

Office of the City Attorney

October 14, 2014

***By first class mail and e-mail to [chall@achp.gov](mailto:chall@achp.gov)***

Ms. Caroline D. Hall, Assistant Director  
Federal Property Management Section  
Office of Federal Programs  
Advisory Council on Historic preservation  
401 F. Street NW, Suite 308  
Washington, D.C. 20001-2637

Re: Berkeley Main Post Office, 2000 Allston Way, Berkeley, CA 94704  
Comments of City of Berkeley and National Trust on the USPS's Request to  
Review Finding of No Adverse Effect

Dear Ms. Hall:

The City of Berkeley (City) and the National Trust for Historic Preservation (National Trust) submit the following comments on the request of the United States Postal Service (USPS) for the Advisory Council on Historic Preservation (ACHP) to review its finding of no adverse effect from the proposed sale of the Berkeley Main Post Office (Property). As we explain below, we believe that a finding of No Adverse Effect is inconsistent with the Section 106 regulations and that the covenant proposed by the USPS is an inadequate restriction that fails to ensure the long-term preservation of the Property's historic significance.

### **1. Incomplete Section 106 Process**

The City and the National Trust are consulting parties to the Section 106 process for the disposition of the Property, and we are committed to ensuring that it is properly protected and preserved.

On February 7, 2014, the USPS circulated a draft preservation covenant for the Property to various consulting and other parties, including the City of Berkeley and the National Trust, and requested comments from all parties by February 24<sup>th</sup>.

The City worked with the National Trust to prepare a set of joint comments, and submitted them on February 24, 2014. Because they were quite extensive, these comments took the form of a proposed replacement covenant (Attachment 1).

On May 7, 2014, the USPS circulated a revised covenant and requested that comments be submitted by May 27<sup>th</sup>. Attachment 2 is a redlined version of the May 7<sup>th</sup> covenant, showing how it differs from the City's and National Trust's covenant. The USPS subsequently extended the May 27<sup>th</sup> deadline to July 11<sup>th</sup>, to allow time for the Berkeley City Council to consider the May 7<sup>th</sup> covenant. On June 24<sup>th</sup>, the City Council did so, and gave staff direction.

The City's and National Trust's joint comments (Attachment 3) were provided to the USPS on July 9<sup>th</sup>. Since that date the USPS and the City's representatives have discussed the City's and National Trust's July 9<sup>th</sup> comments, and we had expected (and still hope for) a revised draft covenant reflecting that discussion.

The covenant submitted by the USPS for review by the ACHP is a far cry – and in our view a step backwards – from both the covenant we had initially proposed (Attachment 1) and the revised May 7<sup>th</sup> covenant proposed by the USPS (Attachment 2). We do not believe it is appropriate for the USPS to submit a wholly different covenant under which it names itself as the grantee, while still negotiating with the City and National Trust on a covenant in which the City would be the grantee.

Furthermore, the new covenant (Covenant) is flawed and does not provide for adequate restrictions that ensure the long-term preservation of the Property's historic significance for three reasons: first, the USPS has no experience administering, monitoring or enforcing covenants; second, the Covenant provides for automatic approval for changes to the Property if the USPS fails or declines to respond to requests from property owners; and third the Covenant invokes both the Section 106 process and the use of the Secretary of the Interior's Standards for the Treatment of Historic Properties, but in a way that will create confusion and ambiguity in the Covenant's interpretation or administration.

## **2. USPS As Covenant Holder**

Unlike all prior versions reviewed by the City and the National Trust, the Covenant submitted to the Council calls for the covenant holder to be the USPS, rather than the City. This proposed solution was entirely unexpected to the consulting parties. We know of no precedent for the USPS accepting the responsibility to monitor and enforce a preservation covenant on a historic property it has sold.

Throughout our consultation with the USPS it became clear the USPS had little or no experience in drafting preservation restrictions for its properties; furthermore, their lack of experience in this area combined with the shallow protection they initially sought to provide for the Property, leaves the City and the National Trust to conclude that the USPS would not take seriously its role as holder of the Covenant and honor its administration, monitoring, and enforcement obligations.

