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

Court of Appeals
A157619

S063048

RESPONDENT ON REVIEW MARJORIE HANSON'S ANSWERING 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
February 5, 2015
before Armstrong, P.J., Egan J., and Wollheim, S.J.
Opinion by Egan, J.

(over...)

September, 2015

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I. RESPONSE TO STATEMENT OF THE CASE

A. Nature of the Proceeding and Judgment Below.

Respondent on Review, Marjorie Hanson, Trustee for the Mary Wilmot Trust (the "Trust"), does not accept Petitioners' statement on the nature of the proceedings in its entirety. ORS 197.772 was not a statute adopted to implement Oregon's Goal 5 historic preservation program. It is a remedial statute adopted to assure that private property was not subjected to nonconsensual local historic designations that restricted the use of private property with no local benefits.

This case involves the Court of Appeals' reversal of LUBA's Order as unlawful in substance under ORS 197.850(9)(a). *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App 811, 344 P3d 26 (2015). (A copy of the Opinion is attached to Petitioners' Brief, but is not labeled as an appendix and has no page numbers). LUBA's Order remanded the City of Lake Oswego's (the "City") decision to remove the Trust's property from the City's inventory of historical resources pursuant to ORS 197.772(3). That statute provides:

> 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.

On review, LUBA concluded that the term "a property owner" was limited to the property owner who owned the property at the time that the local

government first imposed the historic designation. *Lake Oswego Preservation Society v. City of Lake Oswego*, LUBA Slip Op. at 25. (A copy of LUBA's Slip Opinion is also attached to Petitioners' Brief.) The Court of Appeals reversed LUBA concluding that the text and legislative history revealed that the legislature was concerned about correcting impositions of unwanted designations and not on the identity of the property owner. Thus, all owners of property upon which a local historic designation was imposed, even subsequent owners who acquired property after the imposition, could have the designation removed. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App 811, 820-821, 344 P3d 26 (2015). Petitioners appealed the Court of Appeals' decision.

B. References to Participants.

The Petitioners on Review are Lake Oswego Preservation Society, Marylou Colver and Erin O'Rurke-Meadors. They will be referred to collectively as "Petitioners." There are two Respondents on Review – City of Lake Oswego and Marjorie Hanson, trustee for the Mary Cadwell Wilmot Trust. Respondent Marjorie Hanson, trustee for the Mary Cadwell Wilmot Trust will be referred to throughout the Answering Brief as "the Trust." Respondent, City of Lake Oswego, will be referred to throughout the Answering Brief as "the City." There are two Amicus Curiae Briefs on the

Merits. One was submitted by a group of parties: Restore Oregon, Restore Oregon, Architectural Heritage Center National Trust, Preservation Action Preservation Works, City of Portland, City of Pendleton, and City of The Dalles. That group will be referred to throughout the Answering Brief as "Restore." The Oregon Department of Justice submitted a brief on behalf of Amicus Curiae, the State Historic Preservation Office and the Department of Land Conservation and Development. These participants will be referred to throughout as "the State."

C. Questions Presented on Appeal.

The Trust does not accept Petitioners' statement on the issues presented because it includes an issue that was not presented to, or decided by, the Court of Appeals. In their third question presented, Petitioners assert that the Court of Appeals shifted the burden of proof under ORS 197.772(3) from the property owner to local governments. Before the LUBA and Court of Appeals, Petitioners did not raise any issue over whether ORS 197.772(3) created any particular burden of proof, much less whether the statute shifted a burden of proof to local governments. Because the issue was not before it, the Court of Appeals made no decision on who bears the burden of proof. The Court of Appeals correctly concluded that owners of property upon which a local historic designation was imposed have the right to require the local government to

remove that designation. Petitioners did not raise any issue over the burden of proof in their Petitioner for Review to this Court. The issue of whether under ORS 197.772(3) a property owner or a local government bears any particular burden of proof is not before the Court.

The only question presented is whether an owner who acquires a property upon which a local government imposed a local historic designation can require the local government to remove that designation.

D. Proposed Rule of Law.

The Trust does not accept Petitioners' or the State's proposed rule of law because they are inaccurate statements of the law.

The rule of law that is consistent with the text of ORS 197.772(3) and the relevant legislative history is that the term "a property owner" in ORS 197.772(3) means any property owner who owns property upon which a local government imposed a historic designation.

E. Response to Summary of Material Facts.

The Trust does not accept Petitioner's summary of material facts because it is incomplete.

1. <u>Property ownership.</u>

Richard and Mary Wilmot jointly acquired a 10-acre parcel of property in Lake Oswego in 1978. [LUBA Rec. 47]. They sold 8.25 acres in about 1990

and retained 1.25 acres ("the Property"). [LUBA Rec. 234]. The Wilmots owned the Property jointly until Richard passed away. [LUBA Rec. 41]. Thus, Mary Wilmot was an owner of the Property between 1990 and 1992,[1] when, over her and her husband's objection, the City designated her property as a local historic resource. In 2001, after Richard Wilmot's death, Mary Wilmot, as the sole owner, placed the Property in her Trust. [LUBA Rec. 45, 431-432].

2. Proceedings Prior to LUBA.

In June 2013, the Trust submitted an application to the City to modify the historic designation. [LUBA Rec. 229, 235]. Because the City imposed the designation on the entire 1.25 acres, the City's historic resource regulation prohibited any subdivision of the Property. Lake Oswego Dev. Code §50.06.009.8.b. The Trust proposed to create small historic tract on a portion of the Property that would allow for subdivision of the Property and still preserve the historic value with a permanent monument. [LUBA Rec. 229]. Lacking staff support for that proposal [LUBA Rec. 152], in October 2013, the Trust withdrew its application to modify the designation and demanded that the City remove the designation pursuant to ORS 197.772(3). [LUBA Rec. 49-52].

[1] The purchaser of the 8.25 acres also requested that the designation be removed. Initially the City denied both requests. In 1992, after a fire destroyed an old barn on the 8.25 acres the City reconsidered its decision and removed the designation on the 8.25 acres. The City retained the designation on the Wilmot's 1.25 acres.

When the City did not do so, the Trust filed an action in the Circuit Court for the State of Oregon, Clackamas County, and obtained an alternative writ of mandamus compelling the City to either remove the designation or show cause why it was not required to do so. [LUBA Rec. 53-65]. Before the final return date set by the circuit court, City Council voted to remove the designation pursuant to ORS 197.772(3). Council's decision was attached to the City's amended return and the circuit court entered a final judgment decreeing that the City complied with its obligations under the writ by removing the historic designation. [Rec. 348-363]. Petitioners declined to intervene in those proceedings and the final judgment was not appealed.

3. LUBA and Court of Appeals' Decision.

Despite the circuit court's final judgment, LUBA accepted jurisdiction to review Council's underlying decision to remove the designation and remanded that decision. After considering only select legislative history, LUBA concluded that the legislature intended that only the property owner at the time a local designation was placed on the property could seek removal under ORS 197.772(3). *Lake Oswego Preservation Society v. City of Lake Oswego*, LUBA Slip op. at 25. The Court of Appeals reversed LUBA concluding that the term "a property owner" in ORS 197.772(3) was not limited to the original owner at the time of a designation, but included any owner who owned property upon

which a designation was imposed. The court reasoned the legislature was concerned over whether the historic designation was imposed and not on the identity of the owner seeking removal. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App 811, 820-821, 344 P3d 26 (2014).[2] Petitioners accurately quote select passages from the LUBA decision and the Court of Appeals' reversal.

