EXHIBIT A-1
LU 13-0012

Hathaway Koback Connors LLP

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RECEIVED
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CITY OF LAKE OSWEGO
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November 19, 2013

HAND DELIVERED

Cate Schneider, City Recorder
City of Lake Oswego
380 "A" Avenue
Lake Oswego, OR 97034

Re: Mary Cadwell Wilmot Trust
Notice of Appeal of Decision under ORS 197.772

Dear Ms. Schneider:

I have enclosed the Mary Cadwell Wilmot Trust's precautionary appeal of HRAB's November 5, 2013 decision to deny its October 21, 2013 request under ORS 197.772(3) to remove the City's historic designation from property located at 3811 SW Carman Drive.

I want to make sure it is clear that my client formally withdrew its application in the former LU-13-0012 and therefore, no decision was made on that application. The only request pending on November 5, 2013 was a request to remove the designation under state law. Indeed, HRAB's decision plainly states that "Staff advised the Board to deliberate solely on the question of whether or not the historic designation should be removed under ORS 197.772(3)." I do not believe that the November 5, 2013 decision is appealable to City Council under any current provision in the City Code. However, Mr. Boone advised me that under his interpretation of the City Code there is a local appeal to City Council. Accordingly, my client is filing this appeal as a precautionary measure. I have copied Mr. Boone on this letter so that he is also advised of our position.

You will also read that the City does not have any published fee for a request to remove a historic designation under ORS 197.772(3), and, in fact, the City did not charge my client any fee for its October 21, 2013 request. Thus, it is our position that there is no basis to charge a fee for an appeal of that decision because the fee schedule sets the appeal fee at 50% of the original application fee.

Thank you for your consideration in this matter, and if you have any questions, please do not hesitate to contact me.

Very truly yours,

HATHAWAY KOBACK CONNORS LLP

Christopher P. Koback

CPK/df
Enclosure
cc: Evan P. Boone, Deputy City Attorney (w/encl.)

NOTICE OF INTENT TO APPEAL

I. Decision Being Appealed.

This appeal relates to a decision rendered by the Historic Resource Advisory Board ("HRAB") on November 4, 2013 denying the Appellant's October 21, 2013 request under ORS 197.772(3) that the City of Lake Oswego, (the "City") remove the current historic designation from Appellants property.

Although HRAB indicated that its decision was render in File Number LU 13-0012, that reference is incorrect. The former matter identified as LU 13-0012 was formally withdrawn. There was no matter with that designation pending on November 4, 2013. Further, Appellant is not aware that the City assigned any other number to Appellants request under ORS 197.772(3).

II. Precautionary Basis for Appeal.

This appeal is being filed as a precautionary appeal and not because Appellant acknowledges that it must appeal to preserve any ability to seek a writ of mandamus or other relief. Appellant's sole request that the City remove the current historic designation is under ORS 197.772(3). The City code does not provide for any local appeal of a decision denying a request under ORS 197.772(3). The appeal processes described in the City Code t only to land use matters. The appeal provisions all appear in Chapter 50, which is the chapter that contains language regulations. This case does not involve a land use decision. Moreover, ORS 227.180 provides the authority for appeal to the governing body of a local jurisdiction and that statute relates to land use decisions. There is no statute or code-based support to require Appellant to pursue a local appeal under ORS 197.772(3). Appellant believes that jurisdiction over this matter is proper in the Circuit Court, but is filing this appeal as a precaution.

III. Appellant's Standing to Appeal.

The Wilmot Trust owns approximately 1.25 acres at 3811 SW Carman Drive. On October 21, 2013, Appellant made a formal written request pursuant to ORS 197.772 that the City remove the current historic designation from its property. A copy of that detailed request is attached to this Notice of Intent as Exhibit 1. After October 21, 2013, the City did not conduct any public hearings at which it allowed any public testimony or the submission of any evidence. On October 23, 2013, HRAB met but solely for the purposes of deliberation. Appellant was not afforded any opportunity to present additional evidence or argument. Thus, Appellant has done everything within its powers to preserve the issues raised in its October 21, 2013 request that the historic designation be removed. Additionally, although the prior land use proceedings are not relevant to Appellant's request under ORS 197.772(3), Appellant appeared both in writing and orally in all of the evidentiary hearings that preceded the withdrawal of the land use application.

