

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

UNITED STATES POSTAL SERVICE,	)	
	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 16-04815 WHA
	)	
CITY OF BERKELEY,	)	
	)	
Defendant.	)	
	)	

San Francisco, California  
Thursday, December 22, 2016

TRANSCRIPT OF PROCEEDINGS

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1 Thursday - December 22, 2016

8:26 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Okay. So Civil 16-4815, United States  
5 Postal Service versus City of Berkeley. It's on for a motion  
6 to dismiss, and a case-management conference.

7 **THE COURT:** Welcome. Let's hear your appearances.

8 **MR. COWAN:** Good morning, Your Honor. Zach Cowan,  
9 City Attorney for the City of Berkeley, defendant.

10 **THE COURT:** Okay. Good morning.

11 **MS. BERMAN:** Good morning, Your Honor, Julie Berman,  
12 on behalf of the Postal Service.

13 **THE COURT:** Okay. Welcome to you. Are you from DOJ,  
14 or from the Postal Service?

15 **MS. BERMAN:** I'm from DOJ, Your Honor.

16 **THE COURT:** In D.C., or here?

17 **MS. BERMAN:** In D.C., Your Honor.

18 **THE COURT:** You came all the way out?

19 **MS. BERMAN:** Yes, although --

20 **THE COURT:** Have you been over to see the Post  
21 Office?

22 **MS. BERMAN:** I have. And, Your Honor, in the  
23 interest of full disclosure, I often telecommute from southern  
24 California, so I'm almost a native.

25 **THE COURT:** Almost. All right. Good.

1 And who is that over there?

2 **MS. CASTORINA:** I'm Janine Castorina. I am from the  
3 Postal Service.

4 **THE COURT:** Welcome to you. You can have a seat.

5 All right. Let's see. This is a motion to dismiss by --

6 **MR. COWAN:** I think we're reversed (indicating).

7 Yes, Your Honor.

8 **THE COURT:** Oh, I'm sorry. Wait a minute. Who's  
9 bringing this motion?

10 **MR. COWAN:** We are.

11 **THE COURT:** You are. All right. Okay. Go ahead.

12 **MR. COWAN:** Thank you, Your Honor.

13 **THE COURT:** Who are all those (indicating) people?  
14 Are those the Save the Post Office Committee? Oh.

15 I want to -- first I just -- this has no influence on me.  
16 I've got to rule on the merits. I want you to understand that.  
17 You know, it doesn't cut much slack with me that a lot of  
18 people show up or not show up, because I'm sworn to uphold the  
19 law; but I want you to know I appreciate you coming out in the  
20 middle of December on a cold day, even though it's sunny, to  
21 hear your lawyer; support your lawyer. And good for you. So  
22 all right. Thank you.

23 All right. You get to go first.

24 **MR. COWAN:** Thank you, Your Honor. I hope I'm not  
25 overinferring from your comment in the last case that this is a

1 live controversy.

2           **THE COURT:** Well, I think it is a live controversy.  
3 Let me just tell you why, and you can try to talk me out of it.

4           All right. So here's the way I see. This I've got the  
5 thing right here (indicating). The City of Berkeley enacted  
6 this *Gomillion* -- *Lightfoot versus Gomillion*-styled rectangle  
7 with 17 sides -- or 18. I don't know. And it has had the  
8 devastating effect on --

9           What's your name?

10           **MS. BERMAN:** Julie Berman, Your Honor.

11           **THE COURT:** Berman.

12           **MS. BERMAN:** Yeah.

13           **THE COURT:** -- Ms. Berman's client's ability to sell  
14 the Property. They even get somebody interested in it,  
15 because no one's going to buy this building, unless they can  
16 use it for commercial reasons or purposes. So you are imposing  
17 too high a standard. You're saying they've got to have a buyer  
18 in hand before they can bring this lawsuit to get this  
19 ordinance declared illegal.

20           And I say back to you, *I don't think they'll ever get*  
21 *anybody*. I think it's a Catch-22.

22           Okay. Who wrote Catch-22? Let's see how well-informed  
23 you are.

24           **MR. COWAN:** Joseph Heller.

25           **THE COURT:** Who?

1           **MR. COWAN:** Joseph Heller.

2           **THE COURT:** Who do you say?

3           **MS. BERMAN:** Joseph Heller.

4           **THE COURT:** You are both right. You are both right.

5 I was going to ask the people in back, to see how many of those  
6 knew who wrote that Catch-22. Okay. You had it right. Okay.

7           Well, anyway, it's a Catch-22. The City of Berkeley is  
8 Catch-22.

9           So what do you say to that? You go ahead, and answer my  
10 question.

11           **MR. COWAN:** Thank you, Your Honor.

12           I don't think our position is quite that they have to have a  
13 buyer in hand.

14           I think our position is they have to have gone through --  
15 excuse me -- the process that's required by federal law;  
16 namely, the Section 106 consultation --

17           **THE COURT:** Wait a minute. Say that again. Okay?

18           **MR. COWAN:** -- and NEPA process.

19           **THE COURT:** Because I haven't focused on this for  
20 about a year.

21           Do you need a cough drop? Sounds like you're sick. Are  
22 you sick?

23           **MR. COWAN:** No. I'm okay.

24           **THE COURT:** Okay. I don't want germs. If you've got  
25 germs -- you've got to go sit back there if you're going to

1 have germs up here.

2 **MR. COWAN:** Counsel, germ-free.

3 **THE COURT:** Germ-free. Good.

4 What consultation is this, now?

5 **MR. COWAN:** So under the National Historic  
6 Preservation Act, given that this is a National Register  
7 resource, there has to be consultation with consulting parties  
8 and the Advisory Council on Historic Preservation, the federal  
9 agency, about how the resource will be preserved after it's  
10 sold.

11 There also has to be, under National Environmental Policy  
12 Act -- NEPA -- some degree of environmental review of: What  
13 are the impacts of the decision?

14 And when the Court dismissed the City's and the National  
15 Trust's case as moot -- the related case as moot -- it was  
16 based on the Postal Service's representation that it was not  
17 then intending to sell the Property, and it had not been  
18 listed. And part of the Court's Order, which I believe is  
19 quoted in our papers, basically recited those facts, and said,  
20 *So you'll have to go through all of that all over again if you*  
21 *want to sell the Property.*

22 And what we're saying is that, as far as we know, that has  
23 not happened. And furthermore, it seems to us that a purpose  
24 of the NEPA process and Section 106 consultation process --

25 **THE COURT:** Wait. Seven oh what? Seven what? 706?

1           **MR. COWAN:** 106. Section 106. I'm sorry.

2           **THE COURT:** Section 106. It's 106 of what?

3           **MR. COWAN:** The National Historic Preservation Act.  
4 It was recently recodified. I believe there's a footnote in  
5 our opening brief with the current citation completed.

6           **THE COURT:** So let me -- so your view is that the  
7 Post Office has to at least go through the Section 106  
8 procedure, and NEPA.

9           Now, wasn't there something about an intent? Don't they  
10 have to have -- under the regulations, have some kind of intent  
11 to sell or -- I'm going back two years now in this case.  
12 Wasn't there something like that?

