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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

DEREK BLUM and MANDA BLUM,
individuals,

Petitioners,

v.

**OREGON PARKS AND RECREATION
DEPARTMENT**, a political subdivision of
the State of Oregon, **CHRISTINE
CURRAN**, in her official capacity; and **IAN
JOHNSON**, in his official capacity,

Respondents.

Case No. 18CV25307

**PETITION FOR JUDICIAL REVIEW
PURSUANT TO ORS 183.484
REQUEST FOR ATTORNEY FEES**

Petitioners DEREK BLUM and MANDA BLUM, by and through their attorney of record, Brian R. Sheets of BRS Legal, LLC petitions for judicial review of a final order in other than a contested case under ORS 183.484, and alleges as follows:

PARTIES

1.

Petitioners DEREK BLUM and MANDA BLUM are residents of the Eastmoreland Neighborhood in Portland, Oregon and supporters of the Eastmoreland Historic District (“District”) for listing in the National Register of Historic Places (“NRHP”). Petitioners are the co-founders of Historic Eastmoreland Achieving Results Together (“HEART”), an advocacy

1 group formed to support the listing the District in the NRHP.

2 2.

3 Respondent, OREGON PARKS DEPARTMENT, agency of the State of Oregon
4 (“State”), regulates the National Register Program in Oregon, by and through the Oregon State
5 Historic Preservation Office (“SHPO”), a subdivision of the OREGON PARKS
6 DEPARTMENT.

7 3.

8 Respondent OREGON PARKS DEPARTMENT and SHPO is an agency under ORS
9 183.310(1) because it is a “state board, commission, department, or division thereof.”

10 4.

11 Respondent, CHRISTINE CURRAN, is the Deputy Oregon State Historic Preservation
12 Officer, and is the author of one or more orders in the present matter.

13 5.

14 Respondent, CHRISTINE CURRAN, is an agency under ORS 183.310(1) because she is
15 an “officer authorized by law to * * * issue orders.”

16 6.

17 Respondent, IAN JOHNSON, is the Associate Deputy State Historic Preservation Officer
18 and is the author of one or more orders in the present matter.

19 7.

20 Respondent, IAN JOHNSON, is an agency under ORS 183.310(1) because he is an
21 “officer authorized by law to * * * issue orders.”

22 JURISDICTION AND VENUE

23 8.

24 This Court has subject matter jurisdiction to address this petition pursuant to ORS
25 183.484.

26 ///

1 9.

2 Marion County Circuit Court is the proper venue to address this petition pursuant to ORS
3 183.484(1).

4 ORDERS

5 10.

6 The April 25, 2018 Memorandum from Respondent IAN JOHNSON, Associate Deputy
7 State Historic Preservation Officer to J. Paul Loether, National register Chief, National Park
8 Service (“Order 1”) is a Final Order in other than a Contested Case because it constitutes
9 “agency action expressed in writing . . . ” not arising from any of the four categories described in
10 ORS 183.310(2)(a).

11 11.

12 Order 1 (attached as Exhibit 1) states:

13 “The Oregon State Historic Preservation Office (SHPO) submits the encloses
14 property-owner list and count of notarized objections for the nomination of the
15 proposed Eastmoreland Historic District, Multnomah Co., OR (District). The
16 property-owner list and counted objections is based on the appropriate federal
17 regulations and on requested advice from the National Park Service (NPS) and the
18 Oregon Department of Justice (DOJ). The total number of identified property
19 owners is 7,188. The SHPO counted the total number of valid objections under
20 the federal regulations. **As of 2:00 pm on April 24, 2018, our office received
21 5,952 notarized objections, or 82.8% of the total number of owners. It is
22 therefore the determination of the SHPO that the majority of property
23 owners do not consent to listing the District in the National Register of
24 Historic Places.**

19 * * * * *

20 **The SHPO notes that the CFRs do not obligate nor grant the authority to the**
21 **SHPO to investigate ownership.** Instead, the CFRs direct the SHPO to count
22 individuals as owners if the individual submits a properly notarized statement.

22 * * * * *

23 Following the applicable federal regulations and advice from NPS and DOJ, the
24 SHPO compiled the property-owner list for the District beginning with the list
25 provided by the City of Portland on November 18, 2016 from the Multnomah
26 County Tax Assessor as required n 36.CFR60.g(g) [sic], adding owners as
described above. The total number of private property owners is 7,188. **On April
12, 2018, the SHPO received 5,000 notarized objections from recently formed
trusts. As required by the federal regulations, individuals and legal entities**

1 **were added to the property-owner lists even if they were not included in the**
2 **November 2016 property-owner list provided by the county.”** (emphasis
added).

3 12.

4 The Order is final agency action as it demonstrates the conclusion of the SHPO to count
5 5,000 “recently formed trusts” (hereinafter “objection trusts”) as legitimate property owners
6 entitled to object to listing. The decision was forwarded to the National Park Service (“NPS”),
7 which may act on the decision to not list the District in the NRHP without any further action by
8 the SHPO.

9 13.

10 The April 25, 2018 Letter from Respondent CHRISTINE CURRAN to J. Paul Loether
11 regarding the National Register Nomination (“Order 2,” attached as Exhibit 2) is a Final Order in
12 other than a Contested Case because it constitutes “agency action expressed in writing . . . ” not
13 arising from any of the four categories described in ORS 183.310(2)(a).

14 14.

15 Order 2 states:

16 “At the recommendation of the Oregon State Historic Committee on Historic
17 Preservation, **I hereby request a determination of eligibility for the National**
Register of Historic Places for the following Historic Property:

18 EASTMORELAND HISTORIC DISTRICT
19 PORTLAND, MULTNOMAH COUNTY

20 As of the date of this letter, **the Oregon SHPO counts a total of 7,188 owners**
within the proposed district. A total of 5,952, or 82.8% of the owners
submitted valid objections. It is therefore my determination that the majority
of the property owners object to listing the proposed district.” (emphasis
21 added).
22

23 15.

24 Order 2 is final agency action as it demonstrates the conclusion of the SHPO and
25 Respondent CHRISTINE CURRAN to count 5,000 objection trusts as legitimate property
26 owners entitled to object to listing. The decision was forwarded to NPS, which may act on the

1 decision to not list the District in the NRHP without any further action by the SHPO.

2 GENERAL ALLEGATIONS

3 16.

4 Respondent OREGON PARKS AND RECREATION DEPARTMENT is the agency that
5 oversees the SHPO and its activities.

6 17.

7 Respondents CHRISTINE CURRAN and IAN JOHNSON are officers within the SHPO.

8 18.

9 SHPO is an agency responsible for implementing NPS's National Register Program in
10 Oregon, including determining eligibility of properties and nominating eligible properties for
11 listing in the NRHP.

12 19.

13 SHPO operates under NPS federal regulations to process nominations to the NRHP,
14 contained in 36 CFR § 60 *et al.*

15 20.

16 On or about November 1, 2016, the Board of the Eastmoreland Neighborhood
17 Association submitted an application to SHPO nominating the District for listing in the NRHP.

18 21.

19 On or about February 16, 2017, the State Advisory Committee on Historic Preservation
20 ("SACHP") held a public hearing, received public testimony and reviewed the nomination
21 document for completeness, and recommended to the SHPO that the District be listed in the
22 NRHP.

23 22.

24 On or about May 15, 2017, SHPO submitted the nomination document for the District to
25 NPS, finding that the District was eligible for listing in the NRHP, but that the SHPO was unable
26 to determine owner consent to the nomination.

1 23.

2 The SHPO requested the nomination be returned to correct procedural errors, which NPS
3 returned on or about June 30, 2017.

4 24.

5 On or about August 1, 2017, the SHPO requested guidance from the Oregon Department
6 of Justice (“DOJ”) for determining ownership and counting objections to the nomination,
7 including questions regarding objections received on behalf of trusts.

8 25.

9 On or about January 16, 2018, DOJ responded to SHPO’s request for advice via a
10 memorandum (the “DOJ memo,” attached as Exhibit 3) outlining a method to determine
11 ownership of private property based on interpretations of combined federal regulations and
12 Oregon statutes.

13 26.

14 On or about February 13, 2018, the SHPO, through Respondent IAN JOHNSON,
15 indicated that it was re-opening the objection period for the nomination, and would contact
16 private property owners that had submitted deficient objections with instructions for correcting
17 objections, and indicated that objections would be received until April 13, 2018, and would re-
18 submit the nomination by May 18, 2018.

19 27.

20 On or about March 18, 2018, Petitioners learned that Patrick Cummings, a resident of the
21 Eastmoreland Neighborhood and known opponent to the District, had transacted a property
22 record in the Multnomah County recording office that assigned fractional interests of 0.1%
23 interest in his residence to 1,000 objection trusts.

