

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 FRIENDS OF THE LOSTINE WILDLIFE AREA,
5 KENDRICK MOHOLT, LEON WERDINGER,
6 and JEREMIAH MARSH,
7 *Petitioners,*

8
9 vs.

10
11 WALLOWA COUNTY,
12 *Respondent,*

13
14 and

15
16 STEVE W. BILBEN,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2017-013

20
21 ORDER

22 Before the Board are intervenor-respondent's (intervenor's) motion for
23 attorney fees and cost bill.

24 **MOTION FOR ATTORNEY FEES**

25 The decision challenged in this appeal is a permit, issued November 27,
26 2013, which approves a dwelling in the county's Timber/Grazing zone. The
27 decision was issued administratively, without providing notice or hearing.
28 Petitioners filed an appeal of the decision with LUBA on February 13, 2017,
29 over three years after the permit was issued. In the notice of intent to appeal,
30 petitioners took the position that they had standing to appeal the November 27,
31 2013 permit decision to LUBA, and the appeal was timely filed, under ORS

1 197.830(3)(b).¹ On the same date they filed the notice of intent to appeal,
2 petitioners filed a local appeal of the November 27, 2013 permit decision with
3 the county planning commission.² In the local appeal proceeding, Hobbs
4 represented petitioners, while in the LUBA appeal petitioners were represented
5 by a different attorney (Kearns).

6 On February 16, 2017, intervenor’s attorney (Knapp) sent a letter to the
7 county requesting that a hearing on petitioners’ local appeal be postponed to
8 the next planning commission meeting date, April 25, 2017. The letter was
9 copied to Hobbs, but was not copied to Kearns. Both Knapp and Hobbs
10 appeared at the planning commission’s February 28, 2017 meeting. In the
11 minutes of that meeting, the planning director noted that petitioners’ local
12 appeal was not received in time to be heard at the March 28, 2017 planning
13 commission meeting and, further, that intervenor’s attorney had requested a
14 postponement. The planning director recommended that the appeal hearing be

¹ ORS 197.830(3) provides, in relevant part:

“If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:

“* * * * *

“(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required.”

² LUBA’s jurisdiction is limited to cases in which the petitioner has exhausted all remedies available by right before petitioning LUBA for review. ORS 197.825(2)(a).

1 scheduled for the April planning commission meeting.³ The planning
2 commission apparently accepted this recommendation, although the minutes do
3 not reflect any planning commission action on that point.

4 Between March 2 and 6, 2017, Kearns and Knapp spoke by phone and
5 exchanged e-mails regarding Kearns' request to obtain a stipulation to suspend
6 the LUBA proceeding, pending a determination by the planning commission
7 whether or not to provide a local appeal of the permit decision. Intervenor's
8 attorney declined to stipulate to suspension of the LUBA appeal, arguing that
9 the planning commission had scheduled a hearing on petitioners' local appeal
10 to be held in April, and therefore the LUBA appeal should be dismissed, not
11 suspended. On March 8, 2017, Kearns filed an unstipulated motion to suspend
12 the LUBA appeal, pending a determination by the planning commission
13 whether or not to provide a local appeal. In an order dated March 13, 2017,
14 LUBA granted the motion. The order requested that the parties keep LUBA

³ The minutes of the February 28, 2017 planning commission meeting state, in relevant part:

“Another appeal of the Bilben Zone Permit by Moholt, et al. will be heard by the Planning Commission. It was not received in time to be heard at the March meeting. Also, the Bilbens' attorney (Rebecca Knapp) has asked for a postponement of any further hearings of this appeal until after March. Per [the planning director], the best way to proceed would be to skip a March meeting and to provide notice in the newspaper for a hearing in April.” Wallowa County Planning Commission Meeting Minutes, February 27, 2017, page 3 (attached to Affidavit of Rebecca Knapp).

1 apprised of whether the planning commission would provide petitioners with a
2 local appeal.

