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CITY OF BERKELEY, et al.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION
13

14 CITY OF BERKELEY; MAYOR AND
15 MEMBERS OF THE CITY COUNCIL
16 OF THE CITY OF BERKELEY,

NO: 4:14:-04916-WHA

17 Plaintiffs

**FIRST AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

18
19
20 vs.

21 UNITED STATES POSTAL SERVICE;
22 PATRICK R. DONAHUE AS POSTMATER
GENERAL OF THE UNITED STATES
23 POSTAL SERVICE; TOM A. SAMRA,
24 VICE PRESIDENT-FACILITIES
OF THE UNITED STATES POSTAL
25 SERVICE; DIANA ALVARADO, DIRECTOR,
REAL ESTATE, USPS PACIFIC REGION;

26 Defendants.
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PARTIES, JURISDICTION, AND VENUE

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1. Summary: This action for declaratory and injunctive relief seeks to prevent and enjoin defendants from implementing the decision of the United States Postal Service (USPS) to relocate and sell the Berkeley Main Post Office located at 2000 Allston Way, Berkeley, California, until and unless USPS complies with its obligations under the National Environmental Protection Act (NEPA) and National Historic Preservation Act (NHPA), and the proposed relocation and sale is authorized under those statutes. The Berkeley Main Post Office (Post Office) is a century-old city landmark listed in the National Register of Historic Places in the United States, both individually and as a contributing building to Berkeley's Civic Center Historic District. On 18 July 2013, defendants finalized their 19 April 2013 decision to relocate retail services at the Post Office. (24:3.) ("X:Y" refers to (X) the ECF document number in this action and (Y) the page within that document.) Following that final authorization, defendants commenced in August 2013 and are continuing efforts to sell the post office. (27:2; 25:1-2.) USPS has terminated its review of relocation and sale under NEPA and NHPA. Without disclosure to plaintiffs or the public, defendants on 30 April 2014 completed their decision to authorize sale based solely on a "categorical exemption" from NEPA. (26:4-5; 26-3:2.) Defendants did not initiate review under section 106 of the NHPA until 3 September 2013 (27:3.) On 31 October 2014 defendants effectively terminated their consultation with the federal Advisory Council on Historic Preservation (ACHP) and other interested parties, thereby in their eyes completing their compliance with NHPA. (27:7; 27-7:1.) USPS ended this review despite ACHP's finding that defendants had failed to support a finding of no adverse effects and failed to sufficiently ensure the property's long-term preservation. (3-9:12) This action also challenges defendants' decision to move the post office function out of its historic post office building based on the faulty assumption, rejected by the ACHP, that this federal action has no potential to affect historic properties. Accordingly, defendants have taken final action prior to authorizing relocation and sale without ensuring compliance with the NHPA and NEPA.

1 2. Plaintiff City of Berkeley (Berkeley, or City) is a municipal corporation established as a
2 public agency under California law, and within whose borders lie the Berkeley Main Post Office
3 and the Berkeley Civic Center Historic District. In its capacity as a municipal corporation, the City
4 regularly uses the Berkeley Post Office located one-half block from the Berkeley Municipal
5 Building, both as a postal facility and as a registered City landmark and component of the Berkeley
6 Civic Center Historic District.

7
8 3. Plaintiffs Mayor and Members of the City Council of the City of Berkeley are the elected
9 governing body of plaintiff City of Berkeley, whose place of business in the Berkeley Civic Center
10 Building is located one half block from the Berkeley Main Post Office. In their official capacities
11 as members of the City's governing body plaintiffs Mayor and Members regularly use the Berkeley
12 Main Post Office, both as a postal facility and as a registered City landmark and component of the
13 Berkeley Civic Center Historic District.

14
15 4. Defendant United States Postal Service (USPS), owner of the Berkeley Main Post Office,
16 is an independent establishment of the executive branch of the Government of the United States,
17 with power to be sued in its official name. 39 U.S.C. §§ 201, 401(I). Paid for and constructed for
18 the benefit of the people of the United States, the Berkeley Main Post Office is a property that
19 defendant USPS holds in trust for the American public. This trusteeship is enhanced by the
20 Constitutional status of the Post Office (Art. I, § 8, cl. 7), the extraordinary architectural quality of
21 the structure, and the Post Office's vital role as the most significant federal presence in the City,
22 uniting citizen-patrons at the juncture of Berkeley's commercial and civic cores.

