

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where each of a county’s responses to the assignments of error were premised on the same unreasonable, post-hoc, and unsupported argument that approval of a bridge along a pedestrian trail was not connected to the trail and hence required conditional use approval, but rather was a “fire service facility” allowed outright in the EFU zone, the county’s positions on the merits were presented without probable cause to believe they were well founded on factually supported information, and thus attorney fees are warranted under ORS 197.830(15)(b). *Van Dyke v. Yamhill County*, LUBA Nos 2020-032/033 (Apr 1, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where none of a party’s positions on the merits of the appeal were presented with probable cause to believe they were well-supported on factually supported information, the party cannot avoid an award of attorney fees under ORS 197.830(15)(b) because the party happened to present a meritorious position with respect to ancillary matters such as record objections and a motion for stay. *Van Dyke v. Yamhill County*, LUBA Nos 2020-032/033 (Apr 1, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Attorney fees under ORS 197.835(10)(b), based on reversal of a decision denying a land use application, encompasses the reasonable value of legal services provided by an attorney that are related to the applicant’s appeal of a local government decision to LUBA, including developing assignments of error that LUBA did not reach in reversing the decision. *Nieto v. City of Talent*, LUBA No 2020-100 (May 10, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.835(10)(b) authorizes recovery of “attorney fees” but does not mention expenses, unlike similar attorney fee statutes. Accordingly, expenses for computer legal research are not recoverable under ORS 197.835(10)(b). *Nieto v. City of Talent*, LUBA No 2020-100 (May 10, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA reverses a decision denying a land use application ORS 197.835(10)(b) mandates an award of attorney fees “against the local government,” even where the local government did not file a brief defending the decision. The statute does not authorize attorney fees against intervenors-respondents, even if they filed the response brief defending the decision. *Legacy Development Group, Inc. v. City of Talent*, LUBA No 2020-099 (May 17, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Recovery of attorney fees under ORS 197.830(10)(b) include only the reasonable value of legal services provided by an attorney that are related to the applicant’s appeal, and do not include expenses paid for non-legal services of a land use planner. *Legacy Development Group, Inc. v. City of Talent*, LUBA No 2020-099 (May 17, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Attorney fees under ORS 197.830(10)(b) are based on customary billing rates in the local area. Where the prevailing party fails to demonstrate that a billable rate for the lead attorney in the Portland Metro area should apply to a land use appeal in Central Oregon, LUBA will reduce the billable rate to the average rate in the local area, based on Oregon State Bar surveys. *Legacy Development Group, Inc. v. City of Talent*, LUBA No 2020-099 (May 17, 2021).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where an intervenor-respondent submits a response to the petition for review that fails to comply with LUBA’s rules for response briefs, LUBA issues an order instructing the intervenor-respondent to file an amended response brief complying with those rules within seven days, and the intervenor-respondent fails to file a compliant response brief, where LUBA issues another order explaining that it will neither consider the intervenor-respondent’s submittal nor allow them to present oral argument seven days later, the intervenor-respondent has not “presented a position” for purposes of awarding attorney fees under ORS 197.830(15)(b). *Kimbrell v. City of Lincoln City*, 81 Or LUBA 1019 (2020).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where the circumstances under which a local code provision applies are not clearly articulated in that provision or specified in any other local code provision, LUBA cannot say that an argument that the governing body misinterpreted that provision is one that “no reasonable lawyer would conclude \* \* \* possessed legal merit” for purposes of awarding attorney fees under ORS 197.830(15)(b), even where the governing body’s interpretation was required to be affirmed under ORS 197.829(1). *Vannatta v. City of St. Helens*, 80 Or LUBA 1018 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** For purposes of awarding attorney fees under ORS 197.835(10), fees related to petitioner’s prosecution of the LUBA appeal generally start with the final local government decision and include legal work past the date of LUBA’s final decision, such as preparing a cost bill and motion for attorney fees. *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where an appeal involves novel legal issues, including the complex interface of state and county marijuana regulations with land use law, 108.9 hours is a reasonable amount of time to have spent pursuing an appeal before LUBA. *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where the Oregon State Bar Economic Survey describes the average hourly rate for land use attorneys as \$398 where petitioner’s attorneys practice and \$278 where the local government is located; where petitioner’s attorney’s law firm has a partner hourly rate of \$475, an associate hourly rate of \$240 to \$295, and a paralegal hourly rate of \$150; and where petitioner’s counsel charged an average hourly rate of \$272.66 over the entire LUBA appeal period, LUBA will conclude that those hourly rates are reasonable. *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Because the law regarding the application of RLUIPA’s Equal Terms provision to particular local zoning provisions is unsettled, and because conflicts exist between decisions from courts in the various federal circuits that have applied the Equal Terms provision to specific local zoning ordinances, it will be a rare occurrence where a party challenging a local government decision regarding RLUIPA will “present[] a position without probable cause to believe the position was well-founded in law” for purposes of awarding attorney fees under ORS 197.830(15)(b). *Central Oregon Landwatch v. Deschutes County*, 80 Or LUBA 1026 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a local code provision states that certain fire safety guidelines are “suggested” but that the local government may require them when it finds that “such measures are necessary to protect public safety,” an argument that the provision gives the local government discretion to require those measures without such a finding will not support an award of attorney fees because LUBA cannot say that no reasonable lawyer would have advanced that interpretation. *Blu Dutch LLC v. Jackson County*, 79 Or LUBA 1068 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a local code provision states that “a Fire Safety Inspection \* \* \* shall occur prior to *the issuance of building permits*,” an argument that the provision does not prohibit the local government from requiring such an inspection prior to *development approval* will not support an award of attorney fees because LUBA cannot say that no reasonable lawyer would have advanced that interpretation, particularly where LUBA notes that the provision “is not a model of clarity.” *Blu Dutch LLC v. Jackson County*, 79 Or LUBA 1068 (2019).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Petitioner’s argument that the county hearings officer’s failure to adopt findings of compliance with a county code provision (Washington County Development Code (CDC 421-7.8)) is not a position presented “without probable cause” sufficient to entitle an award of attorney fees against a non-prevailing party, where LUBA agreed with petitioner that the hearings officer’s failure to adopt any findings explicitly addressing CDC 421-7.8 would warrant remand, unless, as occurred here, other findings with respect to other standards (CDC 422) in the hearings officer’s decision were sufficient to address the substantive standards set forth in CDC 421-7.8, and therefore the hearings officer’s failure to adopt findings addressing CDC 421-7.8 was harmless error. *McAndrew v. Washington County*, 78 Or LUBA 1094 (2018).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a statute requires a local government to find that the land upon which a proposed motor vehicle dismantling business is to be located is “zoned for industrial use,” and petitioner argues the county must also find that the business possesses a conditional use permit because the business is a conditional use in the city’s industrial zone, LUBA will reject the argument because the statute only requires a finding that the land upon which the proposed business is to be located is “zoned for industrial use.” However, that argument is not frivolous and was presented with “probable cause to believe the position was well-founded in law,” within the meaning of ORS 197.830(15)(b). *Devlin v. Linn County*, 77 Or LUBA 559 (2018).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a statute requires a local government to find that the land upon which a proposed motor vehicle dismantling business is to be located is “zoned for industrial use,” and petitioner argues the land upon which the proposed business is not zoned for industrial use because the business is encroaching on petitioner’s exclusive farm use zoned property, LUBA will reject the argument where there is pending circuit court litigation between the parties that will resolve the parties’ encroachment dispute. However, that argument is not frivolous and was presented with “probable cause to believe the position was well-founded in law,” within the meaning of ORS 197.830(15)(b). *Devlin v. Linn County*, 77 Or LUBA 559 (2018).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The party seeking an award of attorney fees under the probable cause standard must clear a relatively high hurdle, and that hurdle is not met

