



Office of the City Manager

ACTION CALENDAR

June 24, 2014

To: Honorable Mayor and Members of the City Council

From:  Christine Daniel, City Manager

Submitted by: Zach Cowan, City Attorney

Subject: Comments on Proposed Preservation Covenant for Main Post Office

RECOMMENDATION

Provide guidance to staff for future discussions with USPS concerning the draft preservation covenant proposed by USPS for the Main Berkeley Post Office.

FISCAL IMPACTS OF RECOMMENDATION

None.

CURRENT SITUATION AND ITS EFFECTS

On February 7, 2014, the United States Postal Service (“USPS”) circulated a draft preservation covenant for the Main Berkeley Post Office on Allston Way to various consulting and other parties, including the City of Berkeley and the National Trust for Historic Preservation, and requested comments from all parties by February 24.

City staff worked with outside counsel and the National Trust to prepare a set of joint comments, and submitted them on February 24, 2014. These comments were not merely edits to the USPS draft, but took the form of a replacement covenant. The City/National Trust covenant was copied to all parties who had been asked to comment on the USPS’s original draft covenant.

On May 7, 2014, the USPS circulated a revised draft covenant and requested that any responsive comments be submitted by May 27. Staff explained to the USPS that this was not a realistic target, and offered to present the USPS’s revised draft to Council for comment on June 24. Copies of the original City/National trust covenant from February 24, the most recent USPS draft covenant, and a redlined comparison of the two are attached. (The comparison also contains a few edits by staff to correct minor typographical or editorial errors in the USPS draft.)

BACKGROUND

The covenant is a legal restriction that runs with the land. It would be granted by the purchaser of the property (the “Grantor”) to the covenant holder (“Grantee”, in this case the City), who would have the right to enforce the covenant. At present the Grantee is anticipated to be the City, and that is how the covenant reads.

The draft USPS covenant incorporates many of the City's/NTHP's proposed provisions and much of their proposed language, although a number of wording issues remain to be worked out.

This report focuses on the major remaining controversial issues so that Council can provide comments to the USPS and guidance to staff.

1. Introduction

A preservation covenant is necessary to ensure protection of the “preservation and conservation values” – the internal and external features that embody the building’s historic significance – in the event the USPS sells all or part of the Main Post Office to a non-governmental entity.

The covenant operates by giving the covenant holder (referred to as the “Grantee” or “City”) the power to prohibit certain actions that would impair the preservation and conservation values. With one exception noted below, the USPS and the City/National Trust agree on these values.

It is important to understand some basic limitations on the covenant.

First, the covenant does *not* address the art works in the lobby (the mural and the bas relief sculpture). This is because the USPS intends to retain ownership of those works and loan them to the buyer. Thus they will remain the responsibility of the USPS and would not be subject to the covenant.

Second, because the purpose of the covenant is to protect the preservation and conservation values, it does not completely address every potential eventuality related to the future of the building. Assuming the building is sold out of government ownership it will be subject to the full range of the City’s regulations, including the Zoning Ordinance and Landmarks Preservation Ordinance. Thus the preservation covenant need not, and should not, trench upon the City’s future exercise of its police powers.

2. Future Use as a Post Office

The USPS draft covenant deletes a statement in the City/National Trust covenant that one of the preservation and conservation values is the historic use of the building as a post office, as well as a provision that would require that the retail portion of the building be leased back to the USPS for 50 years for operation as a post office. This is obviously an important unresolved issue. We understand that USPS will provide an additional communication on this issue prior to the Council meeting.

3. Public Access to Lobby

The USPS draft covenant also deletes the City'/National Trust proposal as to public access to the lobby, where the art work is located. Resolution of this issue depends in part on future use of the lobby, whether as a post office or as some other use. Nonetheless, the covenant should include some guaranteed minimum public access to the lobby.

4. Art Work

As noted above, the art works in the lobby (the mural and bas relief sculpture) will not be transferred to the purchaser. Rather, the USPS will retain ownership of and responsibility for them, and will loan them to the buyer of the building. The USPS draft covenant states that the loan agreement "will require the purchaser to undertake certain actions to preserve and protect the Mural and Relief and provide public access thereto on terms stated therein." In other words, the covenant itself is essentially silent on the buyer's obligations with respect to the art work and public access, and leaves these issues for a future agreement between the USPS and the purchaser. While the City cannot be expected to be granted any *control* over art works that are retained by the USPS, as stated above, public access for viewing that art work should be included in the covenant. Moreover, the terms of the loan agreement should be made available for public comment well in advance of a sale.

5. Process for Approving/Disapproving Alterations

The USPS covenant as drafted only requires City approval of work that "could significantly affect the Preservation and Conservation Values". This in itself is not necessarily problematic, as long as there is a process for *the City* to determine whether proposed alterations might have such a significant impact. Otherwise, this language might be read to leave this threshold determination up to the owner, which would not be acceptable. We assume that this was simply a drafting oversight.

The USPS draft covenant also requires City decisions under the covenant to be made within 45 days and requires that they not be unreasonable. These are typical provisions that staff does not object to in principle, but the Council should be aware of them. In particular, the time limitation will require the City to devise an efficient means of making decisions under the covenant. Note that these limitations do *not* apply to City decisions under the Zoning Ordinance or Landmarks Preservation Ordinance or any other City ordinance. They apply *only* to decisions under the covenant.

6. Fees

The USPS draft covenant has problematic language that would prevent the City from recovering the full cost of its administration of the covenant. This will need to be

changed. Again, we believe this may have been a drafting issue rather than a position taken by the USPS.

7. Taxes/Notices from Government Authorities

The USPS draft covenant omits provisions requiring the purchaser/new owner to notify the City about taxes and other notices from the government. These are standard provisions that should be restored absent some explanation from the USPS.

8. Insurance

USPS has made some relatively minor changes to the City's proposed language concerning insurance coverage and casualty, but has also identified these provisions in general for further discussion. We expect USPS will provide clarification of its position and the rationale for that position on these issues.

ENVIRONMENTAL SUSTAINABILITY

There are no identifiable environmental effects or opportunities associated with the subject of this report.

RATIONALE FOR RECOMMENDATION

See "Background".

ALTERNATIVE ACTIONS CONSIDERED

N/A

CONTACT PERSON

Zach Cowan, City Attorney (510) 981-6998

Attachments:

- 1: Draft preservation covenant submitted by City of Berkeley and National Trust (February 24, 2014)
- 2: Revised draft preservation covenant circulated by USPS (May 7, 2014)
- 3: Comparison of covenant submitted by City of Berkeley and National Trust and revised draft circulated by USPS

PRESERVATION COVENANT
2000 Allston Way, Berkeley, CA

In consideration of the conveyance of certain real property and the buildings thereon, located at 2000 Allston Way in the City of Berkeley, the County of Alameda, State of California, as more fully described in Exhibit A (“Property”), _____ (“Grantor”) and the City of Berkeley (“City”) agree as follows.

RECITALS

- A. The Property was originally developed in 1914 and has been used as the Berkeley Main Post Office ever since.
- B. The Property is located in an urban setting within downtown Berkeley’s Civic Center District, on an approximately 1.11 acre corner lot bounded by Allston Way to the front (to the north), Kittredge Street to the rear (to the south), Milvia Street to the street side (to the west), and adjacent lot line to the interior side (to the east). The reinforced concrete Second Renaissance Revival-style Berkeley Main Post Office building, which was built in 1914, is rectangular in plan: front section (customer lobby, offices, and part of work area) facing Allston Way, two stories plus basement, with hipped red tile roof; and rear section extending south along Milvia Street one-story plus basement, with flat roof (northernmost 35 feet original; southward addition c.1932). A historic period rear addition was built in 1932. Changes to the Property have been executed with great care. A mural by Suzanne Scheuer was added to the lobby in 1936 and completed in 1937 and depicts an allegory of the life in Berkeley in the Mission, rancho, and early American eras. A limestone bas-relief sculpture by artist David Slivka was added in 1937 that commemorated the contributions of postal workers. The Property was designated a City of Berkeley Landmark in 1980, and was listed on the National Register of Historic Places in 1981. It is also a contributor to the City of Berkeley’s designated Civic Center Historic District.
- C. 1. The historic exterior features of the property are determined to be the following: height, mass and scale of building; hipped roof sheathed in tile with wide overhang; exterior siding, including poured concrete, limestone, terra cotta trim, and rusticated cast blocks at corners; rounded corners of two-story portion of building on all four sides; arcade of eleven high round arches on plain Tuscan columns; loggia with groin vaults; marble on floor and wainscot of loggia; original oak frame pane arches with functioning transom windows; original double-hung windows with panes grouped in 3 vertical divisions; low cement windowsills with wave decoration; ornate groove along the top of the exterior walls; pilasters along the primary façade; pilasters flanking the entrance doors; entrance doors—three sets of paired oak and glass doors with brass fittings; columns with pilasters capped with extremely stylized Corinthian capitals; ornamental features of the exterior: small terra cotta frieze which tops the second story, wide terra cotta beltcourse with dentils, swags, medallions, and wave patterns below