23
24 5. Defendant Patrick R. Donahoe is the Postmaster General and chief executive officer of
25 the United States Postal Service, an instrumentality of the Government of the United States.
26 Defendant Donahoe is named here in his official capacity at Postmaster General.

1 6. Defendant Tom A. Samra is the Vice President-Facilities of the United States Postal
2 Service, with decision-making authority to sell the Post Office. Defendant Samra is named here in
3 his official capacity.

4
5 7. Defendant Diana Alvarado is the Director of Real Estate-Facilities Implementation of the
6 Pacific Region of the United States Postal Service, with decision-making authority to implement the
7 sale of the Post Office. Defendant Alvarado is named here in her official capacity.

8
9 8. Jurisdiction in this Court is vested by 39 U.S.C. § 409 (suits by and against the Postal
10 Service); 28 U.S.C. § 1331 (federal question, including NEPA, 42 U.S.C. § 4321 et seq., and
11 NHPA, 16 U.S.C. §470); and 28 U.S.C. § 2201 (declaratory judgment).

12
13 9. Venue in this Court lies under 28 U.S.C. § 1391, in that a substantial part of the events or
14 omissions which give rise to this complaint occurred, and the property that is the subject of this
15 action is situated, with the County of Alameda, California.

16
17 **THE RESOURCE AT STAKE**

18
19 10. The Berkeley Main Post Office was constructed 100 years ago, in 1914. This property
20 was designated a Berkeley City Landmark in 1980, listed on the National Register of Historic
21 Places in 1981, and identified in 1998 as a contributing building to the National Register-designated
22 Berkeley Civic Center Historic District. The successful 1980 nomination of the Berkeley Post
23 Office building to the National Register describes its individual historic use and significance:

24 The Berkeley Post Office ... embodies for the City of Berkeley the sense of mission
25 which the government then put into its public buildings -- "buildings which will
26 educate and develop the public taste & eventually elevate it to a higher plane"
27 The lobby, particularly, is a civic treasure Berkeley has few if any comparable
28 public spaces where citizens from all over the city come frequently and freely and
can experience the quality workmanship and civic pride that used to be part of
government building.... The authorization of a post office building for Berkeley in
1910, and its completion in 1914, symbolized the city's coming of age

1 Downtown Berkeley is still essentially the Main Street that developed in the 1910s &
2 20s, and the well-patronized post office is important in keeping it alive.

3 (3-4:25.)

4 11. The successful 1998 nomination of the Berkeley Civic Center District to the National
5 Register describes the Berkeley Post Office as a "free adaptation of Brunelleschi's Foundling
6 Hospital' in Florence" (3-2:21) -- the building that won Brunelleschi's commission to design and
7 construct the Duomo. As further summarized in the Civic Center National Register listing:

8 The United State Post Office, constructed in 1914, embodies the distinctive
9 characteristics of the Beaux Arts Classic Renaissance Revival style. The building is
10 an expression of the aesthetic ideals of the government to "educate and develop the
11 public taste and eventually elevate it to a higher plane" and was designed by the
12 Treasury Department Supervising Architect's Office headed by Oscar Wenderoth.
13 The building conveys its significance through its colonnaded recessed entry,
14 ornamentation and materials. The Post Office is related to the Civic Center by its
15 location, function, date and style. The building retains a high degree of integrity of
16 materials and workmanship

14 (3-2:36.)

15
16 12. The importance of the Berkeley Post Office as a publicly-owned and publicly-used
17 component of the Berkeley Civic Center Historic District is summarized in the opening two
18 paragraphs of the district's National Register statement of significance:

19 For almost one hundred years, Berkeley's civic center district has served the
20 needs of its government and small community. Beginning in 1899 when the first City
21 Hall building was strategically relocated to its current site, the district took over a
22 half century to plan and develop. It embodies the political trends of the nation as well
23 as the region and the city during the district's period of significance, 1909-1950.
24 Both World Wars, the Depression, and local politics influenced the district's
25 development. The district also represents the town's importance as an agricultural
26 center for the surrounding region due to the influence of the first state university, the
27 University of California, Berkeley.

