UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF DEFENDANT GARDEN CITY'S EXPERT WITNESS PATRICK CLEARY

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Pursuant to Rules 702 and 403 of the Federal Rules of Evidence, plaintiffs New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc., Vic DeVita, and Francine McCray (collectively, "plaintiffs") move this Court to exclude the testimony and the report of Patrick Cleary ("Cleary"),[1] an expert witness for defendants Incorporated Village of Garden City and the Garden City Board of Trustees (together, "Garden City" or "the Village").

PRELIMINARY STATEMENT

Patrick Cleary's expert opinion is irrelevant, unreliable and misleading: it does not satisfy the *Daubert* requirements and must be excluded. At the heart of Cleary's report is his opinion that Garden City's decision to rezone the Social Services Site to a newly-created townhouse residential zoning (R-T), in lieu of the proposed multi-family residential zoning (R-M), "was done appropriately, with full participation of the community, and in accordance with well established and commonly accepted community planning principles." Cleary anchors his opinion on two main points. First, as he explains in his report and his deposition, the R-T zone "bridges a gap" in Garden City's zoning continuum by permitting townhouses as a land use, something that was not previously permitted under the R-M zoning (or in the Garden City zoning code). Second, the rezoning process, and the R-T zoning itself, is "appropriate" for the Social Services Site according to well-established and commonly accepted community planning principles.

On the first point, Cleary is simply wrong. Not only did the Village's pre-existing zoning code allow for townhouses as a land use prior to the creation of the R-T zone, but the proposed R-M zoning recommended by Garden City's own planning consultant allowed for townhouses as

[1] The expert report at issue in this motion is Patrick Cleary's Expert Report, dated November 7, 2008, hereinafter cited as "Cleary Report at __," attached to the Declaration of Sabrina H. Cochet ("Cochet Decl.") as Exhibit 2.1.

well. Thus, Cleary's alleged main justification for the creation of the R-T zoning and his alleged main distinction between R-T and R-M zoning simply do not exist. On the second point, Cleary's dependence on general planning principles renders his report unreliable because he is unable either to clearly articulate these amorphous, "commonly accepted" principles or point to any authority to support them, other than his own assurance that they are "well established." That Cleary says it is so, certainly does not make it so.

Further, Cleary's expert opinion is inadmissible because it does not sufficiently "fit" the facts of the case, and thus would not assist the trier of fact. Finally, any probative value that Cleary's opinion might have would be outweighed by the danger of unfair prejudice, confusion, or misleading the fact finder.

For these reasons, plaintiffs respectfully request that Cleary's report and opinion be excluded.

BACKGROUND

To avoid unnecessary repetition, plaintiffs incorporate by reference the factual background set forth in their Consolidated Opposition to defendants' Motion for Summary Judgment, dated June 15, 2009, submitted herewith. (*See* Pls' Cons. Opp. at Section II.) As discussed more fully in the Consolidated Opposition, the focal point of this action is a 25-acre parcel of land within the Village of Garden City, known as the Social Services Site. (Sheldon Cohen Deposition transcript, dated April 22, 2008, at 131:20-132:5).[2]

In 2002, Nassau County decided to sell a 25-acre parcel of land it owned in Garden City. (Cohen Dep. tr. 15:10-16:19). At the time the parcel was zoned for public use ("P") and Nassau County requested that the Site be rezoned to permit multi-family housing. (Ex. 11 to the Frank

[2] Hereinafter cited as "Cohen Dep. tr. __," relevant excerpts of which are attached to the Cochet Decl. as Exhibit 2.3.