the 11 second story windows and around the entire building; cornice soffit; terra cotta shields above rusticated cast blocks; two rows of curved wooden brackets framing rectangular panels at eave soffit and soffit paint colors; wrought iron railings with heraldic shields and diagonal rope pattern; arched windows with terra cotta sills on one-story portion of building, and numerous windows continuing on west and east side with heraldic medallions and other decorative elements; the David Slivka 1937 bas-relief sculpture on the east end wall; and granite entry steps forming “plaza” at main (north) entry.

2. The historic interior features of the property are determined to be the following: glazed arches between workroom and lobby; coffered lobby ceiling; individual service counter windows with detailed oak framing, brass grilles and feather-chip glass grilles and service window doors; the Suzanne Scheuer mural over the former Postmaster’s office door; arches around postmaster’s door and service windows; marble baseboards and wainscot; columns in lobby and small and large Corinthian capitals cast ceramic and oak; band joining all columns and capitals of lobby (currently painted brown); carved oak woodwork on columns between entrance doors, windows, service bays and vestibule; entrance door oak frames with modified Corinthian capitals; oak and glass vestibule at center entrance; carved oak and triangular dentilled pediment over Postmaster’s former office door (now elevator door) and lettering; Post office boxes; original bulletin cases; oak casework with movable metal grills; marble staircase, oak handrail, and ornamental metal end pieces and railings; landing of marble staircase with mosaic tiles and black, white, and red fretwork around the edges; and second floor marble and tile flooring.
3. Collectively, the features listed in subparagraphs (a) and (b) of this Recital, as more fully set forth in Exhibits B and C, represent the “Preservation and Conservation Values” of the Property. In addition, one of the Preservation and Conservation Values of the Property is its use, since its construction, as the Main Post Office for the City of Berkeley.

D. It is the Purpose of this Covenant to assure that the Preservation and Conservation Values will be retained and maintained forever substantially in their current or better condition and to prevent any use or change of the Property that will significantly impair or interfere with them.

E. The United States Postal Service owns a certain mural *Incidents in California History* by Suzanne Scheuer (the “Mural”) and the David Slivka relief sculpture of postal workers, 1937, on the east loggia end wall. Notwithstanding any sale or transfer of the Property, the Mural shall continue to be owned by the United States Postal Service. As a condition to the sale of the Property, the United States Postal Service intends to enter into a loan agreement (“Loan Agreement”) with the Grantee, which Loan Agreement [zc1] will be binding upon successor and assigns of Grantee and which

Loan Agreement will require the Grantee to undertake certain actions to preserve and protect the Mural and provide public access thereto.

F. This Covenant is made pursuant to California Civil Code Sections 815 *et seq.*

COVENANT^[zc2]

1. Covenants of Grantor.

- a. Compliance with Secretary of Interior's Standards. The grantor under the deed attached hereto as Exhibit A (hereinafter "Grantor") hereby covenants with the City of Berkeley ("City") in perpetuity on behalf of itself, its heirs, successors and assigns at all times to rehabilitate, maintain and preserve the Property in accordance with the recommended approaches of 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) ("Secretary of Interior's Standards") and any implementing regulations or policies, in order to preserve those qualities that resulted in the listing of the Property on the National Register of Historic Places, the features identified in the Section 106 analysis prepared by the USPS and submitted for review on September 3, 2013, and any other features that may be identified for preservation by the City of Berkeley Landmarks Preservation after a noticed public hearing, pursuant to Berkeley Municipal Code Chapter 3.24. Grantor's compliance with this requirement shall be determined by the City of Berkeley in its sole discretion.
- b. Demolition. The Grantor further covenants not to demolish any building(s) on the Property, or to cause or allow such building(s) to be demolished.
- c. Alterations. No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken that would affect the Preservation and Conservation Values of the Property without prior consultation with, and the express permission of, the City. In addition, Grantor shall maintain the Property in such a manner as to preserve the Preservation and Conservation Values, as determined by the City.
- d. Maintenance. Grantor agrees at all times to maintain the Preservation and Conservation Values in the same or better condition and state of repair as that existing on the effective date of this Covenant. Grantor's obligation to maintain shall require replacement, repair, and/or reconstruction by Grantor whenever necessary to preserve a Preservation or Conservation Value, or any feature identified in Exhibits B and C, in the same or better structural condition and state of repair as that existing on the date of this Covenant, as set forth in _____. This right of repair is subject to the following qualifications.

- i. The right to maintain and repair shall mean the use by Grantor of in-kind materials and colors, applied with workmanship comparable to that which was used in the construction or application of those materials being repaired or maintained, for the purpose of retaining the appearance and construction of any building(s) on the Property in good condition.
 - ii. The right to maintain and repair shall not include the right to make changes in appearance, materials, colors, and workmanship from that existing prior to the maintenance and repair without the prior written approval of Grantee the City upon a determination that such changes are consistent with the Secretary of Interior's Standards.
 - iii. The right to maintain and repair shall not include the right to replace historic materials unless such historic materials are significantly deteriorated or damaged.
- e. Request for Approval by Grantee. When the Grantor wishes to undertake any construction or alterations on the Property that could affect the Preservation and Conservation Values, it shall submit in writing to the City for its approval information (including plans, specifications, and designs where appropriate) together with a specific request identifying the proposed construction or alterations. In addition, Grantor shall also submit to the City a timetable for the proposed construction or alterations that is sufficient to permit the City to monitor such activity. Grantor shall not make changes or take any action subject to the approval of the City unless expressly authorized in writing by an authorized representative of the City.
- f. Replacement and Repair. Subject to the casualty provisions of Paragraphs ___ and ___, the obligation to maintain shall require replacement, repair, and/or reconstruction whenever necessary in accordance with the standards stated in Paragraph ___.
- g. Signs. Grantor may erect or allow to be erected any external signs that are: (i) consistent with the City Sign Ordinance (Title 20 of the Berkeley Municipal Code); and (ii) approved by the City as appropriate for the Property given the obligations set forth in this Covenant.
- h. Public Access to Lobby. [zc3] Grantor shall make, at a minimum, the lobby on the first floor of the 1914 building, as well as the stairway to the second floor and the marbled and tile landing at the top of the stairway publicly accessible during normal business hours (no less than Monday – Friday 9:00 am to 5:00 pm). In addition, the large common and circulation spaces should be opened to the public for viewing at least twice per year, under suitable supervision. Grantor may have a representative present during such public access, and access may be subject to reasonable restrictions to

ensure security of the property. At other reasonable times, upon request of the City made with reasonable notice to Grantor, persons affiliated with educational organizations, professional architectural associations, and historical societies shall be admitted to study the Property. In addition, the City may make photographs, drawings, or other representations documenting the significant historical, cultural, and architectural character and features of the Property and may use or publish them (or authorize others to do so).