28 The civic center district includes federal, regional, and local government
buildings, along with a community theater, a YMCA, and a Veteran's Memorial
Building all surrounding a central park. These diverse community buildings, located
in Berkeley's most important public space, reflect significant social aspects of
Berkeley's history, important to the citizens' health, safety, and welfare. The park
plan and its collection of civic buildings illuminate the variety of architectural and
design influences (the City Beautiful Movement, Beaux Arts and Art Deco/Moderne)
that prevailed during the first half of this century. The park layout and its buildings
were executed by renowned designers and fortunately the district is largely unaltered

1 and retains a high degree of integrity. As a result, Berkeley's Civic Center is locally
2 significant as an ensemble of harmoniously planned buildings and as a collective
3 body of civic architecture.

4 (3:2-25.)

5 **THE ADMINISTRATIVE PROCEEDINGS**

6 13. In June 2012—the same month that the National Trust for Historic Preservation
7 (National Trust) listed America's Historic Post Office Buildings on its annual list of the United
8 States' 11 most endangered places--defendant USPS issued an advisory to its postal patrons that it
9 intended to sell the Berkeley Post Office. On 31 July 2012 the Berkeley City Council unanimously
10 passed resolution 65,858-N.S., opposing the proposed sale and requesting USPS to install a one-
11 year moratorium to explore alternative dispositions other than sale and termination of postal use in
12 the building. (3-2:37-40.)

13
14 14. On 24 September 2012 ADR Environmental Group, Inc. released a "due diligence"
15 report, commissioned by USPS, which concluded that USPS's intended sale of the Berkeley Post
16 Office would require review under both NHPA and NEPA. The report represented that it was
17 performed in accordance with USPS policies for site disposal and developmental projects. The
18 report did not claim that USPS's intended sale would be exempt from compliance with either of
19 these statutes. The "facilities environmental checklist" in the report noted that the action would
20 affect "historic, cultural or archaeological resources," and was not listed as a "categorical
21 exclusion" in 39 C.F.R. part 775. (2-16; 3-3; 26:3.)

22
23 15. On 28 September 2012 the National Trust requested defendant USPS to grant it
24 consulting status under section 106 of NHPA, and objecting to further process toward the intended
25 sale without initiating review under section 106. The National Trust observed that among other
26 adverse effects, sale of the Berkeley Post Office would terminate its historic use; and advised the
27 USPS to investigate less damaging options to sale such as a lease. (3-3:17-33.) On 22 October
28 2013 USPS responded to the National Trust that its request to consult under section 106 was

1 premature. (3-3:35).

2
3 16. On 5 February 2013 defendant USPS issued its notice of intent to relocate the Berkeley
4 Post Office so that it might offer it for sale. (3-3:37.) USPS did not identify a site for that
5 relocation. On 26 February defendant USPS conducted a public hearing on its notice, at which
6 plaintiff Berkeley, the National Trust, and others appeared to oppose the intended sale.

7
8 17. On 5 March 2013 the Berkeley City Council adopted resolution 66,025-N.S. to oppose
9 the intended sale of the post office and to express support for USPS lease of the rear annex to
10 generate additional USPS income. On 13 March 2013 the National Trust presented a demand,
11 endorsed in the following month by the City of Berkeley, that defendant USPS recognize the loss of
12 historic use as a significant adverse effect under NHPA and NEPA, and prepare an environmental
13 impact statement (EIS) under NEPA to explore alternatives to USPS disposition of the Berkeley
14 Post Office (National Trust letter). (3-4:46-49.)

15
16 18. On 10 April 2013 defendant Postmaster General Donohue in communication with the
17 Mayor of Berkeley specifically announced his intent to sell the Berkeley Post Office. On 19 April
18 2013 defendant USPS issued a general notice and press release confirming USPS intent to relocate
19 the post office in order to sell the building. (3-4:38; 24:3.)

20
21 19. On 30 April 2013 plaintiffs Mayor and City Council of Berkeley appealed to defendant
22 Samra the USPS announcement of relocation and sale of the Berkeley Post Office. Plaintiff
23 Berkeley specifically incorporated the objections of the National Trust, as described in paragraph 17
24 above. (3-4:40-51.) On 20 May 2014 the National Trust made a similar appeal to defendant Samra,
25 as did other interested individuals and organizations.

