

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

3
4 ANDERSON WOODS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 WALLOWA COUNTY,
10 *Respondent.*

11
12 LUBA No. 2026-010

13
14 ORDER

15 **MOTION FOR ATTORNEY FEES AND COSTS**

16 Petitioner appealed a board of commissioners decision that verified three
17 legal units of land for petitioner’s property, rather than the four units of land that
18 petitioner requested. The county filed the record but did not file a respondent’s
19 brief or otherwise defend its decision. We sustained petitioner’s first assignment
20 of error, agreeing that the county’s findings were inadequate to explain why the
21 purported fourth parcel was not a legal unit of land and remanded the decision.¹
22 *Anderson Woods, LLC v. Wallowa County*, LUBA No 2026-010 (May 27, 2026).

¹ We did not reach petitioner’s second assignment of error that argued the county’s actions were an unconstitutional taking.

1 Petitioner is the prevailing party. Petitioner now moves for an award of
2 attorney fees in the amount of \$29,205 pursuant to ORS 197.830(15)(b) and ORS
3 197.796(5), which we set out below.²

4 Petitioner also moves for costs pursuant to OAR 661-010-0075(1)(b)(A).
5 The version of OAR 661-010-0075(1)(b)(A) cited by petitioner was superseded
6 on November 1, 2024, and prevailing parties are no longer entitled to costs under
7 the rule. Therefore, the motion for costs is denied.

8 **A. ORS 197.830(15)(b)**

9 ORS 197.830(15)(b) provides that LUBA “[s]hall award reasonable
10 attorney fees and expenses to the prevailing party against any other party who the
11 [B]oard finds presented a position or filed any motion without probable cause to
12 believe the position or motion was well-founded in law or on factually supported
13 information.”³ In determining whether to award attorney fees against a non-
14 prevailing party pursuant to ORS 197.830(15)(b), we must determine that “every
15 argument in the entire presentation [that the non-prevailing party made] to LUBA

² Petitioner cites ORS 197.796(3), which does not provide for an award of attorney fees. We understand that petitioner intends to rely on ORS 197.796(5), which provides for an award of attorney fees in certain circumstances.

³ OAR 661-010-0075(1)(b) implements ORS 197.830(15) and provides:

“Attorney fees shall be awarded by the Board to the prevailing party as specified in ORS 197.830(15)(b) and (c); a motion for attorney fees shall include a signed and detailed statement of the amount of attorney fees sought.”

1 is lacking in probable cause (*i.e.*, merit).” *Fechtig v. City of Albany*, 150 Or App
2 10, 24, 946 P2d 280 (1997). A position is presented “without probable cause” for
3 purposes of ORS 197.830(15)(b) where “no reasonable lawyer would conclude
4 that any of the legal points asserted on appeal possessed legal merit.” *Contreras*
5 *v. City of Philomath*, 32 Or LUBA 465, 469 (1996). In applying the probable
6 cause standard, we “will consider whether any of the issues raised [by the non-
7 prevailing party] were open to doubt, or subject to rational, reasonable or honest
8 discussion.” *Id.* The probable cause standard is a relatively high hurdle, and that
9 hurdle is not cleared by simply showing that LUBA rejected all of a party’s
10 arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776
11 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

12 Petitioner’s entire argument that the county presented a position lacking
13 probable cause is:

14 “In this proceeding, it is clear that Wallowa County’s arguments to
15 LUBA **did not** meet the probable cause standard set out in [LUBA
16 caselaw], because Wallowa County **presented no arguments at**
17 **all.**” Petitioner’s Motion for Attorney Fees 2 (boldface in original).

18 We have repeatedly held that, when a local government does not file a
19 respondent’s brief, it has not presented a position and is therefore not potentially
20 liable for attorney fees under ORS 197.830(15)(b).

21 “Where a local government ‘files the record [but] does not file or
22 join in a brief or other document at LUBA defending its decision,’
23 the local government does not present a position in the LUBA appeal
24 and no award of attorney fees against the local government is
25 possible under ORS 197.830(15)(b).” *Stevens v. City of Island City*,

1 71 Or LUBA 430, 432-33 (2015).

2 Our caselaw is clear that when a local government does not file a
3 respondent's brief or otherwise defend its decision, attorney fees are not available
4 under ORS 197.830(15)(b). Petitioner neither acknowledges that caselaw nor
5 argues that it should be overruled.

6 Petitioner's motion for attorney fees under ORS 197.830(15)(b) is denied.

7 **B. ORS 197.796(5)**

8 Petitioner also argues that it is entitled to attorney fees under ORS
9 197.796(5), which provides, in part:

10 “Notwithstanding ORS 197.830(15), in a proceeding before the
11 Land Use Board of Appeals under this section, the [B]oard shall
12 award costs and reasonable attorney fees to a prevailing party.”

