

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

3
4 6710 LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2001-069

13 ORDER ON MOTION FOR ATTORNEY FEES

14 Petitioner moves for an award of attorney fees pursuant to OAR 661-010-
15 0075(1)(e)(A) and ORS 197.830(15)(b), which provides:

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

20 In determining whether to award attorney fees against a nonprevailing party, we must
21 determine that “every argument in the entire presentation [that a nonprevailing party] makes
22 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). Under ORS 197.830(15)(b), a position without probable
24 cause is presented where “no reasonable lawyer would conclude that any of the legal points
25 asserted on appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465,
26 469 (1996). The probable cause standard is a relatively low standard. *Brown v. City of*
27 *Ontario*, 33 Or LUBA 803, 804 (1997).

28 Petitioner appealed a city decision that purported to correct an error in an existing city
29 zoning map. The city corrected the error without formally amending the zoning map. The
30 city’s code allows the zoning map to be corrected through the administrative process that the
31 city followed when, as applicable here, the “line on the [zoning] map does not match the
32 legal description or map shown or referenced in the ordinance which applied the

1 designation.” Portland City Code (PCC) 33.855.070(A)(3). The city relied on “older mylar
2 versions” of the zoning map to support its decision to correct the current zoning map.
3 Record 9. In its only assignment of error, petitioner alleged that the city’s findings of
4 compliance with PCC 33.855.070(A)(3) were inadequate and unsupported by substantial
5 evidence.¹ We agreed with petitioner in all respects:

6 “First, the challenged decision seems to say that it is correcting the zoning
7 map to conform to the earlier mylar versions of the zoning map. However,
8 neither those older mylar maps nor prints from those mylar maps are included
9 in the record. Therefore, even if the referenced ‘older mylar versions of the
10 maps’ were the proper maps to consult in applying PCC 33.855.070(A)(3), the
11 challenged decision would not be supported by substantial evidence.

12 “Second, PCC 33.855.070(A)(3) requires that the city compare the existing
13 zoning map with (1) the legal description in the ordinance that originally
14 applied the zoning designation or (2) the map that is ‘shown or referenced’ in
15 that original ordinance. The ordinance that adopted the EG2 zone is not
16 included in the record. Neither does the record include the legal description or
17 the map that was adopted by that ordinance to establish the location of the
18 zoning district boundaries in this area. We note that the emphasized language
19 in the above-quoted findings strongly suggests that the ‘older mylar versions
20 of the zoning map’ are not themselves the ‘map shown or referenced in the
21 ordinance which applied the [zoning] designation.’ In summary, as far as we
22 can tell from the parties’ arguments and the decision itself, the map that must
23 be consulted under PCC 33.855.070(A)(3) was not consulted and is not
24 included in the record.” ___ Or LUBA ___ (LUBA No. 2001-069, September
25 17, 2001), slip op 3-4 (footnotes omitted).

26 As we explained in our final opinion in this matter, the central error in the city’s
27 decision is that the city did not compare the existing zoning map with the zoning map or
28 legal description that was included with the original zoning legislation, as is required by PCC

¹ The challenged decision included the following explanatory findings:

“A memorandum from the Bureau of Planning indicates that older mylar versions of the zoning map generally indicate that the zoning line was placed 100 feet west of N. Edison but that the newer digitized map indicate[s] a jog in the line approximately 250 feet south of [the] N. Reno [intersection with N. Edison]. The digitized maps were based on the older mylar versions of the maps. The map error correction is being made so that the digitized map will match the mylar maps on which the digitized maps are based. Earlier mylar versions of the map more accurately portray the intended location of the zone line at the time the zone line was established.” Record 9.

1 33.855.070(A)(3) to administratively correct the existing zoning map. That central error in
2 the city’s findings is compounded by the city’s failures to include in the evidentiary record
3 either the zoning map or legal description that the city was required to consult under PCC
4 33.855.070(A)(3) or the “earlier mylar versions of the map” that the city apparently in fact
5 consulted in making its decision. Petitioner assigned error based on these inadequacies in the
6 city’s findings and the evidentiary record. The city’s brief did not directly respond to
7 petitioner’s allegations of error. Rather, the city’s brief simply quoted the findings in the
8 decision that apply the unidentified older mylar versions of the zoning map and argued that
9 the record is adequate because it includes an older undated paper copy of a zoning map that
10 shows the disputed property.

