

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

3
4 JIM CAPE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEAVERTON,
10 *Respondent.*

11
12 LUBA No. 2004-010

13 ORDER ON MOTION FOR ATTORNEY FEES

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

16 “The board shall also award reasonable attorney fees and expenses to the prevailing
17 party against any other party who the board finds presented a position without
18 probable cause to believe the position was well-founded in law or on factually
19 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 to
22 LUBA is lacking in probable cause (*i.e.*, merit).” *Fechtig v. City of Albany*, 150 Or App 10, 24,
23 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position without probable cause is presented
24 where “no reasonable lawyer would conclude that any of the legal points asserted on appeal
25 possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). The
26 probable cause standard is a relatively low standard. *Brown v. City of Ontario*, 33 Or LUBA
27 803, 804 (1997). Although petitioner does not raise the issue, we note that although petitioner did
28 survive the city’s challenge to his standing that does not rescue a petition for review that does not
29 contain any assignments of error that possess legal merit. When a case is dismissed for jurisdictional
30 grounds, the arguments presented on that issue obviously determine whether or not attorney fees
31 will be awarded. When an appeal is decided on the merits, however, an award of attorney fees is

1 determined by the arguments made in the assignments of error or responses to those assignments of
2 error.

3 Petitioner appealed a city decision annexing two undeveloped parcels comprising
4 approximately 109 acres into the city. Petitioner asserted two assignments of error. First, petitioner
5 argued that due to the size of the annexation, the annexation constituted a “major boundary change”
6 and that the city erred in treating the annexation as a “minor boundary change.” As we explained in
7 our final opinion and order, however, the Metro Code specifically defines an annexation as a “minor
8 boundary change” while the definition of “major boundary change” does not include annexations.
9 *Cape v. City of Beaverton*, ___ Or LUBA ___ (LUBA No. 2204-010, April 27, 2004, slip op
10 4-5). Given the unambiguous Metro Code definition of “major boundary change” and “minor
11 boundary change,” we do not believe any reasonable attorney would argue that an annexation is a
12 “major boundary change,” as the Metro Code defines that concept.

13 In petitioner’s second assignment of error he argues that some unspecified state law requires
14 the city to hold a public hearing or otherwise provide an opportunity for public input if a citizen or
15 public official from another local government requests such a hearing or opportunity. We explained
16 that we had already answered that question in an earlier appeal involving petitioner. *Id.* at 5-6.
17 Petitioner did not argue that our previous decision, which was affirmed by the court of appeals,
18 should be overturned. In fact, petitioner did not even acknowledge our prior decision despite the
19 fact that he was the petitioner in that appeal as well. Petitioner’s only addition to his previously
20 rejected argument was the variation regarding another local government official’s request.
21 Petitioner, however, offered no explanation or rationale for this argument. We do not see that any
22 reasonable attorney would make such an argument based purely on unspecified “substantial rights.”

23 Petitioner’s entire legal argument for reversal or remand under the second assignment of
24 error consists of one and a half pages with no legal analysis or citation of authority. At oral
25 argument, petitioner similarly provided no legal argument or citation to authority. To the extent

1 petitioner made any legal points on appeal, we hold that no reasonable attorney would conclude that
2 they possessed any legal merit.

3 The city's motion for attorney fees is granted.

4 Under ORS 197.830(15)(b), the requested attorney fees and expenses must be reasonable.
5 The city submitted a statement of attorney fees and costs seeking \$453.62 in attorney fees and
6 \$40.40 in expenses. The city spent 8.49 hours at an hourly rate of \$55.43. The requested amount
7 is certainly reasonable. *See 6710 LLC v. City of Portland*, 41 Or LUBA 608, 611-12 (2002)
8 (discussing reasonable hourly rates). The city's expenses consist of two copies of a 102-page
9 record at twenty cents per page as is allowed by OAR 661-010-0075(1)(b)(B).

10 The city's motion for attorney fees and expenses in the amount of \$494.02 is granted. We
11 will award the city petitioner's \$150 deposit for costs. Therefore, the total remaining award to be
12 paid by petitioner to the city is \$344.02.

13 Dated this 9th day of June, 2004.

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Tod A. Bassham
Board Member