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

FRIENDS OF YAMHILL COUNTY,
Petitioner,

vs.

YAMHILL COUNTY,
Respondent,

and

PAUL JAHNKE, MARTHA JAHNKE,
CHARLES DOLENCE, SCOTTY DOLENCE,
and CYCLOPS PROPERTIES LLC,
Intervenors-Respondents.

LUBA No. 2021-074

ORDER

MOTION FOR ATTORNEY FEES

Petitioner appealed a board of county commissioners decision approving a conditional use permit to construct a public road on land zoned Exclusive Farm Use (EFU). In *Friends of Yamhill County v. Yamhill County*, ___ Or LUBA ___ (LUBA No 2021-074, Apr 8, 2022), *aff'd*, 321 Or App 505 (2022), *rev den*, 370 Or 740 (2023), we affirmed the board's decision and denied petitioner's two assignments of error as unpreserved because we concluded that petitioner had failed to raise the issues presented in those assignments of error prior to the conclusion of the final evidentiary hearing, as required by ORS 197.797(1).

Intervenors-respondents (intervenors) are prevailing parties. Intervenors move for an award of attorney fees and expenses in the amount of $25,492.84 pursuant to ORS 197.830(15)(b), which provides that the Board "[s]hall award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position or filed any motion without probable cause to believe the position or motion was well-founded in law or on factually supported information."

In deciding whether to award attorney fees against a non-prevailing party, we must determine that "every argument in the entire presentation [that a non-prevailing 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." *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

1 **A. Waiver**

2 We begin with a discussion of waiver because our resolution of the appeal
3 and intervenors' motion for attorney fees involves waiver principles. ORS
4 197.835(3) limits LUBA's scope of review to those issues "raised by any
5 participant before the local hearings body as provided by ORS 197.195 or
6 197.797, whichever is applicable." ORS 197.797(1) requires that, to be preserved
7 for LUBA review, an issue must "be raised and accompanied by statements or
8 evidence sufficient to afford the governing body, planning commission, hearings
9 body or hearings officer, and the parties an adequate opportunity to respond to
10 each issue." We refer to that rule as "raise-it-or-waive-it" or statutory waiver.

11 Our review jurisdiction is also "limited to those cases in which the
12 petitioner has exhausted all remedies available by right before petitioning the
13 board for review[.]" ORS 197.825(2)(a). Where a local ordinance requires that
14 an appellant specify the grounds for the local appeal, "a party may not raise an
15 issue before LUBA when that party could have specified it as a ground for appeal
16 before the local body, but did not do so." *Miles v. City of Florence*, 190 Or App
17 500, 510, 79 P3d 382 (2003), *rev den*, 336 Or 615 (2004). We refer to that rule
18 as exhaustion waiver.

19 In *Miles*, the disputed issue was which street served as frontage for
20 purposes of measuring a 150-foot minimum frontage standard. The planning
21 commission approved the application and found that the gas station use had
22 adequate minimum frontage on Highway 101. *Miles*, 190 Or App at 503.

1 Opponents appealed the planning commission approval to the city council and
2 were required by the city code to specify the asserted errors in the planning
3 commission decision in a written appeal statement. Opponents' appeal statement
4 did not raise the issue regarding the minimum frontage standard or assert that the
5 planning commission erred in finding that standard was satisfied. The city council
6 rejected opponents' challenges and affirmed the approval, adopting the planning
7 commission's findings. On appeal to LUBA, the petitioners argued that the
8 frontage should be measured on Seventh Street instead of Highway 101. We
9 implicitly concluded that the frontage issue was preserved under ORS
10 197.797(1), because it was raised during the planning commission hearing. We
11 remanded for the city council to address the frontage issue.

