Summary of Attorney Fee Awards

2020-2022

ORS 197.830(19)(d) requires LUBA to report a **"**list of reviews, and a brief summary of the circumstances in each review, under which the board exercises its discretion to require a losing party to pay the attorney fees of the prevailing party."

There are two statutes that govern how and when LUBA can or shall award fees. Below are summaries for the years 2020 through 2022, organized by the statute that applied.

A. ORS 197.830(15)(b)

(15) Upon entry of its final order, the board:

(a) May, in its discretion, award costs to the prevailing party including the cost of preparation of the record if the prevailing party is the local government, special district or state agency whose decision is under review.

(b) Shall award reasonable attorney fees and expenses to the prevailing party against any other party who the board finds presented a position or filed any motion without probable cause to believe the position or motion was well-founded in law or on factually supported information.

(c) Shall award costs and attorney fees to a party as provided in ORS 197.843.

2020 - NONE

2021

1. *Van Dyke v. Yamhill County* (2021) (*Van Dyke IV*), ___ Or LUBA ___ (Order, LUBA Nos 202-032/033, Apr 1, 2021)

This was an appeal that was related to three previous LUBA appeals. The central issue throughout the appeals was a county proposal to develop a recreational trail in the EFU zone in the location of a former railroad line. The decisions appealed in *Van Dyke IV* were a board of county commissioners resolution authorizing the county to enter into a construction contract to construct a portion of the recreational trail involving a bridge over Stag Hollow Creek, and the

contract itself which authorized immediate commencement of construction. Petitioners, farmers with property adjacent to the trail, appealed the resolution and contract, arguing that they authorized a use that had not yet received conditional use approval. In its response to the petition for review and in a motion to dismiss the appeal, the county argued that no conditional use permit was required because the trail qualified as a fire service facility, a use allowed outright in the EFU zone. Petitioners argued, and LUBA agreed, that it was not reasonable for the county to argue for the first time in its pleadings before LUBA that the trail qualified as a fire service facility. The county's response to each assignment of error in these appeals—including assignments that LUBA did not reach in the final opinion—was premised on the same unreasonable, post-hoc argument. LUBA therefore concluded that each of the county's positions was presented "without probable cause to believe that it was well-founded * * * on factually supported information." ORS 197.830(15)(b). Therefore, petitioners were entitled to attorney fees and expenses.

In looking at reasonableness, LUBA determined that the fee request was reasonable based on the rates petitioners' attorney was charging in comparison to the 2017 Oregon State Bar Economic Survey. Also relevant was the county's lack of support for their arguments that the request for fees should be denied or reduced.

An award in the amount of $$44,059.50 in attorney fees and $3,473.93 in expenses, the full amount requested, was granted.

2022

1. *Tadei v. City of Astoria* (2022), ___ Or LUBA ___ (Order, LUBA No 2021-105, Sept 6, 2022)

The city and intervenors-respondents (intervenors) were the prevailing parties in this matter. Petitioner filed a petition for review that lacked assignments of error, failed to address the findings made by the city, and developed no arguments or explanation for why the decision should be reversed or remanded. LUBA affirmed the city's decision and agreed with intervenors that "the petition for review provides no basis on which we can reverse or remand the challenged decision."

Intervenors filed a motion for attorney fees and a cost bill pursuant to ORS 197.830(15)(b). In order to award attorney fees against a non-prevailing party pursuant to ORS 197.830(15)(b), LUBA must determine that "every argument in

the entire presentation [that the non-prevailing party made] to LUBA is lacking in probable cause." In response to intervenors' motion for attorney fees, petitioner did not attempt to identify a reasonable argument that was made in their petition for review. LUBA concluded that no reasonable attorney would conclude that the arguments made by petitioner possessed merit. Therefore, intervenor was entitled to its reasonable attorney fees pursuant to ORS 197.830(15)(b).

Intervenors' motion included fee statements for two separate attorneys at two different law firms, for a total of $53,617. When looking at the reasonableness of the amount, LUBA determined that it was not reasonable, in this matter, to request fees for two attorneys, as there was no explanation for why two attorneys of such experience were needed to handle this appeal. Petitioner offered no other grounds to dispute the reasonableness of the request. Intervenors' lead counsel supported the request by referring to the 2017 Oregon State Bar Economic Survey, which, adjusted for inflation and for experience, shows the reasonableness of the rate invoiced. LUBA awarded intervenors $27,965 for the fees of the lead attorney.

2. *Riverview Meadows, LLC v. City of Nehalem* (2022) ___ Or LUBA ___ (Order, LUBA Nos 2021-124/125/126/127, Oct 13, 2022)

In these consolidated appeals, petitioners challenged a city resolution (Resolution) declaring a moratorium on new connections to the city's water system for areas located outside the city limits. Those areas were identified on a map attached to the Resolution (Moratorium Area). The Moratorium Area included properties located both inside the city's urban growth boundary (UGB) and outside the city's UGB. In the petition for review, petitioners argued, and LUBA agreed that the Resolution was a moratorium within the meaning of ORS 197.524(1), and therefore under that statute, the city was required to either "[a]dopt a public facilities strategy" or "[a]dopt a moratorium on construction or land development under ORS 197.505 to 197.540." Because it was undisputed that the city had done neither, LUBA sustained petitioners' assignment of error and invalidated the moratorium.

