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September 29, 2016

**BY FIRST-CLASS MAIL AND
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Land Conservation and Development Commission
c/o Casaria Taylor
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Subject: Comments on Goal 5 Historic Resource Rulemaking

Dear Goal 5 Historic Resources Rulemaking Advisory Committee (“Committee”):

Miller Nash Graham & Dunn LLP represents Aleta Warren. This letter concerns the proposed amendments to the Goal 5 Historic Resources rules, specifically proposed changes to OAR 660-023-0200.

Before delving into the range of amendments proposed by the staff of the Department of Land Conservation and Development (DLCD), we would like to thank the Committee for its diligent and careful consideration of how to improve these rules to better protect Oregon’s historic resources. It was clear in the audio recording from the August 31, 2016, meeting that the Committee is committed to crafting proposed amendments to the rules that accomplish the purpose of Goal 5 and preserve the state’s historic properties for future generations.

1. The Committee is correct that the rule amendments should strengthen—not weaken—protection of historic resources.

The fifth goal of Oregon’s Statewide Planning Goals and Guidelines is “[t]o protect natural resources and conserve scenic and historic areas and open spaces.” Under that goal’s mandate, “[l]ocal governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future generations.”

Thus, it was very surprising when the DLCDC, “with the input and advice of the State Historic Preservation Office (SHPO),” published “Proposed Amendments to the Goal 5 Rule for Historic Resources,” which proposed rule changes that would seriously weaken the protection of historic resources in Oregon. (See Attachment B to the August 23 RAC staff report.) The goals outlined in the DLCDC information report seemed to be specifically aimed at expanding the ability of public service districts and utilities to thwart or escape the local protection of historic resources and generally lessen the protection of resources on the National Register of Historic Places.

Thus, we were relieved when the Committee’s comments during the first meeting seemed inclined to increase the state protection of historic resources. We note, however, that several of the options proposed by the DLCDC staff in the draft amendments memo dated September 23, 2016, are in line with the original informational report and would actually weaken the protection of historic resources in Oregon. We ask that you continue to push for greater protection of historic resources in this amendment process and not let a single political controversy dictate and undermine state policy.

2. There is no sound reason for National Register sites to receive less protection than sites that are locally designated.

The current rules recognize that the resources listed on the National Register of Historic Places are generally the most valuable historic resources in the state. For instance, OAR 660-023-0200(1)(d) defines resources that are listed in the National Register as “[h]istoric resources *of statewide significance*.” (Emphasis added.) Accordingly, under the current rules, local governments are required to “protect all historic resources of statewide significance through local historic protection regulations, regardless of whether these resources are “designated” in the local plan.” This makes sense because the process for obtaining national recognition is generally much more robust and difficult than obtaining local recognition, and only the most valuable historic resources are able to qualify for federal recognition on the National Register.

The amendments proposed by the DLCDC staff, however, undermine the protection of these most-historic sites. First, the staff proposes to drop the recognition of these resources’ statewide significance and change the defined name to “National Register Resources.” More importantly, the staff proposes a two-tier approach to local protection of historic resources, where the resources on the National Register only receive “baseline protection” unless they are also locally designated. (See Meeting #2 Materials (“Materials”), at 3-4, 10-11.) In fact, under the DLCDC’s proposed amendments, a local jurisdiction would be prohibited from automatically applying

enhanced protection to these National Register resources in the absence of local designation (unless the jurisdiction's program predates this rule). (Materials, at 11.)

The only justification for this demotion of historic resources on the National Register was provided in the DLCD and SHPO publication prior to the initiation of the rulemaking process. (Attachment B to the August 23 staff report.) The staff claims that the rules' current automatic protection of National Register resources "conflates designating a property with protecting a property." But this logical combination is intentional and responsive to Goal 5, which requires protection of historic resources. Thus, protection should *always* follow identification of a historic resource, and the two should not be separate decisions. Like other resources, the program for protection can have flexibility in its application.

There are no reasonable grounds for locally-designated properties to receive a higher level of protection than the resources identified on the National Register. The National Register process is the gold standard for identification of historic properties. The Oregon current and proposed rules even require the local jurisdictions to use the federal guidelines in developing their local preservation programs. OAR 660-023-0200(3).

In addition, the local jurisdictions are not as competent as the specialized historic-preservation divisions of the National Park Service in conducting a historic review. Fifty-three percent of the jurisdictions that responded to the DLCD survey answered that they do not even have a historic preservation committee, but that the council or general planning commission serves this function. (Survey, at 3.) Furthermore, local governments are not even required to identify and designate historic resources. (Materials, at 9.)

It makes little sense that a resource with enough historic value to pass the rigorous review process for addition to the National Register would receive less protection than a resource that has only been recognized through a local process. Such an approach violates the spirit and mandate of Goal 5 to protect historic resources.

We urge the Committee to reject this approach and adopt draft rules that protect all historic resources regardless of how those resources were identified. A two-tier approach would only make sense if the National Register resources were given *more* local protection, not less.

