

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

3  
4                                   SUSAN M. TADEI,  
5                                   *Petitioner,*

6  
7                                   vs.

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9                                   CITY OF ASTORIA,  
10                                  *Respondent,*

11  
12                                  and

13  
14                                BETHANY FREE LUTHERAN CHURCH (ASTORIA) and  
15                                RDA PROJECT MANAGEMENT, LLC,  
16                                *Intervenors-Respondents.*

17  
18                                LUBA No. 2021-105

19  
20                                ORDER

21   **BACKGROUND**

22           The city and intervenors-respondents (intervenors) are the prevailing  
23 parties in *Tadei v. City of Astoria*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2021-105, May  
24 3, 2022). In this appeal, petitioner challenged a decision by the city council  
25 approving a conditional use permit to construct an accessory building adjacent to  
26 an existing church building.

27           Petitioner filed a petition for review that lacked assignments of error, failed  
28 to address the findings made by the city, and developed no arguments or  
29 explanation for why the decision should be reversed or remanded. We affirmed  
30 the city’s decision and agreed with intervenors that “the petition for review

1 provides no basis on which we can reverse or remand the challenged decision.”  
2 *Tadei*, \_\_\_ Or LUBA at \_\_\_ (slip op at 5) (citing *Borrego v. City of Sheridan*, 33  
3 Or LUBA 65, 68 (1995); *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA  
4 218, 220 (1982)). In affirming the city’s decision, we explained that:

5 “‘[a]lthough each of the \* \* \* requirements [for the petition for  
6 review] is important, the requirement of OAR 661-010-060([4])(d)  
7 that the petition for review include assignments of error, supporting  
8 by argument, is particularly important.’ *Scholes v. Jackson County*,  
9 28 Or LUBA 407, 409 (1994) (citing *Bjerk v. Deschutes County*, 17  
10 Or LUBA 194 (1988)). We understand the petition for review to  
11 assert that the city council’s decision violates three Astoria  
12 Comprehensive Plan (ACP) policies and several Astoria  
13 Development Code (ADC) provisions. However, the city council  
14 adopted more than 25 pages of findings, including interpretations of  
15 applicable ACP and ADC provisions, in support of its decision to  
16 deny the appeal and approve the application. The city council  
17 adopted findings that specifically addressed issues raised by  
18 petitioner at and prior to the planning commission hearing. *The*  
19 *petition for review does not address any of the findings or*  
20 *interpretations the city council adopted, or explain why that*  
21 *decision should be reversed or remanded.” *Id.* (citations omitted;  
22 emphasis added).*

23 On May 17, 2022, intervenors filed a motion for attorney fees and cost bill  
24 pursuant to ORS 197.830(15)(b). On May 27, 2022, petitioner filed a response to  
25 intervenors’ motion.

## 26 **ATTORNEY FEES**

27 ORS 197.830(15)(b) requires LUBA to award reasonable attorney fees and  
28 expenses to the prevailing party against any party who the Board finds “presented  
29 a position or filed any motion without probable cause to believe the position or

1 motion was well-founded in law or on factually supported information.” “In  
2 considering a prevailing party’s motion for attorney fees and expenses pursuant  
3 to ORS 197.830(15)(b), we look, first, to whether the party is entitled to attorney  
4 fees and expenses and, second, to the reasonableness of the amount of the  
5 requested attorney fees and expenses.” *Van Dyke v. Yamhill County*, \_\_\_ Or  
6 LUBA \_\_\_, \_\_\_ (LUBA No 2020-032/033, Apr 1, 2021) (slip op at 6).

7 **A. Intervenor’s Entitlement to Attorney Fees**

8 In order to award attorney fees against a nonprevailing party pursuant to  
9 ORS 197.830(15)(b), we must determine that “every argument in the entire  
10 presentation [that the nonprevailing party made] to LUBA is lacking in probable  
11 cause.” *Fechtig v. City of Albany*, 150 Or App 10, 14, 946 P2d 280 (1997). A  
12 position is presented “without probable cause,” for purposes of ORS  
13 197.830(15)(b), where “no reasonable lawyer would conclude that any of the  
14 legal points asserted on appeal possessed legal merit.” *Contreras v. City of*  
15 *Philomath*, 32 Or LUBA 465, 469 (1996). In applying the probable cause  
16 analysis, we “will consider whether any of the issues raised [by the nonprevailing  
17 party] were open to doubt, or subject to rational, reasonable, or honest  
18 discussion.” *Id.*

19 The probable cause standard is a relatively high hurdle, and that hurdle is  
20 not cleared by simply showing that LUBA rejected all of a party’s arguments on  
21 the merits. *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776 (2007) (citing  
22 *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)). Intervenor’s argue that

1 “[t]here is no factual support for [p]etitioner’s claims,” that petitioner’s  
2 arguments were “premised on a statutory provision that is not applicable or  
3 relevant in this case,” and that the petition for review “does not address the  
4 findings or challenged decision itself [and, therefore,] cannot possibly provide a  
5 rational, reasonable, or honest basis for reversing or remanding the decision.”  
6 Motion for Attorney Fees 9-10.

7         Petitioner’s response to intervenors’ motion refers to the portion of our  
8 final opinion and order in which we referred to the ACP and ADC provisions.  
9 Response to Motion for Attorney Fees 3. However, as quoted above, we stated  
10 only that we *understood* the petition for review to assert that those provisions  
11 were violated. We went on to explain that “the city council adopted more than 25  
12 pages of findings \* \* \* that specifically addressed issues raised by petitioner  
13 \* \* \*. The petition for review does not address [those findings], or explain why  
14 th[e] decision should be reversed or remanded.” *Tadei*, \_\_\_ Or LUBA at \_\_\_ (slip  
15 op at 5) (citations omitted; emphasis added).

