BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ART KAMP and ROBERT BURCHFIELD,
Petitioners,

vs.

WASHINGTON COUNTY,
Respondent,

and

GRABHORN INC. dba LAKESIDE
RECLAMATION LANDFILL,
Intervenor-Respondent.

LUBA No. 2007-116

ORDER ON MOTION
FOR ATTORNEY FEES

Intervenor-respondent (intervenor) moves for an award of attorney fees pursuant to 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 * * *." *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). In applying the probable cause analysis, LUBA "will consider whether any of the issues raised [by a party] were open to doubt, or subject to rational, reasonable, or honest discussion." *Id.* The party seeking an award of attorney fees under the probable cause

standard must clear a relatively high hurdle and that task is not satisfied by simply showing that LUBA rejected all of a party's arguments on the merits. *Brown v. City of Ontario*, 33 Or LUBA 803, 805 (1997). *Pro se* litigants are subject to the same standards as lawyers. *Squires v. City of Portland*, 33 Or LUBA 783, *aff'd* 149 Or App 436, 942 P2d 303 (1997).

When a case is dismissed on jurisdictional grounds the arguments presented on that issue determine whether or not attorney fees will be awarded. *Dorall v. Coos County*, 53 Or LUBA 622, 623 (2007) (citing *Jewett v. City of Bend*, 48 Or LUBA 631, 632 (2004)). In the present case, we dismissed the appeal after rejecting all of the petitioners' asserted bases for our jurisdiction. Intervenor argues that all of the petitioners' proffered bases for asserting that the challenged decision is a land use or limited land use decision subject to LUBA's jurisdiction fall short of the probable cause standard.

The challenged decision is a resolution by the county board of commissioners adopting a revised franchise agreement (agreement) between Washington County and intervenor. In relevant part, the revised agreement (1) sets a new maximum rate that intervenor may charge for disposal of dry waste at its landfill, and (2) incorporates a tonnage cap previously determined in an earlier decision. Petitioners made two primary arguments for establishing LUBA's jurisdiction: (1) that the agreement's annual cap of 175,000 tons that can be disposed at the landfill was determined based on an evaluation of transportation and neighborhood impacts, which are land use matters; and (2) that the decision is a "de facto determination of nonconforming use" for the landfill, part of a pattern of county decisions over many years that have incrementally allowed the landfill to expand without formal land use approvals. Because we agree that the second argument exceeded the relatively low "probable cause" threshold to avoid attorney fees, we do not address the first argument.

Intervenor's landfill is a non-conforming use, with a long history of conflict with its neighbors. Some of that history is recounted in *Grabhorn v. Washington County*, 50 Or

LUBA 344 (2005) (reversing county decision verifying the nonconforming nature and scope of the landfill, because the county allowed the application for nonconforming use verification to be withdrawn prior to the decision). In their response to the motion to dismiss, petitioners argued that the landfill has grown from one-quarter acre in 1962 to 43 acres at the present time and changed both its nature and extent, all without a formal nonconforming use verification or a determination of the nature and extent of the landfill as of the date that zoning that prohibits a landfill was applied. Petitioners contended that the county has allowed intervenor to expand or alter the nonconforming landfill over the years through a series of informal decisions, such as a land use compatibility statement, franchise agreements, and informal letters of permission. According to petitioners, the revised franchise agreement represents the latest incremental approval to expand the nonconforming landfill, and therefore it is subject to state and local land use regulations governing the existence and alteration of nonconforming uses.

In our decision dismissing petitioners' appeal, we disagreed with petitioners that the revised franchise agreement is a *de facto* nonconforming use verification. We concluded in relevant part that the "county's resolution makes no determination whatsoever about the lawfulness or status of the landfill operation, and in relevant part simply agrees to a new maximum rate and a maximum tonnage." *Kamp v. Washington County*, _ Or LUBA _ (LUBA No. 2007-116, August 28, 2007). However, in our view petitioners' arguments that the challenged resolution is either a *de facto* nonconforming use verification or a *de facto* authorization to expand or alter the nonconforming use are arguments that are "open to doubt, [and] subject to rational, reasonable, or honest discussion." It is certainly possible for local governments to make decisions regarding unverified nonconforming uses that amount to *de facto* authorizations to expand or alter those uses. Arguably, such decisions would be subject to local land use regulations governing nonconforming uses, and therefore would constitute land use decisions subject to LUBA's jurisdiction. While we disagreed with

petitioners that the decision in the present case was such a *de facto* verification or alteration, we cannot say that no reasonable lawyer would advance that argument.

Although it presents a reasonably close question, intervenor's motion for attorney fees is denied.

Dated this 20th day of November, 2007.

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Tod A. Bassham
Board Member