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

RIVERVIEW MEADOWS LLC, ALEX REVERMAN,
VERN SCOVELL, DAVID VANDEHEY,
ROLL TIDE PROPERTIES CORP. 401K PSP TRUST,
CLAY SELLARS, and CAREY SHELDON,
Petitioners,

vs.

CITY OF NEHALEM,
Respondent.

LUBA Nos. 2021-124/125/126/127

ORDER

BACKGROUND

Petitioners are the prevailing parties in *Riverview Meadows LLC et al v. City of Nehalem*, ___ Or LUBA ___ (LUBA Nos 2021-124/125/126/127, Apr 19, 2022). In these consolidated appeals, petitioners challenged a city resolution (Resolution) declaring a moratorium on new connections to the city's water system for areas located outside the city limits. Those areas were identified on a map attached to the Resolution (Moratorium Area). The Moratorium Area included properties located both inside the city's urban growth boundary (UGB) and outside the city's UGB.

In the petition for review, petitioners argued that LUBA had jurisdiction pursuant to ORS 197.540(1), which subjects to LUBA's jurisdiction "any moratorium on construction or land development * * * alleged to have been

adopted in violation of the provisions of ORS 197.505 to 197.540."[1] Petitioners argued that, pursuant to an intergovernmental agreement between the city and Tillamook County (IGA), properties inside the city's UGB cannot receive building permits from the county without confirmation by the city that public water will be supplied to the property (Water Availability Letter). Accordingly, petitioners argued that, in adopting the Resolution, the city had engaged in, or planned to engage in, a "practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on," land in the Moratorium Area within the meaning of ORS 197.524(1) and that, under that statute, the city was required to either "[a]dopt a public facilities strategy" or "[a]dopt a moratorium on construction or land development under ORS 197.505 to 197.540."[2] Because the city had done

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[1] ORS 197.540(1) provides:

> "In the manner provided in ORS 197.830 to 197.845, [LUBA] shall review upon petition by a county, city or special district governing body or state agency or a person or group of persons whose interests are substantially affected, any moratorium on construction or land development or a corrective program alleged to have been adopted in violation of the provisions of ORS 197.505 to 197.540."

[2] ORS 197.524(1) provides:

> "When a local government engages in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities, the local government shall:

neither, petitioners requested that we invalidate the moratorium pursuant to ORS 197.540(2).[3]

The city did not file a respondent's brief. Instead, after the petition for review was filed, the city filed a motion to dismiss the appeals. The city argued that the Resolution was not a moratorium subject to LUBA's jurisdiction under ORS 197.540 because the city does not process or approve building permits or land use applications for property outside its UGB. Motion to Dismiss 8. We rejected that argument because, as noted, the Moratorium Area included land located inside the city's UGB, city water lines extended to properties inside the city's UGB, and the city did not explain how its argument withstood those undisputed facts.

The city also argued that the Resolution was not a moratorium subject to LUBA's jurisdiction because, according to the city, "[t]he City has no legal duty or obligation to serve properties outside of the City limits." Motion to Dismiss 2. We rejected that argument because the city's water ordinance, at Nehalem City Code (NCC) chapter 51, demonstrated that the city is obligated to provide water

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> "(a) Adopt a public facilities strategy under ORS 197.768; or
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> "(b) Adopt a moratorium on construction or land development under ORS 197.505 to 197.540."

[3] ORS 197.540(2) provides, "If the board determines that a moratorium or corrective program was not adopted in compliance with the provisions of ORS 197.505 to 197.540, the board shall issue an order invalidating the moratorium."

service to properties outside the city limits through the city's water system if sufficient water supply is available at the time of an application. We further explained that, although the NCC allows the city to discontinue such service in certain circumstances, that does not mean that the city is not obligated to provide such service in the first instance.

We agreed with petitioners that the IGA demonstrated that properties inside the city's UGB cannot receive building permits from the county without a Water Availability Letter from the city. *Riverview Meadows*, ___ Or LUBA at ___ (slip op at 9). We explained that a request for a new water connection is almost certainly made in pursuit of "construction or land development." *Id.* We therefore agreed with petitioners that the Resolution was a moratorium over which we had jurisdiction because the effect of the Resolution was a practice of stopping the issuance of authorizations—namely, water service connection authorizations—necessary for construction on or development of land in the Moratorium Area.