26
27 20. On 18 July 2013, defendant Samra executed a document identified as the “final review
28 determination” with respect to USPS’s April 19, 2013 decision. In this document, without

1 specifying the date of relocation or place to which the post office will relocate, Samra refused to set
2 aside the USPS announcement of intent to relocate for purposes of sale. In respect of NEPA
3 compliance for relocation of the Post Office, defendant Samra declared that because USPS has not
4 yet identified a relocation site, "it is premature to evaluate potential impacts. The Postal Service
5 will comply with ... NEPA at the appropriate time." However, defendant Samra did not identify
6 that "appropriate time," and failed to ensure that this time would occur prior to sale of the Berkeley
7 Post Office. (24:3 & Ex. A.)
8

9 21. On 26 July 2013 plaintiff Mayor of Berkeley petitioned the Postal Regulatory
10 Commission to review and set aside the USPS determination to relocate for purposes of sale. On 27
11 August 2013 the Postal Regulatory Commission dismissed the appeal as premature, observing that
12 such an appeal would not be ripe until USPS has identified a date on which the Berkeley Post
13 Office will be closed and the place to which its operations will be relocated. (3-4:58-62.)
14

15 22. On 3 September 2013 defendant USPS initiated its NHPA section 106 review by
16 advising the California State Historic Preservation Officer (SHPO) that it was "considering selling
17 the property." (27:3.)
18

19 23. As early as August 2013, however, defendant USPS "undertook to sell" the Berkeley
20 Post Office. (24:3; 27:2.) On 5 October 2013 USPS listed on its website the Berkeley Post Office
21 for sale, by which time defendants had finally decided to sell the Berkeley Post Office. (25:1; 25:2.)
22

23 24. On 15 November 2013 the California SHPO communicated to USPS that it had not
24 adequately delineated the historic "area of potential effects," and that she could not agree to a
25 finding of no adverse effect until agreement was reached between USPS and a qualified holder of a
26 restrictive preservation easement on the property to be sold, which would eliminate those effects.
27 (3-5:45-48).
28

1 25. On or about 2 February 2014 the U.S. House of Representatives Appropriations
2 Committee in its report on the Financial Services and General Government Appropriation Bill,
3 2014, at 75, stated that it is “concerned by reports that the Postal Service is attempting to sell off
4 many of its historic properties without regard for the preservation of these buildings. The
5 Committee is particularly concerned that the Postal Service may not be following Section 106 of the
6 National Historic Preservation Act in the relocation and sales process of these historic buildings.”
7 (3-5:59).

8
9 26. In a separate report on the Department of Interior, Environment, and Related Agencies
10 Appropriation Bill, 2014, at page 89, the House committee observed:

11 Last year the National Trust on [*sic.*] Historic Preservation placed historic post office
12 buildings on its list of most endangered historic places. The Committee is concerned
13 that although the Advisory Council on Historic Preservation has been working with
14 the United States Postal Service for almost two years to develop a consistent,
15 transparent, consultative process to preserve these historic properties, no such
16 comprehensive process has been forthcoming. The Committee directs the Council to
17 provide, within 90 days of enactment of this Act, a report on the action plan for
18 ensuring USPS compliance with Section 106 responsibilities during the divestment
19 of historically significant properties.

20 (3-5:55.)

21 27. On 17 April 2014 the ACHP issued its 50-page *Preserving Historic Post Offices: A*
22 *Report to Congress*. <http://www.achp.gov/historicpostoffices.pdf>. (3-6:2-31; 3-7:1-24.) The ACHP
23 report noted that in contrast to the vast majority of federal-agency cases in which the line agency
24 accepted an SHPO or ACHP finding of adverse effects, USPS has consistently resolved its conflicts
25 by simply declaring no adverse effect. (3-7:4-5.) The ACHP continued, "The finding of no adverse
26 effect is appropriate only when the [preservation] covenant adequately provides for long-term
27 preservation of the property's significance (which may include characteristics beyond its
28 architectural features)." (3-7:15). And under the heading "Sale of historic postal facilities to non-
federal owners may result in an adverse effect under Section 106," the ACHP wrote, at page 41 with
emphasis added:

1 Many post offices were constructed and have operated for decades as the civic core of
2 the community, serving as community meeting places and providing the federal
3 presence in the community. The effect of this loss of traditional use on the
4 significance of the historic property should be determined through evaluation of the
5 property's significance in accordance with the National Register criteria. That is, if a
6 post office is listed or eligible for the NRHP based solely on its architecture or design
7 (National Register Criterion C), then a change of use would not constitute an adverse
8 effect. However, *if the significance is also tied to historical events (National Register
9 Criterion A), such as the traditional function of providing retail mail service to the
10 community, then changing the use of the property may constitute an adverse effect.*
11 *(36 CFR § 800.5(a)(2)(iv)).*

12 (3-7:14.)

