

**Historic Designation Request for Camp Adair Buildings**  
**STAFF REPORT ON REMAND**  
*November 8, 2017*

**APPLICANT:** McLoughlin Neighborhood Association (MNA)  
c/o Jesse A. Buss  
411 5<sup>th</sup> Street  
City of Oregon City, Oregon 97045

**OWNER:** City of Oregon City  
Public Works Operations Center (Upper Yard)  
PO Box 3040  
Oregon City, Oregon 97045

**REQUEST:** Land Use Board of Appeals (LUBA) remanded a historic nomination for the Community Cannery and Workshop Annex structures in the Upper Yard of the City's Public Works Operation Center.

**LOCATION:** 122 & 220 S. John Adams Street, Oregon City, Oregon 97045

**RECOMMENDATION:** Withdraw consent for historic designation pursuant to ORS 197.772 including resolution of the initial jurisdictional issues identified by LUBA.

**INTRODUCTION:**

On September 27, 2017, the Land Use Board of Appeals (LUBA) remanded the City's actions on an application to locally designate two buildings at the Public Works Operations Center as individually designated historic resources. The application to designate the buildings was submitted by the McLoughlin Neighborhood Association (MNA) to the Historic Review Board (HRB). After the application was submitted and the HRB had been notified of the application as required by the Oregon City Municipal Code, the City Manager submitted a letter revoking consent to the designation. Under a statute discussed further below, once the lack of consent was submitted, the HRB took no further action on the request. MNA appealed the City Manager's letter withdrawing consent as well as the HRB's failure to act on the application to LUBA. LUBA remanded the City's action (or failure to act) on limited grounds. The City Commission must consider the following and adopt findings on remand:

- Whether the City waived its right to refuse consent for historic designations under ORS 197.772(1) by delegating authority to designate resources to the HRB.
- Whether the city manager had authority under the city charter to refuse to consent.
- Whether ORS 197.772(1) allows public entities to refuse to consent to a historic designation.

The Commission may decide whether to adopt staff’s recommended findings or to make a tentative decision and return at a following meeting with findings consistent with its decision.

**FACTUAL BACKGROUND:**

In 2004, the City completed an historic inventory of the buildings located within the City’s Public Works Operations Center, including two buildings on the upper campus, then known as the Cannery and Warehouse buildings. The inventory concluded with a determination that these buildings were not eligible for designation on the National Register of Historic Places either because they “lacked distinction” or they had been “altered.” The 2004 inventory sheets indicate that the property on which these structures were located, the Public Works Operations Center complex, was owned by the City.

On March 2, 2017, MNA filed an application to designate the Cannery and Warehouse buildings as historic landmarks on the City’s local historic inventory. The application provides that these buildings were suitable for designation because of new information - their association with Camp Adair, a US Army World War II training facility, located near the City of Corvallis. The application states that these buildings are owned by the City of Oregon City.

Upon receiving the request, the City researched the eligibility of the structures and received communications from a Historian with the State Historic Preservation Office indicating that, notwithstanding this new information, these buildings would be ineligible for listing in the National Register of Historic Places. A letter from Restore Oregon confirmed this result.

On April 18, 2017, the City Manager Tony Konkol issued a letter refusing to consent to the historic designation of these two buildings pursuant to ORS 197.772(1).<sup>1</sup> Attached to the City Manager’s letter was a memorandum from the City Manager to the HRB explaining that the City had previously created and approved a Master Plan for the property to improve services for the public. In order to achieve that

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<sup>1</sup> ORS 197.772 provides a right for a property owner to avoid historic designation of its property by withdrawing consent. It provides as follows:

(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 (Definitions for ORS 358.480 to 358.545) to 358.545 (Rules) 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 owners 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.

goal, the Camp Adair structures were proposed to be removed. The memorandum indicated that the City would attempt to find a suitable place to relocate the buildings and if the structures could not be relocated, they would be deconstructed.