F. Summary of Arguments

1. <u>First Assignment of Error.</u>

ORS 197.772(3) grants to any property owner who owns property upon which a local government imposed a historic designation the right to have that designation removed. The text the legislature used does not qualify the term a property owner to only the owner at the time of the initial designation. The court should not supply that additional text. ORS 174.010. Petitioners and the State incorrectly argue that the term property owner in ORS 197.772(3) refers to the same property owner identified in ORS 197.772(1). That cannot be the case. The term "a property owner" in section (1) is limited to a person who owns property subject to a local designation process <u>after</u> the enactment of ORS 197.772. Those owners have the right to withhold consent to a

[2] Petitioners had challenged whether the designation in this case had been imposed. Both LUBA and the Court of Appeals summarily rejected Petitioners' argument. Petitioners now concede that point.

designation which precludes all local designations from being placed on their property.

The term "a property owner" referred to in section (3) is broader and includes any owner of property upon which a local designation was imposed, including those owners subjected to a designation process before the enactment of ORS 197.772, who did not have the right to withhold consent. The legislature's use of a broader definition of property owner in section (3) reveals an intent to not limit removal rights to only the owner at the time of the designation. The property owner referred to in section (1) had the right to withhold consent and prevent any local designation from being placed on their property. If the legislature intended for the property owner in Section (3) to be the same owner as in Section (1), then all owners, whether a designation was placed on their property before or after ORS 197.772, would have to get the right to withhold consent under Section (1). Local governments would have to go back to all owners to seek consent.

Petitioners' and Restore's criticism of the Court of Appeals for not accounting for Goal 5 considerations in its decision is misplaced. The Court of Appeals addressed the arguments raised by the parties and Petitioners never raised any argument that applying ORS 197.772(3) required the court to consider its current Goal 5 arguments. In any event, Petitioner and Restore's

argument that Goal 5 considerations compel an interpretation different than that which the Court of Appeals reached is without merit. The history of events that precipitated the enactment of ORS 197.772 reveals that the legislature intended to create a broad and sweeping exception to local governments' Goal 5 programs. Yamhill County attempted by ordinance to elevate private owners' desire to not have their property burdened with a local designated over any Goal 5 considerations. After LUBA and the Court of Appeals held that the County's ordinance violated Goal 5, the legislature took the same concept and, by statute, elevated property owners' desires above all Goal 5 considerations. Under ORS 197.772, the owners' unilateral wishes trump any Goal 5 consideration. A property can meet every Goal 5 element and be kept off all local inventories just because the owner does not wish for the property to be included.

2. Second Assignment of Error.

The original proponents of SB 588 never considered how the proposed law would apply to subsequent purchasers. As the bill went through committees one representative proposed an amendment that would have allowed consensual designations, and only consensual designations, to survive property transfers, which clearly indicates an intent that nonconsensual designations would not survive transfers. The House passed SB 588 with that provision. Under the House version, consensual designations placed on properties before 1995 could

not be removed, even if the property was sold to a new owner but, imposed designations did not survive transfers and could be removed. The Senate refused to accept the House version that allowed consensual designations to survive transfers. The Conference Committee later removed the provision that allowed even consensual designations to survive transfers of the property indicating that the legislature did not want even consensual designation to survive transfers. The 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 a local historic designation removed.

3. Third Assignment of Error.

Petitioners' third assignment of error attempts to raise an issue not before the Court. Petitioners argue that the Court of Appeals implicitly reversed the burden of proof under ORS 197.772(3). The Court of Appeals did not even discuss the burden of proof under ORS 197.772 because there was no reason to decide that issue.

Petitioners' argument is a back-handed attempt to add an issue that they did not raise in their Petition for Review. To the extent there was ever an issue over the burden of proof, it was included in Petitioners' challenge of LUBA's determination that there was substantial evidence to support the City's finding

that the designation on the Property had been imposed. LUBA and the Court of Appeals decided that issue against Petitioners and they did not include that as an issue in their Petition for Review.

Furthermore, even if the Court of Appeals' decision can be interpreted to place on the local government the burden to show that a prior owner consented to a local designation that is not an unreasonable burden. According to Petitioners, local governments undertook elaborate processes to identify local historic resources and then designate them for inclusion in their Goal 5 inventories. One can reasonably presume that local governments have some record of whether they sought and received consent from the property owner.

Restore's argument that local governments may be disadvantaged because they lost records is not relevant to the Court's interpretation of ORS 197.772(3) and relies upon uncorroborated facts not in the record. The legislature was aware of the potential impacts on local historic inventories and never suggested that record retention was an issue. Restore's argument is essentially that the Court should, as a matter of policy, rewrite ORS 197.772(3) to get to an end that it supports. That argument runs counter to the basic principles of statutory construction. Restore has an avenue to turn to; it can propose legislation to address the problems they perceive.

II. RESPONSE TO PETITIONERS' FIRST ASSIGNMENT OF ERROR

A. Concise Response to Petitioners' First Assignment of Error.

The text and context of ORS 197.772 do not support Petitioners' argument that the right to have an imposed local historic designation removed is limited to only the owner of the property at the time of the initial designation. The plain text states that a property owner has the removal right if they own property upon which a local government imposed a historic designation. The legislature chose not to further qualify the term "a property owner" in ORS 197.772(3). The context for ORS 197.772 informs that the legislature intended to create a broad exception to local Goal 5 programs, elevating property owners' desires above Goal 5. When ORS 197.772 applies, it eliminates all Goal 5 considerations and makes the owners' desires the only relevant factor.

B. Respondent on Review's Argument.

1. Standard of Review.

The Court of Appeals reviews LUBA's orders involving local ordinances to determine whether they are unlawful in substance. *Siporen v. City of Medford,* 349 Or 247, 243 P3d 776 (2010). In *Siporen*, this Court indicated that it also applies the unlawful in substance standard to its review of LUBA's interpretations of local ordinances. *Siporen*, 349 Or at 261-262. Although this case involves an interpretation of a state statute rather than a local ordinance,

the Trust submits that that same standard applies when this Court is reviewing a Court of Appeals' decision that reviewed a LUBA interpretation of a state statute.

2. Under the current methodology for construing a statute, the language adopted by the legislative body is the best indication of the legislature's intent.

The proper methodology for interpreting a statue is set forth in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The first step remains an examination of the text and context of the statute. Regardless of whether the statute is ambiguous, the court may also consider pertinent legislative history that a party may offer where it appears useful to the court's analysis. The court determines the weight, if any to give to legislative history. If, after the court considers the text, context and relevant legislative history, the legislature's intent remains unclear, the court may resort to maxims of construction. *Gaines*, 346 Or at 171-172. The court confirmed in *Gaines* that even under the slightly new methodology the text of the statutory provision remains the most persuasive evidence of the legislature's intent. *Gaines*, 346 Or at 171. Only the text adopted receives the consideration and approval of the majority of the members of the legislature. *Id*. This aspect of the *Gaines* holding remains unchanged. *Halperin v. Pitts*, 352 Or at 482, 494-495.

