EXHIBIT C-3
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
October 9, 2013

1. CALL TO ORDER / ROLL CALL

Chair Kasey Holwerda called the meeting to order at 7:00 p.m. in Council Chambers of City Hall, 380 A Avenue, Lake Oswego, Oregon.

Members present:	Chair Kasey Holwerda, Vice-Chair Jeannie McGuire, Holly Rodway, Donald Ross and Dylan Oster (Youth Member)
Members absent:	Craig Foster and Lynda O'Neill
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

Ms. McGuire **moved** to approve the Minutes of May 8, 2013 as corrected by Ms. McGuire. Mr. Ross **seconded** the motion and it **passed** by unanimous vote.

Mr. Ross **moved** to approve the Minutes of June 12, 2013 as corrected the Ms. Holwerda and clarified by Ms. McGuire. Ms. Holwerda **seconded** the motion and it **passed** by unanimous vote.

Ms. McGuire **moved** to approve the Minutes of July 10, 2013 as corrected by Ms. McGuire. Mr. Ross **seconded** the motion and it **passed** by unanimous agreement.

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**. Continued from September 9, 2013. See the Staff Report dated August 1, 2013; the Supplemental Staff Report dated September 10, 2013; and the Deputy City Attorney's October 9, 2013 Memorandum (Exhibit F-12).

Chair Holwerda opened the public hearing. Mr. Boone outlined the applicable criteria and procedure. He confirmed there was a quorum because four HRAB members were present. Ms. McGuire had not been present at the previous hearing. She indicated that she had not been able to review the complete record of the previous hearing. No one challenged the authority of the remaining three Commissioners to hear the application.

Staff Report

Ms. Hamilton pointed out five submittals had been received since the previous hearing: Exhibit G-24 (for removal); Exhibits G-3-17/18/19 (against removal); and Exhibit F-11, Correspondence from SHPO. She recalled that at the end of the last hearing the applicants requested that the Board consider removal under ORS 197 and not CDC Chapter 50. She noted Mr. Boone had addressed four legal questions raised at the last hearing in his memorandum (Exhibit F-12).

Applicant

Christopher Koback, 520 SW Yamhill, Ste. 235, Portland, Oregon, represented the applicant. He referred to Mr. Boone's memorandum on the legal issues. He noted they agreed that the designation had been 'imposed' and his clients had objected to it.

Mr. Koback said a bigger issue the HRAB would need to decide was whether or not the owner who owned the property at the time placed the property in trust after that; the Trust had owned it since, and now the current trustees who were asking for removal had that statutory right. His firm had submitted a legal analysis of the standard for interpreting code language. He said you interpret code language as it is written. His clients' position was that the statute clearly said 'a property owner' has the right to ask for it to be removed. The statute did not say that "the owner who owned the property at the time the designation was imposed" has the right to remove it. He advised that SHPO's interpretation of the statute was not binding on the Board. They were not even legally trained to make the interpretation. SHPO read significant language into the statute that was not there. Under the Supreme Court analysis in the *PGE v. BOLI* case they were directed not to do that. He said the statute clearly allowed "an owner"; and his client clearly was 'a property owner.' He said if the Board read the latest communication from SHPO they would see SHPO kind of agreed with the applicants. SHPO stated, 'It therefore is our position that once a designation is accepted, or at least not objected to, that this designation, like any other zoning, would remain valid even as the property changes hands.' The author of SHPO's email did not address the situation like the one they had here where there clearly was an objection. That had been answered affirmatively by city staff in response to Issue #1. He noted when SHPO was talking about whether the right to remove passes they were not addressing the situation like this where there was an expressed objection. They were saying that if the designation was accepted, or not objected to, by the owner at the time of the imposition, then it runs with the land. However, SHPO did not address the issue if it was objected to. Mr. Koback's statutory interpretation argument was if the owner objected at the time they preserved that property right, like any other property right that right runs with the land. The Trust now had the objection rights that were preserved by their ancestor who owned it before. He said it also made sense that if the designation was to run with the land to successive owners that was a burden. His clients were arguing the Board would have to apply the rights and the burdens equally. If the right to remove the designation which runs to 'a property owner' ends when that property owner divests themselves of the property, then Mr. Koback said he thought the designation ends when the property changes hands. Then the City had to come to 'a property owner' and seek consent under the statute. That was paragraph one. He held the right to not consent runs to "an owner" as does the right to remove. If "an owner" consents, or does not object, the designation is on. If the owner does object it is not. In order to say that only the original owner had the right to remove it you would have to reach the same conclusion based on the same definition of who holds the rights and the burdens to allow a successive owner to withhold their consent.

Mr. Koback said the third legal argument was whether or not this violated Goal 5. Was Goal 5 compliance required prior to removal? He said the statute clearly allowed the removal, so Goal 5 was not an issue.

