

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

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4                               WALUGA NEIGHBORHOOD ASSOCIATION,  
5                                       *Petitioner,*

6  
7                                       vs.  
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9                               CITY OF LAKE OSWEGO,  
10                                       *Respondent,*

11  
12                                       and

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14                               NORTHWEST HOUSING ALTERNATIVES, INC.,  
15                                       *Intervenor-Respondent.*

16  
17                                       LUBA No. 2008-035

18                                       ORDER

19   **MOTION FOR ATTORNEY FEES**

20               Petitioner moves for an award of attorney fees pursuant to ORS 197.830(15)(b),  
21   which provides:

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

26               In determining whether to award attorney fees against a nonprevailing party, we must  
27   determine that “every argument in the entire presentation [that a nonprevailing party] makes  
28   to LUBA is lacking in probable cause \* \* \*.” *Fechtig v. City of Albany*, 150 Or App 10, 24,  
29   946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented “without probable  
30   cause” where “no reasonable lawyer would conclude that any of the legal points asserted on  
31   appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465, 469  
32   (1996). In applying the probable cause analysis LUBA “will consider whether any of the  
33   issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest  
34   discussion.” *Id.* The party seeking an award of attorney fees under the probable cause

1 standard must clear a relatively high hurdle and that task is not satisfied by simply showing  
2 that LUBA rejected all of a party's arguments on the merits. *Brown v. City of Ontario*, 33 Or  
3 LUBA 803, 804 (1997).

4 Petitioner raised five assignments of error in their petition for review. We sustained  
5 petitioner's first assignment of error that the city misapplied the applicable by law by  
6 interpreting the definition of "congregate care" in the local code to mean that age in itself  
7 was a disability. We denied petitioner's other assignments of error. In order to award  
8 attorney fees against a non-prevailing party, LUBA must find that "every argument in the  
9 entire presentation" is lacking probable cause. The city prevailed on four of the five  
10 assignments of error. Clearly the city's arguments regarding the other four assignments of  
11 error do not qualify as arguments that no reasonable attorney would make. Even if the city's  
12 arguments regarding the assignment of error that was sustained were not reasonable, because  
13 the city prevailed on the other assignments the motion for attorney fees must be denied.<sup>1</sup>

14 Petitioner also argues that LUBA should award attorney fees because petitioner is a  
15 neighborhood association. According to petitioner, a failure to award attorney fees in this  
16 case would have a "chilling effect on future appeals by neighborhoods." Motion for  
17 Attorney Fees 3. Even if that is true, we are aware of no authority, and petitioner provides  
18 none, that would allow us to award attorney fees independently of ORS 197.830(15)(b).

19 Petitioner's motion for attorney fees is denied.

## 20 COSTS

21 Petitioner filed a cost bill, requesting award of the cost of the filing fee, in the amount  
22 of \$325. Under OAR 661-010-0075(b)(A), petitioner is entitled to an award of the cost of  
23 the filing fee. The filing fee, however, is \$175 – not \$325. OAR 661-010-0015(14).

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<sup>1</sup> Even if the first assignment of error had been the only assignment of error, an award of attorney fees would not be warranted. The city has discretion in interpreting its own ordinances, and it was a reasonably close question as to whether the city exceeded that discretion.

1 Presumably, petitioner mistakes the \$150 deposit for costs as part of the filing fee. Petitioner  
2 is entitled to a return of the deposit for costs, but it is returned by LUBA. OAR 661-010-  
3 0075(1)(d). Petitioner is awarded the cost of the filing fee, in the amount of \$175, to be paid  
4 by respondents. OAR 661-010-0075(1)(b)(A). The Board will return petitioner's \$150  
5 deposit for costs.

6 Dated this 10<sup>th</sup> day of December, 2008.  
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Tod A. Bassham  
14 Board Member