

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

3
4 WINDLINX RANCH TRUST,
5 *Petitioner,*

6
7 vs.

8
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 **MOTION FOR ATTORNEY FEES**

21 Intervenors-respondents (intervenors) are the prevailing parties in the
22 appeal. *Windlinx Ranch Trust v. Deschutes County*, LUBA No 2023-079 (Feb
23 29, 2024) (*Windlinx II*), *aff'd*, 334 Or App 240 (2024) (nonprecedential
24 memorandum opinion). Intervenors filed a motion for an award of attorney fees
25 and expenses (Original Motion) and an amended motion for an award of attorney
26 fees and expenses (Amended Motion). We sometimes refer to the Original
27 Motion and Amended Motion in this Order together as the Motion. Petitioner
28 filed a response to the Motion (Response), and intervenors filed a reply to the
29 Response (Reply). We have considered all of the pleadings in resolving the

1 Motion.¹ Given the nature of the motion for attorney fees, a brief history of the
2 challenged decision is in order.

3 **A. Background**

4 The decision challenged in this appeal was a hearings officer decision on
5 remand from our decision in *Windlinx Ranch Trust v. Deschutes County*, LUBA
6 No 2022-022 (July 7, 2022) (*Windlinx I*), *aff'd*, 323 Or App 319 (2022)
7 (nonprecedential memorandum opinion).²

8 **1. Windlinx I**

9 We explained in *Windlinx I* that intervenors sought, and the hearings
10 officer approved, a forest template dwelling on their 6.7-acre property. Under
11 ORS 215.750(3)(b)(A), intervenors were required to demonstrate that “[a]ll or
12 part of at least seven other lots or parcels that existed on January 1, 1993, are
13 within a 160-acre square centered on the center of the subject tract[.]” We refer
14 to that 160-acre square centered on the center of the subject property as the
15 Template. In making that demonstration, only parcels that are lawfully created
16 may be counted towards the minimum seven parcels. *Friends of Yamhill County*
17 *v. Yamhill County*, 229 Or App 188, 198, 211 P3d 297 (2009).

¹ Petitioner’s motion to strike intervenors’ reply to petitioner’s response to
intervenors’ motion for attorney fees is denied.

² *Windlinx I* also resulted in a cross-appeal that was resolved in a separate
nonprecedential memorandum opinion, 323 Or App 290 (2022), and the issues
on cross-appeal were not at issue in *Windlinx II*. See LUBA No 2023-079 (slip
op at 2 n 1).

1 “Intervenors identified a minimum of seven and a maximum of nine
2 parcels that intervenors argued were lawfully created ‘lots or
3 parcels.’ Intervenors referred to those parcels as Lots 1 through 7
4 and, more specifically, referred to Lot 7 as Lots 7a, 7b, and 7c. *The*
5 *hearings officer concluded that intervenors established that there*
6 *exist nine lawfully created parcels within the template.” Windlinx I,*
7 *LUBA No 2022-022 (emphasis added, footnote omitted) (slip op at*
8 *16).*

9 In *Windlinx I*, in the fourth assignment of error, petitioner argued to us that the
10 hearings officer’s conclusion that Lot 7b was a lawfully created parcel was not
11 supported by substantial evidence in the whole record, and that the hearings
12 officer’s findings were inadequate to explain why they concluded that Lots 7a
13 and 7c were lawfully created parcels. We sustained a portion of that assignment
14 of error and remanded the hearings officer’s decision in order for “the hearings
15 officer [to] determine whether Lots 7a and 7c are lawfully created parcels under
16 ORS 215.010(1)(a).” *Windlinx I*, LUBA No 2022-022 (slip op at 29). The Court
17 of Appeals affirmed our decision. *Windlinx Ranch Trust v. Deschutes County*,
18 323 Or App 319, 321 (2022) (nonprecedential memorandum opinion).

