BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HOLGER T. SOMMER,
Petitioner,

vs.

CITY OF CAVE JUNCTION,
Respondent.

LUBA No. 2007-120

ORDER ON COSTS AND
MOTION FOR ATTORNEY FEES

The city moves for an award of attorney fees pursuant to ORS 197.830(15)(b), which provides:

> "The board shall * * * award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position without probable cause to believe the position was well-founded in law or on factually supported information."

The city argues that attorney's fees should be awarded because petitioner's assignments of error were not well founded in law or based upon factual information. Petitioner made three arguments and conceded that one argument was without merit. LUBA found the other two were irrelevant to the subject matter of the appeal.

In determining whether to award attorney fees against a nonprevailing party, we must determine that "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause * * *." *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented "without probable cause" 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 LUBA "will consider whether any of the issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest

discussion." *Id*. The party seeking an award of attorney fees under the probable cause standard must clear a relatively high hurdle and that hurdle is not met by simply showing that LUBA rejected all of a party's arguments on the merits. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

As an initial matter, petitioner argues that there is a different standard for attorneys and non-attorneys:

> "How can Petitioner, educated as an engineer, be expected to have legal skills to match those of Respondent's attorney? Even an experienced engineer is not expected to have the level of skill that Respondent indicates was required to deal with the 'extreme complexity' of the matter appealed to LUBA. It is unreasonable to contend that Petitioner should be expected to understand the fine legal distinctions that the learned Respondent Attorney does. Respondent cites 7 LUBA cases Petitioner has been involved in front of the Board. Petitioner prevailed only in two." Petitioner's Objection to Motion for Award of Attorney's Fees 3.

The standard adopted in *Contreras* applies to lawyers and non-lawyers alike. We evaluate not whether a party is represented, but whether there is any "* * * objective legal basis for the appeal," *i.e.*, whether *any* reasonable lawyer would conclude that *any* of the positions taken by the party on appeal possesses legal merit. *Squires v. City of Portland*, 33 Or LUBA 783, (1997).

Petitioner also moves to take evidence not in the record pursuant to OAR 661-010-0045(1). OAR 661-010-0045(1) allows LUBA, based on a party's motion or its own direction, to take evidence not in the record in order to resolve a dispute regarding attorney fees. Petitioner's motion states that petitioner would like to depose attorneys that provided affidavits in support of the city's motion for attorney fees, in order to ascertain the validity of an assertion in their affidavits that these attorneys reviewed the record. The city objects to the motion to take evidence, and argues that petitioner's motion does not satisfy OAR 661-010-0045(2), which requires the motion to explain with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds for taking evidence not in the record, and how those facts will affect the outcome of the review proceeding. We agree with

the city. Petitioner's motion to take evidence not in the record is denied.

Petitioner also argues that under ORS 197.830(15)(a) and (b) and OAR 661-010-0075(1)(e), governing bodies are not entitled to recover attorney fees, even where the governing body is the prevailing party. The city responds that the city is a "party" under OAR 661-010-0010(11), and nothing in the text of the statute or our rules prevents a prevailing party that is a governing body from being awarded attorney fees.[1] We agree.

Turning to the merits, in *Sommer v. Cave Junction*, __ Or LUBA __ (LUBA No. 2007-120, December 19, 2007), petitioner appealed decisions by the city rezoning two parcels of land totaling approximately 3.17 acres in size from the county's Rural Commercial zoning designation to the city's Commercial zoning designation. *Id*. at slip op 2. The subject properties were annexed into the city by ordinances that were adopted on May 29, 2007. Record 56, 62-3. The ordinances approving the zone changes were adopted by the city on June 12, 2007.

In the petition for review, petitioner asserted three assignments of error. First, petitioner argued that the city failed to notify Josephine County of the proposed zone changes as required by an intergovernmental agreement between the city and county, and that the city failed to notify the Oregon Department of Land Conservation and Development (DLCD) of the proposed zone changes as required by ORS 197.610(1) and OAR 660-018-0020. At oral argument, petitioner conceded that the city properly notified the county and DLCD of the proposed zone changes. Evidence in the record shows that both DLCD and the County were notified of the proposed zone changes and were both allowed adequate opportunity to

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[1] OAR 661-010-0010(11) provides:

> "'Party' means the petitioner, the governing body, and any person who intervenes as provided in OAR 661-010-0050. 'Party' does not include a state agency that files a brief under ORS 197.830(8) or an amicus participating under OAR 661-010-0052."

comment. (Record 15, 40, 60). Given the undisputed evidence in the record that such notices were provided, we do not believe a reasonable attorney would make the argument petitioner made in his first assignment of error.

