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November 15, 2017

Oregon City Commission
625 Center St.
Oregon City OR 97045

ENTERED INTO THE RECORD
DATE RECEIVED: 11/15/17
SUBMITTED BY: Jesse Buss
SUBJECT: Item 6C
along with a CD-disk.

RE: McLoughlin Neighborhood Association's Application for Designation
of Historic Landmarks (Camp Adair buildings)
File No. PC 17-139
City Commission hearing scheduled for 11/15/2017

Dear Mayor and Commissioners:

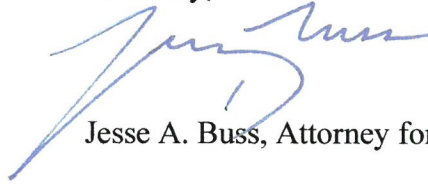
As you know, I represent the McLoughlin Neighborhood Association (MNA) in the above-referenced matter. I offer the following comments on behalf of the MNA.

1. The LUBA record included with the agenda is incomplete. Instead of using the record dated May 15, 2017, the Second Revised Record in consolidated LUBA Case Nos. 2017-052/054 (hereinafter "the LUBA cases") should be used. That entire Second Revised Record should be incorporated into the record on remand.
2. The MNA re-asserts its arguments as presented in the LUBA cases. The MNA submits its LUBA brief along with this letter and incorporates that brief's arguments by reference, as if those arguments were set forth more fully in this letter.
3. It is inappropriate for the City Commission to disallow new evidence at this point in the proceeding (see Staff Report on Remand at 3). Since the MNA's application was submitted in early 2017 the MNA and the public have had no opportunity to submit evidence into the record. Neither the HRB nor the City Commission allowed new evidence or a hearing before the MNA brought the LUBA cases. Now, on remand from LUBA, that opportunity is still being denied.
4. The City Commission is not the appropriate body to address the LUBA remand in the first instance. Instead, under the Oregon City Municipal Code, that authority has been delegated to the HRB. Only the HRB has the authority to make the initial findings on remand. Although an HRB decision may eventually be subject to City Commission review, it is inappropriate to "skip" the HRB process. *See Downtown Community Association, Inc. v. City of Portland*, 3 Or. LUBA 244, 1981 Ore. Land Use Bd. App. LEXIS 77 (1981).
5. In any event, LUBA directed *the HRB* to adopt findings that respond to LUBA's questions on remand: "On remand, the HRB, and perhaps the city commission, need to adopt findings that respond to those two questions." LUBA opinion at 9. The words "and

- perhaps the city commission” do not represent LUBA’s blessing to skip the HRB review process completely. Instead, those words suggest that the City Commission may end up reviewing the HRB’s decision, at which time the City Commission could adopt findings.
6. Oregon City has waived any right to refuse consent under ORS 197.772(1). Waiver is the voluntary relinquishment of a known right. By adopting the detailed and specific OCMC provisions governing designation of historic landmarks in OCMC 17.40.050, done with full knowledge of the existence of ORS 197.772(1), Oregon City has waived the right to refuse consent under that statute.
 7. OCMC 17.40.050(E)(3) does not apply to landmark designation applications. Instead, OCMC 17.40.050(E) applies only to City Commission review of proposed historic districts. So, OCMC 17.40.050(E)(3) cannot be invoked as authority for the City Commission to “reject” a landmark application (see Staff Report on Remand at 6). Similarly, OCMC 17.68.030 does not apply to landmark designation application reviews. *Id.*
 8. In deciding the merits of a landmark designation application, the HRB is limited to the criteria set forth in OCMC 17.40.050(D). By extension, on any review of an HRB decision or recommendation, the City Commission is limited by the same criteria. Therefore, in the event the City Commission is reviewing a landmark designation application, if the City Commission declines to designate the nominated property as a landmark, it must do so solely based on the mandatory and exclusive criteria set forth in OCMC 17.40.050(D). Neither the HRB nor the City Commission have the discretion to deny a landmark application for reasons not based on those criteria.
 9. Neither the City Manager nor the City Commission have the authority to refuse consent for historic landmark designation applications under ORS 197.772(1), for the reasons explained in the MNA’s brief in the LUBA cases. However, in any event, that question is a state law question. As a state law question, LUBA owes no deference to the City’s interpretation of ORS 197.772(1).
 10. The MNA is entitled to a Type III quasi-judicial hearing before the HRB on the merits of the MNA’s landmark designation application.
 11. LUBA remanded the City Manager’s April 18, 2017 letter and memorandum. LUBA opinion at 9-10. It directed the HRB to adopt findings regarding the questions on remand. *Id.* LUBA did not suggest that the City Commission could use the remand process as an opportunity to “shore up” the City’s rejection of the MNA’s application by itself purporting to reject the MNA’s application under ORS 197.772(1). (See Staff Report on Remand at 1, recommending that the City Commission itself “[w]ithdraw consent for historic designation pursuant to ORS 197.772.”). This remand is for the limited purpose of the review of and adoption of findings regarding *the City Manager’s* purported refusal. If the City Commission desires to attempt to use this proceeding as a mode of adopting an ORS 197.772(1) rejection of the MNA’s application (which, as explained above, is impermissible), then such a decision would be a land use decision subject to full public participation, notice, and opportunity to submit new evidence into the record. To that end, the MNA requests a continuance of this hearing to allow for further hearings and opportunity to submit new evidence into the record (after it has been opened for the first time) before the City Commission attempts to refuse designation.
 12. The Staff Report on Remand states that a question on remand is “Whether ORS 197.772(1) allows *public entities* to refuse to consent to a historic designation.” *Id.* at 1

(emphasis added). That is not a correct statement of the present question under ORS 197.772(1). Instead, the present question is whether Oregon City, as a “local government” under ORS 197.772, and which is bound to implement Statewide Land Use Planning Goal 5, can refuse consent under ORS 197.772(1) for a property it owns.

Sincerely,



Jesse A. Buss, Attorney for MNA

Enclosures

cc: Client
Carrie A. Richter, Esq.