Fish Deposition, dated December 17, 2007[3]; Thomas Suozzi Deposition transcript, dated April 24, 2008, at 69:14-70[4]). Garden City hired a consultant, Buckhurst, Fish and Jacquemart ("BFJ"), to analyze the potential rezoning of the Social Services Site and provide the Board of Trustees with a recommendation. (Frank Fish Deposition transcript, dated November 9, 2006, at 28:15-30:20[5]; Peter Bee Deposition transcript, dated April 30, 2008, at 17:23-18:6; 24:3 – 24:24[6].) Throughout 2003 BFJ created a number of reports, all of which recommended the adoption of a zoning classification that would permit affordable multi-family housing ("Proposed Zoning"). (Exhibit 6 to the Frank Fish Deposition, dated November 9, 2006,[7] VGC 83-a to 103, at VGC-97; Exhibit 10 to the Frank Fish Deposition, dated November 9, 2006,[8] BFJ000202 to 222, at BFJ000214; Exhibit 15 to the Frank Fish Deposition, dated November 9, 2006,[9] BFJ000178 to 201, at BFJ000191.) The Village Board of Trustees also approved and recommended this Proposed Zoning. (Exhibit 191 to the Peter Negri Deposition, dated June 10, 2008[10], EPOA0026 to 30, at EPOA0028.)

In 2004 a number of public meetings took place where the Board of Trustees and BFJ presented their Proposed Zoning for the Social Services Site. (Ex. 115 to the Barbara Miller Deposition, dated April 18, 2008,[11] ACORN002349-60; Ex. 116 to Miller Dep., ACORN002386-2433[12]). At these meetings, the residents of Garden City opposed the recommendation for multi-family zoning. (*Id.*) In response to this local opposition, Garden City created a brand new zoning category called R-T, for "Residential Townhouse," and rezoned the

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[3] Attached to the Cochet Decl. as Exhibit 2.11.
[4] Hereinafter cited as "Suozzi Dep. tr. __," relevant excerpts of which are attached hereto as Exhibit 2.8.
[5] Hereinafter cited as "Fish Dep. tr. __," relevant excerpts of which are attached hereto as Exhibit 2.4.
[6] Hereinafter cited as "Bee Dep. tr. __," relevant excerpts of which are attached hereto as Exhibit 2.5.
[7] Attached to the Cochet Decl. as Exhibit 2.9.
[8] Attached to the Cochet Decl. as Exhibit 2.10.
[9] Attached to the Cochet Decl. as Exhibit 2.12.
[10] Attached to the Cochet Decl. as Exhibit 2.17.
[11] Hereinafter cited as "Miller Dep.," attached hereto as Exhibit 2.15.
[12] Attached to the Cochet Decl. as Exhibit 2.16.

Social Services Site to R-T. (Exhibit 20 to the Frank Fish Deposition, dated November 9, 2006,[13] NYAHC000671-678) The Proposed Zoning (R-M) shares many characteristics with the R-T zoning; indeed, the only significant distinction between the two is that the R-T zoning *excludes* the possibility of multi-family housing. (See Cleary Report at 10-12; *see* Patrick Cleary Deposition transcript, dated January 9, 2009, at 174:16-175:13[14]).

Garden City retained Cleary in this action to "review the actions of [Garden City] associated with rezoning . . . the 'Social Services Site,' and to determine if those actions reflected appropriate community planning practices and principles." (Cleary Report at 1.) In his expert report, dated November 7, 2008, Cleary submits three conclusions:

(1) "The R-T District appropriately fits within the Village's well established zoning and land use framework and is cognizant of the historical significance of that framework." (*Id.* At 2.)

(2) "The use of the R-T District is appropriate for the Social Services Site." (*Id.*)

(3) "Rezoning the Social Services Site to R-T was done appropriately, with the full participation of the community, and in accordance with well established and commonly accepted community planning principles." (*Id.*)[15]

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[13] Attached to the Cochet Decl. as Exhibit 2.14.
[14] Hereinafter cited as "Cleary Dep. tr. __," relevant excerpts of which are attached hereto as Exhibit 2.2.
[15] Cleary reiterates his conclusions at the end of the report:

> The R-T District fits appropriately as a rung on the Village's zoning ladder. The District allows for a range of permitted uses, including single family residences, townhouses, multi-family residences and assisted living residences, of densities that appropriately integrate into the Village zoning scheme. The use of the R-T District on the Social Services Site effectively addresses the unique characteristics of the parcel. Rezoning the Social Services Site to R-T was done appropriately, and in accordance with well-established and commonly accepted community planning principles.