Mr. Koback said the last issue was whether or not this process should be used to decide a statutory issue. The *Demlow* case was very narrow. In *Demlow*, LUBA held that it was a land use decision because the City of Hillsboro had a local ordinance that said "Here is how we will apply state law." In *Demlow,* what LUBA held was that city's application of its local ordinance was a land use decision. Mr. Koback said he may disagree with that, but for purposes of that night it was not really relevant. What was relevant was that in *Demlow* LUBA never held that a strict application of the state standard, absent a local ordinance, was automatically a land use decision. Under the state law there was one question: Was it 'imposed'? The answer was a discrete finding of fact. The City of Lake Oswego did not have a local ordinance to apply. It had a policy that had been handled since about 2001 or 2002 where if a request was made, the request came to the HRAB. Mr. Koback said he did not believe that made it a land use decision that was required to go through a land use process and then up to LUBA. It was a strict application of a discrete fact of was it 'imposed,' and if so, the state law applies. He clarified that he was not quarreling with who makes that decision. He was suggesting that it was not a land use decision. It should be handled expeditiously with a determination that a historic designation was 'imposed' and therefore, the state law had been triggered. He indicated that if the HRAB decided that and if they decided the first issue the way he thought SHPO had said it had to be decided when there was an actual objection to the original imposition, they would have to grant his clients' request and allow removal of the designation.

Jeff Kleinman, 1207 SW 6th Ave., Portland, Oregon 97204, an attorney representing the Lake Oswego Preservation Society, submitted proposed findings that he advised addressed the issues before the HRAB and would provide a basis for denial (see Exhibit G-3-20). He advised that any one or any combination of the several grounds set out in the document was sufficient to deny the application.

Mr. Kleinman indicated that the application was filed pursuant to the City's code provisions, and noticed to the public as an application under the City's code provisions for removal from historic designation. The staff report addressed that issue. It was only upon the actual day initially set for the hearing that the applicant said, "No, we want to proceed under the state statute." Mr. Kleinman held it was a completely different case. It required a completely different application. At the September 11 hearing the applicant had clarified that they withdrew the original application from consideration. They were not proceeding under the code as an alternative basis. Mr. Kleinman said he did not think this was fairly or squarely in front of the Board at this time.

Mr. Kleinman pointed out the proposed findings addressed the fact that the provisions of the state statute (which were adopted in 1995) were not available to this applicant. They set out the language of the statue. The language he had presented last time from the *Demlow* case made it quite clear that it was only the owner who had the designation slammed onto the property over their opposition that had the opportunity down the road to remove it. If they were no longer the owner, then the designation stays, unless, pursuant to the City's own provisions, there was an application for removal and the applicant met the criteria for that purpose. Mr. Kleinman clarified it was Richard Wilmot Sr. who was the objecting owner when the original designation was made in 1990 and when it came back on remand in 1991. He was no longer the owner; he was not the applicant for this delisting; he had passed on; the current owner was the Wilmot Trust; he is not either the

beneficiary, the settlor, the trustee, or the designee of the trustee of this trust. It was an entirely different applicant that was before the board. It was a different property owner appearing through a trustee, and that trustee was appearing through the trustee's designee. Mr. Wilmot Sr. was not the person requesting withdrawal.

Mr. Kleinman pointed out he had provided the board with a letter of intent from the drafter of [the statute's] language, who was Patti Milne, a legislator from Woodburn. She said that her intent was that when a historic property designation was imposed 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 said the comments from SHPO that council alluded to were incomplete. His clients had already requested comments from the same person at SHPO: Mr. Johnson. They were in the record as page 3 of Exhibit F-11. What Mr. Johnson stated there was that 'Our office has advised local governments on the application and interpretation of ORS 197.772 since its enactment in 1995. Our consistent interpretation has been that the special right to delisting created by the statute is available only to an original, objecting, owner of the subject property. If title has changed hands that right is not passed along to the subsequent owner.'

Mr. Kleinman pointed out he addressed the state of ownership on the bottom of page 3. He recalled at the last hearing they had heard from the applicant on the "so called entitlement" that the statute created an entitlement that passes down the line for time immemorial. Mr. Kleinman said that was incorrect. The closest parallel of a statute that basically gives a special right to property owners to take land use regulations and kick them in the tail and get rid of them was Measure 37, which was passed by voters in 2004 and then substantially modified by the voters in 2007 with Measure 49. Case law under Measure 37 was that that right was personal only to the owner at the time of the land use designation. If they owned it when the regulation took effect they could make a Measure 37 claim and argue that all those more restrictive land use regulations did not apply. If they took ownership later, that right did not exist. Mr. Kleinman concluded that [the applicants'] theory just did not fly.

Mr. Kleinman pointed out as a practical matter and not as an actual finding or legal issue that lot of things had happened in reliance on the historic designation over the years. That was why it was a mistake to allow people, without going through all of the hoops of the code, to undo the designation. In particular, the large piece that was developed after the barn burned (the 8.75 acres that was removed from the listing after that fire) had developed with a very intense residential development keyed around the sustaining of the historic resource on the remaining 1.25 acres (Carman House). Mr. Kleinman also argued that the original owner actually waived the original objection. As the City Council found in 1991 after the LUBA appeal and the burning of the barn when this came back on remand, the owner said, "remove that 8.75 acres Tax Lot 1201" and did not object to the City Council re-adopting the historic designation on the property that was the subject of this application. Under the law that was at the very least a waiver of the original objection. He would say it was a complete rescission of that objection and a consent in 1991 to the designation so long as the bigger piece no longer had the designation. That was what the City Council did. They removed it and Carman Ridge developed.

Mr. Kleinman addressed the Goal 5 issue. He said the whole process that the City went through in coming up with its landmark list was done to satisfy the historic resource component of Statewide Planning Goal 5. The way the City did that was to adopt Goal 5,

Section 8 of the Comprehensive Plan, which addresses historic resources. Then the code provisions he had talked about were identifying them and creating a list. Then there was a very restricting removal procedure to preserve the historic resource. He said regardless of any rogue statute that was out there, he did not believe that anyone can delist without either amending the regulations in the CDC or amending the Comprehensive Plan to recognize the statute, and to have those amendments in turn acknowledged by LCDC as the original plan and the original code provisions were.

Mr. Kleinman concluded that for all of the above reasons the application must be denied. He believed he had given the Board adequate findings for that purpose if they chose to adopt them.

Rebuttal

Mr. Koback stated that he had not seen anything that was submitted "just now." He asked for seven days to respond to anything in writing that was not given to him before the hearing.

Mr. Koback said the one thing the opponents had ignored was the actual language of Section 3. Their legal analysis did not answer the question of why it did not say "the owner who owned the property at the time of the imposition has the right to remove it." It simply said 'an owner'. He said there was no question that his client was 'a owner.' That was basic statutory construction law that every local body, state legislature, and court had to follow. He reiterated that Mr. Johnson had said what he believed was directly consistent with that. He was talking about two different things. If the designation was not objected to then a new owner could not buy it and say, "I want to object." Mr. Johnson had written that if it was not objected to the designation remained valid as it changed hands. Mr. Koback said, "This was objected to. The right was preserved."

Mr. Koback said he slightly disagreed with the characterization that they withdrew their prior application. The problem they had here was there was not an application process in the City for the statutory basis. The City had handled it a little less formally than some. The City of Hillsboro had a procedure. There was one application and he had filed that application. They asserted the statutory grounds within that application. The opponents had a substantial amount of time to address any issues, so there was no prejudice as a result of the issue being raised. Mr. Koback recalled they had told the Board last time that they wanted the Board to decide the statutory one first. They had not withdrawn their application. There was one application, and it was still before the Board. Their point was it was much more efficient to look at the statute because it was a discrete issue: Was it 'imposed' (objected to)? If it was objected to, even under Mr. Johnson's analysis, it had to be removed.

Mr. Koback said the opponents' theory that a subsequent owner did not get the right did not take into account that there was no notice given to individual property owners. In one of the written submittals from the Preservation Society they said, "Well, the statute was enacted and these people just kind of went along their own way." Mr. Kleinman said he did not see any evidence in city records that an individualized notice went out to people who were previously subject to an imposition saying, "By the way, things have changed now, and we are recognizing this statutory right. You might want to take a look at it." Mr. Koback said he suspected there were a lot of property owners who were never notified that there was a statutory right for removal.

Mr. Koback said there was never a waiver. The objection was made, and the case went up to LUBA. He thought even Mr. Kleinman would acknowledged that when a case has a reconsideration option a property owner does not waive their right to challenge the decision by not seeking reconsideration. That was all that was. The case went up; it came back; the property owner that owned the 8 acres fought for reconsideration. The fact that his client had previously objected and chosen not to vigorously seek reconsideration did not mean they waived anything. In fact, in the proceedings, the Board would see they just said, “We don’t want it imposed, but if you impose it, please impose it on less property. ‘’ Mr. Koback held that was not a waiver.

Mr. Koback addressed the Goal 5 issue. He said it was important to remember that the City of Lake Oswego had a history of removing designations under the statute. The applicants were not the first. Mr. Boone had described how the City had done it in the past in his letter to Mr. Koback. They had done it administratively and then they had done it through the Board. Mr. Boone had related that there had never been a decision that he was aware of in Lake Oswego where to remove the designation under the statute, there had been a requirement that the Comprehensive Plan be changed in any way. Mr. Koback observed that would be a dramatic change from the past treatment of other people in similar positions. He said as a matter of policy, as well as just fundamental legal rights, that would not be an inappropriate decision. Mr. Koback advised the Board to focus on the language. ‘A owner’ had the right, and his clients were ‘an owner.’

Mr. Boone advised the City was following the procedure required by its land use code. Mr. Koback asked the HRAB to keep the record open for seven days in order to provide a final written argument.

Mr. Ross **moved** to meet again on October 23, 2013 at 7:00 p.m. to make the decision and to meet on November 4, 2013 at 6:30 p.m. to vote on the findings. Ms. Rodway **seconded** the motion and it **passed** by unanimous vote.

Mr. Boone confirmed that Ms. McGuire, Ms. O'Neill, and Mr. Foster would be able to participate in the decision on October 23 if they had each reviewed the complete record of the previous hearing.