11 The response brief essentially fails to respond to petitioner’s findings and evidentiary
12 challenge. To the extent the city’s brief can be read to offer a response to petitioner’s
13 assignment of error, we hold that no reasonable lawyer would conclude that the argument
14 that is presented in the city’s brief has merit. Therefore, petitioner is entitled to its reasonable
15 attorney fees and expenses pursuant to ORS 197.830(15)(b).

16 In awarding attorney fees pursuant to ORS 197.830(15)(b), LUBA is afforded
17 discretion to determine the amount of attorney fees that is reasonable under the specific facts
18 of the case. *Young v. City of Sandy*, 33 Or LUBA 817, 819 (1997). LUBA will look to the
19 factors listed in ORS 20.075(2) for guidance in determining the amount of an attorney fee
20 award. *Schaffer v. City of Turner*, 37 Or LUBA 1066, 1072 (2000). In determining what
21 award of attorney fees is reasonable, we must briefly identify the relevant facts and legal
22 criteria on which we rely. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 96, *on*
23 *recons* 327 Or 185, 957 P2d 1200 (1998) (stating principle).

24 In the present case, although the city filed a response to petitioner’s motion for
25 attorney fees, it did not challenge petitioner’s statement of attorney fees and expenses. While
26 we independently review attorney fee statements for reasonableness, the failure of an

1 opposing party to contest such statements is at least some indication that the attorney fees
2 sought are reasonable. We have analyzed petitioner’s attorney fee statement, which seeks
3 recovery of 33.5 attorney hours billed. We agree with petitioner that 33.5 hours is a
4 reasonable amount of time to have spent in pursuing this LUBA appeal.²

5 We do not, however, find that the hourly rates sought by petitioner are reasonable
6 under the circumstances. One of the factors we consider in determining whether the attorney
7 fees sought are reasonable is “[t]he fee customarily charged in the locality for similar legal
8 services.” ORS 20.075(2)(c). We believe the burden is on the party seeking attorney fees,
9 even in the absence of an objection from the opposing party, to establish that the requested
10 rates are reasonable. Petitioner seeks an hourly rate of \$200 per hour for the associate who
11 performed most of the required legal services and \$285 per hour for the partner who
12 supervised the appeal, but provides no evidence or argument that those rates are consistent
13 with community standards. Neither does petitioner provide any justification for why it
14 should be entitled to rates in excess of the community standard.

15 From petitioner’s attorney fee statement it appears that the associate with the firm that
16 represented petitioner has a 1993 bar number, and therefore has nine years of legal
17 experience. It appears that the supervising partner has a 1975 bar number, and therefore has
18 27 years of legal experience. We assume that both attorneys have been practicing law since
19 they became members of the Oregon State Bar. Without any additional information,
20 however, regarding their experience and expertise, there is no justification for awarding an
21 hourly rate that is significantly higher than the average fee customarily charged in the locality
22 for similar services.

23 The Oregon State Bar 1998 Economic Survey (1998 survey) describes various billing
24 rates throughout the state based upon years of experience and practice area. We believe the

² We find that the expenses sought by petitioner in its motion for attorney fees, in the amount of \$78.31, are also reasonable.

1 1998 survey is an accurate indicator of fees customarily charged in a local community.
2 According to the 1998 survey, the average hourly rate for Portland attorneys with seven to
3 nine years of experience was \$141 per hour, and the hourly rate for Portland attorneys with
4 21-30 years of experience was \$178 per hour. Making allowance for reasonable rate
5 increases since the 1998 survey, we believe an hourly rate of \$160 per hour for the associate
6 and \$200 per hour for the partner is reasonable under these circumstances.³

7 Petitioner's motion for attorney fees and expenses in the amount of \$5,578.31 is
8 granted.⁴ Petitioner is also awarded the cost of its filing fee, in the amount of \$175, to be
9 paid by respondent, making the total award against respondent \$5,753.31. The Board will
10 return petitioner's \$150 deposit for costs.

11 Dated this 4th day of February, 2002.
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18 _____
19 Michael A. Holstun
Board Member

³ We believe these rates are also consistent with the 1998 survey's average hourly rate for real estate/land use attorneys, which was \$167 per hour in 1998.

⁴ The total is derived as follows: the associate, 30 hours at \$160 per hour; the partner, 3.5 hours at \$200 per hour; and \$78.31 in expenses.