Petitioners filed a motion for attorney fees pursuant to ORS 197.830(15)(b). The city's sole argument in response to the petition for review was contained in a motion to dismiss that argued that LUBA lacked jurisdiction over this matter under ORS 197.540. LUBA concluded that the challenged resolution adopted a moratorium on the development of land that did not comply with ORS 197.505 to 540.

In its response to the motion for attorney fees, the city advanced a number of arguments for why a reasonable lawyer would argue that the Resolution was not a moratorium subject to LUBA's jurisdiction. However, most of those arguments were not presented in the city's motion to dismiss. The proper analysis for whether a position was supported by probable cause considers what was argued before LUBA during the proceedings, *i.e.* the city's motion to dismiss, not what is argued during a dispute over attorney fees. LUBA determined that both arguments put forward by the city that LUBA lacked jurisdiction lacked probable cause, and that petitioners were entitled to attorney fees.

Petitioners' request was supported by an itemized statement of fees incurred, with detailed descriptions for time spent. The city responded that the request was not reasonable and because the petition for review was too long and, according to the city, contained arguments "not germane" to the moratorium issue. LUBA rejected the city's arguments and agreed with petitioners that their request was reasonable. LUBA granted the the full amount requested, $44, 365. LUBA also awarded the cost of the filings fees, $1200.

B. ORS 197.835(10)(b)

(10)(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) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.

(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.**

2020 – NONE

2021

1. *Legacy Development Group Inc v. City of the Dalles* ___ Or LUBA ___ (Order, LUBA No 2020-099, May 17, 2021)

Petitioner appealed the city council's denial of its application for a 72-lot subdivision, which proposed 83 dwellings and a community park. Petitioner argued that the four provisions of The Dalles Municipal Code (TDMC) on which the city council relied to deny its application failed to satisfy the statutory requirement in ORS 197.307(4) that the city apply only "clear and objective" standards to an application for housing. LUBA agreed with petitioner that the city's decision to deny the application was outside the range of discretion allowed the city under its comprehensive plan and implementing ordinances, and reversed the city's decision and ordered it to approve the application pursuant to ORS 97.835(10)(a)(A).

Petitioner moved for an award of attorney fees in the amount of $28,460. The fees sought by petitioner included $20,295 in fees for 73.8 hours of services that were provided by a land use planner who is not an attorney. The city argued that those fees should be reduced by $11,467.50 because fees incurred by engaging the services of a land use planner are not fees for "legal services" and are therefore not recoverable under the plain meaning of the phrase "attorney fees" in ORS 197.835(10)(b), as construed by the Court of Appeals in *Stewart v. City of Salem*, 240 Or App 466, 247 P3d 763 (2011). The city also argued that the rate of $465 per hour charged by petitioner's lead attorney is not reasonable because it is "well above" the median rate customarily charged in the Tri-County area for similar services. Petitioner made unsupported statements that $465 per hour is the customary rate of their lead attorney, and that their lead attorney has chaired the government relations committee for a home builders association. LUBA determined that those statements did not explain why the rate charged by their lead attorney was reasonable. LUBA agreed with the city that petitioner had not established that a rate was reasonable where it was nearly 40 percent higher than the median rate for an attorney practicing land use and real estate law in the Tri-County area.

LUBA granted the requested attorney fees, in part. LUBA agreed that the fees incurred for a land use planner's services did not fall within the *Stewart* definition for legal services, and reduced the amount by $11,467.50 as requested by the city. LUBA also reduced the hourly fee amount to $335, the reasonable amount for an attorney in the Tri-County area as argued by the city and supported

by the 2017 Oregon State Bar Economic Survey. LUBA also allowed the request for attorney fees for two other attorneys, as the city did not object to their inclusion. Petitioners were awarded $18,039.50, plus their costs.

2. *Nieto v. City of Talent* ___ Or LUBA ___ (Order, LUBA No 2020-100, May 10, 2021)

Petitioners appealed the city's denial of their application to subdivide their 26.58-acre property into a 49-lot residential subdivision. Petitioners argued that the single basis for the hearings officer's denial of its subdivision application, failure to satisfy Talent Municipal Code (TMC) 17.10.060(F), was barred by ORS 197.307(4), a portion of the needed housing statute that prohibits the city from applying standards that are not "clear and objective" to applications for the development of housing. LUBA agreed, pursuant to ORS 197.835(10)(a)(A), and reversed the city's decision as "outside the range of discretion allowed the [city] under its comprehensive plan and implementing ordinances" and ordered the city to approve the application.

