

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                                           OF THE STATE OF OREGON

3  
4                                   LAWRENCE E. TOKARSKI,  
5                                   OF THE LAWRENCE E. TOKARSKI  
6                                   REVOCABLE LIVING TRUST,  
7                                                           *Petitioner,*

8  
9                                                           vs.

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11                                                           CITY OF SALEM,  
12                                                           *Respondent,*

13  
14                                                           and

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16                                                           CREEKSIDE HOMEOWNERS  
17                                                           ASSOCIATION, INC.,  
18                                                           *Intervenor-Respondent.*

19  
20                                                           LUBA No. 2016-025

21                                                           ORDER ON ATTORNEY FEES AND COSTS

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23                                   **MOTION FOR ATTORNEY FEES**

24                   Petitioner Lawrence E. Tokarski (petitioner) is the prevailing party in  
25                   *Tokarski v. City of Salem*, \_\_ Or LUBA \_\_, (LUBA No. 2016-025, Aug 1,  
26                   2016), because we remanded the city’s decision based on petitioner’s first  
27                   assignment of error. Petitioner filed a motion seeking attorney fees in the  
28                   amount of \$37,873.50.

29                   Under ORS 197.830(15)(b), LUBA may grant attorney fees to a  
30                   prevailing party:

1           “The board shall also award reasonable attorney fees and expenses  
2           to the prevailing party against any other party who the board finds  
3           presented a position without probable cause to believe the position  
4           was well-founded in law or on factually supported information.”

5           In determining whether to award attorney fees against a nonprevailing party,  
6           we must determine that “every argument in the entire presentation [that a  
7           nonprevailing party] makes to LUBA is lacking in probable cause[.]” *Fechtig v.*  
8           *City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS  
9           197.830(15)(b), a position is presented “without probable cause” where “no  
10          reasonable lawyer would conclude that any of the legal points asserted on  
11          appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA  
12          465, 469 (1996). In applying the probable cause analysis, LUBA “will consider  
13          whether any of the issues raised [by a party] were open to doubt, or subject to  
14          rational, reasonable, or honest discussion.” *Id.* The party seeking an award of  
15          attorney fees under the probable cause standard must clear a relatively high  
16          hurdle, and that hurdle is not met by simply showing that LUBA rejected all of  
17          a party’s arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA  
18          775, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804  
19          (1997)).

20           **A.    Background**

21          Petitioner appealed a planning commission decision that approved  
22          petitioner’s application to modify a portion of a planned unit development  
23          approval to allow a four-lot subdivision. The city had imposed a condition of  
24          approval that required petitioner to construct a significant portion of Lone Oak

1 Road SE prior to the issuance of the final PUD plan/ plat approval. Petitioner  
2 presented three assignments of error: (1) the city erred in approving the  
3 application as a modification to a planned unit development, which erroneously  
4 allowed the imposition of the afore-mentioned condition, (2) the condition  
5 violated the needing housing statutes, and (3) the condition was not roughly  
6 proportional to traffic impacts of the subdivision, in violation of the Takings  
7 Clause of the United States Constitution. In reaching only the first assignment  
8 of error, LUBA found that the city erred in requiring the subdivision to be  
9 approved as a modification and determined there was no basis to impose the  
10 condition. *Tokarski v. City of Salem*, \_\_ Or LUBA \_\_, (LUBA No. 2016-025,  
11 Aug 1, 2016) (slip op at 14). LUBA’s opinion was affirmed by the Court of  
12 Appeals. *Tokarski v. City of Salem*, 281 Or App 780, 384 P3d 565 (2016).  
13 Petitioner now asserts that the city’s decision and subsequent arguments were  
14 not well-founded in law or on factually supported information and that he is  
15 entitled to attorney fees.

16 **B. First Assignment of Error**

17 Petitioner argues that LUBA’s final opinion and order “demonstrates  
18 [that] the city’s Decision and subsequent arguments before LUBA were not  
19 well-founded in law or on factually supported information.” Petitioner’s  
20 Amended Motion for Fees 3. Petitioner points out that LUBA determined that  
21 the city’s findings misconstrued applicable law and failed to establish that a  
22 PUD modification was required in order to subdivide the subject lot. Petitioner

1 also notes that LUBA determined that the findings did not explain why the  
2 subdivision was accurately viewed as a proposed modification to the PUD, that  
3 the local code did not suggest that a modification was necessary, and that the  
4 city's past actions supported the proposition that a modification was not  
5 necessary. Petitioner also argues that the city compounded these errors by  
6 arguing that the decision was subject to the deferential standard of review at  
7 ORS 197.829(1), where the decision standard of review was actually *de novo*,  
8 citing ORS 197.835(9)(a)(D).

