BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRAD ORTMAN and WENDY ORTMAN,
Petitioners,

vs.

CITY OF FOREST GROVE,
Respondent,

and

RICHARD VANDERKIN and BRENDA VANDERKIN,
Intervenor-Respondents.

LUBA No. 2007-161

ORDER ON MOTION
FOR ATTORNEY FEES

Intervenors move 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 hurdle is not met by simply showing that LUBA rejected all of a party's arguments on the merits. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

Because the facts of the appeal are somewhat complex, we quote the facts from our opinion:

> "On November 2, 2006, the city issued intervenors a building permit to construct an accessory building on their property, which is located adjacent to petitioners' property. Construction began in December, 2006. On February 5, 2007, petitioners sent a letter to the city's planning director asking the planning director to schedule a site visit to intervenors' property and identifying two potential violations of the city's zoning ordinance, one of which involved zoning provisions relating to setbacks for accessory structures. On February 13, 2007, petitioners visited the city's planning office and obtained a copy of the November 2, 2006 building permit. On February 21, 2007, petitioners met with the planning director. On February 26, 2007, petitioners sent another letter to the planning director that identified additional alleged zoning and building code violations and requested that the city send an inspector to the site to investigate the alleged violations.
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> "On March 14, 2007, the planning director sent petitioners a letter that responded to their February 5, 2007 and February 26, 2007 letters. That letter contained the planning director's interpretation of relevant sections of the city's zoning ordinance, and concluded in relevant part that the city applied the correct setback to intervenors' building permit application. Petitioners appealed the planning director's March 14, 2007 letter to the planning commission.
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> "The planning commission determined that petitioners had failed to file a timely appeal to LUBA of the November 2, 2006 building permit, and that the building permit could not be collaterally attacked in the appeal of the planning director's March 14, 2007 letter. The planning commission concluded that petitioners' February 5, 2007 and February 26, 2007 letters to the planning director did not constitute appeals of the November 2, 2007 building permit. The planning commission therefore addressed only petitioners' challenges to the planning director's March 14, 2007 letter and affirmed the conclusions in that letter.
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> "Petitioners appealed the planning commission's decision to the city council, and the city council upheld the planning commission's decision. * * *" *Ortman v. City of Forest Grove*, __ Or LUBA __ (LUBA No. 2007-161, December 20, 2007, slip op 2-3) (record citations omitted).

Our final opinion denied petitioners' first two assignments of error, because we agreed with respondents that the city correctly concluded that petitioners failed to appeal the building permit decision and that the building permit could not be collaterally attacked in the appeal of the planning director's interpretation of the relevant provisions of the city's zoning ordinance governing setbacks. Relying on our first two assignments of error, we denied the third assignment of error because we held that it amounted to a collateral attack on an unappealed land use decision.

We believe that petitioners' argument that the city erred in determining that petitioners' February 5, 2007 and February 26, 2007 letters did not amount to a valid appeal was based on probable cause. Petitioners' first letter specified which city code sections they believed were violated. During their follow up meeting with the planning director on February 21, 2007, petitioners were given a copy of the section of the city's ordinance governing appeals, were told to expect a response to their letter, and were told that upon receipt of that letter, petitioners could follow the appeal process. Record 19. Although we ultimately agreed with the city's conclusion that petitioners' letters were not properly viewed as an appeal of the building permit, we think that petitioners' argument was one that a reasonable attorney would make based on the evidence in the record.

The intervenor-respondent's motion for attorney fees is denied.

Dated this 1st day of April, 2008.

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Melissa M. Ryan
Board Member