by simply showing that LUBA denied all of a party's objections to the record and/or attempts to introduce evidence not in the record for the Board to consider, because record objections and motions to take evidence are not part of the "entire presentation" described in *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). A party's "presentation" includes a party's arguments on the merits of an appeal and on jurisdictional issues that may arise. *Martin v. City of Central Point*, 76 Or LUBA 463 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A prevailing party who did not incur any actual legal fees is not entitled to seek an award of attorney fees under ORS 197.830(15)(b). *Grimstad v. Deschutes County*, 76 Or LUBA 467 (2017).

**27.13 Procedures/Rules – Attorney Fees.** ORS 197.830(3) provides a remedy in the form of tolling of the appeal period when, after a hearing is held, the use that is approved by a land use decision differs to such a degree from the proposal described in the notice of hearing that a petitioner could have been misled by the notice of hearing regarding the nature of the proposal. A novel legal argument regarding the types or extent of deviation from a proposal described in a notice of hearing that could have misled a person was presented with "probable cause to believe the position was well-founded in law" within the meaning of ORS 197.830(15)(b), and LUBA will not award attorney fees even if LUBA rejected the argument. *Oral Hull Foundation v. Clackamas County*, 76 Or LUBA 523 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where one of petitioner's assignments of error challenges a city's dismissal of petitioner's local appeal for failure to pay the appeal fee and argues that the city erred in dismissing his appeal on that basis because nothing in the city's code makes payment of an appeal fee jurisdictional, that argument meets the low probable cause standard that requires the prevailing party to demonstrate that *every* argument made by the nonprevailing party lacked probable cause, and LUBA will deny a motion for attorney fees from the city. *Dang v. City of Rockaway Beach*, 75 Or LUBA 485 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Attorney fees are not warranted against a city for defending its decision to impose exactions on proposed development under the theory that the development represented a "modification" of a planned unit development, warranting imposition of new conditions, where the applicant himself identified the application as one for a "modification," and complex factual and legal circumstances supported the reasonableness of the city's position that the proposed development required a modification of the planned unit development. *Tokarski v. City of Salem*, 75 Or LUBA 489 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA will not address arguments that attorney fees should be awarded against a city under ORS 197.835(10)(a) and ORS 197.796(5), where the motion for attorney fees invokes those statutes only with respect to two assignments of error that LUBA did not reach in its final opinion, and that the Court of Appeals did not review in its decision affirming LUBA's final opinion. *Tokarski v. City of Salem*, 75 Or LUBA 489 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where the issue of whether a county erred by removing property from its Goal 5 inventory of Deer General Winter Range was clearly resolved against petitioner in a prior appeal, petitioner's attempt to revive that issue in a subsequent appeal

is barred under the holding in *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), and constitutes a position presented “without probable cause to believe the position was well-founded in law \* \* \*” under ORS 197.830(15)(b). *Wood v. Crook County*, 75 Or LUBA 494 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a petitioner both presents a position on the merits that meets the “probable cause to believe the position was well-founded in law” standard in ORS 197.830(15)(b), and in response to an argument that the position on the merits is barred under *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), presents a “probable cause” argument that the position is not barred by *Beck*, LUBA will deny a motion for an award of attorney fees under ORS 197.830(15)(b). *Wood v. Crook County*, 75 Or LUBA 494 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Attorney fees are not warranted under ORS 197.830(15)(b) against a petitioner whose only “position” presented was that a precautionary LUBA appeal should be suspended and not be dismissed until it became clear whether the local government would provide a local appeal, where the planning commission had scheduled a hearing to consider petitioner’s request for a local appeal, but provided no notice or confirmation that the planning commission had in fact accepted the local appeal and would voluntarily provide a local appeal. *Friends of the Lostine v. Wallowa County*, 75 Or LUBA 546 (2017).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.835(10)(b) is phrased in mandatory terms, and requires that if LUBA reverses a local government decision to deny an application and orders the local government to approve the application under ORS 197.835(10)(a), LUBA must award attorney fees to the applicant against the city. *Walter v. City of Eugene*, 74 Or LUBA 671 (2016).

**27.13 LUBA Procedures/Rules – Attorney Fees.** While LUBA independently reviews attorney fee statements for reasonableness, the failure of an opposing party to contest such statements is at least some indication that the attorney fees sought are reasonable. *Walter v. City of Eugene*, 74 Or LUBA 671 (2016).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In a case where LUBA rejected a petitioner’s argument that a proposed clubhouse adjacent to a golf course exceeds the ambiguous “design capacity” limits in OAR 660-033-0130(2)(a), LUBA will deny a motion for attorney fees where, given the ambiguity inherent in the administrative rule, LUBA is unable to say that no reasonable lawyer would present the argument that petitioner presented. *Oregon Coast Alliance v. Curry County*, 73 Or LUBA 396 (2016).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A motion for attorney fees was properly served on the opposing party by “first class mail” under OAR 661-010-0075(2)(b)(B) when it was served by certified mail, because certified mail is a type of first class mail. *Oregonians in Action v. City of Lincoln City*, 72 Or LUBA 457 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Although LUBA rejected a petitioner’s argument that an ordinance that created limits on vacation rental use of single family second homes would exacerbate an identified shortage of residential land to meet the need for single family

