

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

3
4 STEVEN SCHULKE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent,*

11
12 and

13
14 I & E CONSTRUCTION, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2024-038

18
19 ORDER

20 **BACKGROUND**

21 This appeal concerned the city council's approval of an adjustment to city
22 tree planting development standards for intervenor-respondent's (intervenor's)
23 application for a multi-family residential apartment complex. We denied
24 petitioner's three assignments of error and affirmed the city council's decision.
25 *Schulke v. City of Salem*, LUBA No 2024-038 (Sep 26, 2024). Respondent and
26 intervenor are the prevailing parties in this appeal.

27 **MOTION FOR ATTORNEY FEES**

28 On October 9, 2024, intervenor moved for an award of attorney fees in the
29 amount of \$40,460.41 pursuant to ORS 197.830(15)(b) and OAR 660-010-

1 0075(1)(d)(A) (Apr 1, 2024). On October 18, 2024, petitioner filed their response
2 to the motion for attorney fees.

3 ORS 197.830(15)(b) provides that LUBA “[s]hall award reasonable
4 attorney fees and expenses to the prevailing party against any other party who the
5 board finds presented a position or filed any motion without probable cause to
6 believe the position or motion was well-founded in law or on factually supported
7 information.” In considering a prevailing party’s motion for attorney fees and
8 expenses pursuant to ORS 197.830(15)(b), we look, first, to whether the party is
9 entitled to attorney fees and expenses and, second, to the reasonableness of the
10 amount of the requested attorney fees and expenses. For the reasons explained
11 below, we conclude that intervenor is not entitled to an award of attorney fees.

12 In determining whether to award attorney fees against a non-prevailing
13 party pursuant to ORS 197.830(15)(b), we must determine that “every argument
14 in the entire presentation [that the non-prevailing party made] to LUBA is lacking
15 in probable cause (*i.e.* merit).” *Fechtig v. City of Albany*, 150 Or App 10, 24, 946
16 P2d 280 (1997). A position is presented “without probable cause” for purposes
17 of ORS 197.830(15)(b) where “no reasonable lawyer would conclude that any of
18 the legal points asserted on appeal possessed legal merit.” *Contreras v. City of*
19 *Philomath*, 32 Or LUBA 465, 469 (1996). In applying the probable cause
20 standard, we “will consider whether any of the issues raised [by the non-
21 prevailing party] were open to doubt, or subject to rational, reasonable or honest
22 discussion.” *Id.* The probable cause standard is a relatively high hurdle, and that

1 hurdle is not cleared by simply showing that LUBA rejected all of a party's
2 arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776
3 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

4 In this appeal, petitioner challenged the city council's approval of an
5 adjustment under Salem Revised Code (SRC) 250.005(2)(d) that waived the
6 requirement in SRC 702.020(b)(2)(A) for intervenor to plant "[a] minimum of
7 one tree, not less than 1.5 inches in caliper, for every 30 linear feet of abutting
8 property width." Petitioner presented three assignments of error, and we denied
9 all of them and affirmed the city council's decision.

10 In the first and second assignments of error, petitioner challenged the city
11 council's decision to approve the adjustment to SRC 702.020(b)(2)(A) and
12 argued that the decision (1) was "not in compliance with" SRC 250.005(2)(d),
13 which is one of the SRC's general requirements for an adjustment; and (2)
14 misconstrued the purpose of SRC 702.020(b)(2), the landscaping development
15 standard. We denied the first and second assignments of error because petitioner
16 did not establish that the city council's interpretation of SRC 702.020(b)(2)'s
17 purpose was implausible, nor did they develop any argument that the city
18 council's interpretation was inconsistent with the express language of any
19 provision of the SRC. *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776
20 (2010); ORS 197.829(1). In the third assignment of error, petitioner argued that
21 the city council's decision was "not in compliance with SRC 250.005(a)(2)(E)
22 because, pursuant to SRC 110.060, the city is prohibited from approving an

1 adjustment to a development standard when a private easement restriction
2 precludes compliance with the standard.

3 Intervenor argues that an award of attorney fees is appropriate because all
4 three of petitioner's assignments of error were presented without probable cause
5 to believe they were well-founded in law in that "no reasonable lawyer would
6 conclude that any of the legal points asserted on appeal possessed legal merit."

