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

TOM BROWN, an individual,

Petitioner,

vs.

**OREGON STATE HISTORIC
PRESERVATION OFFICE and LISA
SUMPTION,**

Respondents.

Case No. 17CV19034

**PETITION TO COMPEL AGENCY
ACTION (ORS 183.490)**

REQUEST FOR ATTORNEY FEES

Petitioner Tom Brown (“Petitioner”) alleges:

PARTIES

1.

Petitioner is a resident of the Eastmoreland neighborhood in Portland, Oregon.

2.

Director of the Oregon Department of Parks and Recreation, Respondent Lisa Sumption is Oregon’s designated State Historic Preservation Officer.

3.

Respondent Sumption is an agency under ORS 183.310(1) because she is an “officer authorized by law to * * * issue orders.”

4.

Respondent Oregon State Historic Preservation Office is an agency under ORS 183.310(1) because it is a “state board, commission, department, or division thereof.”

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5.

Respondents Sumption and the Oregon State Historic Preservation Office (collectively, “SHPO”) are responsible for deciding whether to nominate a property or district for federal historic designation.

JURISDICTION AND VENUE

6.

The Circuit Court for Marion County has subject matter jurisdiction pursuant to ORS 183.490.

7.

Venue is proper in the Circuit Court for Marion County pursuant to ORS 183.490 and ORS 183.484(1).

HISTORICAL FACTS

8.

On November 1, 2016, the Board of the Eastmoreland Neighborhood Association (the “Board”) submitted an application to SHPO nominating Eastmoreland for federal historic district designation.

9.

On February 13, 2017, the Portland Historic Landmarks Commission (PHLC) held a public meeting on the Board’s nomination. Petitioner provided the PHLC with written and oral objections to both the inadequacies of the Board’s nomination application and the lack of due process in the nominating procedure.

10.

On February 16, 2017, the PHLC provided the State Advisory Committee on Historic Preservation (SACHP) with a letter indicating support for the Board’s nomination, but including comments and suggested changes to the Board’s application.

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11.

On February 16, 2017, the SACHP held a public meeting to consider the Board’s nomination. At that time, Petitioner provided both SACHP and SHPO with written and oral objections to inadequacies in the Board’s nomination application and the lack of due process in the nominating procedure.

12.

At its February 16, 2017, meeting, SACHP voted to recommend that the Board’s nomination application was sufficient and, therefore, that SHPO should nominate Eastmoreland for federal historic district designation.

13.

At the February 16, 2017, SACHP meeting, counsel for Petitioner discussed with Deputy State Historic Preservation Officer Christine Curran a timeline within which SHPO would decide whether to nominate Eastmoreland for federal historic district designation. Deputy Curran informed counsel for Petitioner that SHPO would not make a decision concerning the Board’s nomination application until May 15, 2017.

14.

On March 14, 2017, Petitioner sent a letter to SHPO. That letter restated Petitioner’s prior assertions concerning the inadequacy of the Board’s application, and included a demand for a contested case hearing under the Oregon Administrative Procedures Act (OAPA). In the letter, Petitioner requested a contested case pursuant to ORS 183.415 and a referral of the case to the Oregon Office of Administrative Hearings by March 31, 2017. On March 14, 2017, SHPO emailed counsel for Petitioner and acknowledged both receipt of the email and the March 31 deadline.

15.

On March 22, 2017, counsel for Petitioner spoke with counsel for SHPO, Assistant Attorney General Steve Shipsey. During that call, Shipsey requested additional

1 time to respond to Petitioner’s March 14, 2017, letter. Counsel for Petitioner agreed to
2 that request with the understanding that SHPO would respond well before May 15, 2017,
3 the date identified by Deputy Curran as the earliest date SHPO would make its decision.

4 16.

5 On April 6, 2017, counsel for Petitioner emailed Shipsey asking for a phone call
6 to discuss SHPO’s response to Petitioner’s March 14 demand for a contested case
7 hearing. Shipsey returned the call and left a voicemail informing counsel for Petitioner
8 that Shipsey would call again at the beginning of the week.

9 17.

