UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| ACORN (THE NEW YORK ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW), NEW YORK ACORN HOUSING COMPANY, INC., et al., | : | Case No. 05-CV-2301 (JFB) (WDW) |
| Plaintiffs, | : | |
| v. | : | |
| COUNTY OF NASSAU, INCORPORATED VILLAGE OF GARDEN CITY, AND GARDEN CITY BOARD OF TRUSTEES, | : | |
| Defendants. | : | |

**PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS VILLAGE OF GARDEN CITY'S, GARDEN CITY BOARD OF TRUSTEES' AND NASSAU COUNTY'S MOTION FOR SUMMARY JUDGMENT**

June 15, 2009

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Plaintiffs New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc., Vic DeVita and Francine McCray (collectively, "plaintiffs") hereby respectfully submit this memorandum of law in opposition to the motions for summary judgment of defendants the Incorporated Village of Garden City and the Garden City Board of Trustees' (collectively, "Garden City") and Nassau County (hereinafter "Nassau County" or "the County").

## I. PRELIMINARY STATEMENT

This case involves discriminatory conduct by two local governmental entities, the Village of Garden City, and Nassau County, New York. Garden City has been a white enclave as long as it has existed, and has wielded its zoning powers to ensure that it has stayed that way. In particular, when it partnered with Nassau County to rezone the County-owned Social Services Site, Garden City went so far as to invent a new zoning classification to effectively quash any new attempt to make Garden City more attainable to minorities. That new classification, borne of fierce and explicit local opposition to any housing that might have resulted in increased numbers of racial minorities, went against the very recommendations of its own planning experts to stay within existing zoning code, which would have allowed affordable housing.

Nassau County's violation of the law was at least as egregious. Although the minority population of the County has increased in recent years, that population remains segregated. Nassau County has historically bent to the will of its white residents and their resistance to the building of housing that would be occupied by minorities in areas such as Garden City. It has consistently targeted high-minority areas for affordable housing, ensuring that Nassau County remain one of the most segregated counties in the United States.

That conduct continued in the instant case. When residents of Garden City protested the possibility of affordable housing in Garden City, the County Executive, the highest official in the

County government, quickly agreed that no affordable housing would be built. He even promised to covenant that no affordable housing would be built. Sadly, he did so even as he believed that the resistance to affordable housing was racially motivated.

Now, both Garden City and Nassau County, despite this record, argue that there is no triable issue of fact and that summary judgment should be granted in their favor. We show below that not only are there triable issues, but there is also strong evidence that would support the plaintiffs' claims.

## II. STATEMENT OF FACTS

This case revolves around the potential sale and development of a 25-acre parcel of land in the Village of Garden City (the "Social Services Site" or "the Site") owned by defendant Nassau County. (Statement of Additional Material Facts ("SAMF") ¶ 21.) The record developed in discovery shows that plaintiffs have a factual basis that will support the conclusion by a finder of fact that Garden City and the County engaged in discriminatory conduct in imposing exclusionary zoning to obstruct the construction of affordable housing and maintain racial segregation in Garden City and the County.

In 2002, Nassau County adopted a Consolidation Plan to sell a number of its real property holdings, including the Social Services Site. (SAMF ¶ 95). At that time Nassau County was – and remains – one of the most segregated counties in the country. (SAMF ¶ 55-56.) Insofar as the segregation of African Americans is concerned, the County ranks in the top one half of one percent of all counties in the United States. (*Id.*) Further, in the last thirty years that pattern of segregation has not improved. (*Id.*) Segregation of Hispanics has actually worsened in recent years.[1] (*Id.*)

[1] By 2000, Nassau ranked in the top 10% of counties in terms of Hispanic segregation. (SAMF ¶ 55-56).

Garden City is even more segregated, with a population well over 90% white. [2] (SAMF ¶ 1.) This extreme racial homogeneity stands in stark contrast to Garden City's surrounding communities. (SAMF ¶ 2.) Garden City is an island of white populations surrounded by racially integrated and majority-minority towns. For example, to the south and the east of the Village are East Garden City, which is 67% minority, Hempstead, which is 84% minority, and Uniondale, which is 79% minority. (SAMF ¶ 3.)

It is well known that most of the affordable housing units in the County are inhabited by minorities. (SAMF ¶ 228). As of May, 2008, approximately 88% of individuals on the Nassau County Section 8 waiting list were members of a minority group. (SAMF ¶ 223.) Under NYAHC housing proposals in which a portion of the affordable units were designated Section 8, approximately 88% of the occupants of Section 8 units were therefore likely to be minorities. (*Id.*) Under alternative proposals, in which all of the units were affordable, but non-Section 8, the pool of renters who could afford the units was more likely to include members of a minority group. (*Id.*) Despite Nassau County's – and Garden City's – dire need for integrated affordable housing, (SAMF ¶ 71) *there is not one affordable unit in Garden City.* (SAMF ¶ 8.) Accordingly, the development of *any* affordable units in Garden City would reduce the extreme segregated nature of the Village. (SAMF ¶ 10.)

When the County decided to sell the Social Services Site, it contacted Garden City's Board of Trustees[3] and requested that Garden City rezone the Site from "P" zone – public use – to to multi-family residential development. (SAMF ¶¶ 98-102.) The then-Mayor of Garden City appointed a committee of three Trustees, known as the P-Zone Committee, to work with Nassau

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[2] 2.3% of households in Garden City were headed by a black or Hispanic person (just 167 households) compared with 15.3% of households in Nassau County. (SAMF ¶ 5.)

[3] There are eight Trustees. None of them is African-American or Hispanic and indeed, there is no evidence that a minority ever served as a Village Trustee. Lundquist tr. at 15:8-23.

County and make recommendations to the Trustees in connection with the sale of the property. (SAMF ¶ 106.) Trustees Gerald Lundquist, Peter Bee and Peter Negri served as the P-Zone Committee (SAMF ¶ 108), Bee its Chairman. (*Id.*) The County and the Village worked closely together, in constant deliberation, to rezone the Site. (SAMF ¶ 103, 110.) Garden City hired a consultant, Buckhurst, Fish and Jacquemart (hereinafter "BFJ"), to recommend the most appropriate rezoning for the Social Services Site, (SAMF ¶ 106-107) in accord with the County's expressed request for high density, multi-family zoning (*id.*) and Garden City's list of planning and zoning principles. (SAMF ¶ 112-113.) Those planning principles expressly included the use of zoning classifications that already existed in the Village Code. (SAMF ¶¶ 120.)

During 2003 and at the beginning of 2004, BFJ created a number of reports and memoranda, all of which recommended the adoption of an R-M zoning classification that would permit multi-family affordable housing ("Proposed Zoning") for the Social Services Site. (SAMF ¶ 117.) By February 2004, the Board of Trustees was "comfortable" with BFJ's recommendation for RM zoning controls; Trustee Bee "felt the recommended zoning changes [proposed by BFJ in favor of using the R-M zoning controls] were appropriate." (SAMF ¶ 144.)

In early 2004, a number of public meetings took place in which the Garden City Board of Trustees and BFJ presented their proposed zoning for the Social Services Site. (SAMF ¶ 136.) At the public meetings, many residents of Garden City opposed the recommendation for multi-family zoning, citing strong opposition to low income housing as well as concerns over traffic congestion and potential overcrowding of schools. (SAMF ¶¶ 136-165.) BFJ, Garden City's planning consultant, explained in detail that the concerns over traffic and overcrowding of schools were groundless. (SAMF ¶¶ 152, 155.) Trustee Bee and Nassau County Executive Suozzi did the same. (SAMF ¶¶ 153-156.) Garden City residents nonetheless continued to

oppose the Proposed Zoning. (SAMF ¶¶ 154, 157.) In addition to the references references to concerns about traffic and schools (grounds that did not form the bases of the zoning decision because they were refuted by the defendants and their consultants at the time), *see id.*, numerous other comments opposing affordable housing revealed that the Village residents did not want any possibility of such housing in Garden City (and the resulting influx of minority residents). (SAMF ¶ 225-227.)

Finally, at a public meeting held in February 2004, at which County Executive Suozzi made a presentation regarding the proposed development of the Site, the residents demanded assurances that affordable housing would not be constructed. (SAMF ¶¶ 146, 174.) In response, County Executive Suozzi not only immediately agreed that there should and would be no affordable housing in Garden City at the Social Services Site, but also promised that Nassau County, as the landowner, would specifically covenant to exclude affordable housing and would bow to the will of the residents, whatever that might be. (SAMF ¶¶ 172-177.) Since at least 1974, the County has been aware that racism is a primary obstacle to affordable housing in the County.[4] Indeed, both County Executive Suozzi and [Duggan] acknowledge that racism remains an obstacle to affordable housing to this day. Thus, at this meeting, it suspected that the residents' "vociferous" opposition was based, at least in part, on discriminatory motivations. (*Id.*) The County nonetheless agreed to do whatever Garden City wanted, even if it was for discriminatory purposes. (SAMF ¶ 178-180.)

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[4] In 1974, this Court found in *Acevedo et al. v. Nassau County et al* 369 F. Supp. 1384, 1389 (E.D.N.Y. 1974), *aff'd* 500 F.2d 1078, (2d Cir. N.Y. 1974), that in Nassau County "the most objectionable form of housing has been low-income family housing. It is clear from all the evidence that community opposition to this form of housing has been racially motivated. (...) As can be expected such heated opposition has not been ignored by the elected officials of Nassau. There is evidence of more than one housing proposal being dropped because of vehement community opposition."

As a result, Garden City created a brand-new zoning classification for the Social Services Site, "R-T" (SAMF ¶ 185-186, 191), which effectively prevented the construction of affordable housing on the Site. (SAMF ¶ 192.) NC Br. at 3.[5] The R-T zoning reduced multi-family to less than 15% of the site. (SAMF ¶ 175.) Under this zoning, multi-family housing was only possible on a very small "sliver" of land (SAMF ¶ 188-190), and then, only after obtaining a special permit from the Garden City Board of Trustees, the very group that had bowed to the discriminatory animus of the residents in the first place. (SAMF ¶ 186.) In other words, Garden City did exactly what the Village residents demanded – it intentionally and effectively excluded a real possibility of affordable housing. (SAMF ¶ 178, 192.) This new exclusionary zoning was in direct opposition to the zoning requested by Nassau County and originally recommended by BFJ and the P-Zone Committee to the Village Trustees.[6] (SAMF ¶ 117, 142, 144.)

In July 2004, Nassau County issued a Request for Proposals ("RFP") for the development of the Social Services Site using the newly created and exclusionary R-T zoning. (SAMF ¶¶ 194, 197.) On September 10, 2004, plaintiffs ACORN and NYAHC contacted Nassau County with a proposal to develop affordable housing on the Social Services Site pursuant to the originally recommended multi-family zoning. (SAMF ¶¶ 202-203.) Because the new R-T zoning imposed

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[5] Although the zoning did not specifically mention "affordable housing" the intention was clear – the New Zoning imposed set back restrictions and large square footage minimum floor area spaces that knowingly made it economically impossible to construct affordable housing units. (SAMF ¶ 199.)

[6] It also flew in the face of the well established need for multi-family housing and affordable housing in Nassau County and Garden City. The Nassau County 2000-2004 Consolidated Plan plainly and repeatedly recognizes the need for affordable family housing. (SAMF ¶ 199.) ("Low and moderate income households need rental assistance and affordable housing options"); *id.* ("Due to the drastic increase in cost of housing, and shortages in housing availability particularly for the elderly and young families, it has become necessary to increase the supply of suitable affordable housing while maintaining suburban standards of density and design."); *id.* ("The scarcity of affordable rental units is also a concern, with many rental units lost during the 1980's to cooperative or condominium conversions."); *id.* (noting waiting list of over 4,000 households for subsidized housing). Indeed, this need for affordable housing has been long-recognized and documented in Nassau County. *See Acevedo v. Nassau County*, *supra at* 1387 (E.D.N.Y. 1974) ("[T]here is a definite need for multi-family housing to accommodate the aged, the young and the poor residing within the County.")

low density zoning and made it effectively impossible for any affordable housing to be constructed on the Social Services Site (SAMF ¶ 198; NC Br. at 3), it was futile for plaintiffs (or anyone else) to submit an affordable housing response to the RFP that complied with the new zoning. As a result, the affordable housing proposal that plaintiffs submitted to the County did not comply with the new zoning. (SAMF ¶ 200.) The response by plaintiffs shows, however, that plaintiffs were prepared to submit a bid to construct affordable housing on the Site, if zoning were enacted that would make the construction of affordable housing possible. (SAMF ¶¶ 196-215.) It was further shown in discovery that, had the Proposed Zoning been enacted, ACORN and NYAHC would have, and could have, submitted a development proposal for at least the $30 million asking price (*Id.*) and would have been able to construct approximately 78 affordable units as part of a 311 unit development. (SAMF ¶ 206.)

In 2005 plaintiffs commenced a lawsuit against Garden City and Nassau County alleging that the defendants violated the Fair Housing Act, the Civil Rights Act of 1866, the Civil Rights Act of 1871, the Equal Protection Clause and the Civil Rights Act of 1964.

In May 2006, a year after this action was commenced, Nassau County announced that it intended to sell another piece of land in Garden City, the Ring Road site, for the purpose of developing affordable housing in Garden City. (SAMF ¶ 31.) In order for Nassau County's project to go forward, the Village's Board of Trustees needed to rezone the parcel from commercial to multi-family residential. (SAMF ¶ 32.) Plaintiffs ACORN and NYAHC submitted a proposal for an affordable housing development based on the premise that the Village would enact R-M zoning on the Ring Road site. (SAMF ¶ 33.) As with previous attempts to develop affordable housing for minorities, County Executive Suozzi's announcement

raised a flurry of objections from the Garden City residents.[7] Once again the residents of Garden City thwarted the possible development of multi-family affordable housing specifically requesting that County Executive Suozzi not "[cater] to ACORN and black people." (SAMF ¶ 38.) After being confronted by the opposition of the residents of Garden City, Nassau did not further pursue the project and the Ring Road site has never been rezoned to permit multi-family housing by Garden City.

