UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SHAUNA NOEL and EMMANUELLA SENAT,

Plaintiffs,

-against- 15-CV-5236 (LTS) (KHP)

CITY OF NEW YORK,

Defendant.

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PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE COURT'S MAY 8, 2019 OPINION AND ORDER (ECF 745)

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INTRODUCTION

Plaintiffs respectfully seek this Court's reconsideration of its ruling (ECF 745) affirming the Magistrate Judge's denial of plaintiffs' application to depose Mayor de Blasio (ECF 545)[1] in this civil rights action seeking to enjoin a discriminatory policy that the Mayor himself has actively sought to expand, promote and definitively maintain.

Plaintiffs are aware that motions for reconsideration should not be made, and are not granted, lightly. As this Court has explained in another case, the moving party must show "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Rajamin v. Deutche Bank Nat. Tr. Co.*, 2013 WL 1285160, at *2 (S.D.N.Y. Mar. 28, 2013) (citation omitted).

Plaintiffs believe this standard is readily satisfied. New evidence and developments within this action have all come to light in the period since prior briefing was fully submitted. They provide previously unavailable insight into the need for the Mayor's deposition testimony. Likewise, law of the case as articulated only after the briefing was fully submitted critically impacts the relevant analysis. Both developments further help to uncover and emphasize how crucial the Mayor's live testimony is to Plaintiffs' case, and how the erroneous reasoning of the underlying *Magistrate Opinion* could not properly have been accepted by ECF 745.

[1] This Court's May 8, 2019 affirmance, ECF 745, and the Magistrate Judge's underlying ruling, *Winfield v. City of New York*, 2018 WL 4350246 (S.D.N.Y. Sept. 12, 2018) ("*Magistrate Opinion*"), are annexed as Exhibit 1 and 2, respectively, to the Declaration of Craig Gurian, dated May 20, 2019 (Gurian Decl.").

POINT I

THIS COURT'S DECEMBER 2018 DECISION ON PRIVILEGE ISSUES, RELEVANCE, AND MOTIVATION CONTRADICTS THE UNDERLYING MAGISTRATE JUDGE OPINION DENYING THE DEPOSITION AND NEEDED TO BE TAKEN INTO ACCOUNT.

In December 2018 – *after* both the issuance of the Magistrate Opinion denying the deposition and the briefing of plaintiffs' objections to that decision – this Court sustained plaintiffs' objections with respect to the scope and method of analyzing deliberative process privilege. *Noel v. City of New York*, 2018 WL 6786238 (S.D.N.Y. Dec. 12, 2018).[2] Notably, this Court made clear that plaintiff's intentional discrimination claims focus not only on the motivations of defendant's policy makers in *adopting* the outsider-restriction policy in affordable housing lotteries, but also in "continuing" the policy. *Id.* at *5. Likewise, it was not just evidence as to *motivations* for action regarding potential changes to the policy that this Court found to be "highly relevant" to plaintiffs' claims, but also *motivations* for "inaction." *Id.* (emphasis added).

That aspect of the December 2018 decision conflicts with two key premises underlying the Magistrate Opinion. In claiming that the necessary circumstances to warrant the Mayor's deposition were not present, the Magistrate Judge explicitly focused on the fact that the policy was adopted "long ago," that it was modified in 2002, "again by another administration," and has, in the words of the Magistrate Opinion, "*simply continued in effect* since then." *Magistrate Opinion*, 2018 WL 4350246, at *1 (emphasis added). This conflict is dispositive. What the Magistrate Judge dismissed as "simply continuing" a policy is exactly what this Court had identified as part of the *focus* of plaintiffs' intentional discrimination claims.