Under *Gaines* and *Halperin*, the court may consider legislative history offered by the parties, but there are limitations. A court cannot resort to

legislative history as a justification for inserting wording in a statute that the legislature by choice or oversight did not include. *Halperin*, 352 Or at 494-495. Legislative history can be used to identify or resolve an ambiguity in a statute, but it cannot be used to re-write the statute. *Id*. Thus, it is still important for a court to determine whether challenged text is plain and unambiguous. The court in *Gaines* explained that a party seeking to overcome seemingly plain language with legislative history faces a difficult task. *Gaines*, 346 Or at 172. While a party may attempt to use relevant legislative history to convince a court that seemingly clear language has a latent ambiguity, if the court finds that the challenged text is capable of only one meaning, no weight can be given to history that suggests that the legislators intended something else. *Id*, at 172-173.

3. The plain text of ORS 197.772(3) unambiguously bestow the right to remove an imposed historic designation on an owner of property upon which the designation was imposed; the text does not allow for any further qualification to the term "property owner".

a. There is no need to go beyond the plain text of ORS 197.772(3).

The Court of Appeals did not decide this case based exclusively on the text of ORS 197.772, but it correctly concluded that the term "a" in a statute generally refers to an unidentified, underdetermined or unspecified object. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App 811, 818, 344 P3d 26 (2015). The Court of Appeals did not believe that the text and context of ORS

197.773(3) allowed it to answer the specific question of whether an owner who acquired a property upon which a historic designation was imposed could require the local government to remove that designation. *Id*.

Thus, the court proceeded to the legislative history and its discussion reveals that the use of the term "a" and the absence of any qualifying text were important factors in its decision. After examining the relevant history, the court concluded that the legislature was concern about addressing and rectifying designations that were imposed on property and not on the identity of the owner that might now be stuck with the designation. *Id*. at 821. The court then specifically noted that the fact that the legislature did not include any narrowing language supported its view of the relevant legislative history. Thus, the court correctly held that the relevant legislative history supported the text of the statute that is not limited to any particular owner, but rather bestows rights on any owner of property upon which a local historic designation was imposed.

The Trust agrees with the Court of Appeals' analysis and conclusions, but submits that the Court of Appeals' conclusion would have been correct even had it not considered the legislative history. The text of ORS 197.772(3) is plain and unambiguous. The right to remove a local historic designation rests in "a property owner" who owns property upon which a designation was imposed. It does not limit that right to an owner who owned property at the time of the designation.

The only qualification is that the property owner must own property upon which a designation was imposed by the local government. Had the legislature intended to limit the right to the owner who owned the property at the time of the designation, the legislature would have used text that stated that the property owner, *who owned the property at the time a designation was imposed*, can seek removal. The legislature did not use that language and it is not appropriate for the courts to add language that the legislature omitted. ORS 174.010; *International Association of Firefighters, Local 3564 v. City of Grants Pass*, 262 Or App 657, 661, 326 P3d 1214 (2014).

The fact that ORS 197.772(1) also uses the term "a property owner" does not require any further analysis. The term "a property owner" in section (1) refers only to owners who have property subjected to a local designation process after the enactment of ORS 197.772 in 1995. Section (3) addresses all owners regardless of when their property was subject to a local designation process. The text in Section (3) should be interpreted on its own. In describing the owners who have removal rights the legislature used the unqualified term "a property owner." The plain text allows for only one interpretation: all owners of property upon which a local government imposed a historic designation, can have that designation removed.

b. The internal context does not support petitioner's argument that the property owners in ORS 197.772(3) are only those owners at the time of the initial local designation.

Petitioners' current argument, in which the State joined, is that the term "a property owner" in ORS 197.772(3) has to be interpreted to mean the same thing as the term "a property owner" in ORS 197.772(1). In other words, the term "a property owner" in section (3) always refers to the same property owner referred to in section (1). Petitioners assert: "It is undisputed that a property owner in subsection (1) means the owner of the property at the time the Goal 5 historic listing is proposed-that much is not ambiguous." Petitioners miss an important point and suggest a conclusion that cannot be correct. The property owners, referred to in ORS 197.772(1), cannot be all owners who owned property that went through a historic designation at any time. The text in Section (1) unambiguously limits the term "property owner" to only those owners who were exposed to a proposed designation after 1995. ORS 197.772 created a right that did not exist before 1995 — the right to withhold consent and preclude any local designation. Section (1) cannot apply to property owners who were exposed to a local designation process before 1995 because those owners had no right to preclude the local designation. Indeed, later in their brief Petitioners assert, albeit without any citation to the record, that most historic designations were placed on properties before the enactment of ORS 197.772. Pet. Br. p. 32.

On the other hand, the term "a property owner" in ORS 197.772(3) is more expansive than the term "property owner" in ORS 197.772(1). ORS 197.772(3) is not limited to property owners who were exposed to local historic designation processes after 1995. It applies to any owner who owns property upon which a local designation was imposed at any time. Petitioners have never disputed that proposition. The legislature could not have intended the term to mean the same owner in both sections. This was the view taken by LUBA in *Demlow v. City of Hillsboro*, 39 Or LUBA 307, (2001) and Petitioners endorsed that view in prior proceedings. Petitioners' Answering Brief and Cross–Opening Brief, pp. 17-18.

It is possible that an owner could have withheld consent after 1995, and the local government disregarded that lack of consent. In that case, the term "a property owner" could refer to the same owner in Section (1) and Section (3). However, it is more likely and common, that the owner in Section (3) is someone who owned the property before ORS 197.772 and never had the opportunity to withhold consent, or an owner who acquired property from some on who never had that opportunity. The text used in Section (3) was sufficiently broad to cover all of those situations. The term "a property owner" in Section (3) must have its own separate meaning and the Court of Appeals correctly concluded that it was any owner of property upon which a local designation was imposed.

If Petitioners' current view is accepted and the term property owner in

Sections (1) and (3) means the same person, the only owners who have the right to remove would be owners who had the ability to withhold consent under Section (1). Under a strict application of Petitioners' interpretation, governments would be required to go back to those owners who had designations placed on their property before 1995 and ask them for consent. That would be the only way to give the exact meaning to the term "a property owner" in both sections.

The Court should interpret the term "a property owner" in ORS 197.772(3) using the plain text. The legislature did not qualify the term "a property owner" in ORS 197.772(3) in any manner to limit it to the owner of property at the time of the initial historic designation. The text of the statute can only be read to contain one qualification. The property owner identified in ORS 197.772(3) has to be an owner of property upon which a historic designation was imposed by a local government. To further qualify that text to any specific owner would require the Court to add text to the statute that the legislature chose to omit. The applicable statute and case law instruct the court to refrain from doing that.

4. The additional context Petitioners and Restore use to support their arguments does not provide any basis to qualify the term "property owner" to only those owners who owned property at the time of the original designation.

