BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LOUIS DUENWEG,
Petitioner,

vs.

CITY OF MEDFORD,
Respondent,

and

ONTRACK, INC.,
Intervenor-Respondent.

LUBA No. 2009-054

ORDER ON MOTION

FOR ATTORNEY'S FEES

Our final decision dismissing this appeal was issued on October 2, 2009. Our decision was affirmed by the Court of Appeals on December 30, 2009. On February 8, 2010 the Court of Appeal issued the appellate judgment. On February 11, 2010, intervenor requested that LUBA rule on its pending motion for an award of attorney fees.

This appeal concerned county decisions that granted a zoning map amendment and planned unit development approval for a mixed residential and commercial development. We dismissed the appeal as untimely filed. Intervenor-respondent's motion for an award of attorney fees is filed 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)."

Petitioner's appeal of the city's decisions was filed long after the general ORS 197.830(9) deadline for filing an appeal at LUBA expired.[1] Petitioner argued that the notice of hearing the city provided in this matter did not adequately describe the proposal and petitioner relied on ORS 197.830(3) in arguing his appeal was timely filed.[2] Petitioner was not entitled to receive individual written notice of the proposal, and he therefore relied on ORS 197.830(3)(b) and argued that he filed his notice of intent to appeal within 21 days after the date he "knew or should have known of the decision." *See* n 2. In dismissing this appeal, we concluded that the notice of hearing was adequate to reasonably describe the city's final action and that petitioner failed to argue that he was in any way "misled" by the city's notice.

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[1] ORS 197.830(9) provides in relevant part:

> "A notice of intent to appeal a land use decision or limited land use decision shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615."

[2] ORS 197.830(3) provides:

> "If a local government makes a land use decision * * * that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to [LUBA] under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

Although we did not agree with petitioner's argument concerning the adequacy of the notices, the city's notices did not provide a great deal of detail about the precise mixed use nature of the proposal, and petitioner raised a fair question about whether the map that was attached to those notices to elaborate on the precise nature of the proposal was readable. We do not agree with intervenor-respondent that petitioner's arguments about the adequacy of the city's notices were "without probable cause to believe the position was well-founded in law or on factually supported information," within the meaning of ORS 197.830(15)(b).

We also do not agree that petitioner's failure to establish that he was "misled" by the city's notices warrants an award of attorney fees. Citing *Bigley v. City of Portland*, 168 Or App 508, 514, 4 P3d 741 (2000), we explained in our final decision that petitioner failed to establish that he was misled by any deficiency in the city's notices:

> "Where it applies, ORS 197.830(3) delays the ORS 197.830(9) deadline for filing a notice of intent to appeal where a petitioner is 'misled' by differences between the proposal described in the notice of hearing and the proposal that is approved, so that the petitioner's failures to (1) appear during the local proceedings and thereby become entitled to notice of the decision, and (2) file a notice of intent to appeal within 21 days after the decision became final under ORS 197.830(9) should be excused. *Bigley v. City of Portland*, 168 Or App 508, 514, 4 P3d 741 (2000); *Pacific Cascade Resources v. Columbia County*, 55 Or LUBA 216, 220 (2007); *Jacobsen v. City of Winston*, 54 Or LUBA 730, 732, *aff'd* 216 Or App 555, 173 P3d 841 (2007); *Kevedy, Inc. v. City of Portland*, 28 Or LUBA 227, 232-33 (1994). In this case petitioner concedes he was not entitled to receive the written notice of the August 14, 2008 planning commission hearing. As we note below, in arguing that he was unaware of the neighborhood opposition to the decision that was reported in the Medford Mail Tribune during December of 2008 and January of 2009, petitioner argues he lives in California and does not subscribe to the Medford paper. Therefore, even if the written and published notices were inadequate in some way, it is hard to see how petitioner could have been misled by a notice he was not entitled to receive or a notice in a newspaper he claims not to read. At no point in resisting the motion to dismiss does petitioner claim that he saw the written notice, the published notice or the notice that was posted on the property before the August 14, 2008 hearing. Petitioner could not have been misled by notices he never saw. In a case with similar facts, we held that ORS 197.830(3)(b) does not apply to delay the ORS 197.830(9) 21-day deadline for filing a notice of intent to appeal. *Ebar v. Harney County*, [59 Or LUBA 201, 205 (2009)]." *Duenweg v. City of Medford*, ___ Or LUBA ___ (LUBA No. 2009-054, October 2, 2009), slip op at 9-10.

