



United States Department of the Interior

NATIONAL PARK SERVICE
1849 C Street, N.W.
Washington, D.C. 20240

H32(2280)

JUN 29 2018

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

Subject: Proposed Eastmoreland Historic District, Portland, Oregon

Dear Ms. Curran:

I am returning your April 25, 2018, request for a determination of the eligibility for the Eastmoreland Historic District (District) in Portland, Oregon for listing in the National Register of Historic Places (National Register). Your request indicates that your office decided not to nominate the District for listing in the National Register, because you concluded that a majority of private property owners in the District objected to the listing. As explained below, based on a detailed review of all of the materials your office has provided on this nomination, including applicable portions of the National Historic Preservation Act of 1966 (NHPA), applicable portions of the National Register program regulations (36 C.F.R. § 60 et seq.), available articles from the news media, and extensive written comments from local and national organizations and the public at-large, I have decided to return this nomination.

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 the state or local regulations that attach where properties are individually listed in the National Register or identified as contributing to a listed historic district.

Your office, Oregon's state historic preservation office, first submitted the nomination for the District to the Keeper on May 15, 2017, along with the opinion that the District is eligible for listing in the National Register.¹ However, you indicated that you were not confident that you correctly calculated the number of private property owners and valid owner objections regarding the proposed listing. The Keeper concluded that this constituted a prejudicial procedural error and returned the nomination to you for procedural corrections.

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

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 the state historic preservation office had failed or refused to resubmit the nomination in a timely manner. Via letter dated February 23, 2018, the Keeper requested that you submit comments regarding the appeals. In your March 6, 2018, response you reiterated your opinion that the District is eligible for listing and explained that, to ensure that a corrected nomination process adequately satisfied all state and federal regulatory requirements, that your office would continue to work on the resubmission in consultation with the Keeper's staff and the Oregon Department of Justice (Oregon DOJ). You further explained that office was engaged in a significant effort to keep stakeholders and the public informed on the status of the nomination correction process via your agency's website as well as through emails, phone calls, and individual interactions. Importantly, you stated that the corrected nomination would be resubmitted by May 18, 2018. Based on these presentations, the Keeper concluded that the DSHPO had not failed or refused to nominate the District under 36 C.F.R. § 60.12, and denied the appeal.

The request for an eligibility determination

On April 26, 2018, the Keeper received your request for a determination of eligibility of the District, certifying that the District meets the National Register Criteria for Evaluation. The memorandum accompanying your request, attached a proposed property-owner list and count of notarized objections received for the nomination and legal advice from the Oregon DOJ. It explained that the total number of identified property owners was 7,188 and that your (SHPO's) office counted 5,952 notarized objections.² Because 82.8% of the total number of owners objected, you determined that a majority of the owners within the District objected to listing. The memorandum was accompanied by a memorandum from the Oregon DOJ, General Counsel Division which concluded that it was consistent with Oregon law for trusts to be considered "owners" of private property under the National Register Program regulations.

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. Each of these individuals is identified in the deeds as both the grantor and the trustee of the 1,000 trusts, and a list of the 1,000 trusts is attached to the deeds. Each of the trusts is identified by three to four initials and a number from 1 to 1,000. If the five property owners at issue had not created the 5,000 trusts, and had instead been counted as five (5) owners with five (5) objections, it appears that a majority of the private property owners would not have objected to listing.

Although the Oregon DOJ's memorandum addressed the ownership ability of trusts

² On June 25, 2018, the Keeper's Office received correspondence from your office stating that "[s]ince sending in the Eastmoreland Historic District materials we received a public records request that made us aware of a few discrepancies in our official count. The new count is: 7,194 property owners and 6,004 objections."

generally, it did not consider the specific circumstances here. In addition, it does not appear that either you (on behalf of the SHPO) or the Oregon DOJ had the opportunity to review the trust creation documents, or that either investigated or considered the legality or validity of the trusts at issue.

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.

