

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

3
4 DOUGLAS ZIRKER and VIVIANN ZIRKER,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF BEND,
10 *Respondent,*

11
12 and

13
14 HOME FEDERAL BANK,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2011-036

18 ORDER ON MOTION FOR

19 ATTORNEYS' FEES

20 Intervenor-respondent (intervenor) moves for an award of attorney fees pursuant to
21 ORS 197.830(15)(b), 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 As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

27 “Under ORS 197.830(15)(b), a position is presented ‘without probable cause’
28 where ‘no reasonable lawyer would conclude that any of the legal points
29 asserted on appeal possessed legal merit.’ *Contreras v. City of Philomath*, 32
30 Or LUBA 465, 469 (1996). In applying the probable cause analysis LUBA
31 ‘will consider whether any of the issues raised [by a party] were open to
32 doubt, or subject to rational, reasonable, or honest discussion.’ *Id.* The party
33 seeking an award of attorney fees under the probable cause standard must
34 clear a relatively high hurdle and that hurdle is not met by simply showing
35 that LUBA rejected all of a party’s arguments on the merits. *Brown v. City of*
36 *Ontario*, 33 Or LUBA 803, 804 (1997).”

37 Thus, an award of attorney fees is warranted under ORS 197.830(15)(b) where the prevailing
38 party demonstrates that no reasonable lawyer would present any of the “positions” that the

1 losing party presented on appeal. Conversely, a party may avoid paying attorney fees if the
2 party presented at least one position on appeal that satisfied the probable cause standard.

3 Petitioners' dispute with the city over a now-constructed triplex has resulted in four
4 LUBA appeals. In the most recent appeal, petitioners alleged three assignments of error. We
5 rejected all three assignments of error and affirmed the city's decision. Intervenor, who is
6 the original applicants' successor in interest, moves for an award of attorney fees. Although
7 it is a reasonably close question, we deny the motion.

8 We set out the relevant facts in our final decision:

9 "The subject property is zoned Residential Medium Density (RM) and has
10 frontage on Steidl Road, an existing improved city street. The standard front
11 yard setback in the RM zone is 10 feet, measured from the front lot line along
12 the existing Steidl Road right-of-way. Bend Development Code (BDC)
13 2.1.300(C)(2)(a). The triplex complies with this requirement. Steidl Road
14 has a 40-foot right-of-way and is improved with a 24-foot wide paved surface.
15 Under the current BDC, a local street such as Steidl Road is required to have a
16 60 foot right-of-way and a 36-foot wide paved travel surface. In
17 circumstances where existing streets and rights of way are substandard, the
18 BDC imposes three requirements that are relevant here. First, it imposes a
19 special 30-foot setback and requires that the normal front yard setback in the
20 applicable zone be measured from this 30-foot special setback instead of the
21 edge of the existing right-of-way. BDC 3.4.200(J). In this case, that would
22 require that the 10-foot standard front yard setback in the RM zone be
23 measured from the special 30-foot setback instead of the edge of the existing
24 right-of-way. The triplex intrudes into this setback. In this opinion we will
25 refer to the additional setback that is required under BDC 3.4.200(J) as the
26 Extra Setback. The BDC also requires that sufficient right-of-way be
27 dedicated to bring the right-of-way up to current standard. BDC 3.4.200(N).
28 In this case that would require dedication of an additional 10 feet of right-of-
29 way along Steidl Road. Finally, the BDC requires a minimum pavement
30 width of 36 feet. BDC 3.4.200 Table A. As previously mentioned, Steidl
31 Road has a 24-foot wide pavement width." *Zirker v. City of Bend*, ____ Or
32 LUBA ____ (August 31, 2011) slip op at 2-3 (footnotes omitted).

33 In a prior appeal, the Court of Appeals concluded that although the city engineer has
34 authority under the BDC to waive right-of-way dedication and improvement requirements,
35 the city engineer lacks authority under the BDC to waive the Extra Setback requirement.
36 *Zirker v. City of Bend*, 233 Or App 601, 612-13, 227 P3d 1174 (2010). Following LUBA's

1 reversal of an earlier city decision granting waivers and variances to the Extra Setback, right-
2 of-way dedication and right-of-way improvement requirements, the city amended the BDC to
3 authorize the planning department to grant waivers of the Extra Setback if certain standards
4 are met. After intervenor submitted a new application seeking approval of waivers under the
5 amended BDC, the city approved the requested waivers and granted site plan approval.
6 Petitioners appealed.