13 Petitioner's entire argument under ORS 197.796(5) is:

14 “Petitioner is the prevailing party. Petitioner did, in this proceeding,
15 challenge Wallowa County's decision on the basis of the Takings
16 Clause of the Fifth Amendment to the United States Constitution. It
17 is of no consequence that LUBA did not find it necessary to address
18 Petitioner's Second Assignment of Error in which Petitioner
19 asserted its 'taking claim.' *McGovern v. Crook County*, [63 Or
20 LUBA 561, 568-69 (2011)]. Award of attorney fees to Petitioner is,
21 therefore, mandatory under ORS 197.796([5]).” Petitioner's Motion
22 for Attorney Fees 3 (first citation omitted).⁴

⁴ Although the county responded to the motion for attorney fees and made arguments concerning ORS 197.830(15)(b), the county did not respond to petitioner's arguments under ORS 197.796(5).

1 ORS 197.796 applies to situations where an applicant for certain land use
2 decisions may accept conditions of approval imposed on an application and then
3 challenge the imposition of the condition of approval at LUBA or in circuit court.

4 ORS 197.796 states:

5 “(1) *An applicant under ORS 215.427 or 227.178 may accept a*
6 *condition of approval imposed under ORS 215.416 or 227.175 and*
7 *file a challenge to the condition under this section.* Acceptance by
8 an applicant under ORS 215.427 or 227.178 of a condition of
9 approval imposed under ORS 215.416 or 227.175 does not
10 constitute a waiver of the right to challenge the condition of
11 approval. Acceptance of a condition may include but is not limited
12 to paying a fee, performing an act or providing satisfactory evidence
13 of arrangements to pay the fee or to ensure compliance with the
14 condition.

15 “(2) Any action for damages under this section shall be filed in the
16 circuit court of the county in which the application was submitted
17 within 180 days of the date of the decision.

18 “(3)(a) A challenge filed pursuant to this section may not be
19 dismissed on the basis that the applicant did not request a
20 variance to the condition of approval or any other available
21 form of reconsideration of the challenged condition.
22 However, an applicant shall comply with ORS 197.797(1)
23 prior to appealing to [LUBA] or bringing an action for
24 damages in circuit court and must exhaust all local appeals
25 provided in the local comprehensive plan and land use
26 regulations before proceeding under this section.

27 “(b) In addition to the requirements of ORS 197.797(5), at the
28 commencement of the initial public hearing, a statement shall
29 be made to the applicant that the failure of the applicant to
30 raise constitutional or other issues relating to proposed
31 conditions of approval with sufficient specificity to allow the

1 local government or its designee to respond to the issue
2 precludes an action for damages in circuit court.

3 “(c) An applicant is not required to raise an issue under this
4 subsection unless the condition of approval is stated with
5 sufficient specificity to enable the applicant to respond to the
6 condition prior to the close of the final local hearing.

7 “(4) In any challenge to a condition of approval that is subject to
8 the Takings Clause of the Fifth Amendment to the United States
9 Constitution, the local government shall have the burden of
10 demonstrating compliance with the constitutional requirements for
11 imposing the condition.

12 “(5) In a proceeding in circuit court under this section, the court
13 shall award costs and reasonable attorney fees to a prevailing party.
14 *Notwithstanding ORS 197.830(15), in a proceeding before [LUBA]*
15 *under this section, the [B]oard shall award costs and reasonable*
16 *attorney fees to a prevailing party.*

17 “(6) *This section applies to appeals by the applicant of a condition*
18 *of approval* and claims filed in state court seeking damages for the
19 unlawful imposition of conditions of approval of *an application*
20 *made under ORS 215.427 or 227.178.”* (Emphases added.)

21 As ORS 197.796(6) states, this section applies to appeals of a condition of
22 approval imposed on an application made under ORS 215.427 (applicable to
23 counties) or 227.178 (applicable to cities). As this appeal concerns a county
24 decision, in order for attorney fees to be recoverable under ORS 197.796(5), there
25 must have been an application under ORS 215.427, which provides, among other
26 things, requirements for processing “applications.” Therefore, for petitioner to
27 avail itself of ORS 197.796(5) the challenged decision must have involved a

1 challenge to a condition of approval and an “application” under ORS 215.427.
2 ORS 215.427(11) provides:

3 “As used in this section, ‘application’ means an application for:

4 “(a) A permit;

5 “(b) A limited land use decision;

6 “(c) A zone change;

7 “(d) A consolidated zone change and permit described under ORS
8 215.416;

9 “(e) An expedited land division under ORS 197A.140; or

10 “(f) A plat consisting of a land division and middle housing land
11 division as described in ORS 92.044(1)(c)(C).”

12 The challenged decision involved a legal lot verification. The burden is on
13 petitioner to establish that the legal lot verification is an “application” for
14 purposes of ORS 197.796(5). Petitioner has not made any attempt to establish
15 that the legal lot verification was the result of an “application” as defined by ORS
16 215.427(11), and it is not clear to us that it is.

