BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LAKE OSWEGO PRESERVATION SOCIETY,
MARYLOU COLVER and ERIN O'RURKE-MEADORS,
Petitioners,

vs.

CITY OF LAKE OSWEGO,
Respondent,

and

MARJORIE HANSON Trustee for the
MARY CADWELL WILMOT TRUST,
Intervenor-Respondent.

LUBA No. 2014-009

FINAL OPINION
AND ORDER

Appeal from Lake Oswego.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns PC.

Evan Boone, Deputy City Attorney, Lake Oswego, filed a response brief and argued on behalf of respondent.

Christopher P. Koback, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Hathaway Koback Connors LLP.

BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN, Board Member, participated in the decision.

REMANDED 08/05/2014

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city council decision removing a house from the city's Statewide Planning Goal 5 inventory of historic resources, pursuant to ORS 197.772(3).

FACTS

Most of the pertinent facts were set out in a previous order denying intervenor-respondent's (intervenor's) motion to dismiss, *Lake Oswego Preservation Society v. City of Lake Oswego*, __ Or LUBA __ (LUBA No. 2014-009, Order), April 3, 2014. We repeat them below, with additional background.

> "The subject property is the Carman House, located on tax lot 1200, a 1.25-acre parcel. The city added the Carman House to its inventory of historic landmarks in 1990, pursuant to Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). The city's historic landmarks inventory is codified at Lake Oswego Code (LOC) 50.06.009.4.b, Table 550.06.009-1, and the Carman House is listed as item 9 on that table. LOC Chapter 50 is the city's community development code." Slip op 2.

In 1990 the subject property was part of a 10-acre parcel that the city had found to constitute a historic farmstead, including the house and a barn. The 10-acre parcel had originally been owned by Wilmot, but in 1979 he sold 8.75 acres including the barn to Gregg. No formal partition was accomplished at that time, however, so the 1990 decision considered the parcel as a whole. Tax lot 1200 is the 1.25-acre portion of the parcel with the house that was owned by Wilmot, while tax lot 1201 is the 8.75 acre portion with the barn that was owned by Gregg.

The 1990 designation was a legislative decision involving 93 historic resources, adopted on March 15, 1990. That legislative process required notice of the designation to landowners, and provided a quasi-judicial post-designation process for a landowner to object to designation, on the grounds that the property did not meet the applicable historic designation standards.

On May 24, 1990, Wilmot and Gregg filed an objection to designation of the entire 10-acre property, arguing that the property as a whole did not meet the historic designation standards. As alternatives, Wilmot and Gregg argued that only the Carman house had historic value, and accordingly requested that if any designation is made that only the portion of tax lot 1200 immediately surrounding the house be designated, or that only tax lot 1200 be designated. Gregg's goal was to redevelop tax lot 1201 into an assisted living facility.

In 1991, the city conducted a hearing on the objection and issued a decision denying the objection and retaining the historic designation for the entire property. Wilmot and Gregg appealed the 1991 decision to LUBA. While the appeal was pending, there was a fire on the property that destroyed the barn. The city withdrew its 1991 decision for reconsideration in light of the barn's destruction. *Gregg v. City of Lake Oswego*, 23 Or LUBA 564 (1992).

On reconsideration, the city council remanded the matter to the city's Historic Resource Advisory Board (HRAB), which recommended removal of the designation from tax lot 1201, while retaining it for tax lot 1200. The matter returned to the city council, which on July 7, 1992, issued a decision removing the designation from tax lot 1201, but retaining it for tax lot 1200. The city council evaluated whether the Carman House, in isolation from the rest of the parcel, qualified for historic designation, and concluded that it did. The city council's decision stated that no party during the reconsideration

proceedings had contested the historic significance of the Carmen House or argued that tax lot 1200 should not remain on the city's historic inventory. Record 264. Subsequently, the partition was completed and tax lot 1201 was redeveloped into an assisted living facility.

Fast-forward to the present day. The Mary Caldwell Wilmot Trust is successor in interest to Wilmot, after Wilmot transferred his interest in the property to the trust. In June 2013, intervenor filed an application under LOC 50.06.009.5.d to remove the Carman House's historic designation, in order to facilitate proposed redevelopment of the property. Under LOC 50.07.002.5, such requests are reviewed by the HRAB, with right of appeal to the city council. The events that followed were described in our April 3, 2014 order:

> "City staff issued its report on August 1, 2013, recommending denial of the request. The HRAB held a public hearing on August 14, 2013, continued at intervenor's request to September 11, 2013, and then to October 9, 2013. At the August 14, 2013 hearing, intervenor requested that the HRAB also consider removal of the historic designation under ORS 197.772(3).[1] On September 11,

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[1] ORS 197.772, adopted in 1995, provides, in relevant part:

> "(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 to 358.545 or other law * * *
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> "(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 owner's refusal to consent.

