



**City of Portland**  
Historic Landmarks Commission

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September 29, 2016

Jim Rue, Director  
Oregon Department of Land Conservation and Development  
635 Capitol Street NE, Suite 150  
Salem, Oregon 97301-2540

Re: Proposed Initiation of Rulemaking Regarding  
Protection of Historic Resource Sites Under  
Statewide Planning Goal 5  
Interim Rule Comments by the Portland Historic Landmarks Commission

Dear Mr. Rue,

In its capacity as a body that advocates for the protection and preservation of historic resources in Multnomah County, the Portland Historic Landmarks Commission has grave concerns with the overall speed, motives, and timing of the DLCD Rulemaking project. The PHLC objects to all of the proposed rules as they will do nothing but upset the compromises struck by the Oregon State Legislature in 1995 and undermine the existing protections for historic resources within the city and throughout the state. The rules could also elicit a constitutional challenge to the owner consent provisions in ORS 197.772. The PHLC has voiced objections to the 197.772 provisions, as Oregon already stands alone in requiring owner consent for local historic protections. The PHLC sees these changes as specifically tailored to benefit the Central Oregon Irrigation District and its unique legal theories to the detriment of historic resources in the rest of the state. We request that the Department of Land Conservation and Development terminate the rule making and maintain the existing Goal 5 rules. The Commission's rationale is explained below.

**Lack of Transparency**

The DLCD staff report, FAQs, verbal testimony before the LCDC, and other related documents related to the Goal 5 Rule changes are inherently and conveniently vague. The DLCD has elected to be less than transparent in its presentation of context as to the rationale for the rule changes. Despite assertions to the contrary, the rule changes are meant to benefit no one other than the Central Oregon Irrigation District and its attempts to avoid the local, state, and federal laws regarding historic resources. Each of the suggested rule changes are curiously tailored to the exact legal assertions the utility has made in its attempts to object to the listing of the Pilot Butte Canal in the National Register of Historic Places. Thus far, the DLCD has not presented any specific additional information on the identity of other parties who have complained to the Governor's office (or other agencies), the nature of those complaints, and how the proposed changes are intended to address those complaints. Lastly, DLCD staff has not analyzed how the proposed rule changes would affect local historic landmark designations, the National Register program in the state, and whether these changes are constitutionally robust.

### **The Proposed Rules Fail to Fulfill the Legislative Intent Expressed in ORS 197.772**

The DLCDC has not adequately explained whether these rule changes could be interpreted as falling within the legislature's intent when it enacted ORS 197.772. The Oregon Supreme Court recently relied heavily on a review of legislative intent in the *Lake Oswego Preservation Society v. City of Lake Oswego* (360 Or 115 (2016)) – particularly as it pertained to the definition of property owner and the issue of owner consent. As noted in that case, in 1995 Oregon legislature took great pains to ensure that Oregon's owner consent law was consistent with the National Historic Preservation Act (as discussed by the Oregon Supreme Court (360 Or 115 (2016) 149)). We would suggest that the DLCDC provide a detailed justification on how these rule revisions carry out the legislature's intent when it enacted the existing statute and how the Supreme Court's current assessment is erroneous.

### **Different Regulatory Treatments for Similarly Situated Properties**

The existing rules already provide the basic protections that are repackaged and called "baseline" in the new rules for historic resources of statewide significance. Within the definition of "protect" (OAR 660-023-200(8)), local jurisdictions shall "review applications for demolition, removal, or major exterior alteration(s) of a historic resource". For those jurisdictions that do not currently follow state planning rules governing historic resources (and do not have any form of land use protections for historic resources), it remains unclear whether the introduction of the baseline rules would require them to retroactively apply these new rules for properties that are currently listed in the National Register of Historic Places or local landmarks lists. The DLCDC has failed to provide a legal justification behind the assertion that it will only apply to newly listed resources. If the new rules are not applied to previously listed properties, then it would seem that these new requirements would create a difference in the way similarly situated properties are treated despite the fact that the underlying State's laws have not changed. On its face, it raises fundamental equal protection issues as it would prevent an even application of land use rules across historic districts – those formed prior to 2016 and those formed after. These changes would create a regulatory maven for communities as local planning agencies would need to track individual owners and whether or not they individually objected or not.