Both Petitioners and Restore argue that the Court of Appeals erred in not applying ORS 197.772(3) in a manner that was consistent with Goal 5 and its implementing rules. Petitioners and Restore contend that the events surrounding

Yamhill County's adoption of an owner consent provision as part of its Goal 5 program and the subsequent review of that ordinance by LUBA and the Court of Appeals is context that required the Court of Appeals to interpret ORS 197.772 in a manner consistent with Goal 5. Petitioners and Restore criticize the Court of Appeals for not considering the arguments they now raise. There are multiple problems with Petitioners' and Restore's arguments.

a. Petitioners' and Restore's criticism of the Court of Appeals for not discussing in detail how ORS 197.772 squares with Goal 5 is disingenuous since they never raised that argument before the Court of Appeals.

Petitioners and Restore criticize the Court of Appeals for ignoring or failing to consider important Goal 5 elements as part of its interpretive analysis. Pet. Br. p. 18 and 20-21; Restore Br. p. 18. Restore contends:

> The Court of Appeals decision makes no mention of Goal 5, nor is there any indication in the decision that compliance with Goal 5 would be compromised by allowing retroactive de-designation of historic resources. Although the Court of Appeals did not bother to articulate a reason for this omission, one possible explanation is that it incorrectly believed that any subsequent de-designation of historic resources would not be far-reaching. Restore Br. p. 18.

The Court should disregard these arguments. The Court of Appeals properly evaluated the arguments that the parties submitted. Petitioners did not make its current Goal 5 arguments to the Court of Appeals. Petitioners confined their arguments to the text and legislative history of ORS 197.772. Restore never raised any arguments before the Court of Appeals because they did not

participate. Petitioners and Restore are trying to raise a new issue for the first time in their briefs. The more plausible reason that the Court of Appeals did not specifically address Petitioners and Restore's current Goal 5 arguments is because the arguments were never presented to the Court of Appeals. As the Trust will explain below, the Court of Appeals expressly addressed the impacts that ORS 197.772(3) could have on local historic inventories, noting that the legislature was fully aware of those potential impacts when it passed ORS 197.772(3). The Court correctly concluded that the legislature intended ORS 197.772(3) to have that effect.

b. Even though Petitioners did not make their current Goal 5 arguments before the Court of Appeals, the Court appropriately considered the impact of ORS 197.772(3) on local inventories.

Contrary to Petitioners' and Restore's argument, the Court of Appeals did address the potential impact ORS 197.772(3) would have on current Goal 5 historic resources. Although Petitioners never argued to the Court of Appeals that local governments applying ORS 197.772(3) must assure consistency with Goal 5, the Court of Appeals discussed the broader principles. The court noted that the legislature understood the broad implications of the removal rights under ORS 197.772(3) on local historic inventories:

> Indeed, the A9 amendment's opponents were concerned that the amendments would lead to the dismantling of local historic districts and the amendment's proponents did not assert otherwise in the face of those concerns, which supports the understanding that ORS

197.772(3) was intended to be broadly applicable.

Lake Oswego Preservation Society v. City of Lake Oswego, 268 Or App at 818.

The Court of Appeals recognized that the legislature was aware that ORS 197.772(3) would apply to properties that had already gone through a local Goal 5 process and had been designated as local historic resources. The Court of Appeals concluded from that fact that the legislature intended ORS 197.772(3) to apply broadly to all imposed designations, regardless of whether the property had been conveyed. Contrary to Restore's speculation, the Court of Appeals fully appreciated the dramatic impact ORS 197.772(3) could have but concluded correctly that the legislature intended that affect.

c. Petitioners' and Restore's argument that applying ORS 197.772(3) requires the consideration of or application of Goal 5 is wrong.

The events emanating in Yamhill County that led to the enactment of ORS 197.772 do not indicate that the legislature intended to create a narrow exception to Goal 5 that requires local governments to apply Goal 5 considerations when deciding requests to remove a local designation under ORS 197.772(3). That history reveals that the legislature intended to create a broad, sweeping exception to Goal 5 that eliminated all Goal 5 considerations when an owner desired to eliminate a designation that was imposed.

Petitioners' argument that *DLCD v. Yamhill County*, 99 Or App 441, 783 P2d 16 (1989) somehow requires that ORS 197.772 be construed narrowly to be

consistent with, and not violate Goal 5 is not supported by the history of events. There is no dispute that HB 2124, SB 588 and, ultimately, ORS 197.772 were all legislative responses to LUBA and the Court of Appeals decision in *DLCD v. Yamhill County*. Petitioners' discussion on Yamhill County Ordinance 479 and the ensuing appeals is accurate, but the conclusion Petitioners draw from the history is off the mark.

In 1989, Yamhill County adopted Ordinance 479 which, as written, had a dramatic impact on the County's process to comply with Goal 5. It conditioned any historic designation of private property on the County obtaining the owner's consent. Thus, even if the County found that a property was significant and met all other conditions for historic designation, the County was prohibited from placing a historic designation on the property unless it obtained the owner's consent. As the Court of Appeals noted, it "categorically subordinated all historic resources, or at least otherwise qualified landmarks, to an owner's preference for non-regulation." *Id.* at 447.

LUBA decided that making landowner consent a determinative criterion for whether a site will be included on the county inventory of historic resources violated Goal 5. *Id*. at 445. The Court of Appeals affirmed LUBA. The result of the Court of Appeals' decision was that Goal 5 considerations were not subservient to private owners' desires. If a local government concluded that a

specific property should be designated and conflicting used not allowed, an owner's desire to not have their property designated could be disregarded.

Subsequently, in 1993, Representatives from Yamhill County initiated HB 2124 that required owner consent for all historic designation. HB 2124, passed the house and senate. As Petitioners note, the Governor vetoed HB 2124 apparently out of concern that it would have made Oregon's historic preservation program inconsistent with the National Historic Preservation Act of 1966. Opening Br. 23. Plainly, everyone involved understood that the owner consent provision was a broad sweeping exception to Goal 5.

In what can only be interpreted as an act evidencing a desire to restore the broad exception, and elevate private owners' wishes above Goal 5 considerations, the legislature overrode the Governor's veto. Tape Recording, House Committee on General Government and Regulatory Reform, SB 588, May 4, 1995. Tape A; (Respondent City of Lake Oswego Appendix to its Brief at the Court of Appeals, p. 40.)[3] In 1995, legislators introduced SB 588 to clarify certain issues that arose in the passage and veto of HB 2124. SB 588 was substantially similar to HB 2124, but slightly narrowed the owner consent provision to address the concern over inconsistencies with the National Historic Preservation Act. It also added the

[3] The City included transcripts from the May 2 and May 4, 1995 meetings of the House Committee on Government and Regulatory Reform in an Appendix to its brief to the Court of Appeals.

removal right now found in ORS 197.772(3).

The text of ORS 197.772, in the correct context, informs that the legislature decided to override the court's decision in *DLCD v. Yamhill County* and elevate private owners' desires above all Goal 5 considerations. The constitutionality of ORS 197.772 has never been challenged and Petitioners do not contend that the legislature lacked the power to adopt a law that was directly contrary to the Court of Appeals decision in *DLCD v. Yamhill County.*

Contrary to Petitioners' claims, SB 588 was never intended to create a narrow exception to the Goal 5 historic preservation program for certain property owners. Opening Br. 22. The text and overall context of ORS 197.772 proves that the legislature did not carve out a narrow exception to Goal 5; it intended to eliminate non-consensual local designations by elevating property owners the right to keep any form of state and local historic designation off their property above any Goal 5 considerations. ORS 197.772 applies to every owner of property that may be considered historically significant. ORS 197.772 does not require any analysis to determine whether it is consistent with Goal 5. It made all Goal 5 considerations subject to the unilateral right of private owners to withhold consent to any local or state historic designation. It elevated private owner's desires above all Goal 5 considerations.

d. Restore's argument that in applying ORS 197.772(3) a local government must conduct a complete Goal 5 conflicting interest analysis ignores the text of the statute the regulations and the historical context.