24 28.

25 In response to the likely abuse of the objection counting process, on or about March 19,
26 2018, Petitioners sent through their attorney a Petition for Rulemaking pursuant to ORS 183.390,

1 OAR 137-001-0070 and OAR 137-001-0080 to the SHPO and Respondents OREGON PARKS
2 AND RECREATION DEPARTMENT and CHRISTINE CURRAN that described the policy
3 concerns of a single private property owner creating thousands of trusts and subsequently
4 objecting to the listing of the District in the NRHP, and requested that the SHPO and Respondent
5 OREGON PARKS AND RECREATION DEPARTMENT take immediate rulemaking action to
6 not count objections received from objection trusts. The Petition for Rulemaking explained that
7 counting objections from the objection trusts would dilute organic support for the district, and
8 disenfranchise supporting private property owners.

9 29.

10 On or about April 2, 2018, the Oregonian published an article titled “Eastmoreland
11 homeowner divides up property 1000 times to upset historic district campaign” [sic], whereby
12 Patrick Cummings’ intent for the trust creations is revealed: “homeowner Patrick Cummings
13 divided the ownership of his property between 1,000 trusts, giving Cummings -- as trustee for
14 each --1,000 opportunities to object.”

15 30.

16 On or about April 11, 2018, Petitioners learned that three other households in the
17 Eastmoreland Neighborhood had filed property transactions in the Multnomah County Recorders
18 Office that had similarly assigned fractional interests of their properties to trusts, totaling
19 approximately 4,000 trusts.

20 31.

21 On or about April 12, 2018, Petitioners, through their attorney, submitted an addendum to
22 the Petition for Rulemaking, alerting the SHPO of additional objection trusts receiving
23 fractionated property interests, demonstrating the intent of the objection trusts through the April
24 2, 2018 Oregonian article, and again encouraging adoption of a rule that would not count
25 objections from objection trusts. The SHPO denied the petition for rulemaking on or about June
26 14, 2018.

1 32.

2 On or about April 25, 2018, Respondent IAN JOHNSON issued Order 1 in the
3 Memorandum to J. Paul Loether that indicated that SHPO had accepted approximately 5,000
4 objections from the objection trusts, included the trusts as individual property owners, and
5 determined that a majority of private property owners had objected to the District's listing in the
6 NRHP. Therefore, the SHPO requested a "determination of eligibility" that would not
7 recommend the District for listing on the NRHP.

8 33.

9 Respondent noted in Order 1 that "the CFRs do not obligate nor grant the authority to the
10 SHPO to investigate ownership" regarding any alleged private property owner that submits a
11 notarized objection.

12 34.

13 On or about April 25, 2018, Respondent CHRISTINE CURRAN issued Order 2,
14 requesting a "determination of eligibility" for the District instead of a recommendation for listing
15 the District in the NRHP because of her "determination that the majority of the property owners
16 object to listing the proposed district."

17 35.

18 On or about May 9, 2018, Petitioners, through their attorney sent a letter to Oregon Parks
19 and Recreation Department Director and Oregon State Historic Preservation Officer Lisa
20 Sumption, Respondent CHRISTINE CURRAN, and DOJ General Counsel Steven Shipsey that
21 described the legal error of including the objection trusts as legitimate objectors based on
22 misapplication and misinterpretation of Oregon state law and federal regulations. Petitioner
23 requested that the SHPO to correct its counts based on Oregon law, inform NPS of its error, and
24 recommend that the District be listed in the NRHP. Petitioner did not receive a response from
25 any of the parties addressed.

26 ///

PETITION FOR JUDICIAL REVIEW

PURSUANT TO ORS 183.484

36.

Petitioners re-allege paragraphs 1-35.

37.

The Respondent's final order is a final determination adversely affecting Petitioners because Respondents' recognition of 5,000 objection trusts to be counted as legitimate owners and objectors prevented the SHPO from recommending the District to be listed in the NRHP. But for the recognition of the objection trusts' objections, the SHPO would have recommended the District for listing in the NRHP, as only approximately 952 objections should have been counted for approximately 2,188 owners, resulting in only approximately 43.5% of owners objecting.

38.

Petitioners are aggrieved by the SHPO's erroneous determination because NPS may act on Respondents' erroneous decision to not recommend the District for listing in the NRHP, among other things.

39.

Petitioners are aggrieved by Respondents' erroneous determination because Petitioners have supported the District for listing in the NRHP, vigorously participated in the process to list the District in the NRHP, and formed HEART, an organization dedicated to supporting the District for listing in the NRHP, among other things.

40.

Petitioners are aggrieved because Respondents' failure to recommend the District for listing in the NRHP deprives Petitioners' residence and neighborhood of land use protections afforded to historic districts in Oregon statutes and rules, and City of Portland ordinances, among other things.

///

Respondent has erroneously interpreted a provision of law that required or prohibited a particular action by failing to correctly apply one or more of the following:

(a) SHPO is required to “ascertain whether a majority of private property owners have objected” to listing the District in the NRHP. 36 CFR § 60.6(g). “Ascertain” is undefined in the Code of Federal Regulations pertaining to historic district nominations. Applying the normal dictionary definition, this provision requires SHPO “to make certain or definite; to find out with certainty” whether a majority of private property owners have objected to listing the District in the NRHP. (“Ascertain.” Websters New Collegiate Dictionary, Merriam-Webster, n.d. (May 14, 2018)). SHPO and Respondents have expressly declined to investigate or validate ownership information regarding the highly unusual 5,000 objections submitted by the purported trusts: Respondents did not verify whether there were valid purported trusts meeting the standards or ORS 130.155, or verify the purported trusts purposes met the standards of ORS 130.165. Respondents erred in Order 1 and Order 2 by failing to ascertain whether a majority of private property owners object to listing the District in the NRHP.

(b) SHPO misapplied the definition of “owner” to include trusts as the entity objecting, rather than the trustee objecting on behalf of the trusts. Federal regulations define “owner or owners” as “those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.” 36 CFR § 60.3(k). Trusts are not included in this definition. The DOJ memo informed Respondents that under ORS 195.300(18)(c), “owner” means “If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner.” Hence, the settlor or the trustee is the owner of the property, and not the trust itself. Respondents relied on a document titled “Identifying, Notifying & Counting Property Owners in Historic Districts,” purportedly from NPS that states “A trust is

1 listed as an owner – the trust is considered one owner and it gets one vote.” This statement is
2 without support in any federal regulation, and unsupported by Oregon law. Respondents erred in
3 Order 1 and Order 2 by recognizing the approximately 5,000 objection trusts as “owners,” and
4 further erred by recognizing the 5,000 purported objections from the objection trusts, rather than
5 the five trustees of the trusts.

6 (c) SHPO failed to apply federal regulations in 36 CFR § 60.6(g) whereby each owner is
7 entitled to one vote. The final sentence of 36 CFR § 60.6(g) states “Each owner of private
8 property in a district has one vote regardless of how many properties or what part of one property
9 that party owns and regardless of whether the property contributes to the significance of the
10 district.” Respondents erroneously determined that each objection trust was a sole and unique
11 “owner” when one trustee was making the decision to object. Trusts cannot make sentient
12 decisions on their behalf. A trustee or settlor makes decisions for the trust on behalf of a
13 beneficiary, and the trustee holds legal title to the property. Therefore the trustee owns the
14 property and in concert with the federal regulations, “each owner of private property in a district
15 has one vote regardless of how many properties or what part of one property that party owns.”
16 Respondents erred in Order 1 and Order 2 by counting objection trusts as owners, rather than the
17 trustees.

18 42.

19 Because Respondent erroneously interpreted one or more provisions of law, the Court should:

- 20 (a) Set aside or modify Respondent’s final order pursuant to ORS 183.484(5)(a)(A).
21 (b) Or, in the alternative, remand the order back to Respondent for further action under a
22 correct interpretation of the law pursuant to ORS 183.484(5)(a)(B).

23 ATTORNEY FEES

24 Respondents have acted without a reasonable basis in law or fact. Petitioners have
25 incurred attorney fees and costs. Pursuant to ORS 183.497, Petitioners are entitled to receive and
26 be awarded their reasonable attorney fees and costs.

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REQUEST FOR RELIEF

WHEREFORE, Petitioner requests the following relief:

- (a) Set aside and modify the Final Orders; or in the alternative remand to the Agency;
- (b) Order Respondent to inform the National Park Service of its error, and request that the District be listed in the NRHP;
- (c) Make any other disposition of the case the Court determines appropriate;
- (d) Require Respondents to pay Petitioner's reasonable attorney fees and costs under ORS 183.497; and
- (e) Make special findings of fact based on the evidence in the record and conclusions of law indicating clearly all aspects in which the agency's order is erroneous.

