IN THE SUPREME COURT OF THE STATE OF OREGON

LAKE OSWEGO PRESERVATION SOCIETY, Marylou Colver and Erin O'Rurke-Meadors, Petitioners on Review, v. CITY OF LAKE OSWEGO, and Marjorie HANSON, trustee for the Mary Cadwell Wilmot Trust, Respondents on Review.	**Court of Appeals Case No. A157619** **LUBA No. 2014-0009**

PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

Appeal from a August 5, 2014 Final Opinion and Order of the Land Use Board of Appeals, Opinion by Bassham, Board Member

The Court of Appeals reversed on petition and affirmed on cross-petition on February 4, 2015
Before Armstrong, P.J, Egan, J. and Wollheim, S.J.
Opinion by Egan, J

If review is granted, petitioners intend to file a brief on the merits

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March 2015

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STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

This appeal involves the interpretation of the following statute adopted to implement in part Oregon's historic preservation program under State-wide Planning Goal 5:

> **ORS 197.772 Consent for designation as historic property.** (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 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. (emphasis added)

The case involves the oldest historic home on Lake Oswego's local historic inventory – the Carmen House – and its current owner's effort to remove it from the City's inventory so that it can be demolished. The Carman House, on a 1.25-acre lot (Tax Lot 1200), was added to Lake Oswego's historic inventory on July 7, 1992, codified as Item #9 on LOC Table 50.06.009-1. In an earlier decision to list

the Carman House and a larger piece of land,[1] the then-owner Richard Wilmot objected to the designation. When the proposal was substantially reduced in size, Wilmot did not withdraw his objection, so the property ostensibly was listed over the original owner's objection.

The current owner, the Mary Caldwell Wilmot Trust, is successor in interest to Richard Wilmot and applied in 2013 to the City of Lake Oswego to have the Carman House removed from the local inventory pursuant to ORS 197.772(3). After a protracted local proceeding, the City Council approved the Carman House's removal from the local inventory because the original designation had been imposed over the original owner's objection, and the current owner was now seeking its removal pursuant to subsection (3) of the statute.

On appeal, LUBA reached two significant conclusions from the text and context of the statute and the legislative history of SB 588 (1995) which became ORS 197.772:

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1 The City Council had listed the Carman House plus its barn (on TL 1201) as part of a complete historic farmstead on 10 acres in 1991. The owner at the time (Wilmot) and a developer (Glenn Greg) appealed that decision to LUBA in *Gregg v. City of Lake Oswego*, 23 Or LUBA 564 (1992). Following withdraw for reconsideration, the city reduced the proposal to just TL 1200 (1.25 acres) and the Carman House which was listed in a July 7, 1992 decision that was not appealed.

(1) A property owner who consents to a designation pursuant to a proceeding under ORS 197.772(1) cannot later invoke ORS 197.772(3) to remove the designation and

(2) The term "property owner" as used in ORS 197.772(3) was not intended to include people who subsequently became owners of a historically listed property after its designation.

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Admittedly, LUBA found that its second conclusion was a "close question," but on that basis reversed the Lake Oswego City Council. *Id*. at 25.

The current property owner appealed, and the Court of Appeals decided LUBA's close question differently. From the scant legislative history available for SB 588 (1995), the Court concluded in pertinent part that

> …the legislature intended to allow any property owner that had a local historic designation forced on their property to remove that designation. The House committee that adopted the A9 amendments did not contemplate that "a property owner" in subsection (3) would be limited to the property owner at time of the designation; instead, the committee was concerned with addressing, and rectifying, local government designations that had been "imposed" on property. Indeed, the A9 amendments' opponents were concerned that the amendments would lead to the dismantling of local historic districts, and the amendments' proponents did not assert otherwise in the face of those concerns, which supports the understanding that ORS197.772(3) was intended to be broadly applicable. The legislature was thus focused on correcting impositions of unwanted designations, and not on the identity of the property owner that might be now stuck

> with that designation. And, the legislature did not include any narrowing text that would lead us to conclude otherwise. We thus conclude that Hanson, as the successor property owner to Wilmot, who objected to the original historic designation, is entitled to have that designation removed under ORS 197.772(3). Accordingly, we reverse LUBA's order.

LOPS, 268 Or App at 820-821 (emphasis added).

STATEMENT OF THE LEGAL QUESTIONS ON REVIEW AND THE PROPOSED RULES OF LAW

1. Question for Review: Where the original property owner objected to the imposition of a local Goal 5 historic designation, or never was asked, and the property was then conveyed to a successor, may the successor obtain removal of the Goal 5 historic designation pursuant to ORS 197.772(3) as the "property owner"?

2. Proposed Rule of Law: "Property owner" for purposes of ORS 197.772(3) includes only the owner at the time a local historic designation was imposed on the property – whether or not the owner had the opportunity to refuse the designation under ORS 197.772(1). Once a locally listed historic property is conveyed, however, ORS 197.772(3) does not give successor property owner(s) the unilateral right to opt-out of the historic designation that was part of the property when the successor(s) acquired it.