For decades, Nassau County has played an active role in perpetuating the segregation present in Garden City and other similar communities. (SAMF ¶ 60.) Already found by this Court thirty five years ago, "heated" and "racially motivated" community opposition to affordable housing was not "ignored by elected officials of Nassau" and "more than one housing proposal [was] dropped because of [this] vehement community opposition." *See supra,* fn. 4.

Rather than address this basic impediment to fair housing, the County has consistently bowed to this community opposition, resulting in a longstanding segregative policy of directing its federal housing assistance funds, including funds under the federal CDBG and HOME subsidized housing programs, to acquire or support the development of affordable housing in communities predominantly populated by minorities – and by not promoting use of those funds to develop affordable housing in predominantly white areas. (SAMF ¶¶ 67-87.)[8] Indeed, "2/3 of Nassau County's affordable housing units were located in municipalities with minority shares

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[7] *See, e.g.*, communication from a resident of Garden City to T. Suozzi, dated June 5, 2006, stating that she opposes affordable housing in Garden City and that T. Suozzi's affordable housing project is "catering to ACORN and black people," (SAMF ¶ 38) and again on October 12, 2006, bates stamped CNTY05955, and other various communications from Garden City residents opposing affordable housing at the Social Services and the Ring Road sites. (SAMF ¶¶ 32-37.)

[8] The County's 1995, 2000, and 2005 Consolidated Plans expressly state that "Nassau County currently targets its comprehensive community development efforts in a number of lower income and minority areas such as Roosevelt, Inwood, Hempstead Village, New Cassel and Freeport. Housing rehabilitation activities, constructions of affordable housing and housing redevelopment activities have been, and will continue to be, targeted to these areas." (SAMF ¶ 68.)

that were over twice the County average." (SAMF ¶ 64.) Further, 100% of affordable units designated as "new construction" were located in municipalities with a minority share of over twice the County average. (SAMF ¶ 65.) Ninety-five percent of properties sold to non-profit developers were likewise in municipalities with a minority share of over twice the County average. *Id.*

County Executive Suozzi confirmed this intentional segregative practice when he stated that housing assistance has been "[f]or the most part...in minority communities that have traditionally had affordable housing." (SAMF ¶ 70.) By only developing the housing most needed by, and most likely to attract, low- and moderate-income minority families within communities that are already disproportionately minority, Nassau County's practices have continued to perpetuate segregation within the County to the present day.[9] (SAMF ¶ 60-63.)

Furthermore, the County official who administers its CDBG program testified that the County has never evaluated the impact of CDBG and HOME expenditures on racial or housing segregation, nor has it examined how the County's explicit policy of targeting affordable housing in minority communities would be an impediment to fair housing. (SAMF ¶ 91.) This official further testified, in response to questions about this policy, that the County is "not supposed to

[9] The location of subsidized housing in Nassau County reflects a clear pattern of racial segregation, with virtually all subsidized family housing (*i.e.*, housing most likely to be occupied by minorities) sited in areas that are already predominantly minority. By contrast, subsidized senior housing (which is disproportionately white) is regularly sited in predominantly white areas of the County. Recalling that the overall demographics of the County as a whole are 74% white, 10.3% black, and 10% Hispanic, the contrast between the two types of subsidized housing is notable: Fifty- two percent of units in the County designated for families or first-time homebuyer units are located in municipalities where the population is at least 61% minority. On the other hand, two-thirds of units designated for senior citizens and Golden Age housing are located in municipalities where the population is less than 20.3% minority. In addition, of the affordable 1,565 units with which the County claims it has been involved through construction or rehabilitation, two-thirds of the units (62%) were located in municipalities with minority shares that were over twice the County average. Among those 138 units which were explicitly identified as being "new construction", all of the units (100%) were located in municipalities with minority shares that were over twice the County average. Furthermore, of the 734 units that the County has identified as being at least partially funded through the CDBG and HOME federal subsidized housing programs, for which the County is the local administrator and coordinator, two-thirds were located in municipalities with minority shares of the population that were over three times the County average. (SAMF ¶ 64-67.)

look at racial demographics" in allocating CDBG funds to help create new, affordable housing and conceded that racial discrimination was not listed as an impediment to fair housing in their 1995 Consolidated Report. (SAMF ¶¶ 88.)

The evidence plainly shows that this explicit policy has not only contributed to perpetuating and exacerbating segregation in Nassau County, but the practice has also preserved Garden City as a nearly all-white enclave.[10] By supporting the Village's 2004 zoning decision, which prevented affordable housing development at the Social Services Site, Nassau County has continued its practice of promoting the development of affordable multi-family housing only in predominantly minority communities and allowing segregation to persist and even to worsen.

## ARGUMENT

## III. SUMMARY JUDGMENT STANDARD

Summary judgment "may not be granted unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Gallo v. Prudential Residential Services, Ltd. Partnership*, 22 F.3d 1219, 1223 (2d Cir. 2000); Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of "demonstrat[ing] that no genuine issue respecting any material fact exists." *Gallo*, 22 F.3d at 1223. In assessing the evidence, the court's role is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them." *Geoghan v. Long Island R.R.*, No. 06 CV 1435, 2009 WL 982451, at *5

[10] Garden City is a very segregated, nearly all-white Village, particularly compared to neighboring areas. (SAMF ¶¶ 1-7.) Garden City is located in the center of Nassau County, New York. According to 2000 census figures, the Village (97.4% white, 2.6% minority) is a near-total white enclave. *Id.* This is far "whiter" than the County as a whole (80.3% white, 19.7% minority). *Id.* In particular, Garden City stands in stark contrast to the neighboring Village of Hempstead, which has a minority population share of 84.4%. *Id.*

(E.D.N.Y. April 9, 2009) (quoting *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 65 (2d Cir. 1995) (quoting *Gallo*, 22 F.3d at 1224). Moreover, in considering a motion for summary judgment, "all reasonable inferences and any ambiguities are drawn in favor of the nonmoving party." *Thompson v. Gjivoje*, 896 F.2d 716, 720 (2d Cir. 1990) (referencing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam)).

Summary judgment is a drastic remedy and must be "used sparely 'since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury.'" *Egelston v. State University College at Geneseo*, 535 F.2d 752, 754 (2d Cir. 1976) (quoting *Heyman v. Commerce & Industry Ins. Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975)); *see also Gibralter v. City of New York*, 612 F. Supp. 125, 133-34 (E.D.N.Y. 1985). This is particularly true in discrimination cases where, as here, "intent and state of mind are at issue...[as] careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination." *Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000) (internal citations omitted).

As plaintiffs show below, evidence that plaintiffs can and will present at trial establishes key facts and, at minimum, creates numerous issues of material fact concerning defendants' discriminatory actions. The motions should therefore be denied.

## IV. THE EVIDENCE RAISES ISSUES OF MATERIAL FACT WITH RESPECT TO THE CLAIMS THAT DEFENDANTS VIOLATED THE FAIR HOUSING ACT

In 1968, Congress enacted the Fair Housing Act (the "FHA") to "provide . . . for fair housing throughout the United States." 42 U.S.C. § 3601. The statute makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." *Id.* at § 3604(a). According to the Second Circuit, the phrase "otherwise make

unavailable" includes a wide variety of discriminatory housing practices, including discriminatory zoning restrictions. *See Le Blanc-Sternberg v. Fletcher,* 67 F.3d 412, 424 (2d Cir. 1995); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 938 (2d Cir. 1988).

It is well-established in the Second Circuit that a violation of the FHA concerning practices that erect zoning obstacles to housing for the benefit of minority populations may be established by either a disparate impact analysis or by proof of intentional discrimination. *See Huntington*, 844 F. 2d at 934-35; *see also Le Blanc-Sternberg,* 67 F.3d at 425; *Tsombanidis v. West Haven Fire Dept.,* 352 F.3d 565 (2d Cir. 2003); *Forest City Daly Hous., Inc. v. Town of North Hempstead,* 175 F.3d 144, 151 (2d Cir. 1999).

Garden City and Nassau County claim that plaintiffs have no cognizable claim under the FHA (or any other statutes or the Constitution) and that there are no genuine issues of material fact. These arguments ignore the wealth of evidence that plaintiffs have gathered during discovery and that supports plaintiffs' claim that decisions and actions of Garden City and Nassau County were made with discriminatory intent and had, and continue to have, a discriminatory impact on minority populations. As such, they violate the FHA under either a discriminatory intent or discriminatory impact standard of proof.

### A. DEFENDANTS ACTED WITH A DISCRIMINATORY INTENT IN COLLABORATING ON THE EXCLUSIONARY ZONING OF THE SITE

To establish a prima facie case of intentional discrimination, a plaintiff must prove that race was "a motivating factor in the [defendant's decision]." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977).

Defendants claim plaintiffs lack any material evidence that Garden City or Nassau County were motivated by race in their action. "It is sufficient to sustain a racial discrimination

claim if it has been found, and there is evidence to support a finding, that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive." *United States v. Yonkers Board of Ed.*, 837 F. 2d 1181 (2d Cir. 1987); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (*rev'd on other grounds*) ("[A] decision made in the context of strong, discriminatory opposition becomes tainted with discriminatory intent even if the decision makers personally have no strong views on the matter.") Plaintiffs are not charging that the governmental officials making these decisions are necessarily personally racist. Rather plaintiffs claim that the community's opposition to having minority residents and neighbors was presented to the officials involved, they capitulated to it, and discriminatory intent thus animated their decisions.

To determine whether plaintiff can establish a prima facie claim of discriminatory intent, the court must conduct a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights,* 429 U.S. at 266. Discriminatory intent may be inferred from the totality of the circumstances. *Washington v. Davis*, 426 U.S. 229, 242 (1976). In examining all the evidence, the court considers several factors including, but not limited to: (1) the fact that the law bears more heavily on one group than another; (2) historical background of the decision; (3) specific sequence of events leading up to the challenged decision; (4) departures from normal procedural sequences; and (5) departures from normal substantive criteria. *Arlington Heights*, 429 U.S. at 266-68.[11]

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[11] In establishing a prima facie claim of intentional discrimination under the Fair Housing Act courts also refer to the burden-shifting analysis established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See e.g., Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002); *Cabrera v. Jakabovitz*, 24 F.3d 372, 380-84 (2d Cir. 1994). As described by the Court in *Reg'l Econ. Cmty. Action Program,*

> "Discriminatory intent may be inferred from the totality of the circumstances, including . . . the historical background of the decision . . .; the specific sequence of events leading up to the challenged decision . . .;[and] contemporary statements by members of the decision making body . . . ." *LeBlanc*, 67 F.3d at 425 (citations and internal quotation marks omitted). Their initial burden of production under the *McDonnell Douglas* analysis is "minimal." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 125 L. Ed.

Once the plaintiffs show that the challenged decision was in part motivated by a racially discriminatory purpose, the burden shifts to the defendant to establish that the same decision would have resulted even if the impermissible purpose had not been considered. *United States v. Yonkers Board of Ed.*, 837 F.2d 1181, 1217 (2d Cir. 1987) (*Yonkers III*). Defendants' justification is scrutinized to determine if it is pretextual because "if the motive is discriminatory, it is of no moment that the complained-of conduct would be permissible if taken for nondiscriminatory reasons." *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995).

### 1. GARDEN CITY'S REZONING DECISION WAS BASED ON IMPROPER DISCRIMINATORY INTENT

The core of plaintiffs' claim against Garden City is that the Village deliberately disregarded a proposed broad zoning classification for a specific parcel of land (the Social Services Site) and created a new exclusionary zoning classification in order to exclude multi-family affordable housing (and the minority populations likely to live there) and appease the Village residents' racially discriminatory opposition to such housing. Garden City argues that its decision to reject the original recommendation by its planning consultants to use multi-family zoning controls for the Social Services Site (R-M) and to rezone the Site to a townhouse-only zoning (R-T) was "neutral" and non-discriminatory. (GC Br. at 12.) Garden City argues that there is no direct or circumstantial evidence of discriminatory intent in connection with the rezoning decision. On the contrary, there are numerous facts supporting a finding of intentional discrimination, despite Garden City's attempt to hide behind a legislative privilege as to

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2d 407, 113 S. Ct. 2742 (1993); *McGuinness v. Lincoln Hall*, 263 F.3d 49, 53 (2d Cir. 2001)." 294 F.3d at 49.

This iteration of the elements of a prima facie case of intentional discrimination is very similar to that in *Arlington Heights*, but specifically adds to the factors to be considered in the analysis contemporary statements of the decision-making body.

conversations its decision makers might have had that would reveal the real reasons for their decision to create the brand new R-T zone. In any event, it is hardly surprising that in the Twenty-First Century most claims of discrimination are established without a tape or video of public officials making offensive racial remarks, or admitting their intent. Such admissions are not required to prove discrimination.[12]

First, there is significant record evidence that the Village residents' expressed opposition to the Proposed Zoning was merely pretextual, couched in euphemisms hiding racial discrimination, something that could not have escaped the Board's attention. *See e.g.*, *Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 42 (2d Cir. 1997) (citizens used euphemisms to oppose the construction of an alcohol treatment center); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (citizens voiced opposition to affordable housing using racial innuendo); *see also United States v. Yonkers Board of Ed*, 837 F.2d 1181, 1217, 1192 (2d Cir. 1987) (*Yonkers III*); *Sunrise Development v. Town of Huntington*, 62 F. Supp. 2d 762, 768 (E.D.N.Y. 1999); *United States v. City of Birmingham, Michigan*, 538 F. Supp. 819, 825 (E.D. Mich. 1982), *aff'd*, 727 F.2d 560 (6th Cir. 1984).