Moreover, when the Mayor, in the course of admitting his decision-making role as to the

[2] Annexed to the Gurian Decl. at Ex. 3.

outsider-restriction policy,[3] stated that he has "not considered changing the community preference policy for any reason other than to facilitate resolution of this litigation,"[4] that was not supposed to end the inquiry; on the contrary, it should have reminded the Magistrate Judge that one of the factual questions at hand was what his – the Mayor's – motivations were for his "inaction."[5]

Indeed, the Magistrate Opinion's failure to recognize that intent and motivation in intentional discrimination cases are fundamentally *factual* questions is another core premise of the Magistrate Opinion in irreconcilable conflict with this Court's subsequently rendered decision *Noel v. City of New York*, 2018 WL 6786238. The reasons *why* the Mayor believes what he does about the policy (or the justifications for the policy) and the reasons *why* the Mayor chose not to consider changing the policy (given, for example, what he knew about outsider-restriction *not* being integrative), all constitute unique factual information about intent and motivation upon which a deposition is properly premised. *Cf. State of New York v. U.S. Dep't of Commerce,* 333 F. Supp. 3d 282, 288 (S.D.N.Y. 2018) (holding that it "nearly goes without saying that Plaintiffs

[3] *See* plaintiffs' memorandum of law in support of their objections to the Magistrate's Opinion, ECF 566 ("Plaintiffs' Opening Brief"), annexed to Gurian Decl. as Ex. 4, at 2-3. Defendant's opposition brief and plaintiffs' reply brief are annexed to Gurian Decl. at Ex. 5 and Ex. 6, respectively. *See* plaintiffs' reply brief, at 3 (citation and exhibit omitted) [Redacted]

[4] *See* July 23, 2018 Declaration of Mayor Bill de Blasio, ECF 497 ("BdB Decl."), Ex. 7 to Gurian Decl., at ¶ 11.

[5] The Magistrate's Opinion was factually mistaken when it stated that the Mayor had no personal involvement in the "modification and administration" of the policy." *Magistrate Opinion*, 2018 WL 4350246, at *2. He both accepted and rejected various modifications to the policy. *See* Plaintiffs' Opening Brief, at 2-3. The Magistrate Opinion was also both legally and factually mistaken in asserting that "there is no evidence that Mayor de Blasio made any affirmative decision about the longstanding policy. . . ." *Magistrate Opinion*, 2018 WL 4350246, at *2. Legally, because it repeats the error of ignoring that the reasons for continuing the policy are a central part of the case; factually, because it ignores, *inter alia*, the Mayor's reference in his declaration to "*my decisions to reject certain alternatives to the community preference policy*. . . ." *See* BdB Decl., at ¶ 11 (emphasis added).

cannot meaningfully probe or test, and the Court cannot meaningfully evaluate," the decision-making official's "intent and credibility without granting Plaintiffs an opportunity to confront and cross-examine him.").[6] It was a critical error for the Magistrate Opinion to treat the circumstance that some *information* about the challenged policy known to the Mayor was also known to other witnesses[7] as sufficient, let alone conclusive, proof that the Mayor's *intent and motivations* was identical to that of other witnesses or discernable from other witnesses.

ECF 745 could not have taken this Court's December 2018 decision in *Noel v. City of New York*, 2018 WL 6786238 into account because the two central premises of the Magistrate Opinion discussed above are entirely incompatible with that decision. If the Court were to do so now, plaintiffs' objections would of necessity be sustained.

POINT II

NEW EVIDENCE HIGHLIGHTS THE SIGNIFICANCE OF THE FAILURE OF THE MAGISTRATE OPINION TO RECOGNIZE THAT WITNESSES ARE NOT INTERCHANGEABLE.

The Magistrate's Opinion accepted uncritically the Mayor's self-serving declaration that he has "no reason to believe that [he] h[as] any unique factual knowledge about the community preference policy." *Magistrate Opinion*, 2018 WL 4350246, at *2 (citation omitted). The theme that runs through the Magistrate Opinion is that plaintiffs do not need to depose the Mayor because they have had the opportunity to depose others. Newly obtained evidence highlights the error in that premise.

A central justification put forward by defendant for its outsider-restriction is the assertion

[6] The decision was later vacated on other grounds (mootness) by the District Judge who had issued it. *State of New York v. U.S. Dep't of Commerce,* 351 F. Supp. 3d 502, 680 (S.D.N.Y. 2019).

