BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JIM WOOD,
Petitioner,

vs.

CROOK COUNTY,
Respondent,

and

RANDY GOERING and LINDA GOERING,
Intervenors-Respondents.

LUBA No. 2016-016

ORDER

ATTORNEY FEES

Respondent Crook County (county) and intervenors-respondents Randy and Linda Goering (intervenors) 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 between positions that are subject to an award of attorney fees under the ORS 197.830(15)(b) "probable cause" standard, the Court of Appeals and LUBA have used a number of one-word or short-phrase descriptions of the standard imposed by ORS 197.830(15)(b). However, the following description in *Spencer Creek Neighbors v. Lane County*, 152 Or App 1, 9, 952 P2d 90 (1998), probably best describes the standard that we and the Court of Appeals apply under that statute:

> "As a general proposition, however, the question of whether there is probable cause for a defense under ORS 197.830(1[5])(b) does not depend on a successful result but on whether it presents a 'debatable' question 'over which * * * reasonable * * * discussion

may arise.' *Fechtig*, 150 Or App at 14 (*quoting Broyles v. Estate of Brown*, 295 Or 795, 800-01, 671 P2d 94 (1983))."

FACTS

The underlying dispute in this appeal has a complicated history. We restate some of that complicated history here before turning to the parties' motions for an award of attorney fees and costs. This appeal is the fourth appeal challenging the rezoning of intervenors' 640-acre property from Exclusive Farm Use (EFU) to Rural Aviation Community (RAC). In *Wood v. Crook County*, 49 Or LUBA 682 (2005) (*Wood I*), LUBA sustained an assignment of error challenging a decision rezoning the property to RAC, based on the county's comprehensive plan Wildlife Policy 2.[1] LUBA remanded in *Wood I*, finding that the development permitted under the RAC zone would exceed the maximum density permitted under Wildlife Policy 2. LUBA directed the county to either (1) ensure that the RAC zone complies with Wildlife Policy 2, or (2) adopt findings that justify the removal of the subject property from the General Winter Range. LUBA could have been clearer in *Wood I* about what it was suggesting in the second option. What we meant to suggest in *Wood I* was that under option 2 the county might revisit the issue of

[1] As relevant here, Wildlife Policy 2 requires that density within the General Winter Range shall not exceed one residence per 80 acres. Prior to actions taken by the county during the course of these four appeals, intervenors' 640-acre property included land within the General Winter Range.

whether the subject property qualifies as "wildlife habitat."[2] If the county could establish that the subject property does not qualify as wildlife habitat, it need not be included on an inventory of wildlife habitat under Goal 5 and the Goal 5 administrative rule (OAR chapter 660, division 23) and could simply be removed from the inventory for that reason without any further justification.

Next, in *Wood v. Crook County*, 55 Or LUBA 165 (2007) (*Wood II*), the county again attempted to rezone the property RAC, arguing that the act of rezoning the property from EFU to RAC, in and of itself, was sufficient to render Wildlife Policy 2 inapplicable. We rejected that argument, concluding that the rezoning in that case constituted an amendment of the county's Goal 5 program, which the county would need to justify under the Goal 5 administrative rule but failed to do so.

In *Wood II* we identified a third possible option to allow the rezone, which was essentially an elaboration of the reasoning that led us to reject the county's position in *Wood II* that rezoning the property from EFU to RAC, without further justification under the Goal 5 administrative rule, was sufficient to render Wildlife Policy 2 inapplicable:

> "One aspect of our decision in *Wood I* requires clarification. The above-quoted language [from *Wood I*] can be read to say the county only has two options if this matter is to be pursued further:

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[2] OAR 660-023-0110(b) defines "[w]ildlife habitat" as "an area upon which wildlife depend in order to meet their requirements for food, water, shelter, and reproduction. Examples include wildlife migration corridors, big game winter range, and nesting and roosting sites."

> (1) amend the RAC zone to make it consistent with CCCP Wildlife Policy 2 or (2) justify amending the big game winter range inventory to remove the subject property from the inventory of Deer Winter Range. However, as we have just explained, the county has at least one additional option under OAR 660-023-0040 and 660-023-0050 that is similar to the second option we noted in *Wood I*.[3] Under that third option, the county could apply OAR 660-023-0040 and 660-023-0050 and attempt to justify amending the program to protect Deer Winter Range that it adopted in 1992, to remove the residential density limitation that it imposed in 1992 on the subject property. *Under that scenario, the subject property would remain on the big game inventory as Deer Winter Range, but the county would make a Goal 5 program decision under OAR 660-023-0040 and 660-023-0050 not to limit residential conflicting uses to protect the inventoried Deer Winter Range on the subject property*. Such a decision would have to be adequately justified under the applicable rules, and we make no decision here about whether that is possible. But assuming the county can do so, such action under OAR 660-023-0040 and 660-023-0050 is a third option that is potentially open to the county, in addition to the two options we noted in *Wood I*." *Wood II*, 55 Or LUBA at 174-75 (emphasis added.)

