

Office of the City Attorney

October 14, 2014

***By first class mail and e-mail to [chall@achp.gov](mailto:chall@achp.gov)***

Ms. Caroline D. Hall, Assistant Director  
Federal Property Management Section  
Office of Federal Programs  
Advisory Council on Historic preservation  
401 F. Street NW, Suite 308  
Washington, D.C. 20001-2637

Re: Berkeley Main Post Office, 2000 Allston Way, Berkeley, CA 94704  
Comments of City of Berkeley and National Trust on the USPS's Request to  
Review Finding of No Adverse Effect

Dear Ms. Hall:

The City of Berkeley (City) and the National Trust for Historic Preservation (National Trust) submit the following comments on the request of the United States Postal Service (USPS) for the Advisory Council on Historic Preservation (ACHP) to review its finding of no adverse effect from the proposed sale of the Berkeley Main Post Office (Property). As we explain below, we believe that a finding of No Adverse Effect is inconsistent with the Section 106 regulations and that the covenant proposed by the USPS is an inadequate restriction that fails to ensure the long-term preservation of the Property's historic significance.

### **1. Incomplete Section 106 Process**

The City and the National Trust are consulting parties to the Section 106 process for the disposition of the Property, and we are committed to ensuring that it is properly protected and preserved.

On February 7, 2014, the USPS circulated a draft preservation covenant for the Property to various consulting and other parties, including the City of Berkeley and the National Trust, and requested comments from all parties by February 24<sup>th</sup>.

The City worked with the National Trust to prepare a set of joint comments, and submitted them on February 24, 2014. Because they were quite extensive, these comments took the form of a proposed replacement covenant (Attachment 1).

On May 7, 2014, the USPS circulated a revised covenant and requested that comments be submitted by May 27<sup>th</sup>. Attachment 2 is a redlined version of the May 7<sup>th</sup> covenant, showing how it differs from the City's and National Trust's covenant. The USPS subsequently extended the May 27<sup>th</sup> deadline to July 11<sup>th</sup>, to allow time for the Berkeley City Council to consider the May 7<sup>th</sup> covenant. On June 24<sup>th</sup>, the City Council did so, and gave staff direction.

The City's and National Trust's joint comments (Attachment 3) were provided to the USPS on July 9<sup>th</sup>. Since that date the USPS and the City's representatives have discussed the City's and National Trust's July 9<sup>th</sup> comments, and we had expected (and still hope for) a revised draft covenant reflecting that discussion.

The covenant submitted by the USPS for review by the ACHP is a far cry – and in our view a step backwards – from both the covenant we had initially proposed (Attachment 1) and the revised May 7<sup>th</sup> covenant proposed by the USPS (Attachment 2). We do not believe it is appropriate for the USPS to submit a wholly different covenant under which it names itself as the grantee, while still negotiating with the City and National Trust on a covenant in which the City would be the grantee.

Furthermore, the new covenant (Covenant) is flawed and does not provide for adequate restrictions that ensure the long-term preservation of the Property's historic significance for three reasons: first, the USPS has no experience administering, monitoring or enforcing covenants; second, the Covenant provides for automatic approval for changes to the Property if the USPS fails or declines to respond to requests from property owners; and third the Covenant invokes both the Section 106 process and the use of the Secretary of the Interior's Standards for the Treatment of Historic Properties, but in a way that will create confusion and ambiguity in the Covenant's interpretation or administration.

## **2. USPS As Covenant Holder**

Unlike all prior versions reviewed by the City and the National Trust, the Covenant submitted to the Council calls for the covenant holder to be the USPS, rather than the City. This proposed solution was entirely unexpected to the consulting parties. We know of no precedent for the USPS accepting the responsibility to monitor and enforce a preservation covenant on a historic property it has sold.

Throughout our consultation with the USPS it became clear the USPS had little or no experience in drafting preservation restrictions for its properties; furthermore, their lack of experience in this area combined with the shallow protection they initially sought to provide for the Property, leaves the City and the National Trust to conclude that the USPS would not take seriously its role as holder of the Covenant and honor its administration, monitoring, and enforcement obligations.

Indeed, USPS cannot square its previous claims to lack competence in real estate management with its latest assertion that it can act as responsible covenant holder. In its final decision on relocation of retail services in Berkeley, issued on July 18, 2013, the USPS Vice President Tom A. Samra stated "the Postal Service's mission is to provide postal services in an efficient manner, and increasing its role as a landlord diverts from a

proper focus on that core mission. In addition, the Postal Service is legally restrained from offering additional non-postal services.” This statement was cited as the rationale for the agency’s refusal to consider leasing opportunities as required by Section 111 of the National Historic Preservation Act, as the consulting parties had requested<sup>1</sup>.

Currently, the USPS has not provided consulting parties with any assurances that the Covenant it proposes to hold on the Property would be monitored and enforced in a way that would assure long term protection of the property. We encourage the ACHP to require the Postal Service to demonstrate its commitment to the preservation of the building by creating a specific endowment for the necessary oversight of the Covenant (or any covenant they acquire through this process), as is common practice for easement holding organizations across the country, and to also require the USPS to explain the steps it will take to acquire the staff expertise needed to administer the easements in light of the USPS’s financial challenges.

### **3. Public Art**

The USPS proposes to retain ownership of the art works in the lobby (the mural and bas relief sculpture, hereinafter “Mural and Relief”), and to loan them to the buyer of the building. The manner in which the Covenant addresses this issue raises serious concerns.

The Covenant is essentially silent on the buyer’s obligations with respect to the art work and public access thereto, and leaves these issues for a future agreement that will be solely between the USPS and the purchaser. The loan agreement in the USPS’s submission to the ACHP,<sup>2</sup> however, has several major flaws. First, the amount of insurance required (\$100,000) is insufficient given the size of the Mural and Relief and the fact that the Mural and Relief are also incorporated into the building itself. Second, limiting public access to the Mural and Relief to one day per month is severely restrained and grossly inadequate public access, given the current level of access afforded to the public, which is generally six days per week. Third, given the expected lifetime of the building, the ability to terminate the loan and remove the Mural and Relief after 25 years defeats the whole purpose of the loan and the Covenant. Finally, the maintenance standards imposed on the owner of the property reward an irresponsible owner for inadequately maintaining the Mural and Relief. The primary “remedy” is for the buyer to remove the Mural and Relief and transport it to the USPS at its own cost. In other words, a buyer who wishes to be rid of the Mural and Relief need only deface it and ship it away. The lack of an effective remedy (or deterrent) in the loan agreement supports our position that the Mural and Relief, and public access thereto, should to be addressed in the Covenant, which must provide more robust remedies.

The USPS should consider using the language from the Bronx Post Office Covenant (Attachment 4) to address the protection of the Mural and Relief located on the Property. The provisions of the Bronx Post Office Covenant provide much more clarity on the property owner’s obligations regarding the Mural and Relief, and more clearly spell out

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<sup>1</sup> We note that the USPS did not initiate consultation under Section 106 for its relocation decision, to the considerable objection of consulting parties.

<sup>2</sup> The loan agreement is an attachment to the USPS letter of September 13, 2013 from the USPS to the California SHPO, which in turn is part of Exhibit 1 to the USPS’s letter to the ACHP.

the USPS's obligations. We recommend adopting the following language, which was adapted from the Bronx Post Office Covenant:

the Grantee and its heirs, successors and assigns covenant and agree to maintain and preserve the Murals, individually and collectively, in such locations, and in the same or better condition and state of repair as depicted in the photographs at Exhibit C and in accordance with the terms and conditions of this Preservation Covenant while such Murals remain on the Property. While this obligation to maintain and preserve is reflected in a loan agreement between Grantee and the United States Postal Service (USPS), a copy of which is attached hereto and incorporated herein at Exhibit D ("Mural and Relief Loan Agreement"), in the absence or upon the termination of such Mural Loan Agreement or a successor loan agreement, this obligation to maintain and preserve the Murals is not waived, terminated, or released. Grantee shall ensure that any restoration of the Murals shall conform to the American Institute for Conservation of Historic and Artistic Works (AIC) code of ethics and guidelines for practice and the National Park Service conservation guidelines, as these may be amended, replaced or superseded from time to time. Grantor shall maintain damage insurance covering the Murals to their full appraised value, as determined initially on or immediately preceding the Effective Date of this Preservation Covenant by an accredited art appraiser. Grantee shall have such appraised value updated by an accredited art dealer at least every five years measured from the Effective Date of this Preservation Covenant. The damage insurance shall be an "all risk", wall-to-wall policy subject to only the following standard exclusions: wear and tear, gradual deterioration, terrorism, and war. To the extent these insurance requirements conflict with the terms of any mural loan agreement, including the Mural and Relief Loan Agreement attached as Exhibit D hereto, the requirements of this paragraph shall control, and the Grantee shall be bound by them.

#### **4. Public Access**

Except through its reference to the loan agreement, the Covenant is silent as to public access to the Property. The ability for the public to have an opportunity to experience the protected interior of the building – – – is important not only to the public's understanding and appreciation of the Mural and Relief, but also to other aspects of the building that were the basis for its listing on the National Register. The City/National Trust proposed a robust requirement for public access to allow the public to view and experience the lobby of the building. The Covenant submitted to the ACHP deletes any reference to public access. Both the City and the National Trust believe that the Covenant must have some guarantee of adequate public access to the lobby, which has existed as a public space for almost 100 years.

#### **5. Inappropriate Limitation on Grantee's Authority**

In a number of instances the USPS sought to narrow its authority over changes to the Property, putting character defining features of the Property at risk of irreversible

changes or alterations. The purpose clause of the Covenant, paragraph D., was weakened because it constrains the Covenant to preventing only changes that “significantly” affect or interfere with the Preservation and Conservation Values of the Property. The modifier “significant” or “significantly” is also used elsewhere to weaken the Covenant. In paragraph 1(c) the use of the phrase “significantly affect[s]” interjects a level of ambiguity into the Covenant that would make it difficult for the covenant holder to know or be able to control when an alteration would be significant enough to warrant review by the holder. The standard should be that *any* construction or alteration of the protected elements of the Property would trigger a review. The use of the modifier “significant” in paragraph 1(d)(ii) also raises the same issue. As written, the Covenant suggests that the owner is the one who decides whether a proposed change “significantly affects” the Preservation and Conservation Values. This approach was not acceptable to the City or the National Trust, and should not be acceptable to the ACHP. The National Trust as administer of over 100 easements across the country and as a leading authority on the use of preservation restrictions, understands the consequences associated with using such qualifiers, which could be exploited by a property owner to remover or alter protected elements of the Property and would expose the easement holder to costly litigation.

## 6. Possible Loophole for “Adaptive Reuse”

Recital E of the Covenant contains the following language:

The Grantor intends to propose plans for adaptive reuse and rehabilitation of the Property in a manner that may require a substantial level of improvements, all of which improvements shall be done in accordance with the *Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings* (National Park Service, 1997 et seq) (“Secretary of Interior’s Standards”) and subject to applicable land use laws, rules and regulations. Such improvements may affect the Protected<sup>3</sup> Values, including, without limitation, the height, mass and scale of the building on the Property.

