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May 4, 2021

Via email to: National_Register_Submissions@nps.gov and
Alexis_Abernathy@nps.gov

And via regular mail and certified mail, return receipt requested to:

Joy Beasley, Keeper
National Park Service
National Register of Historic Places
1849 C Street, NW, Mail Stop 7228
Washington, DC 20240

Certified Article Number

9414 7266 9904 2182 8811 75

SENDER'S RECORD

Petition opposing the nomination of the Downtown El Paso Historic District, El Paso County, Texas, for listing in the National Register of Historic Places, SG100006548

323 Chihuahua, LLC, Urban Lion, LLC, Marcep Group, LLC, Hunt Oregon, LLC, R.B. Wicker Tire and Rubber Co., and John P. Kemp (the Petitioning Owners) are six of the 124 private property owners who own property within the boundaries of the Downtown El Paso Historic District, El Paso County, Texas (the District) which has been nominated for listing in the National Register of Historic Places (the National Register). The Petitioning Owners petition Joy Beasley, the Keeper, and the National Park Service (the NPS) opposing the listing of the District in the National Register and, based on the grounds set out in writing in this petition, request that the Keeper substantively review the nomination of the District in accordance with the provisions of 36 CFR 60.6(t).

By letter dated April 8, 2021, Mark Wolfe, Texas' State Historic Preservation Officer, sent a letter to Joy Beasley, Keeper, regarding the nomination of the District. A copy of the April 8, 2021 letter is attached as Exhibit A. In his letter, Mr. Wolfe states there are a total of 214 owners of private property within the District's boundaries. Of those 214 private property owners, Mr. Wolfe also submitted objections from 122 of those owners. By signed written statements, those 122 owners objected to the nomination of the proposed District for listing in the National Register. Thus, Texas' State Historic Preservation Officer, and now the Keeper and the NPS, have received objections from a majority of the private property owners in the District.

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Those objections consist of a combination of notarized objections and declarations made pursuant to 17 U.S.C. § 1746. In his letter, Mr. Wolfe acknowledges that the declarations, which do not include a notary seal, are valid objections under 30 C.F.R. § 60.6(g) pursuant to 17 U.S.C. § 1746. Mr. Wolfe makes this acknowledgement based on legal advice he received from the Office of the Attorney General of Texas. That was not his original opinion. On March 24, 2021, Mr. Wolfe wrote a letter to the property owners within the District regarding the District's nomination. A copy of his March 24, 2021 letter is attached as Exhibit B. In that letter he told the property owners that "[y]our letter of objection was not notarized and thus your objection will not be recognized by the NPS [National Park Service] in the determination of whether a majority of property owners object." Mr. Wolfe went on to say in his letter to the property owners, "The National Park Service will then consider the nomination as well as the number of notarized letters of objection and will decide if the property should be listed in the National Register or determined to be eligible for such listing."

However, in his April 8, 2021 letter to the Keeper at the NPS, Mr. Wolfe states, "Because the number of owner objections constitute a majority of property owners, we request your determination whether or not the district is eligible for listing in the National Register of Historic Places." See 36 C.F.R. § 60.6(n). Ultimately, Mr. Wolfe did not submit the nomination of the District to the Keeper for a determination of whether the District should be listed in the National Register. The reason for the change in Mr. Wolfe's actions is that prior to his April 8, 2021 letter, the Petitioning Owners filed suit against Mr. Wolfe because his refusal to recognize their declarations as valid and legal objections was an ultra vires (illegal) act in that he refused to follow applicable federal law, namely 17 U.S.C. § 1746, and treat the declarations as valid objections. See *323 Chihuahua, LLC, et al. v. Mark Wolfe*, Cause No. D-1-GN-21-001459, filed in the 250th District Court of Travis County, Texas. Prior to the court holding a hearing in that lawsuit, Mr. Wolfe received legal advice from his lawyers at the Office of the Attorney General of Texas. Based on that advice, Mr. Wolfe changed his actions and recognized the declarations as valid and legal objections under federal law, including 17 U.S.C. § 1746, and he sent his April 8, 2021 letter to the Keeper.

The language quoted above from Mr. Wolfe's March 24, 2021, states that the NPS will not recognize objections from private property owners, including the Petitioning Owners, in the form of declarations made pursuant to 17 U.S.C. § 1746, in determining whether a majority of private property owners have objected to the nomination of the District for listing in the National Register. The language quoted above from Mr. Wolfe's March 24, 2021 letter, also states that the NPS will consider the nomination as well as the number of notarized letters of objection and will decide if the District should be listed in the National Register or determined to be eligible for such listing. If Mr. Wolfe's March 24, 2021 letter is accurate, it means the Keeper and the NPS have determined not to follow applicable federal law in determining whether a majority of the 214 owners of private property in the District have objected to the District being listed in the National Register.

