BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

BRENT BURTON and DONNA WICHER,
*Petitioners,*

vs.

CITY OF CANNON BEACH,
*Respondent,*

and

MICHAEL TUTMARC
and NANCY TUTMARC,
*Intervenors-Respondents.*

LUBA No. 2011-008

ORDER ON MOTION FOR ATTORNEY'S FEES

Intervenors-respondents Tutmarc are prevailing parties in this appeal and 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)."

This appeal concerned a city council decision that approved intervenors' request for a front yard setback reduction. Under the applicable city zoning, a 15-foot front yard setback is required. The decision on appeal granted intervenors' request to reduce that 15-foot front yard setback to 3 feet. One of the central issues on appeal was whether that approved setback violates the setback reduction criterion set out at Cannon Beach Zoning Ordinance (CBZO) 17.64.010(2), which provides as follows:

> "Significant views of the ocean, mountains or similar features from nearby properties will not be obstructed any more than would occur if the proposed structure were located as required by the zoning district."

Forest Lawn Road runs north and south parallel with and a short distance east of the beach in Cannon Beach. Intervenors own a lot between Forest Lawn Road and the beach. There is presently a view of the ocean across intervenors' vacant lot, looking west from Forest Lawn Road and other properties to the east. Intervenor's legal theory below concerning CBZO 17.64.010(2) was that the part of their proposed home that complies fully with the 15-foot front yard setback will block most of the current significant westerly views of the ocean across intervenors' vacant lot, and allowing intervenors' house to be built in a way that will intrude easterly 12 feet into the 15-foot front yard setback would not obstruct those westerly views of the ocean any more than those views would be obstructed if the house did not intrude into the 15-foot front yard setback.

The portion of the house that fully complies with the 15-foot front yard setback will block all but narrow views of the Pacific Ocean from the east, through the sideyards between intervenors' proposed house and the houses located on the adjoining lots to the north and south. As we explained in our final opinion, the portion of the dwelling that would protrude 12 feet into the 15-foot front yard setback would not block any right angle views of the ocean from the east that would not also be blocked by the part of the proposed dwelling that complies with the 15-foot front yard setback. But some oblique views from some vantage points to the east of intervenors' property through the side yards, which would not be

blocked by the portion of intervenors' proposed dwelling that complies with the 15-foot front yard setback, would be further obstructed by the portion of the proposed dwelling that would protrude into the 15-foot setback. The critical issue became whether this *de minimis* additional obstruction of the view attributable to the portion of the dwelling that would protrude into the front yard setback, violates the CBZO 17.64.010(2) "will not be obstructed any more" standard.

While we affirmed the city's decision, petitioners' argument that the city erroneously interpreted and applied CBZO 17.64.010(2) is not a position that was presented "without probable cause to believe the position was well-founded in law or on factually supported information." The interpretation that petitioners advocated was not inconsistent with the text of CBZO 17.64.010(2), and it was therefore one the city council could have adopted. The issue on appeal came down to whether the *de minimis* additional obstruction that could be attributed to the portion of the dwelling that would be located in the front yard setback necessarily amounted to "more" of an obstruction that violates CBZO 17.64.010(2). We agreed with the city that it need not interpret CBZO 17.64.010(2) to be violated in the circumstances presented in this appeal:

> The CBZO does not include definitions of 'obstruct' or 'obstructed.' The Webster's Third New Int'l Dictionary (1981) definition of "obstruct" is set out below:
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> > "'* * * 3: to cut off from sight: shut out <the high wall [obstructed] the view> * * *.' *Id.* at 1559.
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> "Petitioners apparently interpret CBZO 17.64.010(2) to require that the view of the ocean with the setback reduction must be identical to the view of the ocean without the setback reduction. While it might be possible to adopt such a strict interpretation of CBZO 17.64.010(2) under the above definition of "obstruct," the relevant question in this appeal is whether CBZO 17.64.010(2) must be interpreted to require that the view be identical or better than it would be without the reduction. We do not think so. By any objective standard, the impact on the view that can be attributed solely to the front yard setback is *de minimis*. As the word "obstruct" is defined above, we believe the city has the interpretive latitude to conclude that if the views with the front yard setback and without the front yard setback are as *similar* as they are in this case, the

> significant views of the ocean are not any more obstructed with the set back reduction than they would be without the setback reduction. Stated differently, we conclude that a reasonable decision maker working with the drawing could conclude that the *de minimis* impact those corners may have on some of the limited oblique views of the ocean through the side yards amounts to something less than an obstruction. Such an interpretation is plausible under the above dictionary definition of "obstruct" and therefore within the interpretative discretion LUBA must extend to the city council under *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

As we explained in *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997), the "probable cause" standard in ORS 197.830(15)(b) "creates a relatively low threshold" for a party to avoid an award of attorney fees. Even with the interpretive deference the city enjoys under *Siporen*, petitioner's argument exceeds the "probable cause" threshold that petitioners must exceed to avoid an award of attorney fees under ORS 197.830(15)(b).

Intervenors' motion for attorney fees is denied.

Dated this 15th day of July, 2011.

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Michael A. Holstun
Board Member