

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 MCLOUGHLIN NEIGHBORHOOD ASSOCIATION,
5 *Petitioner,*
6
7 vs.
8
9 CITY OF OREGON CITY,
10 *Respondent.*
11
12 LUBA Nos. 2017-052/054

13
14 FINAL OPINION
15 AND ORDER
16

17 Appeal from Oregon City.

18
19 Jesse A. Buss, Oregon City, filed the petition for review and argued on
20 behalf of petitioner.

21
22 Carrie A. Richter, Portland, filed a response brief and argued on behalf
23 of respondent. With her on the brief was Bateman Seidel Miner Blomgren
24 Chellis & Gram PC.

25
26 HOLSTUN Board Member; BASSHAM, Board Member, participated in
27 the decision.

28
29 RYAN, Board Chair, did not participate in the decision.

30
31 REMANDED 09/27/2017

32
33 You are entitled to judicial review of this Order. Judicial review is
34 governed by the provisions of ORS 197.850.

NATURE OF THE DECISIONS

Petitioner, a neighborhood association, seeks to designate two city-owned structures as historic landmarks. In LUBA No. 2017-052, petitioner appeals a letter to petitioner's chairperson and a memorandum to the city's Historic Review Board (HRB). Both documents are dated April 18, 2017, and in both documents the city manager takes the position that the city refuses to consent to those historic designations under ORS 197.772(1).¹

After the city refused to consent to the requested historic designations, the city's HRB removed petitioner's historic landmark designation application from the agenda of a previously scheduled April 25, 2017 HRB public hearing. However, petitioner's application remained on the agenda for the April 25, 2017 meeting as a discussion item, and no action was taken. In LUBA No. 2017-054, petitioner appeals the HRB's decision to take no further action on its application.

INTRODUCTION

The two city-owned structures in dispute were constructed at Camp Adair as part of a U.S. Army World War II training facility located north of Corvallis. After the war, the structures were moved to Oregon City, where they have been used for various purposes. The city conducted an inventory of

¹ We set out the text of the statute later in this appeal.

1 historic resources in 2004, and at that time concluded the buildings were not
2 eligible for historic designation. Second Revised Record (hereafter Record)
3 254-61.

4 The city wishes to remove the structures from their current location to
5 facilitate construction of a new public works facility. Under Oregon City
6 Municipal Code (OCMC) 17.40.050, a number of persons, including
7 recognized neighborhood groups like petitioner, are authorized to initiate
8 proceedings to designate a historic landmark. Petitioner submitted an
9 application on March 2, 2017, to designate the two buildings as historic
10 landmarks. Under OCMC 17.40.050(C), the planning staff was required to
11 deliver the application to the HRB. The HRB is then required to “prepare a
12 written recommendation or decision approving or rejecting the proposed
13 designation.” *Id.* That decision or recommendation must be delivered to the
14 city commission for final action.² OCMC 17.40.050 (E)(1). Among other
15 things, the HRB is required to determine whether the proposal “[c]onform[s]
16 with the purposes of the city comprehensive plan.” OCMC 17.40.050(D).
17 Under OCMC 17.40.050(E)(3), the city commission is authorized to approve
18 the requested designation, refuse the requested designation or remand the
19 matter to the HRB. Under OCMC 17.40.050(E)(5), the city commission’s

² The city commission is Oregon City’s governing body.

1 decision “shall be in writing and shall state the reasons for approval or
2 disapproval.”

3 After petitioner submitted its applications, and the HRB scheduled its
4 April 25, 2017 public hearing to consider those applications, there does not
5 appear to be any dispute that under the OCMC, the HRB would have taken up
6 the applications at the April 25, 2017 public hearing and thereafter either taken
7 action on or adopted a recommendation, and that action or recommendation
8 would have then been considered by the city commission, which would have
9 rendered a final written decision on the applications.