second homes, LUBA will deny a motion for attorney fees where, given the complexity of the existing vacation rental dwelling regulatory program and the changes to it, LUBA could not say that no reasonable lawyer would present the argument that petitioners presented. *Oregonians in Action v. City of Lincoln City*, 72 Or LUBA 457 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA’s 2010 rule amendments to require that cross assignments of error be included in a cross petition for review were adopted to address a relatively complicated area of LUBA practice where intervenors who support the decision identify errors that, if corrected, might support the decision. An intervenor’s failure in a 2014 appeal to know about the rule change and present his argument as a cross-assignment of error is not the kind of mistake that no reasonable lawyer would make and that failure does not warrant an award of attorney fees. *Parkview Terrace Development LLC v. City of Grants Pass*, 71 Or LUBA 381 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a city has PUD regulations that expressly permit commercial and industrial PUDs to be terminated but no PUD regulations that expressly permit residential PUDs to be terminated, an argument that the city may not permit the owner of an approved and partially constructed PUD to revoke the PUD approval for the undeveloped portion of the PUD by writing a letter to the planning department requesting such termination is not an argument that is so devoid of merit that it warrants an award of attorney fees under ORS 197.830(15)(b). *Parkview Terrace Development LLC v. City of Grants Pass*, 71 Or LUBA 381 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where neither the respondent nor the intervenor-respondent file a response brief, and intervenor-respondent files only a motion to dismiss, LUBA limits its review of petitioners’ motion for attorney fees to the parties’ jurisdictional arguments. Where the motion to dismiss is filed after the petition for review is filed, the jurisdictional question is initially framed by the petition for review. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a jurisdictional statement in the petition for review attempts to incorporate argument on the merits in different section of the petition for review, and in doing so cites the wrong section of the petition for review, LUBA will nevertheless consider the incorporated argument on the merits, where the argument the petitioners intended to incorporate is obvious and no party was misled by petitioners’ error. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Following the principles articulated in *Spencer Creek Neighbors v. Lane County*, 152 Or App 1, 952 P2d 90 (1998), and *Fechtig v. City of Albany*, 150 Or App 10, 946 P2d 280 (1997), if any one of an intervenor-respondent’s arguments in response to petitioners’ four jurisdictional arguments meets the probable cause standard in ORS 197.830(15)(b), petitioner’s request for an award of attorney fees must be denied. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where petitioners argue that issuing a floodplain permit pursuant to a stipulated order required the exercise of policy or legal judgment,

making the ORS 197.015(10)(b)(A) exception to the statutory definition of “land use decision” inapplicable, an intervenor-respondent’s response to that argument satisfies the probable cause standard in ORS 197.830(15)(b), where intervenor points out the stipulated order clearly identifies improvements that must be relocated from the floodplain, improvements that must be removed altogether, and improvements that may remain where they are. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where petitioners cite a code section that expressly requires a Type 2 (discretionary) procedure where a floodplain permit “no-rise certification” will be required, to argue in their petition for review jurisdictional statement that the ORS 197.015(10)(b)(A) ministerial exception to the statutory definition of “land use decision” does not apply, and intervenor then moves to dismiss based on a closely related code section that authorizes a Type 1 (nondiscretionary) procedure in some circumstances, but that closely related code section also expressly requires a Type 2 procedure where a “no-rise certification” will be required, that jurisdictional argument does not satisfy the probable cause standard in ORS 197.830(15)(b). In that circumstance, where the decision findings and a condition of approval expressly require a “no-rise certification,” a reasonable lawyer would not move to dismiss and fail to address the code’s “no-rise certification” language. *Rogue Advocates v. Jackson County*, 71 Or LUBA 392 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORS 197.830(15)(b), a prevailing party may be awarded attorney fees against any other party that presented a position “without probable cause to believe the position was well-founded in law or factually supported information.” The probable cause standard requires the prevailing party to demonstrate that *every* argument made by the nonprevailing party lacked probable cause, and that standard is not met where the nonprevailing party made several arguments that not only met the low probable cause threshold, but LUBA agreed with the non-prevailing party on that argument. *Stevens v. City of Island City*, 71 Or LUBA 430 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a local government, as a nonprevailing party, files the local record but does not file or join in a brief or other document at LUBA defending its decision, the local government does not present a position in the LUBA appeal and no award of attorney fees against the local government is possible under ORS 197.830(15)(b). *Stevens v. City of Island City*, 71 Or LUBA 430 (2015).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Although LUBA rejected petitioner’s argument that the zoning ordinance imposed a mandatory maximum density standard on subdivisions in a particular zoning district, based on petitioner’s failure to challenge the city council’s reliance on the text of the alleged maximum density standard, where petitioner makes a strong contextual argument based on zoning sub-districts that do impose maximum density standards, LUBA will conclude the argument is “open to doubt, or subject to rational, reasonable or honest discussion,” and not subject to an award of attorney fees. *Greller v. City of Newberg*, 70 Or LUBA 499 (2014).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a prevailing party seeking attorney fees makes a *prima facie* case that the petitioner’s single argument presented was “lacking in probable

cause,” and the petitioner does not respond to the motion for attorney’s fees, LUBA will award attorney’s fees to the prevailing party. *Clarke v. Coos County*, 68 Or LUBA 550 (2013).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORS 197.830(15)(b), the requested attorney fees must be reasonable. While LUBA independently reviews attorney fee statements for reasonableness, the failure of an opposing party to contest such statements is at least some indication that the attorney fees sought are reasonable. *Clarke v. Coos County*, 68 Or LUBA 550 (2013).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A reasonable attorney could believe that an enforcement decision that determines that parking of tow trucks is authorized by a previously issued home occupation permit concerns the application of the city’s home occupation regulations, and is thus a land use decision as defined at ORS 197.015(10)(a), because it is frequently unclear whether in making an enforcement decision regarding an existing permit the decision maker applies, or should have applied, a land use regulation. *Noordhoff v. City of North Bend*, 66 Or LUBA 442 (2012).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A petitioner’s arguments that a city relied too heavily on an access road’s excess capacity and failed to give appropriate weight to the demands that might be placed on the access road by the future development allowed under existing zoning are not sufficient to demonstrate error in a city decision that grants a waiver of setback, right-of-way dedication and right-of-way improvement standards for development of a triplex under a criterion that requires that the waiver is “not inconsistent with the general purpose of ensuring adequate public facilities,” where the decision cites a number of reasons why the city did not believe the setback and right-of-way dedication and right-of-way improvement were necessary. However, petitioner’s arguments were not “without probable cause to believe the position was well-founded in law or on factually supported information,” within the meaning of ORS 197.830(15)(b), and therefore LUBA will deny a motion for an award of attorney fees against petitioner. *Zirker v. City of Bend*, 65 Or LUBA 445 (2012).