The above emphasized language in our *Wood II* decision has unfortunately been the source of a great deal of confusion in this matter on the part of all parties. We did not mean to suggest that under the third option we identified in *Wood II* that the subject property *must* remain on the inventory of deer winter range. That language was only included to distinguish the third option from the second option (where the property would be removed from the inventory of deer winter range based on a decision that the subject property

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[3] Options two and three are similar in the sense that under either option Wildlife Policy 2 would not apply to the subject property.

does not qualify as wildlife habitat, thus obviating the need further Goal 5 analysis). Under that third option, even if the subject property remained on the inventory of deer winter range, because it qualifies as wildlife habitat, Wildlife Policy 2 would not apply to the subject property if the county made a programmatic decision under the Goal 5 rule not to apply Wildlife Policy 2 to protect the subject property for its limited wildlife habitat values.

Next, in *ODFW v. Crook County*, 72 Or LUBA 316 (2015), petitioner sought LUBA review of the county's decision that attempted to respond to our decision in *Wood II*. Our decision in the current appeal, *Wood v. Crook County*, ___ Or LUBA ___ (LUBA No. 2016-016, September 6, 2016) (*Wood III*), includes the following description of our decision in *ODFW*:

> "In *ODFW*, petitioner's first assignment of error alleged procedural errors and petitioner's second assignment of error alleged the county erroneously found the subject property does not qualify as wildlife habitat. We rejected both of those assignments of error.
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> "Petitioner's third assignment of error included two subassignments of error. In its first subassignment of error petitioner alleged errors in the county's attempt to amend the RAC zone to make it consistent with Wildlife Policy 2. In its second subassignment of error, petitioner challenged the county's alternative justification under Goal 5 and the Goal 5 administrative rule to fully allow conflicting RAC zone uses 'and remove the subject property from 'all Goal 5 big game wildlife winter habitat inventories * * *.'' *ODFW*, 72 Or LUBA at 335-36. In *ODFW*, while we sustained petitioner's first subassignment of error under the third assignment of error, we rejected petitioner's other arguments. We explained our decision to remand in our conclusion in *ODFW*:

> "'Our disposition of petitioner's first and second assignments of error and second subassignment of error under the third assignment of error would require that we affirm the county's decision. *As we understand the part of the county decision that is challenged in those assignments of error, the county's decision to fully allow the RAC uses and remove the subject property from the county's inventories of significant wildlife habitat have the legal effect of removing the subject property from the county's Goal 5 program for inventoried wildlife habitat*. However, because we sustain petitioner's first subassignment of error under the third assignment of error concerning the amendment of the RAC zone to attempt to make it consistent with Wildlife Policy 2 and Goal 5, remand is required. The county must either repeal those amendments or demonstrate that those amendments are consistent with Wildlife Policy 2 and Goal 5. *ODFW*, 72 Or LUBA at 340 * * *.'
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> "To summarize, our remand in *ODFW* was quite limited. On remand the county was directed to either (1) justify its conclusion that the amendments it adopted to the RAC zone are sufficient to make it consistent with Wildlife Policy 2 and Goal 5, or (2) repeal those amendments. On remand, the county repealed the amendments." *Wood III*, slip op 6-7 (original italics and underscoring deleted; above italics added; footnote omitted).

In *Wood III*, petitioner sought review for a fourth time. The petition for review included three assignments of error, which we discuss in detail below We rejected those assignments of error and affirmed the county's decision.

MOTIONS FOR ATTORNEY FEES

The county and intervenors (respondents) move for awards of attorney fees against petitioner, arguing that all three of petitioner's assignments of error lacked "probable cause to believe the position was well-founded in law or on

factually supported information." ORS 197.830(15)(b). Respondents take the position that *ODFW* was a simple remand, which set out two ways the county could respond. First, the county could make another attempt to further amend the RAC zone to make it consistent with Wildlife Policy 2. Second, the county could simply repeal the RAC zone amendments that LUBA found to be objectionable in *Wood III*. *Wood III*, Slip op 7. Respondents argue the county simply decided to take the second option.

Respondents argue that petitioner's arguments that attempt to revive issues concerning the county's earlier programmatic Goal 5 decision to allow RAC zone uses fully, notwithstanding Wildlife Policy 2, were barred by *Beck v. City of Tillamook*, 313 Or 148, 153, 831 P2d 678 (1992), and therefore were never open for reasonable discussion or rational debate. Intervenors argue:

> "None of Petitioner's Response arguments are reasonable in light of the clarity of LUBA's instructions that if the county simply repeals the RAC amendments, the last remaining live issue goes away, and that is all the county does. This is an appeal that never should have been filed because there is nothing to appeal." Intervenors' Reply 1-2.

