BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SCOTT STEVENS and DEBRA STEVENS,
Petitioners,

vs.

CITY OF ISLAND CITY,
Respondent,

and

JON FREGULIA,
Intervenor-Respondent.

LUBA No. 2014-105

ORDER ON MOTION FOR
ATTORNEY FEES AND COSTS

ATTORNEY FEES

Petitioners move for an award of attorney fees from the city and intervenor-respondent (intervenor) pursuant to ORS 197.830(15)(b), which provides:

> "The board shall also award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

In determining whether to award attorney fees against a nonprevailing party, we must determine that "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause." *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented "without probable cause" where "no

reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit." *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). In applying the probable cause analysis LUBA "will consider whether any of the issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest discussion." *Id.* The party seeking an award of attorney fees under the probable cause standard must clear a relatively high hurdle and that hurdle is not met by simply showing that LUBA rejected all of a party's arguments on the merits. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

Petitioners appealed a city council decision approving a home occupation permit for a commercial truck business. This was the second time this matter was before LUBA. *See Stevens v. City of Island City*, 68 Or LUBA 112, *aff'd* 260 Or App 768, 324 P3d 477 (2014) (remanding the city's initial approval of intervenor's application for a home occupation permit on three grounds). On remand, the city considered multiple methods that could be used to determine if the proposed use could occur within 600 square feet.[1] The city once again approved the permit, concluding that the home occupation would not require more than 600 square feet of floor space. Petitioners appealed again, arguing one assignment of error with two sub-parts: (1) the city erred in its interpretation of its code, and (2) the city's conclusion is not supported by substantial evidence. We sustained petitioners' assignment of error and remanded the decision in order for the city to allow the parties to submit evidence regarding the amount of floor area utilized by the home occupation

[1] Island City Development Code (ICDC) 10.07(A) provides that if a home occupation occurs within an accessory structure, the home occupation "shall not utilize over 600 square feet of floor area."

outside of the footprint of the equipment associated with the use.

A. Fees Against Intervenor-Respondent

Petitioners argue that they are entitled to attorney fees and costs because they prevailed on their single assignment of error, and in opposing that single assignment of error intervenor necessarily presented a position "without probable cause to believe the position was well-founded in law or factually supported information." ORS 197.830(15)(b).

Intervenor responds that petitioners misinterpret the standard of review for attorney fees, noting that the probable cause standard is not met unless the prevailing party demonstrates that *every* argument made by the nonprevailing party lacked probable cause. Intervenor argues that petitioners fail to establish that every argument in intervenor's entire presentation lacked probable cause. We agree with intervenor that petitioners appear to misunderstand the probable cause test. Petitioners do not identify *any* argument or position advanced by intervenor that would fail the probable cause test, much less demonstrate that intervenor's entire presentation, *all* arguments or positions taken by intervenor, lacked probable cause.

Intervenor notes several arguments that it made in response to petitioners' assignment of error that not only met the probable cause standard, but that LUBA agreed with. For example, in response to petitioners' first sub-assignment of error, intervenor argued that petitioners misread ICDC 2.02(E) to compel the city council to adopt the planning staff's interpretation. We agreed with intervenor on that point. Based on that example alone, intervenor presented at least one argument that not only met the low probable cause threshold (*i.e.* it was a position that a reasonable attorney would advance), but it was also the prevailing argument on that point.

While petitioners prevailed in obtaining remand based on some of the arguments presented in the assignment of error, petitioners have not come close to demonstrating that intervenor's entire presentation failed the probable cause test.

Petitioners' motion for fees against intervenor is denied.

B. Fees Against the City

The city responds to petitioners' motion by arguing that no attorney fees are recoverable from the city because the city did not present a "position" on appeal.

ORS 197.830(15)(b) entitles a prevailing party to recover attorney fees when the nonprevailing party has "presented a position without probable cause to believe the position was well-founded in law or on factually supported information." An initial inquiry under ORS 197.830(15)(b) is whether the city, as a nonprevailing party, presented a position to LUBA. Where a local government "files the local record [but] does not file or join in a brief or other document at LUBA defending its decision," the local government does not present a position in the LUBA appeal and no award of attorney fees against the local government is possible under ORS 197.830(15)(b). *Hearne v. Baker County*, 35 Or LUBA 768, 770 (1998), *aff'd* 158 Or App 246, 972 P2d 16 1233 (1999); *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558, 564, *aff'd* 123 Or App 642, 859 P2d 1208 (1993). Because of the city's limited participation, it did not present a "position" for purposes of ORS 197.830(15)(b) and no award of attorney fees is possible.

Petitioners' motion for fees against the city is denied.

COSTS

Petitioners filed a cost bill, requesting award of the cost of the filing fee, in the amount of $200. Under OAR 661-010-0075(1)(b)(A), petitioners are entitled to an award of the cost of the filing fee. Petitioners mistakenly request an award of its $200 deposit for costs. The deposit for costs is not a cost that is recoverable through a motion for costs. Petitioners are entitled to a return of the deposit for costs, but it is returned by LUBA. OAR 661-010-0075(1)(d).

Accordingly, petitioners are awarded the cost of the filing fee, in the amount of $200, to be paid by the city and intervenor. LUBA will return the $200 deposit to petitioners.

Dated this 22nd day of June, 2015.

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Tod A. Bassham
Board Chair