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VIA ECF

August 14, 2017

The Honorable William Alsup
U.S. District Judge
San Francisco Courthouse, Courtroom 8 - 19th Floor
450 Golden Gate Avenue
San Francisco, California 94102

Re: *United States Postal Service v. City of Berkeley*, No. C 16-04815 WHA
August 8, 2017 Order, ECF No. 64

Dear Judge Alsup:

The City's Letter requests relief against the clear instruction of this Court and the prior agreement of the parties. The Court previously considered and rejected the City's argument that the Court should foreclose any inquiry into the City Councilmembers' and Planning Commissioners' purpose in enacting the Overlay. *See* Def.'s Reply, ECF No. 22 at 4–5. Although the City had argued that legislative purpose is not a proper area for judicial inquiry, *see id.*, this Court unequivocally instructed that "the City Council people should sit for a deposition." Tr. of Proceedings, 44:23–24, Ex. 1 hereto. Indeed, the Court admonished the City that it should not assert a privilege against such depositions. *See id.* at 44:24–25. The City's retention of new counsel is not occasion to reconsider that ruling and relieve the City of the agreement related thereto reached between the parties concerning the date and number of such depositions. Moreover, although the City correctly identifies the general principles applicable to the deposition of government officials,[1] its argument gives short shrift to the doctrine controlling here, where there is a chain of events from which the City's illicit purpose can be inferred. Ninth Circuit precedent provides that where such evidence exists, depositions of government officials are appropriate, and an inquiry into legislators' purpose is proper.

[1] The cases on which the City relies principally address cabinet-level officials of the federal government and high-level White House staff; for example, the "high level government officials" in *Alexander v. FBI*, 186 F.R.D. 1 (D.D.C. 1998), were advisors and assistants to the President, and the White House Press Secretary. *Id.* at 2 n.1, 4 (D.D.C. 1998); *see also Green v. Baca*, 226 F.R.D. 624, 649 (C.D. Cal. 2005), order clarified, (C.D. Cal. Jan. 31, 2005) ("police chiefs, and presumably sheriffs as well, do not constitute high government officials") (citing *Detoy v. San Francisco*, 196 F.R.D. 362, 369–70 (N.D. Cal. 2000)). Here, by contrast, the proposed deponents are the current Mayor (and former Councilmember when the Overlay was enacted), a former Mayor, and City Councilmembers or Planning Commissioners.

In a July 6, 2017 telephone call with undersigned counsel, then-City Attorney Mr. Cowan acknowledged the Court's instruction, and, in a follow-up email exchange agreed to a date-range during which those depositions would occur. *See* Email from Cowan to Berman (July 6, 2017), Ex. 2 hereto. The City also consented to the Plaintiff exceeding Fed. R. Civ. P. 30(a)'s ten-deposition limit in this case precisely because there were so many Councilmembers to be deposed; and, while noting that he would consider whether Planning Commissioners should be made available for depositions, Mr. Cowan agreed that Councilmembers' depositions would move forward. *Id.* In compliance with Local Civil Rule 30-1, undersigned counsel emailed the City with specific proposed dates for each deponent, in advance of serving deposition notices and subpoenas. *See* Email from Berman to Cowan and Brown (July 13, 2017), submitted with Def.'s Letter, ECF No. 63-1. However, rather than honor the agreement reached with Mr. Cowan—and in circumvention of the Court's directive, new counsel for the City advised that he would be seeking a protective order from the depositions that the Court already ruled the Councilmembers "should sit for." Tr. of Proceedings, 44:23–24. Such an order here would contravene not only this Court's prior ruling but would be contrary to Ninth Circuit precedent.

The City's Letter misses the point by invoking the general proposition from *United States v. O'Brien*, 391 U.S. 367 (1968) and *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004), that legislators' motivations are not typically subject to judicial inquiry, and that a court "will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *See* Def.'s Letter at 2 (quotation omitted).[2] Those decisions suggest only that "allegations of legislative motive behind the Overlay's passage would not *suffice* to establish unconstitutionality." Order, ECF No. 43 at 7 (emphasis added). But as this Court recognized, the Postal Service's claims encompass both improper purpose and improper effect. *See id.* (recognizing that "the USPS *also* alleges such discrimination is evidenced by the practical effects of the Overlay itself") (emphasis added). Thus, an inquiry into the City officials' purpose in enacting the Overlay is appropriate and consistent with Ninth Circuit precedent.

