

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 McLOUGHLIN NEIGHBORHOOD ASSOCIATION,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF OREGON CITY,
10 *Respondent.*

05/11/18 AM 8:14 LUBA

11
12 LUBA No. 2017-129

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Oregon City.

18
19 Jesse A. Buss, Oregon City, filed the petition for review and argued on
20 behalf of petitioner. With him on the brief was Willamette Law Group.

21
22 Carrie A. Richter, Portland, filed the response brief and argued on behalf
23 of respondent. With her on the brief was Bateman Seidel, P.C.

24
25 HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board
26 Member, participated in the decision.

27
28 AFFIRMED 05/11/2018

29
30 You are entitled to judicial review of this Order. Judicial review is
31 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner, McLoughlin Neighborhood Association (MNA), seeks to designate two city-owned structures within the city of Oregon City as historic landmarks. In this appeal, petitioner challenges the city manager’s December 6, 2017 letter to petitioner reaffirming a previous decision to refuse to consent to those historic designations under ORS 197.772(1).¹

FACTS

This is the second time the city has decided to refuse to consent to petitioner’s historic landmark designation proposal. That proposal concerns two structures that were originally part of Camp Adair, a World War II training facility near Corvallis that was dismantled after the war. The structures were moved to Oregon City after the war and have been used for various purposes since. In *McLoughlin Neighborhood Assoc. v. City of Oregon City*, ___ Or LUBA ___ (LUBA No. 2017-052/054, September 27, 2017) (*MNA I*), petitioner

¹ ORS 197.772(1) states:

“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 except for consideration or nomination to the National Register of Historic Places pursuant to the National Historic Preservation Act of 1966, as amended (16 USC 470 *et seq.*)”

1 appealed a letter to petitioner's chairperson and a memorandum to the city's
2 Historic Review Board (HRB).² Both documents were dated April 18, 2017,
3 and in both documents the city manager took the position that the city refused
4 to consent to the petitioner's requested historic designations under ORS
5 197.772(1). *See* n 1.

6 After the city refused to consent to the requested historic designations,
7 the city's HRB removed petitioner's historic landmark designation application
8 from the agenda of a previously scheduled April 25, 2017 HRB public hearing.
9 However, petitioner's application remained on the agenda for the April 25,
10 2017 HRB meeting as a discussion item, but the evidentiary record was never
11 opened, and no action was taken on the merits of the application. In *MNA I*,
12 petitioner appealed the HRB's decision to take no further action on petitioner's
13 application to LUBA.

14 In *MNA I*, we remanded the city's decisions for the HRB to answer two
15 threshold jurisdictional questions that it failed to answer in its April 18, 2017
16 and April 25, 2017 decisions. Depending on the answers to those questions we
17 stated a third question might need to be answered, and depending on the
18 answer to that third question, a fourth question might need to be answered. We
19 set out those four questions below:

² A more complete set of facts regarding the nature of the disputed city-owned structures is set forth in *MNA I*.

- 1 1. Did the city commission waive its right to refuse to consent
2 to a historic designation of structures on city owned
3 property by delegating historic designation authority to the
4 city HRB?³
- 5 2. If the answer to the first question is “no,” does the city
6 manager have authority under local law to refuse to consent
7 to historic designation of city-owned property?
- 8 3. If the answer to the second question is “yes,” is the right
9 given to property owners by ORS 197.772(1) to refuse to
10 consent to historic designation of their property limited to
11 *private* property owners?
- 12 4. If the answer to the third question is “yes,” is petitioner
13 entitled to a Type III hearing before the HRB?

14 On remand, instead of having the HRB answer the above questions, at a
15 December 6, 2017 city commission hearing, the city commission issued
16 findings of fact and law. Without opening the evidentiary record, the city
17 commission first concluded that it had not waived or delegated its authority to
18 refuse to consent to historic designation of city-owned property under ORS
19 197.772(1), by creating and empowering the HRB. The city commission also
20 determined the city manager has authority under city law to refuse to consent to
21 historic designation of city owned property. And finally, the city commission
22 concluded that the property owners authorized by ORS 197.772(1) to refuse to
23 consent to historic designation of their property include both public and private

³ The city commission is the City of Oregon City’s governing body.

