

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

3
4 TAI DANG,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF ROCKAWAY BEACH,
10 *Respondent.*

11
12 LUBA No. 2016-092

13
14 ORDER

15 **MOTION FOR ATTORNEY FEES**

16 In a final opinion and order dated December 6, 2016, LUBA granted
17 petitioner's motion to dismiss the appeal. *Dang v. City of Rockaway Beach*, __
18 Or LUBA __ (LUBA No. 2016-092, December 6, 2016). On December 20,
19 2016, respondent filed a motion for attorney fees and costs. On January 10,
20 2017, petitioner filed a motion requesting an extension of time to file a
21 response to respondent's motion.¹ On January 11, 2017, LUBA issued an order
22 granting the requested extension. Respondent then filed an objection to
23 petitioner's request for an extension.

24 As noted, LUBA has already granted the request for an extension and
25 declines to reconsider that decision. OAR 661-010-0005 provides in relevant

¹ OAR 661-010-0065(2) provides in relevant part that "[a]n opposing party may, within 14 days from the date of service of a motion, file a response."

1 part that “[t]echnical violations not affecting the substantial rights of parties
2 shall not interfere with the review of a land use decision or limited land use
3 decision.” OAR 661-010-0005 applies to responses to motions for attorney
4 fees. *Oregonians in Action v. City of Lincoln City*, 72 Or LUBA 457, 459
5 (2015).

6 On January 17, 2017, petitioner filed a response to the motion. We now
7 resolve the motion.

8 After the petition for review and the response brief were filed, and prior
9 to oral argument, petitioner moved to dismiss the appeal. Accordingly,
10 respondent is the prevailing party in this appeal. *Pfeifer v. City of Silverton*, 33
11 Or LUBA 869, 870 (1997) (unless circumstances indicate otherwise, where a
12 petitioner timely seeks to voluntarily dismiss the appeal, and the appeal is
13 dismissed prior to LUBA ruling on the merits, respondent is the prevailing
14 party). Respondent moves for an award of attorney fees in the amount of
15 \$6,610 pursuant to ORS 197.830(15)(b), which provides:

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

20 In determining whether to award attorney fees against a nonprevailing
21 party, we must determine that “every argument in the entire presentation [that a
22 nonprevailing party] makes to LUBA is lacking in probable cause[.]” *Fechtig v.*
23 *City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS
24 197.830(15)(b), a position is presented “without probable cause” where “no

1 reasonable lawyer would conclude that any of the legal points asserted on
2 appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA
3 465, 469 (1996). In applying the probable cause analysis, LUBA “will consider
4 whether any of the issues raised [by a party] were open to doubt, or subject to
5 rational, reasonable, or honest discussion.” *Id.* The party seeking an award of
6 attorney fees under the probable cause standard must clear a relatively high
7 hurdle, and that hurdle is not met by simply showing that LUBA rejected all of
8 a party's arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA
9 775, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804
10 (1997)).

11 Petitioner appealed the city council’s decision to dismiss petitioner’s
12 appeal of a city planning commission decision that concluded that the
13 placement of riprap on petitioner’s coastal property did not comply with
14 provisions of the city’s comprehensive plan and zoning ordinances. The basis
15 for the city council’s dismissal of the appeal was that petitioner had not paid
16 the appeal fee.

17 LUBA must deny a motion for attorney fees if it finds that any of the
18 legal points asserted on appeal possessed legal merit. *Contreras*, 32 Or LUBA
19 at 469. In his petition for review, petitioner argued that the city council erred in
20 concluding that it was required to dismiss the appeal because petitioner had
21 failed to pay an appeal fee. Petitioner argued that nothing in the language of
22 any provision of the city’s zoning ordinance makes payment of an appeal fee

1 jurisdictional, and accordingly the city erred in failing to consider petitioner's
2 appeal of the planning commission decision.

3 Respondent's motion for attorney fees does not address the argument
4 that we describe above, and that petitioner made in his petition for review, at
5 all. We agree with petitioner that the argument petitioner presented - that the
6 city erred in concluding that failure to pay an appeal fee requires dismissal of
7 an appeal - is one that a reasonable lawyer would conclude possesses legal
8 merit. Accordingly, respondent's motion for attorney fees is denied.

9 **MOTION FOR OTHER FEES AND COSTS**

10 Respondent moves for an award of a "prevailing party fee" of \$85
11 pursuant to ORS 20.190. Respondent also moves for an award of a "first
12 appearance fee" of \$252 pursuant to ORS 20.140. Respondent has not
13 established that ORS chapter 20 applies to LUBA proceedings. LUBA is not a
14 court as that term is used in those chapters. *See Wiper v. City of Eugene*, __ Or
15 LUBA __ (LUBA No. 2004-016, June 24, 2004, Order on Fees) (ORS 20.190
16 does not apply to LUBA).² Accordingly, respondent has not demonstrated that
17 LUBA is authorized to award such fees or that respondent is entitled to those
18 fees.

² ORS chapter 20 has been cited as relevant context for determining reasonableness of attorney fees in LUBA proceedings. *Fechtig*, 150 Or App at 23.

1 Respondent also requests an award of \$967.13 for costs. OAR 661-010-
2 0075(1)(b) limits the types of costs that are recoverable in LUBA proceedings.³
3 When a governing body is the prevailing party, the only costs that can be
4 recovered are “copying costs for the required number of copies of the record.”
5 OAR 661-010-0075(1)(b)(B).⁴ The required number of copies of the record in
6 this appeal is two. The record is 484 pages, and at the rate of \$.25 cents per
7 page, the cost of copying the record is \$242. Under OAR 661-010-

³ OAR 661-010-0075(1)(b) provides in relevant part:

“Recoverable Costs: Costs may be recovered only for the items set forth in this subsection.

“ * * * * *

“(B) If the governing body is the prevailing party, the governing body may be awarded copying costs for the required number of copies of the record, at 25 cents per page, whether or not the governing body actively participated in the review.

“(C) Costs awarded to the governing body pursuant to this section shall be paid from the deposit required by OAR 661-010-0015(4) and shall not exceed the amount of that deposit.”

⁴ An exhibit appended to respondent’s motion describes “Litigation Expenses” and included as a line item:

“b. Photocopies [Record, 484 pp., x 4 at \$.025/page] \$484.00”
Exhibit RS3 to Respondent’s Statement of Attorney Fees, Costs & Disbursements.

The exhibit also lists expenses for postage, other photocopies, long distance telephone charges, a filing fee, and compact discs, which are not expenses recoverable under OAR 661-010-0075.

1 0075(1)(b)(C), costs awarded to the governing body shall not exceed the
2 amount of petitioner's \$200 deposit for costs. Accordingly, respondent is
3 awarded costs in the amount of \$200, to be paid from petitioner's deposit for
4 costs.

5 Dated this 7th day of February, 2017.
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10 _____
11 Melissa M. Ryan
Board Member