This language creates ambiguity as to whether the Grantor’s changes to the Property under its adaptive reuse and rehabilitation plan *must* be accepted because they were anticipated as a condition of imposing the Covenant on the Property. Moreover, while this paragraph seems to anticipate that modifications associated with adaptive reuse will be consistent with the Secretary of the Interior’s Standards, it also appears to contradict itself by stating that “[s]uch improvements may affect the Protected Values, including, without limitation, the height, mass and scale of the building on the Property.” Finally, the Secretary of the Interior’s Standards provide guidance regarding the rehabilitation of historic buildings and are not necessarily dispositive of whether a particular approach is the correct approach. As such, the Covenant holder should be in the position of interpreting and determining whether any adaptive reuse is or is not consistent with the Secretary’s Standards to ensure that the Preservation and Conservation Values of the Property are protected.

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<sup>3</sup> Presumably this was intended to be “Preservation and Conservation,” not “Protected.”

In addition, this language should be separated from Recital E and become a part of its own recital clause which should make clear that any changes associated with adaptive reuse will be subject to the Grantee's review and approval to the same extent as any other changes, which would close the existing loophole that the proposed language appears to create.

## **7. Standard for establishing baseline condition**

Recital D states a new standard for assessing the condition of the Property. In the National Trust's experience, especially with a building that has deferred maintenance issues, the Covenant should establish that the owner must maintain the property in its "current or better condition." This standard was removed from the Covenant by the USPS. Incorporating this standard into the Covenant ensures that if a property is not in good condition when a covenant is imposed and the property is later rehabilitated, then the property owner will be responsible for maintaining the property in the improved condition. Given the state of portions of the building and Mural and Relief, maintenance and conservation issues already exist that either need to be addressed by the Post Office or that the Post Office should require a prospective purchaser to repair as a condition of sale. In order to determine what issues need maintenance, the Post Office should perform a conditions assessment of the building, which would reveal any critical work that would be needed to repair damaged or deteriorated elements of the Property. Prospective buyers should then be required to make these repairs as a condition of the sale of the Property so that the Property is put into a good condition. Using the language proposed by the City and the National Trust would ensure that whatever maintenance issues are resolved during the rehabilitation of the building would become the baseline condition by which the easement could be enforced in the future.

## **8. Maintenance and Repair**

A reference to Paragraph 1(c) was added to Paragraph 1(d) ("Maintenance and Repair"), but it is unclear why this cross-reference was provided in this paragraph. With regard to the Grantor's maintenance obligations, the determination whether the use of in-kind materials is possible should not be at the discretion of the property owner. By granting this sort of discretion to the property owner, the maintenance clause could be used to make changes or alterations to the Property if the property owner determined that it is not feasible to use an in-kind material while performing routine maintenance. Furthermore, no definition of "feasible" is provided, so that either party could misunderstand or disagree as to what is meant by the term. Protection could be provided by a definition of "feasible" that relates to engineering or architectural feasibility, not merely cost or preference.

## **9. Notice of Offers to Sell**

The USPS also deleted a provision requiring notice to the grantee of offers to sell the building. On a purely common-sense, practical basis, it is vital that the Covenant holder be apprised of potential sales. Because the Covenant is a perpetual restriction on the Property, the holder of the Covenant will have an ongoing relationship with all current and future owners. Giving notice to the Covenant holder enables the holder to explain

the terms and obligations imposed by the Covenant to potential buyers so that they are fully aware of the restrictions on the Property before purchase.

## **10. Remedies**

A right of notice, prior to asserting any legal action against the property owner, was included for any mortgagee of the Grantor in the Covenant. This additional right is unnecessary, burdensome, and could delay the USPS's ability to enforce its rights under the Covenant or could delay or complicate a third party's enforcement rights. Because the Property will not be encumbered by a mortgage at the time the Covenant is put in place its terms and restrictions will be superior to any subsequent conditions placed on the title, such as any rights in the Property asserted by a later mortgagee. This is not an uncommon situation for a mortgagee and will be revealed through the mortgagee's legal due diligence prior to asserting any interest in the Property through a mortgage or deed of trust.

In addition to the third party enforcement rights given to the residents of the City of Berkeley under the Covenant, the City itself should also be named as a party with potential enforcement rights.

## **11. Use of the Property**

Finally, we come to the issue of future use of the Property. The USPS has consistently refused to recognize the fact that the *use* of the Property, as well as its physical characteristics, forms an element of its significance and that the loss of this use constitutes an adverse effect. The ACHP's Report to Congress concludes in finding number six that change of a post office's historic use can constitute an adverse effect when the National Register listing of the property is tied to that use. 36 CFR § 800.5(a)(2)(iv). In the case of this Property, post office use framed the significance in its 1980 National Register nomination:

The Berkeley Post Office ... embodies for the City of Berkeley the sense of mission which the government then put into its public buildings – “buildings which will educate and develop the public taste & eventually elevate it to a higher plane” .... The lobby, particularly, is a civic treasure .... Berkeley has few if any comparable 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.... Downtown Berkeley is still essentially the Main Street that developed in the 1910s & 20s, and the well-patronized post office is important in keeping it alive.

Based on the National Register nomination in this case, the use of the Property as a post office – the use for which it was designed and constructed – is itself an integral Preservation and Conservation Value. This is particularly the case for the lobby, which as noted above was designed as a public space for civic use. We stand by our position that an adverse effect can be caused by loss of use and must be recognized in the Section 106 process in order to craft appropriate mitigation measures. This requirement

does not, however, mean that the historic use of the entire Property must continue to be its future use. As shown by the example of the former Main Post Office at 400 North Ervay in Dallas, an historic post office can be converted to other uses while retaining through a long-term lease postal service and public access in an historic lobby. The USPS has an obligation under Section 106 (and NEPA) to consider the loss of the historic use as an adverse effect to be avoided or mitigated.

The USPS deleted a provision in the Covenant that was drafted to address the use issue by the City and the National Trust (Attachment 1, paragraph 1(i)). The intention of the paragraph was to ensure that if the USPS continued to have a presence in Berkeley, such as a small retail space that provides limited service to the public, the USPS should opt to lease space within the Property rather than in another location elsewhere in the City. The USPS, in its April 22, 2013 relocation announcement<sup>4</sup>, indicated that it intended to relocate elsewhere in Berkeley, which suggests that providing some level of service at the existing location would be a possible option and something that the USPS stated in its relocation announcement. Again, since the civic character of the front lobby and adjoining spaces in the front of the Property are particularly recognized as a Preservation and Conservation Value, continuation of those uses would be the most compatible future use of that portion of the Property.

The Covenant should also include a more general use approval provision, which is common in most preservation covenants. This provision would provide the Covenant holder with the right to review any potential change in use of the Property to ensure that any change is consistent with the building's historic significance. Because this is a common provision in many preservation covenants across the country, we would propose that the following language, paraphrasing a similar provision in the National Trust's Model Easement, be added to the Covenant:

Grantor shall not change the use of the Property to another use other than a civic use allowing regular public access to the lobby of the Property without the written consent of the Grantee. In making its determination regarding a proposed change in use, the Grantee must determine that the proposed use: (i) does not impair the Conservation and Preservation Values of the Property; and (ii) does not conflict with the purpose of the Covenant.

## **12. Conclusion**

The consultation process for the Property is incomplete at this point in time. While the City and the National Trust realize that the USPS may feel that the Section 106 process has taken too much time, the parties could have already reached agreement on acceptable terms for the Covenant if the USPS was seriously interested in protecting the Property using modern and common place preservation restrictions (which are regularly used in other covenants across the country). Earlier compliance with NEPA's environmental assessment requirements would also have facilitated this result. The City and National Trust look forward to progress from this point with these precepts in mind.

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<sup>4</sup> [http://about.usps.com/news/state-releases/ca/2013/ca\\_2013\\_0422.htm](http://about.usps.com/news/state-releases/ca/2013/ca_2013_0422.htm)



If you have any questions about our comments, please feel free to contact Zach Cowan for the City of Berkeley at [zcowan@cityofberkeley.info](mailto:zcowan@cityofberkeley.info) or Brian Turner for the National Trust at [bturner@savingplaces.org](mailto:bturner@savingplaces.org).

Sincerely,

Very truly yours,

City of Berkeley



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By: Zach Cowan  
City Attorney

National Trust for Historic Preservation



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By: Brian Turner  
Senior Field Officer & Attorney, San Francisco Field Office

cc: Tom Samra, Vice President, Facilities, USPS  
Sharon Freiman, Chief Counsel, Procurement and Property Law, USPS  
Reid Nelson, Advisory Council on Historic Preservation  
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Paul W. Edmondson, Chief Legal Officer, National Trust for Historic Preservation  
Antonio Rossmann

**PRESERVATION COVENANT**  
**2000 Allston Way, Berkeley, CA**

In consideration of the conveyance of certain real property and the buildings thereon, located at 2000 Allston Way in the City of Berkeley, the County of Alameda, State of California, as more fully described in Exhibit A ("Property"), \_\_\_\_\_ ("Grantor") and the City of Berkeley ("City") agree as follows.

**RECITALS**

- A. The Property was originally developed in 1914 and has been used as the Berkeley Main Post Office ever since.
- B. The Property is located in an urban setting within downtown Berkeley's Civic Center District, on an approximately 1.11 acre corner lot bounded by Allston Way to the front (to the north), Kittredge Street to the rear (to the south), Milvia Street to the street side (to the west), and adjacent lot line to the interior side (to the east). The reinforced concrete Second Renaissance Revival-style Berkeley Main Post Office building, which was built in 1914, is rectangular in plan: front section (customer lobby, offices, and part of work area) facing Allston Way, two stories plus basement, with hipped red tile roof; and rear section extending south along Milvia Street one-story plus basement, with flat roof (northernmost 35 feet original; southward addition c.1932). A historic period rear addition was built in 1932. Changes to the Property have been executed with great care. A mural by Suzanne Scheuer was added to the lobby in 1936 and completed in 1937 and depicts an allegory of the life in Berkeley in the Mission, rancho, and early American eras. A limestone bas-relief sculpture by artist David Slivka was added in 1937 that commemorated the contributions of postal workers. The Property was designated a City of Berkeley Landmark in 1980, and was listed on the National Register of Historic Places in 1981. It is also a contributor to the City of Berkeley's designated Civic Center Historic District.
- C.
  1. The historic exterior features of the property are determined to be the following: height, mass and scale of building; hipped roof sheathed in tile with wide overhang; exterior siding, including poured concrete, limestone, terra cotta trim, and rusticated cast blocks at corners; rounded corners of two-story portion of building on all four sides; arcade of eleven high round arches on plain Tuscan columns; loggia with groin vaults; marble on floor and wainscot of loggia; original oak frame pane arches with functioning transom windows; original double-hung windows with panes grouped in 3 vertical divisions; low cement windowsills with wave decoration; ornate groove along the top of the exterior walls; pilasters along the primary façade; pilasters flanking the entrance doors; entrance doors—three sets of paired oak and glass doors with brass fittings; columns with pilasters capped with extremely stylized Corinthian capitals; ornamental features of the exterior: small terra cotta frieze which tops the second story, wide terra cotta beltcourse with dentils, swags, medallions, and wave patterns below

the 11 second story windows and around the entire building; cornice soffit; terra cotta shields above rusticated cast blocks; two rows of curved wooden brackets framing rectangular panels at eave soffit and soffit paint colors; wrought iron railings with heraldic shields and diagonal rope pattern; arched windows with terra cotta sills on one-story portion of building, and numerous windows continuing on west and east side with heraldic medallions and other decorative elements; the David Slivka 1937 bas-relief sculpture on the east end wall; and granite entry steps forming “plaza” at main (north) entry.