(Cleary Report at 15.)

Cleary's conclusions do not respond to anything submitted by any of plaintiffs' experts; they are nothing more than an after-the-fact attempt to bolster Garden City's position in the lawsuit. That attempt fails for the reasons explained below.

ARGUMENT

I. Standards for the Admissibility of Expert Opinion

The admissibility of expert testimony under Rule 702 is a preliminary question of law for the district court to determine pursuant to Federal Rule of Evidence 104(a), *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993), and district courts have broad discretion when determining whether or not to admit expert testimony, *United States v. Feliciano*, 223 F.3d 102, 120 (2d Cir. 2000). "[I]t is the proponent's burden under *Daubert* to establish admissibility, rather than the opponent's burden to establish inadmissibility." *Graham v. Playtex Prods., Inc.*, 993 F. Supp. 129, 130 (N.D.N.Y. 1998).

Rules 702 and 703 of the Federal Rules of Evidence govern the admissibility of expert testimony at trial. District courts are required to perform a "gatekeeper" function, "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 580. The Supreme Court has made clear that Rule 702 applies not only to scientific testimony, but also to expert testimony based on technical or other specialized knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). District courts must make certain "'that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *Nimely v. City of New York*, 414 F.3d 381, 396 (2d Cir. 2005) (quoting *Kumho Tire,* 526 U.S. at 152).

In determining admissibility under *Daubert*, a court must determine (1) whether the theory or methodology underlying the testimony is reliable, and (2) whether the expert's theory

or methodology is relevant in that it "fits" the facts of the case. *See Daubert*, 509 U.S. at 590-91; *Kumho Tire*, 526 U.S. at 149-50; *Campbell v. Metro. Prop. & Cas. Ins. Co.*, 239 F.3d 179, 184-85 (2d Cir. 2001). A court should examine whether an "experience-based methodology has produced erroneous results, or whether such a method is generally accepted in the relevant . . . community. Likewise, it will at times be useful to ask even of a witness whose expertise is based purely on experience . . . whether his preparation is of a kind that others in the field would recognize as acceptable." *Kumho Tire*, 526 U.S. at 151. "[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 255 (2d Cir. 2005) (quoting *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002)) (internal quotations omitted).

Even if a court finds expert testimony to be reliable and relevant under Rule 702, it should nevertheless exclude the testimony "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. This consideration is fundamental to the gatekeeping role of the courts in the context of expert testimony as "[e]xpert evidence can be both powerful and quite misleading." *Daubert*, 509 U.S. at 595. "Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than lay witnesses." *Id.* (Internal quotations omitted).

II. Cleary's Opinion Should Be Excluded

A. Cleary's Opinion Is Not Reliable.

1. Cleary's opinion is fundamentally flawed

Cleary's report is plagued with inaccuracies and at least one fundamental mistake, which render both his methodology and the entirety of his opinion thoroughly unreliable.

