

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

3  
4                   1625 SHERMAN AVE. LLC,  
5                                 *Petitioner,*

6  
7                                 vs.

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9                   CITY OF NORTH BEND,  
10                                *Respondent.*

11  
12                               LUBA No. 2022-047

13  
14                               ORDER

15           On May 14, 2022, petitioner filed its notice of intent to appeal the city's  
16 denial of petitioner's application for an Annual Marijuana Retailer Permit and a  
17 Use Occupancy Permit. On June 23, 2022, petitioner filed its petition for review.  
18 On June 30 and July 14, 2022, petitioner filed corrected petitions for review in  
19 response to orders issued by LUBA. On July 11, 2022, the city filed its motion to  
20 dismiss the appeal. On July 22, 2022, petitioner filed its response to the motion  
21 to dismiss. On September 30, 2022, we dismissed petitioner's appeal. *1625*  
22 *Sherman Ave. LLC v. City of North Bend*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2022-  
23 047, Sept 30, 2022). On October 14, 2022, the city filed its cost bill and motion  
24 for attorney fees. On October 28, 2022, petitioner filed its response to the motion  
25 for attorney fees.

1 **COST BILL**

2 The city is the prevailing party. The city requests an award of petitioner’s  
3 \$300 filing fee and the city’s \$57.75 cost of copying the record under OAR 661-  
4 010-0075(1)(c), for a total of \$357.75.

5 **A. Filing Fee**

6 OAR 661-010-0075(1)(c) provides:

7 “If a record has been filed and a petition for review is not filed *within*  
8 *the time required by these rules*, and the governing body files a cost  
9 bill pursuant to this section requesting forfeiture of the filing fee,  
10 then the filing fee required by OAR 661-010-0015(4) shall be  
11 forfeited to the governing body. In addition, if the governing body  
12 files a cost bill pursuant to this section, the Board shall award the  
13 governing body up to \$200, payable from petitioner(s) to the  
14 governing body, as cost of preparation of the record. See OAR 661-  
15 010-0030(1).” (Emphasis added.)

16 OAR 661-010-0030(1) provides, in part:

17 “Failure to file a petition for review *within the time required by this*  
18 *section*, and any extensions of time under OAR 661-010-0045(9) or  
19 661-010-0067(2) shall result in dismissal of an appeal, forfeiture of  
20 the filing fee and an award of up to \$200 for the cost of preparation  
21 of the record payable from the petitioner to the governing body. See  
22 OAR 661-010-0075(1)(c).” (Emphasis added.)

23 On June 23, 2022, petitioner filed its petition for review. On June 28, 2022,  
24 we issued an order directing petitioner to file a corrected petition for review  
25 remedying identified deficiencies in the petition for review with seven days of  
26 the order. On June 30, 2022, petitioner filed a corrected petition for review. On  
27 July 5, 2022, we issued a second order directing petitioner to file a second

1 corrected petition for review within seven days of the date of the order,  
2 remedying deficiencies in the corrected petition for review identified in the order.  
3 On July 14, 2022, petitioner filed a second corrected petition for review.

4 Because the second corrected petition for review was filed nine days after  
5 the date of the second order, as opposed to the seven days directed by the order,  
6 the city argues that the second corrected petition for review was untimely and  
7 asks that we award the city petitioner’s \$300 filing fee. This portion of the cost  
8 bill is denied.

9 “[W]ithin the time required by these rules” and “within the time required  
10 by this section” refer to the time for filing the petition for review, that is, within  
11 21 days after the date the record is received or settled by the Board and any  
12 extensions provided under OAR 661-010-0045(9) or OAR 661-010-0067(2).<sup>1</sup>  
13 OAR 661-010-0075(1)(c); OAR 661-010-0030(1). OAR 661-010-0045(9)  
14 concerns motions to take evidence and OAR 661-010-0067(2) concerns motions  
15 to extend the time to file the petition for review. Neither is at issue here.

16 OAR 661-010-0030(3) provides, “If the Board determines that the petition  
17 for review fails to conform with the requirements of [OAR 661-010-0030(2)], it  
18 shall notify the author, and a brief conforming with the requirements of section

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<sup>1</sup> OAR 661-010-0030(1) provides, in part, “Unless the Board orders otherwise pursuant to ORS 197.830(10)(a), the petition for review \* \* \* shall be filed with the Board within 21 days after the date the record is received or settled by the Board.”

