BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLEN PYNN and JOHN MILLER,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent.

LUBA No. 2002-003

ORDER

Before us are the city's motion for attorney fees and cost bill.

MOTION FOR ATTORNEY FEES

The city is the prevailing party in this appeal and moves for an award of attorney fees against petitioners 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, 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*, 150 Or App 10, 24, 946 P2d 280 (1997). We have 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 that a nonprevailing party must meet to avoid an award of attorney fees is not an exacting standard. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)

Petitioners appealed the city's decision denying their application for design review approval and a natural drainage way permit for construction of an office building. After

filing their notice of intent to appeal, petitioners filed a motion to take evidence outside of the record. The city objected to the motion, and we eventually denied the motion as premature. *Pynn v. City of West Linn*, ___ Or LUBA ___ (LUBA No. 2002-003, Order, April 2, 2002). Petitioners subsequently moved to dismiss the appeal, and we granted the request. *Pynn v. City of West Linn*, ___ Or LUBA ___, (LUBA No. 2002-003, April 22, 2002). This motion followed.[1]

Petitioners' motion to take evidence consisted of their request to submit numerous affidavits, to depose various members of city staff and government, and to order the city to produce various documents. The city opposed the motion on numerous grounds. We denied the motion as premature stating that we were not persuaded that we should deviate from our general approach of denying such motions until the parties' briefs have been filed:

> "Petitioners allege a large and diverse array of facts not found in the record, supported by the five affidavits attached to their motion. The city apparently does not dispute some of the alleged facts, but controverts others, as supported by the nine affidavits attached to its response. Petitioners' legal arguments based on those alleged facts are not developed to the extent they presumably will be in the petition for review. Such developed legal arguments may not always be necessary to prevail in a motion to take evidence under OAR 661-010-0045. However, proceeding to resolve the motion with the benefit of such developed argument, under circumstances that better clarify which of the many alleged facts are disputed, is more consistent with our statutory directive

[1] Both parties assume that arguments petitioners make in their motion to take evidence constitute "present[ing] a position" for purposes of ORS 197.830(15)(b). That assumption is open to at least some question. Our prior cases considering attorney fees under ORS 197.830(15)(b) have invariably focused on "positions" parties present regarding the essential elements of an appeal, such as jurisdiction or the merits of whether the challenged decision should be affirmed, reversed or remanded. That is consistent with LUBA's and the Court of Appeals' interpretation of ORS 197.830(15)(b), that the statute is intended to discourage "frivolous" appeals. *Fechtig*, 150 Or App at 26. We have not had occasion to consider whether positions presented on procedural or ancillary matters, such as record objections or a motion to file a reply brief, are included in the calculus that is required by ORS 197.830(15)(b). One can argue that the intent of the statute is not served if a party whose entire presentation on the merits is patently "frivolous" can nonetheless avoid an award of attorney fees because the party happened to present a meritorious position with respect to a procedural matter such as a motion to file a reply brief. Similarly, one can argue that a party whose *only* presentation is on an ancillary matter, for example a local government that involves itself in an appeal only by responding to record issues, should not be subject to the possibility of attorney fees under the statute. Of course, even if procedural or ancillary matters are not properly subject to the ORS 197.830(15)(b) calculus, it is arguable that a motion to take evidence is not such a matter. Having noted these issues, however, we do not further consider them here. For purposes of this order, we assume, without deciding, that the arguments petitioners presented in their motion to take evidence are subject to ORS 197.830(15)(b).

at ORS 197.805 that 'time is of the essence in reaching final decisions' in land use matters, than would be proceeding to resolve the motion in its current posture." *Pynn*, Order, slip op 4.

The city alleges that petitioners' motion did not allege sufficient grounds to justify considering evidence outside of the record. OAR 661-010-0045(1) provides the grounds for taking evidence outside of the record:

> "* * * The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, ex parte contacts, actions for the purpose off avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. * * *"

Petitioners' motion to take evidence involved disputed factual allegations concerning the constitutionality of the decision, actions for the purpose of avoiding the requirements of 227.178, and other procedural irregularities not shown in the record. All of these are sufficient grounds for filing a motion to take evidence. The grounds petitioners alleged in filing the motion to take evidence were adequately stated.

The crux of the city's argument for attorney fees is that no reasonable lawyer would have filed a motion to take evidence before the briefs had been filed. While the city is correct that our general practice is to deny such motions as premature until the parties' briefs have been filed, we have also stated that there are exceptions.

> "Respondent is * * * correct that OAR 661-010-0045(1) states that the disputed allegations justifying a request for evidentiary hearing must appear 'in the parties' briefs * * *.' However, as we stated in *Citizens Concerned v. City of Sherwood*, [20 Or LUBA 550, 555 n 8 (1991)]:
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> > '* * * The purpose of this requirement is not to present an absolute requirement that the parties provide their justification for an evidentiary hearing in their *briefs*, but rather to assure provision of a sufficiently detailed basis for delaying our review, in advance of the evidentiary hearing.' (Emphasis in original).
>
> "Thus, whereas it is not essential that the parties' briefs be filed prior to the filing of a motion for evidentiary hearing, it is frequently the case that a moving party will best be able to explain why the facts it seeks to present will affect the outcome of the Board's review after the parties' legal arguments

have been presented in detail in the parties' briefs." *Berg v. Linn County*, 21 Or LUBA 622, 623 n 1 (1991).[2]

As we stated in our order denying the motion to take evidence, we were not persuaded that the case warranted departure from our general approach. However, the circumstances in the present case are of the type more likely to result in such a departure. Unlike situations where a party is in possession of evidence and only seeks to introduce it, the present case also involved a request for depositions and production of documents for the purpose of obtaining evidence to be used in support of the petition for review.

When a party requests the Board's assistance in *obtaining* evidence as well as allowing it to be introduced, sound principles of judicial review may dictate deciding the motion before the briefs are filed. Although we did not find the present case to be such a situation, it cannot be said that petitioners' motion was without probable cause so that no reasonable lawyer would conclude the motion had merit.

The city's motion for attorney fees is denied.

COST BILL

The city filed a cost bill requesting award of the cost of preparing the record, in the amount of $149.40. Petitioners do not object to the city's cost bill. Respondent is awarded

[2] We do not see that the subsequent amendments to OAR 661-010-0045 abolish the exceptions to our general rule.

the cost of preparing the record, in the amount of $149.40, to be paid from petitioners' deposit for costs.

Dated this 6th day of June, 2002.

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Tod A. Bassham
Board Member