- i. Maintenance and Operation of Postal Facility.^[zc4] Grantor shall lease to the USPS, and the USPS (pursuant to the concurrently-recorded covenant between the City and USPS) shall lease from the Grantor, the building facade and open space facing Allston Way, the lobby area, and the working area supporting the lobby area, for continued use for a period of fifty (50) years as a retail postal facility and the Main Berkeley Post Office. The lease shall be of sufficient space to ensure operation of a postal facility with consumer service for mailing, post office boxes, package pickup of undelivered mail, bulk mail drop-off, passport services, and such other services as USPS may offer to the general public.
- j. Payment of Fees. Grantor shall pay the City annually for the staff time it expends to monitor and enforce this Covenant, at the hourly rate established by the City Council. ^[zc5]

2. Grantee's Rights.

- a. Consultation and Approvals. The City reserves the right to consult with governmental agencies, nonprofit preservation and conservation organizations, and/or other advisors it deems appropriate, concerning the appropriateness of any construction or alteration proposed by Grantor. All approval rights of the City shall be exercised in the sole discretion of the City. The City agrees to use its reasonable efforts, subject to any procedural requirements required by local ordinances, to respond to any written request of Grantor not later than forty-five (45) days following receipt by the City of Grantor's request. Failure of the City to respond to Grantor within the forty-five (45) day period shall not, however, be deemed to constitute approval of Grantor's request.
- b. Inspection. Authorized representatives of the City shall be permitted at all reasonable times to inspect the property in order to ascertain if the above conditions are being met.

3. Covenant Binding on Heirs and Assigns. This covenant is binding on the Grantor, its heirs, successors and assigns in perpetuity and shall run with the land. All stipulations and covenants contained herein shall be inserted by the Grantor verbatim or by express reference in any deed or other legal instrument by which

the grantee divests itself of any interest in the property or any part thereof. Execution of this covenant shall constitute conclusive evidence that the Grantor agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth.

4. Non-Waiver. The failure of any person or entity permitted by the terms hereof to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or use of such right or remedy at any other time.
5. No Limitation on Police Power. This covenant does not limit the City's police power or exempt the property owner from complying with local law, nor does it prohibit the Grantor from seeking City's permission to develop, or developing any project on the Property or on any part of it.
6. Taxes. Grantor shall pay immediately, when first due and owing, all general taxes, special taxes, special assessments, water charges, sewer service charges, and other charges which may become a lien on the Property unless Grantor timely objects to the amount or validity of the assessment or charge and diligently prosecutes an appeal of the charge, in which case the obligation to pay such charges as defined in this paragraph shall be suspended for the period permitted by law for prosecuting such appeal and any applicable grace period following completion of such action. In place of Grantor, Grantee is hereby authorized, but in no event required or expected, to make or advance upon three (3) days prior written notice to Grantor any payment relating to taxes, assessments, water rates, sewer rentals and other governmental or municipality charge, fine, imposition, or lien asserted against the Property. Grantee may make such payment according to any bill, statement, or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement, or assessment or into the validity of such tax, assessment, sale, or forfeiture. Such payment if made by Grantee shall constitute a lien on the Property with the same effect and priority as a mechanic's lien or any other type of lien the City chooses.
7. Insurance. Grantor shall keep the Property insured by an insurance company rated "Secured" by Best's for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death, and property damage.
 - a. Property damage insurance shall include change in condition and building ordinance coverage, in form and amount sufficient to replace fully the damaged Property and Buildings without cost or expense to Grantor or contribution or coinsurance from Grantor. Such insurance shall include Grantee's interest and name Grantee as an additional insured.

- b. Grantor shall deliver to Grantee a certificate of insurance annually or when coverage is renewed by Grantor. If Grantor fails to submit proof of insurance coverage annually or at the time of renewal, Grantor must deliver proof of coverage, within ten (10) business days of Grantee's written request for documentation of coverage.

8. Casualty. In the event that the Property or any part thereof shall be damaged or destroyed by fire, flood, windstorm, hurricane, earth movement, or other casualty, Grantor shall notify the City in writing within fourteen (14) days of the damage or destruction, such notification including what, if any, emergency work has already been completed. No repairs or reconstruction of any type, other than temporary emergency work to prevent further damage to the Buildings and to protect public safety, shall be undertaken by Grantor without the City's prior written approval. Within thirty (30) days of the date of damage or destruction, if required by the City, Grantor at its expense shall submit to the City a written report prepared by a qualified restoration architect and an engineer who are acceptable to Grantor and the City, which shall include the following: (i) an assessment of the nature and extent of the damage; (ii) a determination of the feasibility of the restoration of the Property and/or reconstruction of damaged or destroyed portions of the Property; and (iii) a report of such restoration/reconstruction work necessary to return the Property to the condition existing at the effective date of this instrument.
 - a. If, after reviewing the report provided in Paragraph ___ and assessing the availability of insurance proceeds, Grantor and the City agree that the Purpose of this Covenant will be served by such restoration/reconstruction, Grantor and City shall establish a schedule under which Grantor shall complete the restoration/reconstruction of the Property in accordance with plans and specifications consented to by the parties up to at least the total of the casualty insurance proceeds available to Grantor.
 - b. If, after reviewing the report and assessing the availability of insurance proceeds, Grantor and the City agree that restoration/reconstruction of the Property is impractical or impossible, or agree that the Purpose of the Covenant would not be served by such restoration/reconstruction, Grantor may, but only with the prior written consent of the City, alter, demolish, remove, or raze all or part of the Property, and/or construct new improvements on the Property. Grantor and Grantee may agree to extinguish this Covenant pursuant to Paragraph 15.

9. Notices. Any notice which either Grantor or City may desire or be required to give to the other party shall be in writing and shall be delivered by one of the following methods: by overnight courier postage prepaid, transmission, registered or certified mail with return receipt requested, or hand delivery, in either case with a copy by e-mail; if to Grantor, then to:

[address],

and if to Grantee, then to:

City Manager
City of Berkeley
2180 Milvia Street, Fifth Floor
Berkeley, CA 94704
manager@ci.berkeley.ca.us

Each party may change its address set forth herein by a notice to such effect to the other party.

10. Remedies.

- a. The City may, following reasonable written notice to Grantor, institute suit(s) to enjoin or remedy any violation of the terms of this easement by *ex parte*, temporary, preliminary, and/or permanent injunction, including prohibitory and/or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance that existed prior to the violation complained of in the suit. The City shall also have available all legal and other equitable remedies to enforce Grantor's obligations contained in this Covenant.
- b. In addition, the City may following reasonable written notice to Grantor and an opportunity to cure, enter upon the Property to make any repairs it deems necessary or appropriate, and may recover the costs of doing so by lawsuit or directly by placing a lien on the Property.
- c. Exercise by Grantee of one remedy hereunder shall not have the effect of waiving or limiting any other remedy, and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

11. Notices from Government Authorities. Grantor shall deliver to the City copies of any notice of violation or lien relating to the Property received by Grantor from any government authority within five (5) days of receipt by Grantor. Upon request by the City, Grantor shall promptly furnish the City with evidence of Grantor's compliance with such notice or lien where compliance is required by law.

12. Notice of Offers to Sell. Grantor shall promptly notify the City in writing of any proposed offer to sell the Property or of any listing of the Property for sale and provide the opportunity for the City to explain the terms of the Covenant to the real estate listing agent and potential new owners prior to sale closing.

13. Plaque. Grantor agrees that the City or other person or entity authorized by the City may provide and maintain a plaque on the Property, which plaque shall not

exceed 24 by 24 inches in size, giving notice of the significance of the Property and the existence of this Covenant.

14. Amendment. If circumstances arise under which an amendment to or modification of this covenant would be appropriate, Grantor and Grantee may by mutual written agreement jointly amend this covenant, provided that no amendment shall be made that will adversely affect the qualification of this covenant or the status of Grantee under any applicable laws, including Sections 170(h) and 501(c)(3) of the Code and the laws of the State of California. Any such amendment shall be consistent with the protection of the Preservation and Conservation Values of the Property and the purpose of this covenant; shall not affect its perpetual duration; shall not permit additional development on the Property other than the development permitted by this covenant on its effective date; shall not permit any private inurement to any person or entity; and shall not adversely impact the overall architectural, historic, and cultural values protected by this covenant. Any such amendment shall be recorded in the land records of Alameda County, California. Nothing in this paragraph shall require Grantor or Grantee to agree to any amendment or to consult or negotiate regarding any amendment.
15. Extinguishment. Grantor and Grantee hereby recognize that circumstances may arise that may make the continued ownership or use of the Property in a manner consistent with the Purpose of this covenant impossible and that extinguishment of the covenant may be necessary. Such circumstances may include, but are not limited to, partial or total destruction of the Building(s) resulting from casualty. Extinguishment must be the result of a judicial proceeding in a court of competent jurisdiction.
16. **This Covenant is not subject to expiration or expiration of record under the Marketable Record Title Act, California Civil Code 880.020-887.090; however, Grantee may re-record this Covenant without the consent of the Grantor from time to time to perpetuate Grantee's rights. Grantor and Grantee expressly acknowledge that no such recording is necessary in order to perpetuate the validity or enforceability of this Covenant, and nothing contained in this paragraph shall be deemed to constitute a requirement that any such recording is necessary.**

**PRESERVATION COVENANT
2000 Allston Way, Berkeley, CA**

In consideration of the conveyance of certain real property and the buildings thereon, located at 2000 Allston Way in the City of Berkeley, the County of Alameda, State of California, as more fully described in Exhibit A (“Property”), [Insert name of Purchaser]_____ (“Grantor”) and the City of Berkeley (“City” or “Grantee”) agree as follows.

