BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HENRY KANE,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

WILLAMETTE WEST HABITAT
FOR HUMANITY, INC.,
Intervenor-Respondent.

LUBA No. 2009-132

ORDER

MOTION FOR ATTORNEY FEES

Intervenor-respondent (intervenor) 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."

As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

> "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 meet 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)."

Thus, attorney fees are warranted under ORS 197.830(15)(b) where the prevailing party demonstrates that no reasonable lawyer would present any of the "positions" that the losing party presented on appeal. Conversely, a party may avoid attorney fees if the party presented at least one position on appeal that satisfied the probable cause standard.

In the present case, the challenged decision is a city council decision affirming a planning commission decision that approves a five-lot subdivision. The planning commission also approved four related variances and adjustments to setbacks, etc., in four separate decisions, but petitioner did not appeal those decisions to the city council.

On appeal to LUBA, petitioner advanced three assignments of error. We denied all three assignments of error, and the Court of Appeals affirmed our decision without opinion. *Kane v. City of Beaverton*, 237 Or App 274, __ P3d __ (2010). Intervenor argues that none of the positions presented under the three assignments of error, including petitioner's responses or lack of response to waiver challenges, are positions that a reasonable lawyer would have presented in an appeal of the subdivision approval. For the reasons set out below, we agree with intervenor.

A. First Assignment of Error

Under the first assignment of error, petitioner argued that approval of a five-lot subdivision violated Metro Code (MC) 3.07.140.A.2, which in relevant part requires local governments to adopt minimum residential densities and provides that a local government "shall not approve a subdivision or development application that will result in a density below the maximum density for the zoning district." According to petitioner, there was no dispute that the maximum density for the subject property is six lots, and therefore the city violated MC 3.07.140.A.2 in approving only five lots.

In the response brief, intervenor argued first that petitioner failed to raise any issue below regarding MC 3.07.140.A.2, and therefore that issue was waived, under ORS 197.763(1) (statutory waiver). In addition, intervenor argued that petitioner had not

identified the issue of compliance with MC 3.07.140.A.2 in the notice of local appeal from the planning commission to the city council. Intervenor contends petitioner therefore failed to exhaust that issue, and it was thus waived, under the reasoning in *Miles v. City of Florence*, 190 Or App 500, 79 P3d 382 (2003) (exhaustion waiver). We did not resolve either waiver challenge, although we commented that we tended to agree that petitioner had not demonstrated that any issue was raised below regarding MC 3.07.140.A.2 for purposes of ORS 197.763(1), or that the issue was identified in the notice of local appeal and therefore not waived under *Miles*.

We disposed of the assignment of error on the merits, agreeing with intervenor that MC 3.07.140.A.2 was not an applicable approval criterion, because under MC 3.07.810.F a Metro requirement such as the minimum density provisions of MC 3.07.140.A.2 applied directly to city decisions only until the city implemented the Metro Code requirement, after which the city applied its implementing regulation. In 2002, the city had adopted regulations, including those at Beaverton Development Code (BDC) 20.05.60, that implemented the MC 3.07.140.A.2 minimum density requirement. BDC 20.05.60 includes provisions that allow a reduction from the minimum density otherwise required, in two circumstances.[1]

The first assignment of error also briefly quoted the first sentence of BDC 20.05.60, which we construed as an argument that approving five lots instead of six lots also violated

[1] BDC 20.05.60 is now codified elsewhere, but as applicable to the challenged decision it provided, in relevant part:

> "New residential development in [residential] zoning districts * * * must achieve at least the minimum density for the zoning in which they are located. Projects proposed at less than the minimum density must demonstrate on a site plan or other means, how, in all aspects, future intensification of the site to the minimum density or greater can be achieved without an adjustment or variance. If meeting the minimum the minimum density will require the submission and approval of an adjustment or variance application(s) above and beyond application(s) for adding new primary dwellings or land division of property, meeting minimum density is not required."

BDC 20.05.60, in addition to MC 3.07.140.A.2. The planning commission had adopted findings that the five-lot subdivision complied with BDC 20.05.60, because creating a sixth lot would require a major adjustment or variance. The city council expressly affirmed and adopted those findings. In addition, the city council found compliance with BDC 20.05.60 on the additional ground that one of the five lots could support a duplex, which demonstrates that future intensification to the minimum density can be achieved. Petitioner, however, did not challenge those findings or develop any kind of argument as to why approval of five lots violated BDC 20.05.60. Accordingly, we rejected petitioner's contentions regarding BDC 20.05.60.

Turning first to petitioner's position regarding BDC 20.05.60, intervenor argues that no reasonable attorney would have argued that the city erred in reducing the minimum density in violation of BDC 20.05.60 without making some attempt to acknowledge and challenge the city's findings of compliance with BDC 20.05.60, which expressly authorize a reduction in minimum density. We agree with intervenor.