The Ninth Circuit has held that it is proper for a court to consider individual statements by city leaders if, as here, those statements are "part of the chain of events from which intent may be inferred, rather than merely the subjective intent of individual legislators." *City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984). The City's Letter sweeps this rule aside in one unsupported assertion, that "[h]ere . . . unlike in the First Amendment context, intent is 'wholly irrelevant.'" Def.'s Letter at 3 (quoting *RUI One Corp.*, 371 F.3d at 1146 n.7).[3]

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[2] The City also argues that councilmembers and planning commissioners should not be subject to deposition based on the doctrine articulated *United States v. Morgan*, 313 U.S. 409, 422 (1941). In *Morgan*, the Secretary of Agriculture testified regarding proceedings in which the Secretary had considered a voluminous record and rendered a determination. *See id.* The Court found that that process "ha[d] a quality resembling that of a judicial proceeding." *Id.* Focusing on the integrity of that quasi-judicial proceeding, the Court reasoned that eliciting testimony from the Secretary was improper because, by analogy, "[s]uch an examination of a judge would be destructive of judicial responsibility." *Id.* As there is no quasi-judicial administrative proceeding at issue here, this reasoning has no application in the instant case.

[3] The quoted footnote in *RUI* stands only for the above-discussed proposition that legislative intent will not be considered as a basis to strike down "an otherwise constitutional

However, central to the Postal Service's complaint is that the Overlay is not otherwise constitutional. *RUI*, therefore, is inapposite.

Indeed, in *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir.1983), the Ninth Circuit concluded that it was appropriate to consider a mayor's statement regarding that city's purpose in making a zoning decision, because that statement had been part of a chain of events from which the city council's purpose could be inferred. *Id.* at 1264. There, evidence had "cast suspicion on [the legislative body's] motives" and the mayor's testimony described elements which "objectively indicated the Council's purpose." *City of Las Vegas*, 747 F.2d at 1299 (discussing *Tovar*).[4] Although the City latches onto the Ninth Circuit's instruction to enter a protective order in *City of Las Vegas*, the Ninth Circuit distinguished that case from *Tovar*, which governs the circumstances here. In *City of Las Vegas*, the plaintiff relied on a "mere statement" that "a motivating factor in the zoning decision" was at issue in that case. *Id.* The Court concluded that bare allegation "[wa]s not sufficient to shift the focus of inquiry from the objective manifestations of legislative purpose to the subjective motivations of individual legislators" *Id.*

Here, by contrast, there is a robust "objective chain of events" from which the Council's purpose to interfere with the Postal Service's constitutional and statutory authority to dispose of its property may be inferred. As alleged in the Complaint, that chain began with a resolution in which the City announced its formal opposition to the sale, and "request[ed] that USPS immediately impose a moratorium on all sales of Post Office Buildings nationwide." Compl. ¶ 17. The City Council then appealed the then-current decision of the Postal Service to relocate retail services, reiterating its "passionate . . . opposition to the sale of this property." *Id.* ¶ 18 (quoting April 30, 2013 Letter to Postal Service). After the Postal Service's regulator dismissed the City's Appeal, *id.* ¶¶ 19–20, then-City Councilmember (now Mayor) Jesse Arreguín sent a letter warning the Postal Service that the Council was considering a zoning ordinance that "would affect what a buyer could do with the property if the building was sold," and reaffirming "the Berkeley City Council's strong opposition to the sale." *Id.* ¶ 28 (quoting Compl., Ex. 2). Furthermore, as in *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998) and *Tovar*, the Postal Service submits that the evidence will show "a departure from normal procedures" and a sudden change in policy bolstering our demonstration of an illicit purpose. *See* Jan. 28, 2014 Ltr. Excerpt, Ex. 3 hereto (referring to the City's failure to follow procedures with respect to the Overlay, and enumerating ways in which the Overlay constituted a departure from the City's then-existing policy). In light of these circumstances, evidence, and the chain of events described above and in the Complaint, *see* ECF No. 1, ¶¶ 27–41, inquiry into the purpose of the Overlay—including through the deposition of City officials—is proper. The Court accordingly should reaffirm its prior ruling.

We thank the Court for its consideration of this submission.

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statute." *RUI One Corp.*, 371 F.3d at 1146 n.7 (quoting *O'Brien*, 391 U.S. at 383).

[4] The Ninth Circuit also ordered the district court to determine whether limited deposition testimony from the legislators in that case would be useful. *See City of Las Vegas*, 747 F.2d at 1299.

Respectfully submitted,

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