**IN THE SUPREME COURT OF THE STATE OF OREGON**

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

**v.**

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

**and**

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

**S063048**

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# PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD

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

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

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**July 2015**

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**Nature of the Proceeding and Relief Sought:**

This appeal seeks review of a written opinion of the Court of Appeals that reversed the Land Use Board of Appeals' interpretation of ORS 197.772 – a statute adopted to implement, in part, Oregon's Goal 5 historic preservation program, and which provides:

> **197.772 Consent for designation as historic property.** (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.

ORS 197.772 (emphasis added)

The Court of Appeals determined in pertinent part that, where the property owner at the time of the local historic listing either objected or did not consent to the historic designation, all subsequent owners of the property have a unilateral

and unfettered right under ORS 197.772(3) to have the property removed from the local historic inventory. In other words, the Court of Appeals found that the property owner right to opt-out of a local Goal 5 historic inventory ran with title to the historic property to successor owners, so long as the original owner had not consented to the original listing, *i.e.,* the original owner either objected or was never asked by the local government to consent to the listing. Petitioners seek reversal of the Court of Appeals' decision. *Lake Oswego Preservation Society, et al., v. City of Lake Oswego*, 268 Or App 811, 344 P3d 26 (2015) ("*LOPS*").

**Basis for Appellate Jurisdiction:**

This court has jurisdiction to hear and decide this appeal of a Court of Appeals decision.

**Effective Date for Appeal:**

The Court of Appeals issued its decision on February 4, 2015, and petitioners timely filed a Petition for Supreme Court Review on March 11, 2015, which was accepted on April 24, 2015 (Amended Order Allowing Review).

**Questions Presented on Appeal:**

**1.** Does ORS 197.772(3) allow subsequent owners of historically listed properties the unilateral right to opt-out of the historic listing if the original property owner objected at the time of listing? Or, does the subsection (3) right to have a property removed from a local historic inventory apply only to the original

owner, does not run with title to the land, and does not confer an opt-out right upon subsequent owners of historic properties who took title with the historic designation already in place?

**2.** Does ORS 197.772(3) allow subsequent owners of historically listed properties the right to opt-out of the historic listing simply because the owner at the time of the listing either failed to consent under ORS 197.772(1) or was never given the opportunity to object?

**3.** When faced with a request by a current owner to de-list a local historic property, does ORS 197.772(3) impose a burden on the local government to prove that the original owner at the time of the local historic listing either consented to the historic designation or that the government gave the prior owner the opportunity to object and the property owner remained silent? In other words, does ORS 197.772(3) give the current owner of a historically listed property the unilateral ability to de-list the property unless the local government proves that the original owner at the time of listing consented to the historic listing or at least was offered the choice and didn't object?

**Proposed Rule of Law:**

"Property owner," for purposes of ORS 197.772(3) does not include an owner who acquires title to an historic property subsequent to the one who owned it at the time the property was added to the local Goal 5 historic inventory.

**Summary of Petitioners' Arguments:**

**1.** The plain language of ORS 197.772 – owner consent – indicates that "property owner" in Subsections(1) and (3) mean that only the owner of the historic property at the time the property was listed on the local Goal 5 historic inventory has the right to withhold consent to the historic listing or to opt-out of the listing if it was imposed over that owner's objections. The text of the owner consent provisions suggest that the right to opt-out of the Goal 5 historic listing under subsection (3) applies in situations where the historic listing pre-dated adoption of the consent requirement in subsection (1) in 1995 and was intended to run with title to subsequent owners.

The same operative term "property owner" is used in both ORS 197.772(1) and (3), and a well-established cannon of statutory construction holds that the same term used in two sections of the same statute has the same meaning in both. Because it is clear and not disputed that "property owner" in ORS 197.772(1) means the owner at the time the local historic listing is proposed, this cannon strongly suggests that the same term in ORS 197.772(3) has the same meaning, *i.e.,* only the owner at the time of historic inventory listing has the option to consent to the listing, and if the listing is made over that owner's objections, then only that owner has the right under subsection (3) to have the historic designation removed, not subsequent owners.

The Court of Appeals‟ interpretation of ORS 197.772(3) that a subsequent property owner that took title with the historic listing already in place could unilaterally demand that the property be removed from the local historic inventory 20 years after the listing ignores the context of State-wide Planning Goal 5, its administrative rule and the Goal 5 statutory scheme. The court‟s opinion does not mention Goal 5, and the remedy it grants violates the substance and process of the Goal 5 historic preservation program because it allows for unilateral removal of inventoried historic resources without any consideration of the factors that Goal 5 requires for the local historic inventory and preservation program to provide stable, predictable and long-term protection for Goal 5 resources. The court basically crafted an exemption to Goal 5‟s public process and program for evaluating and designating those resources in violation of State-wide Planning Goal 5 and its administrative rule.

**2.** The context of a statute, for purposes of interpretation includes consideration of any legislative history that may be helpful. The Court of Appeals determined that the owner consent provisions of SB 588 (1995), which became ORS 197.772, were "hotly contested" – that much is true about the "owner consent" idea generally, but it is not true about the A9 amendment that became ORS 197.772(3). The court misread the legislative history of SB 588 (1995), which gave rise to ORS 197.772(3) and the A9 and A10 amendments that were the

owner consent provisions. The court incorrectly concluded that the sponsors of owner consent were not concerned with the identity of the person who sought to have the historic property removed from the local inventory.

