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

ORDER

Before the Board are intervenor-respondent's (intervenor's) motion to dismiss, and petitioners' motion for a stay.

INTRODUCTION

Petitioners appeal a city council decision that removes a city historic designation from intervenor's property, pursuant to ORS 197.772(3).[1]

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[1] ORS 197.772 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

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 50.06.009-1, and the Carman House is listed as item 9 on that table. LOC Chapter 50 is the city's community development code.

Intervenor is the current owner of the Carman House. In June 2013, intervenor filed an application with the city under LOC 50.06.009.5.d to remove the property's historic designation, to allow proposed redevelopment of the property.[2] Under LOC 50.07.002.5, such requests are reviewed by the

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358.480 to 358.545 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 owner's 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."

[2] LOC 50.06.009.5.d provides, in relevant part:

"Criteria to Remove a Designation

"i. In order to remove a landmark designation the Board shall find that the landmark designation is no longer justified after consideration of the criteria found in LOC 50.06.009.5.a, Criteria for Designation of a Landmark."

city's Historic Resource Advisory Board (HRAB), with right of appeal to the city council.

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). On September 11, 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 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, 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 197.772(3). Accordingly, the city's decision removes item 9 from LOC Table 50.06.009-1.

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.

On January 27, 2014, petitioners appealed to LUBA the city council's January 7, 2014 decision. The parties stipulated to a briefing schedule to allow intervenor to file a motion to dismiss this appeal, and petitioner to file a motion

to stay the city's decision, and for both parties to file responses. We now resolve the motions.

MOTION TO DISMISS

Intervenor moves to dismiss the appeal of the city's January 7, 2014 decision on two grounds. First, intervenor argues that the city's January 7, 2014 decision is not a "land use decision" as defined at ORS 197.015(10)(a), because the decision concerns only the application of ORS 197.772(3), and does not concern the application of any statewide planning goal, comprehensive plan provision, or land use regulation. Because the city's decision is not a "land use decision," intervenor argues, the appeal must be dismissed.

Second, intervenor contends that petitioners' appeal of the city's decision is a collateral attack on the Circuit Court's January 8, 2014 stipulated general judgment. According to intervenor, LUBA lacks authority to review the city's January 7, 2014 decision, because LUBA's review could potentially result in inconsistent decisions by LUBA and the Circuit Court, and effectively void the stipulated general judgment.

A. Land Use Decision

As relevant here, LUBA's jurisdiction is limited to "land use decisions" as defined at ORS 197.015(10)(a)(A), that is, a final decision or determination by a local government that concerns the adoption, amendment or application of the statewide planning goals, a comprehensive plan provision, or a land use regulation.[3]

[3] ORS 197.015(10)(a)(A) defines "land use decision" to include:

As noted, intervenor argues that the city's January 7, 2014 decision was not a "land use decision," because it concerned only the application of a statute, ORS 197.772(3), and did not concern the application or amendment of any goal, comprehensive plan provision, or land use regulation.

Intervenor is incorrect, for two reasons. First, pursuant to statewide planning Goal 5, the city has adopted an inventory of designated historical landmarks, codified at LOC 50.06.009.4.b, Table 50.06.009-1. As noted, the Carman House was formerly listed as item 9 on that table. As a result of the city's January 7, 2014 decision, the Carman House has been removed from that inventory, and item 9 now consists of the notation "[removed 1/7/14]." LOC 50.06.009.4.b, Table 50.06.009-1 is a land use regulation, and the city's decision clearly "amended" that land use regulation. For that reason alone, the city's decision constitutes a "land use decision" as defined at ORS 197.015(10)(a)(A)(iii).

Second, as petitioners note, Goal 5 is implemented with respect to historic resources by OAR 660-023-0200. Consistent with ORS 197.772, OAR 660-023-0200(5) and (6) provide:

> "A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:
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> "(i) The goals;
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> "(ii) A comprehensive plan provision;
>
> "(iii) A land use regulation; or
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> "(iv) A new land use regulation[.]"