13 28. On 28 April 2014 defendant Samra in behalf of USPS responded to the ACHP *Report to*
14 *Congress* as follows, with emphasis added: "The Use of a Building as a Post Office Does Not
15 Make it Historic.... Adopting the ACHP's concept would effectively foreclose sales of historic post
16 offices, since there would be little opportunity to mitigate or minimize the adverse effects of a loss
17 of postal use." (3-8:4.) Notwithstanding this representation, defendant USPS, as part of sales of
18 historic post office buildings, has entered into long-term leases, up to fifty years in length, to
19 maintain postal use in those buildings. (3-8:7-22.)

20 29. On 30 April 2014, USPS executed, but did not circulate for public review or provide to
21 plaintiffs or other members of the public, its "record of environmental consideration" (REC)
22 supporting its "proposed disposal" of the Berkeley Post Office. (26-3:1-3; 26:4-5.) The REC
23 recognized that the Berkeley Post Office is "listed on the National Register of Historic Places" and
24 the Berkeley Historic Civic Center District, and noted that the 18 April 2014 Facilities
25 Environmental Checklist prepared by URS Group, Inc. identified a "potential impact" from the
26 project on historic resources. Nonetheless, the REC found the project categorically exempt from
27 compliance with NEPA under USPS CATEX (e)(8) referenced in USPS' NEPA implementing
28 procedures: 79 Fed. Reg. 2102 (Jan. 13, 2014); 39 C.F.R. § 775.6(e)(8) (2014). The REC
determined that further NEPA review of the project, including preparation of an environmental
assessment, "is not required for this project." (26-3:2.) Accordingly, USPS has taken final agency

1 action prior to sale without ensuring compliance with NEPA, for which there is no adequate remedy
2 in the absence of this Court's review. See 5 U.S.C. §§ 704, 706 (Administrative Procedure Act).
3

4 30. On 9 May 2014 USPS proposed to ACHP a draft preservation covenant for the Berkeley
5 Post Office, requesting that it be the basis for a finding of "no adverse effects" from sale of the post
6 office. The draft anticipated that the City of Berkeley would serve as grantee of the covenant from
7 the purchaser of the Berkeley Post Office. In response, the City and National Trust, acting as
8 section 106 consulting parties, commented on that draft in a letter dated July 9, 2014, proposing the
9 removal of qualifiers that would neutralize the asserted protective provisions and undermine the
10 City's own authority as future land use regulator. The City and National Trust noted that the
11 qualifiers undermined the City's role in implementation and exercise of its lawful land use
12 authority, failed to ensure reasonable public access, and contained loopholes interfering with
13 effective enforcement. Referencing ACHP's conclusion in its *Report to Congress* that changes in
14 historic use of a post office can constitute an adverse effect when the National Register listing was
15 tied to that use, the City and National Trust noted that this was precisely the case with respect to the
16 Berkeley Post Office, and that the draft covenant improperly devalued that use. In addition, the City
17 and National Trust also maintained that the covenant should include a long-term leaseback to USPS
18 for continued postal service operations in the historic post office lobby. (3-8:23-31.)
19

20 31. On 11 July 2014 the California SHPO advised USPS that its proposed covenant
21 "exhibits the same flaws and inadequacies outlined in" the ACHP *Report to Congress*. The SHPO
22 also recommended that USPS incorporate the recommendations submitted by Berkeley and the
23 National Trust. (3-8:32-34.)
24

25 32. On 24 September 2014 USPS formally requested the ACHP to concur in a finding of no
26 adverse effects, based on a new covenant drafted by USPS. (3-9:2-7.) This new covenant included
27 the unprecedented provision that *USPS itself* would be the sole grantee to enforce the covenant's
28 asserted protective terms. USPS' one paragraph "explanation of why the criteria of adverse effect

1 were found inapplicable" did not mention or address the loss of historic use. (3-9:7.) Nonetheless,
2 USPS' submission also included its September 3, 2013 report concurring with the California
3 Department of Parks and Recreation that the Berkeley Post Office "appears to continue to meet"
4 National Register criterion A. (3-5:8.)

