

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 SAIGE TIMBER, LLC,
5 *Petitioner,*
6

7 vs.
8

9 LINN COUNTY,
10 *Respondent,*
11

12 and
13

14 CASEY A. MEADOWS,
15 *Intervenor-Respondent.*
16

17 LUBA No. 2023-075
18

19 ORDER

20 Petitioner appealed the county's approval of intervenor-respondent's
21 (intervenor's) application for two property line adjustments (PLAs). We affirmed
22 the county's decision. *Saige Timber, LLC v. Linn County*, LUBA No 2023-075
23 (Feb 2, 2024). The Court of Appeals affirmed our decision. *Saige Timber, LLC*
24 *v. Linn County*, 333 Or App 643 (2024) (nonprecedential memorandum opinion),
25 *rev den*, 373 Or 81 (2024).

26 **MOTION FOR ATTORNEY FEES**

27 Intervenor, a prevailing party, moves for an award of attorney fees in the
28 amount of \$44,355.50 pursuant to ORS 197.830(15)(b), which provides that the
29 Board "[s]hall award reasonable attorney fees and expenses to the prevailing
30 party against any other party who the [B]oard finds presented a position or filed

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

17 Petitioner challenged a board of commissioners’ decision that affirmed a
18 planning commission decision approving intervenor’s application for two PLAs.
19 Petitioner presented seven assignments of error. We denied all seven assignments
20 of error and affirmed the county’s decision. Intervenor argues that an award of
21 attorney fees is appropriate because petitioner presented all seven assignments of

1 error without probable cause to believe that they were well-founded in law or on
2 factually supported information.

3 Petitioner responds that its first, third, and seventh assignments of error
4 were “reasonable and presented with probable cause while addressing issues that
5 were open to doubt, debate, and honest discussion.” Response to Motion for
6 Attorney Fees 1-2. For the reasons explained below, we conclude that petitioner’s
7 first and seventh assignments of error meet the low threshold for probable cause,
8 and deny intervenor’s motion for attorney fees. We do not consider whether the
9 third assignment of error meets that standard.

10 **A. First Assignment of Error**

11 In its first assignment of error, petitioner argued the board of
12 commissioners misconstrued Linn County Code (LCC) 921.220(C) and ORS
13 215.427, and failed to follow applicable procedures in a manner that prejudiced
14 petitioner’s substantial rights, by affirming the planning commission’s decision
15 without holding a *de novo* appeal hearing before the board.¹ We held that

¹ As explained in our Final Opinion and Order, “ORS 215.427 required the county to make a final decision on intervenor’s PLA application within 150 days after the application was deemed complete on September 27, 2022. ORS 215.427(1); Record 3. That 150-day period could be extended up to a maximum of 215 additional days. ORS 215.427(5). The 150-days deadline passed on February 24, 2023, and the final deadline for the county’s final decision, after the maximum allowed extensions, was September 27, 2023.

“[LCC] 921.220(C) provides:

1 petitioner had failed to establish any prejudice to a substantial right where the
2 planning commission issued its decision after holding a *de novo* hearing and the
3 board affirmed the planning commission’s decision without holding a second *de*
4 *novo* hearing. Because we denied this assignment of error based on petitioner’s
5 failure to show prejudice to a substantial right, we did not reach petitioner’s
6 argument that the board of commissioners misconstrued LCC 921.220(C) or ORS
7 215.427.

8 Intervenor points out that, under our statutory standard of review, a
9 petitioner must establish that the alleged error prejudiced their rights to obtain
10 reversal or remand on a procedural error. ORS 197.835(9)(a)(B). Intervenor
11 argues that petitioner’s first assignment of error lacked probable cause because
12 petitioner provided no evidence that the board’s failure to hold a *de novo* hearing
13 caused any prejudice to petitioner’s substantial rights.

14 Petitioner argued that they are entitled to a *de novo* hearing before the
15 board of commissioners and a decision on the merits from the board, and that the

“‘Notwithstanding any provision in this Code to the contrary, if a time limitation is about to expire and a final decision has not been made, or if the Commission has made a decision and a time limit is about to expire, the Board may enter an order affirming the findings and conclusion of the Commission without conducting any further hearings.’