**27.13 LUBA Procedures/Rules – Attorney Fees.** For purposes of attorney fees under the “probable cause” standard in ORS 197.830(15)(b), no reasonable attorney would argue on appeal that a decision that reduces minimum residential density in a proposed five-lot subdivision violates a code provision that expressly authorizes reducing minimum residential density, without presenting some challenge to findings that address the code provision and conclude that reducing the density complies with the code provision. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** For purposes of attorney fees under the “probable cause” standard in ORS 197.830(15)(b), a reasonable attorney could argue that a Metro code provision mandating a minimum residential density is violated by a decision that approves less than the minimum density, where the Metro code provision directly applies on its face to city subdivision decisions, but is no longer applicable due to the effect of other Metro code provisions and the city’s implementation of the Metro minimum residential density requirement. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a petitioner relies on arguments presented in an assignment of error to avoid attorney fees under ORS 197.830(15)(b), it is not sufficient to assert a “probable cause” argument on the merits of that assignment of error if the argument on the merits was waived. In that circumstance, to avoid attorney fees, the petitioner must also have presented a “probable cause” argument regarding the waiver challenge. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A petitioner fails to present a “probable cause” argument in response to a waiver challenge under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), to an assignment of error, where the petitioner makes no response to the *Miles* waiver challenge and it is clear from the record that the issue raised in the assignment of error was not identified in the local notice of appeal. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where an assignment of error is subject to two separate and independent waiver challenges, one under ORS 197.763(1) and another under *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003), to avoid attorney fees under ORS 197.830(15)(b) the petitioner must make “probable cause” responses to both waiver challenges, in addition to a probable cause argument on the merits of the assignment of error. *Kane v. City of Beaverton*, 63 Or LUBA 522 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Only legal expenses necessarily related to the appeal of a challenged decision to LUBA are recoverable under ORS 197.835(10)(b); any legal expenses incurred prior to a tentative oral decision to deny an application are not recoverable. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Legal expenses to prepare for an appeal to LUBA that are incurred between the date of a tentative oral decision to deny an application and the final written decision denying the application are recoverable under ORS 197.835(10)(b). *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.830(15)(b) implicitly allows recovery of the “reasonable value” of attorney services, and a local government against whom attorney fees are sought under that statute is free to argue that some portion of the requested fees are unreasonable or excessive. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A petitioner may recover attorney fees under ORS 197.830(15)(b) for the time his attorney spent traveling to Salem for oral argument and for attending oral argument, even if petitioner delivered oral argument *pro se* while the attorney sat in the audience. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.830(15)(b) permits recovery only of attorney fees, and does not mention or allow recovery of other expenses, costs or disbursements. *Stewart v. City of Salem*, 63 Or LUBA 555 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In determining whether an award of attorney fees is warranted under ORS 197.830(15)(b) against a party who presented a position without

probable cause to believe the position was well-founded in law or on factually supported information, the scope of the probable cause analysis is not limited to those issues or assignments of error that LUBA actually addressed in its opinion. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under *Zeitoun v. Yamhill County*, 61 Or LUBA 515 (2010), where LUBA does not reach the merits of an assignment of error that a petitioner relies upon to satisfy the ORS 197.830(15)(b) probable cause test for attorney fees, and instead LUBA disposes of the assignment of error based on a waiver challenge, the petitioner must show that at least one of the petitioner’s positions regarding the waiver issue also meet the probable cause test. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where two separate and independent types of waiver challenges are directed at an assignment of error that a petitioner relies upon to avoid an award of attorney fees under ORS 197.830(15)(b), the petitioner must demonstrate that at least one probable cause argument was made with respect to both types of waiver challenges. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Arguments that new evidence submitted on remand regarding a 2000 decision allows petitioner to raise issues regarding that 2000 decision, even if no issues were raised regarding the 2000 decision during the initial appeal to LUBA, are sufficient to surpass the probable cause threshold for attorney fees under ORS 197.830(15)(b), where a reasonable attorney could argue, based on the new evidence submitted on remand, that an issue regarding the character and legality of the 2000 decision could not have been raised, or knowingly waived, during the first appeal. *McGovern v. Crook County*, 63 Or LUBA 561 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a front yard setback reduction standard requires that views of the ocean “will not be obstructed any more” by the portion of the building that would thereby be allowed to protrude into the front yard, and that portion of the building would only result in *de minimis* obstruction of limited oblique views through small side yards, a local government is within its interpretive discretion under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010), in finding that the “will not be obstructed any more” standard is met. However, petitioner’s argument to the contrary was presented with “probable cause to believe the position was well-founded in law or on factually supported information,” and is not subject to an award of attorney fees under ORS 197.830(15)(b). *Burton v. City of Cannon Beach*, 63 Or LUBA 591 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In order for a party at LUBA to recover attorney fees under any statute authorizing an award of attorney fees, that party must be “represented” by an attorney before LUBA. *Stewart v. City of Salem*, 62 Or LUBA 465 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Recoverable attorney fees at LUBA are limited to efforts spent representing a party before LUBA, and not other matters that may fall within an attorney/client relationship. *Stewart v. City of Salem*, 62 Or LUBA 465 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** No statute authorizing recovery of attorney fees incurred before LUBA also authorizes LUBA to award attorney fees incurred before the Court of Appeals on appeal of a LUBA decision. *Stewart v. City of Salem*, 62 Or LUBA 465 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Attorney fees under ORS 197.830(15)(b) are not warranted where the petitioner argued that the county was required under its code to provide for continuation of existing streets in adjoining subdivisions and reasonable persons could disagree, based on the plat of the adjoining subdivision that showed a street apparently stubbed to the common property line, whether the code provision required that street to be continued into the proposed subdivision. *Burness v. Douglas County*, 62 Or LUBA 555 (2011).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A petitioner’s argument that the city’s notice of hearing “did not reasonably describe the local government’s final action” within the meaning of ORS 197.830(3) was not so lacking in merit as to justify an award of attorney fees under ORS 197.830(15)(b), where the city’s notice did not provide a great deal of detail about the precise mixed-use nature of the proposal, and petitioner raised a fair question about whether the map attached to the notice was adequate to elaborate on the precise nature of the proposal. *Duenweg v. City of Medford*, 61 Or LUBA 495 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORS 197.830, where a local government’s notice of hearing is deficient a petitioner may be able to file a delayed LUBA appeal. A petitioner’s failure to establish he was “misled” by the city’s posted or published notice does not merit an award of attorney fees under ORS 197.830(15)(b), where the LUBA decision that established that a person in petitioner’s circumstances must establish that he was misled to be eligible to file a delayed notice of intent to appeal under ORS 197.830(3) was not issued until shortly before LUBA dismissed petitioner’s LUBA appeal as untimely filed. *Duenweg v. City of Medford*, 61 Or LUBA 495 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA will deny a motion for attorney fees under ORS 197.830(15)(b), where the party against whom attorney fees is sought did not file a brief, and the movant fails to identify any “position” the party presented in the appeal. *Swails v. Clackamas County*, 61 Or LUBA 503 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORS 197.830(15)(b) LUBA is to award attorney fees against a party it “presented a position without probable cause to believe the position was well-founded in law or on factually supported information.” If a petitioner wishes to rely on arguments he made on the merits of an issue, and LUBA found that petitioner waived that issue under ORS 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003), by failing to raise the issue during the local hearing and his local notice of appeal, petitioner may only rely on his arguments on the merits if he also had probable cause to believe his arguments in response to the county’s waiver argument were well founded. *Zeitoun v. Yamhill County*, 61 Or LUBA 515 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA concludes that a petitioner had probable cause to believe his responses to a county’s claims that he waived an issue by failing to raise the issue during the local hearing and in his local notice of appeal were well founded, even