DATED this 19th day of June, 2018.

BRS Legal, LLC



Brian R. Sheets, OSB# 134849
P.O. Box 987
Ontario, OR 97914
Phone: 503-830-1448
brian@brs-legal.com
*Of Attorney for Petitioners Derek Blum and
Manda Blum*

Trial Attorney: Brian R. Sheets



MEMORANDUM

DATE: April 25, 2018
 TO: J. Paul Loether, National Register Chief, National Park Service
 FROM: Ian Johnson, Associate Deputy State Historic Preservation Officer
 RE: Nomination process for the Eastmoreland Historic District, Multnomah Co., OR

The Oregon State Historic Preservation Office (SHPO) submits the enclosed property-owner list and count of notarized objections for the nomination of the proposed Eastmoreland Historic District, Multnomah Co., OR (District). The property-owner list and counted objections is based on the appropriate federal regulations and on requested advice from the National Park Service (NPS) and Oregon Department of Justice (DOJ). The total number of identified property owners is 7,188. The SHPO counted the total number of valid objections under the federal regulations. As of 2:00 pm on April 24, 2018, our office received 5,952 notarized objections, or 82.8% of the total number of owners. It is therefore the determination of the SHPO that the majority of the property owners do not consent to listing the District in the National Register of Historic Places.

The following documents are included on the enclosed disks with the digital National Register of Historic Places form: A copy of the original property-owner list provided to our office by the City of Portland; the property-owner list that SHPO prepared according to Chapter 36 of the Code of Federal Regulations, part 60 and NPS' guidance provided in November 2017; objections and letters of support received; scans of all correspondence related to the federal nomination process; and the minutes and recording of the review board hearing. The SHPO retains a full record of all correspondence received and sent and records created as part of the administrative process. The SHPO can provide this information upon request. Guidance documents used to compile the property-owner list and count objections are included as appendices to this memo.

Counting Property Owners and Objections

The following is an overview of the nomination process for the proposed District. A summary of the SHPO's public outreach efforts is also included.

On May 15, 2017, the SHPO sent the nomination for the District to your office. At that time, Christine Curran, the Deputy State Historic Preservation Officer, found that the District was



eligible for listing in the National Register of Historic Places (Register), that the form was technically correct, and that the District was properly documented. However, our office was unable to determine owner consent as required in the Code of Federal Regulations 36CFR60.6(g) due to substantive questions raised during the nomination process regarding counting owners and tallying objections. At the request of the SHPO, NPS returned the nomination document in July 2017. In your agency's response, NPS advised that "real property ownership questions ... be referred to an authorized state official." The SHPO compiled a list of questions raised during the nomination process and forwarded these to the DOJ on August 1, 2017. On November 15, 2017, NPS sent a letter to our office laying out the procedures for counting owners and objections, and reiterating the previous advice to seek guidance on ownership questions from an authorized state official. On January 16, 2018, the SHPO received the requested guidance on ownership from the DOJ.

The SHPO used the federal regulations as construed by the guidance provided by NPS and DOJ to review all previously-received objections and withdrawn objections. Staff evaluated each document to determine that 1) the provided situs address was within the boundaries of the District; 2) the document was signed and dated by a private property owner; and 3) the document was notarized. The SHPO notes that the CFRs do not obligate nor grant the authority to the SHPO to investigate ownership. Instead, the CFRs direct the SHPO to count individuals as owners if the individual submits a properly notarized statement. Based on the federal regulations, our office finds that there are only four instances where an objection may not be counted: 1) the property for which an objection is received is outside the nominated boundary, 2) the objection does not meet the notary standard, 3) the objection cannot be associated with a specific owner, a property within the district, or both, and 4) the "owner" is a public entity as defined in the Code of Federal Regulations.

Based on the DOJ advice, the SHPO notified property owners by mail the week of March 12th if their objection or withdrawn objection appeared to be "deficient," and offered the opportunity to submit complete forms on or before April 13, 2018. That date was advisory, and all correspondence received up to the transmittal of this submission to NPS for the proposed District is included on the enclosed disks.

Following the applicable federal regulations and advice from NPS and DOJ, the SHPO compiled the property-owner list for the District beginning with the list provided by the City of Portland on November 18, 2016 from the Multnomah County Tax Assessor as required in 36.CFR60.6(g), adding owners as described above. The total number of private property owners is 7,188. On April 12, 2018, the SHPO received 5,000 notarized objections from recently formed trusts. As required by the federal regulations, individuals and legal entities were added to the property-owner list even if they were not included in the November 2016 property-owner list provided by

the county. Objections received from property owners outside of the proposed district boundaries were not counted. Objections or withdrawn objections that were considered deficient where the owner failed to submit a valid document were not counted. In the case where an individual submitted multiple notarized documents, the SHPO considered the last valid document received to reflect the private property owner's final decision. The total number of valid objections is 5,952, or 82.8% of the total number of owners.

Please see the attached advice from the DOJ for more detail on the SHPO's application of federal rules regarding counting owners and objections in nominated historic districts.

Public Process

The SHPO met or exceeded notice requirements for listing a property with 50 or more private owners as described in 36CFR60.6(d). A summary of the office's notification and outreach efforts are provided below:

- May 26, 2016 – SHPO staff attended a meeting sponsored by the Eastmoreland Neighborhood Association (ENA) in Portland to answer questions about the National Register process.
- November 1, 2016 – ENA submitted the Eastmoreland Historic District nomination for initial review.
- December 15, 2016 – The SHPO sent written notification of the upcoming State Advisory Committee on Historic Preservation (SACHP) meeting and copies of the draft nomination to the City of Portland Mayor, city landmarks commission, ENA, and preparer.
- December 15 and 20, 2016 – The SHPO published a public notice in *The Oregonian* and *The Portland Tribune*, general circulation newspapers, announcing the availability of the official draft of the Eastmoreland Historic District nomination. The SHPO posted the draft nomination to the agency website with information on the nomination process.
- February 6, 2017 – SHPO sent a press release to local print, radio, and TV news outlets announcing the upcoming SACHP meeting to consider the proposed Eastmoreland Historic District nomination.
- February 16, 2017 – Tour of the proposed Eastmoreland Historic District held for the benefit of the SACHP.
- February 17, 2017 – The SACHP met to consider the proposed Eastmoreland Historic District nomination.
- May 15, 2017 – SHPO sent the nomination document to NPS.

- June 30, 2017 – At the SHPO’s request, NPS returned the nomination document to correct procedural errors.
- February 13, 2018, the SHPO stated the process and timeline for resubmitting the National Register nomination for the District to NPS on the agency website. The SHPO notified self-identified interested parties by email.
- April 25, 2018 – the SHPO sent the nomination document to NPS.



Oregon

Kate Brown, Governor

Parks and Recreation Department

State Historic Preservation Office

725 Summer St NE Ste C

Salem, OR 97301-1266

Phone (503) 986-0690

Fax (503) 986-0793

www.oregonheritage.org



April 25, 2018

J. Paul Loether, Keeper
National Park Service
National Register of Historic Places
1849 C St. NW, Mail Stop 7228
Washington, D.C. 20240

Re: National Register Nomination

Dear Mr. Loether:

At the recommendation of the Oregon State Advisory Committee on Historic Preservation, I hereby request a determination of eligibility for the National Register of Historic Places for the following historic property:

**EASTMORELAND HISTORIC DISTRICT
PORTLAND, MULTNOMAH COUNTY**

As of the date of this letter, the Oregon SHPO counts a total of 7,188 owners within the proposed district. A total of 5,952, or 82.8% of the owners submitted valid objections. It is therefore my determination that the majority of the property owners object to listing the proposed district.

At the request of the Oregon SHPO, the nomination for the Eastmoreland Historic District was returned by your office in June 2017 for a procedural error regarding the SHPO's inability to determine owner consent as required under the federal regulations, 36CFR60.6(g). Applying the appropriate federal regulations and requested advice from your office and the Oregon Department of Justice, the Oregon SHPO has since resolved the questions related to counting property owners and objections.

The enclosed disk contains the true and correct copy of the nomination listed above to the National Register of Historic Places. The included memo describes the nomination process and materials provided in this mailing.

We appreciate your consideration of this nomination. If questions arise, please contact Ian Johnson, Associate Deputy State Historic Preservation Officer at (503) 986-0678 or ian.johnson@oregon.gov.

Sincerely,

Christine Curran
Deputy State Historic Preservation Officer

Exhibit 2
Page 1

Encl.





DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: January 16, 2018

TO: Ian P. Johnson
Associate Deputy State Historic Preservation Officer

FROM: Steven E. Shipsey, Assistant Attorney General *SES*
Natural Resources Section

SUBJECT: Counting Owners and Objections in Historic Districts Nominated to the
National Register of Historic Places

The Oregon State Historic Preservation Office (SHPO) asks whether federal guidance on applying 36 CFR §60.6 is “consistent with Oregon State law for purposes of defining fee-simple owners.” At the outset, there is no applicable Oregon statute or rule enacted or adopted for the purposes of counting fee simple owners for this federal program. Therefore, this memorandum reviews whether anything in the federal guidance would require SHPO to act in a manner that is inconsistent with state law. We conclude that there is not.

Specifically, you have requested general guidance regarding how to count private property owners and objections raised by such owners during the federal process for nomination of a district to the National Register of Historic Places. As you noted, SHPO operates the National Register program in accordance with rules of the National Park Service provided in Chapter 36 of the Code of Federal Regulations (CFR), Part 60. On November 15, 2017, the Keeper of the National Register provided SHPO guidance on the process for determining whether a majority of private property owners object to a proposed National Register listing pursuant to 36 CFR §60.6(g) (November 15, 2017 Guidance). Utilizing both the guidance and procedure outlined by the Keeper in the November 15, 2017 Guidance, this advice addresses your questions grouped into the three key aspects the Keeper identified: (1) Identifying who the

property owners are; (2) determining which owners are private or public; and (3) calculating whether a majority of private owners has objected to the listing.¹

(1) Identifying who the property owners are.

As part of the nomination process, SHPO must identify who owns the nominated property or properties in order to give each owner an opportunity to concur in or object to listing their private property or properties in the National Register. To commence the ownership determination, the federal regulations mandate that SHPO obtain a list of owners from either official land recordation records or tax records, whichever is more appropriate.² 36 CFR §60.6(c). The use of county records to determine ownership is consonant with Oregon law. *See* ORS 195.300(18)(a) (defining “Owner” for purposes of Measure 49 in part to mean “[t]he owner of fee title to the property as shown in the deed records of the county where the property is located[.]”)³ The Keeper noted that SHPO had complied with this process.⁴

¹ In providing this advice, we have considered the National Historic Preservation Act of 1966, the applicable federal regulations at 36 CFR part 60; material you provided: “The National Register of Historic Places Regulations (36 CFR Part 60) A Brief History and Annotated Guide (August 2012) (NRHP Annotated Guide); and two letters from the Keeper of the National Register: H34(7728) (November 15, 2017 Guidance, Attachment A) and H32(2280) (Attachment B).

² SHPO could also request approval from the Keeper to use an alternative source of owners if the land recordation or tax records are not the most appropriate method of determining ownership. 36 CFR §60.6(c). According to the NRHP Annotated Guide, no state has opted to use another source for name of owners.

³ ORS 195.300(18) provides in full that “Owner” means:

“(a) The owner of fee title to the property as shown in the deed records of the county where the property is located;

“(b) The purchaser under a land sale contract, if there is a recorded land sale contract in force for the property; or

“(c) If the property is owned by the trustee of a revocable trust, the settlor of a revocable trust, except that when the trust becomes irrevocable only the trustee is the owner.”

⁴ The Keeper stated, “It is our understanding that the ORSHPO compiled a list of owners obtained from the Multnomah County Tax Rolls in accordance with the provisions of 36 CFR §60.6(c).” H34(7228) at 2.

Thus, the federal rules do not task SHPO with an independent investigation into the ownership of each property involved in a nomination process. Instead, SHPO is directed to begin with a baseline assumption provided by the county of by whom each nominated property is owned. The federal rules define a process to afford private property owners an opportunity to refine the county provided list of owners. The regulation, 36 CFR §60.6(g), is discussed in our responses below. The county ownership list also enables SHPO to distinguish between private and public property owners.

Although under the law of property there are a variety of ways that any particular property may be owned, currently the most common estate is the fee simple absolute. The presumption in Oregon is that a person conveys the fee estate unless the conveyance expressly states otherwise. ORS 93.120 (“Any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant.”). See *First Natl. Bank v. Townsend*, 27 Or App 103, 107, 555 P2d 477 (1976) (“When there is doubt as to whether the parties intended that a deed transfer a fee simple or a lesser interest in land, that doubt should be resolved in favor of the grantee and the greater estate should pass. Stated differently, ‘all doubts are resolved against restrictions on the use of property by the grantee.’” (citation omitted)). A fee simple estate has no conditions or limits. A lesser estate is the fee simple defeasible, which is a fee simple that is subject to a limitation or condition that provides for ownership to change on the occurrence of a future event.⁵ For purposes of determining whether an owner has fee simple title to a property, SHPO does not need to distinguish between fee simple absolute and fee simple defeasible estates. That is because the relevant inquiry under the federal nomination process is by whom the property is owned at the time of the objection.

36 CFR §60.3(k) defines “Owner or owners” to mean “those individuals, partnerships, corporations or public agencies holding fee simple title to property.” The definition expressly excludes holders of either easements or “less than fee interests (including leaseholds) of any

⁵ Similar to the fee simple, the fee-simple-defeasible estate is a vested estate that can be alienated, devised, and inherited. The transferee takes the property subject to the condition. Some limitations or conditions will expire on their own terms, at which point the estate becomes a fee simple absolute.

nature.” The terms “individuals,” “partnerships,” “corporations” or “public agencies” are not further defined in 36 CFR Part 60. State law employs this definition of “owner” in its regulations that pertain to National Register Resources under Statewide Planning Goal 5. OAR 660-023-0200(1)(h)(F).

In the NRHP Annotated Guide, there are examples of “NR Guidance” on counting owners. You have requested review of whether the examples are consistent with Oregon law related to who is a fee-simple owner. We have reviewed the NR Guidance and conclude that the examples are either not inconsistent with Oregon property law or that they simply do not pertain to the matter of fee simple ownership under Oregon property law. The examples related to identifying the property owners are set out in *italics* followed by our comments.

A husband and wife are both listed as owners - each gets a vote and their votes are counted separately.

Under Oregon law, a conveyance made to two persons that are spouses married to each other, creates a tenancy by the entirety, unless a conveyance specifically states otherwise. ORS 93.180(1)(b). A husband and wife would each own one unified interest shared by both partners. That is, spouses who own property as tenants by the entirety do not own half interests; both own the entirety, by the whole, and not by the share. “An entirety estate consists of two interests in all of the entirety property, not two separate interests in divided halves of the property.” *Wilde v. Mounts*, 95 Or App 522, 525, 769 P2d 802 (1989). However, legislation and case law have modified the common-law theory such that each tenant by the entirety is now regarded as the “separate owner of one half the rents and profits and each spouse has the power to convey or encumber the whole title subject to the right of survivorship in the other spouse.” *Brownley v. Lincoln County*, 218 Or 7, 11, 343 P2d 529 (1959). We conclude that separately counting a husband and wife that are both listed as owners is not inconsistent with Oregon property law.

If only one spouse is listed in the records as owner, only the spouse listed on the record gets a vote.

Regardless of whether an individual has a spouse or a spouse in marriage, if only one individual holds the fee simple title to the nominated private property they are the only owner for purposes of 36 CFR §60.3(k). This is consistent with prior advice from the Keeper to Oregon. H32(2280), Attachment B at 1. We conclude that counting the individual listed on the record as owner is not inconsistent with Oregon property law.

Several people own one property and each is recorded as an owner - each gets one vote.

Under Oregon law, a conveyance made to two or more persons creates a tenancy in common, unless a conveyance specifically says otherwise. ORS 93.180(1)(a). Each person has a separate interest. Absent any contrary prior agreement, a tenant in common's undivided, fractional fee ownership may be sold, mortgaged, devised, inherited, levied on, and sold on execution, without the consent of the other cotenants and without affecting their interests. *Le Vee v. Le Vee*, 93 Or 370, 382, 183 P 773 (1919). We conclude that counting several individuals listed on the record as owner of one property is not inconsistent with Oregon property law.

A partnership is listed as an owner - the partnership is considered one owner and it gets one vote regardless of how many partners there are.

Under Oregon law, a partnership is “an entity distinct from its partners.” ORS 67.050(1). Further, property that is “acquired by a partnership is property of the partnership and not of the partners individually.” ORS 67.060. The federal regulations expressly include “partnerships” in the definition of owner. 36 CFR §60.3(k). We conclude that allowing a partnership listed on the county record as owner to make a single objection is not inconsistent with Oregon property law.

A corporation is listed as an owner - the corporation gets one vote.

Generally, under Oregon law, a corporation may have the same powers as an individual to do all things necessary to carry out its business and affairs including owning real property. ORS 60.077(2)(d). The federal regulations expressly include “corporations” in the definition of owner. 36 CFR §60.3(k). We note that this is consistent with prior advice from the Keeper to Oregon. H32(2280), Attachment B at 2. We conclude that allowing a corporation listed on the county record as owner to make a single objection is not inconsistent with Oregon property law.

