



July 23, 2019

Nancy Colbert Puff
Deputy City Manager
City of Portsmouth
1 Junkins Ave.
Portsmouth, NH 03801

Dear Nancy,

It has come to my attention that members of the Portsmouth community have asserted that if the McIntyre Federal Building were conveyed to the City of Portsmouth under GSA's Negotiated Sale Authority at 40 U. S. C. 545(b)(8), then the City could demolish the building after three years. That is not true and I have provided some information below to explain why.

Before conveying any surplus federal property that is listed or eligible for listing on the National Register out of federal ownership, GSA must ensure that its undertaking complies with Section 106 of the National Historic Preservation Act codified at 54 U.S.C. § 306108 (Section 106). The Section 106 regulations set forth the way in which agencies must meet that statutory responsibility by requiring that agencies "take into account the effects of their undertakings on historic properties" (36 CFR 800.1) and avoid any adverse effect that "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." (36 CFR 800.5(1)).

The regulations provide seven examples of adverse effects. One of these is the "transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance."

To comply with Section 106, GSA has a longstanding practice of including adequate and legally enforceable covenants in the deed to ensure the preservation of the property's historic significance in perpetuity. GSA includes these covenants in every deed no matter what authority it uses to convey - no-cost public benefit conveyance, negotiated sale or sale by public auction. The covenants typically allow the State Historic Preservation Officer to review and approve any proposed changes or alterations to the character defining features of the property. Here is how they typically appear in a deed:

HISTORIC PRESERVATION COVENANTS

The Property is listed (eligible for listing) in the National Register of Historic Places. The Grantee, in accepting this Deed, acknowledges and accepts the following conditions and covenants.

1. Grantee shall maintain and preserve the Property in accordance with the recommended approaches in The Secretary of the Interior's Standards for Treatment of Historic



Properties, 1995, Standards for Preservation (Technical Preservation Services for Historic Buildings, National Park Service) in order to preserve and enhance the distinctive materials, features and spaces that make the Property eligible for inclusion in the National Register of Historic Places.

2. When rehabilitation is the appropriate treatment, Grantee shall rehabilitate the Property in accordance with the recommended approaches in The Secretary of the Interior's Standards for Treatment of Historic Properties, 1995, Standards for Rehabilitation (Technical Preservation Services for Historic Buildings, National Park Service). Rehabilitation is appropriate when repair and replacement of deteriorated features is necessary or when alteration or additions to the property are planned.

3. Distinctive materials, features, finishes, construction techniques and examples of craftsmanship that characterize the Property shall be preserved.

4. Plans of proposed rehabilitation, construction, alteration or replacement of distinctive materials, features, finishes or spaces which would affect the appearance or structural integrity of the Property shall be reviewed and approved by the State Historic Preservation Officer ("SHPO") for consistency with in The Secretary of the Interior's Standards for Treatment of Historic Properties, 1995.

5. Archaeological resources shall be protected and preserved in place. All projects involving ground-disturbing activity shall be reviewed by the SHPO. If such resources must be disturbed, mitigation measures must be undertaken with the express prior written permission of the SHPO.

6. The SHPO shall be permitted at all times to inspect the Property in order to ascertain if the above conditions are being observed.

7. In the event that the Property, or any associated historic artifact associated with the Property ceases to be maintained in compliance with the covenants, conditions and restrictions set forth in this section, in addition to any remedy now or hereafter provided by law, the SHPO may, following reasonable notice to Grantee, institute suit to enjoin said violation or to require restoration of the Property.

8. The covenants, conditions and restrictions contained herein shall be inserted by the Grantee verbatim or by express reference in any deed or other legal instrument by which it divests itself of either the fee simple title or any other lesser estate in the Property.

9. The Grantee agrees that the SHPO may, at its discretion, without prior notice to the Grantee, convey and assign all or part of its rights and responsibilities contained herein to a third party.

10. The failure of the SHPO 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 the use of such right or remedy at any other time.



11. The covenants, conditions and restrictions set forth in this Historic Preservation Covenant shall constitute a binding servitude upon the Property and shall be deemed to run with the land.

12. The above covenants shall be binding in perpetuity; however, the SHPO may, for good cause, modify, suspend, or cancel any or all of the covenants upon written application of the Grantee.

The only component of a Negotiated Sale deed that has a three year term is the Excess Profits provision expires after three years from the date of conveyance. The Excess Profits Clause is found at 41 CFR 102-75.895 and states:

(a) This covenant shall run with the land for a period of 3 years from the date of conveyance. With respect to the property described in this deed, if at any time within a 3-year period from the date of transfer of title by the Grantor, the Grantee, or its successors or assigns, shall sell or enter into agreements to sell the property, either in a single transaction or in a series of transactions, it is covenanted and agreed that all proceeds received or to be received in excess of the Grantee's or a subsequent seller's actual allowable costs will be remitted to the Grantor. In the event of a sale of less than the entire property, actual allowable costs will be apportioned to the property based on a fair and reasonable determination by the Grantor.

(b) For purposes of this covenant, the Grantee's or a subsequent seller's allowable costs shall include the following:

(1) The purchase price of the real property.

(2) The direct costs actually incurred and paid for improvements that serve only the property, including road construction, storm and sanitary sewer construction, other public facilities or utility construction, building rehabilitation and demolition, landscaping, grading, and other site or public improvements.

(3) The direct costs actually incurred and paid for design and engineering services with respect to the improvements described in (b)(2) of this section.

(4) The finance charges actually incurred and paid in conjunction with loans obtained to meet any of the allowable costs enumerated above.

(c) None of the allowable costs described in paragraph (b) of this section will be deductible if defrayed by Federal grants or if used as matching funds to secure Federal grants.

(d) To verify compliance with the terms and conditions of this covenant, the Grantee, or its successors or assigns, shall submit an annual report for each of the subsequent 3 years to the Grantor on the anniversary date of this deed. Each report will identify the property involved in this transaction and will contain such of the following items of information as are applicable at the time of submission:



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New England Region

- (1) A statement indicating whether or not a resale has been made.
- (2) A description of each portion of the property that has been resold.
- (3) The sale price of each such resold portion.
- (4) The identity of each purchaser.
- (5) The proposed land use.
- (6) An enumeration of any allowable costs incurred and paid that would offset any realized profit.

(e) The Grantor may monitor the property and inspect records related thereto to ensure compliance with the terms and conditions of this covenant and may take any actions that it deems reasonable and prudent to recover any excess profits realized through the resale of the property.

I hope this explanation clears up any misunderstandings. Please don't hesitate to call me if you have any questions.

Best Regards,

A handwritten signature in blue ink that reads "Carol H. Chirico".

Carol H. Chirico
Assistant Regional Counsel

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