BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CHARLES McGOVERN,
Petitioner,

vs.

CROOK COUNTY,
Respondent.

LUBA No. 2009-069

ORDER

MOTION TO STRIKE REPLY PLEADING

Petitioner moves to strike the county's reply to his response to the motion for attorney fees, discussed below, arguing that LUBA's rules do not authorize such a reply pleading. Although our rules do not provide for a reply pleading, neither do they prohibit one. LUBA's practice is to consider reply pleadings that reply to new matters raised in a response to a motion. *Frevach Land Company v. Multnomah County*, 38 Or LUBA 729, 732 (2000). The county's reply responds to challenges petitioner raised regarding particular fees and expenses claimed in the motion for attorney fees. That is a new matter. A portion of the reply also addresses petitioner's reliance on positions presented on appeal that were not addressed in LUBA's opinion, and not challenged in the motion for attorney fees. That also seems like an appropriate subject for a reply. The motion to strike is denied.

MOTION FOR ATTORNEY FEES

A. Introduction

This appeal involves petitioner's challenge of the county's decision on remand again approving a partition of a 163-acre farm parcel into a 141-acre farm parcel and two 11-acre nonfarm parcels. Given the nature of the motion for attorney fees, a brief history of the challenged decisions is in order.

In *McGovern v. Crook County*, 57 Or LUBA 443 (2008) (*McGovern I*), petitioner challenged the county's original decision approving the partition. ORS 215.263(5)(a)(B) authorizes creation of a nonfarm parcel if the original parcel from which the nonfarm parcel is created was "lawfully created" prior to July 1, 2001. There were four county actions arguably relevant to the date the subject property was created: a 1999 partition, a 2000 boundary line adjustment, a 2005 "correction," and a 2006 administrative decision. As relevant to this motion for attorney fees, in *McGovern I*, petitioner argued that actions that post-dated the July 2001 statutory date, including the 2005 "correction" and the 2006 administrative decision, appeared to have affected the current size and configuration of the subject property. According to petitioner, this may have had the effect of "creating" the subject parcel after July 1, 2001. If so, the parcel did not qualify for partition and approval of nonfarm dwellings under ORS 215.263(5)(a)(B). We agreed with petitioner that it was unclear what occurred after 2001, and remanded the decision for the county to clarify that point:

> "We agree with petitioner that remand is necessary for the county to determine what actions if any occurred after July 1, 2001, that affected the size and configuration of tax lot 1200 and whether those actions may have resulted in a new date of creation for tax lot 1200. Petitioner raised the issue below, and as discussed above the findings and record do not adequately resolve that issue. It is possible that, depending on how and when tax lot 1200 became 163.08 acres in size, it may have been lawfully created after July 1, 2001." *Id*. at 446-47.[1]

In *McGovern I*, the county had made no findings directed at the 2000 boundary line adjustment decision and petitioner made no challenge based on that decision. Indeed, in a footnote to the petition for review, petitioner specifically stated that he "does not in any way

[1] We denied petitioner's other two assignments of error regarding whether the land on which the nonfarm dwelling would be situated was generally unsuitable for farm use and whether the county local appeal fee was unreasonable. Those assignments of error are not relevant to the motion for attorney fees.

dispute the legality of the December 5, 2000 boundary line adjustment." *McGovern I* Petition for Review 5-6 n 1.

On remand, the county conducted an evidentiary hearing to address the issue that was the basis for the remand—what actions occurred after July 1, 2001, and what if any effect those actions had upon the date of creation for the subject parcel. On that issue, the county concluded based on additional evidence submitted on remand that no actions after 2001 affected the configuration or existence of the subject parcel. The county ultimately concluded that the property was "lawfully created" by the 1999 partition, and thus qualified for approval of nonfarm dwellings under ORS 215.263(5)(a)(B).