13           **MR. COWAN:** I did not work on that case. I believe  
14 there's some formal procedure the Post Office has to go  
15 through, but I can't say much more about that.

16           **THE COURT:** Ms. Berman, what do you --

17           First of all, have you gone through Section 106? Let's  
18 just start with that; just that one thing. Have you done that  
19 yet?

20           **MS. BERMAN:** In relation to a sale that could have --  
21 that in the future could occur, not yet, Your Honor.

22           And I would refer the Court to the Decision dismissing the  
23 prior case as moot. On page 5 of that Decision, the Court  
24 indicated that for the City to sustain -- and the Court's  
25 language was, "to conceivably suffer any injury," there would



1 have to be a final sale, so that -- or a final sales agreement,  
2 so that the Court could look at the process followed leading up  
3 to that sale, to assess whether or not the rules, including  
4 Section 106, had been followed.

5 So that action is entirely separate from this one, because  
6 the statutes on which that action was based require a certain  
7 process to be followed before final sale can occur. And in the  
8 steps leading up to that sale, obviously, that's a  
9 resource-intensive process, and something that the Postal  
10 Service would do if -- if there wasn't the Zoning Ordinance  
11 preventing the Postal Service effectively from relisting the  
12 Property in the first instance.

13 This action is about, as the Court put it, the devastating  
14 consequences of the Zoning Ordinance, and preventing the Postal  
15 Service from taking steps to sell the Property in the first  
16 instance, in effect.

17 **THE COURT:** Well, but under your own regulations --  
18 help me remember this part. Isn't there a requirement under  
19 your own regulations that if you want to do a sale, you have to  
20 first adopt some postal resolution -- some resolution, or come  
21 up with an order or a memorandum, a decision that you are, in  
22 fact, going to make a sale or try to find a seller [sic], even  
23 though you haven't yet got a seller [sic] in mind? I mean a  
24 buyer in mind. I know there's something like that. What am I  
25 remembering?

1           **MS. BERMAN:** Your Honor, I believe that the Court is  
2 referring to the decision to relocate Postal Service property.

3           But I, like Mr. Cowan, didn't work on the prior action.

4           May I have a moment to consult with my client, to make  
5 sure I'm getting that?

6           **THE COURT:** Sure, of course. Yeah, go ahead.

7           **MS. BERMAN:** Thank you.

8 (Discussion off the record.)

9           **MS. BERMAN:** Your Honor, having consulted with  
10 counsel for the Postal Service, there was a prior study done  
11 more globally that encompassed the decision to sell the  
12 Property. That's the first step that would be necessary, in  
13 terms of the decision to sell the Property. And that was  
14 never rescinded.

15           The Postal Service has no current intention to list the  
16 Property, but that's because of the Zoning Ordinance. And --

17           **THE COURT:** All right. So -- but the relocation  
18 decision -- that was done back then, and never rescinded?  
19 That's what you're telling me?

20           **MS. BERMAN:** Your Honor, actually, not that decision,  
21 but a more global study about the sale of underutilized  
22 properties. So the relocation decision was made, and then was  
23 rescinded. And so there is no decision currently effective to  
24 relocate postal retail services from that location; but the  
25 decision to sell the Property was never rescinded.

1           There's -- and I should make a distinction between the  
2 decision to sell the Property versus an actual decision to  
3 list the Property, because at this point it makes no economic  
4 sense to list the Property, so there's no decision to do  
5 that; but the decision to sell the Property remains current.

6           **THE COURT:** Well --

7           **MS. BERMAN:** And, Your Honor, if I may --

8           **THE COURT:** Well, what would be so hard for you to go  
9 get a real-estate broker to list the Property? Let the  
10 real-estate broker come in here and testify that they've tried  
11 42,012 ways to sell the Property, and no one is interested on  
12 account of the Ordinance.

13           And then that would tee it up very nicely for you, but  
14 why -- why --

15           But now you want me to do this on a hypothetical basis.

16           **MS. BERMAN:** It's not on a hypothetical basis,  
17 Your Honor, because the injury -- excuse me -- the injury in  
18 this case, Your Honor, is not just economic. It's the  
19 interference with a federal function.

20           And there are a couple of cases, Your Honor, that really  
21 speak to this point. First of all, the *City of Pittsburg*  
22 case -- there's a Ninth Circuit case that we relied on in our  
23 papers, but there was a Northern District of California *City of*  
24 *Pittsburg* case in our papers preceding that Decision, where  
25 there was a Zoning Ordinance through which a city said that a

1 postal carrier couldn't cross a property's lawn without  
2 permission from the owner.

3 And the Postal Service brought an action, alleging  
4 violation of the Supremacy Clause.

5 And the Court first looked at whether that case was ripe,  
6 notwithstanding that there was no postal carrier that had tried  
7 to cross a specific lawn in a specific violation. And the  
8 Court said that it was the attempt to regulate a federal  
9 function or the interference with the exercise of a federal  
10 power. That, in itself, made the case ripe for decision. And  
11 then the Ninth Circuit decided the merits, without discussing  
12 ripeness, of course, indicating that the case was ripe.

13 And that's consistent, too, with what the Supreme Court  
14 did in *Maryland versus Louisiana*, where the State of Louisiana  
15 tried to allocate costs associated with a new gas tax. And  
16 that Decision, the Supreme Court noted, Congress had  
17 specifically allocated to the Federal Energy Regulatory  
18 Commission. And the very act of trying to take the decision  
19 away from the Federal Energy Regulatory Commission, even though  
20 it wasn't clear that the Commission would have made a different  
21 determination from the State of Louisiana, it was the attempt  
22 to take the decision away from the federal government when  
23 Congress specifically vested the decision in the federal  
24 government that made the case ripe for determination.

25 And that's what the Zoning Ordinance does here,

1 Your Honor. The Zoning Ordinance take the decision of whether  
2 to sell the Property away from the Postal Service, and tries  
3 to put it effectively in the hands of the City of Berkeley.

4 If I may, Your Honor, I'd like to take a --

5 **THE COURT:** Wait, wait, wait.

6 **MS. BERMAN:** Yes.

7 **THE COURT:** Because I interrupted counsel.

8 Okay. What do you have to say on this subject?

9 **MR. COWAN:** Thank you.

10 Well, first of all, if the decision to sell the Property  
11 is still current, then I have to wonder why the City's National  
12 Trust case is moot. It seems there's a lot of controversy, and  
13 we should be able to pursue the NEPA and Section 106 claims.

14 Going more directly to Counsel's comments, both Pittsburg  
15 --

16 Well, let me take them separately.

17 The Pittsburg case -- and this is what this case  
18 ultimately comes down to. Pittsburg directly regulated Postal  
19 employees in the performance of their federal function.

20 We are not doing that here. Counsel said the City was  
21 preventing the Postal Service from taking steps to sell the  
22 Property. Well, obviously not, first of all, because  
23 apparently it is for sale.

24 Second of all, the Postal Service's power to sell is  
25 totally unaffected. They can sell their property.

1           The issue here is: Has Congress or does the Constitution  
2 guarantee them the highest price?

3           And we don't see it that way, you know, taking their  
4 allegations on that issue as true for the purposes of this  
5 motion.