Property owners wishing to object to a proposed listing are required to file their objections with the State Historic Preservation Officer, in this case, Mr. Wolfe. 36 C.F.R. § 60.6(g). Section 60.6(g) states that private property owners who 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.” 28 U.S.C. § 1746 provides that written declarations made “under penalty of perjury” are permissible in lieu of notarized statements in any federal proceeding:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)”.

(2) If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)”.

28 U.S.C. § 1746. *See also Ion v. Chevron, USA, Inc.*, 731 F.3d 379, 382 n. 2 (5th Cir. 2013) (plaintiff’s unsworn declaration could be considered in connection with pleading as it complied with 28 U.S.C. § 1746); *Carter v. Clark*, 616 F.2d 228 (5th Cir. 1980) (holding that 28 U.S.C. § 1746 allowed prisoner petitions that met its requirements, despite local rule by federal district judge requiring notarized statements, which local rule was adopted pursuant to federal statute); *U.S. v. Gomez-Vigil*, 929 F.2d 254, 257-58 (6th Cir. 2013) (28 U.S.C. § 1746 applies to all matters required or permitted to be supported by sworn declaration). (Texas law also provides for written declarations made “under penalty of perjury” to be used in lieu of notarized statements in any state proceeding. Section 132.001(a) of the Texas Civil Practice and Remedies Code provides that “an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law.” An unsworn declaration under Section 132.001 must be in writing and made “under penalty of perjury.” Tex. Civ. Prac. & Rem. Code Ann. § 132.001(c). *See also Tex. Dep’t*

of Pub. Safety v. Caruana, 363 S.W.3d 558, 564 (Tex. 2012) (applying Section 132.001 to admit declaration despite another statutory requirement for a sworn report).)

Mr. Wolfe has now properly performed his duties as prescribed by law in this matter. Namely, he submitted the nomination of the District to the Keeper for a determination of whether the District is eligible for listing in the National Register. Under applicable federal law, the only action the Keeper may take with respect to the nomination of the District is to determine whether it is *eligible* for listing in the National Register. 36 CFR § 60.6(s). Under applicable federal law, the Keeper may not *list* the District in the National Register.

On April 27, 2021, the Federal Register included a notice by the NPS under the heading “National Register of Historic Places; Notification of Pending Nominations and Related Actions,” which included the following: “Texas El Paso County Downtown El Paso Historic District, Roughly bounded by Paisano Dr., Kansas St., Missouri Ave., South Santa Fe St., and U.S. 85, El Paso, SG100006548.” preceded by the notation: “An owner objection received for the following resource: . . .” 86 FR 22256-22257. It is unclear from this notice what action the NPS and the Keeper intend to take with respect to the nomination of the District. By law, because a majority of the private property owners within the District have objected to the listing of the District on the National Register, the only action the NPS and the Keeper can take is to consider and determine whether the District is eligible for listing in the National Register. However, the notation “An owner objection received for the following resource:” indicates that the NPS has received an objection from only one of the owners of private property in the District, rather than a majority of those owners. In addition, 36 CFR § 60.6, in particular 36 CFR § 60.6(q), only requires that notice be provided in the Federal Register when a nominated property is being considered for listing in the National Register. Similarly, 36 CFR § 60.13(a) requires posting a notice in the Federal Register only for property that is being considered for listing in the National Register, along with a provision for a 15-day comment period. In contrast, 36 CFR ch. 60 has no requirement for posting a notice in the Federal Register for property that is only being considered for a determination of whether the property is eligible for listing in the National Register. In that regard, 36 CFR § 60.13(c) only requires that the NPS publish notice in the Federal Register if it has made a determination that property is eligible for listing in the National Register.

If the Keeper, or anyone else in the NPS, at any point in time believed, as Mr. Wolfe initially did, that objections made in the form of declarations under 28 U.S.C. § 1746 are not valid and legal objections and, therefore, are not to be counted under 36 CFR § 60.6, that belief is incorrect and contrary to applicable federal law, specifically 28 U.S.C. § 1746. In reviewing the nomination of the District, the Keeper should obtain legal advice regarding this matter including from the Office of the U.S. Attorney General. Doing so should prevent the necessity of the Petitioning Owners bringing a lawsuit against the Keeper and the NPS, in order to ensure that applicable federal law is followed in this matter.