The record of the appeal in *McGovern I* had included only the survey plat of the 2000 boundary line adjustment. Among the evidence that the applicant submitted on remand was a complete copy of the 2000 boundary line adjustment decision. Based on the complete decision, petitioner argued during the remand proceedings that it was the 2000 boundary line adjustment that created the subject property, not the 1999 partition, and moreover did so in violation of applicable laws. Therefore, petitioner argued to the county, the subject parcel was not *lawfully* created before July 1, 2001. In its decision on remand, the county addressed that new legal theory, finding first that the issue of the legality of the 2000 decision had been waived because the issue could have been, but was not, raised in *McGovern I*. Further, the county noted that the issue may have been affirmatively waived, based on the above-quoted footnote from the petition for review. Finally, the county suggested that petitioner's argument constituted an impermissible collateral attack on the 2000 decision. We refer to these findings collectively as the "waiver finding." The county then adopted alternative findings rejecting the merits of petitioner's legal theory, finding that the 2000 boundary line adjustment was lawful, and did not result in creation of the subject property, which the county concluded had been legally created before July 1, 2001, pursuant to the 1999

partition. As noted, the county adopted findings addressing the remand issue, and again approved the application. Petitioner then appealed the remand decision to LUBA.

On appeal of the remand decision, petitioner's petition for review included a single assignment of error that essentially repeated the arguments petitioner made to the county that the 2000 boundary line decision created the subject property in violation of applicable law, and thus the subject parcel had not been "lawfully" created prior to July 1, 2001. The petition for review did not include a challenge to the county's waiver finding, *i.e.*, the county's findings that the issue could have been but was not raised in *McGovern I*, had been affirmatively waived, or was a collateral attack on the 2000 decision.

After the petition for review was filed, the county filed a motion to dismiss the appeal, arguing in relevant part that petitioner's failure to assign error to the county's waiver finding meant that LUBA lacked jurisdiction over the appeal. LUBA denied the motion to dismiss, concluding that even if the county's position regarding the obligation to assign error to the waiver finding is correct, the proper disposition would be to affirm the county's remand decision, not dismiss the appeal for lack of jurisdiction. Attached to the county's motion was an e-mail exchange between county counsel and petitioner's attorney. In the e-mail message, county counsel advised petitioner's attorney that the county intended to seek attorney fees based on petitioner's failure, in the petition for review, to assign error to the waiver finding. Petitioner's attorney replied that she had anticipated that the county would rely on the waiver finding as part of an affirmative defense based on principles of law of the case, affirmative waiver or collateral attack, and she planned to respond to any such affirmative defenses in a reply brief, depending on which theories the county relied upon in its response brief. After LUBA denied the motion to dismiss, the county filed a response brief arguing that (1) petitioner's failure to assign error to the initial finding regarding waiver is a sufficient basis to affirm the county's decision, (2) irrespective of the petitioner's failure to assign error to the waiver finding, petitioner waived the issue of the legality of the 2000

decision by not raising that issue during the earlier appeal and/or by affirmatively waiving that issue, and (3) in any case, on the merits of that issue, the county correctly concluded that the 2000 decision was legal and was not the decision that created the subject property. The county's brief did not argue that petitioner's arguments might constitute a collateral attack on the 2000 boundary line adjustment decision.

Petitioner then filed a two-part reply brief, in which petitioner argued that (1) petitioner was not obligated to assign error to the waiver finding in the petition for review, and (2) the issue of its challenge regarding the 2000 boundary line adjustment on the merits had not been waived or affirmatively waived, and the assignment of error was not a collateral attack on the 2000 decision. The county moved to strike the second part of the reply brief, arguing that in effect it constituted a new assignment of error challenging the waiver finding, which cannot be advanced in a reply brief. We granted the motion to strike the second portion of the reply brief, to the extent it was intended to belatedly assign error to the waiver finding. *McGovern v. Crook County*, 60 Or LUBA 177, 181 (2009), *aff'd* 234 Or App 365, 228 P3d 736 (2010) (*McGovern II*).[2]

In the first part of the reply brief, petitioner argued in relevant part that he had no obligation to assign error in the petition for review to the waiver finding, because the waiver finding did not relate to any approval criteria and was not "necessary" to the decision to approve the partition and dwellings. Petitioner also argued that the waiver finding is not accurately viewed as a true "alternative" finding on the merits of whether to approve the application. In effect, petitioner argued that it was a reasonable tactic on his part to wait to see what defenses the county cited in its response brief based on the waiver finding, if any,

[2] Admittedly, our disposition of the motion to strike a portion of the reply brief could have been clearer on this point. We did not intend to strike the disputed portion of the reply brief for other legitimate purposes, and in fact later in our opinion we considered that portion in agreeing with the county that, irrespective of petitioner's failure to assign error to the waiver finding, petitioners had in fact waived the issue under the reasoning in *Beck* and under the doctrine of affirmative waiver.

and respond to those defenses in a reply brief, rather than assign error to the waiver finding in the petition for review.

