

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

3
4 JEFFREY HENDRICKSON,
5 *Petitioner,*

6
7 vs.

8
9 LANE COUNTY,
10 *Respondent,*

11
12 and

13
14 LANDWATCH LANE COUNTY,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-117

18
19 ORDER

20 **BACKGROUND**

21 Petitioner appealed a decision by the county hearings official denying
22 petitioner’s application for a temporary hardship dwelling on land zoned for
23 exclusive farm use (EFU). Petitioner requested that LUBA reverse the county’s
24 decision and grant the application, pursuant to ORS 197.835(10), which provides,
25 in part:

26 “(a) The board shall reverse a local government decision and order
27 the local government to grant approval of an application for
28 development denied by the local government if the board
29 finds:

30 “(A) Based on the evidence in the record, that the local
31 government decision is outside the range of discretion

1 allowed the local government under its comprehensive
2 plan and implementing ordinances; or

3 “* * * * *

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

8 In our final opinion and order, we agreed with petitioner that the county
9 applied standards “outside the range of discretion allowed the local government
10 under its comprehensive plan and implementing ordinances.” ORS
11 197.835(10)(a)(A); *Hendrickson v. Lane County*, ___ Or LUBA ___, ___ n 6
12 (LUBA No 2021-117, Apr 11, 2022) (slip op at 14 n 6). We reversed the county’s
13 decision to deny the application and ordered it to approve petitioner’s application.
14 *Id.* at ___ (slip op at 15).

15 **MOTION FOR ATTORNEY FEES**

16 An award of attorney fees under ORS 197.835(10)(b) is mandatory. If
17 LUBA reverses a local government decision to deny an application and orders
18 the local government to approve the application under ORS 197.835(10)(a),
19 LUBA must award attorney fees to the applicant against the local government. In
20 awarding attorney fees pursuant to ORS 197.835(10)(b), although the award is
21 mandatory, as noted, LUBA is afforded the discretion to determine the amount
22 of attorney fees that is reasonable under the specific facts of the case. *Young v.*
23 *City of Sandy*, 33 Or LUBA 817, 819 (1997). LUBA will look to the factors listed
24 in ORS 20.075(2) for guidance in determining the amount of an attorney fee

1 award. *Schaffer v. City of Turner*, 37 Or LUBA 1066, 1072 (2000).¹ We identify
2 the relevant facts and legal criteria on which we rely in determining what award
3 of attorney fees is reasonable. *See McCarthy v. Oregon Freeze Dry, Inc.*, 327 Or
4 84, 96, *on recons.*, 327 Or 185, 957 P2d 1200 (1998) (so stating).

5 Petitioner has moved for an award of attorney fees in the amount of
6 \$31,540.00. The county filed a response stating that the county has no objection.²

7 **A. Appeal Period**

8 The Court of Appeals has interpreted the phrase “attorney fees” in ORS
9 197.835(10)(b) to mean the “reasonable value of legal services provided by an
10 attorney that are related to the applicant’s appeal of a local government decision
11 to LUBA.” *Stewart v. City of Salem*, 240 Or App 466, 473, 247 P3d 763 (2011).
12 In other words, “an award of attorney fees under ORS 197.835(10)(b) must
13 necessarily relate to the prosecution of an appeal before the board.” *Id.* Fees that
14 “necessarily relate” to petitioner’s prosecution of the LUBA appeal generally
15 start with the final local government decision. *Stewart*, 240 Or App at 473; *MJAI*

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

² Intervenor-respondent (intervenor) filed a response stating that fee awards under ORS 197.835(10)(b) are limited to those “against the local government.” We have previously acknowledged that point. *See Legacy Development Group, Inc. v. City of the Dalles*, ___ Or LUBA ___, ___ (Order, LUBA No 2020-099, May 17, 2021) (slip op at 3) (an award of fees under ORS 197.835(10)(b) is “against the local government”; thus, intervenor is not liable for an award of fees under ORS 197.835(10)(b)).

1 *Oregon 5, LLC v. Linn County*, ___ Or LUBA ___ (Order, LUBA No 2018-096,
2 Aug 16, 2019). Differently, fees that necessarily relate to the LUBA appeal
3 include legal work past the date of LUBA’s final decision, such as preparing a
4 motion for costs and attorney fees. *Strawn v. Famers Ins. Co. of Oregon*, 233 Or
5 App 401, 425-26, 226 P3d 86 (2010) (“[T]he process of litigating the fee petition
6 for appellate work is properly considered part of the appeal.”).