12 On judicial review, the court reversed and remanded. The court concluded
13 that the opponents had failed to preserve the issue that the petitioner had raised
14 to LUBA for purposes of ORS 197.825(2)(a), even though the issue was
15 preserved for purposes of ORS 197.797(1). The court reasoned:

16 "Three statutes bear on the question of when issues are preserved
17 for LUBA's review. The first is ORS 197.[797](1), which provides
18 that, to be the basis for an appeal to LUBA, an issue 'shall be raised
19 not later than the close of the record at or following the final
20 evidentiary hearing on the proposal before the local government.'
21 The second pertinent statute is ORS 197.835(3), which limits
22 LUBA's review to issues 'raised by any participant before the local
23 hearings body as provided by ORS 197.195 or 197.[797], whichever
24 is applicable.' The net effect of those two statutes is that LUBA may
25 consider only issues that have been properly raised by a participant
26 before the close of the record at the local hearing level and not those

1 raised at a later time.

2 "The third pertinent statute, ORS 197.825(2)(a), has a related but
3 different focus. It limits LUBA's jurisdiction 'to those cases in
4 which the petitioner has exhausted all remedies available by right
5 before petitioning the board for review[.]' As we have observed,
6 ORS 197.825(2)(a) codifies traditional exhaustion principles, which
7 generally require a party to take advantage of available
8 administrative or local government remedies to redress a grievance
9 before seeking further review by a judicial or quasi-judicial body.
10 *See Lyke v. Lane County*, 70 Or App 82, 85-86, 688 P2d 411 (1984).
11 In the context of land use decisions, exhaustion of local remedies
12 before seeking LUBA's review serves at least four purposes:

> 13 "'First, by requiring a petitioner to pursue an available local
> 14 remedy, we permit the county decision making process to run
> 15 its course without interruption. Second, we make it possible
> 16 for the governing body, which is the legislative source of the
> 17 ordinances initially applied by the hearings officer, to clarify
> 18 and determine factual and policy issues presented by land use
> 19 controversies. Third, we open the door to the increased
> 20 possibility of compromise and the avoidance of land use
> 21 litigation. Finally, by [requiring exhaustion of all available
> 22 local remedies], we promote the opportunity for development
> 23 of a more complete, well-organized record.'"

24 "*Id.* at 87 (quoting with approval LUBA's decision in the same
25 case). To serve those purposes, exhaustion principles traditionally
26 require not only that an avenue of review be pursued, but also that
27 the particular claims that form the basis for a challenge be presented
28 to the administrative or local government body whose review must
29 be exhausted. *See generally Outdoor Media Dimensions Inc. v. State*
30 *of Oregon*, 331 Or 634, 661-62, 20 P3d 180 (2001) (when an agency
31 has authority to resolve a particular claim, that claim must be
32 presented to the agency in order to exhaust administrative remedies,
33 even when the claim is purely legal). If a party fails to do so by
34 'timely and adequately addressing the merits before the [local
35 government or] agency,' that party loses his or her right to judicial
36 review on the merits. *Mullenaux v. Dept. of Revenue*, 293 Or 536,

541, 651 P2d 724 (1982). As the Supreme Court explained in *Mullenaux*, a party does not exhaust his or her remedies 'simply by stepping through the motions of the administrative process without affording the [administrative or local government body] an opportunity to rule on the substance of the dispute.' *Id.* In short, failure to exhaust a remedy by presenting the agency or local government with the substance of a claim waives the issue for further review." *Miles*, 190 Or App at 505-07 (internal footnote omitted).

Common purpose and policy underlie both waiver principles and the related limits on LUBA's scope of review—*viz.*, requiring a party to raise issues with sufficient specificity so that the local government and other parties have reasonable notice of the issues and providing the local government the initial opportunity to issue a decision on the material issues.

In this appeal, we affirmed the county's decision after agreeing with intervenors that petitioner had failed to satisfy the requirement in ORS 197.797(1) that issues "be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." We concluded that the issue petitioner raised in the first assignment of error at LUBA was different from the issue petitioner raised before the board of commissioners and that the issue before LUBA was not preserved under ORS 197.797(1). We concluded that the issue petitioner raised in the second assignment of error was not raised at all. Because we concluded that the issues in the two assignments of error were unpreserved under ORS 197.797(1), we were

not required to and did not address intervenors' additional argument that the issues were also unpreserved under exhaustion waiver.