In our opinion in *McGovern II*, we disagreed with that position, holding as a general proposition that:

> "Where the local government makes an explicit finding that a particular issue has been waived or is otherwise not properly before the local government, but as a precaution adopts alternative findings addressing the merits of the issue, a petitioner cannot invoke LUBA's review authority to challenge the alternative findings on the merits unless the petitioner assigns error to the explicit finding that the issue was waived or otherwise not properly before the local government, and demonstrates that the finding is erroneous. *See Citizens for Responsible Development v. City of The Dalles*, 60 Or LUBA 12, 17 (petitioner's failure to assign error to a city finding that a particular issue was not preserved in the notice of local appeal means that any assignment of error at LUBA raising that unpreserved issue does not provide a basis for reversal or remand)." *McGovern II*, 60 Or LUBA 177, 182-83 (2009)

Turning to the circumstances in this case, we concluded that if petitioner wished to invoke LUBA's review of the merits of the dispute over the 2000 boundary line decision, petitioner was obligated to challenge, in the petition for review, the county's finding that that issue was not properly before the county.[3]

Finally, we agreed with the county's argument in the response brief that, irrespective of petitioner's failure to challenge the waiver finding, the issue of the lawfulness of the 2000 boundary line decision could have been raised in *McGovern I*, but was not, and therefore that

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[3] We stated in our opinion:

> "The county's finding on waiver was obviously intended to be a complete disposition of the issue of the legality of the 2000 boundary line adjustment. If that finding is correct and supported by the evidentiary record, then the issue was not properly before the county (and cannot be raised for the first time at LUBA), and there was, strictly speaking, no necessity to adopt alternative findings addressing the merits of issue (however prudent that might be). Nor do we see that petitioner's challenge to the findings on the merits somehow subsumes or implicitly incorporates a challenge to the waiver finding. Therefore, to challenge the findings on the merits petitioner was obligated to assign error to the waiver finding, and demonstrate in the petition for review that that finding is incorrect or unsupported by the evidentiary record. Petitioner did not assign error in the petition for review or otherwise challenge the county's finding that the issue was waived and, as explained above, petitioner cannot assign error to that finding for the first time in the reply brief." 60 Or LUBA at 183.

issue was not within LUBA's scope of review on remand, under the law of the case principle articulated in *Beck v. Tillamook County*, 313 Or 148, 831 P2d 678 (1992). *McGovern II*, 60 Or LUBA at 183-84. We also noted that petitioner in *McGovern I* had seemingly disclaimed any challenge to the legality of the 2000 decision, and concluded that petitioner's exclusive focus in *McGovern I* on legal challenges to post-2001 decisions precluded petitioner from advancing legal challenges to the 2000 decision, under *Beck*. *Id.* at 184. In reaching these conclusions, we considered all of the relevant arguments that petitioner presented in the reply brief.

Consequently, we denied the single assignment of error without reaching the merits of petitioner's arguments regarding the 2000 boundary line adjustment decision, and ultimately affirmed the county's decision. The Court of Appeals affirmed our decision without opinion. *McGovern v. Crook County*, 234 Or App 365, 228 P3d 736 (2010).[4]

B. Motion for Attorney Fees

The county, the prevailing party in this appeal, moves for an award of attorney fees pursuant to ORS 197.830(15)(b), which provides:

> "The board shall * * * award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

> "In determining whether to award attorney fees against a nonprevailing party, we must determine that 'every argument in the entire presentation [that a

[4] In an order dated June 15, 2010, the Court of Appeals denied the county's motion for attorney fees under Oregon Rule of Civil Procedure (ORCP) 17 and Oregon Rules of Appellate Procedure (ORAP) 1.40(4), in part because "petitioner's contentions on judicial review, viewed as a whole, were not unwarranted under existing law or a reasonable extension, modification, or reversal of existing law," and further rejecting the county's assertion that petitioner's arguments to the Court were "'completely groundless and unreasonable.'" Petitioner brings this order to our attention, suggesting that it may be relevant to disposition of the county's motion for attorney fees before LUBA under ORS 197.830(15)(b). However, we do not know what arguments petitioner made to the Court of Appeals and given the different legal standards at issue, we do not see that the Court's denial of the county's motion for attorney fees is particularly relevant to the present motion.