2. The historic interior features of the property are determined to be the following: glazed arches between workroom and lobby; coffered lobby ceiling; individual service counter windows with detailed oak framing, brass grilles and feather-chip glass grilles and service window doors; the Suzanne Scheuer mural over the former Postmaster’s office door; arches around postmaster’s door and service windows; marble baseboards and wainscot; columns in lobby and small and large Corinthian capitals cast ceramic and oak; band joining all columns and capitals of lobby (currently painted brown); carved oak woodwork on columns between entrance doors, windows, service bays and vestibule; entrance door oak frames with modified Corinthian capitals; oak and glass vestibule at center entrance; carved oak and triangular dentilled pediment over Postmaster’s former office door (now elevator door) and lettering; Post office boxes; original bulletin cases; oak casework with movable metal grills; marble staircase, oak handrail, and ornamental metal end pieces and railings; landing of marble staircase with mosaic tiles and black, white, and red fretwork around the edges; and second floor marble and tile flooring.
3. Collectively, the features listed in subparagraphs (a) and (b) of this Recital, as more fully set forth in Exhibits B and C, represent the “Preservation and Conservation Values” of the Property. In addition, one of the Preservation and Conservation Values of the Property is its use, since its construction, as the Main Post Office for the City of Berkeley.

D. It is the Purpose of this Covenant to assure that the Preservation and Conservation Values will be retained and maintained forever substantially in their current or better condition and to prevent any use or change of the Property that will significantly impair or interfere with them.

E. The United States Postal Service owns a certain mural *Incidents in California History* by Suzanne Scheuer (the “Mural”) and the David Slivka relief sculpture of postal workers, 1937, on the east loggia end wall. Notwithstanding any sale or transfer of the Property, the Mural shall continue to be owned by the United States Postal Service. As a condition to the sale of the Property, the United States Postal Service intends to enter into a loan agreement (“Loan Agreement”) with the Grantee, which **Loan Agreement** will be binding upon successor and assigns of Grantee and which

**Comment [zc1]:** This paragraph may need to be modified depending on the disposition of the Property.

Loan Agreement will require the Grantee to undertake certain actions to preserve and protect the Mural and provide public access thereto.

F. This Covenant is made pursuant to California Civil Code Sections 815 *et seq.*

## COVENANT

**Comment [zc2]:** If the USPS retains ownership of part or all of the property, there will need to be an explicit waiver of sovereign immunity, to allow enforcement by the City.

### 1. Covenants of Grantor.

- a. Compliance with Secretary of Interior's Standards. The grantor under the deed attached hereto as Exhibit A (hereinafter "Grantor") hereby covenants with the City of Berkeley ("City") in perpetuity on behalf of itself, its heirs, successors and assigns at all times to rehabilitate, maintain and preserve the Property in accordance with the recommended approaches of the *Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings* (National Park Service, 1997) ("Secretary of Interior's Standards") and any implementing regulations or policies, in order to preserve those qualities that resulted in the listing of the Property on the National Register of Historic Places, the features identified in the Section 106 analysis prepared by the USPS and submitted for review on September 3, 2013, and any other features that may be identified for preservation by the City of Berkeley Landmarks Preservation after a noticed public hearing, pursuant to Berkeley Municipal Code Chapter 3.24. Grantor's compliance with this requirement shall be determined by the City of Berkeley in its sole discretion.
- b. Demolition. The Grantor further covenants not to demolish any building(s) on the Property, or to cause or allow such building(s) to be demolished.
- c. Alterations. No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken that would affect the Preservation and Conservation Values of the Property without prior consultation with, and the express permission of, the City. In addition, Grantor shall maintain the Property in such a manner as to preserve the Preservation and Conservation Values, as determined by the City.
- d. Maintenance. Grantor agrees at all times to maintain the Preservation and Conservation Values in the same or better condition and state of repair as that existing on the effective date of this Covenant. Grantor's obligation to maintain shall require replacement, repair, and/or reconstruction by Grantor whenever necessary to preserve a Preservation or Conservation Value, or any feature identified in Exhibits B and C, in the same or better structural condition and state of repair as that existing on the date of this Covenant, as set forth in \_\_\_\_\_. This right of repair is subject to the following qualifications.

- i. The right to maintain and repair shall mean the use by Grantor of in-kind materials and colors, applied with workmanship comparable to that which was used in the construction or application of those materials being repaired or maintained, for the purpose of retaining the appearance and construction of any building(s) on the Property in good condition.
  - ii. The right to maintain and repair shall not include the right to make changes in appearance, materials, colors, and workmanship from that existing prior to the maintenance and repair without the prior written approval of Grantee the City upon a determination that such changes are consistent with the Secretary of Interior's Standards.
  - iii. The right to maintain and repair shall not include the right to replace historic materials unless such historic materials are significantly deteriorated or damaged.
- e. Request for Approval by Grantee. When the Grantor wishes to undertake any construction or alterations on the Property that could affect the Preservation and Conservation Values, it shall submit in writing to the City for its approval information (including plans, specifications, and designs where appropriate) together with a specific request identifying the proposed construction or alterations. In addition, Grantor shall also submit to the City a timetable for the proposed construction or alterations that is sufficient to permit the City to monitor such activity. Grantor shall not make changes or take any action subject to the approval of the City unless expressly authorized in writing by an authorized representative of the City.
- f. Replacement and Repair. Subject to the casualty provisions of Paragraphs \_\_\_ and \_\_\_, the obligation to maintain shall require replacement, repair, and/or reconstruction whenever necessary in accordance with the standards stated in Paragraph \_\_\_.
- g. Signs. Grantor may erect or allow to be erected any external signs that are:  
(i) consistent with the City Sign Ordinance (Title 20 of the Berkeley Municipal Code); and (ii) approved by the City as appropriate for the Property given the obligations set forth in this Covenant.
- h. Public Access to Lobby. Grantor shall make, at a minimum, the lobby on the first floor of the 1914 building, as well as the stairway to the second floor and the marbled and tile landing at the top of the stairway publicly accessible during normal business hours (no less than Monday – Friday 9:00 am to 5:00 pm). In addition, the large common and circulation spaces should be opened to the public for viewing at least twice per year, under suitable supervision. Grantor may have a representative present during such public access, and access may be subject to reasonable restrictions to

**Comment [zc3]:** If the retail space is not retained by or leased by USPS.

ensure security of the property. At other reasonable times, upon request of the City made with reasonable notice to Grantor, persons affiliated with educational organizations, professional architectural associations, and historical societies shall be admitted to study the Property. In addition, the City may make photographs, drawings, or other representations documenting the significant historical, cultural, and architectural character and features of the Property and may use or publish them (or authorize others to do so).

- i. Maintenance and Operation of Postal Facility. Grantor shall lease to the USPS, and the USPS (pursuant to the concurrently-recorded covenant between the City and USPS) shall lease from the Grantor, the building facade and open space facing Allston Way, the lobby area, and the working area supporting the lobby area, for continued use for a period of fifty (50) years as a retail postal facility and the Main Berkeley Post Office. The lease shall be of sufficient space to ensure operation of a postal facility with consumer service for mailing, post office boxes, package pickup of undelivered mail, bulk mail drop-off, passport services, and such other services as USPS may offer to the general public.
- j. Payment of Fees. Grantor shall pay the City annually for the staff time it expends to monitor and enforce this Covenant, at the hourly rate established by the City Council.

**Comment [zc4]:** Provision calling for lease of retail space by USPS.

**Comment [zc5]:** Such sums should be paid in advance, subject to an annual accounting, and an advance payment should be made contemporaneously with the execution of this covenant.

## 2. Grantee's Rights.

- a. Consultation and Approvals. The City reserves the right to consult with governmental agencies, nonprofit preservation and conservation organizations, and/or other advisors it deems appropriate, concerning the appropriateness of any construction or alteration proposed by Grantor. All approval rights of the City shall be exercised in the sole discretion of the City. The City agrees to use its reasonable efforts, subject to any procedural requirements required by local ordinances, to respond to any written request of Grantor not later than forty-five (45) days following receipt by the City of Grantor's request. Failure of the City to respond to Grantor within the forty-five (45) day period shall not, however, be deemed to constitute approval of Grantor's request.
- b. Inspection. Authorized representatives of the City shall be permitted at all reasonable times to inspect the property in order to ascertain if the above conditions are being met.

3. Covenant Binding on Heirs and Assigns. This covenant is binding on the Grantor, its heirs, successors and assigns in perpetuity and shall run with the land. All stipulations and covenants contained herein shall be inserted by the Grantor verbatim or by express reference in any deed or other legal instrument by which

the grantee divests itself of any interest in the property or any part thereof. Execution of this covenant shall constitute conclusive evidence that the Grantor agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth.

4. Non-Waiver. The failure of any person or entity permitted by the terms hereof to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or use of such right or remedy at any other time.
5. No Limitation on Police Power. This covenant does not limit the City's police power or exempt the property owner from complying with local law, nor does it prohibit the Grantor from seeking City's permission to develop, or developing any project on the Property or on any part of it.
6. Taxes. Grantor shall pay immediately, when first due and owing, all general taxes, special taxes, special assessments, water charges, sewer service charges, and other charges which may become a lien on the Property unless Grantor timely objects to the amount or validity of the assessment or charge and diligently prosecutes an appeal of the charge, in which case the obligation to pay such charges as defined in this paragraph shall be suspended for the period permitted by law for prosecuting such appeal and any applicable grace period following completion of such action. In place of Grantor, Grantee is hereby authorized, but in no event required or expected, to make or advance upon three (3) days prior written notice to Grantor any payment relating to taxes, assessments, water rates, sewer rentals and other governmental or municipality charge, fine, imposition, or lien asserted against the Property. Grantee may make such payment according to any bill, statement, or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement, or assessment or into the validity of such tax, assessment, sale, or forfeiture. Such payment if made by Grantee shall constitute a lien on the Property with the same effect and priority as a mechanic's lien or any other type of lien the City chooses.
7. Insurance. Grantor shall keep the Property insured by an insurance company rated "Secured" by Best's for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death, and property damage.
  - a. Property damage insurance shall include change in condition and building ordinance coverage, in form and amount sufficient to replace fully the damaged Property and Buildings without cost or expense to Grantor or contribution or coinsurance from Grantor. Such insurance shall include Grantee's interest and name Grantee as an additional insured.



