EXHIBIT C-2
LU 13-0012

PLEASE NOTE THAT THESE DRAFT MINUTES HAVE NOT BEEN REVIEWED OR APPROVED BY THE HISTORIC RESOURCES ADVISORY BOARD.

CITY OF LAKE OSWEGO
Historic Resources Advisory Board Minutes
September 11, 2013

1. CALL TO ORDER / ROLL CALL

Chair Kasey Holwerda called the meeting to order at 7:00 p.m. in the Santiam Room of the West End Building, 4101 Kruse Way, Lake Oswego, Oregon.

Members present:	Chair Kasey Holwerda, Lynda O'Neill, Holly Rodway and Donald Ross
Members excused:	Vice-Chair Jeannie McGuire and Craig Foster
Council Liaison:	Councilor Jon Gustafson was not present
Staff:	Paul Espe, Associate Planner/Staff Liaison; Leslie Hamilton, Senior Planner; Evan Boone, Deputy City Attorney; and Iris McCaleb, Administrative Support

2. APPROVAL OF MINUTES

Action on the Minutes of May 8, 2013 was continued to October 9, 2013.

3. PUBLIC HEARING

3.1 LU 13-0012 A request by Mary Cadwell (Wilmot Trust) to remove the historic landmark designation from the Carman House and property and approval of a historic landmark designation on a new tract that will be established from a section of the existing Carman House site.

Chair Holwerda opened the public hearing. Mr. Boone outlined the applicable criteria and procedure. Each of the HRAB members present declared a site visit. No one challenged their authority to hear the matter.

Staff Report

- Staff Report dated August 1, 2013
- Supplemental Staff Report dated September 10, 2013

Ms. Hamilton replaced Exhibit F-9 with Exhibit F-9.1 in order to correct the record. She clarified there had been two separate applications for removal from the Landmark Listing of the Carman House property (1.25 acres) on Tax Lot 1200 and the Gregg farm property (8.75 acres) on Tax Lot 1201. She said the applicant's original 2013 request was to remove the historic landmark designation from the 1.25-acre property, including the house, under the provisions of the Historic Resources Chapter of the Community Development Code. The applicant also requested a separate historic tract be created on a small portion of the property on which an informational plaque or bench would be located. Those requests were analyzed in the August 1 staff report. Staff concluded that the Carman house and property still met the criteria for historic landmark designation as they were more than 50 years old and they had historic architectural and environmental significance, and the benefits of retaining the Landmark designation of the house and property

outweighed the benefits to the community of removal. Staff found that if the historic landmark designation was removed from the entire property and a new 100 s.f. historic tract was created that would not meet the criteria for landmark designation.

On August 14, 2013 the applicant submitted additional information regarding their request and specifically identified grounds for removal under ORS 197.772, Consent to Designation as Historic Property. That additional request was analyzed in the September 10, 2013 report. Under this statute a city must allow a property to be removed from historic designation if the designation was 'imposed' on the property. LUBA interpreted that to mean a property owner must have actively objected to the designation prior to the meeting. Prior to the meeting Staff read and researched the entire record of proceedings from 1990 to 1992 which included the original HRAB and City Council decisions; the appeal to LUBA (which was withdrawn after the barn burned); and a remand to HRAB and City Council to consider the effect of the barn's destruction on the original decisions. Staff found that the original 1990 application requested removal of both tax lots from the historic designation. While HRAB and the City Council had considered multiple options during their deliberations, including partial removal of the designation on TL1200, there was no evidence in the files to indicate that the property owner Wilmot withdrew his original request for complete removal. Staff's recommendation, absent additional evidence presented at the hearing which supported the finding that the applicants consented to the landmark designation in 1991 and 1992, was that HRAB find that the landmark designation was 'imposed' on Carman House and the 1.25 acre property on which it sits.

