West Linn Corporate Park LLC v. City of West Linn et al Doc. 262

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

WEST LINN CORPORATE PARK, LLC,

Plaintiff, No. CV-01-1787-HZ

v.

CITY OF WEST LINN, BORIS PIATSKI, and DOE DEFENDANTS 1 THROUGH 10,

OPINION & ORDER

Defendants.

Michael T. Garone
Donald Joe Willis
Jill S. Gelineau
SCHWABE, WILLIAMSON & WYATT, P.C.
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HERNANDEZ, District Judge:

In this takings case, plaintiff West Linn Corporate Park prevailed at trial on three of its nine claims: (1) a state takings claim regarding Greene Street (plaintiff's fourth claim for relief); (2) a federal takings claim regarding Greene Street (plaintiff's fifth claim for relief)[1]; and (3) a First Amendment retaliation claim (plaintiff's sixth claim for relief). Plaintiff also prevailed on defendants' several counterclaims. Defendants prevailed, either at summary judgment or at trial, on six of plaintiff's claims, including one asserting the breach of an annexation agreement (plaintiff's ninth claim for relief). Judge Ashmanskas, who conducted the court trial in the case, awarded $5,100 in damages to plaintiff on the Greene Street takings claim, and $13,053 in damages for the First Amendment retaliation claim. Sept. 22, 2005 Judgment (dkt #216).

In a May 22, 2006 Opinion & Order, Judge Ashmanskas considered the parties' requests for attorney's fees and costs. He first awarded $9,972.50 in fees to defendants for prevailing on the annexation agreement claim. May 22, 2006 Op. at pp. 3-4 (dkt #240). He then considered plaintiff's request for $574,086.43 in fees and costs, out of a total of $779,187.79 incurred. Id. at

[1] The September 22, 2005 Judgment makes clear that the Judgment on the federal Greene Street takings claim is alternative to the Judgment for plaintiff on the state Greene Street takings claim. The Judgment provides that should judgment on the fourth claim regarding the state Greene Street takings claim be set aside, plaintiff is entitled to judgment on the fifth claim regarding the federal Greene Street takings claim. Because plaintiff's state Greene Street takings claim was affirmed on appeal by the Ninth Circuit, it is the operative claim and accordingly, I refer to the Greene Street takings claim in the singular rather than the plural.

p. 4. He concluded that the requested hourly rates were not grossly excessive, but that the hours expended in the litigation and sought by plaintiff were unreasonable. Id. at pp 6-9. Specifically, he concluded that fees sought for time spent in the nineteen months preceding the filing of the Complaint were not necessarily incurred in preparation for the litigation and that plaintiff failed to appropriately apportion the fees to allow for a fee award related only to the claims upon which plaintiff prevailed. Id. at p. 7. This "defect," as Judge Ashmanskas referred to the issue, "runs throughout [plaintiff's] fee petition." Id.

He also concluded that the claims upon which plaintiff prevailed, including the retaliation claim which was "related to the Greene Street dispute," were "only tangentially related to the claims upon which it did not prevail" and thus, the claims on which plaintiff prevailed were "insufficiently related to the other claims to justify recovery of fees incurred for general tasks." Id. at p. 8. Finally, Judge Ashmanskas concluded that the hours sought were "excessive, inadequately documented and include[d] duplicative work." Id. at p.9. In the end, Judge Ashmanskas awarded plaintiff $165,000 in attorney's fees, and $5,000 in costs, for a total award of $170,000.

Both parties appealed the Judgment to the Ninth Circuit Court of Appeals. At issue on appeal were (1) the claims on which plaintiff prevailed, (2) the two takings claims related to off-site public improvements (plaintiff's first and second claims for relief), and (3) defendants' counterclaims. The Ninth Circuit dismissed the first counterclaim as moot, and affirmed the Judgment in favor of plaintiff on the remaining counterclaims.

The Ninth Circuit further affirmed the Judgment in favor of defendants on the two off-site public improvements takings claims. It also affirmed the Judgment in favor of plaintiff on

both of the Greene Street takings claims. However, the Ninth Circuit reversed the Judgment in favor of plaintiff on the First Amendment retaliation claim. As a result, plaintiff is no longer entitled to the $13,053 in damages the district court awarded to plaintiff on that claim.

The Ninth Circuit noted that the $165,000 in fees awarded to plaintiff was because plaintiff prevailed on the Greene Street takings claim as well as the retaliation claim. Because it reversed the Judgment on the retaliation claim, the Ninth Circuit remanded the case to this Court for reapportionment of the $165,000 fee award which, the Ninth Circuit noted, should account for plaintiff's success on the Greene Street takings claim only.[2]

Furthermore, as the Ninth Circuit indicated, plaintiff is entitled to a fee award on appeal for prevailing on the Greene Street takings claim. Or. Rev. Stat. §§ (O.R.S.) 20.085. Because the Ninth Circuit was remanding the case to the district court for reapportionment of trial fees, it also remanded to the district court the question of plaintiff's fee award for its successful appeal on the Greene Street takings claim.

Accordingly, there are two issues presently before me: (1) the apportionment of the $170,000 in trial fees and costs previously awarded to plaintiff by Judge Ashmanskas to account for the fact that plaintiff has prevailed only as to the Greene Street takings claim; and (2) an award of reasonable attorney's fees to plaintiff for prevailing on the Greene Street takings claim on appeal.

I. Trial Fees

Plaintiff contends that the appropriate apportionment is to divide the $170,000 fee and

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[2] Upon remand, the case was initially assigned to Judge Ashmanskas. As a result of his untimely death in July 2011, the case was reassigned to me.

cost award in half, for an award of $85,000. Plaintiff also seeks an additional $1,112.50 for time spent by plaintiff's attorney Michael Garone preparing for an approximately fifteen-minute telephone status conference with this Court following the Ninth Circuit remand, and in drafting a five-page memorandum in support of its apportionment argument, for a total award of $86,112.50 Additionally, plaintiff contends that the $85,000 portion of the award should bear prejudgment interest at a rate of 9% per annum, beginning on May 22, 2006, the date the fees were first awarded by Judge Ashmanskas.

Plaintiff contends that even though, in plaintiff's opinion, more time was spent on the Greene Street takings claim than on the retaliation claim (suggesting that plaintiff is entitled to more than half of the previously awarded fees), in an effort to avoid further litigation, a 50% apportionment of the $170,000 prior fee and cost award is reasonable. Plaintiff argues that defendants have already conceded that the fees awarded to plaintiff should be split approximately fifty-fifty between the Greene Street takings claim on the one hand and the retaliation claim on the other hand. Thus, plaintiff argues, I should accept plaintiff's estimate that the time properly allocated to each claim is approximately equal.