> nonprevailing party] makes to LUBA is lacking in probable cause * * *.' *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented 'without probable cause' where 'no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit.' *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). In applying the probable cause analysis LUBA 'will consider whether any of the issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest discussion.' *Id*. 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 rejected all of a party's arguments on the merits. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)."

In its motion for attorney fees, the county argues that every position presented by petitioner was lacking in probable cause. The county focuses on two "positions": (1) petitioner's position that he was not obligated to assign error to the county's waiver finding in the petition for review, as a condition precedent to seeking LUBA's review of the assignment of error on the merits of the legality of the 2000 boundary line adjustment decision; and (2) petitioner's position that the principles of law of the case under *Beck* and affirmative waiver did not preclude petitioner from seeking LUBA's review of the assignment of error. The county argues that petitioner's positions were "completely groundless and unreasonable," and that no reasonable attorney would have failed to recognize the need to assign error to the county's waiver finding in the petition for review, in order to reach the allegedly waived merits, or asserted that law of the case and affirmative waiver principles did not preclude LUBA's review of the issue regarding the legality of the 2000 decision.

Petitioner responds first that the county has not attempted to demonstrate that "every" position petitioner took in the appeal is without probable cause. Petitioner notes that LUBA did not address in its opinion, and the county does not address in its motion for attorney fees, petitioner's positions on the merits under the assignment of error.

Further, petitioner argues that even though LUBA disagreed with petitioner's positions expressed in the reply brief that he was not obligated to assign error to the waiver

finding, and that law of the case and affirmative waiver did not preclude reaching the assignment of error that petitioner did make, that disagreement does not mean that petitioner's positions on those legal issues were without probable cause. Even though those arguments did not prevail, petitioner argues that for the reasons set out in the reply brief a reasonable attorney could have believed that it was not necessary to assign error to the waiver finding in order to invoke LUBA's authority to reach the merits of the dispute over the legality of the 2000 decision. Similarly, petitioner argues, a reasonable attorney could argue, as petitioner did in the reply brief, that the *Beck* law of the case doctrine and affirmative waiver did not apply.

The county responds in relevant part that the "entire presentation" for purposes of reviewing an attorney fee petition under ORS 197.830(15)(b) should be limited to the issues that LUBA addressed in its decision. Therefore, the county argues, only petitioner's positions with respect to the two issues LUBA resolved in *McGovern II* and discussed in the county's motion for attorney fees are the appropriate subject of the probable cause analysis.

As framed by the parties, the initial question is what was petitioner's "entire presentation" and which positions were "presented" for purposes of ORS 197.830(15)(b). The county is correct that LUBA has held that in some circumstances we will consider only a subset of a party's "entire presentation" for purposes of attorney fees under ORS 197.830(15)(b). In *Bruce v. City of Hillsboro*, 34 Or LUBA 820, 826 (1988), we limited the probable cause analysis to the petitioner's jurisdictional arguments, where LUBA granted a motion to dismiss the appeal for jurisdictional reasons and therefore did not consider the assignments of error in the petition for review. Conversely, in *Cape v. City of Beaverton*, 47 Or LUBA 625, 626 (2004), we limited the probable cause analysis to the assignments of error in the petition for review, and did not consider as part of the petitioner's "entire presentation" the petitioner's successful response to a jurisdictional challenge. Essentially, those cases hold that to avoid attorney fees under ORS 197.830(15)(b), a party must present

probable cause positions with respect to both jurisdiction (if challenged) and the merits of the appeal, and that presenting a probable cause argument as to jurisdiction will not suffice to avoid an award of fees if the party fails to present a probable cause argument on the merits, and vice versa.

However, we do not understand *Bruce* and *Cape* to stand for the broader proposition that, in reviewing the merits of the appeal, the scope of the probable cause analysis is limited to only those issues or assignments of error that LUBA actually addressed in our decision. There are many different reasons why particular issues or assignments of error may or may not be addressed in a LUBA opinion, and we do not agree that the probable cause analysis is necessarily limited only to the issues or assignments of error that LUBA in fact addressed in its opinion.