A trust is listed as an owner - the trust is considered one owner and it gets one vote.

Under the Oregon Uniform Trust Code, a settlor may create a trust by the transfer of ownership of real property. ORS 130.150(1). We conclude that allowing a trust listed on the record as owner to make a single objection is not inconsistent with Oregon property law.

Multiple trusts for a single property with no trustees named — each trust on a single property gets one vote.

Multiple trusts create multiple ownerships for the single property. It is unclear whether the NR Guidance is addressing the situation where no trustee is named in the county record or where the trusts do not in fact have a trustee named. In Oregon, a trust is valid even if no trustee is named, because the court always has the power to appoint a trustee. ORS 130.615. We conclude that allowing each trust listed on the record to count as owner is not inconsistent with Oregon property law. However, it is generally difficult to envision how a trust that does not have a trustee to act on behalf of the trust, would ‘vote’ *i.e.*, execute an objection. For a revocable trust, it would be consistent with Oregon law to allow the settlor to object as the owner; however once such a trust becomes

irrevocable only the trustee is the owner. *See* ORS 195.300(18)(c) in footnote 3, above. In confronting the circumstance where a trust is listed as an owner of one or more properties in a district, SHPO may count an objection on behalf of the trust either from one or more trustees authorized to act on behalf of the trust or from the settlor of a revocable trust as described above.

Property with a single trust with one or more trustees named — only one vote allowed.

The Oregon Uniform Trust Code provides for cotrustees. ORS 130.610. A conveyance of real property that is made to two or more trustees creates a joint tenancy in the property. ORS 93.180(1)(c); ORS 93.190. The joint tenants have one and the same fee interest. As we concluded above, allowing a trust listed on the record as owner to make a single objection is not inconsistent with Oregon property law.

Trustees act on behalf of the trust, which is the legal owner of the interest. Thus, there is one owner, the trust, even though there are multiple trustees. The trust instrument will determine whether one trustee can act to bind the trust, or if the trustees need to sign an objection to nomination. If a single trustee in this situation submitted an objection, it would be prudent for SHPO to require a further certification from the trustee stating that he or she has the authority to bind the trust in the absence of the other trustee(s).

Property with more than one trust named with one or more trustees named — each trust named on property gets one vote.

As discussed above, multiple trusts for a single property result in multiple owners for purposes of counting owners and the number of trustees does not matter for purposes of determining the number of owners.

A condominium is included within the nominated boundary. The owners of individual units in a condominium hold fee simple title to their property, and therefore are

considered owners under the notification provisions of National Register regulations. Each owner of a condominium unit listed in the official land recordation or tax records gets one vote. In addition, the condominium association may be considered one owner for notification purposes if the common areas of the condominium property are owned in fee simple title by that entity.

Under the Oregon Condominium Act, each unit is individually owned. ORS 100.505 provides:

“(1) While the property is submitted to the provisions of this chapter, a unit may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts inter vivos or mortis causa, as if it were sole and entirely independent of the other units of which they form a part, and the corresponding individual titles and interests shall be recordable.

“(2) Each unit owner shall be entitled to the exclusive ownership and possession of the unit of the owner.”

We conclude that allowing each owner listed on the record of individual units in a condominium to make an objection is not inconsistent with Oregon property law.

The Oregon Condominium Act generally requires an association of unit owners to be a corporation. ORS 100.405(1)(b). The corporation has the power to own and manage real property. ORS 100.405(4)(g) and (i). The federal regulations expressly include “corporations” in the definition of owner. 36 CFR §60.3(k). We conclude that allowing a condominium association corporation that owns common areas of the condominium property in fee simple title to make a single objection is not inconsistent with Oregon property law.

A co-operative (co-op) is included within the nominated boundary. Those individuals participating in a co-operative are part of a corporation and do not hold fee simple title - the co-operative gets one vote.

The Oregon Cooperative Corporation Act, ORS chapter 62, governs cooperatives. Oregon law authorizes each cooperative to own real property. ORS 62.125(6). Private property owned by a cooperative is an asset of the cooperative, the members do not individually hold fee simple title. It is not inconsistent with Oregon law for a cooperative that owns one or more private property or properties in a nominated district to have one vote.

In addition to review of the examples from the NRHP Annotated Guide, you have requested confirmation of certain SHPO understandings of “ownership” under 36 CFR Part 60. First, you pose questions related to the federal regulation that allows an owner whose name does not appear on the list of owners to certify in a notarized letter that they are the sole or partial owner of a property and object to the nomination. The regulation, 36 CFR §60.6(g), provides in part:

“If an owner whose name did not appear on the list certifies in a written notarized statement that the party is the sole or partial owner of a nominated private property such owner shall be counted by the State Historic Preservation Officer in determining whether a majority of owners has objected.”

In carrying out the responsibility to determine if a majority of owners has objected to a nomination, SHPO seeks confirmation whether in the following circumstances the individual or private entity submitting an objection would be considered an “owner” that may object with a notarized statement:

A private individual or entity who has changed their name, but where the name change is not yet recorded in the property records.

A private individual or entity whose name does not appear on the property list.

We understand the question to be whether, under 36 CFR §60.6(g), an individual or entity that has changed their name, but whose changed name is not reflected in the county property records, or an individual whose name simply did not appear on those records, may nonetheless count as an owner and submit a written, notarized statements confirming they are a sole or partial owner of a nominated property. We conclude that they may. Under 36 CFR §60.6(g), an alleged owner

whose name is not on the list of owners may object if the owner submits “a written notarized statement that the party is the sole or partial owner of a nominated private property.” The regulation provides no further restriction on who may submit a notarized statement. Thus, SHPO’s interpretations of 36 CFR §60.6(g) are correct; whether an individual, partnership, or corporation is omitted from the property because of a name change or for any other reason, a notarized statement that complies with 36 CFR §60.6(g) satisfies the federal requirements for an objection. In such circumstances, SHPO should take measures to adjust the ownership count to reflect the corrected ownership information for the property or properties at issue; *e.g.* to ascertain that the number of private property owners does not continue to count more than one sole owner, if that is the case, for a given property.

We understand that individuals and businesses that rent within the district boundary are not fee-simple owners as defined in the federal code nor in state law and may not object. Is this correct?

To be precise, if an individual, partnership, or corporation that rents real property located within the district boundary from an owner submitted an objection to the nomination, SHPO would comply with the federal regulations by not counting the objection from the renter. That is because a rental agreement does not convey a fee simple title to property. The owner in that situation would be the individuals, partnerships, corporations or public agencies holding fee simple title to the property being rented by the purported objector. However, to be clear, if the individual, partnership, or corporation that rents real property located within the district boundary submitted an objection to the nomination based on fee ownership of another property or properties in the district boundary, SHPO would properly count such an objection despite the fact that the objector also rents within the district.

We understood the question to pertain to the situation where the objector was the tenant and not the landlord in a rental agreement. To avoid any ambiguity, an

individual, partnership, or corporation that owns real property located within the district boundary and that has rented that property to another entity, remains the “owner” and may file an objection.

In counting owners, we would understand that the Jane Doe Trust and the Jane S. Doe Trust are separate, distinct legal entities, each holding a fee-simple interest, even if these entities have the same trustee(s). Is this correct?

This is correct. Distinct trusts under the administration of the same trustee(s) that each hold a fee simple ownership in one or more properties each count as an owner. Jane Doe Trust and Jane S. Doe Trust each count as one separate owner and each would have the opportunity to file an objection in accordance with 36 CFR §60.6(g).

The Oregon SHPO assumes that each unique name on the property list is a different person. For instance, Jane Doe and Jane S. Doe are unique entries and would be counted as two distinct persons. Does the SHPO have an obligation to determine if these two entries are in fact two people or the same person?

We understand the question as whether SHPO has an obligation to determine whether two individuals listed as owners on the county record with nearly identical names are in fact distinct individuals. Although National Parks Service rules do not specifically address this question, 36 CFR §60.6(g) provides that “it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected.” The federal regulations do not define “ascertain.” In that circumstance SHPO should construe that term to have its common or ordinary meaning: to “find out or learn with certainty.” Merriam–Webster's Collegiate Dictionary 610 (11th ed 2009). Thus, within the broad delegation of responsibility in 36 CFR §60.6(g), SHPO likely bears an obligation to determine whether nearly identical names found in the ownership records provided by the county may be in fact the same individual as SHPO determines the number of private property owners in the district boundary.

