BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PARKVIEW TERRACE DEVELOPMENT LLC,
Petitioner,

and

JOSEPHINE HOUSING AND COMMUNITY DEVELOPMENT COUNCIL,
Intervenor-Petitioner,

vs.

CITY OF GRANTS PASS,
Respondent,

and

DAVID R. MANNIX, MELISSA S. CANON EAVES, CAREY GILBERT, JAMES FREGO, CYNTHIA FREGO, SHAUN HOBACK, RANDY R. LEMMON, TONI J. LEMMON, DAVID J. HOLMAN and JOANNA H. LOFASO,
Intervenors-Respondents.

LUBA No. 2014-024

ORDER ON MOTION
FOR ATTORNEY'S FEES AND COSTS

INTRODUCTION

In LUBA's final opinion and order in this appeal we reversed the city's decision and ordered the city to approve petitioner Parkview Terrace Development LLC's application for site plan and variance approval, pursuant

to ORS 197.835(10)(a).[1] *Parkview Terrace Development LLC v. City of Grants Pass*, ___ Or LUBA ___ (LUBA No. 2014-024, July 23, 2014). We concluded that all of the reasons the city gave for denying the applications were "'outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]'" *Id*., slip op at 27.

Petitioner is the prevailing party in this appeal. Petitioner filed a motion seeking an award of costs and attorney fees against both the city and intervenor-respondent (intervenor) Mannix.[2] Petitioner seeks an award of costs, in the amount of $200, and seeks an award of attorney fees in the amount of $39,271.28. Petitioner originally sought an award of attorney fees against the city under ORS 197.835(10)(b), arguing that an award of attorney fees under ORS 197.835(10)(b) is mandatory and that ORS 197.835(10)(b) "does not grant LUBA discretion to determine when or whether to award attorney fees against a local government."[3] Cost Bill and Motion for Attorney Fees 4.

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[1] ORS 197.835(10)(a) provides, in part:

> "The board shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
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> "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances[.]"

[2] Intervenor Mannix is the only intervenor-respondent who timely filed a response brief.

[3] ORS 197.835(10)(b) provides:

> "If the board does reverse the decision and orders the local government to grant approval of the application, the board shall

Petitioner also moved for an award of attorney fees against intervenor under ORS 197.830(15)(b), which authorizes LUBA to award attorney fees in certain circumstances.[4] In its motion for attorney fees, petitioner asked that the award of attorney fees be "allocated among one or both of those parties as LUBA, in its discretion, deems appropriate." *Id*. at 14. Petitioner subsequently withdrew its motion for attorney fees against the city. Petitioner now seeks an award of costs, against both the city and intervenor, but limits its motion for attorney fees, seeking an award of attorney fees against intervenor only, pursuant to ORS 197.830(15)(b).

ATTORNEY FEES

ORS 197.830(15)(b) 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, 775-776 (2007):

> "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*

> award attorney fees to the applicant and against the local government."

[4] We set out the text of ORS 197.830(15)(b) later in this opinion.

> *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)."

Thus, an award of attorney fees is warranted under ORS 197.830(15)(b) where the prevailing party demonstrates that no reasonable lawyer would present any of the arguments that the losing party presented in support of the party's position on appeal. Conversely, a party may avoid paying attorney fees if the party presented at least one argument on appeal that satisfied the ORS 197.830(15)(b) probable cause standard. The probable cause standard is a relatively low standard. *Brown*, 33 Or LUBA at 804.

We agree with petitioner that most of the arguments that intervenor presented in his brief do not meet the ORS 197.830(15)(b) probable cause standard. However, one of the arguments presented by intervernor does meet that standard, for the reasons explained below. We limit our discussion in this order to that argument.

