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GARVEY SCHUBERT BARER

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April 20, 2015

State Court Administrator
Appellate Court Records Section
1163 State Street
Salem, Oregon 97301-2563

Re: *Lake Oswego Preservation Society, et al v. City of Lake Oswego, et al*
Court of Appeals Case No. A157619
S063048

Dear Sir:

Please find enclosed herewith for filing the original of the Response to Petitioner, Cross-Respondent's Motion to Strike Brief of Restore Oregon and Architectural Heritage Center as *Amici Curiae* in Support of Petition For Supreme Court Review.

Sincerely,

GARVEY SCHUBERT BARER

By 
Carrie A. Richter

Enclosure

cc: Christopher Koback
Evan Boone
Honorable Ellen F Rosenblum
Daniel Kearns
Oregon Land Use Board of Appeals

GSB:7018380.1 [30188.02018]

IN THE SUPREME COURT OF THE STATE OF OREGON
LAKE OSWEGO PRESERVATION SOCIETY, MARYLOU COLVER and
ERIN O'RURKE-MEADORS,

Respondents,
Cross-Petitioners,
Petitioners on Review,

v.

CITY OF LAKE OSWEGO,

Respondent,
Cross-Respondent,
Respondent on Review,

and

MARJORIE HANSON, Trustee for the Mary Cadwell Wilmot Trust,

Petitioner,
Cross-Respondent,
Respondent on Review.

Court of Appeals Case No.
A157619

S063048

**RESPONSE TO PETITIONER, CROSS-RESPONDENT'S MOTION TO
STRIKE BRIEF OF RESTORE OREGON AND ARCHITECTURAL
HERITAGE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITION
FOR SUPREME COURT REVIEW**

Amici Restore Oregon and Architectural Heritage Center (“Amici”) hereby respond to Petitioner, Cross-Respondent, Marjorie Hanson, Trustee for the Mary Cadwell Wilmot Trust’s (“Cross-Respondent’s”) Motion to Strike pursuant to ORAP 7.05(3). Cross-Respondent’s motion is premised on the inclusion of “extra-record” evidence in Amici’s brief; however, that evidence is expressly permitted by ORAP 9.07 and was submitted to establish the number of people and historic resources affected by the Court of Appeals’ decision and the regularity under which requests for removal of historic designations will arise. These reasons respond directly to criteria that this Court is to consider in determining whether to grant a petition for review. ORAP 9.07(2) & (3). In fact, Footnote 1 to ORAP 9.07 expressly authorizes the court to consider extra-record evidence for this exact purpose. It provides:

A party may include in an appendix to a petition for review materials in support of criteria under this rule that are not otherwise part of the record on appeal, such as materials demonstrating how the case may affect persons other than the parties to the immediate case or how the case is important to the public.

This material was not intended for inclusion within the record, as Cross-Respondent asserts, but rather for the purpose of explaining the wide-ranging impact this decision will have in other jurisdictions, for other historic resources statewide.

Tellingly, Cross-Respondent does not challenge the merits of those assertions but rather objects to the form of their presentation. Cross-Respondent

claims that the new materials cannot be considered because Amici are not “parties” and that the material was not attached as an appendix.

First, the use of the term “parties” referenced in the footnote should not be read to restrict the submittal of new evidence to only those parties who participated in the matter before the court of appeals. ORAP 8.15(5)(a) allows a person (or entity) to seek to appear *amicus curiae* and to file a brief in support of a petition for review, on the merits, or both, by filing a motion making such a request. On March 31, 2015, this Court granted Amici’s Motion to Appear giving them, in effect, party status such that they could present a case for discretionary review by this court that included evidence outside the record. Order attached as Exhibit A. There is no reason to artificially limit the scope of an *amici* submittal because the footnote references the term “party” rather than “party and all *amici* participants,” when the rule allows the court to consider evidence outside the record.

More importantly, as explained in the Motion to Appear as *Amici Curiae*, Restore Oregon is the sole non-profit entity charged with monitoring and furthering the preservation and restoration of historic resources throughout the State. As a result, Restore Oregon is uniquely qualified to present a survey of the extent to which historic preservation protections have been imposed on property owners statewide, to explain how the Court of Appeals decision would have a devastating effect on those resources and to present relevant examples. This is a perspective that the “parties,” as Cross-Respondent would have limited, do not share as they are particularly concerned with a single resource, the oldest standing structure within the City of Lake Oswego.

Second, to the extent that Amici erred by not including the materials in appendix form, the same materials contained in their Petition in Support of Review is attached as Exhibit B for this Court's consideration. Where third party accounts are available, such as an article published by the East Oregonian, relating a story about a historic resource in the City of Pendleton, it was attached.

Cross-Respondent argues that this Court should not consider the extra-record evidence because she did not have an opportunity to challenge it during the proceeding before the local government below.