2013, intervenor advised that it wished to pursue the request only under ORS 197.772(3), and that it wished to withdraw the application under LOC 50.06.009.5.d. HRAB thereafter proceeded to consider the request only under ORS 197.772(3). Deliberations were scheduled for October 23, 2013.

"On October 21, 2013, intervenor submitted a letter to the city attorney requesting that the city attorney or city council decide on its request under ORS 13 197.772(3) rather than the HRAB. Intervenor also advised that if the historic designation is not removed by October 23, 2013, intervenor would file a petition for writ of mandamus in circuit court to compel the city to remove the designation.

"On October 23, 2013, the HRAB deliberated and voted to deny the request to remove the designation under ORS 197.772(3), after concluding that only the property owner at the time of designation can request removal under ORS 197.772(3), not a subsequent property owner such as intervenor. The HRAB's decision was reduced to writing on November 4, 2013. On November 19, 2013, intervenor appealed the HRAB decision to the city council.

"On November 22, 2013, intervenor filed a petition of alternative writ of mandamus with the Circuit Court for Clackamas County, pursuant to ORS 34.130. As required by ORS 34.130(3), the Circuit Court issued an order allowing the alternative writ, requiring the city to either (1) remove the historic designation as requested or (2) show cause why the city has not done so. The city answered the writ and moved to dismiss the writ on several grounds. A show cause hearing was ultimately scheduled for January 8, 2014.

"Meanwhile, on December 17, 2013, the city council conducted a public hearing on the appeal. The city council closed the hearing,

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"(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."

> deliberated, and voted 4-3 to overturn the HRAB decision. On January 7, 2014, the city council issued its final written decision granting the request to remove the historic designation. The city's final decision concludes that (1) 'property owner' as used in ORS 197.772(3) is not limited to the owner at the time the property was designated, and (2) in 1990 the designation was 'imposed' on the then-owner, and therefore intervenor is entitled to removal of the designation under ORS 12 197.772(3). Accordingly, the city's decision removes item from LOC Table 13 50.06.009-1.
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> "On January 8, 2014, the Circuit Court signed a stipulated general judgment. The judgment recited that the city had complied with the alternative writ of mandamus and discharged its obligations under the writ. On the same date, the Court signed a stipulated order stating that intervenor 'is entitled to and has the relief it requested in its petition for writ of mandamus and the [city's] motion to strike and motion to dismiss are withdrawn.' The order states that intervenor is the prevailing party. Petitioners were not a party to the mandamus proceeding.
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> "On January 27, 2014, petitioners appealed to LUBA the city council's January 7, 2014 decision. * * *." Slip op at 3-4.

In the city council's January 7, 2014 decision, the city council (1) rejected the HRAB's conclusion that only the original property owner can request removal under ORS 197.772(3), and (2) concluded that the historic designation had been "imposed" on Wilmot for purposes of ORS 197.772(3). Accordingly, the city council approved intervenor's request to remove the designation from tax lot 1200. Removal was effected by striking through item 9 on LOC Table 50.06.009-1, adding the notation "[removed 1/7/14]."

In our April 3, 2014 order, we concluded that the city council's January 7, 2014 decision was a land use decision subject to LUBA's exclusive jurisdiction, and rejected intervenor's argument that LUBA's review of that decision would constitute a collateral attack on the Circuit Court's January 8, 2014 judgment.

On the merits, petitioners advance two assignments of error. The first alleges that the city failed to follow the applicable procedures in processing intervenor's application to remove the historic designation. The second assignment of error includes two sub-assignments. The first challenges the city council's conclusion that successors in interest to the original owner at the time of designation can request removal under ORS 197.772(3). The second sub-assignment challenges the conclusion that the designation was "imposed" on Wilmot.

JURISDICTION AND SCOPE OF REVIEW

In the response brief, intervenor makes additional arguments regarding the jurisdictional issue resolved in our April 3, 2014 order. The additional arguments do not persuade us that LUBA lacks jurisdiction over the challenged decision, and we adhere to our earlier conclusion that the city's decision is a land use decision as defined at ORS 197.015(10)(a), and therefore subject to our exclusive jurisdiction.

In our April 3, 2014 order, we also concluded that the Circuit Court did not address, litigate or resolve any issue under ORS 197.773(3), for example whether the designation was "imposed on the property." Because the judgment did not resolve any issues under ORS 197.773(3), we concluded that the doctrine of issue preclusion did not apply to limit LUBA's scope of review of the likely merits of this appeal. For the same reason, we concluded that LUBA's review of the city's decision and the parties' arguments under ORS 197.773(3) would not conflict with the judgment.

In the response brief, intervenor continues to argue that LUBA's review of the city's decision and the parties' arguments regarding ORS 197.773(3) would necessarily conflict with or "void" the Circuit Court's judgment. We

continue to disagree. In intervenor's view, the stipulated judgment represents the Circuit Court's determination that intervenor is entitled as a matter of law to remove the designation pursuant to ORS 197.773(3). For the reasons explained in our order, we believe that intervenor considerably overstates the intent and effect of the judgment, which is more accurately understood to reflect only the parties' stipulation that the *city council's* January 7, 2014 decision had determined that removal of the designation was warranted under ORS 197.773(3).