“On September 26, 2023, the board issued its decision affirming and adopting the planning commission decision without holding a hearing.” *Saige Timber, LLC*, LUBA No 2023-075 (slip op at 5).

1 board's failure to provide a *de novo* hearing and a substantive decision were
2 inherently prejudicial. Petitioner argued that petitioner was denied an opportunity
3 to "bring [petitioner's] concerns and arguments against the [planning
4 commission's] [d]ecision in the oversight forum of the [board] as provided by the
5 LCC and protect [p]etitioner's substantial property rights." Petition for Review
6 13. We rejected that argument. Nevertheless, petitioner argues that that argument
7 was open to reasonable debate and discussion. We agree.

8 Intervenor does not argue or establish that petitioner's misconstruction of
9 law argument lacked probable cause. We did not decide that issue, but assumed
10 *arguendo* that LCC 921.220(C) provides petitioner a procedural right to a *de novo*
11 hearing before the board. Petitioner's argument that it suffered *per se* procedural
12 prejudice because it was entitled to but did not receive a *de novo* hearing before
13 the local governing body was open to reasonable debate and discussion to a
14 sufficient extent to avoid an attorney fee award.

15 **B. Seventh Assignment of Error**

16 In its seventh assignment of error, petitioner argued that the county's
17 findings of compliance with the code requirement that a PLA "shall not result in
18 a property size which would alter the stability of the land use pattern in the area,"
19 were not supported by substantial evidence and were inadequate. LCC
20 925.350(B)(7). Petitioner argued that the PLAs "will alter the stability of the land
21 use pattern of the area" by creating an unusually small 6.85-acre parcel, removing
22 tax incentives for maintaining that parcel as small-tract forestland, and

1 eliminating the requirement that the owner of that parcel submit tree stocking
2 reports.

3 We reasoned that “[t]he county evaluated the surrounding properties and
4 analyzed average property size, uses, and approved dwellings from which the
5 county could reasonably conclude that the PLAs would not alter the stability of
6 the land use pattern of the area,” notwithstanding that the PLAs resulted in the
7 creation of a small, 6.85-acre lot. *Saige Timber, LLC*, LUBA No 2023-075 (slip
8 op at 17). We held that petitioner’s arguments did not provide bases for remand
9 under the substantial evidence or inadequate findings standards because
10 petitioner did not explain why, based on the evidence that the county considered,
11 a reasonable decision maker could not reach the decision that it did, and did not
12 explain why the findings were inadequate but, rather, disagreed with the
13 conclusion reached in those findings. *Id.* (slip op at 18).

14 Intervenor argues that LUBA precedent has “set the standard for what
15 constitutes substantial evidence and adequate findings,” and “[p]etitioner’s
16 failure to provide any evidence meeting the clear standards set out by th[o]se
17 cases demonstrates that [p]etitioner took a position lacking all legal merit.”
18 Motion for Attorney Fees 10.

19 Petitioner responds that petitioner argued that the evidence that the county
20 relied on was not “substantial” such that a reasonable person would rely upon it
21 to determine that the PLAs would not “alter the stability of the land use pattern”
22 based on the resulting parcel configuration and petitioner’s assertion that the

1 resulting configuration will “alter the stability of the land use pattern.” We agree
2 with petitioner that that argument meets the low threshold for probable cause.

3 We conclude that petitioner had probable cause to believe that the positions
4 it presented in its first and seventh assignments of error were well-founded in
5 law. ORS 197.830(15)(b). Accordingly, intervenor’s motion for attorney fees is
6 denied.

7 **COSTS**

8 Intervenor requests an award of costs in the amount of \$212.35, including
9 the \$100 intervention filing fee, \$21.45 for postage, and \$90.90 for legal database
10 research. OAR 661-010-0075(1)(b) (Aug 1, 2022) provides that “[c]osts may be
11 recovered only for the items set forth in this subsection,” which do not include
12 postage or legal research database costs. Accordingly, intervenor may not recover
13 its costs for those items. Intervenor is awarded the cost of their \$100 intervention
14 filing fee, to be paid by petitioner. OAR 661-010-0075(1)(b)(D) (Aug 1, 2022).

15 Dated this 5th day of August 2025.
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21 H. M. Zamudio
Board Chair