

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

3  
4                   ROBERT VANNATTA  
5                   and AGNES MARIE PETERSEN,  
6                   *Petitioners,*

7  
8                   vs.

9  
10                  CITY OF ST. HELENS,  
11                  *Respondent,*

12  
13                  and

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15                  ROBERT A. LUCAS  
16                  and ROBERT LEE,  
17                  *Intervenors-Respondents.*

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19                  LUBA No. 2018-128

20  
21                  ORDER

22   **MOTION FOR ATTORNEY FEES**

23                  Intervenors-respondents (intervenors) are the prevailing parties in  
24   *Vannatta v. City of St. Helens*, \_\_ Or LUBA \_\_ (LUBA No 2018-128, Apr 9,  
25   2018). Intervenors move for an award of attorney fees in the amount of \$7,750  
26   pursuant to ORS 197.830(15)(b), which provides:

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

31   In determining whether to award attorney fees against a non-prevailing party, we  
32   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 Intervenor argue that LUBA should award attorney’s fees because  
10 “[LUBA’s] opinion confirms” that the standard in ORS 197.830(15) is met.  
11 Motion/Statement for Attorney Fees. The party seeking an award of attorney fees  
12 under the probable cause standard must clear a relatively high hurdle, and that  
13 hurdle is not met by simply showing that LUBA rejected all of a party’s  
14 arguments on the merits. *Wolfgram v. Douglas County*, 54 Or LUBA 775, 776  
15 (2007) (*citing Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

16 In this appeal, petitioners challenged a city council decision that approved  
17 a conditional use permit for a retail and medical marijuana dispensary. Petitioners  
18 presented a single assignment of error that argued that the city council committed  
19 procedural errors when it continued its deliberations after an initial tie vote taken  
20 with one council member absent. We rejected petitioners’ arguments in the  
21 petition for review, finding that the procedures cited by petitioners as having been

1 allegedly violated did not apply to the city council’s proceedings, and in the  
2 alternative, that no violation had occurred.

3 In their reply brief, which we allowed, petitioners also argued that a  
4 provision of the St. Helens Municipal Code (SMC), 17.24.220(5), that the city  
5 council relied on to continue its deliberations after the tie vote and vote anew  
6 with all five members present, prohibited that new vote. SMC 17.24.220(5)  
7 provides that “[i]n the event of a tie, the decision which is the subject of appeal  
8 \* \* \* shall stand.” Petitioners argued that the provision required that if any vote  
9 of the city council results in a tie, then the city council is prohibited from voting  
10 again, and the planning commission’s decision is the final city decision.

11 In its decision, the city council interpreted SMC 17.24.220(5) as applying  
12 “only when a tie vote is the final vote taken and Council deliberations have  
13 concluded.” Record 5. We concluded that the city council’s interpretation of  
14 SMC 17.24.220(5) was required to be affirmed under ORS 197.829(1), and  
15 rejected petitioners’ argument for a different interpretation. The standard of  
16 review under ORS 197.829(1) is “highly deferential” to the city’s interpretation  
17 of its own regulations. *Mark Latham Excavation, Inc. v. Deschutes County*, 250  
18 Or App 543, 555, 281 P3d 644 (2012). However, we cannot say that petitioners’  
19 argument is one that “no reasonable lawyer would conclude \* \* \* possessed legal  
20 merit,” particularly given that the circumstances under which SMC 17.24.220(5)  
21 applies are not clearly articulated in that provision or specified in any other SMC  
22 provision. Although it is a close call, we do not think that intervenors have

1 established that petitioners failed to present a position without probable cause to  
2 believe the position was well-founded in law when they argued that for a different  
3 interpretation than the city council's interpretation of SMC 17.24.220(5).  
4 Accordingly, intervenors' motion for attorney fees is denied.

5 **COSTS**

6 Intervenor filed a cost bill pursuant to OAR 661-010-0075(1), requesting  
7 an award of the cost of the \$100 filing fee. As the prevailing parties, intervenors  
8 are awarded the cost of the \$100 filing fee, to be paid by petitioners. The board  
9 shall return petitioners' \$200 deposit for costs.

10 Dated this 14<sup>th</sup> day of August, 2019.  
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16 Melissa M. Ryan  
Board Chair