RECITALS

- A. The Property was originally developed in 1914 and has been used as the Berkeley Main Post Office.
- B. The Property is located in an urban setting within downtown Berkeley’s Civic Center District, on an approximately 1.11 acre corner lot bounded by Allston Way to the front (to the north), Kittredge Street to the rear (to the south), Milvia Street to the street side (to the west), and adjacent lot line to the interior side (to the east). The reinforced concrete Second Renaissance Revival-style Berkeley Main Post Office building, which was built in 1914, is rectangular in plan: front section (customer lobby, offices, and part of work area) facing Allston Way, two stories plus basement, with hipped red tile roof; and rear section extending south along Milvia Street one-story plus basement, with flat roof (northernmost 35 feet original; southward addition c.1932). A historic period rear addition was built in 1932. A mural by Suzanne Scheuer was added to the lobby in 1936 and completed in 1937 and depicts an allegory of the life in Berkeley in the Mission, rancho, and early American eras. A limestone bas-relief sculpture by artist David Slivka was added in 1937 that commemorated the contributions of postal workers. The Property was designated a City of Berkeley Landmark in 1980, and was listed on the National Register of Historic Places in 1981. It is also a contributor to the City of Berkeley’s designated Civic Center Historic District.
- C. 1. The historic exterior features of the Property are determined to be the following: height, mass and scale of building; hipped roof sheathed in tile with wide overhang; exterior siding, including poured concrete, limestone, terra cotta trim, and rusticated cast blocks at corners; rounded corners of two-story portion of building on all four sides; arcade of eleven high round arches on plain Tuscan columns; loggia with groin vaults; marble on floor and wainscot of loggia; original oak frame pane arches with functioning transom windows; original double-hung windows with panes grouped in 3 vertical divisions; low cement windowsills with wave decoration; ornate groove along the top of the exterior walls; pilasters along the primary façade; pilasters flanking the entrance doors; entrance doors—three sets of paired oak and glass doors with brass fittings; columns with pilasters capped with extremely stylized Corinthian capitals; ornamental features of the exterior: small terra cotta frieze which tops the second story, wide terra cotta beltcourse with dentils, swags, medallions, and wave patterns below

the 11 second story windows and around the entire building; cornice soffit; terra cotta shields above rusticated cast blocks; two rows of curved wooden brackets framing rectangular panels at eave soffit; wrought iron railings with heraldic shields and diagonal rope pattern; arched windows with terra cotta sills on one-story portion of building, and numerous windows continuing on west and east side with heraldic medallions and other decorative elements; the David Slivka 1937 bas-relief sculpture on the east end wall; and granite entry steps forming “plaza” at main (north) entry.

2. The historic interior features of the property are determined to be the following: glazed arches between workroom and lobby; coffered lobby ceiling; individual service counter windows with detailed oak framing, brass grilles and feather-chip glass grilles and service window doors; the Suzanne Scheuer mural over the former Postmaster’s office door; arches around postmaster’s door and service windows; marble baseboards and wainscot; columns in lobby and small and large Corinthian capitals cast ceramic and oak; band joining all columns and capitals of lobby (currently painted brown); carved oak woodwork on columns between entrance doors, windows, service bays and vestibule; entrance door oak frames with modified Corinthian capitals; oak and glass vestibule at center entrance; carved oak and triangular dentilled pediment over Postmaster’s former office door (now elevator door) and lettering; Post office boxes; original bulletin cases; oak casework with movable metal grills; marble staircase, oak handrail, and ornamental metal end pieces and railings; landing of marble staircase with mosaic tiles and black, white, and red fretwork around the edges; and second floor marble and tile flooring.
3. Collectively, the features listed in subparagraphs (1) and (2) of this Recital, as more fully set forth in Exhibits B and C, represent the “Preservation and Conservation Values” of the Property.

- D. It is the purpose of this Covenant to assure that the Preservation and Conservation Values will be retained and maintained in substantially as good a condition as their present condition and to prevent changes to the Property that will significantly affect or interfere with them.
- E. The United States Postal Service owns a certain mural *Incidents in California History* by Suzanne Scheuer (the “Mural”) and the David Slivka relief sculpture (“Relief”) of postal workers, 1937, on the east loggia end wall. Notwithstanding any sale or transfer of the Property, the Mural and Relief shall continue to be owned by the United States Postal Service. As a condition to any sale of the Property, the United States Postal Service intends to enter into a loan agreement (“Loan Agreement”) with the purchaser of the Property which Loan Agreement will be binding upon successor and assigns of the purchaser and which Loan Agreement will require the purchaser to undertake certain actions to preserve and protect the Mural and Relief and provide

public access thereto on terms stated therein. Grantor acknowledges and agrees that it shall comply with the terms and conditions of the Loan Agreement. 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 of the City. Such improvements may affect the Protected Values, including, without limitation, the height, mass and scale of the building on the Property.

- F. This Covenant is made by the purchaser of the Property pursuant to California Civil Code Sections 815 *et seq*.

COVENANT

1. Covenants of Grantor.

- a. Compliance with Secretary of Interior's Standards. The purchaser of the Property under the deed attached hereto as Exhibit A (referenced herein as "Grantor") hereby covenants with the City of Berkeley ("City") in perpetuity on behalf of itself, its heirs, successors and assigns at all times to rehabilitate, maintain and preserve the Property in accordance with the then current National Park Service, Technical Preservation Services Branch interpretation of the Secretary of Interior's Standards (37 CFR § 67.7(b)) and any implementing regulations or policies, in order to rehabilitate, maintain and preserve those qualities that resulted in the listing of the Property on the National Register of Historic Places, the features identified in the Section 106 analysis prepared by the USPS and submitted for review on September 3, 2013.
- b. Demolition. The Grantor further covenants not to demolish any building(s) on the Property, or to cause or allow such building(s) to be demolished, except in accordance with Section 1(c) below.
- c. Alterations. No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken that would significantly affect the Preservation and Conservation Values of the Property without prior consultation with, and the express permission of, the City. Prior to ground disturbance, a qualified archaeologist hired by Grantor shall check site records from the California Historical Resources Information System ("CHRIS"), and perform a sensitivity analysis to provide to the Grantor and the City. For the purposes of this Section 1(c), an action shall not be considered to significantly affect the Preservation and Conservation

Values if such action is in accordance with the Secretary of Interior's Standards.

- d. Maintenance and Repair. Except as otherwise permitted under Section 1(c) above, Grantor agrees at all times to maintain and repair the Preservation and Conservation Values in the same or better structural condition and state of repair as those existing on the effective date of this Covenant. Grantor's obligation to so maintain and repair shall include such replacement, repair, and/or reconstruction activities as may be necessary from time to time to maintain a Preservation or Conservation Value (including any feature identified in Exhibits B and C), in the same or better structural condition and state of repair as that existing on the date of this Covenant, as shown by the photos attached hereto as Exhibits _____. Grantee's maintenance activities shall be subject to the following:
- i. Grantor shall use, wherever feasible, in-kind materials and colors, applied with workmanship comparable to that which was used in the construction or application of those materials being repaired or maintained, for the purpose of retaining the appearance and construction of any building(s) on the Property in good condition.
 - ii. Grantor shall not make significant changes in appearance, materials, colors, and workmanship from that existing prior to the maintenance and repair without the prior written approval of the City, such approval not to be unreasonably withheld, delayed or conditioned, and based exclusively upon a determination that such changes are consistent with the Secretary of Interior's Standards.
 - iii. Grantor shall not replace historic materials unless such historic materials are significantly deteriorated or damaged.
- e. Request for Approval by City. When the Grantor wishes to undertake any construction or alterations on the Property that could significantly affect the Preservation and Conservation Values, it shall submit in writing to the City for its approval information describing the proposed activity (including plans, specifications, and designs where appropriate), together with a specific request identifying the proposed construction or alterations. In addition, Grantor shall also submit to the City a timetable for the proposed construction or alterations that is sufficient to permit the City to monitor such activity. Grantor shall not make changes or take any action subject to the approval of the City, such approval not to be unreasonably withheld, conditioned or delayed unless expressly authorized in writing by an authorized representative of the City.
- f. Replacement and Repair. Subject to the casualty provisions of Paragraphs ___ and ___, the obligation to maintain shall require replacement, repair,

and/or reconstruction whenever necessary in accordance with the standards stated in Paragraph ___.