Maple Park Planned Unit Development (PUD) Phases I, II and III have received tentative PUD and final plat approval. Record 13. Only Phase I has been constructed. In the decision that was the subject of our final opinion in this matter, the city granted petitioner's request for permission to develop a 50-unit multi-family rental housing project that would be owned and operated by petitioner, in place of the townhouse development with individually owned attached townhouse units on individual lots that had been originally approved for Phases II and III of Maple Park.

Although it was not one of the reasons the city relied on to deny petitioner's application, intervenor argued the city was without authority to grant site plan and variance approvals for a development proposal that is different from, and inconsistent with, the townhouse development authorized by the city's approval of Phases I, II and III, so long as the city's approval of Maple Park PUD Phases I, II and III remains effective:

> "Final approval of the existing Planned Unit Development covering the three (3) phases of Maple Park began in 2006 and is currently valid approval. * * * Final approval is the legally operative point at which a multi-phase PUD comes into existence, being the point at which the conditions and characteristics may be represented to other parties such as lenders and buyers, and at which point said lenders and buyers may rely on those conditions. * * * [A]lthough procedures exist for modifying or amending a PUD, there were not during the times in question, any means for actually terminating a PUD, nor do there appear to be any legal considerations that would automatically bring about the end of a PUD. At this time, the City of Grants Pass has a means of terminating a commercial or industrial PUD, but not a residential PUD. Therefore, the 2006 PUD has been in existence and continues to be in existence." Intervenor-Respondent's Response Brief 17-18.

When intervenor raised questions about whether petitioner's site plan and variance could be approved while city approval of Phases II and III of the PUD remained effective, intervenor contends that petitioner "submitted a letter to the Planning Department saying in effect, 'I revoke.'" *Id.*[5] The city found,

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[5] In a January 27, 2014 letter from petitioner to the city planning department, petitioner stated, in part:

> "As the owner of the property * * * we request irrevocable termination of any and all land development entitlement rights under the tentative PUD approval for Phase II & III of the Maple

based on petitioner's letter, that the city's approval of Maple Park PUD Phases II and III is no longer active, because petitioner withdrew "the previous approval(s) for Phases II & III of Maple Park PUD." Record 13. Intervenor argued in its response brief, "[t]he theory that a successor in interest may years later simply unilaterally revoke a PUD upon which many other parties have relied, is of course, logical nonsense." Intervenor-Respondent's Response Brief 18.

We understand intervenor to argue that although the city has procedures for modifying or amending all types of PUDs, and for terminating commercial and industrial PUDs, it has no procedure for terminating a residential PUD. Intervenor also argued that the city's PUD regulations have no provisions that would "automatically" terminate Phases II and III of the Maple Park PUD. *Id*. Given that the city's PUD regulations include no authority to terminate a residential PUD after it is partially constructed, intervenor argued in his response brief that petitioner cannot unilaterally terminate the PUD by sending a letter to the planning department, as it purported to do in this case. For brevity, in this order we generally refer to that argument as the "PUD Phases II and III argument." Before we address the merits of that argument, we address petitioner's procedural objections that the argument was not well founded because intervenor failed to present the argument as a cross-assignment of error in a cross petition for review.

A. Petitioner's Procedural Challenges to Intervenor's Argument

In *Kane v. City of Beaverton*, 63 Or LUBA 522, 527 (2011), we explained that in determining whether an argument on the merits satisfies the

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Park Townhomes * * * and hereby waive any right to forever rely on any entitlement rights granted by said approval." Record 201.

ORS 197.830(15)(b) probable cause standard, where that argument on the merits is subject to a challenge that the argument on the merits was waived, there must also be an argument that meets the probable cause standard in response to the waiver argument. Arguably a similar two-pronged probable cause standard should apply here. If it does, intervenor must present a sufficient response to petitioner's contention that intervenor's argument regarding Maple Park PUD Phases II and III was presented "without probable cause to believe the argument was well-founded in law" because the argument was not presented as a cross-assignment of error in a cross petition for review, as required by OAR 661-010-0030(7). Because the parties have assumed that a two-pronged probable cause standard applies here, for purposes of this order, we will assume that is the case.

