1 BEFORE THE LAND USE BOARD OF APPEALS 2 OF THE STATE OF OREGON 3 4 ORAN THOMAS WOLVERTON 5 and BEVERLY WOLVERTON, 6 7 Petitioners, LUBA No. 97-233 8 9 ORDER ON VS. PETITION FOR ATTORNEY FEES 10 11 CROOK COUNTY, 12 13 Respondent. 14 15 Petitioners, the prevailing party in this appeal, request an award of attorney fees 16 pursuant to ORS 197.830(14)(b), which provides: 17 "[t]he board shall also award reasonable attorney fees and expenses to the 18 prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in 19 20 law or on factually supported information." 21 In determining whether to award attorney fees against a nonprevailing party, this Board must 22 determine that "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause (i.e., merit)." Fechtig v. City of Albany (A97764), 150 23 Or App 10, 24, 946 P2d 280 (1997). This Board has held that "a position without probable 24 25 cause" under ORS 197.830(14)(b) is presented where "no reasonable lawyer would conclude 26 that any of the legal points asserted on appeal possessed legal merit." Contreras v. City of Philomath, 32 Or LUBA 465, 469 (1996). The probable cause standard creates a low 27 28 threshold. Brown v. City of Ontario, 33 Or LUBA 803, 804 (1997). 29 The county contends that both "the [county court's] decision and the joint 30 Respondent/Intervenor-Respondent brief must be evaluated to see whether any of the [county 31 court's] positions would be viewed by a reasonable lawyer as having merit." Response to 32 Petition for Attorney Fees 2. The county then argues that the county court's decision satisfies 33 the reasonableness standard. However, in <u>Hearne v. Baker County</u>, Or LUBA (LUBA

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

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

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

Petitioners asserted standing in this case based upon their submission of a letter to the county court after the local record had closed for such submissions. The county argued that petitioners lacked standing because they did not submit any evidence to or appear before the planning commission on this application, that the county court's review of the planning commission decision was confined to the record of that lower proceeding under the county's zoning ordinance, and that petitioners did not employ the county's zoning ordinance 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 4 5 6	"the county, by its conduct, reopened the record in this case and accepted the October 3, 1997 letter into the record. That letter is a sufficient appearance to provide petitioners standing in this appeal." Wolverton v. Crook County, 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 12 13 14 15 16 17	Dated this 22 nd day of April, 1999.
19 20	Michael A. Holstun Board Chair
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