BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON COAST ALLIANCE,
and CATHERINE WILEY,
Petitioners,

vs.

CITY OF BROOKINGS,
Respondent,

and

U.S. BORAX, INC.,
Intervenor-Respondent.

LUBA No. 2011-023

ORDER

MOTION FOR ATTORNEY FEES

Intervenor-Respondent (intervenor) moves for an award of attorney fees pursuant to ORS 197.830(15)(b), which provides:

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

In order to award attorney fees LUBA must determine that "every argument in the entire presentation * * * is lacking in probable cause (*i.e.* merit)." *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). An argument lacking probable cause is one 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). The party seeking an award of attorney fees must therefore clear the high hurdle of proving that there is no legal merit to any of the non-prevailing party's arguments. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

The posture of this motion for attorney fees is unusual because petitioners voluntarily dismissed their appeal before the petition for review was due and before advancing any assignments of error challenging the merits of the city's decision. The challenged decision is a letter signed by a city senior planner returning petitioners' application to appeal a planning commission approval to the city council, along with the check petitioners submitted. Under the city fee schedule, the appellant must submit a deposit equal to the application fee, the city tracks its actual costs in processing the appeal, and at the end of the appeal process invoices the appellant for its actual costs above the deposit amount, or deducts the actual costs from the deposit and returns the remainder if any. In this case the application fee, and hence the appeal deposit, was $7,128. However, petitioners declined to pay the full deposit and instead gave the city a check for $1,000, based on petitioners' estimate of the likely costs of processing their appeal of a planning commission decision to the city council. Based on the advice of the city attorney, a senior planner rejected petitioners' appeal for failure to pay the full deposit required before the deadline, returning the appeal application and check. Petitioners then appealed to LUBA that decision to reject petitioners' local appeal for failure to pay the full deposit.

On appeal, shortly after the record was transmitted to LUBA, petitioners filed a motion to take evidence not in the record under OAR 661-010-0045.[1] Specifically, petitioners requested that LUBA authorize depositions of city staff to establish the amount of time city staff required to process appeals to the city council in general, and in particular the amount of time city staff would require to process petitioners' appeal to the city council. As grounds for the motion, petitioners argued that the city committed a "procedural

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[1] OAR 661-010-0045(1) provides, in relevant part:

> "Grounds for Motion to Take Evidence Not in the Record: The Board may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning * * * procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision."

irregularit[y] not shown in the record" by not allowing petitioners the opportunity to present their objections to the application of the city fee schedule, specifically evidence that an appeal fee of $7,128 does not reflect the actual or average costs of processing the appeal, consistent with ORS 227.180(1)(c).[2] In addition, petitioners argued that requiring them to submit an appeal fee equal to the application fee as a prerequisite to disputing the appeal fee was itself procedural error.

In an order dated July 6, 2011, we denied the motion to take evidence because petitioners had failed to demonstrate that the evidence to be elicited was necessary to resolve the very limited legal issues raised in the appeal. *Oregon Coast Alliance v. City of Brookings*, __ Or LUBA __ (LUBA No. 2011-023, July 6, 2011). We explained that, in the posture of an appeal of the decision before us, the only legal issue was whether the city erred in refusing to provide a local appeal unless petitioners paid the full fee deposit. We held that evidence regarding the city's average costs to process appeals, or the city's actual costs to process petitioners' appeal had the city accepted the appeal, is not necessary to resolve that legal issue, and thus petitioners had failed to establish that the evidence sought would have an impact on LUBA's review proceeding.[3]

On July 21, 2011, petitioners moved to voluntarily dismiss this appeal, and on July 26, 2011, LUBA accordingly dismissed the appeal.

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[2] ORS 227.180(1)(c) provides, in relevant part:

> "The governing body may prescribe, by ordinance or regulation, fees to defray the costs incurred in acting upon an appeal from a hearings officer, planning commission or other designated person. The amount of the fee shall be reasonable and shall be no more than the average cost of such appeals or the actual cost of the appeal, excluding the cost of preparation of a written transcript. * * *"

[3] OAR 661-010-0045(2)(a) provides, in relevant part:

> "A motion to take evidence shall contain a statement explaining with particularity what facts the moving party seeks to establish, how those facts pertain to the grounds to take evidence specified in section (1) of this rule, and how those facts will affect the outcome of the review proceeding."

Intervenor now moves for an award of attorney fees under ORS 197.830(15)(b), arguing that all of the positions petitioners took in presenting the motion to take evidence failed to satisfy the low probable cause threshold. According to intervenor, the motion to take evidence failed to articulate a sound basis for reversal or remand of the challenged decision. Further, intervenor argues, petitioners' arguments in the motion were premised solely on the existence of evidence not in the record, evidence that LUBA found to be immaterial to the legal issues on appeal.

Petitioners respond that because the appeal never progressed to the merits, no award of attorneys fees should be considered. Even if attorney fees can be awarded under ORS 197.830(15)(b) in circumstances where the appeal does not proceed to the merits, and the only "positions" presented in the appeal are those in an auxiliary motion such as a motion to take evidence, petitioners argue that the arguments set forth in the motion are ones that a reasonable attorney would make.

