39 Or LUBA 307, 2001 WL 868291 (Or Luba)

Land Use Board of Appeals
State of Oregon

****1** KAY
DEMLOW
, Petitioner,
vs.
CITY OF HILLSBORO, Respondent,
and
JERRY BAYSINGER AND WASHINGTON COUNTY, Intervenors-Respondent.

LUBA No. 2000-160

REMANDED January 12, 2001

***307** Appeal from City of Hillsboro.

Kay Demlow, Hillsboro, filed the petition for review and argued on her own behalf.

Timothy J. Sercombe, Portland, and James R. George, Portland, filed a response brief. With them on the brief was Preston, Gates and Ellis, LLP. James R. George argued on behalf of respondent.

Michael C. Robinson, Portland, and Frank M. Flynn, Portland, filed a response brief. With them on the brief was Stoel Rives LLP. Frank M. Flynn argued on behalf of intervenor-respondent Jerry Baysinger.

Alan A. Rappleyea, Senior Assistant County Counsel, Hillsboro, filed a response brief and argued on behalf of intervenor-respondent Washington County.
BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

1. 25.3.2 Local Government Procedures - Compliance with Statutes - Applicable Criteria.
26.2.6 LUBA Jurisdiction - Land Use Decision: Statutory Test - Ministerial Exception.
LUBA will deny a motion to dismiss based on an argument that the challenged decision is a ministerial decision, where the decision interprets and applies a local land use ordinance adopted to implement a statute and that interpretation requires the exercise of discretion.

2. 9.2 Goal 5 - Open Spaces and Natural Resources/ Goal 5 Rule - Resource Inventory.
25.3.2 Local Government Procedures - Compliance with Statutes - Applicable Criteria.
28.8.5 LUBA Scope of Review - Grounds for Reversal/Remand - Noncompliance with Applicable Law.
A local ordinance that institutes a process to remove property from a Goal 5 historic resources inventory but fails to include a method to determine whether the historic designation was "imposed" on the property, within the meaning of ORS 197.772(3), is inconsistent with that statute.

3. 9.2 Goal 5 - Open Spaces and Natural Resources/ Goal 5 Rule - Resource Inventory.
25.3.2 Local Government Procedures - Compliance with Statutes - Applicable Criteria.
28.8.5 LUBA Scope of Review - Grounds for Reversal/Remand - Noncompliance with Applicable Law.

A local government may not apply only local code provisions to an application to remove property from a historic resources inventory, where the local code provisions are inconsistent with statutory provisions permitting removal of certain properties from a historic resources inventory.

Opinion by Briggs

NATURE OF THE DECISION
Petitioner appeals a decision by the city to remove a building from the city's cultural resources inventory.

***309 MOTIONS TO INTERVENE**
Jerry Baysinger and Washington County move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed. [FN1]

FACTS
In 1992, the Friends of Historic Hillsboro nominated the Old County Hospital (county hospital), which is located within the City of Hillsboro, to the city's cultural resources inventory (CRI). In 1993, the city adopted an amendment to the CRI to add the county hospital to the inventory. The CRI is mandated by the element of the city's comprehensive plan implementing Statewide Planning Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources).

****2** In August 2000, the city received a written request from the county administrator for Washington County, the owner of the county hospital, to remove the property from the CRI. That request was processed pursuant to a city ordinance that was adopted in July 2000 to implement the provisions of ORS 197.772. [FN2] The city ordinance does not, as of right, provide for a ***310** public hearing to permit testimony regarding compliance with the relevant criteria. [FN3]

The planning commission reviewed the request at a regular meeting. Petitioner appeared at the meeting to protest the removal of the property from the CRI. At the public meeting, the planning commission adopted a recommendation that the property be removed from the CRI. However, the planning commission also recommended that the city council hold a public hearing on the matter. Upon receipt of the planning commission's recommendation to remove the property from the inventory, the city council voted to remove the county hospital from the CRI without conducting a public hearing.

This appeal followed.

MOTION TO STRIKE

Intervenor-respondent Baysinger (Baysinger) moves to strike four of five documents appended to the petition for review. [FN4] According to Baysinger, the documents are not in the record, nor are the documents otherwise cognizable in a LUBA proceeding. Petitioner has not responded to the motion to strike.

