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**BEFORE THE HISTORIC RESOURCES ADVISORY BOARD
OF THE
CITY OF LAKE OSWEGO**

-Approved-

**EXHIBIT B-1
LU 13-0012**

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A REQUEST FOR REMOVAL OF HISTORIC)	LU 13-0012 - 1825
LANDMARK DESIGNATION FROM THE)	MARY CADWELL WILMOT TRUST
CARMAN HOUSE AND PROPERTY)	FINDINGS, CONCLUSIONS & ORDER

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NATURE OF APPLICATION / REQUEST

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The applicant is requesting removal of the historic landmark designation from the Carman House and property (Tax Lot 1200). Because the applicant ultimately seeks removal of the historic designation under ORS 197.772(3) only and withdrew its request for removal under LOC 50.06.009.5.d (Criteria to Remove a Designation) (see discussion below), the initial request for concurrent approval of historic landmark designation under LOC 50.06.009.5.a, on a new tract established from a section of the existing Carman House site has been withdrawn.

The applicant initially sought removal under the criteria of LOC 50.06.009.5.d (Criteria to Remove a Designation), and approval of historic landmark designation under LOC 50.06.009.5.a, on a new tract that will be established from a section of the existing Carman House site. On August 14, 2013, the applicant specifically requested the Historic Resources Advisory Board (Board) also consider removal under ORS 197.772(3) (Consent for designation as historic property). On September 11, 2013, following the public hearing, the applicant requested the Board consider removal of the historic designation only under ORS 197.772(3), withdrawing consideration of removal under LOC 50.06.009.5.c.

[Staff note: On October 21, 2013, the applicant notified staff that it was (1) withdrawing the "land use" application for removal of the historic designation, but (2) requesting withdrawal of the historic designation under ORS 197.772(3) and a City decision on that request by October 23, 2013. 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).]

The property is located at 3811 Carman Drive (21E05CD10600).

HEARINGS

The Board held public hearings and considered the request for removal of the historic designation at its meetings of: August 14, 2013 (continuation of public hearing at applicant's request); September 11, 2013 (public hearing); October 9, 2013 (continued public hearing), and October 23, 2013 (deliberation).

1 **CRITERIA AND STANDARDS**

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3 As noted above in Nature of Application, the applicant initially sought removal of the historic
4 designation under LOC 50.06.009.5.d (Criteria to Remove a Designation), but later withdrew its
5 request under that criteria. The applicant ultimately sought and the Board considered the
6 request for removal solely under ORS 197.772(3).

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8 A. **ORS 197.772 (Consent for Designation as Historic Property):**

9 [The full statute is quoted here for reader’s convenience and context.]

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11 (1) Notwithstanding any other provision of law, a local government shall allow a
12 property owner to refuse to consent to any form of historic property designation
13 at any point during the designation process. Such refusal to consent shall remove
14 the property from any form of consideration for historic property designation
15 under ORS 358.480 to 358.545 or other law except for consideration or
16 nomination to the National Register of Historic Places pursuant to the National
17 Historic Preservation Act of 1966, as amended (16 U.S.C. 470 et seq.).

18
19 (2) No permit for the demolition or modification of property removed from
20 consideration for historic property designation under subsection (1) of this
21 section shall be issued during the 120-day period following the date of the
22 property owner’s refusal to consent.

23
24 (3) A local government shall allow a property owner to remove from the
25 property a historic property designation that was imposed on the property by
26 the local government.

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28 B. **Previous Cases**

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30 HR 7-90 (A) and (B)

31
32 **CONCLUSION**

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34 The Board concludes that removal of the historic designation is not warranted under ORS
35 197.772(3).

36
37 **FINDINGS AND REASONS**

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39 The Board incorporates:

- 40 • Staff Report, dated August 1, 2013, Section IV.A only (Findings: Background/Existing
41 Conditions), together with only Exhibits E1, E2, E3, F4, F5, and F6; and
42 • Supplemental Staff Memorandum dated September 10, 2013, together with Exhibits F8,
43 F9, and F10;

- 1 • Exhibits F11 and F12;
- 2 • Testimony Neither for Nor Against (Exhibit G-1-1) (Only to the extent the testimony
- 3 bears upon ORS 197.772(3));
- 4 • Testimony in Support (Exhibits G-2-1 thru G-2-4) (Only to the extent the testimony bears
- 5 upon ORS 197.772(3));
- 6 • Testimony in Opposition (Exhibits G-3-1 thru G-3-20) (Only to the extent the testimony
- 7 bears upon ORS 197.772(3)); and
- 8 • Testimony presented at the Public Hearings on September 11 and October 9, 2013, only
- 9 to the extent the testimony bears upon ORS 197.772(3),

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11 as support for its decision, supplemented by the further findings and conclusions set forth
12 herein. In the event of any inconsistency between the supplementary matter herein and the
13 staff report, the matter herein controls. To the extent they are consistent with the approval
14 granted herein and only to the extent it bears upon ORS 197.772(3), the Board adopts by
15 reference its oral deliberations on this matter.

