

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 ON ATTORNEY FEES

14 In *Stewart v. City of Salem*, 240 Or App 466, __ P3d __ (2011), the Court of Appeals
15 reversed our order dated August 12, 2010, denying an award of attorney fees to petitioner
16 under ORS 197.835(10)(b), and ordered LUBA to determine the amount of attorney fees to
17 be awarded to petitioner.¹ We now do so.

18 Petitioner represented himself *pro se* before LUBA, but used the services of an
19 attorney in reviewing and editing the pleadings petitioner filed on appeal to LUBA. The
20 attorney also attended oral argument in Salem, Oregon and sat in the audience while
21 petitioner argued his case. Petitioner ultimately prevailed in obtaining a reversal of the city's
22 decision under ORS 197.835(10)(a)(A), and therefore became entitled to an award of

¹ ORS 197.835(10) provides, in relevant part:

“(a) The board 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[.]

“* * * * *

“(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government.”

1 attorney fees under ORS 197.835(10)(b). LUBA denied petitioner's motion for attorney fees,
2 however, reasoning that an award of attorney fees is appropriate under ORS 197.835(10)(b)
3 only for parties that are actually represented by an attorney before LUBA. The Court of
4 Appeals disagreed, holding that "attorney fees" under ORS 197.835(10)(b) means the
5 "reasonable value of legal services provided by an attorney that are related to the applicant's
6 appeal of a local government decision to LUBA," including advice and assistance provided
7 during the appeal related to the prosecution of the appeal. 240 Or App at 473. We therefore
8 turn to the parties' positions regarding the reasonable value of the legal services petitioner's
9 attorney provided to petitioner in the prosecution of his appeal.

10 Petitioner's motion for attorney fees requests \$8,460.00 for 43.05 hours of
11 professional services at \$200 per hour in prosecuting the appeal before LUBA, plus office
12 expenses (copying, printing and postage) of \$144.73, for a total of \$8604.73. Petitioner later
13 submitted a supplemental motion for attorney fees, seeking recovery of attorney costs for
14 representing petitioner before the Court of Appeals on the city's appeal of our underlying
15 decision reversing the challenged denial. We denied the supplemental motion in our August
16 12, 2010 order, and the Court of Appeals did not disturb that disposition. 240 Or App at 469
17 n 2. The city filed a response to the original motion for attorney fees that, in relevant part,
18 raises several objections to some of the legal services provided and argues that any award of
19 attorney fees should not include recovery for the disputed services. We turn to those
20 objections.

21 **A. Attorney Fees Incurred Prior to Issuance of the Challenged City Decision**

22 On January 5, 2009, the city council made a tentative oral decision to deny
23 petitioner's application. The evening of January 12, 2009, the city council signed a written
24 decision denying the application, and notice of that written decision was mailed to petitioner
25 on January 13, 2009. On the same date, January 13, 2009, petitioner filed with LUBA the
26 notice of intent to appeal the January 12, 2009 decision.

1 The city argues that an award of attorney fees under ORS 197.835(10)(b) is limited to
2 legal services rendered to prosecute the appeal of a decision to LUBA, and should not
3 include recovery of attorney fees incurred prior to issuance of the city's final written decision
4 on January 12, 2009, and certainly should not include recovery of fees incurred prior to the
5 city's tentative oral decision to deny the application, on January 5, 2009.

6 The attorney fee petition requests recovery for professional services rendered on
7 January 2, 8, 11, and 12, 2009. In its decision, the Court of Appeals stated that "an award of
8 attorney fees under ORS 197.835(10)(b) must necessarily relate to the prosecution of an
9 appeal before the Board." 240 Or App at 473. We agree with the city that only legal
10 expenses necessarily related to the appeal of the challenged decision to LUBA are
11 recoverable under ORS 197.835(10)(b), and that any expenses incurred to assist petitioner to
12 persuade the city council to rule favorably on his pending application cannot be recovered.
13 From the description of services rendered on January 2, 2009, those services did not relate to
14 an appeal to LUBA, prospective or otherwise. According to the description, the attorney
15 advised petitioner on his testimony at the upcoming January 5, 2009 city council hearing and
16 drafted a settlement letter to the city. The expenses incurred on January 2, 2009 (1.75 hours,
17 \$350) are not related to the prosecution of an appeal to LUBA and are clearly not allowed
18 under ORS 197.835(10)(b). Even if the attorney fees generated on January 2, 2009, were
19 related to a prospective appeal to LUBA of the city's future written decision, we question
20 whether the legislature intended to provide for recovery of attorney fees incurred prior to the
21 local government's tentative oral decision to deny the application. Prior to that date, the
22 applicant could only speculate whether the local government will ultimately deny the
23 application and the reasons for that denial.