16         In *Young v. City of Sandy*, 33 Or LUBA 817 (1997), the petitioner  
17 essentially filed a legal memorandum submitted by an attorney below as his  
18 petition for review before LUBA. The petitioner did not present any arguments  
19 that actually challenged the city’s decision or the findings supporting the  
20 decision, and, therefore, the petitioner “did not present any issues that were open  
21 to doubt, or debatable, or subject to rational, reasonable or honest discussion.”  
22 *Young*, 33 Or LUBA at 818. We awarded the city attorney fees because the

1 petitioner had not presented a position that possessed any merit. Similarly, in  
2 *Schaffer v. City of Turner*, 37 Or LUBA 1066 (2000), the petitioner filed a  
3 petition for review that did not articulate a legal basis for reversal or remand, and  
4 we awarded attorney fees against the petitioner. Here, petitioner’s response to  
5 intervenors’ motion does not attempt to identify a reasonable argument that was  
6 made in her petition for review. In our view, no reasonable attorney would  
7 conclude that the arguments made by petitioner possess merit. Therefore, the city  
8 is entitled to its reasonable attorney fees pursuant to ORS 197.830(15)(b).

9 **B. The Reasonableness of Intervenors’ Request**

10 In awarding attorney fees pursuant to ORS 197.830(15)(b), LUBA is  
11 afforded discretion to determine the amount of attorney fees that is reasonable  
12 under the specific facts of the case. *Young*, 33 Or LUBA at 819. LUBA will look  
13 to the factors listed in ORS 20.075 for guidance in determining the amount of an  
14 attorney fee award. *Schaffer*, 37 Or LUBA at 1072. In determining what award  
15 of attorney fees is reasonable, we must briefly identify the relevant facts and legal  
16 criteria on which we rely. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84,  
17 96, *adh’d to on recons*, 327 Or 185, 957 P2d 1200 (1998) (stating principle).

18 Intervenors’ motion included fee statements for two attorneys, for a total  
19 of \$53,617 in attorney fees. One factor that is considered when determining the  
20 reasonableness of attorney fees is “[t]he time and labor required in the  
21 proceeding, the novelty and difficulty of the questions involved in the proceeding  
22 and the skill needed to properly perform the legal services.” ORS 20.075(2)(a).

1 To support their claim that the attorney fees requested are reasonable, intervenors  
2 argue that the case was “procedurally complicated” and that, because  
3 “[p]etitioner’s arguments were so confusing,” intervenors were “forced to guess  
4 what [p]etitioner was attempting to argue and provide a substantive response to  
5 all plausible arguments.” Motion for Attorney Fees 13. Additionally, intervenors  
6 assert that two attorneys were necessary for this appeal because “Mr. Zupancic  
7 has the pre-existing client relationship” and that “[i]t is common for more than  
8 one attorney to handle a LUBA appeal and in this case was essential given Mr.  
9 Zupancic’s local involvement and Mr. Connors’ appellate experience.” *Id.* at 14.

10 Petitioner responds that “two separate attorneys from two separate law  
11 firms \* \* \* is a blatant disregard of necessary attorney involvement,” that  
12 intervenors’ “engagement of multiple legal counsel” was “unnecessary,” and that  
13 “[two] separate attorneys fees is not reasonable.” Response to Motion for  
14 Attorney Fees 5-7 (boldface and underscoring omitted). We agree with petitioner  
15 that requesting attorney fees for two attorneys in this matter is unreasonable. ORS  
16 20.075(2)(g) requires us to consider “[t]he experience, reputation and ability of  
17 the attorney performing the services.” As intervenors state, “Mr. Connors is a  
18 land use specialist who has been practicing for 27 years,” and “Mr. Zupancic is a  
19 land use specialist who has been practicing for 42 years, has served as an expert  
20 witness and is a member of the internationally recognized Counselors of Real  
21 Estate®.” Motion for Attorney Fees 16-17. While this experience supports the  
22 individual rates that each attorney charges for their time, there is no explanation

1 for why two attorneys of such experience were needed to handle this appeal. A  
2 pre-existing client relationship and knowledge of the local record do not support  
3 a request for \$25,652 in attorney fees for Mr. Zupancic. *See* Motion for Attorney  
4 Fees Ex B, at 5. Having reviewed the fee statements, we agree with petitioner  
5 that awarding attorney fees for both attorneys is unreasonable. Intervenors’  
6 responses to petitioner’s record objections, and intervenors’ brief and oral  
7 argument were submitted and presented by Mr. Connors.

8 Petitioner’s response offers no other argument to dispute the  
9 reasonableness of the attorney fees requested. The failure of an opposing party to  
10 contest such fee statements is at least some indication that the attorney fees  
11 sought are reasonable. *Walter v. City of Eugene*, 74 Or LUBA 671 (2016). Mr.  
12 Connors supports the request by referring to the 2017 Oregon State Bar Economic  
13 Survey, which, adjusted for inflation and for experience, shows the  
14 reasonableness of the rate invoiced. ORS 20.075(2)(c); Motion for Attorney Fees  
15 15. With no other objections, as well as the cited support for the reasonableness  
16 for Mr. Connors’ fees, we agree that fees for Mr. Connors’ services shall be  
17 awarded.

18 The motion for attorney fees as to Mr. Connors, in the amount of \$27,965,  
19 is granted.

20 **COSTS**

21 Intervenors filed a cost bill requesting an award of the cost of their  
22 intervention fee pursuant to OAR 661-010-0075(1)(b)(D). As the prevailing

1 parties, intervenors are awarded the cost of their \$100 intervention fee, to be paid  
2 by petitioner.

3 Dated this 6th day of September 2022.

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Melissa M. Ryan  
Board Chair