17 Additionally, in order to obtain an award of attorney fees under ORS
18 197.796(5), petitioner must be challenging a condition of approval. The
19 challenged decision did not contain any formal conditions of approval, and
20 petitioner has not made any attempt to establish that it challenged any condition
21 of approval. While petitioner appears to be arguing that its second assignment of
22 error, alleging an unconstitutional taking, makes ORS 197.796(5) applicable,
23 petitioner does not explain how the appeal involves a condition of approval. It is

1 petitioner's burden to establish that ORS 197.796(5) applies in the present
2 situation, and petitioner has not met that burden.

3 Finally, even if the challenged decision involved an application under ORS
4 215.427 and a condition of approval, petitioner would not be entitled to attorney
5 fees.⁵ The present case is similar to *Tokarski v. City of Salem*, 75 Or LUBA 489
6 (2017). In *Tokarski*, the petitioner sought attorney fees as the prevailing party in
7 *Tokarski v. City of Salem*, 74 Or LUBA 124, *aff'd*, 281 Or App 780, 384 P3d 565
8 (2016). In that appeal, the city imposed a condition of approval requiring the
9 petitioner to make substantial road improvements. In the underlying appeal, the
10 petitioner presented three assignments of error. The first assignment error argued
11 that the city improperly treated the application as a modification to a planned unit
12 development which provided the basis for the imposition of the road
13 improvement condition of approval. The second assignment of error argued that
14 the condition of approval violated the needed housing statutes. The third
15 assignment of error argued that the condition of approval was an unconstitutional
16 taking. We remanded the decision under the first assignment of error and did not
17 reach the second and third assignments of error.

⁵ Even though the challenged decision did not contain any formal conditions of approval, one could argue that, by verifying only three of the four sought legal lots and eliminating any other property lines for petitioner's property, eliminating any other property lines is essentially a condition of approval.

1 The motion for attorney fees was filed contemporaneously with the
2 petition for judicial review with the Court of Appeals. In the motion for attorney
3 fees, the petitioner argued that if the Court of Appeals reached and sustained the
4 third assignment of error – that the condition of approval was an unconstitutional
5 taking (as is the current petitioner’s second assignment of error) – that the
6 petitioner would be entitled to attorney fees pursuant to ORS 197.796(5).

7 We denied the petitioner’s motion for attorney fees under ORS 197.796(5)
8 because neither LUBA nor the Court of Appeals addressed the petitioner’s
9 unconstitutional taking claim:

10 “As noted above, LUBA’s opinion, which did not reach the second
11 and third assignments of error, was affirmed by the Court of
12 Appeals. Under these circumstances, we see no point in reviewing
13 petitioner’s arguments that he is entitled to attorney fees under the
14 cited statutes, based on the unresolved merits of assignments of error
15 LUBA did not reach and the Court of Appeals did not review.
16 Accordingly, because the court affirmed LUBA’s final opinion and
17 order, we need not address petitioner’s contingent arguments
18 regarding attorney fees related to the second and third assignments
19 of error under ORS 197.835 or ORS 197.796.” *Tokarski*, 75 Or
20 LUBA at 493.

21 Petitioner cites *McGovern v. Crook County*, 63 Or LUBA 561, 568-69
22 (2011), for the proposition that in addressing a motion for attorney fees under
23 ORS 197.830(15)(b), the scope of the analysis is not limited to assignments of
24 error that were addressed on appeal. Petitioner, however, does not explain why it
25 believes the reasoning in that case applies to attorney fees sought under ORS
26 197.796(5). While the background and facts of *McGovern* are complicated, the

1 case essentially stands for the proposition that when a case is decided on
2 jurisdictional or waiver grounds without reaching the merits of other assignments
3 of error, a petitioner seeking to avoid attorney fees under ORS 197.830(15) must
4 present a position with probable cause regarding the issue the case was decided
5 on. In other words, even if the arguments regarding an assignment of error meet
6 the probable cause standard, a petitioner may still be liable for attorney fees under
7 ORS 197.830(15) if the case is decided on waiver prior to reaching the
8 assignments of error and the arguments on waiver are made without probable
9 cause. That reasoning, however, is based on the peculiar terms and framework of
10 attorney fee petitions under ORS 197.830(15). Petitioner does not explain why
11 that reasoning should apply to the very different framework of attorney fee
12 petitions under ORS 197.796(5). That framework, as *Tokarski* suggests, depends
13 on whether LUBA addresses and sustains challenges to unlawful conditions of
14 approval. *McGovern* does not assist petitioner.

15 As in *Tokarski*, in the present case we did not address petitioner's argument
16 that the result of the county's decision was an unconstitutional taking. Therefore,
17 under *Tokarski*, even if petitioner had established that the challenged decision
18 involved an "application" under ORS 215.427 and involved a condition of
19 approval, petitioner would still not be entitled to attorney fees.

20 Petitioner's motion for attorney fees under ORS 197.796(5) is denied.

21 Dated this 29th day of July 2026.
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Fred Wilson
Board Member