Petitioners moved for an award of attorney fees in the amount of $18,269.75. In looking at the reasonableness of the fees requested, LUBA determined that nothing in the statute limits attorney fees to only those that are related to issues that LUBA actually addressed in its final opinion and order. LUBA also rejected the city's argument that the fee statement lacked sufficient detail and that the amount requested included the filing fee and deposit for costs that petitioner was separately moving for. Additionally, LUBA considered expenses in the context of ORS 197.835(10)(b). ORS 197.835(10)(b) authorizes recovery of "attorney fees" and does not mention expenses. In this respect, it is unlike ORS 197.830(15)(b), which explicitly authorizes recovery of "reasonable attorney fees *and expenses*." $2,882.25 for "computer legal research" was deducted from the stated total of $18,269.75, for an award of $15,387.50.

2022

1. *Hollander v. City of Astoria* ___ Or LUBA ___ (Order, LUBA No 2021-061, Mar 21, 2022)

In 2018, petitioner applied to develop a four-story, 29,782-sqaure-foot hotel, In *Hollander I*, petitioner appealed the city council's denial of an extension of the permits needed to construct the hotel. LUBA remanded the city's decision. In *Hollander II*, the city council held a public hearing and accepted new evidence into

the record, and again denied the permit extension. LUBA sustained the first and second assignments of error and reversed the city council's decision. Because the city council denied the applications for reasons that were unrelated to any applicable criteria in its code, the city council's decision was outside the range of discretion allowed it under its code. LUBA concluded that petitioner has established as a matter of law that the permit extensions were justified by conditions existing in the market and LUBA ordered the city to issue the permit extensions. ORS 197.835(10)(a)(A).

Petitioner moved for an award of attorney fees in the amount of $18,940. There was no objection to the motion. LUBA agreed with petitioner that 47.5 hours was a reasonable amount of time to spend on the appeal, as well as that their rates for the partner, associate, and paralegal were reasonable. LUBA granted the motion in full.

2. *Hendrickson v. Lane County* ___ Or LUBA ___ (Order, LUBA No 2021-117, Aug 18, 2022)

Petitioner appealed a decision by the county hearings official denying petitioner's application for a temporary hardship dwelling on land zoned for exclusive farm use (EFU). Petitioner requested that LUBA reverse the county's decision and grant the application, pursuant to ORS 197.835(10)(a)(A). LUBA agreed with petitioner that the county applied standards "outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances." LUBA reversed the county's decision to deny the application and ordered it to approve petitioner's application.

Petitioner moved for an award of attorney fees in the amount of $31,540. The county had no objection. Included in the request for fees was $5,160 of charges for work on hearings official reconsideration, which was done prior to the final challenged decision. Relying on previous interpretations in *Stewart v. City of Salem*, 240 Or App 466, 473, 247 P3d 763 (2011) and *MJAI Oregon 5, LLC v. Linn County*, 80 Or LUBA 1021, LUBA determined that it was not the legislature's intent to allow for mandatory fee recovery under ORS 197.835(10)(b) for fees incurred as part of the local proceedings. LUBA deducted $5,160 from the overall fee total. LUBA determined the remaining fee amount, $26,380, was reasonable based on the time, customary rates charged for locality and experience, and that the services were offered *pro bono*.

3. *East Park, LLC v. City of Salem* ___ Or LUBA ___ (Order, LUBA No 2022-050, Dec 6, 2022)

Petitioner appealed the city council's decision denying a conditional use permit (CUP) for a 291-unit multi-family apartment complex. LUBA concluded that the city applied criteria to deny petitioner's housing application that was not clear and objective, in violation of ORS 197.307(4). LUBA reversed the city's decision and directed the city to approve the application pursuant to ORS 197.835(10)(a)(A).

Petitioner moved for attorney fees, costs, and expenses in the amount of $47,394. This was a 10 percent reduction of the total amount petitioner incurred, including fees billed plus costs and expenses. The city conceded that petitioner was entitled to attorney fees and costs, and that $47,394 was reasonable. LUBA agreed that petitioner was entitled to fees, per ORS 197.835(10)(b), and that the fees were reasonable as the amount was not disputed. However, LUBA reduced that amount by $10, as that was the amount of a listed expense and there is no basis in ORS 197.835(10)(b) to recover expenses.

Denied – 2020-2022

2019-077 *Kimbrell v. City of Lincoln City* (March 1, 2020)

2020-016 *Tugaw v. Jackson County* (November 6, 2020)

2020-071 *Lundeen v. City of Waldport* (September 10, 2021)

2021-013 *Dahlen v. City of Bend* (September 16, 2021)

2021-075 *Friends of Douglas County v. Douglas County* (December 5, 2022)

2021-118/2022-030 *Briggs et al v. Lincoln County* (December 6, 2022)

2022-047 *1625 Sherman Ave. LLC v. City of North Bend* (December 14, 2022)