BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JEANNETTE BRINKER,
Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

NETARTS BAY RV PARK AND
MARINA, LLC,
Intervenor-Respondent.

LUBA No. 2002-172

ORDER ON MOTION FOR ATTORNEY FEES

Intervenor-respondent (intervenor) moves for 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 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). Under ORS 197.830(15)(b), a position without probable cause 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 is a relatively low standard. *Brown v. City of Ontario*, 33 Or LUBA 803, 804, 1997.

A. Background

Petitioner appealed a July 24, 2002 county decision that approved a building permit for an advertising sign on a vacant lot across the street from intervenor's RV park and Marina. Intervenor leases the vacant lot for overflow parking. The relevant zoning governing the subject property prohibits an "off-site" sign, but allows an "on-site" sign that advertises services or facilities on the site.

The county issued the challenged building permit July 24, 2002 without providing notice or opportunity for hearing. The sign was constructed in August 2002. A number of neighbors, including petitioner, inquired with the county as to the sign's lawfulness. The city ultimately agreed to seek the legal advice of its county counsel as to whether the county had erred in approving the requested sign. On November 27, 2002, county counsel issued a letter to the planning department in which he opined that the sign was a lawful "on-site" sign, and thus that the county had correctly issued the challenged building permit. On November 30, 2002, petitioner received a copy of the county counsel's letter. On December 19, 2002, petitioner appealed the county's decision to LUBA.

Respondent and intervenor moved to dismiss the appeal, arguing that LUBA lacked jurisdiction over the challenged decision, because (1) the decision was not a land use decision; (2) the decision was not a "permit" as defined in ORS 215.402(4), so the county need not have provided notice or hearing; (3) petitioner's appeal was untimely; and (4) petitioner lacked standing to appeal to LUBA. Petitioner responded to each of these arguments. In relevant part, petitioner took the position that determining whether the sign was an "on-site" or "off-site" sign required interpretation and the exercise of discretion, and the decision was both a "land use decision" subject to LUBA's jurisdiction, and a "permit" that requires notice and hearing. Further, petitioner argued that she was entitled to notice of the decision, and is adversely affected by the decision, because she lives within 250 feet of the subject property, and is thus within the relevant notice area under the county's code. Therefore, petitioner argued, she was entitled to

appeal the decision to LUBA within 21 days of receiving actual notice of the decision, pursuant to ORS 197.830(3)(a). In support of petitioner's belief that she resided within the 250-foot notice area, petitioner apparently examined maps and also physically measured the distance between her property and the subject property.

In response, the county filed an affidavit from the county's planner, stating that based on her review of documents at her office and the county assessor's office, it is clear that petitioner's property is more than 250 feet from the subject property.

Petitioner requested that the city supply her with the same documents the county planner had reviewed. On reviewing those documents, petitioner agreed with the county planner that her property is slightly outside the 250-foot notice area. Accordingly, petitioner filed a motion to dismiss her appeal, in an apparent concession that the location of her property outside the 250-notice area means that petitioner cannot rely upon ORS 197.830(3)(a), and therefore her appeal was untimely.[1] The Board granted the motion, and dismissed the appeal on February 18, 2003.

On March 5, 2003 intervenor filed its request for attorney fees. Intervenor argues that petitioner's key assertion in response to the motions to dismiss that her property was within the 250-foot notice area was not "well-founded" "on factually supported information." Intervenor argues that no reasonable attorney would have asserted, as petitioner did, that her property lay

---

[1] Petitioner's motion states, in relevant part:

> "* * * [W]e have requested and been provided copies of the same 'applicable documents' that [the county planner] used to form the basis of her conclusion. Based on our review of these documents, we must agree that Ms. Brinker's property lies just outside of the 250-foot notice area. Our assertion to the contrary, in our Response to the Motion to Dismiss, dated January 13, 2003, was therefore in error. Our statement which was made in good faith considering what we understood to be the facts, was based on review of the best maps available to us at the time, as well as two on-site measurements. At this point, we are unsure as to why our on-site measurements were inaccurate. However, after consulting with a surveyor, we are accepting of the fact that the tax assessor's maps provided to us by the county are likely more accurate than our measurements. The upshot of this revelation is that it is now clear that the timeline of petitioner's LUBA appeal is governed by ORS 197.830(3)(b), and not subsection (3)(a) as we have previously believed." Petitioner's Motion for Voluntary Dismissal 1-2 (footnote omitted).

In the omitted footnote, petitioner explains that she relied upon a map in the record that contains no scale. Petitioner states that "[t]hough we believed that the map contained some measurements which could be used as a scale, our measurements proved inaccurate." *Id.* 2.

within the 250-foot notice area, based on the information that was available or reasonably available to petitioner. According to intervenor, it is apparent from any map of the area showing tax lots that petitioner's property is further than 250 feet away from the subject property.

We disagree with intervenor. Petitioner's assertion that she resided within 250 feet of the subject property was based on factually supported information: an examination of maps and physical measurement. That more detailed or better-scaled maps available to the county planner showed the contrary does not demonstrate that petitioner's assertion was not well-founded on factually supported information. Under *Contreres*, the question is whether the nonprevailing party's position is "subject to rational, reasonable, or honest discussion." 32 Or LUBA at 468 (quoting *Broyles v. Estate of Brown*, 295 Or 795, 801, 671 P2d 94 (1983). We cannot say that petitioner's assertion with respect to the distance between her property and the subject property was not "well-founded," under that test.

Intervenor-respondent's motion for attorney fees is denied.

Dated this 12th day of May, 2003.

_____

Tod A. Bassham
Board Member

1