7 In their first assignment of error, petitioners alleged the city violated the ORS
8 227.178(3) fixed goal post rule, by not applying the version of the city code that was in effect
9 when the first application was filed. In their second assignment of error, petitioners argued
10 the city should be barred from applying the amended version of the BDC that took effect
11 shortly before the applicants resubmitted their application for site plan approval in this
12 matter. We agree with intervenor that the arguments petitioners advanced under the first and
13 second assignments of error are not arguments that a reasonable lawyer would believe
14 possess legal merit. If petitioners' appeal had been limited to the first two assignments of
15 error, an award of attorney fees would be warranted.

16 Turning to the third assignment of error, under the amended BDC, to grant the
17 requested waivers of the requirements for Extra Setback, right-of-way dedication and right-
18 of-way improvements, the city was required to find "that (1) the waiver or modification will
19 not harm or will be beneficial to the public in general; [and] (2) the waiver and modification
20 are not inconsistent with the general purpose of ensuring adequate public facilities[.]" BDC
21 3.4.150(B). As intervenor correctly notes, throughout petitioners' arguments under the third
22 assignment of error, petitioners take the position that granting the requested Extra Setback
23 waiver forecloses the possibility of ever widening the Steidl Road to a 60-foot right-of-way
24 and widening the existing 24-foot paved surface to the 36-foot paved surface that would be
25 required under current city standards. As we noted in our final opinion, that is simply not the
26 case, and it is not clear to us whether petitioners ever realized their error in this regard. If

1 Steidl Road were widened to a 60-foot right of way and the paved surface was widened and
2 side walks added, the right of way would be six feet from the triplex rather than the ten feet
3 that would result if the triplex had been constructed in accordance with the Extra Setback.
4 The waiver of the Extra Setback in no way precludes widening and improvement of Steidl
5 Road; it simply means the triplex would be six feet from such a widened right of way rather
6 than ten feet. However, as serious as this blind spot in petitioners' arguments under the third
7 assignment of error is, we cannot say petitioners' entire presentation under the third
8 assignment of error was one that was presented "without probable cause to believe the
9 position was well-founded in law or on factually supported information."

10 The decision on appeal granted waivers of the Extra Setback, right-of-way dedication
11 and right-of-way improvement requirements. In doing so, petitioners argued, among other
12 things, that the city failed to give appropriate consideration to the demands that might be
13 placed on Steidl Road if the area around the subject property is redeveloped with the higher
14 densities that its current RM zoning would allow. Petitioners also argued that the city placed
15 undue weight on the fact that Steidl Road currently has excess capacity. Although we
16 rejected those arguments, we cannot say that they are arguments that were presented
17 "without probable cause to believe the position was well-founded in law or on factually
18 supported information."

19 As intervenor correctly notes, one response to petitioners' arguments is that if it turns
20 out that surrounding properties are redeveloped at greater densities and capacity on Steidl
21 Road is exhausted, the right of way could be widened and the roadway improved. However,
22 as we noted above, in granting the requested waivers the city was required to find "that (1)
23 the waiver or modification will not harm or will be beneficial to the public in general; [and]
24 (2) the waiver and modification are not inconsistent with the general purpose of ensuring
25 adequate public facilities[.]" BDC 3.4.150(B). Even if it might be possible to acquire
26 additional right of way and widen Steidl Road, despite the disputed waivers, the waivers

1 would make such widening and improvement more difficult and leave the triplex only six
2 feet from the edge of the widened right of way. We cannot say that no reasonable lawyer
3 would argue that granting the waivers in these circumstances would not “be beneficial to the
4 public in general,” or be consistent “with the general purpose of ensuring adequate public
5 facilities.”

6 Intervenor’s motion for attorney fees is denied.

7 Dated this 24th day of January, 2012.
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14 Michael A. Holstun
Board Member