First, and most significantly, Cleary, Garden City's putative zoning expert, is simply wrong on a basic issue at the heart of the case: the permitted land use under the R-M and R-T zones. Cleary's opinions regarding the propriety of the creation of the R-T zone, its "fit" within Garden City's zoning scheme, and its application to the Social Services Site (and the implication that the R-T zone was more appropriate for the Social Services Site than the R-M zone) rest principally (and unsoundly) on his expressed belief that R-T zoning would allow for townhouses, a use which he asserts was not previously permitted. To this end, Cleary repeatedly asserts that townhouses are not permitted under R-M zoning, and were introduced as a new land use only by the creation of R-T zoning. (*See* Cleary Report at 9 ("The R-T District . . . also introduc[ed] townhouses as a permitted use."); *id.* at 11 ("Both [the R-M and R-T] districts permit a fairly broad array of permitted uses, however the R-T District includes townhouses as a permitted use."); (Cleary Dep. tr. 163:10-13 ("Townhouses were not a permitted use [before the R-T zone was created]."); 217:19-24 ("I believe townhouses are a beneficial inclusion to the array of housing types that are allowed in the village so . . . having said that I think R-T was a very good zone for the [Social Services Site]"; 149:6-8; 165:25-167:9; 167:13-168:6; 198:10-22; 199:17-24; 200:19-201:5; 207:2-4; 217:18-19; 223:24-224:4.))

Contrary to its own expert's analysis, Garden City has admitted that "[t]he Code of the Village of Garden City permitted townhouse use in its existing 'R-M,' or 'Residential Multi-Family' zone . . . ." (Defendants' Incorporated Village of Garden City and Garden City Board of

Trustees Memorandum of Law in Support of Motion for Summary Judgment, to Exclude Plaintiffs' Expert and to Strike Plaintiffs' Jury Demand, dated March 31, 2009[16] at 6; *see also* Affidavit of Michael D. Filippon, dated March 31, 2009, ¶ 2 ("Prior to the enactment of the R-T zoning, the Code permitted townhouse use in its R-M or multi-family zones . . . ."); Affidavit of Peter Bee, dated March 30, 2009, ¶ 20.)[17]

Here the house of cards comes tumbling down, because Cleary's opinion turns on the erroneous "fact" that the R-T zone allegedly permits townhouses as a *new* land use (while R-M did not), which in turn props up Cleary's conclusion that the newly-created zone was "appropriate" since it filled a gap in the Villages' zoning continuum. (Cleary Report at 8.) As he testified:

> [R-T zoning] provides for this additional column in the village's hierarchy of zoning controls. There was a jump in the past from single family R-6 to multi-family. What we now have is an intermediate step that smooths [sic] that transition from single family to multi-family with a brand new zone that allows for in addition to both of those uses that exist on either end of it a new use which fits appropriately in the center of the two the townhouse use that we've been talking about today. That's when I say the creation of that fits in the hierarchy allows for development that's consistent with the character I talked to you about transitionalness [sic].
>
> (Cleary Dep. tr. 226:14-227:6.)

Cleary maintains that the "primary distinction" between R-T zoning and R-M zoning is that "the R-T District provides for a new housing type not previously permitted in [Garden City] – townhouses." (Cleary Report at 12; *see also* Cleary Dep. tr. 223:24-224:4.) And, according to Cleary, it is this delusive distinction that made the R-T a "better" choice than the R-M zone for the Social Services Site:

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[16] Hereinafter cited as "GC Br. at __."

[17] Although Garden City is well aware of Cleary's mistake, it has failed to supplement Cleary's report with a corrective statement as is required under Federal Rules of Civil Procedure. Fed. R. of Civ. P. 26(e)(2).

> The R-T zone does a number of things, one of which is it expands the housing opportunities in the community. That in my judgment is a good thing. R-M didn't provide for townhouses for example. I believe townhouses are a beneficial inclusion to the array of housing types that are allowed in the village so I know that now so having said that I think R-T was a very good zone for the property.
>
> (Cleary Dep. tr. 217:14-24.)
>
> ... would R-M have been better [for the Social Services Site], probably not because it didn't provide for townhouses.
>
> (Cleary Dep. tr. 218:23-25.)

Cleary is simply wrong and by his own admission, his faulty conviction "taints" his opinion about the creation of the R-T zone for use on the Social Services Site. (Cleary Dep. tr. 217:13-17 ("My response to that is tainted because I know of the R-T zone. The R-T zone does a number of things, one of which is it expands the housing opportunities in the community."))