### **Lack of Uniformity in Planning Rules across Jurisdictions**

The lack of uniformity across jurisdictions in the application of state planning rules governing historic resources, as uncovered by the Oregon SHPO survey, does not appear to be a shortcoming in the existing regulations but instead appears to be a shortcoming of planning regulation implementation, education, and the DLCDC's record of not enforcing rule compliance through extended time frames between Periodic Review. If the pattern of extended periodic reviews is allowed to continue, individuals, including private property owners, developers, and/or local planners will have to extensively consult the interstices of Land Use Board of Appeals cases, Oregon Supreme Court Cases, and revised state regulations in order to interpret what should be the plain provisions of a local historic resource ordinance. This is not the picture of regulatory efficiency.

The uneven application of state planning rules also raises fundamental questions about whether or not the Certified Local Government (CLG) program is operating in a manner consistent with federal regulations and whether they will be in compliance following the rule changes, given that their historic resource ordinances would all need to be updated. If any of the 51 Oregon state CLGs maintain a historic resource ordinance that runs afoul of state regulations, the NPS requires that the local jurisdiction either change the ordinance to be consistent with state land use rules or risk being de-certified and no longer eligible for federal CLG funds (see 36 CFR 61.6(e)). From the SHPO survey, it appears that at least 40% of the ordinances are already not consistent with OAR 660-023-0200. SHPO has known about these

discrepancies for some time and yet has not required CLGs to conform with state rules that have been in place for 20 years. Again, if new rules are adopted, will the DLCD suddenly exert influence upon hundreds of Oregon communities to change their ordinances or will the Department merely wait 30 years until the next “periodic” review to hopefully catch the discrepancies and recommend an update?

As opposed to being a problem, the diversity in ordinances reflects the varied regulatory approaches to heritage resource conservation that communities have in Oregon. Arising out of necessity, the City of Portland’s historic preservation program is necessarily more detailed than that implemented in areas such as Harney County. This is largely the result of the differences in the types of resources, the economic environments creating threats to landmarks, how each community has chosen to manage resources, and differing approaches in the degree of public processes, including those to resolve disputes. Rather than changing the rules, the DLCD should first work to strengthen and implement the existing rules across the state and allow local governments to formulate ordinances that fit their particular needs within the bounds established by the existing regulations.

**Owner Consent: Opting Out in Historic Districts is “Bad Historic Preservation Policy”**

The rule changes would allow individual property owners to opt out of a National Register historic district by allowing them to withhold consent to the local designation process by virtue of expanding the owner consent requirements. As a matter of background, the notion of owner consent is rooted in the 1980 amendments to the National Historic Preservation Act. Then U.S. Congressman Dick Cheney from Wyoming inserted language into the act in 1980 that required that the National Park Service receive a property owner’s consent to be listed on the National Register of Historic Places. For districts, however, over 50% of all district property owners had to object to the nomination in order for the nomination to be blocked. Within this context, individual property owners were not permitted to “opt out” even under the federal rules. The rationale behind placing owner consent into the amendments was rooted in the fact that local and state historic preservation laws were sometimes imposed upon National Register-listed properties and Congress wanted to ensure that property owners were afforded the opportunity to withdraw consent or to object to a historic district listing. (See Jess Theodore, “Over My Dead Property! Why the Owner Consent Provisions in the National Historic Preservation Act Strike the Wrong Balance Between Private Property and Preservation”, Unpublished Paper, Georgetown University (2008)). The National Register program, however, never adopted an owner consent model that allowed for “opting out” in a district. In 1995, Oregon adopted the federal model and the legislature applied it to the state’s land use laws which have been implemented since that time on locally-listed historic resources (ORS 197.772).

Even staff of the National Park Service believes “opting out” is a bad idea. In a recent email to the State of Wisconsin, where the administration of Governor Scott Walker attempted to implement owner consent requirements, the CLG program coordinator for the National Park Service wrote that “opting out of an existing district is not only bad historic preservation policy, it also creates certain legal risks for the local government.” As others have written before, the notion of “owner consent” is placing a legislated police power reserved to the legislature into the hands of an individual property owner (Julia Hatch Miller, “Owner Consent Provisions in Historic Preservation Ordinances: Are They Legal?”, Preservation Law Reporter (February 1991) 1037). This notion of land use as a police power is grounded in the U.S. Supreme Court’s *Mugler v. Kansas* ruling (123 U.S. 623 (1887)): “The power to regulate land] must exist somewhere; else society will be at the mercy of the few who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of government.”

