

1 subject to rational, reasonable, or honest discussion.’ *Id.* The party seeking
2 an award of attorney fees under the probable cause standard must clear a
3 relatively high hurdle and that task is not satisfied by simply showing that
4 LUBA rejected all of a party’s arguments on the merits. *Brown v. City of*
5 *Ontario*, 33 Or LUBA 803, 804 (1997).”

6 Petitioner raised eight assignments of error. We denied three assignments of error on
7 the merits (assignments of error 4, 5 and 7), and we denied four assignments of error
8 (assignments of error 1, 2, 3 and 6) because we agreed with intervenors’ argument that
9 petitioner waived the issues presented in those assignments of error under ORS
10 197.825(2)(a) and *Miles v. City of Florence*, 190 Or App 500, 506-507, 79 P3d 382 (2003).¹
11 We did not reach one other assignment of error.

12 Intervenors argue that all three of the assignments of error which the Board addressed
13 on the merits were lacking in probable cause. We tend to agree with intervenors that the
14 arguments set out in those assignments of error were lacking in probable cause. In the fourth
15 assignment of error, petitioner argued that because the subject property and the adjacent tax
16 lot were part of the same tax lot, the subject property was part of a “tract” that already
17 included a dwelling, and therefore the county was precluded from approving a second
18 dwelling on that “tract.” Yamhill County Zoning Ordinance (YCZO) 402.03(I)(6). *Zeitoun*
19 *v. Yamhill County*, __ Or LUBA __ (LUBA No. 2009-088, November 19, 2009). Citing
20 ORS 215.010(2)’s definition of “tract,” we denied the assignment of error because we
21 concluded that petitioner did not set forth any argument or theory as to why the property on
22 which the dwelling was to be located and the adjacent property constituted a “tract” under
23 YCZO 402.03(I)(6), when each property was in separate ownership. *Id.* at slip op 11.

¹ ORS 197.825(2)(a) provides in relevant part that LUBA’s jurisdiction:

“Is limited to those cases in which the petitioner has exhausted all remedies available by right before petitioning the board for review[.]”

In *Miles*, the Court of Appeals held that the duty to exhaust remedies in some cases will require that a party adequately specify a basis for a local appeal and that failing to do so precludes the right to raise that basis in an appeal to LUBA.

1 In his fifth assignment of error, petitioner argued that the county erred in relying on a
2 soils report for the subject property that failed to consider soils on the adjacent property in
3 determining that the dwelling would not be sited on high value farmland. We denied the
4 assignment of error because we concluded that the county reasonably relied on intervenors’
5 soils analysis to conclude that the subject property did not contain high value farmland, and
6 that the soil composition of the adjacent property that was a part of the same tax lot was not
7 relevant to the analysis. *Id.* at slip op 12.

8 In his seventh assignment of error, petitioner argued that the county erred in failing to
9 impose a condition of approval that required the applicant to prove ownership of the
10 property. We denied that assignment of error because the cited provision of the YCZO that
11 petitioner relied on, YCZO 402.03(I)(5), did not impose a review criterion that required
12 proof of ownership, and because the county reasonably concluded that based on evidence in
13 the record, the person signing the application was authorized to do so on behalf of the limited
14 liability company owner. *Id.* at slip op 14.

15 Petitioner’s first three assignments of error, which we did not address as explained
16 above, concerned whether approval of the nonfarm dwelling would have various adverse
17 effects on the stability of the overall land use pattern in the area under YCZO 402.03(4).²

18 Intervenors argue:

19 “LUBA does not need to consider – and in fact should not consider – whether
20 the *merits* of [the four assignments of error that LUBA found were waived]
21 were ‘open to doubt, or subject to rational, reasonable, and honest discussion’
22 if there was no meritorious basis for concluding that LUBA *could reach* the
23 merits due to preservation problems. In this regard, even the most meritorious
24 assignment of error is completely frivolous if it is clear that the issue was not
25 raised below.” Motion for Attorney Fees 4 (emphasis in original).

² YCZO 402.03(I)(4) is referred to in the opinion as the “stability of the overall land use pattern standard” and we refer to it as such in this order. *Zeitoun, ___ Or LUBA*)) at slip op 7.

1 Without determining whether petitioner would have ultimately prevailed on any of those
2 assignments of error, we can easily state that they were not arguments lacking in probable
3 cause under ORS 197.830(15)(b). Therefore, if we consider any of the first three
4 assignments of error for purposes of ORS 197.830(15)(b), an award of attorney fees is not
5 warranted in this appeal.

6 The question presented by intervenors' argument is whether, in determining whether
7 any arguments in the entire presentation met the probable cause standard, it is proper for us
8 to consider arguments that were made in assignments of error that we found were waived.
9 We conclude that where a petitioner relies on the arguments under an assignment of error to
10 defeat an award of attorney fees under ORS 197.830(15)(b), and that assignment of error was
11 subject to a waiver challenge under ORS 197.763(1) or a waiver/exhaustion challenge under
12 *Miles*, the petitioner must demonstrate that the position taken in response to the waiver or
13 waiver/exhaustion challenge also satisfies the ORS 197.830(15)(b) probable cause standard.
14 That is, the petitioner must show that there was probable cause to believe the issue advanced
15 in the assignment of error was raised below consistent with the requirements of
16 ORS 197.763(1) and/or *Miles* waiver/exhaustion.

17 The first three assignments of error were based upon challenges to whether the new
18 dwelling would "materially alter the stability of the overall land use pattern in the area"
19 under YCZO 402.03(I)(4). *See* n 2. In his reply brief responding to the waiver arguments,
20 petitioner cited to portions of his notice of local appeal where petitioner raised issues
21 regarding the impacts of the proposed dwelling on neighboring farms due to a new well and
22 increased runoff onto neighboring farms. Although we ultimately found that he did not
23 specifically raise the issue presented in the first three assignments of error, we noted that the
24 "stability of the overall land use pattern standard" and the standard set out in YCZO
25 402.03(I)(1) (the "significant impact" standard) were similar but that they required different
26 analyses. *Id.* at slip op 9. While we did not agree with petitioner that he preserved in his

1 notice of local appeal the issues presented in the first three assignments of error, he made a
2 reasonable argument in his reply brief, which we allowed, that the discussion in his notice of
3 local appeal regarding the impacts of a new dwelling on adjacent property was sufficient to
4 meet the requirement under ORS 197.825(2) and *Miles* that petitioner raise the issue of
5 compliance with the stability standard. We cannot say that petitioner’s arguments in the
6 reply brief that the issue was not waived were arguments that no reasonable lawyer would
7 make. *See Ghena v. Josephine County*, __ Or LUBA __ (LUBA No. 2005-072, Order,
8 January 4, 2006, slip op 3) (“[n]arrowly losing a preservation argument for an assignment of
9 error that would likely prevail is sufficient to avoid an award of attorney fees under the
10 statute and our rules”).

11 As our above-quoted explanation of the standard states, “every argument in the entire
12 presentation” must be made without probable cause to award attorney fees. Because
13 petitioner presented arguments that met the probable cause standard in his entire presentation
14 to LUBA, including in his reply brief, intervenors’ motion for attorney fees is denied.

15 **COSTS**

16 Although the county was also a prevailing party, it did not file a cost bill. Therefore,
17 we will return petitioner’s deposit for costs.

18 Dated this 9th day of July, 2010.

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Melissa M. Ryan
Board Member