Cleary's error on this critical issue pervades his analysis and his conclusions, rendering them "not sufficiently reliable to be admissible." *Macaluso v. Herman Miller, Inc.*, No. 01 Civ. 11496 (JGK), 2005 WL 563169, at *8 (S.D.N.Y. March 10, 2005) (expert's opinion fails reliability test where "it is based on incorrect factual assumptions that render all of his subsequent conclusions purely speculative"); *see also Ruggiero v. Warner-Lambert Co.*, 424 F.3d 249, 255 (2d Cir. 2005) (expert opinion not admissible where there is "too great an analytical gap between the data and the opinion proffered") (internal quotations omitted) (citation omitted); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (trial judge should exclude expert evidence where "the flaw is large enough that the expert lacks good grounds for his or her conclusions") (internal quotations and citation omitted).

Cleary's erroneous interpretation of permitted land uses under the R-T and R-M zoning is sufficient in itself to render his opinions unreliable, but additional inaccuracies confirm that the

Court should reject his testimony. For example, while Cleary trumpets that the newly created R-T zoning permits multi-family housing (Cleary Report at 7, 9, 11 and 15), he fails to explain that such multi-family housing would only be allowed with a *special permit* approved by the Board of Trustees[18]. The imposition of this approval process is no mere detail, as it effectively eliminated the possibility of constructing multi-family housing on the Social Services Site. (Ismene Spelioptis Deposition, dated November 29, 2007, at 43:10-44:2[19]; Anne Sullivan Deposition, dated November 28, 2007, at 66:9-67:20, 69:4-12[20]; Memorandum of Law in Support of Defendant Nassau County's Motion for Summary Judgment at 3).

Cleary's report also cites the four priorities that the Garden City's comprehensive zoning plan sets forth. (Cleary Report at 4.) However, he conveniently omits the subsections of the second priority, including subsection (4), which imposes a requirement to "take[] account of trends of development in the larger community of Nassau County." (Cleary Dep. tr. 253:6-254:14.) Cleary admits that one of those trends is seeking to optimize opportunities for affordable housing in Nassau County. (*Id.* 254:8-14.)

Finally, Cleary's admission that he found a primary source of his documentary support "confusing" places the reliability of his opinion even further in doubt. Cleary acknowledges that the BFJ reports in 2003 and 2004 are a main source of information about the rezoning process for the Social Services Site. (Cleary Report at 2-3; 15; Cleary Dep. tr. 99:2-100:10; 139:13-16.) However, when asked about his understanding of the critical zoning language in these reports which suggests that townhouses were permitted under R-M zoning controls (*see e.g.* Exhibit 58

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[18] The permit would also be subject to the following prohibitive restrictions: (a) All multi-family dwellings shall be in compliance with R-M District regulations except that 4,000 square feet of total plot area devoted to such use is required per unit; and (b) multi-family dwellings may be located only in 3.03 acre portion of the Site west of County Seat Drive. (Ex. 19 to the Frank Fish Deposition, dated November 9, 2006, BFJ000104-BFJ000147, at BFJ000106, BFJ000113-114.) (Attached to the Cochet Decl. as Exhibit 2.13).

[19] Hereinafter cited as "Speliotis Dep. tr. __," relevant excerpts of which are attached hereto as Exhibit 2.6.

[20] Hereinafter cited as "Sullivan Dep. tr. __," relevant excerpts of which are attached hereto as Exhibit 2.7.

to the Michael Filippon Deposition, dated January 30, 2008, VCG 689-701[21]), he answered: "its an inelegantly drafted two paragraphs. I am not sure what they mean by this. I don't believe its clear." (Cleary Dep. tr. 147:25-148:3; *see also id.* 148:24-149:3.) Indeed, revealing yet again his faulty perception that the R-M zone does not allow townhouses as a structure, Cleary is forced to embark upon a contrived explanation as to why BFJ would discuss a land use that was not permitted, when, of course, the simple answer is that BFJ discusses townhouses because they have always been a permitted use under the R-M zone. (Cleary Dep. tr. 147:2-151:18.) This illustrates how Cleary's mistake permeates all aspects of his report and analysis and, as a result, renders them unreliable.

