BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROGUE ADVOCATES
and CHRISTINE HUDSON,
*Petitioners,*

vs.

JACKSON COUNTY,
*Respondent,*

and

PAUL MEYER and KRISTEN MEYER,
*Intervenors-Respondents.*

LUBA No. 2014-015

ORDER ON MOTION FOR ATTORNEY FEES

AND ORDER ON COSTS

**INTRODUCTION**

The underlying dispute in this appeal has a fairly complicated history. That complicated history is discussed at some length in our initial decision in this matter, *Rogue Advocates v. Jackson County*, __ Or LUBA __ (LUBA Nos. 2013-103 and 2013-104, April 22, 2014) (*Rogue I*), slip op 3-6, and in our decision on the merits in the present appeal, *Rogue Advocates v. Jackson Coun*ty, ___ Or LUBA ___ (LUBA No. 2014-015, August 26, 2014) (*Rogue II*), slip op 2-6. We restate some of the relevant facts here before turning to petitioners' motion for an award of attorney fees.

### A. The County Land Use Hearings Officer's September 26, 2013 Decisions.

In 2012, intervenors sought verification that their existing asphalt batch plant qualifies as a nonconforming use. That existing asphalt batch plant has been in operation since 2001, when it replaced a prior concrete batch plant that had been operated at the site by others. Intervenors also applied for floodplain permit approval for certain batch plant related improvements located within the Bear Creek 100-year floodplain. County planning staff verified the asphalt batch plant as a nonconforming use and approved the requested floodplain permit. That planning staff decision was appealed locally. On September 26, 2013, a Jackson County hearings officer verified the asphalt batch plant as a nonconforming use, but denied the requested nonconforming use verification because he found the request sought nonconforming use verification for some improvements that were *expansions* of the nonconforming asphalt batch plant. Under the Jackson County Land Development Ordinance (LDO), nonconforming use expansions require county approval as such, and the county had never granted such approval. The hearings officer also vacated staff's approval of the floodplain permit based on his denial of the nonconforming use verification.

At this stage in this matter, intervenors had county nonconforming use verification for part, but not all, of its asphalt batch plant. And intervenors' floodplain permit was vacated.

### B. LUBA's *Rogue I* Decision

Petitioners Rogue Advocates appealed the hearings officer's September 26, 2013 decision to LUBA. On April 22, 2014, LUBA affirmed the hearings officer's decision to vacate the floodplain permit and remanded the hearings

officer's decision regarding the nonconforming use verification. LUBA disagreed with the county hearings officer that the conversion of the concrete batch plant to an asphalt batch plant in 2001 did not need to be approved as an *alteration* of the nonconforming concrete batch plant. To summarize, as a result of LUBA's *Rogue I* decision, intervenors' floodplain permit remained vacated, and before the existing asphalt batch plant could be verified as an existing nonconforming use, the alteration of the concrete batch plant to an asphalt batch plant would have to be approved as an alteration of the nonconforming concrete batch plant under statutory and local standards governing nonconforming use alteration.

### C. The County's Enforcement Proceeding and Second Floodplain Permit Decision

Less than three weeks after the county hearings officer's September 26, 2013 decision, the county issued code enforcement citations regarding the asphalt batch plant on October 15, 2013. Petitioner's appeal that led to LUBA's decision in *Rogue I* was filed two days later, on October 17, 2013. One day later, on October 18, 2013, the county and intervenors entered into a stipulation. Intervenors stipulated to remove all improvements that the hearings officer found to be unapproved expansions of the nonconforming asphalt batch plant use. Intervenors also stipulated that they would apply for a floodplain permit, and on October 25, 2013, intervenors filed an application for a floodplain permit. While petitioner's appeal in *Rogue I* of the hearings officer's September 26, 2013 decision was still pending at LUBA, a county planner approved intervenors' floodplain permit application on January 23, 2014.

