

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

3
4 TERRY WOLFGRAM and NANCY WOLFGRAM,
5 *Petitioners,*

6
7 vs.

8
9 DOUGLAS COUNTY,
10 *Respondent,*

11
12 and

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14 WILDWOOD ESTATES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA Nos. 2006-165 and 2006-207

18 ORDER ON MOTION FOR ATTORNEY FEES

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

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

25 “In determining whether to award attorney fees against a nonprevailing party, we
26 must determine that ‘every argument in the entire presentation [that a nonprevailing party]
27 makes to LUBA is lacking in probable cause * * *.’” *Fechtig v. City of Albany*, 150 Or App
28 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented “without
29 probable cause” where “no reasonable lawyer would conclude that any of the legal points
30 asserted on appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465,
31 469 (1996). In applying the probable cause analysis LUBA “will consider whether any of
32 the issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest
33 discussion.” *Id.* The party seeking an award of attorney fees under the probable cause
34 standard must clear a relatively high hurdle and that hurdle is not met by simply showing that

1 LUBA rejected all of a party’s arguments on the merits. *Brown v. City of Ontario*,³³ Or
2 LUBA 803, 804 (1997).

3 In the present case, we affirmed the county’s decision granting subdivision and
4 technical review approval for a subdivision of intervenor’s property located adjacent to the
5 Oregon Dunes National Recreation Area. We rejected petitioners’ assignments of error that
6 generally argued that the subdivision did not comply with various provisions of the Beaches
7 and Dunes Element of the Douglas County Coastal Resources Plan (DCCRP).

8 In response to intervenor’s motion for attorney fees, petitioners argue:

9 “With respect to [p]etitioners’ fifth assignment of error * * * petitioners * * *
10 had probable cause at law and in the facts presented in this appeal to argue
11 that the DCCRP Policy 4 requirement for evaluation of ‘cumulative’ impacts
12 could at least arguably be interpreted as requiring an evaluation of the
13 cumulative impacts of this proposal to the water resources of Clear Creek,
14 particularly in light of the related criteria of [DCCRP Policy] 2(b) requiring
15 the local government to ‘minimize adverse environmental impacts’ when
16 development is proposed in environmentally sensitive areas, such as sand
17 dunes or riparian areas adjacent to creeks.

18 “While petitioners appreciate that the Board viewed this cumulative impact
19 analysis in a more narrow manner than that suggested by petitioners, there
20 was no prior precedent interpreting this land use language, and petitioners’
21 interpretation was certainly within the range of ‘probable cause’ in its
22 alternative interpretation of this criteria, even though their interpretation was
23 ultimately not adopted by the Land Use Board in this action.”

24 We agree with petitioners that petitioners’ fifth assignment of error was “* * * subject
25 to rational, reasonable, or honest discussion,” such that we cannot say that “no reasonable
26 lawyer would conclude that any of the legal points asserted on appeal possessed legal merit.”
27 *Contreras*, 32 Or LUBA at 469. Because we find that one of the positions presented by
28 petitioners meets the probable cause standard, we need not and do not address petitioners’
29 other proffered bases for denying intervenor’s motion. Intervenor’s motion for attorney fees
30 is denied.

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Dated this 14th day of May, 2007.

Melissa M. Ryan
Board Member