

In the United States District Court
Eastern District of Missouri
Eastern Division

Marcia Behrendt,)	
)	
Plaintiff,)	
)	
v.)	
)	
Bradley M. Scott, in his official capacity)	Case No. 4:03CV00699 AGF
as Regional Administrator of the)	
General Services Administration, John L.)	
Nau, III, as Chairperson of the Advisory)	
Council on Historic Preservation, an)	
independent agency of the United States)	
of America)	
)	
Defendants.)	

Plaintiff’s Statement of Uncontroverted Material Facts

Comes Now Plaintiff, by and through counsel, and provides this Court with
Plaintiff’s Statement of Uncontroverted Material Facts:

1. Defendant General Services Administration (“GSA”) abdicated its lawful duty and never conducted an independent, disinterested Section 106 and Section 110(f) review under the National Historic Preservation Act (“NHPA”), instead relying on the interested reports, analysis, and recommendations of the Developers who had a financial interest in the outcome of the Section 106 and Section 110 review process. (Plaintiff’s First Amended Complaint, Exhibit 2, Programmatic Agreement at 11, ¶6.4; Administrative Record (“AR”) at 359; 2555-57). As Regina Nally, GSA’s Regional Historic Preservation Officer in Chicago said, GSA needs to evaluate the proof of all options and the viability of each. (AR at 2557). The GSA chose not to do so in violation of the NHPA and had

the Developer prepare the parking report used to justify the mitigation of any adverse effects and the analysis of feasible and prudent alternatives required by the NHPA. (AR at 2578-2758). The administrative record thus contains no substantive records or reports prepared by Defendant GSA or Defendant ACHP on which it could base its Record of Decision regarding adverse effects, appropriate mitigation measures, or any analysis of feasible and prudent alternatives as presented in the Programmatic Agreement.

2. Although Defendant GSA agreed with Martha Frish of the National Trust for Historic Preservation that an independent parking study was required by Section 106 and in order to ensure the public trust, the agency failed to conduct such a study. (AR at 1387; 1586; 1485). There was no independent basis for the agency to conclude what the reasonable number of parking spaces was, nor whether this requirement could be met through alternatives to demolishing the Century Building. The GSA did not document this issue as it knew it was required to do (AR at 1614, ¶5), and it failed to take reasonable and independent steps to determine whether or not it was feasible and prudent to meet parking needs through such alternatives as placing parking within the Century Building itself, in other parcels on or near the Square, in underground parking garages, in other existing garages, or in some combination thereof. (AR at 1387; 2555-57; 2545-53; 1693-96; 2489-99; 2467-68; 2427-28; 2295-96; 2222-27).

3. The GSA hired an independent firm to scrutinize the proposed financials of the OPO renovation to protect the public interest, yet it failed to hire an independent firm to analyze any feasible and prudent alternatives to the proposed parking solution as required by the Section 106 and Section 110 of the NHPA. (AR at 2274-80).

4. Defendant GSA did not conduct the public hearing on January 29, 2002, to gather information on the proposed demolition of the Century Building for a parking garage to be evaluated and analyzed independently and objectively by the GSA pursuant to Section 106 because GSA's portfolio managers and preservationists had already expressed their support of the Project and the proposed demolition of the Century Building, and they did so at the beginning of the hearing. (AR at 3702; 3652-3696). Indeed, as early as October 23, 2002, GSA was talking about what the "strategy" should be for the public meeting to handle groups like Landmarks that were opposed to the demolition and the fact that the preservationists supporting GSA's position should "unite in opinion" before the public meeting to support each other in the face of contention. (AR at 2224-25). This is not the hallmark of an open process but one of people who have already made up their minds. In fact, during the Section 106 hearing, the proposed parking solution was presented as a *fait accompli* to the public consistent with the comments of GSA portfolio manager, Stephen Stanberry, expressed on January 7, 2002, regarding the "garage debate." "I think the wedge issue that Landmarks, Ralston [Ralston Cox, program analyst for Defendant ACHP] and other *like-minded obstructionist*

will argue is that the project needs to be opened up for requests for competing proposals.