### D. Petitioners' Second Appeal and LUBA's *Rogue II* Decision

Petitioners Rogue Advocates and Christine Hudson appealed the county's January 23, 2014 floodplain permit decision on February 13, 2014. As previously noted, LUBA issued its decision in *Rogue I*, a little over two months later. Believing LUBA's *Rogue I* decision rendered the January 23, 2014 floodplain permit decision invalid, petitioners requested that the county withdraw that floodplain permit decision so that the LUBA appeal of the January 23, 2014 floodplain permit could be terminated and attention focused instead on responding to the error identified by LUBA in *Rogue I*. The county and intervenors declined to do so. Petitioners filed their petition for review on June 2, 2014. Intervenors filed a motion to dismiss the appeal on June 16, 2014 and asked that the briefing schedule be suspended pending resolution of the motion to dismiss. On June 19, 2014 LUBA declined to suspend the briefing schedule, but allowed intervenors until June 27, 2015 to file a response brief. Intervenors did not file a response brief on the merits. LUBA denied intervenors' motion to dismiss and remanded the January 23, 2014 floodplain permit decision on August 26, 2014. *Rogue II.* Petitioners, the prevailing parties in *Rogue II*, thereafter filed the petition for attorney fees and cost bill that is the subject of this Order.

## ATTORNEY FEES

Petitioners move 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, 775-776 (2007):

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

Thus, an award of attorney fees is warranted under ORS 197.830(15)(b) where the prevailing party demonstrates that no reasonable lawyer would present any of the arguments that the losing party presented on appeal. Conversely, a party may avoid paying attorney fees if the party presented at least one argument on appeal that satisfied the probable cause standard. The probable cause standard is a relatively low standard. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

In distinguishing meritless arguments from wrong arguments, the Court of Appeals has explained that references to an argument as "meritless" means "that the presentation to which they refer are lacking in any *arguable* support, as distinct from 'simply' being incorrect." *Spencer Creek Neighbors v. Lane County*, 152 Or App 1, 4 n 2, 952 P2d 90 (1998) *quoting Fechtig v. City of Albany*, 150 Or App 10, 15 n 3, 946 P2d 280 (1997) (emphasis in original).

As noted, in this appeal intervenors submitted a motion to dismiss for lack of jurisdiction, but did not file a response brief. When petitioners seek an award of attorney fees in that circumstance, we limit our review to the parties'

jurisdictional arguments. *Lewelling Neighborhood District v. City of Milwaukie*, 35 Or LUBA 764, 765-766 (1998). In this case the motion to dismiss was filed after the petition for review was filed, and the jurisdictional arguments were initially framed by the petition for review.

### A. Petitioners' Four Arguments That the Exception to the Statutory Definition of "Land Use Decision" Provided by ORS 197.015(10)(b)(A) Does Not Apply

As relevant here, LUBA has exclusive jurisdiction over land use decisions. ORS 197.825(1). As required by OAR 661-010-0030(4)(c), the petition for review included a jurisdictional statement.[1] That jurisdictional statement points out that the challenged floodplain permit decision is a final county decision that applied sections of the LDO. Because the LDO is a land use regulation, petitioners' jurisdictional statement takes the position that the floodplain permit decision qualifies as a "land use decision" as ORS 197.015(10)(a) defines that term.[2] Anticipating that the county or intervenors might take the position that one of the exceptions to the ORS 197.015(10)(a) definition of "land use decision" set out in subsection (b) of ORS 197.015(10) apply here, petitioners took the position that ORS 197.015(10)(b)(A), which exempts decisions that are "made under land use standards that do not require interpretation or the exercise of policy or legal judgment" from the ORS 197.015(10)(a) definition of "land use decision" does not apply to the disputed

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[1] OAR 661-010-0030(4)(c) provides a petition for review must "[s]tate why the challenged decision is a land use decision or a limited land use decision subject to the Board's jurisdiction."

[2] As relevant, ORS 197.015(10)(a) defines "land use decision" to include "[a] final decision or determination made by a local government * * * that concerns the * * * application of * * * [a] land use regulation[.]"

January 23, 2014 floodplain permit. Petitioners' argument in the jurisdictional statement in support of that position is set out below:

> "Because the decision required interpretation or the exercise of policy or legal judgment it is a land use decision and this appeal is subject to LUBA's jurisdiction. ORS 197.015(10)(b)(A); *see infra* Part IV.A.2" Petition for Review 9.

