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 15

16 **UNITED STATES DISTRICT COURT**

17 **NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION**

18 UNITED STATES POSTAL SERVICE,

19 Plaintiff,

20 v.

21 CITY OF BERKELEY,

22 Defendant.

Case No. 3:16-cv-04815-WHA

**DECLARATION OF ANDREW W. SCHWARTZ IN SUPPORT OF DEFENDANT'S MOTION FOR PROTECTIVE ORDER TO PRECLUDE DEPOSITIONS OF CITY OFFICIALS**

The Hon. William Alsup

Date: September 28, 2017

Time: 8:00 a.m.

Trial Date: December 4, 2017

Filed Concurrently with Defendant's Notice of Motion and Motion for Protective Order to Preclude Depositions of City Officials

DECLARATION OF ANDREW W. SCHWARTZ

I, Andrew W. Schwartz, declare as follows:

1. I am an attorney licensed to practice in the State of California and a partner at Shute, Mihaly & Weinberger LLP, attorneys for Defendant City of Berkeley. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief, and as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. On December 8, 2016, Defendant City of Berkeley (“City”) provided Plaintiff United States Postal Service the legislative history of the Civic Center District Overlay (“Overlay”) as part of the City’s initial disclosures. The legislative history includes Minutes of all Planning Commission and City Council public hearings held on the Overlay.

3. On August 18, 2017, Plaintiff propounded to the City Plaintiff’s Second Set of Requests for Admission by Defendant (Fed. R. Civ. P. 36). Exhibit 1 is a true and correct copy of Plaintiff’s Second Set of Requests for Admission.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed August 24, 2017, at San Francisco, California.

\_\_\_\_\_/s/  
Andrew W. Schwartz

# EXHIBIT 1

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10  
 11 **IN THE UNITED STATES DISTRICT COURT**  
 12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

	)	
	)	
UNITED STATES POSTAL SERVICE,	)	Case No. 16-cv-4815-WHA
	)	
Plaintiff,	)	
	)	
v.	)	
	)	PLAINTIFF’S SECOND SET OF
CITY OF BERKELEY	)	REQUESTS FOR ADMISSION BY
	)	DEFENDANT (Fed. R. Civ. P. 36)
Defendant.	)	
	)	
	)	
	)	
	)	

23  
 24 Pursuant to Rule 36 of the Federal Rules of Civil Procedure and the Court’s Order at  
 25 proceedings held on August 17, 2017, *see* August 18, 2017 Minute Entry, Plaintiff hereby  
 26 propounds the following Second Set of Requests for Admission (“Requests for Admission”)  
 27 upon Defendant City of Berkeley.

**DEFINITIONS AND INSTRUCTIONS**

1  
2 1. The term “Zoning Ordinance” means Berkeley Municipal Code Chapter 23E.98,  
3 Civic Center District Overlay, as well as proposals, such as Measure R, that would have imposed  
4 substantially similar restrictions on the use of the Property that the City or the voters of the City  
5 of Berkeley considered prior to the enactment of Berkeley Municipal Code Chapter 23E.98.

6 2. The term “the Property” means the Berkeley Main Post Office parcel, located at  
7 2000 Allston Way, Berkeley, California

8 3. Each request for admission shall be deemed admitted unless you serve a timely  
9 written answer or objection. If you are unable to make an admission in response to a request for  
10 admission, please identify specifically which portion of the request for admission you are  
11 incapable of admitting and set forth in detail the reasons why you are incapable of making a  
12 truthful admission. If all or any part of a request for admission is not admitted, your answer must  
13 specifically deny it or state in detail why you cannot truthfully admit or deny such matter.

14 4. A denial of any request for admission must fairly respond to the substance of the  
15 matter. When good faith requires that you qualify an answer or deny only a part of a matter,  
16 your answer must specify the part admitted and qualify or deny the remainder.

17 5. As to any request for admission, you may assert lack of knowledge or information  
18 as a reason for failing to admit or deny only if you have made reasonable inquiry into the matter  
19 and the information you know or can readily obtain is insufficient to enable you to admit or  
20 deny.

21 6. If you assert a claim of privilege in objecting to any request for admission, or to  
22 any part thereof, and information is not provided on the basis of such assertion, please describe  
23 the basis of such privilege.

24 7. If, in responding to these requests for admission, you encounter what you deem to  
25 be an ambiguity when construing any request for admission, instruction, or definition, please set  
26 forth the matter deemed ambiguous and the construction used in answering.

