BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRIENDS OF YAMHILL COUNTY,
MERILYN REEVES and JIM LUDWICK,
Petitioners,

vs.

YAMHILL COUNTY,
Respondent,

and

CHARMA VAAGE,
Intervenor-Respondent.

LUBA No. 2008-196

ORDER

MOTION FOR ATTORNEY FEES

Petitioners 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."

As we explained in *Wolfgram v. Douglas County*, 54 Or LUBA 775, 775-76 (2007):

> "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, 804 (1997)."

Petitioners challenged the county's approval of a forest template dwelling application. The so-called "template test" found in ORS 215.750(1)(c) allows a county to approve a forest template dwelling if, after applying a 160-acre template centered on the subject property, at least 11 other "lots or parcels that existed on January 1, 1993" are within the 160-acre area and at least three dwellings existed on January 1, 1993 on the "lots or parcels." The county determined that at least 11 parcels meeting the template test were located within the template area and approved the application.

On appeal, petitioners argued that in applying the template test the county erred in counting parcels within the 160-acre template area that were previously determined to have been illegally created in violation of the applicable partition statutes. *See Yamhill County v. Ludwick*, 294 Or 778, 786, 663 P2d 398 (1983) (the subject parcels were sold in 1972 without the benefit of final subdivision approval by the county and the subdivider thus "violated former ORS 92.016" in transferring those lots). We agreed with petitioners, and rejected the county's conclusion that there was no requirement that the parcels that were counted must have been "lawfully created" where ORS 215.010(1) defined "parcel" to include only lawfully created parcels and provided that the definition applied where the word "parcel" was used in ORS Chapter 215. *Friends of Yamhill County v. Yamhill County*, 58 Or LUBA 315, 321 (2009), *a'ffd* 229 Or App 188, 211 P3d 297 (2009).

We also rejected one of the county's alternative bases for approving the application, one that intervenor-respondent (intervenor) argued required us to affirm the decision. We explained:

> "In *Citizens [for Responsibility v. Lane County*, 207 Or App 500, 142 P3d 486 (2006)], the meaning of ORS 197.770 was at issue. ORS 197.770(1) provides in relevant part:

> "'Any firearms training facility in existence on September 9, 1995, shall be allowed to continue operating until such time as the facility is no longer used as a firearms training facility.'
>
> "The Court of Appeals analyzed the text of the provision and reversed LUBA's conclusion that only firearms training facilities established in conformity with law were entitled to its protection. In so holding, the court looked at the text of ORS 197.770 and also pointed to other statutes where the legislature has explicitly included a requirement of lawful establishment to find the absence of such a requirement in the particular statute at issue in that appeal dispositive. However, unlike in the present appeal, there was no other 'applicable legislation' from which the court could discern the meaning of the particular statute at issue, and there is no indication in the court's decision that its decision applies beyond the narrow context of ORS 197.770." *Friends of Yamhill County*, 58 Or LUBA at 322.

Petitioners allege that there was no probable cause for intervenor-respondent to believe that its positions were well-founded in law. According to petitioners, the relevant issues had been addressed in LUBA's decision in *Reeves v. Yamhill County*, 53 Or LUBA 4 (2006), which involved the same parcel, and in the Court of Appeals' decision in *Maxwell v. Lane County*, 178 Or App 210, 35 P3d 1128 (2001), *adhered to as modified* 179 Or App 409, 40 P3d 532 (2002).

Intervenor responds that her positions were well founded in law. In particular, intervenor explains that the county's and intervenor's reliance on *Citizens* was reasonable given that the Court of Appeals in that case applied statutory construction rules, including consideration of other applicable legislation as relevant context for the meaning of the statute at issue. Intervenor argued that the same consideration of other applicable legislation should apply to the statutory provision at issue in the approval of the forest dwelling.

We agree with intervenor that the arguments set forth in the response brief regarding the statutory construction rules that were at issue in *Citizens* were well-founded in law and

that intervenor's position was not without probable cause.[1] *Citizens* involved the meaning of a statute that authorized certain activities if they were "in existence" prior to the date specified in the statute. Although LUBA and the Court of Appeals disagreed that *Citizens* assisted intervenor or the county, it was not unreasonable for intervenor to argue that the Court of Appeals' analysis in *Citizens* should lead to a similar result in the present appeal.

Petitioners' motion for attorney fees is denied.

COST BILL

Petitioners filed a cost bill requesting an award of the $175 filing fee as well as the return of their $150 deposit for costs. Intervenor and the county do not object to petitioners' cost bill. Petitioners are awarded the $175 filing fee, payable by intervenor and the county. Additionally, petitioners' deposit for costs shall be returned.

Dated this 2nd day of February, 2010.

_____
Melissa M. Ryan
Board Member

[1] Because we deny the motion for attorney fees, we need not address intervenor's response that because petitioners' counsel stated at oral argument that she represented petitioners on a pro bono basis, an award of attorney fees is not warranted.