

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

3
4 BRIAN ROGERS and MICHELLE ROGERS,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF EAGLE POINT,
10 *Respondent,*

11 and

12
13 WINFALL, LLC,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2002-030
17

18 ORDER ON MOTION FOR ATTORNEY FEES

19 Petitioners move for an award of attorney fees pursuant to OAR 661-010-
20 0075(1)(e)(A) and ORS 197.830(15)(b), which provides:

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

25 In determining whether to award attorney fees against a nonprevailing party, we must
26 determine that “every argument in the entire presentation [that a nonprevailing party] makes
27 to LUBA is lacking in probable cause (*i.e.*, merit).” *Fechtig v. City of Albany (A97764)*, 150
28 Or App 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position without probable
29 cause is presented where “no reasonable lawyer would conclude that any of the legal points
30 asserted on appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465,
31 469 (1996). The probable cause standard is a relatively low standard. *Brown v. City of*
32 *Ontario*, 33 Or LUBA 803, 804 (1997).

33 Petitioners appealed the city’s decision approving intervenor’s tentative subdivision
34 master plan on property adjacent to petitioners’ subdivision. Petitioners were concerned

1 with a proposal to develop an existing vacant lot in petitioners' subdivision into a local street.
2 Petitioners' property is less than 100 feet from the vacant lot proposed to be developed as a
3 local street, but petitioners did not receive notice of the public hearing or decision on the
4 tentative master plan application. Petitioners filed their notice of intent to appeal more than
5 21 days after the decision approving the tentative master plan was final. Petitioners,
6 however, asserted that they timely appealed the decision within 21 days of finding out about
7 the decision. ORS 197.830(3). The parties filed numerous pleadings, including a motion to
8 dismiss by intervenor arguing that the appeal was not timely filed because petitioners had
9 actual knowledge of the decision more than 21 days before they filed their appeal. The
10 motion to dismiss was denied, and petitioners filed their petition for review. On the day the
11 response brief was due, the city and intervenors moved for a voluntary remand. We
12 remanded the decision over the objections of petitioners. *Rogers v. City of Eagle Point*, ___
13 Or LUBA ___ (LUBA No. 2002-030, September 5, 2002). Petitioners now seek attorney
14 fees from both the city and intervenor.

15 **MOTION TO DISMISS**

16 ORS 197.830(15)(b) entitles a prevailing party to recover attorney fees when the
17 nonprevailing party has "presented a position without probable cause to believe the position
18 was well-founded in law or on factually supported information." Arguments made regarding
19 motions to dismiss for lack of jurisdiction constitute a "position" for purposes of ORS
20 197.830(15)(b). *Lewelling Neighborhood Dist. v. City of Milwaukie*, 35 Or LUBA 764, 766
21 (1998). Petitioners assert that intervenor's motion to dismiss lacked probable cause.

22 Intervenor's motion to dismiss argued that even though petitioners did not receive
23 mailed notice, they nonetheless had actual knowledge of the tentative subdivision approval.
24 Intervenor submitted an affidavit from the developer of petitioners' subdivision stating that
25 he had discussed intervenor's proposed subdivision with petitioners more than 21 days before
26 petitioners filed their appeal. We eventually denied the motion to dismiss because even if

1 intervenor’s allegation that petitioners knew about the proposed subdivision were true,
2 petitioners did not have any reason to know that intervenor’s proposed subdivision intended
3 to use a lot from their subdivision as an access road. Determining when a party knew or
4 should have known about a land use decision being made is generally a fact-specific inquiry,
5 and in this case there were certainly allegations that petitioners knew about the proposed
6 subdivision. Although our view of the facts in this case eventually led to our conclusion that
7 petitioners had filed a timely appeal, intervenor’s position was hardly so infirm that no
8 reasonable lawyer would conclude it had merit. Thus, petitioners cannot recover attorney fees
9 from intervenor based on its position presented in the motion to dismiss.¹

10 **VOLUNTARY REMAND**

11 Petitioners also argue that the city and intervenor are subject to attorney fees for
12 waiting until the 11th hour to file their motion for voluntary remand. We are unclear as to
13 whether petitioners are claiming attorney fees under ORS 197.830(15)(b) and OAR 661-010-
14 0075(1)(e)(A), Oregon Rules of Civil Procedure (ORCP) 17, or on the basis of bad faith. In
15 any event, our disposition is the same under all three possibilities.²

16 **1** Under ORS 197.830(15)(b) and OAR 661-010-0075(1)(e), we may only award
17 attorney fees if a party has “presented a position.” We do not believe filing a motion for
18 voluntary remand satisfies this requirement. Our prior cases involving ORS 197.830(15)(b)
19 have focused on positions presented regarding the essential elements of the appeal, such as
20 the assignments of error and jurisdiction. A motion for voluntary remand, rather than
21 presenting a position, more accurately accepts, at least to some degree, the position of a
22 petitioner. In any event, a concession by the local government that the decision may be

¹ The city joined in intervenor’s motion to dismiss, and for the same reasons is not subject to an award of attorney fees.

² ORCP 17C provides that a person’s signature on a pleading certifies that the pleading is based on that person’s knowledge, is not presented for an improper purpose, is warranted by existing law, and any that any factual assertions are supported by evidence. Violation of this provision may result in an award of attorney fees.

1 vulnerable, which avoids the time and expense of LUBA reaching a similar conclusion,
2 hardly constitutes a position without merit.

3 **2** Petitioners' real objection to the motion for voluntary remand appears to be not that it
4 should not have been filed, but that it should have been filed much earlier. This is apparently
5 the basis for petitioners' claim for attorney fees under ORCP 17 and for bad faith generally.
6 Initially, ORCP 17 does not apply to proceedings before LUBA, nor can we award attorney
7 fees merely because we believe a party acted in "bad faith." As relevant here, our ability to
8 award attorney fees is limited to ORS 197.830(15)(b) and OAR 661-010-0075(1)(e)(A).
9 Furthermore, even if we were permitted to award attorney fees for what we consider to be
10 "bad faith," the present circumstances would hardly qualify.

11 While there is nothing that prevents a local government or intervenor from assessing
12 their chances early on and seeking a voluntary remand, there is also nothing that prevents
13 them from waiting until a petitioner's arguments have been presented to decide whether to
14 file a response brief. While we can understand petitioners' frustration in preparing a petition
15 for review when they believe a remand is unavoidable, local governments and intervenors do
16 not know precisely what arguments they will have to defend against until they are actually
17 presented with a petition for review, no matter how obvious the issues may seem. When
18 faced with a petition for review that raises arguments that a local government or intervenor
19 does not believe it can defend against, it would seem that filing a response brief and
20 extending the process would be worse faith than seeking a voluntary remand. Petitioners are
21 not entitled to attorney fees under any theory due to the motion for voluntary remand.

22 Petitioners' motion for attorney fees is denied.

23 Dated this 16th day of October, 2002.

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25 Tod A. Bassham, Board Member