On the merits, we agreed with petitioners that, because the Resolution was a moratorium within the meaning of ORS 197.524(1), under that statute, the city was required to either "[a]dopt a public facilities strategy" or "[a]dopt a moratorium on construction or land development under ORS 197.505 to 197.540." Because it was undisputed that the city had done neither, we sustained petitioners' assignment of error and invalidated the moratorium.

Petitioners filed a motion for attorney fees pursuant to ORS 197.830(15)(b). On May 24, 2022, the city filed a response to the motion. On June 7, 2022, petitioners filed a reply to the response.

ATTORNEY FEES

ORS 197.830(15)(b) provides that LUBA "[s]hall award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position or filed any motion without probable cause to believe the position or motion was well-founded in law or on factually supported information." In considering a party's motion for attorney fees pursuant to ORS 197.830(15)(b), we look, first, to whether the party is entitled to attorney fees and, second, to the reasonableness of the requested attorney fees.

A. Petitioners' Entitlement to Attorney Fees

In order to award attorney fees against a nonprevailing party pursuant to ORS 197.830(15)(b), we must determine that "every argument in the entire presentation [that the nonprevailing party made] to LUBA is lacking in probable cause." *Fechtig v. City of Albany*, 150 Or App 10, 14, 946 P2d 280 (1997). Where a responding party files a motion to dismiss for lack of jurisdiction but does not file a responsive brief, and where the petitioner subsequently files a motion for attorney fees, we limit our review to the parties' jurisdictional arguments. *See Rogue Advocates v. Jackson County*, 71 Or LUBA 392, 396 (2015) (citing *Lewelling Neighborhood Dist. v. City of Milwaukie*, 35 Or LUBA 764, 765-66 (1998)). A position is presented "without probable cause," for purposes of ORS

197.830(15)(b), 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). In applying the probable cause analysis, we "will consider whether any of the issues raised [by the nonprevailing party] were open to doubt, or subject to rational, reasonable, or honest discussion." *Id.* The probable cause standard is a relatively high hurdle, and that hurdle is not cleared by simply showing that LUBA rejected all of a party's arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

In its motion to dismiss, the city argued that the Resolution was not a moratorium subject to LUBA's jurisdiction because (1) the city does not process or approve building permits or land use applications for property outside its UGB and (2) the city has no obligation to provide water service outside the city limits. Petitioners argue that they are entitled to attorney fees because both of those arguments were lacking in probable cause.

In its response to the motion for attorney fees, the city advances a number of arguments for why a reasonable lawyer would argue that the Resolution was not a moratorium subject to LUBA's jurisdiction. However, most of those arguments were not presented in the city's motion to dismiss.

First, the city argues that the IGA demonstrates only that a Water Availability Letter "may be required" before properties inside the city's UGB can receive building permits from the county. Response to Motion for Attorney Fees

3-4 (quoting Record 106). The city argues that, because a Water Availability Letter is not *necessarily* required, and because that requirement appears in an intergovernmental agreement rather than the city's code, a reasonable lawyer could argue that the Resolution would not necessarily have the effect of stopping construction on or development of land in the Moratorium Area.

Second, the city points to NCC 51.04(A)(2), part of the city's water ordinance, which provides that the city must, under certain circumstances, grant an application of service to "[i]ndividual service on existing lots and parcels, at this time, on existing *adequate* mains outside of the incorporated city limits." (Emphasis added.) The city argues that, because the city's water mains extending into the Moratorium Area are inadequate to serve any new connections at pressure levels mandated under OAR 333-061-0025, those mains were not "adequate" for purposes of NCC 51.04(A)(2). The city argues that a reasonable lawyer could argue, as the city did in its motion to dismiss, that the city has no obligation to provide water service outside the city limits.[4]

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[4] The city also asserts that the conclusion in our final opinion and order that NCC 51.04(A)(2) obligates the city to provide water service to properties outside the city limits under certain circumstances "was not raised by Petitioners in either their petition for review or in response to the motion to dismiss." Response to Motion for Attorney Fees 4.