Applicant

Christopher Koback, 520 SW Yamhill, Ste. 235, Portland, Oregon, represented the applicant, the Mary Cadwell Wilmot Trust. He said on August 14, 2013 they had presented written material explaining the basis for their position that under ORS 197.772 his client had a right to have the designation removed. They presented facts they believed showed that his client had never consented to the imposition of the designation and that the designation was therefore opposed. Consistent with the LUBA case they thought they had the right to have it removed. The most recent staff report concurred with their analysis and recommended that the designation be removed. He asked the HRAB to recommend to the City Council that the designation be removed consistent with state law.

Questions

Mr. Koback clarified the current property owner was the Mary Cadwell Trust and there were three trustees.

Proponents

Jacqueline Heydenrych, 14456 Pfeifer Dr., (97035), testified she owned two properties within a half mile of the subject property. She supported the application because she felt that to meet the family trust application with a knee jerk reaction was the wrong approach towards a family that was one of the founding families of the community. It was not the proper way to treat the progeny of Waters Carman for one thing. She observed there was a state law that allowed the designation to be lifted. The only remaining question was how they could keep this property and restore it. She was not sure they could. The forensic report on the condition of the property seemed to indicate it was already too far gone. It was beyond repair and beyond maintaining its historic character. The basement had serious moisture problems and hazardous levels of mold which was also present on the second floor. The support posts holding up the house had decayed and the support

beams were spanned too far apart. Most of the joists, railings and stringers did not meet building codes. The windows were not attached properly. There was structural movement on the first floor and numerous stress cracks. The house was at high risk of destruction by fire because it was constructed using walls lacking fire blocks. On the second floor rodent infestation caused such severe damage that it left holes in the roof for water to permeate. All of the electrical wiring was substandard and dangerous. The foundation was cracking. The staircase did not meet code and it was dangerous. The essential, unpalatable, truth that must be taken into account was that this house was already beyond redemption and had deteriorated so much since 1990 that it was now not possible to rehabilitate the house without sacrificing much of its original character. A remedy for these problems would require replacing the original foundation, tearing down the walls, removing the support posts, etc. So there really was no way to preserve the historical integrity of the house. That outcome was off the table. The best they could do with this house now was to tear it down to make it safe and create a replica museum. But it would be a copy, not the original. In its present state this house was a danger to public health and safety. There needed to be a proactive, long term, solution. The City had a duty to protect public health and safety above all. The only way to manage the public health and safety risk that this property presented to the surrounding community was to bring it into public ownership so it could be rehabilitated or replicated with safe, modern, materials paid for by public funds. However, that was an extremely expensive option and one that ruled out historic preservation. Under the circumstances the owners' proposal to commemorate the site and provide public access did not seem to be an unreasonable alternative. Indeed, it was the only alternative given that there was a state law in their favor. Development of the site would generate fees of about $170,000 to the City. It was important to consider that option. It probably was for sale and there was no reason why the City could not buy it. If the City did not want to buy it needed to get out of the way and let the owners do what needed to be done with their own property. The historic landmark designation on the property had effectively eliminated its economic value to the owners. This was not the way to treat the family of one of the founding members of this community. She hoped they could honor the memory of Waters Carman with consideration for his family in the spirit of compromise. While they were focusing on the relics left behind they should not forget whose legacy it was they were trying to preserve.

Opponents

William Barbat, 14580 Wilmot Way (97035), said the Carman House predated the Civil War. It was the oldest house in Lake Oswego. Originally there was a 320-acre donation land claim. They sold that off in time and he presumed that the property sale made a considerable amount of money. They ended up with a 10-acre residual base that was an historical site. It had a barn on it that burned down. Then the 10-acre site was changed from historical designation to saleable land. They subdivided it. In the process of developing that land they had to preserve the old spring and the ponds downstream from it and expand the ponds. The residents of the homes in the new development paid thousands of dollars to satisfy the City by planting trees and putting in irrigation systems and irrigating it for about a decade. Then they had to stop watering due to the water rates. The piece of land they were saving from the old historic site was fairly large (he did not know how many acres it was). In addition to preserving this parcel from the old site, their landscapers maintained the fence and vegetation and the trees along the outside edges of that property for those people at no cost. It had become a landmark for the City. The proponent who had just testified should have asked to have her neighbors pitch in and help restore it. She just wanted to sell it and get rid of it and subdivide that land to add more houses. The way their subdivision was developed it would have a very severe

