



TO: Historic Resources Advisory Board

FROM: Leslie Hamilton, AICP, Senior Planner

SUBJECT: LU 13-0012

DATE: September 10, 2013

BACKGROUND

The public hearing for LU 13-0012, the request to remove the historic landmark designation on the Carman House, was scheduled to be held on August 14, 2013. On that day, the applicant submitted additional information regarding this request (Exhibit G-2-3). The applicant specifically indicated an additional ground for removal under ORS 197.772(3). The applicability of ORS 197.772 was neither expressly raised in the applicant's original narrative (Exhibit F1), nor was the application analyzed under that statutory argument in the August 1, 2013 Staff Report. The Deputy City Attorney advised the applicant's representative that staff would recommend that HRAB take public testimony at the August 14th hearing, but continue the hearing until its next regular meeting on September 11, 2013, in order for staff to fully address ORS 197.772. However, the applicant's attorney requested the entire public hearing be continued to September 11. This will be the first evidentiary hearing.

ANALYSIS

ORS 197.772 Consent for Designation as Historic Property.

a. "Imposed" Designation / ORS 197.772(3)

The applicant asserts (Exhibit G-2-3) that the property is entitled to be removed from the historic designation list under ORS 197.772(3), enacted in 1995:

ORS 197.772 (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 City acknowledges the separate statutory basis exists for removal of property from historic designation. Under ORS 197.772(3), the City must allow property to be removed from historical designation if the designation was "imposed" on the property. In Demlow v. City of Hillsboro, 39 Or LUBA 307 (2001), the Land Use Board of Appeals (LUBA) held, after

reviewing the legislative history of the adoption of ORS 197.773 in 2001, that “imposed” means a property owner must have actively objected to the historic landmark designation during the designation process in order to now utilize the statutory removal provision:

“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 (Exhibit F10).”

The Historic Preservation Code at the time (LOC Chapter 58), predating ORS 197.773, allowed a 45-day period following landmark designation in which a property owner could request that his or her property be individually evaluated at a public hearing. The list of designated landmarks became effective on April 13, 1990, and requests for individual evaluations must have been made before May 29, 1990. The applicant requested individual evaluation on May 15, 1990 for both Tax Lot 1200 (Carman House) and Tax Lot 1201 (Carman barn), (Exhibit F9). While these tax lots were under different ownerships, the requests were considered together because the property had not been legally divided. [Note: the current reference for the Carman House and property is Tax Lot 10600 of Tax Map 21E 05CD.]

The applicant’s representative maintains that the applicant objected to the historic designation at the time it was designated in 1990, and thus the historic designation was “imposed” on both Tax Lots 1200 and 1201. Thus, per ORS 197.772(3) and LUBA’s interpretation of that statute in *Demlow*, the Board must determine from the evidence and testimony whether or not the “historic designation [was] placed on a property by the local government over the objection of the owner.”

The long history of the HRAB and Council hearings and findings, the appeal to LUBA (later withdrawn after destruction of the barn), and HRAB and Council’s subsequent reconsideration of the historic designation on both tax lots is documented in the August 1, 2013, Staff Report.

Staff notes that, as shown in the Council’s Findings, Conclusion and Order from the 1991 proceedings (Exhibit F6, page 3), the Council found the applicants¹ objected to the historic designation of the Carman House and a portion of the land surrounding it. Specifically:

“3. Mr. Gregg and Mr. Wilmot requested the Council to make one of three alternative decisions. *Their preferred alternative is that both tax lots be removed from the landmark designation list.* This request is based on their argument that the original designation of the property as a landmark did not comply with the Oregon Administrative Rule for Statewide Land Use Goal 5.

¹ In 1990, the applicants were Mr. R. B. Wilmot (owner of Tax Lot 1200) and Mr. Glenn Gregg (owner of Tax Lot 1201). Although under different ownerships, the properties were considered as one site because the parent parcel had not been legally partitioned prior to the sale of Tax Lot 1201 to Mr. Gregg. Mr. Wilmot and Mr. Gregg were co-applicants on the request.

Their second preference is that the landmark designation be limited to the Carman house and a discrete portion of Tax Lot 1200 immediately surrounding the house, removing the designation from the remainder of Tax Lot 1200.

Their third preference is that the designation be limited to Tax Lot 1200, removing the designation from Tax Lot 1201.”

The applicants’ 1991 original narrative also indicates that the applicants objected to the historic designation:

“As landmark designation relates to the 1.25 acre Tax Lot 1200 property, the site does not meet the City of Lake Oswego Ordinance 2000 criteria for such designation.

Reasons for removal of the landmark designation: [6 reasons for removing the landmark designation are cited].”

In 1991, ORS 197.772 did not yet then exist and thus a request for removal of historic designation could not be made under the statute. This Council finding, the applicants’ original narrative, and the subsequent LUBA appeal, appears to staff to meet the *Demlow* requirement that a property owner has objected at the time of the historic designation to its inclusion on the historic landmark list.

The Council decision was appealed to LUBA, but, after the barn burned, it was remanded to HRAB and Council to reconsider the effect of the barn’s destruction. Staff also reviewed the Council findings following the 1992 LUBA remand. As described in the Council’s Findings, Conclusions and Order in 1992 (Exhibit F4, page 8), the Council stated:

“In the proceedings on reconsideration, no party contested the historic significance of the Carman House or that the house and Tax Lot 1200 should remain on the Historic Landmark Designation List (with the exception of a small strip of property on the north and east portions of Tax Lot 1200....”

However, the Council also “reaffirm[ed] and incorporate[ed] by reference its original Findings regarding the historical significance of the Carman house and Tax Lot 1200 contained in Finding No. 7 of its July 17, 1991, Findings of Fact, Conclusion of Law and Order.” (Exhibit F4, page 8).

This finding, in staff’s reading, is not an indication of a change of position for the applicants, i.e., that they no longer objected to the landmark designation, especially since the findings incorporated the entire record, including the earlier objection. Further, the issue of the historical significance of the Carman house and Tax Lot 1200 is not at issue under ORS 197.772(3), as interpreted by *Demlow*. The question isn’t whether the site has historical significance; the question is whether the owner objected to the historic landmark designation. Staff concludes from the record in the 1991 and 1992 proceedings that the owners objected to the historic landmark designation in the means and manner available to them at the time, thereby meeting the “imposed” requirement under ORS 197.772(3).

- b. Property Owner “Allowed to Refuse to Consent” to Designation / ORS 197.772(1)

The applicant does not assert that the property is entitled to be removed under ORS 197.722(1).

CONCLUSION

Based upon the information provided by the applicant and the evidence in the record, staff finds that there is evidence that the historic landmark designation was imposed, per ORS 197.772(3), on the Carman House and the 1.25 acre lot on which it is located.

RECOMMENDATION

Absent additional evidence presented at the hearing which supports a finding that the applicants consented to the historic landmark designation in 1991 and 1992, staff recommends that the Historic Resources Advisory Board find that the historic landmark designation was imposed, per ORS 197.772(3), on the Carman House and all or a portion of Tax Lot 1200.

EXHIBITS

F. WRITTEN MATERIALS

- F8 Oregon Revised Statute 197.772
- F9 Applicant’s Narrative, dated May 15, 1990 (HR 7-90)
- F10 Demlow v. City of Hillsboro, 39 Or LUBA 307 (2001) Opinion