7 In *Stewart v. City of Salem*, which petitioner cites, we explained that “only
8 legal expenses necessarily related to the appeal of the challenged decision to
9 LUBA are recoverable under ORS 197.835(10)(b), and that any expenses
10 incurred to assist petitioner to persuade the city council to rule favorably on his
11 pending application cannot be recovered.” 63 Or LUBA 555, 557 (2011).
12 However, we awarded fees incurred in anticipation of an appeal to LUBA after
13 the city council’s tentative oral decision to deny the application but before the
14 final decision because those fees were “clearly related to an anticipated appeal to
15 LUBA, involving research of LUBA’s administrative rules, editing ‘Petitioners
16 Brief,’ and review and editing of the ‘Notice of Appeal.’” *Id.* at 558. We
17 concluded that it was reasonable for petitioner to authorize his attorney to
18 research and prepare for an appeal to LUBA of the anticipated written decision,
19 and that such expenses are recoverable under ORS 197.835(10)(b).

20 In *MJAI*, the challenged decision was a decision by the board of county
21 commissioners. After prevailing at LUBA, the petitioner sought to recover fees
22 incurred before the board of county commissioners issued its decision for time

1 that the petitioner's attorney spent analyzing the planning commission decision
2 and evaluated petitioner's chances of success on appeal. The county objected to
3 those fees and argued that the prosecution of the LUBA appeal started on the date
4 that the board of county commissioners issued its decision. We agreed with the
5 county.

6 In the local proceeding in this appeal, the planning director approved the
7 application and intervenor appealed the planning director's decision to the
8 hearings official. On September 16, 2021, the hearings official held a hearing and
9 subsequently denied the application in a decision dated September 28, 2021.
10 After the initial hearings official decision, petitioner engaged their attorneys for
11 assistance at LUBA. Petitioner's attorneys examined the decision and the record
12 and decided to seek local reconsideration of the hearings official's decision. The
13 hearings official granted the reconsideration request and again denied the
14 application. Petitioner appealed to LUBA and prevailed.

15 Petitioner argues that the \$5,160 of fees charged for work on hearings
16 official reconsideration and done prior to the final challenged decision are
17 recoverable at LUBA because (1) at the time petitioner filed for hearings official
18 reconsideration, petitioner had already decided that they would appeal to LUBA
19 and (2) the legal research in support of reconsideration done related to issue
20 preservation and other issues briefed at LUBA, thus it necessarily relates to
21 petitioner's prosecution of the LUBA appeal.

1 In most instances, the issues litigated in the local proceeding will be the
2 same issues that are raised in a LUBA appeal. In most instances, an issue must
3 be raised in the local proceeding in order to ensure preservation for an appeal. In
4 many instances, a party knows in advance of a final local government decision
5 whether and under what circumstances they are likely to pursue an appeal to
6 LUBA. Thus, under the standard that petitioner proposes that we adopt, most, if
7 not all, attorney fees incurred in the local proceeding would be recoverable under
8 ORS 197.835(10)(b). We do not believe that is what the legislature intended in
9 providing for mandatory recovery of attorney fees in a LUBA proceeding under
10 ORS 197.835(10)(b). Accordingly, we do not award the \$5,160 in fees that
11 petitioner incurred in seeking reconsideration of the hearings official’s decision
12 during the local proceeding.

13 **B. Reasonableness**

14 The burden is on the party seeking the attorney fees to establish that the
15 requested rates are reasonable. *Hollander Hospitality v. City of Astoria*, ___ Or
16 LUBA ___, ___ (Order, LUBA No 2021-061, Mar 21, 2022) (slip op at 2);
17 *Legacy Development Group, Inc. v. City of The Dalles*, ___ Or LUBA ___, ___
18 (Order, LUBA No 2020-099, May 17, 2021)) (slip op at 5); *Nieto v. City of*
19 *Talent*, ___ Or LUBA ___, ___ (Order, LUBA No 2020-100, May 10, 2021) (slip
20 op at 5). In determining the amount of attorney fees, we consider the time and
21 labor required in the proceeding, the novelty and difficulty of the questions
22 involved in the proceeding, the skill needed to properly perform the legal

1 services, the fee customarily charged in the locality for similar legal services, and
2 the experience, reputation, and ability of the attorney performing the services.
3 ORS 20.075(2).