10 On April 14, 2017, after hearing nothing from Shipsey, counsel for Petitioner sent
11 Shipsey an email asking to talk. Shipsey did not respond to that email.

12 18.

13 On April 20, 2017, counsel for Petitioner sent Shipsey another email asking, “Any
14 idea on your end about when we will get a response from you on our letter?” Shipsey did
15 not respond to that email.

16 19.

17 On April 24, 2017, counsel for Petitioner emailed Shipsey explaining that “our
18 client is eager to move forward on this” and “[u]nless I hear back from you by the end of
19 the day today (4/24/17), we will move forward.” Shipsey responded to that email asking
20 for a telephone conference.

21 20.

22 On April 26, 2017, counsel for Petitioner and Shipsey discussed, via telephone,
23 the status of SHPO’s response. During that discussion, counsel for Petitioner explained
24 to Shipsey that they needed an immediate answer concerning the demand for a contested
25 case hearing under the OAPA. Shipsey explained that he would have an answer for
26 Petitioner on May 1, 2017. Counsel for Petitioner and Shipsey agreed to another

1 telephone conference on May 1, 2017, at 3:30 pm, where Shipsey would provide
2 Petitioner with SHPO's position regarding the demand for a contested case hearing.

3 21.

4 On May 1, 2017, counsel for Petitioner called Shipsey to discuss the contested
5 case hearing demand, as agreed. Shipsey did not answer his telephone, and counsel for
6 Petitioner left a voicemail asking Shipsey to call. Shipsey did not call.

7 22.

8 On May 2, 2017, counsel for Petitioner called Shipsey. Shipsey did not answer
9 the telephone.

10 23.

11 On May 3, 2017, counsel for Petitioner called Shipsey. Shipsey did not answer
12 the telephone.

13 24.

14 On May 4, 2017, counsel for Petitioner called Shipsey. Shipsey did not answer
15 his telephone, and counsel for Petitioner left a voicemail asking Shipsey to call. Shipsey
16 did not call.

17 25.

18 On May 8, 2017, Shipsey called counsel for Petitioner. Shipsey explained that he
19 does not know definitively whether a contested case is required, and will convey that to
20 SHPO. As of the date of filing of this Petition, neither Shipsey nor SHPO has provided
21 or agreed to provide a contested case hearing.

22 26.

23 Under ORS 358.565 and 36 CFR § 61(k), SHPO has the authority to submit
24 nominations for federal historic district designation to the National Park Service.

25 27.

26 SHPO can submit a nomination to the National Park Service only if SHPO "finds

1 the nominations to be adequately documented and technically, professionally, and
2 procedurally correct and sufficient and in conformance with National Register criteria for
3 evaluation.” 36 CFR § 61(k).

4 28.

5 When SHPO takes action on a nomination application and makes the requisite
6 findings, it must do so in writing.

7 29.

8 When SHPO takes action on the Board’s nomination application and makes the
9 requisite findings, that action will constitute an “order” pursuant to ORS 183.310(6)(a).

10 30.

11 SHPO is the final state agency taking action on a nomination application. SHPO
12 intends to send the nomination to the National Park Service on May 15, 2017, without
13 providing a contested case hearing as required under the OAPA. Doing so will deprive
14 Oregon courts from exercising their jurisdiction under the OAPA to review the actions of
15 state agencies, and will prevent Petitioner and other residents in Eastmoreland from
16 receiving the procedural and substantive rights due to them under the OAPA.

17 31.

18 When SHPO takes action on the Board’s nomination application and makes the
19 requisite findings, that action will constitute a “final order” pursuant to ORS
20 183.310(6)(b).

21 **FIRST CLAIM FOR RELIEF**

22 **(Unlawful Refusal to Act)**

23 32.

24 Petitioner realleges paragraphs 1 through 31.

25 33.

26 ORS 183.490 authorizes the circuit court to “compel an agency to act where it has

1 unlawfully refused to act.”

2 34.

