

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

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4 DEBRAH J. CURL, JERRY L. CURL,
5 THOMAS L. DANIELS, ANDREW SHOOKS,
6 HELEN FISHER, BILL TAYLOR,
7 and JAMES E. SWARM,
8 *Petitioners,*

9
10 and

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12 WESTERN RADIO, INC. and
13 RICHARD OBERDORFER,
14 *Intervenors-Petitioners,*

15
16 vs.

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18 CITY OF BEND,
19 *Respondent,*

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21 and

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23 NPG OF OREGON, INC.,
24 *Intervenor-Respondent.*

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26 LUBA No. 2007-165

27 ORDER ON COSTS

28 Petitioners filed a cost bill requesting award of the cost of their filing fee, in the
29 amount of \$175. Petitioners also request return of their \$150 deposit for costs.

30 Intervenor-respondent (intervenor) does not dispute that petitioners are the
31 “prevailing parties” in this appeal, because LUBA sustained four out of the 18 assignments
32 of error in the petition for review. However, intervenor argues that LUBA retains discretion
33 under ORS 197.830(15)(a) and OAR 661-010-0075(1)(b)(A) to decide whether or not to
34 award the cost of the filing fee to the prevailing party, and the Board should exercise that
35 discretion in the present case to deny petitioners an award of the filing fee.¹ According to

¹ ORS 197.830(15)(a) provides, in relevant part:

1 intervenor, awarding the cost of the filing fee to petitioners is inappropriate in the present
2 case because (1) petitioners prevailed on less than a majority of the assignments of error, (2)
3 petitioners requested reversal of the city's decision, but the Board chose only to remand the
4 decision, and (3) intervenor cross-assigned error to the city's decision and the Board
5 remanded under intervenor's cross-assignment of error.

6 We have consistently held that the petitioner is the prevailing party and an award of
7 the filing fee is appropriate where the Board sustains at least one of the assignments of error
8 and either reverses or remands the decision. *Churchill v. Tillamook County*, 29 Or LUBA
9 572 (1995) (the petitioner is the prevailing party if the challenged decision is reversed or
10 remanded); *Louisiana Pacific v. Umatilla County*, 26 Or LUBA 624, 625 (1995) (the
11 petitioner is the prevailing party because it prevailed on two of six assignments of error).
12 We agree with intervenor that we have some discretion under ORS 197.830(15)(a) and
13 OAR 661-010-0075(1)(b)(A) in deciding what circumstances warrant awarding the petitioner
14 the cost of the filing fee. However, in our view, where the petitioner has prevailed on the
15 merits of at least one assignment of error and LUBA reverses or remands the decision based
16 on that sustained assignment of error, the petitioner is the "prevailing party" and therefore
17 entitled to an award of the cost of the filing fee. That the petitioner prevailed only on a
18 minority of the assignments of error, or obtained remand rather than reversal of the decision,
19 is immaterial.

20 That intervenor prevailed on a cross-assignment of error presents a slightly closer
21 question. There may be rare circumstances where remand under a sustained cross-
22 assignment of error has such a disproportionate impact on the remand proceedings compared

"Upon entry of its final order the board may, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review. * * *"

OAR 661-010-0075(1)(b)(A) implements ORS 197.830(15)(a), and provides that "[i]f the petitioner is the prevailing party, the petitioner may be awarded the cost of the filing fee."

1 to remand under a sustained assignment of error, that it calls into question whether the
2 petitioner is accurately characterized as the “prevailing party.” However, in the present case
3 LUBA remanded under intervenor’s cross-assignment of error merely to clear up alleged
4 “technical or clerical” errors in the wording of several conditions of approval. That very
5 limited basis for remand does nothing to indicate that petitioners should not be viewed as the
6 prevailing parties.

7 Petitioners are awarded the cost of their filing fee, in the amount of \$175, to be paid
8 by respondent and intervenor. The Board shall return petitioners’ \$150 deposit for costs.

9 Dated this 21st day of May, 2009.
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16 Tod A. Bassham
17 Board Chair