

1 of two properties. In an earlier LUBA appeal, petitioner challenged the city’s decision to
2 rezone the two properties annexed into the city by the ordinances challenged in these
3 appeals. We affirmed the city’s decision in that appeal, primarily because petitioner argued
4 that the *annexation* of the properties violated certain land use plans and regulations. *Sommer*
5 *v. City of Cave Junction*, 56 Or LUBA 423 (2007). We also awarded attorney fees against
6 petitioner in that appeal. *Sommer v. City of Cave Junction*, ___ Or LUBA ___ (LUBA No.
7 2007-120, Order on Costs and Motion for Attorney Fees, May 13, 2008). Petitioner filed his
8 notices of intent to appeal (NITAs) in these appeals after our decision in the zone change
9 appeal.

10 The city argued that the NITAs in these consolidated appeals were not timely filed, as
11 the annexations took place in May 2007 and the NITAs were not filed until January 2008.
12 Petitioner argued that the challenged decisions were “plan and land use regulation
13 amendments processed pursuant to ORS 197.610 to 197.625,” and because petitioner did not
14 receive notice pursuant to ORS 197.615(2), the appeals were timely.¹ We rejected that
15 argument. *Sommer v. City of Cave Junction*, ___ Or LUBA ___ (LUBA Nos. 2008-008 and
16 2008-012, May 8, 2008). The city now argues that petitioner’s reliance on ORS 197.610 to
17 197.625 was presented without probable cause to believe the position was well-founded in
18 law or on factually supported information and that no reasonable attorney would make that
19 argument.

¹ ORS 197.615(2)(a) provides:

“On the same day that the text and findings are mailed or delivered, the local government also shall mail or otherwise submit notice to persons who:

- “(A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation or the new land use regulation; and
- “(B) Requested of the local government in writing that they be given such notice.”

1 Although petitioner’s response to the motion for attorney fees is unclear, it appears
2 that petitioner is arguing that because these appeals were dismissed and not decided on the
3 merits that petitioner did not present a position that could be subject to attorney fees under
4 ORS 197.830(15)(b). Although neither party cites any cases, it is well established that when
5 a case is decided on jurisdictional grounds, the arguments presented on that issue determine
6 whether or not attorney fees will be awarded. *Jewett v. City of Bend*, 48 Or LUBA 631, 632
7 (2004); *Cape v. City of Beaverton*, 47 Or LUBA 625, 626 (2004); *Lewelling Neighborhood*
8 *Dist. v. City of Milwaukie*, 35 Or LUBA 764, 765-66 (1998). Petitioner presented a position
9 that may be subject to an award of attorney fees.

10 In order for ORS 197.610 to 197.625 to apply, the challenged decisions must be a
11 plan or land use regulation amendment. The challenged annexations are not plan or land use
12 regulation amendments as they do not amend the comprehensive plan or zoning designation
13 for the subject properties. Petitioner provided no reasonable argument as to why the
14 challenged decisions might be plan or land use regulation amendments. No reasonable
15 attorney would argue that they were. Even if ORS 197.610 to 197.625 applied, the county
16 established that it provided notice of the challenged decisions to petitioner much more than
17 21 days before the NITAs were filed. Petitioner provided no reasonable argument for why
18 the NITAs were timely filed.

19 In the response to the motion for attorney fees, petitioner states that the “record
20 reflects sufficient evidence from which the board could find that petitioner [sic] appeal was
21 well founded in [sic] not in law then at least on factually supported information.”
22 Petitioner’s Objection to Respondent’s Statements of Attorney Fees and Costs 2. Petitioner,
23 however, makes no attempt whatsoever to explain what sufficient evidence in the record
24 supports his position, and we do not see that there is any such evidence. Petitioner makes no
25 other arguments in opposition to the award of attorney fees.

26 The city’s motion for attorney fees is granted.

1 Under ORS 197.830(15)(b), the requested attorney fees must be reasonable. LUBA
2 has discretion to determine the amount of attorney fees that is reasonable under the facts of
3 the case. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769, 771-72 (2005). We
4 independently review attorney fee statements for reasonableness. *See 6710 LLC v. City of*
5 *Portland*, 41 Or LUBA 608, 611-12 (2002) (discussing reasonable hourly rates and
6 reasonable amount of time spent during a LUBA appeal).

7 The city submitted a statement of attorney fees, seeking \$7,640.50 in attorney fees.
8 The city also submitted an affidavit in support of its motion and the reasonableness of the
9 amount of fees sought. The city's attorney spent approximately 41.3 hours defending the
10 appeal at an hourly rate of \$185.00.

11 Petitioner argues that three items described in the city's statement of fees appear to
12 have taken more time than is reasonable. Item 16 indicates that the city's attorney spent 2.5
13 hours drafting two affidavits in response to petitioner's motion requesting subpoenas and
14 depositions. We find that 2.5 hours to draft two distinct, fact-driven affidavits is not an
15 unreasonable amount of time for such a task. Item 25 indicates that the city's attorney spent
16 2.4 hours drafting his affidavit of fees and costs. We agree that 2.4 hours is more time than
17 preparing the affidavit should have taken, and we reduce the award by one hour to 1.4 hours.
18 Finally, item 26 indicates that the city attorney spent one hour drafting affidavits from other
19 attorneys in support of the motion for attorney fees. We believe that time is reasonable. We
20 agree with the city that the remaining time spent on the appeal is a reasonable amount of time
21 to spend in defending the appeal, and that the city's attorney's hourly rate of \$185.00 is
22 reasonable.

23 The city moves for an award of \$7,640.50 in attorney fees. That motion is granted
24 subject to a one hour reduction at \$185 per hour, for a total attorney fee award of \$7,455.50.
25 The city also filed a cost bill, requesting award of the cost of preparing the record and
26 certified mailings, in the amount of \$190.80 and \$57.30 respectively. Petitioner does not

1 object to the city's cost bill. The city is awarded the cost of preparing the record and
2 certified mailings, in the amount of \$248.10. We will award the city petitioner's \$300
3 deposits for costs. Therefore, the total remaining award to be paid by petitioner to the city is
4 \$7,403.60.

5 Dated this 10th day of December, 2008.

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Tod A. Bassham
Board Chair