1. Authority to Set Out Intervenor's PUD Phases II and III Argument in the Response Brief

Initially, we note that intervenor did not explicitly set out his PUD Phases II and III argument as a cross-assignment of error in his response brief, as a number of LUBA's cases that were decided before 2010 indicated is appropriate. *Curl v. City of Bend*, 57 Or LUBA 337, 356 (2008) (cross-assignments of error may be included in a response brief); *Wetherell v. Douglas County*, 57 Or LUBA 240, 242 (2008) (same); *Copeland Sand and Gravel, Inc. v. Jackson County*, 46 Or LUBA 653, 667 (2004) ("we conclude it is consistent with our rules to include a cross-assignment of error in a response brief").[6]

[6] It is worth noting that although the cited cases all stated that including cross-assignments of error in a response brief is appropriate, LUBA's rule governing response briefs at the time did not expressly mention or authorize cross-assignments of error.

Instead, intervenor identified his PUD Phases II and III argument as an "additional ground" or a "further reason" to affirm the city's decision. Response Brief 2, 9, 17-19. Intervenor's citation of authority in the response brief to present its argument in this manner was initially brief, misplaced and incomplete, but intervenor later clarified that the authority intervenor relied on for stating his PUD Phases II and III argument in that manner is *BenjFran Development v. Metro Services Dist*., 17 Or LUBA 1009, 1011-1012 (1988).[7] Intervenor was admittedly slow in clearly identifying authority for presenting his PUD Phases II and III argument as an "additional reason" in his response brief to affirm the decision rather than in assignments of error in a cross petition for review or in contingent cross-assignments of error in the response brief. But our decision in *BenjFran* does provide authority for intervenor to present his argument in that manner. 17 Or LUBA 1011-12.[8]

Our decision in *Copeland Sand & Gravel, Inc. v. Jackson County*, 46 Or LUBA 653 (2004), sets out and discusses a number of LUBA cases that have discussed circumstances when an intervener-respondent must file a cross-petition for review with assignments of error (generally when that intervenor seeks reversal or remand of the decision) and when intervenor-respondent may simply include cross-assignments of error in a response brief, and need not file

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[7] The only mention of LUBA's *BenjFran* decision in the response brief was a brief reference to the "BenjFran principle" in the summary of argument. Response Brief 2. *BenjFran* was not cited in the portion of the response brief where respondent presents its argument regarding Phases II and III. Response Brief 17-19. Intervenor first provided a full citation to the *BenjFran* decision in its rebuttal to petitioner's reply brief. Intervenor-Respondent's Rebuttal 2.

[8] As we pointed out in our decision, LUBA's rules have changed since *BenjFran* was decided in 1988. We discuss that rule change later in this order.

a cross petition for review (generally where that intervenor does not seek reversal or remand of the decision but wishes to challenge limited aspects of the decision in the event LUBA sustains one or more of the assignments of error in the petition for review). 46 Or LUBA at 664-67. Importantly, for present purposes, our decision in *Copeland* points out that *BenjFran* was never explicitly overruled in any of the subsequent LUBA decisions discussing when a cross-petition for review with assignments of error was required and when a response brief with contingent cross assignments of error is appropriate.[9] *Copeland*, 46 Or LUBA 663-64. Therefore, putting aside for the moment the merits of intervenor's PUD Phases II and III argument, intervenor's citation to and reliance on *BenjFran* as authority for the *manner* in which he presented that argument, *i.e.*, as an additional basis upon which the challenged city decision to deny site plan approval could be affirmed by LUBA, is a response to petitioner's procedural objection that is clearly not an argument that was presented "without probable cause to believe it was well founded in law or on factually supported information," within the meaning of ORS 197.830(15)(b).

Intervenor's reliance on the "additional ground" and "further reason" to affirm language in *BenjFran* not important. LUBA has treated arguments in a response brief as cross-assignments of error, where they are in substance a cross-assignment of error, even though the arguments were not formally denominated as such.

