

**WEST LINN HISTORIC REVIEW BOARD
FINAL DECISION AND ORDER
AP 14-02 / ZC 14-02**

**IN THE MATTER OF A VOLUNTARY REMAND OF THE ZONE CHANGE
RECOMMENDATION FOR REMOVAL FROM THE HISTORIC DISTRICT
OVERLAY ZONE AND AN APPEAL OF THE CONDITION OF APPROVAL
FOR THE REAR DORMER**

I. Overview

On May 11, 2015, the Council remanded AP-14-02 and DR-14-02 to the West Linn Historic Review Board (“Board”) at the request of the Applicant, Lonny and Christine Webb, through their attorney, Christopher Koback.

At the Board’s meeting on June 9, 2015, the Board held a public hearing on the Applicant’s request to be removed from the Historic District Overlay Zone (Historic District) and the appeal of the condition of approval for the rear dormer. The approval criteria for a zone change and removal from the Historic District Overlay Zone are found in Community Development Code (CDC) Chapter 25, Overlay Zones - Historic District, and Chapter 105, Amendments to the Code and Map. The approval criteria for Historic Design Review are found in Chapter 25. The hearing was conducted pursuant to the provisions of Chapter 99.

The hearing commenced with a staff report presented by John Boyd, Planning Manager. There was no additional public testimony. Lonny Webb and Christopher Koback presented for the Applicant. The hearing on the zone change recommendation was closed, and a motion was made to recommend denial of the Applicant’s request to be removed from the Historic District Overlay Zone; the motion passed unanimously. The Applicant withdrew the garage design review component from consideration by the Board. The hearing on the design review application was closed and a motion was made by Board Member Jon McLoughlin and seconded by Board Member Chris Sherland to approve the application for the rear dormer with a modified condition of approval. The motion passed unanimously.

II. The Record

The record was finalized at the June 9, 2015, hearing. The record includes the entire file from ZC 14-02 and DR-14-02/AP-14-02, including without limitation the supplemental records entered on May 18, 2015, and June 9, 2015.

III. Burden of Proof

The applicant bears the burden of proof to demonstrate that an application complies with applicable approval standards, and a local government is not required to approve a noncomplying development proposal.¹ The historic design review application and the application for removal from the Historic District Overlay Zone require decisions on land use applications that necessitate compliance with customary land use procedures. Therefore, the applicant is required to carry the burden of meeting each and every criterion for approval.

IV. Incorporation of Staff Report

The Staff Reports for June 9, 2015, and October 21, 2014, (“Staff Reports”) hearings including all Addendums, Supplemental Findings, and exhibits to the Staff Reports, are incorporated into this Final Decision and Order. All the facts, findings and determinations in those Staff Reports are adopted except where the findings in this Final Decision and Order conflict with those Staff Reports. Where there is a conflict between this Final Decision and Order and the findings in the Staff Reports, the findings in this Final Decision and Order shall govern.

V. Findings of Fact

- 1) The Overview set forth above is true and correct.
- 2) The Applicants are Lonny and Christine Webb, and they were represented by their attorney, Christopher Koback, on the zone change recommendation.
- 3) The Board finds that it has received all information necessary to make a decision based on the Staff Report and attached findings; public comment, if any; and the evidence in the whole record, including any exhibits received at the hearing.

VI. Findings and Determinations

These findings will first address the: 1) request for removal from the Historic District, followed by the 2) design review application.

1) ZC-14-02

The Applicant requested removal from the Historic District pursuant to ORS 197.772(3) and CDC 25.100 in their November 7, 2013, letter and the application for ZC-14-02. The Applicant’s attorney further requested removal on the Applicant’s behalf in his April 20, 2015, letter. At no time prior to the Applicant’s submittal on June 5, 2015, which was received by Staff and transmitted to the Board on June 8, 2015, did the Applicant submit an application or letter requesting removal under ORS 197.772(1). Even though the request for removal pursuant to ORS 197.772(1) was untimely, these findings will address the recommendation that removal from the Historic District be denied pursuant to: A) CDC 25.100; B) ORS 197.772(3); and C) ORS 197.772(1).