The city is wrong. Petitioners referenced that provision in the petition for review. Petition for Review 16 n 4 ("The vast majority of the City's water service customers are outside of the City. In fact, second priority water service is provided to land outside the City on existing mains, like Petitioners' properties."

In addition, the city argues that the fact that the Resolution prohibited new connections to the city's water system did not mean that the city could not issue a Water Availability Letter "conditioned to require particular improvements for water availability in the first instance." Response to Motion for Attorney Fees 5. In other words, we understand the city to argue that a reasonable lawyer could argue that the Resolution would not necessarily have the effect of stopping construction on or development of land in the Moratorium Area because the city could still issue Water Availability Letters by conditioning them on the applicant making improvements to the city's water system.

The problem with the city's response is that the city did not make those arguments in its motion to dismiss before we issued our final opinion and order. Instead, the city makes those arguments for the first time in its response to the motion for attorney fees. We have previously explained that whether an award of attorney fees under ORS 197.830(15)(b) is appropriate depends on the positions taken in the appeal before LUBA, not the positions taken during the local proceedings or in the challenged decision itself. *Hastings Bulb Growers, Inc. v. Curry County*, 25 Or LUBA 558, 564 (1993). It is equally true that whether an award of attorney fees is appropriate does not depend on the positions taken in

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(Citing NCC 51.04(A)(2); Record 120, 140-41; Petition for Review App 9, at 3.)). In addition, the city cited related provisions of its water ordinance in the motion to dismiss, which we also addressed in our final opinion and order. Motion to Dismiss 9 (citing NCC 51.05(F)(2)); *Riverview Meadows*, ___ Or LUBA at ___ (slip op at 11).

response to a motion for attorney fees, after the final opinion and order has issued and the appeal before LUBA has concluded. Accordingly, the foregoing arguments provide no basis to deny the motion for attorney fees.

Also in its response to the motion for attorney fees, the city argues that ORS 197.540(1) subjects to LUBA's jurisdiction certain "moratori[a] on construction or land *development*" and that ORS 227.215(1) defines "development" to include, in part, "making a material change in the use or appearance of a structure or land" as well as partitioning and subdividing land.[5] The city argues that, because the Resolution is only a moratorium on new connections to the city's water system and does not reference the use of, construction on, or the division of land, a reasonable lawyer could argue that the Resolution was not a "moratorium on construction or land *development*" subject to LUBA's jurisdiction. That argument bears some similarities to the following passage in the motion to dismiss:

> "ORS 197.540 states that LUBA will review '. . . any moratorium on construction or land development . . .'. In order for LUBA to have jurisdiction over the City's moratorium, it would need to find that the City's moratorium on water service connections in an area outside of the City limits and outside the City's UGB to be a moratorium on construction or land development.

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[5] In our final opinion and order, we explained that, because "development" is not defined in ORS chapter 197, we looked to the plain, ordinary meaning of the word, and we proceeded to quote the dictionary definition thereof. *Riverview Meadows*, ___ Or LUBA at ___ (slip op at 9 n 4).

> "Presumably, the definition of development would be as set forth in ORS 227.215(1) means 'a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels, including partitions and subdivisions . . .'." Motion to Dismiss 7.

However, even assuming that that argument was sufficiently developed for our review in the motion to dismiss, we agree with petitioners that a reasonable lawyer would not have made it. Although ORS 197.540(1) subjects to LUBA's jurisdiction certain "moratori[a] on construction or land *development*," and although the term "development" arguably does not include connection to the city's water system, ORS 197.540(1) more specifically subjects to LUBA's jurisdiction moratoria "alleged to have been adopted in violation of the provisions of ORS 197.505 to 197.540." One of the provisions in that statutory sequence, ORS 197.524(1), prohibits local governments from engaging in "a pattern or practice of delaying or stopping the issuance of permits, *authorizations* or approvals necessary for the subdivision or partitioning of, or construction on, any land, including delaying or stopping issuance based on a shortage of public facilities," unless the local government adopts a public facilities strategy or follows certain procedures. *See* n 2. That statute prohibits delaying or stopping not only approvals of construction on or the division of land, but also authorizations that are "necessary" therefor.