2. Cleary's use of general commonly accepted planning principles as the bedrock of his opinion is unconvincing and unreliable

Cleary's report describes the history of planned development in Garden City, compares the characteristics of certain zoning districts, discusses the nature of the Social Services Site, and outlines some of the history and process of Garden City's decision to rezone the Social Services Site to R-T. At the end of his report, he concludes, *inter alia*, that the rezoning of the Social Services Site was "done appropriately" and in accordance with "commonly accepted community planning principles." (Cleary Report at 15.) Nowhere in his report, however, does he explain the "methodology" he employed, or clearly describe how he arrived at this conclusion. This does not comport with the reliability requirements of *Daubert*. *See Donnelly v. Ford Motor Co.*, 80 F. Supp. 2d 45, 49 (E.D.N.Y. 1999) ("Subjecting [the expert]'s opinions to *Daubert* scrutiny exposes immediately their unreliability, for nothing in his report explains the reasoning or methodology by which he reaches them."). While it is not necessarily required that Cleary's "methodology be subject to the specific criteria set forth in *Daubert*, such as peer review or error

[21] Attached to the Cochet Decl. as Exhibit 2.18.

rates," Cleary must nonetheless explain his methodology "so that it can be evaluated as to its reliability." *Roniger v. McCall,* No. 97 Civ. 8009 (RWS), 2000 WL 1191078, at *3 (S.D.N.Y. Aug. 22, 2000). Cleary has not done so here. "It is insufficient for the expert to merely vouch for the reliability of his own methodology." *J & V Dev., Inc. v. Athens-Clarke County*, 387 F. Supp. 2d 1214, 1227 (M.D. Ga. 2005).

Similarly, Cleary's report does not explain what the "community planning principles" he purports to apply are, nor does he specify to whom exactly those principles apply, nor in any way support his assertion that any such principles are, in fact, "commonly accepted."[22] *See Algarin v. New York City Dep't of Corr.*, 460 F. Supp. 2d 469, 476-77 (S.D.N.Y. 2006) ("[Plaintiffs' expert's] report never articulates, in any legally cognizable way, what are the standards of the medical community governing involuntary commitment"; [The expert]'s failure to identify generally accepted standards . . . undercuts his analysis of the individual defendants' performances, as he has no benchmark against which to judge the individual defendants") During his deposition, Cleary was specifically asked about the "well-established" and "commonly accepted" planning principles on which he purports to rely, but was unable to provide an instructive response. His attempt to delineate certain of these purported principles succeeds only in deepening their mystery, until he ultimately concedes that they are apparently "universal and ... sort of very general." (*id.;* Cleary Dep. tr. 131:19-20, 133:12-21), (*Id.*) Neither are these rather metaphysical "principles" specifically mentioned anywhere in Cleary's report, though they are nonetheless somehow "embodied in the body of the report throughout." (*Id.* 135:13-14.) Such obscurity does not rise to the level of expert testimony. *See, e.g., Donnelly v.*

[22] Moreover, Cleary admitted in his deposition that, when evaluating the "appropriateness" of the rezoning of the Social Services Site, he did not specifically take into account the *actual* planning principles developed by Garden City's planning consultants for redevelopment of County-owned properties in Garden City, such as the Social Services Site. (*See* Cleary Dep. tr. 203:15-204:21.)

Ford Motor Co., 80 F. Supp. 2d at 48 (an expert's testimony must be "ground[ed] in the methods and procedures of science and consist of "more than subjective belief or unsupported speculation.") (quoting *Daubert*, 509 U.S. at 590).

