

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 7TH STREET STATION, LLC,  
5 *Petitioner,*

6  
7 vs.

8  
9 CORVALLIS,  
10 *Respondent.*

11  
12 LUBA Nos. 2007-140 and 2007-141

13 ORDER ON MOTION FOR  
14 ATTORNEY FEES AND COST BILL

15 **MOTION FOR ATTORNEYS FEES**

16 Petitioner moves for an award of attorney fees pursuant to ORS 197.830(15)(b),  
17 which provides:

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

22 In determining whether to award attorney fees against a nonprevailing party, we must  
23 determine that “every argument in the entire presentation [that a nonprevailing party] makes  
24 to LUBA is lacking in probable cause \* \* \*.” *Fechtig v. City of Albany*, 150 Or App 10, 24,  
25 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented “without probable  
26 cause” where “no reasonable lawyer would conclude that any of the legal points asserted on  
27 appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465, 469  
28 (1996). In applying the probable cause analysis LUBA “will consider whether any of the  
29 issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest  
30 discussion.” *Id.* The party seeking an award of attorney fees under the probable cause  
31 standard must clear a relatively high hurdle and that hurdle is not met by simply showing that  
32 LUBA rejected all of a party’s arguments on the merits. *Brown v. City of Ontario*, 33 Or

1 LUBA 803, 804 (1997).

2 In the present appeal, we remanded the city's decision because we found that the city  
3 had misconstrued the applicable law when it conditioned its approval of petitioner's request  
4 for removal of a Planned Development (PD) overlay from petitioner's property on a change  
5 in the zoning and plan map designations for the property. We remanded the decision so that  
6 the city could adopt an order removing the PD overlay without improperly requiring that the  
7 property's plan and zoning map designations be changed. We declined petitioner's request  
8 to affirm the part of the city's decision that removed the a PD overlay and reverse the part of  
9 the city's decision that changed the zone and map designations, because our rules do not  
10 expressly authorize us to affirm in part and reverse in part.

11 Petitioner argues that every argument that the city made in defense of the challenged  
12 decision was lacking in probable cause. In support of this contention, petitioner points to the  
13 minutes of the city council hearing during which the decision that was the subject of the  
14 appeal was made. Those minutes include the city attorney's explanation to the city council  
15 of its options in addressing petitioner's application. Record 76. The minutes indicate that  
16 the city attorney advised the council that if the council chose to remove the PD overlay but  
17 also change the plan and zone map designations for the property, the city's action could  
18 subject the city to an award of attorney's fees in favor of petitioner.

19 The city has not responded to petitioner's motion for attorney fees. Petitioner has  
20 made a *prima facie* case that the city's defense of its decision was "lacking in probable  
21 cause," and the city offers us no reason to conclude otherwise. *Fechtig v. City of Albany*,  
22 150 Or App at 24. Accordingly, petitioner's motion for an award of attorney's fees is  
23 granted.

24 Under ORS 197.830(15)(b), the requested attorney fees must be reasonable. LUBA  
25 has discretion to determine the amount of attorney fees that is reasonable under the specific  
26 facts of the case. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769 (2005). However,

1 while we independently review attorney fee statements for reasonableness, the failure of an  
2 opposing party to contest such statements is at least some indication that the attorney fees  
3 sought are reasonable. *See 6710 LLC v. City of Portland*, 41 Or LUBA 608, 611-12 (2002)  
4 (discussing reasonable hourly rates and reasonable amount of time to pursue a LUBA  
5 appeal).

6 Petitioner submitted a statement of attorney fees, seeking \$14,280.00 in attorney fees.  
7 Petitioner's attorneys spent approximately 67 hours at hourly rates of \$225 and \$175, and  
8 \$112.50 for travel time. We agree with petitioner that approximately 67 hours is a  
9 reasonable amount of time to have spent in prosecuting this appeal, and that petitioner's  
10 attorneys' hourly rates are reasonable. *Id.*

11 Petitioner's motion for attorney fees in the amount of \$14,280.00 is granted.

12 **COST BILL**

13 Petitioner filed a cost bill requesting award of the cost of its filing fees, in the amount  
14 of \$175 for each appeal. Petitioner also requests return of its deposits for costs. Respondent  
15 has not responded to petitioner's motion.

16 Petitioner is awarded the cost of its filing fees, in the amount of \$350, to be paid by  
17 respondent. The Board shall return petitioner's \$300 deposits for costs.

18 Dated this 29<sup>th</sup> day of January, 2008.

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Melissa M. Ryan  
Board Member