1 property owners. With those answers to the first three questions, it was
2 unnecessary for the city commission to answer the fourth question.

3 This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioner's first assignment of error contends it was error on the part of
6 the city commission to take up the matter of answering the threshold
7 jurisdictional issues remanded by LUBA. Instead, petitioner contends,
8 LUBA's instructions were specific that the decision was remanded so that the
9 HRB could answer those threshold questions, at least initially. In making this
10 argument, petitioner relies primarily on the following language from LUBA's
11 decision in *MNA I*:

12 "We generally agree with petitioner. If either of the first two of the
13 arguments petitioner advances against the city manager's
14 purported refusal to consent (waiver of city right to refuse to
15 consent, and lack of city manager authority to refuse to consent)
16 have merit, as far as we can tell the HRB would be required to
17 proceed with its consideration of petitioner's application, without
18 regard to whether petitioner's understanding of the scope of ORS
19 197.772(1) is correct. The HRB should have adopted findings
20 addressing the threshold jurisdictional issue raised by those two
21 questions of local law once petitioner raised the issues. *Norvell v.*
22 *Portland Metro Area LGBC*, 43 Or App 849, 853, 604 P2d 896
23 (1979). The HRB erred by simply suspending its consideration of
24 petitioner's application without adopting findings addressing those
25 arguments. On remand the HRB, and perhaps the city commission,
26 need to adopt findings that respond to those two questions." *MNA*
27 *I*, slip op at 8-9.

28 In response, the city argues that in *MNA I*, LUBA provided no indication
29 or specific citation to the Oregon City Municipal Code (OCMC) that would

1 require HRB review specifically, as a prerequisite to, or instead of city council
2 review.

3 While our remand in *MNA I* was to the HRB to answer the questions we
4 set out in the decision, our decision was written in that way because it was an
5 HRB decision that was before us on appeal. There was simply no issue
6 presented in *MNA I* about the identity of the city decision maker who was
7 required to answer those questions on remand. To the extent any inference can
8 be read into our decision in *MNA I* about who the decision maker on remand
9 was required to be, that inference was not intended. Since no issue was
10 presented in *MNA I* about who must render the decision on remand, LUBA did
11 not decide that issue in *MNA I* and LUBA's decision in *MNA I* did not dictate
12 that the HRB was required to be the decision maker on remand.

13 Petitioner also alleges the OCMC requires the HRB to make the initial
14 findings and decisions in matters involving local historic landmark
15 applications, and thus bypassing the HRB was not harmless error because the
16 members of the HRB have "expertise" in the field of statewide planning Goal 5
17 historic preservation issues.

18 In arguing that the OCMC requires that the HRB rather than the city
19 commission answer the questions LUBA identified on remand, petitioner relies
20 on OAR 660-023-0200(5)(b), which provides "[l]ocal governments may
21 delegate the determination of locally significant historic resources to a local
22 planning commission or historic resources commission." Petitioner contends

1 the city has exercised the delegation authorized by OAR 660-023-0200(5)(b),
2 citing OCMC 2.28.060, which sets out the powers and duties of the HRB, and
3 provides in part:

4 “B. The following matters must be submitted to the [HRB] for
5 its approval or decision:

6 “1. Landmark designations[.]”

7 Petitioner also relies on OCMC 17.40.050, which sets out the city’s procedure
8 for designating historic districts, landmarks and corridors, and provides, in
9 part:

10 “C. The planning staff shall deliver a proposal or an application
11 for the designation to the [HRB] within thirty days after the
12 day on which a proposal or application is received. The
13 [HRB] shall review the proposal on the application and
14 prepare a written recommendation or decision approving or
15 rejecting the proposed designation.”

