

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BLU DUTCH LLC,
5 *Petitioner,*

6
7 vs.

8
9 JACKSON COUNTY,
10 *Respondent,*

11
12 and

13
14 ROBIN WEST,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2018-069

18
19 ORDER

20 **MOTION FOR ATTORNEY FEES**

21 Petitioner is the prevailing party in *Blu Dutch LLC v. Jackson County*, __
22 Or LUBA __ (LUBA No. 2018-069, Dec 7, 2018). Petitioner moves for an award
23 of attorney fees in the amount of \$8,901.92 pursuant to ORS 197.830(15)(b),
24 which provides:

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

29 In determining whether to award attorney fees against a non-prevailing party, we
30 must determine that “every argument in the entire presentation [that a non-

1 prevailing party] makes to LUBA is lacking in probable cause[.]” *Fechtig v. City*
2 *of Albany*, 150 Or App 10, 14, 946 P2d 280 (1997). Under ORS 197.830(15)(b),
3 a position is presented “without probable cause” where “no reasonable lawyer
4 would conclude that any of the legal points asserted on appeal possessed legal
5 merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465, 469 (1996). In applying
6 the probable cause analysis, LUBA “will consider whether any of the issues
7 raised [by a party] were open to doubt, or subject to rational, reasonable, or honest
8 discussion.” *Id.*

9 The party seeking an award of attorney fees under the probable cause
10 standard must clear a relatively high hurdle, and that hurdle is not met by simply
11 showing that LUBA rejected all of a party’s arguments on the merits. *Wolfgram*
12 *v. Douglas County*, 54 Or LUBA 775, 776 (2007) (citing *Brown v. City of*
13 *Ontario*, 33 Or LUBA 803, 804 (1997)). Petitioner argues that all of intervenor-
14 respondent/cross petitioner Robin West’s (West) arguments in support of the
15 local land use decision appealed by petitioner lacked probable cause under ORS
16 197.830(15)(b).

17 In this appeal, petitioner challenged a county hearings officer decision that
18 denied, on a single basis, its application for a large tract forest dwelling. Petitioner
19 presented a single assignment of error, arguing that the hearings officer
20 improperly construed Jackson County Land Development Ordinance (LDO)

1 8.7.1(G)(4) in denying its application for a forest dwelling.¹ The hearings officer
2 interpreted LDO 8.7.1(G) to require a fire safety inspection prior to issuing a

¹ LDO 8.7.1 is entitled “Wildfire Safety Requirements” and provides in relevant part:

“A) Applicability

“This Section contains mandatory standards for all new and existing structures not exempted through Section 8.7.2 located in areas subject to wildfire hazard as identified on the ‘Hazardous Wildfire Area Map.’ The official version of the ‘Hazardous Wildfire Area Map’ will be maintained by the Planning Division. * * * Compliance with the standards of this section will be verified through a Fire Safety Inspection as coordinated through Jackson County Development Services and shall occur prior to issuance of building permits.

“* * * * *

“G) General Fire Safety Guidelines

“The following fire safety guidelines are suggested in all rural and forested areas, and may be required by the County when a finding is made that such measures are necessary to protect public safety (see OAR 660-006-0035 for additional standards in forest zones):

- “1) Bridges constructed of noncombustible materials or as otherwise approved by the local fire official having jurisdiction through a Type 1 Review;
- “2) On-site water storage approved by the fire district serving the proposed use;
- “3) Permanent signs posted along the access route to indicate the location of the emergency water source; and

1 decision on petitioner’s application. Therefore, the hearings officer denied the
2 application because petitioner had not provided a fire safety inspection. West
3 intervened on the side of the county and filed a response brief.

4 In a final opinion and order dated December 7, 2018, we remanded the
5 county’s decision. *Blu Dutch LLC v. Jackson County*, __ Or LUBA __ (LUBA
6 No. 2018-069, Dec 7, 2018).² Petitioner argues that all of West’s arguments in
7 his response brief with respect to the merits of petitioner’s assignment of error
8 lacked probable cause under ORS 197.830(15)(b).³ According to petitioner,
9 West’s arguments were not well-founded in law or based on factually supported

“4) Other measures as recommended by the fire agency
commenting on the application or the County Fire Safety
Inspector.”