The sponsors of owner consent, in fact, were concerned about who could trigger the opt-out provision. The question of whether subsequent owners could seek removal of the historic designation was asked of the sponsors of the A9 and A10 amendments (Representatives Patti Milne and Leslie Lewis), who responded that they had not thought about that situation. This necessarily means that giving subsequent "property owners" the right to opt-out of the local Goal 5 historic inventory pursuant to Subsection (3) was not their intent, and they said so. According to the sponsors of the A9 and A10 amendments, the owner consent provisions were designed to remedy a specific problem for the specific property owners whose Yamhill County properties had been listed over their objections. The owner consent provisions of the A9 and A10 amendments were intended to give those property owners, not subsequent property owners, the remedy of an opt-out from the historic listing. For sure, ORS 197.772(3) was intended to apply beyond the borders of Yamhill County throughout the state, but it was not intended to apply to anyone but an original "property owner" who had objected to the listing in the first place.

In this way, the court reached a conclusion about the meaning of "property

owner" contrary to the testimony of the sponsors of owner consent to the House Committee on General Government and Regulatory Reform in May 1995. The owner consent provision in ORS 197.772(3) was intended to remedy a problem shared by several Yamhill County property owners that had objected to the listing of their properties on the local historic inventory and still wanted them removed. These property owners had urged the local passage of owner consent in 1989. They then urged passage of owner consent on the state level in 1993 in the form of HB 2124 (1993), which was vetoed by the governor. These same property owners took up the cause again in 1995 in urging passage of owner consent as amendments to SB 588. Representative Lewis testified that her constituents had objected to the historic designation of their properties and were still waiting for this remedy, *i.e.,* the right for them to have their properties de-listed. When asked whether the opt-out provision was meant to be used by subsequent owners who acquired their property with the historic designation already in place, she responded that she had <u>not</u> thought of that situation, but expressed her view that a successor owner who took title with the historic designation already in place would be subject to the historic designation.

**3.** According to the court"s holding, ORS 197.772(3) grants an opt-out right to subsequent owners of historic properties unless the original owner consented to the historic designation. This implication of the court"s holding would impose a

burden of proof and long-term record keeping obligation on local governments to demonstrate that they had sought owner consent and either the owner consented to the historic designation or didn‟t respond. This implication is contrary to the statute and the Goal 5 historic preservation program because it grants successor property owners a unilateral right to opt-out of the historic inventory if the original owner had objected or simply failed to consent to the listing. The distinction is significant because most historically designated properties in Oregon were listed before the 1995 owner consent law, and those original owners were not asked for consent prior to listing. At least, there are no records for most historically listed properties in Oregon that owner consent was ever sought. Those jurisdictions that may have asked for owner consent prior to the enactment of ORS 197.772 no longer have any records of the request/consent process.

The court‟s holding, therefore, has broad-reaching implications for the state-wide Goal 5 historic preservation program because it allows most properties to be de-listed on demand by the current owner simply because there is no record that the original owners consented to the designation. The court‟s holding imposes a burden of documentation, if not proof, on local governments to demonstrate that owners of properties listed 20+ years ago consented to the designation. Because virtually no local governments have any such records from before 1995, and most historic properties were listed before 1995, most are susceptible to de-listing upon

demand by the current owner according to the court‟s holding in this case. When viewed in that light, the court‟s decision is decidedly contrary to the Goal 5 program, which calls for the long-term, predictable and stable preservation of historic resources.

**Summary of Material Facts:**

**1.** The local process to list the Carman House as an historic landmark: The facts of the underlying case are well stated by LUBA. *See LOPS* LUBA slip op at 3-7. The following excerpt from LUBA‟s opinion describes the local historic listing process from 1990 to present:

> The subject property is the Carman House, located on tax lot 1200, a 1.25-acre parcel. The city added the Carman House to its inventory of historic landmarks in 1990, pursuant to Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). The city‟s historic landmarks inventory is codified at Lake Oswego Code (LOC) 50.06.009.4.b, Table 550.06.009-1, and the Carman House is listed as item 9 on that table. LOC Chapter 50 is the city‟s community development code.

*LOPS v. City of Lake Oswego*, __ Or LUBA __ (LUBA No. 2014-009, Order on Motion to Dismiss and for Stay, April 3, 2014) – RT 217.

> In 1990 the subject property was part of a 10-acre parcel that the city had found to constitute a historic farmstead, including the house and a barn. The 10-acre parcel had originally been owned by Wilmot, but in 1979 he sold 8.75 acres including the barn to Gregg. No formal partition was accomplished at that time, however, so the 1990 decision considered the parcel as a whole. Tax lot 1200 is the 1.25-acre portion of the parcel with the house that was owned by Wilmot, while tax lot 1201 is the 8.75 acre portion with the barn that was owned by Gregg.

The 1990 designation was a legislative decision involving 93 historic resources, adopted on March 15, 1990. That legislative process required notice of the designation to landowners,and provided a quasi-judicial post-designation process for a landowner to object to designation, on the grounds that the property did not meet the applicable historic designation standards.

On May 24, 1990, Wilmot and Gregg filed an objection to designation of the entire 10-acre property, arguing that the property as a whole did not meet the historic designation standards. As alternatives, Wilmot and Gregg argued that only the Carman house had historic value, and accordingly requested that if any designation is made that only the portion of tax lot 1200 immediately surrounding the house be designated, or that only tax lot 1200 be designated. Gregg"s goal was to redevelop tax lot 1201 into an assisted living facility.

In 1991, the city conducted a hearing on the objection and issued a decision denying the objection and retaining the historic designation for the entire property. Wilmot and Gregg appealed the 1991 decision to LUBA. While the appeal was pending, there was a fire on the property that destroyed the barn. The city withdrew its 1991 decision for reconsideration in light of the barn"s destruction.