The first problem with petitioners' ORS 197.015(10)(b)(A) argument is that there is no "Part IV.A.2" in the petition for review. But petitioners no doubt meant to cite "Part IV.B.2," rather than "Part IV.A.2," and we do not believe petitioners' scrivener's error in citing to "Part IV.A.2" misled anyone about its jurisdictional arguments regarding ORS 197.015(10)(b)(A).

Part IV.B.2 is entitled "The Decision Required Exercise of Policy or Legal Judgment." Petition for Review 15. Part IV.B.2 of the petition for review was included in the arguments in support of petitioners' second assignment of error, in which petitioners took the position that the county's decision to process the floodplain permit as a Type 1 use rather than a Type 2 use prejudiced petitioners' substantial right to participate in a hearing on the floodplain permit.[3] The scope of the argument in Part IV.B.2 of the petition for

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[3] LDO 3.1.2 describes Type 1 uses and LDO 3.1.3 describes Type 2 uses:

> "**3.1.2 Type 1 Land Use Authorizations, Permits and Zoning Information Sheet**
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> "Type 1 uses are authorized by right, requiring only non-discretionary staff review to demonstrate compliance with the standards of this Ordinance. A Zoning Information Sheet may be issued to document findings or to track progress toward compliance. *Type 1 authorizations are limited to situations that do not require interpretation or the exercise of policy or legal*

review in support of the second assignment of error is less than clear. As an argument that the jurisdictional exception set out at ORS 197.015(10)(b)(A) does not apply, Part IV.B.2 is even less clear.

Nevertheless, Part IV.B.2 of the petition for review arguably includes four arguments that the jurisdictional exception set out at ORS 197.015(10)(b)(A) does not apply. Two of the arguments appear on page 16 and continue through line 17 on page 17 of the petition for review. Petitioners first suggest that the county determined the nature and scope of intervenors' nonconforming aggregate batch plant in the floodplain permit decision and argues that determination required the exercise of policy or legal judgment. Second, petitioners suggest the actions proposed by intervenors and approved in the floodplain permit were to comply with the stipulated order, and that determining that those actions comply with the stipulated order required the exercise of policy or legal judgment.

Petitioners' third argument appears on page 18 of the petition for review. Petitioners contend that the county's decision that it could proceed with the floodplain permit while the hearings officer's September 26, 2013 nonconforming use determination was pending at LUBA required the exercise of policy or legal judgment.

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> *judgment. Type 1 authorizations are not land use decisions as defined by ORS 215.402*." (Emphasis added; footnote omitted.)
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> "**3.1.3 Type 2 Land Use Permits**
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> "Type 2 uses are subject to administrative review. *These decisions are discretionary and therefore require a notice of decision and opportunity for hearing*." (Emphasis added.)

Petitioners' fourth argument is that LDO 7.2.2(C)(2)(c) mandates that the county follow its Type 2 procedure in the circumstances presented in this appeal.[4] Petitioners contend that LDO 3.1.3 expressly provides that the Type 2 procedure is required in cases where the exercise of discretion will be required to review the application for permit approval. *See* n 3. Petitioners argue that it follows that the ORS 197.015(10)(b)(A) exemption from the statutory term "land use decision" for decisions that do not require the exercise of policy or legal judgment does not apply in this case.

Petitioners do not contend that they are entitled to an award of attorney fees if any one of the county's arguments in response to those jurisdictional arguments is without probable case. Following the principles articulated in *Fechtig* and *Spencer Creek Neighbors*, if any of intervenors' arguments in response to petitioner's four jurisdictional arguments meet the probable cause standard, the petition for attorney fees must be denied. *Fechtig*, 150 Or App at 24; *Spencer Creek Neighbors* 152 Or App at 6-7. Petitioners cite both *Fechtig* and *Spencer Creek Neighbors* in their petition for attorney fees and do not argue otherwise. We turn to petitioners' jurisdictional arguments, and interevenors' arguments in response to those arguments.

