BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

T.J. SCHAFFER,
Petitioner,

vs.

CITY OF TURNER,
Respondent,

and

RIVERBEND SAND AND GRAVEL,
Intervenor-Respondent.

LUBA No. 98-104

ORDER ON MOTION FOR ATTORNEY FEES

Intervenor-respondent (intervenor) moves for an order awarding its attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(14)(b)[1], which provides:

> "[t]he 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, this Board must 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 Or App 10, 24, 946 P2d 280 (1997). This Board has held that "a position without probable cause" under ORS 197.830(15)(b) is presented 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). The probable cause standard creates a low threshold. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

[1] ORS 197.830(14)(b) was renumbered ORS 197.830(15)(b) following the 1999 legislative session.

Intervenor contends that every position that petitioner asserted lacked a reasonable basis in law or fact. Intervenor argues that petitioner repeatedly filed motions that were "outside the scope of reasonable practice before this Board," and that this Board's order denying those motions held them to be wholly without merit. Memorandum in Support of Petition for Attorney Fees 2. Intervenor contends that the petition for review suffered from defects in both service on intervenor and conformance with the format set forth in this Board's rules at OAR 661-010-0030. Moreover, intervenor contends that the assignments of error were insufficiently developed to allow review and failed to articulate a legal basis for remand or reversal. Intervenor argues that "[t]here is no debate; or doubt; or reasonable conflict; or interpretation; or issue of first impression; or any other decision made by LUBA in this case, except that the positions of Petitioner were palpably frivolous." *Id*. at 7.

This Board's decision in this case stated:

> "Petitioner makes eleven assignments of error, none of which articulate a legal basis for relief under ORS 197.835. Rather, petitioner repeatedly expresses his disagreement both with the challenged decision, and with processes and agreements between the applicant and the city that are not reflected in the record of this appeal and that are unrelated or, at most, tangentially related to the challenged decision. For the most part, petitioner's arguments are insufficiently developed to allow review. To the extent we understand them, they provide no basis for remand or reversal.
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> "In his first, second and third assignments of error, petitioner asserts 'procedural irregularities,' public notice deficiencies, and deficiencies in the notice provided to the Department of Land Conservation and Development. As we understand them, some of the 'irregularities' and 'deficiencies' he asserts could potentially relate to quasi-judicial applications, which are not applicable in this legislative proceeding. To the extent they can be construed to apply to this legislative proceeding, none of the allegations establish legal error.
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> "In his fourth assignment of error, petitioner appears to assert an argument relating to the city allegedly maintaining a road outside the city limits, and perhaps challenging intervenor's apparent agreement to pay for road improvements. The fifth assignment of error appears to be an evidentiary challenge, or perhaps a challenge to the applicability of unspecified criteria as they relate to evidence proffered by a hydrologist. In the sixth assignment of error, petitioner appears to allege that the decision is deficient in its

> consideration of public health and safety. In none of these assignments of error does petitioner relate his disagreements to any legal standard, or establish any legal error in the challenged decision.
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> "Finally, in the seventh through eleventh assignments of error, petitioner makes challenges relating to: (1) the adequacy of the city's record and decision; (2) the impartiality of the decision makers; (3) the alleged 'disproportionate and prejudicial administration of public assets,' Petition for Review 32; (4) compliance with Statewide Planning Goal 2; and (5) the alleged lack of a 'clear and consistent policy' for the applicability of 'some rules and statewide goals.' Petition for Review 33. In none of these assignments does petitioner establish any legal basis for relief." *Schaffer v. City of Turner*, 35 Or LUBA 350, 351-52 (1998).

The Board denied petitioner's assignments of error. *Id.* at 352.

Pursuant to OAR 661-010-0075(1)(f), petitioner objects to the petition for attorney fees on the grounds that an award is not merited in this appeal and that the amount sought is unreasonable. As a threshold issue, petitioner also contends that intervenor is not a prevailing party eligible to receive an award of attorney fees under ORS 197.830(15)(b).

Petitioner contests whether intervenor can be the prevailing party. Petitioner reasons that intervenor could prevail, but only to the extent that intervenor sought relief that differed from the relief sought by respondent. Petitioner argues that respondent did not appear before this Board and therefore was not eligible to recover any costs. Because intervenor sought no relief that differed from that sought by respondent, petitioner concludes that "Intervenor's case was a demurrer" and there is no prevailing party. Reply to Request for Attorney Fees 26. We disagree. As a general rule, this Board considers a respondent or intervenor-respondent to be a prevailing party when a decision is affirmed or the appeal dismissed. *Mackie v. Linn County*, 17 Or LUBA 1013, 1014 (1988). This Board has awarded attorney fees to an intervenor under circumstances similar to those presented here. *Squires v. City of Portland*, 33 Or LUBA 783, *aff'd* 149 Or App 436, 942 P2d 303 (1997); *Crist v. City of Beaverton*, 32 Or LUBA 495 (1997); *New v. Clackamas County*, __ Or LUBA ___ (LUBA No. 95-197, Order on Petition for Attorney Fees and Cost Bill, November 18, 1996). Where no circumstances indicate otherwise, an intervenor may be a prevailing party under ORS

197.830(15)(b). *See Pfeifer v. City of Silverton*, 33 Or LUBA 869, 870 (1997) (holding intervenor to be the prevailing party where petitioner voluntarily dismissed appeal).