9 Intervenor-respondent (intervenor) argues that the respondents' response  
10 to petitioner's first assignment of error was open to doubt and honest  
11 discussion. Intervenor argues that although petitioner took the position on  
12 appeal that a modification to the PUD was not required to approve the four-lot  
13 subdivision, petitioner's own application to the city identified the application  
14 as one for "modification" of a planned unit development. *Tokarski v. City of*  
15 *Salem*, \_\_ Or LUBA \_\_, (LUBA No. 2016-025, Aug 1, 2016) (slip op at 6).  
16 Because of the manner which the application was submitted, intervenor  
17 believes that it was reasonable for the city to process the application as a  
18 modification of the PUD rather than simply a subdivision, and apply the PUD  
19 modification criteria.

20 Petitioner's arguments regarding his first assignment of error are mostly  
21 a recitation of LUBA's determinations. As noted above, the probable cause  
22 standard necessary to award fees is not met by simply showing that LUBA

1 rejected all of a party's arguments on the merits. *Wolfgram v. Douglas County*.  
2 Although we ultimately agreed with petitioner that the PUD modification  
3 criteria were not applicable and disagreed with the city's response that was a  
4 variant to the "invited error" principle rejected in *Recovery House VI v. City of*  
5 *Eugene*, 150 Or App 382, 386, 946 P2d 342 (1997), we agree with intervenor  
6 that the city's position that the PUD modification criteria were applicable to the  
7 application because of the manner in which petitioner submitted its application  
8 was open to rational discussion.

9 In addition, this appeal was relatively complex. As noted in the outset of  
10 the final opinion and order, this appeal involved "[a]n unfortunate amount of  
11 history and detail necessary to understand the issues in this case." *Tokarski v.*  
12 *City of Salem*, \_\_ Or LUBA \_\_, (LUBA No. 2016-025, Aug 1, 2016) (slip op at  
13 3). The complex history of the Creekside PUD and its earlier amendments  
14 provides further support to the reasonableness of the city's position that a  
15 modification to the PUD was required.

16 Accordingly, we deny petitioner's motion for attorney fees as it relates to  
17 petitioner's first assignment of error.

### 18 **C. Second and Third Assignments of Error**

19 Petitioner also argues that because the motion for fees was filed  
20 contemporaneously with a Petition for Judicial Review of LUBA's final  
21 opinion and order to the Court of Appeals, if the Court of Appeals sustains  
22 petitioner's second assignment of error (which LUBA did not reach), petitioner

1 seeks attorney fees under ORS 197.830(15)(b) and ORS 197.835(10)(a).<sup>1</sup> In the  
2 same vein, petitioner also seeks attorney fees based on his third assignment of  
3 error, which LUBA also did not reach, under ORS 197.796(5).<sup>2</sup> (“If the Court

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<sup>1</sup> ORS 197.835(10) provides:

“(a) 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:

“(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; or

“(B) That the local government’s action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.

“(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government.”

<sup>2</sup> ORS 197.796 provides in relevant part:

“(1) An applicant for a land use decision, limited land use decision or expedited land division or for a permit under ORS 215.427 or 227.178 may accept a condition of approval imposed under ORS 215.416 or 227.175 and file a challenge to the condition under this section. \* \* \*

“ \* \* \* \* \*

“(5) In a proceeding in circuit court under this section, the court shall award costs and reasonable attorney fees to a

1 of Appeals sustains petitioner’s third assignment of error, attorney fees should  
2 be awarded under OAR 661-010-0075(1)(e)(B) and ORS 197.796(5).”  
3 Petitioner’s Amended Motion for Fees at 8.)

4 As noted above, LUBA’s opinion, which did not reach the second and  
5 third assignments of error, was affirmed by the Court of Appeals. *Tokarski v.*  
6 *City of Salem*, 281 Or App 780, 384 P3d 565 (2016). Under these  
7 circumstances, we see no point in reviewing petitioner’s arguments that he is  
8 entitled to attorney fees under the cited statutes, based on the unresolved merits  
9 of assignments of error LUBA did not reach and the Court of Appeals did not  
10 review. Accordingly, because the court affirmed LUBA’s final opinion and  
11 order, we need not address petitioner’s contingent arguments regarding  
12 attorney fees related to the second and third assignments of error under ORS  
13 197.835 or ORS 197.796.

14 Petitioner’s motion for attorney fees is denied.

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prevailing party. Notwithstanding ORS 197.830 (15), in a proceeding before the Land Use Board of Appeals under this section, the board shall award costs and reasonable attorney fees to a prevailing party.

“(6) This section applies to appeals by the applicant of a condition of approval and claims filed in state court seeking damages for the unlawful imposition of conditions of approval in a land use decision, limited land use decision, expedited land division or permit under ORS 215.427 or 227.178.”

1 **COST BILL**

2           Petitioner filed a cost bill pursuant to OAR 661-010-0075(1), requesting  
3 a return of its \$200 deposit for costs and an award of the cost of the \$200 filing  
4 fee. As the prevailing party, petitioner is awarded the cost of the \$200 filing fee  
5 to be paid by respondent and intervenor-respondent. The board shall return  
6 petitioner's \$200 deposit for costs.

7           Dated this 22<sup>nd</sup> day of February, 2017.

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Tod A. Bassham  
Board Member