

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

3
4 MJAI OREGON 5, LLC,
5 *Petitioner,*

6
7 vs.

8
9 LINN COUNTY,
10 *Respondent.*

11
12 LUBA No. 2018-096

13
14 ORDER

15 Petitioner appealed a decision by the board of county commissioners
16 denying petitioner’s application for site plan approval for indoor and outdoor
17 marijuana production on land zoned for exclusive farm use (EFU). Petitioner
18 requested that LUBA reverse the county’s decision and grant the application,
19 pursuant to ORS 197.835(10), which provides, in part:

20 “(a) The board shall reverse a local government decision and order
21 the local government to grant approval of an application for
22 development denied by the local government if the board
23 finds:

24 “(A) Based on the evidence in the record, that the local
25 government decision is outside the range of discretion
26 allowed the local government under its comprehensive
27 plan and implementing ordinances; or

28 “* * * * *

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

1 In our final opinion and order, we agreed with petitioner that the county
2 applied standards not contained in the Linn County Code (LC), improperly
3 construed the law, and acted outside the range of discretion allowed under the
4 LC, and therefore rendered a decision prohibited as a matter of law. We reversed
5 the county's decision to deny the application and ordered it to approve
6 petitioner's application. *MJAI Oregon 5, LLC v. Linn County*, __ Or LUBA __
7 (LUBA No 2018-096, Nov 13, 2018).

8 **MOTION FOR ATTORNEY FEES**

9 An award of attorney fees under ORS 197.835(10)(b) is mandatory. If
10 LUBA reverses a local government decision to deny an application and orders
11 the local government to approve the application under ORS 197.835(10)(a),
12 LUBA must award attorney fees to the applicant against the county. In awarding
13 attorney fees pursuant to ORS 197.835(10)(b), although the award is mandatory,
14 as noted, LUBA is afforded the discretion to determine the amount of attorney
15 fees that is reasonable under the specific facts of the case. *Young v. City of Sandy*,
16 33 Or LUBA 817, 819 (1997). LUBA will look to the factors listed in ORS
17 20.075(2) for guidance in determining the amount of an attorney fee award.
18 *Schaffer v. City of Turner*, 37 Or LUBA 1066, 1082 (2000).¹ We identify the
19 relevant facts and legal criteria on which we rely in determining what award of

¹ LUBA does not independently review submissions by the parties for mathematical accuracy.

1 attorney fees is reasonable. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84,
2 96, *on recons*, 327 Or 185, 957 P2d 1200 (1998) (so stating).

3 Petitioner originally moved for an award of attorney fees in the amount of
4 \$34,984.00. The county objected, arguing that petitioner was seeking to recover
5 fees for services not provided and for services rendered by petitioner’s attorney
6 outside the dates of the prosecution of the LUBA appeal, and that the overall fee
7 amount requested is unreasonable.

8 Petitioner then conceded that it mistakenly included certain billing entries
9 in its initial motion, and submitted a revised request and corrected fee statement,
10 seeking \$32,533.00 for legal services rendered. We base our decision on
11 petitioner’s motion for attorney fees on that corrected fee statement.

12 **A. Appeal Period**

13 The Court of Appeals has interpreted the phrase “attorney fees” in ORS
14 197.835(10)(b) to mean the “‘reasonable value of legal services provided by an
15 attorney that are related to the applicant’s appeal’ of a local government decision
16 to LUBA.” *Stewart v. City of Salem*, 240 Or App 466, 473, 247 P3d 763 (2011).
17 In other words, an “award of attorney fees under ORS 197.835(10)(b) must
18 necessarily relate to the prosecution of an appeal before the board.” *Id.*

19 The county argues that the prosecution of the LUBA appeal started on the
20 date that the board of county commissioners issued its decision, July 17, 2018,
21 and ended on the date that LUBA issued our final opinion and order, November
22 13, 2018. Petitioner replies that legal work outside those dates is related to the

1 LUBA appeal. For example, before the board of county commissioners issued its
2 decision, petitioner’s attorney analyzed the planning commission decision and
3 evaluated petitioner’s chances of success on appeal. Petitioner’s attorney
4 prepared the motion for attorney fees after receiving LUBA’s decision.

5 Fees that “necessarily relate” to petitioner’s prosecution of the LUBA
6 appeal generally start with the final local government decision. *Stewart*, 240 Or
7 App at 473. Differently, fees that necessarily relate to the LUBA appeal include
8 legal work past the date of LUBA’s final decision, such as preparing a motion for
9 costs and attorney fees. *Strawn v. Famers Ins. Co. of Oregon*, 233 Or App 401,
10 425–26, 226 P3d 86, 100 (2010) (“[T]he process of litigating the fee petition for
11 appellate work is properly considered part of the appeal.”).