- g. Signs. Grantor may erect or allow to be erected any external signs that are: (i) consistent with the City Sign Ordinance (Title 20 of the Berkeley Municipal Code); and (ii) consistent with National Park Service, Technical Preservation Services Brief 25, *The Preservation of Historic Signs - New Signs and Historic Buildings* et seq.
- h. **OPEN ISSUE OF FEES TO BE DETERMINED.** [Payment of Fees. Grantor shall pay the City annually for the reasonable staff time it expends to monitor and enforce this Covenant, at the hourly rate established by the City Council, such rate to be based on similar rates charged for such work in the area, or the average hourly rate of the salary of the staff members' involved. In addition, notwithstanding the hourly rate, the total amount charged to Grantor shall not to exceed \$----- for the first twelve months following the date of execution of this covenant and escalating by not more than ___% annually thereafter.]

2. City's Rights and Obligations.

- a. Consultation and Approvals. The City reserves the right to consult with governmental agencies, nonprofit preservation and conservation organizations, and/or other advisors it deems appropriate, concerning the appropriateness of any construction or alteration proposed by Grantor. All approval rights of the City shall be exercised in the reasonable discretion of the City. The City agrees to use its reasonable efforts, subject to any procedural requirements required by local ordinances, to respond to any written request of Grantor not later than thirty (30) days following receipt by the City of Grantor's request. Failure of the City to respond to Grantor within the thirty (30) day period shall not, however, be deemed to constitute approval of Grantor's request provided, however, that if Grantor delivers written notice to the City not later than 15 days after the end of the 30 day period that the City has failed to meet its deadline, and the City thereafter, fails to respond for an additional 15 days after such notice, then the failure of the City to respond shall be deemed to constitute approval of Grantor's request.
- b. Inspection. Authorized representatives of the City shall be permitted at all reasonable times to inspect the property in order to ascertain if the above conditions are being met.

3. Covenant Binding on Heirs and Assigns. This covenant is binding on the Grantor, its heirs, successors and assigns and upon the City, and its successors and assigns in perpetuity and shall run with the land. All stipulations and covenants contained herein shall be inserted by the Grantor verbatim or by express reference in any

deed or other legal instrument by which the grantee divests itself of any interest in the property or any part thereof. Execution of this covenant shall constitute conclusive evidence that the Grantor agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth.

4. Non-Waiver. The failure of any person or entity permitted by the terms hereof to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or use of such right or remedy at any other time.
5. No Limitation on Police Power. This covenant does not limit the City's police power or exempt the property owner from complying with local law, nor does it prohibit the Grantor from seeking City's permission to develop, or developing any project on the Property or on any part of it.
6. **OPEN ISSUE TO BE DISCUSSED - Insurance**. Grantor shall keep the Property insured by an insurance company rated "Secured" by Best's for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death, and property damage.
 - a. Property damage insurance shall include change in condition and building ordinance coverage, in form and amount sufficient to replace fully the damaged Property and Buildings. Such insurance shall name Grantee as an additional insured.
 - b. Grantor shall deliver to Grantee a certificate of insurance annually or when coverage is renewed by Grantor. If Grantor fails to submit proof of insurance coverage annually or at the time of renewal, Grantor must deliver proof of coverage, within ten (10) business days of Grantee's written request for documentation of coverage.
7. **OPEN ISSUE TO BE DISCUSSED - Casualty**. In the event that the Property or any part thereof shall be damaged or destroyed by fire, flood, windstorm, hurricane, earth movement, or other casualty, Grantor shall notify the City in writing within fourteen (14) days of the damage or destruction, such notification including what, if any, emergency work has already been completed. No repairs or reconstruction of any type, other than temporary emergency work to prevent further damage to the Property and to protect public safety, shall be undertaken by Grantor without the City's prior written approval. Within thirty (30) days after the date of damage or destruction, if required by the City, Grantor at its expense shall submit to the City a written report prepared by a qualified restoration architect and an engineer reasonably acceptable to Grantor and the City, which shall include the following: (i) an assessment of the nature and extent of the damage; (ii) a determination of the feasibility of the restoration of the Property and/or reconstruction of damaged or destroyed portions of the Property; and (iii) a report

of such restoration/reconstruction work necessary to return the Property to the condition existing at the effective date of this instrument.

- a. If, after reviewing the report and assessing the availability of insurance proceeds, Grantor and the City agree that the Purpose of this Covenant will be served by such restoration/ reconstruction, Grantor and City shall establish a schedule under which Grantor shall complete the restoration/reconstruction of the Property in accordance with plans and specifications consented to by the parties up to at least the total of the casualty insurance proceeds available to Grantor.
 - b. If, after reviewing the report and assessing the availability of insurance proceeds, Grantor and the City agree that restoration/reconstruction of the Property is impractical or impossible, or agree that the Purpose of the Covenant would not be served by such restoration/reconstruction, Grantor may alter, demolish, remove, or raze all or part of the Property, and/or construct new improvements on the Property. Grantor and Grantee may agree to extinguish this Covenant pursuant to Paragraph ____.
8. Notices. Any notice which either Grantor or City may desire or be required to give to the other party shall be in writing and shall be delivered by one of the following methods: by overnight courier postage prepaid, transmission, registered or certified mail with return receipt requested, or hand delivery, in either case with a copy by e-mail; if to Grantor, then to:

[address],

and if to Grantee, then to:

City Manager
City of Berkeley
2180 Milvia Street, Fifth Floor
Berkeley, CA 94704
manager@ci.berkeley.ca.us

Each party may change its address set forth herein by a notice to such effect to the other party.

9. Remedies.
- a. The City may, following reasonable written notice to Grantor, institute suit(s) to enjoin or remedy any violation of the terms of this easement by *ex parte*, temporary, preliminary, and/or permanent injunction, including prohibitory and/or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance that existed prior to the violation complained of in the suit. The City shall also have

available all legal and other equitable remedies to enforce Grantor's obligations contained in this Covenant.

- b. In addition, the City may following reasonable written notice to Grantor and any mortgagee of Grantor, and an opportunity to cure, enter upon the Property to make any repairs it reasonably deems necessary or appropriate, and may recover the actual out of pocket costs of doing so by lawsuit or directly by placing a lien on the Property.
 - c. Exercise by Grantee of one remedy hereunder shall not have the effect of waiving or limiting any other remedy, and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.
 - d. Without limiting the foregoing, in the event of a violation of this covenant, and in addition to any remedy now or hereafter provided by law, any resident of the City of Berkeley having an interest in the Preservation and Conservation Values of the Property may, following reasonable notice to the City institute suit to enjoin said violation or to require the restoration of the property. Remedies shall include, but not be limited to, specific performance, injunction and/or monetary damages, and the specific performance may include restoration of the property to its condition as existing prior to the alteration or construction undertaken in violation of this covenant.
10. Notice of Offers to Sell. Grantor shall promptly notify the City in writing of any proposed offer to sell the Property or of any listing of the Property for sale and provide the opportunity for the City to explain the terms of the Covenant to the real estate listing agent and potential new owners prior to sale closing.
11. Plaque. Grantor agrees that the City or other person or entity authorized by the City may provide and maintain a plaque on the Property, in a location mutually acceptable to the Grantor and Grantee, which plaque shall not exceed 24 by 24 inches in size, giving notice of the significance of the Property and the existence of this Covenant.
12. Amendment. If circumstances arise under which an amendment to or modification of this covenant would be appropriate, Grantor and the City may by mutual written agreement jointly amend this covenant, provided that no amendment shall be made that will adversely affect the qualification of this covenant or the status of Grantee under any applicable laws, including Sections 170(h) and 501(c)(3) of the Code and the laws of the State of California. Any such amendment shall be consistent with the protection of the Preservation and Conservation Values of the Property and the purpose of this covenant; shall not affect its perpetual duration; shall not permit additional development on the Property other than the development permitted by this covenant on its effective date; shall not permit any

private inurement to any person or entity; and shall not adversely impact the overall architectural, historic, and cultural values protected by this covenant. Any such amendment shall be recorded in the land records of Alameda County, California. Nothing in this paragraph shall require Grantor or Grantee to agree to any amendment or to consult or negotiate regarding any amendment.