6           The *Maryland versus Louisiana* case was a -- it was ripe,  
7 because the law is conflicted. The federal law, the FERC  
8 regulations, and the first use tax of Louisiana conflicted on  
9 their face.

10          That's also the case with the other cases they cite: The  
11 *Boeing* case. State rules about nuclear site clean-up and  
12 federal rules conflicted on their face. There are no facts to  
13 be determined.

14          The same with the *U.S. versus New Mexico*. The Rules of  
15 Professional Conduct in New Mexico said that --

16                 **THE COURT:** You say that the City of Berkeley -- I'm  
17 just curious about this. Let's say that the City of  
18 Berkeley -- there might even be a decision on that.

19          Hypothetical. I drive through Berkeley all of the time.  
20 I don't live in Berkeley, but I drive there through there. And  
21 every now and then there's one of those old signs that's still  
22 up from the old days that says that Berkeley is a nuclear-free  
23 zone.

24                 **MR. COWAN:** With some exceptions, yes.

25                 **THE COURT:** Well, but what if the DOD -- Department

1 of Defense -- says, *Wait a minute. Well, we've got to have our*  
2 *bombs go through Berkeley, because we've got to get them to the*  
3 *Oakland port. And if we don't have the bombs go through*  
4 *Berkeley, then we have to go way around through Walnut Creek.*  
5 *And we would prefer to go through Berkeley.*

6       What would be the effect there, or has there been  
7 litigation on that?

8           **MR. COWAN:** There actually was litigation over  
9 Oakland's nuclear-free ordinance. There hasn't been over the  
10 City's, because it exempts certain things.

11           **THE COURT:** What happened in the Oakland case?

12           **MR. COWAN:** Part of it was preëmpted, and part not.  
13 It was quite a while ago. And it's a long time since I read  
14 that Opinion.

15           **THE COURT:** All right. So --

16           **MR. COWAN:** But to answer the Court's question, I  
17 actually have issued an opinion on that question in the past,  
18 which is: The City has no authority over federal activities --

19       Well, the opinion was about the Lawrence Berkeley Lab.  
20 The City has no authority over any nuclear anything that the  
21 federal government is doing.

22       But the difference is in that case, the federal government  
23 is doing something through a contractor, through its own  
24 employees, whatever. It doesn't matter.

25       In this case, the federal government's powers and

1 activities are unaffected. The consequences of those  
2 activities may be changed, but we change the consequences of  
3 the public's activities all of the time when we do zoning.  
4 That's the nature of zoning.

5 The other USPS/Postal Service -- the cases involving the  
6 Postal Service that are cited are similar in that respect.  
7 They're all interference with a function of the Postal Service:  
8 deliveries; construction of facilities for the Postal Service,  
9 whether it's by a private contractor, or otherwise.

10 That's different, it seems to me. It's a difference in  
11 kind. The impact here is at least a degree more attenuated.  
12 And I'm trying to stay away from the direct/indirect language,  
13 because it has a different meaning in this context, but it  
14 seems very much more attenuated than saying, *Your contractor*  
15 *needs our permit to build your building, or we get to tax you,*  
16 which of course --

17 **THE COURT:** All right. So I want to stick with this  
18 question for a minute. Now, I was contemplating a trial in  
19 this case maybe in the next few months, and trying to figure  
20 out what that trial would look like.

21 See, I know what the government thinks. The government  
22 thinks everything can be won on summary judgment.

23 No. If this case goes forward, we're going to have a  
24 trial with real witnesses. Okay? So just start thinking  
25 you're going to be cross-examining somebody up there. All



1 right. But this is still at the what-if stage.

2 But here's what -- I am trying to imagine what the trial  
3 would look like, because I was imagining that you would have a  
4 real-estate broker who would come in and say how many times  
5 they had tried to sell the Property, and they couldn't. But  
6 you don't even have a real-estate broker.

7 So what would your evidence at trial be to show how  
8 adversely this has affected your ability to sell the  
9 Property? You just want to me to pull it out of thin air, and  
10 say, *Well, yeah, it seems like it must.* I mean, you're going  
11 to have to have prove right at trial that it has adversely  
12 affected your ability to sell the Property.

13 **MS. BERMAN:** A couple of responses. And, of course,  
14 we will present the evidence that the Court says is required,  
15 but with --

16 **THE COURT:** Well, you don't have a real-estate  
17 broker. You're not even trying to sell the Property.

18 **MS. BERMAN:** Well, Your Honor, we could present  
19 testimony of the Vice President for the Postal Service or -- of  
20 an official from the Postal Service that would certainly  
21 testify that the Postal Service has judged that it makes no  
22 economic sense to sell the Property under these  
23 circumstances.

24 **THE COURT:** You mean just a raw opinion like, *Oh,*  
25 *I've been sitting in my easy chair. And in between*

1 *advertisements, I thought about this, and it's going to make it*  
2 *harder to sell, as opposed to actually getting out there and*  
3 *trying to sell it?*

4           **MS. BERMAN:** Well, Your Honor, a couple responses on  
5 that point. To begin with, it's resource intensive, of course,  
6 to try to market a property; and where it's obvious on its face  
7 that the Property is so much diminished in value, it would be  
8 a waste of Postal Service resources.

9           But to step back for --

10           **THE COURT:** I don't know about that. How much of a  
11 recent -- you went through this whole exercise before and put  
12 resources in it. Plus it would be the broker doing all of the  
13 resources. The broker is the one who would be out there,  
14 trying to sell the Property; not the Postal Service.

15           **MS. BERMAN:** Well, Your Honor, this Court -- a couple  
16 of responses. This Court has noted in the prior decision  
17 dismissing the prior case as moot that the Zoning Ordinance now  
18 made it highly unlikely that a sale could ever occur; that  
19 there would ever be an interested buyer, but I'd refer the  
20 Court to the second --

21           **THE COURT:** Well, all right. That's a different  
22 case. Now your entire case turns on that proposition. And --  
23 and I think we'd have to have some proof that that was true.

24           **MS. BERMAN:** Your Honor -- and we could certainly  
25 produce proof.

1 But in the Second Circuit Decision in the *Clean Air*  
2 *Markets Group* case.

3 **THE COURT:** What was that case?

4 **MS. BERMAN:** The *Clean Air Markets Group*. It's a  
5 Second Circuit Decision, Your Honor. That's a case that dealt  
6 with allowances for -- it was to do with the cap-and-trade  
7 system, and it had to do with emissions allowances.

8 In that case it was a federally imposed cap-and-trade  
9 system, and the State of New York tried to impose restrictions  
10 on how those allowances could be sold. So the federal system  
11 was that they could be freely traded. The State of New York  
12 imposed regulations that said that they couldn't be sold to  
13 certain states, and attached -- I think it was restrictive  
14 covenants to those emissions allowances.