19 On remand, petitioner did not argue that Lots 7a and 7c were not lawfully
20 created. Rather, petitioner argued to the hearings officer that Lot 7b and Lot 7c
21 are not located within the Template. The issues of whether petitioner was
22 precluded from challenging the location of Lots 7b and 7c within the Template
23 and from arguing that Lot 7c was not included in the original application were
24 central issues during the remand proceedings, and intervenors’ final argument
25 urged the hearings officer that petitioner was precluded from making those

1 challenges. Remand Record 53-54.³ The hearings officer concluded that
2 petitioner’s arguments were outside the scope of our remand in *Windlinx I* and
3 that the issue of whether Lot 7b and Lot 7c are located within the Template is a
4 “settled matter.” Remand Record 39, 42. The hearings officer also adopted
5 alternative, precautionary additional findings that concluded that Lot 7c is within
6 the Template. Remand Record 42-44.

7 2. **Windlinx II**

8 Petitioner appealed the hearings officer’s decision on remand. In its first
9 assignment of error, petitioner argued that the hearings officer “improperly
10 construed the applicable law” when they concluded that whether Lot 7b and 7c
11 are located within the Template is a “settled matter” and thus not subject to
12 challenge on remand. ORS 197.835(9)(a)(D). In the first assignment of error,
13 petitioner cited and relied on *Beck v. Tillamook County*, 313 Or 148, 151, 831
14 P2d 678 (1992), and argued that “the law of the case doctrine does not apply
15 where the issue was not clearly decided and the subject of focused findings.”
16 Petition for Review 15 (citing *Morgan v. Jackson County*, 80 Or LUBA 59, *aff’d*,
17 300 Or App 582, 452 P3d 1088 (2019)). *Beck* stands for the proposition that
18 during post-remand proceedings, petitioners are foreclosed from raising issues
19 that were “conclusively decided against them by the first final and reviewable

³ The record includes the record in *Windlinx I*, which we refer to here as the Original Record, and the record on remand, which we refer to here as the Remand Record.

1 LUBA decision[.]” 313 Or at 150. In the third assignment of error, petitioner
2 argued that the hearings officer’s alternative additional finding that Lot 7c is
3 located within the Template is not supported by substantial evidence in the
4 record. Petitioner argued in the second assignment of error that the Deschutes
5 County Code required intervenors to modify their application on remand in order
6 to include Lot 7c, which petitioner argued was not included in the original
7 application.

8 Citing and relying on the Court of Appeals’ decisions in *Beck*, *Devin Oil*
9 *Co. v. Morrow County*, 252 Or App 101, 111-13, 286 P3d 925 (2012), and *Mill*
10 *Creek Glen Protec. Assn. v. Umatilla County*, 88 Or App 522, 526-27, 746 P2d
11 728 (1987), as well as other LUBA and Court of Appeals’ decisions, intervenors
12 asserted that the issues raised in all three assignments of error were waived
13 because petitioner could have raised but did not raise those issues during their
14 appeal of the hearings officer’s original decision that led to our decision in
15 *Windlinx I*. Intervenors argued:

16 “Issues that have been conclusively resolved in a prior decision are
17 not reviewable at later stages of the same proceeding. *Beck*[, 313 Or
18 at 153]. Issues that could have been, but were not, raised in a first
19 appeal of a decision that LUBA ultimately remands cannot be raised
20 in an appeal of the decision on remand. *Devin Oil Co.*[, 252 Or App
21 at 111-13]; *Botts Marsh LLC v. City of Wheeler*, [LUBA No 2022-
22 079 (Jan 4, 2023) (slip op at 9), *rev’d on other grounds*, 326 Or App
23 215, 532 P3d 544 (2023)]; *Wetherell v. Douglas County*, 60 Or
24 LUBA 131, 137 (2009)[, *aff’d*, 235 Or App 246, 230 P3d 976, *rev*
25 *den*, 349 Or 57 (2010)]; *Mill Creek Glen Protec.[.] Ass[n].*[, 88 Or
26 App 522 at 527]. The purpose of these principles – whether framed

1 as law of the case, waiver, or exhaustion of remedies – is to preclude
2 an opponent from raising issues piecemeal through the course of
3 land use decision review. *Porto v. Linn County*, 67 Or LUBA 162,
4 176 (2013).

5 “* * * * *

6 “The Petition [for Review] violates the *Beck* doctrine of law of the
7 case *in two ways*: raising issues that have been resolved against
8 [p]etitioner *and raising issues that could have been but were not*
9 *raised in the original proceedings and so cannot be raised here.*”
10 Intervenor-Respondent’s Brief 11, 15-16 (emphases added).