² In our decision, we agreed with and sustained petitioner’s single assignment of error. Because we sustained petitioner’s assignment of error, we also addressed West’s two contingent cross-assignments of error brought in his cross petition for review, which we understood to raise issues that might provide additional bases for remanding the decision, in order to correct other alleged errors on remand. *Id.* (slip op at 11-20). We denied West’s first cross-assignment of error, but sustained West’s second cross-assignment of error. Therefore, on the basis of petitioner’s first assignment of error and West’s second cross-assignment of error, we remanded the county’s decision.

³ ORS 197.830(15)(b) provides that LUBA “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.”

1 information. However, as we explain below, we conclude that a least two of the
2 arguments presented by West meet the standard.

3 With respect to petitioner’s sole assignment of error, petitioner argued that
4 the hearings officer’s interpretation of LDO 8.7.1 was incorrect on four separate
5 bases. West responded to each argument. Petitioner argues that in each of West’s
6 responses, West presented a position without probable cause to believe the
7 position was well-founded in law.

8 **1. LDO 8.7.1(G)**

9 In its first argument, petitioner asserted that the hearings officer incorrectly
10 interpreted LDO 8.7.1(G) to require a fire safety inspection. In response, West
11 argued that according to the language of the ordinance, the county has discretion
12 to require “measures [the county deems] necessary to protect public safety,” and
13 therefore we should uphold the hearings officer’s decision.

14 In our final opinion, we agreed with petitioner that the plain language of
15 LDO 8.7.1(G) reveals that subsections (G)(1)-(4) are merely “suggested”
16 “guidelines,” except in the circumstances when the county finds that “such
17 measures are necessary to protect public safety.” Then, “such measures” are set
18 out in subsections (G)(1) through (4), none of which references or requires a fire
19 safety inspection, except that subsection (4) is a catch-all provision that allows
20 the county to impose “[o]ther measures as recommended by the fire agency
21 commenting on the application.” The hearings officer did not find that a fire
22 inspection was necessary to protect public safety, and no fire agency

1 recommended a fire inspection in any comments submitted, and therefore we
2 concluded that no fire safety inspection was required. We rejected West's (and
3 the hearings officer's) proposed interpretation of LDO 8.7.1(G), but we cannot
4 say that no reasonable lawyer would have advanced that interpretative argument.

5 **2. LDO 8.7.1(A)**

6 Petitioner next challenged the hearings officer's conclusion that a fire
7 safety inspection was required prior to a decision on the application, or included
8 as part of the application materials. LDO 8.7.1(A). LDO 8.7.1(A) provides that
9 "[c]ompliance with the standards of this section will be verified through a Fire
10 Safety Inspection as coordinated through Jackson County Development Services
11 and shall occur prior to issuance of building permits." West argued that the code
12 did not "absolutely" require a pre-approval fire safety inspection, but that the
13 code also "[d]id not prohibit" it, and so LUBA should uphold the hearings
14 officer's decision. Response Brief 14.

15 In our final opinion, we stated that "although LDO 8.7.1 is not a model of
16 clarity, it is clear that the standards in LDO 8.7.1(A)-(F) and (H) are operating
17 standards that relate to the post-land use approval design of the dwelling, rather
18 than approval criteria." *BluDutch*, __ Or LUBA __ (LUBA No. 2018-069, Dec
19 7, 2018) (slip op at 8). We then concluded that:

20 "The language that refers to verification of compliance with the
21 standards in LDO 8.7.1 strongly suggests that if a fire safety
22 inspection occurs at all, it is intended to occur as a post-approval
23 condition to be satisfied after development approval but prior to
24 issuance of building permits." *Id.*

1 Petitioner argues that no reasonable lawyer would have argued that the
2 LDO allowed the hearings officer to require a pre-approval fire safety inspection,
3 and that West’s argument was unsupported by law or facts. We disagree. As we
4 noted, the LDO section “is not a model of clarity.” Although we ultimately agreed
5 with petitioner and found that that the applicable LDO standards were related to
6 the post-land use approval design of the dwelling, rather than approval criteria,
7 we cannot say no reasonable lawyer would have advanced the interpretative
8 argument that West advanced.

9 Accordingly, petitioner’s motion for attorney fees is denied.

10 **COSTS**

11 Petitioner filed a cost bill pursuant to OAR 661-010-0075(1), requesting a
12 return of its \$200 deposit for costs and an award of the cost of the \$200 filing fee.
13 As the prevailing party, petitioner is awarded the cost of the \$200 filing fee, to be
14 paid by respondent and intervenor-respondent. The board shall return petitioner’s
15 \$200 deposit for costs.

16 Dated this 11th day of April, 2019.

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Melissa M. Ryan
Board Chair