2002 tentative decision.[4]

B. The County's Arguments

The county argues that, because its tentative approval was issued as a decision without a hearing pursuant to ORS 215.416(11), the applicable appeal deadlines for petitioners are those at ORS 197.830(4).[5] According to the county, petitioners Ogden,

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[4] The NITA explains that the April 30, 2002 tentative decision "purportedly became final on May 13, 2002," but notes that a local appeal was filed and a public hearing was held on June 17, 2002. NITA 1. We understand the NITA to take the position that the challenged decision did not become final until the hearings officer's dismissal of the local appeal.

[5] ORS 197.830(4) provides, in relevant part:

> "If a local government makes a land use decision without a hearing pursuant to ORS 215.416 (11) or 227.175 (10):
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> "(a) A person who was not provided mailed notice of the decision as required under ORS 215.416 (11)(c) or 227.175 (10)(c) may appeal the decision to the board under this section within 21 days of receiving actual notice of the decision.
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> "(b) A person who is not entitled to notice under ORS 215.416 (11)(c) or 227.175 (10)(c) but who is adversely affected or aggrieved by the decision may appeal the decision to the board under this section within 21 days after the expiration of the period for filing a local appeal of the decision established by the local government under ORS 215.416 (11)(a) or 227.175 (10)(a).

Paiken and Saydah were not entitled to notice of the planning department's tentative decision, and thus those petitioners' appeal to LUBA is timely only if filed within 21 days after expiration of the local appeal period, pursuant to ORS 197.830(4)(b). With respect to petitioner DIMRN, the county argues that DIMRN is not entitled to notice, either as a property owner or as a neighborhood or community organization recognized by the county, pursuant to ORS 215.416(11)(c).[6] Because DIMRN was not entitled to notice of the tentative decision, the county argues, its appeal to LUBA is timely only if filed within 21 days after expiration of the local appeal period, pursuant to ORS 197.830(4)(b). The county notes that the NITA was filed more than 21 days after expiration of the local appeal period. Therefore, the county argues, this appeal must be dismissed, unless petitioner Mitchell has standing.

With respect to petitioner Mitchell, the county argues that she was entitled to and received written notice of the tentative decision, and could have requested a public hearing pursuant to ORS 215.416(11)(a), but did not. Because petitioner Mitchell failed to request a hearing, she did not exhaust all remedies available by right to her, and thus may not appeal the county's decision to LUBA. ORS 197.825(2).[7] Because no petitioners were entitled to

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> "(c) A person who receives mailed notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may appeal the decision to the board under this section within 21 days of receiving actual notice of the nature of the decision, if the mailed notice of the decision did not reasonably describe the nature of the decision.
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> "(d) Except as provided in paragraph (c) of this subsection, a person who receives mailed notice of a decision made without a hearing under ORS 215.416 (11) or 227.175 (10) may not appeal the decision to the board under this section."

[6] Petitioners explain that DIMRN is a "group composed of more than twenty-five neighbors living in homes along Dead Indian Memorial Road." Response to Respondent's Motion to Dismiss 1. Petitioners state that many members of DIMRN appeared at the public hearing. Presumably, DIMRN is appealing as a representative of its members. *See Tuality Lands Coalition v. Washington County*, 21 Or LUBA 611, 618 (1991) (discussing requirements of representational standing). However, that is not clear.

[7] ORS 197.825(2) provides, in relevant part:

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

appeal the planning department's tentative decision directly to LUBA, the county argues, this appeal must be dismissed.

C. Petitioners' Response

Petitioners respond that ORS 197.830(3) provides the pertinent appeal deadline in this case, not ORS 197.830(4).[8] According to petitioners, the notice of the tentative decision "did not reasonably describe the local government's final actions" in three particulars and, therefore, petitioners who are adversely affected by the decision may appeal it to LUBA under ORS 197.830(3). Petitioners argue that the notice was deficient because it (1) indicates that a request for 24-hour operation had been made, but does not state whether that request was granted; (2) indicates that the approved aggregate operation will occur within areas E, F and H on the 2,874-acre subject parcel, but includes no map or other indication where those areas are actually located on the property; and (3) indicates that conditions of approval have been imposed, but does not state what those conditions are. We understand petitioners to argue that, due to these notice deficiencies, petitioner Mitchell may appeal the planning department's tentative decision directly to LUBA, pursuant to either ORS 197.830(3) or ORS 197.830(4)(c). *See Bigley v. City of Portland*, 168 Or App 508, 513-14, 4 P3d 741 (2000) (ORS 197.830(3) tolls the appeal period to LUBA for adversely affected persons who are misled by the notice of the proposal).

