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September 14, 2017

Via E-Mail and U.S. Mail

Julia Berman
U.S. Department of Justice, Civil Division
20 Massachusetts Avenue, NW
Washington, DC 20001
julia.berman@usdoj.gov

Re: USPS v. City of Berkeley, U.S. Dist. Court No. 16-cv-4815-WHA;
Objections to Plaintiff's Notice of FRCP 30(b)(6) Deposition

Dear Ms. Berman:

In accordance with Federal Rules of Civil Procedure 26(c)(1), I write on behalf of the City of Berkeley to inform you of the City's objections to Plaintiff's Notice to Take Deposition Pursuant to Federal Rule of Civil Procedure 30(b)(6) and the attached Exhibit 1 containing Definitions and a list of Deposition Topics dated September 11, 2017 ("Notice"). If we cannot resolve the issues set forth in this letter through the meet and confer process, the City intends to seek a protective order from the court.

Objection #1: Definition 3 is vague, ambiguous, and overbroad. The Notice defines "Zoning Ordinance" as "Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay ("Overlay"), as well as proposals, such as Measure R, that would have imposed substantially similar restrictions on the use of the Berkeley Post Office ("Property") that the City or the voters of the City of Berkeley considered prior to the enactment of Berkeley Municipal Code Chapter 23E.98." This definition is vague and ambiguous insofar as it includes unspecified "proposals" that the City or its voters have considered. It is also overbroad because it lacks any reference to time, and thus could be read to include all such proposals considered at any time in the City's history. Moreover, Measure R and any other similar proposals are irrelevant to the case at hand, which challenges the validity of the Overlay only. Because this definition is vague and ambiguous, all Deposition Topics that refer to the "Zoning Ordinance"—i.e., Topics 1-15—are also vague, ambiguous, and overbroad.

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This objection would be addressed if Definition 3 were limited to Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay.

Objection #2: Deposition Topics 1-5 and 13-15 are irrelevant. These topics plainly seek information about City staff and decisionmakers' "intents" and "purposes" in drafting and adopting the Overlay. As we have argued in our pending motion for protective order, intent and purpose is not relevant in this case. All other, relevant, non-privileged information encompassed by Deposition Topics 1-5 (e.g., public drafts of the Overlay, meeting minutes, etc.) is readily available from other sources, including the City's public records, which have already been provided to you in the City's Initial and Supplemental Initial Disclosures and in the two rounds of production of City documents. The burden of producing a City staff person to discuss these topics thus outweighs any benefit to the Postal Service.

To the extent you seek information about issues other than the City's intent and purpose in Topics 13-15, that information is irrelevant as well. City communications with (a) owners or occupants of properties *adjacent* to the area subject to the Overlay (Topic 13); (b) Save The Berkeley Post Office, the Downtown Berkeley Association, or the National Post Office Collaborate (Topic 14); and (c) state department, elected officials, and commissioners of any state, city or county (Topic 15) can have no bearing on whether the Overlay is preempted or in violation of the Supremacy Clause.

To the extent Topics 11 and 12 seek to obtain information about decisionmaker's intentions in adopting the Overlay, they are irrelevant as well.

Objection #3: Deposition Topics 1-5 encompass statements and information protected by the deliberative process privilege. *See* Defendant's Motion for Protective Order at 13-14 (ECF pages 19-20).

Objection #4: Deposition Topic 6 seeks testimony regarding the "practical effects of the Zoning Ordinance on the properties subject to the Zoning Ordinance." The Notice seeks expert opinion, not facts. Pursuant to FRCP Rule 30(b)(6), if the Postal Service names the City as a deponent, the City must designate one or more individuals to testify on the City's behalf. "The person designated must testify about *information* known or reasonably available to the organization." FRCP Rule 30(b)(6) (emphasis added). Opinions about how the Overlay may affect properties subject to it is not "information"; it is expert opinion and includes legal opinions that are reserved for the Court. Nothing in Rule 30(b)(6) authorizes the Postal Service to depose City officials about topics requiring expert opinion testimony or legal opinions.

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Moreover, the Postal Service will be deposing the City's appraiser, Peter Overton, in the next two weeks. Mr. Overton is a designated expert and the person most knowledgeable as to the economic impact of the Overlay on the Property.

Objection #5: Deposition Topics 7, 8, 11, 12, 13, 14, and 15 are overbroad.

Topic 7 seeks to depose a City witness about nonconforming uses located "around the areas subject to the Zoning Ordinance." Information about nonconforming uses outside of the area subject to the Overlay is irrelevant. Moreover, the Topic fails to include any geographic limits on the phrase "*around* the areas subject to the Zoning Ordinance" and thus is also vague and ambiguous.

Topic 8 includes all "negotiations or agreements" with City tenants, renters or lessees in properties subject to the "Zoning Ordinance." The City is a large entity and engages in "negotiations and agreements" with other entities on a wide array of issues. As written, Topic 8 could encompass agreements for contracting services to be provided by individuals or companies who happen to rent within the area subject to the Overlay, negotiations over parking tickets, etc. As such, it is overbroad.

Topics 11-15 encompass communications with various individuals and entities about the Property and/or the Overlay. As noted above, to the extent the Postal Service seeks information about the City's intent and purpose in adopting the Overlay, such information is irrelevant. Moreover, these Topics lack any time limitations and are so broadly worded they could encompass a host of other irrelevant issues, e.g., complaints about conditions on the Property (sidewalk repair, tree maintenance, etc.), communications related to the 1981 historic listing of the Property on the National Register of Historic Places, etc. As such, they are overbroad.

Moreover, the burden of inquiring among the more than 1,600 City employees whether they had engaged in the negotiations, agreements, and communications described in Topics 8 and 11-15 entities outweighs the benefit to the Postal Service of this information. Unless these Topics are narrowed, it will be unduly burdensome for the City to produce one or more witnesses knowledgeable about all of the issues and communications encompassed within them.

Regarding Topics 11 and 12, the City will make reasonable inquiries to determine whether any City employees have communicated with Hudson McDonald or other developers or owners or occupants of properties subject to the Overlay regarding the Property or the Overlay. In sum, the City is prepared to produce one or more witnesses to

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testify about Deposition Topic 16 and, if you amend Definition #3 as proposed above, Topics 7-10 and Topics 11-12 (if the City determines that there have been any of the communications described in those topics). In agreeing to produce such witness(es), the City is not waiving any objections to specific questions asked during the deposition.

Please advise by close of business September 15, 2017 whether you intend to modify the Notice. If the parties cannot resolve the issues set forth in this letter through the meet and confer process, the City intends to seek a protective order from the court.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Andrew W. Schwartz

cc: Stuart Robinson
Farimah Brown
Jessica Mar
Iyengar Savith
Roger Moore