impact to add 5-7 more houses, all using their private streets they paid to maintain because they could not use Carman Drive. One more factor was that the whole neighborhood was developed around a beautiful site with big trees that were preserved. To change that now would totally destroy the beauty of the part of the neighborhood along Carman Drive. He would hate to see this suddenly torn down and gone and instead see a little bench with a plaque on it where it used to be, and a lot of homes using Wilmot Way and the intersection of three streets there, which was a very crowded intersection with mail boxes. They would add to their problems with traffic. He said he thought they had already had the benefit of everything in the past, trying to help them save this, and the neighbors would probably pitch in and try to help them save it too. But all they wanted to do was get rid of it and make some money and walk away from it. Mr. Boone asked him if he was speaking as a representative. Mr. Barbat clarified he was speaking for his family.

Terry Sprague, 14588 Wilmot Way, read aloud written testimony from Janet Brown, the owner of a home directly across the street from the historic home. She stated she was against the application because she loved her place in part, because it was directly across Wilmot Way from the historical Wilmot Farm property. She bought it in good faith that she would be living by an historic landmark. She enjoyed pointing it out to her guests. Removal of the historical designation would diminish the value of her property. She asked the HRAB to maintain the historical designation of the applicants' property so she would not have to tell people who asked where the Carmen Farm went and how it was no longer there, but it once was a great example of Lake Oswego.

Mr. Sprague related he was a real estate broker and had recently sold two properties in the development. He said he would be willing to buy the property at fair market value. He thought that many people would have given backup offers to purchase the property as individual residents. He advised it was a salable property. He would buy it if it was marketed at a reasonable price. He thought the applicants were trying to sell it as a development to obtain additional funds for the benefit of an estate. They had inherited it and benefitted from past sales of property in that area. He said that would diminish the resale value of all of the properties in the area. There would be no consideration or compensation to the people who lived across the street, including himself. He had purchased his property with the benefit of a very picturesque property across the street, with picket fences, nice trees, and a lovely, older home. As a real estate professional, he was completely opposed to the application and completely disagreed with the testimony of the proponent. The list of repairs sounded like nothing when it came to taking care of those repairs and putting the property back into its historical presence that would respect the original concept of that area. He wanted to see it remain an historical site. He did not think the people in the Wilmot neighborhood or Carman Ridge should take a loss on the value of their homes for the benefit of basically greedy people who had inherited an estate and were just trying to maximize the value of that estate by only making it available to a development, rather than selling it to someone like himself. He had tried visit the site but found it was un accessible. He noted that there wasn't one person with whom he had spoken who was in favor of the development. He indicated there had been very little public information that the hearing time had been changed.

William Richard "Rick" Harper Jr., 14591 Pfeifer Way (97035), testified that he opposed the application. He said the right to have reconsideration did not constitute an automatic right of removal. He agreed the house was preservable. He clarified the entire site was historic, not just a house. He owned property adjacent to the site for about 22 years. He knew Mr. and Mrs. Wilmot, the most recent occupants of the property. He had been part of the process of approval of overall development of the property. He said preservation of

the site was integral to the Pfeifer Farm Association support. He said nothing had changed from the original designation. The house had not been repaired, but its basic state was no different now than when Mr. And Mrs. Wilmot lived there. He said this was about making money and not about some qualitative assessment of an historic site.

Susanna Kuo, 15 Cellini Ct. (97035), ceded her time for testimony to Marylou Colver.