B. Waiver and ORS 197.830(15)(b) Attorney Fees

Our resolution of a motion for attorney fees in an appeal where we conclude that issues were not preserved differs from an appeal where preservation is not disputed. When we dispose of an appeal based on a successful waiver challenge, and the prevailing party seeks an award of attorney fees under ORS 197.830(15)(b), to avoid an attorney fee award, a petitioner must show that there was probable cause to support the positions that petitioner presented in response to the waiver challenge that the issues advanced in the assignments of error were preserved or that preservation was not required. That is so because even an assignment of error that may be presented with probable cause, if we reached it, is not presented with probable cause if there is no probable cause for a petitioner to assert that the issue therein was preserved. *Zeitoun v. Yamhill County*, 61 Or LUBA 515, 518 (2010) (to avoid attorney fees it is not sufficient to assert a probable cause argument on the merits if the argument on the merits was waived; in that circumstance, the petitioner must also have presented at least one probable cause argument regarding the waiver challenge).

We have further reasoned that, to avoid liability for attorney fees under ORS 197.830(15)(b), a petitioner must take a position supported by probable cause in replying to a statutory waiver or exhaustion waiver challenge presented in a response brief that, if we conclude is valid, would preclude LUBA from

1 reviewing the merits of an assignment of error. *See McGovern v. Crook County*,
2 63 Or LUBA 561, 571 (2011) (extending *Zeitoun* holding). In *Kane v. City of*
3 *Beaverton*, the intervenor raised both statutory and exhaustion waiver challenges
4 and we held that the petitioner must establish that they made probable cause
5 arguments in response to *both* waiver challenges. 63 Or LUBA 522, 526-27
6 (2011). We concluded that the petitioner did not make a probable cause argument
7 in response to the exhaustion waiver challenge and, therefore, the petitioner could
8 not rely on the merits of the first assignment of error to avoid an attorney fee
9 award under ORS 197.835(15)(b). *Id.* at 528.

10 In this appeal, petitioner raised two assignments of error and intervenors
11 argued that the issues raised in both assignments of error were unpreserved under
12 *both* statutory and exhaustion waiver. We affirmed the decision, concluding that
13 the issues raised in both assignments of error were unpreserved under ORS
14 197.797(1). Under *Zeitoun*, as extended in *McGovern* and *Kane*, if we find that
15 petitioner made arguments supported by probable cause in replying to *both* forms
16 of waiver challenges for at least *one* of the two assignments of error, then we
17 should deny intervenors' motion for attorney fees.

18 We proceed to examine petitioner's presented positions with respect to
19 preservation. As a threshold analytical matter, we note that our inquiry under
20 ORS 197.830(15)(b) is based on the positions that the parties took during the
21 appeal, prior to our final decision. *Riverview Meadows v. City of Nehalem*, ___
22 Or LUBA ___, ___ (Order, LUBA Nos 2021-124/125/126/127, Oct 13, 2022)

(slip op at 8-9). In their multiple and astonishingly lengthy pleadings, intervenors enlarge and elaborate on the waiver arguments that they presented in the intervenors-respondents' brief. Similarly, in opposing the attorney fee motion, petitioner provides extensive new responses to the waiver arguments that were not presented in its reply brief. At this stage, our inquiry is focused on the positions that petitioner presented in the reply brief in response to the waiver arguments presented in the intervenors-respondents' brief and whether petitioner's positions were supported by probable cause. It is not proper for us to consider intervenors' amplified waiver arguments presented in support of their motion for attorney fees. Similarly, petitioner cannot establish probable cause by making new arguments and presenting new positions regarding preservation in its pleadings responding to the motion for attorney fees. We will, however, consider both of the parties' elaborated waiver arguments and responses for the limited purpose of determining whether any reasonable attorney would conclude that petitioner's positions regarding waiver presented in the reply brief possessed legal merit.

