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August 27, 2014

File No. 68419

**VIA E-MAIL**

Members of the City of Berkeley Planning Commission  
Alex Amoroso, Secretary  
Land Use Planning Division  
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Re: Civic Center Historic District Overlay

Dear Commissioners:

The United States Postal Service (“USPS”) welcomes this opportunity to provide these comments on the proposed Civic Center District Overlay Zoning (the “Overlay District”) and its supporting negative declaration and initial study (the “Negative Declaration”) that would impact the Main Post Office (“Berkeley MPO”) located at 2000 Allston Way. The USPS also continues to object to the adoption of the Overlay District for the reasons stated in USPS’s January 28, 2014 letter entitled “Item 8: Berkeley Civic Center Historical District Zoning Overlay” and June 24, 2014 letter entitled “Items 37c & 51d: Civic Center District Overlay Zone,” which USPS incorporates by this reference.<sup>1</sup>

**1. The Public Comment Period Forecloses Meaningful Public Participation.**

As an initial matter, USPS is concerned that the schedule established by the City of Berkeley (“City”) to consider the Negative Declaration precludes the Planning Commission from a good faith consideration of public comments prior to its decision whether to recommend that the City Council adopt the Negative Declaration. The California Environmental Quality Act (“CEQA”) provides the opportunity for the public to comment on environmental documents, such as the proposed Negative Declaration, in order to assist the decision-making body in identifying potential significant effects of a project, alternatives, and mitigation measures. (*See, e.g.,* Pub. Res. Code § 21003.1(a).) Here, the Planning Commission is scheduled to make its recommendation on the Negative Declaration at 7 p.m. on August 27th while the comment

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<sup>1</sup> The USPS also has concerns that the proposed overlay may amount to an unconstitutional attempt to regulate the functions of a federal entity (USPS) and, among other things, regulate in an area that may have been preempted by Congress.

period on the Negative Declaration closes at 5 p.m. on August 27th. USPS is concerned that two hours will not be sufficient time for the Planning Commission to consider, and potentially take action in response to, the public's comments. Indeed, the City's Notice of Public Hearing for August 27, 2014 states that "[t]o assure distribution to Commission members prior to the meeting, *correspondence must be received by 12:00 noon, seven (7) days before the meeting.*" (Notice of Public Hearing, p.2 [original emphasis].) Thus, in order for a member of the public to have any assurance that his or her comments will be considered by the Planning Commission, he or she would need to submit them by 12 p.m. on August 20th, rather than 5 p.m. on the 27th as stated in the City's notice. This would appear to violate the City's duty to consider any comments received during the comment period prior to taking action on the proposed zoning overlay.

## **2. The Negative Declaration Uses an Unlawful Baseline.**

The Negative Declaration repeatedly analyzes the impacts of the Overlay District by comparing the amount of development permitted under existing zoning with the amount of development that would be permitted if the Overlay District were adopted. The initial study states that project impacts would be limited because the Overlay District would limit the development capacity of parcels and that all of the conditionally permitted uses are already allowed under current zoning. (Initial Study, p. 10.) This premise is carried over into specific impact analyses. For example, the initial study's aesthetic impact analysis states that "since the implementing ordinance would serve to lessen development potential in the proposed Overlay, there would be little potential for increased adverse impacts to aesthetic resources" and "significant changes to the built form of the Civic Overlay area are therefore less likely under existing regulations." (Initial Study at p. 11; *see also* 13 [comparing glare impacts to existing regulations], 16 [same for air quality]; 20 [same for cultural resources], 26 [same for greenhouse gasses impacts], 30 [same for hazards and hazardous materials], 41 [same for vibration], 49 [same for solid waste].)

This is contrary to law. The CEQA case-law is clear that the proper framework of analysis for a zoning action is to compare the development that would be permitted by the zoning action with the existing physical environment, not the hypothetical level of development that would be permitted by existing regulations. (*Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683.) In other words, it is improper to determine that the Historic Overlay would not have an environmental impact by concluding that the Historic Overlay would not increase the amount of permitted development compared to existing land use controls. The Negative Declaration must be revised to disclose to the public the impacts of permitted development under the Overlay District compared to the existing physical environment.

