BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON COAST ALLIANCE,
Petitioner,

vs.

CURRY COUNTY,
Respondent,

and

ELK RIVER PROPERTY DEVELOPMENT, LLC,
Intervenor-Respondent.

LUBA No. 2015-080

ORDER ON MOTION FOR ATTORNEY FEES

Intervenor-respondent Elk River Property Development, LLC (intervenor) is the prevailing party in *Oregon Coast Alliance v. Curry County*, __ Or LUBA __ (LUBA No. 2015-080, January 27, 2016) (*ORCA II*). Intervenor moves for an award of attorney fees in the amount of $7,410.75 pursuant to ORS 197.830(15)(b), which provides:

> "The board shall also 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. *Wolfgram v. Douglas County*, 54 Or LUBA 775 (2007) (*citing Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)). Intervenor argues that all of petitioner's arguments in support of its appeal lacked probable cause under ORS 197.830(15)(b).

Petitioner challenged a county decision on remand that approved a conditional use permit for an 18-hole golf course and accessory structures on land zoned exclusive farm use (EFU), within three miles of the City of Port Orford's urban growth boundary. Petitioner challenged the county's determination that the proposed structures met OAR 660-033-0130(2)(a), which provides in relevant part:

> "No enclosed structure with a design capacity greater than 100 people, or group of structures with a total design capacity of greater than 100 people, shall be approved in connection with the use within three miles of an urban growth boundary[.]"

In *Oregon Coast Alliance v. Curry County*, 71 Or LUBA 297 (2015) (*ORCA I*), we explained that the term "design capacity" as used in OAR 660-033-0130(2)(a) is an undefined term, and that the administrative rule history does not clarify the exact meaning of the phrase. We concluded that "design capacity" is not the same thing as maximum building occupancy. 71 Or LUBA at 311. In addition, we concluded that:

> "[A]reas of the clubhouse * * * not intended primarily for human occupancy or for purposes of assembly also need not be counted toward the 100-person design capacity limitation. However, all areas or structures designed primarily for human occupancy or assembly, including the restaurant and lounge, must be designed for a cumulative capacity of 100 persons or less." *Id.* at 313.

In *ORCA II*, petitioner challenged the county's determination on remand that the clubhouse does not violate the design capacity restriction in OAR 660-033-0130(2)(a) and argued that the clubhouse hallways, locker rooms, and patios violated the rule as we interpreted it in *ORCA I*.

As we concluded in *ORCA I*, the concept of design capacity is an unclear one. In its response to the motion for fees, petitioner notes the unclear nature of the standard after *ORCA I*:

> "While it was clear that storage areas were not intended primarily for human occupancy, it remained less clear what other areas of the clubhouse or extensions of the clubhouse were 'designed primarily for human occupancy or assembly.' The appeal at issue here was the first appeal that addressed the standard in OAR 660-033-0130(2)(a) as interpreted by LUBA in *ORCA I*." Response to Motion for Fees 3.

We agree with petitioner. Our decision in *ORCA I* did not provide anything close to a comprehensive interpretation of the inherently ambiguous concept of "design capacity" as that term is used in OAR 660-033-0130(2)(a). We cannot say that a reasonable lawyer would not have argued, as petitioner did in this appeal, that clubhouse hallways and patios should be included in calculating whether the proposed clubhouse complies with the 100-person design capacity limitation.

Accordingly, intervenor's motion for attorney fees is denied.

Dated this 19th day of April, 2016.

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Melissa M. Ryan
Board Member