

1                                   BEFORE THE LAND USE BOARD OF APPEALS

2                                   OF THE STATE OF OREGON

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4                                   TOM WALTER and WALTER  
5                                   DEVELOPMENT COMPANY,  
6   *Petitioners,*

7  
8   vs.

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10                                   CITY OF EUGENE,  
11   *Respondent.*

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13                                   LUBA No. 2016-024

14  
15   ORDER

16           In *Walter v. City of Eugene*, 73 Or LUBA 356 (2016), petitioners  
17 appealed the city’s decision denying petitioners’ application for approval of a  
18 ten-lot subdivision. Petitioners requested that LUBA reverse the city’s decision  
19 as “outside the range of discretion allowed [the city] under its comprehensive  
20 plan and implementing ordinances,” pursuant to ORS 197.835(10)(a)(A).  
21 Petitioners argued that the single basis for the city’s denial of its subdivision  
22 application, a provision of the Eugene Code that we referred to as the “19-Lot  
23 Rule,” was barred by ORS 197.307(4), a portion of the needed housing statute  
24 that prohibits the city from applying standards that are not “clear and objective”  
25 to applications for needed housing. We agreed with petitioners that the city’s  
26 decision relying on the 19-Lot Rule to deny the application was outside the  
27 range of the city’s discretion under its comprehensive plan and implementing  
28 ordinances, reversed the city’s decision to deny the application, and ordered it

1 to approve the application.<sup>1</sup> The city appealed our decision to the Court of  
2 Appeals, which affirmed the decision. *Walter v. City of Eugene*, 281 Or App  
3 461, 383 P3d 1009 (2016).

4 **MOTION FOR ATTORNEY FEES**

5       ORS 197.835(10)(b) provides in relevant part that “[i]f the board does  
6 reverse the decision and orders the local government to grant approval of the  
7 application, the board shall award attorney fees to the applicant and against the  
8 local government.” Petitioners move for an award of attorney fees in the  
9 amount of \$16,141.59. The city objects to the motion, arguing, in essence, that  
10 LUBA erred in determining that the city’s decision was outside the range of  
11 discretion allowed the city under the Eugene Code, because the city was within  
12 its discretion to apply the 19 Lot Rule to deny the application. According to the  
13 city, if the decision was outside the range of any discretion allowed the city, it  
14 is the limited range of discretion under the needed housing statutes. The city  
15 argues that, therefore, LUBA erred in reversing the decision under ORS  
16 197.835(10)(a)(A).

17       We reject the city’s argument. The city’s objection is in essence an  
18 impermissible collateral attack on our decision that the city’s decision to rely  
19 on the 19 Lot Rule was outside the range of its discretion under the Eugene  
20 Code. Our decision was subsequently affirmed by the Court of Appeals, and it

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<sup>1</sup> The city did not respond in its brief or at oral argument to petitioners’ requested relief.

1 is also the law of the case. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678  
2 (1992).

3       ORS 197.835(10)(b) is phrased in mandatory terms, and requires that if  
4 LUBA reverses a local government decision to deny an application and orders  
5 the local government to approve the application under ORS 197.835(10)(a),  
6 LUBA must award attorney fees to the applicant against the city. “[A]ttorney  
7 fees,’ under ORS 197.835(10)(b), means the reasonable value of legal services  
8 provided by an attorney that are related to the applicant’s appeal of a local  
9 government decision to LUBA.” *Stewart v. City of Salem*, 240 Or App 466,  
10 473, 247 P3d 763 (2011). Petitioners seek an award of attorney fees in the  
11 amount of \$16,141.59. The city does not contest the amount of attorney fees  
12 petitioners seek. While we independently review attorney fee statements for  
13 reasonableness, the failure of an opposing party to contest such statements is at  
14 least some indication that the attorney fees sought are reasonable. *See 6710*  
15 *LLC v. City of Portland*, 41 Or LUBA 608, 611-12 (2002) (discussing  
16 reasonable hourly rates and reasonable amount of time to pursue a LUBA  
17 appeal); *7th Street Station v. City of Corvallis*, 55 Or LUBA 732, 734 (2008).  
18 Petitioners’ attorneys submitted a detailed statement describing the tasks they  
19 performed and the time they spent on the appeal, and seek \$16,141.59 in  
20 attorney fees. The attorney fees are reasonable, and we award the fees  
21 requested in the amount of \$16,141.59.

1 **COSTS**

2           Petitioners move for an award of the cost of the filing fee, in the amount  
3 of \$200. Petitioners are awarded the cost of their filing fee, in the amount of  
4 \$200, payable by the city. OAR 661-010-0075(1)(b)(A).

5           The Board will return petitioners' \$200 deposit for costs. OAR 661-010-  
6 0075(1)(d).

7           Dated this 21<sup>st</sup> day of December, 2016.

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Melissa M. Ryan  
Board Member