> "(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 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."

Petitioners contend that OAR 660-023-0200(5) and (6) applied to the city's decision to remove the Carmen House from its historic resource inventory. Therefore, petitioners argue, the city's decision concerned the application of Goal 5 and OAR 660-023-0200(5) and (6), and for that reason constitutes a "land use decision" as defined by ORS 197.015(10)(a)(A)(i).

We agree with petitioners that the city's decision concerned the application of at least OAR 660-023-0200(6), and to that extent the decision concerned the application of Goal 5. For that additional reason, the city's January 7, 2014 decision is a "land use decision" subject to LUBA's jurisdiction unless some statutory exclusion applies. Intervenor does not identify any statutory exclusion that applies.

B. Collateral Attack on the Stipulated General Order

Intervenor contends that LUBA lacks jurisdiction over the city's January 7, 2014 decision, because any challenge to the city's decision would constitute an impermissible collateral attack on the Circuit Court's January 8, 2014 stipulated general order. According to intervenor, when intervenor filed a petition for an alternative writ of mandamus, and the Court issued the writ, the Court assumed subject matter jurisdiction over the city's consideration of the

request to remove the historic designation from intervenor's property, and the city ultimately complied with the writ by removing the designation. Under these circumstances, intervenor argues, LUBA should not exercise its jurisdiction to review the city's decision, because such review could potentially result in conflicting decisions by the two tribunals.

Initially, we note that intervenor's argument is more accurately framed as an argument that LUBA's scope of review in this appeal is limited, not that LUBA lacks "jurisdiction" over what we have concluded above is a land use decision, and therefore a decision subject to our exclusive jurisdiction for review. If we conclude that the only issues that are, or can be, raised in this appeal are beyond our scope of review, we would affirm the city's decision, not dismiss the appeal for lack of jurisdiction.

LUBA's jurisdiction is comprehensively governed by statute. As petitioners point out, ORS 197.015(10)(e)(A) excludes from the definition of "land use decision," and hence from LUBA's jurisdiction, a local land use decision made after a petition for a writ of mandamus has been filed under ORS 215.429 or 227.179. The writ of mandamus filed under ORS 215.429 or 227.179 applies in specified circumstances and, once issued, deprives the local government of jurisdiction to make any decision on the land use matter, and further deprives LUBA of jurisdiction to review any decision the local government might make on the matter. ORS 215.429(2); ORS 227.179(2); *Stewart v. City of Salem*, 61 Or LUBA 77, 79-80, *aff'd* 236 Or App 268, 236 P3d 851 (2010). However, the present case does not involve the circumstances specified in ORS 215.429 or ORS 227.179. Instead, intervenor's petition for writ of alternative mandamus was filed solely under ORS 34.105 *et seq.* Nothing in ORS 197.015(10) or any other statute or case cited to our attention

deprives the city of jurisdiction to make a land use decision after a petition for an alternative writ of mandamus is allowed pursuant to ORS 34.105 *et seq*. in the present circumstances, or deprives LUBA of jurisdiction over any such local government land use decision.[4]

Intervenor is correct to the extent it argues that LUBA's scope of review does not include challenges to decisions not before us, which would obviously include the January 8, 2014 stipulated general judgment. Intervenor is also correct to the extent it argues that, in some circumstances, an issue litigated in a prior proceeding may not be re-litigated in a subsequent proceeding, and in such circumstances LUBA's scope of review over an appeal of the second decision will not include that litigated issue. Generally, such "issue preclusion" applies if (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was the type of proceeding to which preclusive effect will be given.