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[12] Nevertheless, it is improper for Garden City to argue that plaintiffs' claims must be dismissed for lack of direct evidence of discriminatory intent, when Garden City has been responsible for restricting plaintiffs' access to any such direct evidence that may exist. The Village has withheld all significant communications between its Board members, BFJ, Building Department Superintendent Michael Filippon, and Village Administrator Robert Schoelle pursuant to a claim of legislative privilege. The very discussions during which Board members were most likely to have revealed their intentions and motivations have been rendered unavailable. Without access to communications by the Village's public officials, plaintiffs' opportunities for proving their intent directly, rather than circumstantially, are severely limited. Garden City's reliance on a purported absence of direct evidence at summary judgment is therefore disingenuous unless it intends to open the privileged documents to discovery. It is well-settled that a litigant may not use the privilege as both a "shield" and a "sword." *See In re Sims*, 534 F.3d 117, 132 (2d Cir. 2008). Garden City should not be permitted to use its privileges to pursue summary judgment when it was the one depriving plaintiffs of access to material that might disprove or undermine the Village's contentions. *John Doe Co. v. U.S.*, 350 F.3d 299, 302 (2d Cir. 2003); *see Upper Deck Co. v. Breakey Int'l*, 390 F. Supp. 2d 355, 362 (S.D.N.Y. 2005) (improper at summary judgment to consider information previously withheld as privileged). Plaintiffs have appealed Judge Wall's decision, in which the court held that communications among Board members, Filippon, Schoelle, and BFJ (after BFJ's presentation of a formal report to the Board) are privileged. Plaintiffs are awaiting a ruling by this court.

Second, a multitude of material facts arise from an analysis of the circumstantial evidence factors concerning proof of intentional discrimination set out in *Arlington Heights*, to support plaintiffs' claim that Garden City's decision was based on a discriminatory intent. The record shows that when faced with strong opposition from the Village residents – consistent with past racially-motivated opposition to affordable housing projects in the County – Garden City disregarded its own consultant's recommendations for multi-family housing and created an entirely new zoning classification with the specific goal of excluding multi-family affordable housing and therefore excluding much-needed housing for minorities. During discovery, plaintiffs also uncovered evidence that the creation of the new zoning classification was in contravention of the Village's own zoning practices and principles, which advocated remaining within the existing zoning code. Furthermore, it is undisputed that Garden City ignored the desires of Nassau County by substantially reducing the permitted number of multi-family units and making the construction of multi-family housing contingent on approval by the Board of Trustees. As Nassau County, Garden City's co-defendant admits, Garden City's rezoning decision "effectively eliminate[ed] the possibility of constructing multi-family housing on the site." (NC Br. at 3.) Garden City argues that its basis for the creation of the new zoning classification was the residents' expressed concerns regarding overcrowding of schools and traffic, but the record shows that these concerns were addressed and dismissed multiple times by Garden City's consultant, the Village Trustees and Nassau County Executive Suozzi.

### a. The Record shows that the Impact of the Rezoning Bears Most Heavily on Minorities

The record shows that the Board's decision to rezone the Social Services Site effectively eliminated the possibility of affordable housing, disproportionately impacting minority populations and perpetuating the Village as a white enclave in Nassau County. This evidence is

discussed in depth in our discussion of the disparate impact standard of proof and we do not repeat it here. See *infra,* 38-53.

### b. Historical Background of Decision Shows a Pattern and Practice of Discrimination in Garden City

The historical background of the disputed decision is important in a discriminatory intent analysis, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights,* 429 U.S. at 267. The historical background in the instant case reveals a pattern and practice of racial discrimination in Garden City. This is not the first time the Village has used its zoning practices to block the construction of affordable multi-family housing, nor was it the last. Garden City's creation of the completely new R-T zoning classification is preceded and succeeded by numerous incidents that illustrate a deep-seated opposition to affordable housing based on racial animus.

In the late 1980s, Garden City imposed a moratorium on new construction in order to gain tighter control over housing development. (SAMF ¶¶ 18-21, 47-48.) At a town meeting regarding the extension of the moratorium, residents of Garden City overwhelming supported the extension, exclaiming "once you let in the road of high density in a small town, you create another set of problems." (SAMF ¶48.) During this moratorium, which lasted from 1979 to 1989, the Village also implemented zoning changes which effectively prevented a proposal to build 51 units of affordable housing on what is known as the "Doubleday site." (SAMF ¶18.) An attorney representing the Doubleday developers warned the Village Board of Trustees that "if the Village rezoned the property of Country Life Realty 'in such a manner as to deprive it of the commercial use in which it is presently entitled, it will be unable to deliver the proposed affordable housing, thus constituting a violation of the federal Fair Housing Act.'" (SAMF ¶71.) Opportunely-timed building moratoriums aimed at prohibiting affordable housing have been

found to be evidence of discriminatory intent. *See Kennedy Park Homes Assoc. v. City of Lackawanna*, 318 F. Supp. 669, 696 (W.D.N.Y. 1970), *aff'd*, 436 F.2d 108 (2d Cir. 1970).

Several years later, the residents of Garden City successfully filed a lawsuit blocking the lease of the Village-acquired St. Paul's School site to an assisted living facility. (SAMF ¶22.) Indeed, the Property Owner's Association had recommended that the site be used for high-end residential development, and, in a 2004 survey, the residents of Garden City expressed a preference for residential condominiums or assisted living to affordable housing. (SAMF ¶¶22, 49.) More recently, in 2006, Garden City residents accused Nassau County Executive Suozzi of "catering to ACORN and black people" after he proposed building affordable housing on the Ring Road site in Garden City. (SAMF ¶38.) (Some three years later, that project remains stalled, another surrender to racial animus.) Meanwhile, that same year, Garden City increased the amount of residential space available in its H district (hotel district) to allow for more development of luxury condominiums. (SAMF ¶41.)

What the Village dismisses as "a few isolated events" (GC Br. at 12) reflect a culture of racial exclusion and housing discrimination. Garden City has no examples of support for low-income housing to offer as a counter, because they don't exist. Garden City has consistently defended against the possibility of affordable multi-family housing, opting instead to use suitable parcels of land for a few select luxury developments. Today, there is little multi-family housing and no affordable housing at all in Garden City. (SAMF ¶9.)

The racial discrimination at the root of low-income housing exclusion in Garden City is echoed in all every other aspect of the life of the Village. In Garden City, discrimination against minorities can also be felt in schools, in parks, from real estate agents, and on the streets in Garden City. For example, in 1969, the Unitarian University Church of Nassau County proposed

a subsidized daycare center in Garden City. (SAMF ¶46.) Garden City residents reacted with lawsuits and petitions claiming that the center would increase traffic, depreciate property values, and change the character of the neighborhood. (SAMF ¶44-46.) One resident stated: "it's the beginning of integration in Garden City... I certainly don't think that's good. . . if they brought all the colored children in it would decrease property values." (SAMF ¶46.)[13] While overtly discriminatory comments such as these are far less common forty years later, more subtle and equally alarming discrimination exists to this day. In 2005, the Attorney General launched an investigation into the treatment of racial minorities in Garden City parks and found that Garden City park attendants routinely question black non-residents about their residency and refuse them entry into the parks, while permitting white non-residents to enter and use the parks without questioning their residency. (SAMF ¶¶50-53.) There have also been many complaints by minority ACORN members who have felt they were victims of Garden City's discrimination in various contexts. (SAMF ¶54.) One middle-age man from Hempstead was stopped and questioned by police when walking from his car to his doctor in Garden City; several welfare recipients were followed by the police when they were walking home from Social Services through Garden City. (*Id.*) During a survey of discriminatory practices of Garden City realtors, ACORN's "testers" were more than twice as likely to be shown apartments in Garden City if they were white than if they were minorities. (*Id.*)

Defendant Garden City argues that these incidents are irrelevant to the decision to rezone of the Social Services Site. Referring to the Doubleday site and the daycare center, Garden City emphasizes that "there were no findings in either case of racial animus on the part of the Village

[13] The New York State Supreme Court overruled the Zoning Board's rejection of the permit, but the program was effectively quashed when Nassau County rejected the daycare's application for funding due to community opposition, once more bowing to the prejudices of Garden City residents. (Marcuse Report at 5.)

Board." (GC Br. at 13.) These incidents, far from irrelevant, provide evidence to show that Garden City tolerates, and that government officials help to maintains, an exclusionary culture that does not tolerate minorities. Garden City's pattern of blocking multi-family housing under most circumstances—save luxury developments—, particularly when viewed in the undisputed historical context, at the very least raises a triable issue of fact as to the motivations of the Garden City residents and the Board.

### c. The Specific Sequence of Events Reveals that Garden City Capitulated to the Discriminatory Animus of its Constituents

As the *Arlington Heights* Court explained, the sequence of events preceding the challenged decision is important in determining discriminatory intent. *Arlington Heights*, 429 U.S. at 276. Garden City claims that its rezoning decision was "no departure from the Village's normal zoning procedure" since it included the retention of a planner, the formation of a subcommittee, and the creation of public sessions to discuss the zoning change. (GC Br. at 15.) Garden City, however, fails to address the dismissal of its own consultant's recommendation to use multi-family zoning and its disregard of its own planning principles in the face of intense community opposition. Because the opposition was laden with racial animus, and because the Village has failed to proffer any legitimate justification for its creation of a new zone in contravention of its own consultant's proposal, at the very least there, exist several triable issues of fact as to whether this sequence of events proves Garden City's discriminatory intent. At most, Garden City has shown that there are disputed material facts.

**Garden City's Consultant Recommended Multi-family Housing**

When Nassau County announced its desire to sell the Social Services Site in 2002, Garden City did two things in preparation for the sale: it established the "P-Zone Committee" and it hired a zoning and transportation consultant, BFJ, to assess the best use for the site and

provide the Board of Trustees with a recommendation. (SAMF ¶111). There was no question that BFJ was qualified to assess the best use for the site: "BFJ was selected for their experience and credentials in zoning and transportation." (SAMF ¶107.)

In November 2002, BFJ issued a preliminary zoning recommendation for the Social Services Site according to which as many as 770 units could be built on the Site. (SAMF ¶116.) In May of 2003, BFJ issued a report in which it recommended the creation of a CO-5b zone, the Proposed Zoning, which would have permitted residential use under the existing R-M controls and would allow a development of up to 311 multi-family units. This recommendation was based on the "goals/assumptions" of accommodating existing conditions, respecting existing neighborhoods, maximizing the use of existing zoning, and minimizing environmental impacts. (SAMF ¶¶115, 120.) The CO-5b zone permitted the use of multi-family housing, including affordable multi-family housing, townhouses and single dwellings as-of-right. (SAMF ¶126.); (NC Br. At 12). In April 2003, July 2003, September 2003, October 2003 and November 2003, BFJ issued various reports and made various presentations to Garden City. (SAMF ¶¶117-135.) In all of them, BFJ recommended zoning the Social Services Site under the existing R-M controls, which would have permitted a development of up to 311 multi-family units, including affordable multi-family units. (*Id.*)

The BFJ recommendation for the Proposed Zoning was communicated to the P-Zone Committee, which approved the recommendation and sent it to the Board of Trustees. (SAMF ¶129.) The Chairman of the P-Zone Committee in particular strongly supported the Proposed Zoning because Garden City had a great need for multi-family housing. (SAMF ¶141.)

**Garden City residents opposed Multi-family and Low Income Housing**

In October of 2003, the Board of Trustees felt "comfortable enough" with BFJ's R-M proposal to hold public meetings on the issue. (SAMF ¶144.) At the public meetings in October 2003, January 2004 and February 2004, the residents of Garden City vehemently expressed their opposition to the possibility of a multi-family housing development, especially affordable multi-family housing development, on the Social Services Site. (SAMF ¶¶136-142.) For example, a flyer distributed in town rallied the local population to oppose affordable housing at the Social Services Site, and to attend a public meeting in an attempt to "stall the process." The flyer warned that affordable housing would bring residents to town who did not earn "Garden City incomes." (SAMF ¶162.) Additionally, Property Owners Association President, Village Trustee and P-Zone committee member Peter Negri stated in his deposition that the type of housing occupied by low-income minorities is simply not consistent with the existing character of Garden City (SAMF ¶151). Few admissions could be more revealing of the real motive for the creation of the new R-T zone. Numerous courts have found that overt public opposition to affordable housing may support a finding of discriminatory intent. *See Sunrise*, 62 F. Supp. 2d, at 775 (neighborhood association's open hostility to housing development suggested discrimination); *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 48-49 (2d Cir. 1997); *U.S. v. City of Birmingham, Michigan*, 727 F.2d 560, 564 (6th Cir. 1984) (views expressed by opponents suggested racial motivation); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982); *Tsombanidis v. West Haven Fire Dept.*, 352 F.3d 565, 580 (2d Cir. 2003) (appropriate to consider history of public hostility and community's pressure on public officials).

Unsurprisingly, the Village's residents did not explicitly attribute their opposition to the race of the likely inhabitants of affordable housing. But many courts have found that:

> "Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more

> subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persist, violators have learned not to leave the proverbial 'smoking gun' behind."

*Aman v. Cort Furniture Rental Corporation*, 85 F.3d 1074, 1082 (3d Cir. 1996); *see also Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (discrimination may manifest itself in "subtle forms").

Plaintiffs' expert Dr. Peter Marcuse explains in his report that "euphemisms for race are in wide-spread use." These euphemisms include terms and expressions such as "'affordable,' 'inconsistent with village character,' 'multi-family,' 'not upscale,' 'urban character,' 'high density,' and 'rental' . . . which are used by opponents of housing expected to be occupied by minority-group members." (SAMF ¶¶225-227.) The residents and officials of Garden City repeatedly employed these very euphemisms during the various zoning discussions. (SAMF ¶226.) Another example of the subtle forms of discrimination in this case is the way that the residents continued to claim that their opposition was based on were concerns over schools and traffic issues even after BFJ explained that multi-family zoning would be more to their advantage on these issues than single-family zoning. (SAMF ¶¶154, 157, 160.)

Even County Executive Suozzi and Deputy County Executive Duggan recognized that this opposition was tied, at least in part, to racist attitudes within the population of Nassau County. (SAMF ¶¶179-180.)