Restore argues that the removal of the Property from the City's historic property inventory lacked consideration of Goal 5 as well as the administrative rules that implement it, and thus, violated the law. Restore Br. 15. Restore goes on to argue that the Court of Appeals erred in not interpreting the owner consent provision in a fashion consistent with the modern Goal 5 program. Restore Br. 17.

There is nothing in the text of ORS 197.772 that suggests that local governments should, or even could, apply Goal 5 considerations in processing a request under ORS 197.772. The text of the statute does not leave room for that analysis. Section (1) is susceptible to only one interpretation. Regardless of any other Goal 5 consideration, if an owner withholds consent, a local government is prohibited from placing a local designation on their property. In Section (3) if an owner has property upon which a local designation was imposed, they can require a local government to remove the property even if it meets all of the characteristics that would make a significant historical resource. There is no ability for the local government to weigh conflicting interests under Goal 5. The statute is directly inconsistent with Goal 5.

The regulatory agencies responsible for administering Goal 5 recognized that ORS 197.772 dramatically altered the Goal 5 inventory process. In 1996, the regulations related to historic designations under Goal 5 were amended to be consistent with the new state law. The relevant regulations also elevated all private owners' desires above Goal 5. The text of OAR 660-023-0200(5) and (6), provide:

> "(5) Local governments shall adopt or amend the list of significant historic resource sites (i.e. "designate" such sites) as a land use regulation. Local governments shall allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of the designation and shall not include a site on a list of significant historic resources if the owner of the property objects to its designation." OAR 660-023-0200(5).
>
> "(6) The local government shall allow a property owner to remove from the property a historic designation that was imposed on the property by the local government." OAR 660-023-0200(6).

Under the regulations, if a local government desired to add a new property to its historic inventory, it had to go through a land use process. Presumably that process would include the traditional pre-ORS 197.772 Goal 5 analysis. But, under the 1996 rules, even if a property met every criterion for inclusion on a local government's Goal 5 inventory, the owner could prevent any local designation at their discretion. The regulatory agencies understood that any Goal 5 considerations were subservient to the owner's desire. The text also reveals that to remove an imposed designation, local governments were not required to amend

any land use regulation. OAR 666-023-0200(5) cannot apply to removal because it recites in the parenthetical that it only applies to designating historic sites and because if removal of a designation also required the same land use process as a new designation, the agency would not have included a separate provision for removal. OAR 660-023-0200(6).

Restore goes so far as to argue that removing a property from a local inventory requires a comprehensive plan amendment in which local governments revisit the "full panoply of conflicting uses and ESEE evaluations". Restore Brief, p. 9. After the enactment of ORS 197.772 and the amendments to OAR 660-023-0200, that was not the case. As the text from OAR 660-023-0200(5) and (6) illustrates, after ORS 197.772 became law, only the decision to designate additional properties as historic resources required any land use decision. And, even that was subject to the property owner's consent. Under OAR 660-023-0200(6) there was no process required to remove a designation. If the property owner had the right to have the designation removed, there is absolutely no reason to engage in an elaborate process weighing conflicting interests. The entire process would be a waste of time since the only criterion is the owners' wish to have the designation removed.

In the decision Restore seeks to uphold, LUBA recognized this point concluding that if ORS 197.772 applies, all Goal 5 considerations are eliminated;

decisions to add or remove properties are based on the owner's wishes and have nothing to do with Goal 5. LUBA Slip Op., p. 24. Restore cannot reconcile its current argument with the decision they want the Court to uphold.

ORS 197.772 was written to have broad application and almost eliminate Goal 5 considerations in local governments' historic inventory process. Local governments could still evaluate historic significance as they had before, but regardless of the findings, the owner had the final and ultimate say on whether their property could be on the local inventory. Within that context, there is no support for Petitioners' and Amicus' conclusion that ORS 197.772 must be interpreted to be consistent with Goal 5. Within the overall context, all of ORS 197.772, including subsection (3) must be interpreted to create broad private rights. The Court of Appeals was correct in so construing ORS 197.772.

III. RESPONSE TO PETITIONERS' SECOND ASSIGNMENT OF ERROR

A. Concise Response to Petitioners' Second Assignment of Error.

Petitioner's argument that the legislature did not intend for subsequent purchasers of property to have the removal rights created in ORS 197.772(3) ignores critical legislative history. The legislature expressly considered the issue of how ORS 197.772(3) would affect subsequent owners and decided that subsequent owners would not have to accept prior designations. The legislature never intended that subsequent owners would be stuck with previously imposed

local historic designations.

B. Respondent on Review's Argument.

After concluding that the text of ORS 197.772(3) did not include any language limiting its application to any specific owner, the Court of Appeals determined that it needed to examine the relevant legislative history. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App at 818. The Court of Appeals noted that the issue of owner consent was hotly contested because it eliminated local control. *Id.* The Court of Appeals correctly determined that the legislature was concerned more with allowing property owners to remove nonconsensual or imposed designations. The legislature was not concerned with the identity of the property owner who was faced with the unwanted designation. The Court of Appeals decided that the legislature intended ORS 197.772(3) to apply broadly to any owner of property upon which a local government imposed a local historic designation. *Id*. at 821.

The Court of Appeals' decision is correct. As the Trust explained previously, HB 2124 was the first response to *DLCD v. Yamhill County*, and introduced the concept of owner consent. In 1995, after HB 2124 was vetoed and the veto overridden, legislators introduced SB 588, which was substantially similar to HB 2124, but addressed the concern over whether the consent provision was consistent with the National Historic Preservation Act, by allowing local government to continue to consider properties for inclusion in the national registry

even if the owner refused to consent. The Senate Committee on Water and Land Use confirmed the limited effect in its March 22, 1995 Measure Summary. Staff Measure Summary, Senate Committee on Water and Land Use, SB 588, March 22, 1995.

The April 1995, engrossed version of SB 588 included the following sections:

> Section 21. (1) Notwithstanding any other provision of law except as provided in subsection (2) of this section, a local government shall allow a property owner to refuse to consent to any form of historic property designation. Such refusal to consent shall remove the property from any form of consideration for historic property designation under ORS 358.475 to 358.545 or other law.
>
> (2) Subsection (1) of this section does not apply to property that is:
>
> (a) Classified and assessed as historic property under ORS 358.475 to 358.545 pursuant to application filed before July 1, 1997.
>
> (b) Listed in the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470 et seq.).
>
> (c) Determined to be eligible for listing in the National Register of Historic Places.
>
> (d) Under consideration for designation or a determination made pursuant to the National Historic Preservation Act of 1966.

In May, 1995, the House Committee on General Government and Regulatory Reform met to discuss SB 588. On May 2, 1995, Representatives

Milne and Lewis presented amendments A-9 and A-10. Amendment A-10 addressed the owner consent provision in sections 21 of the bill and Representative Milne and Lewis expressed concern that the version of the bill before the committee eroded the owner consent provision that was in HB 2124.