On reconsideration, the city council remanded the matter to the city"s Historic Resource Advisory Board (HRAB), which recommended removal of the designation from tax lot 1201, while retaining it for tax lot 1200. The matter returned to the city council, which on July 7, 1992, issued a decision removing the designation from tax lot 1201, but retaining it for tax lot 1200. The city council evaluated whether the Carman House, in isolation from the rest of the parcel, qualified for historic designation, and concluded that it did. The city council"s decision stated that no party during the reconsideration proceedings had contested the historic significance of the Carmen House or argued that tax lot 1200 should not remain on the city"s historic inventory. Record 264. Subsequently, the partition was completed and tax lot 1201 was redeveloped into an assisted living facility.

> Fast-forward to the present day. The Mary Caldwell Wilmot Trust is successor in interest to Wilmot, after Wilmot transferred his interest in the property to the trust. In June 2013, intervenor filed an application under LOC 50.06.009.5.d to remove the Carman House's historic designation, in order to facilitate proposed redevelopment of the property.

*LOPS*, LUBA Slip op at 3-5, citing *Gregg v. City of Lake Oswego*, 23 Or LUBA 564 (1992). *See also* the city council's 1991 decision denying Wilmot & Gregg's objections to listing the entire 10-acre Carman Pioneer Farmstead as a Goal 5 Historic Landmark at LUBA Rec 293-319 and the city council's 1992 revised decision listing only the Carman House and 1.25 acres at LUBA Rec 257-284.

Hanson abandoned LOC 50.06.009(5)(d) as the basis for her request to remove the Carman House from Lake Oswego's historic inventory on the eve of hearing and substituted in ORS 197.772(3) as the new and sole basis. Hanson claimed that, because Wilmot had objected in 1991 to listing the 10-acre Carman Farmstead on the City's historic inventory, as the current "property owner," she was entitled to use that objection under ORS 197.772(3) and have the Carman House de-listed.

**2.** LUBA. Hanson's focus in the LUBA appeal was to contest LUBA's jurisdiction, which for a variety of reasons did not prevail. *See LOPS v. City of Lake Oswego*, __ Or LUBA __ (LUBA No. 2014-009, Order on Motion to Dismiss and for Stay, April 3, 2014), RT 216-229. On the statutory interpretation

issue central to this appeal, LUBA concluded, based on the legislative history of SB 588 (1995), that "property owner" in ORS 197.772(3) meant the property owner who owned the property at the time it was placed on the local inventory:

> …the legislative history available to us indicates that the A9 amendment that became ORS 197.772(3) was originally intended to apply only to property owners at the time of designation, on whom the designation was imposed without consent. * * * consideration of context and legislative history [suggests] that the legislature intended ORS 197.772(3) to offer relief to property owners whose property had been designated without their consent, and rejected language that was apparently intended to treat subsequent owners in the same manner as property owners at the time of designation.
>
> * * *
>
> Although it is a close question, we are ultimately persuaded that the legislature did not intend that „a property owner," as used in ORS 197.772(3), includes persons who become owners of the property after it is designated. Accordingly, intervenor is not a „property owner" within the meaning of ORS 197.772(3), and the city erred in removing the Carman House designation based on ORS 197.772(3)."

*LOPS*, LUBA Slip op at 23 & 25 (emphasis added).

LUBA also examined how ORS 197.772(3) should operate in the larger context of Goal 5 and the State-wide historic preservation program:

> As explained above, ORS 197.772(1) and (3) operate as specific statutory exceptions to the general rule that Goal 5 historic resources are added to or removed from a local government inventory of significant historic resources based on whether those resources warrant protection under Goal 5. Where ORS 197.772(1) and (3) apply, the required Goal 5 considerations are eliminated, and the decision whether to add resources to the inventory, or later remove them from an acknowledged inventory, are made based on the

owner's wishes, and have nothing to do with Goal 5 or historical significance. If the exception represented by ORS 197.772(3) is broadly construed, it carves a significantly greater hole in the Goal 5 scheme to protect historic resources, compared to the narrower interpretation.

In the present case we must choose between a broader and a narrower interpretation of the scope of "property owner." The broader interpretation is somewhat more consistent with the text of ORS 197.772(3). The narrower interpretation is more consistent with the legislative history discussed above. The legislature clearly believed that a statutory exception to the Goal 5 process for adding and removing historic resources from an inventory is warranted with respect to property owners who were "coerced" into accepting the Goal 5 designation, in the words of Representative Lewis. The A9 amendments were specifically proposed with that limited remedial intent in mind. There is much less reason to believe that the legislature was also concerned with persons who became owners of the property after the designation was already in place and who presumably were aware of the designation when they became owners. In fact, there is some reason to believe, based on the legislative history, that the legislature did not intend subsequent owners to be treated in the same manner as property owners whose property was designated without their consent.

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

Although it is a close question, we are ultimately persuaded that the legislature did not intend that "a property owner," as used in ORS 197.772(3), includes persons who become owners of the property after it is designated. Accordingly, intervenor is not a "property owner" within the meaning of ORS 197.772(3), and the city erred in removing the Carman House designation based on ORS 197.772(3).

*LOPS*, LUBA Slip op at 24.

**3.** Court of Appeals. Hanson appealed, focusing on LUBA's jurisdiction, which the court decided against her. On the statutory interpretation question, however, the court read the legislative history of SB 588 (1995) differently than did LUBA. The court generally reviewed some of the operative committee proceedings on SB 588 and the A9 and A10 amendments that became ORS 197.772(3) and (1), respectively, and concluded that:

> …the legislature intended to allow any property owner that had alocal historic designation forced on their property to remove that designation. The House committee that adopted the A9 amendments did not contemplate that "a property owner" in subsection (3) would be limited to the property owner at time of the designation; instead, the committee was concerned with addressing, and rectifying, local government designations that had been "imposed" on property. Indeed, the A9 amendments' opponents were concerned that the amendments would lead to the dismantling of local historic districts, and the amendments' 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. The legislature was thus focused on correcting impositions of unwanted designations, and not on the identity of the property owner that might be now stuck with that designation. And, the legislature did not include any narrowing text that would lead us to conclude otherwise. We thus conclude that Hanson, as the successor property owner to Wilmot, who objected to the original historic designation, is entitled to have that designation removed under ORS 197.772(3). Accordingly, we reverse LUBA's order.