15 And the Court in that case, the Second Circuit, said that  
16 the value of those allowances was indisputably diminished by  
17 the restriction on their resale. And even though in that case  
18 the State of New York didn't say, *You may not sell the*  
19 *allowances*, just like in this case the City didn't say, *You may*  
20 *not sell the Postal Service property*, it's the restriction on  
21 the sale of the Property that, as the Second Circuit put it  
22 in that case, indisputably diminishes the value of the  
23 Property.

24 But more to the point, Your Honor, it's the --

25 **THE COURT:** But wait a minute. Let's draw a

1 distinction now. I'm going to give you two possibilities. Is  
2 your theory that the regulation diminishes the commercial value  
3 of the Postal Service, or is it that it makes it virtually  
4 impossible to sell it to anybody? Those are two different  
5 propositions.

6 **MS. BERMAN:** It's the latter, Your Honor. It makes  
7 it virtually impossible to sell it in a way that make sense. I  
8 mean, of course, the Postal Service could go out and sell it  
9 for \$10 if somebody would take the Property for \$10. But  
10 to -- it makes an economically viable sale virtually  
11 impossible, because any commercially viable use is taken away  
12 by the ordinance. So --

13 **THE COURT:** But who's going to prove that up at  
14 trial? How are you going to prove that?

15 **MS. BERMAN:** Your Honor, it's -- it's evident from  
16 the face of the ordinance, because the ordinance takes away any  
17 commercially viable use. There's nothing that a commercial  
18 developer can do any longer with this property under the  
19 ordinance.

20 And, Your Honor, to step back from --

21 **THE COURT:** Maybe there could be a new foundation  
22 that came into existence called "The Berkeley Historical  
23 Society," who wants the Property for purposes of installing a  
24 museum to save and display artifacts from the history of  
25 Berkeley. And there will be a floor dedicated to Mario Savio.

1 There will be another floor dedicated to early days of U.C.  
2 Cal, and so forth; all of the great restaurants in Berkeley.  
3 Anyway, there would be -- it could be -- and they would charge  
4 money for the public to come in. And would that be okay? That  
5 would be okay under the ordinance; wouldn't it? And that  
6 building would remain intact, and it would now be a museum.

7 So that -- why wouldn't that work?

8 **MS. BERMAN:** Your Honor, that would be a use close to  
9 my heart. I am a twice Cal graduate.

10 However, Your Honor, it's -- the ordinance's regulation of  
11 the sale of the Property makes it unconstitutional, even if  
12 there were some use that were allowable under the ordinance.  
13 It's the fact that the ordinance's effect, as alleged -- and we  
14 are at the motion-to-dismiss stage at this point. As alleged  
15 in the Complaint, the Zoning Ordinance interfered with the  
16 Postal Service's ability to sell the Property. And that was,  
17 again, as alleged in the Complaint, the very purpose of the  
18 Zoning Ordinance. That's just something that the Constitution  
19 doesn't allow.

20 Now, the City has argued that the Postal Service can't  
21 rely on the purpose of the ordinance in this action, beyond  
22 what the stated purpose is in -- as far as what's written in  
23 the ordinance, itself.

24 That's not the law, Your Honor. The Court can look to the  
25 purpose of the ordinance, as well. And we would urge the

1 Court --

2           **THE COURT:** Well, if we let your case go forward, do  
3 I now have to reactivate the other case which I kept  
4 jurisdiction over?

5           **MS. BERMAN:** No, Your Honor. And in that other --

6           **THE COURT:** So that's called having it both ways.

7           **MS. BERMAN:** Not at all, Your Honor. The cases are  
8 distinct for a couple of reasons.

9           So in this case, the injury to the Postal Service is the  
10 City's regulation of its ability to -- effectively to sell the  
11 Property in the first instance.

12           In the prior action --

13           And again, Your Honor, I would refer to page 5 of the  
14 Court's prior Decision. Any conceivable injury to the Postal  
15 Service and --

16           **THE COURT:** I've got it right here. Page 5?

17           **MS. BERMAN:** Yes, Your Honor.

18           **THE COURT:** Where do you want me to read?

19           **MS. BERMAN:** I am reading from line 3 on page 5,  
20 Your Honor. (Reading)

21           *Any injury plaintiffs could conceivably suffer in the*  
22 *future turns on several unknown contingencies, such as an*  
23 *actual decision to relist the Property, the existence of a*  
24 *contract binding the Postal Service --*

25           I'm paraphrasing at this point, because it's a long

1 sentence --

2           And then, *C*, the terms of the future sale, and the actions  
3 taken by the USPS leading up to them actually violating NEPA  
4 and the National Historic Preservation Act.

5           In other words, Your Honor, because those statutes impose  
6 specific procedural requirements that have to be followed as  
7 the process proceeds, the Court, to determine whether there's  
8 been any injury or any violation of those statutes, would have  
9 to have a record of the steps taken leading up to the sale.

10           Here, the Zoning Ordinance is preventing the Postal  
11 Service from taking steps to sell the Property in the first  
12 instance.

13           **THE COURT:** Well, but come back to my hypothetical a  
14 minute ago. Imagine that we're at the trial.

15           **MS. BERMAN:** Yes, Your Honor.

16           **THE COURT:** Okay. You put on your case. It's the --  
17 somebody from the Postal Service who comes in and says, *In my*  
18 *opinion, the ordinance interferes with our ability to find a*  
19 *commercial buyer, because it outlaws all commercial purposes.*  
20 So you rest your case.

21           Then you put on your case, and you bring forth someone who  
22 testifies that they live in Berkeley, and that the Berkeley  
23 Historical Society wants to buy the building and to turn it  
24 into a museum, and they're willing to pay one-half of what the  
25 government wants.

1           And then I look at it and say, *Well, that's not a total*  
2 *frustration. They're going to get half a loaf. Half a loaf is*  
3 *not total frustration, so the government loses.*

4           Now, why isn't that the right answer? I mean, why  
5 wouldn't that -- under that scenario, why wouldn't that be a  
6 correct answer?

7           It may be frustrating commercial purposes, but that  
8 doesn't rule out other purposes for which the building could be  
9 sold.

10           **MS. BERMAN:** That's correct, Your Honor; but the key  
11 is not whether it frustrates a specific sale of the Property,  
12 but rather whether it frustrates the objectives of Congress, in  
13 terms of the authority that it vested in the Postal Service to  
14 be able to manage its own finances.

15           **THE COURT:** Okay. It's kind of a mishmash, though,  
16 under the --

17           What is the most precise passage of the words of Congress  
18 that is being frustrated here?

19           **MS. BERMAN:** Your Honor, it's 39 U.S.C. Section 401  
20 subpart 5. And the words of Congress specifically there,  
21 Your Honor, are that the Postal Service has the power to sell,  
22 lease, or dispose of any interests in its property.