13. Extinguishment. Grantor and Grantee hereby recognize that circumstances may arise that may make the continued ownership or use of the Property in a manner consistent with the Purpose of this covenant impossible and that extinguishment of the covenant may be necessary. Such circumstances may include, but are not limited to, partial or total destruction of the Building(s) resulting from casualty. Extinguishment must be the result of a judicial proceeding in a court of competent jurisdiction.
14. Perpetual Covenant. This Covenant is not subject to expiration or expiration of record under the Marketable Record Title Act, California Civil Code 880.020-887.090; however, Grantee may re-record this Covenant without the consent of the Grantor from time to time to perpetuate Grantee's rights. Grantor and Grantee expressly acknowledge that no such recording is necessary in order to perpetuate the validity or enforceability of this Covenant, and nothing contained in this paragraph shall be deemed to constitute a requirement that any such recording is necessary.
15. Approvals by City. Wherever in this Covenant the approval of the City is required, the City shall not unreasonably withhold, condition or delay such approval. In the event that the Grantor requests the approval of the City hereunder, the failure of the City to respond within thirty (30) days after receipt of the request shall be deemed to be the approval of the City to the request.

PRESERVATION COVENANT
2000 Allston Way, Berkeley, CA

In consideration of the conveyance of certain real property and the buildings thereon, located at 2000 Allston Way in the City of Berkeley, the County of Alameda, State of California, as more fully described in Exhibit A (“Property”), _____ [Insert name of Purchaser] (“Grantor”) and the City of Berkeley (“City” or “Grantee”) agree as follows.

RECITALS

- A. The Property was originally developed in 1914 and has been used as the Berkeley Main Post Office ~~ever since~~.
- B. The Property is located in an urban setting within downtown Berkeley’s Civic Center District, on an approximately 1.11 acre corner lot bounded by Allston Way to the front (to the north), Kittredge Street to the rear (to the south), Milvia Street to the street side (to the west), and adjacent lot line to the interior side (to the east). The reinforced concrete Second Renaissance Revival-style Berkeley Main Post Office building, which was built in 1914, is rectangular in plan: front section (customer lobby, offices, and part of work area) facing Allston Way, two stories plus basement, with hipped red tile roof; and rear section extending south along Milvia Street one-story plus basement, with flat roof (northernmost 35 feet original; southward addition c.1932). A historic period rear addition was built in 1932. ~~Changes to the Property have been executed with great care.~~ A mural by Suzanne Scheuer was added to the lobby in 1936 and completed in 1937 and depicts an allegory of the life in Berkeley in the Mission, rancho, and early American eras. A limestone bas-relief sculpture by artist David Slivka was added in 1937 that commemorated the contributions of postal workers. The Property was designated a City of Berkeley Landmark in 1980, and was listed on the National Register of Historic Places in 1981. It is also a contributor to the City of Berkeley’s designated Civic Center Historic District.
- C. 1. The historic exterior features of the ~~property~~Property are determined to be the following: height, mass and scale of building; hipped roof sheathed in tile with wide overhang; exterior siding, including poured concrete, limestone, terra cotta trim, and rusticated cast blocks at corners; rounded corners of two-story portion of building on all four sides; arcade of eleven high round arches on plain Tuscan columns; loggia with groin vaults; marble on floor and wainscot of loggia; original oak frame pane arches with functioning transom windows; original double-hung windows with panes grouped in 3 vertical divisions; low cement windowsills with wave decoration; ornate groove along the top of the exterior walls; pilasters along the primary façade; pilasters flanking the entrance doors; entrance doors—three sets of paired oak and glass doors with brass fittings; columns with pilasters capped with extremely stylized Corinthian capitals; ornamental features of the exterior: small terra cotta frieze which tops the

second story, wide terra cotta beltcourse with dentils, swags, medallions, and wave patterns below the 11 second story windows and around the entire building; cornice soffit; terra cotta shields above rusticated cast blocks; two rows of curved wooden brackets framing rectangular panels at eave soffit ~~and soffit paint colors~~; wrought iron railings with heraldic shields and diagonal rope pattern; arched windows with terra cotta sills on one-story portion of building, and numerous windows continuing on west and east side with heraldic medallions and other decorative elements; the David Slivka 1937 bas-relief sculpture on the loggia's east end wall; and granite entry steps forming "plaza" at main (north) entry.

2. The historic interior features of the property are determined to be the following: glazed arches between workroom and lobby; coffered lobby ceiling; individual service counter windows with detailed oak framing, brass grilles and feather-chip glass grilles and service window doors; the Suzanne Scheuer mural over the former Postmaster's office door; arches around postmaster's door and service windows; marble baseboards and wainscot; columns in lobby and small and large Corinthian capitals cast ceramic and oak; band joining all columns and capitals of lobby (currently painted brown); carved oak woodwork on columns between entrance doors, windows, service bays and vestibule; entrance door oak frames with modified Corinthian capitals; oak and glass vestibule at center entrance; carved oak and triangular dentilled pediment over Postmaster's former office door (now elevator door) and lettering; Post office boxes; original bulletin cases; oak casework with movable metal grills; marble staircase, oak handrail, and ornamental metal end pieces and railings; landing of marble staircase with mosaic tiles and black, white, and red fretwork around the edges; and second floor marble and tile flooring.

3. Collectively, the features listed in subparagraphs (a1) and (b2) of this Recital, as more fully set forth in Exhibits B and C, represent the "Preservation and Conservation Values" of the Property. ~~In addition, one of the Preservation and Conservation Values of the Property is its use, since its construction, as the Main Post Office for the City of Berkeley.~~

D. It is the ~~Purpose~~purpose of this Covenant to assure that the Preservation and Conservation Values will be retained and maintained ~~forever~~in substantially ~~in~~as good a condition as their ~~current or better~~present condition and to prevent ~~any use or change of changes to~~ the Property that ~~would~~ will significantly ~~impair~~affect or interfere with them.

E. The United States Postal Service owns a certain mural *Incidents in California History* by Suzanne Scheuer (the "Mural") and the David Slivka relief sculpture ("Relief") of postal workers, 1937, on the east loggia end wall. Notwithstanding any sale or transfer of the Property, the Mural and Relief shall continue to be owned by the United States Postal Service. As a condition to ~~the~~any sale of the Property, the

United States Postal Service intends to enter into a loan agreement (“Loan Agreement”) with the Grantee, purchaser of the Property which Loan Agreement will be binding upon successor and assigns of Grantee the purchaser and which Loan Agreement will require the Grantee purchaser to undertake certain actions to preserve and protect the Mural and Relief and provide public access thereto, on terms stated therein. Grantor acknowledges and agrees that it shall comply with the terms and conditions of the Loan Agreement. 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 of the City. Such improvements may affect the Protected Values, including, without limitation, the height, mass and scale of the building on the Property.

