

1 ZACH COWAN, City Attorney (SBN 96372)  
2 SAVITH IYENGAR, Deputy City Attorney (SBN 268342)  
3 [ZCowan@cityofberkeley.info](mailto:ZCowan@cityofberkeley.info)  
4 CITY OF BERKELEY  
5 2180 Milvia Street, Fourth Floor  
6 Berkeley, CA 94704  
7 TEL.: (510) 981-6998  
8 FAX: (510) 981-6960

9 Attorneys for Defendant  
10 CITY OF BERKELEY

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA

13 UNITED STATES POSTAL SERVICE,

14 Plaintiff,

15 vs.

16 CITY OF BERKELEY,

17 Defendant.

Civ. No. 16-cv-04815WHA

**DEFENDANT CITY OF BERKELEY'S  
REPLY IN SUPPORT OF MOTION TO  
DISMISS PLAINTIFF'S COMPLAINT  
FOR:**

**(1) LACK OF SUBJECT MATTER  
JURISDICTION UNDER F.R.C.P.  
12(b)(1)**

**AND**

**(2) FAILURE TO STATE A CLAIM  
UNDER F.R.C.P. 12(b)6)**

Date: Dec. 22, 2016  
Time: 8:00 a.m.  
Ctrm: 8, 19<sup>th</sup> Fl., San Francisco

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I.

INTRODUCTION

The parties probably agree on a great deal. However their disagreements, though few, are fundamental. In this reply we address why the case remains unripe and why the USPS has not stated a claim under the Supremacy clause or the preemption doctrine.

II.

ARGUMENT

**A There Is No Case or Controversy Because the Postal Service Has Made No Decision To Sell The Property**

The USPS argues as if the reason the City’s related case<sup>1</sup> against the USPS was dismissed as moot was the USPS’s rescission of its decision to *relocate* the Berkeley Main Post Office. USPS Citing its “Notice of the United States Postal Service’s 2013 Final Determination”, the USPS states, “The decision not to relocate retails services was not a decision not to sell.” USPS Opp. at 9:13-14. That is true as far as it goes, but it is irrelevant, since *the decision to sell the property had already been rescinded*. The sale having already fallen through, the rescission was merely the last straw.

To quote the USPS’s brief:

The keystone to any Postal Service decision to sell a building and relocate services—and hence, [the City’s] lawsuit—is the purchase and sale agreement. The Postal Service reached one when it decided to sell the building to a developer in late 2014. But that agreement was later terminated. And the property is no longer for sale. *City of Berkeley, et al. v. U.S. Postal Service, et al*, C14-04916-WHA, Dkt. 50-1, 2:1-8.

And, as this Court stated in its Order dismissing the related case as moot:

As a consequence, no pending sale exists and the property is not currently listed for sale. The USPS stated that it has not decided when, if ever, to re-list the Berkeley Main Post Office for sale. (Lowe Decl. ¶ 4.) *City of Berkeley, et al. v. U.S. Postal Service, et al*, C14-04916-WHA, Dkt. 56 at 2:25-27.

In the City’s reading, the Court’s order dismissing its case was based on the USPS’s

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<sup>1</sup> *City of Berkeley, et al. v. U.S. Postal Service, et al*, C14-04916-WHA.

1 decision not to *sell* the property, not its decision not to *relocate*. Regardless, the Court knows  
2 best why it ruled the way it did in finding the City’s case against the USPS moot.

3 As a fallback, the USPS argues that the Court should exercise its discretion to resolve this  
4 matter because the only issue to be determined is whether the Historic Overlay interferes with  
5 the sale of the Main Post Office. But the fact that a hypothetical issue is susceptible to judicial  
6 resolution does not make the resulting judicial decision any less advisory. The issue the USPS  
7 refuses to come to grips with is that it has taken none of the actions it needs to in order to create  
8 an actual case or controversy, that is, take a formal decision, after compliance with Section 106  
9 and NEPA, to sell the building.

10 As of the date the City filed this motion, to the best of the City’s knowledge, the Postal  
11 Service had not gone through the entire Section 106<sup>2</sup> and NEPA<sup>3</sup> processes “all over again”<sup>4</sup>;  
12 and the Complaint does not allege that it had done so. However, if the City understands the  
13 USPS’s opposition correctly, it appears that the USPS *has* now made a *new*, apparently secret,  
14 decision to list the property for sale – but not to relocate retail services – without any  
15 consultation under Section 106 or environmental review under NEPA. The USPS should  
16 formally confirm whether and when it made such a decision. If it does so, then, to paraphrase our  
17 opening brief, if this case is ripe, then the related case is no longer moot.

18 **B. The Historic Overlay Does Not Violate the Supremacy Clause and is Not Preempted**

19 The USPS fails to acknowledge the difference in kind between the regulations in the  
20 cases it cites about interference with federal government functions and the Historic Overlay. In  
21 all of those cases, the local regulations interfered with the federal government’s ability to fulfill  
22 its mission by directly regulating federal employees<sup>5</sup>, or indirectly by regulating non-federal  
23

24 <sup>2</sup> 54 U.S.C. 306108 (NHPA) (“Section 106”)

25 <sup>3</sup> 42 U.S.C. 4321, *et seq.* (“NEPA”)

26 <sup>4</sup> *City of Berkeley, et al. v. U.S. Postal Service, et al*, C14-04916-WHA, Dkt. 56 at 4:12.