Intervenors consider the complexity of the proceedings to be a red herring, arguing:

> "All of those [remand] issues, complex as they were, had been resolved. Because all of the other issues had been resolved in the prior proceedings, and the county elected to do the minimum that LUBA instructed needed to be done and simply repeal[ed] the RAC zone amendments, no reasonable attorney would have filed an appeal and tried to re-litigate resolved issues." Intervenors' Reply at 3.

Petitioner filed a combined response to the county's and intervenors' motions. Petitioner's main position is that contrary to intervenor's argument that this was "the simplest of remand proceedings," this multi-appeal litigation was "far from straightforward," citing to statements from the county's and intervenor's attorneys regarding the confusing nature of the appeals, and LUBA's own admission that "[o]ur efforts to explain and distinguish between Options 2 and 3 have been consistently unsuccessful." *Wood III*, slip op at 5; "Our attempts in *Wood I* and *Wood II* to identify and simplify the options potentially available for the county to rezone the subject property RAC have not been very successful." *ODFW*, 72 Or LUBA at 329.

We agree with petitioner that for a number of reasons this series of appeals achieved a level of complexity that is unusual even for cases involving Goal 5. However, with one exception, we also agree with respondents that our remand in *Wood III* was exceedingly narrow and rightly or wrongly resolved those complex issues such that under *Beck* they were precluded as a subject of further debate in this appeal.

Specifically, we agree with respondents that the issue concerning whether the county erred by removing the subject property from the inventory of Deer General Winter Range was clearly resolved in *ODFW* against petitioner. That issue was a resolved issue under *Beck*, and petitioner's arguments to the contrary in *Wood III*, which attempt to revive that issue, were presented "without probable cause to believe the position was well-founded in

law * * *." Similarly, with one exception, whether the county could fully respond to LUBA's remand in *ODFW* by simply repealing the amendments to the RAC zone that LUBA found objectionable, and leaving the prior version of the RAC zone in place, was also a resolved issue under *Beck*. But for that exception, which we discuss next, an award of attorney fees in this appeal under ORS 197.830(15)(b) would be warranted.[4]

The exception is a final complex wrinkle in this appeal. As petitioner correctly argued in *Wood III*, the Goal 5 ESEE analysis that was adopted to justify the county's programmatic decision to fully allow the conflicting uses in the RAC zone was based on the amended RAC zone, not the unamended RAC zone that remained after the county repealed the RAC zone amendments following our decision in *ODFW*. Petitioner argued a new ESEE analysis therefore was required. We rejected that argument in *Wood III*:

> "Petitioner suggests in his arguments under the second assignment of error and under the first assignment of error that the ESEE analysis that LUBA sustained in *ODFW* was based on the amended RAC zone, not the prior RAC zone that has been reinstated by the county's repeal of the RAC zone amendments at issue in *ODFW*. Petitioner suggests that a new ESEE analysis and

[4] Like the parties we have focused our attention on petitioner's challenges to the substance of the rezoning decision. Petitioner's third assignment of error challenged a county evidentiary ruling that likely was in error. But petitioner failed to challenge an alternative ruling to that evidentiary ruling that rendered it harmless error at most. Given that failure, petitioner's third assignment of error was presented "without probable cause to believe the position was well-founded in law or on factually supported information."

justification to allow RAC zone conflicting uses is therefore required.

> "We reject the argument. The course of action the county followed on remand, *i.e.*, to abandon its attempt to amend the RAC zone to make it consistent with Wildlife Policy 2 and rely entirely on its Goal 5 rule ESEE analysis and programmatic decision to allow RAC zone uses fully, notwithstanding Wildlife Policy 2, is consistent with our decision in *ODFW*, which expressly concluded that the county could correct the only errors we identified in *ODFW* by repealing the RAC zone amendments. Petitioner's arguments to the contrary are barred by *Beck*.
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> "Even if petitioner's arguments were not barred by *Beck*, the disputed RAC zone amendments that led to our remand in *ODFW* concerned how residential density was to be computed to comply with Wildlife Policy 2. Those amendments did not change the uses that were authorized in the prior RAC zone in any way that we can see. Compare Record 10-14 (unamended RAC Zone) with *ODFW* Record 34-35 (now repealed RAC zone amendments). Petitioner makes no attempt to show how authorized uses in the amended RAC zone that was used in the county's ESEE analysis and decision to fully allow RAC zone conflicting uses were changed in any material way by the county's decision to repeal the amendments so as to call into question the county's ESEE analysis. It is the *conflicting uses* authorized by the amended RAC zone that were the focus of the ESEE analysis in *ODFW*. As already noted, the uses in the amended RAC zone appear to be the same uses authorized in the unamended RAC zone. Petitioner fails to explain how an ESEE analysis under the amended RAC zone would be any different from an ESEE analysis under the unamended RAC zone that is now in effect." *Wood III*, slip op at 10-11 (italics in original).