We have a sound response: that we have tirelessly solicited proposals for years and even had an expert in the field of historical building reuse contact known developers all to no avail.” (AR at 3057). The point that Stanberry misses and ignores is that the proposed Project involved *two* buildings, the OPO and the Century. The proposals he is referring to were for the OPO only. RFPs were never issued for the Century Building because it was in litigation from 1995 until 2002, with the City of St. Louis fighting to keep the Conlon Group from tearing it down for a parking lot. (See Exhibit 4, Plaintiff’s First Amended Complaint; AR at 2296). The City finally took title to the Century Building in February of 2002. (*Id.*). The GSA had an affirmative duty under federal law to consider feasible and prudent alternatives to the demolition of the Century Building.

5. Defendant GSA, through an employee of the Public Building Service, James Ogden, issued its Record of Decision on January 29, 2002, the *same day* it held the public hearing required by Section 106 and Section 110 of the NHPA. (AR at 3645-3646).

6. Caroline Alderson, the Program Manager for the GSA’s Center for Historic Buildings in the Public Building Service, promised the public at the January 29, 2002, hearing that the GSA welcomed the ideas of the public and that the agency would “*leave no stone unturned in exploring alternatives.*” (AR at 3715-17). As noted above, the GSA

issued its Record of Decision the same day as the hearing and before the transcript was even available to be reviewed. (AR at 3581).

7. The Developer admitted at the January 29, 2002, public hearing that at least 422 parking spaces could be placed within an adaptively redeveloped Century and Syndicate Trust Building. (AR at 3659-62). GSA never analyzed and found whether that amount of parking would not satisfy the minimum parking requirements of the proposed OPO tenants.

8. Regarding the January 29, 2002, public hearing, Defendant GSA's employee James Ogden, reported to the Commissioner of the Public Building Service, Joseph Moravec, on February 5, 2002, that "[a]bout 20 local voices spoke on behalf of delay for the project to provide yet more time for alternatives saving the Century Building. No such proposal indicated likelihood of a financially viable plan, and after experiencing the boom of the 90's with no consequential re-development in the area, *another 30 to 45 day period would be unlikely to call forth a viable alternative plan.*" (AR at 3631-32). GSA's internal preservation officers Regina Nally and Caroline Alderson were not copied on this statement. (AR at 732). Consulting parties including the Missouri State Historic Preservation Officer, the Cultural Resources Office of the City of St. Louis, the National Trust for Historic Preservation, and Landmarks Association of St. Louis, Inc. were also not provided this statement. (Id.).

9. On April 10, 2002, the Developer announced it was having to change its proposed plan and finances. (AR at 168). This announcement came 65 days after James Ogden said the project couldn't wait 30-45 days to explore alternatives to the demolition of the Century Building. (See Undisputed Material Fact No. 5 above).

10. Barbara Geisman, Deputy Mayor for Development for the City of St. Louis, stated at the public hearing on January 29, 2002, that the City had never received a plan for the Century/Syndicate Trust Building, yet she had received a summary pro forma of such a plan from Craig Heller, one of the alternative developers, a week earlier, on January 17, 2002. (Compare AR at 3689 (p. 151) with AR at 4649-53).

11. In response to the February 5, 2002, update on the public hearing, GSA's regional attorney, Samuel Skare suggested to James Ogden within 35 minutes of receiving the update that a debriefing and analysis of the comments from the public hearing be conducted by Defendant GSA. (AR at 3631-32).

12. After four exhaustive reviews of the almost 9,000 pages of the AR, Plaintiff has not found one document, email, or memo reflecting that anyone at the GSA ever held a debriefing or conducted any analysis of the comments from the January 29, 2002, public hearing, or explored any alternatives to the adverse effect of demolishing the Century

Building even though the Developer conceded at the hearing that 422 parking spaces could be placed within a renovated building and the GSA promised it would “leave no stone unturned.”

