

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

3  
4 FRIENDS OF DOUGLAS COUNTY  
5 and SHELLY WETHERELL,  
6 *Petitioners,*

7  
8 vs.

9  
10 DOUGLAS COUNTY,  
11 *Respondent,*

12  
13 and

14  
15 MILLEGAN BROTHERS LLC,  
16 *Intervenor-Respondent.*

17  
18 LUBA No. 2021-075

19  
20 ORDER

21 In *Friends of Douglas County v. Douglas County*, \_\_\_ Or LUBA \_\_\_  
22 (LUBA No 2021-075, Jan 31, 2022), we affirmed a board of county  
23 commissioners' decision approving intervenor-respondent's (intervenor's)  
24 preliminary site plan for a destination resort, making intervenor a prevailing party  
25 in this appeal. A prevailing party may file a cost bill or motion for attorney fees  
26 no later than 14 days after LUBA issues its final order. OAR 661-010-0075(1)(a).  
27 Intervenor filed their cost bill and motion for attorney fees on February 11, 2022.  
28 The cost bill and motion for attorney fees are therefore timely.

1 **TIMELINESS OF PETITIONERS' RESPONSE**

2 As noted, we issued our final opinion and order on January 31, 2022.  
3 Petitioners subsequently appealed our decision to the court of appeals, which  
4 affirmed it without opinion on May 18, 2022. 319 Or App 847, 510 P3d 883  
5 (2022). Petitioners then sought reconsideration, which motion was subsequently  
6 denied. The court issued the appellate judgment on August 12, 2022.

7 On August 18, 2022, petitioners filed a motion for extension of time to  
8 respond to intervenor's motion for attorney fees. Intervenor filed a response  
9 objecting to petitioners' motion for extension of time and petitioners filed a reply  
10 to that response. Petitioners also filed a response to intervenor's motion for  
11 attorney fees.

12 For cases where LUBA's final decision is appealed to the Court of  
13 Appeals, our rules do not suspend the OAR 661-010-0075(1)(f) 14-day deadline  
14 for filing a response to a motion for attorney fees. Therefore, the better practice  
15 is to file a response within the deadline established by OAR 661-010-0075(1)(f),  
16 even if an appeal is filed with the Court of Appeals to challenge the final decision.  
17 However, when an appeal challenging LUBA's decision is filed, our final  
18 decision is at issue until the appellate process has run its course and the appellate  
19 judgment is issued. In all such cases, LUBA delays ruling on a motion for  
20 attorney fees in that circumstance, because the appeal may necessitate a different  
21 final decision by LUBA and result in a different prevailing party. Petitioners'

1 delay in filing the response to the motion for attorney fees in this case did not  
2 cause any delay in LUBA's ruling on the motion.

3 We conclude it is appropriate to treat petitioners' delay in filing their  
4 response as a technical violation of OAR 661-010-0075(1)(f), which will not  
5 result in our refusal to consider its response unless there is prejudice to the  
6 substantial rights of intervenor. OAR 661-010-0005. As we have already  
7 explained, there was no prejudice to intervenor's substantial right to a timely  
8 ruling on the motion for attorney fees, because LUBA does not rule on motions  
9 for attorney fees until after the appellate judgment is issued in cases where  
10 LUBA's final opinion is appealed. Petitioners' untimely response to the motion  
11 is allowed.

## 12 **MOTION FOR ATTORNEY FEES**

13 ORS 197.830(15)(b) provides that, upon entry of its final order, LUBA  
14 "[s]hall award reasonable attorney fees and expenses to the prevailing party  
15 against any other party who the board finds presented a position or filed any  
16 motion without probable cause to believe the position or motion was well-  
17 founded in law or on factually supported information." Intervenor moves for an  
18 award of attorney fees in the amount of \$20,940.00 on the grounds that petitioners  
19 presented a position without probable cause to believe that it was well-founded  
20 in law.

21 In determining whether to award attorney fees against a non-prevailing  
22 party, we must determine that "every argument in the entire presentation [that a

1 non-prevailing party] makes to LUBA is lacking in probable cause.” *Fechtig v.*  
2 *City of Albany*, 150 Or App 10, 14, 946 P2d 280 (1997). Under ORS  
3 197.830(15)(b), a position is presented “without probable cause” where “no  
4 reasonable lawyer would conclude that any of the legal points asserted on appeal  
5 possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465, 469  
6 (1996). In applying the probable cause analysis, LUBA “will consider whether  
7 any of the issues raised [by a party] were open to doubt, or subject to rational,  
8 reasonable, or honest discussion.” *Id.* The party seeking an award of attorney fees  
9 under the probable cause standard must clear a relatively high hurdle, and that  
10 hurdle is not met by simply showing that LUBA rejected all of a party’s  
11 arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776  
12 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

13 In appealing the board of county commissioners’ decision, petitioners  
14 asserted two assignments of error.<sup>1</sup> Petitioners’ second assignment of error  
15 argued “that the county’s decision improperly construe[d] OAR 738-005-  
16 0010(102) and violated the 1988 CUP by approving use of the airport for the  
17 destination resort. *Friends of Douglas County*, \_\_\_ Or LUBA at \_\_\_ (slip op at  
18 7). We found that “[p]etitioners’ description of the county’s decision is not

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<sup>1</sup> Intervenor alleges that petitioner’s positions in both assignments of error were presented without probable cause. We conclude that petitioners’ second assignment of error was supported by probable cause. Thus, we do not address intervenor’s argument regarding the first assignment of error.

1 accurate” and “[t]he county expressly concluded that no changes to the airport  
2 were proposed or approved[.]” *Id.* at \_\_\_ (slip op at 10). Intervenor argues that  
3 our denial of petitioners’ second assignment of error is support for their  
4 conclusion that the assignment of error does not meet “the ‘probable cause’  
5 threshold.” Motion for Attorney Fees 6. Petitioners respond, in part, that there  
6 was “a debatable question over which reasonable discussion may arise[.]” to  
7 assert their second assignment of error. Response to Motion for Attorney Fees 13  
8 (citing *Grimstad v. Deschutes County*, 76 Or LUBA 467, 468 (2017) (quoting  
9 *Spencer Creek Neighbors v. Lane County*, 152 Or App 1, 9, 952 P2d 90 (1998))).  
10 Petitioners point to their argument that the site plan submitted by intervenor  
11 included the airport, with improvements noted, and “upgrades to the airport are  
12 included in its cost calculations for the resort.” Response to Motion for Attorney  
13 Fees 13-14; *see* Petition for Review 17-18. While we agreed with intervenor and  
14 denied petitioners’ second assignment of error, we do not agree that “no  
15 reasonable lawyer would conclude that any of the legal points asserted [in the  
16 second assignment of error] possessed legal merit.” *Contreras*, 32 Or LUBA at  
17 469. That is so particularly where the existing airport was clearly shown on the  
18 site plan, and where intervenor included cost calculations for airport upgrades in  
19 order to demonstrate that intervenor’s investment far exceeded the required  
20 minimum investment amount to satisfy the county’s implementation of the  
21 destination resort statute, at Douglas County Land Development Ordinance  
22 3.50.050.6.

1           The motion for attorney fees is denied.

2   **COST BILL**

3           OAR 661-010-0075(1)(b)(D) provides that, if an intervenor is a prevailing  
4 party, the intervenor may be awarded their cost to intervene. Intervenor is  
5 awarded its \$100 filing fee, to be paid by petitioners.

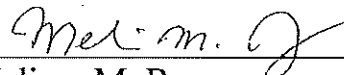
6           Dated this 5th day of December 2022.

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Melissa M. Ryan  
Board Chair