23           And to take a step back, Your Honor, Congress empowered  
24 the Postal Service to do that, because Congress wanted to  
25 empower the Postal Service to be able to manage its own



1 affairs, to be able to provide services consistent with --

2           **THE COURT:** Right. I see that argument, but what if  
3 the ordinance only imposed a 10-percent problem? Let's say  
4 that it reduced it by 10 percent. Then I guess you're telling  
5 me, *Well, okay. We could live with that. That wouldn't be*  
6 *unconstitutional; but if it reduces 90 percent, it is.*

7           Or is it even a 1 percent diminution in value that -- you  
8 invoke the Second Circuit case to say --

9           See, earlier you told me it was total frustration, was  
10 your theory; not 1 percent diminution.

11           **MS. BERMAN:** And, Your Honor, that is -- our position  
12 is that that is this case; which is to say that the value has  
13 been so diminished, that it makes no economic sense. It  
14 may -- the Property isn't worth zero, of course; but the sale  
15 of the Property is completely frustrated.

16           To answer the Court's question specifically, in terms of  
17 how -- whether a 1 percent diminution would be enough,  
18 Your Honor, it probably wouldn't be, but that's not this case.  
19 And the Court need not decide whether --

20           You know, the City raises a slippery-slope-type argument,  
21 which I gather is what the Court is referring to. Anything  
22 could potentially diminish the value of federal property, but  
23 Your Honor, in this case we have two factors that make that not  
24 something that the Court needs to consider. One, as alleged in  
25 the Complaint, the effect in this case has been not just to

1 diminish and make the sale more attractive, but to make it no  
2 longer economically viable to sell the Property. But  
3 second --

4           **THE COURT:** All right. Okay. On that point, I want  
5 to change the subject slightly. Is it your intention at trial  
6 to call as witnesses the councilpeople who said just what  
7 you've said; that they're trying to frustrate this sale, and  
8 the way to do it is to enact this ordinance? I mean, that's  
9 what the record seems to indicate, is that this was a very,  
10 very cleverly designed to save the Post Office. And -- but  
11 then there's -- you run into this case law that says you can't  
12 do that.

13           So what -- how do you analyze your way through that  
14 problem?

15           **MS. BERMAN:** Your Honor, the Court's correct. If  
16 this case went to trial, we would present that evidence.

17           **THE COURT:** You would?

18           **MS. BERMAN:** Yes, Your Honor.

19           **THE COURT:** And how do you get around the  
20 Supreme Court?

21           **MS. BERMAN:** Your Honor, those cases -- *O'Brien*, I  
22 think the Court is referring to --

23           **THE COURT:** Correct.

24           **MS. BERMAN:** And *RUI* -- they just stand for the  
25 proposition that where an ordinance is otherwise

1 constitutional, that the Court won't invalidate it on the basis  
2 of the intent of a handful of legislators.

3 We would urge the Court to take a look at *City of*  
4 *Las Vegas versus Foley*, which is also a Ninth Circuit Decision.

5 **THE COURT:** City of Las Vegas versus who?

6 **MS. BERMAN:** Versus Foley, Your Honor. That's a case  
7 that the City cited in its reply. And that's a Ninth Circuit  
8 case, Your Honor, in which the Court, as the City noted, didn't  
9 grant discovery into the intent of certain legislators, but the  
10 Court then distinguished that situation from a situation where  
11 there is a chain of events from which intent could be inferred.

12 And in that type of situation, where it's not just what a  
13 handful of people said about an ordinance, but there's a whole  
14 chain of events that includes statements by legislators that  
15 shows the purpose of an ordinance -- that can be considered in  
16 assessing whether an ordinance is constitutional.

17 And the Ninth Circuit, in the *City of Las Vegas versus*  
18 *Foley* case, actually discussed a prior Decision where the  
19 statements by a mayor were considered in determining whether or  
20 not --

21 **THE COURT:** Was that a race-based case, or was this  
22 one like ours, that has nothing to do with race?

23 **MS. BERMAN:** I believe, Your Honor, that it was a  
24 First Amendment case, but I'd have to take a look to be sure.  
25 I think it was First Amendment.

1           But Your Honor, here there is a chain of events. It's not  
2 just statements by a handful of individuals. And we would  
3 start, Your Honor, with the effect of the ordinance, because  
4 our position, of course, as alleged in the Complaint, is that  
5 the ordinance, just taken on its effect, is not constitutional  
6 because it singles out nine properties, most of which are owned  
7 by the City; two of which are owned by another government  
8 entity, the School District; one of which is owned by the YMCA.

9           **THE COURT:** One is the looked like it was State Farm.  
10 State Farm offices.

11           **MR. COWAN:** That's a building the City purchased.

12           **THE COURT:** The City owns that?

13           **MR. COWAN:** Yes.

14           **THE COURT:** Okay. Is it State Farm still in there?

15           **MR. COWAN:** No.

16           **THE COURT:** Who's in there now?

17           **MR. COWAN:** That is the -- that is mostly City  
18 office. And there's a tenant -- a prior tenant.

19           **THE COURT:** How come my map says State Farm Insurance  
20 offices?

21           **MR. COWAN:** It was originally the State Farm  
22 Building. And if you look carefully in the afternoon, you can  
23 still see the outline of those letters at the top, but that --  
24 that's --

25           **THE COURT:** All right. So that's kind of misleading,

1 because it makes it sound like a commercial property.

2           **MR. COWAN:** The practice for -- in the preservation  
3 field, at least in Berkeley, is they tend to refer to buildings  
4 by their original titles.

5           City Hall, where the City offices have been, used to be a  
6 bank.

7           **THE COURT:** All right. Well, okay. All right.  
8 Look. I've got to bring this to a close.

9           So here's the way I see the trial unfolding. The  
10 councilpeople get to come to testify. You get to cross-examine  
11 them.

12           The experts get to testify. The broker, which you don't  
13 have one of, would testify if you had one. But there goes your  
14 best witness, because you don't want to have one, because you  
15 want to win it the easy way instead of doing it the hard way.

16           And then you present your experts.

17           Tell me this. Is there a historical society? Is there  
18 somebody who would buy this building and put it to some use  
19 that would make it viable sale?

20           **MR. COWAN:** Well, there is, in fact, a Berkeley  
21 Historical Society. My guess is that they don't have the  
22 resources to do that. In part --

23           **THE COURT:** Who could? Who could? I mean, it does  
24 seem to me on the face of it that the government's got a good  
25 point; that you can't -- you know. How is the -- they're never

1 going to be able to sell this property.

2 What do you say to that argument?

3 **MR. COWAN:** Well, if I may, I'd like to back up a  
4 little bit.

5 **THE COURT:** Sounds like you're dodging the issue.

6 **MR. COWAN:** Okay. I'll start with your question,  
7 then, Your Honor.

8 **THE COURT:** All right.

9 **MR. COWAN:** The ordinance allows commercial uses. It  
10 doesn't allow all of them, but it allows some. It allows  
11 public markets. It allows live-performance theaters.

12 Well, those are the commercial uses, other than --

13 **THE COURT:** That's a good idea. Could the Post  
14 Office be turned into a live-performance theater; and if so,  
15 who would pay that? Would the City buy it for that purpose?  
16 Why doesn't the City go and buy this property? Why doesn't the  
17 City just come up with the money to buy this property?

18 **MR. COWAN:** You know, I observe that Courts are  
19 allowed, too. And we'd love to have the Berkeley branch of the  
20 Federal Court.

21 **THE COURT:** Well, yes. That's a grand idea. I would  
22 like that, too.