16 The city initially argues petitioner previously relied on OAR 660-023-
17 0200(5)(b) and OCMC 17.40 and never mentioned OCMC 2.28.060 and
18 therefore has waived its right to rely on OCMC 2.28.060. ORS 197.763(1);
19 197.835(3).⁴ Petitioner responds, and we agree, that it adequately raised OCMC

⁴ ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings

1 2.28.060 in both its initial appeal in MNA I (Record 64, 349, 600, 614, 615)
2 and on remand (Record 313, 326, 329).⁵

3 On the merits, the OCMC sections petitioner cites make it clear that
4 when it comes to “review[ing a landmark] proposal” under OCMC
5 17.40.050(C) or rendering “approval or [a] decision” on an application for
6 landmark designation, the city has delegated that authority to the HRB. But in
7 answering the first three questions the city was required to answer following
8 our remand in *MNA I* the city was not “review[ing a landmark] proposal” under
9 OCMC 17.40.050(C) or rendering “approval or [a] decision” on an application
10 for landmark designation under OCMC 2.28.06. Rather, the city was tasked
11 with deciding whether, by virtue of the action taken by the city manager, the
12 HRB was divested of its authority to proceed to perform those functions by a
13 statute, ORS 197.772(1). We agree with the city commission that petitioner has
14 cited nothing in the OCMC that requires that the HRB must be the decision-
15 making body following our remand in *MNA I* to determine whether the city
16 manager’s refusal to consent to designation under ORS 197.772(1) divests the

officer, and the parties an adequate opportunity to respond to each
issue.”

ORS 197.835(3) provides:

“Issues [before LUBA] shall be limited to those raised by any
participant before the local hearings body as provided by ORS
197.195 or 197.763, whichever is applicable.”

⁵ The letters “REM” precede each page number in the record. We omit those letters in our citations to the record.

1 HRB of its authority to proceed to review and render a decision on petitioner's
2 proposal to designate the city-owned property as a historic landmark.

3 As the city notes, in the absence of a specific requirement from LUBA,
4 which we have determined is lacking here, where a local government has not
5 adopted procedures governing how it must review a decision on remand from
6 LUBA, a local government has discretion to determine the preferred method to
7 resolve the decision on remand and is not required to repeat the procedures that
8 governed its initial decision. *Rosenzweig v. City of McMinnville*, 66 Or LUBA
9 164, 171 (2012).

10 Because OCMC 2.28.060(B) and OCMC 17.40.050(C) do not dictate
11 that the HRB must be the decision maker to decide whether the HRB has
12 authority to proceed to review and make a decision on petitioner's proposal,
13 because the city has not adopted procedures that govern how the city must
14 proceed when HRB decisions are remanded, and because the dispositive
15 questions to be answered on remand did not call for a decision on the historic
16 merits of the proposal, but rather are questions the city commission is equally
17 or better qualified to answer in the first instance, the city commission did not
18 err by rendering the decision on remand from *MNA I*.

19 The first assignment of error is denied.

1 **SECOND ASSIGNMENT OF ERROR**

2 In its second assignment of error, petitioner argues the petitioner’s
3 substantial rights were prejudiced when the city refused to open the record to
4 receive evidence following LUBA’s remand, on two grounds.

5 First, petitioner argues it was entitled to review of its application for
6 historic landmark determination on the merits, which requires an evidentiary
7 hearing.⁶ Petitioner argues that the city has yet to provide an evidentiary
8 hearing on the application, either in the proceedings at issue in *MNA I*, or in the
9 proceedings on remand.

10 Second, petitioner argues that resolution of the issue of whether the city
11 waived its right to refuse to consent to historic designations under ORS
12 197.772(1), by delegating authority to the HRB under the OCMC to receive
13 applications and forward recommendations to the city commission for final
14 action, is an inherently factual inquiry. Therefore, according to petitioner its
15 substantial rights were prejudiced when it was denied any opportunity to
16 present evidence regarding the waiver issue. In a footnote petitioner argues by
17 way of an example, that such evidence “could have” included local legislative
18 history, although petitioner does not actually assert that it has relevant
19 legislative history that might have some bearing on whether the city
20 commission, in creating and empowering the HRB, either delegated any rights

⁶ We address petitioner’s arguments regarding its entitlement to review on the merits of its application in the fourth assignment of error, below.

1 it might have under ORS 197.772(1) to the HRB or intended to abandon those
2 rights altogether. Petition for Review at 34 n 4.

