BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ORAL HULL FOUNDATION FOR
THE BLIND, INC.,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

TOAL PROPERTIES, LLC,
Intervenor-Respondent.

LUBA No. 2017-022

ORDER

MOTION FOR ATTORNEY'S FEES

Intervenor-respondent Toal Properties, LLC (intervenor) moves for an award of attorney fees in the amount of $17,193.15 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, 776 (2007) (citing *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997)).

Intervenor applied to the county for a home occupation permit to host events in a pole barn on its property. The county held a public hearing on the application, and after the public hearing, the hearings officer approved the application. Petitioner appealed that decision to LUBA, and other parties also appealed the same decision to LUBA. *See Willis v. Clackamas County*, __ Or LUBA __ (LUBA No. 2017-021, October 20, 2017) (resolving other appeal).

After petitioner filed its petition for review, intervenor moved to dismiss petitioner's appeal, arguing that petitioner failed to establish that it had "[a]ppeared before the local government * * * orally or in writing" as required to file an appeal under ORS 197.830(2)(b). Petitioner filed a response to the

motion to dismiss and argued that it was entitled to appeal the decision pursuant to ORS 197.830(3). ORS 197.830(3) provides:

> "If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), *or the 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 the board 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." (Emphasis added).

Petitioner argued that the county's notice of the public hearing differed from the decision the county actually made because the notice listed Clackamas County Zoning and Development Ordinance (CCZDO) 806, which provides the standards for the species of home occupation the CCZDO identifies as "home occupations to host events," as an applicable approval criterion. Petitioner argued that the public notice failed to list CCZDO 822.02, which provides the standards for the more general category of "home occupations" and includes a definition for "home occupations." The CCZDO 822.02.D. definition of "home occupations" includes a requirement that a home occupation be "clearly subordinate" to the residential use of the property. Petitioner alleged that failure to list the CCZDO 822.02 definition of "home occupations" misled petitioner into concluding that the requirement in that

definition did not apply to intervenor's application for a home occupation to host events pursuant to CCZDO 806.

LUBA rejected petitioner's argument. In an order on intervenor's motion to dismiss petitioner's appeal, we explained that:

> "*ORS 197.830(3) is not concerned with the applicable approval criteria that are also listed in the notice of hearing.* ORS 197.830(3) asks whether the use that is approved by a land use decision differs to such a degree from the proposal described in the notice of hearing that a person could have been misled by the notice regarding the nature of the proposal, and failed to appear or participate at the hearing and thus become entitled to notice of the decision, or failed to timely appeal the local government's final decision. *See Bigley v. City of Portland*, 168 Or App 508, 4 P3d 741 (2000) ('ORS 197.830(3) provides a remedy, in the form of the tolling of the appeal period, to adversely affected persons who are misled by the deviation between the notice of the proposal and the substance of the decision.')." *Willis v. Clackamas County*, __ Or LUBA __ (LUBA Nos. 2017-021/022, Order, August 28, 2017, slip op 4) (emphasis added).

We concluded that the notice of hearing reasonably described the county's final action.

Intervenor argues that no reasonable attorney would have argued that the county's notice of the public hearing differed to such a degree from the county's final action that it misled the petitioner, based on the failure to list a CCZDO 822.02 definition as an applicable approval criterion in the notice of public hearing. In response, petitioner reiterates its argument presented during the proceedings below, and responds that an argument that petitioner was misled by the county's failure to list a definition from the CCZDO in the notice

of public hearing misled petitioner is an argument that a reasonable attorney would present.

Although it is a close question, we agree with petitioner that the argument that petitioner made is one that a reasonable attorney could make. ORS 197.830(3) is a provision that is infrequently relied on to establish standing, application of the statute is complicated, and it is not unreasonable for petitioner to have made a somewhat novel argument regarding the types or extent of deviation from a proposal described in a notice of hearing that could mislead a person pursuant to ORS 197.830(3). Until this appeal, no LUBA decision had addressed (and rejected) the argument that a person could cite 197.830(3) and argue that the local government's mere failure to list in the notice of public hearing a criterion that the person thought applied, within the meaning of ORS 197.830(3), as interpreted in *Bigley*.

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

COST BILL

Intervenor requests an award of the cost of fee for filing the motion to intervene, in the amount of $100. OAR 661-010-0075(1)(b)(D) provides that a prevailing intervenor may be awarded the cost of the fee to intervene. Petitioner does not object to intervenor's cost bill. Accordingly, intervenor is awarded the cost of the $100 fee to intervene, to be paid by petitioner.

Dated this 1st day of December, 2017.

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Melissa M. Ryan
Board Chair