11 Intervenor’s pointed out that the hearings officer’s original decision concluded
12 that nine parcels were located within the Template and that all were lawfully
13 created, and that in *Windlinx I* petitioner’s only challenge at LUBA was that the
14 parcels were lawfully created and petitioner did not raise any issue regarding the
15 location of Lot 7b and Lot 7c inside or outside of the Template. Intervenor-
16 Respondent’s Brief 22-24. Intervenor’s also responded that for the same reason,
17 the issue of whether a modification of the application was necessary in order for
18 Lot 7c to count as a qualifying parcel was waived because it could have been but
19 was not raised during its appeal of the hearings officer’s original decision that led
20 to our decision in *Windlinx I*. *Id.* at 32. Petitioner filed a reply brief, but did not
21 respond to intervenor’s argument that it was precluded from raising new issues
22 that could have been but were not raised in *Windlinx I*.

23 We agreed with intervenor’s that petitioner was precluded from raising the
24 issues raised in the first and third assignments of error because petitioner could

1 have raised but failed to raise the issues in its appeal in *Windlinx I*. In resolving
2 the first and third assignments of error, we explained:

3 “In *Mill Creek Glen Protec. Assn.*[, 15 Or LUBA 563], the
4 petitioners appealed a county commissioners’ decision approving a
5 conditional use permit for gravel extraction and processing on
6 remand, after we remanded the decision in *Allen v. Umatilla County*,
7 14 Or LUBA 749 (1986). In *Mill Creek Glen*, we concluded that the
8 law of the case doctrine precluded our review of the issues that the
9 petitioners raised to us in that appeal, because they were issues
10 which could have been raised but were not raised in *Allen*. *Id.* at 566
11 (citing *Portland Audubon v. Clackamas County*, 14 Or LUBA 433,
12 *aff’d*, 80 Or App 593, 722 P2d 745 (1986)).

13 “The Court of Appeals affirmed our decision, holding that the law
14 of the case doctrine barred the petitioners from raising issues in a
15 second appeal to LUBA that could have been but were not raised in
16 a first appeal from the same land use decision. *Mill Creek Glen*
17 *Protection Assoc. v. Umatilla Co.*, 88 Or App 522, 526-27, 746 P2d
18 728 (1987). In *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678
19 (1992), the Supreme Court reviewed a number of statutes that
20 govern LUBA review and judicial review of LUBA decisions, and
21 concluded that issues that LUBA decides in an earlier unappealed
22 final opinion in the same case may not be the subject of assignments
23 of error in a later final opinion in the same case. The Supreme Court
24 cited *Mill Creek Glen Protection Assoc.*, 88 Or App at 527, with
25 approval. *Beck*, 313 Or at 153 n 2.

26 “* * * * *

27 “Petitioner does not explain why they could not have raised the issue
28 they attempt to raise now regarding whether Lot 7b and Lot 7c are
29 located within the Template during the appeal that led to our
30 decision in *Windlinx I*. Petitioner also does not take the position that
31 the issue was raised during the appeal that led to *Windlinx I*, and in
32 fact argues that LUBA did not decide whether Lot 7b or Lot 7c are
33 within the Template. Petition for Review 16-17. With that much we

1 agree, because the issue was not raised in any of petitioner's
2 assignments of error in *Windlinx I* and was not raised in [the Court
3 of Appeals' decision affirming *Windlinx I*]. Under the law of the
4 case doctrine, petitioner's first and third assignments of error are
5 waived." *Windlinx II*, LUBA No 2023-079 (footnotes omitted) (slip
6 op at 8-9, 12).

7 We concluded that the second assignment of error was waived for the same
8 reason. *Id.* (slip op at 14-15).

9 **3. Windlinx III**

10 Petitioner appealed our decision to the Court of Appeals and the court
11 affirmed our decision. *Windlinx Ranch Trust v. Deschutes County*, 334 Or App
12 240 (2024) (nonprecedential memorandum opinion) (*Windlinx III*). The court
13 explained that although we mislabeled the court's holding in *Mill Creek Glen* as
14 the law of the case doctrine rather than the doctrine of waiver, *Mill Creek Glen*
15 was "dispositive," and that

16 "petitioner, having not challenged whether lot 7c was within the
17 forest template in the original land use proceeding and the appeal to
18 LUBA in *Windlinx I*, waived the right to bring that challenge in the
19 subsequent remanded proceeding and the related appeal before
20 LUBA. *Mill Creek Glen Protection*, 88 Or App at 526-27." 334 Or
21 App at 244.