27 8. Please supplement your responses to these Requests for Admission as required by  
28 Rule 26(e) of the Federal Rules of Civil Procedure.

1 **REQUESTS FOR ADMISSION**

2 1. Admit that then-Mayor Tom Bates made the following statement as set forth in  
3 *Berkeleyside*, dated June 19, 2014: “There is general agreement on the council that we would  
4 like to save the Post Office, and this is a good way to do it.”

5 2. Admit that then-Mayor Bates said that he believed the downtown zoning  
6 initiative, formally known as the Green Downtown & Public Commons Initiative, would be  
7 defeated in November 2014, so the City Council should take separate action to enact the Zoning  
8 Ordinance, as described in *Berkeleyside*, dated June 19, 2014.

9 3. Admit that then-Mayor Bates made the following statement as set forth in  
10 *Berkeleyside*, dated June 19, 2014: “This way we will protect the post office by taking action in  
11 the first part of September.”

12 4. Admit that then-Mayor Bates was referring to the Zoning Ordinance in the  
13 statements cited in Requests for Admission Nos. 1 and 3 above.

14 5. Admit that then-Mayor Bates stated that the civic center overlay can be easily  
15 described as “help save the post office,” as described in *Berkeleyside*, dated June 19, 2014.

16 6. Admit that then-Mayor Bates stated said that he decided to push for an overlay in  
17 June 2014 because he had grown increasingly frustrated with his dealing with the U.S. Postal  
18 Service, as described in *Berkeleyside*, dated June 19, 2014.

19 7. Admit that Councilmember Maio made the following statement as set forth in the  
20 *Berkeley High Jacket*, dated November 1, 2013: “The council has joined with the preservation  
21 community to use every legal means possible to save the building for public use and public  
22 access, and to keep the post office operations in that building.”

23 8. Admit that Councilmember Maio stated that if the council had a closed session,  
24 there would be discussion about what steps to take toward purchasing the Property as described  
25 in the *Berkeley High Jacket*, dated November 1, 2013.

26 9. Admit that then-Mayor Bates made the following statement as set forth in *The*  
27 *Daily Californian*, dated February 27, 2013: “Our post office is not for sale. It is something we  
28 truly love and value . . . we are not going to stand by and watch this happen.”

1           10. Admit that then-Mayor Bates stated that he and the Council would fight to  
2 prevent a sale of the Property as described in *Berkeleyside*, dated February 28, 2013.

3           11. Admit that then-Councilmember Jesse Arreguín made the following statement as  
4 set forth in *Berkeleyside*, dated March 6, 2013: “I want to commend the community and the City  
5 Council for slowing this down so far . . . . My hope is that we can stop this altogether.”

6           12. Admit that then-Councilmember Arreguín thanked his colleagues and members of  
7 the public for their efforts thus far, and said he’d like to see the building and post office services  
8 saved in the end, as described in *Berkeleyside*, dated March 6, 2013.

9           13. Admit that then-Councilmember Arreguín was referring to the Postal Service’s  
10 effort to sell the Property in the statements cited in Requests for Admission Nos. 11 and 12.

11           14. Admit that then-Mayor Bates made the following statement as set forth in  
12 *Berkeleyside*, dated May 3, 2013: “We’re not going quietly. We’re going to fight this every step  
13 of the way. . . We are against it and the people of Berkeley are against it.”

14           15. Admit that then-Mayor Bates was referring to the Postal Service’s effort to sell  
15 the Property in the statements cited in Request for Admission No. 14.

16           16. Admit that then-Councilmember Arreguín made the following statements as set  
17 forth in the *San Jose Mercury News*, dated May 8, 2013: “The entire Berkeley City Council is  
18 united on its opposition to the sale of this beloved post office . . . . When has the City Council ever  
19 agreed on anything? It’s because, we agree with you, that selling this building, which is part of  
20 our public commons, is not only wrong, but would have a major impact on not only the  
21 residences of our community but the businesses. We cannot privatize our public commons.  
22 These buildings were built with taxpayer dollars; they should remain owned by the taxpayers.”

23           17. Admit that Councilmember Gordon Wozniak said he thinks the building could be  
24 repurposed, since 80% of it is empty, and that he would like to keep the front section as a post  
25 office, but the rear could be used as a farmers market or other community use, as described in  
26 *Berkeleyside*, dated October 24, 2014.

1           18. Admit that Councilmember Wozniak said that he did not think “saving the  
2 building to keep it empty” was a good idea, as described in *Berkeleyside*, dated October 24,  
3 2014.