The documents appended to the petition for review include correspondence between petitioner and other interested persons and the planning director, minutes of the 1993 planning ***311** commission meeting where the county hospital property was added to the CRI, and a letter from an assistant attorney general to the director of the Department of Land Conservation and Development, discussing ORS 197.772.

Because petitioner has failed to demonstrate that the documents are in the record of proceedings below, or are otherwise subject to official notice, Baysinger's motion to strike is granted.

MOTION TO DISMISS

Intervenors move to dismiss this appeal. According to intervenors, the action of the city in removing the county hospital from the CRI is not a land use decision. Intervenors argue that because Ordinance 4932 does not contain discretionary criteria, the removal of a property from the CRI falls under the exception to "land use decision" found in ORS 197.015(10)(b)(A).ORS 197.015(10)(b)(A) provides that the definition of land use decision does not include a decision by a local government:

> "Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

Intervenors argue that the city's removal of a property from the CRI under Ordinance 4932 does not require any discretion. In intervenors' view, if the owner of a property listed on the CRI submits a written request to remove the property from the inventory, the city cannot deny the request.

****3 1** We disagree that the city's decision falls within the scope of ORS 197.015(10)(b)(A). Our jurisdiction is based on the interpretation and application of an ordinance that implements a statute, here ORS 197.772. As we explain below, ORS 197.772(3) requires the city to conduct a discretionary inquiry before it can remove a historic designation from property. That Ordinance 4932 fails to incorporate that discretionary inquiry does not render the city's decision one that does not require the exercise of policy or legal judgment. Intervenors' motion to dismiss is denied.

***312 INTRODUCTION**

Petitioner's assignments of error fall into three categories. The first category includes arguments that the process used by the city to adopt Ordinance 4932 and its subsequent application in the challenged decision fail to comply with requirements in the city's comprehensive plan and zoning ordinance that land use actions in general be subject to broad public participation. The second category includes arguments that the city's decision fails to comply generally with Oregon land use laws and goals and, as a result, deprives petitioner of constitutional due process rights. In the third category, petitioner contends that the city's decision to remove the county hospital from the CRI violates ORS

197.772, because that statute only permits historic properties to be removed from a comprehensive plan inventory if the historic designation was "imposed" on the property. Petitioner argues that the city's decision and the ordinance setting out the removal process are flawed in that they do not require evidence to show that the historic designation in this case was imposed on the county. We address only petitioner's argument regarding the "imposed" requirement of ORS 197.772(3) because her other arguments are either collateral attacks on acknowledged plan and land use regulations or insufficiently developed for review.

INTERPRETATION AND APPLICATION OF ORS 197.772

Petitioner argues that the city failed to follow all of the requirements set out in ORS 197.772(3) pertaining to the removal of a historic structure from the CRI. According to petitioner, before the city may remove a property from the CRI the city must conclude that the listing of the cultural resource was "imposed" on the property owner.

Respondents first argue that the issue is not sufficiently developed by petitioner in the petition for review and, therefore, they are not able to provide a response. We will consider arguments presented in a petition for review where we are able to determine the nature of those arguments and where such arguments are stated clearly enough to afford a response. *Silani v. Klamath County*, 22 Or LUBA 734, 736 (1992). We disagree with respondents that the argument regarding whether the city properly applied the "imposed" requirement of ORS 197.772(3) is ***313** not stated clearly enough for review. The petition for review clearly states the view that ORS 197.772(3) requires that a historic property designation must have been placed upon a property over the objection of the owner in order to allow the owner to require removal of that designation under ORS 197.772(3). Respondents' decision not to address this issue does not change the fact that petitioner stated the issue clearly enough to provide an opportunity to respond.