At its April 25 hearing, the HRB received a briefing on the historic nomination for the Camp Adair buildings including a presentation by staff as well as from MNA's attorney. Consistent with ORS 197.772, the application was removed from any further consideration by the HRB. On April 27, city staff mailed notice to MNA that the HRB would be taking no further action to consider the request.

MNA appealed Mr. Konkol's April 18<sup>th</sup> letter as well as the HRB's failure to take action on the application to LUBA. Before LUBA, MNA raised the following issues: (1) whether a local government is entitled to withdraw consent for a historic designation under ORS 997.772(1); (2) whether Oregon City waived the right to refuse consent; (3) whether the City Manager had authority to withdraw consent under the City Charter; and (4) that the HRB had an obligation to hold a hearing and make a decision on the substance of the application consistent with the City's hearing requirements set forth in Oregon City Municipal Code 17.50.

LUBA agreed with MNA, in part. LUBA found that the City should have addressed items 2 and 3 in the list above. First, the City must consider whether it waived its right to refuse consent for historic designations under ORS 197.772(1) by delegating authority to designate resources to the HRB. Second, the City must consider whether the city manager had authority under the city charter to refuse to consent. LUBA did not make any ruling on whether public property owners are entitled to withdraw consent under ORS 197.772(1). As a result, the City Commission should make a decision on the scope of ORS 197.772(1) as well.

**PROCESS:** On November 15, the City Commission will hold a public hearing to resolve the issues raised in LUBA's opinion in *MNA v. City of Oregon City*, LUBA Nos. 2017-052/054. The City Commission's review should be limited to arguments related to the three items identified above and no new evidence is allowed. After hearing testimony from the public limited to these three issues, the City Commission's decision will become the City's final decision and is appealable to LUBA within twenty-one days of when it becomes final.

One issue that may come up is whether the HRB was required to hear this remand or if the City Commission may resolve these issues. In its opinion, LUBA indicated that, "[o]n remand the HRB, and perhaps the city commission, need to adopt findings that respond to those two questions." The proper body to resolve these issues is the City Commission for a number of reasons.

First, a local government has considerable discretion in determining the procedures on remand. Where a matter is remanded, a local government is not required to apply the procedures it applied to the initial decision unless the remand specifically requires the procedures to be followed. *Wentland v. City of Portland*, 23 OR LUBA 321 (1992); *Schatz v. City of Jacksonville*, 25 Or LUBA 327, 335 *aff'd without opinion*, 122 Or App 299 (1993).

Had LUBA required that the City consider the proposed application on its merits, for compliance with OCMC 17.40.50 substantive standards, there may be some justification for retaining HRB expertise. However, the only matters on remand are limited to: (1) whether the adoption of OCMC 17.40.050 waived the City's right to object to an historic designation, and (2) whether the City Manager had authority to refuse to consent. The Commission finds that the Commission is the better body to resolve the first question because it was the body that adopted ORS 17.40.50 and, therefore, is more familiar with the issue and is the appropriate body to answer the question of intent raised by the issue. *See Gage v. City of Portland, Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994). As to the second question, it raises a question of authority in which the HRB has no expertise. The City Commission, as the source of all residual power in the City is in a better position to determine if the City Manager acted within his authority in refusing to consent to the proposed designation.

Finally, the HRB may make a decision or a recommendation to the City Commission. OCMC 17.40.050.C. To the extent the HRB makes recommendation, it automatically goes to the Commission, which is empowered to make the final decision. To the extent the HRB makes a final decision, that decision is appealable to the City Commission. OCMC 17.50.030.C. In short, remand to the HRB would serve no purpose because the Commission is better suited to resolve the remanded issues and would be required to make those determinations in any event.

## **ANALYSIS**

### Waiver

The first issue is whether the adoption of OCMC 17.40.50, authorizing the Historic Review Board to review historic designations, served to waive the City's right to object to a historic designation under ORS 197.772(1). LUBA did not weigh in on the merits of this question finding that it was a threshold jurisdictional question that had to be answered by the City.