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[8] ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), or the local government makes a land use decision that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
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> "(a) Within 21 days of actual notice where notice is required; or
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> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

In addition, petitioners contend that in the present case the county deviated from a policy of notifying neighbors within several miles of a proposed aggregate operation, where aggregate trucks would use a rural road serving the neighbors' property. Petitioners attach an affidavit from counsel to that effect. We understand petitioners to argue that such neighbors are "adversely affected or aggrieved" by the tentative decision, and thus entitled to notice of that decision. ORS 215.416(11)(a)(A). Petitioners attach an affidavit from petitioner Ogden stating that he and petitioners Paiken and Saydah are adversely affected by the county's decision. The affidavit also states that Ogden, Paiken and Saydah first learned of the planning department's tentative decision on June 15, 2002, and filed their NITA within 21 days thereafter. Under these circumstances, we understand petitioners to argue, petitioners Ogden, Paiken and Saydah are entitled to appeal the planning department's tentative decision to LUBA under ORS 197.830(3).

D. Analysis

As framed by the parties' arguments, the central issues in this case are whether the deadline and requirements for appealing the planning department's tentative decision are found under ORS 197.830(3) or (4), and whether petitioners were required to exhaust further administrative remedies before appealing that decision to LUBA.

At the outset, we note that the issues presented in the county's motion to dismiss are ones of first impression. We are aware of no cases that address which statutory provisions govern appeal to LUBA of a tentative decision made pursuant to ORS 215.416(11), when a local appeal of that decision was filed but later dismissed because the appellant withdrew the local appeal. As discussed below, the answer is by no means clear under the pertinent statutory provisions, which do not appear to contemplate the possibility that the *de novo* hearing provided for under ORS 215.416(11) might be aborted before the county's final decision maker reaches a decision on the merits of the local appeal.

Based on the arguments in the county's motion to dismiss, the county appears to view the legal consequence of dismissing the local appeal, after a request for hearing under ORS 215.416(11) is withdrawn, to be that (1) any obligations or rights under that statute are extinguished; (2) the circumstances revert to the *status quo ante*; and (3) the planning department's tentative decision becomes the county's final land use decision retroactively, as of the date the local appeal period expired.

The county does not explain the basis for its view, particularly as to the retroactive finality of the tentative decision. Generally speaking, a tentative decision made under ORS 215.416(11) becomes the county's final decision only if no request for a *de novo* hearing is filed. If such a request is filed "in the manner and within the time period provided in the county's land use regulations," then the county must conduct a *de novo* hearing and render a final decision approving or denying the permit application. Under those circumstances, the planning department's tentative decision does not and cannot become the county's final decision, and therefore cannot be appealed to LUBA under ORS 197.830(4) or any other provision of law. As relevant here, our jurisdiction is limited to *final* land use decisions. ORS 197.015(10)(a); 197.825(1).

The present case, of course, did not follow the usual path contemplated by ORS 215.416(11). Although a request for a *de novo* hearing was filed in the manner and within the time period provided in the LDO, and the county conducted that hearing, the hearings officer did not render a decision approving or denying the permit application. The parties appear to view the hearings officer's dismissal of the request for hearing as having the effect of making the planning department's tentative decision the county's final land use decision on the permit application. We also adopt that view, as otherwise there is no final decision on intervenor's permit application.

However, it does not necessarily follow that the planning department's tentative decision became final retroactively to May 13, 2002, as the county presumes. We are aware

of no authority for that view. It seems equally plausible that the hearings officer's order had the effect of making the tentative decision the county's final decision, as of the date of the hearings officer's order. We are aware of no authority for *that* view either. However, some support for that view is found by analogy to circumstances where appeal to the local government's highest decision maker is a matter of discretion. *See Lyke v. Lane County,* 70 Or App 82, 688 P2d 411 (1984) (a petitioner cannot seek review of a hearings officer's decision directly from LUBA when the relevant ordinance provides an opportunity to seek the discretionary review of the board of commissioners). Under such an ordinance, where the highest decision maker declines to grant review, it is logical to view the effect of that decision as making the underlying decision final as of the date the decision maker declines further review. That underlying decision would then be appealable to LUBA within 21 days of becoming final, pursuant to ORS 197.830(9).[9] Otherwise, the county's land use decision could become final prior to the date all required local remedies are exhausted, a result that could preclude review of such decisions. As a general principle, the statutory finality and exhaustion requirements should not be interpreted in a manner that effectively defeats the possibility of timely LUBA appeals. *Franklin v. Deschutes County*, 139 Or App 1, 6-7, 911 P2d 339 (1996); *Shaffer v. City of Salem*, 137 Or App 583, 587, 905 P2d 1175 (1995).

Similarly, in the present case, if the planning department's tentative decision retroactively becomes final two months after it was issued, then the period for appealing that planning department decision to LUBA may pass before anyone had reason to suspect it was a final decision that could be appealed to LUBA.

We conclude, therefore, that the challenged decision became final for purposes of appeal to LUBA on July 1, 2002, the date the hearings officer's order dismissed the local

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[9] ORS 197.830(9) provides, in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. * * *"

appeal. That conclusion has several consequences for our analysis of the county's motion to dismiss. Most importantly, it means that the parties' arguments regarding whether ORS 197.830(3) or 197.830(4) governs appeal of the tentative decision to LUBA are misplaced.[10] It seems to us that the statute that most readily, if not exclusively, governs petitioners' appeal to LUBA is ORS 197.830(9). Under that statute, there is no dispute that petitioners' notice of intent to appeal was filed within 21 days of the date the challenged decision became final, under our foregoing analysis.