13. Despite James Ogden’s prediction that a 30-45 day period would not produce a viable alternative plan to the demolition of the Century Building, one did emerge within three weeks of the January 29, 2002, public meeting. On February 19, 2002, an alternative plan was presented publicly even though the GSA never issued the RFP that the public commentators had asked for at the public hearing. (AR at 4768-72; 202; 3946-62; 4755-60). Thus, shortly after the public hearing, Defendant GSA was put on notice that other developers had presented an alternative plan that would have restored the Century Building while providing for the parking needs of the Old Post Office. Though under a duty to consider all feasible and prudent alternatives, the agency failed to independently assess the feasibility of this proposed project.

14. James Ogden then, on February 21, 2002, recommends to Mark Warnick, inside counsel for the GSA, that the alternative proposal be dismissed and not considered as a part of the NHPA review as he considered it to be “Vaporware.” (AR at 4761).

15. Mark Warnick states on February 21, 2002, to his boss, regional counsel, Samuel Skare, that he believes Section 106 requires Defendant GSA to look at and

consider the alternative proposal and that he wasn't sure he was "comfortable simply ignoring it" as Ogden had suggested. (AR at 4762).

16. Defendant GSA scheduled and presumably held a conference call on March 4, 2002, to discuss, among other things, the proposed alternative plan. (AR at 4752). There are no minutes, notes, memos or records of any kind regarding what was discussed or decided upon and the basis for it in this conference call. Again, there is no indication that GSA's internal historic preservation personnel or the outside consulting parties to the Section 106 process were included on this conference call.

17. The only analysis of the alternative plan in the AR was done by the Developer and the MDFB. (AR at 4624-82; 4541-52). These were provided to the GSA on March 4, 2002, and March 11, 2002. The MDFB analysis was clearly a joint effort of the Developer and the Executive Director of the MDFB. Defendant GSA never did its own internal analysis or engaged a neutral, third-party to conduct an analysis of whether this proposed alternative plan was feasible and prudent or could mitigate the adverse effects of the proposed plan and still enable the renovation of the Old Post Office. (See Undisputed Material Fact No. 1 above).

18. Four days after Defendant GSA received the Developer's analysis, it was reported to the public that the alternative plan was voluntarily withdrawn on March 8, 2002, because it was not viable. (AR at 4559).

19. Even after Defendant GSA received evidence that the alternative plan was not voluntarily withdrawn and that the Developer and City of St. Louis may have threatened and forced the alternative developers to withdraw their plan, GSA failed to conduct any investigation or other due diligence (this despite its own lawyer's suggestion to independently review the alternative proposal) since there is no report or result of any investigation in the AR. The evidence GSA had was as follows: The Developer told Mark Warnick on March 7, 2002, *the day before* the alternative developers withdrew their plan, that there was a meeting with the City and those involved on March 8, 2002, and that the alternative plan would be "dismissed" at that meeting (AR at 4612); the GSA later received emails showing that the Developer sent to the Bank (specifically Zack Boyers) the press release that the alternative developers were to sign on March 8, 2002 (AR at 5325-27); the alternative plan was dismissed at that March 8th meeting and the Developer faxed the initialed press release to Mark Warnick on March 11, 2002 (AR at 4556-60); the GSA received the Riverfront Times news article on March 20, 2002, that detailed the exact threats made to the alternative developers by the Developer, the banks involved, and the City of St. Louis (AR at 174-77); the GSA also knew that the Developer had evidenced this kind of behavior before; specifically, on or about March 15,

2001, when the Developer was successful in stopping a St. Louis Business Journal story about a competing plan because he had convinced the paper's editor the story was not newsworthy (AR at 1599). Faced with this evidence, the AR reflects Defendant GSA did not conduct an investigation and make any findings regarding whether these developments infected the Section 106 review, although it appears Mark Warnick did ask for documents related to this issue around June of 2002. (See AR at 5112-5331).