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[4] ORS 34.130(5) provides that "[t]he filing or allowance of a petition for a writ of mandamus does not stay any judicial or administrative proceeding from which the mandamus proceeding may arise, but the court in its discretion may stay such proceeding." No such stay was issued in the present case. Notably, ORS 34.110 provides that a writ of mandamus "shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law." The city moved to dismiss the writ on several grounds, including that the pending land use proceedings before the city council demonstrated that there is a plain, speedy and adequate remedy in the ordinary course of the law. However, the city's motion to dismiss was withdrawn as moot after the city council issued its January 7, 2014 decision removing the historic designation, and the Court never ruled on the motion.

Nelson v. Emerald People's Utility Dist., 318 Or 99, 104, 862 P2d 1293 (1993). However, none of five *Nelson* requirements appear to be met in this case, or at best only the first requirement. Most obviously, requirements three and four are not met, since petitioners were not a party to the mandamus proceeding.

In addition, the alternative writ of mandamus proceeding leading to the January 8, 2014 stipulated general judgment was not, in our view, the type of proceeding to which preclusive effect should be given, at least as far as that proceeding went. Intervenor considerably overstates the scope and effect of the Circuit Court proceedings on its petition. Under ORS 34.130(3), once the petition for writ of alternative mandamus is filed, the Court must ("shall") allow the writ, which the Court duly allowed. However, the allowance of the alternative writ implied no review of or judgment on the merits of whether the city was compelled by law to grant intervenor the requested performance (removal of the historic designation), as intervenor suggests. Allowance of the writ simply initiated a process that compelled the city to either (1) remove the designation or (2) show cause why it need not be removed. The city answered the writ, moving to dismiss the writ and essentially indicated its intent to contest the merits at a show cause hearing. However, a show cause hearing on the merits never took place. After the city council completed the land use process and issued its decision to remove the designation, the parties entered into a stipulation to end the mandamus proceeding. That stipulation was reduced to a judgment, but at no point during the Circuit Court proceedings does it appear that the Court made any ruling on the merits of whether the city must remove the historic designation. That issue was not "actually litigated" for purposes of the second *Nelson* requirement, and the proceedings never reached a point (a show cause hearing on the merits) where that issue could

have been litigated. Had the Court issued a *peremptory* writ of mandamus under ORS 227.179(5), or had it issued an order after a show cause hearing on the merits that compelled the city to remove the historic designation, the Circuit Court proceeding almost certainly would have been the type of proceeding to which preclusive effect could be given, for purposes of the fifth *Nelson* requirement.[5] But that is not what happened.

In sum, as far as intervenor has demonstrated the January 8, 2014 stipulated general judgment resolved no issues regarding whether intervenor is entitled to removal of the historic designation. That issue was resolved in the city's January 7, 2014 decision, a land use decision over which LUBA has exclusive jurisdiction. One of the central issues in this appeal will likely be whether the city correctly determined that the historic designation was "imposed" on the property and therefore that intervenor is entitled to request removal of the historic designation under ORS 197.772(3). Because that issue

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[5] *Murphy Citizens Advisory Com. v. Josephine County*, 325 Or 101, 934 P2d 415 (1997) is of some assistance here. The actual holding of *Murphy Citizens* was legislatively overturned by adoption of ORS 215.429(2) and ORS 227.179(2) in 1999, but the analysis seems still relevant to the present case. Briefly, the Court held that only issuance of a *peremptory* writ deprives the local government of jurisdiction to issue a land use decision, and deprives LUBA of jurisdiction to review such a decision, for purposes of *former* ORS 215.428(7) and *former* ORS 197.015(10)(d)(B) (now codified as ORS 197.015(10)(e)(B)). The Court concluded that issuance of an *alternative* writ of mandamus, and a subsequent judgment that disposed of the writ proceeding based on the parties' stipulation, does not deprive LUBA of jurisdiction to review the pre-judgment local government land use decision on the application that mooted the writ proceeding. The distinction the Court drew between peremptory writs and alternative writs has some bearing in the present circumstances, where ORS 215.429, ORS 227.179 and ORS 197.015(10)(e) do not apply.

was not addressed, litigated or resolved in the proceedings leading up to the Court's January 8, 2014 stipulated general judgment, we do not see how LUBA's resolution of the merits of that issue or any other likely issue in this appeal could possibly conflict with the Court's judgment. Accordingly, intervenor has not demonstrated that the present appeal is a "collateral attack" on the January 8, 2014 stipulated general judgment, or that any likely issue in this appeal is beyond our scope of review.