On the merits of awarding attorney fees, petitioner argues:

> "While LUBA was unpersuaded to remand this case, both facts and legal reasoning requested in ORS 197.830([15])(b) are presented, and a reason to award Attorney Fees, is not.
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> "* * * * *
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> "Petitioner agrees, Intervenor is generally entitled to request Attorney Fees. Petitioner asks that the request be denied, because it neither satisfies legal requirements, nor does it serve public purpose to grant Attorney Fees in this matter." Reply to Request for Attorney Fees 2-3.

Petitioner proceeds to set out "a few examples of facts that have supported this appeal and thus satisfied the expectation inherent to ORS 197.830([15])(b)." *Id.* at 4-15. Petitioner also contends that his appeal was well-founded in law. *Id.* at 15-23. Petitioner concludes that intervenor should not be awarded attorney fees because petitioner "met and exceeded the test at ORS 197.830([15])(b)." *Id.* at 29. We turn to an analysis of whether "any of the issues raised in petitioner's appeal were open to doubt, or subject to rational, reasonable or honest discussion." *Contreras*, 32 Or LUBA at 469.

Petitioner's contention that his appeal presented a position with probable cause to believe the position was well-founded on factually supported information suffers from a defect that was present in his petition for review. That is, some of the factual information that petitioner relies on in his arguments is not contained in the record before this Board. ORS 197.835(2)(a) provides that this Board's review "shall be confined to the record." Petitioner nevertheless argues:

> "Petitioner presented and referred many facts that do bear on the specific matters at issue and could provide probable cause to consider remand of Respondent's land use decision. Even Intervenor's Petition * * * admits Petitioner presented facts.
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> "Intervenor and Respondent suppressed access to facts by deflecting citizen inquiries and also by opposing Petitioner's wish to rely on public documents

> and records of Respondent, *not included* in the LUBA RECORD. As more facts emerge, probable cause in support of this appeal seems to increase, rather than decrease. In Petitioner's view, suppression of public records, like municipal resolutions, is a special case of probable cause to appeal." Reply to Request for Attorney Fees 4 (emphasis added).

Regardless of the merits of petitioner's contention about the existence, relevance and availability of factual information that bears on this appeal, but that is not contained in the record, this Board may not ignore its statutory mandate to confine its review of the local government's decision to that record. ORS 197.835(2)(a).

Petitioner does contend that some of the factual information upon which he based his positions before this Board is in the record. However, petitioner failed to use such information within the record to articulate a legal position on appeal that possessed legal merit. To avoid attorney fees under ORS 197.830(15)(b), a nonprevailing party must present at least one position that is well-founded in law and on factually supported information. Therefore, we believe that an award of attorney fees is appropriate in this case. Petitioner failed to present a position in this appeal that had a sufficient legal basis to satisfy the statutory attorney fees requirement. This Board's resolution of each of petitioner's preliminary motions and the assignments of error in the petition for review shows that petitioner failed to raise any issue that was debatable, open to reasonable discussion, or required legal analysis or explanation by this Board. Petitioner presented no position or argument that a reasonable lawyer would have raised.[2] Petitioner concedes that:

> "Intervenor correctly states, LUBA found Petitioner arguments undeveloped from a legal point of view. LUBA did articulate that point of view. Development of a legal issue has little to do with probable cause to appeal. Probable cause has to do with, 'we know we have some policy problems', and development of legal issues has to do with words and forms." Reply to Intervenor Memorandum 4.

[2]Although petitioner appeared *pro se,* we apply the "reasonable lawyer" standard from *Contreras* to *pro se* petitioners and lawyers alike. *Squires*, 33 Or LUBA at 785.

We disagree that noting "some policy problems" is a position that meets the probable cause standard of ORS 197.830(15)(b). It is not this Board's function to supply the legal arguments or analysis necessary to present an assignment of error that is debatable, open to reasonable discussion, or requires legal analysis or explanation by this Board. *See Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220 (1982) (stating principle).