16
17 Following are the supplementary findings and conclusions of this Board:

- 18
19 1. The Board finds that Exhibits F13 and F14 were received after the record was closed and
20 are not part of the record.
- 21
22 2. The Board heard testimony from the applicant that historic designation removal requests
23 under ORS 197.772 are not considered land use decisions, and the landmark designation
24 removal request was not properly before Board.

25
26 The Board expressly adopts Section 4 of Exhibit F12 as its finding, and concludes that it is
27 the entity delegated the initial decision making authority to decide whether a historic
28 designation by the City may be removed under law, including ORS 197.772(3). The
29 classification of the decision – whether it is or is not a “land use decision”-- is not relevant
30 to the Board’s consideration of the Record before it and whether the historic designation
31 must be removed under ORS 197.772(3).

- 32
33 3. The Board heard testimony that because the request for removal of the historic
34 designation was originally argued under the criteria of LOC 50.06.009.5.d (Criteria to
35 Remove a Designation), that in order to seek removal of the historic designation under
36 ORS 197.772(3), a new application would need to be filed.

37
38 The Board finds it is the entity delegated the initial decision making authority to decide
39 whether a historic designation by the City may be removed under law, including ORS
40 197.772(3). An application was filed requesting the removal of the historic designation.
41 Proper public notice was given to interested parties of the initial public hearing of August
42 14, 2013. At the August 14, 2013 public hearing, although no testimony was taken and
43 the public hearing was continued at the applicant’s request, the applicant gave notice that
44 it would request removal of the historic designation under the alternative criterion of ORS

1 197.772(3). All interested parties were therefore noticed that the Board would also be
2 considering removal of the historic designation under ORS 197.772(3) on August 14, 2013.
3 Public testimony was taken on September 11 and again on October 9. The Board finds
4 that no prejudice was suffered by any interested person, as there was ample public notice
5 and opportunity for interested persons to address whether removal of the historic
6 designation was required per ORS 197.772(3), under the procedure of LOC Ch. 50 and, to
7 the extent applicable, under the due process requirements of the Oregon and federal
8 constitutions.

- 9
10 4. The Board heard testimony both for and against the legal question of whether a current
11 owner could assert the provisions of ORS 197.772(3) when it was not the current owner,
12 but a prior owner, that had objected to the historic designation at the time of designation.

13
14 The Board finds that the owner of the subject site at the time of designation, in 1990, was
15 Richard Wilmot. The property was transferred by Mary S. Wilmot to the Mary Cadwell
16 Wilmot Trust by warranty deed in 2001 for no consideration amount.

17
18 The Board applies the statutory means of construction set forth by the Deputy City
19 Attorney in Exhibit F12, p. 2:

20
21 “Examination of text and context; due consideration of any relevant legislative
22 history; and if the [legislature’s] intent remains unclear after examining text,
23 context, and legislative history, resort to general maxims of statutory
24 construction is made, to aid in resolving the remaining uncertainty.”

25
26 *Sarathy v. Washington County*, 64 Or LUBA 279 (2011)(footnote omitted).

27
28 The issue of “transferability” under ORS 197.772(3) is not addressed directly in ORS
29 197.772. The Board notes, however, that the Oregon Land Use Board of Appeals, when
30 called to interpret ORS 197.772(3) held in *Demlow v. City of Hillsboro*, 39 Or. LUBA 307,
31 315 (2001) (emphasis added):

32
33 “ORS 197.772(1) and (3), read in conjunction, make reasonably clear that the
34 time for objecting to a historic property designation is during the designation
35 process, and that **owners who had historic designations placed upon their**
36 **properties before the owner consent provision of ORS 197.772(1) was available**
37 **may have those designations removed if they were placed on the properties**
38 **over the objections of the owners.**”

39
40 The Board finds from *Demlow*, per the context of ORS 197.772(3), that it is the original
41 “owners” who had historic designations placed upon their properties” who would have
42 any available right to removal of the designation under ORS 197.772(3).
43

1 The Board further finds from the legislative history of ORS 197.772(3) that the Legislature
2 intended the right of ORS 197.722(3) was limited to the original objecting owner. Rep.
3 Patti Milne, who actually introduced the language of subsection (3) and carried the
4 legislation on the floor of the House of Representatives, stated on May 4, 1995, in the
5 House General Government and Regulatory Reform Committee work session,
6

