BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

GAIL A. MAXWELL,
Petitioner,

vs.

CITY OF HAPPY VALLEY,
Respondent.

LUBA No. 2003-048

ORDER ON COSTS AND ATTORNEY FEES

Petitioner appealed a city resolution entitled "A Resolution Establishing a Preliminary Methodology and Area for a Reimbursement District for the Improvement of SE 147th Avenue." Record 3. The city moved to dismiss the appeal, arguing that the decision was not a land use decision subject to LUBA's jurisdiction. ORS 197.825(1). Petitioner responded to the motion to dismiss, and also renewed the request that she made earlier in the notice of intent to appeal, that the case be transferred to circuit court should LUBA decide it does not have jurisdiction. See OAR 661-010-0075(11) (transfers to circuit court). We agreed with the city that LUBA does not have jurisdiction over the challenged decision and transferred the case to circuit court. *Maxwell v. City of Happy Valley*, ___ Or LUBA ___ (LUBA No. 2003-048, April 24, 2003). The city now moves for an award of attorney fees and costs.

ATTORNEY FEES

The city 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."

The parties first dispute whether the city is the prevailing party. According to petitioner, because her notice of intent to appeal and response to the motion to dismiss

included an alternative request to transfer the matter to circuit court, and the case is now pending before that court, no final determination has been made in this appeal. Without any final determination, petitioner argues, there can be no prevailing party. We disagree.

The petitioner is generally viewed as the prevailing party when the challenged decision is reversed or remanded. *Mackie v. Linn County*, 17 Or LUBA 1013 (1988). The respondent is generally viewed as the prevailing party when the decision is affirmed or the appeal is dismissed. *Id*. A transfer to circuit court is a statutory alternative to dismissal, where LUBA concludes that the appealed decision is not a land use decision. Therefore, for purposes of designating the prevailing party, a transfer to circuit court is properly treated as a dismissal. Although there are certain exceptions to our general rule that the respondent is the prevailing party in a dismissal, *see Central Klamath County CAT v. Klamath County*, 41 Or LUBA 600 (2002) (discussing exceptions), we do not see that any of those exceptions apply or that another exception should be made for transfers generally or this transfer in particular. Petitioner may very well prevail on the merits in circuit court, but for purposes of the LUBA appeal and OAR 661-010-0075(1), the city is the prevailing party before LUBA.[1]

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 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). The probable cause standard is a relatively low standard. *Brown v. City of Ontario*, 33 Or LUBA 803, 804 (1997).[2]

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[1] We also reject petitioner's assertion that the transfer to circuit court divests LUBA of jurisdiction to decide issues regarding attorney fees and costs with respect to the LUBA appeal.

[2] Petitioner cites *Lois Thompson Housing Project v. Multnomah County*, 37 Or LUBA 580 (2000) for the proposition that filing a notice of intent to appeal does not present a position for purposes of ORS

We found that the reimbursement district decision that petitioner appealed is not a land use decision. We had reached a similar conclusion in other appeals, finding that such decisions were fiscal in nature. *See Jesinghaus v. City of Grants Pass*, 42 Or LUBA 477 (2002) (ordinance creating a reimbursement district); *Baker v. City of Woodburn* 37 Or LUBA 563, *aff'd* 167 Or App 259, 4 P3d 775 (2000) (ordinance establishing a process for forming reimbursement districts for improvement of a particular road). We rejected petitioner's attempts to distinguish the present case from *Jesinghaus* and *Baker*. However, petitioner also asserted the following:

> "Because of varying legal interpretations of whether establishing a reimbursement district is a land use decision, statutorily or judicially, and therefore reviewable by LUBA, and as a cautious approach in protecting petitioner's appeal rights, petitioner appealed the challenged decision to LUBA." Petitioner's Response to Motion to Dismiss 1 (footnotes omitted).

The "varying legal interpretations" that petitioner referred to are found in *State ex rel Moore v. City of Fairview*, 170 Or App 771, 13 P3d 1031 (2000) and *Friends of Yamhill County v. Yamhill County*, 43 Or LUBA 270 (2002). As we explained in our final opinion in this matter, we did not agree with petitioner that either of those cases supported a conclusion that the reimbursement district resolution that was challenged in this appeal is properly viewed as a land use decision. However, we do not agree with respondent that petitioner's argument was unreasonable. Petitioner's choice to file her appeal with LUBA was driven in part by uncertainty concerning the proper forum to challenge the resolution.[3] That uncertainty is at least partially explained by the nature of the "fiscal" exception to our jurisdiction to review land use decisions. *State Housing Council v. City of Lake Oswego*, 48

197.830(15)(b). While we agree that *merely* filing a notice of intent to appeal does not present a position in the present case, petitioner also responded to the motion to dismiss, which does present a position for purposes of ORS 197.830(15)(b). *Harcourt v. Marion County*, 40 Or LUBA 610 (2001).

[3] As petitioner pointed out in its response to the city's motion to dismiss:

> "An appeal to LUBA protects the timing of petitioner's appeal whether the decision is a land use decision or not. On the other hand, if an appeal to Circuit Court is judged a land use decision, the appeal is not automatically timely. *See* ORS Chapter 34 (Writ of Review)." Petitioner's Response to Motion to Dismiss 1 n 2.

Or App 525, 617 P2d 655 (1980), *rev dismissed* 291 Or 878, 635 P2d 647 (1981). Suffice it to say that there is no bright line standard that permits a petitioner to determine in advance whether the "fiscal" exception to LUBA's review jurisdiction applies. *Friends of Yamhill County*, 43 Or LUBA at 274 ("The scope of the 'fiscal exception' to statewide land use planning standards generally and LUBA's jurisdiction in particular is not well defined.") Moreover, as a general proposition, petitioner correctly notes that choosing the proper forum to challenge local government decisions has historically been an exercise that is fraught with danger for an appellant. *Forman v. Clatsop County*, 297 Or 129, 133-137, 681 P2d 786 (1984) (Peterson, C.J., concurring). We conclude that in this case petitioner cannot be faulted for filing a precautionary appeal with LUBA and moving for transfer of the appeal to circuit court in the event LUBA concluded the challenged decision was not a land use decision. To the contrary, petitioner may well have been exercising proper caution in doing so.

We leave open the possibility that an award of attorney fees might be appropriate in a case where the challenged decision is obviously not a land use decision, there is no reasonable argument to the contrary, and the delay and additional expense that is entailed by filing first at LUBA rather than proceeding directly to circuit court is clearly unwarranted. However, this appeal is not such a case.

Respondent's motion for attorney fees is denied.

COSTS

We previously determined that the city was the prevailing party. Thus, under OAR 661-010-0075(1)(b)(B and C), the city is entitled to its requested amount of $33.20 for the cost of preparing the record. The remainder of the deposit for costs will be returned to petitioner.

Dated this 30th day of June, 2003.

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Michael Holstun
Board Member