As we explained in our final opinion and order, the Resolution was a practice of stopping the issuance of authorizations—namely, water service connection authorizations—necessary for construction on or development of land

in the Moratorium Area. In the petition for review, petitioners asserted that the IGA "requires properties within the UGB to connect to the City water system, not drill a well as the [Resolution] states is possible." Petition for Review 28. In its motion to dismiss, although the city took the position that "[a]ny of the properties located outside the City limits are free to obtain their water by well, or other source, such as surface water or a cistern," the city did not explain why petitioners' representation of the requirements in the IGA was incorrect or dispute that the IGA requires properties within the UGB to connect to the city's water system rather than drill wells. Motion to Dismiss 2-3. The city challenges that interpretation in its response to the motion for attorney fees, but, as we have already explained, that argument was not made in the motion to dismiss, and whether an award of attorney fees is appropriate does not depend on it. In light of the language of ORS 197.524(1) and petitioners' unrebutted interpretation of the IGA, a reasonable lawyer could not argue that the Resolution was not a moratorium subject to LUBA's jurisdiction simply because it does not mention the use of, construction on, or the division of land.

In conclusion, in its motion to dismiss, the city argued that the Resolution was not a moratorium subject to LUBA's jurisdiction because (1) the city does not process or approve building permits or land use applications for property outside its UGB and (2) the city has no obligation to provide water service outside the city limits. We conclude that both of those arguments were lacking in probable cause. In its response to the motion for attorney fees, the city offers

largely new arguments for why the Resolution was not a moratorium subject to LUBA's jurisdiction. Most of those positions were not taken in the appeal before LUBA, and whether an award of attorney fees is appropriate does not depend on them. To the extent that one of those positions was taken in the appeal before LUBA, we agree with petitioners that a reasonable lawyer would not have taken it. We therefore agree with petitioners that every argument that the city made in its motion to dismiss was lacking in probable cause. Accordingly, petitioners are entitled to attorney fees.

B. The Reasonableness of Petitioners' Request

In awarding attorney fees pursuant to ORS 197.830(15)(b), LUBA is afforded discretion to determine the amount of attorney fees that is reasonable under the specific facts of the case. *Young v. City of Sandy*, 33 Or LUBA 817, 819 (1997). LUBA will look to the factors listed in ORS 20.075 for guidance in determining the amount of an attorney fee award. *Schaffer v. City of Turner*, 37 Or LUBA 1066, 1072 (2000). One of those factors is "[t]he time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding and the skill needed to properly perform he legal services." ORS 20.075(2)(a). In determining what award of attorney fees is reasonable, we must briefly identify the relevant facts and legal criteria on which we rely. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84, 96, *adh'd to on recons*, 327 Or 185, 957 P2d 1200 (1998) (stating principle).

Petitioners attach to their motion an itemized statement of attorney fees incurred in the course of these appeals. The statement provides a relatively detailed description for each entry. Petitioners seek recovery of 109.44 attorney hours billed and 8.3 paralegal hours billed for a total of $44,365 in attorney fees.

The city argues that the attorney fees requested are not reasonable because the petition for review is relatively lengthy. The city argues:

> "Petitioners cannot, on the one hand, take the position that this outcome was so obvious and beyond dispute [as to make an award of attorney fees appropriate] and then, on the other hand, expend 9,980 words * * * claiming that this amount of time was reasonable to explain why they are entitled to prevail." Response to Motion for Attorney Fees 7-8.

We understand the city to argue that, because petitioners used nearly all of the words allowed by OAR 661-010-0030(2)(b) in drafting their petition for review, the issues in the appeal must have been "open to doubt, or subject to rational, reasonable, or honest discussion." *Contreras*, 32 Or LUBA at 469.

The question under ORS 197.830(15)(b) is not whether the issues in the appeal are factually or legally complex but whether a reasonable lawyer would have made the arguments that were made by the nonprevailing party. That the subject matter of an appeal is obscure does not compel a conclusion that the arguments made by the nonprevailing party are reasonable. It is entirely possible for a petitioner to write a lengthy petition for review explaining a complicated—or at least infrequently litigated—area of the law and for a local government to make unreasonable jurisdictional arguments in response, thereby making an

award of attorney fees appropriate. The city's argument is a *non sequitur* challenge to the amount of attorney fees sought by petitioners.