24 The expenses incurred on January 8, 11, and 12, 2009 post-date the city council's
25 tentative oral decision to deny the application, and appear to be clearly related to an
26 anticipated appeal to LUBA, involving research of LUBA's administrative rules, editing

1 “Petitioners Brief,” and review and editing of the “Notice of Appeal” for a total of 8.3 hours
2 of services. Record Transmittal 224-25. Whether a party can recover attorney fees under
3 ORS 197.835(10)(b) that are incurred in *anticipation* of an appeal to LUBA, prior to issuance
4 of the final written decision to be appealed, is a matter of first impression. Neither the city
5 nor petitioner offer focused argument on that point.

6 After January 5, 2009, the date the city council had made a tentative oral decision to
7 deny the application, petitioner had ample reason to believe that the city council would adopt
8 a final written decision denying the application, for reasons that potentially would be
9 impermissible under ORS 197.835(10)(a). We believe it was reasonable at that point for
10 petitioner to authorize his attorney to research and prepare for an appeal to LUBA of the
11 anticipated written decision, and that such expenses are recoverable under ORS
12 197.835(10)(b). Therefore, the attorney expenses incurred on January 8, 11, and 12, 2009
13 (8.3 hours, \$1,660), are allowed.

14 **B. Attorney Fees Incurred After Issuance of the Challenged City Decision**

15 The city also objects to several claimed expenses for professional services incurred
16 after the challenged decision was issued and the appeal to LUBA was filed. The city notes
17 that petitioner’s attorney billed him for 17.75 hours for reviewing and editing the petition for
18 review that petitioner drafted. We understand the city to question whether it was reasonable
19 to spend that much time reviewing and editing a draft petition for review.

20 ORS 197.835(10)(b) provides for an award of “attorney fees to the applicant[.]”
21 Significantly, there is no qualifier for “reasonable” attorney fees, unlike ORS
22 197.830(15)(b), which authorizes LUBA to award “reasonable attorney fees and expenses”
23 in particular circumstances not present here. However, as noted, the Court of Appeals
24 interpreted “attorney fees” under ORS 197.835(10)(b) consistent with Oregon Rules of Civil
25 Procedure 68(A)(1) to mean the “reasonable value of legal services provided by an attorney
26 that are related to the applicant’s appeal” to LUBA. *Id.* at 473. We therefore assume that the

1 city is free to argue that some portion of the requested attorney fees under ORS
2 197.830(10)(b) do not represent “reasonable value.” Even with that understanding, however,
3 we cannot say that spending 17.5 hours to review and edit a 47-page brief written by a non-
4 lawyer is unreasonable or excessive. The petition for review raised a number of complex
5 issues, including constitutional and statutory challenges to the city’s decision.

6 The city also objects to 3.75 hours or \$600 claimed for petitioner’s attorney to travel
7 to Salem and to attend oral argument.² Petitioner’s attorney sat in the audience and did not
8 appear before the Board, although he consulted with his client. The manner in which
9 petitioner employed his attorney’s services for purposes of oral argument to LUBA is a
10 matter between petitioner and his attorney regarding the scope of the attorney’s services.
11 The requested expense to travel and attend oral argument is allowed.

12 Finally, the city objects to 2.5 hours for petitioner’s attorney to fill out timekeeping
13 records, but does not explain why that amount of time is unreasonable or not recoverable
14 under ORS 197.835(10)(b).

15 **C. Office Expenses**

16 Petitioner also requests recovery of his attorney’s office expenses for copying,
17 printing and postage, in the amount of \$144.73. The city does not object to that requested
18 office expense, but we note that ORS 197.835(10)(b) authorizes recovery only of “attorney
19 fees,” and does not mention expenses. In this respect, it is unlike ORS 197.830(15)(b),
20 which explicitly authorizes recovery of “reasonable attorney fees and expenses[.]” Further,
21 Oregon Rules of Civil Procedure (ORCP) 68A, a rule cited by the Court of Appeals as
22 context for ORS 197.830(15)(b), also distinguishes between “attorney fees” and “costs and
23 disbursements.” However, because the city does not object to recovery of office expenses,
24 the requested amount is allowed.

² Petitioner’s attorney billed two hours of travel time at \$125 per hour rather than \$200, which accounts for the apparent discrepancy.

1 **D. Conclusion**

2 Petitioner is awarded attorney fees in the amount of \$8,110.00 and expenses in the
3 amount of \$144.73, for a total of \$8,254.73, payable by the city.

4 Dated this 26th day of May, 2011.

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Tod A. Bassham
Board Member