22 The court applied the same reasoning to conclude that petitioner's second
23 assignment of error that argued that a modification of the application was
24 required in order to include Lot 7c in the Template was waived because petitioner
25 failed to bring that challenge in *Windlinx I*. *Id.* at 245.

1 **B. Attorney Fees Standard**

2 Intervenors move for an award of attorney fees in the amount of
3 \$49,752.09 and expenses in the amount of \$693.18, pursuant to ORS
4 197.830(15)(b), which provides that the Board “[s]hall award reasonable attorney
5 fees and expenses to the prevailing party against any other party who the [B]oard
6 finds presented a position or filed any motion without probable cause to believe
7 the position or motion was well-founded in law or on factually supported
8 information.” In deciding whether to award attorney fees against a non-prevailing
9 party, we must determine that “every argument in the entire presentation [that a
10 non-prevailing party] makes to LUBA is lacking in probable cause (*i.e.*, merit).”
11 *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS
12 197.830(15)(b), a position is presented “without probable cause” where “no
13 reasonable lawyer would conclude that any of the legal points asserted on appeal
14 possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465, 469
15 (1996). In applying the probable cause analysis, LUBA “will consider whether
16 any of the issues raised [by a party] were open to doubt, or subject to rational,
17 reasonable[,] or honest discussion.” *Id.* “The party seeking an award of attorney
18 fees under the probable cause standard must clear a relatively high hurdle, and
19 that hurdle is not met by simply showing that LUBA rejected all of a party’s
20 arguments on the merits.” *Wolffgram v. Douglas County*, 54 Or LUBA 775, 776
21 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

1 Intervenors directed two separate and independent types of waiver
2 challenges at all three of petitioner’s assignments of error. Intervenors argued
3 that *Beck* precluded petitioner from raising issues that were conclusively resolved
4 in *Windlinx I*. Intervenors also argued that *Mill Creek Glen* and a number of other
5 LUBA and Court of Appeals’ decisions precluded petitioner from raising issues
6 that could have been raised but were not during prior proceedings. We did not
7 reach any of petitioner’s arguments on the merits because we concluded that the
8 assignments of error were waived, because petitioner could have raised but failed
9 to raise the issues during the proceedings that led to *Windlinx I*. Where two
10 separate and independent types of waiver challenges are directed at an
11 assignment of error that a petitioner relies upon to avoid an award of attorney
12 fees under ORS 197.830(15)(b), the petitioner must demonstrate that at least one
13 probable cause argument was made with respect to *both* types of waiver
14 challenges. *Kane v. City of Beaverton*, 63 Or LUBA 522, 526-27 (2011);
15 *McGovern v. Crook County*, 63 Or LUBA 561, 570-71 (2011).

16 In the first assignment of error, petitioner argued that it was not precluded
17 from raising the issue raised in the first assignment of error because “*Beck* does
18 not apply to this matter because the law of the case doctrine does not apply *where*
19 *the issue was not clearly decided and the subject of focused findings.*” Petition
20 for Review 15 (citing *Morgan*, 80 Or LUBA at 73-74 (emphasis added)). In the
21 second assignment of error, petitioner argued that it was not precluded from
22 raising the issue because our decision in *Windlinx I*, as characterized by

1 petitioner, concluded that Lot 7c was not part of the application. In the third
2 assignment of error, petitioner did not address waiver at all.

3 Petitioner cited and relied on *Beck* and argued that it was not precluded
4 from raising the issues because none of the issues it raised in *Windlinx II* were
5 conclusively decided or resolved against it in *Windlinx I*.⁴ But petitioner did not
6 respond at all to intervenors’ contention that it was precluded from raising the
7 issues it raised in *Windlinx II* because it could have raised but failed to raise the
8 issues in *Windlinx I*. Intervenors maintain that given the abundance of settled case
9 law on the issue, no reasonable lawyer would conclude that they could raise an
10 issue in a second appeal to LUBA that they could have raised but failed to raise
11 in a prior appeal to LUBA of a local government decision on the same
12 application.⁵ Motion 10-11. Intervenors argue that petitioner did not establish in
13 the petition for review or reply brief that the waiver doctrine articulated and relied
14 on by the court in *Devin Oil and Mill Creek Glen* is “open to doubt or subject to
15 rational, reasonable, or honest discussion.” *Id.* at 11.