though LUBA ultimately concluded the issue was waived, petitioner may rely on his arguments on the merits of the issue in responding to a motion for attorney fees. *Zeitoun v. Yamhill County*, 61 Or LUBA 515 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Although LUBA and the Court of Appeals disagreed with intervenor that the holding in *Citizens for Responsibility v. Lane County*, 207 Or App 500, 142 P3d 486 (2006), a case involving firearms training facilities, should be extended to apply to dwellings on forest land that were not lawfully established, the argument that the same reasoning should apply to dwellings on forest land was not unreasonable and an award of attorney fees is not warranted. *Friends of Yamhill County v. Yamhill County*, 60 Or LUBA 493 (2010).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When a challenged decision does not make it clear that the local government relied on its general planning and zoning authority to authorize residential through-the-fence (TTF) airport uses, rather than state statutes that explicitly authorize only commercial and industrial TTF programs, a petitioner satisfies the ORS 197.830(15)(b) probable cause standard by arguing that the decision improperly relied on the state statutes for authority in approving the residential TTF use. *Port of St. Helens v. City of Scappoose*, 59 Or LUBA 516 (2009).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When a notice of intent to appeal (NITA) is filed more than 21 days after a local government’s final decision and the petitioner relies on ORS 197.610 to 197.625 to argue that the NITA was timely filed because he did not receive notice of the decision pursuant to the statute, if the petitioner makes no reasonable attempt to show why the decision is a post-acknowledgment plan amendment subject to the statute or even if the statute did apply why he did not receive notice of the decision, then an award of attorney fees is warranted. *Sommer v. City of Cave Junction*, 58 Or LUBA 671 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When a party prevails on at least one assignment of error an award of attorney fees is not warranted, even if its arguments on the other assignments of error were without merit. *Waluga Neighborhood Association v. City of Lake Oswego*, 58 Or LUBA 675 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The fact that a prevailing party is a neighborhood association has no bearing on whether an award of attorney fees is warranted. A neighborhood association must make the same demonstration as any other party to obtain an award of attorney fees. *Waluga Neighborhood Association v. City of Lake Oswego*, 58 Or LUBA 675 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** There was “probable cause to believe [a] position was well-founded” under ORS 197.830(15)(b) where one of the non-prevailing party’s arguments in the appeal was based on actions by city planning staff that led the non-prevailing party to believe that a local appeal of a response to their letter to the planning staff was available to them. *Ortman v. City of Forest Grove*, 56 Or LUBA 813 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In determining whether to grant a motion for attorney fees, there is no different standard for attorneys and non-attorneys; rather, LUBA

evaluates whether *any* reasonable lawyer would conclude that *any* of the positions taken by the party on appeal possesses legal merit. *Sommer v. City of Cave Junction*, 56 Or LUBA 818 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Nothing in the text of ORS 197.830(15)(b) or LUBA’s rules prevents a prevailing party that is a governing body from being awarded attorney fees. *Sommer v. City of Cave Junction*, 56 Or LUBA 818 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** While it is close question, an argument that an amended franchise agreement between the county and a non-conforming landfill is a land use decision subject to LUBA’s jurisdiction, because the agreement is a de facto nonconforming use verification or a de facto authorization to expand or alter the landfill, is an argument that a reasonable lawyer could advance. Accordingly, that argument is sufficient to avoid attorney fees under the ORS 197.835(15)(b) “probable cause” standard. *Kamp v. Washington County*, 55 Or LUBA 711 (2007).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a petitioner makes a *prima facie* case that a city’s position was “lacking in probable cause,” and the city does not respond to the motion for attorneys fees, the motion for attorney fees will be granted. *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 732 (2008).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Even though petitioners’ argument that a local comprehensive plan policy required broad evaluation of cumulative impacts of a development was rejected, petitioners’ argument was “subject to reasonable, rational, or honest discussion” such that no award of attorneys fees was warranted. *Wolfgram v. Douglas County*, 54 Or LUBA 775 (2007).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An award of attorney fees is not warranted against a party who, faced with the possibility that a concession agreement that was not appealed would later be immune to challenge in the absence of an appeal to LUBA, appealed the decision and argued that the decision had the effect of authorizing a conditional use. *Dorall v. Coos County*, 53 Or LUBA 622 (2007).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When a petitioner submits a letter as the petition for review that is so grossly deficient that it is not even recognized as a petition for review, and that letter provides no basis for reversal or remand of the challenged decision, an award of attorney fees under ORS 197.830(15)(b) is warranted. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769 (2005).

**27.13 LUBA Procedures/Rules – Attorney Fees.** There is no bright line that separates significant impact land use decisions from those whose impacts are not sufficient to meet the test. Where a petitioner argues that a lot line adjustment constitutes a significant impact land use decision because the decision would violate covenants, conditions, and restrictions for the property that prevent abandonment of a golf course, LUBA will not award attorney fees when a petitioner is unable to link the significant impacts directly to the challenged decision. *Jewett v. City of Bend*, 48 Or LUBA 631 (2004).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When a case is dismissed on jurisdictional grounds, the arguments presented on that issue determine whether attorney fees will be awarded. When an appeal is decided on the merits, whether attorney fees are awarded is determined by the arguments made in the assignments of error and the responses to those assignments of error. *Cape v. City of Beaverton*, 47 Or LUBA 625 (2004).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When annexations are specifically listed in the definition of a “minor boundary change” and are not listed in the definition of a “major boundary change,” no reasonable attorney would argue that annexations are a “major boundary change.” *Cape v. City of Beaverton*, 47 Or LUBA 625 (2004).

**27.13 LUBA Procedures/Rules – Attorney Fees.** When a prior decision specifically rejects a party’s argument made to LUBA, no reasonable attorney would repeat that argument without acknowledging the prior decision, providing some argument as to why the prior decision was wrong or should be overturned, or providing any other explanation or rationale for the argument. *Cape v. City of Beaverton*, 47 Or LUBA 625 (2004).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An assertion that petitioner resided within the 250-foot notice area is based on factually supported information, where petitioner examined maps and physically measured the distance between her house and the subject property. The fact that more detailed or better-scaled maps not available to petitioner showed the contrary does not demonstrate that petitioner’s factual assertion was not well-founded. *Brinker v. Tillamook County*, 44 Or LUBA 832 (2003).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A transfer to circuit court is a statutory alternative to dismissal where LUBA concludes that the appealed decision is not a land use decision, and a transfer is therefore properly treated as a dismissal of the appeal for purposes of determining who is the prevailing party. *Maxwell v. City of Happy Valley*, 44 Or LUBA 852 (2003).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The scope of the exception to LUBA’s jurisdiction for decisions that are “fiscal” in nature is sufficiently ill-defined that LUBA’s transfer of a precautionary appeal of a decision that establishes a reimbursement district to circuit court does not warrant an award of attorney fees against petitioner. *Maxwell v. City of Happy Valley*, 44 Or LUBA 852 (2003).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Filing a motion for voluntary remand does not “present a position” that may potentially justify an award of attorney fees pursuant to ORS 197.830(15)(b) and OAR 661-010-0075(1)(e). To the extent a motion for voluntary remand may be viewed as a “position,” it is essentially is a concession of error. *Rogers v. City of Eagle Point*, 43 Or LUBA 592 (2002).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Oregon Rules of Civil Procedure 17, which allows sanctions for frivolous pleadings, is not applicable to proceedings before LUBA. ORS 197.830(15)(b) and OAR 661-010-0075(1)(e) provide the only standards for sanctioning frivolous positions presented to LUBA. Under those provisions, LUBA may not award attorney fees based

