BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MORTEZA ABADI, Petitioner, vs. WASHINGTON COUNTY, Respondent, and FRED BALL, ROBERT GEHRTS and TIM JOHNS, Intervenors-Respondent.	LUBA No. 98-031 ORDER ON PETITION FOR ATTORNEY FEES

Intervenors-respondent (intervenors) move for an order awarding their attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(14)(b), which provides:

> "[t]he 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, this Board must determine that "every argument in the entire presentation [that a nonprevailing party] makes to LUBA is lacking in probable cause (i.e., merit)." Fechtig v. City of Albany (A97764), 150 Or App 10, 24, 946 P2d 280 (1997). This Board has held that "a position without probable cause" under ORS 197.830(14)(b) is presented 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).

Intervenors contend that petitioner asserted a position that had no reasonable basis in law or fact, stating in part that:

> "intervenors-respondent are prevailing parties following LUBA's dismissal of petitioner's appeal for lack of standing. Dismissal was based on facts presented by petitioner that unequivocally demonstrate that petitioner did not file the appeal within the time required by statute. Petitioner did not have probable cause to believe that his standing, and consequently the appeal, was factually supported." Petition for Attorney Fees 1.

Intervenors contend that in this case "there is no room for dispute that petitioner's alleged standing was not based on factual information." Id. at 2.

As relevant to this petition, this Board reported the following facts:

> "Pursuant to the approved grading permit, the applicants began grading the area around former Tract A, constructing the retaining wall, and placing fill behind it. Sometime on or before January 6, 1998, petitioner learned about the retaining wall and the grading permit approved in June 1997. On January 6, 1998, petitioner wrote a letter to the county asking various questions about the wall, the grading permit and the subdivision approval. Petitioner asked questions about the fill approved by the grading permit[.]
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> "* * * * *
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> "The county replied in a letter dated January 16, 1998, making reference to the final grading plan that was submitted along with the application for a grading permit, and explaining that the retaining wall and fill was necessary to bring the grade for the realigned road within required parameters. Petitioner filed a notice of intent to appeal the issuance of the grading permit on February 6, 1998, within 21 days of the January 16, 1998 county letter but more than 21 days from petitioner's January 6, 1998 letter." Abadi v. Washington County, ___ Or LUBA ___ (LUBA No. 98-031, August 19, 1998), slip op 4-5.

This Board concluded that "petitioner filed his appeal more than 21 days from the date he knew or should have known about the challenged decision, and thus his appeal was untimely filed." Id. at 8. The Board dismissed the appeal for lack of jurisdiction.

If the relevant "position" for purposes of considering a request for attorney fees under ORS 197.830(14)(b) in this appeal is the position that appears to be stated in the petition for review, i.e. that petitioner did not have actual knowledge of the existence of the disputed grading permit until January 16, 1998, an award of attorney fees would be warranted. This is because the record clearly shows that petitioner referred to the disputed grading permit in his January 6, 1998 letter to the county, and therefore must have known of the grading permit on

or before that date. Any contention that petitioner was unaware of the existence of the grading permit is not "well-founded in law or [based] on factually supported information." However, at oral argument, petitioner further explained his legal argument concerning when he "knew or should have known of the decision" within the meaning of ORS 197.830(3)(b). As clarified at oral argument, we understand petitioner to argue that the grading permit itself does not constitute notice of the "decision," because the grading permit itself was not sufficient to inform petitioner that it was the grading permit (as opposed to some other decision) that constituted the county's decision authorizing the disputed retaining wall. As petitioner points out in opposing the petition for attorney fees, it is the grading plan submitted by the applicant to obtain the grading permit, not the grading permit itself, that expressly shows the disputed retaining wall. In addition, as petitioner correctly notes, the prior subdivision decision might have been the decision that authorized the disputed retaining wall, in which case an appeal of a grading permit decision that simply implemented the prior subdivision decision might be precluded. Petitioner's "position" as clarified at oral argument is the position that we consider in this order.[1]

In our final decision in this appeal, we concluded that petitioner's fatal error was in delaying his appeal of the disputed grading permit for more than 21 days after he obtained a copy of the disputed grading permit. Our final decision rejected petitioner's argument that the date that he "knew or should of known of the decision" should be delayed by the alleged

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[1]Intervenors argue that this Board should not consider petitioner's allegations of fact concerning whether the grading permit authorized the disputed retaining wall or whether some other decision, such as the subdivision approval decision, authorized the retaining wall. Intervenors contend that the evidentiary record in this matter does not support those allegations of fact and that petitioner has not moved for an evidentiary hearing to place such evidence before this Board. We agree with intervenors that the record in this matter is not sufficient to establish petitioner's actual state of mind concerning the meaning of the grading permit when he received it and that petitioner has not moved for an evidentiary hearing to present evidence that would allow us to make findings of fact concerning petitioner's actual state of mind.