****4** Respondents next argue that whether Ordinance 4932 fully comports with statutory requirements cannot be addressed in this appeal because that argument is essentially a collateral attack on an ordinance that has been acknowledged. We disagree. Acknowledgement forecloses challenges to plans and land use regulations based on noncompliance with the statewide planning goals; it does not foreclose challenges based on noncompliance with statutes. *Foland v. Jackson County*, 18 Or LUBA 731, 754-55,*aff'd*101 Or App 632, 792 P2d 1228 (1990), *aff'd*311 Or 167, 807 P2d 801 (1991) (statutory requirements do not become inapplicable to local governments after acknowledgment of their plans and land use regulations).

ORS 197.772(3) provides:

> "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.)

Petitioner argues that ORS 197.772(3) requires a local government to answer two questions affirmatively before it may remove a historic property designation. First, was the historic designation put in place as a result of an action by the local government? Second, was the historic designation imposed on the property? According to petitioner, for a historic designation to be "imposed" on a property, the local government must have placed the designation on the property over the objection of the owner. None of the respondents address this issue; instead they rely upon the argument, rejected above, that petitioner's challenge is an impermissible collateral attack on the ordinance. At oral argument, however, intervenor Washington County disagreed with petitioner's interpretation of the word "imposed" in ORS 197.772(3).

***314** The city's recently amended ordinance, designed to implement ORS 197.772(3), provides in pertinent part:

> "The property owner or owners of record of a site listed on the Cultural Resources Inventory prior to September 1, 2000, may request removal of the site from the Inventory by submitting a written request to the Planning Director." Hillsboro Zoning Ordinance No. 1945, Section 132(4)(g).

The city's ordinance does not mention the word "imposed," let alone require a determination that a historic designation was placed on a property over the owner's objection. Therefore, if petitioner is correct that the statute only allows owners to remove historic designations if those designations were placed on the property over their objections, then the city's decision under the ordinance is inconsistent with ORS 197.772(3).

The question we face is one of statutory construction. When interpreting a statute, we follow the methodology set out in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993). We first look to the text and context as the best evidence of the legislature's intent. *Id.* at 610-11.Giving the text its plain, natural and ordinary meaning, we attempt to determine its meaning without inserting what has been omitted, or omitting what has been inserted. *Id.* at 611.Context may include "other provisions of the same statute and related statutes, prior enactments and prior judicial interpretations of those and related statutes, and the historical context of the relevant enactments." *Young v. State of Oregon*, 161 Or App 32, 35-36, 983 P2d 1044,*rev den*329 Or 447 (1999) (citations omitted). If the legislature's intent is not clearly expressed in the text and context of the statute, we consider the statute's legislative history. *PGE*, 317 Or at 611-12.

****5** The text of the statute allows a property owner to remove a historic property designation that was "imposed on" the property. [FN5] Among the many definitions of "impose" are: "to give or bestow (as a name or title) authoritatively or officially"; "to ***315** cause to be burdened"; "to make, frame, or apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable"; "force one to submit to or come into accord with"; "to establish forcibly." *Webster's Third New International Dictionary*, 1136 (unabridged ed 1981).*Webster's* also defines "impose on" as: "to force oneself esp. obnoxiously on (others)"; "to encroach or infringe on"; "to take unwarranted advantage of"; "to practice deception on." *Id.* Although there are many meanings associated with the word "impose," the majority of the meanings support petitioner's argument that it involves doing something over the objection of another.

The context of ORS 197.772(3) also supports petitioner's argument. ORS 197.772(1) provides that "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." This provision demonstrates that the time for objecting to a historic property designation is during the designation process. An owner who fails to refuse to consent during the designation process is thereafter precluded from objecting to the historic designation. ORS 197.772(1) and (3), read in conjunction, make reasonably clear that the time for objecting to a historic property designation is during the designation process, and that owners who had historic designations placed upon their properties before the owner consent provision of ORS 197.772(1) was available may have those designations removed if they were placed on the properties over the objections of the owners.

We generally consider legislative history only if the statutory language is capable of more than one construction. *PGE*, 317 Or at 611-12. Although we do not find that the language of ORS 197.772(3) is capable of more than one construction, we also find that the legislative history supports our conclusion. *See State v. Sumerlin*, 139 Or App 579, 587

n 7, 913 P2d 340 (1996) (examination of text and context ended the inquiry but court nonetheless noted that legislative history also supported text and context reading).