In many circumstances county property records are unclear or incomplete. Examples include:

- *There are multiple trustees listed, but no trust named. It is unclear if the trustees represent multiple trusts with a fee-simple interest or a single trust.*

SHPO is correct that this circumstance creates uncertainty that could implicate the determination as to the number of owners. A reasonable approach in such circumstances is for SHPO to treat this as a property with a single trust with multiple trustees named, as described above, in the absence of specific ownership information obtained from the county under 36 CFR §60.6(c) or an owner under 36 CFR §60.6(g).

- *The property list includes an entry for both a Jane Doe Trust and a Jane S. Doe Trust, each listed as the owner of one or more properties. It is unclear if these are two separate entities or a single entity.*

This circumstance does not create uncertainty that could implicate the determination as to the number of owners. As discussed above Jane Doe Trust and Jane S. Doe Trust both separately count as an owner and would have the opportunity to file an objection in accordance with 36 CFR §60.6(g).

Under what circumstances is the Oregon SHPO required to resolve questions regarding ownership? Is it reasonable to not research ownership questions unless the numbers of objections reach a certain threshold?

As discussed above, 36 CFR §60.6(g) provides that “it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected.” In fulfilling that responsibility, we advise SHPO to take reasonable steps to identify who the property owners are in order to determine the number of owners in the nominated district boundary. For example, the Keeper has previously advised SHPO that for purposes of counting

owners where the county record identify ownership with the term “et al” that “may signal the need for the State to further investigate the ownership of the property by referring to the other official land records.” H32(2280), Attachment B at 2. What is reasonable may vary on a nomination by nomination basis and could depend on variables such as the size of the proposed district, the number of properties within the district, and the evaluation of the list of owners obtained under 36 CFR §60.6(c). While in some instances it may be reasonable to not research ownership questions unless the numbers of objections reach a certain threshold, SHPO would want to initially consider whether it can fulfill its responsibility to ascertain whether a majority of owners of private property have objected based on its confidence that the total number of private property owners has been accurately determined.

(2) Determining which owners are private or public.

The Keepers’ November 15, 2017 guidance identifies as the second key aspect of the nomination process the determination of which of the identified owners are private property owners. Making that determination is necessary for SHPO in order to comply with a provision of the National Historic Preservation Act of 1966 (NHPA) and the implementing federal regulations. Section 101(a)(6) of the NHPA provides:

“The Secretary shall promulgate regulations requiring that before any property or district may be included on the National Register or designated as a National Historic Landmark, the owner or owners of such property, or a majority of the owners of the properties within the district in the case of an historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property or district for such inclusion or designation. If the owner or owners of any *privately owned* property or a majority of the *owners of such properties* within the district in the case of an historic district, object to such inclusion or designation, *such property* shall not be included on the National Register or designated as a National Historic Landmark until such objection is withdrawn.” (Emphasis added).

To implement that provision, the National Park Service rule, 36 CFR §60.6(g), provides in part:

“Upon notification, any owner or owners of a *private property* who wish to object shall submit to the State Historic Preservation Officer a notarized statement certifying that the party is the sole or partial owner of the *private property*, as appropriate, and objects to the listing. In nominations with multiple ownership of a single *private property* or of districts, the property will not be listed if a majority of the owners object to listing.” (Emphasis added).

It is clear from the NHPA and the context of the federal regulations that SHPO is concerned with a majority of the private property owners, not all property owners. See 36 CFR §60.6(r) (“the owner of private property (or the majority of such owners for a district[.]”). Thus SHPO is tasked with determining whether a majority of private property owners within the district object to the designation.

We resume reviewing the example related to determining which owners are private or public in the NRHP Annotated Guide, set out in italics followed by our comments, before addressing the other questions posed by SHPO.

A district which includes both public and private property owners. Example, a district includes 100 owners (4 public property owners and 96 private property owners). For purposes of owner concurrence or objection, only the 96 private property owners’ votes may be tabulated.

This is not a matter of Oregon Law, so SHPO must comply with this direction. As discussed above the NHPA only provides the opportunity for the owners of private property to object or concur in nomination of a district. NHPA § 101(a)(6).

We understand the CFRs forbid federal and state agencies from submitting a notarized objection to list a property in the National Register. NPS asserts, and we believe, that to include political subdivisions of the state, including local jurisdictions and taxing districts (school, fire, library, irrigation district, etc.). We understand that this prohibition does not apply to private public entities, including private schools, churches, service organizations, and foundations and non-profits. Is this correct?

Public agencies are expressly recognized in the definition of “Owner or owners” in 36 CFR §60.3(k). There is nothing in 36 CFR Part 60 that forbid either federal or state agencies from submitting a notarized objection to list a property in the National Register. However, in counting objections and owners SHPO only

considers objections of the owner or owners of a private property. 36 CFR §60.6(g) provides in part:

“Upon notification, any owner or owners of a *private property* who wish to object shall submit to the State Historic Preservation Officer a notarized statement certifying that the party is the sole or partial owner of the *private property*, as appropriate, and objects to the listing. In nominations with multiple ownership of a single *private property* or of districts, the property will not be listed if a majority of the owners object to listing.” (emphasis added).

SHPO is correct that political subdivisions of the state, including local government, local service districts, and special government bodies are not owners of private property for purposes of 36 CFR §60.6(g). SHPO may however, count as an owner any “private public entities” that own private property in a district, including private schools, churches, service organizations, and foundations and non-profits.

(3) Calculating whether a majority of private owners has objected to the listing.

The Keepers’ November 15, 2017 guidance identifies as the final key aspect of the nomination process the calculation of whether a majority of private owners has objected to the listing of the proposed district. The process for making objections by private property owners and the SHPO counting of such objections is provided in 36 CFR Part 60. Generally, this aspect of the nomination process does not implicate Oregon property law.

In the NRHP Annotated Guide, there are examples of “NR Guidance” on determining whether a majority of private owners has objected to the listing of the proposed district. You have requested review of whether the examples are consistent with Oregon law related to who is a fee-simple owner. The examples are again set out in italics followed by our comments.

A person owns several properties within the nominated boundary - that person gets one vote, regardless of how many properties he or she owns.

This statement reflects the federal regulation in 36 CFR §60.6(g), which provides:

“Each owner of private property in a district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district.”

This is not a matter of Oregon law. SHPO, in operating the National Register program must act in accordance with the federal rules.

In addition to review of the examples from the NRHP Annotated Guide, you have requested confirmation of certain SHPO understandings of calculating the number of owners under 36 CFR Part 60.

We understand the CFRs to mean that all persons listed in the property records are owners and are to be counted toward the total number of owners for the purposes of determining a simple majority for the process, regardless of whether that individual can be contacted using the provided information in the property list. Is this correct?

The individuals, partnerships, corporations, and public agencies listed in the records obtained from the county for notification pursuant to 36 CFR §60.6(c) are the starting point for SHPO in making the determination of whether a majority of the private property owners object to the submittal under 36 CFR §60.6(g). However, as discussed above, when SHPO receives a written notarized statement from an owner whose name did not appear on the county property list certifying that the party is a sole or partial “owner” as that term is defined in 36 CFR § 60.3(k), the federal regulations mandate that SHPO count such an owner in determining whether a majority of owners has objected. Because SHPO has the responsibility “to ascertain whether a majority of owners or private property have objected” to a nomination, we conclude that SHPO is additionally tasked with taking reasonable steps to determine the total number of owners. Thus, if and when SHPO receives a written notarized statement from an owner whose name did not appear on the list certifying that

the party is a sole or partial owner, SHPO should adjust the total number of owners accordingly. For example, if the initial list indicates that property X is owned by individuals A & B and SHPO receives a written notarized statement from Corporation C that it is the sole owner of property X, then SHPO has a responsibility to adjust the total number of owners to reflect that property X has a single “owner” as that term is defined in 36 CFR §60.3(k).

In the circumstance where SHPO cannot successfully contact an owner using the information provided in the property list, SHPO may generally rely on the county list for determining the number of owners. However, as described above, in any instance where SHPO receives a written notarized statement of ownership, SHPO should adjust the ownership total accordingly.

May an executor or personal representative of an estate submit a notarized objection on behalf of a deceased person who is listed in the property records in addition to themselves?

An executor or personal representative of an estate may submit a notarized objection on behalf of a deceased individual that is an owner under 36 CFR §60.3(k). A personal representative is a fiduciary and is under a general duty to preserve the decedent’s estate, among other responsibilities. ORS 114.265. Furthermore, the personal representative has a range of powers with respect to the real property of the decedent. *See* ORS 114.305 (authorized transactions for personal representatives). Offering an objection to a national historic district listing is not specifically listed among the powers of a personal representative, but ORS 114.305(26) includes a catch-all provision that gives personal representatives the power to “perform all other acts required or permitted by law or by the will of the decedent.”

May a notarized objection be counted if the signature date for the owner and the signature date for the notary are different? In this situation, the notary is certifying that the person before them is the individual that is signing the document.

