

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 MEL STEWART,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent.*

11
12 LUBA No. 2009-009

13 ORDER

14 **MOTION FOR ATTORNEY FEES**

15 In *Stewart v. City of Salem*, 58 Or LUBA 605, *aff'd* 231 Or App 356, 219 P3d 46
16 (2009), petitioner appealed the city's denial of his partition application. We agreed with
17 petitioner that the city's denial was "outside the range of discretion allowed the local
18 government under its comprehensive plan and implementing ordinances." ORS
19 197.835(10)(a)(A).¹ We reversed the city's decision and ordered the city to approve the
20 partition application. The city appealed our decision to the Court of Appeals, which
21 affirmed. The appellate judgment became final August 6, 2010.

¹ ORS 197.835(10) provides:

- “(a) [LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if the board finds:
- “(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or
- “(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.
- “(b) If [LUBA] does reverse the decision and orders the local government to grant approval of the application, [LUBA] shall award attorney fees to the applicant and against the local government.”

1 Petitioner moves the Board for an award of attorney fees pursuant to ORS
2 197.835(10)(b) and OAR 661-010-0075(1)(e)(B), the latter of which provides:

3 “Attorney fees shall be awarded to the applicant, against the governing body,
4 if the Board reverses a land use decision or limited land use decision and
5 orders a local government to approve a development application pursuant to
6 ORS 197.835(10).”

7 However, for the reasons set forth below we conclude that petitioner is not entitled to
8 attorney fees under ORS 197.835(10)(b) and OAR 661-010-0075(1)(e)(B), because
9 petitioner was not represented by an attorney before LUBA.

10 At all relevant times in this appeal prior to issuance of LUBA’s final opinion and
11 order, petitioner represented himself *pro se*. The notice of intent to appeal (NITA) filed on
12 January 13, 2009 states that “Petitioner, Mel Stewart, is represented by himself,” and is
13 signed by petitioner. NITA 1. The caption of the petition for review filed on February 19,
14 2009 identifies petitioner as representing himself *pro se*. The signature page of the petition
15 for review is signed by petitioner as “Mel Stewart, Pro Se.” The signature page also states
16 that the petition for review was prepared “[w]ith the advice and assistance of: Hoelscher &
17 Associates, PC,” and bears the signature of attorney William F. Hoelscher (Hoelscher).
18 Petition for Review 47. It is not clear to us what the language “[w]ith the advice and
19 assistance” of Hoelscher was intended to convey, but petitioner does not argue, and we do
20 not understand it to be the case, that that language was intended to advise LUBA and the city
21 that at that point Hoelscher assumed representation of petitioner before LUBA.

22 Subsequently, petitioner filed a motion to file a reply brief on his own behalf, and
23 later a motion to withdraw the reply brief. At oral argument, petitioner appeared and argued
24 on his own behalf. Consistent with petitioner’s *pro se* status, LUBA’s final opinion and
25 order dated April 27, 2009 states that petitioner “filed the petition for review and argued on
26 his own behalf.” Also, as discussed below, after the issuance of LUBA’s final opinion and
27 order, petitioner filed a Supplemental Motion for Attorney Fees on his own behalf.

1 At no point in the proceedings before LUBA has Hoelscher filed a formal notice of
2 representation on behalf of petitioner.² However, on May 6, 2009, Hoelscher filed a cost bill
3 and motion for award of attorney fees on behalf of petitioner, seeking \$8,460 in legal
4 services dating from January 9, 2009, through May 5, 2009. The city objects to the motion
5 for attorney fees, arguing that at all relevant times petitioner represented himself before
6 LUBA and is therefore not entitled to recover attorney fees.