27 <sup>5</sup> *United States v. City of Pittsburg*, 467 F.Supp. 1080 (N.D. Cal. 1979), *aff’d*. 661 F.2d 783 (9<sup>th</sup>  
28 Cir. 1981).

1 persons carrying out work for the government, such as building post office facilities<sup>6</sup>, cleaning  
2 up a nuclear site<sup>7</sup>, or constructing Air Force bases<sup>8</sup>.

3 The Historic Overlay, in contrast, has no such application or effect. It does not interfere,  
4 directly or indirectly with the USPS's activities as an entity of the federal government. Rather,  
5 because it applies only after the property is out of federal ownership or use, it affects the USPS  
6 only as a market participant, as in the cases cited by the City in its opening brief. And unlike the  
7 law at issue in *Maryland v. Louisiana*, 451 U.S. 725 (1981), the Historic Overlay does not require  
8 the USPS to adjust its operations. Indeed, continued use of the building by the USPS after a sale  
9 would be *consistent* with the Historic Overlay.<sup>9</sup>

10 The USPS has also failed to grapple with the “slippery slope” aspects of its rationale.  
11 Could the USPS designate a target price that was entirely unrealistic, and then claim that the  
12 zoning – whatever it might be – interfered with a sale at that price because it limited the future  
13 development of its property post-sale to a private party? How long would such exemption from  
14 local regulation last? Would it be permanent?

15 Ultimately, the USPS is forced to rely on an impermissible argument about the City's  
16 “motivation” joined with a misrepresentation of the record.

17 The USPS argues that because the City Council was “motivated” to “save the Post  
18 Office”, it “cherry-picked properties for inclusion and exclusion” from the Historic Overlay,  
19 implying that as a result it has “an irregular 16-sided shape”. USPS Opp. at 19.

20 This is false. As the City pointed out in its opening brief and as stated in the Historic  
21 Overlay itself, the Historic Overlay was based on the City's Civic Center Historic District that

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23 \_\_\_\_\_  
24 <sup>6</sup> *U.S. Postal Service v. Town of Greenwich*, 901 F.Supp. 500 (D. Conn. 1995); *U.S. Postal Service v. City of Hollywood*, 974 F.Supp. 1459 (S.D. Fla. 1997).

25 <sup>7</sup> *Boeing v. Movassaghi*, 768 F.3d 832 (9<sup>th</sup> Cir. 2014).

26 <sup>8</sup> *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

27 <sup>9</sup> The Historic Overlay is therefore not preempted or invalid under the Supremacy Clause on  
28 this basis. See *United States v. City of St. Louis, Branch 343, Nat. Ass'n of Letter Carriers, AFL-CIO*, 597 F.2d 121, 124 (8<sup>th</sup> Cir. 1979).

1 was designated in 1998. (Dkt. 1, Exh. 1, § 23E.98.010 & Dkt. 1, Exh. 2; RJN, Exh. E. Indeed,  
2 their boundaries are coterminous: the Historic Overlay corresponds exactly to the Civic Center  
3 Historic District. Decl. Stephenson, filed herewith, Exhs. A & B. That is entirely appropriate and  
4 there is nothing suspicious about it. While any number of hypothetical boundaries might support  
5 a suggestion of discrimination against the USPS, this one certainly does not.<sup>10</sup>

6 The USPS also asks the Court to step outside its appropriate boundaries and rule based on  
7 the City’s alleged motivation, arguing that “statements of council members who enacted the law”  
8 confirm that the City’s motivation was to prevent the sale of the Property.” Opp. at 19:18-25. In  
9 fact, the quoted statements refer to “saving the Post Office”, not “preventing its sale” – two very  
10 different things. “Saving the Post Office” is equally susceptible to the interpretation that the  
11 Council’s intention was to make sure that postal activities continued at that location: something  
12 the USPS apparently also intends, as it has reversed its decision to relocate. In reality, the USPS  
13 is asking the Court to infer one of a number of possible motivations based on statements by two  
14 Council members. This is not a basis for invalidating a duly adopted local law.

15 Regardless, however, “it is a familiar principle of constitutional law” that courts “will not  
16 strike down an otherwise constitutional statute on the basis of an alleged illicit legislative  
17 motive.” *U.S. v. O’Brien*, 391 U.S. 367, 383 (1968). “[I]nquiries into congressional motives or  
18 purposes are a hazardous matter” because “what motivates one legislator to make a speech about  
19 a statute is not necessarily what motivates scores of others to enact it, and the stakes are  
20 sufficiently high for us to eschew guesswork.” *Id.* at 383-384. “This fundamental principle of  
21 constitutional adjudication was reaffirmed” and applied to challenged state law as well. *Id.* at  
22 383 (citing *State of Arizona v. State of California*, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed.  
23 1154 (1931)).

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26 <sup>10</sup> The USPS also quibbles that the Historic Overlay did not unilaterally terminate the lease of  
27 an existing City lessee in one of its buildings within the district. The City’s fulfillment of its  
28 lease obligations, which are by nature temporary, is not an indication of its bad faith in adopting  
the Historic Overlay. Moreover, it is common in zoning practice not to terminate preexisting uses  
(or leases) overnight, as that would generally be considered a taking of property.