7 Intervenor argues that petitioner's first assignment of error was lacking in
8 probable cause because it "(1) violate[d] the ancient canon [of *lex specialis*
9 *derogate legi general*] and ORS 174.020(2) by [basing their argument on an
10 inapplicable general provision of the SRC]; (2) fail[ed] to identify or address the
11 correct standard of review for a city council interpretation of its own code; (3)
12 fail[ed] to 'develop any argument' that the city council misinterpreted the code;
13 and (4) fail[ed] to cite a secondary standard of review for inadequate findings or
14 develop a findings argument." Motion for Attorney Fees 5. Regarding

15 petitioner's second assignment of error, intervenor argues that petitioner's
16 arguments were lacking in probable cause because they "argue[d] about an
17 irrelevant code chapter," and "fail[ed] to challenge the actual interpretation in the
18 decision." Motion for Attorney Fees 8. Regarding petitioner's third assignment
19 of error, intervenor argues that petitioner's arguments were lacking in probable
20 cause because (1) petitioners "argued for a prohibition that simply does not exist
21 in the code;" (2) "misrepresented what the application proposed and what the city
22 decided;" and (3) ignored an express provision which specifically allows the

1 adjustment sought. Motion for Attorney Fees 9-11. Additionally, intervenor
2 argues that petitioner solely sought reversal, and not remand, of the challenged
3 decision and therefore was required to demonstrate that each assignment, if
4 sustained, would allow LUBA to reverse the challenged decision, and that
5 petitioner did not do so. Intervenor argues that no reasonable lawyer would have
6 sought reversal without demonstrating that the city erred in one of the three ways
7 in which LUBA has provided by rule it will reverse a land use decision under
8 OAR 661-010-0071(1).

9 Petitioner argues in their response to intervenor's motion that they believe
10 all of the arguments presented in their three assignments of error raised issues
11 that "were open to doubt, or subject to rational, reasonable, or honest discussion."

12 Petitioner argues in response to the motion for attorney fees:

13 "While LUBA ultimately rejected the first assignment of error, the
14 petitioner's argument was nonetheless well founded in law, based
15 on a reasoned interpretation of (1) the text and context of the general
16 requirements for granting a Class 2 adjustment, (2) the text and
17 context of the adjustment criterion at issue (the 'equally or better
18 met' provision), (3) the text and context of the applicable
19 development standard, and (4) the city council's substantive
20 findings of fact and conclusions of law." Response to Motion for
21 Attorney Fees 3.

22 We conclude that at least one of petitioner's arguments passes the low
23 threshold for legal merit. In approving the adjustment, the city council found that
24 "[t]he proposed landscaping and the increased setback distance due to the BPA
25 easement provides screening and separation which meets the intent of [SRC

1 702.020(b)(2)].” Record 14. The city’s interpretation of the purpose of SRC
2 702.020(b)(2), the landscaping development standard, was not set out explicitly
3 in the decision. However, we explained:

4 “*Implicit in the city council’s finding is its conclusion* that the
5 purpose of SRC 702.020(b)(2) is to provide a buffer between multi-
6 family development and single family development, and that the
7 fence, with low shrubs planted in front of it, combined with the
8 distant location of the closest apartment building to petitioner’s
9 dwelling, * * * equally or better meets the purpose of SRC
10 702.020(b)(2) to provide a buffer between development through a
11 combination of screening and landscaping.” *Schulke*, LUBA No
12 2024-038 (slip op at 9) (emphasis added).

13 Petitioner offered an alternative interpretation of the purpose of SRC
14 702.020(b)(2) based on the express language of the provision, which was to
15 provide both a screening function and an aesthetic function. Petitioner argued
16 that an adjustment that eliminates the required landscaping in SRC
17 702.020(b)(2)(A) does not “equally or better meet” the purpose of the standard,
18 because it does not fulfill the *aesthetic* purpose of landscaping that petitioner
19 argued applied through a different provision in the SRC that also addresses
20 landscaping and screening. Although we rejected petitioner’s arguments, we
21 believe that petitioner’s alternative interpretation of the purpose of SRC
22 702.020(b)(2) was “subject to rational, reasonable, or honest discussion,”
23 particularly given the lack of an explicit interpretation in the city council’s
24 decision of the purpose of SRC 702.020(b)(2) and given that the purpose of the
25 SRC provision at issue is ambiguous. *Contreras*, 32 Or LUBA at 469.

We conclude that petitioner had probable cause to believe that at least one of the positions that they presented was well-founded in law. Accordingly, intervenor's motion for attorney fees is denied.

COST BILL

OAR 661-010-0075(1)(b)(D) (Apr 1, 2024) provides: “If an intervenor under OAR 661-010-0050 * * * is the prevailing party, the intervenor * * * may be awarded the cost of the fee to intervene * * *.” On October 1, 2024, intervenor moved for costs in the amount of their \$100 filing fee. Intervenor, the prevailing party in this appeal, is awarded their filing fee in the amount of \$100, to be paid by petitioner.

Dated this 27th day of February 2025.

H.M. Zamudio
Board Chair