

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

3
4 NEDONNA DEVELOPMENT, LLC,
5 *Petitioner,*

6
7 vs.

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

11
12 and

13
14 OREGON SHORES CONSERVATION COALITION and
15 NORTH COAST COMMUNITIES FOR WATERSHED PROTECTION,
16 *Intervenors-Respondents.*

17
18 LUBA No. 2025-069

19
20 ORDER ON MOTIONS FOR ATTORNEY FEES

21 **BACKGROUND**

22 This appeal concerned the city council's denial of petitioner's application
23 to modify a planned unit development (PUD) that the city originally approved in
24 2008, and to authorize construction of modified Phase 2. The city initially
25 approved the application to modify the PUD and authorize construction of Phase
26 2. Opponents appealed the decision to LUBA. LUBA remanded for the city to
27 adopt findings addressing two issues: whether the 2008 PUD approval had
28 expired, and whether the lots proposed in the modified Phase 2 encroached within
29 areas zoned Special Area Wetland (SA), which does not allow residential
30 development. *Oregon Shores Conservation Coalition v. City of Rockaway Beach,*

1 LUBA No 2025-001 (July 2, 2025). As explained in *Oregon Shores*, the city's
2 official zoning map is small-scale, and does not show lot lines or property-
3 specific information. LUBA No 2025-001 (slip op at 2).

4 On remand, the city council concluded that (1) the 2008 PUD had expired,
5 based on the city council's interpretation of a PUD condition of approval, and (2)
6 the Phase 2 plat did propose building lots within areas of the property zoned SA,
7 based in part on review of an unofficial digital zoning map, not the city's official
8 paper zoning map. Accordingly, the city council denied the application to modify
9 the 2008 PUD and authorize construction of the modified Phase 2.

10 Petitioner, the applicant, appealed the city's denial to LUBA, challenging
11 both bases for denial. We only addressed the second assignment of error,
12 challenging the first basis for denial, expiration of the 2008 PUD, and rejected
13 that assignment of error. Under our caselaw and jurisprudence, a local
14 government needs only one sustained basis for denial to prevail on appeal.
15 Accordingly, we did not reach the first and third assignments of error, which
16 challenged the second basis for denial, and affirmed the city council's decision.
17 *Nedonna Development, LLC v. City of Rockaway Beach*, LUBA No 2025-069
18 (Feb 6, 2026). The city and intervenors-respondents (intervenors) are the
19 prevailing parties in this appeal.

20 **MOTIONS FOR ATTORNEY FEES**

21 On February 20, 2026, the city and intervenors separately moved for
22 awards of attorney fees pursuant to ORS 197.830(15)(b) and OAR 660-010-

1 0075(1)(c) (Jan 15, 2025).¹ The city moves for an award of attorney fees in the
2 amount of \$22,561.50. Intervenor move for an award of attorney fees in the
3 amount of \$17,695.50. On March 2, 2026, petitioner filed its response to
4 intervenors’ motion for attorney fees, and on March 13, 2026, filed its response
5 to the city’s motion for attorney fees.

6 **A. Attorney Fees Standard**

7 ORS 197.830(15)(b) provides that LUBA “[s]hall award reasonable
8 attorney fees and expenses to the prevailing party against any other party who the
9 [B]oard finds presented a position or filed any motion without probable cause to
10 believe the position or motion was well-founded in law or on factually supported
11 information.” ORS 197.830(15)(b) is not entirely clear what constitutes the
12 “position” being evaluated. Is it any single position or argument advanced by the
13 non-prevailing party, or does it refer to that party’s entire presentation on appeal?
14 Shortly after the statute was adopted, LUBA and the Court of Appeals held that
15 “position” means the latter. That is, in deciding whether to award attorney fees
16 against a non-prevailing party pursuant to ORS 197.830(15)(b), LUBA must
17 determine that “every argument in the entire presentation [that the non-prevailing
18 party made] to LUBA is lacking in probable cause (*i.e.* merit).” *Fechtig v. City*
19 *of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997).