**3. A Fair Argument Exists that the Adoption of the Proposed Overlay District Will Result in Urban Decay.**

The City must prepare an Environmental Impact Report (EIR) because substantial evidence exists that the Overlay District may result in urban decay. On behalf of USPS, Economic & Planning Systems (EPS) analyzed the potential economic and connected physical impacts of the Overlay District.<sup>2</sup> EPS concluded that the Overlay District would result in a loss of existing revenue streams to the City, would result in a reduced ability to finance the restoration of the historic City Hall building, and would foreclose private uses that could fund the restoration and preservation of the historic buildings within the Overlay District. EPS also found that the Overlay District could result in a deactivation of the Civic Center by increasing the likelihood of long-term vacancies in buildings within the Overlay District. EPS concluded that these impacts would result in an increased likelihood of vandalism and deterioration of structures and facilities within the Overlay District.

The EPS report is substantial evidence that the adoption of the Overlay District may result in a significant urban decay impact. (See e.g. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184.) Under the fair argument standard, the City *must* prepare an EIR – rather than a negative declaration – whenever substantial evidence in the record supports a fair argument that the project may have a significant effect on the environment. (*No Oil, Inc. v. City of Los Angeles* (1974) 12 Cal.3d 68, 75.) That test is met here. Therefore, the City must prepare and certify an EIR before it takes action on the Overlay District.

**4. The Proposed Overlay District Would Result in Current Tenants of City-owned Property and the YMCA Becoming Non-Conforming Uses.**

The Overlay District would prohibit office uses that currently exist within City-owned properties. For example, the City Manager confirmed that the private tenancy within 1947 Center Street that provides \$4.2 million in lease payments (used for debt service on that building) would become a non-conforming use. (January 28, 2014 City Council Hearing Video Transcript at 3:02.) This would mean that any change in that tenancy or renewal of the tenant's lease would likely be foreclosed unless a use permit is obtained. (Mun. Code § 23C.04.060.) Given that the City appears to argue that office uses are detrimental to the historic character of the Civic Center, it may be difficult for the City to make the required findings to issue such a permit, assuming of course that the Overlay District would not preclude the issuance of a use permit entirely. (See, e.g. Mun. Code § 23B28.050; Proposed Mun. Code § 23E.98.030 [“All properties in the Civic Center District Overlay are restricted to only those uses listed below, regardless of uses permitted in the underlying district [these uses do not include office].) The City's staff report does not identify any alternative source of funding for 1947 Center Street's debt service.

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<sup>2</sup> EPS's report is enclosed and incorporated by this reference.

Likewise, the Historic Overlay would make the programs at the YMCA, including its hotel and any fitness operations within the overlay, non-conforming uses. The Historic Overlay requires a public hearing and use permit for all "non-profit cultural, arts, environmental, community service and historical organizations." To USPS's knowledge, the YMCA does not currently hold such a permit. Therefore, the YMCA would be unable to make changes to its programming without a public hearing. As with the City's tenants' office uses, it is unclear if the City would be able to make the required findings to issue such a permit because the City has taken the position that hotel and fitness uses are incompatible with the historic nature of the district. It is also unclear how the identity of the owner of such uses would reduce that incompatibility. For example, if a hotel in private for-profit ownership would be incompatible with the Historic Overlay, the City will be hard pressed to make a finding that the exact same use, but owned by a private non-profit, would be compatible with the Historic Overlay. Furthermore, the City's apparent preference given to private non-profit entities over private for-profit entities within the Overlay District may raise equal-protection concerns because zoning is normally used to regulate uses rather than ownership.

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USPS respectfully requests that the Planning Commission delay action on the Overlay District until the City completes an environmental review of the Overlay District that complies with CEQA.

Sincerely,



R. Clark Morrison

cc: Zach Cowan, City Attorney  
Christine Daniel, City Manager  
Sharon Freiman, USPS  
Barbara Cioffi, USPS

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## **MEMORANDUM**

To: Christian Cebrian  
From: Walter Kieser and Ben Sigman  
Subject: Civic Center Overlay District  
Date: August 27, 2014

*The Economics of Land Use*



This memorandum addresses the potential economic effects of a proposed City of Berkeley Zoning Ordinance Amendment titled Civic Center Overlay District (Overlay District). It is concluded that these economic effects can lead to deleterious physical changes (urban decay) in the Civic Center area that should be further evaluated and mitigated as part of the environmental review mandated by the California Environmental Quality Act (CEQA).