Marylou Colver, 68 Leonard St., stated that the staff report had been issued a day and a half prior to the hearing and there had been minimal time to prepare additional testimony based on completely new criteria. She asked that the hearing be continued to the next HRAB meeting or that the written record be left open to some date to allow her to submit additional evidence. She noted she had submitted testimony based on the original application criteria (Exhibit G-3-10). She then read aloud her written testimony as President of the Lake Oswego Preservation Society dated September 11, 2013 in Exhibit G-3-17. In her submittal she related Waters Carman's connection with the founding of Lake Oswego. She noted the Carman house was the only Donation Land Claim era structure left in the City. She remarked that it was shortsighted to sacrifice the greater good of the community and the place this property holds in the community's memory for the economic benefit of a few individuals. She reported that Richard Wilmot was quoted in a 1979 *Oregonian* article as saying that he was planning on donating the house and about one-half an acre to an appropriate historical or governmental body for preservation. That statement seemed at odds with his 'objection' to the historic designation.

She questioned how the designation could be characterized as 'imposed' when the City Council minutes of October 12, 1999 reported that Councilor Rhode had explained that the state legislature empowered the [Historic Resources Advisory] Board to inventory properties, declare them historic, and to regulate modification to the historic homes; and in 1995 the legislature allowed any property owner to opt out of an historic designation. (She noted the Oregon Goal 5 revision that enabled owners of historic places to have them removed from a plan's inventory if they had been included without the owner's consent had actually been adopted in 1996.) She noted that at the time Richard Wilmot had not appealed the City Council decision that designated the Carman House and 1.25-acre parcel as a Landmark and granted development of Carman Ridge. In fact, that was one of the preferences suggested by Wilmot and Gregg. She related that Wilmot had appealed the farmstead designation but that legal process had been rendered unnecessary by the fire that destroyed the barn. She held the Carman House landmark designation had not only been accepted without objection or appeal, but it had even been done at Wilmot's suggestion. She pointed out the application specified the property owner was the Mary Cadwell Wilmot Trust, which was not the owner at the time of the original, or the subsequent, historic designation, so the applicants' assertion that the owner objected was inaccurate. She said the Lake Oswego Historical Society asked the Board to deny the application based on the record and the fact that historic designation was probably not 'imposed' on the property.

Stephen Dow Beckham, 1389 SW Hood View Ln., stated he chaired the Oswego Heritage Council's Historic Preservation Committee. He had submitted the Resolution from the Oswego Heritage Council (Exhibit G-3-8). He said the property had been appropriately listed in the City's historic inventory. He advised the state's resource of Oregon Trail historic structures was very small and rapidly diminishing. Ms. Colver's submittal spoke to the attrition of Donation Land Claim era structures in Lake Oswego. There were fewer than 200 such properties extant today in the western part of the state. The Historic Preservation League of Oregon had placed Oregon Trail property on the most endangered

list. He disagreed with the neighbor who contended the property was beyond restoration. He knew it was possible to restore property. He and his wife had restored a century-old home with fire stops in the walls; hand dug a new foundation; and bolted the structure to the new concrete foundation. He believed Waters Carman and his wife would recognize the property today. It was more than the house. It was the setting. He encouraged the Board to explore alternatives to preserve the property and restore it.

Jeff Kleinman, 1207 SW 6th Ave., Portland, Oregon 97204, stated he was an attorney representing the Lake Oswego Preservation Society. He said it was not clear if the original application was still being considered under the City's criteria for removal of a landmark, or if the applicant had abandoned the original application. Regardless of that, the applicant had brought up for the first time on the original hearing date essentially delisting under ORS 197.772. That was a new application. It was not properly before the board at this time. It was an application followed with a narrative. There was a revised, or amended, or supplemental narrative. Everything about this case was directed at the City's criteria under its own code for removal of the historic landmark designation. If the applicant wanted to proceed in a different way - even if it was in the alternative - then the applicant had failed to identify that in the application or any of the supplemental submittals before the notice of the hearing went out. He held the applicant needed to apply under the statute if that was something that the applicant wished to have considered. He held it was not properly before the board.

Mr. Kleinman said the Society would join in Ms. Colver's request that the hearing be continued to allow submittal of additional evidence, or, in the alternative, that the record be held open for that purpose. Assuming, for the sake of argument, that the original application was still before the HRAB, the Society would join in the original staff report and the recommendation of the original staff report that the application failed to comply with several of the individual criteria for a delisting and was not entitled to one. He said it appeared from the testimony that night that the applicant was withdrawing or abandoning that approach.

