

1 CHAD A. READLER
Acting Assistant Attorney General
2 JENNIFER D. RICKETTS
Director, Federal Programs Branch
3 JACQUELINE COLEMAN SNEAD
Assistant Branch Director
4 JULIA A. BERMAN, CA Bar No. 241415
STUART J. ROBINSON, CA Bar No. 267183
5 Trial Attorneys
U.S. Department of Justice, Civil Division
6 450 Golden Gate Ave.
San Francisco, CA 94102
7 Phone: (415) 436-6635; Fax: (415) 436-6632
Email: stuart.j.robinson@usdoj.gov
8 *Attorneys for the United States Postal Service*

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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 _____)
14 UNITED STATES POSTAL SERVICE,) Case No. 16-cv-4815-WHA
15 Plaintiff,)
16 v.)
17 CITY OF BERKELEY) PLAINTIFF’S RESPONSE
18 Defendant.) TO THE COURT’S REQUEST
19) FOR INFORMATION
20) FOLLOWING VIEWING
21)
22 _____)

23 Plaintiff the United States Postal Service, through undersigned counsel, submits the
24 following response to the Court’s Request For Information Following Viewing, ECF No. 49.

- 25 1. *The Court understands that the United States Postal Service intends to secure a perpetual*
26 *covenant to maintain as-is the front portion of the building, including the facade, retail*
27

1 windows, and service areas currently used by the public, as well as the relief on the wall
2 outside and the mural on the wall inside. Is this understanding correct?

3 Yes, the Court is correct. The Postal Service further notes that the proposed covenant
4 would protect items in addition to those listed by the Court, with respect to both exterior and
5 interior historic features.¹ The Postal Service expects that the covenant would include a
6 statement that these historic features will be retained and maintained forever in their current or
7 better condition, and that any change in use of, or change to, the Property could not significantly
8 impair or interfere with these historic features without prior consultation with, and approval of,
9 the covenant holder and without following the applicable laws, ordinances, and regulations of the
10 City of Berkeley.

11 In addition, the Postal Service intends to continue to own the mural by Suzanne Scheuer,
12 *Incidents in California History*, as well as the David Slivka bas relief. As a condition to the
13 transfer of the Property, the Postal Service expects to enter into a loan agreement with the new
14 owner, binding upon any successors or assigns of the new owner, which would require the new
15 owner to undertake actions to preserve and protect the mural and the bas relief as well as
16 providing public access to the mural.

17 2. *Would the aforementioned covenant include the vacant office spaces on the second floor*
18 *above the retail area? If not, what would become of those spaces?*

19 The Postal Service anticipates that the covenant would include portions of the second
20 floor, specifically the landing of the marble staircase with mosaic tiles and black, white, and red
21 fretwork around the edges; and the second floor marble and tile flooring. The new owner would
22 be able to determine the use of second-floor space that does not constitute historic character
23 defining features, provided such use is consistent with applicable laws, ordinances, and
24 regulations of the City of Berkeley.

25
26 _____
27 ¹ The Postal Service is willing to provide any additional information regarding the proposed
28 covenant that is of interest to the Court. The Postal Service respectfully submits, however, that
the scope of the proposed covenant does not bear on the ultimate legal questions in this case, i.e.,
whether the Zoning Ordinance violates the Supremacy Clause and is preempted by federal law.
United States Postal Service v. City of Berkeley, Case No. 16-cv-4815
Plaintiff's Response To The Court's Request For Information Following Viewing

1 3. *What other measures, if any, would the USPS take to ensure that any future use of the*
2 *building would continue to preserve the historical nature of the building as a whole? For*
3 *example, would any potential buyer of the building be free to erect large, tall, or even*
4 *ugly facilities that might overpower the aesthetics of the building's historical features?*
5 *Or would any potential buyer instead be restricted to essentially remodeling the existing*
6 *shell of the building without enlargement or significant modification thereof?*

7 The Postal Service's primary method of ensuring that the historical nature of the Property
8 is preserved is through the negotiation of the aforementioned covenant. This covenant, once
9 recorded, would bind all future owners of the Property. The covenant holder, not the Postal
10 Service, would be best situated to enforce the terms of the covenant. Similarly, the City of
11 Berkeley, not the Postal Service, would be best situated to ensure that any future use of the
12 Property complied with applicable laws, ordinances, and regulations of the City of Berkeley.

