IN THE SUPREME COURT OF THE STATE OF OREGON

LAKE OSWEGO PRESERVATION SOCIETY; MARY LOU COLVER and ERIN O'RURKE-MEADORS,
Respondents
Cross-Petitioners,
Petitioners on Review

v.

CITY OF LAKE OSWEGO,
Respondent,
Cross-Respondent,
Respondent on Review.

and

MARJORIE HANSON, trustee for the Mary Cadwell Wilmot Trust,
Petitioner,
Cross-Respondent,
Respondent on Review

S063048

PETITIONERS' REPLY BRIEF

Appeal from an August 5, 2014 Final Opinion and Order of the Land Use Board of Appeals, Opinion by Bassham, Board Member

The Court of Appeals reversed on petition and affirmed on cross-petition on February 4, 2015 Before Armstrong, P.J., Egan, J., and Wollheim, S.J. Opinion by Egan, J.

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INTRODUCTION TO PETITIONERS' REPLY BRIEF

In her Answering Brief, respondent on review Marjorie Hanson ("Hanson") engages in a warped sort of revisionist legislative history, fixates on the word "a" in ORS 197.772(3) in her hope that the Court will not look elsewhere for guidance about what the statute means, and assumes without proving that State-wide Planning Goal 5 is irrelevant. In fact, this case began and ends with Goal 5 – a point that LUBA understood, yet the Court of Appeals missed, despite extensive briefing on the subject from the petitioners.[1] By way of reply, petitioners offer the following points:

1. This is a Goal 5 case, a point that LUBA understood and both the Court of Appeals and Hanson missed:

Hanson asserts that petitioners failed to argue the Goal 5 context for the proper interpretation of ORS 197.772 to the Court of Appeals. To the contrary, LUBA's reversal of the City was based largely on how the City's interpretation of ORS 197.772 was inconsistent with the Goal 5 context of the statute, *e.g.*:

> Finally, the narrower interpretation [of ORS 197.772] has the additional virtue of carving out a smaller exception to the general rule that decisions regarding a Goal 5 inventory of historic resources are made based on historic significance and similar Goal 5-based considerations. Under that narrower interpretation, persons who obtain property subject to a historic designation may still seek removal of the designation, subject to Goal 5 considerations.

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1 Hanson claims that the Court of Appeals fully understood the Goal 5 context of ORS 197.772, analyzed the Goal 5 implications and rejected petitioner's Goal 5

LUBA slip op at 25.

In truth, LUBA got it right.

Despite this and numerous other references in LUBA's reversal to ORS 197.772's Goal 5 foundation and context, Hanson failed to challenge that aspect of LUBA's Final Opinion and Order. Nonetheless, petitioners' response at the Court of Appeals to Hanson's Second Assignment of Error argued vigorously that the City's and Hanson's hoped-for interpretation of ORS 197.772 was contrary to the resource protection objectives, public process, ESEE analysis and context of State-wide Planning Goal 5 and the extensive public participation that come with historic designation (and de-designation) of Goal 5 resources.[2] *See* LOPS's Answering Brief to the Court of Appeals, pp 16-21. The most that Hanson can say is that petitioners did not cite the *DLCD v. Yamhill County*, 17 Or LUBA 1273 *aff'd* 99 Or App 441, 783 P2d 16 (1989) below. That much is true.

Yamhill County only sharpens the point that this is a Goal 5 case, because SB 588 (1995) was crafted to fix the specific problem that these Yamhill County property owners had with how the county had forced historic designations on <u>their</u> properties over <u>their</u> objections several years before, and <u>they</u> wanted them

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2 A word search of the Court of Appeals' decision in this case shows that "Goal 5" is mentioned once, and then only in a quote from legislative hearing proceedings. In contrast, "Goal 5" occurs 19 times in LUBA's Final Opinion and Order. Hanson's arguments in this appeal can prevail only if Goal 5 has no relevance.

removed. That problem involved specific property owners who at the time of adoption of SB 588 in 1995 still owned their historically listed properties, which the county had designated over their objections. SB 588 (1995) was clearly intended to fix that problem, but not to give subsequent owners the unilateral right to opt-out of a local Goal 5 historic inventory designation after the property had changed hands.

