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11 CITY OF BERKELEY

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 UNITED STATES POSTAL SERVICE,

15 Plaintiff,

16 vs.

17 CITY OF BERKELEY

18 Defendant.

Civ. No. 16-cv-04815WHA

RESPONSE TO REQUEST FOR
INFORMATION AFTER VIEWING

19 The Court has asked the parties to respond to five questions as a follow-up to the Court's
20 viewing. The Court's questions and the City's responses are set forth below.

- 21 1. The Court understands that the United States Postal Service intends to
22 secure a perpetual covenant to maintain as-is the front portion of the
23 building, including the facade, retail windows, and service areas currently
used by the public, as well as the relief on the wall outside and the mural
on the wall inside. Is this understanding correct?

24 As far as the City is aware, the USPS is still proposing a preservation covenant, although
25 it would retain *ownership* of the Suzanne Scheuer mural in the lobby and the David Slivka relief
26 in the loggia. However the extent to which the other features of the building would be protected
27 is an unresolved issue.

1 In 2014, the USPS conducted a Section 106 consultation process with the City, the State
2 Office of Historic Preservation and the Advisory Council on Historic Preservation (ACHP),
3 which involved attempting to negotiate an agreed-upon preservation covenant. On February 7,
4 2014, the USPS circulated a draft preservation covenant for the Property to various consulting
5 and other parties, including the City of Berkeley and the National Trust for Historic Preservation
6 (NTHP), and requested comments from all parties by February 24th. The City worked with the
7 National Trust to prepare a set of joint comments, and submitted them on February 24, 2014.
8 Because they were quite extensive, these comments took the form of a proposed replacement
9 covenant.

10 On May 7, 2014, the USPS circulated a revised covenant and requested that comments be
11 submitted by May 27th. The USPS subsequently extended the May 27th deadline to July 11th, to
12 allow time for the Berkeley City Council to consider the May 7th covenant. The City's and
13 NTHP's joint comments were provided to the USPS on July 9th. The draft covenants to this
14 point had identified Berkeley as the covenant holder.

15 Later that year, however, the USPS submitted to the ACHP a very different covenant,
16 under which it, and not the City, would be the covenant holder. The consulting parties were
17 aware of no precedent for the USPS accepting the responsibility to monitor and enforce a
18 preservation covenant on a historic property it had sold. Moreover, the USPS had previously
19 claimed to lack competence in real estate management, so the consulting parties questioned its
20 ability (especially given its resource constraints) to adequately fulfill its role as covenant holder.¹

21 The USPS proposed to retain ownership of the art works in the lobby and loggia and to
22 loan them to the buyer of the building. The loan agreement proposed by the USPS had several
23 flaws. First, the amount of insurance required (\$100,000) was insufficient. Second, it limited
24 public access to the art to one day per month. Third, it allowed the loan to be terminated, and the

25 _____
26 ¹ In its final decision on relocation of retail services in Berkeley, issued on July 18, 2013, the
27 USPS Vice President Tom A. Samra stated "the Postal Service's mission is to provide postal
28 services in an efficient manner, and increasing its role as a landlord diverts from a proper focus
on that core mission. In addition, the Postal Service is legally restrained from offering additional
non-postal services."

1 art work removed after 25 years. Finally, the maintenance standards imposed on the owner of the
2 property would have rewarded an irresponsible owner for inadequately maintaining the art, since
3 the primary remedy was for the buyer to simply return the art to the USPS. For its part, the
4 covenant was essentially silent on the buyer's obligations with respect to the art work and public
5 access thereto.

6 The covenant was more generally deficient with respect to public access. In early 2014,
7 the City and NTHP proposed that any future owner would be required to make the lobby on the
8 first floor of the 1914 building, as well as the stairway to the second floor and the marbled and
9 tile landing at the top of the stairway, publicly accessible during normal business hours, and to
10 make the property available to persons affiliated with educational organizations, professional
11 architectural associations, and historical societies at other reasonable times, with reasonable
12 notice. The USPS rejected this proposal. Except through its reference to the loan agreement, the
13 covenant was silent as to public access. Yet the ability for the public to have an opportunity to
14 experience the protected interior of the building is an important element of its preservation.

15 In their comments on an earlier draft of the covenant, the City and the NTHP proposed
16 that given the condition of the building, the USPS perform a condition assessment of the building
17 and require a prospective purchaser to repair it as a condition of sale. The USPS's proposed
18 covenant did not require any improvement or maintenance in a condition better than the
19 building's current somewhat dilapidated condition.

20 The covenant's recitals anticipated that a buyer would propose plans for adaptive reuse
21 and rehabilitation of the building. While it contemplated that any improvements would be in
22 accordance with the *Secretary of the Interior's Standards for the Treatment of Historic*
23 *Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic*
24 *Buildings*, it also apparently approved of the notion that such adaptive reuse and rehabilitation
25 might affect the building's historic features, including, without limitation, the height, mass and
26 scale of the building. This language creates substantial ambiguity as to whether alterations under
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1 an adaptive reuse and rehabilitation plan *must* be accepted, and whether such alterations would
2 really need to be consistent with the *Secretary of the Interior's Standards*.

3 Finally, in the proposed covenant, the USPS apparently sought to narrow its authority
4 over changes to the building. For instance, the purpose clause of the covenant was weakened to
5 require review only of changes that “significantly” affect or interfere with the preservation and
6 conservation values of the property.² And as written, the covenant suggested that the *owner*
7 would decide whether a proposed change “significantly affects” the building.

8 The City and NTHP had various other comments as well. In a nutshell, while the
9 covenant might have preserved some of the building, it would not have ensured that “the front
10 portion of the building, including the facade, retail windows, and service areas currently used by
11 the public, as well as the relief on the wall outside and the mural on the wall inside” would
12 necessarily be “maintain[ed] as-is”, and would certainly not have allowed sufficient public
13 access. The covenant proposed in July 2014 by the City and NTHP would have done so.

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

16 The proposed covenant identified various features that were generally referred to as
17 “Preservation and Conservation Values”. These included “marble staircase, oak handrail, and
18 ornamental metal end pieces and railings; landing of marble staircase with mosaic tiles and
19 black, white, and red fretwork around the edges; and second floor marble and tile flooring.” The
20 proposed covenant did not identify any other “Preservation and Conservation Values” on the
21 second floor.

- 22 3. What other measures, if any, would the USPS take to ensure that any
23 future use of the building would continue to preserve the historical nature
24 of the building as a whole? For example, would any potential buyer of the
25 building be free to erect large, tall, or even ugly facilities that might
overpower the aesthetics of the building’s historical features? Or would
any potential buyer instead be restricted to essentially remodeling the

26 ² The modifier “significant” or “significantly” was used in a number of places to weaken
27 protections. This term interjects a level of ambiguity into the covenant that would make it
28 difficult for the covenant holder to know or be able to control when an alteration would be
significant enough to warrant review by the holder.

