

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

3
4 MICHAEL KIMBRELL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF LINCOLN CITY,
10 *Respondent,*

11
12 and

13
14 LEE HULLINGER,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-077

18
19 ORDER

20 **MOTION FOR ATTORNEY FEES**

21 On January 22, 2020, petitioner filed a cost bill and motion for attorney
22 fees against the city and intervenor-respondent (intervenor) (collectively
23 respondents). On February 4, 2020, the city filed its response to petitioner's
24 motion. On February 5, 2020, intervenor filed his response to petitioner's motion.

25 LUBA is required to award reasonable attorney fees and expenses to
26 prevailing parties against any other party who "presented a position without
27 probable cause to believe the position was well-founded in law or on factually
28 supported information." ORS 197.830(15)(b). There are three requirements for
29 an award of attorney fees. First, the movant must be the prevailing party. Second,
30 the party against whom attorney fees are sought must have presented a position

1 in the appeal. Third, that party’s position must have been presented without
2 probable cause to believe it was legally or factually well-founded. It is undisputed
3 that petitioner is the prevailing party. The question is therefore whether the city
4 and intervenor “presented a position” and, if so, whether any of those positions
5 were presented “without probable cause.” Because we conclude that respondents
6 did not present a position, the motion for attorney fees is denied.

7 **A. Background**

8 Petitioner appealed a city council decision approving a geological hazard
9 report as part of intervenor’s efforts to develop a single-family dwelling on
10 property located in ocean bluff and coastal erosion hazard areas. *Kimbrell v. City*
11 *of Lincoln City*, ___ Or LUBA ___, ___ (LUBA No 2019-077, Jan. 8, 2020) (slip
12 op at 2). The development plan included excavating 10 feet of the existing bluff
13 prior to construction of the dwelling. *Id.* Under the Lincoln City Code (LCC),
14 most “development” within coastal erosion hazard areas must be supported by a
15 geological hazard report prepared at the applicant’s expense. LCC 17.47.020(B).
16 In addition, “new structure[s]” in ocean bluff areas must be set back from the
17 bluff by a distance of at least 60 times the annual erosion rate. LCC 17.47.020(D).
18 For this purpose, the location of the bluff is determined by the city based on
19 certain photos, data, and maps, while the annual erosion rate is determined by the
20 applicant’s geological hazard report. *Kimbrell*, ___ Or LUBA ___, ___ (slip op
21 at 6-8). However, if the city is unable to locate the bluff, it may rely on the

1 applicant's geological hazard report to determine an appropriate site for the new
2 structure, if one exists. *Id.* (slip op at 11-12).

3 In approving intervenor's geological hazard report, the city council
4 measured the setback from where the bluff would be located after the 10-foot
5 excavation, as determined by the geological hazard report itself. *Id.* (slip op at 5-
6 7). This enabled the dwelling to be located closer to the ocean than would have
7 been possible if the setback were measured from the pre-excavation bluff. *Id.* The
8 city council concluded that this interpretation of LCC 17.47.020(D) was
9 permissible because that provision neither prohibits measurement of the setback
10 from the post-excavation bluff nor requires that it be measured from the pre-
11 excavation bluff, and because it allows the city to refer to an applicant's
12 geological hazard report to determine an appropriate site for new structures. *Id.*
13 (slip op at 6-7, 11-12).

14 On September 3, 2019, petitioner filed his notice of intent to appeal. On
15 September 18, 2019, intervenor filed his motion to intervene. On September 26,
16 2019, the city transmitted the record. On October 31, 2019, petitioner filed his
17 petition for review. On November 19, 2019, intervenor filed a pleading titled
18 "Intervenor-Respondent's Answer to Petitioner's Brief" (November 19, 2019
19 submittal). On November 20, 2019, we issued an order identifying the ways in
20 which intervenor's November 19, 2019 submittal failed to comply with LUBA's
21 rules, and instructing intervenor to file an amended response brief within seven
22 days. *Kimbrell v. City of Lincoln City*, ___ Or LUBA ___, ___ (LUBA No 2019-

1 077, Order, Nov 20, 2019). On December 4, 2019, we issued another order
2 explaining that, because intervenor failed to file a compliant brief, we would
3 neither consider his November 19, 2019 submittal nor allow him to present oral
4 argument. *Kimbrell v. City of Lincoln City*, ___ Or LUBA ___, ___ (LUBA No
5 2019-077, Order, Dec 4, 2019).

6 On the merits, we agreed with petitioner that the city council's
7 interpretation of LCC 17.47.020(D) was inconsistent with the express language
8 of that provision since the documents on which it requires the city to rely in
9 locating the bluff reflect existing conditions rather than hypothetical future
10 conditions, and since that provision only allows the city to rely on the applicant's
11 geological hazard report for siting purposes if the city is *unable* to locate the bluff.
12 *Kimbrell*, ___ Or LUBA ___, ___ (LUBA No 2019-077, Jan 8, 2020) (slip op at
13 7-8, 11-12). We also agreed with petitioner that the city council's interpretation
14 of LCC 17.47.020(D) was inconsistent with that provision's context—namely
15 other LCC sections which, among other things, exempt only specific types of
16 excavation from the setback requirement and do not support the conclusion that
17 the city may sever construction from site preparation for purposes of determining
18 whether a setback is required. *Id.* (slip op at 8-9). We also agreed with petitioner
19 that the city erred in approving a geological hazard report depicting the
20 cantilevered portion of the home and at least one footing as encroaching into the
21 setback. *Id.* (slip op at 15).