The use of euphemistic terms and unfounded justifications to bar the construction of low-income housing has been found by the courts to be evidence of racial animus. References to "the character" of a neighborhood uttered by Peter Negri, Mayor Miller, and Thomas Suozzi have long been used as a "justification" to support discriminatory policies and practices. (SAMF ¶227.) For instance, a resident opposed to an assisted living facility in Huntington, Long Island,

expressed concern that the facility would "alter the residential character of Dix Hills." *Sunrise*, 62 F. Supp. 2d, at 768. Similarly, in the *Yonkers* cases, the residents made "frequent references to the effect that subsidized housing would have on the 'character' of the neighborhood." *Yonkers III,* 837 F.2d at 1192 (holding the local government liable for giving in the racially-charged opposition of its residents). *Id.* at 1226.

The record shows that it was not until the residents' opposition manifested itself during public hearings that the Village abruptly decided to reject the Proposed Zoning recommended by BFJ and the P-Zone Committee and to create an entirely new zoning classification, the R-T zone. The R-T zone permits the constructions of townhouses and single-family dwellings as-of-right (just as the R-M zone did) but so severely restricts the use of multi-family housing that it effectively eliminated the construction of affordable housing on the Site. (*See* NC Br. at 3.)

The residents' communications to County Executive Suozzi and to local media regarding the Ring Road site also underscore the extent of the Village's general hostility towards affordable housing, and its link to discriminatory motivations. (SAMF ¶ 39) ("Please do not pursue this low income housing in GC....Everyone has a 'right' to live where they want...they don't have a 'right' to get things they do not deserve or work for. Please do not turn GC into Hempstead, Roosevelt, etc....It will only lead to property values decreasing, schools negatively impacted"); (SAMF ¶ 35) ("Stop trying to amount to destroy Garden City! . . . We would much prefer to see Family Court moved to our eleven acres, not rental properties or affordable (low income) housing."); (SAMF ¶ 36) ("I oppose the useage [*sic*?] of prime real estate in the County for low income housing."); (SAMF ¶ 37) ("Once again, I am disgusted when I pick up this week's copy of the Garden [*sic*] City News and read about how you still want to destroy our

beautiful village by forcing in affordable housing"); (SAMF ¶ 16) ("[K]eep affordable housing out of Garden City . . . My fears are increased crime, drug traffic and a transient population.").[14]

Garden City claims that plaintiffs cannot show that the Board was aware of the discriminatory motives behind the opposition of its residents and relies heavily on the Eleventh Circuit case *Hallmark Developers, Inc. v. Fulton County, GA*, 466 F.3d 1276 (11th Cir. 2006), where the court found that Plaintiff failed to establish that members of the decision-making body were aware of the motivations of the private citizens. *Hallmark*, 466 F.3d at 1284. In that case, only one Board member was privy to the community's opinions, and the plaintiff could not show that the other Board members knew of improper motivations. *Id.* at 1284. Here, the Board of Trustees held multiple public meetings during which the Board, the Mayor, and County Executive Suozzi all heard the comments from the Garden City residents. (SAMF ¶¶136-162.) The residents' opinions were well-publicized and a matter of public knowledge. Garden City cannot argue that the members of the decision-making body were unaware of the opinions of the residents not when the press, the County Executive and even Magistrate Judge Wall has recognized that "[i]t is hardly a secret that there was community opposition to a zoning change in Garden City that would allow the affordable housing project to be built." (Sanction Order at 10.)[15]

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[14] In the context of affordable housing, references to increased crime have been recognized as euphemisms for racism. *Innovative Health Systems*, 117 F.3d at 42 (residents voiced safety concerns and falling house prices to stop the construction of a drug treatment facility) *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982) (noting that the lower court found that "there was evidence of other statements by citizens . . . which in a different context might not illustrate racial bigotry, but, against the background of a housing project in Clarkton and the considerable opposition to it, were interpreted by the trial court as 'camouflaged' racial expressions"; concerns expressed were that there would be influx of "undesirables" and that new occupants would "dilute" public schools).

[15] In addition, Hallmark could not show an issue of fact regarding as to whether the Board was justified in rejecting the proposal based on its quality. *Hallmark*, 466 F.3d at 1284. Plaintiffs have gone through each and every "justification" brought forth by the defendant and shown that none of them had foundation. Defendant rejected the plan of its own consultant based on purported resident concerns that were a clear pretext to cover up a well-orchestrated plan to prevent affordable housing.

The evidence strongly suggests—and co-defendant Nassau County agrees (NC Br. at 12)—that the Board rejected their consultant's proposal as an accommodation to public opinion, which opposed affordable housing on the basis of manifestly groundless justifications and specious reasoning. Should the trier of fact find that public opposition was driven by racial animus, that the Board knew about the racial animus, and that the Board bowed to motivations of the residents, Garden City can be held liable for discriminatory intent: "Government officials, whether city or state, are not permitted to engage in deliberate conduct or deliberate omissions that have the foreseeable effect of perpetuating known segregation, where their acts or omissions are undertaken in response to and in accordance with the segregative wishes of the others that are known to be racially motivated." *United States v. City of Yonkers,* 96 F. 3d 600, 617-18 (2d Cir. 1996); *see also Yonkers III*, 837 F.2d at 1226 ("City may be properly held liable for the segregative effect a decision to cater to the race-based 'will of the people'."); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066-67 (4th Cir. 1982). As meeting minutes of the Eastern Property Owners' Association reflect, Trustee Bee's goal was to "achieve the highest level of comfort that future development at the Social Services Site would meet the desires of area residents." (SAMF ¶ 163).

**d. Departures from Normal Procedural Sequences and Normal Substantive Criteria**

The last two factors of the test analyze whether decision-making party has departed from normal procedural sequences. *Arlington Heights*, 429 U.S. at 267. As discussed above, the new R-T zoning passed by the Board of Trustees eliminated the possibility of multi-family housing on the larger 21-acre parcel, but allowed multi-family on the "narrow sliver of land . . . not very feasible for single family homes" on the west side of County Seat Drive but only if approved by the Village Board of Trustees. (SAMF ¶¶188-190). Garden City argues that the new townhouse

zoning "filled a gap" in the Garden City zoning code. This "justification" is nothing but an after-the-fact excuse and is in contradiction with Garden City's admission that the R-M zoning allowed for townhouses. (SAMF ¶121). The only reason to create a new zoning for townhouses and apply that zoning to the Social Services Site was to effectively eliminate any possibility of affordable multi-family housing on the Social Service Site. BFJ's proposed recommendation of R-M zoning allowed for the greatest flexibility as either townhouses, single-family, or multi-family apartments could be built in that area. (*Id.*)

The evidence shows that virtually every one of the Board's stated goals would have been better facilitated by multi-family housing than by single-family:

-- The Board aimed to create open space, but multi-family housing provides more open space than single-family housing. (SAMF ¶164.)

-- The Board considered the issue of overcrowding in school, but multi-family housing would have had less of an impact than single family housing. (SAMF ¶¶136-162.)

-- The Board considered the issue of depreciation in value of surrounding property, but multi-family housing would not have depreciated values. (SAMF ¶165.)

-- The Board considered the issue of traffic, but multi-family housing would greatly reduce the traffic already created by the government buildings. (SAMF ¶¶136-162.)

These issues all highlight the irrationality of the Board's decision, and create additional questions as to its motivation which must be resolved at trial.

### 2. NASSAU COUNTY'S ACTIONS WERE BASED ON IMPROPER DISCRIMINATORY INTENT

Similarly, the record is replete with myriad issues of material fact regarding defendant Nassau County's discriminatory intent that preclude summary judgment in this case. The County attempts to escape liability by placing the blame for the rezoning squarely on Garden

City, and argues that its actions were justified because it was simply pursuing the sale of the property at the most profitable price. As the record reflects, however, Nassau County initially requested multi-family housing (*not* affordable housing as defendant's brief contends (NC Br. at 10), then quickly retreated when it became clear that Garden City would capitulate to its residents' racially motivated opposition. (SAMF ¶169.) Although County officials were well aware of (i) Nassau's state of extreme segregation; (ii) that the County had a continued dire need for affordable housing; (iii) that racism had long been a barrier to building affordable housing; and (iv) that racism likely played a role in Garden City's opposition to the BFJ proposal, the County nonetheless accommodated the Village entirely — even offering to deed the property so as to perpetually limit its use to single-family or luxury homes — thus facilitating the Village's racially-motivated decision. The obvious and foreseeable result of the County's actions not only links them to Garden City's discriminatory zoning decision, but also more broadly perpetuates the extreme segregation that exists between Garden City and surrounding communities, a condition that had long been exacerbated by Nassau County's consistent practice of targeting minority areas for affordable housing construction.

The County does little to dispute the adverse disparate impact of the rezoning decision on minority households in the County. It does little to address their pattern of actions that perpetuates residential segregation. As discussed in part b below, there is a significant amount of material evidence that Nassau County is an extremely segregated county, and that the County's actions have historically perpetuated and exacerbated this segregation. With respect to whether the zoning decision disproportionately hurt minority households, the County appears to concede this point. See *infra,* p.39.

### a. Nassau County's Actions Perpetuate Segregation and Have an Adverse Impact on Minority Populations

Nassau County has a history of engaging in and furthering residential segregation. Four decades ago, Nassau County's Housing Law of 1969 recognized that residents of Nassau County have been forced to live in substandard housing as a result of discrimination and segregation. (SAMF ¶224.) And as we have discussed earlier, in 1974 this Court found that broad-based housing discrimination did exist in Nassau County, that minorities make up the majority of those living in low-income housing, and that the County had given up on several low income projects due to racially motivated community opposition. *Acevedo v. Nassau County*, *supra*, at 1390.

It is undisputed that Nassau County has a need for affordable housing. (SAMF ¶171.) County Executive Suozzi recognizes that they are several hurdles to building affordable housing in Nassau County. First, he acknowledges that zoning density limits created half a century ago render the construction of affordable housing infeasible and municipalities are doing nothing to affirmatively change the zoning. (SAMF ¶¶83-86.) Second, he agreed that "pervasive structural and institutional racism spanning centuries remains omnipresent in Long Island" and that "exclusionary zoning and lethargic government fair-housing enforcement of today" allows the situation to persist. (SAMF ¶83.) Nassau's own evaluative report states that "unlawful discrimination is one of the most blatant impediments to fair housing." (SAMF ¶84.) Deputy County Executive Patrick Duggan also testified that he believes racism to be a barrier to affordable housing "based on studies that have been done, based on the factual evidence that in some communities they have a very low population of non white people." (SAMF ¶85.) Finally, Rosemary Olsen, Director of the Nassau County Office of Housing and Intergovernmental Affairs, explained that communities "are concerned if they develop multi-family housing in their communities that they will attract people that are different from themselves." (SAMF ¶86.)

Third, County Executive Suozzi has recognized that government has failed to address the fair housing crisis. In 2005, County Executive Suozzi was quoted in the New York Times as saying "[h]ousing discrimination is very real" and that "government at all levels had been ineffective in dealing with the problem." (SAMF ¶79.) A 2002 Nassau County Economic Development Plan further acknowledges that government assistance is needed to support and encourage development of affordable housing in Nassau County. (SAMF ¶82.)

The County lays out its plan for remedying the dearth of affordable housing in its several reports including the Nassau County Consolidated Strategy and Plan 2000-2004 ("the 2000-2004 Plan") and its Nassau Urban County Consortium Five-Year (2005–2009) Consolidated & Annual Action Plan ("the 2005-2009 Plan").[16] (SAMF ¶79.) Both Plans pledge that "Nassau County will support the development of low cost home ownership housing to expand its supply of affordable housing." (*Id.*) The Plan further explains how the County will use CDBG and HOME funds to further this goal. (*Id.*)

The problem is that while Nassau County's plan may create more affordable housing, it purposefully targets minority communities thus perpetuating and reinforcing the already extreme segregation in the County. (SAMF ¶¶55-94.) In fact the County celebrates its flawed policy vowing to continue targeting minority areas through its Next Generation program, which boasts "for three decades, Nassau County has provided HOME funds to local governments and non-profits to acquire sites exclusively in low and moderate-income census tracts." (SAMF ¶89.) Its

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[16] The 2005-2009 Plan lists several barriers to affordable housing including local opposition:

> Affordable housing remains a difficult concept to sell to existing residents of neighborhoods throughout the county. Affordable housing sponsors are often confronted with strong neighborhood opposition to proposed low and moderate income developments. Such opposition is particularly strong when it involves proposed developments designed to assist the needs of the extremely low income and low income residents, the homeless or special needs groups.

(SAMF ¶¶78-79.) When asked whether this is still an area of concern for Nassau County's current administrative, Mr. Duggan replied "Absolutely. That's part of why we developed the housing plan." (*Id.*)

2005-2009 Plan targets five areas for development: Hempstead Village, Roosevelt, Freeport, Jamaica Square, and New Cassel. (SAMF ¶68.) Duggan agrees that these areas all have very high minority populations. (SAMF ¶69.)

When Nassau County decided to sell the Social Services Site in Garden City in order to raise funds for the County, it was well aware that the County was segregated, that the County needed affordable housing, that racism could be barrier to building affordable housing in non-minority neighborhoods, and that vacant land rarely becomes available in white areas. Nassau County, however, did not even investigate the possibility of an affordable housing project for the Social Services Site despite the fact that plaintiffs contacted County executives to discuss that very possibility. (SAMF ¶212.)

**b. The Sequence of Events Shows that Nassau County Knowingly Acquiesced to in Garden City's Rezoning Decision, which Was, Affected by the Racial Motivations of its Residents**

Nassau County argues that it had no control over the zoning of the Social Services Site and that it objected to Garden City's rezoning decision. However, the record shows that Nassau County did not propose its own zoning, discuss Garden City's motivation for creating a new exclusive zoning for the Social Services Site, appeal Garden City's zoning decision, challenge the decision under its FHA responsibility to affirmatively further fair housing or withdraw the RFP. Rather, it simply acquiesced in Garden City's rezoning decision even as it suspected that the decision was based on improper discriminatory intent and it was well-aware that it would perpetuate segregation in the Village and the County.

