

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PORT OF ST. HELENS,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SCAPPOOSE,
10 *Respondent,*

11 and

12
13 SIERRA PACIFIC COMMUNITIES, LLC
14 *Intervenor-Respondent.*

15
16 LUBA No. 2008-114

17
18 ORDER

19 **MOTION FOR ATTORNEY FEES**

20 Intervenor-respondent Sierra Pacific Communities, LLC (Sierra Pacific) moves for an
21 award of attorney fees pursuant to ORS 197.830(15)(b), which provides:

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

26 As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

27 “In determining whether to award attorney fees against a nonprevailing party,
28 we must determine that ‘every argument in the entire presentation [that a
29 nonprevailing party] makes to LUBA is lacking in probable cause * * *.’
30 *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under
31 ORS 197.830(15)(b), a position is presented ‘without probable cause’ where
32 ‘no reasonable lawyer would conclude that any of the legal points asserted on
33 appeal possessed legal merit.’ *Contreras v. City of Philomath*, 32 Or LUBA
34 465, 469 (1996). In applying the probable cause analysis LUBA ‘will
35 consider whether any of the issues raised [by a party] were open to doubt, or
36 subject to rational, reasonable, or honest discussion.’ *Id.* The party seeking
37 an award of attorney fees under the probable cause standard must clear a
38 relatively high hurdle and that task is not satisfied by simply showing that
39 LUBA rejected all of a party’s arguments on the merits. *Brown v. City of*
40 *Ontario*, 33 Or LUBA 803, 804 (1997).”

1 In this appeal, petitioner challenged comprehensive plan and land use regulation
2 amendments relating to the Scappoose Airport. The city adopted amendments to create a
3 new Airport comprehensive plan map designation and a new Airport Related (AR) zone.
4 Although the decision does not actually apply the AR zone to any specific properties,
5 petitioner believes the city will in the future apply the AR zone to the Scappoose Airport.
6 Petitioner was particularly concerned that the AR zone could potentially allow through-the-
7 fence (TTF) residential development that would jeopardize petitioner's federal funding.
8 Petitioner raised eight assignments of error that were all denied.

9 In its first and second assignments of error, petitioner argued that the express
10 statutory authority for establishing TTF programs is restricted to *commercial* and *industrial*
11 uses. According to petitioner, because the AR zone would allow *residential* TTF uses, the
12 AR zone is not authorized by the statutes.

13 ORS 836.640 through 836.642 provide statutory authority for commercial and
14 industrial TTF programs at rural airports like the Scappoose Airport. And as petitioner
15 argued under its first and third assignments of error, those statutes do not authorize
16 residential TTF programs. Nevertheless, we eventually agreed with Sierra Pacific and
17 respondent that ORS 836.640 through 836.642 and Oregon Department of Aviation
18 implementing administrative rules are not the exclusive source of authority for establishing
19 TTF programs. We also agreed with Sierra Pacific and respondent that there was no reason
20 to assume that the city was relying on those statutes and administrative rules for authority to
21 adopt the AR zone. We explained that while "neither the decision nor the Joint Response
22 Brief identifies the enabling legislation that the city is relying on to adopt an AR zone that
23 allows airport residential development, we note that the city has broad planning and zoning
24 authority." *Port of St. Helens v. City of Scappoose*, ___ Or LUBA ___ (LUBA No. 2008-
25 114, December 31, 2008, slip op 14).

1 Had the challenged decision made it clear that the city was relying on its general
2 planning and zoning authority, and was not relying on ORS 836.640 through 836.642 and
3 Oregon Department of Aviation implementing administrative rules for its enabling authority
4 to enact the AR zone, petitioner's first and third assignment of error almost certainly would
5 not satisfy the probable cause standard. But the challenged decision did not identify the
6 enabling authority the city was relying on, and petitioner's assumption that the city might be
7 relying on ORS 836.640 through 836.642 and Oregon Department of Aviation implementing
8 administrative rule for that authority was not unreasonable. Therefore, petitioner's first and
9 third assignments of error satisfied the probable cause standard, and are not subject to an
10 award of attorney fees.

11 Because we conclude the first and third assignments of error satisfy the ORS
12 197.830(15)(b) probable cause standard, intervenor's motion for attorney fees must be
13 denied, and we need not and do not consider whether petitioner's remaining assignments of
14 error meet that standard. *Fechtig v. City of Albany*, 150 Or app at 24-27.

15 Intervenors' motion for attorney fees is denied.

16 **COSTS**

17 The city filed a cost bill requesting award of the cost of preparing the record, in the
18 amount of \$150. Petitioner has not objected to the cost bill. The city is awarded the cost of
19 preparing the record, in the amount of \$150, to be paid from petitioner's deposit for costs.

20 Dated this 9th day of June, 2009.

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27 _____
28 Michael A. Holstun
Board Member