But the county is correct that the "entire presentation" for purposes of the probable cause analysis includes both the merits of an assignment of error and the positions taken with respect to any waiver challenges to that assignment of error. We have chosen to treat waiver issues as being such an integral part of the merits for purposes of a probable cause analysis under ORS 197.830(15)(b) that, to avoid attorney fees, a party must present probable cause arguments with respect to *both* the waiver issue and the merits of the issue that is allegedly waived. In an order decided after the parties briefed the attorney fee issue in this case, we held that where the petitioner relies on arguments under an assignment of error to oppose an award of attorney fees under ORS 197.830(15)(b), and that assignment of error was subject to a successful waiver challenge under ORS 197.763(1) or a successful exhaustion/waiver challenge under *Miles v. City of Florence*, 190 Or App 500, 506-07, 79 P3d 382 (2003), the petitioner must *also* show that at least one position taken on the waiver challenge satisfies the probable cause standard. *Zeitoun v. Yamhill County*, 61 Or LUBA 515, 518 (2010). In *Zeitoun*, we denied the motion for attorney fees. In doing so we first found that at least one of the positions the petitioner in *Zeitoun* asserted in response to each of the waiver challenges

met the probable cause standard, even though we had concluded in our decision on the merits that the issues had been waived. We then determined that although the assignments of error had been waived and LUBA's decision on the merits had not addressed petitioner's arguments in support of those assignments of error, petitioner's arguments on the merits met the probable cause standard.

Under the reasoning in *Zeitoun*, the "presentation" in this case includes the positions taken under petitioner's single assignment of error. The county does not dispute that petitioner's positions on the merits of the single assignment of error surpass the probable cause threshold. The current law on how to determine whether property was "lawfully created" is sufficiently unclear and unsettled that a party could likely advance a wide variety of positions on that issue without fear of being subject to an award of attorney fees. However, that does not end the inquiry. As we explained in *Zeitoun*, where LUBA does not reach the merits of an assignment of error that the petitioner relies upon to satisfy the probable cause test, and instead LUBA disposes of that assignment of error based on a waiver challenge, the petitioner must show that at least one of petitioner's positions with respect to the waiver issue also met the probable cause test.

In a recent order we extended the holding in *Zeitoun*, concluding essentially that where two separate and independent types of waiver challenges are directed at an assignment of error and a petitioner wishes to rely on arguments under that assignment of error in responding to a motion for attorney fees, the petitioner must demonstrate that at least one probable cause argument was made with respect to *both* types of waiver challenges. *Kane v. City of Beaverton*, __ Or LUBA ___ (LUBA No. 2009-132, Order, March 16, 2011), slip op 7. *Kane* involved assertions by the respondents that a particular issue had been waived under ORS 197.763(1) and also had been waived under the *Miles* exhaustion/waiver doctrine. Extending the reasoning in *Kane* to the present circumstances is appropriate. Here, the county's response brief asserted, basically as affirmative defenses, three separate and

independent obstacles to LUBA's consideration of the merits of the assignment of error: (1) failure to assign error to the waiver finding, (2) law of the case under *Beck*, and (3) affirmative waiver.[5] Each of those defenses, if valid, would preclude LUBA from reviewing the merits of the assignment of error. Under the reasoning in *Kane*, which we extend here, petitioner can avoid attorney fees only if he presented a probable cause argument as to each of these defenses.

1. Law of the Case and Affirmative Waiver

In both the petition for review and the reply brief, petitioner noted that the complete 2000 boundary line adjustment decision was not in the record of the decision that was appealed in *McGovern I*, but was submitted as new evidence during the evidentiary proceedings on remand from *McGovern I*. The earlier record had included only a survey plat from the 2000 boundary line adjustment decision. In the reply brief, petitioner explained that, based on the complete boundary line adjustment decision included in the record on remand, it became clear to petitioner that the county's understanding of the character and legal effect of the 2000 boundary line adjustment decision was incorrect. Petitioner argued, essentially, that the issue of the effect and legality of the 2000 boundary line adjustment decision was not "law of the case" in the first appeal because it could not have been reasonably raised in the first appeal, based on the limited evidence in the original record and the county's confused and problematic theories in its initial decision about how and when the subject parcel was created, which in fact led to LUBA's remand of the initial decision.

[5] The county does not argue that petitioner made no probable cause argument with respect to the county's collateral attack defense, and we did not address the collateral attack issue in our decision. To the extent it remains at issue, we agree with petitioner that a reasonable attorney could argue that determining whether the subject parcel was "lawfully created" for purposes of ORS 215.263(5)(a)(B) is not a collateral attack on the decision that created the parcel, and indeed that argument would probably be a prevailing argument. Such a determination would simply go to the whether the subject parcel qualifies for further partition and non-farm dwelling approvals under that statute, not overturn or invalidate the 2000 boundary line adjustment decision.