The draft Overlay District, which would affect only nine parcels (eight whole parcels and a portion of a ninth parcel) and generally covers Berkeley's Civic Center area, imposes additional regulations over and above the existing underlying base zoning. These proposed regulations would, in summary, limit use of the identified parcels within the Overlay area to public and non-profit quasi-public uses. In addition, three new definitions (Museum, Live Performance Theatre, and Public Market) would be added to the Zoning Ordinance.

The affected parcels are currently zoned, respectively, Downtown Commercial Mixed Use (C-DMU) Core, Outer Core and Buffer, as well as Restricted Two Family Residential District (R-2) and Multi-Family Residential District (R-3). The City's General Plan designations include Downtown, Low-Medium Residential and Institutional General Plan designations. The affected parcels encompass the civic, educational and institutional uses of the City just west of the Downtown area, Berkeley High School to the south, residential districts to the west, and residential and commercial districts to the north. Seven of the subject properties are owned by the City of Berkeley; the other two are owned by the YMCA and the US Postal Service. Of these two non-City-owned parcels, only the Post Office has any realistic near-term use potential for non-public uses. And yet, the Overlay District would have economic effects on the other publicly-owned parcels as well.

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While the California Environmental Quality Act (CEQA) excludes consideration of social and economic impacts of a project, the statute and related case law require consideration of potential economic impacts if such impacts have the potential to indirectly result in adverse physical changes to the environment. Adverse physical changes to the environment from economic effects commonly manifest themselves in the form of urban decay—the degradation of or the creation of blighting conditions in the project area and in the surrounding urban area. The term “urban decay” is generally defined as, among other characteristics, visible symptoms of physical deterioration that invite vandalism, loitering, and graffiti that is caused by a downward spiral of local business including closures and long-term vacancies. The outward manifestation of urban decay includes, but is not limited to, boarded doors and windows, dumping of refuse, deferred maintenance of structures, unauthorized use of buildings and parking lots, littering, and dead or overgrown vegetation. When such urban decay effects are found to be significant, CEQA requires the lead agency to adopt fully enforceable mitigation measures, and also a monitoring program to ensure such measures will actually be implemented as a condition of project approval (California Public Resources Code, § 21081.6.).

## **Economic Effects of the Overlay District**

Use restrictions imposed by zoning regulations such as the proposed Overlay District have a direct effect on potential use of the affected property and thus its market value or economic potential. By prohibiting non-public uses, the proposed Overlay District will result in economic effects that primarily include:

- Loss of existing revenue streams to the City of Berkeley;
- Reduced ability to adaptively reuse and finance restoration of the historic City Hall building; and
- Inability for the Post Office building to support private uses that can fund the restoration and preservation of the historical aspects of the building.

## **Loss of Existing and Future Municipal Revenue Sources**

It is common for public agencies to lease underutilized property including land and building space to private businesses or individuals. Such arrangements may be temporary, taking advantage of temporarily unneeded space or as part of “public private partnerships” where such leases or other tenure arrangements help achieve a variety of public purposes. The City of Berkeley currently leases space in the State Farm Building (that would be subject to the proposed Overlay District) to private parties. The value of the existing leases (cumulative lease payments) is estimated to be \$4.2 million.<sup>1</sup> Under the provision of the proposed Overlay District these leases would be “grandfathered” and, at term, no new leases or extensions could be let by the City leading to a direct loss of revenue otherwise accruing to the City’s General Fund. Other opportunities to lease space for private use would be eliminated thereby reducing opportunities for generating revenue from underutilized or unneeded City building space.

Additionally, private uses generate a variety of revenues to the City including property taxes and gross receipts taxes and other local taxes and fees that would be forgone with a prohibition of

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<sup>1</sup> Report by the City Manager (City Council Hearing Video Transcript at 3:02.) January 28, 2014.

any private uses in the area. This loss of revenue would reduce funding available for critical municipal services including police protection and street and sidewalk maintenance.

### **Reduced Ability to Finance Restoration of City Hall Building**

The City Hall has in recent years been largely unoccupied due to its seismic weaknesses (vulnerability to damage by a major earthquake), general deterioration, and lack of modern office formats and facilities. While a recognized historic structure well worth saving, costs for restoration, according to estimates made by the City, are above \$30 million.<sup>2</sup> No source of funding has been identified for this expenditure and no use for the space has been identified.