Viewed in that light, the county's arguments that the NITA was untimely filed are without merit. The county's challenges to petitioners DIMRN, Ogden, Paiken and Saydah are based entirely on untimely appeal. There remains only the county's argument that petitioner Mitchell failed to exhaust available local remedies, because she failed to file her own local appeal.

We have long held that the petitioner before LUBA need not itself have filed the local appeal with the highest local decision maker in order to satisfy ORS 197.825(2)(a). *Choban v. Washington County*, 25 Or LUBA 572, 578 (1993); *McConnell v. City of West Linn*, 17 Or LUBA 502, 506 (1989). The exhaustion requirement is satisfied, we have held, where an appeal to the highest local decision maker was filed and the petitioner participated in the appeal hearing. *Choban*, 25 Or LUBA at 578. Here, an appeal to the highest local decision maker was filed, and all named petitioners participated in that appeal hearing. There is no

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[10] There are additional reasons why the particular facts of this case should not be analyzed under ORS 197.830(3) or (4). Neither statute contemplates the particular circumstances here, where a *de novo* review hearing is held, but later aborted without reaching a decision on the merits of the permit application. ORS 197.830(4) allows appeal of the county's "decision without a hearing pursuant to ORS 215.416(11) or 227.175(10)," for three classes of persons, under specified circumstances. Thus, ORS 197.830(4) appears to apply where a decision without a hearing was rendered, and became the county's final decision, because no request for a hearing was made in the manner and within the time specified in the local government's land use regulations. As explained above, in the normal course of events ORS 197.830(4) does not apply where a request for a hearing is made pursuant to ORS 215.416(11) or 227.175(10), as was done in this case.

The present case also does not fit under ORS 197.830(3). In relevant part, that statute specifically excludes from its scope decisions made without a hearing "as provided under ORS 215.416(11) or 227.175(10)." The challenged decision would seem to fit within that exception.

question under *Choban* and *McConnell* that, had that local appeal resulted in a final decision on the merits of intervenor's application, petitioner Mitchell's failure to file her own appeal would not bar her from appealing that final decision to LUBA. However, the local appeal process here was aborted and resulted in a decision that effectively recognized the planning department's tentative decision as the county's final decision. The question becomes how to apply the exhaustion requirement under these circumstances.

Again, we are aware of no authority that addresses that question. In *McConnell*, we concluded, based on several Court of Appeals and LUBA decisions, that the purpose and intent of the exhaustion requirement at ORS 197.825(2)(a) is that the final land use decision should be made by the highest level local decision making body available, before an appeal to LUBA is pursued. 17 Or LUBA at 507. Arguably, that purpose was served in this case, if the hearings officer's order is viewed as effectively declaring that the planning department's tentative decision is the decision by the highest level decision maker available in this case. One could make the contrary argument, however, that the purpose of the exhaustion requirement is better served by requiring that petitioner Mitchell file her own local appeal, and obtain a decision on the merits from the hearings officer. However, the natural consequence of the latter view is that no person would be entitled to rely on the fact that another person has filed a local appeal, as allowed under *Choban* and *McConnell*. Such a person would be at risk that the local appeal would be withdrawn for whatever reason. The probable consequence of that view is that, in many cases, multiple appeals will be filed, with attendant fees, casting a significant additional burden on parties participating in the review process provided by ORS 215.416(11) and 227.175(10).

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.[11] It is

[11] The only case we find remotely bearing on the subject is *Save Otter Rock's Environment v. Lincoln County*, 2 Or LUBA 251 (1981), which predates both the statutory exhaustion requirement and statutory procedures for a decision without a hearing. In that case, the planning commission approved an application for

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.

For the foregoing reasons, the county's motion to dismiss is denied.

Dated this 31st day of October, 2002.

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Tod A. Bassham
Board Member

tentative subdivision plat approval after a hearing, whereupon the applicant sought a *de novo* hearing before the board of commissioners, challenging certain conditions of approval. Just before the scheduled hearing, however, the applicant withdrew its appeal, and the board of commissioners cancelled the hearing and dismissed the appeal. The subdivision opponents attempted to file their own local appeal of the planning commission's decision, but the planning director denied that appeal as untimely. The opponents then attempted to appeal the planning commission's decision directly to LUBA. We dismissed the appeal, concluding that the planning commission decision was not a final decision. 2 Or LUBA at 264-65. We noted that petitioners did not attempt to appeal to us the board of commissioners' dismissal of the applicant's local appeal, or attempt to appeal locally the administrative decision denying their own local appeal. *Save Otter Rock's Environment* is some support for the view we reject above. However, to the extent that case is inconsistent with our holding with respect to petitioner Mitchell, we overrule *Save Otter Rock's Environment.*