Finally, Hanson asserts that ORS 197.772 is "directly inconsistent with Goal 5." Hanson's Answering Brief at 26. That is only true if the Court subscribes to Hanson's and the Court of Appeal's interpretation of the statute. LUBA's interpretation of ORS 197.772(3) was compatible and consistent with Goal 5 and how the historic program functioned and so to is petitioners' proffered interpretation, as well as that of the Amicus intervenors.

2. The meaning of "a property owner" in Subsection (3) is ambiguous, not as Hanson asserts, clear on its face – what does "a" mean?

Hanson's fixation on the plain meaning of the word "a" in "a property owner" from Section (3) holds water only if the expression is unambiguous. This case has progressed this far precisely because the expression is ambiguous. Hanson ignores a fundamental presumption of statutory interpretation that the same term used twice in a statute has the same meaning.[3] There is nothing to rebut

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3 *See PGE v. BOLI*, 317 Or at 611 ("use of the same term throughout a statute indicates that the term has the same meaning throughout the statute"); *Racing Com.*

or disturb that presumption in this case. The meaning of "a property owner" in Subsection (1) is crystal clear and undisputed, yet Hanson fails to explain why the presumption doesn't apply and why the same expression used in Subsection (1) would have a different meaning in Subsection (3), *i.e.*, why "a property owner" in both subsections does not mean the person who owned the property when the historic designation was imposed upon it.

Hanson can only prevail in this plain meaning textual argument if one assumes that "a property owner" in Subsection (3) is unambiguous. The parties don't agree on much, but everyone acknowledges that this operative expression is ambiguous. Therefore, rules of interpretation take us beyond the plain text and simple argument that "a" means "a."

3. Hanson's selective view of the legislative history of SB 588 ignores what actually happened during the bill's journey to becoming ORS 197.772.

The relevant legislative history of SB 588 shows two important things:

(1) When asked whether subsequent owners would have a unilateral opt-out right under the bill the same as the original owners, its sponsors expressly said that

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v. Multnomah Kennel Club, 242 Or 572, 584, 411 P.2d 63 (1966) ("the presumption is that the word was used to express the same meaning in both sections"); *State v. Allison*, 143 Or. App. 241, 255, 923 P2d 1224 (1996) (rejecting suggestion that statutory term means two different things in same sentence); *State v. Jones*, 109 Or App 235, 238 n 3, 818 P2d 1286 (1991) ("Presumably, the legislature intended the phrase to carry the same meaning every time it used it in the same sentence."); *Vill. At Main St. Phase II, LLC v. Dep't of Revenue*, 356 Or 164, 174-75, 339 P3d 428 (2014) (same).

they had not thought of that situation. This demonstrates that placing subsequent owners of historically listed property in the same shoes as the original owners for purposes of the opt-out right was not the intent of Subsection (3); and

(2) After that colloquy, the Senate committee adopted the Exhibit L Amendment that, as Hanson notes, would have put subsequent owners into the same position as the original owner upon whom a historic designation was imposed for purposes of opting out of the historic designation. In conference committee, the Exhibit L Amendment language was removed without comment. From this, LUBA (correctly) concluded that the most reasonable inference was that the conference committee did not want subsequent owners like Hanson to have that opt-out authority:

> In sum, the legislative history available to us indicates that the A9 amendment that became ORS 197.772(3) was originally intended to apply only to property owners at the time of designation, on whom the designation was imposed without consent. In response to a question, the House committee members proposed additional language that would have effectively put subsequent owners on the same footing as the property owner at the time of designation, for purposes of ORS 197.772(3). However, the legislature ultimately deleted that additional language, from which the strongest inference is that the legislature did not intend that result. Deletion of the Exhibit L language left the A9 amendment in place as it was originally intended: to apply only to the property owner at the time of designation.