- b. Grantor shall deliver to Grantee a certificate of insurance annually or when coverage is renewed by Grantor. If Grantor fails to submit proof of insurance coverage annually or at the time of renewal, Grantor must deliver proof of coverage, within ten (10) business days of Grantee's written request for documentation of coverage.
8. Casualty. In the event that the Property or any part thereof shall be damaged or destroyed by fire, flood, windstorm, hurricane, earth movement, or other casualty, Grantor shall notify the City in writing within fourteen (14) days of the damage or destruction, such notification including what, if any, emergency work has already been completed. No repairs or reconstruction of any type, other than temporary emergency work to prevent further damage to the Buildings and to protect public safety, shall be undertaken by Grantor without the City's prior written approval. Within thirty (30) days of the date of damage or destruction, if required by the City, Grantor at its expense shall submit to the City a written report prepared by a qualified restoration architect and an engineer who are acceptable to Grantor and the City, which shall include the following: (i) an assessment of the nature and extent of the damage; (ii) a determination of the feasibility of the restoration of the Property and/or reconstruction of damaged or destroyed portions of the Property; and (iii) a report of such restoration/reconstruction work necessary to return the Property to the condition existing at the effective date of this instrument.
- a. If, after reviewing the report provided in Paragraph \_\_\_\_ and assessing the availability of insurance proceeds, Grantor and the City agree that the Purpose of this Covenant will be served by such restoration/reconstruction, Grantor and City shall establish a schedule under which Grantor shall complete the restoration/reconstruction of the Property in accordance with plans and specifications consented to by the parties up to at least the total of the casualty insurance proceeds available to Grantor.
  - b. If, after reviewing the report and assessing the availability of insurance proceeds, Grantor and the City agree that restoration/reconstruction of the Property is impractical or impossible, or agree that the Purpose of the Covenant would not be served by such restoration/reconstruction, Grantor may, but only with the prior written consent of the City, alter, demolish, remove, or raze all or part of the Property, and/or construct new improvements on the Property. Grantor and Grantee may agree to extinguish this Covenant pursuant to Paragraph 15.
9. Notices. Any notice which either Grantor or City may desire or be required to give to the other party shall be in writing and shall be delivered by one of the following methods: by overnight courier postage prepaid, transmission, registered or certified mail with return receipt requested, or hand delivery, in either case with a copy by e-mail; if to Grantor, then to:



[address],

and if to Grantee, then to:

City Manager  
City of Berkeley  
2180 Milvia Street, Fifth Floor  
Berkeley, CA 94704  
manager@ci.berkeley.ca.us

Each party may change its address set forth herein by a notice to such effect to the other party.

10. Remedies.

- a. The City may, following reasonable written notice to Grantor, institute suit(s) to enjoin or remedy any violation of the terms of this easement by *ex parte*, temporary, preliminary, and/or permanent injunction, including prohibitory and/or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance that existed prior to the violation complained of in the suit. The City shall also have available all legal and other equitable remedies to enforce Grantor's obligations contained in this Covenant.
- b. In addition, the City may following reasonable written notice to Grantor and an opportunity to cure, enter upon the Property to make any repairs it deems necessary or appropriate, and may recover the costs of doing so by lawsuit or directly by placing a lien on the Property.
- c. Exercise by Grantee of one remedy hereunder shall not have the effect of waiving or limiting any other remedy, and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

11. Notices from Government Authorities. Grantor shall deliver to the City copies of any notice of violation or lien relating to the Property received by Grantor from any government authority within five (5) days of receipt by Grantor. Upon request by the City, Grantor shall promptly furnish the City with evidence of Grantor's compliance with such notice or lien where compliance is required by law.

12. Notice of Offers to Sell. Grantor shall promptly notify the City in writing of any proposed offer to sell the Property or of any listing of the Property for sale and provide the opportunity for the City to explain the terms of the Covenant to the real estate listing agent and potential new owners prior to sale closing.

13. Plaque. Grantor agrees that the City or other person or entity authorized by the City may provide and maintain a plaque on the Property, which plaque shall not

exceed 24 by 24 inches in size, giving notice of the significance of the Property and the existence of this Covenant.

14. Amendment. If circumstances arise under which an amendment to or modification of this covenant would be appropriate, Grantor and Grantee may by mutual written agreement jointly amend this covenant, provided that no amendment shall be made that will adversely affect the qualification of this covenant or the status of Grantee under any applicable laws, including Sections 170(h) and 501(c)(3) of the Code and the laws of the State of California. Any such amendment shall be consistent with the protection of the Preservation and Conservation Values of the Property and the purpose of this covenant; shall not affect its perpetual duration; shall not permit additional development on the Property other than the development permitted by this covenant on its effective date; shall not permit any private inurement to any person or entity; and shall not adversely impact the overall architectural, historic, and cultural values protected by this covenant. Any such amendment shall be recorded in the land records of Alameda County, California. Nothing in this paragraph shall require Grantor or Grantee to agree to any amendment or to consult or negotiate regarding any amendment.
15. Extinguishment. Grantor and Grantee hereby recognize that circumstances may arise that may make the continued ownership or use of the Property in a manner consistent with the Purpose of this covenant impossible and that extinguishment of the covenant may be necessary. Such circumstances may include, but are not limited to, partial or total destruction of the Building(s) resulting from casualty. Extinguishment must be the result of a judicial proceeding in a court of competent jurisdiction.
16. **This Covenant is not subject to expiration or expiration of record under the Marketable Record Title Act, California Civil Code 880.020-887.090; however, Grantee may re-record this Covenant without the consent of the Grantor from time to time to perpetuate Grantee's rights. Grantor and Grantee expressly acknowledge that no such recording is necessary in order to perpetuate the validity or enforceability of this Covenant, and nothing contained in this paragraph shall be deemed to constitute a requirement that any such recording is necessary.**



second story, wide terra cotta beltcourse with dentils, swags, medallions, and wave patterns below the 11 second story windows and around the entire building; cornice soffit; terra cotta shields above rusticated cast blocks; two rows of curved wooden brackets framing rectangular panels at eave soffit ~~and soffit paint colors~~; wrought iron railings with heraldic shields and diagonal rope pattern; arched windows with terra cotta sills on one-story portion of building, and numerous windows continuing on west and east side with heraldic medallions and other decorative elements; the David Slivka 1937 bas-relief sculpture on the loggia's east end wall; and granite entry steps forming "plaza" at main (north) entry.

2. The historic interior features of the property are determined to be the following: glazed arches between workroom and lobby; coffered lobby ceiling; individual service counter windows with detailed oak framing, brass grilles and feather-chip glass grilles and service window doors; the Suzanne Scheuer mural over the former Postmaster's office door; arches around postmaster's door and service windows; marble baseboards and wainscot; columns in lobby and small and large Corinthian capitals cast ceramic and oak; band joining all columns and capitals of lobby (currently painted brown); carved oak woodwork on columns between entrance doors, windows, service bays and vestibule; entrance door oak frames with modified Corinthian capitals; oak and glass vestibule at center entrance; carved oak and triangular dentilled pediment over Postmaster's former office door (now elevator door) and lettering; Post office boxes; original bulletin cases; oak casework with movable metal grills; marble staircase, oak handrail, and ornamental metal end pieces and railings; landing of marble staircase with mosaic tiles and black, white, and red fretwork around the edges; and second floor marble and tile flooring.

3. Collectively, the features listed in subparagraphs (a1) and (b2) of this Recital, as more fully set forth in Exhibits B and C, represent the "Preservation and Conservation Values" of the Property. ~~In addition, one of the Preservation and Conservation Values of the Property is its use, since its construction, as the Main Post Office for the City of Berkeley.~~

D. It is the ~~Purpose~~purpose of this Covenant to assure that the Preservation and Conservation Values will be retained and maintained ~~forever~~in substantially ~~in~~as good a condition as their ~~current or better~~present condition and to prevent ~~any use or change of~~changes to the Property that ~~would~~ ~~will~~ significantly ~~impair~~affect or interfere with them.

E. The United States Postal Service owns a certain mural *Incidents in California History* by Suzanne Scheuer (the "Mural") and the David Slivka relief sculpture ("Relief") of postal workers, 1937, on the east loggia end wall. Notwithstanding any sale or transfer of the Property, the Mural and Relief shall continue to be owned by the United States Postal Service. As a condition to ~~the~~any sale of the Property, the

United States Postal Service intends to enter into a loan agreement (“Loan Agreement”) with the ~~Grantee,~~purchaser of the Property which Loan Agreement will be binding upon successor and assigns of ~~Grantee~~the purchaser and which Loan Agreement will require the ~~Grantee~~purchaser to undertake certain actions to preserve and protect the Mural and Relief and provide public access thereto; on terms stated therein. Grantor acknowledges and agrees that it shall comply with the terms and conditions of the Loan Agreement. The Grantor intends to propose plans for adaptive reuse and rehabilitation of the Property in a manner that may require a substantial level of improvements, all of which improvements shall be done in accordance with the Secretary of the Interior’s Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings (National Park Service, 1997 et seq) (“Secretary of Interior’s Standards”) and subject to applicable land use laws, rules and regulations of the City. Such improvements may affect the Protected Values, including, without limitation, the height, mass and scale of the building on the Property.

- F. This Covenant is made by the purchaser of the Property pursuant to California Civil Code Sections 815 *et seq.*

## COVENANT

### 1. Covenants of Grantor.

- a. Compliance with Secretary of Interior’s Standards. The ~~grantor~~purchaser of the Property under the deed attached hereto as Exhibit A (~~hereinafter~~referenced herein as “Grantor”) hereby covenants with the City of Berkeley (“City”) in perpetuity on behalf of itself, its heirs, successors and assigns at all times to rehabilitate, maintain and preserve the Property in accordance with the ~~recommended approaches~~then current National Park Service, Technical Preservation Services Branch interpretation of the Secretary of ~~the~~ Interior’s Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings (National Park Service, 1997) (“Secretary of Interior’s Standards”)(37 CFR § 67.7(b)) and any implementing regulations or policies, in order to rehabilitate, maintain and preserve those qualities that resulted in the listing of the Property on the National Register of Historic Places, the features identified in the Section 106 analysis prepared by the USPS and submitted for review on September 3, 2013, ~~and any other features that may be identified for preservation by the City of Berkeley Landmarks Preservation after a noticed public hearing, pursuant to Berkeley Municipal Code Chapter 3.24. Grantor’s compliance with this requirement shall be determined by the City of Berkeley in its sole discretion.~~

- b. Demolition. The Grantor further covenants not to demolish any building(s) on the Property, or to cause or allow such building(s) to be demolished, except in accordance with Section 1(c) below.
- c. Alterations. No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken that would significantly affect the Preservation and Conservation Values of the Property without prior consultation with, and the express permission of, the City. ~~In addition, Grantor shall maintain the Property in such a manner as to preserve the Preservation and Conservation Values, as determined by the City.~~ Prior to ground disturbance, a qualified archaeologist hired by Grantor shall check site records from the California Historical Resources Information System (“CHRIS”), and perform a sensitivity analysis to provide to the Grantor and the City. For the purposes of this Section 1(c), an action shall not be considered to significantly affect the Preservation and Conservation Values if such action is in accordance with the Secretary of Interior’s Standards.
- d. Maintenance and Repair. ~~Except as otherwise permitted under Section 1(c) above,~~ Grantor agrees at all times to maintain and repair the Preservation and Conservation Values in the same or better structural condition and state of repair as ~~that those~~ existing on the effective date of this Covenant. Grantor’s obligation to so maintain and repair shall ~~require~~ include such replacement, repair, and/or reconstruction ~~by Grantor whenever activities as may be necessary from time to preserve time to maintain~~ a Preservation or Conservation Value, ~~or (including any feature identified in Exhibits B and C),~~ in the same or better structural condition and state of repair as that existing on the date of this Covenant, as set forth in \_\_\_\_\_. This right of repair is shown by the photos attached hereto as Exhibits \_\_\_\_\_. Grantor’s maintenance activities shall be subject to the following qualifications:
- i. ~~The right to maintain and repair Grantor shall mean the use by Grantor of, wherever feasible,~~ in-kind materials and colors, applied with workmanship comparable to that which was used in the construction or application of those materials being repaired or maintained, for the purpose of retaining the appearance and construction of any building(s) on the Property in good condition.
  - ii. ~~The right to maintain and repair Grantor shall not include the right to make significant~~ changes in appearance, materials, colors, and workmanship from that existing prior to the maintenance and repair without the prior written approval of ~~Grantee the City the City,~~ such approval not to be unreasonably withheld, delayed or conditioned, and based exclusively upon a determination that such changes are consistent with the Secretary of the Interior’s Standards.