First, nothing in the ORAP suggest this same concern. Rather, the footnote in ORAP 9.07 indicates the opposite. Cross-Respondent could have explained how the facts of this case are anomalous and are not likely to occur routinely. Or others, presumably a representative of the building industry, could have filed an *amicus curie* brief in support of Cross-Respondent's position to counter Amici's assertions. They failed to do so and cannot rely on a baseless motion to strike as the vehicle to raise these concerns. In any event, the failure to include counterveiling evidence can not undermine Amicis' explanation of the significant impacts this decision will have in jurisdictions across this state.

Requiring that participants in a local government land use proceedings submit evidence showing how a decision would impact others as a means to establish a precautionary record, in the event that a petition is filed before this Court, would impose an unreasonable burden. Nothing in the ORAP or state law requires as much. It makes far more sense to allow the court to consider

evidence on the nature and regularity of the impact, once the issues have been framed through appeal, and included as part a petition for review or a brief in support of the same.

To suggest that subsequent owners do not know of historic property designations because title companies do not provide such information as part of the conveyance process is misleading. First, as noted in the Amicis' Brief, historic designation typically results in higher property values, meaning that historic designations are well-known in the purchase of property. Moreover, title reports are, by their nature, limited in their scope. There are any number of limitations on the use of property that do not appear in title reports and historic designations are only one of those limitations. The legislature acknowledged as much by adopting ORS 93.040, which mandates that all sales agreements, earnest money receipts or other instruments of conveyance instruct the purchaser to "VERIFY THE APPROVED USES OF THE LOT OR PARCEL" prior to purchase. Presumably, Cross-Respondent saw that very language and had an opportunity to inquire further before the property was purchased.

For these reasons, Cross-Respondent's Motion to Strike should be denied.

Dated this 20 day of April, 2015.

GARVEY SCHUBERT BARER

By: 
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IN THE SUPREME COURT OF THE STATE OF OREGON

LAKE OSWEGO PRESERVATION SOCIETY, MARYLOU COLVER, and ERIN O'RURKE-MEADORS,
Respondents
Cross-Petitioners,
Petitioners on Review,

v.

CITY OF LAKE OSWEGO,
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Cross-Respondent,
Respondent on Review,

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Petitioner
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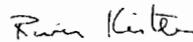
Court of Appeals
A157619

S063048

ORDER GRANTING APPLICATION TO APPEAR AS *AMICUS CURIAE*

This matter is before the court on the application of Restore Oregon and Architectural Heritage Center, for leave to appear *as amicus curiae* and file a brief in support of the petitioners on review. ORAP 8.15(5). The application is granted.

The brief of the *amicus curiae* submitted with the application is filed this date. However, the title on the brief is incorrect. You must re-file the brief with the correct title as shown in the caption of this order within 14 days from the date of this order. The *amicus curiae* may appear by brief only.



3/31/2015
9:37:47 AM

RIVES KISTLER
PRESIDING JUSTICE, SUPREME COURT

ORDER GRANTING APPLICATION TO APPEAR AS *AMICUS CURIAE*

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State Street, Salem, OR 97301-2563

c: Evan P Boone
Daniel H Kearns
Christopher P Koback
Jennifer Bragar

sh

ORDER GRANTING APPLICATION TO APPEAR AS *AMICUS CURIAE*

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
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Restore Oregon, a statewide 501(c)(3) nonprofit organization incorporated in 1977, has a mission to “preserve, reuse, and pass forward Oregon’s historic places to ensure livable, sustainable communities.” Headquartered in Portland, Restore Oregon works with property owners, governments, and organizations around the state to advance historic preservation objectives, educate the general public, and ensure that appropriate policies are enforced to protect historic resources.

Since 2011, I have served as the organization’s Senior Field Programs Manager, a position that requires regular engagement with historic preservation programs in jurisdictions across Oregon. Concerning the case *Lake Oswego Preservation Society v. City of Lake Oswego*, I testified at the Lake Oswego Historic Review Board and City Council hearings, as well as attended oral arguments at the Land Use Board of Appeals and Court of Appeals. My experience working with planners, commissioners, and preservation professionals across Oregon provided me with a unique ability to assemble much of the research presented in the Brief for Restore Oregon and Architectural Heritage Center as Amici Curiae in Support of the Petition for Supreme Court Review. My M.S. in Historic Preservation from the University of Oregon and B.S. in Community Development from Portland State University provided me with the methodological skills necessary to quickly and accurately collect the data included in the amicus curiae brief.

In Oregon, a total of 49 cities and counties are considered Certified Local Governments, a designation that requires those communities to take steps to designate and protect historic resources. Some of those communities have relatively few historic resources and others, such as Portland, have thousands. Given time and funding constraints, I conducted a survey of current and former planners and commissioners in jurisdictions with the greatest number of historic resources.