16 We have previously explained that whether an award of attorney fees under
17 ORS 197.830(15)(b) is appropriate depends on the positions taken in the appeal

⁴ As we explained in *Windlinx II*, none of the issues were raised in *Windlinx I*, so LUBA had no occasion to conclusively decide or resolve those issues. *Windlinx II*, LUBA No 2023-079 (slip op at 12).

⁵ Moreover, intervenors point out that petitioner also failed to raise the issues in its appeal of our decision in *Windlinx I* to the Court of Appeals. Motion 3.

1 before LUBA, not the positions taken during the local proceedings or in the
2 challenged decision itself. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or
3 LUBA 558, 564, *aff'd*, 123 Or App 642, 859 P2d 1208 (1993). “It is equally true
4 that whether an award of attorney fees is appropriate does not depend on the
5 positions taken in response to a motion for attorney fees, after the final opinion
6 and order has issued and the appeal before LUBA has concluded.” *Riverview*
7 *Meadows LLC v. City of Nehalem*, LUBA Nos 2021-124/125/126/127 (Oct 13,
8 2022) (slip order at 8-9). Petitioner addresses *Mill Creek Glen* and the waiver
9 doctrine for the first time in its Response. Response 19-20. We do not consider
10 those arguments in the probable cause analysis in deciding the attorney fee
11 motion, because they were not presented during the appeal in the petition for
12 review or the reply brief.

13 We conclude that petitioner has not satisfied its burden to establish that it
14 presented at least one argument in the briefing in *Windlinx II* that satisfied the
15 probable cause standard with respect to *both* types of waiver challenges.
16 Petitioner did not present any argument at all in response to intervenors’
17 argument that the issues were waived because they could have been raised but
18 were not raised in *Windlinx I*. Petitioner’s argument that the issue raised in the
19 second assignment of error was conclusively decided in *Windlinx I* relies on a
20 wholly inaccurate characterization of our decision in *Windlinx I*, a
21 characterization that we conclude no reasonable attorney would make. In

1 explaining the factual background for the fourth assignment of error in *Windlinx*
2 *I*, we described the hearings officer’s decision:

3 “Intervenors identified a minimum of seven and a maximum of nine
4 parcels that intervenors argued were lawfully created ‘lots or
5 parcels.’ Intervenors referred to those parcels as Lots 1 through 7
6 and, more specifically, referred to Lot 7 as Lots 7a, 7b, and 7c. *The*
7 *hearings officer concluded that intervenors established that there*
8 *exist nine lawfully created parcels within the template.” Windlinx I,*
9 LUBA No 2022-022 (emphasis added) (slip op at 16).

10 In footnote 9, we stated that “[i]ntervenors’ application stated that they were not
11 relying on Lot 7c to meet the required template test.” *Windlinx I*, LUBA No 2022-
12 022 (citing Original Record 1249) (slip op at 16 n 9).

13 In this appeal, petitioner argued that that footnote conclusively decided that
14 Lot 7c was not included in intervenors’ *application*. Petition for Review 23-24;
15 Reply Brief 3. The quoted passage from *Windlinx I* and footnote 9 explicitly
16 recognized that intervenors’ *application* included Lot 7c but that intervenors
17 identified nine parcels, two more than the seven required parcels, and therefore
18 were not *relying on* Lot 7c as one of the seven required parcels. Petitioner’s
19 characterization of the quoted language and the footnote is not accurate. No issue
20 was raised by petitioner that Lot 7c was not included in the application.

21 For the above reasons, none of petitioner’s positions with respect to the
22 three assignments of error presented in the petition for review are sufficient to
23 avoid an award of attorney fees under ORS 197.835(15)(b). Accordingly,
24 intervenors are entitled to attorney fees.