- iii. ~~The right to maintain and repair~~ Grantor shall not ~~include the right to~~ replace historic materials unless such historic materials are significantly deteriorated or damaged.
- e. Request for Approval by Grantee City. When the Grantor wishes to undertake any construction or alterations on the Property that could significantly affect the Preservation and Conservation Values, it shall submit in writing to the City for its approval information describing the proposed activity (including plans, specifications, and designs where appropriate), together with a specific request identifying the proposed construction or alterations. In addition, Grantor shall also submit to the City a timetable for the proposed construction or alterations that is sufficient to permit the City to monitor such activity. Grantor shall not make changes or take any action subject to the approval of the City, such approval not to be unreasonably withheld, conditioned or delayed unless expressly authorized in writing by an authorized representative of the City.
- f. Replacement and Repair. Subject to the casualty provisions of Paragraphs \_\_\_ and \_\_\_, the obligation to maintain shall require replacement, repair, and/or reconstruction whenever necessary in accordance with the standards stated in Paragraph \_\_\_.
- g. Signs. Grantor may erect or allow to be erected any external signs that are: (i) consistent with the City Sign Ordinance (Title 20 of the Berkeley Municipal Code); and (ii) approved by the City as appropriate for the Property given the obligations set forth in this Covenant, consistent with National Park Service, Technical Preservation Services Brief 25, The Preservation of Historic Signs - New Signs and Historic Buildings et seq.
- ~~h. Public Access to Lobby. Grantor shall make, at a minimum, the lobby on the first floor of the 1914 building, as well as the stairway to the second floor and the marbled and tile landing at the top of the stairway publicly accessible during normal business hours (no less than Monday—Friday 9:00 am to 5:00 pm). In addition, the large common and circulation spaces should be opened to the public for viewing at least twice per year, under suitable supervision. Grantor may have a representative present during such public access, and access may be subject to reasonable restrictions to ensure security of the property. At other reasonable times, upon request of the City made with reasonable notice to Grantor, persons affiliated with educational organizations, professional architectural associations, and historical societies shall be admitted to study the Property. In addition, the City may make photographs, drawings, or other representations documenting the significant historical, cultural, and architectural character and features of the Property and may use or publish them (or authorize others to do so).~~

~~i. Maintenance and Operation of Postal Facility. Grantor shall lease to the USPS, and the USPS (pursuant to the concurrently recorded covenant between the City and USPS) shall lease from the Grantor, the building facade and open space facing Allston Way, the lobby area, and the working area supporting the lobby area, for continued use for a period of fifty (50) years as a retail postal facility and the Main Berkeley Post Office. The lease shall be of sufficient space to ensure operation of a postal facility with consumer service for mailing, post office boxes, package pickup of undelivered mail, bulk mail drop off, passport services, and such other services as USPS may offer to the general public.~~

~~j.h. **OPEN ISSUE OF FEES TO BE DETERMINED.** [Payment of Fees. Grantor shall pay the City annually for the reasonable staff time it expends to monitor and enforce this Covenant, at the hourly rate established by the City Council-, such rate to be based on similar rates charged for such work in the area, or the average hourly cost to the City rate of the salary of the staff members' involved. In addition, notwithstanding the hourly rate, the total amount charged to Grantor shall not to exceed \$----- for the first twelve months following the date of execution of this covenant and escalating by not more than \_\_\_\_\_ % annually thereafter.]~~

2. Grantee's City's Rights and Obligations.

a. Consultation and Approvals. The City reserves the right to consult with governmental agencies, nonprofit preservation and conservation organizations, and/or other advisors it deems appropriate, concerning the appropriateness of any construction or alteration proposed by Grantor. All approval rights of the City shall be exercised in the ~~sole~~reasonable discretion of the City. The City agrees to use its reasonable efforts, subject to any procedural requirements required by local ordinances, to respond to any written request of Grantor not later than ~~forty five (45)~~thirty (30) days following receipt by the City of Grantor's request. Failure of the City to respond to Grantor within the ~~forty five (45) day period shall not,~~ however, thirty (30) day period shall not, however, be deemed to constitute approval of Grantor's request provided, however, that if Grantor delivers written notice to the City not later than 15 days after the end of the 30 day period that the City has failed to meet its deadline, and the City thereafter, fails to respond for an additional 15 days after such notice, then the failure of the City to respond shall be deemed to constitute approval of Grantor's request.

b. Inspection. Authorized representatives of the City -shall be permitted at all reasonable times to inspect the property in order to ascertain if the above conditions are being met.



3. Covenant Binding on Heirs and Assigns. This covenant is binding on the Grantor, its heirs, successors and assigns and upon the City, and its successors and assigns in perpetuity and shall run with the land. All stipulations and covenants contained herein shall be inserted by the Grantor verbatim or by express reference in any deed or other legal instrument by which the grantee divests itself of any interest in the property or any part thereof. Execution of this covenant shall constitute conclusive evidence that the Grantor agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth.
4. Non-Waiver. The failure of any person or entity permitted by the terms hereof to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or use of such right or remedy at any other time.
5. No Limitation on Police Power. This covenant does not limit the City's police power or exempt the property owner from complying with local law, nor does it prohibit the Grantor from seeking City's permission to develop, or developing any project on the Property or on any part of it.
- ~~6. Taxes. Grantor shall pay immediately, when first due and owing, all general taxes, special taxes, special assessments, water charges, sewer service charges, and other charges which may become a lien on the Property unless Grantor timely objects to the amount or validity of the assessment or charge and diligently prosecutes an appeal of the charge, in which case the obligation to pay such charges as defined in this paragraph shall be suspended for the period permitted by law for prosecuting such appeal and any applicable grace period following completion of such action. In place of Grantor, Grantee is hereby authorized, but in no event required or expected, to make or advance upon three (3) days prior written notice to Grantor any payment relating to taxes, assessments, water rates, sewer rentals and other governmental or municipality charge, fine, imposition, or lien asserted against the Property. Grantee may make such payment according to any bill, statement, or estimate procured from the appropriate public office without inquiry into the accuracy of such bill, statement, or assessment or into the validity of such tax, assessment, sale, or forfeiture. Such payment if made by Grantee shall constitute a lien on the Property with the same effect and priority as a mechanic's lien or any other type of lien the City chooses.~~
- 7.6. OPEN ISSUE TO BE DISCUSSED - Insurance. Grantor shall keep the Property insured by an insurance company rated "Secured" by Best's for the full replacement value against loss from the perils commonly insured under standard fire and extended coverage policies and comprehensive general liability insurance against claims for personal injury, death, and property damage.
  - a. Property damage insurance shall include change in condition and building ordinance coverage, in form and amount sufficient to replace fully the damaged Property and Buildings ~~without cost or expense to Grantor or~~

~~contribution or coinsurance from Grantor.~~ Such insurance shall include Grantee's interest and name Grantee as an additional insured.

- b. Grantor shall deliver to Grantee a certificate of insurance annually or when coverage is renewed by Grantor. If Grantor fails to submit proof of insurance coverage annually or at the time of renewal, Grantor must deliver proof of coverage, within ten (10) business days of Grantee's written request for documentation of coverage.

~~8.7.~~ **OPEN ISSUE TO BE DISCUSSED - Casualty.** In the event that the Property or any part thereof shall be damaged or destroyed by fire, flood, windstorm, hurricane, earth movement, or other casualty, Grantor shall notify the City in writing within fourteen (14) days of the damage or destruction, such notification including what, if any, emergency work has already been completed. No repairs or reconstruction of any type, other than temporary emergency work to prevent further damage to the ~~Buildings~~Property and to protect public safety, shall be undertaken by Grantor without the City's prior written approval. Within thirty (30) days ~~of~~after the date of damage or destruction, if required by the City, Grantor at its expense shall submit to the City a written report prepared by a qualified restoration architect and an engineer ~~who are~~reasonably acceptable to Grantor and the City, which shall include the following: (i) an assessment of the nature and extent of the damage; (ii) a determination of the feasibility of the restoration of the Property and/or reconstruction of damaged or destroyed portions of the Property; and (iii) a report of such restoration/reconstruction work necessary to return the Property to the condition existing at the effective date of this instrument.

- a. If, after reviewing the report ~~provided in Paragraph~~ and assessing the availability of insurance proceeds, Grantor and the City agree that the Purpose of this Covenant will be served by such restoration/reconstruction, Grantor and City shall establish a schedule under which Grantor shall complete the restoration/reconstruction of the Property in accordance with plans and specifications consented to by the parties up to at least the total of the casualty insurance proceeds available to Grantor.
- b. If, after reviewing the report and assessing the availability of insurance proceeds, Grantor and the City agree that restoration/reconstruction of the Property is impractical or impossible, or agree that the Purpose of the Covenant would not be served by such restoration/reconstruction, Grantor may, ~~but only with the prior written consent of the City,~~ alter, demolish, remove, or raze all or part of the Property, and/or construct new improvements on the Property. Grantor and Grantee may agree to extinguish this Covenant pursuant to Paragraph ~~15.~~\_\_\_\_\_.

~~9.8.~~ **Notices.** Any notice which either Grantor or City may desire or be required to give to the other party shall be in writing and shall be delivered by one of the

following methods: by overnight courier postage prepaid, transmission, registered or certified mail with return receipt requested, or hand delivery, in either case with a copy by e-mail; if to Grantor, then to:

[address],

and if to Grantee, then to:

City Manager  
City of Berkeley  
2180 Milvia Street, Fifth Floor  
Berkeley, CA 94704  
[manager@ci.berkeley.ca.us](mailto:manager@ci.berkeley.ca.us)

[manager@cityof-berkeley.infoea.us](mailto:manager@cityof-berkeley.infoea.us)

Each party may change its address set forth herein by a notice to such effect to the other party.

10.9. Remedies.

- a. The City may, following reasonable written notice to Grantor, institute suit(s) to enjoin or remedy any violation of the terms of this easement by *ex parte*, temporary, preliminary, and/or permanent injunction, including prohibitory and/or mandatory injunctive relief, and to require the restoration of the Property to the condition and appearance that existed prior to the violation complained of in the suit. The City shall also have available all legal and other equitable remedies to enforce Grantor's obligations contained in this Covenant.
- b. In addition, the City may following reasonable written notice to Grantor and any mortgagee of Grantor, and an opportunity to cure, enter upon the Property to make any repairs it reasonably deems necessary or appropriate, and may recover the actual out of pocket costs of doing so by lawsuit or directly by placing a lien on the Property.
- c. Exercise by Grantee of one remedy hereunder shall not have the effect of waiving or limiting any other remedy, and the failure to exercise any remedy shall not have the effect of waiving or limiting the use of any other remedy or the use of such remedy at any other time.

~~11. Notices from Government Authorities. Grantor shall deliver to the City copies of any notice of violation or lien relating to the Property received by Grantor from any government authority within five (5) days of receipt by Grantor. Upon request by the City, Grantor shall promptly furnish the City with evidence of Grantor's compliance with such notice or lien where compliance is required by law.~~

d. Without limiting the foregoing, in the event of a violation of this covenant, and in addition to any remedy now or hereafter provided by law, any resident of the City of Berkeley having an interest in the Preservation and Conservation Values of the Property may, following reasonable notice to the City institute suit to enjoin said violation or to require the restoration of the property. Remedies shall include, but not be limited to, specific performance, injunction and/or monetary damages, and the specific performance may include restoration of the property to its condition as existing prior to the alteration or construction undertaken in violation of this covenant.

