

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

3
4 LEGACY DEVELOPMENT GROUP, INC.,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF THE DALLES,
10 *Respondent,*

11
12 and

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14 DENISE LYNNE DIETRICH-BOKUM,
15 ROBERT CLAYTON BOKUM,
16 GARY GINGRICH, TERRI JO JESTER GINGRICH,
17 DAMON ROLLA HULIT, and
18 ROBERTA KAY WYMORE-HULIT,
19 *Intervenors-Respondents.*

20
21 LUBA No. 2020-099

22
23 ORDER

24 **BACKGROUND**

25 In *Legacy Development Group, Inc. v. City of The Dalles*, ___ Or LUBA
26 ___ (LUBA No 2020-099, Feb 24, 2021), petitioner appealed the city council’s
27 denial of its application for a 72-lot subdivision to include 83 dwellings and a
28 community park. Petitioner argued that the four provisions of The Dalles
29 Municipal Code (TDMC) on which the city council relied to deny its application
30 failed to satisfy the statutory requirement in ORS 197.307(4) that the city apply
31 only “clear and objective” standards to an application for housing. We agreed
32 with petitioner that none of the four TDMC provisions on which the city council

1 relied to deny the application satisfied the ORS 197.307(4) requirement that the
2 city apply only “clear and objective” standards.

3 In the petition for review, petitioner requested that LUBA reverse the
4 decision and order the city to approve the application. Petition for Review 32.
5 We agreed with petitioner that the city’s decision to deny the application was
6 outside the range of discretion allowed the city under its comprehensive plan and
7 implementing ordinances, and we reversed the city’s decision and ordered it to
8 approve the application. ORS 197.835(10)(a)(A). Because we sustained
9 petitioner’s first assignment of error and reversed the decision, we did not address
10 the second assignment of error that argued that the city committed a procedural
11 error that prejudiced petitioner’s substantial rights or the third assignment of error
12 that argued that the city’s decision violated the Fifth Amendment to the United
13 States Constitution.

14 **MOTION FOR ATTORNEY FEES**

15 ORS 197.835(10)(b) provides, “If the board * * * reverse[s] the decision
16 and orders the local government to grant approval of the application, the board
17 shall award attorney fees to the applicant and against the local government.”
18 Petitioner moves for an award of attorney fees in the amount of \$28,460. An
19 award of attorney fees under ORS 197.835(10)(b) is mandatory. If LUBA
20 reverses a local government decision to deny an application and orders the local
21 government to approve the application under ORS 197.835(10)(a), LUBA must
22 award attorney fees to the applicant against the local government.

1 In awarding attorney fees pursuant to ORS 197.835(10)(b), although the
2 award is mandatory, LUBA is afforded the discretion to determine the amount of
3 attorney fees that is reasonable under the specific facts of the case. *Young v. City*
4 *of Sandy*, 33 Or LUBA 817, 819 (1997). Intervenors-respondents (intervenors)
5 and the city each object to petitioner’s motion.

6 **A. Intervenors Are Not Liable for an Attorney Fee Award under**
7 **ORS 197.835(10)(b)**

8 Intervenors respond to the motion for attorney fees, noting that city did not
9 participate to defend its decision on appeal and observing that any award of
10 attorney fees under ORS 197.835(10)(b) is “against the local government.” Thus,
11 intervenors argue that they may not be held liable for any award of fees under
12 ORS 197.835(10)(b). We agree. The statute is clear that an award of fees under
13 ORS 197.835(10)(b) is “against the local government.”

14 **B. Amount of Fees**

15 The city objects to the amount of fees sought in petitioner’s motion.

16 **1. Fees for Non-Attorney Services**

17 The fees sought by petitioner include \$20,295 in fees for 73.8 hours of
18 services that were provided by a land use planner who is not an attorney. The city
19 argues that those fees should be reduced by \$11,467.50 because fees incurred by
20 engaging the services of a land use planner are not fees for “legal services” and
21 are therefore not recoverable under the plain meaning of the phrase “attorney

1 fees” in ORS 197.835(10)(b), as construed by the Court of Appeals in *Stewart v.*
2 *City of Salem*, 240 Or App 466, 247 P3d 763 (2011).¹

3 We agree. In *Stewart*, citing the Oregon Supreme Court’s decision in *Colby*
4 *v. Gunson*, 349 Or 1, 238 P3d 374 (2010), the Court of Appeals reviewed the
5 meaning of the phrase “attorney fees,” as used in ORS 197.830(10)(b), and
6 concluded that it means “the reasonable value of legal services provided by an
7 attorney that are related to the applicant’s appeal.” *Stewart*, 240 Or App at 473.
8 Accordingly, the land use planner fees are reduced by the amount requested by
9 the city, \$11,467.50.²

10 2. Hourly Rate for Lead Attorney

11 Next, the city argues that the rate of \$465 per hour charged by petitioner’s
12 lead attorney is not reasonable because it is “well above” the median rate
13 customarily charged in the Tri-County area (Multnomah, Washington, and
14 Clackamas Counties outside of downtown Portland) for similar services.³
15 Response to Cost Bill and Motion for Attorney Fees 5. One of the factors we

¹ The city’s response is confusing and includes requests for an award of “not more than \$14,867.50” and, in the alternative, “not more than * * * \$9,679.50.” Response to Cost Bill and Motion for Attorney Fees 7.

