

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

3  
4                                   WINDLINX RANCH TRUST,  
5   *Petitioner,*

6  
7   vs.

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9                                   DESCHUTES COUNTY,  
10   *Respondent,*

11  
12   and

13  
14                                   HODGE KERR and DEBORA KERR,  
15   *Intervenors-Respondents.*

16  
17   LUBA No. 2023-079

18  
19   ORDER

20   **BACKGROUND**

21                   On February 29, 2024, we issued the final opinion in this appeal, affirming  
22   the county’s decision. *Windlinx Ranch Trust v. Deschutes County*, LUBA No  
23   2023-079 (Feb 29, 2024). On March 14, 2024, prevailing parties intervenors-  
24   respondents (intervenors) moved for an award of attorney fees and costs under  
25   ORS 197.830(15)(b). On March 20, 2024, petitioner filed a petition for judicial  
26   review of our decision. The Court of Appeals affirmed our final opinion in a  
27   decision dated August 7, 2024. *Windlinx Ranch Trust v. Deschutes County*, 334  
28   Or App 240 (2024) (nonprecedential memorandum opinion). The appellate  
29   judgment for that decision became effective on November 7, 2024. *See* ORS  
30   19.450(1) (defining “appellate judgment” and “decision”).

1           On February 27, 2025, we issued an order awarding intervenors their  
2 attorney fees and costs for the LUBA appeal in the total amount of \$50,545.27,  
3 payable by petitioner.<sup>1</sup> *Windlinx Ranch Trust v. Deschutes County*, LUBA No  
4 2023-079 (Feb 27, 2025). On March 19, 2025, petitioner filed a petition for  
5 judicial review appealing our order on attorney fees. The Court of Appeals  
6 affirmed our order on attorney fees in a decision dated July 2, 2025. *Windlinx*  
7 *Ranch Trust v. Deschutes County*, 341 Or App 619 (2025) (nonprecedential  
8 memorandum opinion). The court’s decision requires no change to our order on  
9 attorney fees. The appellate judgment for that decision became effective on  
10 February 23, 2026.

11           **OBJECTION TO THE SUFFICIENCY OF THE UNDERTAKING**

12           A party that appeals a LUBA decision awarding attorney fees and costs  
13 against that party under ORS 197.830(15)(b) must file with LUBA “an  
14 undertaking with one or more sureties insuring that the party will pay all costs,

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<sup>1</sup> We do not resolve pending motions on attorney fees when the Court of Appeals has jurisdiction over the matter. *See former* OAR 661-010-0075(1)(f) (Aug 1, 2022), *renumbered as* OAR 661-010-0075(2) (Jan 1, 2026) (“If a cost bill, a motion for attorney fees, or both are filed, and the Board’s decision is appealed to the Court of Appeals, the Board shall act on the cost bill or motion for attorney fees after an appellate judgment is issued and any further Board proceedings necessitated by that judgment are concluded.”); *see also Friends of Douglas County v. Douglas County*, LUBA No 2021-075 (Dec 5, 2022) (explaining that LUBA delays ruling on a motion for attorney fees until the judicial review of the underlying LUBA decision is complete and the appellate judgment is issued, because judicial review may result in a different prevailing party) (slip order at 2-3).

1 disbursements and attorney fees awarded against the party by the Court of  
2 Appeals.” ORS 197.850(12).<sup>2</sup> The undertaking must be filed with LUBA and  
3 served on the opposing parties within 10 days after the date the petition for  
4 judicial review was filed with the Court of Appeals. ORS 197.850(14). On March  
5 25, 2025, petitioner filed an undertaking with LUBA ensuring payment not to  
6 exceed the sum of \$50,545.27, the total amount of the award in our order on  
7 attorney fees.

8 On April 7, 2025, intervenors filed a “Motion for Hearing on Objections  
9 to Undertaking; Objection to the Sufficiency of the Undertaking on Appeal”  
10 (objection to the sufficiency of the undertaking). Intervenors argue, among other  
11 things, that LUBA should require petitioner to file an additional and increased  
12 undertaking on appeal to the Court of Appeals to ensure that petitioner would pay  
13 an additional, unspecified sum for attorney fees that the Court of Appeals might  
14 award intervenors on appeal defending our order on attorney fees. Intervenors

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<sup>2</sup> ORS 197.850(12) states:

“A party must file with the board an undertaking with one or more sureties insuring that the party will pay all costs, disbursements and attorney fees awarded against the party by the Court of Appeals if:

“(a) The party appealed a decision of the board to the Court of Appeals; and

“(b) In making the decision being appealed to the Court of Appeals, the board awarded attorney fees and expenses against that party under ORS 197.830(15)(b) or (c).”