3 The city’s theory for refusing to open the evidentiary record was that
4 “the limited questions on remand [were] questions of law that did not require
5 the submittal of any additional evidence.” Record 4. Further, the city argues
6 petitioner failed to preserve its argument that the waiver issue requires a factual
7 inquiry and hence requires the city to open the evidentiary record, because
8 petitioner failed to raise that argument before the city below. ORS 197.763(1);
9 197.835(3); *see* n 4.⁷

10 We agree with the city. At the November 15, 2017 hearing, petitioner
11 presented both written and oral argument. The petitioner’s written argument
12 regarding its objection to the city refusing to open the evidentiary record was as
13 follows:

14 “It is inappropriate for the City Commission to disallow new
15 evidence at this point in the proceeding (see Staff Report on
16 Remand at 3). Since the MNA’s application was submitted in early
17 2017 the MNA and the public have had no opportunity to submit
18 evidence into the record. Neither the HRB nor the City
19 Commission allowed new evidence or a hearing before the MNA
20 brought the LUBA cases. Now, on remand from LUBA, that
21 opportunity is still being denied.” Record 313.

⁷ The parties’ and our phrasing of the first question—as whether the city commission “waived” its right to refuse to consent under ORS 197.772—unfortunately presents the possibility of confusion with the concept of statutory “waiver” of issues under ORS 197.763(1) and 197.835(3). A more accurate way to describe the issue presented in the first question is whether the city commission delegated or abdicated its rights under ORS 197.772.

1 Petitioner's oral testimony at the November 15, 2017 hearing appears to
2 be more of a request to submit evidence regarding the merits of the proposed
3 historic landmarks designation, rather than a request to present evidence
4 regarding petitioner's waiver (delegation) argument. Specifically, at the
5 November 15, 2017 city commission hearing, petitioner testified:

6 "The MNA also objects to new evidence not being allowed
7 tonight. We're kind of in a strange procedural posture, this
8 application from the MNA never actually made it to hearing
9 before the HRB. It went up to LUBA, LUBA remanded and said
10 the HRB needs to consider this, but there has never been an actual
11 open record here. So the record needs to be opened at some point,
12 and that should happen now. For the same reason, the [MNA]
13 requests a continuation of this hearing, so that the record can be
14 open and new evidence placed in it." Audio Recording at 2:15:20.

15 Petitioner's written statement regarding waiver (delegation) did not include an
16 argument that the evidentiary record should be opened to receive legislative
17 history of the local legislation that created and empowered the HRB:

18 "Oregon City has waived any right to refuse consent under ORS
19 197.772(1). Waiver is the voluntary relinquishment of a known
20 right. By adopting the detailed and specific OCMC provisions
21 governing designation of historic landmarks in OCMC 17.40.050,
22 done with full knowledge of the existence of ORS 197.772(1),
23 Oregon City has waived the right to refuse consent under that
24 statute." Record 314.

25 The city commission provisionally adopted the recommended findings at
26 the November 15, 2017 hearing, and continued its decision until December 6,
27 2017 to correct an administrative error in the record and to adopt final written
28 findings. The city commission reconvened on December 6, 2017 but did not

1 open the evidentiary record. Although petitioner attempted to make an offer of
2 proof at the December 6, 2017 city commission meeting, the public hearing had
3 been closed at the conclusion of the November 15, 2017 hearing, and
4 petitioner's offer was rejected. It is unclear what evidence petitioner intended
5 to offer, or what argument it was related to. Petition for Review 31.

6 There does not appear to be any dispute that, but for the city manager's
7 refusal to consent under ORS 197.772(1), the HRB would have been obligated
8 under the OCMC and ORS 197.763 to conduct an evidentiary hearing as part of
9 the city's consideration of petitioner's application. The dispute then is not
10 whether petitioner is entitled to an evidentiary hearing if the refusal to consent
11 under ORS 197.772(1) is ineffective for any reason. Rather, the question is
12 whether in answering the questions the city was required to answer following
13 LUBA's remand in *MNA I*, the city was required to open the evidentiary record
14 and to accept evidence. The planning staff took the position on remand that the
15 questions that had to be answered on remand are legal questions and therefore
16 it was unnecessary to open the evidentiary record. Record 326. Petitioner
17 never clearly argued otherwise during the proceedings below.

18 Under ORS 197.763(1) and 197.835(3), the city was entitled to "fair
19 notice" that petitioner took the position that the questions on remand were
20 factual in nature and therefore required an evidentiary record. *See Boldt v.*
21 *Clackamas County*, 107 Or App 619, 813 P2d 1078 (1991) (the purpose of the
22 "raise it or waive it" requirement at ORS 197.763(1) is to provide "fair notice"

1 of the issue to the decision maker and other parties, so they have an adequate
2 opportunity to respond and address the issue). At no point during the remand
3 proceeding did petitioner give the city give fair notice that petitioner took the
4 position that waiver (delegation) is an inherently factual question that
5 necessitates an evidentiary record or that petitioner wanted the city to open the
6 evidentiary record to allow petitioner to submit relevant local legislative
7 history regarding the local legislation that created and empowered the HRB.

8 Citing *Alderman v. Davidson*, 326 Or 508, 513, 954 P2d 779 (1998),
9 petitioner argues “that waiver is the voluntary relinquishment of a known right”
10 and thus an inherently factual question. Petition for Review 33. Whether the
11 city commission delegated or abdicated its rights under ORS 197.772(1) by
12 amending the OCMC to create and empower the HRB is more accurately
13 characterized as a question of legislative intent, the search for which is
14 governed by the principles set out in *PGE v. Bureau of Labor and Industries*,
15 317 Or 606, 610-12, 859 P2d 1143 (1993). Legislative intent can be gleaned
16 from text, context and by applying rules of statutory construction, none of
17 which require consulting an evidentiary record. 317 Or at 612. It is only when
18 considering legislative history that the inquiry *can* shift from a legal inquiry to
19 an inquiry that can have a factual component. That is because local legislative
20 history, unlike statutory history, is not subject to judicial notice and must be
21 included in the local record if it is to be relied upon on appeal. *Byrnes v. City*
22 *of Hillsboro*, 104 Or App 95, 99, 798 P2d 1119 (1990).

1 If petitioner had offered to submit local legislative history below that
2 would support a finding that the city commission delegated or abdicated its
3 rights under ORS 197.772(1), we believe the city commission might well have
4 been obligated to open the evidentiary record on remand, accept that legislative
5 history, and give it appropriate weight in answering the first of questions on
6 remand from *MNA I*. However, petitioner never made it clear that it believed
7 answering the first question is inherently factual. Petitioner takes that position
8 for the first time in this appeal. Neither did petitioner ever take the position
9 before the city that it had relevant legislative history of the local legislation that
10 created and empowered the HRB. Moreover, in this second appeal to LUBA,
11 petitioner never actually takes the position that it has such relevant legislative
12 history, it merely suggests that such legislative history might exist. Petitioner's
13 belated offer of proof on December 16, 2017, after the November 15, 2017
14 public hearing had closed, came too late. For the foregoing reasons, the issue
15 of whether the waiver (delegation) issue is a factual issue that required the
16 county to open the evidentiary record is waived under ORS 197.763(1) and
17 197.835(3) and is not within our scope of review.

18 The second assignment of error is denied.

19 **THIRD ASSIGNMENT OF ERROR**

20 Under its third assignment of error, petitioner sets forth essentially the
21 same three arguments alleged under its first assignment of error in *MNA I*. We
22 address each in turn.

1 **A. The City Waived its Right to Refuse to Consent Under ORS**
2 **1977.772**

3 Under this sub-assignment of error, petitioner assumes for purposes of
4 argument only that the city as a public property owner has a right to refuse to
5 consent under ORS 197.772(1). Petitioner argues the city waived its right to
6 refuse to consent to historic designation of public buildings under ORS
7 197.772(1) by adopting land use regulations that delegate historic listing
8 decisions to the city’s HRB and establishing mandatory procedures and
9 standards for HRB review of listing applications. For this proposition,
10 petitioner cites to OCMC 2.28.060(B) and OCMC 17.40.050(C), which set out
11 the matters subject to review by the HRB and its duties.⁸ Petitioner argues that
12 by adopting OCMC 2.28.060(B) and OCMC 17.40.050(C), which are part of a
13 larger local historic planning scheme implementing Statewide Planning Goal 5,
14 and by opting to mandate HRB review of all historic designation applications,
15 the city has waived (delegated) its right to refuse consent under ORS
16 197.772(1). Petitioner argues:

17 “[B]y adopting code provisions mandating HRB review of historic
18 landmark applications based on limited, specified criteria, Oregon

⁸ OCMC 2.28.060(B) and OCMC 17.40.050(C) were quoted earlier in our discussion of the first assignment of error. OCMC 2.28.060(B) provides: “The following matters must be submitted to the historic review board for its approval or decision: (1) Landmark designations[.]” OCMC 17.40.050(C) provides, in pertinent part: “The historic review board shall review the proposal on the application [for historic designation] and prepare a written recommendation or decision approving or rejecting the proposed designation.”