We understand you to ask whether the notarization of an objection is valid if the owner's signature on the objection precedes the date the objection was notarized. The general answer is that such a vote is probably not valid, unless the objecting person re-signed the objection in the presence of the notary.

Whether a notary may notarize a pre-signed document depends on whether the document requires the notary to "take an acknowledgement" of the signature or to "witness[] or attest[] a signature." As explained below, a notary may notarize a pre-signed document that requires an acknowledgement, but a document that requires a notary to witness/attest a signature requires the signer to sign in the notary's presence at the time of notarization.

Under ORS 194.215(1), an "acknowledgement" means "a declaration by an individual before a [notary] that the individual has signed a record for the purpose stated in the record." The past tense used in the definition of acknowledgement—"has signed"—expressly suggests that a notary can take an acknowledgement even if the individual signed the acknowledgement before bringing it to the notary. This interpretation is confirmed in the Oregon Notary Public Guide, page 40, provided by the Oregon Secretary of State.

However, "witnessing or attesting a signature" requires the notary to perform a similar function to an acknowledgment, but the signer must sign in the presence of a notary. "Witnessing or attesting a signature" is not defined in ORS 194.215 et seq., but according to the Oregon Notary Public Guide, page 49, a document requiring witnessing/attestation typically includes the phrase "signed or attested" or "subscribed before me" and must be signed in the presence of the notary. The model form for a notary certificate for witnessing or attesting a signature, ORS 194.285(4), includes the language "Signed (or attested) before me on (date)."

Here, the objection form uses the phrase “Signed or attested before me on [date].” This suggests that the objection form requires the notary to witness/attest the signature, rather than merely requiring a notary to acknowledge the signature. In turn, this means that that the signer must sign the document in the presence of the notary. If an objecting person signed the objection, and later had the objection notarized without re-signing it, then the objector did not sign it in the notary’s presence and it was not validly notarized. In that circumstance, SHPO may contact the submitting party to inform them that a new submittal is necessary to constitute a valid objection.

NPS asserts that a vote may only be rescinded with another notarized letter, but this process is not described in the CFRs. Is this consistent with Oregon State law?

There is no general Oregon law on point to this question. As described above, the Revised Uniform Law on Notarial Acts, ORS chapter 194, prescribes processes for a properly executed notarized letter, but does not provide substantive law applicable here. In the absence of an administrative rule in OAR chapter 736, division 50, we recommend that SHPO follow NPS guidance construing its federal regulations. The Keeper has advised participating state SHPOs that they must notify “Owners who had previously objected by notarized letter that their original objection stands unless another notarized letter is received removing their objection.” H32(2280), March 25, 2001 at 4.

NPS asserts that once submitted an objection stands until rescinded, regardless if the ownership changes. This process is not described in the CFRs. Is this position consistent with Oregon State law?

As stated above, this position is consistent with the Keeper guidance, that an objection from a private property owner stands unless another notarized letter is received removing their objection. If SHPO receives a written notarized statement under the process provided in 36 CFR §60.6(g) regarding the same private property for which SHPO has already received an objection and if the subsequent written notarized statement asserts that the party is the sole owner, we

advise that SHPO take reasonable measures to determine the ownership of that property in order to fulfill the responsibility to ascertain whether a majority of owners of private property have objected.

After the owner list is created, does the Oregon SHPO have an obligation to adjust the total number of owners based on submitted objections for owners who did not appear on the property list? See Question 2 above.

Yes, as discussed above, because 36 CFR §60.6(g) assigns SHPO the responsibility “to ascertain whether a majority of owners of private property have objected,” that would reasonably include adjusting the ownership count when SHPO is provided written notarized statement detailing by whom a private property is owned. While SHPO is generally authorized to rely on the county list, where SHPO has been provided specific ownership information regarding a particular property it should adjust the ownership counts to fulfill the responsibility under the federal rules to ascertain whether a majority objects to the nomination.

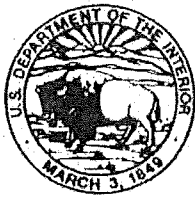
The CFRs require that the Oregon SHPO obtain a property list for notification purposes within 90 days prior to the notification of intent to nominate, 36 CFR §60.6(c). It is not unusual for properties to change ownership during the nomination process, which can take several months. Is the Oregon SHPO required to rely only on this initial list to determine the total number of owners, or may/must the agency pull another subsequent and presumably more accurate list? Is it reasonable to use the initial notification list for the entire process unless the numbers of objections reach a certain threshold?

The federal regulations contemplate that SHPO will use the original property list described in 36 CFR §60.6(c) as the basis for counting the total number of private property owners. SHPO will modify that ownership count as described in the November 15, 2017 guidance provided to SHPO from the Keeper and consistent with this advice. SHPO may take such steps as it deems necessary “to ascertain whether a majority of owners of private property have objected.” 36 CFR §60.6(g). The federal regulations do not expound on how SHPO is to fulfill that responsibility. However, the November 15, 2017 guidance

emphasizes that SHPO is to utilize the original list of owners obtained from the county. We conclude that SHPO may use the original list and only adjust it based on certified statements of ownership.

Conclusion

The required calculus under the federal rules may prove to be a complicated one. The number of properties within a nominated district will rarely equal the number of private property owners. A single property may have more than one owner. A single individual, partnership, or corporation may own multiple private properties within a nominated district. The federal regulations place importance not on how many properties are located within the nominated district boundary, but on how many property owners there are and of that number, how many are private property owners. As discussed in this memorandum, we have not found instances where the federal rules and guidance are inconsistent with Oregon property law; therefore, we advise SHPO that it may and should utilize the NRHP Annotated Guidance and the November 17, 2017 Guidance as it processes national historic district nominations.



United States Department of the Interior

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

NOV 15 2017

H34(7228)

Mr. Ian P. Johnson
Associate Deputy State Historic Preservation Officer
Oregon State Historic Preservation Office
Oregon Parks and Recreation Department
725 Summer Street, NE, Suite C
Salem, OR 97301

Subject: Eastmoreland Historic District National Register Nomination

Dear Mr. Johnson:

This letter will serve as a follow-up to our recent phone discussion in which you requested advice from the Keeper as to how the Oregon State Historic Preservation Officer (ORSHPO) should proceed in order to complete its processing and resubmission of the historic district nomination noted above.

In this regard, please note the following:

- 1) Pursuant to the provisions of 36CFR§60.6(r), the nomination was not "disapproved for listing in the National Register" by the Keeper; rather, it was "returned for correction and resubmission for listing in the National Register;"
- 2) Based on the statement provided by Deputy ORSHPO Christine Curran on a continuation sheet dated May 15, 2017, which was included with the nomination as originally submitted to the Keeper, we concluded that the requirements of 36CFR§60.6(o)(1) had not been fully satisfied-- processing of the nomination at the state level was procedurally deficient in that the ORSHPO had not adequately ascertained "whether a majority of owners of private property" [within the proposed district] have objected to the listing [see 36CFR§60.6(g)]; and
- 3) No other technical or professional inadequacies were found in the nomination as submitted.

Given that the reason for returning the nomination had to do solely with the procedural error identified above, the balance of these comments will focus on how that error can be corrected prior to resubmitting the nomination to this office for final processing.

There are three key aspects involved in determining whether, pursuant to 36CFR§60.6(g), a majority of private property owners object to a proposed National Register listing:

- 1) identifying who the property owners are;
- 2) determining which owners are private or public; and
- 3) calculating whether a majority of private owners has objected to the listing.

As defined in 36CFR§60.3(k), "The term owner or owners means those individuals, partnerships, corporations, or public agencies holding fee simple title to the property. Owner or owners does not include individuals, partnerships, corporations, or public agencies holding easements or less than fee interests (including leaseholds) of any nature."

With respect to the above definition, please note that the terms "fee simple" and "fee" are used as commonly abbreviated forms of the term "fee simple absolute." Please also remember that exactly what does/does not constitute a fee simple interest in real property, while grounded in common law, is sometimes more specifically defined by the law(s) of the state in which the property is located. If you have any specific questions regarding whether or not an individual or private entity holds a fee simple interest in a property in this historic district pursuant to Oregon state law, we strongly recommend you refer that question to your agency's authorized legal counsel.

It is our understanding that the ORSHPO compiled a list of owners obtained from the Multnomah County Tax Rolls in accordance with the provisions of 36CFR§60.6(c). The primary purpose for compiling such a list of owners is to ensure compliance with the notification requirements of this subsection when 50 or fewer property owners are involved. Because the proposed Eastmoreland Historic District includes more than 50 property owners, individual notifications as specified 36CFR§60.6(c) were not required. Rather, in accordance with the provisions of 36CFR§60.6(d), proper notification consisted of the ORSHPO publishing an appropriate "general notice to property owners regarding the State's intent to nominate" the proposed Eastmoreland Historic District in the *Oregonian*, a general-circulation newspaper in this part of Oregon.