Furthermore, while decisions to designate a historic resource are based upon well-heelled criteria of historical significance and objective findings, the property owner's decision on designation is based on standardless whim. This only seems to undermine the fundamentals of Oregon land use law as the new rules would allow an individual property owner to effectively spot zone their property and reap all of the attendant benefits of historic district protections without any need to comply with regulations that will apply to their immediate neighbors.

### **Impacts to Local Designation and National Register Programs**

The expansion of owner consent would slow local designations to an absolute trickle and hobble local designation programs. As a direct result of the existing "owner consent" provisions in Goal 5 (first inserted in 1995 by the Oregon Legislature who overturned a veto by then Governor Kitzhaber), in Portland, only 4 to 5 individual properties have successfully gone through the local landmark designation process in the past 20 years. Since 1988 Washington County has not added anything to its local landmarks list and since 1992 Clackamas does not appear to have designated any as well. If one looks at other communities, you would probably see a similar trend. On the other hand, the number of National Register properties protected under the existing process has remained robust - a case in point is the Irvington Historic District which is now covered by historic design review (it contains over 2,800 properties and is the largest historic district in the United States). If the rules are revised, the substantive local regulatory benefits for listing a historic district on the National Register would nearly vanish in Portland (and elsewhere in the state) and so would the desire to list a historic district on the National Register. When combined with the lack of interest in local landmark designation, the inventory and designation programs in the state would cease to be effective. Indeed, the Oregon Supreme Court acknowledged this fact by stating in the recent Lake Oswego Preservation Society v. City of Lake Oswego case that "allowing individual owners to refuse designation makes historic inventories less comprehensive and the preservation of historic properties less complete, reducing the value of such programs" (360 Or 115 (2016)). The DLCD has not provided any evidence whatsoever that National Register listings would substantially improve in number should the new rules be put in place. It is based upon pure hearsay.

### **Property Owner Definition**

The push to define property owner by the DLCD will likely extend to lesser ownership standard than "absolute fee simple" (the current standard of the National Register program), such that owners with subservient property interests can prevent local designations (as was the legal argument made by the Central Oregon Irrigation District). This could come to include not only minor property interests (such as easement or covenant holders) but also State-owned properties, municipal properties, and properties owned by other political subdivisions within the state who, for the most part, are not fee simple owners of property. So in other words buildings such as Memorial Coliseum, would likely now be demolished because the City of Portland would likely have objected to its designation. If that had happened, we could now be looking at a minor league stadium instead of a "National Treasure" - a recently bestowed recognition by the National Trust for Historic Preservation. As mentioned previously, the push to redefine "property owner" if it contains any other standard than "absolute fee simple ownership," would make the rules contrary to the 1995 legislature's intent as well as the Oregon Supreme Court's attribution of Oregon's existing historic resource rules and laws as being based upon the federal model for recognizing the significance of historic properties as expressed in the National Historic Preservation Act and the National Register program.

**Lack of Problem Statement and Context**

The DLCD staff report, FAQ's, verbal testimony before the LCDC, and other related documents related to the Goal 5 Rule change project are inherently vague and conveniently leave out the true origins for these rule changes. The DLCD needs to provide an improved summary of what events and what parties have prompted Governor Kate Brown and/or her advisors to issue this request. To date, no one from the Governor's office has replied to emails sent on September 9, 2016, September 16, 2016, and September 26, 2016 from the PHLC despite numerous attempts. The request for information has been forwarded to Portland's Office of Government Relations and City Council.

**First Draft of Revised Rules**

Due to the minimal amount of time to review the first draft of the proposed changes, at an initial glance it remains unclear whether DLCD staff actually listened to the views or perspectives of the Rulemaking Advisory Committee at the previous meeting. Since all of the public comment received by the agency thus far has been in opposition to the rule changes, it remains unclear why DLCD staff continues to introduce rule provisions that would substantially weaken protections for historic resources in the state. Thus far, the process seems to be following a predetermined result.

Sincerely,



Kirk Ranzetta  
Chair



Paul Solimano  
Vice Chair

cc  
Brandon Spencer-Hartle, BPS  
Hillary Adam, BDS