Without restoration and without reuse, the City Hall building will continue to deteriorate, adding, as time goes by, to the costs of the needed seismic retrofit and restorations. Indeed, if the next large Hayward Fault earthquake occurs before seismic upgrades, the building could be damaged beyond the point of repair. Since the City does not have the funding to pursue necessary strengthening and restoration, and voter support for additional property tax-supported bonded indebtedness appears to be weak (a bond measure proposed in 2002 failed at the ballot<sup>3</sup>), a public-private partnership may be a viable option to fund the necessary improvements. The Overlay district, by excluding any private uses of the building, would foreclose the public-private partnership option, thus contributing to the continued deterioration of the building and prolonging the time that it is exposed to the risk of seismic event failure.

### **Relocation of Operations from the Historic Post Office Building**

The US Postal Service announced its initial decision to relocate retail services from its historic downtown Berkeley Post Office on April 22, 2013. While retail operations continue in the front portion of the Post Office, the last remaining "back office" activity utilizing the rear portion of the Post Office (carriers and bulk mail operations) were completely relocated to another facility in January 2014. These relocation decisions were made as part of a broader effort to improve efficiency and reduce operating costs as the Postal Service nationally confronts substantial financial constraints brought on by societal shifts away from traditional first class mail (the primary operating revenue source of the Postal Service), competition with the continuously evolving express mail and package delivery industry, and the legislative requirement to prefund healthcare and retirement benefit costs for its retirees. The Postal Service receives no tax dollars for operating expenses and relies on the sale of postage, products, and services to fund its operations. As a part of this fiscal reality, post offices around the nation have been relocated and right-sized as necessary to retrench and establish a new and sustainable business model. Reducing operating inefficiencies is the primary goal of this restructuring and right-sizing but the real estate assets also offer opportunities for minimizing net costs or even generating revenue that can help sustain broader Postal Service operations locally and nationally.

Postal regulations provide a process for the disposition of Postal Service properties that are oversized for existing postal operations. In the context of an historic building housing a Post Office, any sale of the building would need to be fully coordinated with the goal of historic preservation of the historic features of the building. The US Postal Service has successfully

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<sup>2</sup> City estimate cited by San Francisco Chronicle (Jones, Carolyn *Berkeley struggles to retrofit City Hall*, Thursday, December 27, 2012).

<sup>3</sup> Measure J in 2002 received 60.3 percent support, short of the 2/3rds requirement needed to approve the proposed General Obligation bond for repair of the Old City Hall.

transferred ownership of its historic buildings to the private sector (or public sector) while fully preserving their historical features and attributes. Specifically, Executive Order (EO) 13287 titled *Preserve America*, was issued by President Bush on March 3, 2003 reaffirming the commitment of the Federal government to fulfill its responsibilities under the National Historic Preservation Act of 1966 (NHPA), as amended by EO 13287 to improve Federal agency planning, accountability, and stewardship in regards to historic properties under the control of Federal agencies; to encourage agencies to explore partnerships to preserve and utilize these properties; to support the promotion of historic properties through heritage tourism and heritage education; and to promote the contribution of historic properties to local economies.

A more recent Report to the Advisory Council on Historic Preservation (December 2011) regarding EO 13287 provides details about the historic preservation efforts including reference to numerous case studies where transfer of ownership to private ownership has achieved desired historic preservation outcomes. Such an approach is consistent with broader historic preservation of public buildings and other historical resources around the nation where market potential can be tapped, along with available historic preservation tax credits and other financial resources, to preserve and restore historic buildings. In most cases such transfers involve imposition of a restrictive covenant on the property title that is imposed to assure and sustain such preservation.

### **Post Office Site Use Potential**

According to Berkeley's Downtown Area Plan the Post Office site is designated "Commercial Downtown Mixed Use Outer Core" (C-DMU Outer Core). This zoning district allows a wide range of land uses consistent with the goals of the Downtown Plan including retail, personal and business service, office, residential, entertainment, hospitality, and medical facilities. A 60-foot height limit applies in the Outer Core with additional height allowed with the Green Pathway Bonus provisions. A 60-foot height limit would allow a four- or perhaps five-story building although site related constraints such as parcel size, configuration, and surrounding uses may further limit building height.