IV. Nature of the Issues being Appealed.

The plain text of ORS 197.772(3) requires that the City remove a historic designation that was imposed upon a property. City staff has admitted in written reports that the historic

designation was imposed on Appellant's property for purposes of ORS 197.772(3). Thus, the City has a mandatory duty to remove the current historic designation. Exhibit 1 to this Notice of Appeal provides additional detail for the basis of Appellant's appeal.

V. Appeal Fee.

In the Notice of Decision dated November 5, 2013, the City incorrectly recited that the appeal fee, assuming an appeal is proper, is $2,053. The City's fee schedule does not have a fee for appealing a decision to deny a request under ORS 197.772(3). The City's fee schedule clearly states that the fee for an appeal to City Council is "½ of the original application fee not to exceed $4,800." The only application fee charged to Appellant was the application fee for a withdrawn land use action. Appellant cannot appeal any decision under that application because it was withdrawn before any decision was rendered. The only decision that could have been rendered was a decision on Appellant's October 21, 2013 request that the City remove the historic designation under ORS 197.772(3). The City has no fee for a request under that statute and the Appellant was never charged a fee. Thus, to the extent this appeal is prosecuted, the fee for the appeal is 50% of zero.

DATED this 19th day of November, 2013.

HATHAWAY KOBACK CONNORS LLP

By _____
Christopher P. Koback, OSB # 913408
Attorney for Appellant
Mary Cadwell Wilmot Trust

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October 21, 2013

VIA EMAIL

Evan P. Boone
Deputy City Attorney
City of Lake Oswego
380 A Avenue
PO Box 369
Lake Oswego, OR 97034

Re: 3811 SW Carman Drive, Lake Oswego

Dear Evan:

Pursuant to ORS 197.772(3), the Mary Cadwell Wilmot Trust ("Wilmot Trust") is requesting that the City of Lake Oswego remove the current historic designation from its 1.25 acre parcel of property located at 3811 SW Carman Drive, Lake Oswego, Oregon. To facilitate a prompt decision on my client's request, I will address several points that have been raised about the application of ORS 197.772 to my client's property. You and I have discussed most, if not all, of these issues.

For ease of reference, I set out below the text of the statute:

> **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. 40 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 supplied).

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The statue is abundantly clear. If a historic designation was imposed on a property, the local government shall allow an owner of that property to have the designation removed. The January 31, 1997 Attorney General Opinion we recently received confirms that a local government's role in the removal request under the statue is limited. The local government must answer two basic factual questions: (1) was the historic designation placed on the property by the local government; and (2) was the designation imposed. The Attorney General confirmed that if the answer to both of those questions was affirmative, the local government had no discretion not to remove the designation.

Here, Lake Oswego has confirmed, as a matter of fact, that the historic designation on my client's property was placed on the property by the City. Furthermore, at the time of the designation, the owner formally objected and requested that the designation be removed. I believe that ORS 197.772 requires that the City immediately remove the current historic designation from my client's property.

I want to address a few points that have come up in recent weeks over the current designation. First, I believe that the City's decision to remove the current designation cannot be processed as a land use decision. ORS 197.015 contains the statutory definition of a land use decision. As it relates to decisions of local governments, a land use decision is a final decision or determination made by a local government or special district that concerns the adoption, amendment or application of: (1) the goals; (2) a comprehensive plan provision; (3) a land use regulation; (4) or a new land use regulation. ORS 197.015(10). We discussed the above definition and it was my impression that you tended to agree with me that a decision under ORS 197.772 does not meet the definition of a local land use decision. The *Demlow* decision is not controlling on this issue. I believe that LUBA was clearly wrong. More importantly, in *Demlow* the City of Hillsboro had a local ordinance that it applied to requests for removal under ORS 197.772(3). Thus, the City did, in some respects, apply a local regulation. The City of Lake Oswego does not have any local regulation that addresses requests to remove a historic designation under ORS 197.772. Thus, the City must apply state law only.

Next, I want to respond to Mr. Johnson's recent email in which he opined ORS 197.772 only applies to designation that occurred after the effective date of the statute. I believe you agreed with me that Mr. Johnson is wrong. Indeed, ORS 197.772(3) has to apply to historic designations imposed before the effective date of the statute. After the statute became effective, a historic designation could not be imposed. If the owner did not consent, ORS 197.772(1) precluded Cities from placing the designation on a property. If the owner consented, the designation was not imposed.