FIRST ASSIGNMENT OF ERROR

As noted, intervenor initially applied to remove the historic designation under the criteria and process set out at LOC 50.06.009.5.d, which essentially requires the applicant to demonstrate that a property no longer warrants a historic designation. Prior to the initial evidentiary hearing intervenor invoked ORS 197.772(3) as an additional basis to approve the request to remove the designation. Later, on October 21, 2013, intervenor submitted a letter withdrawing its application under LOC 50.06.009.5.d, and on the same date submitted a second letter that continued to request that the city remove the historic designation pursuant to ORS 197.772(3).

LOC 50.07.003.1.i provides that an applicant may withdraw an application at any time prior to adoption of a final decision on the application and, if so, "[p]roceedings on the application shall terminate as of the date of withdrawal." Petitioners argue that once intervenor withdrew the application, pursuant to LOC 50.07.003.1.i the city lost jurisdiction to further process the application or any request to remove the historic designation. Petitioners contend that the city erroneously acted as if the application had been simply amended, with the amendment invoking different approval criteria, ORS

197.772(3), instead of the LOC 50.06.009.5.d standards. According to petitioners, the correct procedure once the application was withdrawn was to require intervenor to submit a new application based solely on ORS 197.772(3).[2]

The parties have very different views on the nature of the proceedings below and the consequences of the October 21, 2013 letter purporting to withdraw the application. The city argues that the two October 21, 2013 letters, read together, make it clear that intervenor was not withdrawing its application to remove the historic designation, but instead simply was choosing to rely solely on the previously invoked ORS 197.773(3) to support that application. We understand the city to argue that the city correctly continued to process that request under the original land use application number, LU 13-0012, and to process intervenor's appeal of the October 23, 2013 HRAB decision denying the request according to the city's land use appeal procedures. Intervenor, on the other hand, argues that its first October 21, 2013 letter withdrew the land use application filed under LU 13-0012, while its second October 21, 2013 letter initiated an entirely new request, not subject to any land use procedures or standards, for removing the designation pursuant to ORS 197.772(3). In its decision, the city council concluded that ORS 197.772(3) is silent as to the process a local government must use to evaluate a request under

[2] We do not understand petitioners to argue that any procedural error the city committed below prejudiced petitioners' substantial rights, or to request remand based on such prejudice, pursuant to ORS 197.835(9)(a)(B) (authorizing LUBA to remand for procedural errors that prejudice the substantial rights of the petitioner). Instead, petitioner argues that the city's alleged loss of jurisdiction to continue processing the request is a "substantive" error and not a procedural error.

the statute, but that the normal land use procedures apply to any request to remove a historic designation, whether that request is based on LOC 50.06.009.5.d or ORS 197.772(3).

As the city council noted, ORS 197.772(3) is silent regarding what process is to be followed when a property owner invokes the statute. As we explained in our April 3, 2014 order, a decision to amend a city's Goal 5 inventory of historic resources is a land use decision as defined at ORS 197.015(10), even if that decision is based on ORS 197.772(3) or its cognate at OAR 660-023-0200(6) rather than local or goal-based land use standards that would otherwise apply. In our view, when a local government makes a decision concerning whether to remove property from the inventory of historic resources, for whatever reason—including ORS 197.772(3)—the local government is required to follow its adopted procedures under its code for making changes to its historic resource inventory. Accordingly, the city council correctly determined that it had jurisdiction to hear intervenor's appeal of the October 23, 2013 HRAB decision on LU 13-0012, and to otherwise process the appeal under its land use appeal procedures that apply to inventory of historic resources amendments.

Turning to petitioner's argument under LOC 50.07.003.1.i, the city council clearly did not view the two October 21, 2013 letters to have the effect of withdrawing LU 13-0012 and initiating an entirely new request based solely on ORS 197.772(3). The caption of the city council decision is labeled "LU 13-0012," and the decision characterizes intervenor's actions as withdrawing the request to remove the designation under the LOC 50.06.009.5.d criteria, not as withdrawing the entire application. Record 8. That is a reasonable characterization of intervenor's October 21, 2013 letters. LOC 50.07.003.1.i

appears to concern circumstances where the applicant withdraws the entire application with the intent that the city not proceed at all on the requested action. Because the present case does not involve such circumstances, petitioners have not demonstrated that the city violated LOC 50.07.003.1.i by continuing to process the application.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In two sub-assignments of error, petitioners challenge the city's interpretations and application of ORS 197.772(3).