- F. This Covenant is made by the purchaser of the Property pursuant to California Civil Code Sections 815 *et seq.*

COVENANT

1. Covenants of Grantor.

- a. Compliance with Secretary of Interior’s Standards. The grantor purchaser of the Property under the deed attached hereto as Exhibit A (hereinafter referenced herein as “Grantor”) hereby covenants with the City of Berkeley (“City”) in perpetuity on behalf of itself, its heirs, successors and assigns at all times to rehabilitate, maintain and preserve the Property in accordance with the recommended approaches then current National Park Service, Technical Preservation Services Branch interpretation of 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) (“Secretary of Interior’s Standards”)(37 CFR § 67.7(b)) and any implementing regulations or policies, in order to rehabilitate, maintain and preserve those qualities that resulted in the listing of the Property on the National Register of Historic Places, the features identified in the Section 106 analysis prepared by the USPS and submitted for review on September 3, 2013, and any other features that may be identified for preservation by the City of Berkeley Landmarks Preservation after a noticed public hearing, pursuant to Berkeley Municipal Code Chapter 3.24. Grantor’s compliance with this requirement shall be determined by the City of Berkeley in its sole discretion.

- b. Demolition. The Grantor further covenants not to demolish any building(s) on the Property, or to cause or allow such building(s) to be demolished, except in accordance with Section 1(c) below.
- c. Alterations. No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken that would significantly affect the Preservation and Conservation Values of the Property without prior consultation with, and the express permission of, the City. ~~In addition, Grantor shall maintain the Property in such a manner as to preserve the Preservation and Conservation Values, as determined by the City. Prior to ground disturbance, a qualified archaeologist hired by Grantor shall check site records from the California Historical Resources Information System (“CHRIS”), and perform a sensitivity analysis to provide to the Grantor and the City. For the purposes of this Section 1(c), an action shall not be considered to significantly affect the Preservation and Conservation Values if such action is in accordance with the Secretary of Interior’s Standards.~~
- d. Maintenance and Repair. Except as otherwise permitted under Section 1(c) above, Grantor agrees at all times to maintain and repair the Preservation and Conservation Values in the same or better structural condition and state of repair as ~~that those~~ existing on the effective date of this Covenant. Grantor’s obligation to so maintain and repair shall ~~require~~ include such replacement, repair, and/or reconstruction ~~by Grantor whenever activities as may be necessary from time to preserve time to maintain~~ a Preservation or Conservation Value, ~~or (including any feature identified in Exhibits B and C),~~ in the same or better structural condition and state of repair as that existing on the date of this Covenant, as ~~set forth in _____~~. This right of repair is shown by the photos attached hereto as Exhibits _____. Grantor’s maintenance activities shall be subject to the following ~~qualifications~~:
- i. ~~The right to maintain and repair Grantor~~ shall ~~mean the use by Grantor of, wherever feasible,~~ in-kind materials and colors, applied with workmanship comparable to that which was used in the construction or application of those materials being repaired or maintained, for the purpose of retaining the appearance and construction of any building(s) on the Property in good condition.
 - ii. ~~The right to maintain and repair Grantor~~ shall not ~~include the right to~~ make significant changes in appearance, materials, colors, and workmanship from that existing prior to the maintenance and repair without the prior written approval of ~~Grantee the City the City, such approval not to be unreasonably withheld, delayed or conditioned, and based exclusively~~ upon a determination that such changes are consistent with the Secretary of the Interior’s Standards.

- iii. ~~The right to maintain and repair~~ Grantor shall not ~~include the right to~~ replace historic materials unless such historic materials are significantly deteriorated or damaged.
- e. Request for Approval by Grantee City. When the Grantor wishes to undertake any construction or alterations on the Property that could significantly affect the Preservation and Conservation Values, it shall submit in writing to the City for its approval information describing the proposed activity (including plans, specifications, and designs where appropriate), together with a specific request identifying the proposed construction or alterations. In addition, Grantor shall also submit to the City a timetable for the proposed construction or alterations that is sufficient to permit the City to monitor such activity. Grantor shall not make changes or take any action subject to the approval of the City, such approval not to be unreasonably withheld, conditioned or delayed unless expressly authorized in writing by an authorized representative of the City.
- f. Replacement and Repair. Subject to the casualty provisions of Paragraphs ___ and ___, the obligation to maintain shall require replacement, repair, and/or reconstruction whenever necessary in accordance with the standards stated in Paragraph ___.
- g. Signs. Grantor may erect or allow to be erected any external signs that are: (i) consistent with the City Sign Ordinance (Title 20 of the Berkeley Municipal Code); and (ii) approved by the City as appropriate for the Property given the obligations set forth in this Covenant, consistent with National Park Service, Technical Preservation Services Brief 25, The Preservation of Historic Signs - New Signs and Historic Buildings et seq.
- ~~h. Public Access to Lobby. Grantor shall make, at a minimum, the lobby on the first floor of the 1914 building, as well as the stairway to the second floor and the marbled and tile landing at the top of the stairway publicly accessible during normal business hours (no less than Monday—Friday 9:00 am to 5:00 pm). In addition, the large common and circulation spaces should be opened to the public for viewing at least twice per year, under suitable supervision. Grantor may have a representative present during such public access, and access may be subject to reasonable restrictions to ensure security of the property. At other reasonable times, upon request of the City made with reasonable notice to Grantor, persons affiliated with educational organizations, professional architectural associations, and historical societies shall be admitted to study the Property. In addition, the City may make photographs, drawings, or other representations documenting the significant historical, cultural, and architectural character and features of the Property and may use or publish them (or authorize others to do so).~~

~~i. Maintenance and Operation of Postal Facility. Grantor shall lease to the USPS, and the USPS (pursuant to the concurrently recorded covenant between the City and USPS) shall lease from the Grantor, the building facade and open space facing Allston Way, the lobby area, and the working area supporting the lobby area, for continued use for a period of fifty (50) years as a retail postal facility and the Main Berkeley Post Office. The lease shall be of sufficient space to ensure operation of a postal facility with consumer service for mailing, post office boxes, package pickup of undelivered mail, bulk mail drop off, passport services, and such other services as USPS may offer to the general public.~~

~~j.h. **OPEN ISSUE OF FEES TO BE DETERMINED.** [Payment of Fees. Grantor shall pay the City annually for the reasonable staff time it expends to monitor and enforce this Covenant, at the hourly rate established by the City Council, such rate to be based on similar rates charged for such work in the area, or the average hourly cost to the City rate of the salary of the staff members' involved. In addition, notwithstanding the hourly rate, the total amount charged to Grantor shall not to exceed \$----- for the first twelve months following the date of execution of this covenant and escalating by not more than % annually thereafter.]~~

2. Grantee's City's Rights and Obligations.

a. Consultation and Approvals. The City reserves the right to consult with governmental agencies, nonprofit preservation and conservation organizations, and/or other advisors it deems appropriate, concerning the appropriateness of any construction or alteration proposed by Grantor. All approval rights of the City shall be exercised in the ~~sole~~reasonable discretion of the City. The City agrees to use its reasonable efforts, subject to any procedural requirements required by local ordinances, to respond to any written request of Grantor not later than ~~forty five (45)~~thirty (30) days following receipt by the City of Grantor's request. Failure of the City to respond to Grantor within the ~~forty five (45) day period shall not, however, thirty (30) day period shall not, however, be deemed to constitute approval of Grantor's request provided, however, that if Grantor delivers written notice to the City not later than 15 days after the end of the 30 day period that the City has failed to meet its deadline, and the City thereafter, fails to respond for an additional 15 days after such notice, then the failure of the City to respond shall be deemed to constitute approval of Grantor's request.~~

b. Inspection. Authorized representatives of the City -shall be permitted at all reasonable times to inspect the property in order to ascertain if the above conditions are being met.