7 In order for a party at LUBA to recover attorney fees under any statute authorizing an
8 award of attorney fees, that party must be “represented” by an attorney before LUBA.
9 OAR 661-010-0075(6), entitled “Appearances Before the Board,” provides in relevant part
10 that “[a]n individual shall either appear on his or her own behalf or be *represented* by an
11 attorney.” (Emphasis added.) OAR 661-010-0075(6) is clearly framed in the disjunctive
12 either/or. Either an individual appears on his or her own behalf, or he or she is represented
13 by an attorney. Simply put, a petitioner at LUBA may not at the same time appear both *pro*
14 *se* and be represented by an attorney. Petitioner cites no authority to the contrary, or any
15 authority suggesting that a party representing themselves *pro se* before LUBA may recover
16 attorney fees for legal assistance provided by an attorney to that party but who does not
17 represent that party before LUBA.

18 Further, it is clear that recoverable attorney fees at LUBA are limited to efforts spent
19 representing a party before LUBA, and not other matters that may fall within an
20 attorney/client relationship. *See Schaffer v. City of Turner*, 37 Or LUBA 1066, 1072-73
21 (2000) (even though intervenor was entitled to recovery of its attorney fees, that recovery did
22 not include time spent advising the city or time spent attempting to settle the case outside the
23 LUBA appeal process). In the present case, it appears that prior to his first appearance in this

² The city attaches to one of its responses a January 7, 2009 letter from Hoelscher to the city attorney, advising the city that petitioner will represent himself *pro se* in the appeal to LUBA, and that Hoelscher would let the city know if that changed.

1 proceeding on May 6, 2009, when he filed a motion for attorney fees, Hoelscher's efforts
2 were limited to advising petitioner on how to pursue the LUBA appeal on his own behalf.
3 Petitioner represented himself, filed all his own pleadings, engaged in direct negotiations
4 with the city's attorney, conducted oral argument, and performed all the activities that an
5 attorney would have performed if petitioner had been represented by an attorney before
6 LUBA. While petitioner may have or had an attorney-client relationship with Hoelscher,
7 that relationship did not include Hoelscher's *representation* of Stewart *before* LUBA, at least
8 prior to May 6, 2009.

9 No supplemental motion for attorney fees has been filed requesting attorney fees for
10 any legal services performed by Hoelscher representing petitioner before LUBA that were
11 incurred after May 6, 2009, which was the date that Hoelscher filed a motion for attorney
12 fees and thus was the first date that the city and LUBA learned that petitioner no longer
13 represented himself.³ Therefore, we do not consider whether petitioner is entitled to an
14 award of attorney fees for Hoelscher's representation of petitioner before LUBA that were
15 incurred after May 6, 2009.

16 Petitioner's motion for attorney fees is denied.

17 **SUPPLEMENTAL MOTION FOR ATTORNEY FEES**

18 As noted above, the city appealed our decision to the Court of Appeals. Petitioner
19 retained counsel to represent him before the Court of Appeals, and the Court affirmed
20 LUBA's decision. Petitioner then moved the Court of Appeals for an award of attorney fees
21 for attorney fees that were incurred defending LUBA's decision *before the Court of Appeals*.
22 The Court denied petitioner's motion for attorney fees, and petitioner moved for
23 reconsideration. On March 3, 2010, the Court denied petitioner's motion for reconsideration.

³ On October 29, 2009, Hoelscher filed a reply to the city's response to the motion for attorney fees. As far as we can tell, that is the only appearance by Hoelscher on behalf of petitioner in this appeal, other than the May 6, 2009 motion for attorney fees.

1 On January 21, 2010, petitioner filed with LUBA, *pro se*, a supplemental motion for
2 attorney fees, seeking an award from LUBA of the attorney fees that petitioner paid his
3 attorney to defend LUBA's decision before the Court of Appeals. Petitioner argues the
4 Court's order authorizes petitioner to seek an award from LUBA of attorney fees that were
5 incurred at the Court of Appeals. The city responds that petitioner misinterprets the Court's
6 order and that petitioner is not entitled to request from LUBA an award of attorney fees for
7 fees incurred at the Court of Appeals.