### 1. Legal and Policy Judgment was Required to Determine the Scope and Extent of the Nonconforming Aggregate Batch Plant

We did not address petitioners' first jurisdictional argument in our final opinion in *Rogue II*. As we explain below, we determined that we have jurisdiction to review the floodplain permit under another of petitioners'

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[4] We set out the relevant text of LDO 7.2.2(C)(2)(c) later in this opinion.

jurisdictional arguments. As a result of our decisions in *Rogue I* and *Rogue II*, the county will need to determine the nature and extent of the concrete batch plant use and address whether the changes that were made to the concrete batch plant to convert it to an asphalt batch plant can be approved as an alteration of the nonconforming concrete batch plant, under the statutory and LDO standards that govern nonconforming use alterations. As our decision in *Rogue II* points out, it is not entirely clear whether in granting the January 23, 2014 floodplain permit the county relied on the stipulated order, or on the hearings officer's nonconforming use verification decision. Whatever the case, it is quite clear the county did not make a new nonconforming use verification decision in rendering the floodplain permit.

The intervenors' challenge to petitioners' first jurisdictional argument, like the jurisdictional argument itself, is not clear. But intervenors take the position that the county was not required under LDO 7.2 to determine the scope and nature of the nonconforming use in issuing the disputed floodplain permit. We understand intervenors take that position because the scope and nature of the nonconforming aggregate batch plant is, or will be, determined in other decisions. That is a probable cause argument in response to petitioners' first ORS 197.015(10)(b)(A) argument.

Our decision that intervenors advanced a probable cause response to petitioners' first ORS 197.015(10)(b)(A) argument means that the petition for attorney fees must be denied. We nevertheless also consider intervenors' remaining arguments. Two of those remaining arguments satisfy the ORS 197.830(15)(b) probable cause standard; one of them does not.

**2. Legal and Policy Judgment was Required to Determine Whether the Actions Authorized by the Floodplain**

**Permit Comply with the Stipulated Order Required the Exercise of Policy and Legal Judgment**

We also did not address the petitioners' second jurisdictional argument, in which they argue that in granting the January 23, 2014 floodplain permit the county determined the proposal is consistent with the stipulated order and that the county was required to exercise policy and legal judgment to make that determination. Intervenors respond that the improvements that make up the asphalt batch plant that may remain under the terms of the stipulated order are clearly identified in an exhibit that is attached to the stipulated order. Intervenors argued in the motion to dismiss that no discretion is required to determine under the terms of the stipulated order which improvements can remain where they now are, which improvements must be removed altogether and which features must be moved out of the floodway.[5] Intervenors further argue that petitioners do not argue that the standards that must be applied to grant a floodplain permit under LDO 7.2 require the exercise of policy or legal judgment.

` As intervenors point out, the stipulated order seems to clearly identify the asphalt batch plant features that may remain where they are, those that must be moved, and those that are not approved. And while it may be that petitioners' suggest that other requirements of LDO 7.2 require the exercise of legal or policy judgment, that suggestion is undeveloped. Intervenors' challenge to petitioners' second ORS 197.015(10)(b)(A) jurisdictional argument is sufficient to satisfy the ORS 197.830(15)(b) probable cause standard.

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[5] Intervenors proposed to eliminate the improvements that the hearings officer identified as unapproved expansions.

### 3. Proceeding with the Floodplain Permit While the Appeal of the Hearings Officer's Nonconforming Use Verification was Pending in *Rogue II* Required the Exercise of Policy or Legal Judgment

It was this third ORS 197.015(10)(b)(A) argument that LUBA relied on to determine that it has jurisdiction in this matter:

> "For purposes of intervenors' jurisdictional challenge, the decision on appeal implicitly determined that the city could proceed to issue the requested floodplain permit for the 2012 configuration of the asphalt batch plant, notwithstanding that the hearings officer's decision that established the scope of that nonconforming use was on appeal to LUBA and therefore might be found to be erroneous. That implicit determination required 'interpretation or the exercise of policy or legal judgment.' Therefore the exception to our jurisdiction set out at ORS 197.015(10)(b)(A) does not apply." *Rogue II*, slip op at 8.