It is not likely that reuse of all or part of the approximately 57,000 gross square foot Post Office building space "as-is" would generate value sufficient to assure the necessary preservation and restoration of the historic features of the building. Any non-federal use will be required, at the minimum, to adhere to the historic preservation covenants, meet current building code requirements, and complete appropriate demising of space and other improvements for the given use. While the actual development/use potential of the building depends upon a large range of variables and related assumptions, it is likely that an adaptive reuse of the Post Office building (the rear portion) would involve development within the existing outer walls of the building, either as a thoroughgoing renovation of the existing space for commercial (i.e., retail, entertainment, or office) purposes or as a new multi-story development within the existing building envelope.

In any event, in addition to paying for the necessary improvements needed for reuse, additional and likely substantial investments will be made for the dedication, restoration, and maintenance of the historic original Post Office building and the related restoration and retention of the historic features of the newer rear building. In lieu of such a private investment approach it is unlikely that any public, or quasi-public use, would generate sufficient net use-derived revenues needed to restore and sustain the historical space and features of the Post Office while paying market value for the site. Additionally, with new development opportunities limited in the Downtown, every opportunity to increase "activation" of the area (i.e., new businesses,

entertainment uses, and residential uses) will be needed to contribute to the economic success of the entire Downtown area.

## **Potential Urban Decay Impacts**

As noted above urban decay is generally defined as, among other characteristics, visible symptoms of physical deterioration that invite vandalism, loitering, and graffiti that is caused by a downward spiral of local business including closures and long-term vacancies. The outward manifestation of urban decay includes, but is not limited to, boarded doors and windows, dumping of refuse, deferred maintenance of structures, unauthorized use of buildings and parking lots, littering, and dead or overgrown vegetation. By this definition it is possible that the restrictions imposed by the draft Overlay District could cause urban decay as well as a loss of an opportunity to use a tried and true method of historic preservation to preserve valuable historical resources, one that has been used by the US Postal Service in numerous other cases where postal operations have been relocated from historic Post Office buildings.

The contributing factors to urban decay and threats to preservation of the Old City Hall and the Post Office and realizing broader downtown revitalization as envisioned in the Downtown Plan include:

- Losing existing and future revenues to the City derived from the prohibition of commercial leases of public property and prohibition of private for-profit uses throughout the Overlay District. This funding source, while a General Fund revenue, could be allocated to historic preservation and restoration in the Civic Center that if not completed, could lead to blighting and urban decay conditions. In addition to the loss of rental income there also would be less municipal tax revenue including property taxes, sales taxes, and employee and resident-based taxes levied by the City otherwise created by the private uses.
- Removing the possibility of some commercial leasing in the City Hall building as part of a broader historic preservation effort (i.e., a public-private partnership) may delay seismic retrofit and restoration efforts. Every year that goes by increases the risk that the eventual Hayward Fault earthquake may effectively destroy the building, eliminating its potential for restoration and preservation. Meanwhile, the building, largely vacant, will continue to deteriorate.
- Reducing the pool of potential tenants in both City-owned property (including Old City Hall, the State Farm Building, and the Veterans' Memorial Building) and private property, thus increasing the likelihood of long-term vacancies. Long-term vacancies are correlated with increased vandalism, crime, and other forms of physical and social blight. Long-term vacancies also would increase the likelihood of the "deactivation" of the Civic Center, which would increase the likelihood of vandalism and social behavior that would result in the deterioration of Civic Center Park.
- Decreasing the ability of public-private partnerships for City-owned buildings that would increase the ability of Old City Hall, the State Farm Building, the Veterans Memorial Building to be maintained and preserved, thus increasing the likelihood of deterioration of these buildings.
- Significantly impairing the possibility of a sale for private uses, thereby increasing the likelihood of the building being vacant for a protracted period of time following any future

relocation of remaining Postal Service operations. Under such a scenario, despite the efforts of the Postal Service to secure the site, there would be an increased likelihood of vandalism, including removal of exterior features and graffiti, deterioration of the building's exterior and illegal occupancy. Without investment by an entity with sufficient funding and investment incentives the features of urban decay will be more likely.