on allegations that the local government acted in “bad faith” in failing to file a motion for voluntary remand earlier in the LUBA proceeding. *Rogers v. City of Eagle Point*, 43 Or LUBA 592 (2002).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An award of attorney fees is not warranted against a party whose only “position” was an unsuccessful motion to take evidence under OAR 661-010-0045 filed prior to the parties’ briefs, where LUBA concludes that a reasonable lawyer would have filed the motion, notwithstanding LUBA’s general practice to deny such motions as premature until the parties’ briefs have been filed. *Pynn v. City of West Linn*, 42 Or LUBA 602 (2002).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a city zoning map correction procedure permits administrative corrections to current city zoning maps to make them consistent with the originally adopted zoning map or legal description upon which the original zoning was based, a city commits legal error by finding that the existing zoning map may be corrected to be consistent with an intermediate zoning map that is not included in the record before LUBA. An award of attorney fees under OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b) is warranted, where the city argues that such findings are adequate and supported by substantial evidence. *6710 LLC v. City of Portland*, 41 Or LUBA 608 (2002).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where no attempt is made to justify the hourly rate used in a motion for attorney fees, and the requested hourly rate is significantly higher than the relevant hourly rates shown in an Oregon State Bar Economic Survey for the community for attorneys with the same number of years of experience, LUBA will reduce the requested attorney fees to reflect the hourly rate shown in the Oregon State Bar Economic Survey. *6710 LLC v. City of Portland*, 41 Or LUBA 608 (2002).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Filing a notice of intent to appeal does not present the position that a challenged decision is a final land use decision, for purposes of an award of attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b), when the appeal is filed for precautionary purposes and the petitioners do not oppose the motion to dismiss. *Harcourt v. Marion County*, 40 Or LUBA 610 (2001).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA will award attorney fees pursuant to ORS 197.830(15)(b) where petitioner fails to articulate a legal basis for reversal or remand. *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA will apply the factors provided in ORS 20.075 for guidance in exercising its discretion to determine whether the amount of attorney fees requested under ORS 197.830(15)(b) is reasonable. *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Consistent with the legislative policies for timely resolution of land use disputes, and encouragement of alternative dispute resolution, LUBA will not consider attorney fees incurred in mediation or in pursuit of settlement in determining an award of reasonable attorney fees under ORS 197.830(15)(b). *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where petitioner files nothing more than a notice of intent to appeal, petitioner has not presented a position, for purposes of an award of attorney fees under ORS 197.830(14)(b). *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.835(10)(a)(A) mandates that LUBA reverse a land use decision where a “local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]” If a decision is reversed under ORS 197.835(10)(a)(A), ORS 197.835(10)(b) requires that LUBA award attorney fees to the applicant. However, those statutes do not apply to a land use decision that is reversed because it is outside the discretion allowed under an LCDC administrative rule. *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85 (1999).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A local government’s land use decision does not present a “position” to the Board for the purpose of determining whether or not an award of attorney fees against the local government is required under ORS 197.830(14)(b). *Wolverton v. Crook County*, 36 Or LUBA 757 (1999).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A nonprevailing party that presents arguments for the extension of principles of LUBA case law does not present a position without probable cause to believe the position is well-founded in law. *Abadi v. Washington County*, 36 Or LUBA 748 (1999).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Respondent’s attempt to distinguish petitioners’ case from well-settled legal principles does not necessarily mean that such approach was void of any rational, reasonable or honest discussion meriting the recovery of attorney fees under OAR 661-010-0075(1)(e)(A) and ORS 197.830(14)(b). *Witzel v. Harney County*, 35 Or LUBA 806 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A prevailing party that moves for an award of attorney fees has the responsibility to not only allege any necessary facts to support its motion, but also to establish why, as a legal matter, it is statutorily entitled to relief. *Gutoski v. Lane County*, 35 Or LUBA 803 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA will not supply the legal arguments or analysis that establish that no reasonable lawyer could conclude that any of the legal points asserted on appeal possessed legal merit. *Gutoski v. Lane County*, 35 Or LUBA 803 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A prevailing party’s bald assertion that any challenge to a local government’s decision reviewed under the “clearly wrong” standard is one that no reasonable lawyer could conclude possessed legal merit is itself clearly wrong. *Gutoski v. Lane County*, 35 Or LUBA 803 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A petitioner does not “present a position” in a notice of intent to appeal, within the meaning of ORS 197.830(14)(b), for purposes of an award of attorney fees. *Dornan v. Yamhill County*, 35 Or LUBA 786 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Positions presented during the local proceedings that lead to a decision that is later appealed to LUBA are not positions presented to LUBA, for purposes of an award of attorney fees under ORS 197.830(14)(b). *Dornan v. Yamhill County*, 35 Or LUBA 786 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Arguments presented in a petition for attorney fees by the prevailing party at LUBA cannot, under ORS 197.830(14)(b), provide a basis for an award of attorney fees to the nonprevailing party in the appeal. *Dornan v. Yamhill County*, 35 Or LUBA 786 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A local government that simply files the local record and does not file or join in a brief or other document at LUBA defending its decision does not present a position “as a litigant” and cannot be required to pay attorney fees under ORS 197.830(14)(b). *Hearne v. Baker County*, 35 Or LUBA 768 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The city presented a position to LUBA for purposes of ORS 197.830(14)(b), where the city submitted a memorandum on jurisdiction, even though the city did not write a response brief, appear in the appeal, or participate in oral argument. *Lewelling Neighborhood Dist. v. City of Milwaukie*, 35 Or LUBA 764 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.845(3) authorizes an award of attorney fees when a quasi-judicial decision for which a stay has been granted is affirmed by LUBA. However, the attorney fees recoverable under ORS 197.845(3) are limited to attorney fees related to the stay. *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.845(3) authorizes an award of attorney fees when a quasi-judicial decision for which a stay has been granted is affirmed by LUBA. Where LUBA dismisses the appeal, an award of attorney fees is not authorized by ORS 197.845(3). *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where an appeal is dismissed for failure to exhaust remedies, but involves a complex interaction of the notice provisions of ORS 197.195 (governing notice of limited land use decisions), the tolling provisions of ORS 197.830(4) and the exhaustion requirement of ORS 197.825(2)(a), the question of LUBA’s jurisdiction over the appeal was open to doubt and reasonable discussion, and no attorney fees are warranted under ORS 197.830(14)(b). *Walton v. Clackamas County*, 34 Or LUBA 829 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA dismisses an appeal prior to consideration of the merits of the appeal, LUBA will consider the arguments presented by petitioners in opposition to the motion to dismiss in deciding whether an award of attorney fees is warranted. *Bruce v. City of Hillsboro*, 34 Or LUBA 820 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA issues an order requiring that the notice of intent to appeal be served on all persons entitled to service of the notice under OAR 661-010-0015 and petitioners fail to do so, arguing instead that they should be able to rely on an erroneous statement by the city concerning the persons entitled to notice, petitioners present a position that is not “open to doubt, or debatable, or subject to rational, reasonable or honest discussion,” and an award of attorney fees is warranted. *Bruce v. City of Hillsboro*, 34 Or LUBA 820 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An evidentiary hearing to resolve “disputes regarding attorney fees” pursuant to OAR 661-010-0045(1) is not warranted where the motion for an evidentiary hearing is filed before LUBA has entered its final opinion. *Ackerley Outdoor Advertising v. City of Portland*, 34 Or LUBA 736 (1998).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The fact that the petitioner was attempting to purchase the property at issue in a LUBA appeal does not compel a conclusion that the appeal was brought without probable cause to believe it was well-founded. *Pfeifer v. City of Silverton*, 33 Or LUBA 869 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORCP 54A(3), where petitioner voluntarily dismisses an appeal, and no circumstances indicate otherwise, intervenor-respondent is the prevailing party. *Pfeifer v. City of Silverton*, 33 Or LUBA 869 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Attorney fees will not be awarded under ORS 197.830(14)(b) where LUBA’s final opinion determined it was not “clear” that previously adopted comprehensive plan amendments rendered a decision to construct a bridge and related improvements the nondiscretionary culmination of the plan amendments. *Knapp v. City of Jacksonville*, 33 Or LUBA 834 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A petitioner’s failure to prevail on every assignment of error does not preclude an award of attorney fees against a local government that advances a non-meritorious defense to one or more assignments of error. *Spencer Creek Neighbors v. Lane County*, 33 Or LUBA 824 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA will award attorney fees where it determines that none of the arguments raised in response to a sustained assignment of error are “open to doubt, or subject to rational, reasonable, or honest discussion.” *Spencer Creek Neighbors v. Lane County*, 33 Or LUBA 824 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Applying ORS 197.830(14)(b) and *Contreras v. City of Philomath*, 32 Or LUBA 465 (1996), an award of attorney fees is appropriate against a petitioner who does not present any issues that challenge the local government’s final decision or the findings supporting that decision. *Young v. City of Sandy*, 33 Or LUBA 817 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Although ORS 197.830(14)(b) makes an award of attorney fees mandatory where LUBA finds that an appeal is not supported by probable cause,