With respect to petitioner's position regarding MC 3.07.140.A.2, which was the primary thrust of the first assignment of error, intervenor argues that no reasonable attorney would have asserted that MC 3.07.140.A.2 applied directly to the city's decision, when even a minimal amount of research would have revealed that under MC 3.07.810.F the minimum density requirements of MC 3.07.140.A.2 no longer directly apply to city land use decisions once the city has adopted implementing regulations, which the city clearly had. We disagree with intervenor. MC 3.07.140.A.2 says what it says, and it does not cross-reference MC 3.07.810.F or include any suggestion that the Metro Code minimum density standard stops applying once the local government implements it. We do not think that, before asserting violation of a Metro Code provision that on its face appears to apply to a decision, a party is required to comb through dozens of pages of code language looking for something that would render the code provision inapplicable, in order to avoid attorney fees under ORS

197.830(15)(b). While petitioner's position that MC 3.07.140.A.2 applied and is violated by the city's decision did not prevail, that position was, as far as it went, a position that a reasonable attorney would present in the petition for review.

Intervenor also argues that no reasonable attorney would have presented on appeal the issue of the issue of compliance with MC 3.07.140.A.2, when that issue had not been raised below and had not been identified as an issue in the local notice of appeal, and thus was an issue that was not within LUBA's scope of review under both ORS 197.763(1) and *Miles.* As noted, we did not dispose of the first assignment of error based on intervenor's statutory and exhaustion waiver arguments. In a recent case, however, we held that where the petitioner relies on arguments under an assignment of error to defeat an award of attorney fees under ORS 197.830(15)(b), and that assignment of error was subject to a successful statutory or exhaustion waiver challenge, the petitioner must *also* show that at least one position taken on the waiver challenges satisfies the probable cause standard. *Zeitoun v. Yamhill County*, __ Or LUBA __ (LUBA No. 2009-088, Order, July 9, 2010), slip op 4. In *Zeitoun*, we denied the motion for attorney fees, finding that at least one of the positions taken on the waiver challenge met the probable cause standard, and that at least one of the positions in the assignment of error that was the subject of the waiver challenge satisfied the probable cause standard. In short, under *Zeitoun*, to avoid attorney fees it is not sufficient to assert a probable cause argument on the merits if the argument on the merits was waived. In that circumstance, the petitioner must also have presented at least one probable cause argument regarding the waiver challenge.

In the present case, we disposed of the first assignment of error on the merits, and therefore did not address the pending waiver challenge, in fact two pending waiver challenges. Although it is somewhat counterintuitive, LUBA sometimes chooses to reject an issue on the merits rather than on the basis of a waiver challenge, where the merits of an issue are straightforward, quicker to resolve than the waiver challenge, and result in denial of

the assignment of error, as in the present case. Further, in the present case our determination to resolve the first assignment of error on the merits and not address the waiver challenges was also influenced by the fact that petitioner did not attend oral argument, due to circumstances described in our opinion, and therefore did not exercise one of his opportunities to respond (orally) to the waiver challenges.

The present circumstances differ from *Zeitoun* in that respect. Nonetheless, we believe the rationale in *Zeitoun* applies in the present circumstance as well, where LUBA disposes of the assignment of error on the merits and does not reach one or more pending waiver challenges. Therefore, our conclusion that petitioner's argument on the merits regarding MC 3.07.140.A.2 met the probable cause threshold does not end our inquiry. We must also determine whether petitioner's positions regarding ORS 197.763(1) waiver and *Miles* waiver met the probable cause threshold. If they do not, petitioner may not rely on the probable cause merits of his arguments regarding MC 3.07.140.A.2 to avoid an award of attorney fees, even though those arguments meet the relatively low probable cause threshold.

Turning to the waiver challenges, we have reviewed petitioner's pleadings, and we find no response to intervenor's arguments that the issue of compliance with MC 3.07.140.A.2 was not identified in the local notice of appeal, and that issue was therefore waived under *Miles*. Petitioner has not identified anything in the local notice of appeal, or documents submitted along with the local notice of appeal, that even mentions MC 3.07.140.A.2. We have independently reviewed the notice of local appeal and accompanying documents, and we cannot find any mention of MC 3.07.140.A.2. Petitioner's non-response to the *Miles* waiver argument does not satisfy the probable cause threshold and we have been unable to identify anything in the notice of local appeal and accompanying documents that would allow a response that meets the probable cause threshold.