In petitioner's second assignment of error, he argued that the city's findings were inadequate to demonstrate that the city's *annexation of the subject properties* complied with the City of Cave Junction Comprehensive Plan Goal 14. In his third assignment of error, petitioner argued that the city's *annexation of the subject properties* violated section 1.E of the IGA. In denying those assignments of error, we held:

> "The city responds that petitioner's second and third assignments of error are challenges to the Annexation Ordinances and not to the decisions that petitioner appealed in the present appeal. As noted above, the Annexation Ordinances were adopted by the city on May 29, 2007. Record 56, 62-3. The decisions that are being appealed in this appeal are the two ordinances, Ordinances 504 and 505, that rezoned the subject properties from Rural Commercial to Commercial.
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> "We agree with the city that petitioner's second and third assignments of error challenge rezoning decisions based on criteria that apply only to annexation decisions. Therefore petitioner's arguments provide no basis for reversal or remand." *Sommer v. Cave Junction*, __ Or LUBA __ (LUBA No. 2007-120, December 19, 2007, slip op 3.)

Petitioner's response to the city's motion for attorney fees relies on the same premise set forth in the petition for review: that the previously adopted annexation ordinances could be challenged in the appeal of the subsequent ordinances rezoning the properties. Petitioner concedes as much:

> "Because the Zone Change can only happen [sic] after the Annexation, Petitioner assumed (that is his only mistake) that the annexation decisions and the zone change decisions were made together and are inseparable from each other, given LUBA also has jurisdiction over the annexation of the properties." Petitioner's Objection to Motion for Award of Attorney's Fees 4.

The arguments presented in the second and third assignments of error were arguments that the city erred in failing to apply criteria that do not apply to rezoning decisions, but rather apply to annexation decisions. In the entire petition for review, petitioner made no argument

that any criteria that are applicable to zone changes were violated in approving the zone changes. Applying the *Contreras* standard, we agree with the city that no reasonable attorney would present those arguments, and we hold that no reasonable attorney would conclude that the arguments possessed any legal merit.

Respondent's motion for award of attorney fees is granted.

Under ORS 197.830(15)(b), the requested attorney fees must be reasonable. LUBA has discretion to determine the amount of attorney fees that is reasonable under the specific facts of the case. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769 (2005). We independently review attorney fee statements for reasonableness. *See 6710 LLC v. City of Portland*, 41 Or LUBA 608, 611-12 (2002) (discussing reasonable hourly rates and reasonable amount of time to prosecute a LUBA appeal).

The city submitted a statement of attorney fees, seeking $8,658.00 in attorney fees. The city also submitted three affidavits in support of its motion and the reasonableness of the amount of fees sought. The city's attorney spent approximately 46.8 hours defending the appeal at an hourly rate of $185.00. The city later agreed to reduce the amount of fees sought by .7 hours or $129.50 after petitioner argued that the description of the services for one item billed was similar or identical to another item already billed.

Petitioner argues that fees for time the city's attorney spent preparing the city's motion for attorney fees are not recoverable, and that in the event such fees are recoverable, the time spent on these items is unreasonable. Petitioner does not cite any authority for his claim that such fees are not recoverable. We disagree with petitioner that fees for time spent preparing the motion for attorney fees are not recoverable. ORS 197.830(15)(b) allows recovery of "reasonable attorney fees," and we think that includes fees for preparation of a motion for attorney fees under the statute. We also think the amount of time spent on these items is reasonable.

However, we find that two items described in the city's statement of fees appear to

have taken more time than is reasonable. Item 6 indicates that the city's attorney spent two hours reviewing a one-page letter from petitioner. We find that two hours to review a one-page letter is not a reasonable amount of time for such a task, and that a reasonable amount of time for such a task is .3 hours. Item 17 indicates that the city's attorney spent two hours reviewing LUBA's final opinion in *Sommer*. Our final opinion totaled three pages, including an entire page for the case caption. We find that two hours to review what is in essence a two page opinion is not a reasonable amount of time for such a task, and that a reasonable amount of time for such a task is .5 hours. Therefore, the amount of fees claimed in Items 6 and 17 are reduced accordingly. We agree with the city that the remaining time spent on the appeal is a reasonable amount of time to have spent in defending the appeal, and that the city's attorney's hourly rate of $185.00 is reasonable. *Id*.

In summary, we find that a reasonable amount of time for reviewing the one-page letter and three-page LUBA opinion is .8 hours (.3 hours plus .5 hours). Accordingly, the four hours included in the city's statement of fees for these items is reduced by 3.2 hours, with the result that the award of attorney fees is reduced by $592.00. When that $592.00 is added to the $129.50 reduction that the city has already agreed to, the city is awarded attorney fees in the amount of $7,936.50.

Respondent also filed a cost bill requesting award of the cost of preparing the record, in the amount of $27.60. Petitioner does not object to respondent's cost bill. Respondent is awarded the cost of preparing the record, in the amount of $27.60, to be paid from petitioner's deposit for costs. The Board shall return the remainder of petitioner's deposit for costs, in the amount of $122.40.

Dated this 13th day of May, 2008.

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Melissa M. Ryan
Board Chair