23 But you're the one that's -- you know, why doesn't  
24 Berkeley come up with some money, go over there, and put in an  
25 offer? And, see, you could use it for office space.

1           **MR. COWAN:** Well, it hasn't been listed.

2           **THE COURT:** Yeah. I'll give a hint. They're  
3 interested in selling. You can say everybody could --

4           **MR. COWAN:** Well, I will --

5           **THE COURT:** All right. You wanted to make a point,  
6 and I've been giving you grief. All right. Go ahead and make  
7 your point.

8           **MR. COWAN:** So the Postal Service has the power to  
9 sell under Section 401 that Counsel cited.

10           The *Clean Air Markets* case is one where there is a very  
11 detailed, involved federal scheme that was intended and stated  
12 it applied in a certain manner; and New York was clearly  
13 interfering with that. That was preëmpted.

14           The language in Section 401 that Counsel stated is not  
15 that. It is, *You have the power to sell*. Yes, of course, the  
16 Post Office has the power to sell.

17           It is not in the least comparable to the kinds of  
18 situations where courts have found preëmption, where there --  
19 as in *Clean Air Markets*, there's a very detailed scheme or, for  
20 instance, in the procurement cases. Well, Arkansas -- *Miller*  
21 *versus Arkansas*, which the Postal Service cites, which  
22 basically gave the state veto power over who the federal  
23 government could hire to do construction work; or, indeed, all  
24 of the cases that are cited.

25           There's a -- Congress has reached out and said these are

1 the parameters of what you can do.

2           **THE COURT:** All right. What is the closest Decision  
3 to our case, where a local government ordinance or a Zoning  
4 Ordinance was sustained in the face of a federal preëmption  
5 argument? What do you think it is? I want to have that in  
6 mind. Just one Decision.

7           **MR. COWAN:** I haven't found any. I haven't found any  
8 occasions like this, at all, where preëmption or, indeed, the  
9 Supremacy Clause were applied to invalidate regulations that  
10 applied to --

11           **THE COURT:** Well, where was even the argument made,  
12 and the argument was rejected, so that -- so that I could --  
13 That would be very helpful to your case, if there was such  
14 a Decision.

15           **MR. COWAN:** I can't cite you one right now.

16           **THE COURT:** Okay.

17           **MR. COWAN:** -- but --

18           **THE COURT:** I've got one last question, then. There  
19 was something that my law clerk said that this side raised in  
20 reply, that you hadn't had an opportunity to reply to. What  
21 was that?

22           **MS. BERMAN:** Your Honor, I believe that was the idea  
23 that the Postal Service couldn't rely on the purpose of the  
24 ordinance, beyond what's written on the face of the ordinance.

25           **THE COURT:** You mean the testimony from the



1 councilpeople?

2 **MS. BERMAN:** Ah. So --

3 **THE COURT:** Is that it?

4 **MS. BERMAN:** Yes. I can't --

5 **THE COURT:** I'm trying to remember what it was.

6 **MS. BERMAN:** Yes, Your Honor.

7 **THE COURT:** Do you want a day or so to file a very  
8 short supplement? You don't have to, but I don't -- somebody's  
9 got to get the last word. And they got the last word, and used  
10 it to bring up a new argument. So if you want to have a chance  
11 to reply to that, I'll give that to you.

12 **MS. BERMAN:** Thank you, Your Honor. I appreciate  
13 that.

14 **THE COURT:** Well, all right, but can you do it by  
15 tomorrow?

16 **MS. BERMAN:** If it's by -- if it's by the end of the  
17 day tomorrow, then yes, Your Honor. I'm traveling this  
18 evening, but I can certainly do it.

19 **THE COURT:** I'll tell you what. Monday is what day?

20 **THE CLERK:** It's a holiday.

21 **THE COURT:** Monday is a holiday. Okay. I'll give  
22 you until Tuesday at noon, but limit it to three pages. And  
23 limit it to that one issue, now. Don't use it as an occasion  
24 to say, *Oh, this came up in the argument. And here's why we*  
25 *can't get a broker.*

1 My law clerk is coming to tell me I misspoke.

2 (Whereupon a document was tendered to the Court.)

3 **THE COURT:** Oh. All right. She's got different  
4 question, but you --

5 Okay. Three pages. All right.

6 I've got a question for the City. Could we clarify if  
7 City is still asserting statute-of-limitations argument?

8 **MR. COWAN:** No.

9 **THE COURT:** No?

10 **MR. COWAN:** No. We can clarify. The answer is "No."

11 **THE COURT:** The answer is "No." Sorry. Okay. The  
12 answer is "No." Thank you for your candor.

13 **MR. COWAN:** Could I say one other thing?

14 The Court's initial comments raised the issue of *Gomillion*  
15 *versus Lightfoot*. And I haven't had a chance to respond to  
16 that. I think we responded to it in the brief, but just to  
17 clarify, because this was also something we mentioned in reply  
18 for the first time -- well, not for the first time, but more  
19 emphatically --

20 **THE COURT:** Go ahead. What is it?

21 **MR. COWAN:** The boundaries of this District are  
22 exactly congruent to the boundaries of a 1998 Historic District  
23 designation. It is nothing like gerrymandering cases. In  
24 fact, it is quite principled, in that it matches what was --

25 **THE COURT:** Well, how would I know that, unless we

1 had somebody testify to that? I mean, how could I -- you don't  
2 want to have them testify. So how would we know that that's  
3 the way it came out?

4 **MR. COWAN:** We're happy to have someone testify about  
5 that. I should point out that I did request judicial notice of  
6 the National Registry designation, which shows the boundaries.  
7 And the boundaries --

8 **THE COURT:** Is that something I could take judicial  
9 notice of?

10 **MR. COWAN:** I believe so, Your Honor.

11 **THE COURT:** Is that right?

12 **MS. BERMAN:** I'm not certain, Your Honor. I'd have  
13 to look into it, but we don't have an objection to taking  
14 judicial notice of the National Register of Historic Places  
15 designation.

16 But if I may respond -- I don't want to jump into the  
17 middle of Mr. Counsel's comments.

18 **MR. COWAN:** I'm done. Thank you.

19 **THE COURT:** Please go ahead.

20 **MS. BERMAN:** Your Honor, there's no allegation that  
21 what this Zoning Ordinance did was rezone all of the  
22 historically significant properties in the City of Berkeley,  
23 nor is there an allegation that those specific properties that  
24 were affected by the ordinance prior to the ordinance had  
25 similar zoning. They had different zoning.

1           And what the City did in imposing the overlay was to take  
2 these specific nine properties, and only these specific nine  
3 properties, and change them to remove, as we discussed, any  
4 commercially viable use.

5           And the effect on the ground, because of who the property  
6 owners were of those nine parcels, which is to say mostly the  
7 City of Berkeley and a couple of other owners that had no -- as  
8 alleged in the Complaint, had no intention of selling or  
9 changing the use -- the effect on the ground of this ordinance  
10 fell solely on the Postal Service, and to prevent the sale.  
11 And, as alleged in the Complaint, that's exactly what the  
12 purpose of the ordinance was.

