

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 BILL BURNES AND KATIE BURNES,  
5 *Petitioners,*

6  
7 vs.

8  
9 DOUGLAS COUNTY,  
10 *Respondent,*

11  
12 and

13  
14 GREAT AMERICAN PROPERTIES LIMITED PARTNERSHIP,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 2010-032

18  
19 ORDER

20 **MOTION FOR ATTORNEY FEES**

21 Intervenor-respondent (intervenor) moves for an award of attorney fees pursuant to  
22 ORS 197.830(15)(b), 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 As we explained in *Wolfram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

28 “Under ORS 197.830(15)(b), a position is presented ‘without probable cause’  
29 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  
31 Or LUBA 465, 469 (1996). In applying the probable cause analysis LUBA  
32 ‘will consider whether any of the issues raised [by a party] were open to  
33 doubt, or subject to rational, reasonable, or honest discussion.’ *Id.* The party  
34 seeking an award of attorney fees under the probable cause standard must  
35 clear a relatively high hurdle and that hurdle is not satisfied by simply  
36 showing that LUBA rejected all of a party’s arguments on the merits. *Brown*  
37 *v. City of Ontario*, 33 Or LUBA 803, 804 (1997).”

1 Thus, attorney fees are warranted under ORS 197.830(15)(b) where the prevailing party  
2 demonstrates that no reasonable lawyer would present any of the “positions” that the party  
3 against whom fees is sought presented on appeal.

4 In the present case, the challenged decision approves a 34-lot subdivision on rural  
5 land. Petitioners advanced four assignments of error, with numerous subassignments of  
6 error, arguing that the county’s decision was inconsistent with applicable subdivision criteria.  
7 Intervenor argues that none of petitioners’ challenges were presented with probable cause to  
8 believe the position was well-founded in law or on factually supported information.

9 As noted, to avoid attorney fees, petitioners need identify only one “position” that  
10 satisfies the probable cause standard. In response to the motion for attorney fees, petitioners  
11 argue that their position regarding compliance with the county’s Land Use and Development  
12 Ordinance (LUDO) 4.100.3 was subject to rational, reasonable, or honest discussion. We  
13 agree with petitioners.

14 LUDO 4.100.3 requires in relevant part that the subdivision “provide for the  
15 continuation of major and secondary streets existing in adjoining subdivisions.” Petitioners  
16 noted that the plat from an adjoining subdivision appears to show a road stubbed to the  
17 subject property’s northeastern boundary, and argued that the county erred in failing to  
18 require continuation of the road into the proposed subdivision, as required by LUDO 4.100.3.  
19 Intervenor responded in part that the issue of compliance with LUDO 4.100.3 was not raised  
20 below and thus was waived under ORS 197.763(1). Petitioners, however, identified places  
21 in the record where that issue was raised with sufficient specificity, and we rejected  
22 intervenor’s waiver challenge. On the merits, we held that the county’s finding that no roads  
23 are stubbed to the property boundary is supported by substantial evidence. The evidence  
24 both parties relied upon was the adjoining subdivision’s plat, which indeed depicted a road  
25 ending in a turnaround that touched the property line with the subject property, and could be  
26 construed as being stubbed to the property line. However, based in part on plat text

1 indicating that the roads depicted on the plat were intended to “benefit this plat,” we  
2 concluded that a reasonable person could conclude from the plat that the apparently stubbed  
3 road is an internal road that is not intended to be a connecting road with adjoining properties.  
4 Accordingly, we denied that subassignment of error.

5 The subdivision plat at issue was ambiguous regarding whether the depicted road was  
6 stubbed to the property line and was intended to be a connecting road to adjoining  
7 subdivisions, or whether it was an internal road. Reasonable lawyers could disagree about  
8 whether LUDO 4.100.3 applied to require continuation of the road that ended at the subject  
9 property’s boundary. The ambiguous evidence on that point made compliance with LUDO  
10 4.100.3 an issue that was subject to rational, reasonable, or honest discussion. Therefore,  
11 intervenor has not demonstrated that all of petitioners’ positions were presented without  
12 probable cause to believe the position was well-founded in law or on factually supported  
13 information. The motion for attorney fees is denied.

14 **COSTS**

15 The county has not filed a cost bill. Therefore, LUBA will return the petitioners’  
16 deposit for costs to petitioners.

17 Dated this 12th day of January, 2011.

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22 Tod A. Bassham  
Board Member