~~12.~~10. Notice of Offers to Sell. Grantor shall promptly notify the City in writing of any proposed offer to sell the Property or of any listing of the Property for sale and provide the opportunity for the City to explain the terms of the Covenant to the real estate listing agent and potential new owners prior to sale closing.

~~13.~~11. Plaque. Grantor agrees that the City or other person or entity authorized by the City may provide and maintain a plaque on the Property, in a location mutually acceptable to the Grantor and Grantee, which plaque shall not exceed 24 by 24 inches in size, giving notice of the significance of the Property and the existence of this Covenant.

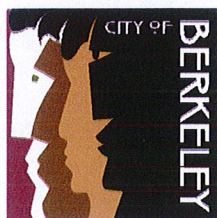
~~14.~~12. Amendment. If circumstances arise under which an amendment to or modification of this covenant would be appropriate, Grantor and ~~Grantee~~the City may by mutual written agreement jointly amend this covenant, provided that no amendment shall be made that will adversely affect the qualification of this covenant or the status of Grantee under any applicable laws, including Sections 170(h) and 501(c)(3) of the Internal Revenue Code and the laws of the State of California. Any such amendment shall be consistent with the protection of the Preservation and Conservation Values of the Property and the purpose of this covenant; shall not affect its perpetual duration; shall not permit additional development on the Property other than the development permitted by this covenant on its effective date; shall not permit any private inurement to any person or entity; and shall not adversely impact the overall architectural, historic, and cultural values protected by this covenant. Any such amendment shall be recorded in the land records of Alameda County, California. Nothing in this paragraph shall require Grantor or Grantee to agree to any amendment or to consult or negotiate regarding any amendment.

~~15.~~13. Extinguishment. Grantor and Grantee hereby recognize that circumstances may arise that may make the continued ownership or use of the Property in a manner consistent with the Purpose of this covenant impossible and that extinguishment of the covenant may be necessary. Such circumstances may include, but are not limited to, partial or total destruction of the Building(s) resulting from casualty. Extinguishment must be the result of a judicial proceeding in a court of competent jurisdiction.

~~16.~~14. Perpetual Covenant. This Covenant is not subject to expiration or expiration of record under the Marketable Record Title Act, California Civil Code 880.020-887.090; however, Grantee may re-record this Covenant without the consent of the Grantor from time to time to perpetuate Grantee's rights. Grantor and Grantee expressly acknowledge that no such recording is necessary in order to perpetuate the validity or enforceability of this Covenant, and nothing contained in this paragraph shall be deemed to constitute a requirement that any such recording is necessary.

15. Approvals by City. Wherever in this Covenant the approval of the City is required, the City shall not unreasonably withhold, condition or delay such approval. In the event that the Grantor requests the approval of the City hereunder, the failure of the City to respond within thirty (30) days after receipt of the request shall be deemed to be the approval of the City to the request.





Office of the City Attorney

July 9, 2014

Ms. Ann Sarver  
Facilities Environmental Specialist  
USPS Facilities Department – HQ Field Office  
Facilities Implementation Team A  
PO Box 39430  
Tampa, FL 33630-9430

Re: Berkeley Main Post Office Covenant – City of Berkeley and National Trust Comments

Dear Ms. Sarver,

The City of Berkeley (the City) and National Trust for Historic Preservation (National Trust) appreciate the opportunity to comment on the May 7, 2014, version of the Berkeley Main Post Office Covenant (Covenant). As you know the City and the National Trust are consulting parties to the Section 106 process, and we are committed to ensuring that the Berkeley Main Post Office (Property) is properly protected and preserved in the disposition process.

On February 7, 2014, the United States Postal Service (USPS) circulated a draft preservation covenant for the Main Berkeley Post Office on Allston Way to various consulting and other parties, including the City of Berkeley and the National Trust, and requested comments from all parties by February 24<sup>th</sup>.

The City worked with the National Trust to prepare a set of joint comments, and submitted them on February 24, 2014. Because they were quite extensive, these comments took the form of a proposed replacement covenant.

On May 7, 2014, the USPS circulated the (May 7<sup>th</sup> draft) Covenant and requested that any responsive comments be submitted by May 27<sup>th</sup>. The USPS subsequently extended that deadline to July 11<sup>th</sup>, to allow time for the Berkeley City Council to consider the Covenant. On June 24<sup>th</sup>, the City Council did so, and expressed the City's position as follows in the form of directions to staff:

1. To make the covenant as restrictive as possible.
2. To maintain public access to the building.
3. To maintain the full Post Office uses at the facility.

In addition to expressing the City's views, the following comments include the input from the National Trust as a leading authority on the use of preservation and conservation easements to protect historic resources. We offer them for your careful consideration.

## 1. Public Art

We understand that the art works in the lobby (the mural and bas relief sculpture, hereinafter “Mural and Relief”) will not be transferred to the purchaser. Rather, the USPS will retain ownership of and responsibility for them, and will loan them to the buyer of the building. However the manner in which the Covenant addresses this issue raises serious concerns.

The Covenant states that the loan agreement “will require the purchaser to undertake certain actions to preserve and protect the Mural and Relief and provide public access thereto on terms stated therein.” In other words, the Covenant itself is essentially silent on the buyer’s obligations with respect to the art work and public access, and leaves these issues for a future agreement that will be solely between the USPS and the purchaser. At a minimum, public access (see Item 2) for viewing the Mural and Relief should be included in the Covenant. Moreover, the terms of the loan agreement should be made available for public review and input well in advance of a sale.

The USPS should consider using the language from the draft Bronx Post Office Covenant to address the protection of the Mural and Relief located on the Property. The provisions of the Bronx Post Office Covenant provide much more clarity on the property owner’s obligations regarding the Mural and Relief and more clearly spell out the USPS’s obligations related to the Mural and Relief. We recommend adopting the following language, which was adapted from the Bronx Post Office Covenant<sup>1</sup>:

The Grantor agrees to maintain and preserve the Mural and Relief, individually and collectively, in such locations, and in the same or better condition and state of repair as depicted in the photographs at Exhibit \_\_\_ and in accordance with the terms and conditions of this Preservation Covenant while such Mural and Relief remain on the Property. While this obligation to maintain and preserve is reflected in a loan agreement between Grantor and the United States Postal Service (USPS), a copy of which is attached hereto and incorporated herein at Exhibit \_\_\_ (“Mural and Relief Loan Agreement”), in the absence or upon the termination of such Mural and Relief Loan Agreement or a successor loan agreement, this obligation to maintain and preserve the Mural and Relief is not waived, terminated, or released. Grantor shall ensure that any restoration of the Mural and Relief shall conform to the American Institute for Conservation of Historic and Artistic Works (AIC) code of ethics and guidelines for practice and the National Park Service conservation guidelines, as these may be amended, replaced or superseded from time to time and the [insert standards for conservation of the Relief]. Grantor shall maintain damage insurance covering the Mural and Relief to their full appraised value, as determined initially on or immediately preceding the Effective Date of this Preservation Covenant by an accredited art appraiser. Grantor shall have such appraised value updated by an accredited art dealer at least every five years measured from the Effective Date of this Preservation Covenant. The damage insurance shall be an “all risk”, wall-to-wall policy subject to only the following standard exclusions: wear and tear, gradual deterioration, terrorism, and war. To the extent these insurance requirements conflict with the terms of any mural loan agreement, including the Mural and Relief Loan Agreement attached as Exhibit \_\_\_, the requirements of this paragraph shall control, and the Grantee shall be bound by them.

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<sup>1</sup> A copy of the Bronx Post Office Covenant is attached.

## **2. Public Access**

Except in very limited circumstances, such as not providing public access to archeological sites to prevent looting, public access should be included in a Covenant such as this one. While the exact amount of public access may vary from case to case, at a basic level the ability for the public to have an opportunity to see the protected interior of the buildings--on an appropriately controlled basis – is important to the public's understanding and appreciation of the Preservation and Conservation Values protected by the Covenant. In this case the Preservation and Conservation Values include the Mural and Relief. These are an integral component of the Property's significance because of their intrinsic value, as well as the role they have played in the community's experience of the interior of the Property. Long-term preservation of the Property's significance therefore depends on reasonable public access to these features. However the Covenant deletes the City/National Trust proposal regarding public access to the lobby, where the Mural and Relief are located. The Covenant must include some guarantee of substantial public access to the lobby.

## **3. Inappropriate Limitations on City's Authority**

The use of the phrase "significantly affect[s]" interjects a level of ambiguity into the Covenant that makes it difficult for a property owner to know when an alteration would be significant enough to warrant consultation with the City. The standard should be that any construction or alteration of the structure would trigger a review. The City's decision to withhold or condition its approval should be in its sole discretion, and not based on a determination by the property owner as to whether the City is acting reasonably or unreasonably in conditioning or issuing its approval.

### **A. "Significantly Affects"**

In a number of clauses addressing alterations to the Property, the phrase "significantly affect" was added to determine whether alterations affected the Preservation and Conservation Values of the Property. (E.g., Recital D, ¶¶ 1(d)(ii), 1(e).) This phrase would make it difficult for the City or a property owner to know when an alteration triggered consultation with the City, making the covenant difficult and costly to enforce. A clearer alternative approach would be to require that any increase or decrease in the height of, additions to, change in the construction materials of, improvement to, alteration of, reconstruct of, or change affecting the Preservation and Conservation Values must be reviewed and approved by the City. Moreover, the Covenant suggests that the owner decides whether a proposed change "significantly affects" the Preservation and Conservation Values. This is not acceptable to the City or the National Trust.

### **B. Limitation on Discretion**

The City's authority to determine whether the property owner is in compliance with terms of the Covenant has been diminished significantly throughout the Covenant. For example, under Paragraphs 1(a), 1(c), 1(e), and 2(a) the City no longer has the sole discretion to determine whether the property owner is rehabilitating, maintaining, and preserving the Property in accordance with the Secretary of the Interior's Standards (Standards). Because the Standards and Guidelines provide a framework for decision-making about changes to historic properties, it is important that one party has the authority to make a final determination on whether a treatment is consistent with the Standards. Requiring that the City exercise of its discretion be "reasonable" creates ambiguity by restating a principle that is already applicable via the



underlying law. By doing so, the Covenant seems to be suggesting some additional limitation on the City's discretion, without describing the contours of that additional limitation.

### **C. Time Limit for Decision Making**

The Covenant also requires City decisions to be made within 45 days. While this time limitation will work in many cases, it is not realistic when major alterations, or alterations that pose complex challenges, are proposed. Moreover, some alterations will trigger review by the City's Landmarks Preservation Commission and/or the Zoning Adjustments Board. The review, public notice, public hearing, and appeal processes under the applicable ordinances do not permit decisions to be made within 45 days. Furthermore, artificially separating decisions under the Covenant from decisions under City ordinances serves no purpose, since a negative decision under either source of City authority would prevent a proposed alteration from going forward. If the 45-day (or preferably 60-day) limitation is restricted to minor changes and those that do not trigger City regulatory processes, it might be workable.