Lake Oswego Preservation Society, LUBA slip op at 23 (emphasis added).

Arguably LUBA correctly described the practical effect of the Exhibit L Amendment adopted by the Senate Committee after the bill's sponsors expressly

stated that they had not considered whether subsequent owners would, could or should have the same opt-out right as the original owner. It is not clear why the conference committee removed the Exhibit L Amendment language, but LUBA's conclusion is by far the simplest and most likely explanation to be inferred, *i.e.*, the conference committee did not want subsequent owners of historically listed property to have the same opt-out right as did the initial owner at the time the designation was imposed. LUBA's inference drawn from this legislative history is plausible; whereas, Hanson's view to the contrary is only wishful thinking.

Hanson then goes one step further and asserts that "[t]he only logical and supportable interpretation of the relevant history is that the legislature did not intend that local designations survive transfers. It follows that any subsequent owner who acquired property with a local historic designation had the right to have the local historic designation removed." *See* Hanson Answering Brief at 10 & 39. That assertion goes beyond the facts of this case (where the evidence in the record is that the original owner objected) and makes all historic designations temporary until ownership changes and then the designation goes away – a result that LUBA and the Court of Appeals expressly (and correctly) rejected as a violation of Goal 5. *See DLCD v. Yamhill County*, 17 Or LUBA 1273, *aff'd* 99 Or App 441, 783 P2d 16 (1989). To the extent that this somewhat bizarre conclusion can be inferred from the Court of Appeals decision in this case only serves to illustrate how far

afield the Court's decision is from the Goal 5 foundation and context of the state-wide historic preservation program. In truth, there is no support in the text, context, legislative history or Goal 5 to support Hanson's argument that no historic designation survives transfer to a subsequent owner. The argument, however, shows the significant and damaging unintended implications of this decision, another of which is the subject of LOPS's Third Assignment of Error.

4. Another untended consequence of the Court's interpretation of ORS 197.772(3) is that it reverses the burden so that if a current owner opts out of the local historic inventory, the local government can only resist that demand if it can prove that the original owner was given the option to refuse the historic designation and chose to accept it. The Secretary of State's retention rules under the Public Records Law does not require retention of those notice records, and virtually no local government has them.

While Hanson advances what is in effect an unintended consequence of the Court of Appeals' decision below, she claims that petitioners are barred from assigning error to another unintended consequence of the Court's decision. The Court's decision allows any subsequent owner of a historic property to opt-out of the program. The consequence of this decision is that a local government can only resist that demand if it can prove that the original owner was asked if it would accept the historic listing and agreed. That is exactly how this case played-out at the local level, and is exactly how it will play out in the future if the Court of Appeals' decision stands.

As explained in petitioners' Opening Brief and in the Brief of the Amicus cities, virtually no city has any such documents and certainly not as far back in time as most local historic resources were listed, *i.e.*, prior to 1995. Under the Public Records Act,[4] the Secretary of State has established retention schedules for local public records.[5] Under OAR 166-200-0320 (retention schedule for city planning and development records), the longest retention period for any records, except those related to an urban renewal district, is 10 years. This means that none of the notice and owner consent records prior to 2005 generally are retained by any jurisdiction. Therefore, under Hanson's theory of ORS 197.772 and the one ratified by the Court of Appeals in this case, local governments are essentially not able to resist a current owner demand for de-listing of local historic resources. Again, this is contrary to the historic preservation objectives of the Goal 5 program; it gives owners veto power over the local program, which was rejected by the Court of Appeals in the *Yamhill County* case, and is a necessary implication of the decision challenged in this appeal.

5. There is no support for Hanson's assertion that "everyone involved understood that the owner consent provision was a broad and sweeping exception to Goal 5."

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4 ORS 192.410, *et seq*.

5 *See* OAR ch. 166, div. 200 (retention schedules for cities) and OAR ch. 166, div. 150 (retention schedules for counties and special districts).