With respect to affirmative waiver, petitioner argued that affirmative waiver requires relinquishment of a "known right," but given the limited evidentiary record and the ways the issues were framed in the original appeal, petitioner's statement during the original appeal that he did not dispute the legality of the 2000 decision should not be viewed as an affirmative waiver.

In our view, each of the above arguments in the reply brief exceed the low probable cause threshold, even though they did not assist petitioner in prevailing in our decision on the merits. Generally, when the evidentiary record is re-opened on remand, the parties may raise new, unresolved issues that relate to the new evidence. *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), *Anderson v. Lane County*, 57 Or LUBA 562, 568 (2008). We believe that a reasonable lawyer *could* argue, based on the new evidence submitted on remand, that the issue of the character and legality of the 2000 boundary line adjustment decision was an issue that could not have been reasonably raised in the first proceeding, and was therefore not waived under *Beck*. Similarly, given the state of the record in the first proceeding a reasonable attorney could argue that petitioner had not affirmatively relinquished a "known right" by stating, in a footnote to the petition for review, that petitioner did not challenge the legality of the 2000 boundary line adjustment decision.

2. Failure to Assign Error to the Waiver Finding

The more difficult issue is whether a reasonable attorney would have failed to assign error to the county's waiver finding, or more precisely, argued in the reply brief that it was unnecessary to assign error to the waiver finding in the petition for review, essentially as a condition precedent to invoking LUBA's review of the merits of the assignment of error arguing that the 2000 boundary line adjustment decision unlawfully created the subject property. For the reasons below, we believe that petitioner's positions on that point satisfy the low probable cause standard.

A party can of course assign error to whatever alleged sins of omission or commission in the challenged decision that the party wishes to challenge, and is not generally required to assign error to any specific aspect of the decision. However, sometimes local governments expressly adopt two or more alternative, independently dispositive findings regarding applicable approval criteria. For example, in response to arguments that criterion B applies instead of criterion A, a local government might adopt findings concluding that *if* criteria A applies, it is satisfied, and alternatively *if* criteria B applies, it is satisfied. In such circumstances, a petition for review that is limited to challenging one set of alternative, independently dispositive findings is unlikely to result in reversal or remand. The petitioner must either challenge both sets of findings in the petition for review, or explain, in a reply brief or at oral argument, why it was unnecessary to do so, in order to invoke LUBA's review of the set of findings challenged in the petition for review. If the petitioner fails to do either, LUBA will generally deny the assignment of error based on that failure, rather than address the merits of the assignment of error. *See, e.g., Adams v. City of Medford*, 39 Or LUBA 464, 469 (2001); *Port Dock Four, Inc. v. City of Newport*, 36 Or LUBA 68, 75-76 (1999); *Hood River Valley Res. Comm. v. City of Hood River*, 33 Or LUBA 233, 238 (1997).

In the present case, we essentially applied the above analytical framework to the arguments before us, and denied the single assignment of error because, as relevant here, petitioner failed to demonstrate that it was unnecessary to assign error to the waiver finding in order to invoke LUBA's review of the assignment of error. We cited *Citizens for Responsible Development v. City of the Dalles*, 60 Or LUBA 12 (2009), which was issued in October 2009, to support application of that framework in the present case. In *Citizens*, the local code contained a provision that required the appellant to specifically identify in its local notice of appeal the issues that it was raising, and the city council's decision listed and addressed all of the issues it determined were raised in the local notice of appeal, which

included compliance with *local* transportation standards. On appeal to LUBA, the petitioner included an assignment of error alleging noncompliance with *state* transportation standards. We noted that petitioner had not challenged the city's findings regarding the scope of the issues preserved in the local notice of appeal, which did not include compliance with state transportation standards, and suggested that that failure may preclude reaching the merits of the assignment of error. *Id.* at 27. However, we went on to address the merits of the assignment of error, and ultimately denied it. *Id*. at 28. In a case not cited in our opinion, we reached a similar conclusion in a companion case issued in August 2009, *Citizens for Responsible Development v. City of the Dalles*, 59 Or LUBA 369, 375 (2009). In that appeal, the city council interpreted a local code standard to limit the city council's review to issues raised before the planning commission, and the city council adopted a finding that certain issues arguably raised in the notice of local appeal had not been raised before the planning commission. The petitioner did not challenge that finding before LUBA, but rather advanced assignments of error based on certain issues the city council found had not been preserved for the city council's review. Based on the unchallenged finding, we rejected the assignments of error.