The City's ability to protect the Property is eroded by the addition of language apparently allowing automatic approval of a property owner's request. (Paragraphs 2(a) and 15.) This means inappropriate alterations could occur to the Property without the City's review and approval. There should not be a procedural mechanism in the Covenant that allows for change or alteration to the Property that is not reviewed and approved by the City.

### **4. Casualty**

The requirement that the property owner receive the City's written consent prior to demolishing all or part of the Property (§ 7(b)) was eliminated from the Covenant. It should be reinserted. If both parties agree that the restoration or rehabilitation of the Property is impractical or impossible, then an agreement should be memorialized in writing that incorporates consent of the City and the property owner.

### **5. Loophole for "Adaptive Reuse"**

The following language was added to Recital E of the Covenant:

The Grantor intends to propose plans for adaptive reuse and rehabilitation of the Property in a manner that may require a substantial level of improvements, all of which improvements shall be done in accordance with the Secretary of the Interior's Standards for the Treatment of Historic Properties with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings (National Park Service, 1997 *et seq*) ("Secretary of Interior's Standards") and subject to applicable land use laws, rules and regulations of the City. Such improvements may affect the Protected<sup>2</sup> Values, including, without limitation, the height, mass and scale of the building on the Property.

This language should be edited to make it clear that while changes to the Property are anticipated from its adaptive reuse and rehabilitation, such changes must be consistent with the Standards and are subject to review and approval by the City under the terms of the Covenant. The current language of this paragraph creates ambiguity as to whether the Grantor's changes to the Property under its adaptive reuse and rehabilitation plan *must* be accepted by the City

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<sup>2</sup> We believe this should be "Preservation and Conservation", not "Protected".

because they were anticipated as a condition of imposing the Covenant on the Property. Moreover, while this paragraph seems to anticipate that modifications associated with adaptive reuse will be consistent with the Standards, it also appears to contradict itself by stating that “[s]uch improvements may affect the Protected Values, including, without limitation, the height, mass and scale of the building on the Property.”

This language in Recital E should be separated to form its own recital clause. A correlative operative provision should be added to the Covenant to make clear that any changes associated with adaptive reuse will be subject to City review and approval to the same extent as any other changes, thereby closing the loophole that this language seems to create.

## **6. Standard for Establishing Baseline Condition**

Recital D states a new standard for assessing the condition of the Property. In the National Trust’s experience, and depending on the existing condition of the Property, the Covenant should establish that the owner must maintain the property in its “current or better condition.” This ensures that if a property is not in good condition when a covenant or easement is imposed and it is later rehabilitated, then the property owner will be responsible for maintaining the property in the improved condition at a minimum.

## **7. Archaeology**

While we have no objection to requiring testing to locate and protect archaeological deposits, this issue would be better addressed in its own section of the Covenant. In addition, no definition is provided for the term “sensitivity analysis” and no guidance is given in the event that such an analysis determines that archaeological material is present. If archeological issues are of concern to the USPS, then we would propose that language similar to the following model language be included in the Covenant:

The City, at its discretion, may as a condition of granting approval, require Grantor, at Grantor’s cost, to perform an archaeological survey to identify and determine the significance of archaeological deposits. If archaeological deposits are identified, then Grantee may deny or condition approval of topographical changes as appropriate.

Grantor shall take all reasonable precautions to protect archaeological deposits, sites, or features on the Property, and archaeologically significant deposits, sites, or features on the Property shall not be intentionally disturbed or excavated except by or under the supervision of a professionally qualified archaeologist retained by Grantor, and an archaeological plan approved by the City.

## **8. Maintenance and Repair**

A reference to Paragraph 1(c) was added to Paragraph 1(d) (“Maintenance and Repair”), but it is unclear why this cross-reference was provided. With regard to the Grantor’s maintenance obligations, the determination whether the use of in-kind materials is possible should not be at the discretion of the property owner. By granting this sort of discretion to the property owner, the maintenance clause could be used to make changes or alterations to the Property if the property owner makes a determination that it is not feasible to use an in-kind material while performing routine maintenance on the Property. Furthermore, there is no definition provided so that either party understands or agrees what is meant by the term “feasible”.

## **9. Payment of Fees**

The Covenant has problematic language (§ 1(h)) that would prevent the City from recovering the full cost of its administration of the Covenant. The City does not believe that there is a basis for this change. The USPS has subsequently stated that the justification for its position is to “avoid the creation of financial uncertainty” to a purchaser. But under any reasonable scenario, the amount of time the City would spend on administration of the Covenant multiplied by the reasonable hourly rate of the employees would be miniscule in comparison to the normal costs of operating and maintaining the Property for the indefinite future. Moreover, any major alterations would likely trigger City review and permits under the Landmarks Preservation Ordinance and/or Zoning Ordinance, in which case the owner would be required to pay permit fees to compensate the City for its staff time. Since the issues involved in landmarks and/or zoning review would overlap substantially with issues under the Covenant, many of the costs of City review under the Covenant would likely be subsumed in permit fees. (We note that this efficiency is another reason not to artificially divorce these reviews by requiring all decisions under the Covenant to be made within 45 days.) Nonetheless, the City is willing to accept a lump sum payment of \$75,000 in lieu of future hourly reimbursement for administration and enforcement of the Covenant (but not permit fees).

## **10. Taxes**

The paragraph requiring payment of taxes that was proposed by the City and the National Trust was removed from the Covenant. It should be reinserted. The ability of the City to pay taxes in the event that the property owner fails to do so ensures that the City can step in and avoid a tax sale of the Property. This may allow the governmental agency selling the Property to sell it free and clear of any existing encumbrances like the Covenant.

## **11. Notice from Government Authorities**

Similarly, the paragraph proposed by the City and the National Trust requiring the property owner to provide the City with notices of violations or liens related to the Property was removed from the Covenant. It should be restored. This paragraph allows the City, as the Covenant holder, to have notice of violations or liens that may affect the Preservation and Conservation Values of the Property or the perpetual nature of the Covenant.

## **12. Insurance**

Adequate insurance coverage ensures that in the case of damage the necessary resources will be available to repair the Property in a manner that retains/restores the Preservation and Conservation Values. Paragraph 6 has been amended to eliminate language prohibiting contributions or coinsurance. This could allow a property owner to significantly underinsure the Property and not have the financial resources to address property damage. The language proposed by the City and the National Trust should be reinserted.

## **13. Remedies**

A right of notice was included for any mortgagee of the Grantor in the Covenant (§ 9(b)). This additional right is unnecessary and could delay the City in its ability to enforce its rights under the Covenant. Because the Property will not be encumbered by a mortgage at the time the Covenant is put in place, any mortgagee will have notice of the Covenant and the City’s rights

thereunder. Therefore in the future the City should not have an obligation to track down a mortgagee and provide it with notice prior to instituting a suit or seeking a remedy.

#### **14. Perpetual Covenant**

Paragraphs 3 and 14 are similar and should be combined.

#### **15. Use of Property**

Finally, we come to the issue of future use of the Property. As noted by the City Council at its June 24<sup>th</sup> meeting, continued use of this facility for postal services is a priority. But we would like to emphasize that post office use does not exclude other uses. Continued post office use is important, but still allows for adaptive reuse of other parts of the building for new functions.

The ACHP's Report to Congress concludes in finding number 6 that change of a post office's historic use can constitute an adverse effect when the National Register listing of the property is tied to that use. 36 CFR § 800.5(a)(2)(iv). And indeed historic post office use framed the significance in the 1980 National Register nomination:

The Berkeley Post Office ... embodies for the City of Berkeley the sense of mission which the government then put into its public buildings – “buildings which will educate and develop the public taste & eventually elevate it to a higher plane” .... The lobby, particularly, is a civic treasure .... Berkeley has few if any comparable 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.... Downtown Berkeley is still essentially the Main Street that developed in the 1910s & 20s, and the well-patronized post office is important in keeping it alive.

Based on the National Register nomination in this case, the use of the Property as a post office – the use for which it was designed and constructed – is itself an integral Preservation and Conservation value. Accordingly, the preservation of this use is the preferred use of the building in order to preserve its identified historical and cultural value. In derogation of the significance of the post office use in this case, however, the Covenant deletes a statement in Recital C.3 of the City/National Trust covenant that one of the Preservation and Conservation values is the historic use of the building as a post office, as well as a provision that would require that the retail portion of the building be leased back to the USPS for 50 years for operation as a post office. (Paragraph 1(i).)

In a subsequent letter the USPS stated that this term is not feasible, and that it intends to require only a five-year leaseback, with three additional five-year options. This is inconsistent with the City Council's desire that the use of the facility as a post office be retained and that the Covenant be as restrictive as possible. The USPS letter states that due to the transaction costs of moving, it generally exercises such options to remain in place. Thus the required leaseback term should be a minimum of 20 years, even under the USPS's reasoning. As noted above, the City Council's position is that the Property should include full post office uses (e.g., bulk mail service and package pickup should be restored) for the long term. The parties are far apart on this issue.

Ann Sarver

July 9, 2014

Page 8 Berkeley Main Post Office Covenant – City of Berkeley and National Trust Comments

If you have any questions about our comments, please feel free to contact Zach Cowan via email at [zcowan@cityofberkeley.info](mailto:zcowan@cityofberkeley.info) or [bturner@savingplaces.org](mailto:bturner@savingplaces.org).


Very truly yours,

City of Berkeley



By: Zach Cowan  
City Attorney

National Trust for Historic Preservation



By: Brian Turner  
Senior Field Officer & Attorney, San Francisco Field Office

cc: Tom Samra, Vice President, Facilities, USPS  
Sharon Freiman, Chief Counsel, Procurement and Property Law, USPS  
R. Clark Morrison, Cox Castle Nicholson  
Antonio Rossmann  
Carol Rowland-Nawi, SHPO



## PRESERVATION COVENANT

### 558 Grand Concourse Bronx, New York

In consideration of the conveyance by Deed dated <sup>August</sup> ~~July~~ 15, 2014 and recorded herewith from the UNITED STATES POSTAL SERVICE (the "Grantor") to BRONX LANDMARK, LLC (the "Grantee") of certain real property located at 558 Grand Concourse in the Borough of Bronx, in the City and County of Bronx, State of New York as such property is more particularly described in the legal description attached to the Deed at Exhibit A, which legal description is also attached to this Preservation Covenant at Exhibit A and incorporated herein (the "Property"), the Grantee hereby agrees with and covenants to the Grantor, the New York City Landmarks Preservation Commission, a bureau of the government of the City of New York, New York, having an office at 1 Centre Street, 9<sup>th</sup> Floor North, New York, New York 10007 and the New York Landmarks Conservancy, a New York not-for-profit organization having an office at One Whitehall Street, New York, New York 10004 (the "Covenantees"), as follows:

- (1) In accordance with and under the authority of N.Y. Env. Cons. Law §§ 49-0301 to 49-0311, the Grantee hereby grants to the Covenantees in perpetuity on behalf of itself, its heirs, successors and assigns, the covenant and servitude at all times to maintain and preserve the Property's Historic Features (as depicted in the photographs, measured drawings and site plan attached hereto and incorporated herein at Exhibit B and as further defined in paragraph 3 of this Preservation Covenant) in accordance with the "Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings" (National Park Service, 1997, 36 CFR Sec. 67), as these may be amended from time to time ("Secretary's Standards") in order to preserve those qualities that make this Property eligible for listing on the National Register of Historic Places and in order to preserve the Murals hereinafter described. Grantee shall at all times maintain the Historic Features (hereinafter defined) in the same or better condition as that existing on the Effective Date (hereinafter defined) of this Preservation Covenant. Grantee's obligation to maintain shall require Grantee to replace, repair, and/or reconstruct the Historic Features in the same or better condition, state of repair, and appearance as that existing on the Effective Date of this Preservation Covenant, as such condition and state of repair is depicted in the photographs, measured drawings and site plan at Exhibit B. Grantee's obligation to maintain the Historic Features shall be performed in accordance with the Secretary's Standards and shall include, without limitation, the use by Grantor of in kind materials and colors, applied with workmanship comparable to that which was used in the original construction or application of those materials being repaired or maintained. Notwithstanding the foregoing, if because of circumstances beyond its control the Grantee believes it is necessary for Grantee to make changes in appearance, materials, colors, and original workmanship to all or any portion of the Historic Features, or if there has been significant deterioration or damage to all or any portion of the Historic Features which is determined by an appropriate governmental agency having jurisdiction over the Property to be a danger to human health or the environment, then Grantee may make changes to the appearance, materials, colors and original workmanship of the Historic Features but only with the prior written approval of both the New York City Landmarks Preservation Commission (NYC LPC) and the New York Landmarks Conservancy (Conservancy), which approval in the sole discretion of either the NYC LPC or the Conservancy may be withheld or conditioned except and to the extent that an applicable governmental entity has determined that there exists an imminent threat to human health or the environment and Grantee reasonably believes that



Grantee is likely to be subject to fines or penalties or other governmental enforcement action should Grantee fail to make such changes.