Defendants contend that the issues involved in the Greene Street takings claim were simple and straightforward and that, as defendants contended previously before Judge Ashmanskas, $30,000 is a reasonable fee for that claim. Defendants also oppose an award of interest on the fee award dating from May 22, 2006. Rather, defendants contend, they are owed interest on the $9,972.50 they were awarded for prevailing on the breach of the annexation agreement claim, which was never challenged on appeal.

I agree with plaintiff that the fees should be divided in half. Without a discussion of any

specific apportionment by Judge Ashmanskas, it is reasonable to assume that the fees he awarded were to be divided equally between the two claims. Additionally, I agree with plaintiff that this percentage closely resembles the percentage defendants themselves advocated to Judge Ashmanskas as being an appropriate amount for each of the two claims.

As plaintiff notes, defendants argued that a reasonable fee for prosecution of the Greene Street takings claim was $30,000, and a reasonable fee award for the First Amendment retaliation claim was $35,000, for a total award of $65,000. Franz Dec. 1, 2005 Affid. at p. 4 (dkt #234). This, according to plaintiff, indicates that at the time defendants' counsel made these statements, defendants conceded that of the total amount of fees defendants contended was reasonable, 46.2% was for the Greene Street takings claim and 53.8% was for the retaliation claim. Given defendants' position before Judge Ashmanskas, plaintiff argues that it is reasonable to apply the same, or similar, relative percentages to the claims at this time.

Defendants maintain that they were not relying on a percentage but rather, a flat fee of $30,000 as a reasonable fee for the pursuit of the Greene Street takings claim and that it is unreasonable to apply the relative percentages. But, obviously, Judge Ashmanskas rejected defendants' dollar figures by awarding $100,000 more than what defendants argued was the reasonable amount of fees to be awarded to plaintiff. Defendants cannot deny that in terms of relative value, defendants argued for dollar figures for each claim that were 46.2% and 53.8% of the total dollar figure defendants deemed reasonable, suggesting that defendants viewed the claims as requiring almost equal amount of time and effort.

A reasonable apportionment of the fees is to deduct 50% of the fees and 50% of the costs previously awarded by Judge Ashmankas, to account for the fact that plaintiff is no longer the

prevailing party on the retaliation claim. Thus, I award $85,000 in trial fees and costs to plaintiff for the Greene Street takings claim.

As for the additional time requested by Mr. Garone, I award one hour of time at the rate of $445 per hour. Given Mr. Garone's familiarity with the case, little or no time was required to prepare for the telephone status conference this Court conducted on August 26, 2011. Given that the minute order setting the conference indicated it was a "status" conference, no substantive preparation was required. Additionally, the memorandum plaintiff submitted following the conference is largely a repeat of the argument Mr. Garone presented at the telephone conference, which he himself indicated he had previously presented to defendants' counsel. Thus, a total of 2.5 hours of time spent preparing for and attending the approximately fifteen-minute scheduling conference (at which no argument was expected or desired by this Court), and for submitting a five-page memorandum, is unreasonable. The reasonableness of Garone's hourly rate is discussed below.

In regard to interest, state law governs the award of prejudgment interest because the only claim upon which plaintiff prevailed is a state law claim and because the state law claims were adjudicated in federal court as a result of supplemental jurisdiction. See Olcott v. Delaware Flood Co., 327 F.3d 1115, 1126 (10th Cir. 2003) ("[w]here state law claims are before a federal court on supplemental jurisdiction, state law governs the court's award of prejudgment interest"); Emmenegger v. Bull Moose Tube Co., 324 F.3d 616, 623-24 & n.9 (8th Cir. 2002) ("as in a diversity case, a federal court exercising supplemental jurisdiction is bound to apply the substantive state law governing the claims" when ruling on an award of prejudgment interest); Lewis v. Haskell Co., Inc., 304 F. Supp. 2d 1347, 1351 (M.D. Ala. 2004) (where the court has

both federal question and supplemental jurisdiction but the only claim on which relief was awarded was premised on supplemental jurisdiction, federal law requires that the interest determination be based on state law).

Under Oregon law, a court may award prejudgment interest only when the exact amount, and the time from which interest should run, is ascertained or easily ascertainable. Farhang v. Kariminaser, 230 Or. App. 554, 556, 217 P.3d 218, 219 (2009). Plaintiff argues that as of May 22, 2006, when Judge Ashmanskas filed his Opinion regarding attorney's fees, the number of hours expended by plaintiff's attorneys on the Greene Street takings claim was ascertainable and the reasonable rates of plaintiff's attorneys was decided. Thus, plaintiff continues, it was merely a matter of multiplying the hours expended by the hourly rate to arrive at a clearly ascertainable attorney's fee as to that claim and accordingly, Oregon law authorizes prejudgment interest on the attorney's fee award beginning May 22, 2006.

I disagree. First, at the time the May 22, 2006 Opinion was filed, both parties had already filed Notices of Appeal, creating uncertainty about the viability of the Greene Street takings claim and the retaliation claim. Second, while Judge Ashmanskas awarded attorney's fees of $165,000, he did not delineate the reasonable hours expended on the Greene Street takings claim and thus, plaintiff errs when stating that a simple calculation of reasonable hourly rates multiplied by the reasonable number of hours is all that was required, as of May 22, 2006, to arrive at a clearly ascertainable attorney fee on that claim. Third, the very fact that the Ninth Circuit ordered a recalculation of the trial fee award demonstrates it was not ascertained, or ascertainable, as of May 22, 2006. The attorney fee award on the Greene Street takings claim is not properly subject to prejudgment interest.

On the other hand, I agree with defendants that the $9,972.50 in fees awarded to defendants on the annexation agreement claim should be subject to prejudgment interest as of May 22, 2006 because no appeal was taken from that claim and thus, the amount was conclusively ascertained on May 22, 2006. Moreover, the amount of that award was based on a simple calculation which came from the hourly rate and number of hours delineated in defendants' counsel's affidavit (dkt #221) filed in support of defendants' motion for attorney's fees. Thus, defendants are entitled to prejudgment interest on the $9,972.50 attorney fee award, commencing May 22, 2006. The applicable rate is 9% per annum. O.R.S. 82.010(2).

II. Fees on Appeal

Plaintiff initially seeks $57,889.85 in fees related to defending the Greene Street takings claim on appeal, plus $12,084 in fees for preparing the fee petition, for a total of $69,973.65. In its Reply Memorandum, plaintiff seeks an additional $16,362.50 for time spent litigating the appellate fee issues after its initial fee request was filed on June 21, 2011. Defendants raise several objections, including that the hourly rates are excessive, that the fees are not properly attributable to only the Greene Street takings claim, and that they are duplicative and excessive.

As indicated by the Ninth Circuit, there is no dispute that plaintiff is entitled to attorney's fees for prevailing on the state Greene Street takings claim. O.R.S. 20.085. The award is mandatory. Id. Under Oregon law, the court must consider several factors in determining the amount of attorney's fees to be awarded. O.R.S. 20.075(2). These factors include the objective reasonableness of the claims and defenses asserted by the parties, the extent to which an award would deter others from asserting good faith claims or defenses in similar cases, the extent to which an award would deter others from asserting meritless claims and defenses, the objective

reasonableness of the parties and the diligence of the parties and their attorneys during the proceedings, the time and labor required in the proceeding, the novelty and difficulty of the questions involved in the proceeding, the skill needed to properly perform the legal services, the fee customarily charged in the locality for similar legal services, the amount involved in the controversy and the results obtained, the nature and length of the attorney's professional relationship with the client, the experience, reputation and ability of the attorney performing the services, and whether the fee is fixed or contingent. O.R.S.20.075(1), (2).

A. Initial Fee Request for Appellate Work

1. Reasonable Hourly Rates

Seven attorneys and one paralegal worked on the appeal. The requested hourly rates are as follows:

Name	Year - Hourly Rate
Donald Joe Willis	2006 - $385 2008 - $440 2009 - $475 (with two exceptions: $427.50 for work performed September 2-11, 2009; and $356.25 for work performed September 14-15, 2009) 2010 - $490 2011 - $500

Michael Garone	2005 - $275 2006 - $300 2007 - $340 2008 - $390 (except beginning December 16, 2008, rate was $410) 2009 - $410 (with three exceptions: $369 for work performed August 28-September11, 2009; $307.55 for work performed on September 14, 2009; and $307.51 for work performed on September 15, 2009) 2010 - $420 2011 - $445
Jill Gelineau	2005 - $295 2006 - $325 2008 - $390 2009 - $450 2010 - $460 2011 - $470
Peter Livingston	2009 - $326.25
Steve Morasch	2009 - $440 (with two exceptions: $396 for work performed on August 31, 2009; $330 for work performed September 15, 2009) 2011 - $440
W. Michael Gillette	2011 - $550
Sara Kobak	2006 - $190 2009 - $261
Angela St. Martin (paralegal)	2008 - $150 2009 - $160

While the rates are high, I do not find them unreasonably excessive. For example, Willis has been practicing law for over forty years, with a substantial amount of experience litigating private property rights and condemnation cases. His 2006 hourly rate of $385 falls between the 75th and 95th percentiles of billing rates for Portland attorneys with over thirty years of practice according to the 2007 Oregon State Bar Economic Survey (2007 OSB Survey). If one looked at

rates by area of practice instead of years of experience, the closest category would likely be business or corporate litigation where the average hourly rate in Portland reflected in the 2007 OSB Survey was $283, with hourly rates in the 95th percentile at $445. Even if general civil litigation were considered to be the appropriate category, the average hourly rate for Portland attorneys shown in the 2007 OSB Survey was $249, with the hourly rate in the 95th percentile at $388. Regardless of the category, Willis's $385 per hour rate in 2006 was less than the highest hourly rate reflected in the OSB 2007 Survey.

Although defendants argue that no more than the average rate should be awarded, plaintiff's counsels' rates are reasonable when both the experience of counsel and the particular sub-specialty are considered. In 2006, Willis had thirty-five years of experience. The categories of business litigation or general civil litigation do not account for his expertise in land use, property rights, and condemnation law. Thus, a rate higher than the average shown in the OSB 2007 Survey is appropriate. Moreover, I note that Judge Ashmanskas found the hourly rates for plaintiff's trial counsel (at least three of whom also worked on the appeal) to be reasonable. Additionally, in a 2009 Opinion and Order, Judge Mosman also found hours billed by Willis, and other attorneys at his firm including Morasch and Garone who worked on the instant case, to be reasonable. Molony v. Crook County, No. CV-05-1467-MO, Op. at p. 3 (D. Or. Oct. 13. 2009).

In sum, the rates are reasonable when considering the skill needed to perform the services, the fee customarily charged in the locality for similar legal services, and the experience, reputation, and ability of the attorney performing the services.

2. Reasonable Number of Hours

At the outset, it is worth noting that the appellate litigation was extensive. After the parties finished their first round of appellate briefs and participated in oral argument before the Ninth Circuit, the Ninth Circuit certified three questions of law to the Oregon Supreme Court. West Linn Corporate Park, LLC v. City of West Linn, 534 F.3d 1091 (9th Cir. 2008). The parties then engaged in a second round of briefing and oral argument before the Oregon Supreme Court. Once the Oregon Supreme Court issued its decision on the certified questions, West Linn Corporate Park, LLC v. City of West Linn, 349 Or. 58, 240 P.3d 29 (2010), the case returned to the Ninth Circuit for another round of briefing and another oral argument. The Ninth Circuit issued a final decision on the merits of the dispute on April 18, 2011.

As explained in plaintiff's memorandum in support of its fee request, and in the June 21, 2011 Declaration of Michael Garone[3], as of June 21, 2011, the fees incurred in the appeal in this case were in excess of $330,000. Because plaintiff prevailed only on the Greene Street takings claim, plaintiff is required to seek fees for time expended only on that claim. As a result, plaintiff has attempted to apportion the more than $330,000 incurred by first excluding all time entries which were wholly unrelated to defending the Greene Street takings claim. Following that, plaintiff's fees amounted to $271,418.84, representing 713.50 hours of work, expended, in whole or in part, on the Greene Street takings claim or on tasks common to all claims.

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[3] Plaintiff filed its motion for fees on appeal with the Ninth Circuit on June 21, 2011, and due to a filing error, re-filed it with that court on June 22, 2011. Garone submitted a declaration, dated June 21, 2011, in support of the fee request. After the Ninth Circuit transferred the issue of fees on appeal to this Court, plaintiff re-filed the materials it had previously filed with the Ninth Circuit, in this Court (dkt #251) on August 15, 2011. All of the materials previously filed by plaintiff with the Ninth Circuit are appended as Exhibits to an August 15, 2011 Declaration by Garone. Ex. D to Garone's August 15, 2011 Declaration is the June 21, 2011 Garone Declaration.