¹ OAR 660-010-0075(1)(c)(A) (Jan 15, 2025) provides: “Attorney fees shall be awarded by the Board to the prevailing party as specified in ORS 197.830(15)(b) and (c)[.]”

1 Under ORS 197.830(15)(b), a position is presented “without probable
2 cause” where “no reasonable lawyer would conclude that any of the legal points
3 asserted on appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or
4 LUBA 465, 469 (1996).² In applying the probable cause analysis, we “will
5 consider whether any of the issues raised [by the non-prevailing party] were open
6 to doubt, or subject to rational, reasonable or honest discussion.” *Id.* “The party
7 seeking an award of attorney fees under the probable cause standard must clear a
8 relatively high hurdle, and that hurdle is not met by simply showing that LUBA
9 rejected all of a party’s arguments on the merits.” *Wolfgram v. Douglas County*,
10 54 Or LUBA 775, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803,
11 804 (1997)).

12 **B. LUBA’s Disposition of the Appeal**

13 In this appeal, petitioner challenged the city council’s denial of petitioner’s
14 application to modify a previously approved PUD, and to authorize construction
15 of Phase 2, as modified. The decision denied the application on two independent
16 bases: (1) that a condition of approval in the 2008 decision, properly interpreted,
17 caused the 2008 approval to expire, and along with it expired the ability to apply
18 to modify the 2008 PUD; and (2) that the proposed, modified Phase 2 includes

² In 2019, the legislature passed House Bill (HB) 3272 amending ORS 197.830(15)(b) to provide for an attorney fee award for motions filed without probable cause. Or Laws 2019, ch 447, § 1. No party argues that the 2019 amendments to ORS 197.830(15)(b) modify the *Fechtig* and *Contreras* standards.

1 buildable lots within the SA zone, which does not allow residential development.
2 Petitioner presented three assignments of error in its petition for review.
3 Petitioner's first and third assignments of error challenged the city's
4 determinations that at least some of the Phase 2 lots are within the SA zone, and
5 that the SA zone does not allow residential uses within the PUD. Petitioner's
6 second assignment of error challenged the city's determination that the 2008
7 PUD had expired. As we explained in our opinion, LUBA will generally affirm
8 a decision denying an application if at least one basis for denial is unchallenged
9 or survives all challenges. *Nedonna Development, LLC*, LUBA No 2025-069
10 (citing *Wal-Mart Stores, Inc. v. Hood River County*, 47 Or LUBA 256, 266, *aff'd*,
11 195 Or App 762, 100 P3d 218 (2004), *rev den*, 338 Or 17 (2005)) (slip op at 6).
12 In that circumstance, the Board typically does not address challenges directed at
13 other, alternate, bases for denial. In our opinion, we addressed only petitioner's
14 second assignment of error, the challenge to the city's interpretation of the
15 condition of approval, and determination that the condition of approval caused
16 the 2008 PUD to expire. We rejected that challenge, and accordingly affirmed
17 the city's decision without reaching the first and third assignments of error.

18 The city and intervenors now seek attorney fees under ORS
19 197.830(15)(b), both arguing that the positions presented in petitioner's second
20 assignment of error were so lacking in merit or "probable cause" that no
21 reasonable lawyer would have presented those positions. For the reasons

1 explained below, we conclude that neither the city nor intervenors are entitled to
2 awards of attorney fees.

3 **C. City's Motion for Attorney Fees**

4 The city argues that petitioner's arguments under its second assignment of
5 error were presented without probable cause to believe they were well-founded
6 in law or on factually supported information. In our final opinion and order, we
7 concluded that petitioner's arguments against expiration of the 2008 PUD relied
8 on Rockaway Beach Zoning Ordinance (RBZO) 10.060 and Section 11 of the
9 city subdivision ordinance, provisions that the city had not relied on as the basis
10 for determining whether the permit had expired, and petitioner did not identify
11 any provision of the city's land use regulations with which the city's decision
12 failed to comply. The city also cites our conclusion that petitioner "[did] not point
13 to any provision of the RBZO or subdivision ordinance that expressly prohibits
14 the city's interpretation of the 2008 conditions of approval, requires the city to
15 treat the final PUD approval as perpetually valid, or otherwise mandates a
16 different outcome." *Nedonna Development, LLC*, LUBA No 2025-069 (slip op
17 at 13). The city further cites our conclusion that petitioner's reliance on the city's
18 2010 modification of the PUD approval did not provide a basis for remand or
19 reversal. We held in relevant part that there was no evidence that the city, in that
20 2010 modification decision, made any determination regarding Condition of
21 Approval 1 or the expiration of the 2008 PUD. Further, we determined that
22 petitioner had not explained why the potential 2010 assumption that the 2008

