IN THE SUPREME COURT OF THE STATE OF OREGON

LAKE OSWEGO PRESERVATION SOCIETY, MARYLOU 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.

LUBA No. 2014009

Appellate Court No. A157619

Supreme Court No. S063048

BRIEF ON THE MERITS OF AMICUS CURIAE ON REVIEW, STATE OF OREGON BY AND THROUGH ITS STATE HISTORIC PRESERVATION OFFICE AND DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Land Use Board of Appeals

Opinion Filed: February 4, 2015
Author of Opinion: Egan, J.
Before: Armstrong, Presiding Judge, and Egan, Judge,
and Wollheim, Senior Judge

Continued…

DANIEL H. KEARNS #893952
Reeve Kearns PC
621 SW Morrison St Ste 1225
Portland, OR 97205
Telephone: (503) 225-1127
Email: dan@reevekearns.com

Attorneys for Petitioners on Review

EVAN P. BOONE #781518
Lake Oswego City Attorneys
380 A Ave
PO Box 369
Lake Oswego, OR 97034
Telephone: (503) 635-0225
Email: eboone@ci.oswego.or.us

Attorney for Respondent on Review
City of Lake Oswego

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
JUDY C. LUCAS #903285
Senior Assistant Attorney General
INGE D. WELLS #881137
Assistant Attorney in Charge
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: inge.d.wells@doj.state.or.us

Attorneys for Amicus Curiae State of Oregon by and through its State Historic Preservation Office and Department of Land Conservation and Development

CHRISTOPHER P. KOBACK # 913408
Hathaway Koback Connors LLP
520 SW Yamhill St Ste 235
Portland, OR 97204
Telephone: (503) 205-8400
Email: chriskoback@hkcllp.com

Attorney for Respondent on Review
Marjorie Hanson

JENNIFER M. BRAGAR #091865
CARRIE A. RICHTER #003703
Garvey Schubert Barer
121 SW Morrison St 11th Fl
Portland, OR 97204
Telephone: (
Email: jbragar@gsblaw.com,
crichter@gsblaw.com

Attorneys for Amici Curiae Restore Oregon and Architectural Heritage Center

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BRIEF ON THE MERITS OF AMICUS CURIAE STATE OF OREGON, BY AND THROUGH ITS STATE HISTORIC PRESERVATION OFFICE AND DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT

STATEMENT OF THE CASE

Introduction and interest of *amicus curiae*, the State of Oregon

This judicial review involves the interpretation of ORS 197.772. The State of Oregon appears as *amicus curiae* because of the state's policy of maintaining, preserving and rehabilitating properties of Oregon historical significance. ORS 358.475.

ORS 197.772(1) requires local governments to allow a property owner to refuse to consent to designation or consideration for designation as a historic property (except consideration or designation for the National Register of Historic Places). ORS 197.772(3) allows a property owner to remove a locally designated property from a local government's inventory of historic properties in one specified circumstance: if the designation was "imposed" on the property by the local government. This case presents the question of whether ORS 197.772(3) applies to any subsequent owner of the designated property, or only to the owner at the time the designation was imposed. The answer to that question is the latter. The text, context and legislative history demonstrate that subsection (3) was intended to apply only to property owners who did not have

the opportunity to refuse to consent at the time the property was designated as historic property.

Question Presented

ORS 197.772(3) provides that "A local government shall allow a property owner to remove from the property a historic property designation that was imposed on the property by the local government." Does that statute apply to a subsequent owner of the property, or only to the property owner at the time the designation was imposed?

Proposed Rule of Law

ORS 197.772(3) applies only to property owners whose properties were designated as historic properties prior to the enactment of ORS 197.772, and who were not afforded an opportunity to refuse to consent to the designation.