[7] [Redacted]

See Point III, *infra.*

that *the policy prevents displacement*. Indeed, at the deposition of Vicki Been – who at the time was in between her previous stint as Commissioner of HPD and her current stint as Deputy Mayor for Housing and Economic Development – Ms. Been testified that "the *best* tool that we have to prevent displacement is the Community Preference . . . ."[8]

Yet just last month, the Mayor re-introduced Ms. Been in her new role at a press conference. In an off-the-cuff moment, he directly contradicted Ms. Been's deposition testimony. His focus was not new construction (as to which outsider restriction applies) or even rezoning. The Mayor wanted to focus on housing *preservation*:

> I really want to say this because I think it hasn't gotten the attention it deserves. [Preservation] is the *ultimate anti-displacement tool*. A lot of discussion about rezoning and that's a good discussion to have but the *simplest, strongest, clearest anti-displacement tool* is to protect a working family in their apartment, in their neighborhood, subsidize it, protect it for decades ahead.[9]

The sharp discordance is highly relevant not just from the point of view of disparate impact (defendant has to show that a policy is *necessary* to achieve its goals and the Mayor's public statement clearly indicates that Ms. Been had been exaggerating the relative importance of outsider-restriction to such a goal), but also from the point of view of intentional discrimination (the false or exaggerated role of outsider-restriction is evidence of pretext).

The fact of the discordance demonstrates anew that the Magistrate Opinion was fatally flawed in not recognizing either that perspectives of participants can vary (*i.e.*, constitute unique facts about motivation and intent) or that no one else can explain the Mayor's views as he can.

To allow the Mayor, the ultimate policy maker on outsider-restriction, to be siloed off from

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[8] *See* excerpts of transcript of April 10, 2018 deposition of Vicki Been ("Been II"), annexed to Gurian Decl. as Exhibit 8, at 24:2-4 (emphasis added).

[9] *See* an excerpt of transcript of April 4, 2019 press conference, "Mayor de Blasio Appoints Vicki Been as Deputy Mayor for Housing and Economic Development," annexed to Gurian Decl. as Ex. 9, at 2-3 (emphasis added).

the reach of the fact-finding process (as provided for by the Magistrate Opinion) is clear error and manifestly unjust.

POINT III

NEW EVIDENCE OF [Redacted]

UNDERLINE THE EXISTENCE OF COMMUNICATIONS ABOUT WHICH ONLY THE MAYOR CAN PROVIDE A FULL ACCOUNT.

The Magistrate Opinion discounted the Mayor's active participation in the outsider-restriction policy: "[T]hat the Mayor may have defended the policy in a general way in some public statements consistent with the City's position in this case does not mean he has unique knowledge or involvement in the administration of the policy." *Magistrate Opinion*, 2018 WL 4350246, at *2.

Some of the evidence that directly contradicts the Magistrate Opinion in this regard was submitted to the Court and has never been addressed by any ruling. We respectfully submit this has been an oversight that has resulted in clear error. In any event, new evidence has since been developed in this case that further emphasizes the significance of the underlying evidence of the Mayor's active role defending the policy that is being challenged here.

In fact, [Redacted]

.[10]

In August 2016, [Redacted]

[10] *See* Plaintiffs' Reply Brief, at 8, n.26, referencing a July 2015 email containing the quoted language.

[Redacted]

"[11]

But as made clear only *after* the full briefing on our objections to the denial of the Mayor's deposition, in the January 2019 deposition of James Patchett (former chief of staff to the deputy mayor for housing and economic development), the Mayor did [Redacted]

.[12]

Critically, what was made clear for the first time in the January 2019 deposition of Mr. Patchett is that often, the Mayor is the *only* person who can provide a first-hand account of [Redacted] It was a normal practice for the Mayor to conduct calls *on his own* after having received general written talking points. [Redacted]

.[13] As Mr. Patchett also testified:

> A. …Usually if the Mayor were going to speak with [the HUD Secretary] on [a] phone call, he would just call him on his cell phone.
>
> Q. You would not necessarily dial in?
>
> A. Definitely not.

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[11] *See* plaintiffs' Ex. 296, identified at the Jan. 16, 2019 deposition of James Patchett. The document which includes the referenced email from the Mayor, is annexed to Gurian Decl. as Ex. 10.

[12] *See* excerpts of transcript of Jan. 16, 2019 deposition of James Patchett ("Patchett Depo."), annexed to Gurian Decl. as Ex. 11, at 132:25-136:21 and 170:24-171:16 [Redacted]

at 170:13-22 [Redacted] and at 178:12-13

[Redacted]

).

[13] *See id*. at 178:18-179:5.

Q. Or would you be with the Mayor while he spoke to him on his cell phone?

A. Usually not. I mean, occasionally the [Redacted]

[14]

[Redacted]

.