5
6 33. Defendants did not await completion of review under section 106 of NHPA before
7 entering into a purchase and sale agreement with a prospective buyer. On 22 September 2014, two
8 days before transmitting its request to ACHP, USPS entered into an agreement with a prospective
9 buyer to sell and purchase the Berkeley Post Office. (25:2; 38-2:2, 3.)

10
11 34. No earlier than 23 October but no later than 24 October 2014, USPS posted on its
12 website with respect to the Berkeley Post Office "✓ IN CONTRACT."

13
14 35. On 24 October 2014 the ACHP rejected the USPS finding of no adverse effects.
15 Focusing on USPS' proposal that it act as covenant grantee, ACHP found that term insufficient to
16 ensure the long-term preservation of the property's historic significance, as required under NHPA
17 section 106 and 36 C.F.R. §800.5(a)(2)(viii) to proceed with transfer, lease or sale of the property,
18 since it would allow for demolition "so long as the covenant holder, USPS, approves them."
19 Noting that USPS had abruptly ended discussions with consulting parties without providing
20 reasonable notice, ACHP urged USPS not to terminate consultation, and offered to assist USPS in
21 renewed discussions on covenant terms and avoidance of adverse effects. (3-9:12.)

22
23 36. On 27 October 2014 the Berkeley City Attorney requested the Chief Counsel of USPS
24 to disclose immediately any contracts or escrow instructions between USPS and a prospective
25 purchaser of the Berkeley Post Office, and a written commitment that it would not enter into a sale
26 of the post office without 30 days' advance notice. (3-9:14.)

27
28 37. On 29 October 2014 the Chief Counsel responded, claiming "under good business

1 practices" that it must "continue to keep confidential that information." Similarly, the Chief Counsel
2 asserted that providing the City with 30 days' advance notice "would be contrary to good business
3 practice." The Chief Counsel reiterated USPS' objection to "the City's insistence that the Postal
4 Service include in any preservation covenant a requirement that the Postal Service lease space in the
5 Berkeley Main Post Office for the operation of a postal facility" (3-9:16-17.)
6

7 38. On 31 October 2014 USPS responded to ACHP, declining to establish an independent
8 covenant grantee, and expressly refusing "to include the use of the property as a retail post office as
9 an historic feature of the Property." (3-9:20.) On that basis, and despite ACHP's urging to resume
10 consultation, USPS refused to revise its finding of no adverse effect and declared that "the
11 submission of this letter to you, the California SHPO and the consulting parties, concludes the
12 section 106 process." (3-9:21.) Accordingly, USPS has taken final agency action prior to sale or
13 relocation without ensuring compliance with NHPA, for which there is no adequate remedy in the
14 absence of this Court's review. See 5 U.S.C. §§704, 706 (Administrative Procedure Act).
15

16 39. On 5 November 2014 plaintiffs commenced this action, requesting a temporary
17 restraining order (TRO) and preliminary injunction. (1:1-2; 2:1-2; 3:1-23; 3-1:1-3; 3-2:1-40; 3-3:1-
18 27; 3-4:1-62; 3-5:1-59; 4:1-2; 5:1-3.) On the same date the Court entered a TRO and set hearing on
19 an order to show cause. (8:1-2.) Before that hearing took place, USPS' then-prospective buyer
20 notified USPS on 2 December 2014 of its termination of the purchase and sale agreement with
21 USPS. (38-2:2, 3.) The parties then agreed to take the hearing on preliminary injunction off
22 calendar and vacate the TRO, subject to plaintiffs' agreement to withdraw their motion for
23 preliminary injunction without prejudice, and USPS' commitment to provide plaintiffs and the
24 Court with at least 45 days' notice prior to the closing of any future sale. (38:3.) USPS through the
25 website listing properties for sale (<http://www.uspspropertiesforsale.com>) continues to list the
26 Berkeley Post Office as "for sale."
27
28

CHARGING ALLEGATIONS

Claim One: Violation of NHPA

40. Plaintiffs incorporate by reference the preceding paragraphs of this complaint and allege their contents as though fully set forth here.