Indeed, USPS cannot square its previous claims to lack competence in real estate management with its latest assertion that it can act as responsible covenant holder. In its final decision on relocation of retail services in Berkeley, issued on July 18, 2013, the USPS Vice President Tom A. Samra stated "the Postal Service's mission is to provide postal services in an efficient manner, and increasing its role as a landlord diverts from a

proper focus on that core mission. In addition, the Postal Service is legally restrained from offering additional non-postal services.” This statement was cited as the rationale for the agency’s refusal to consider leasing opportunities as required by Section 111 of the National Historic Preservation Act, as the consulting parties had requested<sup>1</sup>.

Currently, the USPS has not provided consulting parties with any assurances that the Covenant it proposes to hold on the Property would be monitored and enforced in a way that would assure long term protection of the property. We encourage the ACHP to require the Postal Service to demonstrate its commitment to the preservation of the building by creating a specific endowment for the necessary oversight of the Covenant (or any covenant they acquire through this process), as is common practice for easement holding organizations across the country, and to also require the USPS to explain the steps it will take to acquire the staff expertise needed to administer the easements in light of the USPS’s financial challenges.

### **3. Public Art**

The USPS proposes to retain ownership of the art works in the lobby (the mural and bas relief sculpture, hereinafter “Mural and Relief”), and to loan them to the buyer of the building. The manner in which the Covenant addresses this issue raises serious concerns.

The Covenant is essentially silent on the buyer’s obligations with respect to the art work and public access thereto, and leaves these issues for a future agreement that will be solely between the USPS and the purchaser. The loan agreement in the USPS’s submission to the ACHP,<sup>2</sup> however, has several major flaws. First, the amount of insurance required (\$100,000) is insufficient given the size of the Mural and Relief and the fact that the Mural and Relief are also incorporated into the building itself. Second, limiting public access to the Mural and Relief to one day per month is severely restrained and grossly inadequate public access, given the current level of access afforded to the public, which is generally six days per week. Third, given the expected lifetime of the building, the ability to terminate the loan and remove the Mural and Relief after 25 years defeats the whole purpose of the loan and the Covenant. Finally, the maintenance standards imposed on the owner of the property reward an irresponsible owner for inadequately maintaining the Mural and Relief. The primary “remedy” is for the buyer to remove the Mural and Relief and transport it to the USPS at its own cost. In other words, a buyer who wishes to be rid of the Mural and Relief need only deface it and ship it away. The lack of an effective remedy (or deterrent) in the loan agreement supports our position that the Mural and Relief, and public access thereto, should to be addressed in the Covenant, which must provide more robust remedies.

The USPS should consider using the language from the Bronx Post Office Covenant (Attachment 4) to address the protection of the Mural and Relief located on the Property. The provisions of the Bronx Post Office Covenant provide much more clarity on the property owner’s obligations regarding the Mural and Relief, and more clearly spell out

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<sup>1</sup> We note that the USPS did not initiate consultation under Section 106 for its relocation decision, to the considerable objection of consulting parties.

<sup>2</sup> The loan agreement is an attachment to the USPS letter of September 13, 2013 from the USPS to the California SHPO, which in turn is part of Exhibit 1 to the USPS’s letter to the ACHP.

the USPS's obligations. We recommend adopting the following language, which was adapted from the Bronx Post Office Covenant:

the Grantee and its heirs, successors and assigns covenant and agree to maintain and preserve the Murals, individually and collectively, in such locations, and in the same or better condition and state of repair as depicted in the photographs at Exhibit C and in accordance with the terms and conditions of this Preservation Covenant while such Murals remain on the Property. While this obligation to maintain and preserve is reflected in a loan agreement between Grantee and the United States Postal Service (USPS), a copy of which is attached hereto and incorporated herein at Exhibit D ("Mural and Relief Loan Agreement"), in the absence or upon the termination of such Mural Loan Agreement or a successor loan agreement, this obligation to maintain and preserve the Murals is not waived, terminated, or released. Grantee shall ensure that any restoration of the Murals shall conform to the American Institute for Conservation of Historic and Artistic Works (AIC) code of ethics and guidelines for practice and the National Park Service conservation guidelines, as these may be amended, replaced or superseded from time to time. Grantor shall maintain damage insurance covering the Murals to their full appraised value, as determined initially on or immediately preceding the Effective Date of this Preservation Covenant by an accredited art appraiser. Grantee shall have such appraised value updated by an accredited art dealer at least every five years measured from the Effective Date of this Preservation Covenant. The damage insurance shall be an "all risk", wall-to-wall policy subject to only the following standard exclusions: wear and tear, gradual deterioration, terrorism, and war. To the extent these insurance requirements conflict with the terms of any mural loan agreement, including the Mural and Relief Loan Agreement attached as Exhibit D hereto, the requirements of this paragraph shall control, and the Grantee shall be bound by them.

#### **4. Public Access**

Except through its reference to the loan agreement, the Covenant is silent as to public access to the Property. The ability for the public to have an opportunity to experience the protected interior of the building – – – is important not only to the public's understanding and appreciation of the Mural and Relief, but also to other aspects of the building that were the basis for its listing on the National Register. The City/National Trust proposed a robust requirement for public access to allow the public to view and experience the lobby of the building. The Covenant submitted to the ACHP deletes any reference to public access. Both the City and the National Trust believe that the Covenant must have some guarantee of adequate public access to the lobby, which has existed as a public space for almost 100 years.

#### **5. Inappropriate Limitation on Grantee's Authority**

In a number of instances the USPS sought to narrow its authority over changes to the Property, putting character defining features of the Property at risk of irreversible

changes or alterations. The purpose clause of the Covenant, paragraph D., was weakened because it constrains the Covenant to preventing only changes that “significantly” affect or interfere with the Preservation and Conservation Values of the Property. The modifier “significant” or “significantly” is also used elsewhere to weaken the Covenant. In paragraph 1(c) the use of the phrase “significantly affect[s]” interjects a level of ambiguity into the Covenant that would make it difficult for the covenant holder to know or be able to control when an alteration would be significant enough to warrant review by the holder. The standard should be that *any* construction or alteration of the protected elements of the Property would trigger a review. The use of the modifier “significant” in paragraph 1(d)(ii) also raises the same issue. As written, the Covenant suggests that the owner is the one who decides whether a proposed change “significantly affects” the Preservation and Conservation Values. This approach was not acceptable to the City or the National Trust, and should not be acceptable to the ACHP. The National Trust as administer of over 100 easements across the country and as a leading authority on the use of preservation restrictions, understands the consequences associated with using such qualifiers, which could be exploited by a property owner to remover or alter protected elements of the Property and would expose the easement holder to costly litigation.

## 6. Possible Loophole for “Adaptive Reuse”

Recital E of the Covenant contains the following language:

The Grantor intends to propose plans for adaptive reuse and rehabilitation of the Property in a manner that may require a substantial level of improvements, all of which improvements shall be done in accordance with the *Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings* (National Park Service, 1997 et seq) (“Secretary of Interior’s Standards”) and subject to applicable land use laws, rules and regulations. Such improvements may affect the Protected<sup>3</sup> Values, including, without limitation, the height, mass and scale of the building on the Property.

This language creates ambiguity as to whether the Grantor’s changes to the Property under its adaptive reuse and rehabilitation plan *must* be accepted because they were anticipated as a condition of imposing the Covenant on the Property. Moreover, while this paragraph seems to anticipate that modifications associated with adaptive reuse will be consistent with the Secretary of the Interior’s Standards, it also appears to contradict itself by stating that “[s]uch improvements may affect the Protected Values, including, without limitation, the height, mass and scale of the building on the Property.” Finally, the Secretary of the Interior’s Standards provide guidance regarding the rehabilitation of historic buildings and are not necessarily dispositive of whether a particular approach is the correct approach. As such, the Covenant holder should be in the position of interpreting and determining whether any adaptive reuse is or is not consistent with the Secretary’s Standards to ensure that the Preservation and Conservation Values of the Property are protected.