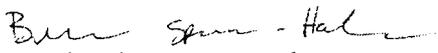
Prior to initiating my survey of Certified Local Governments, on March 11, 2015, I communicated by telephone with Ian Johnson and Chrissy Curran at the State Historic Preservation Office, a division of the Oregon Parks and Recreation Department. The State Historic Preservation Office determined that they did not have current data, nor would they be able to collect and analyze new data, regarding the scope of the Court of Appeals decision. This determination effectively placed Restore Oregon in the best position to provide meaningful assistance to the Court on this case. As such, between March 14 and March 17, I requested detailed information from the following communities about their local historic designation programs:

1. Albany. 94 properties were added to local inventory of historic properties by ordinance in 1991. Owners were provided notice and objections were honored.
2. Ashland.
3. Astoria. 368 local landmarks have been designated and owner objections were honored at the time of designation.
4. Baker City.
5. Bend. 61 locally-designated properties.

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6. Benton County. 45 properties were designated in the 1980s, but records are unclear as to whether owners had the right to object or if objections were even recorded. The Senior Planner estimates 50% of the locally-designated properties have changed hands since 1995.
 7. Clackamas County.
 8. Columbia County. 34 local landmarks designated before 1995. It could not be determined whether owners were given an opportunity to object.
 9. Corvallis. 98 properties locally designated. Owners were given opportunity to object, and objections were honored.
 10. Cottage Grove.
 11. Deschutes County. 34. Local landmarks. Owners were notified and given the opportunity to object, records of which are on file. An unknown number of these local landmarks were designated against owner objection, at least two of which have been de-designated since passage of ORS 197.772.
 12. Eugene.
 13. Grants Pass.
 14. Hood River County. 15 properties locally designated in 1976.
 15. La Grande.
 16. Lake Oswego. 72 landmarks designated prior to adoption of ORS 197.772. Owners received notice and objections are kept on file.
 17. Medford.
 18. Oregon City. 376 properties were designated as local landmarks in 1981-83. All property owners were given notification, but a number of properties were listed over objections of their owners.
 19. Pendleton. 169 properties designated in 1985, but due to a flood all records of owner notification and/or objection have been lost. The Umatilla County Assessor provided title records for 100 of the 169 properties; 99 have seen a change in ownership since 1985.
 20. Phoenix. Several properties were surveyed in the 1980s and are today regulated as landmarks. Opportunity for comment was not provided and no objection letters were filed.
 21. Portland. 127 properties are listed as local landmarks, most of them designated before 1995. Notice of the designation was provided and numerous properties were designated over the owner's objection. The 1985 Portland Historic Resource Inventory includes 5,158 buildings, for which owner consent was not collected. The last sale dates are available for 2,688 properties on the Inventory and, of those, 2,666 have changed ownership since the time of Inventory listing. An additional designation, Conservation Districts, includes 1,612 properties, 1,104 of which have changed hands since their 1993 designation.
 22. Redmond. 15 locally-designated properties.
 23. Salem.
 24. Talent. Local inventory compiled in 1980s and owners were given the ability to comment.
 25. The Dalles. 98 properties designated as local landmarks between 1984 and 1995. No information could be found on file about notice or objections. According to the city's planner, roughly 80% have changed ownership since the time of designation.

I was able to collect data through telephone interviews, email correspondence, and review of historic resource lists. Data collection took place between March 14 and March 22, 2015. The three case studies presented in the petition required real estate transaction information provided by

Umatilla County, City of Portland, and City of The Dalles, as well as in-house data analysis to most accurately capture the number of historic resources subject to the Court of Appeals' interpretation of ORS 197.772.


Brandon Spencer-Hartle
Senior Field Programs Manager
Restore Oregon

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the date indicated below, I caused to be filed the original of the attached RESPONSE TO PETITIONER, CROSS-RESPONDENT'S MOTION TO STRIKE BRIEF OF RESTORE OREGON AND ARCHITECTURAL HERITAGE CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR SUPREME COURT REVIEW with the:

State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

by First Class US Mail. On the same date I caused to be served two true, complete and correct copies of the same document by First Class US Mail on the following parties or attorneys:

Christopher Koback
Hathaway Koback Connors LLP
520 SW Yamhill Street, Suite 235
Portland, OR 97204

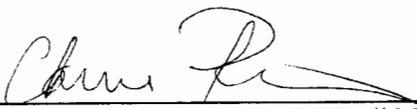
Daniel Kearns
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Oregon Land Use Board of Appeals
775 Summer Street NE, Suite 330
Salem, OR 97301-1283

Evan Boone
Assistant City Attorney
P O Box 369
Lake Oswego, OR 97034
Honorable Ellen F Rosenblum
Oregon Department of Justice
1162 Court St NE
Salem OR 97301

DATED this 20 day of April 2015.

GARVEY SCHUBERT BARER

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