4 **1. Time**

5 Excluding the time spent seeking reconsideration of the hearings official's
6 decision during the local proceeding, petitioner's counsel seeks to recover fees
7 generated for 69.1 hours of legal services, including the time spent on attorney
8 fee recovery. We agree with petitioner that 69.1 hours is a reasonable amount of
9 time to have spent in pursuing this LUBA appeal. *MJAI Oregon 5, LLC*, ___ Or
10 LUBA at ___ (slip op at 5) (108.9 hours found reasonable); *Stewart*, 63 Or LUBA
11 at 556-57 (41.3 hours found reasonable).

12 **2. Rates**

13 Petitioner's primary attorney billed for this matter at an hourly rate of
14 \$400. Another associated attorney billed at an hourly rate of \$300. Motion for
15 Attorney Fees 5.

16 One of the factors we consider in determining whether the attorney fees
17 sought are reasonable is the "fee customarily charged in the locality for similar
18 legal services." *Hollander Hospitality*, ___ Or LUBA at ___ (slip op at 3) (citing
19 ORS 20.075(2)(c)); *Legacy Development Group, Inc.*, ___ Or LUBA at ___ (slip
20 op at 5). The Oregon State Bar Economic Survey (2017) (the 2017 Survey)
21 describes various billing rates throughout the state based upon years of
22 experience and practice area and is an "accurate indicator of fees customarily

1 charged in a local community.” *6710 LLC v. City of Portland*, 41 Or LUBA 608,
2 612 (2002).

3 Petitioner’s primary attorney states that they practice in the Upper
4 Willamette Valley in real estate and land use law and have more than 30 years of
5 practice experience. According to the 2017 Survey, \$250 was the median hourly
6 billing rate for the following groups of attorneys in the Upper Willamette Valley:
7 (1) all surveyed practicing attorneys; (2) attorneys specializing in real estate and
8 land use law; and (3) attorneys with over 30 years admitted to practice. Petitioner
9 asserts that, adjusted for inflation, the median rate for those categories is \$325 in
10 2022. *See Legacy Development Group, Inc.*, ___ Or LUBA at ___ (slip op at 5)
11 (concluding it is reasonable to adjust the OSB survey rate for inflation). Based
12 on the 2017 Survey, and as adjusted by petitioner for inflation, the hourly rate for
13 petitioner’s primary attorney is a bit above the 75th percentile and the hourly rate
14 for the associated attorney is below the median rate. Petitioner’s motion for
15 attorney fees included declarations explaining their primary attorney’s extensive
16 practice and expertise in land use law and a declaration from another experienced
17 land use attorney in the same geographic area who bills at \$380 an hour and
18 opines that \$400 is a reasonable rate.

19 Based on the foregoing, we conclude that the requested hourly rates are
20 reasonable for both petitioner’s attorneys.

1 **3. Pro Bono Services**

2 As petitioner points out, ORS 20.075(2) was recently amended to add the
3 consideration of whether or not the services being performed were “on a pro bono
4 basis or the award of attorney fees otherwise promotes access to justice.” ORS
5 20.075(2)(i); *see* Petitioner’s Motion for Attorney Fees 10; *see also* Or Laws
6 2021, ch 325, § 1 (amending ORS 20.025(2)). Petitioner’s attorney represented
7 petitioner at LUBA on a *pro bono* basis. Petitioner emphasizes the social utility
8 of temporary hardship dwellings for the residents of the county and petitioner.
9 The purpose of the temporary hardship residence provision is to provide
10 temporary relief to a resident or a relative of a resident of EFU zoned property
11 who is experiencing a qualifying hardship. That relief is in the form of allowing
12 temporary residential use of a manufactured dwelling, recreational vehicle, or
13 existing building in conjunction with an existing dwelling on a unit of property
14 zoned EFU. We take the *pro bono* status of the petitioner’s representation in this
15 matter into consideration when weighing the reasonableness of the fees
16 requested.

17 Petitioner’s motion for attorney fees is hereby granted, in part. The county
18 is hereby ordered to pay petitioner’s attorney fees in the amount of \$26,380.00
19 (\$31,540 minus \$5,160).

20 **COSTS**

21 Petitioner may be awarded its cost of the filing fee, which is \$300. *See*
22 OAR 661-010-0075(1)(b)(A) (“If the petitioner is the prevailing party, the

1 petitioner may be awarded the cost of the filing fee.”). Petitioner requested an
2 award of \$300 for its filing fee. Petitioner is awarded its filing fee in the amount
3 of \$300, to be paid by the county and intervenor.

4 Dated this 18th day of August 2022.

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H. M. Zamudio
Board Chair