

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

3
4 L. CALVIN MARTIN
5 and MARK HANEBERG,
6 *Petitioners,*

7
8 and

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10 DAVID SMITH,
11 *Intervenor-Petitioner,*

12
13 vs.

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15 CITY OF CENTRAL POINT,
16 *Respondent,*

17
18 and

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20 COSTCO WHOLESALE CORPORATION,
21 and CHARLES E. BOLEN,
22 *Intervenors-Respondents.*

23
24 LUBA No. 2016-042

25
26 ORDER

27 **MOTION FOR ATTORNEY FEES**

28 The decision challenged in this appeal was the city’s decision to approve
29 an application for a conditional use permit for a Costco store on land zoned
30 Industrial. We affirmed the city’s decision. *Martin v. City of Central Point*, 74
31 Or LUBA 312 (2016), *aff’d* 283 Or App 648, 389 P3d 1198 (2017). Intervenor-
32 respondent Costco Wholesale Corp. (Costco) and the city are the prevailing
33 parties.

1 ORS 197.830(15)(b) provides:

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

6 Costco and the city each move for an award of attorney fees against petitioners
7 and intervenor-petitioner Smith (Smith).

8 In determining whether to award attorney fees against a nonprevailing
9 party, we must determine that “every argument in the entire presentation [that a
10 nonprevailing party] makes to LUBA is lacking in probable cause[.]” *Fechtig v.*
11 *City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS
12 197.830(15)(b), a position is presented “without probable cause” where “no
13 reasonable lawyer would conclude that any of the legal points asserted on
14 appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA
15 465, 469 (1996). In applying the probable cause analysis, LUBA “will consider
16 whether any of the issues raised [by a party] were open to doubt, or subject to
17 rational, reasonable, or honest discussion.” *Id.* The party seeking an award of
18 attorney fees under the probable cause standard must clear a relatively high
19 hurdle, and that hurdle is not met by simply showing that LUBA rejected all of
20 a party’s arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA
21 775, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804
22 (1997)).

1 **A. The City’s Motions for Attorney Fees**

2 The city argues that all of petitioners’ and Smith’s arguments in support
3 of their appeal lacked probable cause under ORS 197.830(15)(b).

4 **1. Petitioners’ Arguments**

5 Petitioners’ 24-page response to the city’s motion largely re-litigates the
6 merits of their appeal, with a reference to Galileo sprinkled in. Petitioners’
7 Response 12, 18-22. However, we glean from petitioners’ response at pages 9-
8 12 that they believe that their first assignment of error passes the low threshold
9 for legal merit, and we agree.

10 Petitioners’ petition for review contained two assignments of error. In a
11 portion of their first assignment of error, petitioners argued that Costco’s
12 application failed to satisfy Central Point Municipal Code (CPMC)
13 17.76.040(B), which requires the city to find that “the site has adequate access
14 to a public street or highway and that the street or highway is adequate in size
15 and condition to effectively accommodate the traffic that is expected to be
16 generated by the proposed use[.]” Petitioners argued that the city improperly
17 construed that provision because the evidence in the record was that for a
18 limited period of time after the store opened, but prior to completion of a
19 project to widen Table Rock Road, CPMC 17.76.040(B) would not be satisfied.
20 Stated differently, we understood petitioners to argue that the city could not
21 approve an application that would result in a limited time period of non-
22 compliance with the criterion.

1 We rejected petitioners’ argument. We agreed with the city that in the
2 absence of any argument from petitioners explaining why the city council’s
3 interpretation of CPMC 17.76.040(B) as allowing a “short temporal separation”
4 between store opening and compliance with the criterion was not “plausible,”
5 we were required by ORS 197.829(1) to affirm that interpretation. However,
6 we cannot say that petitioners’ argument is one that “no reasonable lawyer
7 would conclude * * * possessed legal merit,” particularly given that the express
8 language of CPMC 17.76.040(B) is phrased in the present tense (“is adequate
9 in size and condition”), and does not refer to a short temporal separation or
10 period of non-compliance with the criterion.

11 The city’s motion for attorney fees against petitioners is denied.

12 **2. Smith’s Arguments**

13 The city also moves for an award of attorney fees against Smith, arguing
14 that all of Smith’s arguments were lacking in probable cause. Smith filed a
15 response to the city’s motion, and that response was not filed within the time
16 set in our rules for responding to a motion for attorney fees.¹ The city moves to
17 strike that response. We treat the late filing as a technical violation under OAR

¹ OAR 661-010-0065(2) allows an opposing party 14 days from the date of service of a motion to file a response.

1 661-01-0005 and allow the response.² *Oregonians in Action v. City of Lincoln*
2 *City*, 72 Or LUBA 457, 459 (2015).

3 Smith’s petition for review incorporated petitioners’ assignments of
4 error, including their first assignment of error. Accordingly, for the reasons
5 explained above, the city’s motion for attorney fees against Smith is denied.

6 **B. Costco’s Motion for Attorney Fees**

7 Costco seeks an award of attorney fees against petitioners for fees
8 incurred in (1) responding to petitioners’ objections to the record and (2)
9 opposing petitioners’ attempt to introduce evidence not included in the record
10 as appendices to their petition for review. Briefly, after the city filed the record,
11 petitioners filed objections to the record. We ultimately denied petitioners’
12 objections. Petitioners then filed their petition for review, and included in
13 appendices to the petition for review 21 appendices that were not part of the
14 record. Some of the appendices were documents that our previous order
15 settling the record had concluded were not part of the record of the local
16 government proceeding. Respondents then moved to strike the appendices, and
17 petitioners filed a motion to take evidence not in the record seeking to have us
18 consider the appendices. We denied that motion.

² 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.”

1 As we explain above, the party seeking an award of attorney fees under
2 the probable cause standard must clear a relatively high hurdle, and that hurdle
3 is not met by simply showing that LUBA rejected all of a party’s arguments on
4 the merits. That hurdle is also not met by simply showing that LUBA denied all
5 of a party’s objections to the record and/or attempts to introduce evidence not
6 in the record for the Board to consider, because record objections and motions
7 to take evidence are not part of the “entire presentation” described in *Fechtig*.
8 A party’s “presentation” includes a party’s arguments on the merits of an
9 appeal and on jurisdictional issues that may arise. *Fechtig*, 150 Or App at 24;
10 *Lewelling Neighborhood Dist. v. City of Milwaukie*, 35 Or LUBA 764, 766
11 (1998). The “presentation” does not include arguments made regarding
12 procedural matters during the proceeding before LUBA.

13 Costco’s motion for attorney fees is denied.

14 **COST BILL**

15 Respondent, the prevailing party in this appeal, filed a cost bill
16 requesting award of the cost of preparing the record, in the amount of
17 \$1,136.50. Respondent is awarded the cost of preparing the record, in the
18 amount of \$200.00, to be paid from petitioners’ deposit for costs.

19 Costco filed a cost bill seeking to recover the cost of its intervention fee,
20 in the amount of \$100.00. Costco is awarded the cost of its fee, in the amount
21 of \$100.00, to be paid by petitioners and Smith.

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1 Dated this 10th day of July, 2017.

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Melissa M. Ryan

7 Board Chair