With respect to the statutory waiver challenge, petitioner responded by citing several occasions in the record where he briefly mentions "Metro's minimum requirements,"

although apparently without citing specifically to MC 3.07.140.A.2. *E.g.* Record 15. Those oblique references to MC 3.07.140.A.2 are not sufficient to respond to a statutory waiver challenge. As far as we can tell, petitioner's references to the Metro minimum density standard were simply an adjunct to petitioner's arguments regarding BDC 20.05.60, which was the main focus of his arguments to the city. Petitioner never advised the city, at least not clearly, that he believed that MC 3.07.140.A.2 imposed an obligation on the city that is independent of BDC 20.05.60, and not subject to the BDC 20.05.60 exceptions that allow authorization of less than the prescribed density. However, the relevant question is not whether petitioner's response to the statutory waiver challenge is adequate to show that the issue was preserved. For purposes of this attorney fee petition, the question is whether that response satisfied the low probable cause threshold. Although it is a very close question, we believe that a reasonable attorney *could* argue, based on the references to MC 3.07.140.A.2 in the record below, that the issue of compliance with MC 3.07.140.A.2 had been raised below for purposes of waiver under ORS 197.763(1).

However, as noted, under the reasoning in *Zeitoun*, as extended in this order, where a petitioner seeks to rely upon the merits of an assignment of error that was the subject to a waiver challenge to avoid an award of attorney fees, the petitioner must demonstrate that both the merits of the assignment of error and petitioner's response to the waiver challenge surpassed the relatively low probable cause standard, *i.e.*, were positions a reasonable attorney would have taken. Here, intervenor raised two distinct types of waiver challenges, each of which could have independently led to denial of the assignment of error without regard to the substantive merits of the assignment of error. In this circumstance, we believe that petitioner must establish that he made probable cause arguments in response to both types of waiver challenges (statutory and exhaustion waiver), before he may rely on his arguments on the merits of the assignment of error. We extend the reasoning in *Zeitoun* to so hold. As explained above, petitioner did not make a probable cause argument in response to

the exhaustion waiver challenge, and therefore petitioner cannot rely upon the merits of the first assignment of error to avoid attorney fees under ORS 197.835(15)(b).

B. Second and Third Assignments of Error

The second and third assignments of error appeared to challenge one or more of the separate planning commission variance and adjustment decisions that were not before the city council or LUBA. Petitioner offered no understandable theory for why the unappealed planning commission variance and adjustment decisions could be challenged in a LUBA appeal of the city council's subdivision approval, and we therefore denied the second and third assignments of error, and affirmed the city council's decision.

Intervenor argues, and we agree, that petitioner's positions taken under the second and third assignments of error were not presented with probable cause to believe the position was well-founded in law or on factually supported information. Petitioner's apparent challenge to separate planning commission variance and adjustment decisions that were not appealed to the city council or before LUBA was a challenge that no reasonable attorney would present.

In response to the motion for attorney fees, petitioner appears to argue that the subject of the second and third assignments of error was not, as we presumed in our decision, the planning commission's separate variance decisions that were not appealed to the city council, but rather the city council's subdivision decision on appeal to LUBA. In the response, petitioner characterizes the subdivision decision as approving a *de facto* "variance" to the minimum density standard at BDC 20.05.60, because it approves five lots instead of six, and as a variance the city must therefore apply the city's general variance criteria. However, if petitioner intended the second and third assignments of error to express the position that the city council's subdivision decision in fact approved a general "variance" to the BDC 20.05.60 minimum density requirement, that position was not stated with sufficient clarity in the petition for review. In any case, that position is also one that a reasonable attorney would

not advance. A finding of compliance with BDC 20.05.60, which expressly permits approving fewer than the minimum number of lots in specified circumstances, cannot be reasonably understood as adopting a "variance" to BDC 20.05.60, requiring application of the city's general variance criteria. Petitioner's arguments under the second and third assignments of error do not shield him from an award of attorney fees.

C. Conclusion

For the above reasons, none of petitioner's positions with respect to the three assignments of error presented in the petition for review and other relevant pleadings are sufficient to avoid an award of attorney fees under ORS 197.835(15)(b). Intervenor's motion for attorney fees is granted.

Intervenor seeks $6,760 in attorney fees and expenses, based on a detailed statement showing 33.8 hours of legal work at $200 per hour. Petitioner does not dispute the detailed statement, the number of hours, the hourly rate, or the total amount. We agree with intervenor that the requested fees and expenses are reasonable. Intervenor is awarded $6,760 in attorney fees and expenses, to be paid by petitioner.

COST BILL

The city submitted a cost bill seeking recovery of the cost of the copying the record, in the amount of $208.20. Pursuant to OAR 661-010-0075(1)(b)(B) and (C) (2002), the city is awarded costs in the amount of $150, the amount of the deposit for costs, to be paid from the deposit for costs.

Dated this 16th day of March, 2011.

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Tod A. Bassham
Board Member