- (2) The Grantee hereby acknowledges that (a) the Property is listed on the National Register of Historic Places and is a designated New York City landmark; (b) that the lobby of the building located on the Property has been designated as a New York City Interior Landmark; (c) that the lobby contains thirteen (13) fresco murals by noted Depression-era artist Ben Shahn as shown in the photographs attached hereto and incorporated herein at Exhibit C (the "Murals"); and therefore (d) the Grantee and its heirs, successors and assigns covenant and agree to maintain and preserve the Murals, individually and collectively, in such locations, and in the same or better condition and state of repair as depicted in the photographs at Exhibit C and in accordance with the terms and conditions of this Preservation Covenant while such Murals remain on the Property. While this obligation to maintain and preserve is reflected in a loan agreement between Grantee and the United States Postal Service (USPS), a copy of which is attached hereto and incorporated herein at Exhibit D ("Mural Loan Agreement"), in the absence or upon the termination of such Mural Loan Agreement or a successor loan agreement, this obligation to maintain and preserve the Murals is not waived, terminated or released. Grantee shall ensure that any restoration of the Murals shall conform to the American Institute for Conservation of Historic and Artistic Works (AIC) code of ethics and guidelines for practice and the National Park Service conservation guidelines, as these may be amended, replaced or superseded from time to time. Grantee shall maintain damage insurance covering the Murals to their full appraised value, as determined initially on or immediately preceding the Effective Date of this Preservation Covenant by an accredited art appraiser. Grantee shall have such appraised value updated by an accredited art dealer at least every five years measured from the Effective Date of this Preservation Covenant. The damage insurance shall be an "all risk", wall-to-wall policy subject to only the following standard exclusions: wear and tear, gradual deterioration, terrorism, and war. To the extent these insurance requirements conflict with the terms of any mural loan agreement, including the Mural Loan Agreement attached at Exhibit D hereto, the requirements of this paragraph shall control, and the Grantee shall be bound by them.
- (3) No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken that would affect the Historic Features of the Property without consultation with and the express permission of the Conservancy and NYC LPC. The Historic Features are shown and described on Exhibit B hereof and are further defined as: (1) the exterior envelope of the building located on the Property and (2) the interior lobby area of the Property, as depicted in the attached site plan, photographs and measured drawings at Exhibit B.
- (4) No construction, alteration or rehabilitation shall be undertaken or permitted to be undertaken with respect to the aforementioned Historic Features without NYC LPC approval under the New York City Landmarks Law [Charter of the City of New York §§ 3020 et seq. and the Administrative Code of the City of New York §§25-301 et seq.] and compliance with all other laws applicable to Grantee. Grantee acknowledges that such compliance may include the requirement that the Conservancy co-sign all applications to the LPC that affect the exterior or designated interior.
- (5) The Conservancy and NYC LPC, jointly and severally, shall be permitted at all reasonable times during Grantee's business hours to inspect the Property in order to ascertain if the above conditions are being met. The entity requesting the inspection shall provide advance written notification of the date and time that such entity wishes to inspect the Property to Grantee.
- (6) In the event of a violation of this covenant by Grantee, and in addition to any remedy now or hereafter provided by law, NYC LPC may, following delivery of reasonable



notice to the Grantee ("Cure Notice"), with a copy to the Conservancy, and a reasonable opportunity to cure such violation in a manner reasonably satisfactory to the NYC LPC, institute suit to enjoin said violation or to require the restoration of the Historic Features of the Property which have been damaged, altered, modified or destroyed. Remedies shall include, but not be limited to, specific performance, permanent injunction and/or damages. In the event that NYC LPC fails to enforce the obligations of Grantee under this Preservation Covenant, the Conservancy shall have the right to issue a Cure Notice and institute a suit to enjoin said violation in the same manner as NYC LPC outlined above. In the event Grantee is found to have violated any of its obligations under this Preservation Covenant, Grantee shall reimburse the Conservancy and/or the NYC LPC, as applicable, for any reasonable costs or expenses incurred by the Conservancy and/or the NYC LPC in connection with their enforcement of the terms of this preservation covenant, including but not limited to all reasonable: court costs, and attorneys, architectural, engineering, and expert witness fees.

- (7) This Preservation Covenant is binding on the Grantee, its heirs, successors and assigns in perpetuity and shall run with the land. All stipulations and covenants contained herein shall be inserted by the Grantee verbatim or by express reference in any deed or other legal instrument by which the Grantee divests itself of any interest in the Property or any part thereof. Use of the term "Grantee" herein shall mean and include the original Grantee BRONX LANDMARK, LLC, and all of its heirs, successors and assigns in perpetuity.
- (8) The failure of the NYC LPC and/or the Conservancy to exercise any right or remedy granted under this instrument shall not have the effect of waiving or limiting the exercise of any other right or remedy or use of such right or remedy at any other time.
- (9) Execution of this Preservation Covenant shall constitute conclusive evidence that the Grantee agrees to be bound by the foregoing conditions and restrictions and to perform to obligations herein set forth. This Preservation Covenant shall be self-executing and thus, the failure of the Conservancy, NYC LPC, or USPS to execute this Preservation Covenant shall not impair its effectiveness or impede its enforcement against Grantee.
- (10) The unenforceability of any term or provision in the Preservation Covenant shall not affect the validity of the remaining sections or portions of the Preservation Covenant.
- (11) Subject to the conditions and requirements of the laws and regulations of the City of New York, the State of New York, and the United States of America (including, but not limited to, those City, State and federal laws and regulations governing the activities of governmental agencies and tax-exempt charitable organizations and governing preservation covenants and easements granted in perpetuity), the NYC LPC and the Conservancy, may, in their sole determination as conditioned above, and for good cause, amend, modify or cancel any or all of the foregoing restrictions upon application of the Grantee, its heirs, successors or assigns provided that proper and adequate notice of such amendment, modification or cancellation shall be given at least thirty (30) calendar days in advance to the public by publication in a media of general circulation and availability and by written correspondence to the State Historic Preservation Office.
- (12) This Preservation Covenant takes effect at the time and date that the Property is conveyed by the USPS to the Grantee (the "Effective Date").
- (13) This Preservation Covenant is not subject to expiration under any Marketable Title Act or similar law. The Conservancy or NYC LPC may re-record this Preservation Covenant without the consent of the Covenantor from time to time to perpetuate the Conservancy's and NYC LPC's rights. The parties expressly acknowledge that no such recording is necessary in order to perpetuate the validity or enforceability of this Preservation Covenant, and nothing contained in this paragraph shall be deemed to constitute a requirement that any such recording is necessary.



**SIGNATURE PAGE FOR PRESERVATION COVENANT**

**GRANTEE:**

**BRONX LANDMARK, LLC,**  
a Delaware limited liability company

**BRONX LANDMARK, LLC**  
a Delaware limited liability company

By: **Bristol YWA, LLC**  
a Delaware limited liability company  
its Sole Member

By: **Bristol El Buzon, LLC**  
a Delaware limited liability company  
its Managing Member

By: **Bristol Value II, L.P.**  
a Delaware limited partnership  
its Sole Member

By: **Bristol Investment Company III, LLC**  
a Delaware limited liability company  
Its General Partner

By: Stacy Fuchs  
Name: Stacy Fuchs  
Its: Secretary

By: J. M. Lay  
Name: Todd McRay  
Its: Chief Financial Officer

ACKNOWLEDGMENTS

STATE OF *California* )  
 )ss  
COUNTY OF *San Francisco* )

On August *14*, 2014 undersigned, a notary public in and for said state, personally appeared *Todd J. McKay* personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the persons upon behalf of which the individual acted, executed the instrument.

*Lauren D. Maack*  
Notary Public



SEAL

STATE OF *California* )  
 )ss  
COUNTY OF *San Francisco* )

On August *14*, 2014 undersigned, a notary public in and for said state, personally appeared *Stacy Fuchs* personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the persons upon behalf of which the individual acted, executed the instrument.

*Lauren D. Maack*  
Notary Public



SEAL

Robert B. Tierney (Date) 2/24/14  
Robert B. Tierney  
Chair, New York City Landmarks Preservation Commission

State of New York )  
County of New York ) ss.

On the 24 day of Feb in the year 2014 before me, the undersigned, personally appeared Robert Tierney, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Subscribed to and sworn before me this 24<sup>th</sup> day of Feb (month), 2014 (year),

by Robert Tierney . (Robert B. Tierney, Chair, New York City Landmarks Preservation Commission)

[Signature] (signature of notary) (seal of notary)

LILY I. FAN  
Notary Public, State of New York  
No. 02FA5020867  
Qualified in Queens County  
Commission Expires Nov. 29, 2017

**SEAL**

Peg Breen (Date) 7/22/14  
Peg Breen  
President, New York Landmarks Conservancy

State of New York )  
County of New York ) ss.

On the 22<sup>nd</sup> day of July in the year 2014 before me, the undersigned, personally appeared See below personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Subscribed to and sworn before me this 22<sup>nd</sup> day of July (month), 2014 (year),

by Peg Breen (Peg Breen, Chair, President, New York Landmarks Conservancy)

Tranell Daniels Autry (signature of notary)

(seal of notary)

TRANELL DANIELS AUTRY  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01DA6120464.  
Qualified in New York County  
My Commission Expires December 20, 2016

**SEAL**



*Daniel Delahaye* (Date) 11 July 2014

Daniel Delahaye  
Federal Preservation Officer, United States Postal Service

District of Columbia

This instrument was acknowledged before me on July 11, 2014 by Daniel Delahaye as the Federal Preservation Officer of the United States Postal Service.

*[Signature]*  
Signature of notarial officer  
(Seal, if any)

*Supervisor, Legal Services*  
Title  
Commission expires: *Feb. 28, 2018*

ANASTASIA BARTHOLOMEW  
NOTARY PUBLIC DISTRICT OF COLUMBIA  
My Commission Expires February 28, 2018



SEAL