ORS 197.772 is quoted in n 1; we repeat the relevant language here:

> "(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 to 358.545 or other law * * *.
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> "* * * * *
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> "(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."[3]

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[3] ORS 197.772(1) and (3) are implemented in OAR 660-023-0200(5) and (6), respectively, the administrative rule that implements Goal 5. The rule provides:

> "(5) Local governments shall adopt or amend the list of significant historic resource sites (i.e., 'designate' such sites) as a land use regulation. Local governments shall allow owners of inventoried historic resources to refuse historic resource designation at any time prior to adoption of

ORS 197.772(3) is ambiguous in two relevant respects. First, it is not clear that the intended scope of "a property owner" includes persons who become owners of the property after designation, or whether "property owner" is limited to the owner at the time the designation was imposed. Second, it is not clear what circumstances result in the designation being "imposed on the property." As discussed below, in *Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001), LUBA concluded that "imposed" meant imposed over the objections of the property owner at the time of designation. In the present case, the city council concluded that (1) "a property owner" as used in ORS 197.772(3) is not limited to the property owner at the time of designation, but includes subsequent post-designation owners, and (2) the original property owner (Wilmot) objected to the designation and did not withdraw that objection or otherwise consent to the designation, and thus the designation was "imposed on the property." Petitioners challenge both conclusions.

The framework for interpreting a statute is set out in *State v. Gaines*, 346 Or 160, 171-172, 206 P3d 1042 (2009), and *PGE v. BOLI*, 317 Or 606, 859 P2d 1143 (1993). Under that framework, the first level of analysis requires examination of the text and context of the ambiguous statute, together with any relevant legislative history. If the meaning of the text remains ambiguous, resort to general maxims of statutory construction is permissible.

> the designation and shall not include a site on a list of significant historic resources if the owner of the property objects to its designation.
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> "(6) The 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."

A. First Sub-Assignment of Error: A Property Owner

Citing to language in *Demlow*, petitioners argue that ORS 197.772(3) is intended to authorize removal at the request of the "property owner" at the time the property was designated a historic resource, but does not authorize subsequent or successive owners of the property to request removal.

In *Demlow*, the city failed to make any determination whether the designation had been "imposed on the property." LUBA examined the text, context and legislative history of SB 588, the 1995 legislation that adopted ORS 197.772, and interpreted the phrase "imposed on the property" as used in ORS 197.772(3) to mean the local government imposed the designation over the objection of the property owner at the time of designation. We explained that:

> "ORS 197.772(1) and (3), read in conjunction, make reasonably clear that the time for objecting to a historic property designation is during the designation process, and that owners who had historic designations placed upon their properties before the owner consent provision of ORS 197.772(1) was available may have those designations removed if they were placed on the properties over the objections of the owners." *Id.* at 315.

We also examined legislative history, and quoted an exchange between three representatives regarding the meaning of "impose," to the effect that the legislature intended that property owners who voluntarily allow their property to receive historic designation status cannot subsequently have that designation removed under ORS 197.772(3).[4] Because the city had made no findings

[4] In *Demlow*, we considered the following legislative history as a partial basis to conclude that "imposed on the property" meant imposed over the objections of the owner at the time of designation.

"During a May 4, 1995 House General Government and Regulatory Reform Committee work session, Representatives Bryan Johnston, Cedric Hayden, Patti Milne, and Bob Tiernan discussed the meaning and intent of the word 'imposed' in the statute:

"REP. JOHNSTON: When we look at the - A9 [ORS 197.772(3)] and the -A10 [ORS 197.772(1)] amendments together, could someone consent under the -A10 amendments and later ask to be out under the -A9 amendments?

"REP HAYDEN: Responds he thinks it would be read in context as a whole to apply to the -A10 and -A9.

"REP JOHNSTON: The -A10 grants the property owner the right to refuse to consent to any form of historic property if they choose to. They could choose to agree. Under the -A9 amendments could the property owner two years later decide to take the property out of the designation?

"REP MILNE: My intent in the language in line 3, 'historic property designation that was imposed on the property …' is when the property owners were not allowed to consent and government imposed it on them, they would have an opportunity to remove their property.

"REP JOHNSTON: If a person does it under Section 10 but had the opportunity to not do it, can they, two years later, take their property out?

"REP MILNE: That was not my intent.

"CHAIR TIERNAN: Then once a person voluntarily puts their property in, it is in.

"REP JOHNSTON: That is what I want to understand." Minutes, House Committee on General Government and Regulatory Reform, Work Session on SB 588, May 4, 1995, p 9." *Id*. at 315-16.

regarding whether the designation had been imposed over the objection of the property owner, we remanded the decision to the city to make that determination.

In *Demlow* the property owner at the time of designation and at the time the city made its decision was the same, so *Demlow* did not consider the issue presented in this case. Nonetheless, petitioners argue that the analysis and legislative history quoted in *Demlow* supports their interpretation of ORS 197.772(3), to the effect that removal is available *only* to the property owner at the time of designation, and that a subsequent property owner cannot request removal under ORS 197.772(3), even in circumstances where the designation was imposed over the objections of the then-owner. We understand petitioners to argue that ORS 197.772(3), read in context with ORS 197.772(1), is focused on the owner at the time of designation and whether that owner objected to the designation, and there is nothing in the text or context of the statute suggesting that a different post-designation property owner can, 20 years later, request removal based upon the earlier owner's objection.