First, as a general legal principle, a local government cannot affirmatively waive a guarantee provided by state law. For example, Oregon City could not decide to limit private property owner's ability to object to a historic designation by adopting an ordinance that did not contain that same guarantee.<sup>2</sup> Therefore, a property owner's right to object to a designation cannot be altered by local government action, whether that property owner is public or private. Rather, a local government could determine, as a matter of public policy, not to take advantage of a guarantee granted by state law, either prospectively or on a case-by-case basis. Therefore, the question is whether there is any indication in local regulations to suggest that the City intended to subject itself to such an exclusion.

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<sup>2</sup> All local governments have an obligation to "exercise their planning and zoning responsibilities...in accordance with ORS chapter(s) ...197..." ORS 197.175.

OCMC 17.40.50 sets forth the procedure and standards for designating local landmarks.<sup>3</sup> In summary, the process may be initiated by the city, neighborhood group or other party interested in designation.

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<sup>3</sup> OCMC 17.40.50 provides:

- A. Institution of Proceedings. The city commission, the planning commission, the historic review board, a recognized neighborhood group or any interested person may initiate the proceedings for designation of an historic or conservation district, landmark, or historic corridor as follows:
1. The city commission or the historic review board may initiate designation proceedings by sending a written proposal or application to the planning staff. Such proposal is not subject to any minimal information requirements other than a description of the boundaries of the area to be designated.
  2. Any interested person or recognized neighborhood group may start designation proceedings by sending a written application to the planning staff.
- B. Application Information. The planning staff may specify the information required in an application and may from time to time change the content of that information, but at all times the planning staff shall require the following information:
1. The applicant's name and address;
  2. The owner's name and address, if different from the applicant;
  3. A description of the boundaries of the proposed district or a description of the proposed landmark;
  4. A map illustrating the boundaries of the proposed district or the location of the proposed landmark;
  5. A statement explaining the following:
    - a. The reasons why the proposed district or landmark should be designated,
    - b. The reason why the boundaries of the proposed district are adequate and suitable for designation,
    - c. The positive and negative effects, if any, which designation of the proposed district or landmark would have on the residents or other property owners of the area.
- C. The planning staff shall deliver a proposal or an application for the designation to the historic review board within thirty days after the day on which a proposal or application is received. The historic review board shall review the proposal on the application and prepare a written recommendation or decision approving or rejecting the proposed designation.
- D. In preparing the recommendation or decision, the historic review board shall limit its review to:
1. Whether the proposed district or landmark would serve the purpose of the historic overlay district as stated in Section 17.40.010; and
  2. Conformity with the purposes of the city comprehensive plan.
- E. City Commission Review of District.
1. The historic review board shall deliver a copy of its recommendation to the city commission within thirty days.
  2. The city commission shall hold a public hearing pursuant to procedures contained in Chapter 17.68.
  3. After the hearing, the city commission may engage in one of the following actions:

The request does not have to be initiated by the owner. OCMC 17.40.50(B)(2) requires that the application identify the name and address of the owner, if different from the applicant. The HRB is to make a decision based on whether the designation would “serve the purpose of the historic overlay district as stated in Section 17.40.010” and the City’s Comprehensive Plan. OCMC 17.40.50(D). The HRB’s recommendation is then forwarded to the City Commission for consideration. The Commission may approve the requested designation, refuse the requested designation or remand the matter to the HRB. OCMC 17.40.050(E)(3) and 17.68.030.

OCMC 17.40.50 makes no reference to limiting a public property owner’s ability to withdraw consent under ORS 197.772. Rather, allowing the City Commission to “refuse the designation,” suggests that the Commission could refuse the designation in the first instance.