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<sup>3</sup> Presumably this was intended to be “Preservation and Conservation,” not “Protected.”

In addition, this language should be separated from Recital E and become a part of its own recital clause which should make clear that any changes associated with adaptive reuse will be subject to the Grantee's review and approval to the same extent as any other changes, which would close the existing loophole that the proposed language appears to create.

## **7. Standard for establishing baseline condition**

Recital D states a new standard for assessing the condition of the Property. In the National Trust's experience, especially with a building that has deferred maintenance issues, the Covenant should establish that the owner must maintain the property in its "current or better condition." This standard was removed from the Covenant by the USPS. Incorporating this standard into the Covenant ensures that if a property is not in good condition when a covenant is imposed and the property is later rehabilitated, then the property owner will be responsible for maintaining the property in the improved condition. Given the state of portions of the building and Mural and Relief, maintenance and conservation issues already exist that either need to be addressed by the Post Office or that the Post Office should require a prospective purchaser to repair as a condition of sale. In order to determine what issues need maintenance, the Post Office should perform a conditions assessment of the building, which would reveal any critical work that would be needed to repair damaged or deteriorated elements of the Property. Prospective buyers should then be required to make these repairs as a condition of the sale of the Property so that the Property is put into a good condition. Using the language proposed by the City and the National Trust would ensure that whatever maintenance issues are resolved during the rehabilitation of the building would become the baseline condition by which the easement could be enforced in the future.

## **8. Maintenance and Repair**

A reference to Paragraph 1(c) was added to Paragraph 1(d) ("Maintenance and Repair"), but it is unclear why this cross-reference was provided in this paragraph. With regard to the Grantor's maintenance obligations, the determination whether the use of in-kind materials is possible should not be at the discretion of the property owner. By granting this sort of discretion to the property owner, the maintenance clause could be used to make changes or alterations to the Property if the property owner determined that it is not feasible to use an in-kind material while performing routine maintenance. Furthermore, no definition of "feasible" is provided, so that either party could misunderstand or disagree as to what is meant by the term. Protection could be provided by a definition of "feasible" that relates to engineering or architectural feasibility, not merely cost or preference.

## **9. Notice of Offers to Sell**

The USPS also deleted a provision requiring notice to the grantee of offers to sell the building. On a purely common-sense, practical basis, it is vital that the Covenant holder be apprised of potential sales. Because the Covenant is a perpetual restriction on the Property, the holder of the Covenant will have an ongoing relationship with all current and future owners. Giving notice to the Covenant holder enables the holder to explain

the terms and obligations imposed by the Covenant to potential buyers so that they are fully aware of the restrictions on the Property before purchase.

## **10. Remedies**

A right of notice, prior to asserting any legal action against the property owner, was included for any mortgagee of the Grantor in the Covenant. This additional right is unnecessary, burdensome, and could delay the USPS's ability to enforce its rights under the Covenant or could delay or complicate a third party's enforcement rights. Because the Property will not be encumbered by a mortgage at the time the Covenant is put in place its terms and restrictions will be superior to any subsequent conditions placed on the title, such as any rights in the Property asserted by a later mortgagee. This is not an uncommon situation for a mortgagee and will be revealed through the mortgagee's legal due diligence prior to asserting any interest in the Property through a mortgage or deed of trust.

In addition to the third party enforcement rights given to the residents of the City of Berkeley under the Covenant, the City itself should also be named as a party with potential enforcement rights.