Because many of the time entries that were the basis of the $271,418.84 in fees related to tasks that were common to all claims and not just to the Greene Street takings claim, plaintiff has further apportioned the fees by reducing them on a percentage basis. To do this, Garone divided the appellate litigation into four phases because, based on his in-depth knowledge of the case, the Greene Street takings claim required more time during certain phases of the appeal. The four phases are: (1) time spent starting October 25, 2005 and ending May 31, 2006, beginning with the initial stages of the appeal through the filing of plaintiff's combined opening brief/response brief as to the cross-appeal, and which generated $57,921 of the $271,418.94 in fees; (2) time spent starting June 1, 2006 and ending July 28, 2008, beginning with reviewing defendants' second appellate brief, preparing plaintiff's optional reply brief, and continuing through the preparation for and participation in oral argument before the Ninth Circuit, and which generated $39,920.75 of the $271,418.94 in fees; (3) time spent July 29, 2008 through September 23, 2010 which involved all work done before the Oregon Supreme Court, and which generated $101,206.63 of the $271,418.94 in fees; and (4) time spent September 24, 2010 through April 18, 2011, beginning with the return of the case to the Ninth Circuit after the Oregon Supreme Court's September 23, 2010 decision through the date of the Ninth Circuit's disposition, and which generated $72,370.50 of the $214,418.94 in fees.

Garone then explains that for the first phase,15% of the time spent was on the Greene Street takings claim because although defendants' opening brief contained approximately twelve pages on the Greene Street claim (suggesting this was at least one-third or more of the substantive portions of the brief), plaintiff's response brief was a combined response to defendants' brief and plaintiff's opening brief on the off-site improvements claim was "a major

focus of [plaintiff's] attention" during this phase[.] Garone June 21, 2001 Decl. at ¶ 13.

For the second phase, Garone states that 20% of the time was spent on the Greene Street takings claim. He states there were three major issues in the case: the off-site improvements takings claims, the retaliation claim, and the Greene Street takings claim. As a result, the time attributable to the Greene Street claim could be justified at one-third. But, he explains that the off-site improvements claim continued to be the major focus of plaintiff's time, and thus, plaintiff seeks only twenty-percent of the time as related to the Greene Street takings claim.

For the third phase, plaintiff seeks 30% of the time spent because the certification to the Oregon Supreme Court involved three discrete issues, with almost one-third of plaintiff's brief and about one-half of defendants' brief to that court devoted to the Greene Street claim. Additionally, according to plaintiff, the Greene Street claim was "heavily fact-dependent" and required careful review of testimony and exhibits, resulting in thirty-percent of the time during this phase being devoted to the Greene Street takings claim.

As to the fourth phase, plaintiff seeks 15% of the time spent because, Garone explains, although plaintiff initially devoted little time to the Greene Street issue in its opening brief to the Ninth Circuit, defendants placed great emphasis on this claim in its brief, requiring plaintiff to spend a substantial amount of time reviewing the transcript and exhibits in preparation for oral argument.

Applying these percentages of time to the fees incurred during that phase, produces the following fees: (1)$8,688.15 for phase one; (2)$7,984.15 for phase two; (3) $30,361.98 for phase three; and (4)$10,855.57 for phase four. Added together, the sum is $57,889.85.

Before addressing defendants' objections, I cannot accept plaintiff's percentages in two of

the four phases. Phases one and two include the time spent from the beginning of the appeal through the decision by the Ninth Circuit certifying the questions to the Oregon Supreme Court. During this entire time, the off-site improvement claims, the retaliation claim, the Greene Street takings claim, and defendants' counterclaims were litigated. Plaintiff states that during phase one, 15% of the time spent was on the Greene Street takings claim, but somehow, in phase two, even though the issues remained the same, the amount of time devoted to the Greene Street claim was 20%. There is no appreciable difference between phase one and phase two regarding the claims at issue. Thus, the appropriate percentage of time spent on the Greene Street takings claim in phase two is reduced from 20% to 15%.

In phase four, plaintiff acknowledges that it devoted very little time in its initial brief to the Greene Street takings claim, but it contends 15% of this entire phase is attributable to that claim because of the time and effort it spent on the claim preparing for oral argument. Regardless of the emphasis placed on the claim by defendants in their brief, plaintiff had already been told by the Ninth Circuit, in the certification order, that if the Oregon Supreme Court answered the relevant certified question "yes," then the district court's ruling on the state Greene Street takings claim would be affirmed. 534 F.3d at 1105. The Oregon Supreme Court answered the question in the affirmative, 349 Or. at 100-01, 240 P.3d at 52-53, making the outcome a foregone conclusion. Thus, while plaintiff certainly needed to be prepared to address defendants' arguments at oral argument, plaintiff reaches too far in ascribing 15% of the time spent in this phase to the Greene Street takings claim. Thus, the appropriate percentage of time spent on the Greene Street takings claim in phase four is reduced from 15% to 10%.

Defendants raise several objections to the requested fees: (1) that the $5,100 in damages

awarded on the Greene Street takings claim does not justify a fee award of close to $70,000; (2) that plaintiff's billing statements show that plaintiffs seek fees for time clearly not spent on the Greene Street takings claim; (3) that plaintiff's billing entries are vague, sometimes contain no subject, and/or suffer from "block billing"; and (4) much of the time spent by plaintiff's counsel was duplicative.

a. Results Obtained

Although defendants cite to federal cases which are not applicable to the fee award for this state law claim, Oregon law requires courts to consider the amount involved and the results obtained as one of several factors to consider in awarding attorney's fees. O.R.S. 20.075(2)(d); see also City of Bend v. Juniper Utility Co., 242 Or. App. 9, 33-34, 252 P.3d 341, 355 (2011) (instructing trial court on remand to reconsider the amount of the attorney fee award in light of the appellate court's reduction of the compensation judgment).

Defendants note that plaintiff initially sought close to $2 million in damages for their claims, but ended up, after appeal, with damages only on the Greene Street takings claim in the amount of $5,100. Thus, defendants suggest that when the amount involved in the controversy is compared with the result obtained, it is clear that plaintiff is not entitled to the fees it seeks. Plaintiff notes that when considering just the Greene Street takings claim, it sought $5,100 in damages and obtained a full judgment on that amount which was affirmed on appeal. Thus, plaintiff's counsel obtained excellent results on that claim.

Both parties have a point. Nonetheless, while plaintiff can claim complete victory as to the Greene Street takings claim, it is questionable whether plaintiff would have even commenced litigation if this were the only claim at issue. Plaintiff failed to prevail on the claims that were

the heart of the case. Although plaintiff has attempted to account for the fact that it is not entitled to fees on the other claims, the fees sought seem grossly disproportionate to the result obtained in this case. Even before considering the additional request sought in the Reply Memorandum, plaintiff seeks almost $70,000 in fees for obtaining a $5,100 judgment. Although I do not believe a certain ratio controls when these issues arise, I note that the total amount sought, $86,336.15, which includes the additional amount for time spent after June 21, 2011, is almost seventeen times the damages plaintiff received. Even considering that plaintiff's complete victory on this claim underscores the objective reasonableness of the claim as well as the diligence of plaintiff's counsel in litigating the claim, the amount involved compared to the results obtained weighs in favor of reducing the fees sought. Thus, I deduct 10% of the fees requested.