1 PUD approval was effective and unexpired would control the city’s subsequent
2 interpretation in this later-challenged decision. The city argues that
3 “[p]etitioner’s position [was] more than incorrect, it [was] an assertion without
4 support and [did] not give rise to rational, reasonable, or honest discussion[,]”
5 and because no reasonable lawyer would take the position petitioner did, the city
6 is entitled to attorney fees. City’s Motion for Attorney Fees 4.

7 We disagree with the city. Petitioner’s argument that the city council
8 misconstrued Condition of Approval 1 and that the interpretation conflicted with
9 the cited city code provisions were arguments that a reasonable attorney would
10 advance in challenging the city’s decision. It is almost axiomatic that if a disputed
11 issue must be resolved by interpretation, the language being interpreted is
12 ambiguous and supports more than one possible interpretation. Here, Condition
13 of Approval 1 was ambiguous regarding whether it extended to the final 2008
14 PUD approval, and resolving that ambiguity required interpretation. Further,
15 because nothing in the city code expressly provided an expiration period for a
16 PUD, petitioner argued that the city’s interpretation of the condition is not
17 supported by the city’s code and indeed could be understood to conflict with
18 certain code provisions. While we disagreed with petitioner on these points, we
19 conclude that a reasonable lawyer could advance them to challenge the city’s
20 conclusion that the 2008 PUD had expired. In other words, the issues petitioner
21 raised were open to doubt, and subject to rational, reasonable or honest
22 discussion. *Contreras*, 32 Or LUBA at 469.

1 In addition, we note that the city does not make any attempt to argue that
2 petitioner's first or third assignments of error, which were directed at the city's
3 other basis for denial, lacked probable cause. As explained above, in determining
4 whether to award attorney fees against a non-prevailing party pursuant to ORS
5 197.830(15)(b), we must determine that "*every argument* in the entire
6 presentation [that the non-prevailing party made] to LUBA is lacking in probable
7 cause (*i.e.* merit)." *Fechtig*, 150 Or App at 24 (emphasis added). The city in its
8 motion addresses only petitioner's second assignment of error and does not
9 address whether the arguments presented in petitioner's first or third assignments
10 of error were lacking in probable cause. Accordingly, for that additional reason
11 the city has not established that "every argument" in petitioner's presentation to
12 LUBA was lacking in probable cause. *Id.*

13 The city's motion for attorney fees is denied.

14 **D. Intervenor's Motion for Attorney Fees**

15 Like the city, intervenors also argue that petitioner's arguments under their
16 second assignment of error were presented without probable cause to believe they
17 were well-founded in law or on factually supported information. We reject those
18 arguments for the same reasons above. Like the city, intervenors do not advance
19 any arguments that the positions presented in the first and third assignments of
20 error, or petitioner's "entire presentation," lacked probable cause. *Fechtig*, 150
21 Or App at 24. Unlike the city, intervenors advance an additional argument,
22 indeed, a novel legal theory, under which they, as movants, would not be required

1 to demonstrate, or even assert, that petitioner’s “entire presentation” lacked
2 probable cause. In other words, in seeking attorney fees against a petitioner who
3 unsuccessfully challenged a denial with multiple bases for denial, intervenors
4 argue that they need only demonstrate that the positions presented with respect
5 to a single basis for denial lacked probable cause.

