

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

3  
4 TONY NIETO and TORY NIETO,  
5 *Petitioners,*

6  
7 vs.

8  
9 CITY OF TALENT,  
10 *Respondent,*

11  
12 and

13  
14 VERNON J. DAVIS, MARY A. TSUI,  
15 LAURIE E. CUDDY, and FOREST L. DAVIS,  
16 *Intervenors-Respondents.*

17  
18 LUBA No. 2020-100

19  
20 ORDER

21 **BACKGROUND**

22 In *Nieto v. City of Talent*, \_\_\_ Or LUBA \_\_\_ (LUBA No 2020-100, Mar  
23 10, 2021), petitioners appealed the city’s denial of their application to subdivide  
24 their 26.58-acre property into a 49-lot residential subdivision. Petitioners argued  
25 that the single basis for the hearings officer’s denial of its subdivision application,  
26 failure to satisfy Talent Municipal Code (TMC) 17.10.060(F), was barred by  
27 ORS 197.307(4), a portion of the needed housing statute that prohibits the city  
28 from applying standards that are not “clear and objective” to applications for the  
29 development of housing. We agreed with petitioners that the city’s decision was

1 barred by ORS 197.307(4) because TMC 17.10.060(F) is not a “clear and  
2 objective” standard.

3 Petitioners requested that LUBA “reverse the Decision and order the City  
4 to approve the Subdivision as presented in the Application and as recommended  
5 by City Staff.” Petition for Review 37. Pursuant to ORS 197.835(10)(a)(A), we  
6 reversed the city’s decision as “outside the range of discretion allowed the [city]  
7 under its comprehensive plan and implementing ordinances” and ordered the city  
8 to approve the application.<sup>1</sup> In doing so, we did not address petitioners’ other  
9 assignments of error, some of which argued that the city’s decision was an  
10 unconstitutional taking of petitioners’ property.

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<sup>1</sup> 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; or

“\* \* \* \* \*

“(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 **MOTION FOR ATTORNEY FEES**

2 Petitioners move for an award of attorney fees in the amount of  
3 \$18,269.75. An award of attorney fees under ORS 197.835(10)(b) is mandatory.  
4 If LUBA reverses a local government decision denying 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 local government.

7 In awarding attorney fees pursuant to ORS 197.835(10)(b), although the  
8 award is mandatory, LUBA is afforded the discretion to determine the amount of  
9 attorney fees that is reasonable under the specific facts of the case. *Young v. City*  
10 *of Sandy*, 33 Or LUBA 817, 819 (1997). LUBA will look to the factors listed in  
11 ORS 20.075(2) for guidance in determining the amount of an attorney fee award.  
12 *Schaffer v. City of Turner*, 37 Or LUBA 1066, 1072 (2000). We identify the  
13 relevant facts and legal criteria on which we rely in determining what award of  
14 attorney fees is reasonable. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or 84,  
15 96, *adh'd to on recons*, 327 Or 185, 957 P2d 1200 (1998) (so stating).

16 The city objects to petitioners' motion on procedural and substantive  
17 grounds.<sup>2</sup>

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<sup>2</sup> Some of the city's objections argue that petitioners failed to properly plead reversal of the city's decision under ORS 197.835(10)(a)(A). Response to Motion for Attorney Fees and Cost Bill 4-7. We reject those objections for two reasons.

First, as noted, petitioners requested that that LUBA "reverse the Decision and order the City to approve the Subdivision as presented in the Application and

1           **A.     Timing of Motion**

2           First, the city argues that LUBA should deny petitioners’ motion for  
3 attorney fees because it was not filed within the time set in OAR 661-010-  
4 0075(1)(a), which provides that a motion for attorney fees must be filed within  
5 14 days of the Board’s final opinion and order.

6           Petitioners concede that the motion was filed one day late but respond that  
7 LUBA should treat the untimeliness as a “technical violation” pursuant to OAR  
8 661-010-0005 and allow the motion.<sup>3</sup> We agree with petitioners. *See Schatz v.*

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as recommended by City Staff.” Petition for Review 37. Using the operative language of ORS 197.835(10)(a)(A) is sufficient to plead and request the remedy of reversal of the decision with an order to the city to approve the application.

Second, the objections are, in essence, an impermissible collateral attack on our final opinion and order that determined that the city’s decision was outside the range of discretion allowed it under the TMC. Our decision was not appealed, and it is the law of the case. *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) *see also Walter v. City of Eugene*, 74 Or LUBA 671 (2016) (rejecting a city’s objection to a motion for attorney fees under ORS 197.835(10)(b) that was, in essence, an impermissible collateral attack on LUBA’s final opinion and order).

<sup>3</sup> OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision.”