1 City has expressed a clear public policy in favor of resolving
2 landmark applications in a prescribed way. OCMC 2.28.060(B);
3 OCMC 17.40.050(C). * * * While third parties are not limited by
4 Oregon City's prescribed process, and could therefore avail
5 themselves of the owner consent provision of ORS 197.772(1), the
6 City's discretion to avail itself of any right to refuse consent is
7 limited by code. Because the local code prescribes a certain
8 decision-making process for landmark designation applications,
9 the City is bound by that code and has waived any right to
10 arbitrarily refuse consent under ORS 197.772(1)." Petition for
11 Review 38-39.

12 In response, the city points out that petitioner has cited no authority for
13 the proposition that a local government's adoption of a historic resource
14 regulatory scheme results in an implied waiver of statutory rights the city might
15 have under ORS 197.772(1).

16 We agree with the city. Put another way, the city determined that the
17 exercise of property owner rights afforded to the city pursuant to ORS 197.772
18 operates separately from the powers given to the HRB by the OCMC. As the
19 city points out, OCMC 2.28.060(B) and OCMC 17.40.050(C) do not even
20 mention ORS 197.772. The city's interpretation that its historic landmark
21 designation decision-making process, which does not mention ORS 197.772,
22 does not result in a waiver of the city's rights under ORS 197.772(1) is
23 certainly "plausible," and for that reason must be affirmed under ORS
24 197.829(1). *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776 (2010).⁹

⁹ ORS 197.829(1) provides:

1 This sub-assignment of error is denied.

2 **B. The City Manager Does Not Have Authority to Refuse to**
3 **Consent Under ORS 197.772(1)**

4 Like the prior sub-assignment of error, this subassignment of error
5 assumes for purposes of argument only, that the city has a right to refuse to
6 consent to historic designation under ORS 197.772(1). Oregon City Charter,
7 Chapter V, Section 21(c) sets out six general powers and duties of the city
8 manager. Chapter V, Section 21(c)(6) provides:

9 “[The city manager] shall supervise the operation of all public
10 utilities owned and operated by the city and shall have general
11 supervision over all city property.”

12 Because Chapter V, Section 21(c) does not specifically list the power to
13 refuse to consent under ORS 197.772(1), petitioner contends the city manager

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 lacks that authority. Instead, petitioner argues, that power lies initially with the
2 city commission under Chapter III, Section 6 of the Oregon City Charter, which
3 provides:

4 “Except as this charter provides otherwise, all powers of the city
5 shall be vested in the commission.”

6 Petitioner then repeats its earlier argument that any right to refuse to consent
7 that the city commission may have, has been delegated to the HRB by the
8 previously discussed sections of the OCMC.

9 The city commission adopted findings specifically addressing this
10 question, findings that petitioner does not acknowledge or explicitly challenge.
11 Those findings set out the city manager’s general authority to exercise
12 “supervision over all city property” and the city commission’s retention of all
13 powers that are not granted to others under the charter and ultimately conclude
14 the general authority to exercise “supervision over all city property” is
15 sufficiently broad to include the ORS 197.772(1) right to refuse to consent to a
16 historic designation of city-owned property. Record 8.

17 The word “supervision” is not defined in the charter, and its dictionary
18 definition is broad enough to encompass a refusal of consent to allow an
19 application to list city-owned property as a historic landmark to go forward.¹⁰

¹⁰ Webster’s Third New International Dictionary definition of “supervision”
is set out in part below:

“* * * the act, process, or occupation of supervising : direction,
inspection, and critical evaluation : OVERSIGHT,

1 In reviewing the city commission’s interpretation of the city charter, the correct
2 standard of review is ORS 197.835(9)(a)(D) (“[i]mproperly construed the
3 applicable law”). We cannot say the city commission’s interpretation of the
4 Oregon City Charter delegation of authority to the city manager to supervise
5 city property as being broad enough to allow the city manager to exercise the
6 city’s rights under ORS 197.772(1) represents a misconstruction of Oregon
7 City Charter, Chapter V, Section 21(c)(6).¹¹

8 This sub-assignment of error is denied.

SUPERINTENDENCE * * *. *Webster’s Third New Int’l
Dictionary* 2296 (unabridged ed 2002).