LUBA is afforded the discretion to determine what amount of attorney fees is “reasonable” under the specific facts of the case. *Young v. City of Sandy*, 33 Or LUBA 817 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The probable cause standard stated in ORS 197.830(14)(b) creates a low threshold. *Brown v. City of Ontario*, 33 Or LUBA 803 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.830(14)(b) will not be applied to punish LUBA appellants who vigorously pursue all reasonable legal arguments just because, when viewed with the benefit of hindsight, those arguments do not entitle them to prevail. *Brown v. City of Ontario*, 33 Or LUBA 803 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The context of ORS 197.830(14)(b) indicates that the statute was not intended to require an award of attorney fees where any single assertion set forth in a petition for review is not supported by probable cause. *Fechtig v. City of Albany*, 33 Or LUBA 796 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA determines that at least one of petitioner’s arguments is sufficiently well-founded to avoid an award of attorney fees, the Board will not apply the ORS 197.830(14)(b) standard to all other assignments of error in search of an argument that does not meet that standard. *Fechtig v. City of Albany*, 33 Or LUBA 796 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An award of attorney fees is not appropriate where petitioner raised issues that were subject to reasonable discussion, and LUBA cannot say that no reasonable lawyer would find petitioner’s arguments were meritless. *Fraley v. Deschutes County*, 33 Or LUBA 790 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In determining whether an award of attorney fees is required, LUBA will not consider whether a party is represented by an attorney but only whether there is “no objective legal basis for the appeal,” *i.e.*, whether *any* reasonable lawyer would conclude that *any* of the positions taken by the party on appeal possesses legal merit. *Squires v. City of Portland*, 33 Or LUBA 783 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In order to recover attorney fees under ORS 197.830(14)(b), the prevailing party must present LUBA with a signed and detailed statement of the amount of attorney fees which minutely itemizes or particularizes the services rendered and the time devoted to the services. *Squires v. City of Portland*, 33 Or LUBA 783 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a county moves for voluntary remand before it presents any position before LUBA in the form of a response brief or otherwise, there is no basis on which to make a determination under ORS 197.830(14)(b) regarding an award of attorney fees. *Eppich v. Clackamas County*, 33 Or LUBA 774 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA’s disposition of an appeal by memorandum opinion does not necessarily indicate that a petitioner’s position was presented without probable cause to believe it was well founded. *Arnold v. Columbia County*, 33 Or LUBA 766 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Petitioner did not have probable cause to believe that a “preannexation agreement” entered into by the city and intervenor was an appealable final land use decision; accordingly, an award of attorney fees is required under ORS 197.830(14)(b). *Crist v. City of Beaverton*, 32 Or LUBA 495 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORS 197.830(14)(b), LUBA must make an award of attorney fees to a prevailing party if it determines that no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit. In making this determination, LUBA will consider whether any of the issues raised on appeal were open to doubt, or subject to rational, reasonable or honest discussion. *Contreras v. City of Philomath*, 32 Or LUBA 465 (1996).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An award of attorney fees to intervenor is appropriate under ORS 197.830(14)(b) where petitioners’ appeal to LUBA purported to challenge actions by the city that could not even arguably be depicted as land use decisions subject to LUBA jurisdiction. *Contreras v. City of Philomath*, 32 Or LUBA 465 (1996).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Under ORS 197.830(14)(b), LUBA is required to award reasonable attorney fees to a prevailing party upon a finding that another party presented a position without probable cause to believe the position was well-founded in law or on factually supported information. *Pfeifer v. City of Silverton*, 32 Or LUBA 463 (1996).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where petitioner voluntarily dismisses his appeal, intervenors are not entitled to an award of attorney fees because neither party is the “prevailing party” for purposes of ORS 197.830(14)(b). *Pfeifer v. City of Silverton*, 32 Or LUBA 463 (1996), *rev’d and rem’d*, 146 Or App 191, 931 P2d 833 (1997).