Moreover, the record is not consistent with Nassau County's contention that it was motivated by getting the highest purchase price. When Nassau County decided to sell off the property, it wanted to sell it for at least $30 million. (SAMF ¶98-99.) ("Mr. Suozzi wanted to

receive at least 30 million, and trying to find a way of making zoning that would allow him to be selling a piece of property, that property could command that type of money.") As the parties involved understood, the more units a development can contain, the more money the owner can receive from the sale. (SAMF ¶101.) For this reason, the County supported using R-M zoning for the Social Services Site (SAMF ¶¶102-103.) When BFJ's proposed a plan for 311 units with the R-M zoning, the County responded by asking it to increase the units to over 400 so it could maximize the value of the property. (SAMF ¶102.) ("the more units per acre would have made us more money. So the higher the units per acre, the better it would have been for the County. Q. Right. A. This was strictly about money. Q. So would the County have preferred more than 311 units? A. Absolutely."))

Incredibly, Nassau County now claims that "[w]hat is indisputable is that Mr. Suozzi's purpose in attending the Village hearing was to support the *original* affordable housing project proposed by the County for Village consideration" (NC Br. at 10) and that "it is undisputed that the County sought Village zoning changes needed to accommodate an affordable housing project." (NC Br. at 12.) These statements are contrary to the evidence in the record, County Executive Suozzi stated early on in the process that he was not proposing affordable housing on the Social Services Site: "We would generate more revenues to the Country by selling it to upscale housing in that location. This is what we think is in the character of Garden City and would be appropriate there [as opposed to affordable housing]." (SAMF ¶172.) County Executive Suozzi sought a plan for luxury housing at the onset of the project. ("I've been saying for the past two years; if you've been reading the papers, I'd like to see a Wyndham type development at this location because it generates the most money for the County and it creates

open space in the process. When we sell the property it generates a lot of revenues to pay for our other issues.") (*Id.*)

The County repeatedly promised Garden City and its residents that it would abide by their will. (SAMF ¶177.) ("Without being able to quote the County executive exactly, he indicated that he would not seek to do anything at the site that the Incorporated Village of Garden City would not support.") The County Executive made this commitment despite his knowledge that the local opposition to affordable housing in Garden City was based upon racial animus. (SAMF ¶179.) ("I think there are some people that are opposed to affordable housing in Garden City based upon racism.)"; *see also id.* (stating that it was possible that racism acted as a barrier to affordable housing in Garden City.)

At the public hearing in February of 2004, County Executive Suozzi stated: "I'm willing to completely abandon [R-M zoning] based upon what the people have said here tonight. It's fine, it's your community you decide what's best. I am happy to go with the people." (SAMF ¶¶170-180.) County Executive Suozzi went as far as offering to put deed restrictions on the property limiting the construction to upscale housing and promised that the property would not be affordable housing projects, (*id.*) While Nassau County had a specific policy and obligation to fight racial discrimination in housing and promised to do so, according to its own publications, by building more affordable housing the County Executive testified that the improper motive behind opposition to the project, "was not my concern as County Executive of Nassau County." (SAMF ¶180.)

When it became aware of the unique opportunity to further fair housing and alleviate segregation that the Social Services Site represented, NYAHC contacted the County to work

with it on a proposal that would include multi-family affordable housing. In a letter accompanying a proposal of the Social Services Site, NYAHC stated:

> The County is well aware that there is a dearth of opportunities to create affordable housing on Long Island. The lack of undeveloped property, high acquisition costs and restrictive zoning throughout the area, and especially in affluent communities like Garden City, are all significant barriers to affordable housing development . . . The rezoning of the Parcel by the Village of Garden City endorsed by the County in the RFP is designed to discourage the development of multi-family housing generally and especially mixed income housing.

(SAMF ¶203.) It is undisputed that the NYAHC option would have been more lucrative to the County over time as it proposed paying the town $5 million every year for 30 years for a total of $150 million, representing a present-day value of $67 million. (SAMF ¶207.) NYAHC met with County Executive Suozzi and other County officials to discuss the proposal and the possibility of constructing of affordable housing on the site. (SAMF ¶209.) NYAHC also brought its concerns to the Nassau County Planning Commission. (SAMF ¶210.) Evidence gathered during discovery shows that NYAHC urged the County to withdraw or modify the RFP to require some part of the property to be affordable housing, but that the County refused to reissue the RFP and did not even investigate whether an affordable housing project would have been financially beneficial to the County. (SAMF ¶211.)

Despite plaintiffs' demonstration to Nassau County, that the new zoning and the RFP foreclosed much needed affordable housing, the County simply dismissed plaintiffs' proposals as non-conforming to the RFP and accepted the Fairhaven proposal to develop luxury housing on the site. (SAMF ¶213.) Nassau County's action had the foreseeable consequence of perpetuating the pervasive segregation that afflicts Nassau County and Garden City, but the officials of Nassau County chose to turn a blind eye. Nassau County's decision was not about money; it was the result of acceding to the discriminatory animus of the resident of Garden City.

## B. MATERIAL ISSUES OF FACT EXIST AS TO WHETHER DEFENDANTS VIOLATED THE FAIR HOUSING ACT UNDER A DISPARATE IMPACT STANDARD OF PROOF

Under a disparate impact analysis, the plaintiff need not show that the decision complained of was made with discriminatory intent, *United States v. Yonkers Board of Education*, 837 F. 2d 1181, (2d Cir. 1987); *Robinson v. 12 Lofts Realty, Inc.*, 610 F. 2d 1032, 1039 (2d Cir. 1979), 610 F. 2d at 1036-38.[17] Rather, in order to establish a prima facie claim of disparate impact under the FHA, plaintiffs need to show that an outwardly neutral practice "actually or predictably has a discriminatory effect." *Huntington*, 844 F.2d at 934 (citing *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)). Furthermore, there are two distinct forms of discriminatory effect: (1) a disproportionate impact on a particular minority group; and (2) the perpetuation of residential segregation which harms the community in general. *Id.* at 937.

The burden then shifts to defendants to prove that "its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Id.* at 936 (citing *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977), *cert. denied*, 435 U.S. 908, 98 S. Ct. 1457, 55 L. Ed. 2d 499 (1978). The *Huntington* Court then stated that "in the end there must be a weighing of the adverse impact against the defendant's justification" and that two factors were particularly important in this weighing of evidence – any proof of discriminatory intent and "whether the

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[17] By not requiring any proof of discriminatory intent, the *Huntington* standard differs from the four-prong disparate impact test set out by the Seventh Circuit in *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F. 2d 1283, 1287-90 (7th Cir. 1977), *cert, denied*, 434 U.S. 1025, 54 L. Ed. 2d 772, 98 S. Ct. 752 (1978), which included as one of the four factors whether there is "some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of *Washington v. Davis* [, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)]." In *Huntington*, the Second Circuit set the prima facie standard for a disparate impact claim as dependent on only showing that the practice or policy has a disparate racial impact, but noted that other "factors such as those mentioned in *Arlington Heights II* are to be considered in a final determination on the merits rather than as a requirement for a prima facie case." *Huntington,* 844 F. 2d at 935.

plaintiff is suing to compel a governmental defendant to build housing or only to require a governmental defendant to eliminate some obstacle to housing that the plaintiff itself will build." *Id.*[18] *See also Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (granting partial summary judgment to plaintiffs).

Thus, proof of discriminatory intent, although not required to establish a prima facie disparate impact claim, remains nonetheless an important factor in a disparate impact analysis. As the *Huntington* Court said: "Though we have ruled that such intent is not a requirement of the plaintiff's prima facie case, there can be little doubt that if evidence of such intent is presented, that evidence would weigh heavily on the plaintiff's side of the ultimate balance." *Huntington* at 936. Moreover, when evaluating the relief sought by plaintiff in weighing the proof, a defendant normally has to establish a more substantial justification for its adverse action than would be required if the plaintiff were seeking to compel the governmental body to build housing. Both these factors weigh strongly in plaintiffs' favor.

### 1. GARDEN CITY'S REZONING DECISION HAD A DISCRIMINATORY IMPACT

#### a. There are material facts in dispute concerning whether Garden City's rezoning had a disparate effect

Garden City claims that its rezoning decision had no discriminatory impact and that the facts on this question are not in dispute. (GC Br. at 15-20.) This bald assertion is unsupported and flatly contradicted by the record and plaintiffs' unchallenged expert report. Even Nassau County does not dispute the rezoning's disparate impact; instead, the County simply attempts to

[18] In the later circumstance, which is present in this case, a defendant normally has to establish a somewhat more substantial justification for its adverse action than would be required if the defendant were defending its decision not to build. *Id.*

disassociate itself from the zoning decision by claiming that it had nothing to do with it. (*See* NC Br. at 1-2.)[19]

Garden City focuses its argument with respect to the disparate effect on whether the decision had a disparate impact on minority households. Interestingly, it implicitly concedes that its new R-T zoning has a discriminatory impact on minorities – but argues that although such an impact may exist, it is not sufficient to constitute a valid claim under the FHA. (GC Br. at 17-18.) In order to lend strength to a claim that not even defendant Nassau County is prepared to argues Garden City attempts to recast plaintiffs' claim of discrimination under the FHA as a novel theory regarding density and housing type as opposed to a claim of discrimination under the FHA. This is simply not so.

Garden City alleges that there is a difference in the number of affordable units between plaintiff NYAHC's proposal (under an R-M zoning classification) and that permitted under R-T zoning and then baldly claims that such a difference is "clearly" not evidence of a disparate impact. (GC Br. at 18.)[20] This is wrong for several reasons. First, Garden City's claim that 36 affordable housing units may be constructed under the R-T zoning is disingenuous and disputed by the evidence in the record. Garden City's claim ignores the fact that any potential multi-family housing on the Site must be approved by the Board of Trustees – the same Board that

[19] The County also does not dispute that its decision to sell the Social Services Site to a luxury developer foreclosed housing opportunities for minorities in Nassau County; instead it asserts that it took this action for a legitimate, bona fide government interest. Finally, the County does not really dispute that its policies and actions with regards to the distribution of federal housing funds has a significant adverse impact on minorities; once again, it only argues that it exercised a legitimate, bona fide government interest in these actions and policies. Like Garden City's contention, the County's position is inconsistent with material facts in the record, including facts established by Nassau County's own witnesses.

[20] Garden City states (GC Br. at 17), that "it is questionable whether the FHA is even implicated where a proposed housing development containing only 20% affordable is frustrated." That novel argument that housing discrimination is permissible if a municipality discriminates on a small scale is not supported by case law. Indeed, the Court in the *Anderson Group LLC v. City of Saratoga Springs,* 2008 U.S. Dist Lexis 39028, at 22-23 cited by Garden City ruled for the plaintiffs on this issue, concluding: "It would seem that if the loss of 60 affordable housing units has a disparate impact on protected group, it has such an impact whether those units make up 1% or 100% of the overall proposal." *Id.* at 23.

rejected zoning that would permit multi-family housing in the first place – through a special permit system. The record further shows that the construction of affordable housing under the R-T zoning is virtually impossible (SAMF ¶198), that the Village residents demanded and obtained from Nassau County Executive Suozzi the promise that no affordable housing would be constructed on the Site, (SAMF ¶174), and that Nassau County has in fact chosen a luxury developer for the site that– if the sale goes through – will not construct any affordable housing. Even Garden City's co-defendant, Nassau County, recognizes that the Village's action eliminated the possibility of the construction of multi-family affordable housing. (NC Br. at 3.)

Garden City not only ignores these material and highly probative facts, but its position is flawed as a matter of law. To find a disparate impact, courts look to the proportion of protected class members affected by the governmental action, not to the particular number of housing units at stake.[21] *See generally Huntington*, 844 F.2d 926, 937-938; *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 575 (2d Cir. 2003) ("The basis for a successful disparate impact claim involves a comparison between two groups-those affected and those unaffected by the facially neutral policy").[22] A statistical analysis by plaintiffs' expert, Nancy McArdle, shows that under the four proposals developed by the New York ACORN Housing Company (NYAHC) in 2004 for the development of the Social Service Site, the pool of renters that could afford to buy multi-family homes would range from 56 minority households or 18 percent of the households to 101 minority households or 32 percent of the households depending on which proposal was accepted by Nassau County (SAMF ¶¶217-223.) Further, if parts of these proposed developments were under the federal Section 8 program, it is estimated that approximately 88% of those households

[21] Even if the court were to find the number of actual units affected to be a relevant consideration, Garden City's arbitrary line-drawing at a number of forty-one is wholly unsupported by fact or law.

that would occupy the units would be minority because that is the racial make-up of the Section 8 waiting list (SAMF ¶218.)

In contrast, the proposed construction under R-T zoning is likely to be occupied by whites, with only 3 to 6 minority households. (SAMF ¶¶217-223.)[23] Thus there is significant evidence that the adoption of the R-T zoning creates an adverse impact by severely restricting, if not eliminating, the number of multi-family affordable units that can be built at the site and thus the number and proportion of minority residents. (NC Br. at 3.) As discussed above, minorities are more likely to be able to afford or qualify for affordable or Section 8 units than market rate units. At most, the R-T zone essentially eliminates access to housing for a population that is roughly 88% minority (those on the Section 8 waiting list) and perpetuates the extreme segregation existing in the Village. This result is more than sufficient to support a finding of disparate impact. *See Huntington*, 844 F.2d at 938 (restrictive zoning decision had substantial adverse impact when minorities composed 61% of those on Section 8 certificate waiting list).