The petition for review in this appeal was filed in September 2009, just before the second *Citizens* case and just after we issued our second *Citizens* decision discussed above. We are aware of no cases prior to these cases where LUBA applied the above analytical framework to circumstances where the local government adopted (1) findings that an issue was waived or otherwise not properly before the local government and, alternatively, (2) findings addressing the merits of the allegedly waived issue. For whatever reason, prior to these cases LUBA apparently had never directly held that a petitioner in the above circumstance must assign error in the petition for review to the waiver finding as a condition precedent to obtaining LUBA's review of an assignment of error addressing the merits of the allegedly waived issue.

Although it is a close question, we believe that in September 2009 a reasonable attorney could have taken the position that there was no obligation to assign error in the petition for review to the county's waiver finding, in order to reach the merits of the allegedly waived issue. As petitioner notes, waiver and similar affirmative defense-type challenges are typically addressed in a reply brief, not in the petition for review. The county is free to adopt findings regarding the scope of issues properly before it on remand, based on the *Beck* law of the case doctrine and affirmative waiver, but the county is not obligated to do so. Nothing in any code provision, statute or administrative rule requires local governments to adopt findings regarding *Beck* law of the case or affirmative waiver, and in equivalent circumstances at least some local governments would not bother, but leave it up to interested parties to raise such doctrines as affirmative defenses before LUBA. Both waiver doctrines are judicially-created doctrines, not based on any local code standard, and the county's views on whether an issue is waived under either doctrine are entitled to no deference from LUBA or the Court of Appeals. As petitioner argued, a finding regarding *Beck* law of the case or affirmative waiver does not generally relate to the question of compliance with applicable approval criteria. In that sense, petitioner was correct in arguing that such a finding is not "necessary" to the decision to approve or deny development.

Although LUBA has now clarified, in *McGovern II*, that a petitioner faced with a finding that an issue has been waived under *Beck* or affirmatively waived must first challenge the waiver finding in the petition for review as a condition precedent to obtaining LUBA's review of the merits of the allegedly waived issue, we cannot say that that obligation was so obvious in September 2009 that no reasonable attorney would have failed to recognize it at that time. Petitioner in the present case made an informed decision that it was unnecessary to assign error to the county's waiver finding, believing it was sufficient to address *Beck* law of the case or affirmative waiver issues, if raised in the response brief, in a reply brief. That turned out to be a fatal mistake. However, as explained above, the

arguments that petitioner made in the reply brief with respect to issues of law of the case waiver, and affirmative waiver defenses raised in the response brief all surpassed the low probable cause threshold. We did not consider those arguments to the extent they constituted a belated assignment of error challenging the waiver finding, and considered them only as direct responses to the similar affirmative defenses independently raised in the response brief. Nonetheless, if those arguments had been made in the petition for review and styled as an assignment of error challenging the waiver finding, petitioner would be in no danger of an award of attorney fees, for the reasons set out above. Under these circumstances, awarding attorney fees against petitioner would be punishing petitioner for what amounted to a pleading error.

In our view, the legislature intended the low probable cause standard at ORS 197.830(15)(b) to dissuade parties from presenting essentially "frivolous" appeals or "frivolous" defenses of decisions on appeals. *Fechtig*, 33 Or LUBA at 798. As explained, petitioner's mistake in believing that it was not necessary to assign error to the waiver finding in the petition for review was, in light of the case law at the time, a decision that was open to doubt, and subject to rational, reasonable, and honest discussion. We certainly cannot say that petitioner's entire presentation on the appeal can be described as "frivolous." For these reasons, the motion for attorney fees is denied.

C. Costs

The county requests recovery of its costs for preparing the record pursuant to OAR 661-010-0075(1)(b)(B) in the amount $146.80.[6] Petitioner argues that part of that amount is

[6] OAR 661-010-0075(1)(b)(B) provides:

> "If the governing body is the prevailing party, the governing body may be awarded copying costs for the required number of copies of the record, at 25 cents per page, whether or not the governing body actively participated in the review."