Mr. Kleinman noted that several persons had spoken about the historic significance of the home. There were comments in the original application materials about equity to the owners and some considerations of fairness that required the board to allow them to tear down the historic house and develop further. However, he pointed out that after what had been referred to as the 'barn burning' several years ago, the balance of the property (that which was shaded in blue) was developed with 55 condominium units. There had been a very significant development of the originally-designated historic site of the Carman property. There were also comments in the application about the fiduciary duty of the trustee to maximize returns while at the same time talking about how the house was falling apart. He would suggest to the applicant that the applicant's fiduciary duty as custodian of the property was to maintain the property and not let it fall to rack and ruin. That duty had been violated. He said the concept of switching out, in essence, the historic designation of the property for a little plaque was one of the more cynical ploys he had heard.

For the record, Mr. Kleinman addressed the application that was not properly before the HRAB under the Oregon statute. The Society disagreed that the applicant was entitled to removal of the designation under ORS 197.772. Ms. Colver had already testified to some extent about that. He read the statute and the one and only case (which was the LUBA case) which interpreted the statute as saying that the only person who was entitled to seek a removal or delisting of the designation under the statute was the owner who failed to consent: the owner who objected at the time of the listing. Mr. Kleinman said there was no

question in his mind about that. Otherwise you have a situation where under your Goal 5 Historic Resources Inventory, people can show up literally 200 years later and 50 people down the line of succession and say, “Wait a minute, 210 years ago there was no consent to this designation and we have the right to have it removed.” Mr. Kleinman said the record was clear that the owner at the time of the original designation was Richard Wilmot Senior (or Richard Wilmot the first). He no longer owned the property. The property was owned by the Trust, which was the applicant. There had been at least one other intervening change in ownership, perhaps through a personal representative’s deed, that Mary Wilmot succeeded Richard Wilmot Sr. as owner of the property. He submitted a copy of a deed for the record (Exhibit G-3-16) to show that in 2001 Mary Wilmot conveyed the property to the Mary Cadwell Wilmot Trust. He said the original owner was no longer the owner and held that there was no one qualified to file the application under the statute.

Mr. Kleinman referred to Demlow v. City of Hillsboro, which was discussed in the Supplemental Staff Report. He submitted a document containing two excerpts from the decision (Exhibit G-3-15). He asked the Board to bear in mind that the statute that was alluded to was adopted in 1995. It would have allowed an owner to opt out if they had not consented. That was the question here whether there was a failure of consent at the time of the original designation. His client believed there was consent. In any event, LUBA said the statute made it reasonably clear that the time for objecting to historic property designation is during the designation process, and that owners who had historic designations placed on their properties before the owner consent provision of ORS 197.772 was available (prior to 1995) could have those designations removed if they were placed on the properties over the objections of the owners. He said it seemed clear that that language was talking about a single owner. If you were the owner at the time and you did not consent and this was forced on you you had the right to have it removed. But it did not apply to successors of the original owner, whether it was ten, twenty or 200 years down the road. Lastly, LUBA quoted some of the legislative intent behind the statute. LUBA quoted Representative Patty Milne, who was the chief sponsor, who said her intent was that ‘historic property designation that was imposed on the property…’ was when the property owners were not allowed to consent and government imposed it on them, they would have an opportunity to remove their property. Mr. Kleinman pointed out she said ‘they’ and that did not mean someone else down the road, no matter how near or how far down the road. He held there was no opportunity under the statute for the application to be allowed. The applicants were not the original owners and they were not entitled to a delisting.

Finally, Mr. Kleinman pointed out that historic resources were Goal 5 resources and Goal 5 compliance was required. The City complied with Goal 5 in the manner of adopting the historic resources on the inventory. It was not lawful to just boot them out at the request of somebody without addressing the criteria under Goal 5, which were approved when the City adopted its original provisions. Mr. Kleinman concluded that “nothing can overcome the delisting requirements of the code.” For that to happen would violate Goal 5.