Webster’s definition of “supervise” is set out in part below:

“2 : to coordinate, direct, and inspect continuously and at first
hand the accomplishment of : oversee with the powers of direction
and decision the implementation of one’s own or another’s
intentions * * *.” *Id.*

¹¹ At oral argument petitioner pointed out other places in the city charter that grant authority to “control” and argued that because Oregon City Charter, Chapter V, Section 21(c)(6) uses the word “supervision” rather than the word “control,” Oregon City Charter, Chapter V, Section 21(c)(6) is not properly interpreted to include the right to refuse to consent under ORS 197.772(1). We are not persuaded by that argument, but more importantly that argument was not included in the petition for review and for that reason is not properly presented in this appeal. *Freedman v. Lane County*, 64 Or LUBA 309, 318 (2011).

1 **C. ORS 197.772 Distinguishes Between Private and Public**
2 **Property Owners**

3 Petitioner argues that as a “property owner” the city cannot refuse to
4 consent to historic designation under ORS 197.772(1) because local
5 governments that are bound to implement state historic resource programs
6 under Statewide Planning Goal 5 are not “property owners” for purposes of
7 ORS 197.772. According to petitioner, this is because the regulatory context
8 and legislative history set forth in *Lake Oswego Preservation Society v. City of*
9 *Lake Oswego (LOPS)*, 360 Or 115, 379 P3d 462 (2016), requires a narrow
10 interpretation of the term “property owner.” For this proposition, petitioner
11 cites us to the following:

12 “The words ‘property’ and ‘owner’ are relatively straightforward,
13 referring, in context, to the individual or entity that has legal title
14 to a piece of real estate. *See Webster’s Third New Int’l Dictionary*
15 1818, 1612 (unabridged ed 2002) (defining ‘property’ and
16 ‘owner’). However, those definitions do not tell us *which* property
17 owners the text refers to.

18 “* * * * *

19 “The phrase ‘a property owner’ in subsection (1), therefore, refers
20 to a specific and relatively narrow class of owners: those who own
21 a property at the time that the government designates that property
22 as historic.” *Id.* at 126, 128.

23 Accordingly, petitioner contends that in construing the terms “local
24 government” and “property owner,” we should give those terms “the same”
25 narrow reading. Petition for Review 46. Petitioner further argues that *LOPS*
26 emphasizes that the legislative history of ORS 197.772 establishes that the

1 intent of the legislature was to promote the duty of local governments to ensure
2 the preservation of historic resources, while at the same time protecting private
3 citizens from having their properties designated for historic protections over
4 their objection. Therefore, petitioner argues, to be consistent with *LOPS* we
5 must find that in enacting ORS 197.772, the legislature's intent was to protect
6 private citizens by affording them a private right to refuse historic designation,
7 not an intent to provide local governments with that same right. Petition for
8 Review 47-49.

9 We disagree. The Supreme Court explained that its holding in *LOPS*
10 was a narrow one that had nothing to do with whether the property owners
11 referenced in ORS 197.772(1) and 197.77(3) include or exclude public
12 property owners:

13 "The issue presented on review is thus a narrow one: If a local
14 historic designation is imposed on a property and that property is
15 then conveyed to another owner, may the successor remove that
16 designation under ORS 197.772(3)? For the reasons explained
17 below, we conclude that, although the legislature intended ORS
18 197.772(3) to provide a statutory remedy for certain owners whose
19 property was designated as historic against their wishes, the
20 legislature also intended that owners who acquired property after it
21 had been designated would be bound by that designation and by
22 any resulting restrictions on the use and development of that
23 property. * * *" *LOPS*, 360 Or at 117.

24 The Supreme Court's ultimate conclusion that property owners who
25 acquire properties *after* those properties have had historic designations
26 imposed on them is supported by an extensive analysis of the statutory text of
27 ORS 197.772 (seven pages), its legislative and regulatory context (13 pages)

1 and its legislative history (12 pages). The Supreme Court found the text
2 inconclusive, that the legislative and regulatory context favored an
3 interpretation that limited the referenced property owners to the property
4 owners who owned the property as the time a historic designation was imposed
5 on the property, and that the legislative history also supported that limitation.
6 None of that analysis has any direct bearing on the question presented in this
7 appeal.