b. Time Spent on non-Greene Street Claims

Defendants contend that despite plaintiff's claim that it excised time spent on non-Greene Street claims, there are still billing entries for such time. Defendants identify several such billing entries which defendants contend either relate in whole or in part to non-Greene Street claims. Plaintiff responds that of these entries, only two contain time billed solely to non-Greene Street claims, a good-faith mistake which it is willing to correct. Pltf's Reply at p. 9 n.7[4]. According to

[4] Plaintiff concedes that an entry for 1.25 hours on May 17, 2006 by Gelineau for $406.25, should have been deleted, as well as a 1.0 hour entry on April 28, 2008 by Willis for $440. The first entry occurred in phase one and plaintiff seeks only 15% of the $406.25 (or $60.94) claimed by Gelineau. Thus, I deduct $60.94 from the fees sought in phase one. The $440 claimed by Willis occurred in phase two. Given that I am reducing the percentage allowable from 20% to 15% for this phase, I will recalculate all of the phase two fees at the conclusion of this opinion and will deduct the entire $440 from the gross phase two fees, before calculating the 15% allowable.

plaintiff, all of the other entries contain time spent on both Greene Street and non-Greene Street claims. Plaintiff contends that the time spent on the non-Greene Street claims has been deducted via the percentage reductions described above.

Defendants specifically challenge the billing entries related to (1) an amicus brief; (2) any work by Sara Kobak; (3) the "Danebo" opinion; (4) "the Dolan matter"; (5) a writ of review and "LUBA timing," (6) collateral estoppel, waiver, and res judicata issues; (7) time spent determining whether to seek leave to file a reply brief; (8) analyzing supplemental authority; and (9) post-final decision strategy, including consideration of a petition for certiorari. Plaintiff argues that Kobak's time, the collateral estoppel, res judicata and waiver issues, and the time spent on whether to file a reply brief, are properly sought as related to the Greene Street claim. Plaintiff does not mention the other categories.

My review of defendants' objections indicates that there are several billing entries which appear to be unrelated to the Greene Street takings claim and which should be deducted from the fee request. This task is somewhat complicated by the practice of some of plaintiff's counsel in inadequately segregating tasks that comprise one billing entry, the so-called "block billing" problem described in this Court's "Message From the Court Regarding Fee Petitions," posted on the Court's website.[5] However, for those entries, I find that the percentage reductions described above adequately protect defendants from paying for time spent on other claims.

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[5] For example, on February 9, 2009, Willis billed 3.6 hours for four tasks: pulling all other file briefs, reviewing relevant sections and pull and review selected cases; pulling and reviewing a law review on Dolan, and updating and preparing notes for a conference with Garone. The time spent on Dolan should not be chargeable to the Greene Street claim but because of the block billing problem, it cannot be easily deducted.

Putting aside the fees related to Kobak's time, the collateral estoppel, res judicata, and waiver issues, and the time spent determining whether to file a reply brief, discussed below, the following discrete time entries are deducted as being unrelated to the Greene Street takings claim:

January 9, 2006: 1.0 hour by Willis related to the amicus brief (billed at $385/hour, 15% of which, $57.75, to be deducted from phase one fees);

February 28, 2009: 2.4 of the 3.2 hours by Morasch related to LUBA issue (2.4 hours billed at $440/hour is $1,056, 30% of which, $316.80, will be deducted from phase three fees);

March 4, 2009: 2.8 of the 7.4 hours by Morasch related to LUBA issue (2.8 hours billed at $440/hour is $1,232, 30% of which, $369.60, will be deducted from phase three fees);

September 30, 2009: 0.3 hours by Garone related to supplemental authority (0.3 hours billed at $410/hour is $123, 30% of which, $36.90, will be deducted from phase three fees);

October 5, 2009: 0.7 hours by Willis related to supplemental authority (0.7 hours at $475/hour is $332.50, 30% of which, $99.75 will be deducted from phase three fees);

October 7, 2009: 1.5 hours by Garone related to supplemental authority (1.5 hours at $410/hour is $615, 30% of which, $184.50, will be deducted from phase three fees);

October 8, 2009: 0.4 hours by Garone related to supplemental authority (0.4 hours at $410/hour is $164, 30% of which, $49.20, will be deducted from phase three fees);

April 18, 2011: 0.4 hours by Gillette related to petition for certiorari[6] (0.4 hours at

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[6] Because plaintiff obtained a complete victory on the Greene Street takings claim in the April 18, 2011 decision by the Ninth Circuit, any time spent by plaintiff's counsel on or after that date analyzing strategies for "going forward," including filing a petition for certioriari, cannot possibly have been related to the Greene Street takings claim.

$550/hour is $220, all of which will be deducted from the gross phase four fees before 10% allowable is calculated);

April 18, 2011: 1.8 hours by Garone related to post-decision strategy (1.8 hours at $445/hour is $801, all of which will be deducted from the gross phase four fees before ten-percent allowable is calculated)..

As to Kobak's time, I agree with defendants that plaintiff has not established that all billing entries related to Kobak's research and other tasks is related to the Greene Street takings claim. As defendants note, in the first comprehensive billing statement covering all of the work by all of the attorneys during the appeal, Kobak's research and time in February 2006 was spent on the physical takings claim, not the Greene Street claim. Ex. D to Aug. 15, 2011 Garone Decl. at pp. 54-55. As a result, plaintiff excised all of Kobak's time from February 2006 in its first culling of the appellate fees and seeks none of it in this fee petition. Compare Ex. D. to Aug. 15, 2011 Garone Decl. at pp. 54-55 to Ex. D to Aug. 15, 2011 Garone Decl at p. 89.

What plaintiff did not do, and what defendants object to, is deduct the time spent by other attorneys directing Kobak's research, meeting with Kobak, and reviewing her work on the physical takings claim. In his Reply Declaration, Garone states that it is his recollection that Kobak performed research on the Greene Street claim and wrote initial portions of the appellate brief on the Greene Street issue. Aug. 22, 2011 Garone Decl. at ¶ 13. But, the billing entries by Kobak in February 2006 specifically refer to the physical takings claim, not the Greene Street takings claim, and given that the only work noted by Kobak herself in the February 2006 billing entries relates solely to the physical takings claim, it is not reasonable to conclude that the time spent by the other attorneys assigning or reviewing her work at this time was related to

something other than the claim Kobak was actually working on. Thus, the following entries, all occurring during phase one, are deducted:

January 24, 2006: 1.0 hours by Willis for emailing and conferring with Kobak and confirming the outline for her research (billed at $385 per hour, 15% of which, $57.75, will be deducted from phase one fees);

February 3, 2006: 0.2 hours by Willis for emailing Kobak "regarding status" (0.2 hours at $385/hour is $77, 15% of which, $11.55, will be deducted from phase one fees);

