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9 CITY OF BERKELEY, et al

10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 CITY OF BERKELEY; MAYOR AND
14 MEMBERS OF THE CITY COUNCIL
OF THE CITY OF BERKELEY,
15 Plaintiffs,

16 v.

UNITED STATES POSTAL SERVICE;
17 ESTATE, USPS PACIFIC REGION,
18 Defendants.

) Case No.: 3:14-cv-04916-WHA

)
) PLAINTIFF CITY OF BERKELEY’S INITIAL
) RESPONSE TO DEFENDANTS’ NOTICE OF THE
) STATUS OF THE UNITED STATES POSTAL
) SERVICE’S 2013 FINAL DETERMINATION

) Judge: Hon. William Alsup
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1 Plaintiff City of Berkeley provides here its initial response to defendants' notice (Doc. 54)
2 purporting to respond to the Court's question whether the United States Postal Service would
3 rescind its July 18, 2013 "final determination" regarding relocation of retail services (Doc. 24-1). If
4 the Court wishes further discussion of this issue, Berkeley respectfully requests leave until April 9,
5 2014 to provide a more detailed response.

6 Defendants purport to say "yes." But to do so, they rely on a nonexistent (and therefore not
7 cited and un-citable) "September 2014" decision, and claim they don't even know how to rescind the
8 operative July 2013 final determination. Lacking an authentic rescission, they provide a convoluted
9 mirage designed to approximate one, which leaves in place the key decisions on which they relied
10 to support sale of the property. It falls short in consistency, logic and law.

11 Defendants' notice lacks any assurance that USPS will readdress NEPA and NHPA
12 compliance before transferring title of the National Register-listed Berkeley Post Office out of
13 federal ownership. Plaintiffs' first amended complaint seeks relief to correct USPS' faulty
14 compliance with NEPA and NHPA *prior to selling* the Berkeley Post Office (Doc. 46: 14-19), and to
15 prevent USPS from proceeding with "any relocation or sale" without fully complying with these
16 statutory duties. (*Id.* at 19-20.) However, defendants fail to mention--much less rescind-- their
17 two other final determinations challenged here, which terminated efforts to comply with NEPA
18 and NHPA prior to selling the Berkeley Post Office. On April 30, 2014, USPS signed a Record of
19 Environmental Consideration for the Proposed Disposal of Real Estate, which concluded that
20 "further NEPA analysis is not required" prior to the disposal of the Berkeley MPO. (Doc. 26-3). On
21 October 31, 2014, USPS concluded its NHPA review. USPS had requested review of its finding that
22 the sale of the property would cause "no adverse effect" by the Advisory Council on Historic
23 Preservation ("ACHP") on September 24. (Doc. 28-1). Over the objections of the ACHP, the USPS
24 authored a letter disagreeing with the ACHP and stating that the "submission of this letter to you,
25 the California SHPO and the consulting parties, *concludes the Section 106 process.*" (Doc. 3-9: 21;
26 27-7 and Doc. 27-8) (emphasis added).)

1 Defendants' notice never commits to refraining from selling the historic building or re-initiating
2 NEPA or NHPA if it does sell the building. Instead, it merely indicates that at some future point USPS
3 will follow its administrative process for relocation of services (an action related to, but different from a
4 sale of federal property). Moreover, rather than providing an authentic rescission of its final July
5 2013 relocation decision, defendants implausibly suggest that this final decision was already
6 "rendered obsolete" as of September 2014. This revisionist theory of virtual rescission is
7 untenable. First, the theory is blatantly inconsistent with what, until now, has been the core of
8 defendants' motion to dismiss—Hudson-McDonald's December 2014 termination of the previous
9 purchase and sales agreement (See Doc. 47: 16; 50-1: 2.). Second, the cited documents do not even
10 establish a September 2014 "plan" or document how the USPS supposedly rescinded or
11 "render[ed] obsolete" the earlier decision. Indeed, both declarants—outside the administrative
12 record of what USPS did, or did not do, which should frame the case—cited by defendants concede
13 that the undisclosed "plan" would only retain retail operations, if at all, "following the sale" of the
14 Berkeley Post Office. See Alvarado Decl. (Doc. 24, ¶ 7); Lowe Decl. (Doc. 25, ¶ 3.) Nor does either
15 declarant even hint at any renewed commitment to comply with NHPA and NEPA prior to selling
16 the property out of federal ownership. Lastly, the premise begs the question of what USPS' post-
17 September 2014 procedures stood for. If USPS supposedly rescinded its decision in September
18 2014, what was it doing in October 2014 completing and "concluding" its section 106 review? That
19 suggests strongly that whatever USPS did in September 2014 can be summarily reversed.

20 Rather than providing an actual "rescission" that would afford a new opportunity to ensure
21 NHPA and NEPA compliance in connection with the proposed sale and relocation, defendants
22 recycle a variation on their jurisdictional argument that has already been discussed and
23 discredited in opposition to the motion to dismiss. (See, e.g., Doc. 48: 12-16; Doc. 46: 8).

1 Lastly, defendants only suggest that they will negotiate a termed leaseback with a new buyer. By
2 the time a relocation decision comes up, the building would already be under new ownership without
3 NEPA or NHPA compliance. The defendants' referenced administrative process would only occur at a
4 future point if and when the new owner of the building exercises its discretion under the lease
5 arrangement to terminate its lease. At that point, defendant would have already committed to relocate
6 through a binding legal agreement. In sum, no authentic "rescission" has occurred, and defendants' new
7 arguments simply underscore the need to pursue the action and secure the Court's relief.

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10 DATED: April 3, 2015

Respectfully submitted,

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