13           The reason that that's a violation of the Supremacy  
14 Clause, Your Honor, is not just the extent to which the value  
15 is diminished; but more specifically it's an interference with  
16 a federal function that Congress vested specifically in the  
17 Postal Service. Your Honor, that's -- the power to determine  
18 when to sell federal property is specifically given to the  
19 Postal Service. And it's an important federal function. It's  
20 the first function that's listed in the Property Clause of  
21 the Constitution. That clause starts out that the federal  
22 government may dispose of federal property. And because the  
23 Zoning Ordinance interferes with that ability, it's a violation  
24 of the Supremacy Clause, and it frustrates congressional  
25 purposes in the Postal --

1           **THE COURT:** Now you're waffling off, though, into the  
2 1 percent argument. So I'll just be clear. You told me a  
3 minute ago that it was effective total frustration, not a small  
4 diminution. Right?

5           I'll give you a chance to clear it up. If you want to  
6 argue the 1 percent thing, you can say that, I guess; but you  
7 told me earlier that you were saying, no, you didn't rely upon  
8 that. What you were relying on was this ordinance effectively  
9 totally prevented you from selling the Property.

10           **MS. BERMAN:** Totally prevented an economically viable  
11 sale.

12           I don't want to suggest that it's impossible to sell the  
13 Property under any circumstances.

14           **THE COURT:** All right. Fair enough.

15           **MS. BERMAN:** So totally prevented an economically  
16 viable sale.

17           **THE COURT:** And by "economically viable," do you say  
18 that 80 percent of what would otherwise be a -- in other words,  
19 a 20 percent deduct is not economically viable?

20           That's not -- I don't buy that.

21           **MS. BERMAN:** And the Court need not make that type of  
22 determination in this case, Your Honor, because the purpose of  
23 the Zoning Ordinance, the record will show -- we would submit  
24 that the purpose of the Zoning Ordinance was to have the effect  
25 that it did have: To prevent the sale of the Property. Not

1 just to diminish its value, but to prevent it from being sold.

2 And Your Honor.

3 **THE COURT:** What if this -- what if the Postal  
4 Service wanted to sell this to a gun dealer, and the gun dealer  
5 was willing to pay 100 percent?

6 And Berkeley went and passed a law that said, *In this*  
7 *particular zone we cannot have any gun dealers, because we*  
8 *don't like guns. We don't want them. We don't want gun*  
9 *dealers selling guns in our -- in this district.* And you came  
10 in here and made that very same argument. *Well, this is*  
11 *preventing us from selling it to the gun dealer.* So what would  
12 you say to that?

13 **MS. BERMAN:** Your Honor, I would say that that would  
14 be a different circumstance, and I think it would depend on the  
15 facts of that case.

16 Here, Your Honor, there isn't a secondary purpose that is  
17 as central to this Zoning Ordinance as the prevention of the  
18 sale of the Postal Service property. This really is -- there  
19 are, of course, lots of situations -- excuse me -- that could  
20 arise that would be distinguishable, and might present more  
21 difficult issues than the instant case.

22 Here it's really a Zoning Ordinance that was designed  
23 primarily to prevent the execution of this federal function,  
24 and has had that effect. And so the more difficult cases need  
25 not -- the Court need not decide that situation: What if there

1 were a secondary issue that the City was trying to address,  
2 like bringing in gun sales? That would be a different  
3 situation from where the City is primarily trying to prevent  
4 the sale of Postal Service property.

5 **THE COURT:** Yeah, but that depends on you trying --  
6 you have to get the councilpeople's testimony in. And we've  
7 got that Supreme Court Decision to deal with.

8 **MS. BERMAN:** Your Honor, with respect to the  
9 Supreme Court Decision, *O'Brien* says that if the ordinance is  
10 otherwise constitutional, then the intent won't be used to  
11 invalidate --

12 **THE COURT:** Well, if it's otherwise unconstitutional,  
13 you don't need the testimony.

14 **MS. BERMAN:** Well, and, Your Honor -- excuse me -- I  
15 would refer to the other Postal Service-type cases that say  
16 that zoning ordinances don't apply to the Postal Service,  
17 precisely because the federal government can't be regulated in  
18 this way by a city. In those cases, it was the effect of the  
19 zoning ordinances or the effect of the requirement to get a  
20 building permit that made them violations of the Supremacy  
21 Clause.

22 The reason that we're emphasizing purpose in this case is  
23 not because necessarily it's required for the Supremacy Clause  
24 case or the preemption argument, but to show why this case is  
25 different from the slippery-slope-type cases or why that

1 argument isn't a concern in this circumstance, because here we  
2 have -- excuse me -- I believe, a unique situation, or at least  
3 I hope a unique conversation, where a city really has set out  
4 to regulate the Postal Service sale; not just something that  
5 happens to affect the sale. Excuse me.

6 **THE COURT:** All right. I've got to bring it to a  
7 close. I've got a couple of comments to make. In case we let  
8 the case go forward, I want you to be thinking of a trial on  
9 June 5. And I want you to be thinking: Trial, cross-examine.

10 I don't want you to be thinking: Summary judgment.

11 I want witnesses up here being hammered and beaten up, and  
12 blood on the floor. No summary judgment.

13 So that's where I'm --

14 I'm giving you that date so that -- because this is not  
15 our case-management conference; is it, or is it?

16 **MS. BERMAN:** It is, Your Honor.

17 **MR. COWAN:** Yes.

18 **THE COURT:** Oh, it is? I don't have an order here.

19 All right. I'll just give you the dates. I didn't  
20 realize it was a case management. All right. Let's just talk  
21 about that. Is that too soon? If the case goes forward and I  
22 let it stay alive, is that too soon? Tell me what your  
23 druthers are. Did you submit a joint statement?

24 **MR. COWAN:** We did, Your Honor.

25 **THE COURT:** I apologize. If they gave it to me -- I



1 thought I read every one of them this morning.

2 All right. So tell me the trial date you'd be interested  
3 in. Is that too soon?

4 **MS. BERMAN:** May I consult with my client for a  
5 moment, Your Honor?

6 **THE COURT:** Now, keep in mind you're going to have to  
7 take discovery. You've got to get in there and take  
8 depositions. You've got to get the documents -- both sides.  
9 I'm going to make both sides come clean with your documents and  
10 so forth; and none of this, *I'm the federal government, and*  
11 *they don't get my documents.* So go over there and consult for  
12 a moment.

13 **MS. BERMAN:** Thank you.

14 **THE COURT:** Can my law clerk go get me the joint  
15 statement? I need to see that.

16 **MS. BERMAN:** Thank you so much, Your Honor.

17 Because of the -- if we're going to do discovery of  
18 electronic documents in this case, I understand that the Postal  
19 Services electronic database is substantial in size, and would  
20 require a long time to be able to process discovery requests.  
21 And so we'd ask that a trial date be set -- excuse me -- for a  
22 year from this date, rather than during the summertime.

23 **THE COURT:** A year is December.

24 **MS. BERMAN:** Yes, Your Honor.