Comments received regarding the owner and objection count

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 more substantive letters received are recounted below.

The National Trust for Historic Preservation (National Trust) expressed concern that "a small handful of property owners within the nominated Eastmoreland Historic District (three individual property owners and two joint owners of a fourth property) each recently split their properties into 1,000 'trusts' per owner, for the purpose of artificially increasing the number of objecting owners within the historic district, in an effort to prevent listing in the National Register." The National Trust found your "decision to accept the objections of these manufactured or cloned ownership interests . . . especially troubling in light of the fact that the 5,000 trusts at issue here were created by a mere handful of property owners, living in only four homes, in a neighborhood with more than 2,000 other property owners." These comments urged the Keeper to reject the tactics used by the grantor/trustees and warned that, if successful, this tactic could be used by both proponents and opponents of listing, who could simply create ownership interests to skew the owner count, essentially undermining the National Register program. The National Trust further urged the Keeper to "'pierce' the corporate veil" with respect to the trusts and, rather than counting 1,000 trusts as owners of each property, to count the individual named as the grantor and trustee for each of those trusts. It further warned about potential repercussions of this action, specifically stating that:

The National Trust is concerned that, if this attempt to manipulate the owner objection process were accepted by your [the Keeper's] office, it would set a precedent that could completely undermine the credibility of the National Register nomination process, and subvert the long-standing efforts by the National Park Service to administer a fair and objective method for implementing the owner objection provisions of the National Historic Preservation Act (NHPA). Manipulation of this process effectively disenfranchises other property owners who are abiding by the regulations designed to give each property owner an equal opportunity to accept or object to the National Register designation.

The Executive Director of the Advisory Council on Historic Preservation (Advisory Council), in a letter to the Acting Director of the National Park Service expressed support for the National Trust's position, recounting the history of the owner objection process as follows:

In 1980, the NHPA was amended to address owner participation in the nomination process. The intent of this provision was to allow legitimate property owners a voice in listing decisions, reflecting the democratic ideal that the desires of a majority of the property owners in a historic district should determine whether the district would be formally listed on the National Register. For nearly four decades the owner objection provision in the law has worked effectively to find balance and achieve listing decisions that were in accordance with national policy and the will of the majority of affected citizens.

The Advisory Council then expressed concern that the actions at issue “threaten to make a sham of this reasonable process and jeopardize the entire underpinnings of National Register historic district designations.” Specifically, the Advisory Council stated that “[b]y artificially inflating the influence of a small group of property owners through legal sleight of hand, the views of the true majority of property owners in the community are frustrated, subverting the legislative intent and purpose of the owner objection process.” It opined that “[s]uch an effort is not in the public interest and, if validated by the National Park Service, would eviscerate the National Register listing process for historic districts.” Likewise, the Portland Coalition for Historic Resources objected, urging the Keeper to “declare the use of trust formation to manipulate the outcome as invalid and disallow the objections.”

Brian Sheets, an attorney representing Eastmoreland residents in favor of the 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 these 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 of the DSHPO's failure or refusal to nominate, which was converted to a petition, at his request, on May 31, 2018.

Mr. Sheets also provided a legal opinion by Alan Brickley, an Oregon title attorney, who opined that the deeds conveying 0.1% interest in the various properties at issue were without legal effect because they appeared to be illusory or “sham” trusts. Mr. Brickley also explained that the public policy for compliance with the recording statute is to provide “complete and accurate notice of interests in real property” and that obfuscating the public record “is in violation of the public benefit.” Reference was also made to the public policy of ascertaining the public will in order to determine whether a district can be listed, and that creating a “false count” of owners and objectors runs counter to that policy. Also of note, Mr. Brickley explained the likely difficulties attendant to a subsequent sale of the four properties at issue.

The Keeper's return decision

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. Accordingly, I am returning the nomination.

If you have any questions regarding this determination, please feel free to contact Julie Ernstein (202-354-2217) or Paul Lusignan (202-354-2229).

Sincerely,



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