Of course our decision in *Rogue II* had not been issued when intervenors filed their motion to dismiss, so intervenors did not know at the time they filed the motion to dismiss that LUBA would rely on that jurisdictional argument to determine it has jurisdiction in this matter. Intervenors' motion to dismiss and intervenors' subsequent response to petitioners' opposition to the motion to dismiss do not clearly address the petitioners' third ORS 197.015(10)(b)(A) jurisdictional argument. That failure on intervenors' part makes the question of whether they presented a probable cause argument in response to petitioners' third jurisdictional argument much closer than it might have been. But one of intervenors' primary theories for why the floodplain permit decisions qualify for the ORS 197.015(10)(b)(A) exception for decisions that do not require the exercise of policy of legal judgment is that the floodplain permit is guided by the stipulated order, and, by implication, is not guided by the hearings officer's September 26, 2013 nonconforming use verification decision. We do not agree

with that theory, because the hearings officer's September 26, 2013 nonconforming use decision was pretty clearly at least one of the bases for the floodplain permit decision. As we explained in our decision in *Rogue II*, "* * * the January 23, 2014 floodplain development permit expressly cites the hearings officer's September 26, 2013 floodplain development permit and nonconforming use determinations (ZON2012-01172_FP and ZON2012-01173_NC) in identifying the scope and identify of the nonconforming use structures that were granted floodplain development permit approval." *Rogue II*, slip op at 7-8. But earlier in *Rogue II* we noted that it was "somewhat unclear whether the October 18, 2013 stipulation relies on an order issued by the code enforcement hearings officer to identify the structures that qualify as nonconforming uses, or whether the stipulation relies on the September 26, 2013 hearings officer's decision to identify the scope of the structures that have legal nonconforming use status, or both." *Id*. at 7. We continue to believe the floodplain permit decision relied on the September 26, 2013 hearings officer's nonconforming use verification decision. Therefore, the county's decision to proceed with the floodplain permit decision while the September 26, 2013 hearings officer's nonconforming use verification was pending at LUBA was a decision that required the exercise of policy or legal judgment. But while it is an exceedingly close question, intervenors' position to the contrary was not, as explained in *Spencer Creek Neighbors*, so "meritless" that it warrants an award of attorney fees under ORS 197.830(15)(b). Intervenors' challenge to petitioners' third ORS 197.015(10)(b)(A) argument is sufficient to satisfy the ORS 197.830(15)(b) probable cause standard.

### 4. Petitioners LDO 7.2.2(C)(2)(c) Argument

Petitioners' fourth ORS 197.015(10)(b)(A) argument relies on a somewhat obscure footnote in Part IV.B.2 of the petition for review.[6] In Part IV.B.1 of the petition for review, petitioners relied on LDO 7.2.2(C) to argue that the county erred by following its Type 2 process rather than its Type 1 process.[7] As noted earlier, the LDO Type 1 process is for decisions that do not

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[6] That footnote states:

> "LUBA's jurisdiction over land use decisions does not include decisions of a local government that are "made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]" ORS 197.015(10)(b)(A). For the same reasons that the Respondent improperly used the Type 1 process; LUBA has jurisdiction over this appeal. *See Johnson v. Jackson County*, 59 Or LUBA 94, 96 (2009)." Petition for Review 15 n 2.

[7] LDO 7.2.2(C) provides:

> "**Establishment of Floodplain Development Permit**
>
> "A Floodplain Development Permit will be required prior to initiating development activities in any Area of Special Flood Hazard established in Section A above.
>
> "A Floodplain Development Permit will be processed through the following review procedures:
>
> "(1) A Type 1 Floodplain Development Permit (administrative) is required for the following development projects.
>
> "* * * * *
>
> "(b) *Development outside of the floodway* where base flood elevations have been determined by FEMA. *However, development requiring a cumulative*

require discretion, while the Type 2 procedure is required for discretionary decision making. *See* n 3. Specifically, petitioners relied on LDO 7.2.2(C)(2)(c). *See* n 7. Petitioners argued in their petition for review that the Type 2 procedure was required under LDO 7.2.2(C)(2)(c) because the floodplain permit findings indicate a no-rise certification will be submitted and condition 5 of the January 23, 2014 floodplain permit expressly requires a no-rise certification.[8]

LDO 7.2.2(C)(1) sets out circumstances when Type 1 floodplain permits are permissible, and appears just before LDO 7.2.2(C)(2), which sets out circumstances where Type 2 floodplain permits are required. *See* n 7. Intervenors argued that when the application was submitted on October 25, 2013 they did not seek approval for development within the floodplain.

