



Preserving America's Heritage

October 24, 2014

Mr. Daniel Delahaye
Federal Preservation Officer
United States Postal Service
475 L'Enfant Plaza, SW, Suite 6670
Washington, DC 20260-1862

Ref: *Review of No Adverse Effect Finding Regarding Proposed Sale of Berkeley Post Office
City of Berkeley, California*

Dear Mr. Delahaye:

The Advisory Council on Historic Preservation (ACHP) has received your letter dated September 24, 2014, requesting a review of the United States Postal Service's (USPS') no adverse effect finding for the referenced undertaking. In accordance with our regulations, "Protection of Historic Properties" (36 CFR Part 800), we are providing our opinion on this finding. It is the opinion of the ACHP that the USPS' finding of no adverse effect for the referenced undertaking is not supported by the covenant as presently written.

The applicable provision of the Section 106 regulations specifies as an adverse effect:

Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance. (36 C.F.R. §800.5(a)(2)(vii))

It is the ACHP's opinion that the proposed covenant does not sufficiently ensure the long-term preservation of the property since the USPS, as covenant holder, has the unfettered authority to approve adverse effects to the property (including demolition) while having neither the demonstrated experience in holding preservation covenants nor an apparent interest in the long term preservation of the property.

The ACHP acknowledges that the USPS has made improvements to the substantive provisions of the preservation covenant in response to recommendations from the ACHP and other parties. For instance, the removal of the "good cause" clause that the ACHP found problematic in a past proposed covenant has been replaced with a provision stating the need for covenant amendments to be consistent with the protection of preservation values of the property and another provision setting a high standard for the extinguishment of the covenant.

However, the current covenant allows for alterations (including demolition) so long as the covenant holder, USPS, approves them. Such an approval is left to the sole discretion of the covenant holder, without any restrictions. See Section 1(b) and (c) of the covenant. Accordingly, the commitment and the capability of the covenant holder become paramount. It is essential that the covenant holder has a

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637
Phone: 202-517-0200 • Fax: 202-517-6381 • achp@achp.gov • www.achp.gov

demonstrated experience in protecting historic properties and evidences its interest and capability, through its core mission or otherwise, in the long term preservation of the property. If these factors are absent, use of a covenant will not support a finding of no adverse effect per 36 C.F.R. §800.5(b).

In order to rectify this limitation, the ACHP recommends that the USPS identify another covenant holder that meets the standards outlined above. Should USPS be unable to identify a qualified covenant holder, we urge it to continue consultation to add provisions to the covenant that would insert a suitable preservation organization in the process of considering and approving alterations that may adversely affect the property. Such organizations might include the State Historic Preservation Officer, the National Trust for Historic Preservation, local preservation organizations, and Certified Local Governments.

Lastly, in the future we encourage the USPS to consider inviting the ACHP's participation in consultation when apparent conflicts are first identified, so that it might assist the parties in reaching an agreement. We understand that the consulting parties were trying to achieve acceptable covenant language and were caught off guard by the USPS abruptly ending those discussions through its September 24 referral to the ACHP. We would urge you in the future to give consulting parties reasonable notice about your intentions to end consultations by a specific date, so they can focus their final efforts to resolve disagreements.

If the USPS does not change the covenant as outlined above, and maintains its finding of no adverse effect, it must prepare a summary of its finding that contains the rationale for the decision and evidence of consideration of the ACHP's opinion, and provide it to the ACHP, the SHPO, and consulting parties prior to proceeding with the undertaking per 36 C.F.R. § 800.5(c)(3)(ii)(B). Should USPS choose to resume consultation to rectify these issues with the proposed covenant, the ACHP will participate in consultation to assist USPS in either reaching a determination of No Adverse Effect or resolving adverse effects in accordance with the provisions of 36 C.F.R. § 800.6. If you have any questions regarding our comments, please contact Caroline Hall at (202) 517-0208 or via email at chall@achp.gov.

Sincerely,



Reid J. Nelson
Director
Office of Federal Agency Programs