C. First Assignment of Error

Yamhill County Zoning Ordinance (YCZO) 402.04(N) allows a road as a conditional use in EFU zones, "subject to compliance with OAR 660-12." OAR 660-012-0065(3)(o) requires that for transportation facilities on EFU land to be considered consistent with relevant statewide planning goals, the facilities must "serve local travel needs" and be "limited to that necessary to support rural land

uses identified in the acknowledged comprehensive plan." In the petition for review first assignment of error, petitioner argued that the county failed to find that the road will satisfy either of those requirements.

Intervenors responded that petitioner had failed to raise that issue under OAR 660-012-0065(3)(o) in the local proceeding and had therefore waived that issue under statutory waiver. Intervenors also argued that petitioner failed to raise that issue in its notice of local appeal and had therefore waived that issue under exhaustion waiver. We concluded that petitioner had failed to raise the issue as required under ORS 197.797(1). We did not address either the merits of the first assignment of error or intervenors' exhaustion waiver argument.

We examine petitioner's positions presented prior to our final opinion with respect to both waiver issues. For reasons explained below, we conclude that petitioner's positions with respect to statutory and exhaustion waiver for the first assignment of error were supported by probable cause. Accordingly, we deny the motion for attorney fees.[1]

1. Statutory Waiver

In the petition for review and reply brief, petitioner cited to Record 69 to establish that the issue raised in the first assignment of error was preserved.

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[1] In their motion for attorney fees, intervenors argue that petitioner was unlikely to prevail on the merits of the first assignment of error; however, intervenors do not argue that the substance of the first assignment of error was presented without probable cause.

Record 69 is a comment letter that petitioner submitted on June 15, 2021 to the board of county commissioners, prior to its July 8, 2021 public hearing on petitioner's appeal, and includes the following paragraph:

> "Next, the applicant and the staff report fail to demonstrate that the proposal complies with OAR 660-012-0065. Subsection (3)(o) does not authorize 'public roads,' but instead allows 'transportation facilities' that are matched to local travel needs. 'The travel capacity and performance standards of facilities and improvements serving local travel needs *shall be limited to that necessary to support rural land uses identified in the acknowledged comprehensive plan or to provide adequate emergency access*.' OAR 660-012-0065(3)(o). In this case, the tax lots for the subject properly already have the transportation facilities needed, namely either direct access to Willis Road or access by means of a private access easement. The easement was approved as part of the M37 waiver to serve all of the parcels. The language in Docket P-36-05 specifically addresses that the private easement is sufficient." Record 69 (emphasis in original; internal parenthetical omitted).

Petitioner contended that the above passage raised the issue of compliance with OAR 660-012-0065(3)(o) and local travel needs, which petitioner argued is sufficient to avoid statutory waiver of the issues raised in the first assignment of error.

Intervenors argued, and we agreed, that the issue petitioner raised before the board of commissioners was that a public road is not needed because the subject parcels can be accessed by way of a private easement, which is a different issue than the one it raised in its first assignment of error to LUBA. At LUBA, petitioner argued that intervenors cannot establish that the road will "serve local

travel needs" unless and until intervenors obtain county land use approval to develop a dwelling on the parcels served by the road.

As we explained in our decision, there is no "easy or universally applicable formula" for differentiating between "issues" and "arguments." *Reagan v. City of Oregon City*, 39 Or LUBA 672, 690 (2001). A reasonable attorney could assert that the reference to OAR 660-012-0065(3)(o) was sufficient to preserve the issue that petitioner raised on appeal under that rule. While that argument did not prevail, petitioner's position with respect to statutory waiver clears the low probable cause threshold.

2. Exhaustion Waiver

As explained above, we did not address intervenors' exhaustion waiver argument in our final decision. In the intervenors-respondents' brief, intervenors argued that YCZO 1404.03(B) requires that an appellant specify the grounds for local appeal. That section provides:

> "Any appeal filed shall be in writing, shall explain the basis of the appeal and shall include one or more of the following:
>
> "1. A reference to the ordinance provisions or plan policies providing the basis of the appeal.
>
> "2. Reasons why the decision is factually or legally incorrect.
>
> "3. A description of new information or additional facts which should have been considered in the decision.
>
> "4. A description of any mitigating factors which might be taken to make the decision acceptable."