*LOPS*, 268 Or App at 820-21.

In so ruling, the court read the legislative history behind SB 588 in much

more general terms than did LUBA. The court also failed to analyze the question in the context of Goal 5 or how its view comported with the state-wide historic preservation program or the ESEE methodology for evaluating, designating and preserving historic resources. Also, the implication of the court‟s holding would have ORS 197.772(3) apply to situations where the original owner objected or failed to consent to the initial historic listing. This is a significant implication of the court‟s holding since it reverses the burden of proof in these cases. In effect, any current owner of an historic property can now petition for the removal of the property from the historic inventory unless the local government can prove that the original owner consented to the listing.

**First Assignment of Error**

> **The opt-out provision in ORS 197.772(3) gives only the original property owner – the one who objected to the historic listing – the unilateral right to have the property removed from the local Goal 5 historic inventory. The text and context of subsection (3), including the State-wide Goal 5 historic preservation program, indicate that subsequent owners of historically listed properties take title subject to the historic designation and that the property owner opt-out right in subsection (3) does not run with title to the land to subsequent owners.**

**Standard of Review:** The appellate courts review a LUBA final opinion and order to determine if it is unlawful in substance. ORS 197.850(9). *Clark v. Jackson County*, 313 Or 508, 513, 836 P2d 710 (1992). The appellate courts, however, review statutes de novo and divine their meaning using the methodology from

*PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), as modified by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). While both LUBA and the Court of Appeals also are familiar with the process, they nonetheless reached different conclusions about the meaning of ORS 197.772(3). It is undisputed, that ORS 197.772(3) is ambiguous and that interpretation is needed to divine the statute's true meaning and resolve this appeal. The first level of analysis requires an examination of the statute's text and context together with any relevant legislative history. If the meaning remains elusive or ambiguous, the court resorts to general maxims of statutory construction. *Greenfield v. Multnomah County*, 259 Or App 687, 690, 317 P3d 274 (2013).

**Preservation of Error:** The correct meaning of ORS 197.772(3) was the focus of petitioners' briefing to LUBA (RT 181-184), which they reiterated before the Court of Appeals.

**Argument - The Text:** In a prior opinion, LUBA concluded that "imposed on the property owner" meant that the local historic designation was imposed over the owner's objections. *Demlow v. City of Hillsboro*, 39 Or LUBA 307, 315-16 (2001) *see also* Or A.G. Informal Opn to Richard Benner, DLCD Director (Jan 31, 1997). Subsections (1) and (3) both use the operative term "property owner," which the Court of Appeals correctly concluded was ambiguous, noting that both subsections used the term "a property owner" not the property owner. *LOPS*, 268

Or App at 818. What the court failed to appreciate, however, are properties that either were placed on local Goal 5 historic inventories before enactment of ORS 197.772 (in 1995) or property owners that for whatever reason were never asked for their consent as subsection (1) now requires. In a purely textual view, the term "property owner" can and should have the same meaning in both subsections, *i.e.*, both mean the owner of the property at the time of the historic listing.

It is undisputed that "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. The same term is used in subsection (3). There is a presumption that the same term used twice in the same statute has the same meaning, *i.e.,* only the "property owner" that owned the historic property at the time of listing can trigger the opt-out allowed by subsection (3). *See PGE v. BOLI*, 317 Or at 611 ("use of the same term throughout a statute indicates that the term has the same meaning throughout the statute"); *Racing Com. v. Multnomah Kennel Club*, 242 Or 572, 584, 411 P.2d 63 (1966) ("the presumption is that the word was used to express the same meaning in both sections"); *State v. Allison*, 143 Or. App. 241, 255, 923 P2d 1224 (1996) (rejecting suggestion that statutory term means two different things in same sentence); *State v. Jones*, 109 Or App 235, 238 n 3, 818 P2d 1286 (1991) ("Presumably, the legislature intended the phrase to carry the same meaning every time it used it in the same sentence."); *Vill. At Main St. Phase II,*

*LLC v. Dep't of Revenue*, 356 Or 164, 174-75, 339 P3d 428 (2014) (same). This is the simplest and most straight-forward way to resolve this case.

**Argument – The Context:** The context for interpreting ORS 197.772 includes State-wide Planning Goal 5 and its the extensive public process involved in placing historic resources on local Goal 5 historic inventories. The Court of Appeals ignored this important legal, policy and procedural context. *See* Goal 5 and OAR 660, div 23, especially OAR 660-023-0200 (historic resources). Before any property is added to a local historic inventory, it is subject to an exhaustive public evaluation process that involves numerous evidentiary hearings, a complicated and fact-laden economic, social, environmental and energy (ESEE) analysis that dictates how much protection is afforded a proposed Goal 5 resource, what conflicting uses are allowed and to what degree, and the final decision is appealable to LUBA. *See* OAR 660-023-0030 (inventory process), OAR 660-023-0040 (ESEE decision process), OAR 660-023-0050 (programs to achieve Goal 5). Timely notice to affected land owners is required at every step of this public process. OAR 660-023-0060 (notice and land owner involvement). Lake Oswego codified its Goal 5 historic inventory process and its Landmark Designation List, which until recently included the Carman House as Resource No. 9 on the list. *See*