6 Intervenor reason that, in an appeal of a denial of a land use application,
7 a local government needs only one supported basis for denial to prevail before
8 LUBA, and correspondingly a petitioner must challenge every basis for denial
9 before LUBA. If a petitioner fails to challenge each basis for denial, LUBA may
10 summarily affirm the decision without addressing the merits of the bases for
11 denial that were challenged, as indeed happened in this case. Consequently,
12 intervenors argue, petitioner’s presentation on the merits of the appeal of a denial
13 decision is only as strong as its weakest assignment of error. If that framework is
14 carried forward into the context of a motion for attorney fees under ORS
15 197.830(15)(b), intervenors argue that it logically follows that the appeal, taken
16 as a whole and viewed in its entirety, will be lacking in probable cause if *any*
17 single challenge to a basis for denial is lacking in probable cause. Under this
18 view, that the petitioner may have presented probable cause arguments against
19 all other bases for denial would not suffice to avoid attorney fees.

20 In support of their argument, intervenors cite various cases in which we
21 have held that a party’s “entire presentation” for purposes of the probable cause
22 analysis includes both the merits of an assignment of error and the positions taken

1 with respect to any waiver challenges to that assignment of error, and further that
2 when an appeal is dismissed on jurisdictional grounds, the arguments presented
3 on the jurisdictional issue determine whether attorney fees will be awarded.
4 Intervenors argue that those cases are analogous to this appeal. Intervenors argue:

5 “A petitioner that does not have probable cause to challenge each of
6 multiple bases for denial has no chance of prevailing on any of their
7 other assignments of error nor on the appeal as a whole. *Wal-Mart*
8 *Stores*, 47 Or LUBA at 266. Such a flaw, like having no argument
9 to support the Board’s jurisdiction or to show issues were raised
10 below, undercuts the merits of each of the arguments raised on
11 appeal, rendering the ‘entire presentation’ meritless. ‘[E]ven an
12 assignment of error that may be presented with probable cause * * *
13 is not presented with probable cause if there is no probable cause for
14 a petitioner’ to challenge each independent basis for a denial.”
15 Intervenors’ Motion for Attorney Fees 6 (quoting *Friends of Yamhill*
16 *County v. Yamhill County*, LUBA No 2021-074 (Mar 14, 2024)
17 (brackets added) (order at 7)).

18 However, even if we accept, without deciding, that intervenors’ novel legal
19 approach is the appropriate framework to evaluate a motion for attorney fees
20 under ORS 197.830(15)(b) against a petitioner challenging a denial decision,
21 application of that framework in this case would not assist intervenors. That is
22 because intervenors, like the city, argue only that petitioner’s arguments under
23 the second assignment of error fail the probable cause test. Like the city,
24 intervenors present no argument regarding the first and third assignments of error,
25 which challenge a different basis for denial. Our above conclusion that the
26 positions presented in the second assignment of error pass the low probable cause
27 threshold means that intervenors’ motion for attorney fees must be denied,

1 because that is the only part of petitioner's presentation that intervenors argue
2 lacked probable cause.

3 Nonetheless, in the interests of a complete record, we have considered
4 petitioner's arguments regarding the merits of the positions taken in the first and
5 third assignments of error, and agree with petitioner that those positions surpass
6 the low probable cause threshold. In relevant part, petitioner argued that the city
7 erred in relying upon unofficial digital maps, rather than its official zoning map,
8 to determine that the proposed Phase 2 would locate building lots within areas of
9 the property zoned SA, notwithstanding alleged conflicts between the digital map
10 and the official zoning map. While that argument may not have prevailed, had
11 we reached it, we cannot say that argument is not open to doubt, or subject to
12 rational, reasonable or honest discussion. *Contreras*, 32 Or LUBA at 469.
13 Accordingly, even if intervenors are correct that in the present case probable
14 cause challenges to each basis for denial is necessary to avoid attorney fees (a
15 point we do not decide), both of petitioner's challenges to the two bases for denial
16 surpassed the low probable cause threshold.

17 Intervenors' motion for attorney fees is denied.

18 Dated this 14th day of September, 2026.
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23 _____
24 Tod A. Bassham
 Board Member