4           19. Admit that Councilmember Wozniak was referring to the Property in the  
5 statements cited in Requests for Admission Nos. 17 and 18.

6           20. Admit that Councilmember Capitelli asked, as set forth in the *Contra Costa*  
7 *Times*, dated November 6, 2014: “if we allow retail use (for Ace Hardware), how do we control  
8 (the retail portion) in the future?”

9           21. Admit that Councilmember Capitelli was referring to the Property in the question  
10 cited in Request for Admission No. 20.

11           22. Admit that then-Councilmember Arreguín made the following statement as set  
12 forth in the *Contra Costa Times*, dated November 6, 2014: “If we open it up to Ace Hardware, it  
13 opens the door to a whole lot of other for-profit uses.”

14           23. Admit that then-Councilmember Arreguín made the following statement as set  
15 forth in the *Contra Costa Times*, dated November 6, 2014: “The post office just wants to sell the  
16 building and make a quick buck.”

17           24. Admit that then-Councilmember Arreguín said he’d like to see the post office  
18 lease unused portions of the facility for community serving activities such as a museum or  
19 performing arts, as described in the *Contra Costa Times*, dated November 6, 2014.

20           25. Admit that then-Councilmember Arreguín was referring to the Property in the  
21 statements cited in Requests for Admission Nos. 22, 23, and 24.

22           26. Admit that then-Mayor Bates said that Hudson McDonald’s proposal for the  
23 Property would be a win-win for downtown Berkeley but that the City Council was not  
24 supporting the developer’s proposal because it was not supporting taking the building in that  
25 direction, as described in the *Berkeleyside*, dated November 5, 2014.

26           27. Admit that then-Mayor Bates said that there was potential for the Postal Service  
27 to pursue litigation in response to the Zoning Ordinance because such an ordinance would hinder  
28



1 the sale and desirability of the Property, as described in *The Daily Californian*, dated July 29,  
2 2014.

3 28. Admit that then-Mayor Bates said that he was confident that the council would  
4 marshal its support behind passing the Zoning Ordinance to protect the post office, as described  
5 in *The Daily Californian*, dated July 29, 2014.

6 29. Admit that then-Mayor Bates made the following statement as set forth in *The Los*  
7 *Angeles Times*, dated April 18, 2014: “It is not just that we want to save the building; we want to  
8 save its use, as well . . . We want this building to remain a U.S. Post Office and a central part of  
9 the Berkeley downtown community.”

10 30. Admit that then-Mayor Bates said that he hopes the main post office will remain  
11 and at the very least, he and other city officials hope the building isn’t sold to someone who will  
12 modify the building, as described in *The Berkeley Daily Planet*, dated September 14, 2012.

13 31. Admit that then-Mayor Bates said that the decision about the future of the main  
14 post office ultimately “is in the political arena” and “is a federal issue” because it’s a federal  
15 building, as described in *The Berkeley Daily Planet*, dated September 14, 2012.

16 32. Admit that then-Mayor Bates made the following statement regarding the  
17 Property as set forth in *The Berkeley Daily Planet*, dated September 14, 2012: “We want it to  
18 remain in its current state and we’ll fight to the death.”

19 33. Admit that Mayor Arreguín made the following statements regarding the Postal  
20 Service’s effort to sell the Property as set forth in *The Daily Californian*, dated August 24, 2016:  
21 “I don’t feel that they are serious about trying to find a compromise to preserve the building.  
22 They want to sell the building, they’ve made that clear over the years . . . We’re not gonna roll  
23 over, we’re not gonna let our historic postal service building be sold.”

24 34. Admit that then-Councilmember Arreguín said of the Zoning Ordinance that it  
25 would prevent the Property from being used for private purposes, as described in *The Daily*  
26 *Californian*, dated July 29, 2014.

27 35. Admit that then-Councilmember Arreguín made the following statements as set  
28 forth in *The Daily Californian*, dated July 29, 2014: “The things that Ralph Nader talked about

1 are things that we all need to really take very seriously and take direct action to address . . . The  
2 zoning overlay is the one stick we have to protect our post office and the entire Civic Center.”

3 36. Admit that then-Mayor Bates made the following statement as set forth in *The*  
4 *Daily Californian*, dated July 29, 2014, regarding the sale of post offices: “It’s a diabolical plan  
5 to kill the postal service as we know it, and I’m very proud of our community for doing  
6 everything we can to fight it.”