With respect to the second prong of the disparate effect analysis – the perpetuation of residential segregation - Garden City appears to argue it is somehow mitigated in this case because R-T zoning "create[s] housing where none could otherwise have been created." (GC Br. at 18.) Once again, this argument misses the point and certainly does not entitle Garden City to summary judgment: the issue is not whether *any* housing may be built under the R-T zoning plan, but whether the R-T zoning, by preventing any realistic possibility of the construction of affordable housing, Garden City's zoning decision discriminatorily perpetuates residential

[23] The number of minorities among the pool of homeowners who could afford to purchase units potentially developed by Fairhaven Properties, the purchaser of the parcel after adoption of the restrictive R-T zoning, would be significantly lower than this 18-32% figure. Fairhaven is likely to develop market rate and more upscale housing. Of the 156 units proposed by Fairhaven, between three and six are likely to be purchased by minorities. A development by Fairhaven is unlikely to change the percentage of households headed by a minority in Garden City, which is 2.3%. (*See* SAMF ¶¶217-223.)

segregation.[24] Garden City's argument that as long as it builds more housing, it doesn't matter whether it blocked the possibility of that housing being occupied by minorities is absurd on its face.

In any event, there is ample, indeed obvious, evidence to support plaintiffs' claim that the zoning decision perpetuates residential segregation in Garden City. The Village had just 2.6% racial minority population in 2000. (SAMF ¶2.) This number stands in stark contrast to the percentage of minorities countywide, 19.7%. (*Id.*) Indeed, Garden City is an island of white surrounded by racially integrated and majority-minority towns. (McArdle Report, p. 6). The evidence plainly shows and Plaintiff's expert opines that by refusing to accept the R-M zoning proposed by its planner, and creating a new R-T zone instead, Garden City barred the creation of affordable housing in Garden City, thus perpetuating the severe segregation that has existed for decades. This is more than sufficient to create a question of fact that must defeat summary judgment on the issue of discriminatory impact.

Garden City also makes two other arguments to support their effort to dismiss the disparate impact claim. First, it argues the case should be dismissed because the plaintiffs did not participate in the rezoning process, did not own the land and did not submit a qualifying bid. If this were true, a local government could discriminatorily rezone land without fear as long as there was no group present to protest at the time and no landowner putting in a bid to build affordable housing despite its inconsistency with the zoning. This argument ignores section 3604(a), of the FHA, the provision applicable to the exclusionary zoning argument in this case.

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[24] Garden City points to *Ventura Village, Inc. v. City of Minneapolis,* 419 F.3d 725, 727 (8th Cir. 2005) in support of their argument, but this case does not support it. The Court there held that the City of Minneapolis did not discriminate when it approved construction of a supportive housing facility for homeless families because it approved every application for all eleven of such projects, including six in majority white neighborhoods. Thus, the City in this case had increased overall the housing available to a protected class of persons in a desgregative manner. Garden City has done nothing remotely similar here. Rather, its decision blocked the ability to provide housing to minorities in Garden City.

Section 3604(a) makes it unlawful, *inter alia*, to "make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin" There is no requirement in this provision that a plaintiff be part of the zoning process or be required to affirmatively propose an affordable housing development to sustain a finding that an exclusionary zoning violates the FHA.[25] Furthermore, plaintiffs did seek a solution with Nassau County, the owner of the parcel, in the form of non discriminatory zoning after the zoning had been adopted. It would make no sense to require plaintiffs to submit a qualifying bid to the RFP since all bids needed to conform to the discriminatory zoning that plaintiffs challenge.

Second, Garden City similarly argues that the barrier to affordable housing under the R-T zone is one of price, not racial discrimination. (GC Br. at 14.) Indeed, Garden City contends, plaintiffs would have been able to construct affordable housing under the R-T zoning only if the County had given away the land for a "ridiculously below-market sum." *Id.* This argument misses the central point of this case – that it was Garden City's decision to adopt a zoning classification that excludes affordable housing for discriminatory reasons before the land was put up for bid which blocked plaintiffs' ability to construct such housing. Under RM zoning, both a high selling price for the land and affordable housing were possible. RT zoning both lowered the value of the land as Nassau County indeed protested, and made the construction of affordable housing effectively impossible. Garden City's attempt to place the blame solely on defendant Nassau County is misplaced when, as Magistrate Judge Wall stated, "[i]t is hardly a secret that there was community opposition to a zoning change in Garden City that would allow the

[25] This Court has already rejected an nearly identical argument in its July 21, 2006 decision denying the defendants' initial motions to dismiss this case, citing *Arlington Heights*, 429 U.S. 252, 262-63 (the harm does not have to be economic, indeed, "an interest in making suitable low-cost housing available in areas where such housing is scarce" can "support a plaintiff's standing."), and *Fair Housing in Huntington Comm. Inc. v. Town of Huntington,* 316 F.3d 357, 363 (2d Cir. 2003) (plaintiffs must only allege facts from which it reasonably could be inferred that absent defendants' challenged conduct there is a substantial probability that housing with greater minority occupancy would have been built in the town, citing *Warth v. Seldin,* 422 U.S. 490, 504 (1975).

affordable housing project to be built." (Sanction Order at 10.) The issue is not one of cost but of the deliberate actions by Garden City to prevent affordable housing from being constructed in Garden City.

This is not a disparate impact claim based upon increased costs; rather the claim is based upon the fact that Garden City rejected zoning that would have made affordable housing a real possibility and chose to rezone in a way as to instead make it a virtual impossibility. The foreseeable result: the perpetuation of one of the most segregated communities in one of the most segregated counties in this county. And, to require a so-called "qualifying bid" would be an exercise in futility given the restrictions of the R-T Zone.

**b. There are material facts in dispute concerning whether Garden City demonstrated that it had a legitimate bona fide governmental interest or that there was no less discriminatory alternative to its rezoning decision**

Garden City argues that its rezoning decision was the result of a complex and nuanced process which should not be second-guessed. Although a town's interest in zoning requirements is "substantial," other interests "cannot . . . automatically outweigh significant disparate effects." *Huntington*, 844 F.2d at 937. Rather, as noted earlier, in analyzing a FHA claim under a disparate impact standard, the Court must ultimately balance the plaintiffs' showing of discriminatory impact against the defendant's justifications for its conduct. *Huntington*, 844 F.2d at 936. Furthermore, when conducting this fact-intensive exercise, evidence of the defendants' discriminatory intent weighs heavily in the plaintiffs' favor, as does a plea for relief in the form of elimination of defendant's obstacles to housing rather than an affirmative order to compel a governmental defendant to build housing. *Id.*

Garden City attempts to suggest justifications for its zoning decision based on purported concerns about traffic, schools, and aesthetics. (*See* GC Br. at 6.) These are completely

undercut by the record. First, BFJ studies and Frank Fish's testimony show that any residential use of the Social Services Site would dramatically decrease the amount of traffic in comparison to commercial use. (SAMF ¶¶136-162.) That residential use produces less traffic than commercial use was "taken as a fact" by Mayor Miller. (SAMF ¶156). Mr. Filippon stated during a public hearing in 2004: "the two residential uses that are being proposed as one of the alternates, each of which on their face automatically generate far less traffic than the existing use." *Id.* County Executive Suozzi called an attempt to justify the decision based on traffic "irrational," (SAMF ¶161), and neither Mr. Filippon nor Mr. Schoelle expressed any concern about potential increases in traffic. (SAMF ¶156).

Second, the evidence indicates that Village residents' opposition to multi-family housing on the basis of potential overcrowding in schools was also pretextual. Public officials—along with Frank Fish of BFJ—repeatedly presented the community with data and analysis concluding that single-family homes would place a larger burden on local schools than multi-family. (SAMF ¶¶152-153.) In the face of this empirical evidence to the contrary, residents nonetheless persisted in demanding that single-family housing be built at the Social Services Site. (SAMF ¶¶136-162.) This behavior suggests an ulterior motive, and at minimum, it demonstrates an additional issue of material fact as to the existence of discriminatory intent.

The Village cannot claim that it acted on residents' concerns and created the R-T zone in pursuit of a legitimate governmental interest. According to its own consultant, BFJ, townhouses were likely to produce roughly the same number of school children as multi-family housing. (SAMF ¶¶152-153.) The Village was well-aware that the R-T zone would provide no advantage over R-M in reducing the number of children in its schools.

Third, as for the lack of aesthetic appeal of multi-family housing, the record indicates little, if any, such concern at the time of the rezoning decision. There are only a few remarks in the public meetings about the "character" of the potential construction at the Social Services Site, which can as readily be read to address the "type of people" who would occupy the housing. BFJ, which Garden City lauds as a extremely competent planning firm, had no qualms about recommending an R-M zoning for Social Services Site and stated in its reports that "in terms of potential aesthetic impacts, the proposed [multi-family] zoning controls were specifically designed to accommodate existing conditions, respect existing neighborhood-particularly residential neighborhoods, maximize the use of existing zoning controls and minimize adverse visual impacts." (SAMF ¶120.) Garden City's purported aesthetic concerns were raised only after the commencement of litigation, and should be rejected out of hand. "*Post hoc* rationalizations" should be afforded "little deference" by the courts. *Huntington,* 844 F. 2d at 940 (citing *Securities Indus. Ass'n v. Board of Governors*, 468 U.S. 137 (1984)) (concern first raised during litigation "[could not] be a bona fide reason for the Town's action").

Facts in the record dispute that concerns about traffic, overcrowding of schools and aesthetics are "bona fide and legitimate" Not only because they are unfounded, but because they were rejected at the time by Garden City officials and planners themselves rejected them at the time as unfounded. *Huntington*, 844 F.2d at 940 (traffic concern "entirely insubstantial" when testimony did not support it).[26] The lack of a credible justification for the Village's decision

[26] Garden City's own purported expert stated that local opposition should never dictate a Board's zoning decision, especially if the opposition is unsupported.

raises a strong inference that it was based on impermissible factors. *See Innovative Health Sys.*, 117 F.3d at 49.[27]

### 2. NASSAU COUNTY'S ACTIONS VIOLATE THE FHA UNDER A DISPARATE IMPACT ANALYSIS

#### a. There are disputed issues of material fact as to Nassau County's responsibility for Garden City's exclusionary zoning decision

Nassau County does even attempt to dispute that its actions in supporting Garden City's exclusionary rezoning and in selling the land to a developer that will not construct any affordable housing had a disproportionate impact on minorities and perpetuates the residential segregation that has long existed in the County (NC Br. at 15). Instead, the County alleges that it had a legitimate bona fide government interest in taking those actions and that there were no other less discriminatory alternatives. Material evidence in the record contradicts the County's claims.

Nassau County is well-aware that Garden City is an extremely segregated community surrounded by minority majority communities. Nassau County had also recognized that one of the major obstacles to affordable housing in the County is local community opposition based on discriminatory intent. Finally the County has admitted that the R-T zoning effectively eliminated the possibility of affordable multi-family housing on the Social Services Site. The County, however, states that it had no zoning authority and therefore its choice to maximize the purchase price of the social service site pursuant to the R-T zoning is a legitimate government interest, without any less discriminatory alternative.

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[27] Plaintiffs note that although Garden City does not specifically discuss the "concerns" Garden City's residents expressed about multi-family units decreasing the property values of the surrounding area, those concerns are no less pretextual. In its brief, presumably because it recognizes that any such concerns are without a basis in fact. Indeed, the Village of Garden City never actually investigated the impact how the value of multi-family or affordable housing would affect neighboring properties. (SAMF ¶165.) In fact, Mayor Miller never even asked either the Board of Trustees or the residents about the fear: "Did you ask either the real estate agent or other residents or other board members, what [the perception that multi-family housing decreased property values was] based on . . .?" Mayor Miller answered "no seemed to be just part of the way Garden City ran itself." (*Id.*) In his deposition, Gerry Lundquist stated that the BFJ proposal would not have decreased property values (*Id.*)

Nassau County's claims are contradicted by the facts. First, Nassau County admits that it initiated the rezoning process by requesting that the Social Services Site be rezoned from P-Zone (public) to multi-family residential development. (SAMF ¶104.) County Executive Suozzi went on to offer to covenant that no affordable housing would be built, even as he suspected that the residents' opposition to the R-M zoning awas at least partly racially motivated. (Summary Judgment Letter to Judge Bianco, dated January 30, 2009 at 1)]; (SAMF ¶¶173-174, 179.) Second, Nassau County touts the fact that it "partnered" with Garden City to create the zoning for the Social Services Site. (SAMF ¶103). Third, despite Nassau County's understanding that it had the power to negotiate with the Village of Garden City over zoning (SAMF ¶170), the County admitted that it failed to engage in serious negotiations with Garden City regarding the rezoning of the Social Services Site. (SAMF ¶170.) Nassau County is the owner of the Social Services Site and had a critical role in taking the initiative on what would be located on the site. Yet when faced with opposition to affordable housing, County Executive Suozzi's quickly declared that "[w]e're absolutely not interested in building affordable housing there [Social Services Site] and there is a great need for affordable housing, but Garden City is not the location." County Executive Suozzi went on to offer to covenant that no affordable housing would be built, even as he suspected that the residents' opposition to the R-M zoning was at least partly racially motivated. (SAMF ¶179.) Nassau County never truly fought the rezoning decision as it could have.[28] It capitulated to the demands of residents that affordable housing not be put on the site. Even though the rezoning had economic disadvantages for Nassau County the

[28] When Garden City rezoned the property from R-M to R-T, thereby drastically reducing the permitted number of multi-family units, Nassau responded by letter stating: "By limiting the density as proposed, the Village is severely impacting the County's potential revenue from the sale of this property, especially at 101 County Seat Drive, and as such, limiting the County's ability to build and/or renovate its existing properties." (Plaintiffs' Exhibit 93, Bates stamped Nassau County 023345-023348). Beyond this letter, there is no other evidence that Nassau County opposed the rezoning of the property in any significant way.

land owner of the Social Services Site, it did not appeal the decision, challenge the decision either publicly, or in court under the FHA. Instead, that County actively participated in and supported the Village's rezoning that prevented affordable housing. ("We would be willing to put deed restrictions on any property we sold. The Village would have control of their zoning requirements. We would put on restrictions whatsoever, no ifs ands or buts, that it cannot be anything but upscale housing." (SAMF ¶176.)