The motion to dismiss is denied.

MOTION FOR STAY

Under ORS 197.845(1) and OAR 661-010-0068, a petitioner may move for a stay of a land use decision under LUBA's review if, among other things, the petitioner demonstrates (1) at least one "colorable claim of error" in the decision, and (2) that the petitioner will suffer "irreparable harm" if the stay is not granted.[6]

A. Colorable Claim of Error

The "colorable claim of error" prong of ORS 197.845(1) is not a demanding standard, and does not require petitioners to show that they will

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[6] ORS 197.845(1) provides:

> "Upon application of the petitioner, [LUBA] may grant a stay of a land use decision or limited land use decision under review if the petitioner demonstrates:
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> "(a) A colorable claim of error in the land use decision or limited land use decision under review; and
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> "(b) That the petitioner will suffer irreparable injury if the stay is not granted."

prevail on the merits. *Mingo v. Morrow County*, __ Or LUBA__ (LUBA Nos. 2011-014/016/017, Order), March 15, 2011, slip op 3, (citing *Western Pacific Development v. City of Brookings*, 21 Or LUBA 537, 538 (1991)).

Petitioners state that they intend to advance at least four assignments of error in this appeal: that (1) the city erred in failing to apply the criteria for removing an historic designation at LOC 50.06.009.5.d; (2) the city violated OAR 660-023-0200 by failing to process the request to remove the designation as an application for an amendment of a land use regulation; (3) the city's determination that the designation was imposed over the objection of the then-owner in 1990 is not supported by substantial evidence; and (4) even if the owner at the time of designation objected, the city misconstrued the law in concluding that a subsequent owner can request removal under ORS 197.772(3).

Intervenor disputes that the second and third claims of error are "colorable." Intervenor does not address the first and fourth claims of error or explain why those claims are not "colorable." As noted, the colorable claim of error prong is not a demanding standard. We cannot say that none of the four asserted claims are "colorable" claims of error.

B. Irreparable Harm

Petitioners argue:

> "As a historic resource, the Carman House is irreplaceable should it be demolished before the resolution of this appeal. Absent a stay, the house could be demolished, notwithstanding the 120-day waiting period in OAR 660-023-0200(9), which would render LUBA's remand remedy wholly ineffective. Only a stay can prevent irreparable harm to the Carman House." Motion for Stay 9.

Intervenor does not respond to or dispute petitioners' claim of irreparable harm if a stay is not granted. There are two problems with petitioners' allegation of irreparable harm. First, we note that ORS 197.845(1)(b) requires petitioners to demonstrate that the *petitioner* will "suffer irreparable injury if the stay is not granted," not that the Carman House will suffer irreparable injury. Petitioners provide no information about their interest in the Carman House, or any argument whatsoever that petitioners will suffer irreparable injury if the stay is not granted. Second, petitioners do not allege any reason to believe that intervenor plans to demolish the Carman House while this appeal is pending or that such demolition could be accomplished without first seeking a permit to do so from the city. Petitioners bear the burden of demonstrating that a stay is warranted under ORS 197.845(1). Petitioners have not met that burden.

The motion for stay is denied.

SCHEDULE

Pursuant to the parties' stipulation, the record is deemed received on the date of this order. Accordingly, unless record objections are filed within the time provided by our rules, the petition for review is due 21 days from the date of this order, and the response briefs are due 42 days from the date of this order. The Board's final opinion and order is due 77 days from the date of this order.

Dated this 3rd day of April, 2014.

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Tod A. Bassham
Board Member