Summary of Argument

Statewide Planning Goal 5 encourages local governments to maintain a current inventory of historically significant properties in their jurisdictions.[1] In 1993 and again in 1995, legislation was introduced to require local governments to make owner consent a prerequisite to historic designation. That legislation was adopted as Senate Bill 588 (1995) and became ORS 197.772. In addition

[1] Goal 5 requires local governments to "adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations. These resources promote a healthy environment and natural landscape that contributes to Oregon's livability."

to the owner consent provision, ORS 197.772 contains an "owner removal" provision, which allows a property owner to require the local government to remove a historic designation from the property if the designation was "imposed" by the local government.

In this case, the City of Lake Oswego removed its historic designation of the Carman House (built in 1855) at the request of the current property owner, based on a previous owner's objection to the city's 1990 decision to designate the property. On appeal, the Land Use Board of Appeals (LUBA) reversed the city's action on the ground that ORS 197.772(3) does not apply to a subsequent property owner, but only to the property owner who had objected at the time the designation was made. The Court of Appeals agreed with the city and reversed LUBA's decision. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App 811, 820-21, 344 P3d 26 (2015). But the Court of Appeals' reasoning is flawed in two respects, and its interpretation of ORS 197.772(3) is therefore in error.

First, the Court of Appeals failed to adequately consider the text of ORS 197.772. The text provides no basis for concluding that the legislature intended to allow "post-enactment" property owners to remove an *existing* historic designation. The Court of Appeals erred in concluding that, because the legislature "did not include any narrowing text," ORS 197.772(3) applies to

any property owner who can establish that the existing designation was imposed without the consent of the owner at the time of the designation.

Second, the Court of Appeals ignored legislative history expressly addressing the intent of the proponents of the owner removal provision in ORS 197.772(3), and misinterpreted the legislative history it did address. That legislative history, especially viewed in the historical context surrounding that statute's enactment, supports the conclusion that subsection (3) was intended to provide a remedy for property owners who did not have the opportunity to refuse their consent at the time the property was designated a local historic property. Proposed and enacted together, ORS 197.772(1) and (3) give owner consent priority over local control of the initial historic designation decision. That is, the legislature intended ORS 197.772(1) and (3) to place the *designation* decision in the hands of property owners, not local government.

As interpreted by the Court of Appeals, ORS 197.772(3) could indeed "wreak havoc" on Oregon's program of historic preservation. The Court of Appeals erred in concluding that was the legislature's intent. This court should reverse the Court of Appeals' decision.

ARGUMENT

The issue presented in this case is the correct interpretation of ORS 197.772(3). The court's goal, in construing a statute, is to discern what the legislature intended at the time that it originally enacted the critical statutory

language. In pursuing that inquiry, the court considers the text and context of the statute in light of any legislative history that appears useful to the court's analysis. *State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009). In this case, the text, context, and legislative history of ORS 197.772 demonstrate that subsection (3) of the statute was intended to apply only to property owners who did not have the opportunity to refuse their consent at the time the property was designated as a historic property.

I. Read in context, the phrase "a property owner" in ORS 197.772(3) may plausibly be interpreted to mean the owner at the time the historic designation is made.

ORS 197.772 provides:

> (1) Notwithstanding any other provision of law, a local government shall allow a property owner to refuse to consent to any form of historic property designation at any point during the designation process. Such refusal to consent shall remove the property from any form of consideration for historic property designation under ORS 358.480 to 358.545 or other law except for consideration or nomination to the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.).
>
> (2) No permit for the demolition or modification of property removed from consideration for historic property designation under subsection (1) of this section shall be issued during the 120-day period following the date of the property owner's refusal to consent.

> (3) A local government shall allow a property owner to remove from the property a historic property designation that was imposed on the property by the local government.[2]

As discussed below, ORS 197.772(1) and (3) were enacted together, as the A-9 and A-10 House amendments to SB 588 (1995). When the legislature uses the identical phrase in related statutory provisions that were enacted as part of the same law, the court interprets the phrase to have the same meaning in both sections. *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005). *See also Village at Main Street, Phase II, LLC v. Dept. of Rev.*, 356 Or 164, 175, 339 P3d 428 (2014) ("[T]he general assumption of consistency counsels us to assume that the legislature intended the same word to have the same meaning throughout related statutes unless something in the text or context of the statute suggests a contrary intention."). There is no indication in ORS 197.772 that the legislature intended "a property owner" to have different meanings in subsections (1) and (3).