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> *analysis or a no-rise certification requires a Type 2 Floodplain Development Permit*;
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> "* * * * *." (Emphases added.)
>
> "(2) A Type 2 Floodplain Development Permit is required for the following development projects.
>
> "* * * * *
>
> "(c) Except as identified in 1) above, development within the floodway where an Oregon registered *professional engineer is required to complete a no-rise certification* * * *;
>
> "* * * * *." (Emphasis added.)

[8] Condition 5 provides in part:

> "[T]he Applicant's engineer shall submit the No-Rise Certification and Engineers Statement pursuant to LDO 7.2.10 (C) and (D) for fill associated with the septic tank removal." Record 6.

Therefore, intervenors argued in their motion to dismiss, under LDO 7.2.2(C)(1)(b) the Type 1 (nondiscretionary) process was appropriate. Intervenors argued that following the reasoning in *Johnson v. Jackson County*, 59 Or LUBA 94, 96 (2009) it therefore follows that the ORS 197.015(10)(b)(A) exception for decisions that do not require the exercise of policy of legal judgment applies and the floodplain permit decision is not a land use decision.

The parties dispute whether the floodplain permit proposed development in the floodway. We need not resolve that dispute, because even if that dispute is resolved in intervenors' favor, we conclude that a reasonable attorney would not have moved to dismiss in this case, based on LDO 7.2.2(C)(1)(b). LDO 7.2.2(C)(1)(b) (which intervenors relied on) appears in the same section of the LDO as LDO 7.2.2(C)(2)(c) (which petitioners relied on). As petitioners argued in the petition for review, there is language in LDO 7.2.2(C)(2)(c) that expressly requires a Type 2 procedure if a "no-rise certification" is required. LDO 7.2.2(C)(1)(b), which intervenors relied on in their motion to dismiss, also expressly provides that "a no-rise certification requires a Type 2 Floodplain Development Permit." In moving to dismiss, intervenors did not acknowledge petitioners' argument based on the "no-rise certification" language and made no attempt to address that language in LDO 7.2.2(C)(1)(b) and 7.2.2(C)(2)(c). A reasonable attorney would not move to dismiss based on LDO 7.2.2(C)(1)(b) without addressing petitioners' argument regarding the jurisdictional significance of the required no-rise certification. If intervenors' LDO 7.2.2(C)(1)(b) argument had been the only jurisdictional argument it made, an award of attorney fees would be warranted in this case. But because intervenors advanced three probable cause arguments in response to

petitioners' four jurisdictional arguments, an award of attorney fees against intervenors is not appropriate.

**B. Attorney Fees Against the County**

Petitioners' motion generally requests attorney fees, without specifying whether petitioners seek an award of attorney fees against both the county and intervenors.

ORS 197.830(15)(b) entitles a prevailing party to recover attorney fees when the nonprevailing party has "presented a position without probable cause to believe the position was well-founded in law or on factually supported information." Therefore, an initial inquiry under ORS 197.830(15)(b) is whether the county, as a nonprevailing party, presented a position to LUBA. Where a local government "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). *Hearne v. Baker County*, 35 Or LUBA 768, 770 (1998), *aff'd* 158 Or App 246, 972 P2d 1233 (1999) ; *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558, 564, *aff'd* 123 Or App 642, 859 P2d 1208 (1993). The county's only other participation in this appeal was a response to petitioners' motion for fees. But that response only provided that the county concurred with and joined intervenors' response in opposition to petitioners' motion.

Because of the county's limited participation, we do not consider it to have "presented a position" that could justify an award of attorney fees. Therefore, assuming petitioners' motion for fees seeks an award against the county, it is denied.

**COSTS**

Petitioners filed a cost bill requesting award of the cost of their filing fee and subsequent return of their deposit pursuant to OAR 661-010-0075(1)(d).

The county and intervenors do not object to petitioners' cost bill. Petitioners are awarded the cost of their filing fee, in the amount of $200, to be paid by the county and intervenors. The Board shall return petitioners' $200 deposit for costs.

Dated this 12th day of March, 2015.

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Michael A. Holstun
Board Member