² The city does not argue that the fees included in petitioner’s motion should be reduced by the full \$20,295 attributable to the land use planner.

³ Petitioner’s lead attorney is based in Clark County, Washington. The city’s response assumes that rates in Clark County, Washington, are similar to rates in the Tri-County area. Response to Cost Bill and Motion for Attorney Fees 5.

1 consider in determining the amount of an attorney fee award is the fee
2 customarily charged in the locality for similar legal services. *6710 LLC v. City of*
3 *Portland*, 41 Or LUBA 608, 611 (2002) (citing ORS 20.075(2)(c)).

4 In its response, the city cites the Oregon State Bar 2017 Economic Survey
5 (the 2017 Survey) and states that the 2017 Survey lists the median rate for an
6 attorney practicing land use and real estate law in the Tri-County area with years
7 of experience comparable to petitioner's lead attorney as \$275 per hour.
8 Response to Cost Bill and Motion for Attorney Fees 5. The city argues that,
9 adjusting for inflation after 2017 at an annual rate of five percent, a reasonable
10 rate for attorney services is \$335 per hour. We have previously relied on Oregon
11 State Bar economic surveys as an accurate indicator of the fees customarily
12 charged in a community. *Van Dyke v. Yamhill County*, ___ Or LUBA ___, ___
13 (LUBA Nos 2020-032/033, Order, Apr 1, 2021) (slip op at 17-18); *6710 LLC*, 41
14 Or LUBA at 612.

15 The burden is on the party seeking the attorney fees to establish that the
16 requested rates are reasonable, even in the absence of an objection. *6710 LLC*, 41
17 Or LUBA at 611. Petitioner's statements that \$465 per hour is their lead
18 attorney's customary rate and that their lead attorney has chaired the government
19 relations committee for a home builders association do not explain why the rate
20 charged by their lead attorney is reasonable. Absent any assistance from
21 petitioner, we agree with the city that petitioner has not established that a rate that
22 is nearly 40 percent higher than the median rate for an attorney practicing land

1 use and real estate law in the Tri-County area is reasonable.⁴ Accordingly,
2 petitioner is awarded fees for the 13.2 hours that their lead attorney spent on the
3 appeal, at a rate of \$335 per hour.⁵

4 In sum, petitioner’s motion for attorney fees is partially granted, as
5 follows:

6	Lead Attorney	\$4,422.00 (13.2 hours at \$335 per hour)
7	Other Attorney	\$162.50
8	Other Attorney	\$105.00
9	Paralegal	\$4,522.50 ⁶
10	Land Use Planner	\$8,827.50 (\$20,295 minus \$11,467.50)
11	Total	\$18,039.50

⁴ Petitioner asserts that “[t]he total fees are \$31,223 for 108 billable hours, for an average rate of \$289” and argues that that average rate is “consistent with the Portland metro area.” Cost Bill and Motion for Attorney Fees 2. However, petitioner does not otherwise develop that argument or argue that the average rate for all attorney and non-attorney services in an appeal is relevant to LUBA’s assessment of the reasonableness of the rate that petitioner’s lead attorney actually charged for services.

⁵ Petitioner’s detailed statement of attorney fees includes \$267.50 for the services of two other attorneys in the law firm, to which the city does not object.

⁶ Although the city’s response includes a request for a reduction in the fees for paralegal services based on its argument that the *total* amount of time spent by petitioner’s law firm on the appeal (108 hours) is unreasonable, the city does not assert any independent basis for us to reject or reduce the amount of fees incurred for paralegal services or argue that 20.10 hours for paralegal services is an unreasonable amount of time for the appeal.

1 **COST BILL**

2 Petitioner, the prevailing party in this appeal, filed a cost bill seeking an
3 award of its filing fee in the amount of \$200. Petitioner is awarded the cost of its
4 filing fee in the amount of \$200, payable by the city and intervenors. The Board
5 will return petitioner’s \$200 deposit for costs.

6 Dated this 17th day of May 2021.

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Melissa M. Ryan
Board Member