> REP. LEWIS: Our concern was the way this was worded would possibly allow local government to say the property was under consideration at some point for designation and therefore the person could not exercise his/her rights to owner consent. The A10 amendments specifically state that owner consent would not apply for consideration or nomination; it should be "or" instead of "for".

City's Court of Appeals Br., App. 27.

Representative Milne's proposed Amendment A-10 removed section 2 from the engrossed bill quoted above. The A-9 amendments included language creating the removal rights that are contained in ORS 197.772(3). SB 588-A-9, May 2, 1995.

The text that Petitioners quote from the May 2, 1995 meeting on pages 27 and 28 of their Brief reflects nothing more than, as of May 2, 1995, Representative Lewis simply had not yet considered the issue of whether a subsequent owner of a property upon which a local historic designation had been placed could remove that designation. Pet. Br. 27-28. As of May 2, 1995, the original sponsors of SB 588 had not considered how the bill would apply to subsequent owners. But, that changed as the Committee continued its work.

The Committee reconvened on May 4, 1995. Before discussing the issue

of how SB 588 may or may not apply to subsequent owners, the Committee voted to pass Amendment A-9. The discussion before the vote demonstrates that the Committee was aware that the removal rights being created would have broad application:

> REP. JOHNSTON: I will oppose the –A9. If we pass it, we will wreak havoc on the historic districts.

City's Court of Appeals Br., App. 35.

Then, the Committee discussed the relationship between the A-9 amendment and the A-10 amendments. Petitioners recite an exchange between Representative Johnston and Milne and argue that the exchange reveals that the proponents of the bill intended to limit the removal rights to the owner at the time of the initial designation. Pet. Br. 29-30. The discussion Petitioners quote does not support that conclusion. Representative Johnston's question was limited to whether the same owner could consent under section 1 in Amendment A-10 and later ask for removal under Amendment A-9:

> REP. JOHNSTON: The –A10 grants a property owner the right to refuse to consent to any form of historic property if they choose to. They could choose to agree. Under the –A9 amendments could the property owner two years later decide to take the property out of the designation.
>
> REP. MILNE: My intent in the language in line 3, "the historic property designation that was imposed on the property..." is when property owners were not allowed to consent and government imposed it on them, they would have an opportunity to remove their property.

> REP. JOHNSTON: If a person does it under Section 10 but had the opportunity to not do it, can they, two years later, take their property out? (App. 36-37)

City's Court of Appeals Br., App. 36-37.

Representative Milne was not addressing the questions asked to Representative Lewis on May 2, 1995, about subsequent owners. She did not intend to exclude future owners from relief under SB 588. She and Representative Lewis just had not considered that question. The only intent Representative Milne expressed was that if an owner consented to local designation, that same owner was saddled with the designation. The issue of whether a subsequent owner would be stuck with the designation was raised, but not answered by Representative Milne.

Petitioners fail to account for the continued discussion that specifically focused upon the applicability of SB 588 on subsequent owners. That discussion was precipitated by Representative Ross' proposed amendments and it demonstrates that the Committee never intended that a subsequent owner would have to accept a non-consensual local designation. At that meeting Representative Ross presented her proposed amendment, labeled Exhibit L:

> (4) If a local government, with the concurrence of the property owner, designates a property as historic the designation shall run with the property. Historic designations maybe removed by local government only if the historic significance of the property is substantially altered or destroyed.

Representative Ross made it clear that her proposed amendment was in

response to the question that arose on May 2, 1995 about how the removal rights would apply to subsequent owners.

> REP. ROSS: Explains her amendment (EXHIBIT L) is in response to a question that arose yesterday that if a property was designated a historic property by a local government and someone bought the property after the designation had been placed on it, could they say they don't want to be a part of the program. If this amendment is taken together with the –A9 amendments, it is my understanding that if the designation was imposed, then the owner could opt out if they want. But if a person bought the property with the designation on it, the person buys the designation as part of the property.

City's Court of Appeals Br., App. 39.

The question Petitioners raise in this appeal is the same question Representative Ross was addressing. Would subsequent purchasers of property be saddled with a previously imposed local historic designation? Her proposed amendment provided that subsequent purchasers would only have to accept local designations if the designation was placed on the property with the consent of a prior owner. Her amendment shows that there was never any legislative intent that subsequent purchasers of property that had a previously imposed designation would have to accept that designation. The local government would have to obtain their consent to the designation or the new owner could have it removed.

Not all Committee members supported the concept of allowing even consensual designations bind subsequent owners. When Representative Ross began discussing the relationship between her amendments and the A-9 amendments, Representative Johnston expressed concern that even allowing

consensual local designations to survive transfers was problematic because it would create a cloud on titles impinging owners' rights.

> REP. ROBERTS: If a property is put on the registry and someone buys the property, the buyer has to be told up front that they have to follow the rules.
>
> REP. JOHNSTON: If Rep. Ross's amendment were to pass, it would put a cloud on the title of all the properties. The title companies would have to include in their analysis of the title that the property owner's rights to the property are impinged.

City's Court of Appeals Br., App. 35.

Other Representatives pointed out additional problems if local designations survived transfers. Representative Strobeck expressed concern that if the only way a local government could remove a designation is when the historic significance is substantially altered or destroyed, owners may take action to create that situation:

> REP. STROBECK: Comments the language seems to guarantee midnight arson and other ways of substantially altering or destroying the property if someone doesn't want to be included any longer. I would think Rep. Ross would want some change of language.

City's Court of Appeals Br., App. 39.

Eventually Representative Strobeck offered a friendly amendment to Representative Ross' amendment that limited a local government's ability to remove a designation to situations where the owner consented:

> MOTION: REP. STROBECK moves to further amend Rep. Ross's motion: at the end of line 3 add "with the concurrence of the property owner".

City's Court of Appeals Br., App. 40.

The final text of the relevant provisions of the bill that went to the house vote included Representative Strobeck's friendly amendment to Representative Ross's motion in paragraph (4) below:

> (3) If a local government, with the concurrence of the property owner, designates property as historic property, the property shall continue to be so designated upon the property's transfer to one or more subsequent owners.
>
> (4) A local government that has designated property as historic property may remove the designation only upon the concurrence of the property owner.
>
> (5) A local government shall allow a property owner to remove from the property a historic designation that was imposed on the property by the local government.

B Engrossed SB 588, House Amendments dated May 22, 1995.

Under the version of the bill that went to the House for a vote, the removal rights applied to all owners of property with historic designations except those that were consensual. The House voted to approve SB 588 as presented by the Committee. As the Court of Appeals noted, the Senate refused to concur with the House version. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App at 820. Consequently, the bill was referred to the Joint Conference Committee. On June 3, 1995, the Conference Committee decided to delete the amendments that came out of Representative Ross' Exhibit L. Specifically, the Conference Committee struck the text that would have resulted in consensual designations surviving transfers:

> Deletes House amendments that would have permitted a local government to remove a historic property designation only with the concurrence of the property owner and that would have permitted a designated property to continue to be so designated when transferred to one or more subsequent owners.

Staff Measure Summary Carrier, Conference e Committee, June 3, 1995.