1 **C. Reasonableness of Attorney Fees**

2 Intervenors attach to their motion an itemized statement of attorney fees
3 incurred in the course of this appeal. The statement provides a relatively detailed
4 description for each entry. Intervenors seek recovery of 108 attorney hours billed,
5 1.55 paralegal hours billed, and 13.46 legal assistant hours billed for a total of
6 \$49,752.09 in attorney fees and \$693.18 in expenses.

7 In determining what award of attorney fees is reasonable, we must briefly
8 identify the relevant facts and legal criteria on which we rely. *See McCarthy v.*
9 *Oregon Freeze Dry, Inc.*, 327 Or 84, 96, *adh'd to on recons*, 327 Or 185, 957
10 P2d 1200 (1998) (stating principle). In awarding attorney fees pursuant to ORS
11 197.830(15)(b), LUBA has discretion to determine the amount of attorney fees
12 that is reasonable under the specific facts of the case. *Young v. City of Sandy*, 33
13 Or LUBA 817, 819 (1997). LUBA will look to the factors listed in ORS 20.075
14 for guidance in determining the amount of an attorney fee award. *Schaffer v. City*
15 *of Turner*, 37 Or LUBA 1066, 1072-73 (2000). The burden is on the party seeking
16 the attorney fees to establish that the requested rates are reasonable, even in the
17 absence of an objection. *6710 LLC v. City of Portland*, 41 Or LUBA 608, 611
18 (2002).

19 **1. Hourly Rate**

20 ORS 20.075(2)(g) requires us to consider “[t]he experience, reputation and
21 ability of the attorney performing the services.” Intervenors’ Motion details the
22 land use experience of both the primary and second attorney. Motion 15-16;

1 Reply 5-6. Intervenor's cite the Oregon State Bar 2022 Economic Survey (the
2 2022 Survey). We have previously relied on Oregon State Bar economic surveys
3 as an accurate indicator of the fees customarily charged in a community. *Van*
4 *Dyke v. Yamhill County*, LUBA Nos 2020-032/033 (Apr 1, 2021) (slip order at
5 17-18); *6710 LLC*, 41 Or LUBA at 612.

6 Intervenor's state that the 2022 Survey lists the median rate in the Tri-
7 County area (Multnomah, Washington, and Clackamas Counties outside of
8 downtown Portland) for an attorney practicing real estate, land use and
9 environmental law in 2021 as \$513, which adjusted for inflation is \$566.⁶ Motion
10 15. Intervenor's cite the 2022 Survey median rate of \$600, which adjusted for
11 inflation is \$662, for an attorney with years of experience comparable to
12 intervenor's primary attorney. Intervenor's primary attorney's rate is \$495, which
13 is approximately 25 percent less than the inflation-adjusted median rate for
14 attorneys in the Tri County area with similar experience and approximately 10
15 percent less than the inflation-adjusted median rate for an attorney practicing real
16 estate, land use and environmental law. Intervenor's second attorney's rate is
17 \$415, also much lower than the 2022 Survey for similar attorneys in the Tri-
18 County area.

19 One of the factors we consider in determining the amount of an attorney
20 fee award is "[t]he fee customarily charged in the locality for similar legal

⁶ Intervenor's attorneys' offices are located in the Tri-County area.

1 services.” 6710 LLC, 41 Or LUBA at 611 (quoting ORS 20.075(2)(c)). Petitioner
2 argues that the rate of \$495 per hour charged by intervenors’ primary attorney
3 and \$415 for a second attorney is not reasonable because

4 “[t]his is a Central Oregon land use matter. Intervenors relied solely
5 on a study using the Portland Metro area rates. The rates charged in
6 Central Oregon are lower as the same study reveals.” Response 28.

7 We understand petitioner to argue that therefore, intervenors’ reliance on the
8 2022 Survey’s median rates for attorneys in the Tri-County area is unreasonable.⁷
9 For the reasons explained below, we find this argument unpersuasive.

