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October 17, 2017

Hon. William Alsup
Judge of the U.S. District Court
Northern District of California
Courtroom 8, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Proposed Order re City's Motion for Protective Order: *USPS v. City of Berkeley*, Case No. 3:16-cv-04815-WHA

Dear Judge Alsup:

The City objects to parts of the USPS' October 16, 2017 proposed Order regarding the City's Motion for Protective Order. The City respectfully requests that the Court sign the City's proposed Order (attached as Ex. B). The City contends that its Order more accurately reflects the Court's statements on the record at the October 11 hearing on the Motion and would prevent USPS from indirectly obtaining testimony of the City deponents' legislative motivations, which the Court ruled is not discoverable.

We attach the following documents to this letter:

Ex. A City's redline of differences between USPS and City's proposed Orders

Ex. B City's proposed Order

We explain the City's changes to USPS' proposed Order with reference to the pages and lines of Exhibit A (the City's redline):

Redline Ex. A page/line 2:15

The Service attempts to expand the subject areas that the Court expressly found were appropriate for inquiry by adding the words "including, but not limited to." This addition would make the depositions of the City's Legislators completely open-ended. At the October 11 hearing, the Court limited the subjects that are proper for inquiry. These subjects are listed in items 1-5 and the following paragraph of USPS' proposed Order (redline 2:17-3:10). If USPS now claims the right to depose the City's Legislators on other subjects, it should have raised the issue at the hearing. Accordingly, the City's proposed Order deletes the words "including, but not."

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Redline Ex. A pages/lines 2:20-21, 3:8-9

USPS misinterprets the Court's comments regarding the opinions of the City's Legislators. USPS takes the Court's statement at page/lines 36:24-25 of the Transcript out of context. USPS omits the first part of the exchange between the Court and the City's counsel at 36:16-23 regarding the types of land uses the Overlay covers and the Court's explanation of its ruling at 37:2-12 and 37:23-38:16. At page 38:7-16, the Court said that a Legislator's opinion as to "what the ordinance covers . . . would be perfectly legit if that's what they do as part of their job. But to go back and say, What was your subjective motivation at the time of the ordinance: you can't do that."

The City's proposed wording would allow the Legislators to give their opinions as to what land uses the Overlay allows and does not allow, as the Court ordered. But to allow USPS' proposed inquiry into the "opinions about the effect" of the Overlay would be the equivalent of asking about legislative motivation, which is not permitted.

Redline Ex. A page/line 3:12-13

The Service improperly adds "unstated" to "mental states" and "internal" to "motivations." The Court made no such rulings. The Court repeatedly used the terms "mind" (Tr. 8:11, 35:4), "legislative motive" (Tr. 7:24), and "subjective motivation" (Tr. 34:23-24, 38:15), never once using these modifiers. The Court ruled that the synonyms "intent" (Tr. 13:13-11) and "purpose" (Tr. 22:8-9) are also subjects that are off-limits. The City adds these synonyms to prevent USPS from circumventing the Court's ruling by simply using another term for legislative motive.

In its meet and confer letter to USPS, the City requested the addition of "intent" and "purpose," but USPS did not include them in its proposed Order, which indicates that USPS contends that it may ask the Legislators for their intent or purpose in adopting the Overlay.

Moreover, the Court did not limit the protection of a Legislator's thought processes to the Overlay. See Tr. 14:12-13 ("I just think that *Foley* decision is totally against you."). Accordingly, the City strikes "regarding the Zoning Ordinance." For example, under the USPS's proposed Order, it might ask Legislators for their thoughts and opinions about the USPS or its decision to close the Post Office. These lines of inquiry are plainly off-limits under the Court's holding articulated at the hearing.

Redline Ex. A page/line 3:16-17

In its initial revised proposed Order, USPS provided that that City could only object to a USPS question on grounds of privilege. In its meet and confer letter to USPS, the City requested that USPS include the essential addition that the City' counsel may object

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“as necessary to ensure compliance with this Order.” Without this ground for objection, either the City would be powerless to ensure that USPS complies with the Court’s protective order or the parties would be forced, in every instance of such a potentially objectionable question, to suspend the deposition and call the Court to resolve the dispute as provided for in the Court’s CMC Order. Allowing for such objections would allow counsel to confer about a potential violation of the Order that might be rectified by a rephrasing of the question. In its proposed Order, however, USPS has again failed to include this essential term.

Redline Ex. A page/line 3:19-24

At the parties’ October 11 meet and confer prior to the hearing, the Service withdrew its request for a 30(b)(6) deposition as to Topic 4 of its Revised Exhibit 1 pending the Service’s propounding of written discovery on Topic 4 to the City. See Tr. 7:5-10. At the hearing, USPS also indicated that it was only seeking testimony on Topics 8-10 of its 30(b)(6) notice. Tr. 4:22-25, 41:9-13. Accordingly, USPS appears to have withdrawn its 30(b)(6) requests as to Topics 5, 6, and 7.

In its meet and confer letter to USPS, the City requested that USPS include the agreement between the parties as to Topic 4 and USPS’s withdrawal of its 30(b)(6) requests for Topics 5, 6, and 7. The City respectfully requests that the Court add this result to the Order to clarify the scope of remaining discovery.

Very truly yours,

/s/

Andrew W. Schwartz
Counsel for City of Berkeley

Attachments

cc: Stuart Robinson
Farimah Brown
Jessica Mar
Savith Iyengar
Roger Moore

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