13 4. *Since much of the building has fallen into disuse and seems to be in a state of near-*
14 *disrepair, if the situation is left as-is, and time goes on, is there any risk that the vacant*
15 *structure will become a hazard or blight to the City?*

16 No, there is no risk that the Property, if vacant, would become a hazard or blight to the
17 City. As owner, the Postal Service will maintain the building consistent with applicable laws
18 and regulations and in the manner necessary to protect its interests and the sanctity of the mail.²
19 The Postal Service has maintained and will continue to maintain the Property, as the Postal
20 Service continues to occupy space and operate a retail postal services facility there. Indeed, even
21 if the Property is sold, the Postal Service hopes to continue retail postal services operations in the
22 building.

23 5. *Would the Civic Center District Overlay challenged by the USPS in this action in any*
24 *way prevent the federal government itself from remodeling unused portions of the*
25 *building for some other purpose (e.g., a federal prison or detention facility, or a Drug*
26

27
28 ²The Postal Service further notes that the Property is not currently vacant and is unlikely to become vacant.

1 *Enforcement Administration facility)? If so, please discuss the legality of such*
 2 *interference under the Supremacy Clause.*

3 The ability of appropriated agencies of the federal government, such as the General
 4 Services Administration or Drug Enforcement Administration, to remodel unused portions of the
 5 building for a purpose other than its current use is contingent upon a sale or lease of the Property
 6 by the Postal Service to such a federal agency.³ The Postal Service expects that the Overlay
 7 would materially depress the price that the General Services Administration or other federal
 8 agencies would pay to purchase or lease the Property, and thus make such a sale or lease
 9 unattractive for the Postal Service, and therefore, unlikely. The Postal Service is not a federal
 10 agency, and does not receive appropriated funding from the federal government. Accordingly,
 11 it must sell its assets at the highest prices available consistent with the best interests of the Postal
 12 Service. Therefore, just as the Zoning Ordinance prevents the Postal Service from effecting an
 13 economically viable sale to a non-government entity, it would prevent an economically viable
 14 sale or lease to a government entity, and thereby effectively prevent the Postal Service from
 15 selling or leasing the property to federal agencies for purposes such as those named by the Court.
 16 Such interference with the Postal Service's ability to dispose of the Property—a federal function
 17 vested in the Postal Service by Congress—violates the Supremacy Clause. *See* Order Denying
 18 Mot. to Dismiss, ECF No. 43, at 5-6 (quoting and citing *North Dakota v. United States*, 495 U.S.
 19 423, 435 (1990), and *Boeing Co. v. Movassaghi*, 768 F.3d 832, 839 (9th Cir. 2014)).

20
 21 Dated: March 23, 2017

Respectfully submitted,

22
 23 OF COUNSEL:

CHAD A. READLER
 Acting Assistant Attorney General

24 JANINE CASTORINA

25 ³ For the reasons stated in Plaintiff's Opposition to Defendant's Motion to Dismiss, the
 26 ordinance cannot control the use that the Postal Service itself makes of the property. ECF No.
 27 20, at 17-21. Thus, even though the Postal Service will alter or construct buildings only after
 28 consideration of all requirements of local zoning and land use laws, *see* 39 U.S.C. § 409(f), the
 Supremacy Clause ensures that the Postal Service is under no affirmative duty to comply with
 such laws.

United States Postal Service v. City of Berkeley, Case No. 16-cv-4815
 Plaintiff's Response To The Court's Request For Information Following Viewing

1 Attorney
2 Appellate and Commercial Litigation
3 United States Postal Service
4 475 L'Enfant Plaza, SW
5 Washington, DC, 20260
6 Phone: (202) 268-3069
7 Fax: (202) 268-2049
8 E-mail: Janine.Castorina@usps.gov

JENNIFER D. RICKETTS
Branch Director

JACQUELINE COLEMAN SNEAD
Assistant Branch Director

/s/ Stuart J. Robinson
JULIA A. BERMAN, Bar No. 241415
STUART J. ROBINSON, Bar No. 267183
United States Department of Justice
Civil Division, Federal Programs Branch
450 Golden Gate Ave.
San Francisco, CA 94102
Tel: (415) 436-6635
Fax: (415) 436-6632
Email: stuart.j.robinson@usdoj.gov
Counsel for Plaintiff