41. USPS regulations specify that USPS must comply with section 106 of NHPA, Executive Order 12072, and Executive Order 13006. 39 C.F.R. § 241.1(d)(1). NHPA section 106, 16 U.S.C. §470f, requires that federal agencies take into account the effect of any undertaking licensed or approved by the federal government on any site or object included in, or eligible for inclusion in, the National Register of Historic Places. The Berkeley Post Office, owned and proposed for sale by USPS, is a National Register-listed property and a contributing building to the National Register-listed Berkeley Civic Center Historic District. Sale of the Berkeley Post Office is a project or activity under USPS's direct jurisdiction, requiring compliance with section 106. By terminating consultation prior to relocation and sale without documenting the adverse effects of the decision to close and sell the Berkeley Post Office on the building and surrounding community, USPS violated section 106.

42. Section 106 requires that the agency initiate consultation under its section 106 at the earliest possible stage of the decision-making process – in this case, at the time when a *proposed sale of historic property* is announced, not when the property is formally listed for sale. 36 C.F.R. § 800.3(e)-(f). NHPA's "early planning" requirement is intended to assure the public that agencies of the federal government will consider "a broad range of alternatives" in order avoid harm to historic properties. *Id.* § 800.1(c). USPS must complete its section 106 consultation before offering to sell the historic post office building. Taking such a consequential decision before consultation is completed precludes consideration of viable preservation alternatives and stifles public input. 16 U.S.C. § 470f. By prematurely terminating consultation, USPS violated section 106.

1 their contents as though fully set forth here.

2
3 48. NEPA requires federal agencies, including the USPS, to take a hard look at the
4 consequences of all proposed “major federal actions significantly affecting the quality of the human
5 environment.” 42 U.S.C. §4332(2)(C). Section 102(2) contains “action-forcing” provisions to
6 make sure that federal agencies act according to the letter and spirit of NEPA. 40 C.F.R.
7 §1500.1(a). Under NEPA, “human environment shall be interpreted comprehensively” to include
8 “physical environment and the relationship of people with that environment.” *Id.* § 1508.14 The
9 NEPA procedure followed by federal agencies “must insure that environmental information is
10 available to public officials and citizens before decisions are made and before actions are taken.”
11 *Id.* §1500.1(b).

12
13 49. NEPA regulations adopted by the USPS, like those of the Council on Environmental
14 Quality, recognize that an environmental assessment (EA) and EIS must be prepared whenever its
15 proposed action is “significant” in context or intensity. 39 C.F.R. §775.6 (a); 40 C.F.R. §1508.27.

16
17 50. The decision of USPS to move the post office function out of Berkeley’s historic post
18 office building and proceed to sale represent a major federal action affecting the human
19 environment, requiring full compliance with NEPA. 40 C.F.R. §1508.27(b) (“may cause
20 destruction of significant...cultural, or historical resources.”) This action will produce major
21 changes in context and intensity on several levels--in the building’s own use, in its contribution to
22 the Berkeley Civic Center Historic District, and in its cumulatively significant impact in connection
23 with numerous other historic post offices proposed for closure and sale throughout the United
24 States. Accordingly, an EA and EIS should have been prepared and circulated for public review.

25
26 51. To comply with NEPA, assessment of the relocation and sale must take place at the
27 earliest possible moment to ensure that impacts are acknowledged, alternatives identified, and both
28 the proposal and impacts are assessed *before* a decision is made and in time to allow meaningful

1 public participation. 40 C.F.R. § 1502.5 (EIS "shall be prepared early enough" to contribute to
2 decision-making and "not be used to rationalize or justify decisions already made"). Assessment
3 after relocation will prove meaningless, because at that time the remaining alternatives will only ask
4 how to deal with an empty, publicly inaccessible building. USPS violated NEPA, and the NEPA
5 regulations of USPS and CEQ, by failing to prepare either an EA or EIS before completing its
6 decision-making.

7
8 52. Ample and overwhelmingly substantial evidence supports the conclusion that moving
9 the post office function out of the current location and selling the Berkeley Post Office may produce
10 a major adverse impact on the environment, which includes the loss of public access and use of an
11 historic resource, and degradation of the integrity of an historic civic center district. This evidence
12 of significant effects was presented at the USPS public hearing in Berkeley on 26 February 2013,
13 referenced in the unanimously adopted resolution No. 66,025 N.S. of the Berkeley City Council,
14 and discussed in other documents noted above. USPS curtailed consultation and proceeded to final
15 action in contravention of the advice of ACHP that USPS had failed to support a determination of
16 no significant effect. Without a remedy from this Court, the negative effects of USPS's action will
17 directly and irreparably harm the City and its constituents.

