

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CENTRAL OREGON LANDWATCH,

5 *Petitioner,*

6
7 vs.

8
9 DESCHUTES COUNTY,

10 *Respondent,*

11
12 and

13
14 JOHN SHEPHERD and STEPHANIE SHEPHERD,

15 *Intervenors-Respondents.*

16
17 LUBA No. 2018-095

18
19 ORDER

20 **MOTION FOR ATTORNEY FEES**

21 Intervenors-respondents (intervenors) are the prevailing parties in *Central*
22 *Oregon Landwatch v. Deschutes County*, __ Or LUBA __ (LUBA No 2018-095,
23 Dec 14, 2018), *aff'd*, 296 Or App 903, 439 P3d 1060 (2019). Intervenors move
24 for an award of attorney fees in the amount of \$11,205, pursuant to ORS
25 197.830(15)(b), which provides:

26 “The board shall * * * award reasonable attorney fees and expenses
27 to the prevailing party against any other party who the board finds
28 presented a position without probable cause to believe the position
29 was well-founded in law or on factually supported information.”

1 Intervenors argue that LUBA should award attorney’s fees because,
2 according to intervenors, petitioner “must establish probable cause for each of its
3 assignments of error.” Intervenors’ Motion for Attorney Fees 2. However, that
4 articulation of intervenors’ burden to establish that an award of attorney fees is
5 warranted is not correct. Rather, in determining whether to award attorney fees
6 against a non-prevailing party, we must determine that “*every argument in the*
7 *entire presentation* [that a non-prevailing party] makes to LUBA is lacking in
8 probable cause[.]” *Fechtig v. City of Albany*, 150 Or App 10, 14, 946 P2d 280
9 (1997) (emphasis added). Under ORS 197.830(15)(b), a position is presented
10 “without probable cause” where “no reasonable lawyer would conclude that any
11 of the legal points asserted on appeal possessed legal merit.” *Contreras v. City of*
12 *Philomath*, 32 Or LUBA 465, 469 (1996). In applying the probable cause
13 analysis, LUBA “will consider whether any of the issues raised [by a party] were
14 open to doubt, or subject to rational, reasonable, or honest discussion.” *Id.* For
15 the reasons we explain below, intervenors’ motion is denied.

16 The challenged decision approved intervenors’ application for an
17 administrative determination and site plan review to authorize weddings and
18 other events associated with a religious use on intervenors’ property zoned
19 Exclusive Farm Use and located in the Wildlife Area (WA) overlay zone. As we
20 explained in our decision, intervenor John Shepherd is pastor of Shepherdsfield
21 Church, which is registered with the State of Oregon’s Corporations Division and
22 with the Internal Revenue Service as a 501(c)(3) non-profit organization, and

1 which identifies the subject property as the organization’s principal place of
2 business. Although the provisions of the Deschutes County Code (DCC) that
3 apply in the WA overlay zone prohibit a “church” in the WA overlay zone, the
4 county nevertheless approved the application. The county reasoned that the
5 Religious Land Use and Institutionalized Persons Act of 2000, 42 USC sections
6 2000cc to 2000cc-5 (RLUIPA) prohibited the county from applying provisions
7 of the DCC that would require denying intervenors’ application.¹ We affirmed

¹ Briefly, as we explained in our decision:

“Three provisions of RLUIPA are relevant to our disposition of this appeal. First, RLUIPA at 42 USC section 2000cc(b)(1) provides that:

“No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.’

“We refer to that provision as the Equal Terms provision.

“A different provision of RLUIPA, codified at 42 USC section 2000cc(a), prohibits local and state governments from applying a land use regulation in a manner that imposes a ‘substantial burden’ on the religious exercise of a person, religious assembly or institution, unless the government demonstrates that the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest. We refer to that provision as the Substantial Burden provision.” *Central Oregon Landwatch*, __ Or LUBA __ (LUBA No 2018-095, Dec 14, 2018) (slip op 6-8).

1 the county’s decision, concluding that there is no legally significant distinction
2 between the prohibited religious use and the allowed non-religious uses in the
3 WA overlay zone, and therefore the Equal Terms provision prohibited the county
4 from applying the DCC provision that prohibits a “church” in the WA overlay
5 zone.

6 In its fourth assignment of error, petitioner argued that the county’s
7 construction and application of the Equal Terms provision was improper. In
8 support, petitioner cited our decision in *1000 Friends v. Clackamas County*, 46
9 Or LUBA 375, 398-401, *appeal dismissed*, 194 Or App 212, 94 P3d 160 (2004),
10 as well as several other decisions from federal courts. In *1000 Friends*, we
11 rejected a challenge under the Equal Terms provision to an Oregon
12 Administrative Rule (Three Mile Rule) that prohibited a church on high value
13 farmland within three miles of the urban growth boundary. 46 Or LUBA 375.

14 Petitioner responds that its argument—that the county would not violate
15 RLUIPA by denying the application—was based on a reasonable interpretation of
16 RLUIPA as applied to the DCC, based on both LUBA and federal court
17 decisions. We agree. Petitioner, intervenors, and the county cited and relied on
18 several Oregon and federal cases to support their arguments in their briefs. The
19 law regarding the application of the Equal Terms provision to particular local
20 zoning provisions is unsettled, and conflicts exist between decisions from courts
21 in the various federal circuits that have applied the Equal Terms provision to
22 specific local zoning ordinances. *See, e.g., The Lighthouse Inst. for Evangelism,*

1 *Inc. v. City of Long Branch*, 510 F3d 253 (3d Cir 2007); *River of Life Kingdom*
2 *Ministries v. Vill. of Hazel Crest*, 611 F3d 367 (7th Cir 2010); *Centro Familiar*
3 *Cristiano Buenas Nuevas v. City of Yuma*, 651 F3d 1163 (9th Cir 2011). In that
4 circumstance, it will be a rare occurrence where a party challenging a local
5 government decision regarding RLUIPA will “present[] a position without
6 probable cause to believe the position was well-founded in law[.]” ORS
7 197.830(15)(b). Given the paucity of settled case law regarding RLUIPA, we
8 conclude that the issues raised by petitioner in its fourth assignment of error
9 “were open to doubt, or subject to rational, reasonable, or honest discussion.”

10 Intervenor’s motion for attorney fees is denied.

11 **COSTS**

12 Intervenor filed a cost bill pursuant to OAR 661-010-0075(1), requesting
13 an award of the cost of \$122.32. As the prevailing parties, intervenors are awarded
14 the cost of the \$100 filing fee, to be paid by petitioner. The board shall return
15 petitioner’s \$200 deposit for costs.

16 Dated this 19th day of August, 2019.

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Melissa M. Ryan
Board Chair