8 The dictionary definition of “property owner” is clearly broad enough to
9 include property that is owned by a municipality (an entity). The question is
10 whether there is a sufficient textual, contextual or legislative history basis for
11 believing the legislature intended to distinguish between private property
12 owners and public property owners and to grant the right to refuse to consent
13 under ORS 197.772(1) to private property owners only, as petitioner suggests.
14 We do not believe there is such a basis. Further, we believe that interpreting
15 ORS 197.772(1) to be limited to private property owners and to exclude public
16 property owners would require inserting a limitation that the legislature did not,
17 in contravention of ORS 174.010.¹²

¹² 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.”

1 It is true, as petitioner argues, that there arguably is some tension
2 between the city's obligations as a local government under the statewide land
3 use planning program to inventory and protect historic resources and the city's
4 rights as a property owner.¹³ But that tension is frequently present, and cities
5 and counties frequently must wear two hats—as both regulator and as property
6 owner. *Sahagian v. Columbia County*, 27 Or LUBA 592, 599 (1994); *Wait v.*
7 *Marion County*, 16 Or LUBA 353, 357 (1987); *Gordon v. Clackamas County*,
8 10 Or LUBA 240, 245 (1984). Petitioner suggests that the interests of public
9 and private property owners are different and distinct. But as the city points
10 out, the city acts in both governmental and proprietary capacities. *Wold v. City*
11 *of Portland*, 166 Or 455, 112 P2d 469 (1941). And in this case, in exercising its
12 right to refuse to consent to the proposed historic landmark designation, the
13 city is acting in a proprietary capacity (as a property owner) in furtherance of
14 its desire to develop new facilities on this city-owned property. While the
15 interests of public and private property owners can differ, public property
16 owners will often have the very same concerns over historic landmark
17 designation, as private property owners, such as future costs of, or possible
18 restrictions on, future development.

¹³ As the city correctly points out, this obligation has been significantly reduced by ORS 197.772 and other statutory and rule amendments that post-date ORS 197.772. Respondent's Brief 37-38.

1 We conclude the city commission did not misconstrue the applicable
2 law, when it concluded that the city has the right to refuse to consent to a
3 historic landmark designation of city-owned property under ORS 197.772(1).

4 This sub-assignment of error is denied.

5 **FOURTH ASSIGNMENT OF ERROR**

6 Like it did under its second assignment of error in *MNA I*, petitioner
7 argues the city erred in failing to review petitioner’s application for historic
8 landmark designation on the merits. Petitioner argues that under applicable
9 sections of the OCMC it was entitled to a hearing on the merits of its historic
10 landmark designation application, and that we should therefore remand to the
11 city’s HRB for such a hearing.

12 In response, the city reiterates its position that because the city manager
13 refused to consent to have the subject property considered for historic
14 designation, ORS 197.772(1) prohibits a local government from “any form of
15 consideration for historic property designation,” and therefore any
16 consideration on the merits would have been improper. The city concedes that
17 if LUBA were to sustain petitioner’s third assignment of error—that is, if
18 LUBA had determined the city waived its right to refuse consent, or that the
19 city manager lacks authority to refuse to consent, or that ORS 197.772 only
20 grants the right to refuse consent to private property owners, then remand to the
21 HRB for a Type III hearing would be necessary.

1 The text of ORS 197.772(1) was set out earlier at n 1. We agree with the
2 city that ORS 197.772(1) prohibits a local government from consideration of a
3 historic designation of a property, where the property owner has refused to
4 consent. Here, as set forth above, we agree with the city that the city did not
5 waive its right to refuse to consent to historic designation, the city manager has
6 authority to refuse to consent, and that ORS 197.772(1) grants the right to
7 refuse to consent to property owners, regardless of whether those property
8 owners are public property owners or private property owners, as long as they
9 are the property owner at the time of historic designation. There is no dispute
10 that the city owns the subject property. Accordingly, petitioner's fourth
11 assignment of error provides no basis for remand.

12 This assignment of error is denied.

13 The city's decision is affirmed.