The city also argues that the attorney fees requested are not reasonable because, according to the city, portions of the petition for review were not germane to the question of whether the Resolution was a moratorium subject to LUBA's jurisdiction. Specifically, the city points to 5 pages of the petition for review discussing the legislative history and purpose of the moratorium statutes, 4 pages of the petition for review and 6 pages of the response to the motion to dismiss discussing allegedly irrelevant disputed facts, and 15 pages of the petition for review explaining that the city did not comply with ORS 197.505 to 197.540 in adopting the Resolution, a point the city did not dispute. Because petitioners' fee statement does not explain how much time was spent on each part of the petition for review and the response to the motion to dismiss, the city argues that LUBA can only conclude that the entire amount was unreasonable.

In addition, the city argues that, because 15 pages of the petition for review discussed jurisdiction, it was unreasonable for petitioners to spend 22.5 hours—nearly a quarter of the total hours for which attorney fees are sought—drafting the response to the motion to dismiss, which also discussed jurisdiction. The city further argues that it was unreasonable for petitioners' attorney and petitioners' attorney's paralegal to spend a total of 2.5 hours drafting, reviewing, revising, and filing the four nearly identical notices of intent to appeal in these consolidated appeals. Finally, the city argues that it was unreasonable for petitioners' attorney

to spend 15 hours preparing for a 15-minute oral argument given the issues in the appeal and the fact that the city did not file a respondent's brief and, accordingly, was not allowed to present oral argument. OAR 661-010-0040(1) ("Only parties who have submitted briefs shall be allowed to present oral argument to the Board.").

We reject the city's arguments. Appeals of moratoria to LUBA are infrequent and complex. These appeals were made more complex by the facts that some of petitioners' property is inside the city's UGB, some of their property is outside the city's UGB, and the Resolution had different effects on construction or land development on that basis. In drafting the petition for review and the response to the motion to dismiss, petitioners were entitled to thoroughly brief the jurisdictional issue beyond simply responding to the city's arguments.[6] Petitioners were also entitled to put forth challenges to all alleged errors in the city's decision. Finally, as petitioners point out, the manner in which a petitioner employs their attorney's services for purposes of oral argument at LUBA is a matter between the petitioner and their attorney regarding the scope of the

[6] LUBA is not bound by the parties' positions regarding jurisdiction. *See Diack v. City of Portland*, 306 Or 287, 759 P2d 1070 (1988) ("It is well settled that an agency's jurisdiction cannot be conferred by stipulation of the parties." (Citing *Hoffman v. City of Portland*, 294 Or 150, 156, 654 P2d 1106 (1982); *City of Hermiston v. ERB*, 280 Or 291, 295, 570 P2d 663 (1977); *Lane Council Govts v. Emp. Assn.*, 277 Or 631, 636, 561 P2d 1012, *reh'g den*, 278 Or 335, 563 P2d 729 (1977).)).

attorney's services. *Stewart v. City of Salem*, 63 Or LUBA 555, 559, *aff'd*, 240 Or App 466, 247 P3d 763 (2011) (awarding attorney fees to the petitioner for the time their attorney spent traveling to and attending oral argument, even though the petitioner delivered oral argument *pro se* while the attorney sat in the audience).

Having considered the city's arguments, we agree with petitioners that 109.44 attorney hours and 8.3 paralegal hours is a reasonable amount of time to have spent in pursuing these appeals. *Stewart*, 63 Or LUBA 555 (41.3 hours found reasonable); *7th Street Station LLC v. City of Corvallis*, 55 Or LUBA 732 (2008) (67 hours found reasonable); *Kahn v. Canfield*, 330 Or 10, 14-15, 998 P2d 651 (2000) (107 hours for a 35-page appellate response brief not *per se* unreasonable). We conclude that petitioners' requested attorney fees are reasonable.

The motion for attorney fees in the amount of $44,365 is granted.

COSTS

Petitioners filed a cost bill requesting an award of the cost of their filing fees pursuant to OAR 661-010-0075(1)(b)(A). As the prevailing parties, petitioners are awarded the cost of their filing fees, in the amount of $1,200, to be paid by the city.

Dated this 13th day of October 2022.

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Melissa M. Ryan
Board Chair