Lastly, some have argued that the right to have a historic designation removed belongs only to the person who owned the property at the time the designation was imposed. Thus, if years before the creation of the statutory right to have a designation removed, a father owned property and objected to a designation, and the day after the designation was impose he died, his heirs would not get the benefit of ORS 197.772 after its enactment. There is no support in the text or context of ORS 197.772 for such an interpretation.

As you pointed out in your October 9, 2013 memorandum to Ms. Holwerda, in interpreting a statute, courts and other decision makers must follow the analysis set out in *PGE v. BOLI*, 317 Or 606, 859 P.2d 1143 (1143). The first level of analysis requires a decision maker to apply the plain text of the statute. If the text is unambiguous, the decision maker must apply it as written. A decision maker cannot add or omit terms from the statute to reach an interpretation.

The plain, unambiguous text of ORS 197.772 does not limit the removal right to the owner of the property at the time the designation was imposed. ORS 197.772(3) permits "a" property owner to remove a historic designation placed on the property by the local government. It does not limit the right to any particular owner. If the legislature intended the right to run only to the owner who owned the property at the time of imposition, ORS 197.772(3) would state that "a local government shall allow the owner of a property at the time that a historic designation was imposed on the property to remove from the property a historic designation ...." Or it would state that "the local government shall allow a property owner to remove a historic designation that was imposed on the property by the local government at the time that that owner owned the property." Of course the text recites none of that. To limit ORS 197.772(3) to the owner who owned the property at the time of the designation, the City would have to violate one of the basic principles in statutory construction and add significant language to the statute.

As you note in your memorandum, the legislative history does not state that the removal right was intended to be limited to only the original owner. Mr. Johnson's inaccurate interpretation is not legislative history. I do not believe it would ever be admissible in a court case interpreting the statute. In fact, in one respect, Mr. Johnson appears to acknowledge that his understanding of ORS 197.772 is consistent with my interpretation. In one of his emails he acknowledges that a designation only binds property if it was accepted or at least not objected to. Thus, if the designation was consensual, a subsequent owner would not have any right to require its removal. However, if the designation was objected, to the removal right was preserved.

The maxims of construction support my interpretation more than any other interpretation. The essential purpose of ORS 197.772 was to give the owners of property the power over whether the property was designated as historic. The purpose of ORS 197.772(3) was to grant the right to owners to have previously imposed designations removed from the property. The focus is on the property subject to the designation and not on any particular owner.

ORS 197.772, is without a doubt, a remedial statute. Particularly, ORS 197.772(3) gives a property owner the right to have a restrictive designation removed from private property to facilitate free use of that property. It must be construed to permit a subsequent owner, and particularly a family member, to remove a previous designation that was imposed.

At a conceptual level, the opponents point runs counter to how real property rights flow. Both the burdens on and rights of a property owner, run with the property to a subsequent owner. If property is transferred, the historic designation runs with the property and, the local government is not required to seek to impose a historic designation on the new owner. It makes no sense that an objection to the designation made before the enactment of ORS 197.772 would not also follow the property.

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For the reasons expressed in this letter, the Wilmot Trust respectfully requests that the City remove the current historic designation from its property. I understand that the City may have the right to determine what body makes the ultimate decision on removal. Personally, I feel this is a decision that City Council and your office needs to make. However, if the City elects to have its Historic Resource Board make the decision, that is the City's choice. HRAB meets October 23rd and is familiar with the issues. I am authorized to advise you that if the designation is not removed at the October 23, 2013 meeting or earlier, we will file a petition for a writ of mandamus in the circuit court. I believe *Parks v. Tillamook County*, 11 Or App 177, 501 P.2d 85 (1973) is instructive. While that case specifically involved ORS 215.185, it reinforced the concept that when a local government has a mandatory duty to act and refuses to do so, a citizen may seek mandamus relief. As you know, ORS Chapter 34 permits the court to award attorney fees to the prevailing party.

I look forward to the City's response.

Very truly yours,

HATHAWAY KOBACK CONNORS LLP

Christopher P. Koback

Christopher P. Koback

CPK/df
cc: Leslie Hamilton, Senior Planner

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