10 The April 18, 2017 letter and memorandum, in which the city manager
11 refused to consent to the requested designation pursuant to ORS 197.772(1),
12 resulted in the HRB suspending action on the applications. ORS 197.772(1)
13 provides:

14 “Notwithstanding any other provision of law, a local government
15 shall allow a property owner to refuse to consent to any form of
16 historic property designation at any point during the designation
17 process. Such refusal to consent shall remove the property from
18 any form of consideration for historic property designation under
19 ORS 358.480 to 358.545 or other law except for consideration or
20 nomination to the National Register of Historic Places pursuant to
21 the National Historic Preservation Act of 1966, as amended (16
22 U.S.C. 470 et seq.).”

23 In an undated letter to petitioner following the April 25, 2017 HRB
24 public hearing, a city planner explained that the city refused to consent to the
25 requested designations under ORS 197.772(1), and explains:

1 “As the property owner has refused consent to the nomination, the
2 application must now be removed from ‘any form of
3 consideration’ for designation. Accordingly, the Historic Review
4 Board is no longer authorized to continue to consider your request
5 and the City will take no further action on this matter.” Record
6 23.

7 JURISDICTION

8 The city concedes the two letters are “land use decisions” that are subject
9 to LUBA review, because they concern the application of OAR 660-023-
10 0200(6), an administrative rule that implements Statewide Planning Goal 5
11 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and ORS
12 197.772.³ But the city argues, citing *Cascade Geographic Society v. ODEQ*,
13 57 Or LUBA 276, 277, *aff’d* 224 Or App 178, 197 P3d 1152 (2008), that the
14 HRB decision to take no action on petitioner’s application is not a land use
15 decision, because the HRB made no decision.

16 While there is language in *Cascade Geographic Society* that can be read
17 to lend some support to the city’s jurisdictional challenge, we conclude the
18 HRB decision to suspend its review of petitioner’s application to designate the
19 two city structures as historic landmarks is a land use decision. In *Cascade*
20 *Geographic Society*, the Oregon Department of Environmental Quality took the
21 position that it had no authority or obligation to review the erosion control plan

³ Under ORS 197.015(10)(a), “[a] final decision * * * that concerns the
* * * application of” a statewide planning goal or comprehensive plan is a
“land use decision.”

1 at issue in that appeal. In this case, there is no dispute that the HRB had
2 jurisdiction to review the application, and there is no dispute that but for the
3 city's refusal to consent under ORS 197.772(1), the HRB would have been
4 obligated to forward a recommendation to the city commission, and the city
5 commission would have been required to issue a final written decision
6 approving or refusing to approve the application. Such a city commission final
7 decision would have concerned the application of the city's comprehensive
8 plan and therefore would qualify as a land use decision," as ORS
9 197.015(10)(a) defines that term. See n 3. We conclude the HRB's final
10 decision to suspend and terminate its review of an application that would
11 otherwise result in a final decision by the city commission, based solely on an
12 ORS 197.772(1) refusal to consent, is a land use decision that is reviewable by
13 LUBA. That refusal to consent posed a threshold jurisdictional question for the
14 HRB. The HRB's apparent conclusion that the ORS 197.772(1) refusal to
15 consent deprived it of jurisdiction to continue with its review of the application
16 is a decision that concerns the application of the Goal 5 rule and the city's
17 comprehensive plan and therefore is a land use decision.

18 Finally, the city points out that petitioner argues the HRB adopted "no
19 findings * * * and no decision (written or otherwise)" was adopted. Response
20 Brief 5. If the city is suggesting a writing is a jurisdictional necessity for there
21 to be a land use decision, the Court of Appeals has reserved judgment on that
22 question. See *Friends of the Creek v. Jackson County*, 165 Or App 138, 141,

1 995 P2d 1204 (2000) (questioning whether the fact that an application happens
2 to have been acted on in the form of written decision is determinative of
3 LUBA’s jurisdiction). And in any event, in this case we have the written HRB
4 minutes and the planning staff letter to petitioner following the April 25, 2017
5 HRB meeting. Those suffice if a writing is required for a land use decision.