The legislature adopted ORS 197.772 in 1995 as Senate Bill 588. During a May 4, 1995 House General Government and Regulatory Reform Committee work session, Representatives Bryan Johnston, Cedric Hayden, Patti Milne, and Bob Tiernan ***316** discussed the meaning and intent of the word "imposed" in the statute:

> "REP. JOHNSTON: When we look at the - A9 [FN6] and the -A10 [FN7] amendments together, could someone consent under the -A10 amendments and later ask to be out under the -A9 amendments?
>
> ****6** "REP HAYDEN: Responds he thinks it would be read in context as a whole to apply to the -A10 and -A9.
>
> "REP JOHNSTON: The -A10 grants the property owner the right to refuse to consent to any form of historic property if they choose to. They could choose to agree. Under the -A9 amendments could the property owner two years later decide to take the property out of the designation?
>
> "REP MILNE: My intent in the language in line 3, 'historic property designation that was imposed on the property …' is when the property owners were not allowed to consent and government imposed it on them, they would have an opportunity to remove their property.
>
> "REP JOHNSTON: If a person does it under Section 10 but had the opportunity to not do it, can they, two years later, take their property out?
>
> "REP MILNE: That was not my intent.
>
> "CHAIR TIERNAN: Then once a person voluntarily puts their property in, it is in.
>
> "REP JOHNSTON: That is what I want to understand." Minutes, House Committee on General Government and Regulatory Reform, Work Session on SB 588, May 4, 1995, p 9.

2, 3 Representative Milne submitted the proposed amendments that included the provision that is currently ***317** codified at ORS 197.772(3). House Committee on General Government and Regulatory Reform, Work Session on Senate Bill 588, Exhibit N (May 2, 1995). The foregoing discussion strongly suggests that the legislature intended that property owners who voluntarily allow their property to receive historic designation status cannot subsequently have that designation removed under ORS 197.772(3). Accordingly, we conclude from our examination of the statutory text, context, and legislative history, that ORS 197.772(3) requires that a historic designation have been placed on a property by the local government over the objection of the owner in order to have that designation removed pursuant to the statute. In the present case, the city did not determine that the historic designation was imposed on the property by the local government over the objection of the owner. [FN8]

Petitioner's argument is sustained.

The city's decision is remanded.

[FN1]. We refer to intervenors-respondent Baysinger and Washington County together as "intervenors" and to respondent and intervenors-respondent together as "respondents."

[FN2]. ORS 197.772 provides, in relevant part:

> "(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 358.475 to 358.545 or other law.

"(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."

[FN3]. Ordinance 4932 adds Section 132(4)(g) to the city zoning ordinance. Section 132(4)(g) provides the following process for removing properties from the CRI:

"The property owner or owners of record of a site listed on the [CRI] prior to September 1, 2000, may request removal of the site from the Inventory by submitting a written request to the Planning Director. The request shall describe the site and its location with particularity. The Planning Director shall submit the request to the Planning Commission for adoption of a resolution acknowledging the request and forwarding the request to the City Council for approval. Upon receipt of the resolution of the Planning Commission, the City Council shall adopt a resolution removing the site from the [CRI]. The Planning Commission shall not conduct a public hearing on the request, but may recommend that the City Council conduct a public hearing. The City Council may, but need not, conduct a public hearing on the request."

[FN4]. The fifth document is a copy of Ordinance 4932.

[FN5]. A "designation" is a "decision by a local government declaring that a historic resource is 'significant' and including the resource on the list of significant historic resources." OAR 660-023-0200(1)(a).

[FN6]. The "-A9" amendment is the subsection that was eventually codified at ORS 197.772(3), *i.e.*, the "imposed" language.

[FN7]. The "-A10" amendment is nearly identical to what is currently codified at ORS 197.772(1), *i.e.*, the owner consent language. The only change was to add to the owner consent provision that the property owner could refuse to consent to a historic property designation "at any point during the designation process."

[FN8]. We do not consider the question of whether and under what procedures or standards the city can remove the historic designation from property that was designated without the objection of the owner.

39 Or LUBA 307, 2001 WL 868291 (Or Luba)

END OF DOCUMENT