These newly discovered facts should be taken into account in recognizing that the Magistrate Opinion was clearly in error in treating information only able to be gotten from the Mayor at deposition as interchangeable with that available from others.

POINT IV

THE MAYOR'S TESTIMONY WOULD PROVIDE UNIQUE INSIGHT INTO NEWLY-DISCOVERED EVIDENCE REGARDING DEFENDANT'S [Redacted]

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New information that defendant focuses its rezonings [Redacted]

it is the Mayor who ultimately makes the call as to rezoning strategy, and it is he who needs to be deposed to explain why [Redacted]

As this Court has pointed out, one of the facts from which an inference of discriminatory intent can be drawn is the following allegation: "As recently as the Bloomberg administration

[14] *See* Patchett Depo., at 134:18-135:7.

(2001-2014), Plaintiffs allege that white and black neighborhoods were treated differently when it came to zoning: increases in density occurred most frequently in neighborhoods with disproportionately high African-American or Latino populations and decreases in density occurred most frequently in white neighborhoods." *Winfield v. City of New York*, 2016 WL 6208564, at *7 (S.D.N.Y. Oct. 24, 2016).

Vicki Been, while in a pre-Commissioner stint at the Furman Center,[15] had co-authored a policy brief relating to rezonings during a portion of the Bloomberg Administration (2003-2007).[16] She was asked about the brief during her April 2018 deposition. Ms. Been confirmed upzoning to increase residential density facilitates affordable housing construction and that downzoning to reduce residential density would tend to make it more difficult to add to the affordable housing supply.[17] She referred to upzoning (rezoning to add capacity) as something that makes it "more likely that the Fair Housing will pencil out."[18]

She then confirmed that she still believed the following, recited from the policy brief, to be true of the Bloomberg-era rezonings:

> Upzoned lots tended to be located in census [tracts] with a higher proportion of non-white residents than the median [tract] in the city.
>
> Downzoned lots, on the other hand, were more likely to be located in [tracts] with a higher share of non-Hispanic white residents than the city median.
>
> And contextual only rezoned lots were located in areas with still higher shares

[15] Ms. Been returned to the Furman Center after she concluded her service as HPD Commissioner and before she returned to City service in her current position as Deputy Mayor for Housing and Economic Development.

[16] The policy brief is entitled, "How Have Recent Rezonings Affected the City's Ability to Grow?" ("Rezonings") and was marked as Ex. 105 at Ms. Been's April 2018 deposition. An excerpt of the policy brief is annexed to Gurian Decl. at Ex. 12.

[17] *See* Been II, at 75:4-76:10.

[18] *See id.*, at 75:23-76:3.

> of non-Hispanic white residents.
>
> The opposite trend exists for both black and Hispanic residents. Upzoned lots were more likely to be in areas that have a higher share of black and Hispanic residents than the city median while downzoned and contextual-only rezoned lots both were in areas with smaller shares of black and Hispanic residents.[19]

Ms. Been also stated that race was intended to be encompassed in the term "socioeconomic characteristics" when she and her co-authors had written, "The variation in the patterns of rezonings among communities with different socioeconomic characteristics calls for a larger conversation about how the benefits and burdens of development should be shared across the City."[20]

Despite the racially-disparate pattern pointed to in the policy brief, and despite the call for a "larger conversation," [Redacted]

Through a talking-point document not available to plaintiffs until after briefing on the objections was completed, defendant's description of its approach is as follows (a bullet point part of the suggested answer to " [Redacted] "):

[Redacted]

. . . .[21]

[Redacted]

. It is not disputed that it is the Mayor that ultimately sets administration

[19] *See id.*, at 76:16-77:24.

[20] *See id.*, at 78:8-22.

[21] *See* excerpt of "City Limits Panel Discussion: Fair Housing in a Rezoned City," annexed to Gurian Decl. as Ex. 13, at 4 (Bates number NYC_0166779). The full document was identified and marked as Exhibit 278 at the January 10, 2019 deposition of Leila Bozorg.

policy as to where to rezone.[22] *His* unique reasons for [Redacted] – including *his* unique view of the *political* realities of what doing so would encompass – need to be probed, as they were not probed in the Magistrate Opinion.