REASONS WHY THE LEGAL QUESTION HAS IMPORTANCE BEYOND THIS CASE AND REQUIRES A DECISION BY THE SUPREME COURT

1. <u>The case presents a significant issue of law, predicated on statutory interpretation</u>: If the Court of Appeals' interpretation of ORS 197.772 stands, it could have the effect of gutting the state's Goal 5 historic preservation program by allowing any "owner" of a property that was designated historic before 1995 to opt-out unilaterally at any time. Like the Carman House, most properties listed on local historic inventories were designated before 1995 - before enactment of the opt-out requirement in ORS 197.772(1). Those properties, like the Carman House, either were not given the opportunity to avoid listing pursuant to ORS 197.772(1) or the property was designated over the owner's objections. In either case, like the Carman House, most locally listed historic properties have been sold and purchased many times since the historic designation. So today, most historic listed properties are owned by successor owners who purchased for value with notice and knowledge of the historic designation and frequentlyhave received benefits from the designation. If the Court of Appeals' decision stands, subsequent owners, land developers and speculators may be allowed to simply opt-out of the local historic designation pursuant to ORS 197.772(3), demolish the structure and redevelop the lot. The Court of Appeals did not directly address the situation where the property owner never was asked or was not given the opportunity to object to the local historic designation.

2. <u>The Legality of an Important Governmental Action</u>. The Court of Appeals misconstrued ORS 197.772 and drew the wrong inference from the legislative history associated with SB 588 (1995). The Court did not address LUBA's view or LUBA's interpretation of the same legislative materials, nor did it address or consider the underlying purposes and structure of Oregon's Goal 5 historic preservation program.[2] LUBA's interpretation kept the Goal 5 historic inventory program intact, by determining that subsequent "property owners" could <u>not</u> unilaterally opt-out of a local historic program, after their property had been so designated for many years through successive owners.

3. <u>The situation arises often</u>: There are more than 7,000 structures and properties in Oregon listed on local Goal 5 historic inventories scattered throughout the State. Most (more than half) were designated before the enactment of ORS 197.772 (1995). Most of those have likely changed ownership since original designation. This case impacts any property on a local Goal 5 historic inventory where the designation was either imposed over the then-owner's objection or the then-owner was never given the option now required by ORS 1997.772(1), but the current/subsequent owner now wants to de-list the structure

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2 "Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces): To protect natural resources and conserve scenic and historic areas and open spaces. Local governments shall adopt programs that will protect natural resources and conserve scenic, historic, and open space resources for present and future

and redevelop the land. The Court of Appeals' decision could be read to give all of these "property owners" unilateral authority to de-list their properties from local historic inventories. While this is the first time this question has reached the appellate courts, there is every reason to expect that owners of land listed on local historic inventories that want to redevelop will use this case to un-do the Goal 5 process and de-list their properties unilaterally.

4. Many people are affected by the decision, and it is of great consequence to the people of Oregon: Land use regulation is a matter of statewide concern, is implemented by every city and county and affects everyone living in the state. The local historic preservation program flows from State-wide Planning Goal 5, and the state-wide program depends upon certainty – the certainty that the local government has performed the exhaustive Goal 5 ESEE public process and analysis before listing,[3] and that the historic properties so listed will when be preserved in accordance with Goal 5, OAR 660-023-0200 and local protection measures. Inventories, such as Lake Oswego's, are subject to the procedures and protections in the local code. *See* LOC 50.06.009 (Historic Preservation). The Goal and administrative rule, indeed the whole program, is focused on identifying,

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generations. These resources promote a healthy environment and natural landscape that contributes to Oregon's livability."

3 *See* OAR div 660, chapter 023 and Goal 5 generally for the requirement to analyze the economic, social, environmental and energy (ESEE) consequences of preserving a potential Goal 5 resource.

designating and preserving historic structures and properties. Most historically listed properties in Oregon were designated before the adoption of SB 588 (1995), thus, most of the original "property owners" were not given the ability to opt-out provided by ORS 197.772(1). The Court's decision could have the effect of allowing the successor "property owners" of every one of those properties to opt-out unilaterally from the local historic program and demolish the resource. Over time, this will eliminate the program because eventually many (in some jurisdictions maybe all) of the owners of these properties will exercise this new de-listing option under ORS 197.772(3) even though the property went through an exhaustive public evaluation process under Goal 5 and the current "property owner" purchased the property with notice, knowledge and the benefits of the historic designation.

5. <u>The issue is one of first impression in the Supreme Court</u>: Prior to this, LUBA had construed ORS 197.772 only once, in a case that was not appealed further. *See Demlow v. City of Hillsboro*, 39 Or LUBA 307 (2001). The Court of Appeals never previously construed ORS 197.772, nor has the Supreme Court.

6. <u>The legal issue is properly preserved, free of factual disputes, and both LUBA and the Court of Appeals issued written opinions</u>: The central issue in this appeal is a question of law –interpretation of a state statute – that was the central issue before LUBA and the Court of Appeals. It is properly preserved for

Supreme Court review in the briefs and the record. The Court's interpretation is governed by ORS 174.020, *PGE v. Bureau of labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993) as modified by *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009), to give primary weight to the text and context of the provisions in light of any legislative history that may be appropriately considered.