1 assert that ORS 197.850(12) requires such an undertaking and authorizes LUBA  
2 to order petitioner to file an additional undertaking. Intervenors acknowledge that  
3 there is no specified statutory or rule-based process for challenging the  
4 sufficiency of an undertaking under ORS 197.850(12). Intervenors argue that we  
5 should apply the process for challenging an undertaking on appeal that applies to  
6 appeals of circuit court judgments in civil actions. ORS 19.305; ORCP 82.

7         On April 28, 2025, petitioner filed a response to intervenors' objection to  
8 the sufficiency of the undertaking, arguing that intervenors have no probable  
9 cause to object to the undertaking because intervenors are not entitled to recover  
10 their attorney fees for the Court of Appeals judicial review proceeding.  
11 Petitioner's Response to Objection to the Sufficiency of the Undertaking 5. The  
12 issues underlying the parties' cross pleadings on the sufficiency of the  
13 undertaking are (1) whether intervenors are entitled to recover their attorney fees  
14 at the Court of Appeals and, if so, (2) whether LUBA must order petitioner to  
15 increase the undertaking required by ORS 197.850(12) to secure payment of a  
16 potential attorney fee award from the Court of Appeals.

17         Intervenors' objection to the sufficiency of the undertaking would require  
18 us to determine whether LUBA has jurisdiction and statutory authority to require  
19 an additional undertaking to secure performance of a potential and indeterminate  
20 attorney fee award at the Court of Appeals. We are not convinced that we have  
21 such authority. However, we need not and do not resolve that novel issue.

1           On January 7, 2026, the Court of Appeals issued a decision granting  
2 intervenors an award of attorney fees in the amount of \$30,970.50 for  
3 intervenors’ attorney fees for their work on the Court of Appeals proceeding that  
4 affirmed our order on attorney fees.<sup>3</sup> *Windlinx Ranch Trust v. Deschutes County*,  
5 346 Or App 435, 439, \_\_\_ P3d \_\_\_ (2026). That Court of Appeals attorney fee  
6 award is included in the appellate judgment that became effective on February  
7 23, 2026. Intervenors requested that we require petitioner to secure performance  
8 of a potential and indeterminate attorney fee award at the Court of Appeals prior  
9 to the Court of Appeals awarding attorney fees and issuing a judgment. Now that  
10 the court has issued that judgment, it appears to us that our ruling on intervenors’  
11 objection to the sufficiency of the undertaking would have no practical effect and  
12 we deny it as moot.<sup>4</sup>

13           **CROSS MOTIONS FOR ATTORNEY FEES**

14           The parties’ cross pleadings on intervenors’ objection to the sufficiency of  
15 the undertaking include nominal cross-motions for attorney fees for preparing  
16 those pleadings. Petitioner’s response to intervenors’ objection to the sufficiency  
17 of the undertaking includes a section titled “Petition for Attorney Fees.”

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<sup>3</sup> The Court of Appeals also awarded intervenors costs in the amount of \$491.00.

<sup>4</sup> Intervenors have leave to file a motion requesting that we reconsider this order and explaining why their objection to the sufficiency of the undertaking is not rendered moot by the February 23, 2026 appellate judgment.

1 Petitioner’s Response to Objection to the Sufficiency of the Undertaking 5.  
2 Intervenors filed a “Response to Petition for Attorney Fees and Sur Response to  
3 Petitioner’s Objections to the Undertaking.” In the paragraph concluding that  
4 filing, intervenors assert that “[p]etitioner’s response is wholly without merit[,]”  
5 and intervenors request that their costs for responding “be added to the attorney  
6 fees and costs to which [intervenors] are entitled.” Response to Petition for  
7 Attorney Fees 16.

8           ORS 197.830(15)(b) provides that LUBA “[s]hall award reasonable  
9 attorney fees and expenses to the prevailing party against any other party who  
10 [LUBA] finds presented a position or filed any motion without probable cause to  
11 believe the position or motion was well-founded in law or on factually supported  
12 information.” “[A] motion for attorney fees shall include a signed and detailed  
13 statement of the amount of attorney fees sought.” *Former* OAR 661-010-  
14 0075(1)(d)(A) (Aug 1, 2022), *renumbered as* OAR 661-010-0075(1)(b) (Jan 1,  
15 2026). Neither petitioner nor intervenors included with their cross-motions for  
16 attorney fees “a signed and detailed statement of the amount of attorney fees  
17 sought,” and we deny both motions on that basis. *Id.*

18           Dated this 30th day of March 2026.  
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24           H. M. Zamudio  
              Board Chair