February 7, 2006: 0.25 hours by Kobak for conferring with Willis regarding the strategy for the appellate mediation memorandum (0.25 hours at $190 per hour is $47.50, 15% of which, $7.13, will be deducted from phase one fees);

February 7, 2006: 0.6 hours by Willis for emailing and conferring with Kobak (0.6 hours at $385/hour is $231, 15% of which, $34.66, will be deducted from phase one fees);

February 16, 2006: 0.6 hours by Willis for a telephone conference with Kobak (0.6 hours at $385/hour is $231, 15% of which, $34.66, will be deducted from phase one fees);

February 28, 2006: 0.5 hours by Willis for conferring with Garone regarding the Kobak memorandum and briefing; (0.5 hours at $385/hour is $192.50, 15% of which, $28.87, will be deducted from phase one fees);

March 20, 2006: 0.5 hours by Willis for receiving and reviewing the updated Kobak memorandum (0.5 hours at $385/hour is $192.50, 15% of which, $28.87, will be deducted from phase one fees)..[7]

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[7] Other entries by Kobak, such as 0.5 hours reviewing issues and outlining the appellate brief on March 28, 2006, 7.5 hours researching and drafting the combined opening appellate brief and the answering brief on March 31, 2008, and subsequent similar entries are not

I reject defendants' position that time spent in May and June 2009 by plaintiff's counsel analyzing whether to seek leave to file a reply memorandum should be disallowed. Determining whether to seek leave to file a memorandum is part of litigation, whether at the trial or appellate level.

I further reject defendants' position that issues of collateral estoppel, waiver, and res judicata were unrelated to the Greene Street takings claim. These issues were briefed by both parties in connection with that claim. Ex. O to Aug. 22, 2011 Garone Reply Decl. at pp. 15-18; Id. at Ex. P, pp. 4-5; Id. at Ex. Q, pp. 16-23; Id. at Ex. R, pp. 11-14.

c. Vague Entries

I agree with defendants that some of plaintiff's billing entries are "blocked billed," or contain vague or conclusory references, making it difficult to discern whether the time spent was connected to the Greene Street claim. In this case, however, I disagree with defendants that the appropriate remedy is to disallow the billed time. Here, the 10%, 15%, or 30% allowable time, depending on the phase in which the billing occurred, sufficiently addresses and omits the time spent on other claims.

d. Duplicative Time

Defendants contend that plaintiff seeks time for duplicative work. Defendants contend that having seven attorneys work on one appeal is excessive as a matter of law. Additionally, defendants notes that plaintiff's counsel repeatedly billed for time spent on meetings and correspondence with each other.

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disallowed because these entries are not restricted to work on the physical takings claim and any time spent by Kobak on non-Greene Street takings claim is accounted for by allowing only fifteen-percent of the fees incurred in the phase one billings.

Although I am unwilling to state that a certain number of attorneys is excessive as a matter of law, I agree with defendants that the records show duplicative and excessive time which should not be shifted to defendants. I also note that Judge Ashmanskas found the same problem to exist at the trial level, as did Judge Mosman in his attorney fee decision in Molony v. Crook County, which, as noted above, involved several of the same attorneys as the instant case. Molony, Oct. 13, 2009 Op. at pp. 7-8 (Judge Mosman noting that "when nine lawyers play some role in litigation, nobody is getting nine times the amount of work that would by done by one lawyer" and reducing award by fifteen-percent); May 22, 2006 Op. at p. 9 (Judge Ashmanskas noting that the hours sought were "excessive, inadequately documented and include[d] duplicative work.").

As Judge Stewart explained:

> A party is certainly free to hire and pay as many lawyers as it wishes, but cannot expect to shift the cost of any redundancies to its opponent. Instead it can only shift the reasonable attorney fee expended. A fee that is "not excessive" may still be unreasonable. When attorneys hold a telephone or personal conference, good "billing judgment" mandates that only one attorney should bill that conference to the client, not both attorneys.

Nat'l Warranty Ins. Co. v. Greenfield, No. CV-97-1654-ST, 2001 WL 34045734, at *5 (D. Or. Feb. 8, 2001).

Here, the record is replete with examples of overlapping time. I need mention only a few to demonstrate the problem:

(1) Plaintiff's work on its initial brief in the Ninth Circuit took place between January 2006 and May 31, 2006. During this time, at least four attorneys worked on the brief, frequently billing for time spent meeting or corresponding with each other. E.g., January 3, 2006: Garone emails Willis; January 5, 2006: both Garone and Willis meet with client; January 12, 2006:

Gelineau has office conference with Willis; January 18, 2006 - February 7, 2006: Willis and Kobak have conferences and exchange emails regarding memorandum; February 2006: Garone and Willis both work on issues regarding appellate brief, including conferencing with each other, exchanging emails, and reviewing Kobak's work and discussing issues with Kobak; March - April 2006: Gelineau, Willis, and Garone all work on the appeal brief including reviewing Kobak's memorandum, discussing issues with Kobak, conferencing with each other, emailing each other, reviewing drafts, working together on strategy, and other tasks such as "[e]-mails, edits and telephone conversations." Ex. D to Garone Aug. 15, 2011 Decl. at pp.88-92.

(2) Moot court proceedings and time spent preparing for oral argument: these occurred before each of the three oral arguments conducted in the appellate litigation. As one example, I note that in preparing for oral argument before the Oregon Supreme Court, at least three attorneys helped prepare Willis, who is described by plaintiff as the primary trial attorney, not the primary appellate attorney, for oral argument, including a moot court session. Id. at pp. 101-03. Several of the billing entries include time spent by counsel emailing other counsel, corresponding with other counsel, discussing the oral argument issues with other counsel, or assisting Willis in preparation for oral argument. Id.

(3) Plaintiff's work on its brief to the Ninth Circuit after the Oregon Supreme Court issued its decision on the certified questions, took place between September 22, 2010 and November 16, 2010. During this time, three senior attorneys (Willis, Garone, Gelineau), all spent time working on the brief, including time spent emailing each other, discussing the issues with each other, and reviewing the brief. Id. at pp. 104-08.

The billing entries contain dozens of entries where plaintiff's attorneys spent time

conferencing, discussing, meeting, or emailing each other, or reviewing each other's work. Certainly, having more than one lawyer work on a case is not unusual and is not inherently "padding" hours by duplicating work. Here, where Willis was the primary trial attorney and Garone apparently the primary appellate attorney (although, curiously, Willis actually orally argued the case before the appellate tribunals), a certain amount of conferring is expected and justifiable. But, seven attorneys working on issues which had largely been litigated at the trial level, and which were repeatedly litigated in each phase of the appeal, is problematic because, as suggested by Judge Mosman, the lawyers are not producing seven times the amount of work given that a fair amount of time is spent communicating with each other and reviewing each other's work.