7. The Court of Appeals' decision is wrong: LUBA provided the initial review of the legislative materials associated with SB 588 (1995), thoroughly analyzed what if found and reached a conclusion that considered the specific issue now presented to the Supreme Court, *i.e.,* whether successor owners of historically listed properties are "property owners" under ORS 197.772(3) and unilaterally demand the removal of their properties from a local historic inventory. The Court of Appeals was less thorough in its review of the same legislative history and makes no mention of the Goal 5 historic protection program. The Court made no mention of the inferences drawn by LUBA, who reached a different conclusion from the same legislative history.

8. The Court will be assisted by historic preservation organizations, with state-wide experience with Goal 5 and local preservation programs, who will participate amicus curiae if review is granted: Several state-wide historic preservation organizations that assist property owners throughout the state to obtain historic status for their properties under the State (Goal 5) program or the

National Park Service program (National Register of Historic Places) are keenly interested in this case because of its potential to gut the Oregon state program. One or more will intervene amicus curiae to assist the court and provide a state-wide perspective of the impact of this issue.

ARGUMENT REGARDING THE LEGAL QUESTION ON REVIEW

ORS 197.772 is ambiguous, and its application to locally historic properties listed before 1995 and subsequently conveyed is not clear. Both subsections (1) and (3) use the operative term "property owner." A proper interpretation of the statute must consider the legislative history associated with SB 588 (1995) and the State-wide Planning Goal 5 historic preservation program.

The legislative materials that struck LUBA as critical and enlightening were the series of amendments offered in May 1995 to the House Committee on General Government and Regulatory Reform. The amendments were initially motivated by property owners whose property had been listed without their consent, indeed over their objections. The remedy to that problem (owner consent to the initial listing) is addressed in ORS 1997.772(1). However, during the course of committee hearings in May 1995 the question arose about whether subsequent owners who acquire the historically listed property could also opt-out, *i.e.*, whether the power to opt-out unilaterally ran with title to the land and the subsequent owners stood in the same position as the original "property owner." The bill's sponsors indicated

that they hadn't considered the question. LUBA traced the series of amendments and concluded the following about the final proposed amendment (the so-called "Exhibit L" amendment) that the committee rejected:

> "…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."*LOPS* slip op at 22-23.

This left in place the previous A-9 amendment that became ORS 197.772(3), which LUBA concluded "was originally intended to apply only to property owners at the time of designation, on whom the designation was imposed without consent." *Id* at 23. Considering the intervenor's argument in this light and the context of the Goal 5 program, LUBA concluded that:

> "…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

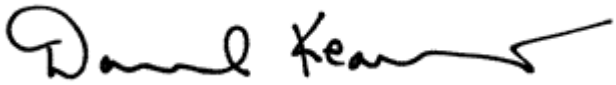
> interpretation, persons who obtain property subject to a historic designation may still seekremoval of the designation, subject to Goal 5 considerations.
>
> "Although it is a close question, we are ultimately persuaded that thelegislature did not intend that "a property owner," as used in ORS 197.772(3),includes persons who become owners of the property after it is designated.Accordingly, intervenor is not a "property owner" within the meaning of ORS197.772(3), and the city erred in removing the Carman House designationbased on ORS 197.772(3)." *LOPS*, LUBA slip op at 25.

The Court of Appeals glossed-over the distinction between property owners at the time of historic designation and subsequent owners, the primary remedial motivation of SB 588, and the purpose, procedures and policy of the Goal 5 historic preservation program. These were all important considerations to LUBA's interpretation and its conclusion. The Court saw no reason to believe that the legislature meant to treat subsequent owners any differently, but is not clear that the Court really looked at that question. Without discussion of the distinction, the Court summarily concluded that subsequent owners stood in the same shoes as the original owner at the time of historic listing and could therefore unilaterally opt-out at any time, years or decades after original listing.The Court also did not appear to consider the implication of its holding that the current owners of properties that had been listed prior to 1995 might also seek to de-list even though they were not the original owner.

For all of these reasons, this is a significant case of state-wide importance that merits Supreme Court review.

Respectfully submitted this 11th day of March 2015.

REEVE KEARNS PC



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CERTIFICATE OF SERVICE AND FILING
and Certificate of Word Count

I hereby certify that on the date indicated below, I caused to be filed the attached PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION with the:

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by e-filing. On the same date I caused to be served two true, complete and correct copies of the same document by First Class Certified U.S. Mail, return receipt requested on the following parties or attorneys:

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I further certify that APPELLANTS' PETITION FOR SUPREME COURT REVIEW OF COURT OF APPEALS DECISION complies with the word count limitation in ORAP 9.05(3)(a) for a Petition for Supreme Court Review; it is proportionately typed, not smaller than 14-point font for body and footnotes and contains 2,877 words.

DATED this 11th day of March 2015.

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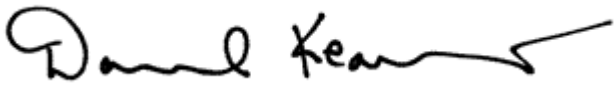

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