20. The June, 2002 report on the Project's process does not mention any investigation of feasible and prudent alternatives, nor any analysis that was made as a result of the public hearing on January 29, 2002. In fact, the report succinctly states how Defendant GSA viewed the Section 106 public hearing: it was held "so that historical societies and citizens who had concerns . . . could ask questions and voice opinions about the project." (AR at 452-454). There is absolutely no discussion of any "turning of stones" or exploring alternatives as was promised by the GSA's historic preservation officer, Caroline Alderson because the report reflects no such actions were taken.

21. In June of 2002, the Developer and the City of St. Louis tried to get the GSA to admit and agree that the demolition of the Century Building was unavoidable and that photographs for the Historic American Buildings Survey was sufficient mitigation but the GSA refused to do so because it did not conclude that the demolition was unavoidable as a result of its own analysis. (Compare AR at 8797 with AR at 8771). GSA did

acknowledge the adverse effects, that is, the demolition of the Century Building, but it did not say that it considered any feasible and prudent alternatives. (AR at 8771).

22. Even after the June, 2002, report, Defendant GSA, through the actions of its Commissioner of the Public Building Service, Joseph Moravec, lost or destroyed an August 29, 2002, memo written by a rehabilitation expert on the staff of Bill Walters, at the time the Chief of Staff to Fran Mainella, Director of the National Park Service, that stated “the Century could be converted to a parking garage - without demolition and without compromising its historic character - a conclusion of which *I am highly dubious.*” (AR at 5550).

23. When Sam Eismont asked Mark Duffy to pronounce the Section 106 review complete on or about November 1, 2002, there is no indication of what documents or reports were provided to him other than the October 25, 2002, draft of the Programmatic Agreement. (AR at 5935). Thus there is no indication that Mark Duffy was afforded the opportunity to analyze and determine whether the GSA conducted its Section 106 review lawfully by independently reviewing feasible and prudent alternatives to the demolition of the Century Building; by determining whether the Developer, the banks and the City of St. Louis forced a viable alternative off the table by use of threats; by mitigating the admitted adverse effects caused by the Project; or by considering the National Park

Service's opinion that parking for the Project could be provided in a restored Century Building, among other things.

24. The AR reflects that the Defendant GSA and Defendant ACHP failed to conduct a Section 110(f) review process as required by the NHPA as a National Historic Landmark ("NHL") was involved in the project. The heightened requirements of a Section 110 historic review process provide that the agency must protect the historic integrity of the NHL to the maximum extent possible. This process would have required the GSA to determine the negative impact to the NHL associated with the loss of the historic character surrounding the building through the demolition of the Century Building, which is listed in the National Register. This process would have also required the GSA to solicit and analyze feasible and prudent alternatives to any adverse effect, which the AR reflects the GSA failed to do.

25. Defendant GSA failed to carry out a National Environmental Policy Act ("NEPA") review in conjunction with the NHPA Section 106 and 110 review. Defendant GSA lost or destroyed the alleged documentation and analysis of the reasons supporting the Project's CATEX exclusion under the NEPA. (AR at 5916-17; 5936; 5718-20).

Respectfully submitted,

Chackes, Carlson & Spritzer, LLP

By: /s/ Matthew J. Ghio

Matthew J. Ghio #68960

8390 Delmar Blvd., Suite 218

St. Louis, Missouri 63124

Phone: (314) 872-8420

Fax: (314) 872-7017

Email: mghio@vccs-law.com

Attorney for Plaintiffs

Certificate of Service

I hereby certify that on this 18th day of October, 2004, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following Defendants' counsel:

Jane Rund
Assistant United States Attorney
Eastern District of Missouri
111 South Tenth Street, 20th Floor
St. Louis, Missouri 63102

/s/ Matthew J. Ghio