1 (2) shall be filed within three (3) days of notification by the Board.” The orders  
2 directing petitioner to file corrected petitions for review were not extensions of  
3 time under OAR 661-010-0045(9) or 661-010-0067(2) but, rather, opportunities  
4 to correct the petition for review under OAR 661-010-0030(3). The city does not  
5 assert that the petition for review filed on June 23, 2022, was untimely. The  
6 request for forfeiture of the filing fee is denied.

7 OAR 661-010-0075(1)(b)(B) provides, “If the governing body is the  
8 prevailing party, the governing body may be awarded copying costs for the  
9 required number of copies of the record, at 25 cents per page, whether or not the  
10 governing body actively participated in the review.” The city reports that its cost  
11 of copying the record totaled \$57.75.

12 The city is awarded its cost of copying the record, in the amount of \$57.75,  
13 to be paid by petitioner.

#### 14 **MOTION FOR ATTORNEY FEES**

15 ORS 197.830(15)(b) provides that the Board “[s]hall award reasonable  
16 attorney fees and expenses to the prevailing party against any other party who the  
17 board finds presented a position or filed any motion without probable cause to  
18 believe the position or motion was well-founded in law or on factually supported  
19 information.”

20 “In determining whether to award attorney fees against a non  
21 prevailing party, we must determine that ‘every argument in the  
22 entire presentation [that a nonprevailing party] makes to LUBA is  
23 lacking in probable cause[.]’ *Fechtig v. City of Albany*, 150 Or App

1 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position  
2 is presented ‘without probable cause’ where ‘no reasonable lawyer  
3 would conclude that any of the legal points asserted on appeal  
4 possessed legal merit.’ *Contreras v. City of Philomath*, 32 Or LUBA  
5 465, 469 (1996). In applying the probable cause analysis, LUBA  
6 ‘will consider whether any of the issues raised [by a party] were  
7 open to doubt, or subject to ratio[nal], reasonable, or honest  
8 discussion.’ *Id.* The party seeking an award of attorney fees under  
9 the probable cause standard must clear a relatively high hurdle, and  
10 that hurdle is not met by simply showing that LUBA rejected all of  
11 a party’s arguments on the merits.” *Martin v. City of Central Point*,  
12 76 Or LUBA 463, 464 (2017).

13 “A party’s ‘presentation’ includes a party’s arguments on the merits of an appeal  
14 and on jurisdictional issues that may arise.” *Id.* at 466.

15 As we explained in our final opinion and order, “petitioner argue[d] that  
16 the city council applied policy or legal judgment when it decided that it could not  
17 issue the marijuana retailer’s license based on the city’s prior issuance of the 2020  
18 [land use compatibility statement (LUCS)].” *1625 Sherman Ave.*, \_\_\_ Or LUBA  
19 at \_\_\_ (slip op at 10). The city argues that an award of attorney fees is appropriate  
20 because

21 “[p]etitioner’s assertion, that the City made a legal and policy  
22 determination subject to LUBA’s jurisdiction when the City  
23 determined that the 2020 LUCS had no ‘binding effect on the City’s  
24 decision’ is a position without probable cause, does not reference  
25 any supporting law or facts, or present grounds that are open to  
26 doubt or that are debatable.” Cost Bill and Motion for Attorney Fees  
27 6.

28 In its response to the motion for attorney fees, petitioner addresses the city’s  
29 argument concerning the LUCS and argues that “the binding effect of an issued

1 LUCS with respect to subsequent administrative actions” and LUBA’s jurisdiction  
2 were debatable because “a LUCS is in fact a determination of land use  
3 compatibility based upon land use rules and regulations.” Response to Motion  
4 for Attorney Fees 2. We agree with petitioner that, although unsuccessful,  
5 petitioner’s argument was open to honest or reasonable discussion.

6 The motion for attorney fees is denied.

7 Dated this 14th day of December 2022.

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Michelle Gates Rudd  
Board Member