To be sure, the use of the indefinite article "a" suggests more than a single property owner. But ORS 197.772(1) refers to a property owner's ability to refuse to consent "during the designation process." In other words, it is only

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[2] The Court of Appeals agreed with LUBA that the phrase "imposed on the property" refers to designations "placed on the properties over the objections of the owners." *Lake Oswego Preservation Society*, 268 Or App at 817. There is no dispute in this case that the former property owner objected to the 1990 designation.

a single property owner—the one who owns the property at the time of the designation—who can refuse to consent. And it is that same property owner who can remove a designation imposed by a local government prior to the enactment of the statute.

In sum, the phrase "a property owner" in ORS 197.772(3) may plausibly be interpreted to mean *any* property owner, or only the owner at the time the historic designation is made. But any ambiguity in the statute is resolved by the legislative history, which demonstrates that the legislature intended subsection (3) to apply only to property owners whose properties had previously been designated as historic without their consent.

II. The legislative history demonstrates that the legislature intended the phrase "a property owner" in ORS 197.772(3) to mean the owner at the time the historic designation was made.

Local implementation of Goal 5's historic resources rules met with resistance by some property owners. In response to that resistance, local governments began to enact "owner consent" provisions in their historic preservation ordinances. The courts subsequently invalidated some of those provisions as contrary to Goal 5. *See e.g. DLCD v. Yamhill County*, 99 Or App 441, 444, 783 P2d 16 (1989).

In 1993, the legislature attempted to enact an owner consent provision that would be applicable statewide. HB 2124 (1993). The bill passed both houses, but was vetoed by Governor Roberts because of ongoing concerns that

owner consent would "undermine existing and future local government historic preservation programs."[3] Senate and House Journal 1995, p 20.

The debate over owner consent was renewed in the 1995 Regular Session with the introduction of SB 588. ORS 197.772(1) and (3) originated as the A-9 and A-10 amendments to SB 588-A in the May 2, 1995, work session of the House Committee on General Government and Regulatory Reform. At that work session, Representative Lewis, one of the proponents of the amendments, directly addressed the question presented in this case: whether a subsequent owner could remove an existing local historic designation. Representative Ross asked:

> In the -9's, Representative Lewis, would that mean that if somebody bought a piece of property that had been designated, had a historic designation by a local government, who bought the piece of property under historic designation, that was clear when they bought it and then they move in and the minute they got there they could say, "Well, we're sorry, we don't want to be historic anymore?"

Tape Recording, House Committee on General Government and Regulatory Reform, SB 588, May 2, 1995, Tape 126, Side A. Representative Lewis replied that was not her intent in proposing the A-9 amendment:

> I frankly hadn't thought about that situation, Representative Ross. I had more thought of people who, who since the implementation of the historic designation under Goal 5, and, you

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[3] That bill did not contain the "owner removal" provision later enacted as ORS 197.772(3).

> know, in our county basically many people have been forced into the historic property designation and I believe some of those people are waiting for HB 2124 to become law. Then they intend to petition to be removed from the historical property designation. I frankly hadn't thought through your question.

Id.

In other words, the intent of the A-9 amendment, which became ORS 197.772(3), was not to allow a buyer to acquire property with a historic designation and then seek to have that designation removed. Instead, the amendment was intended to provide a remedy for property owners who had been "forced into the historic property designation" by the local government. "*Those people*" were waiting for the bill to be enacted, so that they could, in essence, enforce their previous objection to the designation. Stated differently, Representative Lewis' intent was that a property owner who had been "forced" into a historic designation prior to the enactment of SB 588 would have the opportunity to have that designation removed.