While individual owner notification was not required, the original list of owners compiled by the ORSHPO in accordance with the provisions of 36CFR60.6(c) and 36CFR60.6(g) served as a basis for identifying fee simple owners of properties within the proposed district. The list also enabled the ORSHPO to distinguish between private and public owners, and laid the groundwork necessary for the ORSHPO to "ascertain whether a majority of owners of private property have objected" to listing the proposed district, as required by 36CFR§60.6(g). That said, this regulation subsection further states: "If an owner [as defined in 36 CFR 60.3(k)] whose name did not appear on the list certifies in a written notarized statement that the party is the sole or partial owner of a nominated private property, such owner shall be counted by the State Historic Preservation Officer in determining whether a majority of owners has objected."

In order to "correct" the nomination and resubmit it to my office for further consideration, we therefore suggest that the ORSHPO proceed as follows:

Step 1:

- (a) Carefully review the original list of owners the ORSHPO obtained from the Multnomah County Tax Rolls within 90 days prior to the notification of the State's intent to nominate

the Eastmoreland Historic District for listing in the National Register pursuant to the provisions of 36CFR§60.6(c)&(d);

- (b) Determine which properties on the list are held by public and which are held by private owners;
- (c) Calculate the total number of private owners;
- (d) Calculate the number of private owners who have filed an objection to listing in accordance with the requirements specified in 36CFR§60.6(g);
- (e) Identify any private owners (if any) who have withdrawn an objection previously filed under (d) above and adjust the figure in (d) above accordingly;
- (f) Calculate i) the total number of private-property owners arrived at via this Step; and ii) the total number of objecting private property owners via this Step;
- (g) Proceed to Step 2 below.

Step 2:

- (a) Carefully review and calculate the number of private owners whose names did not appear on the original list of property owners referred to in Step 1(a) but who submitted objections to the ORSHPO in accordance with the requirements of 36CFR§60.6(g);
- (b) Identify any of these private owners who have withdrawn an objection previously filed under Step 2(a), and adjust the figure in Step 2(a) accordingly;
- (c) Account for any new objections or removals of objections known to have resulted from transfers of property ownership after the original owner's list described in Step 1(a) was finalized;
- (d) Calculate the total number of private property owner objections arrived at following the completion of Steps 2(b) and 2(c);
- (e) Proceed to Step 3.

Step 3:

- (a) Add the total number of private-property owner objections calculated for Step 1(f) and Step 2(a);
- (b) Add the total number of property owners identified in the original list described in Step 1(a), and the total number of additional property owners identified in Step 2(a);

- (c) Compare the total number of private-property objections arrived at in Step 3(a) above, with the total number of private property owners calculated in Step 3(b) to determine if 50% of the private owners object to the listing;
- (d) Based on these calculations, upon resubmitting the nomination to the Keeper, indicate in your transmittal letter if more than 50% of the total property owners have or have not filed standing objections to listing the proposed district in accordance with the provisions of 36CFR§60.6(g). In this regard, please remember that 36CFR§60.6(g) also specifies that: "Each owner of private property in the district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district."

As you know, if more than 50% of the private owners object, the property cannot be listed in the National Register. Instead, the Keeper shall review the nomination and make a determination of eligibility within 45 days of receipt, unless an appeal is filed pursuant to 36CFR§60.12(a), in which case the Keeper may extend the 45-day review period by an additional 30 days beyond the date of the appeal in accordance with the provisions of 36CFR§60.12(a) and 36CFR§60.6(t).

In closing, please note that this office recognizes that the calculation of total number private owner objections received by the ORSHPO may fluctuate somewhat between the date of this letter and the date the nomination is resubmitted to our office. For this reason, we ask that your office provide us with a "count" that is as contemporaneous as possible to the day your office resubmits the nomination. We also ask that you promptly forward--addressed to the attention of Lisa Deline of my staff--any additional objections or objection withdrawals that the ORSHPO receives after the nomination has been resubmitted.

We hope that these comments prove helpful, and thank you for the opportunity to provide further assistance on this issue. If you have any additional questions regarding the processing of this nomination, please contact National Register program historian Lisa Deline at 202-354-2239.

Sincerely,



J. Paul Loether
Chief, National Register/National Historic Landmarks and
Keeper of the National Register

cc: Lisa Deline, Historian, National Park Service
Christine Curran, Oregon Deputy State Historic Preservation Officer



United States Department of the Interior

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

IN REPLY REFER TO:

H32(2280)

JAN 16 2003

Mr. Michael Carrier
State Historic Preservation Officer
Oregon State Parks & Recreation Department
1115 Commercial Street, NE
Salem, Oregon 97301

Dear Mr. Carrier:

This letter responds to your correspondence of November 4, 2002, regarding the owner notification procedures for nominations to the National Register of Historic Places. We apologize for the delay in our response.

In your letter you outlined a series of questions concerning the treatment of various owners and ownership categories with regard to the notification and objection processes required under 36 CFR Part 60. In an effort to reply to these questions we have consulted directly with our Solicitor's office for clarification. The result of that consultation is outlined below. We note that the responses provided are conceptual in nature and may not necessarily apply to the factual circumstances of a particular nomination of a property. Additionally, we did not research Oregon state laws in providing these responses.

Q1. If a husband and wife aren't both listed on the deed, then only the one listed gets the opportunity to object, correct? Does it matter whether they are tenants in common, or joint tenants?

Response. Generally, under state law, only the individual listed on the deed is considered to be the owner of a property. The individual listed on the deed would thus be considered the owner of a property for purposes of objecting to a National Register nomination. If a spouse is not listed in a deed, then the spouses generally are not considered to be tenants in common or joint tenants. In dealing with any particular nomination or issue of ownership, the SHPO should refer to the National Register regulations found at 36 CFR 60.6.

Q2. If it is a trust, such as a family trust, does the trust count as a single entity? Is a trustee the only party that counts? What if the trustee is listed as a trustee for multiple trusts? What if the trustee, as an individual, owns other properties in the district? In the case of a trust, do both the trusts and the trustees get an opportunity to object? For example, if the John Doe Trust with John Doe as Trustee owning 50% objects, and John Doe owning 50% objects, is this two opportunities to object or one?

Response. Generally, under state law, a trust is considered to be a single legal entity. The trust, not the trustees or beneficiaries, would thus be considered the owner of a property for purposes of objecting to a National Register nomination. If the laws in a particular state provide differently, then those laws would have to be reviewed in conjunction with the circumstances of a particular nomination.

Q3. If the property is owned by a corporation, does the corporation count as just one no matter how many people are owners of the corporation?

Response. Generally, under state law, a corporation is considered to be a single legal entity. The corporation, not the shareholders who own stock in the company, would thus be considered to be the owner of a property for purposes of objecting to a National Register nomination.

Q4. Do Limited Liability Corporations (LLC) count as separate entities just as standard corporations? Or is there a different status accorded LLCs?

Response. Limited Liability Corporations are treated the same as corporations.

Q5. If a property is owned by a regular partnership, do the partners count or does just the partnership? If the partners count and they own additional tax lots do they get additional opportunities to object?

Response. Generally, under state law, a partnership is considered to be a single legal entity. The partnership, not the partners, would thus be considered the owner of a property for purposes of objecting to a National Register nomination. If the laws in a particular state provide differently, then those laws would have to be reviewed in conjunction with the circumstances of a particular nomination.

Q6. If it is a limited partnership (LTD), does the partnership count as one, or does the general partner count as one? Does each of the partners count? What if the general or another partner owns other properties either solely or in other partnerships, trusts, etc. in the district?

Response. Generally, under state law, a limited partnership is considered to be a single legal entity. The limited partnership, not the general and limited partners, would thus be considered to be one owner of a property for purposes of objecting to a National Register nomination.

Q7. If the property is owned by an entity, such as a trust or corporation, and "et al", will the entity count as one and each of the "et als" count separately? If there are et als, is this counted as one for all of the et als, or are they counted separately? (If it is John Doe et al, does John Doe count as one and each of the listed et als count as one or do all of the et als combine to count as one.)

Response. For purposes of notification and initial counting of owners, if the land recordation or tax records identify ownership with the term "et al," it may signal the need for the State to further investigate the ownership of the property by referring to other official land records. In dealing with any particular nomination or issue of ownership, the SHPO should refer to the National Register regulations found at 36 CFR 60.6.

If you have questions or concerns regarding this letter, please contact Paul Lusignan of the National Register staff at 202/354-2229.

Sincerely,



Carol D. Shull
Chief, National Historic Landmark Survey and
Keeper, National Register of Historic Places