BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SUSAN LENOX,
Petitioner,

vs.

JACKSON COUNTY,
Respondent,

and

MARIE MARSHALL GARSJO,
Intervenor-Respondent.

LUBA No. 2007-168

ORDER ON MOTION
FOR ATTORNEY FEES AND COSTS

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 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).

In the present appeal, petitioner challenged the county's approval of an ownership of record dwelling on intervenor's property, and presented one assignment of error. That assignment of error asserted that the subject property was part of a "tract" because intervenor owned the subject property and also owned an adjacent property in common ownership with her husband.[1] Thus, petitioner argued, the county erred in approving the dwelling without requiring that the subject property be consolidated with the adjacent property that intervenor owned in common with her husband as required by state statutes and the LDO.[2]

We denied petitioner's assignment of error because we agreed with intervenor that petitioner had not demonstrated that the ownerships of the two properties constituted the "same ownership" as that term is used in LDO 13.268. *Lenox I*, slip op. 6. We rejected petitioner's attempt at relying on a provision of the LDO that defines the term "owner," in part because we concluded that the provision was inapplicable in determining whether

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[1] As we explained, "ORS 215.010(2) defines 'tract' as 'one or more contiguous lots or parcels under the same ownership.' OAR 660-033-0020(10) and [Jackson County Land Development Ordinance] 13.268 contain virtually identical definitions." *Lenox v. Jackson County*, __ Or LUBA __ (LUBA No. 2007-168, January 11, 2008), slip op at 4 n 4 (*Lenox I*).

[2] LDO 4.3.6 implements ORS 215.705. ORS 215.705 sets out special authority for counties to approve what are referred to as "Lot or Parcel of Record Dwellings," as well as special restrictions on approval of such dwellings. LDO 4.3.6(D)(9) and (10) provide in relevant part:

> "9) When the lot or parcel where the dwelling is to be sited is part of a tract, the remaining portions of the tract shall be consolidated into a single lot or parcel. Consolidation prior to the issuance of a building permit shall be a condition of approval.
>
> "10) No dwellings will be allowed on the remaining portion of the tract that is consolidated into a single lot or parcel. Irrevocable deed restrictions, precluding all future rights to construct a dwelling on the consolidated remainder lot or parcel or to use the remainder lot or parcel to total acreage for future siting of dwellings for present and any future owners, unless the tract is no longer subject to protection under the goals for agricultural lands or forest land, shall be recorded with the deed for each lot and parcel[.]"

properties were in the "same ownership" and thus constituted a "tract." We noted that *Craven v. Jackson County*, 135 Or App 250, 253-54, 898 P2d 809 (1995), cited by intervenor in its response brief, addressed a similar issue under the state law definition of "owner."

Although there are differences between the relevant LDO language and the corresponding statutory language that was at issue in *Craven*, petitioner's attorney did not call those differences to our attention or argue that those differences are legally significant. Neither did petitioner attempt to explain why any of the cases that intervenor cited in her arguments below to the hearings officer, including *Craven*, did not control the outcome of the appeal, and she did not request permission to file a reply brief when intervenor argued that *Craven* and other cases cited by intervenor were controlling. Finally, petitioner has not responded to the motion for attorney fees.

Absent some assistance or argument from petitioner explaining why her position set forth in the petition for review was "subject to rational, reasonable, or honest discussion," we conclude that intervenor has sufficiently demonstrated that petitioner's position was "lacking in probable cause." *Fechtig v. City of Albany*, 150 Or App at 24. Accordingly, intervenor's motion for an award of attorney's fees and expenses is granted.

Under ORS 197.830(15)(b), the requested attorney fees and expenses must be reasonable. LUBA has discretion to determine the amount of attorney fees that is reasonable under the specific facts of the case. *Gallagher v. City of Myrtle Point*, 50 Or LUBA 769, 771-72 (2005). However, while we independently review attorney fee statements for reasonableness, the failure of an opposing party to contest such statements is at least some indication that the attorney fees sought are reasonable. *See 6710 LLC v. City of Portland*, 41 Or LUBA 608, 611-12 (2002) (discussing reasonable hourly rates and reasonable amount of time to pursue a LUBA appeal).

Intervenor submitted a statement of attorney fees, seeking $4,076.25 in attorney fees and expenses. Intervenor's attorney spent approximately 23.10 hours defending the appeal at

an hourly rate of $175, and spent approximately $33.75 on a copy of the record in the appeal. We agree with intervenor that approximately 23 hours is a reasonable amount of time to have spent in defending this appeal, that intervenor's attorney's hourly rate is reasonable, and that the expenses for copying the record are reasonable. *Id*.

Intervenor's motion for attorney fees and expenses in the amount of $4,076.25 is granted.

Dated this 5th day of September, 2008.

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Melissa M. Ryan
Board Chair