Petitioner contends that *Bigley* concerned a petitioner who was entitled to receive written notice of a hearing, received that written notice and then sought to file a delayed notice of intent to appeal under ORS 197.830(3), arguing that the written notice was misleading.[3] In the present appeal, petitioner was not entitled to written notice of hearing and sought to file a delayed notice of intent to appeal under ORS 197.830(3)(b), which applies when a petitioner is not entitled to notice of hearing. Petitioner argues that while it may be appropriate to require that a petitioner who was entitled to written notice of hearing to establish that he or she was misled by that notice, it is not appropriate to require that a petitioner who was not entitled to written notice of hearing to establish that he was misled by a notice that he was not entitled to receive.

In this case the city posted notice of hearing on the property and published notice of the hearing in a newspaper. Although petitioner was not entitled to individual written notice of the hearing, he nevertheless could have been misled by the posted or published notice. In *Jacobsen v. City of Winston*, 54 Or LUBA 730, 732, *aff'd* 216 Or App 555, 173 P3d 841 (2007), we relied on *Bigley* to dismiss an appeal where a petitioner challenging a city decision that increased local appeal fees filed a delayed LUBA appeal under ORS 197.830(3)(b), but did not establish that she was misled by the published notice. However, *Jacobson* was an appeal of a legislative action for which there was no individual notice of hearing, only published notice. So *Jacobsen* did not resolve the question of whether the holding in *Bigley* necessarily applies to a petitioner who was not entitled to receive individual written notice of hearing in a quasi-judicial land use permit proceeding. As we

[3] Petitioner understands the references in ORS 197.830(3)(a) to "where notice is required" and in ORS 197.830(3)(b) to "where no notice is required" to be references to notice of *hearing*. The statute is not clear, but we have consistently interpreted those references to be references to notice of the *decision*. *Frymark v. Tillamook County*, 45 Or LUBA 685, 697 (2003); *DLCD v. Benton County*, 27 Or LUBA 49, 60 n 11 (1994); *Leonard v. Union County*, 24 Or LUBA 362, 375-76 (1992). However, petitioner's central point regarding *Bigley* is correct. The petitioner in *Bigley* was entitled to and in fact received written notice of hearing, whereas petitioner in this appeal was not entitled to and did not receive written notice of the hearing in this matter.

explained in our decision in this appeal, that question was resolved in *Ebar v. Harney County*, a case that was decided three months before our decision in this appeal. In *Ebar*, the petitioner was not entitled to individual written notice of the quasi-judicial permit hearing and apparently had not received any written notice of that hearing and filed a delayed LUBA appeal under ORS 197.830(3). We dismissed the appeal as untimely filed under ORS 197.830(9), in part, because petitioner did not establish that he was misled by the written or published notices. However, until our decision in *Ebar*, the question of whether a petitioner who was not entitled to written notice of a quasi-judicial land use hearing should be required to establish that he or she was misled by the city's posted or published notices had not been decided. We do not believe petitioner's failure to be aware of that recently issued LUBA decision means he "presented a position without probable cause to believe the position was well-founded in law or on factually supported information," within the meaning of ORS 197.830(15)(b).

Intervenor's motion for an award of attorney fees is denied.

Dated this 8th day of March, 2010.

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Michael A. Holstun
Board Member