7 37. Admit that then-Councilmember Arreguín made the following statements  
8 regarding the Postal Service’s effort to sell the Property as set forth in *The Daily Californian*,  
9 dated January 29, 2015: “They are just resolute that they want to sell the building, despite  
10 opposition from the community and city leadership, which has left us with little options.”

11 38. Admit that then-Councilmember Arreguín made the following statements  
12 regarding the Property as set forth in *The Daily Californian*, dated November 7, 2014:  
13 “Fundamentally, this building was paid for by taxpayer dollars . . . It shouldn’t be sold to private  
14 hands.”

15 39. Admit that then-Councilmember Arreguín made the following statements  
16 regarding the Property as set forth in *The Daily Californian*, dated October 2, 2014: “Obviously,  
17 the postal service is concerned that the overlay will affect the potential sale of the post office . . .  
18 . I am overjoyed that the zoning overlay is going to be law. This is a big victory for the people of  
19 Berkeley.”

20 40. Admit that then-Councilmember Arreguín said of the concept of rezoning the  
21 downtown historic buildings, that the proposal, in part, is intended to discourage sale of the  
22 Property, as described in *The Times Herald*, dated September 27, 2013.

23 41. Admit that then-Councilmember Arreguín said of the Property that, if it were  
24 sold, public-serving uses such as a market hall or performing arts venue could be acceptable, as  
25 described in *The Times Herald*, dated September 27, 2013.

26 42. Admit that then-Councilmember Arreguín made the following statements  
27 regarding a proposal to develop the Property as set forth in *The Times Herald*, dated September  
28 27, 2013: “What they want is a blank check and no restrictions. They want to build up . . . . They

1 want to bring in a hotel or residential—that’s not what I’ve heard from people in the community  
2 about what they want. I believe it should continue as something that is public serving, something  
3 that meets the specific needs of our community and not something that’s going to serve a  
4 developer or a corporation.”

5 43. Admit that then-Councilmember Arreguín made the following statements  
6 regarding the Property as set forth in *The Daily Californian*, dated April 24, 2013: “In the end,  
7 even if the outcome of the appeal is not favorable, what we can certainly do as a city government  
8 is to work with the USPS to make sure who buys the building uses it for a positive use.”

9 44. Admit that then-Councilmember Arreguín made the following statements  
10 regarding the Postal Service as set forth in *The Daily Californian*, dated January 31, 2014:  
11 “We’ve been pleading with them for a year to meet with us and to work with us . . . It wasn’t  
12 until the zoning overlay was on the table that they wanted to work out compromise.”

13 45. Admit that then-Councilmember Arreguín made the following statements  
14 regarding the Property as set forth in *The Daily Californian*, dated July 25, 2012: “I think what’s  
15 important is working to try to ensure that the building is used for a public purpose . . . . The city needs to  
16 play a leadership role in finding a buyer who will put forth a public use of the space.”

17 46. Admit that then-Councilmember Arreguín made the following statements  
18 regarding the Property as set forth in *The Daily Californian*, dated November 14, 2012: “I don’t  
19 think it makes sense to sell a building we own in order to lease another space . . . . It’s an  
20 important community resource, and selling it is going to have a negative impact. . . . It is  
21 troubling that our post offices are under attack, and it is happening in Berkeley . . . . We have to  
22 fight it . . . this is really a sort of battleground that is happening all over the country, and if we  
23 stop it here, that will send a strong message.”

24 47. Admit that then-Councilmember Arreguín made the following statements  
25 regarding the Property as set forth in *The Daily Californian*, dated January 31, 2013: “If for  
26 whatever reason the Postal Service does go through the sale . . . we need to push to make sure the building  
27 will be made for positive use.”

1           48. Admit that then-Mayor Bates made the following statements as set forth in *The*  
2 *Daily Californian*, dated August 12, 2013: “The Postal Service is putting our historic Berkeley Main  
3 Post Office building up for sale under the guise of a ‘relocation of retail services,’ . . . . I believe USPS  
4 never had the intention to relocate postal services and is playing semantic games with our community —  
5 what they really want is to sell the building . . . . We’re not going gently into the night . . . . We’re  
6 fighting this every step of the way. This is a seven-act opera.”

7           49. Admit that then-Councilmember Arreguín made the following statements as set  
8 forth in *The Daily Californian*, dated January 29, 2015: “We’re Berkeley — we’re going to keep  
9 fighting . . . . We think it’s important to fight the sale and to hold the post office accountable, so we’re  
10 proceeding with the lawsuit.”

11  
12  
13 Dated: August 18, 2017

Respectfully submitted,

14  
15 OF COUNSEL:

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