POINT V

NEW EVIDENCE CONTRADICTS THE MAYOR'S CLAIM THAT OUTSIDER-RESTRICTION IS AN IMPORTANT TOOL WORKING IN FAVOR OF FAIR HOUSING.

Vicki Been has testified that, "The mayor has expressed to me that the *Community Preference is an important aspect of his approach to Fair Housing* and that it helps to prevent displacement."[23] Plaintiffs view has been that this assertion represents a combination of pretext and consciousness of guilt: that is, defendant, including the Mayor, knows full well that outsider-restriction operates to deny on the basis of race a level playing field for New Yorkers to access housing in the neighborhood of their choice (to make the choice to move out of one's segregated community district harder than the choice to remain in one's segregated community district). Because of the Magistrate Opinion, plaintiffs have not been able to question the Mayor directly.

But new evidence – from defendant's own proposed expert – underlines the importance of probing the Mayor's apparent view. Criticizing the reports of two of plaintiffs' experts,

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[22] As an illustration, an email produced subsequent to the briefing on plaintiffs' objections (partially redacted) bears the subject line "Rezoning Decision Memo feedback" and lists as the attachment an updated decision memo on "Neighborhood Rezonings." [Redacted]

This cover email, Bates NYC_0195400, is annexed to Gurian Decl. as Ex. 14; the underlying decision memo was withheld from production on the basis of privilege.

[23] *See* Been II, at 63:15-19 (emphasis added). Note that the acknowledgment of outsider-restriction being an important aspect of his (the Mayor's approach) belies the attempt of the Magistrate Opinion to separate the Mayor from the policy.

defendant's own proposed expert, Professor Edward Goetz, states that they have "*mistakenly* assumed that the Community Preference policy is meant to be an integrative policy."[24] He articulated the same point at his deposition. Professor Goetz had been asked to confirm that "to you it's not problematic in any way that a particular area that is characterized by dominance of one racial group would have better odds than people from the rest of the city who were much more racially diverse?"[25] He first explained that the imbalance would not bother him because, defendant was doing "other things" to pursue the "objectives of integration."[26] He then distinguished what outsider-restriction does from the objectives of integration: "[T]he community preference policy is *aimed at a different set of objectives*."[27]

Defendant will undoubtedly attempt to harmonize Ms. Been's recitation of outsider-restriction as part of what the Mayor considers "his approach to fair housing" with the admission of defendant's expert that the policy is "aimed at a different set of objectives." But that presentation cannot be cross-examined. It is the Mayor, who needs to be queried directly about "his approach." And ECF 745 could not have taken the contradiction between the Mayor's rationale and defendant's expert testimony into account because that contradiction did not emerge until after the briefing to this Court (indeed, the Goetz Rebuttal Report was not submitted to plaintiffs until after ECF 745 was rendered).

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[24] *See* excerpt of May 10, 2019 report of Professor Edward Goetz ("Goetz Rebuttal Report"), annexed to Gurian Decl. as Ex. 15, at 12 (emphasis added).

[25] *See* excerpt of April 5, 2019 deposition of Edward Goetz, annexed to Gurian Decl. as Ex. 16, at 112:10-17.

[26] *See id*., at 112:19-23.

[27] *See id*., at 112:24-113:3 (emphasis added).

POINT VI

THE LOGISTICS OF THE DEPOSITION CAN BE ARRANGED TO MINIMIZE ANY BURDEN ON THE MAYOR.

The Magistrate Opinion explained that the purpose of the high-governmental official doctrine is "to protect the ability of the official to perform his or her governmental duties without the interference of civil litigation." *Magistrate Opinion*, 2018 WL 4350246, at *1. As it happens, and unknown until after ECF 745 was decided, Mayor de Blasio has just decided to take a very substantial amount of time, on an ongoing basis, away from his governmental duties as Mayor in order to run for the Democratic Party nomination for President. Plaintiffs will certainly cooperate to schedule the deposition on one of the extensive number of days that the Mayor will be out of the City not performing his governmental duties, if that arrangement is more convenient to him.

CONCLUSION

For the reasons stated, ECF 745 should be reconsidered, and, upon reconsideration, plaintiffs' objections to the Magistrate Opinion should be sustained and defendant's cross-motion for a protective order overturned.

Dated: New York, New York
May 20, 2019

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