Nassau County argues that NYAHC's bid proposal was not a realistic, less discriminatory alternative because it "was far below the minimum $30,000,000 price and the highest bid of $56,500,000." (NC Br. at 17). Of course, it is Nassau County, not the plaintiffs, who must demonstrate that there was no less discriminatory alternative. *Huntington*, 844 F.2d at 936. It has not attempted to do so. Second, it is debatable whether the proposal ultimately accepted by Nassau County was financially more advantageous to Nassau County than the $5,000,000 per year revenue stream over a period of 30 years (a total of $150,000,000) first raised by NYAHC. In fact, that proposal represented a present day value return to the County of $67 million, significantly more than the winning bid. (SAMF ¶207.) In any event, the evidence shows that Nassau County failed to investigate whether an affordable housing project was possible on the site while still obtaining a reasonable purchase price. The record shows that plaintiffs contacted Nassau County executives to propose a plan for the Social Services Site and begin a discussion of possible solutions which would include an affordable housing component while still being financially appropriate for the County. The County did not respond or investigate this possibility. It simply stone walled NYAHC. Plaintiffs' proposals would have at least satisfied the County's asking price while providing for the construction of integrated housing in Garden City. Finally, it is important to note that Nassau County cannot possibly argue that increasing revenue is a

legitimate governmental interest in this case when it concluded, as evidenced by a letter to Garden City complaining of the rezoning from R-M to R-T, that "by limiting the density as proposed, the Village is severely impacting the County's potential revenue from the sale of this property. . ." (Plaintiffs' Exhibit 93, Bates stamped Nassau County 023345-023348) Unfortunately, the County took no other action to challenge the rezoning.[29]

**b. There is disputed material evidence that Nassau County did not have a legitimate bona fide government interest or that there was no other less discriminatory alternative to their decision to target majority minority areas for affordable housing**

As previously noted, Nassau County is one of the most segregated counties in the country, ranking in the top one half of one percent of all the counties in the United States for blacks, and in the top 10% of all counties for Hispanics. (SAMF ¶57.) Between 1980 and 2000, the minority share of the population in Nassau County doubled from 10 to 20%; half of that minority population lives in nine majority-minority areas. (SAMF ¶58.) Minorities make up just 14.8% of all households in Nassau County in 2000, but 31.1% of renter households, 41.4% of very-low-income renter households, and 53.1% of non-elderly, very-low-income households. (SAMF ¶59.)

Evidence uncovered during discovery show that the County has played an active role in perpetuating this segregation. Affordable multi-family housing has been directed to majority-minority areas, leaving majority white communities to remain that way. The County's standard practice has been to direct affordable housing projects to high minority municipalities, while

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[29] Nassau County's reliance on *Strykers Bay Neighborhood Council, Inc. v. City of New York*, 695 F. Supp 1531 (S.D.NY. 1988) is misplaced. In that case, *City of New York* had fought for and won the right to build low-income housing on the disputed property. During the course of the first litigation in which the City won that right, inflation made the funds appropriated for the development of the site insufficient. The City decided to use part of the site for luxury housing so that it could still use the remainder of the site for low-to moderate-income rental units. In rejecting the contention that the City violated the Fair Housing Act, the Court ruled that as the City's urban renewal efforts had resulted in significantly more integrated housing in the area, its decision to build luxury housing on part of the project had no discriminatory impact. The Court accepted that the only way the City could build low-income housing was to permit the construction of a mixed-income building. Here, there was no attempt to use any part of the project for affordable housing.

placing high-density senior housing in white majority areas. Indeed, "2/3 of Nassau County's affordable housing units were located in municipalities with minority shares that were over twice the County average." (SAMF ¶64.) Further, 100% of affordable units designated as "new construction" were located in municipalities with a minority share of over twice the County average. (SAMF ¶65.) And, 95% of properties sold to non-profit developers were likewise in municipalities with a minority share of over twice the County average. (SAMF ¶66.)

The County's strategies for affordable housing include proposals targeted almost exclusively at majority-minority towns. Its Five Year (2005-2009) Consolidated and Annual Action Plan, the Nassau Urban County Consortium states a goal of "expand[ing] its supply of affordable housing" in the towns of Hempstead Village, Roosevelt, Freeport, Jamaica Square and New Cassel. These five municipalities have among the highest percentages of minorities County-wide.[30] (SAMF ¶68.) Under all four NYAHC housing proposals for the Social Services Site, minorities were more likely to be able to afford or to qualify for affordable or Section 8 units than for market rate units.[31] (SAMF ¶¶217-223.) The County's actions in facilitating the Village's discriminatory zoning decision thus foreseeably perpetuated segregation within the County's borders. There is simply no legitimate governmental interest in the perpetuation of residential segregation and the County's own planning documents constitute admissions this is exactly what it did.

[30] Hempstead Village is approximately 84.4% minority, Roosevelt approximately 95.8% minority, Freeport approximately 66%, Jamaica Square approximately 78%, and New Cassel approximately 88.9%. (SAMF ¶69.)

[31] McArdle Report at 18-21.

## V. PLAINTIFFS ASSERT SUFFICIENT EVIDENCE TO RAISE ISSUES OF MATERIAL FACT WITH RESPECT TO DEFENDANTS VIOLATION OF 42 U.S.C. § 1981, 42 U.S.C. § 1982, 42 U.S.C. § 1983, THE EQUAL PROTECTION CLAUSE AND OF 2000(d)

Plaintiffs have set forth sufficient evidence of an intent to discriminate with respect to both Garden City and Nassau County to create triable questions of fact as to whether they acted with a discriminatory intent, whether their purported justifications are pretextual, and whether they therefore violated §1981[32], §1982[33], §1983[34], the Equal Protection Clause[35] and 2000(d).[36]

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[32] 42 U.S.C. § 1981 states in pertinent part that "all persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ." In order to state a claim under § 1981, Plaintiff must allege: (1) that he is a member of a racial minority, (2) defendant had an intent to discriminate on the basis of race, and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Wiltshire v. Dhanraj*, 421 F. Supp. 2d 544, 555 (E.D.N.Y. 2005).

[33] 42 U.S.C. § 1982 states that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." In order to establish a violation of § 1982, the Plaintiff must establish that she was "[intentionally] deprived of a property right because of her race." *Harary v. Allstate Ins. Co.*, 983 F. Supp. 95 (E.D.N.Y. 1997) (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968)); *see also Strykers Bay Neighborhood Council, Inc v. City of New York*, 695 F. Supp. 1531, 1543 (S.D.N.Y. 1988).

[34] To set forth a claim under 42 U.S.C. § 1983, plaintiffs must allege that: (1) defendants acted under color of state law, and (2) as a result of defendants' actions, the plaintiffs suffered a denial of their federal statutory rights, or their constitutional rights or privileges. *Fair Housing in Huntington Committee v. Town of Huntington*, No. 02-CV-2787(DRH)WDW, 2005 WL 3184273, at *5 (E.D.N.Y. Nov. 29, 2005). Like under §§ 1981 and 1982, Plaintiff must assert proof of intentional discrimination to establish an Equal Protection violation under 42 U.S.C. § 1983. *Okolie v. Paikoff*, 589 F. Supp. 2d 204, 217 (E.D.N.Y. 2008).

[35] Plaintiffs' Fourth Claim alleges violations of the Equal Protection Clause of the Fourteenth Amendment in that both Garden City and Nassau County deprived individual plaintiffs equal access to housing and NYAHC of the right to making housing available. The Equal Protection Clause demands that "No state shall make or enforce any law which ... deny to any person within its jurisdiction the equal protection of the laws." As the first step in the equal protection analysis, a court must determine what level of review should be applied to the action. Strict scrutiny applies "where governmental action disadvantages a suspect class . . . and will be upheld only if the government can establish a compelling justification for the action." *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983). Where the action does not burden a fundamental right, the action will undergo rational basis review and will be sustained if the action is rationally related to a legitimate governmental purpose. *Id.* For purposes of strict scrutiny, race is considered a suspect class. *McLaughlin v. State of Fla.*, 379 U.S. 184, 192 (1964). To sustain a claim under a strict scrutiny analysis, Plaintiff must show discriminatory intent or purpose. *McKnight v. Hayden*, 65 F. Supp. 2d 113, 120 (E.D.N.Y. 1999) (citing *Washington v. Davis*, 429 U.S. 229, 242 (1976)). Plaintiffs have claimed that the government actions in this case have deprived racial minorities of equal access to housing, thus strict scrutiny applies. As such, plaintiffs have the burden of showing that defendants acted with discriminatory intent, at which point defendants must show that they had a compelling justification for the action.

[36] Title IV of the Civil Rights Act of 1964 demands that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The Congressional Record indicates that Congress enacted § 2000d to prevent the beneficiaries of federal monies from

## VI. PLAINTIFFS HAVE STANDING TO ENFORCE SECTION 3608 OF THE FHA AGAINST NASSAU COUNTY AND THERE ARE GENUINE ISSUES OF MATERIAL FACT CONCERNING WHETHER OR NOT NASSAU COUNTY VIOLATED THIS REQUIREMENT

The FHA requires that the Secretary of Housing and Urban Development ("HUD") shall "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [the FHA]." 42 U.S.C. § 3608(e) (5). Applicants for affordable housing assistance provided by various HUD programs, including the CDBG and HOME programs, are required to certify that "the grantee will affirmatively further fair housing." 42 U.S.C. § 5304(b) (2). To meet this requirement, HUD regulations require a grantee to undertake three tasks: to conduct an analysis to identify impediments to fair housing choice within the area; to take appropriate actions to overcome the effects of any impediments identified through that analysis; and to maintain records reflecting the analysis and actions in this regard." 24 C.F.R. § 91.425(a)(1)(i), *see also id.* § 570.601(a)(2). In its Fifth Cause of Action in the Amended Complaint, Plaintiffs assert that Nassau County has violated this provision of the FHA.

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using the funds to finance racially segregated programs. *Soberal-Perez v. Heckler*, 717 F.2d 36, 39 (2d Cir. 1983). The statute covers situations in which federal funding is given to a non-federal agency which then provides assistant to the ultimate beneficiary. *Soberal-Perez*, 717 F.2d at 38. The prohibition against using federal funds in a discriminatory matter applies to programs in which the federal government distributes funds to subsidize public housing programs. *Hills v. Gautreaux*, 425 U.S. 284, 301 (1976). Plaintiffs claim that defendants Garden City and Nassau County "discriminated against [them] on the basis of race, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the [defendants'] actions." *Tolbert v. Queens College*, 242 F.3d 58, 69 (2d Cir. 2000); *see also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) ("It is beyond dispute that [Title VI] prohibits only intentional discrimination."). Essentially, the same showing is required to establish a violation of 42 U.S.C. § 2000d as is required to make out a racial discrimination violation of the Fourteenth Amendment's Equal Protection Clause. *Goodwin v. Wyman,* 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971). In their complaint, plaintiffs allege that "The County Government's discriminatory practices with regard to the administration of federal programs, including the federal CDBG and HOME programs, motivated by malice and/or callous disregard for the rights of the Individual plaintiffs and New York ACORN, violate the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*" Complaint, ¶ 107. The standing of the individual plaintiffs and ACORN to bring suit under § 2000d is not under dispute. (NC Br., p.34: "As the Supreme Court explaining in *Alexander v. Sandoval*, 532 U.S. 275 (2001), there is no dispute that plaintiff individuals such as DeVita and McCray, and ACORN, an association within the meaning of 'person' as defined by 42 U.S.C. § 3602(d), may sue to enforce § 601. . . ."). Nor is there dispute that § 2000d applies to Nassau County as the recipient of federal funds including HOME and CDBG programs.

In its Motion for Summary Judgment, the County argues that that this claim should be dismissed because (1) Section 3608 does not impose an affirmative duty to further fair housing on non-federal entities; and (2) there is no private right of action to enforce Section 3608 against the County. (NC Br. at 19.) They further argue that, in any event, they have complied with this FHA requirement. All these claims are without merit and summary judgment should be denied.

### A. NASSAU COUNTY IS COVERED BY SECTION 3608 OF THE FAIR HOUSING ACT

The County first argues that Section 3608 imposes the duty to affirmatively further fair housing only on the federal government, not on local, non-federal entities like Nassau County. However, the Second Circuit plainly held in *Otero v. New York City Housing Auth.*, 484 F.2d 1122, 1133-34 (2d Cir. 1973) that Section 3608 places the duty to affirmatively further fair housing both "on the Secretary of HUD by § 3608(d)(5) *and through him on other agencies administering federally-assisted housing programs.*" (emphasis added)

Indeed, in their Motion to Dismiss filed in January of 2006, the County conceded that the "affirmatively to further" duty applied to municipalities that receive federal funds. *See* Nassau County's Memorandum in Support of Motion to Dismiss, filed January 19, 2006, p. 15.[37] Subsequently, this Court denied the County's Motion to Dismiss citing another Second Circuit case, *Evans v. Lynn,* 537 F.2d 571, 578 (2d Cir. 1975) for the proposition that "agencies administering grants have an 'affirmative duty to encourage fair housing.'" *See ACORN et. al. v. County of Nassau et. al.,* 2006 U.S. Dist. LEXIS 50217 (E.D.N.Y., July 21, 2006).

Courts have repeatedly extended Section 3608's "affirmatively to further" requirement to local recipients of federal funding for housing. Most recently, in *United States ex rel. Anti-*

[37] At that time, the County tried to argue that *Otero* is limited to instances in which plaintiffs seek to have the municipality "integrate its own public housing." But, the plain language in *Otero* – applying the "affirmatively to further" duty on municipalities that "administer[] federally-assisted housing programs" – is not so limited and clearly applies to any municipality that is a recipient of federal housing funds. *See Otero,* 484 F.2d at 1133-4.