3 On March 14, 2017, before receiving the Board’s March 13, 2017 order
4 suspending the appeal, Knapp filed a motion to dismiss the LUBA appeal,
5 along with a motion to take evidence outside the record. In the motion to
6 dismiss, Knapp advanced two challenges to LUBA’s jurisdiction: (1)
7 petitioners lacked standing under ORS 197.830(3), and (2) petitioners’ appeal
8 to LUBA was untimely under ORS 197.830(3)(b). At some point, Kearns
9 called the county counsel to confirm whether the county had decided to allow
10 the local appeal. The county counsel did not know, but promised to find out.
11 In a March 29, 2017 e-mail to Kearns, county counsel confirmed that the
12 planning commission would provide a hearing on the local appeal at its April
13 25, 2017 meeting.⁴

14 On March 30, 2017, petitioners filed a motion to dismiss this appeal,
15 citing *Tarjoto v. Lane County*, 137 Or App 305, 904 P2d 641 (1995) (LUBA
16 lacks jurisdiction over an appeal of a permit decision made without a hearing
17 under ORS 197.830(3), where the local government voluntarily provides the

⁴ The county counsel’s March 29, 2017 e-mail states, as relevant:

“Good morning Dan:

“I am advised that the local appeal filed by [petitioners] is scheduled to be heard at the April 25, 2017 Planning Commission meeting.” Response to Cost Bill and Motion for Attorney Fees, 2.

1 petitioner with a local appeal). On April 5, 2017, LUBA issued a final opinion
2 and order granting the motion and dismissing the appeal.

3 On April 13, 2017, intervenor filed a cost bill and motion for attorney
4 fees, pursuant to ORS 197.830(15)(a) and (b).⁵ Intervenor argues that
5 petitioners knew as early as the planning commission’s February 27, 2017
6 meeting, via their local attorney Hobbs, that the planning commission intended
7 to provide a hearing on petitioners’ local appeal. Intervenor argues that Knapp
8 also informed Kearns of the same during their phone conversations on March
9 2, 2017. Notwithstanding petitioners’ knowledge that the county intended to
10 provide petitioners a hearing on their local appeal, intervenor argues that
11 petitioners delayed seeking dismissal of the LUBA appeal until March 30,
12 2017, and instead filed a motion to suspend the LUBA appeal, on March 11,
13 2017. That delay, intervenor argues, meant that intervenor incurred

⁵ ORS 197.830(15) provides:

“(a) Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review. The board shall apply the deposit required by subsection (9) of this section to any costs charged against the petitioner.

“(b) The board shall also 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.”

1 unnecessary attorney fees in preparing intervenor’s motion to dismiss the
2 LUBA appeal:

3 “[T]he attorney fees incurred by intervenor after February 28,
4 2017, could have been avoided entirely if petitioners had
5 dismissed their [LUBA] appeal immediately following the
6 February 28, 2017 Planning Commission meeting. Instead of
7 proceeding with such an immediate dismissal, petitioners
8 continued to assert, without any basis, that they were not certain
9 whether the local government would afford them a hearing.”
10 Motion for Attorney Fees 6.

11 Petitioners respond that attorney fees under ORS 197.830(15)(b) are
12 warranted only where a party presents “a position without probable cause to
13 believe the position was well-founded in law or on factually supported
14 information,” and that petitioners presented very few positions in the short
15 course of this appeal. As relevant here, petitioners did present the position, in
16 their motion to suspend the LUBA appeal, that it was not yet certain whether
17 the county would provide a local appeal. However, petitioners argue that that
18 position was “well-founded in law” and “on factually supported information.”

