

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
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4 PETER BRIGGS, RICHARD E. CAVE, JANE C. GIBBONS,
5 CRAIG MCCLANAHAN, KATHERINE GUPTILL, KEN GUPTILL,
6 JULIE D. READING, JANE M. FITZPATRICK, MITCHELL MOORE,
7 GARY WESKE, LINDA FENDER, DARRELL FENDER,
8 DOUGLAS PALMER, JAYNE PALMER, OLENA STROZHENKO,
9 JOHN OSTYN, MARY OSTYN, NADINE SCOTT,
10 JERRY MERRITT, and LORIN J. LYNCH,
11 *Petitioners,*

12
13 vs.

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15 LINCOLN COUNTY,
16 *Respondent,*

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18 and

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20 MONICA KIRK and MICHELE RILEY,
21 *Intervenors-Respondents.*

22
23 LUBA No. 2021-118

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25 JUDY CAMMANN, JOHN BLACKBURN,
26 LAURI HINES, and PETER PREHN,
27 *Petitioners,*

28
29 vs.

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31 LINCOLN COUNTY,
32 *Respondent,*

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34 and

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36 MONICA KIRK and MICHELE RILEY,
37 *Intervenors-Respondents.*
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3 ORDER

4 **BACKGROUND**

5 Petitioners are the prevailing parties in *Briggs v. Lincoln County*, ___ Or
6 LUBA ___ (LUBA Nos 2021-118/2022-030, Aug 8, 2022). The decision
7 challenged in these appeals was county Ballot Measure (BM) 21-203, which
8 imposed new limits on short-term rentals (STRs) and which was approved by
9 voters on November 2, 2021, and certified by the county as final on November
10 19, 2021.

11 Petitioners included four assignments of error in their joint petition for
12 review, with some containing subassignments of error. In the first subassignment
13 of error under the first assignment of error, petitioners argued that BM 21-203
14 violated ORS 215.130(5) because it required that STRs, a previously lawful use,
15 be phased out over five years in certain zones, did not allow transfer of the STR
16 use during that period, and imposed septic and occupancy restrictions on STRs
17 during that period. In the first subassignment of error under the third assignment
18 of error, petitioners argued that BM 21-203 was inconsistent with and preempted
19 by ORS 215.130(5). We agreed with petitioners that BM 21-203 violated and was
20 preempted by ORS 215.130(5). We therefore sustained the foregoing
21 subassignments of error, in part, and reversed the decision.

22 On August 22, 2022, petitioners filed a motion for attorney fees under ORS
23 197.830(15)(b), a motion to take evidence not in the record in support of the

1 motion for attorney fees, and a cost bill. On August 29, 2022, the county filed a
2 response to the motion for attorney fees.¹ On September 2, 2022, intervenors-
3 respondents (intervenors) filed a response to both the motion to take evidence
4 and the motion for attorney fees. On November 23, 2022, petitioners filed a reply
5 to the county’s response. We have considered all of the pleadings.

6 **MOTION FOR ATTORNEY FEES**

7 ORS 197.830(15)(b) provides that LUBA “[s]hall award reasonable
8 attorney fees and expenses to the prevailing party against any other party who the
9 board finds presented a position or filed any motion without probable cause to
10 believe the position or motion was well-founded in law or on factually supported
11 information.” In order to award attorney fees against a nonprevailing party under
12 ORS 197.830(15)(b), we must determine that “every argument in the entire
13 presentation [that the nonprevailing party made] to LUBA is lacking in probable
14 cause.” *Fechtig*, 150 Or App at 14. A position is presented “without probable
15 cause,” for purposes of ORS 197.830(15)(b), where “no reasonable lawyer would
16 conclude that any of the legal points asserted on appeal possessed legal merit.”
17 *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). In applying the
18 probable cause analysis, we “will consider whether any of the issues raised [by

¹ The county expressly takes no position on the motion to take evidence. County’s Response to Motion for Attorney Fees 7 n 2.

1 the nonprevailing party] were open to doubt, or subject to rational, reasonable, or
2 honest discussion.” *Id.*

3 In the first subassignment of error under the first assignment of error,
4 petitioners argued that BM 21-203 violated ORS 215.130(5) because it required
5 that STRs be phased out over five years in certain zones, did not allow transfer
6 of the STR use during that period, and imposed septic and occupancy restrictions
7 on STRs during that period. In the first subassignment of error under the third
8 assignment of error, petitioners argued that BM 21-203 was inconsistent with and
9 preempted by ORS 215.130(5).

10 The county and intervenors (collectively, respondents) responded that,
11 because BM 21-203 merely imposed a business licensing regime, and because
12 there was no right to transfer an STR business *license* prior to BM 21-203’s
13 approval, ORS 215.130(5) was not implicated.

