BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SHARON MITCHELL JEWETT,
Petitioner,

vs.

CITY OF BEND,
Respondent,

and

J.L. Ward Co.,
Intervenor-Respondent.

LUBA No. 2004-072

ORDER

Petitioner appealed the city's approval of a lot line adjustment. We dismissed the appeal because we did not have jurisdiction. Intervenor now seeks attorney fees and costs.

ATTORNEY FEES

Intervenor moves for an award of attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b), which provides:

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

In determining whether to award attorney fees against a nonprevailing party, we must determine that "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause (*i.e.*, merit)." *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). Under ORS 197.830(15)(b), a position is presented without probable cause where "no reasonable lawyer would conclude that any of the legal points asserted on appeal possessed legal merit." *Contreras v. City of Philomath*, 32 Or LUBA 465,

469 (1996). The probable cause standard is a relatively low standard. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

When a case is dismissed on jurisdictional grounds, the arguments presented on that issue determine whether or not attorney fees will be awarded. *Cape v. City of Beaverton*, ___ Or LUBA ___ (LUBA No. 2004-010, June 9, 2004, Order on Motion for Attorney Fees). In addition to asserting statutory grounds for our jurisdiction, petitioner asserted that we had jurisdiction over the appeal under the "significant impact test." A decision that does not otherwise qualify as a statutory land use decision may nonetheless come within LUBA's jurisdiction if the decision "effects a significant change in the land use status quo of the area." *City of Pendleton v. Kerns*, 294 Or 126, 135, 653 P2d 992 (1982) . Elaborating on that test, we have held that the "significant impact" test is met if the decision creates an "actual, qualitatively or quantitatively significant impact on present or future land uses." *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994); *Keating v. Heceta Water District*, 24 Or LUBA 175, 181-82 (1992).

In our final order and decision dismissing petitioner's appeal, we stated:

> "Here, petitioner does not explain how the April 19, 2004 decision changes the 'land use status quo of the area' or creates an actual, qualitatively or quantitatively significant impact on present or future land uses. We understand petitioner to be concerned with intervenor's intent to abandon the golf course operation on the adjusted parcels, or with development that intervenor may propose on the readjusted parcels in the future. However, petitioner does not explain how the disputed adjustments relate to those present or future land uses. For example, petitioner makes no attempt to demonstrate that the disputed adjustments allow a different kind or intensity of development than would otherwise be permitted under the applicable zoning regulations. Petitioner has failed to demonstrate that the April 19, 2004 decision is a 'land use decision' within our jurisdiction under *Kerns* and *Billington* [*v. Polk County*, 299 Or 471, 703 P2d 232 (1985)]." *Jewett v. City of Bend*, ___ Or LUBA ___ (LUBA No. 2004-072, October 5, 2004).

Although we did not find that the challenged decision satisfied the "significant impact test," we cannot say that no reasonable attorney would make such an argument. There is no bright line in the "significant impact test" that separates decisions that do and do not satisfy

the test. In the present case, petitioner argued that approving the lot line adjustment would violate the covenants, conditions, and restrictions for the property and facilitate abandonment of the golf course development adjacent to petitioner's property and redevelopment of the adjusted parcels. While petitioner was unable to demonstrate that the lot line adjustment itself would cause those results, those results would likely constitute a significant impact under the test. Although ultimately unsuccessful, we cannot say her argument was without merit and one that no reasonable attorney would advance.

Intervenor's motion for attorney fees is denied.

COSTS

The city did not file a cost bill. Therefore, we will return petitioner's $150 deposit for costs.

Dated this 30th day of November, 2004.

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Tod A. Bassham
Board Member