¹ *Adler v. City of Portland*, 25 Or LUBA 546 (1995).

A) CDC 25. 100

The Board adopts the findings and determinations for CDC 25.100(A) in the Staff Reports. The Board finds that the Applicant did not demonstrate that the factors in 25.100(A) required removal; therefore, the Applicant did not carry the burden on this criterion. The inability to satisfy any one criterion required for removal from the Historic District is sufficient to deny removal from the Historic District.

CDC 25.100(B) Owner consent.

- 1. Historic landmarks. For historic landmark properties, the property owner at the time of designation must have objected, on the record, to the historic designation.*
- 2. Historic districts. For properties in historic districts, the property owner at the time of designation must have objected, on the record, to inclusion in the district.*

Further, the Board finds that CDC 25.100(B) incorporates the requirement from *Demlo v. City of Hillsboro*², that “imposed” means the historic designation is “imposed over the objections of the property owner at the time of designation.”³ The Board finds that the property located at 1344 14th Street (“Property”) was in the Historic District from 1983 and throughout all subsequent amendments to the zone. The Applicant did not provide any evidence of an objection on the record during the original designation of the Historic District in 1983, or the subsequent amendments to the Historic District in 1985, 1986, or 2013. Therefore, the Applicant did not meet the burden of proof required under CDC 25.100(B) for the Board to recommend removal from the Historic District.

B) ORS 197.772(3)

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. [1995 c.693 §21; 2001 c.540 §19.]*

Similar to CDC 25.100(B) regarding owner consent, the Board finds that ORS 197.772(3) requires a removal from the Historic District if the historic designation was imposed over the objections of the property owner at the time of designation. In addition, if the Applicant demonstrates that there was an objection from a property owner at the time of designation, a “successor property owner” is “entitled to have that designation removed under ORS 197.772(3).”⁴

The Applicant argues that a historic designation is “imposed” within the meaning of ORS 197.772(3) if a historic designation is made after 1995 without the consent of the property owner. The Board rejects this interpretation of “imposed” and finds that

² 39 OR LUBA 307 (2001).

³ *Lake Oswego Preservation Society v. City of Lake Oswego*, 268 Or. App. 811, 817 (2015) (citing *Lake Oswego Preservation Society v. City of Lake Oswego*, LUBA No. 2014-009 (2014)).

⁴ *Id.* at 821.

“subsection (3) was meant to provide a mechanism for property owners to remove a designation placed on their property and over an owner’s objection *before* enactment of ORS 197.772” in 1995.⁵ The Board finds that when subsection (3) was adopted it was limited so that property owners who did not utilize “subsection (1) to refuse consent after the enactment of ORS 197.772, could not use subsection (3) to remove the designation.”⁶

The Applicant also attempts to shift the burden to the City to prove that notice was given to Historic District property owners when the Historic District was formed in 1983. Individualized notice was not required because the Historic District was formed before the passing of Measure 56. The record shows that other citizens made requests for zone changes during the Comprehensive Plan process that were addressed by the Council at the time;⁷ however, there were no requests to change the Historic District boundaries in 1983. The Board finds that it is the Applicant’s burden to show that there was an objection, and that the Applicant has not shown evidence of any objection to the Historic District.

The Board does not find that the burden shifts to the City to prove that notice of the Historic District formation was given. Evidence in the record shows that there were multiple hearings, and Mayor McIntyre pointed out that “public notice has been made regularly regarding workshops being held on the Comprehensive Plan.”⁸ Although it is not required, the Board finds that there is substantial evidence in the record to show that notice for a legislative action was given in 1983, when the original designation was made. Notice of the amendment in 1986 is also in the record. Thus, notice of the designation was given.

Staff finds that the applicant has not provided an objection, on the record, at the time of designation when the Historic District was adopted in 1983, or during the subsequent amendments prior to 1995. Therefore, the applicant has not demonstrated that the Historic District was “imposed on the property by the local government,” which is required for removal under ORS 197.772(3). Therefore, the Board recommends the Property remain in the Historic District.