Petitioner's argument on the merits was that a new ESEE analysis should be required because the ESEE analysis at issue in *ODFW* relied on the amended RAC zone, whereas the zone that was actually applied to the subject

property in the decision that was before LUBA in *Wood III* was the prior, or unamended, RAC zone. While we rejected that argument on the merits, it easily qualifies as a position presented with "probable cause to believe the position was well-founded in law * * *." It was a debatable question over which there could be reasonable discussion. *Spencer Creek Neighbors*, 152 Or App at 9. However, petitioner's position that that argument was within LUBA's scope of review following *ODFW*, and not barred by *Beck* as we found it to be the case in *Wood III*, presents a much closer question.

Our conclusion in *ODFW* was set out earlier, and we set it out again below to resolve the *Beck* issue:

> "'Our disposition of petitioner's first and second assignments of error and second subassignment of error under the third assignment of error would require that we affirm the county's decision. As we understand the part of the county decision that is challenged in those assignments of error, the county's decision to fully allow the RAC uses and remove the subject property from the county's inventories of significant wildlife habitat have the legal effect of removing the subject property from the county's Goal 5 program for inventoried wildlife habitat. However, because we sustain petitioner's first subassignment of error under the third assignment of error concerning the amendment of the RAC zone to attempt to make it consistent with Wildlife Policy 2 and Goal 5, remand is required. The county must either repeal those amendments or demonstrate that those amendments are consistent with Wildlife Policy 2 and Goal 5.'" *ODFW*, 72 Or LUBA at 340 (footnote omitted).

Whether petitioner was entitled to argue the ESEE analysis that relied on the amended RAC zone was sufficient to support a Goal 5 program that relies on the prior, unamended RAC Zone was resolved against petitioner in *Wood*

III. But because our decision in *ODFW* remanded the county's decision to either further justify the RAC zone amendments or repeal them, we conclude that petitioner's position that the repeal of the RAC zone amendments could implicate the adequacy of the ESEE analysis that was based on the amended version of the RAC zone was presented with "probable cause to believe the position was well-founded in law * * *." That position admittedly can be described as being at odds with a strict and literal reading of our conclusion quoted above. But given the complex legal and factual foundation that the county's Goal 5 programmatic decision (and LUBA's decision) rested on, we cannot say it is a position that justifies an award of attorney fees under ORS 197.830(15)(b).

Because we conclude that one of the positions petitioner presented in this appeal was presented with "probable cause to believe the position was well-founded in law * * *," it does not matter that petitioner also presented a number of positions that were not presented with "probable cause to believe the position was well-founded in law * * *." *Fechtig v. City of Albany*, 150 Or App at 14.[5]

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[5] Our usual practice in resolving petitions for attorney fees is to proceed directly to address a position that is presented with "probable cause to believe the position was well-founded in law * * *," where there is at least one, and to not address other positions that do not meet the probable cause standard. We have deviated somewhat from that usual practice here both to provide context for understanding the single position in this appeal that meets the ORS

Respondents' motions for attorney fees are denied.

MOTION FOR COSTS (INTERVENORS)

Intervenors move for an award of the cost of their $100 filing fee as a cost to the prevailing party under ORS 197.830(15)(a) and OAR 660-010-0075(1)(b)(D), or as an "expense" under ORS 197.830(15)(b).[6] Because the decision of the county was affirmed, and intervenors intervened on the side of the county to defend the decision, intervenors are considered a prevailing party for purposes of ORS 197.830(15)(a). Petitioner does not oppose intervenors' cost bill. The motion is granted and intervenors are awarded the cost of their filing fee, to be paid by petitioner, in the amount of $100.

197.830(15)(b) probable cause standard and to illustrate how close that position came to failing to meet that standard.

[6] OAR 661-010-0075(1)(b) provides in relevant part:

> "(B) 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.
>
> "(C) Costs awarded to the governing body pursuant to this section shall be paid from the deposit required by OAR 661-010-0015(4) and shall not exceed the amount of that deposit.
>
> "(D) If an intervenor under OAR 661-010-0050 or a state agency under OAR 661-010-0038 is the prevailing party, the intervenor or state agency may be awarded the cost of the fee to intervene or to file a state agency brief."

MOTION FOR COSTS (COUNTY)

The county moves for an award of costs in the amount of $200 for preparing the record pursuant to OAR 661-010-0075(1)(b)(B). *See* n 6. The county incurred a cost of $618.78 for copying the record for this appeal. Petitioner does not contest the motion for costs. The motion is granted, and under OAR 661-010-0075(1)(b)(C), the cost of $200 shall be paid from petitioner's deposit for costs.

Dated this 1st day of March, 2017.

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Michael A. Holstun
Board Chair