14 We observed:

15 “BM 21-203 states that effective upon the date of its enactment,
16 STRs *shall become* nonconforming uses in the R-1-A, R-1 and R-2
17 zones. Said differently, because of the application of BM 21-203,
18 STRs no longer conform to the use requirements in the R-1-A, R-1
19 and R-2 zones. BM 21-203 therefore presumes that prior to its
20 enactment, STRs were allowed uses in those zones and for purposes
21 of this opinion, we assume that is correct.” *Briggs*, ___ Or LUBA at
22 ___ (slip op at 15) (emphasis in original).

23 We concluded that BM 21-203 effectively rezoned property in the three
24 residential zones and required nonconforming STR *uses* to end within five years,

1 and that it required nonconforming STR *uses* to cease upon transfer. Accordingly,
2 we concluded that BM 21-203 violated and was preempted by ORS 215.130(5).

3 Petitioners argue that they are entitled to attorney fees because
4 respondents' arguments that BM 21-203 did not violate ORS 215.130(5) were
5 lacking in probable cause.

6 The county responds that petitioners have not demonstrated that “*every*
7 argument in the entire presentation [that respondents made] to LUBA is lacking
8 in probable cause,” as is required in order to award attorney fees against
9 respondents. *Fechtig*, 150 Or App at 14 (emphasis added). In the motion for
10 attorney fees, petitioners argue only that respondents' arguments that BM 21-203
11 did not violate ORS 215.130(5) were lacking in probable cause. We understand
12 that argument to concern only respondents' responses to the first subassignment
13 of error under the first assignment of error and the first subassignment of error
14 under the third assignment of error.² We sustained those subassignments of error,
15 and they are the only subassignments of error that we addressed in our final
16 opinion and order.

² Petitioners explain, “LUBA found that reversal under ORS 215.130(5) was indicated, and that BM 21-203 was preempted by ORS 215.130(5), the arguments responding to this argument are the focus of the request for attorney fees.” Motion for Attorney Fees and Cost Bill 7.

1 However, respondents’ responses to those subassignments of error are not
2 the only arguments that respondents made to LUBA. As we explained in our final
3 opinion and order,

4 “[t]he remainder of petitioners’ first assignment of error is that BM
5 21-203 is inconsistent with ORS 203.040. Petitioners’ second
6 assignment of error is that BM 21-03 violates ORS 203.045(2)(b),
7 ORS 215.503, and ORS 215.223. The remainder of petitioners’ third
8 assignment of error is that the decision is unconstitutionally vague,
9 impairs contracts in violation of Article I, section 21 of the Oregon
10 Constitution, and is preempted by the Oregon Planned Community
11 Act and the Oregon Condominium Act.

12 “Petitioners’ fourth assignment of error is not an assignment of
13 error, but rather seeks to avoid a disposition that affirms BM 21-03
14 in part and remands in part. Petition for Review 36-40. The county
15 and intervenors respond with arguments that severance is
16 appropriate. We do not have the authority to affirm in part and
17 reverse or remand in part a decision. *Dept. of Land Conservation v.*
18 *Columbia County*, 117 Or App 207, 843 P2d 996 (1992).”

19 In addition to the first subassignment of error under the first assignment of error
20 and the first subassignment of error under the third assignment of error, in their
21 response briefs, respondents responded to the remainder of the first and third
22 assignments of error and the second and fourth assignments of error.

23 Because petitioners address only respondents’ responses to the first
24 subassignment of error under the first assignment of error and the first
25 subassignment of error under the third assignment of error, and because
26 petitioners do not address, let alone establish, the unreasonableness of
27 respondents’ responses to the remainder of the first and third assignments of error

1 and the second and fourth assignments of error, the county argues that petitioners
2 have not established that they are entitled to attorney fees.

3 We agree with the county. In *Fechtig*, the Court of Appeals affirmed our
4 conclusion that we may award attorney fees against a nonprevailing party under
5 ORS 197.830(15)(b) only if “every argument in the entire presentation [that the
6 nonprevailing party made] to LUBA is lacking in probable cause.” 150 Or App
7 at 14. In *Fechtig*, we declined to award attorney fees to the respondent against
8 the petitioners. In *Spencer Creek Neighbors v. Lane County*, we distinguished
9 that circumstance from the circumstance in which the petitioners file a motion
10 for attorney fees against the respondent:

11 “[W]e refine the rule adopted in *Fechtig* to hold that when
12 considering a petition for attorney fees brought by a prevailing
13 petitioner, we will analyze the merit of those arguments that are
14 made by a respondent or an intervenor-respondent *in response to*
15 *assignments of error that were sustained*. Applying this approach to
16 the standard set forth in *Contreras*, we will make an award of
17 attorney fees to a petitioner if we determine that no reasonable
18 lawyer would conclude that any of the legal points asserted *in*
19 *response to arguments raised in assignments of error that were*
20 *sustained by LUBA* possessed legal merit. In making this
21 determination, we will consider whether any of the issues raised in
22 defense of a sustained assignment of error were open to doubt, or
23 subject to rational, reasonable, or honest discussion. If not, an award
24 of attorney fees against the local government will be required.” 33
25 Or LUBA 824, 826 (1997) (emphases added).