6 **ASSIGNMENTS OF ERROR**

7 Petitioner’s first assignment of error is directed at the city manager’s
8 April 18, 2017 letter to petitioner and memorandum to the HRB, which, among
9 other things, refuse to consent to the requested historical designation under
10 ORS 197.772(1). Petitioner argues the refusal to consent is ineffective for
11 three reasons. First, petitioner argues the city has waived its right to refuse
12 consent for historic designations under ORS 197.772(1), by delegating
13 authority to the HRB under the OCMC to receive applications and forward
14 recommendations to the city commission for final action. Second, petitioner
15 argues the city manger lacks authority under the city charter to refuse to
16 consent. And finally, petitioner argues the city does not qualify as a “property
17 owner,” as that term is used in ORS 197.772(1), because the only property
18 owners entitled to refuse to consent under ORS 197.772(1) are *private* property
19 owners. Petitioner contends that *public* property owners are not entitled to

1 refuse to consent to historic designations of public property under ORS
2 197.772(1).⁴

3 Under the second assignment of error, petitioner argues “[n]o hearing
4 was held, the record was never opened, no motion was made, no findings were
5 discussed or adopted, and no decision (written or otherwise) was made on the
6 application as required by OCMC 17.40.050(A).” Petition for Review 19.
7 Petitioner goes on to argue:

8 “This matter should be remanded to the HRB for a hearing and
9 written decision even if LUBA finds that [the city manager’s]
10 April 18th attempted refusal under ORS 197.722(1) may ultimately
11 have been effective. That is, the HRB had a duty to enquire into
12 and make findings of fact and conclusions of law regarding the
13 validity and effectiveness of [the city manager’s] April 18th
14 decision. Because the HRB failed to so enquire, there are no
15 findings of fact or conclusions of law for LUBA to review on
16 appeal. Where there should be a decision there is only a vacuum;
17 LUBA cannot review * * * (or defer to) a vacuum.” Record 21.

18 We generally agree with petitioner. If either of the first two of the
19 arguments petitioner advances against the city manager’s purported refusal to
20 consent (waiver of city right to refuse to consent, and lack of city manager
21 authority to refuse to consent) have merit, as far as we can tell the HRB would
22 be required to proceed with its consideration of petitioner’s application,
23 without regard to whether petitioner’s understanding of the scope of ORS

⁴ Petitioner makes those three arguments in a different order. We have reordered the arguments so that they are posed in the order in which they are properly answered.

1 197.772(1) is correct. The HRB should have adopted findings addressing the
2 threshold jurisdictional issue raised by those two questions of local law once
3 petitioner raised the issues. *Norvell v. Portland Metro Area LGBC*, 43 Or App
4 849, 853, 604 P2d 896 (1979). The HRB erred by simply suspending its
5 consideration of petitioner’s application without adopting findings addressing
6 those arguments. On remand the HRB, and perhaps the city commission, need
7 to adopt findings that respond to those two questions.

8 Petitioner’s third argument—because the city is a “local government” it
9 cannot qualify as a “land owner,” within the meaning of ORS 197.772(1)—is a
10 question of state law rather than local law. If the HRB had addressed the first
11 two questions without addressing the third question, there would be no reason
12 to remand for the city to address the third question first, because LUBA would
13 not owe the HRB or the city commission any deference in its interpretation of
14 state law. *Kenagy v. Benton County*, 115 Or App 131, 838 P2d 1076 (1992).
15 However, the city’s answers to the first two questions could make it
16 unnecessary to consider whether petitioner’s narrow reading of ORS
17 197.772(1) is correct.

18 We therefore sustain petitioner’s third assignment of error, but only to
19 the extent it argues the HRB erred by failing to adopt findings that address the
20 three questions petitioner posed regarding the city’s purported refusal to
21 consent to the requested historic landmark designations. Given our disposition
22 of the second assignment of error, we also remand the city manager’s April 18,

1 2017 letter and memorandum. However, we do not reach, and express no view,
2 on petitioner's arguments under the first assignment of error. We also express
3 no view on petitioner's argument under the second assignment of error that it
4 was entitled to a Type III quasi-judicial hearing before the HRB.

5 The second assignment of error is sustained in part. The city's decisions
6 in LUBA Nos. 2017-052 and 2017-054 are remanded.