19 We agree with petitioners. The interplay between ORS 197.830(3),
20 which allows an extended 21-day deadline to appeal certain decisions directly
21 to LUBA, and ORS 197.825(2)(a), which requires that a party exhaust all local
22 appeals available by right before appealing to LUBA, introduces a great deal of
23 uncertainty to the appeal process. Where ORS 197.830(3) applies, the
24 petitioner often learns of the decision long after the local appeal period has
25 expired, presenting an awkward choice: should the petitioner file a local appeal

1 and take a chance that the 21-day deadline to appeal to LUBA will expire
2 before learning that no local appeal is available? Or should the petitioner
3 appeal directly to LUBA, and take a chance that the exhaustion requirement
4 will not apply? If there is any doubt regarding whether a local appeal is
5 available, the prudent answer is to file both a local appeal and an appeal to
6 LUBA, and proceed with the LUBA appeal only if the local government
7 declines to offer a local appeal. *Comrie v. City of Pendleton*, 45 Or LUBA 758,
8 771 n 12 (2003). In that circumstance, LUBA typically if not invariably
9 suspends the LUBA appeal, on its own motion if necessary, until the local
10 government determines whether or not it will provide a local appeal. Until that
11 determination is made, and the uncertainty regarding the availability of a local
12 appeal is conclusively resolved, the LUBA appeal is in jurisdictional limbo.
13 For that reason, LUBA typically refrains from resolving any issues raised in the
14 appeal before LUBA, including challenges to LUBA's jurisdiction based on
15 standing or timely appeal, until it becomes clear that the local government has
16 declined to provide a local appeal.

17 In the present case, the uncertainty regarding whether the county would
18 provide a local appeal lingered long after the February 27, 2017 planning
19 commission meeting. The minutes of that meeting do not expressly indicate
20 that the commission accepted the planning director's recommendation to
21 schedule a hearing on petitioners' local appeal for April 25, 2017. The county
22 apparently sent no letter or written confirmation to the parties that the county is

1 providing petitioners a local appeal, with the hearing scheduled for April 25,
2 2017, until the county counsel's e-mail on March 27, 2017. In our view, under
3 these circumstances a prudent petitioner would not have moved to dismiss the
4 LUBA appeal until receiving from the county an express or unequivocal
5 confirmation that the county would voluntarily provide a local appeal.

6 Given the lingering uncertainty on this point, petitioners appropriately
7 sought to suspend the LUBA appeal until they received an express
8 confirmation that a local appeal was available. We note that intervenor's
9 attorney declined to stipulate to such a suspension, and instead chose to devote
10 a considerable number of hours to drafting and filing a motion to take evidence
11 and a motion to dismiss the LUBA appeal, based on two jurisdictional grounds
12 that LUBA would consider only in the event that it turned out that no local
13 appeal was available to petitioners. That was an odd choice, because
14 intervenor's attorney believed that the county *was* providing a local appeal to
15 petitioners. If the county in fact provides a local appeal, the direct LUBA
16 appeal must be dismissed under the reasoning in *Tarjoto*, and accordingly
17 LUBA would have no occasion to consider the merits of the standing and
18 timely appeal challenges intervenor raised in the two motions. Under these
19 circumstances, intervenor's choice to draft and file the motion to dismiss and
20 the motion to take evidence, instead of simply agreeing to a suspension of the
21 LUBA appeal, was perhaps not the best use of legal and judicial resources.

1 In sum, the relevant position petitioners took in this appeal—that the
2 LUBA appeal should be suspended until the county confirms whether a local
3 appeal is available to petitioners—was not only based on probable cause to
4 believe was well-founded in law and factually supported information, but was
5 also a correct and appropriate position for a prudent lawyer to take in the
6 present circumstances. Accordingly, intervenor has not demonstrated that
7 attorney fees are warranted against petitioners under ORS 197.830(15)(b).

8 **COST BILL**

9 Intervenor, as prevailing party, seeks an award of the cost of the fee to
10 intervene, in the amount of \$100. OAR 661-010-0075(1)(b)(D). Petitioners do
11 not contest the cost bill. Accordingly, intervenor is awarded the cost of the fee
12 to intervene, in the amount of \$100, to be paid by petitioners.

13 Because no record was filed in this appeal, LUBA will return the deposit
14 for costs to petitioners. OAR 661-010-0075(1)(d).

15 Dated this 11th day of May, 2017.

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Tod A. Bassham
Board Member