> "[W]here the response brief includes arguments that are *de facto* cross-assignments of error that are reasonably recognized as such

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[9] *BenjFran* and our cases authorizing cross-assignments of error in response briefs were effectively overruled by LUBA's 2010 rule amendments, which we discuss later in this order.

> by all parties, we believe it is appropriate to treat such arguments as a cross-assignments of error. *See Linstromberg v. City of Veneta*, 47 Or LUBA 99, 108 (2004) (treating argument that defective findings provide no basis for reversal or remand because the findings address an inapplicable criterion as a cross assignment of error). We believe it is appropriate to do so here."

Pete's Mtn. Home Owners Assoc. v. Clackamas County, 55 Or LUBA 287, 300 (2007). *See also Cyrus v. Deschutes County*, 46 Or LUBA 703, 713 n 7, *aff'd* 194 Or App 716, 96 P3d 858 (2004) (considering arguments that were "in the nature of cross-assignments of error"). The argument in *BenjFran* was in substance a cross-assignment of error.[10] Intevenor's PUD Phases II and III argument here is also in substance a cross-assignment of error. Both *BenjFran* and our decisions following *Copeland* supply legal authority for intervenor to present his PUD Phases II and III argument in the way that he did in his response brief, rather than in a cross petition for review.

We next turn to petitioner's procedural objection that LUBA's current rules required intervenor to present his PUD Phases II and III argument as a cross-assignment of error in a cross petition for review.

2. OAR 661-010-0030(7)

OAR 661-010-0030(7), which governs cross petitions for review, was amended in 2010 to authorize contingent cross-assignments of error in a cross

[10] In *BenjFran* the intervenors-respondents supported Metro's decision denying an urban growth boundary amendment, but took the position that "Metro was mistaken when it found 'failure to show an increase in the projected population is not equivalent to a failure to show 'need' under Goal 14.'" 17 Or LUBA 30, 41 (1988).

petition for review.[11] Also in 2010, OAR 661-010-0035(3), which governs the content of respondents' briefs, was amended to provide "[a] response brief shall not include an assignment of error or cross-assignment of error." Following these 2010 rule amendments, LUBA's administrative rules for the first time explicitly authorized cross-assignments of error. And contrary to prior practice, the 2010 rule amendment requires cross-assignments of error to be included in a cross petition for review, rather than in a response brief. It was on the basis of these 2010 rule amendments that LUBA declined to address the merits of intervener's PUD Phases II and III argument. *Parkview Terrace Development. LLC v. City of Grants Pass*, slip op at 9.

Intervenor's failure to be aware of our 2010 rule amendment, and his failure to present his argument as a contingent cross-assignment of error in a cross petition for review, while resulting in LUBA's refusal to consider the argument on the merits, is not a sufficient basis for an award of attorney fees under ORS 197.830(15)(b). Our 2010 rule amendments were adopted in an attempt to bring some measure of certainty to this relatively complicated area

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[11] The relevant OAR 661-010-0030(7) language authorizing contingent cross-assignments of error is set out below:

> "Cross Petition: Any respondent or intervenor-respondent who desires reversal or remand of an aspect of the decision on appeal regardless of the outcome under the petition for review may file a cross petition for review that includes one or more assignments of error. The cross petition for review may also include contingent cross-assignments of error, clearly labeled as such, that the Board will address only if the decision on appeal is reversed or remanded under the petition for review. * * *"

The language of OAR 661-010-0030(7) was further modified in 2014 but that modification has no bearing on our analysis here.

of LUBA practice. Our 2010 rule amendments had been in effect over four years when intervenor filed his brief in this appeal. But prior to our decision in this appeal, those 2010 rule changes had only been relied upon by LUBA to refuse to consider an argument in only one case.[12] Given the complicated evolution of the manner in which LUBA has considered intervenors-respondents' arguments concerning errors that might lend support to the decision on appeal, we cannot say intervenor's failure to be aware of that rule amendment is a mistake no reasonable attorney would make.