ORS 197.772 was enacted in 1996. The version of OCMC 17.40.50 that is currently in place indicates an implementation date of 2009 through Ordinance No. 2008-1014 and amendment in 2010.<sup>4</sup> The fact that ORS 197.772 was in place when the revised OCMC 17.40.50 was codified without mention of the state law suggests that the City was aware of the law and decided not to waive any of the guarantees provided by ORS 197.772 with regard to public ownership of property. For a local government to waive a right, guaranteed by state law, there must be some evidence of intent. There is no evidence of that intent to exclude publicly owned property mentioned within the plain text of OCMC 17.40.50.

Rather the context of OCMC 17.40.50 suggests a contrary result - no intent to limit the scope of the owner consent authorization of ORS 197.772. OCMC 17.40.50 provides that an application for a historic designation can be filed by a party other than the owner so long as the application includes the name and address of the owner. No signature of the owner is required as an indication of consent. On the other hand, for all other land use permits the property owner must either sign the application or sign as an indication of consent. OCMC 17.50.060. The fact that the designation cannot occur without owner consent, with no reference to withholding consent pursuant to ORS 197.772, suggests that the City Commission was aware of the right guaranteed by ORS 197.772 and believed that it was adequate to ensure that resources would not be designated over an owners’ objection, regardless of whether that owner was a public or a private entity.

Further, assuming that OCMC 17.50.40 served to effectively (and silently) waive the ORS right of public property owners to withdraw consent, such an assertion would effectively waive those rights for private property owners, as well. The appeal does not suggest that OCMC 17.50.40 waived ORS 197.772 rights as it relates to all owners but just public property owners. Nothing in the plain language OCMC 17.50.40 supports any intent for such disparate treatment. Further, as explained above, although a local government may elect not to take advantage of legal right, a local government cannot, through its regulations, abrogate a right protected by state law.

For these reasons, the City Commission should conclude that the adoption of OCMC 17.40.50 did not waive the City’s ability to withdraw consent to a historic designation pursuant to ORS 197.772.

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<sup>4</sup> This is evidenced on the face of code provision itself and did not rely on any extra-record evidence.

### Authority to Withdraw Consent

The second question that LUBA asked that the City resolve on remand was: who has authority to refuse to consent to a historic designation? City Charter Chapter III, Section 6 provides: “except as this charter provides otherwise, all powers of the city shall be vested in the commission.” City Charter Chapter V, Section 21(c) outlines all of the duties bestowed upon the City Manager. They include the “general supervision over all city property.” Therefore, Section 21(c) of the City Charter authorized the City Manager to revoke consent as the supervisor over city property, acting in his proprietary capacity on behalf of the City.

Should there be any doubt on the City Manager’s authority, the City Commission should reaffirm the City Manager’s April 18, 2017, letter by formally revoking consent to the designation of the Warehouse and Cannery buildings on its own motion as part of this decision, thereby making the City Manager’s action moot.

### Local Government Land Ownership under ORS 197.772

The final remanded issue is whether ORS 197.772(1) allows public entities to refuse to consent to a historic designation. LUBA’s decision provides no additional guidance in answering this question of state law.

The appeal’s principle argument before LUBA was that the right to withdraw consent applies only to private property owners. MNA found support in this argument in two ways. First, as a matter of statutory construction, because the City is a “local government,” it cannot qualify also qualify as a “land owner,” and therefore, withdraw consent to a historic designation.<sup>5</sup>

The City responded to this argument by explaining that the structure of the statute makes clear that the reference to “local government” is as the body reviewing the historic designation and the reference to “property owner” as the person or entity that owns the property. The Oregon Supreme Court has defined this term with regard to ORS 197.772 in the case, *Lake Oswego Preservation Society v. City of Lake Oswego*, 360 Or 115 (2016) where it stated:

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<sup>5</sup> Quoted again for the Commission’s convenience, ORS 197.772(1) provides:

(1) Notwithstanding any other provision of law, a local government shall allow a property owner to refuse to consent to any form of historic property designation at any point during the designation process. Such refusal to consent shall remove the property from any form of consideration for historic property designation under ORS 358.480 (Definitions for ORS 358.480 to 358.545) to 358.545 (Rules) 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.).