Changes in a bill as it moves through the legislative process provide clues as to the legislative intent. *Arken v. City of Portland*, 351 Or 113, 137, 263 P3d 975 (2011). Staff Measure summaries are valid indicators of legislative intent. *McCollum v. DCLD*, 252 Or App 147, 158, 286 P3d 916 (2012). The amendments to SB 588 and the Staff summaries that relate to the amendments, directly contradict Petitioners' claim that the legislature did not consider how ORS 197.772 would apply to subsequent purchasers. Representative Ross proposed text that provided that consensual local historic designations would continue to be on property after a transfer to a subsequent owner. By limiting her amendment to consensual designations, Representative Ross confirmed that non-consensual designations would not bind subsequent owners. The removal rights in ORS 197.772(3) applied to all nonconsensual designations regardless of who owned the property. The House approved that version of the bill. The Conference Committee considered Representative Ross' modified text and removed it before the full legislature voted on the bill, evidencing the intent that no local designations would bind subsequent owners.

What the initial proponents may have intended or considered is not relevant. The history reveals that the legislative Committees considered the issue and ultimately decided that the bill would not allow local designations to survive transfers. The only conclusion the Court can draw from the legislative history is that the legislature did not intend for new owners to be stuck with prior designations.

Against that historical backdrop, ORS 197.772(3) cannot be interpreted to apply only to the owner at the time of the original designation. It applies to any owner upon whom a historic designation was imposed. If local historic designations were not intended to bind subsequent owners, they certainly have the right to have a designation to which they did not consent removed under ORS 197.772(3).

In this case, Mary Wilmot acquired her own interest in the property in 1978. She and her husband Richard Wilmot owed the property. The original designation was imposed in 1990. (LUBA Rec. 294). When Richard Wilmot died, Mary Wilmot retained her interest. In 2001, Mary Wilmot simply placed her interest into her trust that still owns the property. (LUBA Rec. 45). Any way the Court looks at the issue, the Trust has the right to remove the current designation. If the mere placement of her interest in trust was not a change in ownership under ORS 197.772, the Mary Wilmot Trust retained the right to have

the designation removed even under LUBA's interpretation because Mary Wilmot owned the property in 1990. Conversely, if the transfer is considered a conveyance, the legislative history establishes that the prior designation, which was imposed, did not continue to burden her. The City was required to seek consent from the Trust to continue the designation. Since the City did not do so, the Trust has the right to have the designation removed.

IV. RESPONSE TO PETITIONERS' THIRD ASSIGNMENT OF ERROR

A. Concise Response to Petitioners' Third Assignment of Error.

Petitioner's third assignment of error attempts to raise an issue not before the Court. Petitioners argue that the Court of Appeals implicitly reversed the burden of proof under ORS 197.772(3). The Court of Appeals did not even discuss the burden of proof under ORS 197.772 because there was no reason to decide that issue. Before LUBA and the Court of Appeals, Petitioners did not raise any issue about what burden of proof, if any, ORS 197.772(3) created. Petitioners did not raise that as an issue in their Petition for review. The issue is not preserved. *State v. Roble-Baker*, 340 Or 631, 639, 136 P3d 22 (2006). Furthermore, the Court of Appeals did not reverse the burden of proof. It correctly interpreted ORS 197.772(3).

B. Respondent on Review's Arguments.

1. Petitioners did not preserve their third assignment of error.

The City's records plainly revealed that after the City imposed a historic designation on the Property, the Wilmots objected, requesting that it be removed. Before LUBA and the Court of Appeals, Petitioners argued that there was not substantial evidence that the historic designation in this case was imposed on the property because they believed that the Wilmots withdrew their objection when the City reconsidered the designation on a part of the original property that was designated in 1990. LUBA rejected that argument and concluded that the local designation had been imposed. *Lake Oswego Preservation Society v. City of Lake Oswego*, Slip Op at 27-29. The Court of Appeals summary affirmed that part of LUBA's decision in a footnote. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App at 814, n. 5. Petitioners did not petition this Court to review that aspect of the Court of Appeals' decision. There is no decision on quality of evidence required to find that a local designation was imposed or on the respective burden of proof for this Court to review. The issue is not before the Court. Petitioners are asking the Court for an advisory opinion on how burden of proof under ORS 197.772(3) may apply to any number of factual scenarios that are not before the Court.

2. The Court of Appeals did not make any decision on who bears the burden of proof under ORS 197.772(3).

Even if the issue had been preserved, the Court of Appeals never made any decision about which party bears the burden of proof under ORS 197.772(3). Petitioners attempt to create an issue by stating, with no support in the record, that most historic properties were placed on the historic inventory without the local government seeking consent from the owners at the time. Petition, p. 33. From there, Petitioners conclude that the Court of Appeals implicitly held that the owners of all of those properties can remove the historic designation claiming that the original owners never had a chance to object to the listing. Petition, p. 33.

The Court of Appeals simply accepted the language the legislature used in ORS 197.772(3) and never decided which party, if any, had the burden of proving that a prior owner objected to the historic designation. The court observed that the legislative history showed that the legislature intended that individual property owners on which historic designations had been involuntarily imposed by local government could have those designations removed, but that if a property owner consented to the designation (before 1995) or did not utilize the mechanism in ORS 197.772(1) to refuse consent, that same owner could not use ORS 197.772(3) to remove the designation. *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or App at 819.

The court never created a presumption that all designations before 1995 were imposed or require any extraordinary showing by local government.

Petitioners' argument is also fundamentally flawed and lacks support of any evidence in the record. Petitioners argue that for most local governments that may have sought owner consent at the time of historic listing, those records are now more than 20 years old and may not exist. Petition, p. 33. There is no evidentiary support for that statement. The only evidence properly before the Court is that local governments did retain the relevant records. All of the records from the proceedings at Lake Oswego in the period between 1990 and 1992 were available to the parties. They are part of the record LUBA reviewed.

It also contradicts Petitioners' earlier argument that local governments engaged in an elaborate Goal 5 planning process where they had to carefully evaluate historic properties. Petitioners argue that during that process local governments conducted public proceedings with notice before creating their historic inventories. Pet. Br. 18. Petitioners fail to offer any explanation for why a local government that engaged in such an elaborate process and presumably has the records it needs to maintain that a property was properly designated as a historic resource, but yet may not have the records to indicate whether the affect owner received notice and a meaningful opportunity to object during that process.

3. Restore's unsupported concerns that local government's record-keeping policies will facilitate removal of properties do not rise to the level of Legislative facts relevant to the Court's interpretation of ORS 197.772(3).

Restore speculates that most local governments did not maintain records prior to 1995 as they do now, and from that speculation asserts that local governments could not determine whether a designation was consensual so they would have to remove all requests by subsequent owners. Restore maintains that the Court of Appeal's decision could eviscerate local governments' Goal 5 programs. Restore Br. pp. 21-25. Restore attempts to support its argument with what it characterizes as "legislative facts." That argument has a number of problems.