8 Petitioner's request for attorney fees before the Court of Appeals was apparently
9 based on ORS 19.440.⁴ The Court of Appeals' order denying petitioner's motion for
10 attorney fees states:

11 "ORS 19.440 only allows fees in an 'appeal' of a 'civil action or proceeding.'
12 The proceeding before the court is a 'review' proceeding, and not an 'appeal.'
13 ORS 197.850 (describing LUBA review proceedings in the Court of Appeals).
14 In *Executive Department v. FOPPO*, 94 Or App 754, 757, 767 P2d 112
15 (1989), we held that *former* ORS 19.220, *renumbered as* ORS 19.440 (1997)
16 'applies to civil actions, not to judicial review of agency orders under ORS
17 chapter 183.' The same result obtains here."

18 Petitioner apparently understands the Court of Appeals' citation to *FOPPO* to mean
19 that petitioner must request that LUBA award him the attorney fees that were incurred at the
20 Court of Appeals. "It is to be noted that the *FOPPO* decision holds for the proposition that
21 to recover the attorney fees expended at the Court of Appeal[s], the prevailing party must
22 first seek those fees from the State agency from which the appeal arose." Supplemental
23 Motion For Award of Attorney Fees 2. We agree with the city that petitioner misunderstands
24 the Court's order. Although in *FOPPO* the parties were required to seek from the

⁴ ORS 19.440 provides:

"Any statute law of this state that authorizes or requires the award or allowance of attorney fees to a party in a civil action or proceeding, but does not expressly authorize or require that award or allowance on an appeal in the action or proceeding and does not expressly prohibit that award or allowance on an appeal, shall be construed as authorizing or requiring that award or allowance on an appeal in the action or proceeding."

1 Employment Relations Board (ERB) attorney fees that were incurred on appeal to the Court
2 of Appeals, that is because the statutes governing ERB proceedings specifically required
3 such action under ORS 243.676(2).⁵ Petitioner provides no similar statutory authority for
4 LUBA to award attorney fees incurred at the Court of Appeals, on appeal of a LUBA
5 decision. More importantly, we also agree with the city that the Court’s citation to *FOPPO*
6 was merely for the proposition that ORS 19.440 only allows attorney fees in an appeal of a
7 “civil action or proceeding,” and an appeal of a LUBA final opinion and order is a review of
8 an agency order and not a civil action or proceeding. If petitioner wishes to challenge the
9 Court of Appeals’ interpretation of ORS 19.440, LUBA is not the proper forum.

10 Petitioner’s supplemental motion for attorney fees is denied.

11 **COST BILL**

12 Petitioner requests (1) an award of the cost of the filing fee, in the amount of \$175,
13 (2) refund of the \$150 deposit for costs, and (3) reimbursement in the amount of \$150 for
14 preparing a transcript of the city council hearing. The city objects to the requested
15 reimbursement of preparing a transcript, arguing that nothing in LUBA’s rules authorize a
16 prevailing party to recover the costs of preparing a transcript. We agree with the city.

17 Pursuant to OAR 661-010-0075(1)(b)(A), petitioner is awarded the cost of the filing
18 fee, in the amount of \$175, to be paid by the city. The Board will return petitioner’s \$150

⁵ ORS 243.676(2) provides:

“Where, as a result of the hearing required pursuant to subsection (1)(c) of this section, the board finds that any person named in the complaint has engaged in or is engaging in any unfair labor practice charged in the complaint, the board shall:

“* * * * *

“(d) Designate the amount and award representation costs, if any, to the prevailing party;
and

“(e) Designate the amount and award attorney fees, if any, to the prevailing party on
appeal, including proceedings for Supreme Court review, of a board order.”

1 deposit for costs, under OAR 661-010-0075(1)(d).

2 Dated this 12th day of August, 2010.

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Tod A. Bassham
Board Member