1 **B. Fees Against the City**

2 In his motion for attorney fees, petitioner argues the city’s position was
3 without merit because the city made no appearance on appeal and because the
4 record contains evidence that the city attorney expressed disagreement with the
5 city council’s interpretation during the proceedings below. The city, apparently
6 assuming that it presented a position by transmitting the record, argues that its
7 position was not without probable cause. We disagree with both parties that the
8 city presented a position in this appeal. We have held that, “[w]here a local
9 government ‘files the local record [but] does not file or join in a brief or other
10 document at LUBA defending its decision,’ the local government does not
11 present a position” for purposes of awarding attorney fees. *Stevens v. City of*
12 *Island City*, 71 Or LUBA 430 (2015) (quoting *Hearne v. Baker County*, 35 Or
13 LUBA 768, 770 (1998), *aff’d*, 158 Or App 246, 972 P2d 1233 (1999)). Because
14 the city did not defend its decision at LUBA, it is not subject to an award of
15 attorney fees.

16 Petitioner’s motion for attorney fees against the city is denied.

17 **C. Fees Against Intervenor**

18 While acknowledging that we did not consider intervenor’s November 19,
19 2019 submittal, petitioner nonetheless argues that intervenor presented a position
20 for purposes of awarding attorney fees and that, because his submittal “made no
21 attempt to address any point of law or fact raised by petitioner on appeal,” his
22 position was without probable cause. Motion for Attorney Fees 5. Intervenor

1 responds that he presented no position at all because merely filing a motion to
2 intervene does not qualify as presenting a position for purposes of awarding
3 attorney fees, and his November 19, 2019 submittal was not considered by
4 LUBA. Intervenor further argues that, because we did not consider his submittal,
5 we would have no way of knowing whether the submittal did in fact present a
6 position.

7 We have repeatedly held that a party's presentation for purposes of
8 awarding attorney fees is limited to their arguments on the merits and on
9 jurisdictional issues. *Martin v. City of Central Point*, 76 Or LUBA 463, 466
10 (2017) (citing *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997);
11 *Lewelling Neighborhood Dist. v. City of Milwaukie*, 35 Or LUBA 764, 766
12 (1998)). Thus, intervenor did not present a position merely by filing a motion to
13 intervene.

14 We also conclude that intervenor's November 19, 2019 submittal in
15 response to the petition for review did not present a position for purposes of an
16 award of attorney fees. We have previously held that, where a petitioner submits
17 a letter that is intended to be a petition for review but that is so noncompliant with
18 LUBA's rules and "so grossly deficient that we did not even recognize it as a
19 petition for review," but where the local government nonetheless files a response
20 brief and a motion to dismiss, the local government is entitled to recover attorney
21 fees. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769, 771 (2005). In
22 *Gallagher*, the city filed a motion to dismiss the appeal or compel petitioner to

1 comply with the requirements for a petition for review because petitioner's filing
2 was so grossly noncompliant that no petition for review had been filed at all.
3 *Gallagher v. City of Myrtle Point*, 50 Or LUBA 303, 309 (2005). As a
4 precautionary measure, the city also filed a response brief attempting to respond
5 to petitioner's filing; we ultimately awarded attorney fees. We do not award
6 attorney fees here because the facts of this case differ from *Gallagher* in material
7 respects.

8 First, *Gallagher* involved the filing of a noncompliant brief by the
9 petitioner. The petition for review is required to set forth each assignment of
10 error. OAR 661-010-0030(4)(d). Failure to file a petition for review within the
11 time required will result in dismissal of an appeal. OAR 661-010-0030(1). Unlike
12 the city – the respondent in *Gallagher* – petitioner here bore the burden of
13 presenting his case in the first instance and if he elected to have representation
14 by an attorney, would necessarily incur related fees.

15 Second, we notified the parties in this case that intervenor's submittal was
16 noncompliant on November 20, 2019, the day after it was submitted and
17 instructed intervenor to file a compliant response brief within seven days.
18 Intervenor failed to file a compliant brief and we issued an order on December 4,
19 2019, advising the parties that we would not consider the initial filing or allow
20 intervenor to participate in the December 11, 2019 oral argument. Therefore,
21 unlike the city in *Gallagher*, which was not apprised that LUBA would not
22 consider the petitioner's letter as a petition for review until after the city prepared

1 and filed its response brief, here petitioner received notice in advance of our final
2 opinion, that we would not consider intervenor's deficient submittal. We
3 understand that petitioner incurred some fees related to intervenor's
4 noncompliant filing. In *Gallagher*, however, respondent reasonably filed a
5 precautionary response brief. No precautionary response was required here.
6 Given these circumstances, intervenor's deficient submittal did not present a
7 position for purposes of awarding attorney fees.

8 Petitioner's motion for attorney fees against intervenor is denied.

9 **COSTS**

10 Petitioner filed a cost bill pursuant to OAR 661-010-0075(1), requesting a
11 return of its \$200 deposit for costs and an award of the cost of the \$200 filing fee.
12 As the prevailing party, petitioner is awarded the cost of the \$200 filing fee, to
13 be paid by the city and intervenor. The board shall return petitioner's \$200
14 deposit for costs.

15 Dated this ____ day of March 2020.
16
17
18
19

20 _____
21 Michelle Gates Rudd
Board Chair