BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DEAN W. DEVLIN and LAWNNA K. DEVLIN,
*Petitioners*,

vs.

LINN COUNTY,
*Respondent*,

and

WILLIAM L. BANKS
and RECYCLING DEPOT, INC.,
*Intervenors-Respondents*.

LUBA No. 2016-093

ORDER

In our final opinion and order in this appeal we determined the challenged decision is not a land use decision and dismissed the appeal on February 21, 2017. *Devlin v. Linn County*, 75 Or LUBA 163 (2017). On March 7, 2017, intervenors-respondents (intervenors), as prevailing parties, filed a motion to award attorney fees and costs. On March 21, 2017, petitioners filed a petition for judicial review and a response opposing the motion for attorney fees. In an April 26, 2017 Order, we advised the parties that we would await an appellate judgment from the Court of Appeals before considering the motion for attorney fees. On June 7, 2017, the Court of Appeals affirmed our decision without opinion. *Devlin v. Linn County*, 286 Or App 304, 397 P3d 79 (2017).

The appellate judgment issued on December 12, 2017. We now turn to intervenors' motion for an award of attorney fees.

**A. Attorney Fees**

Intervenors request an award of attorney fees in the amount of $14,547.50 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)). When an appeal is dismissed for lack of jurisdiction, the arguments

presented on the jurisdictional question determine whether an award of attorney fees is warranted. *Kamp v. Washington County*, 55 Or LUBA 711, 712 (2007); *Jewett v. City of Bend*, 48 Or LUBA 631, 632 (2004); *Cape v. City of Beaverton*, 47 Or LUBA 625, 626 (2004).

This appeal concerned a board of county commissioners' decision regarding an Oregon Department of Motor Vehicles (DMV) business certificate for intervenors to operate their wrecking yard as a motor vehicle dismantler. It was a procedurally and substantively complex appeal.

As relevant here, LUBA has jurisdiction to review "land use decision[s]." ORS 197.825(1). ORS 197.015(10)(a) sets out the statutory definition of "land use decision."[1] Our final opinion and order determined that the challenged decision qualified as a land use decision under that definition, but that LUBA nevertheless lacked jurisdiction because the ORS 197.015(10)(b)(A) exception for decisions that do not require "the exercise of policy or legal judgment" applies in this case:[2]

> "Paragraph B [of the DMV business certificate application form] and ORS 822.140(2)(b) require the county to determine 'that the location or proposed location meets the requirements for location

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[1] Under ORS 197.015(10)(a), a final decision that applies a land use regulation is a land use decision.

[2] If a decision "is made under land use standards that do not require interpretation or the exercise of policy or legal judgment," it is not a land use decision even if it would otherwise qualify as a land use decision under ORS 197.015(10)(a). ORS 197.015(10)(b)(A).

under ORS 822.110[.]' The only requirement under ORS 822.110 for which the county must apply land use standards is set out at ORS 822.110(1)(a), which provides in part:

> "'(1) Except as provided in subsection (2) of this section, the Department of Transportation shall issue a dismantler certificate to any person if the person meets all of the following requirements:
>
> > "'(a) The person establishes that the area in which the business is located and the place of business to be approved under the dismantler certificate for use in the motor vehicle dismantling business are *zoned for industrial use* or subject to another zoning classification that permits the type of business conducted by the dismantler.' (Emphasis added.)

"Because the board of commissionerss simply signed at the bottom of the DMV form, we do not know whether the board of commissioners determined that intervenors' property is 'zoned for industrial use,' or whether it determined intervenors' property 'is subject to another zoning classification that permits the type of business conducted by the dismantler.' The documents submitted by intervenors establish that it is the former.

"Intervenors devote all of their arguments toward the statewide planning goal exception to Goal 3 (Agricultural Lands) that the county adopted to allow the property to be planned and zoned for something other than exclusive farm use. However, the fact that the county has adopted such a statewide planning goal exception to allow intervenors' property to be planned for industrial use does not answer the question posed by ORS 822.110(1)(a). Just because the comprehensive plan includes an exception to *allow* the property to be planned and zoned for industrial use does not mean that it *has been planned and zoned for such use*. * * *

"Nevertheless, the documents submitted by intervenors also establish that the subject property is zoned Light Industrial (LI). Intervenors-Respondents Brief Appendix A, page 3. The LI zone allows wrecking yards as a conditional use. Linn County – Rural

> Development Zone Code 929.330(B)(1); Intervenors' January 27, 2017 Motion, Appendix VI, page 5. While it is true that we do not know whether intervenors have received conditional use approval for their wrecking yard, or may be operating as a nonconforming use if they do not have conditional use approval, ORS 822.110(1)(a) does not require the county to determine whether the wrecking yard has any required conditional use approval or has been verified as a nonconforming use. All ORS 822.110(1)(a) and ORS 822.140(2)(b) require is that the county determine the property is *zoned for* industrial use. It is clear from the documents submitted by intervenors that it is zoned for industrial use. And for purposes of ORS 197.015(10)(b)(A), determining that the property is zoned industrial did not require 'interpretation or the exercise of policy or legal judgment.' The map supplied by intervenors and cited above does not require 'interpretation or the exercise of policy or legal judgment' to make that determination. The property is plainly designated LI." 75 Or LUBA at 171-72.

Petitioners advanced a number of arguments in support of their position that LUBA has jurisdiction to review the disputed DMV business certificate decision. Two of those arguments were that intervenors lack conditional use approval, and both of the county's industrial zoning districts require conditional use approval, and that the disputed wrecking yard has encroached on petitioners' exclusive farm use (EFU)-zoned property. Petitioners contended that determining whether the proposal meets the standard set out at ORS 822.110(1)(a) therefore requires the exercise of policy or legal judgment:

> "ORS 822.140(2)(b) and ORS 822.110(1)(a) required the County to determine whether the zoning of the subject property permits the proposed auto wrecking yard. In this case, both of the County's industrial zoning districts * * * only allow a 'wrecking yard' on industrial land after a discretionary Type IIA conditional use permit approval * * *. Moreover, its EFU district would not allow a wrecking yard at all." Reply Brief 3-4.

In the previously quoted text from our final opinion, we rejected petitioners' argument that the county was required to determine that the wrecking yard possessed a conditional use permit, concluding that the county was only required to determine if the subject property was zoned industrial. And with regard to petitioners' argument about possible encroachment of intervenors' wrecking yard onto petitioners' EFU-zoned property, we concluded that argument did not present a question that was determined or had to be determined in the disputed decision: "if intervenors' vehicle dismantling operation is trespassing on petitioners' property, we see no reason why the parties' pending circuit court litigation cannot resolve those issues." 75 Or LUBA at 173. However, neither of those arguments was frivolous, and we conclude both of those arguments were presented with "probable cause to believe the positon was well-founded in law," within the meaning of ORS 197.830(15)(b).

Intervenors' motion for an award of attorney fees is denied.

**B. Costs**

Under OAR 661-010-0075(1)(b)(D) prevailing intervenors are entitled to recover the cost of their filing fee. Intervenors are entitled to recover the cost of their filing fee, in the amount of $100, from petitioners. Intervenors motion for an award of costs is granted.

Dated this 26th day of January, 2018.

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Michael A. Holstun
Board Member