The Petitioning Owners appreciate your consideration of this Petition and your substantive review of the nomination of the District. The Petitioning Owners request that the Keeper determine, as did Mark Wolfe, that (1) a majority of the owners of private property in the District have properly objected to the listing of the District in the National Register, (2) the District therefore may not be listed in the National Register, and (3) whether the District is *eligible* for listing in the National Register.

Respectfully submitted,

KEMP SMITH LLP

By: 

Mark N. Osborn, Attorney for 323 Chihuahua, LLC,
Urban Lion, LLC, Marcep Group, LLC, Hunt
Oregon, LLC, R.B. Wicker Tire and Rubber Co., and
John P. Kemp

Exhibit A

TEXAS HISTORICAL COMMISSION

real places telling real stories

April 8, 2021

Joy Beasley, Keeper
National Park Service
National Register of Historic Places
1849 C Street, NW, Mail Stop 7228
Washington, DC 20240

RE: El Paso Downtown Historic District, El Paso, El Paso County, Texas

Dear Ms. Beasley:

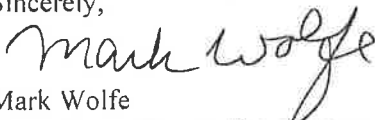
We are forwarding the signed National Register of Historic Places nomination form for the El Paso Downtown Historic District (El Paso, El Paso County, Texas) through the Cultural Resources Online Mail Management System. The submitted file is the true and correct copy of the National Register of Historic Places nomination for the district, with the required photographs and location map embedded in the document. We have notified the federal preservation officer of the U.S. Postal Service and the director of the Federal Reserve Bank of Dallas that federal properties under their purview contribute to the significance of the nominated district.

We are also submitting scanned copies of all letters of owner objection received from private property owners, other written correspondence received from government officials and members of the public regarding the eligibility of the nominated district, and the list of private property owners. The list was derived from El Paso Central Appraisal District records and amended to accurately reflect the number of owners after examination of official land recordation records. The current number of private property owners on the list is 214.

The Texas Historical Commission (THC) has received letters of objection from 124 property owners on the list, of which 31 include the seal of a notary public, along with two such notarized letters from property owners not on the list. Two property owners who initially objected subsequently submitted letters rescinding their objections and are therefore not included in the tally of objecting owners, which now stands at 122. Although some objection letters lack a notary seal, each of the letters includes an unsworn declaration attesting to the truth and accuracy of the statements under penalty of perjury. After consultation with the Office of the Attorney General of Texas, THC believes that these letters meet the declaration standards of 17 USC § 1746 and therefore may be considered valid objections under 36 CFR 60.6(g), which allows "any owner or owners of a private property who wish(es) 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." Because the number of owner objections constitute a majority of property owners, we request your determination whether or not the district is eligible for listing in the National Register of Historic Places.

This is an extraordinarily important historic district, and we appreciate your consideration. Please let me know if you have any questions.

Sincerely,



Mark Wolfe
Texas State Historic Preservation Officer



Exhibit B

TEXAS HISTORICAL COMMISSION
real places selling real stories

March 24, 2021

RE: Letters of Objection, Downtown El Paso Historic District, El Paso, El Paso County

Property Owner:

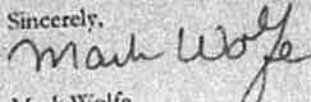
The Texas Historical Commission is processing the National Register of Historic Places nomination for the Downtown El Paso Historic District, which was approved by the State Board of Review on January 16, 2021. We have received a signed document indicating that you or the entity you duly represent own private property within the district and object to the listing of the district in the National Register.

The National Register regulations 36 CFR 60.6(g) state that

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. Upon receipt of notarized objections respecting a district or single private property with multiple owners, it is the responsibility of the State Historic Preservation Officer to ascertain whether a majority of owners of private property have objected. 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. 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.

Your letter of objection was not notarized and thus your objection will not be recognized by the NPS in the determination of whether a majority of property owners object. If you wish to formally object to the nomination, please submit an original notarized statement to the Texas Historical Commission and send an electronic copy to the National Park Service at: Alexis_Abernathy@nps.gov. We will submit the nomination to the Keeper of the National Register for consideration before April 16, 2021, as prescribed in the federal regulations (36 CFR 60.11(e)). The National Park Service will then consider the nomination as well as the number of notarized letters of objection and will decide if the property should be listed in the National Register or determined to be eligible for such listing.

Sincerely,



Mark Wolfe
State Historic Preservation Officer