*Discrimination Center of Metro New York, Inc. v. Westchester Cty.*, 495 F. Supp 2d 375, 386 (S.D.N.Y. 2007) the Court emphasized that the obligation of recipients of CDBG and other federal housing assistance funds recipients, which are set out in 42. U.S.C. § 5306, includes the obligation of a grantee to "affirmatively further fair housing." ...." 42 U.S.C. §5304(b) (2). Like Westchester County, Nassau County receives CDBG, as well as HOME, funds and has the same obligation.[38]

The County's apparent retraction of its earlier concession that Section 3608 applies to local recipients of federal housing assistance appears based solely on *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974). However, that decision does not support the County's argument. The primary claim in *Acevedo* was that the defendants had discriminated against the plaintiff class in violation of the Fourteenth Amendment of the U.S. Constitution by providing low-income housing for senior citizens without providing low-income family housing. *Id.* at 1081. The *Acevedo* Court rejected this claim and then briefly considered a "rather vague claim" made by the plaintiffs based on the Fair Housing Act that did not state what sections of the FHA on which it was relying. *Id.* at 1082. In this context, the Court briefly discussed §3608, surmising that under this provision:

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[38] *See, also, e.g., Comer v. Cisneros,* 37 F.3d 775, 792, 795 (2d Cir. 1994)(applying the affirmatively to further fair housing obligation to a CDBG grantee, holding that local officials "must administer ... and handle CDBG funds in conformance with ... the applicable civil rights laws" and holding that a segregation-enforcing "local preference is null and void to the extent that [it] is inconsistent with [civil rights laws]."); *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 432 (E.D.N.Y. 1995) ("A unit of local government is eligible to receive CDBG funds only if it certifies to HUD that it ... meets certain statutory requirements" concerning AFFH); *Langlois v. Abington Housing Authority*, 234 F. Supp. 2d 33, 71-75 (D. Mass. 2002) (Massachusetts public housing authorities had duty "affirmatively to further" FHA when selecting award of Section 8 vouchers as a recipient of HUD funding for Section 8 program); *Reese v. Miami-Dade County,* 210 F. Supp. 2d 1324, 1329 (S.D. Fla. 2002) (finding that "the duty to 'affirmatively' further fair housing imposes a binding obligation upon the states"); *U.S. v. Charlottesville Redevelopment & Housing Authority*, 718 F. Supp. 461, 464-465 (W.D. Va. 1989) (Charlottesville public housing authority had duty "affirmatively to further" FHA when selecting tenants for its public housing); *see also* Robert G. Schwemm, *Housing Discrimination*, § 21.1 (2005) ("In addition to applying to all federal programs and activities, § 3608's affirmative duties have been held by some courts to apply also to local public housing authorities and other entities that receive federal housing funds.")

> HUD might be justified in denying appellees funding for other projects if they refuse to approve low income housing. Indeed, that is precisely what happened here. But HUD's discretionary powers under the Act extend beyond the duties imposed by the Act on local housing plans. HUD's action does not mean that appellees have violated section 804 of the Act. *Id.*

Nothing in this language can be interpreted to mean that local recipients of federal housing assistance do not have a duty to affirmatively further fair housing. The *Acevedo* Court was addressing whether HUD's denial of federal funding because of Nassau's failure to approve low-income housing was pertinent to a possible violation of Section 804 of the Fair Housing Act, 42 U.S.C. § 3604, not § 3608. In short, the Court was saying that HUD's "discretionary powers" to deny federal housing assistance is something beyond the responsibility of grantees. However, there is nothing in this *dictum* that discusses a recipient's duty to affirmatively further fair housing clearly set forth in HUD's CDBG regulations. In any event, the direct holding in *Otero* and numerous other cases makes clear that grantees, like Nassau County, do have the duty to affirmatively further fair housing.

### B. THE PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 3608

The County next argues that there is no implied private right of action that permits Plaintiffs to enforce Section 3608. The County rests this argument primarily upon two cases from the First Circuit – *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149, 154 (1st Cir. 1987) and *Latinos Unidos de Chelsea v. Secretary of Housing and Urban Development*, 799 F.2d 774, 792-93 (1st Cir. 1986) – which hold that there is no implied private right of action to bring a Section 3608 claim against federal agencies that enforce this provision except pursuant to the Administrative Procedures Act ("APA").[39] Other courts of appeals have

[39] Plaintiffs also rely on two district court cases with similar holdings, *Marinoff v. United States Dep't of Hous. & Urban Dev.*, 892 F. Supp. 493 (S.D.N.Y. 1994) and *Pleune v. Pierce,* 697 F. Supp. 113, 119-20 (E.D.N.Y. 1988).

also held that Congress did not create any such direct private right of action against HUD under Section 3608. Instead, the remedy against HUD for failure to comply with Section 3608 is available only pursuant to a claim brought under the APA. *See, e.g., Montgomery Improvement Ass'n v. United States Dep't of Housing and Urban Development*, 645 F.2d 291, 297-98 (5th Cir. 1981) *Anderson v. City of Alpharetta*, 737 F.2d 1530, 1534 (11th Cir 1984) (FHA); *Alschuler v. HUD*, 686 F.2d 472, 476, 477-78 (7th Cir. 1982).

However, in this case, the defendant is a local recipient of federal funding – Nassau County – not HUD. The Second Circuit has not yet specifically examined whether there is an implied private of action to enforce Section 3608 against either HUD or a non-federal recipient of federal housing assistance like Nassau County. However, in *Otero*, the Second Circuit did hold that § 3608 is equally enforceable against local housing authorities and HUD. Moreover, subsequently in *Evans v. Lynn, supra,* 537 F.2d at 578, a case which included a Section 3608 claim against the local housing agency recipient, as well as HUD, the Second Circuit held that plaintiffs had been "injured in fact by administrative inaction," and that this was "sufficient to give plaintiffs standing to challenge administrative violations of statutory duties."

Moreover, one of the jurisdictional bases of this case is 42 U.S.C. 1983. (*See* Amended Complaint, Fourth Cause of Action, p.28). Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." As the Supreme Court noted in *Blessing v. Freestone,* 520 U.S. 329, 340 (1997), "this provision safeguards certain rights conferred by federal statutes." More specifically, the Court in *Blessing* holds that

> [i]n order to seek redress through § 1983, . . . a plaintiff must assert the violation of a federal *right*, not merely a violation of federal law." *Id.* (citation omitted). [Courts look] at three factors to determine[e] whether a particular statutory provision gives rise to a federal right. First, Congress must have

> intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms. *Id.* at 340-41 (citations omitted) (emphasis in original).

At least three district courts have held that the provisions § 3608(e)(5) pass the *Blessing* test and provide for an implied private right of action. *Wallace v. Chicago Hous. Auth.*, 298 F. Supp. 2d 710, 719 (N.D. Ill. 2003); *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 71-72 (D. Mass. 2002); *Reese v. Miami-Dade County*, 210 F. Supp. 2d 1324, 1329 (S.D. Fl, 2002). As the Court held in *Wallace, supra,* 298 F. Supp 2d at 719:

> . . . we believe that the provisions § 3608(e) (5) of the Fair Housing Act easily pass the *Blessing* test. See *Langlois*, 234 F. Supp. 2d at 71-72. At issue in this case is the first prong of the Blessing test, because there is little dispute that the language of the act is mandatory; nor can the parties seriously contend that a claim under the Fair Housing Act strains judicial competence. See note 3, supra. With respect to this first prong, we agree with the *Langlois* court that "it could not be clearer from the statute, the legislative history, and the case law construing it, that [§ 3608(e)(5)] was intended to benefit the plaintiffs here: people in desperate need of access to fair housing, minorities and the poor." Id. at 72. As noted above, Congress drafted the Fair Housing Act with an explicit focus on those who have traditionally been victims of discrimination in housing. See *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211, 34 L. Ed. 2d 415, 93 S. Ct. 364 (1972) (citing Senator Mondale, a chief sponsor of the FHA, as stating that one of the Act's purposes was to create "truly integrated and balanced living patterns."). Thus, for the foregoing reasons, we hold that Plaintiffs may sue under § 1983 to combat a violation of § 3608(e)(5) of the Fair Housing Act.[40]

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[40] In support of their motion, the County cites *Thomas v. Butzen*, 2005 U.S. Dist. LEXIS 21525 (N.D. Il 2005), a case in which another court in the Northern District of Illinois disagreed with the holdings in *Wallace* and *Langlois* in large part because of the Supreme Court's decision in *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002). The court in *Wallace*, however, sets forth a convincing argument for concluding that *Gonzaga* – which is a case examining whether there is private right of action to enforce a statute based on the Constitution's spending clause – does not apply to a case like this which involves a civil rights statute concerned with remedying past housing discrimination. As the *Wallace* court states: "This is significant, according to the Supreme Court, because there is 'far less reason to infer a private remedy in favor of individual persons if Congress . . . had written [the statute] simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.' (citing the *Gonzaga Court's* quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690-93 (1979)." *Wallace*, supra, 298 F. Supp. 2d at 718.

In sum, Plaintiffs have established standing to bring an action to enforce Section 3608(e). Existing Second Circuit precedent has held plaintiffs have standing to sue local recipients of federal funds for a violation of 3608(e) and several district courts have held that 42 U.S.C. § 1983 provides a sound basis for finding an implied private right of action to enforce Section 3608.

### C. THERE ARE MATERIAL ISSUES OF FACT AS TO WHETHER THE COUNTY HAS VIOLATED SECTION 3608

The County also briefly argues that even if it is assumed, *arguendo,* that it has a duty to affirmatively further fair housing and plaintiffs have standing to bring a 3608 action, "the County has fulfilled this obligation." (Nassau County's Mem. Supp. Summ. J. 27). In support of argument they point only to two facts set forth in the affidavit of the County official responsible for CDBG and HOME: (1) that they have produced the required analysis of impediments; and (2) that they have tracked CDBG and HOME expenditures. *Id.* at 28.

But, it is clear that these actions, fall far short of their duty. Section 3608's obligation to affirmatively further fair housing "requires something more of [a grantee] than simply to refrain from discriminating itself or purposely aiding the discrimination of others, [rather, it] reflects the desire to have [HUD] grant programs ... assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases," *NAACP v. Sec'y of Housing and Urban Development,* 817 F.2d 149, 154 (1st Cir. 1987). As stated by the Second Circuit in *Otero v. New York City Hous. Auth.,* 484 F.2d 1122, 1133-34 (2d Cir. 1973) when discussing Section 3608:

> . . . the affirmative duty placed on the Secretary of HUD by § 3608(d)(5) and through him on other agencies administering federally-assisted housing programs also requires that consideration be given to the impact of proposed public housing programs on the racial concentration in the area in which the proposed housing is to be built. Action must be taken to fulfill, as much as

> possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat. See, in accord, *Shannon v. HUD*, 436 F.2d 809 at 820-821 (3d Cir. 1970), noted in 85 Harv.L.Rev. 870 (1972); *Banks v. Perk*, 341 F. Supp. 1175, 1182 (N.D.Ohio 1972); *Blackshear Residents Organization v. Housing Authority of City of Austin*, 347 F. Supp. 1138 (W.D.Tex. 1971). Senator Mondale, who drafted § 810(a) of the Act, 42 U.S.C. § 3610, pointed out that the proposed law was designed to replace the ghettos "by truly integrated and balanced living patterns." 114 Cong.Rec. 3422.[41]

In a recent decision by the Southern District of New York, the Court held that "a local government entity that certifies to the federal government that it will affirmatively further fair housing as a condition to its receipt of federal funds must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction." *United States ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester Cty.*, 495 F. Supp. 2d 375, 376 (S.D.N.Y 2007). The court then spelled out this duty in more detail:

> At a minimum, when a grantee certifies that the grant will be "conducted and administered" in conformity with the Civil Rights Act of 1964 and the Fair Housing Act, and certifies that it "will affirmatively further fair housing," the grantee must consider the existence and impact of race discrimination on housing opportunities and choice in its jurisdiction. In identifying impediments to fair housing choice, it must analyze impediments erected by race discrimination or segregation, and if such impediments exist, it must take appropriate action to overcome the effects of those impediments. *Id.* at 387.

The record in this case demonstrates that Nassau County has fallen far short of meeting its duty under this provision of the FHA. Instead, its policy of funding affordable housing developments in minority areas works against the duty established by section 3608. The County's acquiescence in the Village's joint decision to exclude affordable housing on the social services site exacerbates this failure. Furthermore, nowhere does the County demonstrate it has taken any action "to fulfill, as much as possible, the goal of open, integrated residential housing

[41] *See also Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (holding that local residency preference with disparate racial impact was impermissible); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005) (holding that HUD violated its duty to affirmatively further fair housing by funding housing in racially impacted areas).

patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the act was designed to combat." *Otero,* 484 F.2d at 1134 (citations omitted). Nor has it has demonstrated that it has analyzed "the impact of race on housing opportunities and choice in its jurisdiction," nor the impact of their practice of targeting affordable housing in minority neighborhoods. *United States ex rel. Anti-Discrimination Center of Metro New York, Inc.*, 495 F. Supp. 2d at 376. Indeed, it appears to believe erroneously that they are prohibited from considering race in administering the program. Finally, it has not demonstrated that "[i]n identifying impediments to fair housing choice" that it ever "consider[ed] impediments erected by race discrimination, and if such impediments exist, [that] it [is] tak[ing] appropriate action to overcome the effects of those impediments." *Id.* at 387.[42]

## VII. JURY TRIAL

Plaintiffs concede that the matter at issue is to be tried to the court.

[42] Earlier in its Memorandum, the County seemingly attempts to relieve itself of the Section 3608 duty to affirmatively further fair housing by arguing that in order to receive CDBG or HOME funds from the County, localities like Garden City must join the Nassau County Urban Consortium, and that since Garden City has never joined the Consortium, the County had no duty to affirmatively further fair housing in Garden City. (Nassau County's Mem. Supp. Summ. J. 21.) However, the responsibility to affirmatively further fair housing is a County-wide duty and is not limited to individual localities. Moreover, Garden City's refusal to join the Consortium and disqualify itself from acceptance of CDBG and HOME funds does not relieve the County of its duty to affirmatively further fair housing in Garden City in other ways, such as opposing Garden City's zoning decision with respect to the County-owned Social Service site in 2004, a decision which was a clear impediment to promoting residential desegregation in Garden City and in the County.

## CONCLUSION

For the foregoing reasons, Garden City and Nassau County's motion for summary judgment should be denied.

Dated: New York, New York
June 15, 2009

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