In summary, intervenor's failure to anticipate that LUBA would characterize his PUD Phases II and III argument as a cross-assignment of error and on that basis refuse to consider that argument on the merits because it was not presented as a cross-assignment of error in a cross petition for review is not the kind of mistake no reasonable lawyer would make. Therefore, that procedural error on intervenor's part does not mean his argument on the merits was an argument that was presented "without probable cause to believe the position was well-founded in law or on factually supported information," within the meaning of ORS 197.830(15)(b). We finally turn to the merits intervenor's PUD Phases II and III argument, to determine whether, it is an argument that was presented "without probable cause to believe it was well-founded in law or on factually supported information."

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[12] In *WKN Chopin LLC v. Umatilla County*, 66 Or LUBA 1, 13 (2012) we expressed uncertainty regarding whether intervenors in that appeal were attempting to assert a cross-assignment of error, and cited intervenors' failure to file a cross petition for review under OAR 661-010-0030(7) or include cross-assignments of error in their response brief as permitted prior to the 2010 rule amendments as bases for concluding the argument was "not properly presented in [that] appeal."

B. Intervenor's PUD Phases II and III Argument on the Merits

Although intervenor did not cite to the specific Grants Pass Development Code PUD regulations he describes in his brief in stating his PUD Phases II and III argument, Article 18 of the Grants Pass Development Code (GPDC) governs "Planned Unit Development." GPDC 18.100(1) provides that a "Preliminary or Final PUD Plan" may be revised, but requires that such revisions "follow the same procedures required for initial approval of a Preliminary PUD Plan in this Section * * *." No party contends that those procedures were followed in this case or that the city treated the proposal as a revision of the existing PUD approval. And GPDC 18.100(2) sets out a procedure for terminating "[a] Commercial or Industrial Use PUD," but as intervenor correctly notes in his brief, the GPDC does not appear to include any express authorization for termination of a residential PUD once it has been approved.

Had we reached the merits of intervenor's PUD Phases II and III argument, that argument easily would pass muster under the ORS 197.830(15)(b) probable cause standard. There is no evidentiary dispute that the city approved Maple Park PUD Phases II and III. Record 13. Intervenor argued, and petitioner does not dispute, that the city's PUD regulations expressly authorize termination of Commercial and Industrial PUDs, but do not expressly authorize termination of an approved Residential PUD like Maple Park. The "law" that intervenor relied on to support his argument, although the specific GPDC sections were not cited in his brief, appears to be accurately described in intervenor's response brief and supports his argument. The relevant facts, as far as we can tell, are undisputed. Intervenor contends that petitioner's letter, which purports to unilaterally terminate Maple Park PUD

Phases II and III, is ineffective to do so, and the city erred in approving a site plan that is inconsistent with the approved Maple Park PUD Phases II and III. Had we considered that argument on the merits, it might well have resulted in our agreeing with intervenor and remanding the city's decision so that the city could consider whether intervenor's PUD Phases II and III argument provides a basis for the city's decision to deny petitioner's application, notwithstanding that the bases that the city relied on in its initial decision on the application were rejected by LUBA. That argument certainly is not an argument that was presented "without probable cause to believe the position was well-founded in law or on factually supported information," within the meaning of ORS 197.830(15)(b).

For the above reasons, petitioner's motion for an award of attorney fees against intervenor is denied.

COSTS

Petitioner, the prevailing party in this appeal, filed a cost bill requesting award of the cost of their filing fee, in the amount of $200.

Respondent and intervenor-respondent do not object to petitioner's cost bill regarding the filing fee.

Petitioner is awarded the cost of its filing fee, in the amount of $200, to be paid by respondent and intervenor. The Board shall return petitioner's $200 deposit for costs.

Dated this 25th day of February, 2014.

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Michael A. Holstun
Board Member