LOC 50.06.009 (historic preservation).[1] Consistent with the Goal 5 rule, the city's regulations require notice, public hearings and a full and exhaustive public process that mirrors the state law requirements and ensures open, full, public participation, including the property owner. Once a property is designated on the local Goal 5 historic inventory, the designation attaches to the real property in the same way as any other legislatively adopted zoning, and all subsequent owners take title subject to the designation. Having gone through that public process, it makes no sense nor is it consistent with Goal 5's stated purposes to allow subsequent owners 20 years later the unilateral authority to nullify the process and opt-out of the local historic inventory. As LUBA correctly concluded:

> In the present case we must choose between a broader and a narrower interpretation of the scope of "property owner." …The legislature clearly believed that a statutory exception to the Goal 5 process for adding and removing historic resources from an inventory is warranted with respect to property owners who were "coerced" into accepting the Goal 5 designation, in the words of Representative Lewis. The A9 amendments were specifically proposed with that limited remedial intent in mind. There is much less reason to believe that the legislature was also concerned with persons who became owners of the property after the designation was already in place and who presumably were aware of the designation when they became owners. In fact, there is some reason to believe, based on the legislative history, that the legislature did not intend subsequent owners to be treated in the same manner as property owners whose property was designated without their consent.

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[1] Available on-line at http://www.codepublishing.com/or/lakeoswego/.

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

*LOPS*, LUBA Slip op at 24-25 (emphasis added).

The context of ORS 197.772 includes Goal 5 and the state-wide historic preservation program. The Court of Appeals failed to consider whether its interpretation of the statute comported with Goal 5 and its administrative rule (now OAR 660, div 023), which it has previously described in the following terms:

> The goal and the rules which LCDC has adopted to explain the goal describe the procedure the city must use. It must first establish an inventory of Goal 5 resource sites, then identify conflicting uses for the sites and finally develop a plan to meet the goal. That plan may either protect the site fully by prohibiting conflicting uses, permit conflicting uses fully at the expense of the resource or permit limited conflicting uses while protecting the resource to some desired extent. The city is to determine which course to follow through an analysis of the economic, social, environmental and energy (ESEE) consequences of the various options. OAR 660-16-000 to OAR 660-16-010.

*Friends of the Columbia Gorge. v. LCDC*, 85 Or App 249, 251, 736 P2d 575 (1987), citing ; *Collins v. LCDC,* 75 Or App 517, 520, 707 P2d 599 (1985).

The Court of Appeals failed to take into account – or cite at all – the Goal 5 program or statutory context of the Goal 5 historic preservation system. *See State*

*v. Ofodrinwa*, 353 Or 507, 512, 300 P3d 154 (2013) (The context for interpreting a statute"s text includes the statutory framework in which the law was enacted).

As will be explained below in a discussion of the legislative history of SB 588 (1995), which became ORS 197.772, the owner consent idea for Goal 5 historic resource designation arose in Yamhill County in 1989 when the county adopted Ordinance 479. Ordinance 479 included both a requirement that the owner consent before the county could list the property on the local historic inventory and that it allow the owner of an already listed property to demand removal of the historic designation on 14 days notice. DLCD and several individuals appealed Ordinance 479 to LUBA, which reversed after determining that Yamhill County"s owner consent ordinance was inconsistent with Goal 5 and its rule:

> We conclude that making landowner consent a determinative criterion for whether a site will be included on the county"s inventory of historic resources is not allowed by Goal 5 and OAR 660-16-000.
>
> * * *
>
> …an approach that allows the selection of a program to be based in all cases on the desires of the landowner, without also examining the comparative values of the particular property for historic or identified conflicting uses, would appear to be inconsistent with OAR 660-16-010, 660-16-020 and Goal 5.

*DLCD v. Yamhill County*, 17 Or LUBA 1273, 1282, *aff'd* 99 Or App 441, 446, 783 P2d 16 (1989).

The Court of Appeals affirmed LUBA based on LUBA's reasoning that Yamhill County's owner consent provision conflicted with Goal 5 and its administrative rule (now OAR 660, div. 023).

The legislature subsequently adopted ORS 197.772 in 1995, indicating a clear legislative desire to carve-out a particular exception to the Goal 5 historic preservation program for certain "property owners." That much certainly is the legislature's prerogative; however, the court of appeals holding in *DLCD v. Yamhill County*, *supra*, is equally clear in showing that any such exception must be narrowly construed to be consistent with and avoid violating Goal 5 and its administrative rule. This was LUBA's conclusion in limiting the applicability of ORS 197.772(3) to the "property owner" who owned the property at the time of historic listing and not extending the opt-out right to subsequent owners such as Hanson. *LOPS* LUBA slip op at 24 ("If the exception represented by ORS 197.772(3) is broadly construed, it carves a significantly greater hole in the Goal 5 scheme to protect historic resources, compared to the narrower interpretation."). The Court of Appeals in the present case rejected LUBA's view and interpretation of ORS 197.772(3) but failed to address the Goal 5 scheme or reconcile its interpretation with the Goal 5 context.

With regard to just how large a hole the court's holding here will carve in the Goal 5 scheme and how inconsistent the court's broad interpretation of ORS

197.772(3) is with Goal 5 and the rule, petitioners incorporate by reference arguments about the Goal 5 process from the Opening Brief of *Amicus Curiae* Restore Oregon, Architectural Heritage Center, the National Trust for Historic Preservation, Preservation Works and the cities of Portland, Pendleton and The Dalles, without restating them here.