First, as noted above, Petitioners did not raise this argument before the Court of Appeals or in their Petition for Review. Restore cannot present supporting arguments on an issue that was not preserved. Second, local governments record keeping deficiencies is irrelevant to the Court's decision. The issue presented involves an interpretation of a statute. The specific question is whether ORS 197.772(3) grants removal rights to all owners of property upon which a local historic designation was imposed, or to just the owner at the time the designation was first placed on the property. There is no suggestion in the legislative history that the legislature limited removal rights out of concern that local governments may not have records to show whether a

designation was consensual. In fact, the legislative history reveals that the legislature fully appreciated that the removal rights could have significant impacts on local governments' historic inventories and enacted ORS 197.772 anyway.

Third, Restore takes great liberty with it characterizes as legislative facts. Legislative facts are those that have relevance to legal reasoning and law making process. *Chartland v. Coos Bay Tavern*, 298 Or 689, 693, 696 P2d 513 (1985). Restore makes factual assertions about how certain local governments may or may not preserve records. Restore Br. 24. In its Brief on the Merits, Restore highlights their assertion that the City of Pendleton and the City of the Dalles either lost or cannot locate its records. It also attempts to incorporate facts it presented in its Brief in Support of Petition for Review. Restore Br. p. 8, n. 12. A number of those facts were generated by an informal survey Restore did of local planners. The actual survey results were never provided. Restore's Brief in Support of Petition for Review, 8, n. 12.

Whether or not the City of Pendleton or the City of The Dalles lost certain records is not relevant to any legal reasoning or lawmaking process. There is no indication that the legislature factored record retention into drafting the statute. Moreover, the Court should view the new factual assertion with a healthy dose of skepticism. The assertions apparently came from an informal

survey conducted by Restore and have no corroboration whatsoever. Moreover, most of the "facts" Restore used in its Brief in Support are qualified under the term "estimate." None of the "facts" are relevant to the accepted methodology for interpreting a statute.

4. The Court of Appeals' decision contains the correct interpretation of the term "imposed" as used in ORS 197.772(3).

In an argument that is not easy to follow, Restore appears to argue that the Court of Appeals interpreted ORS 197.772(3) in such a manner as to read the term imposed out of the statue. Restore argues that LUBA's decision in *Demlow v. City of Hillsboro* is the only way to give the term imposed meaning. Amicus Br. 23. According to Restore, if there is no evidence of an objection, there is no way to determine if a designation was imposed on property. *Id*. The Court of Appeals did not specifically discuss the decision in *Demlow*, but it does appear that the Court of Appeals endorsed a slightly different and more correct view of the term imposed.

In *Demlow*, under the facts presented, LUBA suggested that for a local designation to be imposed, it must be placed on property over an objection. However, LUBA never considered a situation where the owner did not have any opportunity to object. LUBA never examined the issue of whether a designation was imposed or not imposed in a situation where an owner at the time of a local designation had no knowledge of the proposed designation and

no meaningful opportunity to object. LUBA's analysis assumed that the owner had knowledge and began by looking at the dictionary definition of the term "imposed." The first definition LUBA recited was to "give or bestow (as a name or title) authoritatively or officially"; "to cause to be burdened"; "to make, frame or apply (as a charge, tax, obligation, rule penalty) as compulsory, obligatory or enforceable. *Demlow*, 39 Or LUBA at 314-315. Then LUBA went to secondary definitions that included "taking unwanted advantage of." From that exercise, LUBA incorrectly concluded that the majority of meanings supported the conclusion that imposed involved doing something over the objection of another. LUBA's conclusion assumes that the person who is being imposed upon had an opportunity to object. *Id.*

LUBA was correct to the extent that there are cases where a burden is deemed imposed only if it is over an objection of another party. But, that situation would have to include notice to the other party and some opportunity to raise an objection. If the process leading up to something being imposed involved notice and some ability to object, the lack of an objection could signify that the designation or obligation was not imposed.

Under the secondary definitions that LUBA stated and apparently relied more heavily upon, there are examples of impositions where that could be no objection. LUBA included in the definition of imposed to encroach or infringe

upon. As an example, if one neighbor went on vacation and came home two weeks later to find a fence built several feet over the property line that would be an encroachment imposed upon the vacationing neighbor. But, under LUBA's apparent reasoning, because the vacationing owner did not object before the fence was imposed, it really was not imposed. It cannot be the case that the only time a burden is deemed to be imposed is when the party being burdened formally objected on the record. LUBA simply did not fully analyze the statutory text looking at the proper context.

In the context of a local historic designation, it is plausible that a property could be included on an inventory through a legislative process with no notice to the individual owners. That designation would be imposed even if the owner did not make an objection.

To the extent that the Court of Appeals endorsed a broader definition of the term imposed under ORS 197.772(3), it is a more accurate and legally sound definition. If that definition requires local governments to show that property owners were afforded the opportunity to object to a designation, that is not an unwarranted burden. In designating private property as a historic resource, the local governments are taking affirmative action to restrict private property rights. They are in the best position to produce evidence of whether a property owner was given notice that there was going to be a historic

designation placed on their property, because they that initiated the elaborate process of evaluating historic resources and then undertook the state mandated process to consummate that designation.

5. Restore's arguments for the most part ignore the established rules of statutory construction and focus on broad policy concerns that are appropriate for the legislature to address.

Restore does not include any argument focused on the text of ORS 197.772(3) or the relevant legislative history. Their arguments focus on how they believe ORS 197.772 should fit within the existing Goal 5 program. Restore devotes most of its argument stressing facts not in the record in an attempt to show how ORS 197.772(3) as interpreted by the Court of Appeals, would devastate local Goal 5 program. Their argument is a policy argument that the Court should essentially re-write the statue and the relevant legislative history to avoid their perceived impacts on local programs.

What the broader policies should be is not part of the established rules for construing a statute.[4] In interpreting a statute, the court's role is to discern what the legislature intended, not to make its own policy judgments. *Whipple v.*

[4] In a similar vein, the State answers that owners with local designations qualify for certain tax benefits. State Br. 11. ORS Chapter 358 is clear. The mere fact that a property had a local historic designation does not give an owner any tax incentives or other benefits. The definition of a Historic Property in that Chapter does not include a property on a local inventory.

Houser, 291 Or 475, 480, 632 P3d 782 (1981). As the property owners in Yamhill County did, Restore and others have recourse if they believe that ORS 197.772(3) establishes bad policy. They can propose legislation to change that policy.

V. CONCLUSION

For the reasons provided above, Cross-Respondent respectfully requests that the Court affirm the Court of Appeals decision.

DATED this 11th day of September, 2015.

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CERTIFICATE OF COMPLIANCE WITH RESPONSE LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this response complies with the word-count limitation in ORAP 5.05(2)(b)(i)(B), as 14,000 words pursuant to ORAP 5.05(2)(b)(i)(B), and (2) the word-count of this response (as described in ORAP 5.05(2)(b)(i)(B) is 11,624 words.

I 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(4)(g).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the foregoing RESPONDENT ON REVIEW'S ANSWERING BRIEF causing it to be electronically filed with the Appellate Court Administrator on September 11, 2015, through the appellate eFiling system.

I further certify that, through the use of the electronic service function of the appellate eFiling system on September 11, 2015, I served the foregoing document on the following person(s): Daniel Kearns, Jennifer Bragar, Carrie Richter, Inge Wells, Kathryn Beaumont, Evan P. Boone.

I further certify that I served the foregoing document by causing a copy thereof to be mailed by first-class mail on September 11, 2015, addressed as follows:

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