

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

3
4 PAUL GRIMSTAD,
5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,
10 *Respondent,*

11
12 *and*

13
14 DAN MAHONEY,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2016-035

18
19 ORDER ON ATTORNEY FEES AND COSTS

20 **ATTORNEY FEES**

21 Petitioner Paul Grimstad, the prevailing party in this appeal,¹ moves for
22 an award of attorney fees pursuant to ORS 197.830(15)(b), which provides:

23 “The board shall * * * award reasonable attorney fees and
24 expenses to the prevailing party against any other party who the
25 board finds presented a position without probable cause to believe
26 the position was well-founded in law or on factually supported
27 information.”

¹ Both petitioner and intervenor sought judicial review of LUBA’s final order. The Court of Appeals affirmed LUBA’s opinion. 283 Or App 648, ___ P3d ___ (2017).

1 As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-776
2 (2007):

3 “In determining whether to award attorney fees against a
4 nonprevailing party, we must determine that ‘every argument in
5 the entire presentation [that a nonprevailing party] makes to
6 LUBA is lacking in probable cause * * *.’ *Fechtig v. City of*
7 *Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS
8 197.830(15)(b), a position is presented ‘without probable cause’
9 where ‘no reasonable lawyer would conclude that any of the legal
10 points asserted on appeal possessed legal merit.’ *Contreras v. City*
11 *of Philomath*, 32 Or LUBA 465, 469 (1996). In applying the
12 probable cause analysis LUBA ‘will consider whether any of the
13 issues raised [by a party] were open to doubt, or subject to
14 rational, reasonable, or honest discussion.’ *Id.*”

15 Thus, an award of attorney fees is warranted under ORS 197.830(15)(b) where
16 the prevailing party demonstrates that no reasonable lawyer would present any
17 of the arguments that the losing party presented on appeal. Conversely, a party
18 may avoid paying attorney fees if the party presented at least one argument on
19 appeal that satisfied the probable cause standard. The probable cause standard
20 is a relatively low standard. *Brown v. City of Ontario*, 33 Or LUBA 803, 804
21 (1997).

22 In distinguishing between positions that are subject to an award of
23 attorney fees under the ORS 197.830(15)(b) “probable cause” standard, the
24 Court of Appeals and LUBA have used a number of one-word or short-phrase
25 descriptions of the standard imposed by ORS 197.830(15)(b). However, the
26 following description in *Spencer Creek Neighbors v. Lane County*, 152 Or App

1 1, 9, 952 P2d 90 (1998), probably best describes the standard that we and the
2 Court of Appeals apply under that statute:

3 “As a general proposition, however, the question of whether there
4 is probable cause for a defense under ORS 197.830(1[5])(b) does
5 not depend on a successful result but on whether it presents a
6 ‘debatable’ question ‘over which * * * reasonable * * * discussion
7 may arise.’ *Fechtig*, 150 Or App at 14 (*quoting Broyles v. Estate*
8 *of Brown*, 295 Or 795, 800-01, 671 P2d 94 (1983)).”

9 Petitioner’s one-page motion quotes ORS 197.830(15)(b) and LUBA’s
10 administrative rule OAR 661-010-0075 that implements that statute. Petitioner
11 provides no explanation as to why he believes the county or intervenor
12 (collectively respondents) “presented a position without probable cause to
13 believe the position was well-founded in law or on factually supported
14 information.” In our final opinion and order, we remanded the county’s
15 decision by sustaining petitioner’s second, third and fourth assignments of
16 error, but denied petitioner’s first, fifth and sixth assignments of error.
17 Petitioner does not analyze the “probable cause” standard or provide any
18 argument as to why *all* of respondents’ positions taken with respect to the
19 merits of the assignments of error failed to meet the probable cause standard.
20 *Stevens v. City of Island City*, 71 Or LUBA 430, 431-32 (2015) (a prevailing
21 party is required to demonstrate that every argument made by the nonprevailing
22 party lacked probable cause.)

23 Additionally, intervenor argues that petitioner’s motion and attachment
24 appears to indicate that petitioner incurred no actual attorney fees. We agree.

1 Petitioner appeared *pro se*, and his brief was signed only by himself. Petitioner
2 does not represent that he received any legal services from an attorney during
3 the pendency of his LUBA appeal. Under ORS 197.835(15)(b), “attorney fees”
4 means the reasonable value of legal services provided by an attorney that are
5 related to the applicant’s appeal of a local government decision to LUBA.
6 *Stewart v. City of Salem*, 240 Or App 466, 473, 247 P3d 763 (2011).
7 Accordingly, petitioner’s failure to demonstrate that he incurred any legal fees
8 provides an additional basis for the motion to be denied.

9 Petitioner’s motion for attorney fees is denied.

10 **COSTS**

11 Petitioner also moves for reimbursement of “expenses as prescribed by
12 the State of Oregon Administrative Rules, Revised Statutes, per [petitioner’s
13 attachment].” That attachment includes an expense of “Filing Notice of Intent
14 to Appeal LUBA Fees \$400[.]” Per OAR 661-010-0015(4), a petitioner is
15 required to include a \$200 filing fee and a \$200 deposit for costs with its notice
16 of intent to appeal. As the prevailing party, petitioner is entitled to the return
17 of his \$200 deposit by LUBA. OAR 661-010-0075(1).² In addition, petitioner
18 is awarded the \$200 filing fee to be paid by respondents. *Id.*

² OAR 661-010-0075(1) provides in relevant part:

“(1) Cost Bill and Attorney Fees:

“ * * * * *

1 Dated this 2nd day of August, 2017.

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5 Tod A. Bassham

6 Board Member

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

“(A) If the petitioner is the prevailing party, the petitioner may be awarded the cost of the filing fee.

“ * * * * *

“ * * * * *

“(d) Return of Deposit: After any award of costs under subsection (b) of this section is made, any amount of the deposit remaining shall be returned to petitioner.”