3 Under Oregon law, federal historic district designation of Eastmoreland will
4 trigger statutes and rules that discourage private development within Eastmoreland. ORS
5 197.520 provides that local governments must comply with the Statewide Planning
6 Goals. Statewide Planning Goal 5 requires local governments to protect federally
7 designated historic districts. OAR 660-015-0000(5). Those protections include an
8 immediate prohibition preventing property owners from “destroy[ing], remov[ing], or
9 relocat[ing]” any of their property within the designated historic district. OAR 660-023-
10 0200(1)(a), (8)(a). That rule also authorizes local governments to “apply additional
11 protective measures” on property within the designated historic district. OAR 660-023-
12 0800(8)(b).

13 35.

14 The Due Process Clause of the Fourteenth Amendment to the United States
15 Constitution requires that, where federal historic district designation triggers statutes and
16 rules that discourage private development of property within the proposed district, a
17 historic district nomination may proceed only after an agency hearing.

18 36.

19 The OAPA requires a contested case hearing for every “proceeding before an
20 agency * * * [i]n which the individual legal rights, duties or privileges of specific parties
21 are required by statute or Constitution to be determined only after an agency hearing.”
22 ORS 183.415(2); ORS 183.310(2)(a)(A).

23 37.

24 Because the United States Constitution requires that the Eastmoreland nomination
25 may proceed only after an agency hearing, SHPO is lawfully required to provide notice
26 and a contested case hearing under ORS 183.415(2).

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38.

By not providing a contested case hearing as Petitioner has demanded, and by repeatedly delaying its response to Petitioner’s demand for a contested case hearing, SHPO has effectively refused to provide a contested case hearing for the Eastmoreland nomination process.

39.

SHPO’s refusal to provide a contested case hearing for the Eastmoreland nomination process is unlawful.

40.

Time is of the essence, and this court must ensure that SHPO provides a contested case hearing before sending the Board’s nomination to the National Park Service.

SECOND CLAIM FOR RELIEF

(Unreasonable Delay in Taking Action or Making a Decision)

41.

Petitioner realleges paragraphs 1 through 40.

42.

ORS 183.490 authorizes the circuit court to “compel an agency to act where it has * * * unreasonably delayed taking action or making a decision.”

43.

SHPO has unreasonably delayed taking action on or making a decision with respect to Petitioner’s March 14, 2017, demand for a contested case hearing.

44.

Time is of the essence, and this court must ensure that SHPO provides a contested case hearing before sending the Board’s nomination to the National Park Service.

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1 **THIRD CLAIM FOR RELIEF**

2 **(Attorney Fees)**

3 45.

4 ORS 20.105 authorizes an award of attorney fees where the opposing party has no
5 reasonable basis for asserting its claims or defenses. SHPO has no objectively reasonable
6 basis for refusing to provide a contested case hearing. Petitioner seeks attorney fees
7 under ORS 20.105.

8 The property rights of every resident of Eastmoreland are affected by SHPO’s
9 decision concerning the Board’s nomination. If Petitioner prevails in this action, it will
10 confer a substantial benefit on every resident of Eastmoreland. Additionally, if this court
11 requires SHPO to provide a contested case hearing for all federal historic designation
12 nominations, every citizen of the State of Oregon will receive the substantial benefit of
13 having their statutory and constitutional rights enforced. Petitioner seeks attorney fees
14 under the equitable “substantial benefit” doctrine. *Lewis v. Beyer*, 262 Or App 486, 498,
15 325 P3d 59 (2014).

16 WHEREFORE, Petitioner prays that this Court:

- 17 1. Order that Respondents conduct a contested case hearing for the
18 proposed Eastmoreland federal historic district nomination.
- 19 2. Issue an Order restraining Respondents from taking any action on
20 the Board’s nomination application until they conduct a contested case hearing.
- 21 2. Award Petitioner his attorney fees pursuant to ORS 20.105 and the
22 equitable “substantial benefit” doctrine.

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3. Award such other relief as the Court may deem just and proper.
DATED this 9th day of May, 2017.

HARRANG LONG GARY RUDNICK P.C.

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CERTIFICATE OF SERVICE

I certify that on May 9, 2017, I served or caused to be served a true and complete copy of the foregoing **PETITION TO COMPEL AGENCY ACTION (ORS 183.490)** on the party or parties listed below as follows:

- Via the Court’s Efiling System
- Via First Class Mail, Postage Prepaid
- Via Email
- Via Personal Delivery

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