Petitioners' reliance on *Demlow* is overstated. *Demlow* did not involve a subsequent owner, and our analysis and conclusions simply did not address that scenario. It is reasonably clear based on *Demlow* and the legislative history quoted at n 4 that the legislature did not believe that a property owner who consents to a designation pursuant to a proceeding under ORS 197.772(1) could later invoke ORS 197.772(3) to remove the designation. However, the facts in *Demlow* did not involve a subsequent owner, and the legislative dialogue quoted in *Demlow* and repeated in n 4 did not concern a subsequent owner. As discussed further below, it is clear that the legislature intended ORS 197.773(3) to provide relief to pre-1995 property owners whose property was

burdened with a historic designation without the property owners' consent, but the dialogue quoted in *Demlow* is not a sufficient basis, in itself, to conclude that the legislature may not have also intended ORS 197.773(3) to apply to persons who subsequently become owners of the property with the designation already in place.

Turning to the text of ORS 197.772(3), the phrase "a property owner" does not include any textual qualifications that are particularly helpful in determining the members of that category. Petitioners are correct that, as interpreted in *Demlow*, determining whether the designation was "imposed on the property" involves determining whether the property owner at the time of designation objected to the designation in some way. The focus of that inquiry lends some support to petitioners' view that "property owner" is limited to the owner at the time of designation. However, that qualification is not stated in the text. To interpret that phrase to limit the term to the property owner at the time of designation would arguably insert language that the legislature omitted, contrary to ORS 174.010.[5] Of course, the contrary argument can be made that to interpret the phrase to include post-designation subsequent purchasers also inserts language that was omitted.

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[5] ORS 174.010 provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Turning to context, perhaps the strongest contextual argument for petitioners' view is that both ORS 197.772(1) and (3) use the same phrase, "a property owner." As used in ORS 197.772(1), "a property owner" necessarily refers to the property owner at the time of designation. Generally, use of the same phrase in different provisions of the same statute indicates that the two phrases have the same meaning. If so, that would suggest that "a property owner" as used in ORS 197.772(3) also refers to the property owner at the time of designation.[6]

On the other hand, the structure and relationship between ORS 197.772(1) and (3) suggests that use of the same phrase in both provisions may not have been intended to have the same meaning. ORS 197.772(1) and (3) involve different, non-overlapping circumstances that occur at different times, and that never will operate on the same property or involve the same property owners.

ORS 197.772(1) is forward-looking; it requires local governments to allow "a property owner" to refuse to consent to designation during the designation process. ORS 197.772(1) is not retroactive, and does not speak to designations that may have occurred prior to 1995. ORS 197.772(1) governs

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[6] The State Historic Preservation Office (SHPO), the state agency that administers state historic preservation policy, advocated a similar position below. The State Historian advised the city that:

> "Our office has advised local governments on the application and interpretation of ORS 197.772 since its enactment in 1995. Our consistent interpretation has been that the special right to delisting created by the statute is available only to an original, objecting owner of the subject property. If title has changed hands, that right is not passed along to the subsequent owner." Record 346.

only post-1995 designations, and when it is applied and complied with a historic designation will never be "imposed on the property" for purposes of ORS 197.772(3). That is because either (1) the property owner consents to designation, or (2) the property owner objects during the designation proceedings, and the designation is therefore not made. In either case, a designation proceeding that complies with ORS 197.772(1) will never result in a designation that "imposed" for purposes of ORS 197.773(3).

ORS 197.773(3), by contrast, is backward-looking, and as a practical matter operates only on properties designated prior to 1995. As a result, a "property owner" in the circumstances described in ORS 197.772(1) will never be a "property owner" for purposes of ORS 197.772(3), and vice versa. The two categories are mutually exclusive. In other words, Subsections (1) and (3) provide context for each other, but operate in different circumstances, over different time periods, and do not directly or sequentially interact. The non-overlapping structure of ORS 197.772(1) and (3) undercuts the general presumption that in using the same term in both provisions the legislature intended the same limited meaning.

Based on the foregoing analysis of the text and context of ORS 197.773(3), in our view the somewhat stronger interpretation is that the phrase "a property owner" refers to the current owner of designated property at the time the request to remove the designation is made, without regard to whether that current owner was also the owner at the time the property was designated. If we considered text and context alone, we might well so conclude. However,

ORS 174.020 directs interpreting bodies to also consider legislative history, as appropriate.[7]

Intervenor argues that there is no legislative history relevant to whether ORS 197.772(3) allows a subsequent owner to request removal of an imposed designation. Intervenor's Response Brief 23. However, there is in fact some legislative history on that point, although the legislature's ultimate intent is less than clear.