1 In its reply brief, petitioner did not dispute (1) that YCZO 1404.03(B)
2 required petitioner to specify the issues in its appeal statement for purposes of
3 exhaustion waiver or (2) that petitioner's appeal statement did not specify the
4 issue raised to LUBA.[2] Record 156 (local appeal application). However,
5 petitioner argued in its reply brief that exhaustion waiver does not apply and
6 *Miles* is distinguishable because, in *Miles*, the city council adopted the planning
7 commission's findings and rejected the opponents' challenges specified in the
8 local notice of appeal without considering the issue that the petitioners raised to
9 LUBA. *Miles*, 190 Or App at 503. Petitioner argued that differently, here, the
10 board of commissioners considered the issue that petitioner raised at Record 69
11 "regardless of the contents of the notice of appeal" and petitioner had, thus,
12 exhausted its local remedies and satisfied ORS 197.825(2). Reply Brief 2.

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[2] Exhaustion waiver only applies when local code requires that the bases for a local appeal be specified. *Rawson v. Hood River County*, 75 Or LUBA 200, 213 (2017). We have previously reasoned that YCZO 1404.03(B) requires specification of issues. *Zeitoun v. Yamhill County*, 60 Or LUBA 111, 114 (2009).

For the first time, in response to the motion for attorney fees, petitioner asserts that "petitioner does not concede that its appeal statement to the county board of commissioners was inadequate." Response to Motion for Attorney Fees 41. That issue was undisputed during briefing. As we explained above, our inquiry is limited to those positions that petitioner took during briefing.

1 We conclude that petitioner's position on exhaustion waiver presented in
2 the reply brief is subject to honest discussion.[3] Given that the purpose of the
3 preservation and exhaustion principles limit LUBA's scope of review to those
4 issues that are raised before the local government—at a time and in a manner that
5 allows the local government to address the issues—a reasonable attorney could
6 argue, as petitioner did, that, because the board expanded its review to exceed the
7 issues specified in the local notice of appeal, the exhaustion requirement was
8 satisfied and the issue is within LUBA's scope of review. In other words, a
9 reasonable attorney could argue that the exhaustion requirement was satisfied
10 because the board of commissioners accepted petitioner's argument and made

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[3] According to intervenors, under exhaustion waiver, appealable issues are limited to those issues expressly set out in the local notice of appeal and no reasonable attorney would take petitioner's position that exhaustion waiver does not apply because the county's review went beyond the issues stated in the local notice of appeal. In other words, according to intervenors, LUBA's scope of review is defined in the local notice of appeal and no subsequent county action during the local appeal can cure an inadequate notice of appeal and enlarge the scope of issues reviewable at LUBA. Intervenors argue that their position is correct as a matter of law and cite, in addition to *Miles*, *Central Oregon Landwatch v. Deschutes County*, 74 Or LUBA 540 (2016), and *McKeown v. City of Eugene*, 46 Or LUBA 494, 502-3 (2004), *aff'd*, 193 Or App 46, 93 P3d 845 (2004). We have reviewed those cases and do not agree that they support intervenors' view of *Miles* as a matter that is beyond reasonable debate. Neither of those two latter cases involved the facts of this case, where a petitioner attempts to raise at LUBA an issue that is arguably within an expanded scope of issues that the final decision maker addressed and that was beyond those issues specified in the local notice of appeal.

findings regarding the same. Petitioner's position presented in the reply brief with respect to exhaustion waiver reaches the low probable cause threshold.

We find that petitioner's position with respect to both statutory and exhaustion waiver under the first assignment of error were supported by probable cause. Therefore, we deny intervenors' motion for attorney fees.

Intervenors' motion for attorney fees is denied.

Dated this 14th day of March 2024.

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H. M. Zamudio
Board Member