The words ‘property’ and ‘owner’ are relatively straightforward, referring, in context, to the individual or entity that has legal title to a piece of real estate. *See Webster’s Third New Int’l Dictionary* 1818, 1612 (unabridged ed 2002.) *Id* at 126. (Emphasis added.)

The “entity” that owns the property where the Camp Adair buildings are located is the City of Oregon City. No party disputes that the City holds legal title to the subject property; the request for nomination acknowledged as much in its application. 2<sup>nd</sup> Sup Rec 237, 254-261. Similarly, nothing in the dictionary definition gives any indication that public ownership of property is any different than private ownership. To find otherwise would insert the term “private” where no such qualifier exists in violation of ORS 174.010 (in interpreting statutes, the interpreter should not insert what has been omitted).

The appeal argued that a city cannot serve in both a regulatory as well as a proprietary capacity. However, courts have long recognized a distinction in municipal actions between “governmental, public or legislative” and “corporate, proprietary or private” acts. *Wold v. City of Portland*, 166 Or. 455, 463 (1943). The Oregon Supreme Court has acknowledged a city’s authority to make decisions with respect to property in a proprietary capacity as a private owner, for example, in the case of *Seafeldt v. Port of Astoria*, 141 Or. 418 (1932), the Court quoted the following from *McQuillin on Municipal Corporations*:

“\*\*\* All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to a public use. In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title and which is not affected by a public trust, in substantially the same manner as an individual unless restrained by statute or charter; and this power is an incidental power inherent in all corporations, public or private. \*\*\* So land bought for a public purpose, if not actually so used, cannot be said to be affected by a public trust, and hence may be sold.” 3 *McQuillin on Municipal Corporations* (2d Ed.) § 1242. See, also, 43 C. J. 1340.; *Seafeldt v. Port of Astoria*, 1933, 141 Or 418, 16 P.2d 943. *See also Pullen v. Oregon Industrial Development Commission*, 240 Or 583, 585 (1965). (Emphasis added).

If a local government is given all of the power to dispose of property in the same way as a private entity, it stands to reason that it is similarly free to act with regard to the use of private property in the same ways as any other private property owner, unless otherwise prohibited by law or local regulation. Further, Oregon law acknowledges that local government can operate in such a dual capacity. For example, LUBA has ruled multiple times that a local government can be an applicant as well as the reviewing body in a land use case without prejudicing the outcome. *Crook v. Curry County*, 38 Or LUBA 677, 683 (2000); *Wal-Mart v. City of Oregon City*, 49 Or LUBA 729, 735-736 (2005); *Sahagian v. Columbia County*, 27 Or LUBA 592 (1994); *Waite v. Marion County*, 16 Or LUBA 353 (1987).

Given that LUBA and the courts have acknowledged that a city can be both a regulator as well as an applicant and there is nothing in the language of ORS 197.772 to suggest that the balance of equities struck by the legislature with the adoption of ORS 197.772 was intended to exclude local government owned property, ultimately holding public lands to higher standard, the City Commission finds that it has



authority to revoke consent to the proposed historic designation of the Warehouse and Cannery Buildings.

**Recommendation:**

Based on the foregoing analysis, the Commission conclude that: (1) it is the proper decision-maker on this remanded matter; (2) the adoption of OCMC 17.40.50 did not waive application of ORS 197.772 with regard to publicly owned property; (3) although the city manager had authority to revoke consent, the City Commission affirms that action by revoking consent to any historic designation of the Warehouse and Cannery Buildings located in the Upper Yard of the Public Works Operations Facility; and (4) ORS 197.772 does not distinguish between private and public property owners in their ability to refuse to consent.