25 **THE COURT:** Yeah. See, I've learned the hard way

1 whenever the lawyers are clever enough to ask for a December  
2 trial date, they really mean February, because they think the  
3 Judge will not hold them to that. "Oh, Judge, the holidays,  
4 the holidays."

5 Please.

6 And then they wind up getting --

7 But I'm, you know, Scrooge. So I would make you go to  
8 trial in December. But that's what you want: December.  
9 Right?

10 **MS. BERMAN:** Yes, please, Your Honor.

11 **THE COURT:** Are you okay with a December trial date?

12 **MR. COWAN:** Yes, Your Honor.

13 **THE COURT:** So the trial date will be December 4.  
14 Have you done your initial disclosures?

15 **MS. BERMAN:** Yes, Your Honor.

16 **MR. COWAN:** Yes.

17 **THE COURT:** Oh, good. Now, you understand that I  
18 hold you to your initial disclosures. You've got to identify  
19 your witnesses, and so forth. Right? Do it the right way.

20 Okay. So the end of discovery would be -- I'm going to  
21 say September 29. Does that work?

22 **MS. BERMAN:** Yes, Your Honor.

23 **MR. COWAN:** Yes, Your Honor.

24 **THE COURT:** And then -- I can't say "never" to  
25 summary judgment. I'm just going to tell you it's unlikely.

1 But that would be October 5; to be heard on a 35-day track.

2 And then December 4 would be our trial date.

3 Did I ever refer you to settlement judge?

4 **MR. BERMAN:** We had an ADR call, Your Honor, and have  
5 another one scheduled on the 28th.

6 **THE COURT:** I think you need to have someone who is  
7 good at real estate transactions, who'll get the City of  
8 Berkeley to buy this property for half price. You can sell it  
9 for half price. And they put in a museum there, instead of a  
10 gun dealer or whatever else might get in there. So I'm not  
11 saying half is required, but there ought to be a deal here. A  
12 deal. This is -- it's a beautiful building.

13 **MS. BERMAN:** It is a beautiful --

14 **THE COURT:** You don't want it to fall into the hands  
15 of some condo developer who is going to have -- everyone living  
16 there is going to have three cars, and is going to get the  
17 streets all crowded, and then -- you don't want that there.

18 You want use that will be consistent with that zoning.

19 **MS. BERMAN:** Your Honor, absolutely. The building is  
20 beautiful. And it's protected under federal law. Certainly,  
21 the Postal Service has -- would take steps to make sure that  
22 its historic features are protected, but for -- the reason that  
23 the Postal Service brought this action is that there's an  
24 interference with the objective of Congress to have a Postal  
25 Service that can manage its own affairs. And I would urge

1 Your Honor, in terms of putting this case in context: This  
2 isn't a one-off decision to try to sell a single property.  
3 It's is response to a nationwide dire financial situation. And  
4 the Postal Service is trying to sell underutilized properties  
5 so it can continue to provide affordable service.

6 And we would urge the Court, as the Court considers the  
7 parties' arguments about the Zoning Ordinance here, what the  
8 effect would be on the Postal Service's ability to respond  
9 generally to its financial --

10 **THE COURT:** It's a fair point.

11 For people my age, there was an era in America where these  
12 post offices were built all across the country; not just in  
13 Berkeley. And they're beautiful buildings. And they represent  
14 a time period in our country that people your age don't  
15 remember very well; but my age -- remember, they were already  
16 in existence, but they were like the vibrant heart of the  
17 downtown for people who grew up in the forties, fifties, and  
18 sixties. So it's an important part of America.

19 I'm going to refer you to Magistrate Judge Donna Ryu for  
20 mediation.

21 Now listen to me. I don't want you two objecting a lot,  
22 and I don't want you overreaching.

23 I think that the City Councilpeople should sit for a  
24 deposition. Don't come back to me and say there's some  
25 privilege against that. It may not be evidence later on at

1 trial, but they ought to sit for a deposition. And that  
2 doesn't need to be more than about an hour and a half per  
3 councilperson.

4 And then yours -- on your side, they are going to be able  
5 to get a lot of documents that you're going to want to claim  
6 are deliberative.

7 No. You're the plaintiff. If you want to win this case,  
8 you've got to come clean and show all of those bad e-mails that  
9 you don't want to ever see the light of day.

10 **THE CLERK:** I didn't hear you set a pretrial  
11 conference.

12 **THE COURT:** Oh. Final pretrial conference will be --  
13 I always hate this date, speaking of history -- November 22 at  
14 2:00 p.m.

15 **MS. BERMAN:** Your Honor, just one point of  
16 clarification. And I may be getting confused, because I don't  
17 have a calendar in front of me.

18 **THE COURT:** Yeah.

19 **MS. BERMAN:** But close of discovery is set for  
20 September 29th?

21 **THE COURT:** That's a Friday. That's a Friday.

22 **MS. BERMAN:** And a motion for summary judgment would  
23 be due -- I think I got that date confused.

24 **THE CLERK:** October 5.

25 **THE COURT:** October 5.

1           **MS. BERMAN:** Okay.

2           **THE COURT:** And that means it would be heard --

3           **THE CLERK:** November 9th.

4           **THE COURT:** -- November 9th, which is pretty close to  
5 the trial. But I will get an order out pronto. And then  
6 meanwhile you'll have to be doing your motions *in limine*, if  
7 you're going to have any.

8           If you want me to back and reduce the discovery period by  
9 a month, I will do that if both of you -- but that would give  
10 you one less month to take your discovery.

11           **MS. BERMAN:** Your Honor, I think that we would ask  
12 for the full period that the Court set.

13           **THE COURT:** Fine.

14           **MR. COWAN:** One question, Your Honor. We have the  
15 ADR conference call scheduled. I assume that --

16           **THE COURT:** I'm overruling all of that.

17           **MR. COWAN:** Okay.

18           **THE COURT:** I'm giving you Donna Ryu, because I think  
19 she lives in Berkeley, and she's over in Oakland. She's a  
20 Magistrate Judge. She is very practical. She'll be great.

21           **MR. COWAN:** And we should contact her?

22           **THE COURT:** Or she'll contact you. She'll contact  
23 you to try to work out some deal.

24           **MR. COWAN:** Cowan. All right. I've done all the  
25 damage I could do for today.

1           **MR. COWAN:** Your Honor.

2           **THE COURT:** You please remember to submit your thing  
3 by Tuesday at noon. All right?

4           **MS. BERMAN:** Tuesday at noon.

5           **THE COURT:** Thank you.

6           **MS. BERMAN:** I'm so sorry, Your Honor. Tuesday at  
7 noon.

8           **THE COURT:** Isn't that what I said?

9           **MS. BERMAN:** Yes.

10           **THE COURT:** I said Tuesday at noon. Your three-pager  
11 is due Tuesday at noon.

12           Okay. Thanks to the public for coming here today.

13           (At 9:28 a.m. the proceedings were adjourned.)

14 I certify that the foregoing is a correct transcript from the  
15 record of proceedings in the above-entitled matter.

16

17 

18 \_\_\_\_\_ December 27, 2016

19 Signature of Court Reporter/Transcriber      Date

19 Lydia Zinn

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