At the May 2 House Committee on General Government and Regulatory Reform work session on SB 588, Representative Milne introduced the A-9 and A-10 amendments, which ultimately became ORS 197.772(3) and (1), respectively. Representative Lewis spoke in favor of the amendments. Representative Ross then asked whether, "if somebody bought a piece of property that had a historical designation by a local government, they could say they don't want to have the designation any more?" Minutes, May 2, 1995, p 11. The answer from Representative Lewis was "[w]e haven't thought about that situation." *Id.* Representative Lewis then commented that "[i]n our county

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[7] ORS 174.020 provides, as relevant:

> "(1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
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> "(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.
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> "* * * * *
>
> "(3) A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate."

many people have been coerced into the historic property designation" and that those people are waiting "so they can petition to be removed from the historic property designation." *Id.* Based on those comments, it appears that the A9 amendment was intended, at least initially, to afford relief only to those property owners on whose property the designation had been imposed. The proponents of the A9 amendments had not "thought about" subsequent owners.

At the May 4, 1995 continued work session, Representative Ross introduced an unnumbered amendment, Exhibit L, which provided in relevant part that if a local government designates a property with the concurrence of the property owner, the designation "run[s] with the property." As she explained, the intent was to ensure that the subsequent owner of a property that had been designated with the consent of the property owner "buys the designation," apparently meaning that the subsequent owner cannot later ask that the designation be removed under the A9 amendment (ORS 197.772(3)).[8] Minutes, May 4, 1995, page 11.

The apparent intent of the Exhibit L amendment "taken together" with the A9 amendment was to treat subsequent owners the same as the property

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[8] Representative Ross explained that the Exhibit L amendment:

> "is in response to a question that arose yesterday that if a property was designated a historic property by a local government and someone bought the property after the designation had been placed on it, could they say they don't want to be part of the program. If this amendment is taken together with the –A9 amendments, it is my understanding that if the designation was imposed, then the owner could opt out if they want. But if a person bought the property with the designation on it, the person buys the designation as part of the property." Minutes, May 4, 1995, page 11.

owner at the time of designation: if the designation was imposed, then a subsequent owner as well as the property owner at the time of designation could request removal under the A9 amendment, which became ORS 197.772(3). Conversely, as the legislative history quoted at n 4 suggests, if the property owner at the time of designation consented to the designation, the original property owner—and presumably also a subsequent purchaser—could not request removal under ORS 197.772(3).

The House Committee adopted the Exhibit L amendment, which became part of SB 588, B-Engrossed. The bill then went to a Senate/House conference committee for reconciliation. However, at a June 3, 1995 Senate/House conference committee, the Exhibit L language was stripped out of the bill, and the bill was ultimately adopted without that language. Unfortunately, the minutes and audio recordings of the conference committee include no discussion regarding why the Exhibit L language was deleted.

There are a number of reasons why the conferees might have deleted the Exhibit L amendments, and in the absence of some explanation several conflicting inferences are possible. But the strongest inference seems to be that the conferees disagreed with what the Exhibit L amendment was intended to accomplish. As we understand it, the Exhibit L amendments had the intent and effect of placing subsequent owners in the same shoes as the property owner at the time of designation. The conferees apparently disagreed with that intent. The net result is that the legislature removed from SB 588 language that had the intent and effect of advancing the position that the city adopted in its decision, and that intervenor advocates on appeal: that persons who acquire property after designation are "property owners" for purposes of ORS 197.772(3), who are bound by that designation, or may remove that

designation, in the same manner as the property owner at the time of designation.

In sum, the legislative history available to us indicates that the A9 amendment that became ORS 197.772(3) was originally intended to apply only to property owners at the time of designation, on whom the designation was imposed without consent. In response to a question, the House committee members proposed additional language that would have effectively put subsequent owners on the same footing as the property owner at the time of designation, for purposes of ORS 197.772(3). However, the legislature ultimately deleted that additional language, from which the strongest inference is that the legislature did not intend that result. Deletion of the Exhibit L language left the A9 amendment in place as it was originally intended: to apply only to the property owner at the time of designation.

The foregoing analysis of legislative history is far from conclusive, and in our view does not entirely disambiguate the terms of ORS 197.772(3). As explained above, consideration of the text alone suggests that "property owner" as used in ORS 197.772(3) is unqualified, and therefore the remedial relief offered under that provision is not limited to the property owner at the time of designation. However, consideration of context and legislative history significantly undercuts that interpretation, instead suggesting that the legislature intended ORS 197.772(3) to offer relief to property owners whose property had been designated without their consent, and rejected language that was apparently intended to treat subsequent owners in the same manner as property owners at the time of designation.

