BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARY ELIZBETH McANDREW,
Petitioner,

vs.

WASHINGTON COUNTY,
Respondent,

and

LOOK CONSTRUCTION, LLC
and MICHAEL TROJAN,
Intervenors-Respondents.

LUBA No. 2018-005

ORDER

MOTION FOR ATTORNEY FEES

Intervenors-respondents Look Construction, LLC and Michael Trojan (together intervenors) are the prevailing parties in *McAndrew v. Washington County*, __ Or LUBA __ (LUBA No. 2018-005, July 12, 2018). Intervenors move for an award of attorney fees in the amount of $9,396.00 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."

In determining whether to award attorney fees against a non-prevailing party, we must determine that "every argument in the entire presentation [that a non-prevailing 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)). Intervenors argue that all of petitioner's arguments in support of her appeal lacked probable cause under ORS 197.830(15)(b).

In this appeal, petitioner challenged a county hearings officer decision that approved with conditions intervenors' drainage hazard alteration and tree removal permit allowing construction of a new single-family residence on intervenor Trojan's .24-acre parcel (the subject property). Petitioner presented four assignments of error: (1) the county erred in failing to make findings that

the environmental impact of the disturbance or alteration of riparian wildlife and vegetation had been minimized to the extent practicable, as required by Washington County Development Code (CDC) 421-7.8. (2) the county incorrectly allowed a portion of the new dwelling to be constructed within the flood area, (3) the county improperly allowed a portion of the new dwelling to be constructed within a riparian corridor, which would result in the alteration of the vegetation or terrain corridor, and (4) improperly concluded that the new single-family dwelling will not seriously interfere with the preservation of fish and wildlife areas and habitat as identified in the county's comprehensive plan.

In a final opinion and order dated July 12, 2018, we affirmed the county's decision. *McAndrew v. Washington County*, __ Or LUBA __ (LUBA No. 2018-005, July 12, 2018). In our decision, we denied each of petitioner's four assignments of error. With respect to the first assignment of error, we concluded that the hearings officer's failure to explicitly address CDC 421-7.8 was harmless error, because the hearings officer addressed similar standards in CDC 422 and other code and plan provisions sufficiently addressed the substantive requirements of CDC 421-7.8, which was sufficient to ensure that the impacts of intervenors' proposed project on significant natural resources are minimized.[1]

[1] CDC 421-7.8 requires a finding that "the environmental impact of the disturbance or alteration of riparian wildlife and vegetation has been minimized to the extent practicable *as required by Section 422*. Enhancement of riparian habitats through planting or other such improvements may be required to

Intervenors argue that all of petitioner's arguments in support of her appeal lacked probable cause under ORS 197.830(15)(b). According to intervenors, petitioner's arguments were not well-founded in law or based on factually supported information. However, we conclude that a least one of the arguments presented by petitioner meets the standard.

With respect to petitioner's first assignment of error, intervenors argue that petitioner presented a position without probable cause to believe the position was well-founded in law in arguing that the hearings officer erred in failing to address compliance with CDC 421-7.8. As noted, in relevant part, CDC 421-7.8 requires a finding that "the environmental impact of the disturbance or alteration of riparian wildlife and vegetation has been minimized to the extent practicable as required by Section 422." Petitioner first argued that CDC 421-7.8's "minimized to the extent practicable" language required the applicant to propose alternatives such as a smaller house. We rejected petitioner's proposed interpretation of CDC 421-7.8, but we cannot say that no reasonable lawyer would have advanced that interpretative argument.

Petitioner next challenged the hearings officer's failure to adopt any findings explicitly addressing compliance with CDC 421-7.8. In our final opinion, we stated that "petitioner is correct that the hearings officer's failure to adopt any findings explicitly addressing CDC 421-7.8 would warrant remand,

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mitigate adverse effects. Significant features such as natural ponds, large trees and endangered vegetation within the flood area shall be protected when practicable." (Emphasis added.)

unless, as intervenors argue, other findings in the decision suffice to address the substance of CDC 421-7.8." *McAndrew*, __ Or LUBA __ (LUBA No. 2018-005, July 12, 2018) (slip op at 8). We then evaluated a number of findings addressing somewhat similar standards in CDC 422 and other code provisions. We ultimately concluded that:

> "the findings addressing CDC 422 and similar code and plan language appear adequate to address the substantive requirements of CDC 421-7.8. Accordingly, we agree with intervenors that the hearings officer's failure to adopt findings expressly directed at CDC 421-7.8 is harmless error, and that petitioner's arguments under this assignment of error do not provide a basis for reversal or remand of the decision." *McAndrew*, __ Or LUBA __ (slip op at 12).

Intervenors argue that no reasonable lawyer would have assigned error to the failure to adopt findings of compliance with CDC 421-7.8, without recognizing that the text of CDC 421-7.8 expressly delegates evaluation of impacts and minimization to the extent practicable to the requirements of CDC 422 and, further, that the hearings officer clearly relied upon findings addressing CDC 422 to evaluate environmental impacts.

We disagree with intervenors. The hearings officer did not adopt any findings explaining the relationship between CDC 421-7.8 and 422, or taking the position that findings addressing CDC 422 are sufficient to establish compliance with CDC 421-7.8. Clearly there is significant overlap in subject matter and standards between the two code provisions, but it is not at all clear that CDC 422 is the fungible equivalent of CDC 421-7.8. Although we

ultimately concluded that findings addressing CDC 422 and other standards appear to address the substantive standards set forth in CDC 421-7.8, and therefore the failure to adopt findings addressing the latter was harmless error, it was still *error* not to adopt findings addressing CDC 421-7.8. Accordingly, we cannot say that no reasonable attorney would have challenged the lack of findings addressing CDC 421-7.8 or that the argument lacked probable cause

Accordingly, intervenors' motion for attorney fees is denied.

COSTS

Intervenors filed a cost bill requesting an award of the cost of the filing fee. Intervenors are awarded the cost of their filing fee in the amount of $100.00. The Board will return the remainder of petitioner's deposits for costs.

Dated this 17th day of December, 2018.

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Tod A. Bassham
Board Member