The combination of highly paid attorneys who command rates at the highest end of the spectrum precisely because of their experience and expertise, with the use of a large number of attorneys or with a significant overlap of time is problematic for the Court. That is, if Willis and Garone are to be paid at hourly rates of $500 and $445 respectively (for time expended in 2011), they should be able to perform their work with minimal assistance from others and with minimal overlap with each other. Judge Hubel encountered a similar problem in an earlier case when he explained that:

> A highly seasoned specialist, by virtue of his or her experience, should handle the case more efficiently and with fewer hours needed for research and preparation of the motion than a less experienced, but competent junior lawyer. Thus, if the clients and the attorneys . . . want to have the senior lawyers work up the case themselves, I expect to see fewer hours billed than would be reasonably expended by a more junior attorney at a lower hourly rate. The problem here is that the requested amount is based on an exceptionally high hourly rate and an exceptionally high number of hours considering the tasks at hand. In my opinion, neither the requested rates, nor the requested hours are reasonable taken together.

Gardner v. Martino, No. CV-05-769-HU, Findings & Rec. at p. 23 (D. Or. June 15, 2006), adopted by Judge Brown (D. Or. Sept. 20, 2006).

Here, plaintiff is billing at a fee level that should require fewer hours. Instead, plaintiff used a large number of lawyer hours to accomplish relatively straightforward tasks. The Court expects to see an inverse relationship between the hourly rate and the hours needed. However, in this case, there are both high fees and an inordinate number of hours. Based on my review of the billing records, the overlapping and duplicative work created an approximate 15% increase in the amount of time expended. Thus, I reduce the amount requested, after taking the previously-mentioned reductions, by an additional 15%.

3. Calculation of the Initial Fee Award

a. Phase One Fees

For phase one, plaintiff seeks $8,688.15, calculated based on the hourly rates set forth in the table above, then reduced to account for the fact that only 15% of counsels' time in phase one was devoted to the Greene Street takings claims. The specific deductions to be made from phase one fees are:

$60.94 (see footnote 3)

$57.75 (see page 19)

$57.75 (see page 21)

$11.55 (Id.)

$7.13 (Id.)

$34.66 (see page 22)

$34.66 (Id.)

$28.87 (Id.)

$28.87 (Id.)

Subtracting these amounts leaves $8,365.97.

b. Phase Two Fees

For phase two, plaintiff seeks $39,920.75, calculated based on the hourly rates set forth in the table above. Before reducing the sum further, I make the following specific deductions:

$440 (see footnote 3)

This leaves $39,480.75. As indicated above, only 15% of this time, rather than the 20% sought by plaintiff, is awardable, making the phase two fees $5,922.11.

c. Phase Three Fees

For phase three, plaintiff seeks $30,361.98, calculated based on the hourly rates set forth in the table above, then reduced to account for the fact that only 30% of counsels' time was spent on the Greene Street takings claim. The specific deductions to be made from the phase three fees are:

$316.80 (see page 19)

$369.60 (Id.)

$36.90 (see pages 19-20)

$99.75 (see page 20)

$184.50 (Id.)

$49.20 (Id.).

Subtracting these amounts leaves $29,305.23.

d. Phase Four Fees

For phase four, plaintiff seeks $10,855.57, calculated based on the hourly rates set forth in the table above. Before reducing the sum further, I make the following specific reductions:

$220 (see page 20)

$801 (Id.)

Subtracting these amounts leaves $9,834.57. As indicated above, only 10% of this time, rather than the 15% sought by plaintiff, is awardable, making the phase four fees $8,851.11.

e. Total Fees

Adding the four phases together produces an award of $52,444,42. As indicated above, this sum is reduced by 10%, or $5,244.44, to account for the fact that the result obtained was small compared to the amount involved in the case. This reduces the total to $47,199.98. I reduce this award by 15%, or $7,078, because of the duplicative work. Thus, the total award for the work performed on the substantive appeal is $40,121.98.

B. Fees For Time Spent Preparing the Initial Fee Petition

Plaintiff seeks an additional $12,084 in fees for preparing the initial fee petition filed on June 21, 2011. This represents eighteen hours of Garone's time at $445 per hour, and nineteen hours of time spent by his associate Jennifer Franks, at $210 per hour. Plaintiff omitted some of the time spent by Franks and all of the time spent by Willis.

Nonetheless, my review of the hours and the time spent shows that the amount requested is not reasonable. The billing entries show that Franks spent most of her time preparing the motion for fees and the supporting memorandum including time spent researching and drafting documents. Ex. D to Garone Aug. 15, 2011 Decl. at pp. 227-28. Franks also spent time drafting Willis's and Garone's declarations. Id. Although it was likely less expensive to assign this task

to Franks given her lower hourly rate, Garone then later spent time reviewing and revising the declaration, resulting in a duplication of hours.[8]

Additionally, while again, giving Franks the primary responsibility for drafting the motion and the memorandum may have been prudent, the time Garone and Franks spent meeting about the task should not be chargeable by both attorneys and Garone's subsequent time amounting to more than twelve hours on June 16-18, 2011, spent reviewing and revising the motion and memorandum, is unnecessarily duplicative. See Taylor v. Albina Cmty Bank, No. CV-00-1089-ST, 2002 WL 31973738, at *4 (D. Or. Oct. 2, 2002) (disallowing conferences among timekeepers as duplicative; noting that "[w]hen attorneys hold a telephone or personal conference with another attorney or paralegal, good 'billing judgment' mandates that only one participant in the conference should bill that conference to the client"); Nat'l Warranty Ins. Co., 2001 WL 34045734, at *5 (same).

Additionally, while the time records for an appeal lasting more than five years are voluminous, the review was likely complicated by the fact that seven different attorneys worked on the appeal over time. This is solely attributable to a choice by plaintiff to involve so many attorneys in the case. Given Garone's extensive participation in the appeal and his intimate knowledge of the issues of the case, his review of the time records and preparation of the fee petition should have taken fewer than eighteen hours. Moreover, Willis's regular handling of inverse condemnation cases should make him and his firm familiar with the right to fees mandated by O.R.S. 20.085, and thus, other than adding specifics about the instant case,

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[8] Presumably, Willis also billed for time spent reviewing and revising his declaration, but plaintiff already deducted his time.

preparation of the motion and the memorandum should have been routine and not taken an extensive amount of time. .

I conclude that twelve hours of time for Franks and ten hours of time for Garone is reasonable. Thus, I award $2,520 for the time spent by Franks and $4,450 for the time spent by Garone, for a total of $6,970 for preparing the initial fee petition.

C. Fee Petition Fees Incurred June 21, 2011 and Thereafter

Plaintiff seeks an additional $16,362.50 in fees for time spent after its initial fee request was filed with the Ninth Circuit. The time spent can be segregated into two categories: (1) time spent on filings with the Ninth Circuit regarding plaintiff's entitlement to fees on appeal; and (2) time spent on the reply memorandum and supporting documents in support of the appellate fee request.

