

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 SUSANNA NOORDHOFF, KARLA SHERMAN,
5 and BUCK BOWLING,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF NORTH BEND,
11 *Respondent.*
12

13 LUBA No. 2011-122
14

 ORDER

15 **MOTION FOR ATTORNEY FEES**

16 The decision challenged in this appeal is a December 7, 2011 decision by the city
17 planning director concluding that the holder of a home occupation permit is not in violation
18 of that permit, and declining to take further action on petitioners’ request to enforce against
19 alleged violations of the permit. The city moved to dismiss the appeal, arguing that the
20 decision is not a land use decision as defined in ORS 197.015(10)(a), and thus not subject to
21 LUBA’s jurisdiction. Petitioners argued to the contrary, and also filed a contingent motion to
22 transfer the appeal to circuit court pursuant to OAR 661-010-0075(11)(c), in case LUBA
23 concluded that the decision is not a land use decision. In a final opinion and order dated June
24 27, 2012, we agreed with the city that the challenged decision is not a land use decision, and
25 transferred the appeal to circuit court.

26 The city subsequently moved for attorney fees under ORS 197.830(15)(b) and OAR
27 661-010-0075(1)(e)(A), arguing that petitioners’ position that the challenged decision is a
28 land use decision subject to LUBA’s jurisdiction was presented “without probable cause to
29 believe the position was well-founded in law or on factually supporting information.” ORS
30 197.830(15)(b). The city is the prevailing party and thereby eligible to request attorney fees

1 under ORS 197.830(15)(b), when an appeal is transferred to circuit court under OAR 661-
2 010-0075(11)(c) rather than dismissed. *Maxwell v. City of Happy Valley*, 44 Or LUBA 852,
3 854 (2003).

4 In determining whether to award attorney fees against a nonprevailing party, we must
5 determine that “every argument in the entire presentation [that a nonprevailing party] makes
6 to LUBA is lacking in probable cause (i.e., merit).” *Fechtig v. City of Albany*, 150 Or App
7 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented without
8 probable cause where “no reasonable lawyer would conclude that any of the legal points
9 asserted on appeal possessed legal merit.” *Contreras v. City of Philomath*, 32 Or LUBA 465,
10 469 (1996). The probable cause standard is a relatively low standard. *Brown v. City of*
11 *Ontario*, 33 Or LUBA 803, 804 (1997).

12 The jurisdictional question turned on whether the December 7, 2011 letter was a
13 “land use decision” as defined at ORS 197.015(10)(a), that is, whether it concerned the
14 application of any city comprehensive plan provision or land use regulation. The city argues
15 that no reasonable lawyer would have argued that the December 7, 2011 planning director
16 letter was a land use decision subject to LUBA’s jurisdiction. Petitioner Noordhoff responds
17 that reasonable lawyers might disagree over whether a planning director decision that a
18 permit holder is not in violation of the permit, and declining to take enforcement action
19 against the permit holder, concerns the application of a city land use regulation. We agree
20 with petitioner. Review of local decisions on enforcement of land use regulations and permit
21 conditions occupies a jurisdictional grey area, and it is frequently unclear whether in making
22 such decisions the final decision-maker applied, or should have applied, a comprehensive
23 plan provision or land use regulation. In the present case, LUBA concluded that the planning
24 director’s decision did not apply any comprehensive plan provision or land use regulation,
25 but instead only evaluated compliance with the permit itself. Nonetheless, a prudent lawyer
26 might well have argued, as petitioners did, that such a decision required the planning director

1 to evaluate whether the permit holder’s actions violated the city’s home occupation
2 regulations, which are part of the city zoning code. While we disagreed with that position,
3 we cannot say that it was a position presented “without probable cause to believe the position
4 was well-founded in law or on factually supporting information.” ORS 197.830(15)(b).

5 The city’s motion for attorney fees is denied.

6 **COST BILL**

7 The city filed a cost bill requesting an award of \$46.50 from petitioners’ deposit for
8 costs, as the cost of copying the record. The city is awarded \$46.50 from petitioners’ deposit
9 for costs. LUBA will return to petitioners the remainder of the deposit for costs.

10 Dated this 22nd day of August, 2012.

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Tod A. Bassham
Board Chair