12 Accordingly, in assessing reasonableness of fees we consider the fees
13 incurred from July 17, 2018 forward, and we deduct \$7,574.50 from the stated
14 total of \$32,533, for the fees incurred prior to July 17, 2018.

15 **B. Reasonableness**

16 The burden is on the party seeking the attorney fees to establish that the
17 requested rates are reasonable. *6710 LLC v. City of Portland*, 41 Or LUBA 608,
18 611 (2002). In determining the amount of attorney fees, we consider the time and
19 labor required in the proceeding, the novelty and difficulty of the questions
20 involved in the proceeding, the skill needed to properly perform the legal
21 services, the fee customarily charged in the locality for similar legal services, and

1 the experience, reputation and ability of the attorney performing the services.
2 ORS 20.075(2).

3 **1. Time**

4 The county argues that the overall number of hours petitioner’s counsel
5 spent on the LUBA appeal were excessive based upon the “relative lack of factual
6 or legal complexity” involved. Response to Motion for Attorney Fees 4. The
7 county specifically objects to the amount petitioner charged for the filing of the
8 Notice of Intent to Appeal (NITA) and the amount of time charged in preparation
9 for oral argument. Response to Motion for Attorney Fees 5–6.

10 Petitioner responds that the matter presented in the appeal was a matter of
11 first impression: no LUBA decision had previously addressed the code provisions
12 at issue here, LC 940.400(A)(5) and LC 940.400(A)(9); nor has any LUBA
13 opinion addressed similar marijuana code provisions in similar circumstances.

14 Using petitioner’s corrected statement, we have analyzed petitioner’s
15 attorney fees and find that from July 17, 2018 forward, petitioner’s counsel seeks
16 to recover fees generated for 108.9 hours of legal services. Based upon the novel
17 legal issues in this matter, including the complex interface of state and county
18 marijuana regulations with land use law, we agree with petitioner that 108.9 hours
19 is a reasonable amount of time to have spent in pursuing this LUBA appeal.
20 *Stewart*, 63 Or LUBA 555, 556-57 (2011) (41.3 hours found reasonable); *7th*
21 *Street Station v. City of Corvallis*, 55 Or LUBA 732 (2008) (67 hours found

1 reasonable); *Kahn v. Canfield*, 330 Or 10, 14-15, 998 P2d 651 (2000) (107 hours
2 for a 35-page appellate response brief not *per se* unreasonable).

3 **2. Rates**

4 Next, the county argues that the attorney fees sought by petitioner are not
5 reasonable based upon the hourly rates charged. One of the factors we consider
6 in determining whether the attorney fees sought are reasonable is the “fee
7 customarily charged in the locality for similar legal services.” *6710 LLC v. City*
8 *of Portland*, 41 Or LUBA 608, 611 (2002) (citing ORS 20.075(2)(c)). The
9 Oregon State Bar Economic Survey (2017) (the 2017 Survey) describes various
10 billing rates throughout the state based upon years of experience and practice area
11 and is an “accurate indicator of fees customarily charged in a local community.”
12 41 Or LUBA 608, 612. As petitioner points out, according to the 2017 Survey,
13 the average rate per hour in 2017 for land use attorneys practicing in the
14 downtown Portland private bar (where petitioner’s attorneys practice) was \$398,
15 and \$278 in the lower Willamette Valley (including Linn County). According to
16 petitioner’s statement of costs, petitioner’s partner hourly rate appears to be \$475,
17 with an associate hourly rate of \$240 to \$295, and a paralegal hourly rate of
18 \$150/hour. As the county calculated, petitioner’s counsel charged an average of
19 \$272.66 over the entire LUBA appeal period. Response to Motion for Attorney
20 Fees 4. Those hourly rates are reasonable.

21 Petitioner’s motion for attorney fees is hereby partially granted. The
22 county is hereby ordered to pay petitioner’s attorney fees commencing on July

1 17, 2018, which in this matter are in the amount of \$24,958.50 (\$32,533 minus
2 \$7,574.50).

3 **COSTS**

4 Petitioner originally filed a cost bill requesting an award in the amount of
5 \$400. The county objected that petitioner may only be awarded its cost of the
6 filing fee, which is \$200. *See* OAR 661-010-0075(1)(a)(A) (“If the petitioner is
7 the prevailing party, the petitioner may be awarded the cost of the filing fee.”).
8 Petitioner amended its cost bill, requesting an award of \$200 for its filing fee.
9 Petitioner is awarded its filing fee in the amount of \$200, to be paid by the county.
10 The Board will return petitioner’s \$200 for costs. OAR 661-010-0075(1)(d).

11 Dated this 16th day of August, 2019.
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15 _____
16 H. M. Zamudio
Board Member