26 On appeal, the Court of Appeals rejected our interpretation of ORS
27 197.830(15)(b):

28 “LUBA’s opinion in this case would have the effect of making that

1 rule applicable when the party from whom the attorney fees are
2 sought is the appellant, but not when attorney fees are sought from
3 a governmental body or other respondent. Nothing in the language
4 of the statute permits such a distinction. * * *

5 “Moreover, the difference in the way LUBA’s present opinion
6 proposes to treat appellants and respondents would be quite
7 anomalous. * * *

8 “* * * * *

9 “Insofar as LUBA’s analysis in the present case is inconsistent with
10 our opinion in *Fechtig*, we disagree with LUBA’s reasoning.”
11 *Spencer Creek Neighbors v. Lane County*, 152 Or App 1, 952 P2d
12 90 (1998).

13 Because we correctly concluded that the respondent’s response to one of the
14 assignments of error was not lacking in probable cause, the court affirmed our
15 order denying attorney fees. However, the court made it clear that, even where
16 the petitioners file a motion for attorney fees against the respondent, we may
17 award attorney fees under ORS 197.830(15)(b) only if *every* argument that the
18 respondent made is lacking in probable cause.

19 Here, because petitioners address only respondents’ responses to the first
20 subassignment of error under the first assignment of error and the first
21 subassignment of error under the third assignment of error, and because
22 petitioners do not address, let alone establish, the unreasonableness of
23 respondents’ responses to the remainder of the first and third assignments of error
24 and to the second and fourth assignments of error, petitioners have not established

1 that every argument that respondents made was lacking in probable cause. We
2 agree with the county that petitioners are not entitled to attorney fees.

3 Respondents also argue that a reasonable lawyer could argue that BM 21-
4 203 merely imposed a business licensing regime, that there was no right to
5 transfer an STR license prior to BM 21-203's approval, and that ORS 215.130(5)
6 was therefore not implicated. We agree with respondents. The legal landscape of
7 county regulation of STR uses is new and evolving, and the law is far from settled
8 regarding such uses. Given that, a reasonable lawyer could make the arguments
9 that respondents made in defending BM 21-103 from petitioners' challenges.³

³ The county also responds that petitioners have not demonstrated that the motion for attorney fees was timely filed. OAR 661-010-0075(1)(a) provides, in part, "The prevailing party may file a cost bill or a motion for attorney fees, or both, no later than 14 days after the final order is issued." OAR 661-010-0075(2)(a)(B) provides, in part:

"[F]iling a document with the Board is accomplished by:

"(i) Mailing by first class or priority mail with the United States Postal Service on or before the due date. If the date of mailing is relied upon as the date of filing, the date of the postmark is the date of filing." (Emphasis added.)

We issued our final opinion and order in these appeals on August 8, 2022. Accordingly, petitioners were required to file the motion for attorney fees no later than August 22, 2022. The certificate of filing included with the motion states that it was filed on August 22, 2022. However, the county attaches to its response a copy of the envelope in which its service copy of the motion was mailed. Because the postmark on that envelope contains no date, the county argues that petitioners have not demonstrated that the motion was timely filed.

1 The motion for attorney fees is denied.

2 **MOTION TO TAKE EVIDENCE**

3 OAR 661-010-0045(1) provides:

4 “The Board may, upon written motion, take evidence not in the
5 record in the case of disputed factual allegations in the parties’ briefs
6 concerning unconstitutionality of the decision, standing, ex parte
7 contacts, actions for the purpose of avoiding the requirements of
8 ORS 215.427 or 227.178, or other procedural irregularities not
9 shown in the record and which, if proved, would warrant reversal or
10 remand of the decision. *The Board may also upon motion or at its
11 discretion take evidence to resolve disputes regarding the content of
12 the record, requests for stays, attorney fees, or actual damages under
13 ORS 197.845.*” (Emphases added.)

14 Petitioners ask that we take as evidence not in the record, in support of the motion
15 for attorney fees, declarations of petitioners’ attorneys Alterman, Brann, and
16 Berman, and the exhibits thereto. Because we deny the motion for attorney fees,
17 the motion to take evidence is moot.

18 **COST BILL**

19 Petitioners in LUBA No. 2021-118 filed a cost bill requesting an award of
20 the cost of their filing fee pursuant to OAR 661-010-0075(1)(b)(A). As the
21 prevailing parties, petitioners in LUBA No. 2021-118 are awarded the cost of
22 their filing fee, in the amount of \$300, to be paid by respondents.

The certificate of filing included with the motion states that it was filed on August 22, 2022. The county provides no reason for us to question that representation, and we accept the certificate of service as proof of the date of mailing.

1 Dated this 6th day of December 2022.

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Michelle Gates Rudd

7 Board Member