C) ORS 197.772(1)

ORS 197.772(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.).

⁵ *Id.* at 818 (emphasis added).

⁶ *Id.* at 820.

⁷ City Council Meetings 1983 Minutes, October 20, 1983, Joint P/C and C/C Public Hearing.

⁸ City Council Meetings 1983 Minutes, November 2, 1983, City Council Final Public Hearing.

The Board finds that ORS 197.772(1) is “forward-looking”, and it only applies to designations that occur after 1995.⁹ The Applicant has not provided any evidence that the Historic District designation for the Property was repealed. The Applicant has the burden to show that there is no such designation, and the Applicant has not met the burden.

The record shows that the Historic District was amended in 2013 by Ordinance 1614. The language of Ordinance 1614 controls, and it states clearly in Section 17 that the map for the Historic District is being amended. No evidence has been presented to show that the Historic District has ever been amended to exclude the Property. The Board finds that the applicant has not provided any evidence that the original 1983 Historic District Overlay Zone has ever been repealed, and that instead any subsequent actions by ordinance are amendments to the zone that did not affect the Property. A new designation did not occur in 2013; therefore, ORS 197.772(1) does not apply.

The Applicant argues that the Historic District did not transfer with the property; therefore, when the Applicant purchased the Property, consent had to be obtained under ORS 197.772(1). The Board rejects this interpretation of the statute. If a subsequent owner could withhold designation for a district property properly formed through the legislative process, there would be no certainty about historic designations. The Board finds that the Historic District designation, like all other zoning designations in the City, transfers with the property. Further, it would not have been necessary for the Court of Appeals to determine whether the statute applied to property owners at the time of designation *and* subsequent owners in the *Lake Oswego* case if the Applicant’s interpretation was correct.¹⁰

The Applicant also argues that if subsection (1) applies, silence is a means of withholding consent under subsection (1). As stated previously, this subsection does not apply because the Property was designated before 1995.

The Board finds that ORS 197.772(1) is not applicable; therefore, it cannot be utilized as a basis to recommend removal from the Historic District.

2) AP-14-02/DR-14-02

25.060 DESIGN STANDARDS APPLICABLE TO HISTORIC RESOURCES

The following design standards apply to all changes, including alterations, additions, and new construction proposed on a designated historic resource. These standards are intended to preserve the features that made the resources eligible for historic designation. Development must comply with all applicable standards, or be approved through the modifications process specified in CDC 25.080.

A. Standards for alterations and additions. This section applies to historic reviews for alteration of and additions to designated historic resources:

1. Retention of original construction. The original construction shall be maintained or restored to the greatest extent practicable. Stylistic features of original construction that shall be preserved include, but are not limited to: a line of columns, decorative

⁹ *Lake Oswego Preservation Society v. City of Lake Oswego*, LUBA No. 2014-009 (2014).

¹⁰ *Lake Oswego Preservation Society*, 268 Or. App. 811, 817 (2015).

shingles, projecting bays, other primary structural elements, spatial relationships that characterize the property, examples of skilled craftsmanship that characterize the building, and architectural details defining the structure's character and historic significance.

Finding: At the public hearing on June 9, 2015, the applicant clarified the appeal of the garage was withdrawn from further design review consideration; therefore, no additional findings for the garage are necessary and the previous denial of the garage replacement is a final decision.

Finding: Rear dormer: The addition to the rear dormer does not retain the original construction to the greatest extent possible since it extends flush to the side elevation. The dormer is a structural element and this change to it affects the spatial relationships that characterize the property. Staff finds that the criterion can be met if the proposed dormer is constructed as approved in "Applicant's Design Review Submission for June 9, 2015" ("Webb Submittal") Figure 7 (also called Option B or Option 2). This is addressed in modified Condition of Approval 2.

Staff finds that the criterion is met for the rear dormer. Staff finds that the criterion can be met for the addition to the rear dormer with Condition of Approval 2.

3. Time period consistency. Buildings shall be recognizable as a physical record of their time and place. Alterations which have no historical basis or which seek to create a false sense of historical development are not allowed.