**Second Assignment of Error**

> **The legislative history of SB 588 (1995), which became ORS 197.772, shows that subsection (3) was intended to ensure that the owner of a property previously placed on the local historic inventory over that owner's objections could de-list the property under the new statute. The legislative history does not suggest that subsequent owners would or should have the same opt-out right as a property owner who objected at the time of historic designation. Subsections (1) and (3) were intended to ensure that owners whose property was listed over their objections had a right to refuse the listing or opt-out of the local inventory if they didn't have the opportunity to withhold consent.**

**Argument:** Owner consent was not part of the Goal 5 historic preservation program until the passage of SB 588 in 1995, which became ORS 197.772. Owner consent was first proposed as part of HB 2124 (1993) – which Governor Roberts vetoed because it would have made Oregon"s program inconsistent with the National Historic Preservation Act of 1966 (16 USC 470, *et seq*.) and jeopardize federal funding of the State Preservation Office. Owner consent was resurrected in the 1995 legislative session in a form that avoided the defects of the 1993 version, but still remedied the problem that was the genesis of owner consent

in 1989. The owner consent provision in the ill-fated 1993 version (HB 2124) and the 1995 version (SB 588) that became ORS 197.772, arose in Yamhill County and was proposed by Representative Milne.

The version of owner consent in HB 2124 (1993) that ended up passing in the House required local governments to afford property owners the right "to refuse to consent to any form of historic property designation." *See* HB 2124-A, §22 (1993). The bill used the mandatory "shall" not the permissive "may" in so directing local governments, but provided no exception for properties listed on the Federal Register under the National Historic Preservation Act of 1966. According to historic advocates and Robert Meinen, Director of Oregon Department of Parks and Recreation at the time, such a broad owner consent provision with no exception for federal historic designation would jeopardize federal funding for the State Historic Preservation Office. *See* Exs. 5, 13 & 2 presented to Sen. Revenue and School finance Committee, Property Tax Subcommittee on HB 2124, July 20, 1993. As it turned out, this was also the form in which HB 2124 passed the senate and went to Governor Roberts for signature. Governor Roberts vetoed HB 2124 because of the wording of the owner consent provision in §22:

> The statutes authorizing the special tax assessment program for historic property sunset on January 1, 1994. House Bill 2124 would continue special tax assessment in modified form … Unfortunately, late in the legislative session an "owner consent" provision was added to House Bill 2124. Owner consent had met great resistance at earlier

> points in the session, where it had been proposed in a number of measures including the original land use [sic] bill, HB 3661.
>
> Section 22 of House Bill 2124 allows any property owner to refuse to be subject to any form of historic designation or regulation, and will undermine existing and future local government historic preservation programs. It rejects the balance fashioned in land use Goal 5 between the rights of individual property owners and the public‟s right and obligation to preserve the significant historic and cultural resources of our communities for the benefit of present and future generations.

House Journal, 1995, p 20.

The local problem that gave rise to the owner consent language of HB 2124 §22 in 1993 persisted and returned in a revised form in the 1995 session as amendments A9 and A10 to SB 588 (1995), introduced by Representatives Patti Milne and Leslie Lewis from Yamhill County in hearings before the House Committee on General Government and Regulatory Reform on May 2, 1995. *See* Exs. N, O & P presented to House Committee on General Government and Regulatory Reform on SB 588, May 2, 1995.

The owner consent conflict in Yamhill County, in fact, arose long before this and took the form in 1989 of Yamhill County attempting to include owner consent in its Historic Landmark Preservation Ordinance through the adoption of Ordinance 479. As mentioned above, LUBA reversed Yamhill County‟s decision to adopt Ordinance 479, and the Court of Appeals affirmed, concluding that owner consent, when it was allowed to trump all other considerations in the Goal 5 ESEE

evaluation, violated the Goal and its administrative rule. *DLCD v. Yamhill County*, 99 Or App at 446 ("an approach that allows the selection of a program to be based in all cases on the desires of the landowner, without also examining the comparative values of the particular property for historic or identified conflicting uses, would appear to be inconsistent with OAR 660-16-010, 660-16-020 and Goal 5").

In the following colloquy before the house committee, Representatives Lewis and Milne from Yamhill County explained the problem that the owner consent provisions were intended to remedy and how the A9 and A10 amendments were simply a refinement of the owner consent language from the prior session:

> Rep Milne: The concern there, especially after we've worked so hard to keep this historic property, the owner consent part intact, that subsection 2 of section 21 may nullify *the property owner's right to refuse*. …
>
> The amendments … are pretty clear and we feel like they're needed in order to kept the intent. This bill does do some technical clean-up, but … what we're addressing needed to be taken care of. They are simple amendments rewording …
>
> Representative
> Rep Lewis: Owner's consent is a very important issue to Yamhill County, and we were concerned … about language on page 10, specifically lines 1 through 8. And what we had planned to do in the amendments that we're proposing, the A10 amendments is, on page 9 of the bill, delete lines 41-45 and insert … Section 21: "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. ..." And then on page 10 delete lines 1 through

> 14. And we think this accomplishes the same thing in terms of saying that if property is for consideration or nominated to the National Historic Registry, then … obviously an owner would not -- if the property has already been designated under the National Historic Registry the property owner cannot then take it off that Registry. But we felt that the language on page 10 as it stands now … could be used to say any property that had ever been under consideration, … we would not have the owners be allowed to consent … I have a conceptual of the A9's. I don't have the actual language in front of me. But the A10's would become subsection 1 of Section 21 and … the A9 amendment would become subsection 2 of Section 21 and would read simply: "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." We think that that is what is meant under subsection 1 but we thought that the additional clarification would make sure that there isn't a lot of litigation surrounding this.

Tape Recording, House Committee on General Government and Regulatory Reform, SB 588, May 2, 1995, Tape 126, Side A. (Emphasis added.)