1 *City of Jacksonville*, 21 Or LUBA 571, 571 n 1 (1991) (accepting motion for  
2 attorney fees filed two days late); *Jones v. Lane County*, 29 Or LUBA 573, 573-  
3 74 (1995) (accepting cost bill filed eight days late). The city’s substantial rights  
4 include the right to respond to petitioners’ motion, which it has done. Therefore,  
5 petitioners’ violation of OAR 661-010-0075(1)(a) does not affect our review.

6 **B. Amount of Fees**

7 The burden is on the party seeking the attorney fees to establish that the  
8 requested rates are reasonable. *6710 LLC v. City of Portland*, 41 Or LUBA 608,  
9 611 (2002). We understand the city to argue that the amount of attorney fees  
10 sought is not reasonable for three reasons.

11 First, according to the city, petitioners’ counsel may not recover fees for  
12 time spent developing arguments in the petition for review and reply brief that  
13 LUBA ultimately did not reach in its final opinion and order.<sup>4</sup> Petitioners respond  
14 that whether LUBA reached the merits of an argument included in petitioners’  
15 brief has no relevance to whether the amount of attorney fees sought is  
16 reasonable. We agree. As the Court of Appeals explained in *Stewart v. City of*  
17 *Salem*, “‘attorney fees,’ under ORS 197.835(10)(b), means the reasonable value  
18 of legal services provided by an attorney that are related to the applicant’s appeal  
19 of a local government decision to LUBA.” 240 Or App 466, 473, 247 P3d 763

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<sup>4</sup> As noted, LUBA sustained petitioners’ first assignment of error and did not reach the remaining assignments of error that argued, in part, that the city’s decision was an unconstitutional taking of petitioners’ property.

1 (2011). Nothing in the statute limits attorney fees to only those that are related to  
2 issues that LUBA actually addressed in its final opinion and order. We reject the  
3 city’s argument.

4         Second, we understand the city to argue that petitioners’ fee statement  
5 lacks sufficient detail to justify the amount of fees sought. OAR 661-010-  
6 0075(1)(e)(A) requires that a motion for attorney fees include a “detailed  
7 statement of the amount of attorney fees sought.” This argument is largely  
8 derivative of the city’s first argument that petitioners may not be awarded fees  
9 for arguments made in connection with issues that LUBA did not reach and, for  
10 the reasons explained above, we reject it.

11         Moreover, we agree with petitioners that their statement satisfies OAR  
12 661-010-0075(1)(e)(A). Petitioners’ statement includes entries such as “Work  
13 with [redacted] to outline brief and develop strategy (1.5);” “Continue drafting  
14 brief (1.5);” and “Review and Analyze Response Brief and provide summary to  
15 client team regarding same (1.5).” Motion for Attorney Fees and Cost Bill,  
16 Attachment 1 at 5-6. Such entries are more than sufficient to meet the  
17 requirements of the rule.

18         Third, the city objects to the following charges included in the motion for  
19 attorney fees: (1) petitioners’ \$400 filing fee and deposit for costs and (2) charges  
20 that seek reimbursement for “computer legal research.” Petitioners respond that  
21 the total amount of attorney fees requested, \$18,269.75, does not include the \$400

1 filing fee and deposit for costs. Based on that response, we reject the city’s  
2 argument.

3 Petitioners also respond that charges for computer legal research are a  
4 reasonable and typical part of the legal services provided by an attorney and  
5 petitioners should be able to be reimbursed for those charges. However, we agree  
6 with the city that ORS 197.835(10)(b) does not authorize recovery of charges  
7 incurred for “computer legal research.”

8 ORS 197.835(10)(b) authorizes recovery of “attorney fees” and does not  
9 mention expenses. In this respect, it is unlike ORS 197.830(15)(b), which  
10 explicitly authorizes recovery of “reasonable attorney fees *and expenses.*”  
11 (Emphasis added.) Further, ORCP 68A, cited by the Court of Appeals in *Stewart*  
12 as context for interpreting ORS 197.835(10)(b), also distinguishes between  
13 “attorney fees” and “costs and disbursements.” Accordingly, we deduct  
14 \$2,882.25 for “computer legal research” from the stated total of \$18,269.75, for  
15 a total award of \$15,387.50.

## 16 **COSTS**

17 Petitioners, the prevailing parties in this appeal, filed a cost bill seeking an  
18 award of their filing fee in the amount of \$200. Petitioners are awarded the cost  
19 of their filing fee in the amount of \$200, payable by the city and intervenors-  
20 respondents. The Board shall return petitioners’ \$200 deposit for costs.

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1 Dated this 10th day of May 2021.

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Melissa M. Ryan

7 Board Member