BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RICHARD L. HARCOURT and
CAROLYN HARCOURT,
Petitioners,

vs.

MARION COUNTY,
Respondent,

and

MERRILL DEVELOPMENT, INC.,
ALLAN MERRILL and LYNN MERRILL,
Intervenors-Respondent.

LUBA No. 2001-116

ORDER ON MOTION FOR ATTORNEY FEES

This matter is before us on a motion for attorney fees filed by intervenors-respondent (intervenors), the prevailing party.

INTRODUCTION

The challenged decision in this case involved a determination by the county planning staff that intervenors had submitted evidence of a sustainable long-term water supply during the pre-application stage of subdivision approval, as required by county ordinance. Petitioners filed a "precautionary" appeal to LUBA out of concern that intervenors and the county might treat the planning staff decision as a final decision with respect to criteria applicable at the subdivision approval stage. Intervenors intervened and moved to dismiss the appeal as premature on the grounds that the planning staff decision was not a *final* land use decision. In their response to the motion to dismiss, petitioners agreed with intervenors' characterization of the decision, and we dismissed the appeal. *Harcourt v. Marion County*, ___ Or LUBA ___ (LUBA No. 2001-116, September 18, 2001).

MOTION FOR ATTORNEY FEES

Intervenors request an award of attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and 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 find that every argument made by the nonprevailing party is lacking in probable cause, *i.e.*, merit. *Fechtig v. City of Albany*, 150 Or App 10, 24, 946 P2d 280 (1997). We have held that "a position without probable cause" under ORS 197.830(15)(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). The probable cause standard creates a low threshold. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).

Before we can determine whether a position is lacking in probable cause, we must find that the nonprevailing party "presented a position." We have consistently held that the mere filing of a notice of intent to appeal does not "present a position" for the purposes of ORS 197.830(15)(b) and OAR 661-010-0075(1)(e)(A). *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580, 586 (2000); *Dornan v. Yamhill County*, 35 Or LUBA 786, 788 (1998). In *Lois Thompson Housing Project*, we dismissed the appeal because the Columbia River Gorge Commission had jurisdiction over the decision rather than LUBA. 37 Or LUBA at 584. In *Dornan*, we dismissed the appeal after both the intervenor and the petitioner moved to dismiss the appeal upon the petitioner's standing becoming an issue. 35 Or LUBA at 786. In neither case did we find that simply filing a notice of intent to appeal presented a position regarding the challenged decision.

Intervenors attempt to distinguish the present case from *Lois Thompson Housing Project* and *Dornan* on the basis that because a notice of intent to appeal states on its face that it is challenging a land use decision, it necessarily presents the position that the challenged decision is a final land use decision. We disagree. A notice of intent to appeal is just that – a notice. Its purpose is to afford all the participants in local proceedings notice that the petitioner intends to contest the decision. *Atwood v. City of Portland*, 4 Or LUBA 177, 179 (1981), *aff'd* 56 Or App 396, 643 P2d 424 (1982). That a notice of intent to appeal characterizes the challenged decision as a "land use decision" does not present the position that the decision is a final land use decision any more than the notice in *Dornan* presented the position that the petitioner had standing or the notice in *Lois Thompson Housing Project* presented the position that the Board had jurisdiction. In the present case, once intervenors raised the issue of finality, petitioners presented a position on the matter, *i.e.*, that the decision was not a final land use decision.[1] As discussed in our final opinion and order, that position was not only presented with probable cause, it was correct.[2] Therefore, petitioners are not subject to an award of attorney fees pursuant to OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b).

The motion for attorney fees is denied.

Dated this 22nd day of October, 2001.

[1] Petitioners argue that they clearly took the position, before and after the appeal was filed, that the appeal was precautionary, and was only filed to protect against the possibility that their failure to appeal the staff determination might be asserted to bar any challenge petitioners might make regarding the long-term water supply evidence in the subdivision appeal proceeding.

[2] Were we to hold otherwise, petitioners who would otherwise agree to resolution of an appeal would be forced to pursue the appeal solely for purposes of avoiding an award of attorney fees. OAR 661-010-0075(1)(e)(A) and ORS 197.830(15)(b) do not punish parties for *filing* appeals that may later be found to be without probable cause but for *proceeding* with such appeals.

Tod A. Bassham
Board Member