Then Representative Ross asked Representative Lewis to comment on what is essentially the issue presented in this appeal, i.e., whether a subsequent owner who buys property with the historic designation already in place can opt-out pursuant to the A9 amendment:

> Rep. Ross: In the dash 9, 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, they bought the piece of property that was under the historic designation; it was clear when they bought it, and then they could move in and the minute they got there, they say that "well we're sorry, we don't want the historic anymore?"*
>
> Rep Lewis: *I frankly haven't thought about that situation Representative Ross. I had more thought of people who since the*

> *implementation of the historic designation under Goal 5, in our county, many people have been basically coerced into the historic property designation, and I believe some of those people are waiting for HB 2124 to become law and then they intend to petition to be removed from the historic property designation. I frankly hadn't thought through your question.*
>
> Rep. Milne. These amendments help get us back to the true intent of HB 2124.
>
> Rep. Ross. … The question I had is that if a property had been restored and had had some special privileges or rights attached to it and then somebody bought it, the community had put effort into it and then the guy says, "Well gee, you know, I want to make this into a motel and I don't care if it was historic or not," and … that's just the question I had.
>
> Rep. Lewis: … Certainly there are communities that have under their own city or downtown associations that have some kind of regulations and local ordinances [Rep. Ross interjects: "historic districts"] as part of their economic development perhaps and *my intent anyway is that those local ordinances are not disturbed because some of them might even be attached, as you purchase the property, you know that you're buying into that downtown area, for example, and there are certain ordinances you have to abide by.*
>
> Rep. Ross: So this *would not affect areas that are protected by local ordinance?*
>
> Rep. Lewis: *That's my intent, yes*. I'm not an attorney.

Tape Recording, House Committee on General Government and Regulatory Reform, SB 588, May 2, 1995, Tape 126, Side A. (Emphasis added.)

Then, two days later on May 4, 1995, the sponsors of the A9 and A10 amendments to SB 588 concluded their testimony and reiterated their intent

behind the owner consent provisions that became subsections (3) and (1), respectively:

> Rep. Johnston: …could somebody, as you understand this, consent under A10 and then later ask to be out under A9?
>
> Rep. Hayden: I was thinking Representative Johnston that you would read this in context and that you would read this as a whole. So my conceptual amendment would apply to A10 and A9.
>
> Rep. Johnston: …I just want to see how these things merge. By A10, we are granting a property owner the right to refuse to consent to any form of historic property, you know, if they choose to. They could choose to agree. I have a piece of property in downtown Ashland and I decide to agree, and now I'm part of the historic district. Could I then under A9 just two years later decide to take it out?
>
> Rep. Milne: *Representative Johnston, my intent in this amendment is where it says on line 3, "historic property designation that was imposed on the property," my feeling there is that what we are trying to say, what my intent is that when property owners were not allowed to consent and government imposed it on them, that now they would have an opportunity to remove their property from that designation*.
>
> Rep. Johnston: Ok, let's call those "class A," so I understand those. But I'm talking about class B – a person who does it under section 10 [A10], had the opportunity to not do it, went ahead and did it, *can they two years later under A9, take their property out?*
>
> Rep. Milne: *That was not my intent Representative Johnston*.
>
> Chair Tiernan: Once you put your property in, its in.

Tape Recording, House Committee on General Government and Regulatory Reform, SB 588, May 4, 1995, Tape 130, Side B. (Emphasis added.)

Thus, according to the sponsors of the A9 and A10 amendments to SB 588, the owner consent provisions at issue in this appeal were intended to assist certain property owners who were upset because their property had been placed on the local historic inventory over their objections; they still owned the property, and they still wanted off the inventory list. This exchange also shows that the A9 and A10 amendments were not intended to assist subsequent owners who acquired title to Goal 5 historic property that had been so designated for years or decades, so that these new owners could de-list and redevelop the property. As Representative Lewis said, she had not thought of that situation; therefore, addressing that situation was not her intent. The Yamhill County property owners who had urged Representatives Milne and Lewis to include owner consent in the ill-fated HB 2124 in 1993 and again in 1995 with SB 588 through the A9 and A10 amendments were still "waiting for HB 2124 [1993] to become law and then they intend[ed] to petition to be removed from the historic property designation." Presumably these were the same property owners who had urged Yamhill County to adopt owner consent in Ordinance 479 in 1989, which LUBA reversed in *DLCD v. Yamhill County, supra*.

The legislative history of SB 588 does not support the court's conclusion that ORS 197.772(3) was intended to be open-ended or that it applies to subsequent owners of historic properties without limit. The Yamhill County

residents advocating for the A9 and A10 amendments were not subsequent "property owners" like Hanson in this case. In her testimony, Representative Lewis referred to particular people – certain property owners in Yamhill County – as the impetus behind her owner consent amendments, not people generally with historically listed property. The A9 amendment that became ORS 197.772(3) gave the original "property owners" – the ones who had objected to the listing – the relief they sought in 1993 and again in 1995 for obtaining the de-listing of their properties. The A10 amendment, which became ORS 197.772(1), would ensure that, going forward, the owner of any property proposed for a local historic inventory would have the right to refuse the listing and that Goal 5 historic designations would not occur over an owner's objections. The sponsors of the A9 and A10 amendments expressed their view that subsequent owners who took title to property with the historic designation already in place – just like any other legislatively adopted zoning restriction – were bound to comply with those restrictions in the normal course.

The legislative history behind SB 588 and the A9 and A10 owner consent amendments is clearly stated and contrary to the Court of Appeals' conclusion. *See LOPS*, 268 Or App at 820-821. The sponsors of owner consent described the problem their amendments were intended to remedy, and it was not Ms. Hanson's situation; the sponsors had not thought about that situation. Instead, the owner

consent right to opt-out of a local historic listing was intended to benefit the original property owner at the time of listing who had objected to the listing. Subsection (3), at issue here, was specifically intended to remedy the problem of the Yamhill County property owners who had originally sought relief through HB 2124 (1993), not subsequent "property owners" – a situation that the A9 and A10 amendment sponsors said they had not considered. The Supreme Court should take this legislative history into consideration as it interprets ORS 197.772(3) and reverse the Court of Appeals' contrary conclusion.