3. The state definition of “owner” should be consistent with its common meaning and federal law.

The chief concern of the DLCD staff appears to be that the federal definition of “owner” for the National Register process is automatically incorporated into local protection of federally-recognized resources. It is clear from the DLCD/SHPO information report that the staff (or the elected officials over them) strongly object to the federal definition of owner. The report states:

The National Register has a very narrow definition of owner and a process for determining owner consent in the case of a historic district nomination, neither of which exist in state law. The National Register defines “owner” as those with a “fee simple interest” and prohibits public entities from preventing a nomination. This means that public entities, including service districts, have no standing when a property or resource in their ownership is considered for listing in the National Register. (Attachment B to the August 23 staff report, at 4.)

The staff states in the report that the solution to the above situation is:

The addition of a definition for “property owner” [that] would clarify that public owners and some “owners of interest” are entitled to consideration under ORS 197.772(1) (owner consent). (Attachment B to the August 23 staff report, at 1.)

Accordingly, although no member of the Committee seemed to be in favor of such a broad definition during the first meeting, the DLCD staff included as the first option for the definition of owner:

“Owner” or “owners” means those individuals, partnerships, corporations or public agencies holding fee simple title to property or a property interest that entitles the possessor of the property interest to exclusive and continuous use and possession of all or part of the property. Examples of property interests constituting ownership are limited fee interests in rights-of-way, such as those for railroads, irrigation canals, public highways and major high-voltage powerlines, but not for common utility easements such as those for local water, gas, electricity, or communications services.

This seems contrary to the comments by the Committee during the August 23 Committee meeting, which appeared to be in favor of a more narrow definition of “owner.” The Committee seemed to favor a narrower definition so that individuals would not have to go through the onerous National Register process in order to obtain some level of recognition or protection for local historic resources. The Committee’s apparent narrow approach is the best course of action, because it would meet the requirements of Goal 5 and be compatible with federal law.

Furthermore, the course suggested by the staff would seem to exceed the authority granted in the consent statute. ORS 197.772 states that only a “property owner” is allowed to refuse consent to historic property designation. The meaning of this key term in this statute was recently interpreted by the Oregon Supreme Court. It found:

Because none of the terms in ORS 197.772 are defined in the statute, we look first to their ordinary meanings to determine what the legislature meant. *State v. Dickerson*, 356 Or. 822, 829, 345 P.3d 447 (2015). 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) (defining “property” and “owner”).

Lake Oswego Pres. Soc’y v. City of Lake Oswego Hanson, 360 Or. 115 (2016).

Accordingly, the Land Conservation and Development Commission is not allowed to adopt a rule that contravenes the plain meaning of “property owner” and expand it to lesser interest holders. *Marolla v. Dep’t of Pub. Safety Standards & Training*, 245 Or. App. 226, 230, 263 P.3d 1034, 1035 (2011) (“An administrative rule so adopted must be consistent with the legislative directive; it exceeds the agency’s statutory authority if it “depart[s] from a legal standard expressed or implied in the particular law being administered, or [if it] contravene[s] some other applicable statute.” *Planned Parenthood Assn. v. Dept. of Human Res.*, 297 Or. 562, 565, 687 P.2d 785 (1984).”).

Pursuant to ORS 197.772—as interpreted by the Oregon Supreme Court—the definition of “owner” in the administrative rule should be narrow and only include those individuals or entities that hold legal title. This does not include limited interests in property that do not hold the title to the land, such as the easement interests controlled by “railroads, irrigation canals, public highways and major high-voltage powerlines * * *.”

The legislature likely did not include these limited interests in the consent provision because it would undermine the purpose and structure of preservation programs. Such entities would never have an incentive to consent to historic recognition. The administrative rules should not now contravene the plain language and purpose of the controlling statute.

4. The grounds for removal of a resource from local historic protection should be narrow.

Ironically, the September 23 staff memo also conflates the concepts of designation and protection for historic resources in its proposed rule amendment for an alternative path for removing a local designation. Staff correctly proposes that a designation of historic value should be removed if the property no longer qualifies as being historic. (Materials, at 12, proposed section 9(a)-(b).) But staff also suggests that the historic designation should be removed if an alternative use of a historic property outweighs the value of preservation (proposed 9(c)), or if the building is unsafe and needs to be demolished (proposed 9(d)).

These second two considerations are not relevant to whether a property should be recognized as historic. That determination should be based only on the objective facts regarding the historic properties of the resource. The considerations of other more-valuable uses and safety go to whether the resource should be protected (i.e., preserved). This type of flexible consideration should be (and usually is) built into the local jurisdiction's protection program.

5. Conclusion.

The DLCD staff has not set forth adequate justification to amend the Goal 5 rules to treat historic resources in a two-tier fashion, expand the definition of owner for consent rules, or allow for broad removal of historic designation. The protection offered for historic properties is already very limited and flexible in Oregon. The public service districts should be able to work within these limited protection programs to complete any project that truly is in the public interest. Accordingly, we urge the Committee to adopt draft rules that enhance, not diminish, state protection of historic resources.

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Please let me know if you would like any additional information for the matters discussed above.

Very truly yours,

A handwritten signature in blue ink, appearing to read "SGL", is centered on the page.

Steven G. Liday

cc: Ms. Aleta Warren