10 The Court of Appeals has held that “the locality” considered for similar
11 legal services can be the locality of the attorneys’ offices, not the locality of the
12 property or the forum in which the legal matter is litigated. *Hanna LP v. Windmill*
13 *Inns of America*, 223 Or App 151, 165-67, 194 P3d 874 (2008). In *Hanna*, the
14 court concluded that the trial court did not abuse its discretion when it awarded
15 attorney fees based on rates for Portland attorneys to litigate a case in Douglas
16 County that the court concluded “required specialized business litigators.” *Id.* at
17 166; *see also Makarios-Oregon, LLC v. Ross Dress-For-Less, Inc.*, 293 Or App
18 732, 742, 430 P3d 142, *adh’d to on recons*, 295 Or App 449, 430 P3d 1125 (2018)
19 (holding it was not an abuse of discretion to award more than Oregon rates for

⁷ Petitioner provides no evidence regarding what they characterize as “Central Oregon” rates and how they compare to intervenors’ attorneys’ rates. The 2022 Survey identifies Deschutes County in a subregion labeled “Eastern Oregon” and we assume for purposes of this Order that petitioner means “Eastern Oregon.”

1 San Francisco attorneys based on the complexity of the case and minor
2 adjustments by attorneys and the district court); *Robinson v. DeFazio*, 284 Or
3 App 98, 108, 392 P3d 781, *adh'd to on recons*, 286 Or App 709, 399 P3d 1095,
4 *rev den*, 362 Or 175 (2017) (“Defendant was not required to employ less costly
5 local counsel to litigate the case to be entitled to a reasonable award of attorney
6 fees. The evidence submitted by the defendant established that his attorneys had
7 reasonable hourly rates for Oregon.”). Intervenor’s retention of Oregon attorneys
8 outside of Eastern Oregon with outside of Eastern Oregon rates is not
9 unreasonable. Intervenor’s attorneys’ hourly rates are well below the inflation-
10 adjusted median rates for attorneys in the Tri-County area practicing land use and
11 for attorneys in the Tri-County area with similar experience. We conclude that
12 the rates are reasonable.⁸

13 2. **Hours Billed**

14 One factor that is considered when determining the reasonableness of
15 attorney fees is “[t]he time and labor required in the proceeding, the novelty and
16 difficulty of the questions involved in the proceeding and the skill needed to
17 properly perform the legal services.” ORS 20.075(2)(a).

18 In a single sentence, petitioner argues that “[p]etitioner believes that 108
19 hours billed is unreasonable.” Response 28. Petitioner’s only argument in their

⁸ Petitioner also argues that the Motion fails to establish intervenor’s second attorney’s experience and thus the basis for the hourly rate. Intervenor adequately explain the second attorney’s experience in their Reply. Reply 5-6.

1 Response appears to be that intervenors should have submitted an expert affidavit
2 supporting the amount of time spent. Although an expert witness affidavit
3 opining on the reasonableness of the hours spent on the matter may be useful
4 evidence, petitioner offers no other argument to dispute the reasonableness of
5 time spent on the matter. Intervenors attorneys explain that in order to adequately
6 brief this appeal, they were required to extensively research LUBA's decision in
7 *Windlinx I*, the Court of Appeals' decision affirming LUBA's decision, as well
8 as respond to a petition for review that asserted issues that intervenors contended
9 were waived and also provide substantive responses to those issues. According
10 to intervenors, those substantive responses "required * * * researching and
11 understanding complex expert witness testimony regarding deed histories,
12 experts' conflicting analysis and conclusions drawn from those materials, and the
13 [hearings officer's d]ecision's weighing of that expert testimony." Motion 17-18.
14 Absent any developed argument from petitioner to support its position, we agree
15 with intervenors that 108 attorney hours, 1.55 paralegal hours, and 13.46 legal
16 assistant hours is a reasonable amount of time to have spent in defending this
17 appeal.

18 We conclude that intervenors' requested attorney fees are reasonable.
19 Intervenors are awarded attorney fees in the amount of \$49,752.09, payable by
20 petitioner.

1 **D. Expenses**

2 Intervenors seek an award of expenses in the amount of \$693.18. Petitioner
3 does not dispute the expenses. Intervenors are awarded expenses in the amount
4 of \$693.18, payable by petitioner.

5 **COST BILL**

6 Intervenors move for an award of the cost of their filing fee to intervene,
7 in the amount of \$100. OAR 661-010-0075(1)(b)(D) (Apr 1, 2024). Intervenors
8 are awarded the cost of their intervention fee, in the amount of \$100, to be paid
9 by petitioner.

10 Dated this 27th day of February 2025.

11

12

13

14

15 _____
H.M. Zamudio

16 Board Chair