We tend to agree with petitioners that there will be few circumstances where the appeal is voluntarily dismissed prior to the filing of the petition for review, and attorney fees are awarded against a petitioner under ORS 197.830(15)(b) based solely on arguments presented in a motion to take evidence. In two cases not discussed by the parties, we assumed, without deciding, that attorney fees may be awarded under ORS 197.830(15)(b) based solely on arguments presented in a motion to take evidence, where the appeal was dismissed prior to filing a petition for review or presenting arguments on the merits of the appeal. *Pynn v. City of West Linn*, 42 Or LUBA 602 (2002); *Meredith v. City of Lincoln City*, __ Or LUBA __ (LUBA No. 2002-167, Order on Costs and Attorney Fees, August 7, 2003). The circumstances in *Pynn* were identical to those in the present case, an appeal voluntarily dismissed where the only arguments presented in the appeal involved a motion to take evidence that the Board denied. Although we addressed and ultimately rejected the motion for attorney fees, we commented in a footnote:

> "Both parties assume that arguments petitioners make in their motion to take evidence constitute 'present[ing] a position' for purposes of ORS 197.830(15)(b). That assumption is open to at least some question. Our prior cases considering attorney fees under ORS 197.830(15)(b) have invariably focused on 'positions' parties present regarding the essential elements of an appeal, such as jurisdiction or the merits of whether the challenged decision should be affirmed, reversed or remanded. That is consistent with LUBA's and the Court of Appeals' interpretation of ORS 197.830(15)(b), that the statute is intended to discourage 'frivolous' appeals. *Fechtig*, 150 Or App at 26. We have not had occasion to consider whether positions presented on procedural or ancillary matters, such as record objections or a motion to file a reply brief, are included in the calculus that is required by ORS 197.830(15)(b). One can argue that the intent of the statute is not served if a party whose entire presentation on the merits is patently 'frivolous' can nonetheless avoid an award of attorney fees because the party happened to present a meritorious position with respect to a procedural matter such as a motion to file a reply brief. Similarly, one can argue that a party whose *only* presentation is on an ancillary matter, for example a local government that involves itself in an appeal only by responding to record issues, should not be subject to the possibility of attorney fees under the statute. Of course, even if procedural or ancillary matters are not properly subject to the ORS 197.830(15)(b) calculus, it is arguable that a motion to take evidence is not such a matter. Having noted these issues, however, we do not further consider them here. For purposes of this order, we assume, without deciding, that the arguments petitioners presented in their motion to take evidence are subject to ORS 197.830(15)(b)." *Id.* at 603, n 1.

In the present case, as in *Pynn* and *Meredith*, we again have no need to resolve whether attorney fees can be awarded based solely on arguments presented in a motion to take evidence, because even assuming that is the case, intervenor has not demonstrated that all of the arguments petitioners presented in support of their motion to take evidence fail to surmount the low "probable cause" threshold.

The case law on whether and how a party can bring an as-applied challenge to an appeal fee, or more specifically whether and how a party can present evidence that an appeal fee violates ORS 227.180(1)(c) and its cognate applicable to counties at ORS 215.422(1)(c), has continued to evolve rapidly in recent years. *See Willamette Oaks, LLC v. City of Eugene*, __ Or App __, __ P3d __ (A148149, August 17, 2011) (LUBA erred in remanding a decision to the city planning commission to allow petitioner to submit evidence to challenge the

"average cost" basis for the city's appeal fee, where under city code the planning commission did not have authority to accept new evidence). Almost all of the case law on as-applied challenges to appeal fees has involved disputes over fees determined under the "average costs of such appeals" approach. LUBA has held that if a party intends to bring an evidentiary challenge to such an appeal fee in the course of an appeal to LUBA, the party has the initial obligation of submitting evidence supporting that challenge into the record during the proceedings below, at least where local appeal procedures provide for submission of new evidence. *Young v. Crook County*, 56 Or LUBA 704, 717-18 (2008), *aff'd* 224 Or App 1, 197 P3d 48 (2009).

In the present case, as explained in our order, the city's appeal fee is based on the "actual cost" of the appeal, rather than the "average costs of such appeals." Under that approach, the local government typically requires an up-front deposit, and the actual fee is determined only after the appeal is over and the city accounts for its actual costs, which are paid from the deposit and the remainder, if any, returned to the appellant, or an invoice for any shortage. There are no reported cases resolving a challenge to an appeal fee based on an "actual cost" approach. Petitioners' motion to take evidence sought in relevant part to elicit evidence of the likely actual cost to process their local appeal, apparently in aid of one or more contemplated assignments of error arguing that (1) the city's appeal fee scheme violates ORS 227.180(1)(c), and (2) rejecting petitioners' local appeal for failure to pay an appeal fee that violates the statute was procedural error that prejudiced petitioners' substantial rights.

Given the paucity of case law regarding "actual cost" appeal fee schemes, and cases such as *Young* placing the initial obligation on the local appellant to provide evidence that an appeal fee violates the statute, a reasonable attorney might well have believed that it was necessary to point to some evidence regarding the likely costs of petitioners' appeal, in order to provide support for the kind of assignments of error petitioners apparently contemplated advancing in the petition for review. Our order denying the motion to take evidence clarified

that evidence of petitioners' likely appeal costs was not material to the support any assignments of error arguing that the city erred in rejecting petitioners' local appeal for failure to pay the full appeal fee deposit, which was the only cognizable legal issue on appeal to LUBA in the posture of this case. However, we cannot say that no reasonable attorney would have taken the precaution of moving to take evidence of the actual costs of petitioners' local appeal, in case such evidence was ultimately found to be necessary to provide support for contemplated assignments of error on the merits of the appeal. The motion for attorney fees is denied.

COSTS

The city requests an award of the costs of copying the record, in the amount of $37.50. OAR 661-010-0075(1)(b)(B). The city is awarded costs in the amount of $37.50, to be paid from petitioners' deposit for costs. The Board will return the remainder of the deposit for costs to petitioners. OAR 661-010-0075(1)(d).

Dated this 20th day of September, 2011.

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Tod A. Bassham
Board Member