1. Time Spent Before the Ninth Circuit

As indicated above, the Ninth Circuit issued a Memorandum Disposition on the merits of the appeal on April 18, 2011. The mandate issued on June 15, 2011.

On June 9, 2011, before the mandate issued, plaintiff filed a motion to transfer consideration of attorney's fees on appeal to the district court. Plaintiff, citing O.R.S. 20.085, indicated that it was entitled to fees on appeal and because the Ninth Circuit had already remanded the apportionment of trial fees back to the district court, plaintiff requested that the Ninth Circuit transfer consideration of the fees on appeal to the district court as well.

On June 17, 2011, defendants filed an opposition to plaintiff's request to transfer the issue of appellate fees to the district court. Defendants cited to 42 U.S.C. § 1988 for the proposition that fees were discretionary and noted that because the Ninth Circuit, in its April 18, 2011

Memorandum, had stated that each party was to bear its own costs on appeal, the Ninth Circuit had effectively already held that plaintiff was not entitled to fees.

Plaintiff filed its substantive motion for fees on appeal on June 21, 2011. The Ninth Circuit issued an Order on June 22, 2011, denying plaintiff's motion to transfer consideration of the fees on appeal to the district court because, it explained, the mandate had issued and each party was to bear its own costs. An error in filing caused plaintiff to re-file its motion for attorney fees on appeal and supporting documents on June 22, 2011.

On June 23, 2011, plaintiff moved for reconsideration of the Ninth Circuit's June 22, 2011 Order denying plaintiff's motion to transfer consideration of appellate fees to the district court. The substantive part of this filing was five pages, and explained that contrary to defendants' reliance on 42 U.S.C. § 1988 allowing discretion to award fees, the controlling statute, O.R.S. 20.085, mandated an award of fees. A few hours later, the Ninth Circuit denied plaintiff's substantive motion for attorney's fees on appeal, again explaining that the mandate had issued and each party was to bear its own costs. A few hours after that, still on June 23, 2011, plaintiff filed a motion to reconsider the Order denying plaintiff's motion for attorney's fees. This filing contained much of the same argument made in the previous motion to reconsider, but it also included a timeline of the recent motion activity which was repeated in an accompanying two-page declaration filed by Garone.

On June 27, 2011, the Ninth Circuit issued another Order, this time directing defendants to respond to plaintiff's motion to reconsider the June 22, 2011 Order denying plaintiff's motion to transfer consideration of the fees on appeal to the district court. The Order made no mention of a reply.

Defendants filed an opposition of approximately six pages on July 5, 2011. Plaintiff filed an approximate ten-page reply on July 6, 2011.

Finally, on July 26, 2011, the Ninth Circuit issued an Order recognizing that under O.R.S. 20.085, plaintiff was entitled to fees on appeal related to the state Greene Street takings claim. Accordingly, it granted plaintiff's motion to reconsider the prior Order denying plaintiff's motion to transfer consideration of fees on appeal to the district court.

From June 22, 2011 through July 26, 2011, plaintiff seeks fees for 16.4 hours billed by Garone and 3.1 hours billed by Willis, for a total of 19.5 hours. These hours are grossly excessive in relation to the nature of the tasks at hand and further, the billing entries reveal inappropriate charges by both counsel for conferences with each other regarding the motions. The Ninth Circuit's initial Order denying plaintiff's motion to transfer the issue of fees on appeal to the district court, was one sentence. Its motion denying plaintiff's motion for fees was four sentences. The two motions to reconsider filed by plaintiff in response to these Orders, consisted of approximately thirteen substantive pages, with several pages repeating the same information. It is unreasonable for plaintiff to claim that someone of Garone's expertise and experience required almost ten hours, as seen in billing entries dated June 22 - 27, 2011, to review the Ninth Circuit Orders and prepare the motions to reconsider. Willis also billed an additional two hours for these tasks.

I conclude that five hours for Garone is a reasonable number of hours for the work performed on the fee issue between June 22, 2011 and July 26, 2011. I award no time to Willis because the time duplicates the efforts already billed by Garone. Thus, for this time period, I award $2,225 in fees.

2. Time Spent Before the District Court on Appellate Fee Issues

Plaintiff seeks fees for time spent between August 9, 2011 and August 22, 2011, on tasks such as reviewing defendants' objections to plaintiff's request for attorney fees on appeal, drafting the Reply Memorandum in support of fees, and drafting Garone's Reply Declaration. Ex. K to Garone Aug. 22, 2011 Decl. at p. 2. Plaintiff seeks 16.1 hours billed by Garone and 0.7 hours billed by Willis. Some of the time is properly deducted as being duplicative (e.g., 0.3 hours by Willis on August 12, 2011 regarding the status of the record in the district court and 0.3 hours by Garone on August 15, 2011 reviewing issues regarding the attorney fee proceeding in the district court and reviewing issues regarding filing of documents), some of the time is properly deducted as being related to the apportionment of trial fees issue remanded by the Ninth Circuit to this court (e.g., 0.7 hours by Garone on August 16 - 17, 2011, writing a letter to this Court which primarily addressed the handling of the trial fee issue), and some of the time is properly deducted as simply excessive (e.g., Garone billed 0.7 hours for the letter which consisted of two paragraphs).

Considering again that a practitioner of Garone's experience and with his expertise was billing for the work, I consider a reasonable number of hours for the tasks in this time period to be no more than six, with no time awarded to Willis. Thus, I award $2,670 for work performed from August 9,2 011 through August 22, 2011.

The total award for time spent after the initial filing of the fee petition is $4,895.

D, Total Fee Award

The total fee award for the appeal is $51,986.98. This award will sufficiently facilitate the assertion of good faith claims or defenses in similar cases and will deter meritless claims and

defenses. It adequately reflects the time and labor required and the novelty and difficulty of the questions involved in the proceeding. Finally, plaintiff indicates that it recently changed from a fixed to contingent fee agreement with counsel. The nature of the fee agreement requires no adjustment to the fee award given that the change occurred in October 2010 and the bulk of the fees were incurred before that date.

CONCLUSION

Plaintiff is awarded $85,000 in fees and costs for work at the trial level. Plaintiff is awarded $51,986.98 for fees on appeal. Defendant's previously awarded fees of $9,972.50 shall be subject to prejudgment interest at the rate of 9% per annum, commencing May 22, 2006.

Plaintiff shall tender an Amended Judgment to Court, after conferring with defendant, within ten days of the date of this Opinion & Order.

IT IS SO ORDERED.

Dated this 4th day of October, 2011

/s/ Marco A. Hernandez
Marco A. Hernandez
United States District Judge