Rebuttal

Mr. Koback talked about the application. The City had one process to apply to remove the designation. It had criteria. State law was not listed as a criterion, so it was not legally proper to allow the City to say “you have filed your application.” State law was state law. If they wanted to make that a separate application process it should be in the code, but it was not. So the applicants were appropriately before the HRAB with their original application. As to the `imposition on an owner, he understands that Mr. Kleinman was

arguing that because Mary Wilmot passed away and passed her property to her heirs they were not allowed to object. He said the land use statute did not support that. He said the owner of the property at the time (1990) had objected. The property had been passed down to the heirs. If the rule of law was going to be that because somebody died and passed their property on they lost all their entitlements, all their property rights, that was a new theory of law. It would be a brand new law that would never be upheld. It would be a terrible law. This was an entitlement like any other entitlements, such as easement rights and land use entitlements. It ran with the land. The process that occurred in 1990 was that under Goal 5 the City can close the designation. There were 90 properties. The process was that if the owner wanted to have it removed they had to come and request that it be removed. The owner of this property did that. They requested that it be removed under the appropriate procedure. There was a hearing and the City said 'No.' The owner had objected fully. He said there was a clear record that the owner at the time, the predecessor of his client, fully exercised their rights under state law to have this removed. They did not need to do anything further. The Demlow case that LUBA decided was absolutely on point. It did not say that the only time period that you could object was within a certain window after the designation was put on. Mr. Koback said he thought that was what Ms. Colver was arguing. He encouraged the HRAB to talk to the City Attorney and ask where in the statute it required that within a certain time period of that statute someone who had the right to have the designation removed must come forward to have it removed. The language did not say that. There was no time period. His clients' request was proper and timely.

Mr. Koback addressed Ms. Colver's comment that because his client listed a priority of preferences they somehow consented. The Board could read the evidence that Mr. Wilmot said, "I don't want any designation at all, but if it is going to be imposed this would be less onerous than the third one would be" (which was what ended up happening). Because an owner said "I don't want it but if you do it make it as least onerous as possible" was not consent. Mr. Koback said the evidentiary record was very clear that Mr. Wilmot never consented to the imposition of this. In fact, no one ever consented.

Mr. Koback referred to the other comments. He said they appreciated the neighbors' input about the value they saw. His clients, as set forth in their material, looked at it a little bit differently as the owners. The only comments that were disappointing were about his clients' focus. They had given a lot to the City and their ancestors had given a lot. He said his clients were in retirement age. This was their retirement. All they wanted to do was put some houses in, and maximize what their parents and ancestors did for their retirement. It was not doing any good for anybody right now. It had been on the market for probably seven or eight years. Now somebody had come in to say, "Yes, I want to buy it." He wanted to ask what their agenda was. It had been on the market for a long time. Sue Albert, the real estate agent, had listed it and there had been no response. He said they thought the Oregon statute applied. All of the requirements were met. The procedural argument by Mr. Kleinman was creative and not supported by the code. He asked the Board to follow the staff recommendation for approval.

Questions

Ms. Holwerda asked if the applicants were withdrawing their original request to be considered under the City code for approval and just relying on the statute for removal, or did they also want the HRAB to consider the removal request under the City code? Mr. Koback said they only had one request. For the grounds, they would like the Board to consider the statute. He said he did not think the rest was too relevant. They did not have

a position on continuance.

Mr. Boone advised that parties had asked for continuance so the HRAB was required to do that by state statute. He outlined their options to continue the hearing and allow oral and written testimony at the next hearing, or leave the record open for only written material and written rebuttal to that material. He explained the time constraints of the 120-day rule. If the Board decided to continue the hearing for both written and oral testimony at the next hearing they would need to schedule a special hearing after the next regularly scheduled meeting to adopt findings in time for the City Council to consider them.

Mr. Ross **moved** to continue LU 13-0012 to October 9, 2013 and also hold an additional meeting on October 23, 2013 to adopt the findings. Ms. Rodway **seconded** the motion and it **passed** by unanimous vote.