3. Covenant Binding on Heirs and Assigns. This covenant is binding on the Grantor, its heirs, successors and assigns and upon the City, and its successors and assigns in perpetuity and shall run with the land. All stipulations and covenants contained herein shall be inserted by the Grantor verbatim or by express reference in any deed or other legal instrument by which the grantee divests itself of any interest in the property or any part thereof. Execution of this covenant shall constitute conclusive evidence that the Grantor agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth.
4. Non-Waiver. The failure of any person or entity permitted by the terms hereof to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or use of such right or remedy at any other time.
5. No Limitation on Police Power. This covenant does not limit the City's police power or exempt the property owner from complying with local law, nor does it prohibit the Grantor from seeking City's permission to develop, or developing any project on the Property or on any part of it.
- ~~6. Taxes. Grantor shall pay immediately, when first due and owing, all general taxes, special taxes, special assessments, water charges, sewer service charges, and other charges which may become a lien on the Property unless Grantor timely objects to the amount or validity of the assessment or charge and diligently prosecutes an appeal of the charge, in which case the obligation to pay such charges as defined in this paragraph shall be suspended for the period permitted by law for prosecuting such appeal and any applicable grace period following completion of such action. In place of Grantor, Grantee is hereby authorized, but in no event required or expected, to make or advance upon three (3) days prior written notice to Grantor any payment relating to taxes, assessments, water rates, sewer rentals and other governmental or municipality charge, fine, imposition, or lien asserted against the Property. Grantee may make such payment according to any bill, statement, or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement, or assessment or into the validity of such tax, assessment, sale, or forfeiture. Such payment if made by Grantee shall constitute a lien on the Property with the same effect and priority as a mechanic's lien or any other type of lien the City chooses.~~
- 7.6.OPEN ISSUE TO BE DISCUSSED - Insurance**. Grantor shall keep the Property insured by an insurance company rated "Secured" by Best's for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death, and property damage.
 - a. Property damage insurance shall include change in condition and building ordinance coverage, in form and amount sufficient to replace fully the damaged Property and Buildings ~~without cost or expense to Grantor or~~

~~contribution or coinsurance from Grantor.~~ Such insurance shall ~~include Grantee's interest and~~ name Grantee as an additional insured.

- b. Grantor shall deliver to Grantee a certificate of insurance annually or when coverage is renewed by Grantor. If Grantor fails to submit proof of insurance coverage annually or at the time of renewal, Grantor must deliver proof of coverage, within ten (10) business days of Grantee's written request for documentation of coverage.

8.7.OPEN ISSUE TO BE DISCUSSED - Casualty. In the event that the Property or any part thereof shall be damaged or destroyed by fire, flood, windstorm, hurricane, earth movement, or other casualty, Grantor shall notify the City in writing within fourteen (14) days of the damage or destruction, such notification including what, if any, emergency work has already been completed. No repairs or reconstruction of any type, other than temporary emergency work to prevent further damage to the ~~Buildings~~Property and to protect public safety, shall be undertaken by Grantor without the City's prior written approval. Within thirty (30) days ~~of~~after the date of damage or destruction, if required by the City, Grantor at its expense shall submit to the City a written report prepared by a qualified restoration architect and an engineer ~~who are~~reasonably acceptable to Grantor and the City, which shall include the following: (i) an assessment of the nature and extent of the damage; (ii) a determination of the feasibility of the restoration of the Property and/or reconstruction of damaged or destroyed portions of the Property; and (iii) a report of such restoration/reconstruction work necessary to return the Property to the condition existing at the effective date of this instrument.

- a. If, after reviewing the report ~~provided in Paragraph~~ and assessing the availability of insurance proceeds, Grantor and the City agree that the Purpose of this Covenant will be served by such restoration/reconstruction, Grantor and City shall establish a schedule under which Grantor shall complete the restoration/reconstruction of the Property in accordance with plans and specifications consented to by the parties up to at least the total of the casualty insurance proceeds available to Grantor.
- b. If, after reviewing the report and assessing the availability of insurance proceeds, Grantor and the City agree that restoration/reconstruction of the Property is impractical or impossible, or agree that the Purpose of the Covenant would not be served by such restoration/reconstruction, Grantor may, ~~but only with the prior written consent of the City,~~ alter, demolish, remove, or raze all or part of the Property, and/or construct new improvements on the Property. Grantor and Grantee may agree to extinguish this Covenant pursuant to Paragraph ~~15.~~.

9.8.Notices. Any notice which either Grantor or City may desire or be required to give to the other party shall be in writing and shall be delivered by one of the

following methods: by overnight courier postage prepaid, transmission, registered or certified mail with return receipt requested, or hand delivery, in either case with a copy by e-mail; if to Grantor, then to:

[address],

and if to Grantee, then to:

City Manager
City of Berkeley
2180 Milvia Street, Fifth Floor
Berkeley, CA 94704
manager@ci.berkeley.ca.us

manager@cityof-berkeley.infoea.us

Each party may change its address set forth herein by a notice to such effect to the other party.

10.9. Remedies.

- a. The City may, following reasonable written notice to Grantor, institute suit(s) to enjoin or remedy any violation of the terms of this easement by *ex parte*, temporary, preliminary, and/or permanent injunction, including prohibitory and/or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance that existed prior to the violation complained of in the suit. The City shall also have available all legal and other equitable remedies to enforce Grantor's obligations contained in this Covenant.
- b. In addition, the City may following reasonable written notice to Grantor and [any mortgagee of Grantor, and](#) an opportunity to cure, enter upon the Property to make any repairs it [reasonably](#) deems necessary or appropriate, and may recover the [actual out of pocket](#) costs of doing so by lawsuit or directly by placing a lien on the Property.
- c. Exercise by Grantee of one remedy hereunder shall not have the effect of waiving or limiting any other remedy, and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

~~11. Notices from Government Authorities. Grantor shall deliver to the City copies of any notice of violation or lien relating to the Property received by Grantor from any government authority within five (5) days of receipt by Grantor. Upon request by the City, Grantor shall promptly furnish the City with evidence of Grantor's compliance with such notice or lien where compliance is required by law.~~

d. Without limiting the foregoing, in the event of a violation of this covenant, and in addition to any remedy now or hereafter provided by law, any resident of the City of Berkeley having an interest in the Preservation and Conservation Values of the Property may, following reasonable notice to the City institute suit to enjoin said violation or to require the restoration of the property. Remedies shall include, but not be limited to, specific performance, injunction and/or monetary damages, and the specific performance may include restoration of the property to its condition as existing prior to the alteration or construction undertaken in violation of this covenant.

12.10. Notice of Offers to Sell. Grantor shall promptly notify the City in writing of any proposed offer to sell the Property or of any listing of the Property for sale and provide the opportunity for the City to explain the terms of the Covenant to the real estate listing agent and potential new owners prior to sale closing.

13.11. Plaque. Grantor agrees that the City or other person or entity authorized by the City may provide and maintain a plaque on the Property, in a location mutually acceptable to the Grantor and Grantee, which plaque shall not exceed 24 by 24 inches in size, giving notice of the significance of the Property and the existence of this Covenant.

14.12. Amendment. If circumstances arise under which an amendment to or modification of this covenant would be appropriate, Grantor and ~~Grantee~~the City may by mutual written agreement jointly amend this covenant, provided that no amendment shall be made that will adversely affect the qualification of this covenant or the status of Grantee under any applicable laws, including Sections 170(h) and 501(c)(3) of the Internal Revenue Code and the laws of the State of California. Any such amendment shall be consistent with the protection of the Preservation and Conservation Values of the Property and the purpose of this covenant; shall not affect its perpetual duration; shall not permit additional development on the Property other than the development permitted by this covenant on its effective date; shall not permit any private inurement to any person or entity; and shall not adversely impact the overall architectural, historic, and cultural values protected by this covenant. Any such amendment shall be recorded in the land records of Alameda County, California. Nothing in this paragraph shall require Grantor or Grantee to agree to any amendment or to consult or negotiate regarding any amendment.

15.13. Extinguishment. Grantor and Grantee hereby recognize that circumstances may arise that may make the continued ownership or use of the Property in a manner consistent with the Purpose of this covenant impossible and that extinguishment of the covenant may be necessary. Such circumstances may include, but are not limited to, partial or total destruction of the Building(s) resulting from casualty. Extinguishment must be the result of a judicial proceeding in a court of competent jurisdiction.

16.14. Perpetual Covenant. This Covenant is not subject to expiration or expiration of record under the Marketable Record Title Act, California Civil Code 880.020-887.090; however, Grantee may re-record this Covenant without the consent of the Grantor from time to time to perpetuate Grantee's rights. Grantor and Grantee expressly acknowledge that no such recording is necessary in order to perpetuate the validity or enforceability of this Covenant, and nothing contained in this paragraph shall be deemed to constitute a requirement that any such recording is necessary.

15. Approvals by City. Wherever in this Covenant the approval of the City is required, the City shall not unreasonably withhold, condition or delay such approval. In the event that the Grantor requests the approval of the City hereunder, the failure of the City to respond within thirty (30) days after receipt of the request shall be deemed to be the approval of the City to the request.