18
19 53. USPS cannot rationalize its failure to comply with NEPA prior to sale by insisting that
20 its action merely addresses "relocation" of retail services. The "major federal action" -- the "whole
21 of the action" -- defined by the USPS in its notice also applies to sale ("If this relocation is approved,
22 USPS anticipates selling the current Berkeley Main Post Office building." (3-3:37)). The action
23 cannot be segmented into relocation only when the driving force for that action is the intended sale.
24 40 C.F.R. § 1508.25 ("connected actions ... should be discussed in the same impact statement").

25
26 54. USPS cannot rationalize its failure to comply with NEPA by claiming "categorical
27 exclusion" to escape the duty to prepare an EIS. The regulations of both the Council on
28 Environmental Quality and U.S. Postal Service itself do not allow categorical exclusions in cases

1 such as this, representing "extraordinary circumstances in which a normally excluded action may
2 have a significant adverse effect." 40 C.F.R. § 1508.4; 39 C.F.R. § 775.6; see also 39 U.S.C. § 404
3 (no Congressional NEPA exemption for closure or consolidation of post offices). Nonetheless,
4 without informing plaintiffs or other consulting parties or the interested public, USPS completed
5 and relied on a "categorical exclusion" as its purported satisfaction of NEPA duties. (26-3:1-3;
6 26:4-5.) Moreover, USPS' reliance upon its purported categorical exclusion is contrary to the
7 statutory and regulatory guidance of CEQ and ACHP in their jointly-issued publication *NEPA and*
8 *NHPA: A Handbook for Integrating NEPA and Section 106* (September 2013). (33:1-51.) That
9 publication provides:

10 If the proposed action is a type of undertaking with the potential to affect historic
11 properties, the agency initiates the Section 106 consultation process by identifying
12 the appropriate SHPO/THPO and other parties with an interest in the effects of the
13 undertaking on historic properties, and consults to determine the area of potential
14 effects, and the scope of identification efforts, consistent with 36 C.F.R. Part 800.
15 *The Section 106 consultation can assist an agency in determining whether*
16 *"extraordinary circumstances" related to historic properties are present.*
17 *"Extraordinary circumstances," in which a normally excluded action may have a*
18 *significant environmental effect, typically consider the "degree to which the action*
19 *may adversely affect districts, sites, highways, structures, or objects listed in or*
20 *eligible for listing in the National Register of Historic Places or may cause loss or*
21 *destruction of significant scientific, cultural, or historical resources."*

22 When the Section 106 process concludes there are no historic properties present in
23 the area of potential effects for the proposed action or that the proposed action will
24 have no effect or no adverse effect to historic properties, the agency may proceed
25 with the CE, *if there are no other extraordinary circumstances, after documenting*
26 *completion of its Section 106 requirement.* However, if an agency determines there
27 may be adverse effects to historic properties, it must consider whether the adverse
28 effects constitute "extraordinary circumstances" that merit further analysis in an EA
or EIS, either alone or in combination with other environmental effects. When the
agency resolves the adverse effects to historic properties through the Section 106
process by avoiding, minimizing, or mitigating them such that the potential adverse
effects no longer constitute "extraordinary circumstances," it may still meet its
NEPA responsibilities through a CE. The agency documents the Section 106 analysis
to support the application of the CE, and *the Section 106 analysis should be*
completed before or concurrent with the use of a CE. If an agency uses CE
documentation as its decision document and the proposed action constitutes a type of
undertaking with the potential to affect historic properties, then it would have to wait
until the Section 106 process was concluded to issue such a CE document.

(33:20-21.)

- 1 4. Grant an injunction against defendants proceeding with any relocation or sale of the
- 2 Berkeley Main Post Office unless and until the USPS fully complies with NEPA,
- 3 including the preparation of an environmental assessment and EIS;
- 4 5. Award plaintiffs costs and attorneys' fees pursuant to the Equal Access to Justice Act
- 5 28 (U.S.C. §2412), NHPA (16 U.S.C. § 470w-4), and any other applicable
- 6 requirements of law or equity; and
- 7 6. Issue any additional relief that the Court deems just and proper.

8
9 DATED: December 30, 2014

Respectfully submitted,

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26
27
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