Hanson presumes the truth of her main argument on appeal, *i.e.*, that the owner consent provision was a broad and sweeping exception to Goal 5. See Hanson's Answering Brief at 24. Ironically, Hanson's arguments to this Court have significantly more Goal 5 analysis than did the underlying Court of Appeals opinion. Nonetheless, her discussion of Goal 5 is completely at odds with the Goal and its administrative rule, the ESEE analysis that is required to designate Goal 5 resources, and the protracted public process involved in designating them.

Notwithstanding that disconnect with Goal 5, Hanson's assumption that the exception in ORS 197.772(3) to the Goal 5 historic preservation program was meant to be broad and sweeping ignores another maxim of statutory interpretation, *viz,* exceptions to statutory requirements are to be narrowly construed. *Brown v. Guard Publishing Co*., 267 Or. App. 552, 341 P.3d 145 (2014), *citing Guard Publishing Co. v. Lane County School Dist*., 310 Or 32, 37, 791 P2d 854 (1990). LUBA understood the importance of the Goal 5 historic preservation program and applied this maxim to conclude that the Legislature intended a narrow not a broad construction of ORS 197.772(3)'s exception to the Goal 5 program:

> No general maxim of statutory construction seems particularly relevant here, but the closest may be a rule of construction the Court of Appeals has applied in some cases, essentially that if the scope of an exception to a general rule is ambiguous, the scope of the exception should be construed narrowly rather than broadly. … As explained above, ORS 197.772(1) and (3) operate as specific statutory exceptions to the general rule that Goal 5 historic resources are added to or removed from a local government inventory of significant

> historic resources based on whether those resources warrant protection under Goal 5. Where ORS 197.772(1) and (3) apply, the required Goal 5 considerations are eliminated, and the decision whether to add resources to the inventory, or later remove them from an acknowledged inventory, are made based on the owner's wishes, and have nothing to do with Goal 5 or historical significance. If the exception represented by ORS 197.772(3) is broadly construed, it carves a significantly greater hole in the Goal 5 scheme to protect historic resources, compared to the narrower interpretation.
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> * * *
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> Finally, the narrower interpretation has the additional virtue of carving out a smaller exception to the general rule that decisions regarding a Goal 5 inventory of historic resources are made based on historic significance and similar Goal 5-based considerations. Under that narrower interpretation, persons who obtain property subject to a historic designation may still seek removal of the designation, subject to Goal 5 considerations.

Lake Oswego Preservation Society, LUBA slip op at 24-25 (emphasis added), *citing Colby v. Gunson*, 224 Or App 666, 676, 199 P3d 350 (2008) (exceptions to public disclosure requirement should be narrowly construed in favor of disclosure).

LUBA's view is more consistent with this and the other standard maxims of statutory construction, and Hanson's view to the contrary fails to explain why the maxim should not apply. LUBA's resolution also points-up the fact that any property owner, such as Hanson, who acquired property with a preexisting local historic designation, can seek removal or modification of the designation through the procedures allowed by Goal 5 and the Goal 5 Rule.

CONCLUSION

The Court of Appeals' interpretation of ORS 197.772(3) suffers from the

legal deficiencies identified in petitioners' Opening Brief as augmented by the two briefs from Amicus parties. For those reasons, and based on the clarifications set forth in this Reply Brief, this Court should reverse the Court of Appeals and declare that "a property owner" in ORS 197.772(3) means that only a property owner who objected at the time of the property's designation on the local historic inventory can require the local government to remove the historic designation.

Respectfully submitted October 2, 2015.

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CERTIFICATE OF SERVICE AND FILING
and Certificate of Word Count

I hereby certify that on the date indicated below, I caused to be filed the attached PETITIONERS' REPLY BRIEF in S063048 with the:

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by e-Filing pursuant to ORAP 16. On the same date I caused to be served a true, complete and correct copy of the same document by e-Service on the following parties or attorneys:

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I further certify that Petitioners' Reply Brief complies with the word court limitation in ORAP 5.05(2)(b) for a reply brief; it is proportionately typed, not smaller than 14-point font for the body and footnotes, and contains 2,529 words.

DATED this 2nd day of October 2015.

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