The question of removal of historic designation by a subsequent property owner arose again at the second committee work session, on May 4, 1995. After the committee had just passed the A-9 amendments, Representative Johnson raised a question about the combined effect of A-9 and A-10:

> If you look at the dash 9 and dash 10— and we just passed 9—could somebody as you understand this come under 10 and then ask to be out, under 9?

Tape Recording, House Committee on General Government and Regulatory Reform, SB 588, May 4, 1995, Tape 130, Side B. Representative Milne, another proponent of the amendments, explained the intent of A-9:

> Representative Johnson, my intent in this amendment is where it says on line 3, "historic designation that was imposed on the property," my feeling there is what we're trying to say, what my intent is, is that *when property owners were not allowed to consent,* and government imposed it on them, that now they would have the opportunity to remove their property from that designation.

Id. (emphasis added).

Thus, it is apparent that the legislators who proposed A-9 and A-10 had as their purpose to make owner consent a requirement of local historic designation, even if the designation had already been made over the owner's objection. In other words, the A-9 amendment offered a remedy to a property owner who had been denied the opportunity to refuse consent to a locally "imposed" historic designation.

III. The text, context and legislative history of ORS 197.772(3) demonstrate that it was intended to apply only to property owners who did not have the opportunity to refuse to consent at the time a historic designation was "imposed" on the property by a local government.

The legislative history discussed above shows that ORS 197.772(1) and (3) came about as a result of concern that property owners were being forced to accept local historic designation of their property despite their objections. Subsection (3) must be read in conjunction with subsection (1). The concern

addressed in both provisions was ensuring the property owner's right to *refuse* a historic designation. Thus, the legislature intended only that those property owners whose objections to designation were overridden by local government prior to 1995 would have the remedy under subsection (3) of having the existing designation removed.

To be sure, the text of ORS 197.772 is ambiguous, and one possible meaning of "a property owner" is "any property owner," as the Court of Appeals concluded. But that conclusion fails to take into account the statutory framework within which the law was enacted. *See State v. Ofodrinwa*, 353 Or 507, 512, 300 P3d 154 (2013) (context for interpreting a statute's text includes the statutory framework in which the law was enacted). Oregon's land use statutes and historic preservation regulations set up a procedure for the inventory of historic properties in the state. Once historic properties are designated, owners are offered incentives (primarily in the form of tax incentives) to preserve, maintain, and rehabilitate them. ORS 358.480-545. Given that context, it is implausible that the legislature intended to give the purchaser of a designated historic property the unilateral authority to remove that designation, after the owner at the time of the imposed designation had declined the opportunity to remove the designation as provided in ORS 197.772(3). Had the legislature intended such an anomalous result, it could have expressly stated that intent in ORS 197.772(3), but it did not do so.

CONCLUSION

This court should reverse the decision of the Court of Appeals.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
ANNA M. JOYCE
Solicitor General

/s/ Inge D. Wells

INGE D. WELLS #881137
Assistant Attorney in Charge
Civil/Administrative Appeals
inge.d.wells@doj.state.or.us

Attorneys for Amicus Curiae
State of Oregon, by and through its State Historic Preservation Office and Department of Land Conservation and Development

IDW:ka3/6645617

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 10, 2015, I directed the original Brief On The Merits to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Daniel H. Kearns, attorney for petitioners on review, Evan P. Boone, attorney for respondent on review City of Lake Oswego, Christopher P. Koback, attorney for respondent on review Hanson, Jennifer M. Brager and Carrie A. Richter, attorneys for Amici Curiae Architectural Heritage Center and Restore Oregon, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,623 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

/s/ Inge D. Wells

INGE D. WELLS #881137
Assistant Attorney in Charge
Civil/Administrative Appeals
inge.d.wells@doj.state.or.us

Attorney for Amicus Curiae
State of Oregon

IDW:ka3/6645617