BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGONIANS IN ACTION LEGAL CENTER
and JON CHANDLER,
Petitioners,

vs.

CITY OF LINCOLN CITY,
Respondent.

LUBA Nos. 2014-108, 2015-002 and 2015-003

ORDER ON MOTION FOR
ATTORNEY FEES AND COSTS

MOTION FOR ATTORNEY FEES

Respondent City of Lincoln City (respondent) is the prevailing party in these consolidated appeals. *Oregonians in Action v. City of Lincoln City*, _ Or LUBA _ (LUBA Nos. 2014-108, 2015-002, and 2015-003, April 22, 2015). Respondent moves for an award of attorney fees from petitioners in the amount of $4,830.34, 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."

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 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. *Wolfgram v. Douglas County*, 54 Or LUBA 775 (2007) (*citing Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

A. Background

The consolidated appeals challenged three ordinances enacted by the city. Ordinance No. 2014-21 created a new Vacation Rental zoning district. We affirmed Ordinance 2014-21 because we concluded that arguments regarding future impacts of rezoning property to the vacation rental zone were premature since the creation of the new vacation rental zone did not rezone any land. Ordinance No. 2014-22 amended the existing provisions of the city's zoning code that regulate vacation rental dwellings. We affirmed Ordinance 2014-22 for reasons we discuss in more detail below. Ordinance 2014-23 amended the provisions of Title V of the city's municipal ordinances relating to the issuance of vacation rental dwelling business licenses. We transferred the appeal of Ordinance 2014-23 to circuit court because we concluded that Ordinance 2014-23 amended only licensing provisions of the city's municipal code that are not "land use regulations[,]" as defined in ORS 197.015(11).

B. Motion for Attorney Fees and Petitioners' Response

An initial issue we must resolve involves the timing of petitioners' response to respondent's motion for attorney fees. Under OAR 661-010-

0075(2)(a)(B)(ii), as relevant here, filing a motion with the board is achieved by:

> "[m]ailing [the motion] on or before the date due by first class mail with the United States Postal Service. If the date of mailing is relied upon as the date of filing, the date of the first class postmark on the envelope mailed to the Board is the date of filing."

Serving a party with a copy of the motion is similar, as "[s]ervice may be in person, or by first-class mail. Mail service is complete on deposit in the mail." OAR 661-010-0075(2)(b)(B).

Respondent filed its motion for attorney fees with the board on May 6, 2015. A certificate of service is attached to respondent's motion that certifies that respondent served a copy of the motion on petitioners by certified mail on that same date.

LUBA received a response to respondent's motion from petitioners on June 30, 2015, well after the deadline for filing a response to the motion. Under OAR 661-010-0065(2), an opposing party has 14 days from the date of service of a motion to file a response. Petitioners argue that the untimeliness of their response should be excused. According to petitioners, respondent failed to properly serve the motion for attorney fees because respondent served the motion via *certified* mail. Petitioners argue that service by certified mail did not accomplish proper service under OAR 661-010-0075(2)(b)(B). Petitioners explain that the post office placed a notice of receipt of respondent's motion in counsel for petitioners' post office box on May 11, 2015, but that the office manager for petitioners' counsel did not receive that notice. Petitioners' Response to Motion for Fees 1, n 1.

Respondent then filed a motion to strike petitioners' response to the motion for fees as untimely. Respondent argues that "[a]ccording to the United

States Postal Service [USPS], Certified Mail is 'First-Class' Mail with an 'extra service."' Respondent's Motion to Strike 2. Respondent attaches a USPS document to its motion that explains "First-Class Mail * * * is the only class of mail eligible to receive * * * Certified Mail service." Respondent's Motion to Strike, Exhibit B.

We agree with respondent that respondent's motion for attorney fees was properly served upon petitioners. Certified mail is a type of first class mail. Accordingly, petitioners' response to the motion was untimely under OAR 661-010-0065(2).

Petitioners also respond that if the Board determines that respondent's motion was properly served, that the Board should nevertheless accept petitioners' response to the motion. Citing OAR 661-010-0005, petitioners argue that their untimely response to respondent's motion is a technical violation that does not affect the substantial rights of the respondent.[1] We agree with petitioners and allow petitioners' untimely response.

C. Petitioners Presented A Probable Cause Argument

Respondent argues that all of petitioners' arguments in support of their appeal lacked probable cause under ORS 197.830(15)(b). According to respondent, petitioners' arguments were not well-founded in law or based on factually supported information.[2]

---

[1] OAR 661-010-0005 provides in relevant part that "[t]echnical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision."

[2] First, respondent argues that petitioners misrepresented the content and effect of the three challenged ordinances to support their legal theory of the case. Second, respondent points out that the city council adopted detailed

We disagree with respondent that all of petitioners' arguments presented in the petition for review lacked probable cause. One of the arguments presented by petitioners meets the standard, as petitioners explain in their response.

In their first and second assignments of error, petitioners argued that Ordinance 2014-22 limited the ability of the owners of "single family second homes" (a type of housing identified in the city's comprehensive plan Housing Element as needed housing) to rent the homes to vacation and short-term renters to offset the cost of the maintaining the home and to finance the cost of the home. Petitioners argued that limitation would exacerbate an alleged existing shortage of residential land available to meet the need for single family second homes identified in the comprehensive plan's Housing Element. Accordingly, petitioners argued, Ordinance 2014-22 was inconsistent with the comprehensive plan's Housing Element.

In our final opinion, after explaining in detail the city's existing regulatory scheme for vacation rental dwellings and the changes effected by Ordinance 2014-22, we rejected petitioners' premise. We concluded that Ordinance 2014-22 did not create any *additional* limits on vacation rental use of single family second homes, and therefore would not exacerbate any identified shortage of residential land to meet the need for single family second homes. Although we rejected petitioners' argument, we cannot say the

---

findings rejecting positions proffered by petitioners, and petitioners failed to acknowledge or challenge those findings. Finally, respondent argues that petitioners misrepresented factual data contained in some sections of the city's comprehensive plan. For example, respondent argues that petitioners misrepresented the comprehensive plan's housing and commercial lands supply to support their arguments.

argument was lacking in probable cause. We explained in detail in our opinion at slip op 3-7 the city's existing program for regulating vacation rental dwellings and the changes to that program that were adopted by Ordinance 2014-22. The existing program is complex and somewhat vague because it requires that vacation rental use of a dwelling is an "accessory use" without providing a particularly helpful definition of that phrase. Ordinance 2014-22 retains some features of the existing program (*i.e.* the ability to establish a vested right to a specific number of nights of vacation rental use beyond the new limits in Ordinance 2014-22), while at the same time attempts to establish temporal sideboards on what that "accessory use" may be. Given the complexity of the existing program and the changes to it, we cannot say that no reasonable lawyer would present the argument that petitioners presented.

Accordingly, respondent's motion for attorney fees is denied.

COSTS

The city filed separate records for each of the appealed ordinances. The city filed a cost bill requesting an award of the cost of preparing copies of the three records. The city is awarded the cost of preparing the record in the LUBA No. 2014-108 in the amount of $200. The city is awarded the cost of preparing the record in the LUBA No. 2015-002 in the amount of $52.25. The city is awarded the cost of preparing the record in the LUBA No. 2015-003 in the amount of $10.00. The Board will return the remainder of petitioners' deposits for costs.

Dated this 16th day of October, 2015.

_____

Melissa M. Ryan
Board Member