

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 GARY DORALL and JEAN DORALL,  
5 *Petitioners,*

6  
7 vs.

8  
9 COOS COUNTY,  
10 *Respondent,*

11 and

12  
13 TIOGA SPORTS PARK ASSOCIATION, INC.,  
14 *Intervenor-Respondent.*

15  
16 LUBA No. 2006-083

17  
18 ORDER

19  
20 **MOTION FOR ATTORNEY FEES**

21 Intervenor moves for an award of attorney fees pursuant to ORS 197.830(15)(b),  
22 which provides:

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

27 In determining whether to award attorney fees against a nonprevailing party, we must  
28 determine that “every argument in the entire presentation [that a nonprevailing party] makes  
29 to LUBA is lacking in probable cause (*i.e.*, merit).” *Fechtig v. City of Albany (A97764)*, 150  
30 Or App 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented  
31 without probable cause where “no reasonable lawyer would conclude that any of the legal  
32 points asserted on appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or  
33 LUBA 465, 469 (1996). The probable cause standard is a relatively low standard. *Brown v.*  
34 *City of Ontario*, 33 Or LUBA 803, 804 (1997).

1           When a case is dismissed on jurisdictional grounds the arguments presented on that  
2 issue determine whether or not attorney fees will be awarded. *Jewett v. City of Bend*, 48 Or  
3 LUBA 631, 632 (2004). In the present case, we dismissed the appeal because we rejected all  
4 of petitioners’ asserted bases for our jurisdiction. Intervenor argues that all of the petitioners’  
5 proffered bases for LUBA to have jurisdiction fall short of the probable cause standard.

6           The challenged decision involved a concession agreement (agreement) between Coos  
7 County and intervenor to provide concession and other services at a shooting range.  
8 Petitioners made three primary arguments for establishing LUBA’s jurisdiction: (1) the  
9 agreement applied land use regulations; (2) the agreement was a “development agreement”  
10 within the meaning of ORS 94.504; and (3) the agreement was a “permit” within the  
11 meaning or ORS 215.402(4). If any of the three purported bases for jurisdiction were  
12 advanced with probable cause, then an award of attorney fees is not warranted.

13           ORS 197.015(11)(a)(A)(iii) provides that a “land use decision” includes a final  
14 decision made by a local government that concerns the application of a land use regulation.  
15 Petitioners argued that the county and intervenor treated the agreement as though it  
16 authorized a conditional use permit (CUP) under the county’s land use regulations. The  
17 county’s CUP regulations certainly constitute land use regulations under ORS  
18 197.015(11)(a)(A)(iii), and any final decision concerning those CUP regulations would be  
19 subject to our jurisdiction. Before this Board, intervenor argued, and we agreed, that the  
20 agreement did not constitute CUP approval, because among other things, it stated that all  
21 applicable land use permits and approvals would still need to be obtained. Although in  
22 retrospect that conclusion might seem foreseeable, prior to this appeal that conclusion was  
23 hardly obvious. Until our decision reached that conclusion, petitioners were faced with the  
24 real possibility that the county and intervenor might rely in the future on the fact that  
25 petitioners had not appealed the agreement and make the very argument made by petitioners  
26 in this appeal. When faced with the possibility that a decision that was not appealed would

1 later be immune to challenge in the absence of an appeal, the prudent course is to appeal the  
2 decision rather than being prevented from collaterally attacking it in the future.

3 Petitioners argue:

4 “Prior to this Board’s ruling in the [appeal], this case presented an issue of  
5 first impression by addressing the primary legal question presented \* \* \* -  
6 whether a decision that both the local government and the intervenor/applicant  
7 had deemed to provide authority for undertaking land uses that otherwise  
8 required a Conditional Use Permit (CUP) by the applicable local land use  
9 regulations constituted a ‘land use decision’ if the challenged decision served  
10 as the basis for allowing land use to proceed by the local government and  
11 intervenors. Petitioners \* \* \* certainly at least had probable cause to believe  
12 that this decision by a local government that was being treated as a land use  
13 authorization for a use (shooting range) that otherwise required a CUP was a  
14 “de facto” discretionary permit, and petitioners at least had probable cause to  
15 believe that this was a land use decision under the statutory land use definition  
16 of ORS 197.015(11)(a)(A) as a decision ‘concerning’ a land use regulation,  
17 wherein the local government was required to apply land use regulations and  
18 did not, or as a discretionary permit per ORS 215.402(4), by authorizing a  
19 land use action requiring a [CUP].” Petitioners’ Response to Motion for  
20 Attorney Fees at 3.

21 We agree with petitioners.<sup>1</sup> Although it is a reasonably close question, intervenor’s  
22 motion for attorney fees is denied.

23 Dated this 29<sup>th</sup> day of January, 2007.

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30 Melissa M. Ryan  
Board Member

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<sup>1</sup> Because we find that one of the positions presented by petitioners meets the probable cause standard, we need not and do not address petitioners’ other proffered bases for jurisdiction.