**Third Assignment of Error**

**The Court of Appeals implicitly reversed the burden of proof under ORS 197.772(3) by allowing the current owners of most historically designated properties to opt-out of the historic listing unless the local government can demonstrate that the original owner consented to the designation or was asked and did not object.**

**Argument:** The most disturbing implication of the court's decision in this case – and the one most contrary to the statute's Goal 5 historic preservation context – is to give the right of a retro-active opt-out to any current property owner based on the assertion that the owner at the time of historic listing either objected to the listing or did not have the opportunity to object. Most historic properties listed on local Goal 5 inventories in Oregon were designated before the owner consent provision in ORS 197.772(1) was enacted. The Court of Appeals understood that

subsection (3) was designed to address those properties. *LOPS*, 268 Or App at 818. Therefore, most historic properties were placed on the local historic inventory without the local government seeking consent of the owner at the time. The implication of the court"s holding in this case is that the current owner of all of those properties can be removed pursuant to subsection (3) by claiming that the original owners never had the chance to object to the listing. Following the court"s decision, the only way for local governments to resist that demand and keep their Goal 5 historic inventories intact is to attempt to prove that the original owners had the opportunity to object to the historic listing but failed to do so.

This presents an impossible situation for local governments with historic inventories that pre-date 1995 because it imposes a burden of proof on them that most cannot meet. For those local governments that may have sought owner consent at the time of historic listing, even though the law at the time did not require it, those records are now more than 20 years old and may not exist. Lake Oswego is unusual in that it gave the owner at the time (Richard Wilmot) the opportunity to object to the historic listing, and the city still has the records of those proceedings. Most local governments do not.

The court"s opinion in this case now means that the current owners of most historic properties (those listed before 1995) can demand that the property be removed from the inventory because there is a (valid) presumption that the

original owners were not asked for their consent to the historic listing. Unless the local government can then demonstrate that the owner at the time of listing either consented to the designation or was asked and did not object, the property must be removed from the local inventory pursuant to the court‟s holding in this case and ORS 197.772(3).

This implication of the court‟s holding has the potential to devastate Oregon‟s Goal 5 historic preservation program over time. At a minimum, it also conflicts with the Goal 5 ESEE evaluation and designation process designed to preserve historic resources. *See DLCD v. Yamhill County, supra*. In this regard, petitioners incorporate by reference arguments about the possible impact of the court‟s decision on the state‟s Goal 5 program from the Opening Brief of *Amicus Curiae* Restore Oregon, Architectural Heritage Center, the National Trust for Historic Preservation, Preservation Works and the cities of Portland, Pendleton and The Dalles, without restating them here.

## CONCLUSION

The Court of Appeals‟ interpretation of ORS 197.772(3) was incorrect in three significant respects. First it failed to give the same meaning to "property owner" as the expression has in ORS 197.772(1). The same expression used twice in the same statute should have the same meaning in both places, and the exact meaning of "property owner" in subsection (1) is crystal clear.

Second, the court failed to appreciate that the intent of the A9 and A10 amendments to SB 588 (1995) was to address certain Yamhill County property owners whose property had been placed on the local historic inventory over their objections and the same property owners still owned those properties and wanted off the local inventory. Yamhill County had attempted to provide relief for these property owners adopting owner consent into the County"s code by Ordinance 479 in 1989. Representatives Lewis and Milne had attempted to introduce owner consent through HB 2124 (1993), which passed but was vetoed by Governor Roberts. Representatives Lewis and Milne again introduced owner consent in the next session with the A9 and A10 amendments to SB 588 (1995), which became ORS 197.772(3) and (1), respectively. When asked whether the intent of the A9 amendment was to give subsequent owners the unilateral right to opt-out of the local historic inventory, Representative Lewis responded:

> I frankly haven"t thought about that situation Representative Ross. I had more thought of people who since the implementation of the historic designation under Goal 5, in our county, many people have been basically coerced into the historic property designation, and I believe some of those people are waiting for HB 2124 to become law and then they intend to petition to be removed from the historic property designation.

This means that the conclusion reached by the Court of Appeals is contrary to the sponsor"s stated legislative intent behind ORS 197.772(3). Clearly ORS 197.772(3) applies beyond the borders of Yamhill County throughout the state, but

it was not intended to apply to anyone but an original "property owner" who had objected to the listing in the first place.

Finally, the court completely over-looked Goal 5, its administrative rule, and the exhaustive quasi-judicial process by which Goal 5 resources are identified, inventoried, evaluated and protected that ensures full owner and community participation. Had it considered the Goal 5 context of ORS 197.772, the court would have concluded that the right to opt-out of the local Goal 5 historic inventory was for the property owner at the time of historic listing only and was not intended to run with title to the land to subsequent owners to be activate years or decades after the listing.

For these reasons, this Court should reverse the Court of Appeals and declare that "property owner" in ORS 197.772(3) means that only a property owner who objected at the time of the property's designation on the local historic inventory can require the local government to remove the designation.

Respectfully submitted July 10, 2015.

REEVE KEARNS, PC

By:_____

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## CERTIFICATE OF SERVICE AND FILING
## and Certificate of Word Count

I hereby certify that on the date indicated below, I caused to be filed the attached PETITIONERS' OPENING BRIEF AND EXCERPT OF RECORD in S063048 with the:

State Court Administrator
Supreme Court Bldg.
1163 State Street
Salem, OR 97301-2563

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

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I further certify that Petitioners' Opening Brief complies with the word court limitation in ORAP 5.05(2)(b) for an opening brief; it is proportionately typed, not smaller than 14-point font for the body and footnotes, and contains 9,532 words.

DATED this 10th day of July 2015.

By:_____
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