We turn to petitioner's contention that the amount of attorney fees sought is unreasonable. Petitioner argues that portions of intervenor's charge record consist of advice to respondent that does not have anything to do with intervenor or intervenor's LUBA appeal. Petitioner objects that "Respondent was unrepresented in the appeal, presented no cost recovery request, and the inclusion of research and document preparation for [respondent's employee] appears irrelevant to the appeal and is impertinent[.]" Reply to Request for Attorney Fees 26. Petitioner also objects to the inclusion of costs that reflect "an unsuccessful effort to obtain settlement outside of the LUBA appeal process." *Id*. at 27.

This Board has held that although ORS 197.830(15)(b) makes an award of attorney fees mandatory where the Board finds that an appeal is not supported by probable cause, the Board is afforded the discretion to determine what amount of attorney fees is "reasonable" under the specific facts of the case. *Young v. City of Sandy*, 33 Or LUBA 817, 819 (1997). In determining what award of attorney fees is "reasonable" in any case in which this Board awards attorney fees, this Board will briefly identify the relevant facts and legal criteria on which it relies in awarding attorney fees. *See McCarthy v. Oregon Freeze Dry, Inc*., 327 Or 84, 96*, on recons* 327 Or 185, 957 P2d 1200 (1998) (stating principle).

We agree with petitioner that the portion of time that intervenor spent counseling respondent's employees or providing legal assistance to respondent in this matter is not appropriate for an award of attorney fees in this circumstance. Respondent did not move for an award of attorney fees under OAR 661-010-0075(1)(a). Portions of the statement of the

amount of attorney fees sought that we are able to identify as services provided to respondent are denied.

Petitioner's objection to the inclusion of fees requested for efforts to obtain settlement outside of the LUBA appeal process is also well-taken. ORS 20.075(2) provides a list of factors that a court must consider in determining the amount of an award of attorney fees in cases in which the court has discretion to award attorney fees. LUBA will look to the factors provided in ORS 20.075 for guidance when determining the amount of an award of attorney fees when the Board awards fees pursuant to ORS 197.830(15)(b). ORS 20.075(1)(f) requires a court to consider "[t]he objective reasonableness of the parties and the diligence of the parties in pursuing settlement of the dispute." ORS 20.075(1)(h) requires the consideration of "other factors" that are considered "appropriate under the circumstances of the case." One of the factors we consider is the legislative policy espoused in ORS 197.805 that "time is of the essence in reaching final decisions in matters involving land use." Encouraging parties to a land use appeal to pursue settlement of their dispute furthers that legislative policy. *Cf.* ORS 197.010(2) (encouraging the use of alternative dispute resolution techniques to resolve conflicts in land use planning). A number of factors influence a party's decision concerning whether to pursue settlement or alternative dispute resolution. We believe that a possibility that a party could be required to pay both the party's own fees and costs and the other party's fees and costs in pursuing settlement or alternative dispute resolution would provide a potentially significant disincentive to pursuing those options. We do not believe an award of attorney fees under ORS 197.830(15)(b) should provide such a disincentive.[3] We agree with petitioner that the Board should not consider the fees incurred in the pursuit of settlement of this case when determining the reasonable amount of an award of attorney fees.

[3]Consistent with this principle, in *Young* the Board considered the city's failure to attempt to resolve that dispute through formal mediation, to reduce the award of attorney fees in that case. 33 Or LUBA at 819.

We have analyzed the detailed statement of the amount of attorney fees sought by intervenor in this case. Intervenor's statement states that 90.5 total hours were spent on this appeal. Petitioner analyzes that statement and argues that 34 hours went into the preparation of this case by intervenor. However, petitioner only contests 48.6 hours that he argues either went toward legal services to respondent (19.4 hours) or the effort to obtain settlement outside of the LUBA appeal process (29.2 hours). Hence, petitioner states no specific challenge to 41.9 hours detailed in the statement of the amount of attorney fees sought. Having considered the foregoing and the reasonableness of the fees charged for legal services, we conclude that $6,500 is a reasonable award of attorney fees in this matter.

ORS 197.830(15)(b) requires the Board to "award reasonable attorney fees and expenses" under circumstances present in this appeal. In the petition for attorney fees, intervenor seeks $146.22 in total expenses. Petitioner objects to the reasonableness of $111 of copy costs. We hold that the challenged copy costs are reasonable. However, because we denied the requested attorney fees that were incurred to provide services to respondent, we likewise deny those expenses that we are able to identify as incurred to provide services to respondent. The mileage expenses on June 22 and 23, 1998, totaling $12.90, are denied.

Intervenor's motion for attorney fees and expenses is granted in the amount of $6,633.32.

Dated this 25th day of April, 2000.

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Tod A. Bassham
Board Chair