



Historic Designation Request for Camp Adair Buildings
FINDINGS OF FACT AND LAW ON REMAND
Adopted December 6, 2017

- APPLICANT:** McLoughlin Neighborhood Association (MNA)
c/o Jesse A. Buss
411 5th 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 two structures in the Upper Yard of the City's Public Works Operation Center.
- LOCATION:** 122 & 220 S. John Adams Street, Oregon City, Oregon 97045
- FINDING:** Affirm City's Manager's action to withdraw consent for historic designation pursuant to ORS 197.772 including resolution of the initial jurisdictional issues identified by LUBA.
- ORDER ON REMAND:** The request for revocation of consent to historic designation of the Cannery and Workshop Annex structures is reinstated and no further historic designation for these structures may be considered.

INTRODUCTION:

On September 27, 2017, the Land Use Board of Appeals (LUBA) remanded the City's actions on an application to designate two buildings at the Public Works Operations Center as historic resources. The application to designate the buildings had been submitted by the McLoughlin Neighborhood Association (MNA) to the Historic Review Board (HRB), but the City Manager did not consent to the designation. Under a statute discussed further below, once the lack of consent was made known, the HRB took no further action and that failure to act was appealed to LUBA. LUBA remanded the City's action (or failure to act) on limited grounds.

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 Community Cannery and Workshop Annex buildings. The inventory concluded with a determination that these

buildings were not eligible for historic designation 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 Facility Complex, was owned by the City.

On March 2, 2017, MNA filed an application to designate the Cannery and Workshop buildings as historic landmarks. 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.

While the request was pending, the City 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. Staff additionally reached out to a variety of other stakeholders such as the Adair Living History, Inc, Oregon Department of Fish and Wildlife, Fort Vancouver, and Clackamas Community College to learn more about the history of the structures and identify opportunities to preserve the structures.

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).¹ A related memorandum explained that, pursuant to previously adopted City Master Plan, the Public Works Operations Center would be modernized. In order to achieve that goal, the Camp Adair structures could not be retained and had to be replaced. The memorandum discussed the research which had been completed since the nomination was submitted and 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.

¹ 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.

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 18th 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.

PROCESS: On November 15, the City Commission held 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 Record

The City Commission's review was limited to the items identified by LUBA's opinion on remand and no new evidence was allowed. With regard to the record, the agenda packet presented to the City Commission in advance of the hearing included a copy of the first record submitted to LUBA in LUBA No. 2017-052 (prior to consolidation). During the hearing, MNA submitted a copy of the settled record for the LUBA appeal. The LUBA record or settled record is automatically part of the record on remand and therefore, the failure to include a second copy in the agenda packet was not error. *Rutigliano v. Jackson County*, 47 Or LUBA 628 (2004). In any event, the proceeding on remand did not involve any document contained in the settled record that was not included in the initial record. Therefore, the City Commission will include an additional copy of the settled record of the proceeding before LUBA, Petitioner's Opening Brief before LUBA along with written comments dated November 15, 2017, although as a practical matter, the settled record is already part of the record on remand.

Time Limits, New Evidence and Continuance

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).

During the hearing, MNA objected to the City Commission’s decision to limit its oral testimony to five minutes, the amount of time given to a neighborhood group under the standard land use review process. The City Commission denies this objection finding that (1) the subject review relates to application of the Oregon consent law rather than the application to designate historic resources and (2) this is a limited hearing on remand. Moreover, the Commission notes that there was no limit to the amount of written testimony it would accept, giving MNA an adequate opportunity to participate, notwithstanding the limitation on oral testimony.

MNA requested an opportunity to submit new evidence and to a continuance of the remand proceeding. The City Commission rejects the argument that the record must be open to new evidence because the limited questions on remand were questions of law that did not require the submittal of any additional evidence. *Bartels v. City of Portland*, 23 Or LUBA 182, 185 (1992); *Von Lubken v. Hood River County*, 19 Or LUBA 404, 419, *rev'd on other grounds* 104 Or App 683 (1990).