If the text/context analysis and consideration of legislative history do not resolve the ambiguity, resort to general maxims of statutory construction is

permitted. *PGE,* 317 Or at 612. No general maxim of statutory construction seems particularly relevant here, but the closest may be a rule of construction the Court of Appeals has applied in some cases, essentially that if the scope of an exception to a general rule is ambiguous, the scope of the exception should be construed narrowly rather than broadly. *See, e.g., Colby v. Gunson*, 224 Or App 666, 676, 199 P3d 350 (2008) (exceptions to public disclosure requirement should be narrowly construed in favor of disclosure). As explained above, ORS 197.772(1) and (3) operate as specific statutory exceptions to the general rule that Goal 5 historic resources are added to or removed from a local government inventory of significant historic resources based on whether those resources warrant protection under Goal 5. Where ORS 197.772(1) and (3) apply, the required Goal 5 considerations are eliminated, and the decision whether to add resources to the inventory, or later remove them from an acknowledged inventory, are made based on the owner's wishes, and have nothing to do with Goal 5 or historical significance. If the exception represented by ORS 197.772(3) is broadly construed, it carves a significantly greater hole in the Goal 5 scheme to protect historic resources, compared to the narrower interpretation.

In the present case we must choose between a broader and a narrower interpretation of the scope of "property owner." The broader interpretation is somewhat more consistent with the text of ORS 197.772(3). The narrower interpretation is more consistent with the legislative history discussed above. The legislature clearly believed that a statutory exception to the Goal 5 process for adding and removing historic resources from an inventory is warranted with respect to property owners who were "coerced" into accepting the Goal 5 designation, in the words of Representative Lewis. The A9 amendments were

specifically proposed with that limited remedial intent in mind. There is much less reason to believe that the legislature was also concerned with persons who became owners of the property after the designation was already in place and who presumably were aware of the designation when they became owners. In fact, there is some reason to believe, based on the legislative history, that the legislature did not intend subsequent owners to be treated in the same manner as property owners whose property was designated without their consent.

Finally, the narrower interpretation has the additional virtue of carving out a smaller exception to the general rule that decisions regarding a Goal 5 inventory of historic resources are made based on historic significance and similar Goal 5-based considerations. Under that narrower interpretation, persons who obtain property subject to a historic designation may still seek removal of the designation, subject to Goal 5 considerations.

Although it is a close question, we are ultimately persuaded that the legislature did not intend that "a property owner," as used in ORS 197.772(3), includes persons who become owners of the property after it is designated. Accordingly, intervenor is not a "property owner" within the meaning of ORS 197.772(3), and the city erred in removing the Carman House designation based on ORS 197.772(3).

The first sub-assignment of error is sustained.

B. Second Sub-Assignment of Error: Imposed on the Property

Our conclusion that ORS 197.772(3) does not authorize removal of the Carman House designation makes it unnecessary to resolve petitioners' second sub-assignment of error, which challenges the city council's finding that the city "imposed" the designation over Wilmot's objections. However, given the close question on the meaning of "a property owner," and the likelihood of

appeal, we deem it appropriate to resolve the parties' arguments regarding the meaning of "imposed" and the evidence supporting the city council's finding that the designation was imposed. For purposes of this sub-assignment of error, we will assume that a subsequent property owner may request removal under ORS 197.772(3), if the designation was "imposed on the property" over the objections of the property owner at the time of designation, consistent with our interpretation in *Demlow*.

The city council adopted by reference staff findings and conclusions that Wilmot initially objected in 1991 to the designation of the Carman House in the only manner allowed under the city's code, and that objection was not "waived" during the 1992 proceedings on reconsideration.[9] Petitioners argue

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[9] The incorporated findings state:

> "[T]he [1992] Council also 'reaffirm[ed] and incorporate[ed] by reference its original Findings regarding the historical significance of the Carman house and Tax Lot 1200 contained in Finding No. 7 of its July 17, 1991, Findings of Fact, Conclusion of Law and Order.' (Exhibit F4, page 8).
>
> "This finding, in staff's reading, is not an indication of a change of position for the applicants, i.e., that they no longer objected to the landmark designation, especially since the findings incorporated the entire record, including the earlier objection. Further, the issue of the historical significance of the Carman house and Tax Lot 1200 is not at issue under ORS 197.772(3), as interpreted by Demlow. The question isn't whether the site has historical significance; the question is whether the owner objected to the historic landmark designation. Staff concludes from the record in the 1991 and 1992 proceedings that the owners objected to the historic landmark designation in the means and manner available to them at the time, thereby meeting the 'imposed' requirement under ORS 197.772(3)." Record 157.

that those findings are not supported by substantial evidence. According to petitioners, the record shows that Wilmot initially objected only to the designation of the larger 10-acre farmstead parcel, and during the proceedings on reconsideration Wilmot did not object to the significantly modified designation that included only the 1.25-acre tax lot 1200 and the Carman House. In particular, petitioners point out that the 1992 City Council decision expressly found that during the reconsideration proceedings "no party contested the historic significance of the Carman House or that the house and tax lot 1200 should remain" designated.[10] Petitioners characterize that finding as evidence that Wilmot did not object to the modified designation limited to the house and tax lot 1200. Petitioners also note that Wilmot did not appeal the 1992 reconsideration decision to LUBA. *See Gregg*, 23 Or LUBA 564 (1992) (dismissing the original appeal because no party sought review of the decision on reconsideration). According to petitioners, there is no substantial evidence in the record that Wilmot, the owner of tax lot 1200, objected to the modified designation limited to the Carman House and tax lot 1200.