## **11. Use of the Property**

Finally, we come to the issue of future use of the Property. The USPS has consistently refused to recognize the fact that the *use* of the Property, as well as its physical characteristics, forms an element of its significance and that the loss of this use constitutes an adverse effect. The ACHP's Report to Congress concludes in finding number six that change of a post office's historic use can constitute an adverse effect when the National Register listing of the property is tied to that use. 36 CFR § 800.5(a)(2)(iv). In the case of this Property, post office use framed the significance in its 1980 National Register nomination:

The Berkeley Post Office ... embodies for the City of Berkeley the sense of mission which the government then put into its public buildings – “buildings which will educate and develop the public taste & eventually elevate it to a higher plane” .... The lobby, particularly, is a civic treasure .... Berkeley has few if any comparable public spaces where citizens from all over the city come frequently and freely and can experience the quality workmanship and civic pride that used to be part of government building.... The authorization of a post office building for Berkeley in 1910, and its completion in 1914, symbolized the city's coming of age.... Downtown Berkeley is still essentially the Main Street that developed in the 1910s & 20s, and the well-patronized post office is important in keeping it alive.

Based on the National Register nomination in this case, the use of the Property as a post office – the use for which it was designed and constructed – is itself an integral Preservation and Conservation Value. This is particularly the case for the lobby, which as noted above was designed as a public space for civic use. We stand by our position that an adverse effect can be caused by loss of use and must be recognized in the Section 106 process in order to craft appropriate mitigation measures. This requirement

does not, however, mean that the historic use of the entire Property must continue to be its future use. As shown by the example of the former Main Post Office at 400 North Ervay in Dallas, an historic post office can be converted to other uses while retaining through a long-term lease postal service and public access in an historic lobby. The USPS has an obligation under Section 106 (and NEPA) to consider the loss of the historic use as an adverse effect to be avoided or mitigated.

The USPS deleted a provision in the Covenant that was drafted to address the use issue by the City and the National Trust (Attachment 1, paragraph 1(i)). The intention of the paragraph was to ensure that if the USPS continued to have a presence in Berkeley, such as a small retail space that provides limited service to the public, the USPS should opt to lease space within the Property rather than in another location elsewhere in the City. The USPS, in its April 22, 2013 relocation announcement<sup>4</sup>, indicated that it intended to relocate elsewhere in Berkeley, which suggests that providing some level of service at the existing location would be a possible option and something that the USPS stated in its relocation announcement. Again, since the civic character of the front lobby and adjoining spaces in the front of the Property are particularly recognized as a Preservation and Conservation Value, continuation of those uses would be the most compatible future use of that portion of the Property.

The Covenant should also include a more general use approval provision, which is common in most preservation covenants. This provision would provide the Covenant holder with the right to review any potential change in use of the Property to ensure that any change is consistent with the building's historic significance. Because this is a common provision in many preservation covenants across the country, we would propose that the following language, paraphrasing a similar provision in the National Trust's Model Easement, be added to the Covenant:

Grantor shall not change the use of the Property to another use other than a civic use allowing regular public access to the lobby of the Property without the written consent of the Grantee. In making its determination regarding a proposed change in use, the Grantee must determine that the proposed use: (i) does not impair the Conservation and Preservation Values of the Property; and (ii) does not conflict with the purpose of the Covenant.

## **12. Conclusion**

The consultation process for the Property is incomplete at this point in time. While the City and the National Trust realize that the USPS may feel that the Section 106 process has taken too much time, the parties could have already reached agreement on acceptable terms for the Covenant if the USPS was seriously interested in protecting the Property using modern and common place preservation restrictions (which are regularly used in other covenants across the country). Earlier compliance with NEPA's environmental assessment requirements would also have facilitated this result. The City and National Trust look forward to progress from this point with these precepts in mind.

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<sup>4</sup> [http://about.usps.com/news/state-releases/ca/2013/ca\\_2013\\_0422.htm](http://about.usps.com/news/state-releases/ca/2013/ca_2013_0422.htm)



If you have any questions about our comments, please feel free to contact Zach Cowan for the City of Berkeley at [zcowan@cityofberkeley.info](mailto:zcowan@cityofberkeley.info) or Brian Turner for the National Trust at [bturner@savingplaces.org](mailto:bturner@savingplaces.org).

Sincerely,

Very truly yours,

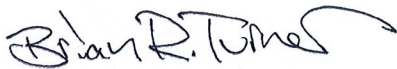
City of Berkeley



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