

1 No. 97-146, Order on Petition for Attorney Fees, September 29, 1998), slip op 4, this Board
2 held that where a local government simply files the local record and does not file or join in a
3 brief or other document at LUBA defending its decision, that government does not present a
4 position as a litigant. Thus, whether or not the county court's decision satisfies the
5 reasonableness standard is not relevant to the present inquiry, because that decision is not
6 considered a position presented by the county on appeal.

7 Our inquiry in this proceeding is limited to whether any of the positions that the
8 county presented to this Board would be viewed by a reasonable lawyer as having merit. A
9 "position" refers to a party's stance in the appeal as a whole and to the tenability of the party's
10 presentation, viewed in its entirety, in defending this appeal. Fechtig, 150 Or App at 16, 27.
11 Specifically, this petition for attorney fees asks the Board to determine whether the county's
12 defense of the decision as a litigant was "so untenable that a reasonable litigant could not
13 have advanced it." Spencer Creek Neighbors v. Lane County, 152 Or App 1, 9, 952 P2d 90
14 (1998).

15 The county's response brief presented positions contesting petitioners' standing and
16 two of petitioners' four assignments of error. We turn to a determination of whether no
17 reasonable lawyer would conclude that the county's assertion on appeal that petitioners
18 lacked standing possessed legal merit.

19 Petitioners asserted standing in this case based upon their submission of a letter to the
20 county court after the local record had closed for such submissions. The county argued that
21 petitioners lacked standing because they did not submit any evidence to or appear before the
22 planning commission on this application, that the county court's review of the planning
23 commission decision was confined to the record of that lower proceeding under the county's
24 zoning ordinance, and that petitioners did not employ the county's zoning ordinance
25 procedure for supplementing the record before the county court. Therefore, the county

1 argued, petitioners' letter to the county court did not suffice to establish petitioners' standing
2 in this appeal. The Board disagreed, concluding that

3 "the county, by its conduct, reopened the record in this case and accepted the
4 October 3, 1997 letter into the record. That letter is a sufficient appearance to
5 provide petitioners standing in this appeal." Wolverton v. Crook County, __
6 Or LUBA __ (LUBA No. 97-233, May 29, 1998), slip op 6.

7 Although the Board ultimately disagreed with the county's position on standing, we cannot
8 say that no reasonable lawyer would conclude that the county's standing argument possessed
9 legal merit.

10 The petition for attorney fees is denied.

11 Dated this 22nd day of April, 1999.

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Michael A. Holstun
Board Chair