**27.13 LUBA Procedures/Rules – Attorney Fees.** If a petition for attorney fees is included in a party’s brief, the signed and detailed statement justifying the amount of the fees must be filed after the issuance of LUBA’s opinion, and the opposing party may have 10 days to respond. *Cox v. Yamhill County*, 31 Or LUBA 270 (1996).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Before LUBA will consider a petition for attorney fees, the petition must be supported by a statement of the amount requested, supported by sufficient detail to justify the award. *Cox v. Yamhill County*, 31 Or LUBA 270 (1996).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Although OAR 661-10-075(1)(a) states that petitions for attorney fees must be filed within 14 days after LUBA’s final order is issued, LUBA will allow a petition for attorney fees in the parties’ briefs. *Cox v. Yamhill County*, 31 Or LUBA 270 (1996).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.845(3) requires an award of attorney fees and damages when LUBA affirms a quasi-judicial land use decision or limited land use decision for which a stay was granted. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA normally considers several factors in determining whether to accept a late petition for attorney fees and damages: (1) length of delay; (2) validity of the explanation of lateness; and (3) presence or absence of prejudice. *Save Amazon Coalition v. City of Eugene*, 30 Or LUBA 448 (1995).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA’s final opinion and order remands the challenged decision for further proceedings, rather than reversing the decision and ordering the local government to approve petitioners’ application, LUBA is not authorized to award attorney fees to petitioners under ORS 197.835(8). *Spathas v. City of Portland*, 29 Or LUBA 579 (1995).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where petitioner does not allege in its petition for attorney fees that the local government lacked probable cause to believe its positions in an appeal were well-founded or that those positions were presented primarily for a purpose other than to secure appropriate action by LUBA, the petition for attorney fees will be denied. ORS 197.830(15)(b); OAR 661-10-075(1)(d)(A). *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 624 (1994).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Although positions taken by a party in an appeal before LUBA may be the basis for an award of attorney fees under ORS 197.830(15)(b), positions taken during local proceedings or in the challenged land use decision itself may not be the basis for an award of attorney fees by LUBA. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558 (1993).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where LUBA determines a local government decision is precluded by a prior circuit court judgment, LUBA will not conclude the local government presented argument to the contrary “without probable cause to believe the position was well-founded,” where application of the principles of claim preclusion to the challenged decision is somewhat uncertain. In such circumstances LUBA will not award attorney fees pursuant to ORS 197.830(15)(b). *Joines v. Linn County*, 25 Or LUBA 759 (1993).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In order to award attorney fees under ORS 197.830(15)(b), LUBA must find that the petitioner presented a position (1) without probable cause to believe it was well-founded, *and* (2) primarily for a purpose other than securing appropriate action by LUBA. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

**27.13 LUBA Procedures/Rules – Attorney Fees.** The presentation of a losing argument before LUBA, of itself, does not satisfy the requirement of ORS 197.830(15)(b) that a party have presented a position “without probable cause to believe the position was well-founded.” The fact that a party’s attorney may have unsuccessfully presented contrary positions in other cases concerning somewhat related questions is also not enough to establish that the requirement of ORS 197.830(15)(b) is met. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

**27.13 LUBA Procedures/Rules – Attorney Fees.** LUBA’s rejection of petitioners’ arguments that the challenged decision is final, does not mean petitioners’ arguments were presented without

probable cause to believe they were well-founded. Whether a challenged decision is a “final” decision is, more often than not, far from obvious. *City of North Plains v. Washington County*, 24 Or LUBA 623 (1993).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where the prevailing party does not allege or argue that the opposing party “presented a position \* \* \* primarily for a purpose other than to secure appropriate action by [LUBA],” LUBA will deny the prevailing party’s petition for award of attorney fees pursuant to ORS 197.830(15)(b). *Miller v. City of Dayton*, 24 Or LUBA 616 (1992).

**27.13 LUBA Procedures/Rules – Attorney Fees.** ORS 197.835(8) only applies where LUBA reverses a local government’s denial of a development application and orders that the development be approved. Where the challenged decision is simply a request for an interpretation of a local government’s ordinances, and there is no development application for LUBA to order approved, a petition for attorney fees will be denied. *Harmony House, Inc. v. City of Salem*, 23 Or LUBA 683 (1992).

**27.13 LUBA Procedures/Rules – Attorney Fees.** An award of attorney fees against a local government pursuant to ORS 197.830(15)(b) is not justified simply because the local government presented a position on appeal which lacked legal foundation, or may have engaged in an improper course of conduct during the proceedings below. *Bradbury v. City of Independence*, 23 Or LUBA 670 (1992).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Even if the positions presented in petitioner’s petition for review were not well-founded, that does not necessarily mean they were presented “primarily for a purpose other than to secure appropriate action by the board,” as required for the award of attorney fees under ORS 197.830(15)(b). *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 830 (1992).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Petitioner’s desire to defer pursuing its appeal before LUBA, because of the possibility that the outcome of its action in federal court would make it unnecessary to seek additional remedies through the LUBA appeal, does not indicate the LUBA appeal was brought for an improper purpose, as required for the award of attorney fees under ORS 197.830(15)(b). *Oregon Worsted Company v. City of Portland*, 22 Or LUBA 830 (1992).

**27.13 LUBA Procedures/Rules – Attorney Fees.** A party’s presentation of a losing argument before LUBA, standing alone, does not satisfy the requirement of ORS 197.830(15)(b) that a party have presented a position “without probable cause to believe the position was well-founded.” *Schatz v. City of Jacksonville*, 21 Or LUBA 571 (1991).

**27.13 LUBA Procedures/Rules – Attorney Fees.** In order to award attorney fees under ORS 197.830(15)(b), LUBA must determine that the parties against whom the award is requested presented a position without probable cause to believe it was well-founded, and primarily for a purpose other than securing appropriate action by LUBA. *Knapp v. City of Jacksonville*, 20 Or LUBA 535 (1991).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Petitioners’ request for *reversal* of the appealed decision was presented with probable cause to believe it was well-founded where any of petitioners’ challenges to the appealed decision (1) was presented with probable cause to believe it was well-founded, and (2) if upheld, would allow LUBA to *reverse* the appealed decision. *Knapp v. City of Jacksonville*, 20 Or LUBA 535 (1991).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Where a county adopted additional standards, addressing annual gross farm income and crop density and acreage, for determining whether a proposed dwelling is “in conjunction with farm use,” the county’s argument to LUBA that its standards eliminate discretion from the determination of whether a dwelling is “in conjunction with farm use,” although incorrect, was not presented without probable cause to believe the position was well-founded and, therefore, an award of attorney fees is not warranted. *McKay Creek Valley Assoc. v. Washington County*, 20 Or LUBA 494 (1990).

**27.13 LUBA Procedures/Rules – Attorney Fees.** Petitioner’s challenge to nonessential findings is not sufficient to justify a finding by LUBA pursuant to ORS 197.830(15)(b) that petitioner’s “position was presented without probable cause to believe the position was well-founded.” *Griffith v. City of Milwaukie*, 19 Or LUBA 614 (1990).

**27.13 LUBA Procedures/Rules – Attorney Fees.** For attorney fees to be awarded under ORS 197.830(15)(b), LUBA must find both that the losing party lacked probable cause to believe its position was well founded and that its position was presented primarily for a purpose other than to secure appropriate action by LUBA. *Bradbury v. City of Independence*, 19 Or LUBA 584 (1990).