MNA asserted that the City Commission’s hearing on remand served as the initial hearing under ORS 197.763(6) and was entitled to a continuance as a result. A hearing on remand from LUBA is a continued proceeding and as a result, ORS 197.763(6) does not apply. *Wetherell v. Douglas County*, 56 Or LUBA 120 (2008). Even though this hearing on remand is the first public hearing on this matter, it is not the “initial evidentiary hearing.” No new evidence was allowed and the merits of the designation application were not considered. As a result, the Commission finds that the hearing on remand represented a continuation of the challenge to the City’s ability to revoke consent to a historic designation as authorized by ORS 197.772, therefore, MNA had no right to submit new evidence or to a continuance.

City Commission Review

One issue that came up was whether the HRB was required to hear this remand or if the City Commission may resolve these issues.² 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.

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*

² During the hearing, MNA’s counsel objected to the City’s consideration of whether this remand could be considered by the Commission or whether it must be returned to the HRB when this issue was not included within the list of issues identified for consideration on the hearing notice. Notwithstanding that objection, the City did hear testimony from MNA, both oral and in writing, objecting to the City Commission’s consideration of the remand, as opposed to the HRB, eliminating any potential prejudice.

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.

For these reasons, MNA's reliance on *Downtown Community Association, Inc. v. City of Portland*, 3 Or LUBA 224 is inopposite. In *Downtown Community*, the city council made a decision to grant a variance applying the substance of the variance criteria in contravention of a regulation indicating that staff would make an initial determination. There is nothing in the OCMC suggesting that the HRB is to make the initial evaluation of jurisdictional issues relating to application of the Oregon Consent Rule.

Finally, the City Commission rejects MNA's suggestion that the City Commission's review of historic designation applications is limited to local historic districts as stated in OCMC 17.40.030(E). First, OCMC 17.50.030(C) specifies that all historic review is to be processed through a Type III process, where final HRB decisions are appealable to the City Commission. Further, the City Commission finds that to designate a historic resource pursuant to OCMC 17.40.030 has the affect of applying a historic overlay zone to encompass additional property i.e. a map amendment. Any change in zoning requires a Type IV process including a final decision by the City Commission. In either scenario, City Commission's review of this designation request was required. In short, the City 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).³ 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 ability to object to a historic designation by adopting an ordinance that did not contain that same guarantee.⁴ 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

³ LUBA's decision instructs the "HRB, and perhaps the city commission" to respond to these questions. LUBA Opinion, slip op 9, lns 6-7. The City Commission finds that as body that adopted the City's land use regulations, particularly OCMC 17.40.50, it is also in the best position to interpret them.

⁴ All local governments have an obligation to "exercise their planning and zoning responsibilities...in accordance with ORS chapter(s) ...197..." ORS 197.175.

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 such an exclusion.

OCMC 17.40.50 sets forth the procedure and standards for designating local landmarks.⁵ In summary, the process may be initiated by the city, neighborhood group or other party interested in designation.

⁵ 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.

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).

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 2010.⁶ The fact that ORS 197.772 was in place when 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 can 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 the statutory right 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. MNA 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

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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:

⁶ This is evidenced on the face of code provision itself and did not rely on any extra-record evidence.

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 concludes 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.

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, the City Commission reaffirms that 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.

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.

MNA'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, MNA believes that, because the City is a "local government," it cannot also qualify as a "land owner," and therefore, withdraw consent to a historic designation.⁷

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:

⁷ Quoted again, 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; MNA acknowledged as much in its application and stated as much during the hearing on remand. 2nd Sup Rec 237, 254-261. Similarly, nothing in the dictionary definition gives any indication that ownership of property has a different meaning depending on who retains it. 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).

MNA 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* **Error! Bookmark not defined.**, 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.

Conclusion and Order:

Based on the foregoing analysis, the Commission concludes that: (1) the City Commission is the proper decision-maker to consider this matter on remand; (2) the adoption of OCMC 17.40.50 did not waive application of ORS 197.772 with regard to publicly owned property; (3) the City Manager had authority to revoke consent under the Oregon City Charter; and (4) ORS 197.772 does not distinguish between private and public property owners in their ability to refuse to consent.

The request for revocation of consent to historic designation of the Community Cannery and Workshop Annex structures is reinstated and no further historic designation for these structures may be considered.