We recently amended our rules to allow recovery costs in the amount of 25 cents per page. The rules applicable to this appeal allowed recovery of 20 cents per page.

for copies of the record form *McGovern I* and should not be allowed because LUBA already had the record from *McGovern I*. Petitioner is mistaken. As the county points out, LUBA sent a letter to both parties informing them that LUBA did not have the record from *McGovern I*, and that if that record were to be incorporated another copy of that record would have to be filed. That is precisely what the county did. The county is entitled to recover its costs for preparing the record in the amount of $146.80. LUBA shall return the remainder of the deposit for costs to petitioner.

Dated this 26th day of May, 2011.

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Tod A. Bassham
Board Member

Holstun, Board Chair, concurring.

I write separately to emphasize two concerns. Under the terms of LUBA's remand in *McGovern I*, this was a one issue case and the county elected to treat it as such on remand. That issue was whether the disputed 163-acre parcel was created after July 1, 2001. In *McGovern I*, petitioner raised no issue concerning whether the parcels that resulted from the 2000 boundary line adjustment were legally created. To the contrary, petitioner expressly disavowed any concern with the 2000 boundary line adjustment. Based on a lack of clarity about the possible legal effect of post-2001 decisions concerning the property, LUBA remanded the county's decision. On remand, petitioner changed his position and argued that the 2000 boundary line adjustment was improper, and that the parcels that were the subject of that 2000 boundary line adjustment were not lawful. In language that is about as clear as it gets, the county found that petitioner waived its position concerning the 2000 boundary line adjustment:

> **"G. Waiver of Arguments**
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> "The County Court observes that the opposition attempted to raise new issues during the remand hearing[.]
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> "* * * * *
>
> "* * * [T]he opposition now appears to attempt to challenge the validity of the Boundary Line Adjustment of December 2000. The County Court * * * rejects this attempt to raise this new issue. While the Boundary Line Adjustment of 2000 has some bearing upon the issue of how the property achieved its current size and configuration, the opposition specifically waived this issue when the Petition for Review at LUBA stated that 'Petitioner does not in any way dispute the legality of the December 5, 2000 boundary line adjustment.' * * * In addition the Boundary Line Adjustment was never appealed at the local level and has been in place since December 2000. The opposition unequivocally stated they did not dispute the legality of the Boundary Line Adjustment. To allow the opposition to now challenge the legality of the Boundary Line Adjustment would substantially prejudice the applicant and allow the opposition to raise an issue that could have been, but was not raised in the earlier appeal.

> "*In the alternative* the County Court finds that the record indicates the December 2000 Boundary Line Adjustment was lawful. The April 9, 2009 letter from the applicant's agent * * * details the history of the December 2000 Boundary Line Adjustment. The opposition has not cited to any credible or convincing evidence that the December 2000 Boundary Line Adjustment was improper. Further, the County Court finds that no new parcel was created by the December 2000 Boundary Line adjustment despite the assertions of the opposition. Rather, the opposition cites an outdated LUBA case and attempts to confuse lawfully created parcels with tax lot numbers created for tax assessment purposes." Record 567-68 (emphasis added).

Contrary to the majority opinion, the county's waiver findings are not "alternative" findings. It is the county's findings on the merits that are the county's "alternative" findings. The county's primary finding is that the issue petitioner wished to raise before the county on remand had been waived. It is difficult to see how a reasonable lawyer would fail to appreciate that if he wishes to assign error to the substance of the county's alternative findings on the merits of the 2000 boundary line adjustment, he or she must also assign error to the waiver findings. Nevertheless, the current state of waiver law and this Board's method of analyzing petitions for attorney fees is sufficiently muddled that I agree that petitioner's failure to assign error to the county's waiver findings in this case does not warrant an award of attorney fees under ORS 197.830(15)(b).

However, going forward, I have two concerns. First, after this order, there should be no remaining doubt that where a quasi-judicial land use decision includes findings that the issue a petitioner seeks to raise at LUBA was waived, and those findings are as clear and as explanatory as they are in this decision, a reasonable attorney would not fail to assign error to the waiver findings and only assign error the local government's alternative findings on the merits. My second concern lies in the opposite direction. This order should not be taken as a signal to local governments to routinely incorporate unexplained boilerplate waiver findings as a matter of course in their quasi-judicial land use decisions. Doing so could needlessly complicate land use decision making and appeals. And it seems unlikely to me that local governments that do so will be able to rely on a petitioner's failure to specifically assign

error to such undeveloped boilerplate waiver findings, either to prevail on the merits or seek an award of attorney fees.