Finding: Rear dormer: The addition to the rear dormer affects the appearance of the structure. It is unlikely that it would have historically been constructed this way, particularly given the construction of the other side of the dormer on the south elevation. There is not a historical basis for the alteration. Staff finds that the criterion can be met if the proposed dormer is constructed as approved in Webb Submittal Figure 7 (also called Option B or Option 2). This is addressed in modified Condition of Approval 2.

5. Differentiate old from new. Alterations and additions shall be differentiated from the original buildings and shall be compatible with the historic materials, features, size, scale, proportion, and massing to protect the integrity of the property.

Finding:

Rear dormer: The addition to the rear dormer is not differentiated from the original building. The addition is flush with the side elevation and cannot be clearly identified as an addition to the dormer. The proportions and massing of the addition are not compatible with the historic structure since the side elevation appears as a single wall

rather than an extension of the existing dormer. Staff finds that the criterion can be met if a piece of trim is added to the proposed dormer to visually differentiate between old and new construction as depicted in Webb Submittal Figure 7 (also called Option B or Option 2). This is addressed in modified Condition of Approval 2.

6. Reversibility. Additions and alterations shall be undertaken in such a manner that, if removed in the future, the essential form and integrity of the historic property and its context would be unimpaired.

Finding:

Rear dormer: The addition to the rear dormer is not proposed in a way that is easily reversible nor is the essential and original form of the structure easily identifiable. Staff finds that the criterion can be met if the proposed dormer is constructed as approved in Webb Submittal Figure 7 (also called Option B or Option 2). This is addressed in modified Condition of Approval 2.

7. Building additions. Building additions shall be subordinate to the original building, smaller in scale, and attached to the rear or set back along the side. Features of building additions, including the proportions of window and door openings, shall be consistent with those of the existing building. Dimensional and other requirements in the underlying zone, as applicable, shall apply.

Finding:

Rear dormer: The proposal for the addition to the rear dormer is not subordinate or smaller in scale to the original building since it is flush with the side elevation. It is located on the rear elevation, but is not set back along the side. Staff finds that the criterion can be met if the proposed dormer is constructed as approved in Webb Submittal Figure 7 (also called Option B or Option 2). This is addressed in modified Condition of Approval 2.

VII. Order

Based on the above Findings of Fact, Findings, and the evidence in the whole record, the Board recommends to the City Council that it deny the Applicant's request pursuant to ZC-14-02 to be removed from the Historic District Overlay Zone.

In addition, the Board concludes that AP 14-02/DR 14-02 is approved based on the Record, Findings of Fact and Findings above. The Board concludes that all of the required approval criteria are met subject to the following modified condition of approval.

2. Rear Dormer. (Modifies DR 14-02) The applicant shall construct the rear dormer so that new construction is differentiated from original construction by a piece of applied trim as shown in the "Applicant's Design Review Submission for June, 9, 2015," in Figure 7 on page 8; this dormer modification is also referred to in the submittal as "option (B)" or "Style B".



ADAM PETERSEN, CHAIR
WEST LINN HISTORIC REVIEW BOARD

6/15/15

DATE

This decision may be appealed to the City Council pursuant to the provisions of Chapter 99 of the Community Development Code and any other applicable rules and statutes. This decision will become effective 14 days from the date of mailing of this final decision as identified below. Those parties with standing (i.e., those individuals who submitted letters into the record, or provided oral or written testimony during the course of the hearings, or signed in on an attendance sheet or testimony form at either of the hearings, or who have contacted City Planning staff and made their identities known to staff) may appeal this decision to the West Linn City Council within 14 days of the mailing of this decision pursuant to the provisions of Chapter 99 of the Community Development Code. Such appeals would require a fee of \$400 and a completed appeal application form together with the specific grounds for appeal to the Planning Director prior to the appeal-filing deadline.

Mailed this 16th day of June, 2015.

Therefore, this decision becomes effective at 5 p.m., June 30, 2015.

Devrev/projects folder/projects AP-14-02 and DR-14-02/ZC-14-02 final decision