However, our decision in this order turns on petitioner's legal arguments concerning the legal and factual inferences that are possible from the grading permit itself. Neither our final decision nor our decision on this petition for attorney fees turns on our understanding of petitioner's actual state of mind concerning the meaning of the disputed grading permit.

lack of clarity in what the grading permit authorized. Abadi, slip op at 7. We also rejected petitioner's suggestion that the date he "knew or should have known of the decision" should be delayed until petitioner was able to obtain confirmation from the county on January 16, 1998, that it was indeed the disputed grading permit, rather than some other decision, that authorized the disputed retaining wall.

Citizens Concerned v. City of Sherwood, 22 Or LUBA 390, 395 (1991), presented a question concerning when a petitioner obtained actual knowledge of a city's decision approving a medical waste incinerator. In that case the petitioner learned of the existence of the incinerator, promptly pursued the matter, and later obtained copies of the permit. In that case the Board concluded that the petitioner obtained actual notice of the city decision on the date that the petitioner obtained the permit rather than on the date the petitioner learned of the existence of the incinerator. Citizens Concerned, 22 Or LUBA at 395. The principle decided in our final opinion on the merits in this appeal is a relatively straightforward refusal to extend the principle articulated in Citizens Concerned. Once petitioner actually obtained a copy of the grading permit, he could not delay filing a notice of intent to appeal that decision with LUBA for more than 21 days, simply because he was not sure what the decision authorized or whether there might be other land use decisions that authorized the retaining wall.

However, we cannot say that petitioner's argument that essentially asked this Board to extend the principle articulated in Citizens Concerned is "without probable cause to believe the position was well-founded in law or on factually supported information" within the meaning of ORS 197.830(14)(b). In Fechtig v. City of Albany, 33 Or LUBA 795, 798, aff'd 150 Or App 10, 946 P2d 280 (1997), this Board quoted Westfall v. Rust International, 314 Or 553, 840 P2d 700 (1992):

> "[w]e hold that an appeal is 'frivolous' * * * if every argument on appeal is one that a reasonable lawyer would know is not well grounded in fact, or that a reasonable lawyer would know is not warranted either by existing law or by

> a reasonable argument for the extension, modification, or reversal of existing law." Id. at 559 (footnote omitted).

In the present case, petitioner advanced arguments that in effect requested extension of Citizens Concerned.

As we explained in Brown v. City of Ontario, 33 Or LUBA 803, 804 (1997), the probable cause standard that petitioner must overcome to avoid an award of attorney fees is not a demanding one:

> "Our interpretation of the probable cause standard in Contreras was based on the Oregon Supreme Court's opinion in Broyles v. Brown, 295 Or 795, 671 P2d 94 (1983). In Broyles, the court applied ORS 19.160, which allows an appellate court to attach an additional 10 percent to a judgment for the recovery of money that is affirmed on appeal 'unless it appears evident to the appellate court that there was probable cause for taking the appeal.' The Broyles court relied on State v. Iverson, 76 Idaho 117, 278 P2d 205 (1954), and held:
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> > "'The term "probable cause for appeal" does not mean probable cause for reversal of the judgment or that reversible errors were committed. It means there is presented a case in which appellant has assigned, or may assign, grounds that are open to doubt, or are debatable, or over which rational, reasonable or honest discussion may arise. State v. Iverson, 76 Idaho 117, 278 P2d 205 (1954).' Broyles, 295 Or at 801.
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> "As described by Broyles and Iverson, the term 'probable cause for appeal' creates a low threshold. The court in Iverson states that probable cause for appeal exists where the party presents a legal contention 'that is not clearly and palpably frivolous and vexatious.' Iverson, 278 P2d at 205."

We conclude that petitioner's position crosses the threshold of being "open to doubt, or * * * debatable, or over which rational, reasonable or honest discussion may arise."

The petition for attorney fees is denied.

Dated this 30th day of March, 1999.

Michael A. Holstun
Board Chair