7 “REP MILNE: My intent in the language in line 3, ‘historic property designation
8 that was imposed on the property ...’ is when the property owners were not
9 allowed to consent and government imposed it on them, they would have an
10 opportunity to remove their property.”
11

12 The Board also notes that the state agency that assists local government in the
13 administration of the state historic preservation laws and rule, the State Historical
14 Preservation Office (SHPO) of the Oregon Parks and Recreation Dept., has stated that:
15

16 “As I noted in our conversation, our office has advised local governments on the
17 application and interpretation of ORS 197.772 since its enactment in 1995. **Our**
18 **consistent interpretation has been that the special right to delisting created by**
19 **the statute is available only to an original, objecting owner of the subject**
20 **property. If title has changed hands, that right is not passed along to the**
21 **subsequent owner.”**
22

23 Email from Ian P. Johnson, Historian, Oregon SHPO, to Attorney Jeff
24 Klienman (copied to City Associate Planner Paul Espe), Oct. 4, 2013
25 (Exhibit F11)(emphasis added).
26

27 And in a follow-up email, SHPO further stated:
28

29 We base our interpretation [of the Oct. 4 email statement] on the following:
30 197.772(1) allows for a property owner to refuse consent during the designation
31 process, but does not note any subsequent opportunity for a property owner to
32 refuse designation. **It is therefore our reading that 197.772(3) refers to this**
33 **initial designation process, and that the imposition of a designation would only**
34 **occur if the property was designated a local landmark over the objection of the**
35 **property owner at the time the designation process occurred.** In the *Demlow*
36 case, LUBA found that the owner could not subsequently remove a property
37 from a local landmarks list if the owner did not object to the designation during
38 the designation process. **It therefore is our position that once a designation is**
39 **accepted, or at least not objected to, that this designation, like any other**
40 **zoning, would remain valid even as the property changes hands.** Our
41 interpretation does **not distinguish between a successor owner by inheritance**
42 **or a purchaser for value.** In both cases, the new owners take possession of the
43 property with the designation already in place. **While the new owner may not**
44 **have been aware of the designation, we view this as a failure for the new**

1 **owner to complete proper due diligence since local landmark designations are**
2 **part of the public record.**

3
4 Email from Ian P. Johnson, Historian, Oregon SHPO, to Deputy City
5 Attorney Evan Boone, Oct. 8, 2013 (Exhibit F11)(emphasis added).
6

7 Accordingly, *assuming* the record supported a finding that the historic designation was
8 “imposed” upon the site in 1990, which the Board is not called upon to determine, based
9 upon the context and legislative history, the Board concludes that the Mary Cadwell
10 Wilmot Trust is not eligible to seek release of the historic designation under ORS
11 197.772(3).
12

13 5. The Board heard testimony that:
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- 15 • Following the adoption of ORS 197.772 by the Oregon Legislature in 1995, it should
16 be held that there was a limited period of time to exercise the provisions of ORS
17 197.772(3).
- 18 • The owner objected to the historic designation in 1990 by both written statements
19 and by appealing the designation to the City Council and to the Oregon Land Use
20 Board of Appeals.
- 21 • The owner, after seeking removal of the historic designation on a larger site (Tax
22 Lots 1200 and 1201) in 1990, made statements consenting to the historic
23 designation of the subject site.
- 24 • Removal of the designation would require amendment of the Lake Oswego
25 Comprehensive Plan and/or Community Development Code.
26

27 Because the Board finds that the provisions of ORS 197.772(3) cannot be exercised by an
28 owner of an historic designated site if that owner was not the then owner at the time of
29 “imposition” of the designation (per *Demlow*), the Board need not and does not consider
30 the above assertions.
31

32 **ORDER**

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34 **IT IS ORDERED BY THE HISTORIC RESOURCES ADVISORY BOARD** of the City of Lake Oswego that
35 the request for removal of historic designation of the Carman House and property (Tax Lot 1200) is
36 denied.
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I CERTIFY THAT THIS ORDER was presented to and adopted by the Historic Resources Advisory Board of the City of Lake Oswego.

DATED this 4th day of November 2013.

Kasey Holwerda /s/
Kasey Holwerda, Chair
Historic Resources Advisory Board

Leslie Hamilton /s/
Leslie Hamilton
Senior Planner

ATTEST:

ORAL DECISION - October 23, 2013

AYES: Holwerda, Ross, McGuire, Rodway
NOES: None
ABSTAIN: None
EXCUSED: Foster, O'Neill

WRITTEN FINDINGS AND ORDER - November 4, 2013

AYES:
NOES:
ABSTAIN:
EXCUSED: