



United States Department of the Interior

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OR SHPO

Ms. Chrissy Curran
Deputy State Historic Preservation Officer
Oregon Heritage
Oregon Parks & Recreation Department
725 Summer Street NE, Suite C
Salem, Oregon 97301

Subject: Proposed Eastmoreland Historic District, Portland, Oregon

Dear Ms. Curran:

I am returning your May 23, 2019, nomination of the Eastmoreland Historic District (District) in Portland, Oregon for listing in the National Register of Historic Places (National Register). Based on a detailed review of all of the materials your office has provided me on this nomination, I have decided to return this nomination to allow the State Historic Preservation Office (SHPO) to resolve issues relating to the counting of owners and objectors.

Background:

The proposal to list the Eastmoreland Historic District in the National Register has been marked by controversy among the district's property owners. Much of this controversy appears to be tied to state or local regulations that attach where properties are individually listed on the National Register or identified as contributing to a listed historic district.

Oregon's Deputy State Historic Preservation Officer (DSHPO) first submitted the nomination for the District to the Keeper on May 18, 2017, along with your opinion that the District is eligible for listing in the National Register.¹ However, you indicated that you were not confident that the number of private property owners and valid owner objections regarding the proposed listing had been correctly calculated. The Keeper concluded that this constituted a prejudicial procedural error and returned the nomination to the DSHPO for procedural corrections on July 3, 2017.

On February 9, 2018, the Keeper received an appeal from the Eastmoreland Neighborhood Association (ENA) pursuant to the provisions of 36 C.F.R. § 60.12 alleging that you had failed or refused to re-submit the nomination in a timely manner. Based on your response to the

¹ In Oregon, the DSHPO has been delegated authority to act for the SHPO in all matters related to the National Register.

Keeper's request for comments regarding the appeal, the Keeper concluded that you had not failed or refused to nominate the District under 36 C.F.R. § 60.12, and denied the appeal.

On April 25, 2018 you requested an eligibility determination for the District, attached a proposed property-owner list and count of notarized objections received for the nomination and legal advice from the Oregon Department of Justice. Your request explained that the total number of identified property owners was, 7,188 and that SHPO's office counted 5,952 notarized objections. The owner and objection count differed significantly from the previously identified number of owners and objectors within the District. This is because in March and April of 2018 five property owners of four separate properties within the District executed deeds conveying a 0.1% interest in their property to 1,000 different trusts.

In response to the April 25, 2018 request for an eligibility determination, the Keeper received over 300 letters and postcards from interested parties expressing concern regarding your office's owner and objection count, and 10 notarized letters from owners rescinding their previous objections. The National Trust for Historic Preservation (National Trust) and the Advisory Council on Historic Preservation, urged the Keeper to reject the tactics used by the landowners who created the trusts and warned that these tactics could undermine the National Register program. Brian Sheets, an attorney representing Eastmoreland residents in favor of nomination, also submitted an objection, arguing that Oregon law defines the owner of a revocable trust as the settlor and the owner of an irrevocable trust as the grantor. Mr. Sheets further argued that, under the circumstances, the SHPO was required by National Register program regulations to conduct further research into the validity of the trusts and the legitimacy of the objections. Mr. Sheets subsequently submitted an appeal, which was converted to a petition on May 31, 2018.

On May 3, 2018, the Keeper sent letters, via certified mail, to the grantor/trustees of the 5,000 trusts at issue, requesting copies of the trust instruments/deeds associated with a random sampling of the trusts associated with each grantor/trustee within ten (10) calendar days of receipt of the letter. The Keeper received deeds from a couple of the grantor/trustees, but did not receive trust instruments regarding any of the trusts.

On June 29, 2018, Keeper returned the request for a determination of eligibility for the District, under the following reasoning:

The National Register Program regulations (36 C.F.R. § 60.3(k)) define the terms owner/owners as "...those individuals, partnerships, corporations, or public agencies holding fee simple title to a property." Trusts are not included within this definition. However, the NPS views the intent and purpose of the National Historic Preservation Act and National Register Program regulations to be inclusive rather than exclusive when it comes to recognizing the legitimate rights of private property owners. If, under applicable state law, a valid trust can legally own a fee simple interest in real property, such trust should be accorded the right to object to listing. If, under applicable state law, the trustee or settlor/grantor of a validly created trust holds the fee simple ownership, the trustee or settlor/grantor should be accorded the right to

object to listing.

From the comments we received it is clear there is some question as to whether these trusts are valid, have legal effect, and constitute a “fee simple” holding, as is required by our regulations. Under the National Register Program regulations, “it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected.” 36 C.F.R. § 60.6. Under these circumstances, this responsibility requires that the SHPO conduct further research in order to determine whether the thousands of trusts created shortly before submission of the nomination are valid legal entities capable of owning a fee simple property interest, and whether the transactions purporting to transfer ownership to them have legal effect. Put simply, the SHPO needs to ascertain whether these trusts are valid and whether they have a fee simple ownership in the properties at issue...

May 23, 2019 Nomination of the Eastmoreland Historic District:

On May 24, 2019, the Keeper received a nomination package for the Eastmoreland Historic District from your office. In your nomination letter you indicated that the Oregon SHPO counted a total of 1,988 owners within the proposed District, and that a total of 956 owners (48%) submitted valid objections.

In making these calculations, you employed the services of a certified internal auditor with no previous connection to the nomination as third party, independent, neutral reviewer. The materials you submitted with the nomination detail the measures that your office took to ensure the information regarding owners and objectors was accurate at the time the nomination was submitted.

Your response included a memorandum entitled “SHPO Response to June 2018 National Park Service Return Letter for the Proposed Eastmoreland Historic District.” It asserted that counting the five sets of 1,000 trusts as one owner each is consistent with the intent of the NPS’s regulations implementing the National Register program. In this memorandum, you explained that, in compliance with an Oregon state court ruling, you did not include any trusts as property owners on the property list, and you did not count any objections submitted on behalf of trusts.

However, you did conduct further inquiry in response to the request in the June 29 return letter to ascertain whether the 5,000 trusts created by five objecting landowners “are valid and whether they have a fee simple ownership in the properties at issue.” You obtained information using subpoenas in a case that was subsequently dismissed and learned that all of the trusts were similar as follows: “in each of the five groups of trusts all 1,000 trusts were created by a single trust agreement; in each of the five groups of trusts the trusts were all revocable; in each of the five groups of trusts the trusts all used one trustee apiece.” You were unable to obtain trust agreements, but do not believe obtaining these would change your analysis. You explained that you think the question is not the validity of the trusts, but whether or not the trusts should be afforded a single objection under the National Register

regulations, and opined, for various reasons, that it should not.

On June 21, 2019, the Keeper received a petition from David R. Simon requesting the Keeper to undertake a substantive review of the nomination and extend the review period for an additional 30 days from the date of the Keeper's receipt of the petition. The extension authorized under 36 C.F.R. §§ 60.6(t) and 60.12(a), revised the end of the Keeper's review period to July 19, 2019. In addition to the Simon petition, the Keeper received extensive correspondence from both proponents and opponents of the nomination, many citing inconsistencies in the ownership records utilized by the SHPO.

Reasons for Returning the Nomination:

a. Questions regarding the objection count

Subsequent to receiving the nomination from the SHPO, the Keeper received additional correspondence from several parties calling into question the owner objection counts. The correspondence included: new notarized owner objections, corrected owner objections, evidence relating to claimed double counts affecting the number of total owners and objections, evidence relating to settlors of revocable trusts, evidence relating to trustees of irrevocable trusts, evidence alleging miscounts in the inclusion of trusts, claimed discrepancies between the owners list and tax records, notarized rescissions of previous objections, and the addition of new property owners. The level of detail provided in these materials varies widely, making an assessment of an accurate count by the Keeper difficult, if not impossible, particularly as it relates to the treatment of trusts.

Given the detailed methodology and complicated system used by the SHPO to develop the related ownership and objection counts, it is unclear whether any of these identified issues were previously considered and exactly how they might impact a revised final count of owners and objectors. The fact that many of these items are related to trusts further complicates any assessment by the Keeper. The SHPO, having dealt with these issues in extensive detail previously is in a better position to accurately consider the materials in the first instance as directed under 36 C.F.R. § 60.6, "it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected." I am providing all of the documents we received during the review period for your review and consideration.

b. Treatment of Trusts in general

The National Register Program regulations (36 C.F.R. § 60.3(k)) define the terms owner/owners as "...those individuals, partnerships, corporations, or public agencies holding fee simple title to a property." Trusts are not included within this definition. As we have previously advised, the NPS views the intent and purpose of the NHPA and National Register Program regulations to be inclusive rather than exclusive when it comes to recognizing the legitimate rights of private property owners. If, under applicable state law, a valid trust can legally own a fee simple interest in real property, such trust should be accorded the right to object to listing. If, under applicable state law, the trustee or settlor/grantor of a validly created trust holds the fee simple ownership,

the trustee or settlor/grantor should be accorded the right to object to listing.

As you have explained, on April 3, 2019, the Oregon State Court of Appeals found that when the Oregon SHPO published NPS guidance describing trusts as property owners eligible to object to a National Register nomination, you “inadvertently created a ‘rule’ within the meaning of the Oregon Administrative Procedures Act,” and the court held that your compliance with our guidance was invalid because your office failed to comply with Oregon rulemaking procedures. As a result, until the Oregon SHPO promulgates a rule pursuant to State law, the court has held that you are precluded under state law from complying with our guidance regarding a federal program.

The Secretary of the Interior, acting through the Director of the NPS, has the authority to make rules and regulations regarding the National Register and to interpret those regulations, which are applied nationwide. The Oregon State Court of Appeals’ ruling was limited to a question of state law, and does not affect the NPS’s position with respect to the ability of validly created trusts to be counted as property owners and to object to listing, if they so choose. I appreciate that in submitting the nomination you acknowledged this conflict and, in addition to a certification that a majority of owners did not object to listing if trusts were not counted as owners, you also completed an analysis to determine if counting trusts as owners and objections received on behalf of trusts, and determined that this would not affect the outcome. It is unclear, given the information submitted to the Keeper during the review period, whether the counting, or not counting, of trusts would make a difference in the outcome of the owner objection process.

c. Questions regarding the validity of certain trusts.

As to the analysis in the May 23, 2019 memorandum regarding how to count the 5,000 newly created trusts for the purposes of the owner/objector count, we appreciate your analysis regarding the trusts but disagree as to the key issue. The Oregon Department of Justice previously concluded that trusts could own a fee simple interest in real property under Oregon law. However, other parties raised legal questions as to whether the trusts at issue were valid. The key issue regarding whether the trusts can be counted as owners or objectors is whether the trusts themselves are valid. We appreciate your concerns that your office does not have the investigative tools to learn additional information regarding the trusts, and that it does not have the “authority to pronounce a trust valid or invalid.” However, this is an issue of Oregon law that the Keeper is not in a position to resolve.

Conclusion

Under the National Register program’s implementing regulations it is the State Historic Preservation Officer’s responsibility to determine the identity of property owners within a historic district, the number of property owners within that district, and whether a majority or minority of property owners object to listing. See generally 36 C.F.R. § 60.6. This is because it is the State Historic Preservation Officer, not the Keeper, who is in the best position to make those determinations. In those rare cases where there are questions as to the accuracy of the owner objection count that could affect whether a property can be listed in the National Register, the Keeper cannot simply adopt the State’s findings. See Sierra Club v. Salazar, 177 F. Supp. 3d 512, 541 (D.D.C. 2016). In this case, there are questions as to the accuracy of the owner objection

count that the Keeper cannot resolve. Further there is a legal question under Oregon law that the Keeper is not in a position to resolve. Accordingly, I am returning the nomination of the Eastmoreland Historic District to you to address the issues explained more fully above.

If you have any questions regarding this determination, please feel free to contact Paul Lusignan (202) 354-2229.

Sincerely,

A handwritten signature in black ink, appearing to read "Joy Beasley". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joy Beasley
Acting Associate Director, Cultural Resources, Partnerships, and Science
and Keeper of the National Register

Enclosures