

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 SAVE OUR SKYLINE, KEVIN ARCHER, NANCY ARCHER,
5 STEVEN BERG, JENNIFER BERG, EARL BOWERMAN,
6 LISA BOWERMAN, JERRY CURL, DEBRAH CURL,
7 THOMAS DANIELS, MARTHA DANIELS, GEORGE EMMERT,
8 VALERIE EMMERT, JASON EPPLE, RONALD FISHER,
9 HELEN FISHER, JEFFREY KAPPLE, MARC LANDRY,
10 KATHLEEN LANDRY, ELIZABETH MURPHY, MARK NEUMAN,
11 JANICE NEUMAN, PERRY PATTISON, ANN PATTISON,
12 DONALD ROWDEN, KAREN ROWDEN, JONATHAN SHARPE,
13 JANIS SHARPE, ANDREW SHOOKS, MICHELLE SHOOKS,
14 WILLIAM TAYLOR, DIANE TAYLOR,
15 MARSHALL THOMAS, and LOUANN THOMAS,

16 *Petitioners,*

17
18 vs.

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20 CITY OF BEND,

21 *Respondent,*

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23 and

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25 AWBREY TOWERS, LLC,

26 *Intervenor-Respondent.*

27
28 LUBA Nos. 2004-004 and 2004-048

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30 WESTERN RADIO SERVICES COMPANY,

31 *Petitioner,*

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33 and

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35 SAVE OUR SKYLINE, KEVIN ARCHER, NANCY ARCHER,
36 STEVEN BERG, JENNIFER BERG, EARL BOWERMAN,
37 LISA BOWERMAN, JERRY CURL, DEBRAH CURL,
38 THOMAS DANIELS, MARTHA DANIELS, GEORGE EMMERT,
39 VALERIE EMMERT, JASON EPPLE, RONALD FISHER,
40 HELEN FISHER, JEFFREY KAPPLE, MARC LANDRY,
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44 JANIS SHARPE, ANDREW SHOOKS, MICHELLE SHOOKS,
45 WILLIAM TAYLOR, DIANE TAYLOR,

1 MARSHALL THOMAS, and LOUANN THOMAS,
2 *Intervenors-Petitioner,*

3
4 vs.

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6 CITY OF BEND,
7 *Respondent,*

8
9 and

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11 AWBREY TOWERS, LLC,
12 *Intervenor-Respondent.*

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14 LUBA No. 2004-005

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16 ORDER ON COSTS

17 Under our rules, prevailing petitioners are entitled to recover their filing fee as costs.
18 OAR 661-010-0075(1)(b)(A). Petitioners in LUBA Nos. 2004-004 and 2004-048 (hereafter
19 petitioners) seek an award of costs, in the amount of their two \$175 filing fees in those two
20 appeals. Intervenor-respondent (hereafter intervenor) objects on two grounds. First, while
21 petitioners prevailed on one subassignment of error under their third assignment of error,
22 petitioners' remaining assignments and subassignments of error were rejected. Intervenors
23 also point out that while petitioners sought *reversal* of the city's decision, LUBA *remanded*
24 the city's decision. Second, intervenor does not believe petitioners should be awarded costs
25 for LUBA No. 2004-048, which petitioners and intervenor characterize as a precautionary
26 appeal.

27 Petitioners need not prevail in all of their assignments of error. So long as one of
28 petitioners' assignments of error is sustained in whole or in part and results in reversal or
29 remand of an appealed decision, petitioners are the "prevailing party" within the meaning of
30 OAR 661-010-0075(1)(b)(A). *Churchill v. Tillamook County*, 29 Or LUBA 572 (1995). We
31 decline intervenor's invitation to exercise our discretion under OAR 661-010-0075(1)(b)(A)
32 to reject petitioners' cost bill for failure to prevail on more of their allegations of error.

33 Turning to intervenor's second basis for objection, the decision that was ultimately

1 the subject of our review was a December 10, 2003 county hearings officer's decision.
2 Petitioners and the petitioner in LUBA No. 2004-005 filed local appeals of that decision and
3 their requests for a local appeal were denied by the city council on January 7, 2004, although
4 that decision apparently was never reduced to writing. The appeals in LUBA Nos. 2004-004
5 and 2004-005 were filed within 21 days of the city council's January 7, 2004 decision.
6 However at that January 7, 2004 meeting the city council agreed to hear the Deschutes
7 County's sheriff's local appeal of the hearings officer's decision. The city council
8 subsequently voted to reject that appeal as well and affirmed the hearings officer's decision
9 on March 3, 2004. Petitioners' appeal in LUBA No. 2004-048 was filed on March 18, 2004,
10 in anticipation that some party might take the position that the hearings officer's decision
11 became final on March 3, 2004.

12 Because the issue was not raised, we did not decide whether the hearings officer's
13 decision became final on January 7, 2004 or March 3, 2004. However, there is easily enough
14 uncertainty regarding the answer to that question that the filing of both LUBA No. 2004-004
15 and LUBA No. 2004-048 was a prudent choice on petitioners' part. Petitioners are the
16 prevailing parties in LUBA No. 2004-004 and 2004-048, and they are entitled to recover their
17 filing fee in both appeals.¹

18 Petitioners are awarded costs, in the amount of \$350, to be paid by intervenor and
19 respondent. The Board will return petitioners' deposits for costs in LUBA Nos. 2004-004
20 and 2004-048.

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¹ If intervenor had moved to dismiss LUBA No. 2004-004 or LUBA No. 2004-048 we would have had to determine when the challenged decision became final and dismiss one of those appeals. In that event, petitioners would only have been the prevailing party in one of their appeals and would only be entitled to recover one of their filing fees under OAR 661-010-0075(1)(b)(A).

1 Dated this 7th day of December, 2004.

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Michael A. Holstun
Board Chair