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[10] The 1992 City Council decision states, in relevant part:

> "In the proceedings on reconsideration, no party contested the historic significance of the Carman house or that the house and tax lot 1200 should remain on the Historic Landmark Designation List (with the exception of a small strip of property on the north and east portions of tax lot 1200 upon which Mr. Gregg proposes to build an access road for his elderly housing project, discussed below). The City Council therefore reaffirms and incorporates by reference its original Findings regarding the historic significance of the Carman house and tax lot 1200 contained in Finding No. 7 of its July 17, 1991, Findings of Fact, Conclusion of Law and Order." Record 264.

The city's findings and intervenor characterize the evidence differently. According to respondents, Wilmot joined with Gregg in objecting to historic designation of both tax lot 1200 and tax lot 1201, on the grounds that the city had not demonstrated that those properties, either individually or together, warranted protection under the standards implementing Goal 5. *See* Record 333-34 (Wilmot's objections in the 1991 proceeding to designation of tax lot 1200). While Wilmot may not have continued to press his objection to the designation of tax lot 1200 during the reconsideration proceedings, respondents argue nonetheless that the record of the first proceeding was incorporated into the record of the proceeding on reconsideration, and that the record therefore included Wilmot's original objections. Respondents argue that there is no evidence that Wilmot withdrew his original objections or otherwise consented to the modified designation that was limited to tax lot 1200.

The parties' arguments present a mixed question of fact and law, specifically, was the designation "imposed on the property" within the meaning of ORS 197.772(3), where the property owner initially objected to designation of his property on the grounds that it did not meet the standards for placing the property on the historic resource inventory, but in a later stage involving a modified designation did not continue to press those objections, possibly leading the city council to conclude that on reconsideration "no party contested the historic significance" of the property?

In our view, where a property owner initially objects to designation, but later withdraws that objection or consents to the designation, the designation is not "imposed on the property." However, mere failure to continue to actively press the objection at later stages of the proceeding does not mean that the owner withdrew the objection or consented to the designation. In the present

case, Wilmot clearly objected separately to the designation of tax lot 1200, independent of his objection to designation of tax lot 1201. Record 333. While the designation was later modified to remove tax lot 1201, the designation of tax lot 1200 remained in its original form. As far as we can tell, the modified designation was not intended to satisfy, or have the effect of satisfying, any of the objections that Wilmot raised to designation of tax lot 1200.

The 1992 city council's statement that "no party contested the historical significance" of tax lot 1200 is probably accurate, as far as it goes. Wilmot did not dispute that the Carmen House met the code standards for historical significance, *e.g.*, that the house was older than 50 years, had architectural significance, etc. Instead, he objected on other grounds, for example that the staff analysis of the economic, social, environmental and energy (ESEE) consequences of designation was inadequate because it did not properly consider economic consequences. Record 333.

Under these circumstances, we agree with respondents that Wilmot did not withdraw his objections or consent to the designation. The city council's finding that the designation was "imposed on the property" is supported by substantial evidence.

The second sub-assignment of error is denied.

The second assignment of error is sustained, in part.

DISPOSITION

Petitioners argue that if the second assignment of error is sustained that LUBA should reverse the city's decision, because intervenor cannot remove the designation pursuant to ORS 197.772(3), and the city's action under the statute is therefore prohibited as a matter of law. OAR 661-010-0071(a)(c).

Alternatively, petitioners argue that remand is appropriate if LUBA concludes that the de-listing criteria at LOC 50.06.009.5.d. are still applicable to intervenor's request to remove the designation, notwithstanding intervenor's election not to pursue removal under the code de-listing standards, in which case LUBA should remand the decision for the city to render a decision under those code standards.

As explained above, where ORS 197.772(3) applies, it carves out a statutory exception to the general rule that amendments to a local government's acknowledged Goal 5 inventory must comply with Goal 5. LOC 50.06.009.5.d implements Goal 5, and supplies the local standards for de-listing a historic resource from the city's acknowledged inventory. Petitioners suggest, at Petition for Review 13, that even where ORS 197.772(3) applies, the city must also apply LOC 50.06.009.5.d in order to remove the designation. We disagree. Where the statute applies, a city need not also apply Goal 5 or local standards implementing the goal. The two paths are alternatives, and we see no reason why an applicant cannot elect to pursue only one alternative, or both alternatives at once.

In the present case, intervenor essentially elected to proceed only under ORS 197.772(3). We have now held that that path is not available to intervenor. The only path forward appears to be pursuant to LOC 50.06.009.5.d. However, we do not know if intervenor would, or could, revive its request for removal under the LOC 50.06.009.5.d criteria if the decision were remanded, or whether a new application is required. To preserve the former possibility, we conclude that remand is appropriate to allow the city to determine whether revival of the request under LOC 50.06.009.5.d is an option.

The city's decision is remanded.