3. Cleary fails to take into account critical evidence in this case

Cleary's report speaks in very broad terms. (Cleary Report at 1-2, 15.) So much so that it became clear during his deposition that Cleary had failed to take into account certain critical evidence. For example, Cleary explains that in his experience there are two types of public opposition to rezoning projects: valid and supported opposition and baseless opposition for the sake of complaining. (Cleary Dep. tr. 34:25-38:5.) Cleary admits that a town's board of trustees should take into account local opposition by residents only if it is valid and supported. (*Id.* 35:21-38:5.) In his report, he opines that the R-T rezoning was done appropriately "with the full participation of the community," and adds "[d]eveloping a planning concept that does not reflect the input and expectations of the community would surely be considered arbitrary." (Cleary Report at 2.) But in his deposition, Cleary admitted that although he considered the public comments opposing the original BFJ recommendation, he did not investigate whether the local opposition in this case was valid; he *simply assumed* it was. (Cleary Dep. tr. 182:12-13.) "I read public comment so I am assuming it's valid.")

In a case where demographics and the issue of segregation are at the core of the matter, Cleary also admits that he did not take into account any demographic data, although he is aware that Nassau County and Garden City are segregated. (Cleary Dep. tr. 115:4-21; 121:14-17; Expert Report of Nancy McArdle, dated September 12, 2008, at 3[23].) Cleary explained that in his view, in the context of a rezoning application, it is *never* appropriate to look at whether a community is segregated or whether a rezoning decision is going to perpetuate segregation with

[23] Attached to the Cochet Decl. as Exhibit 2.19.

respect to a rezoning application. (Cleary Dep. tr. 137:7-15.) Affordable housing is another example of a critical element that Cleary simply did not look at before opining that Garden City's decision to create the R-T zoning was "appropriate." Indeed, although he agrees that the Social Services Site represented a unique opportunity to develop affordable housing in a county with a dire need for affordable housing, Cleary admits that he did not investigate the most basic information about affordable housing in Garden City. (Cleary Dep. tr. 262:22-263:4.)

In sum, Cleary is Garden City's proffered zoning and planning expert, yet he: (i) failed the most basic task of determining correctly what land uses are permitted under R-M and R-T zoning; (ii) repeatedly relied on what he asserts are "well-established" and "commonly accepted" principles, but for which he can offer no support or evidence; and (iii) failed to take account of critical evidence when reaching his so-called expert opinion. Therefore, Cleary's "methodology" underlying his opinion is not sufficiently reliable to allow that opinion to be admitted here. *See Donnelly v. Ford Motor Co.*, 80 F. Supp. 2d at 48 (an expert's testimony must be "'ground[ed] in the methods and procedures of science' and consist of "'more than subjective belief or unsupported speculation."') (quoting *Daubert*, 509 U.S. at 590); *see also Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("To warrant admissibility ... it is critical that an expert's analysis be reliable at every step."); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir.1994) ("requirement that the expert testify to scientific knowledge – conclusions supported by good grounds for each step in the analysis--means that any step that renders the analysis unreliable under the Daubert factors renders the expert's testimony inadmissible.") (Internal quotations omitted).

B. Cleary's Opinion Does Not Assist the Trier of Fact.

Cleary's testimony should also be excluded because it will not assist the trier of fact in understanding the evidence or determining a fact in issue. *See, e.g., American Ref-Fuel Co. of*

Niagara, LP v. Gensimore Trucking, Inc., No. 02 Civ. 814C, 2008 WL 1995120, at *3 (W.D.N.Y. May 6, 2008) ("The 'relevance' inquiry requires the court to decide whether the expert testimony will be helpful to the trier of fact in understanding or determining a fact in issue, *i.e.*, whether the expert's testimony 'fits' the facts of the case.") (citation omitted).

In the instant case, Cleary's opinion is limited to an after-the-fact review of Garden City's rezoning process without consideration of the salient facts. For example, as already noted, Cleary admitted during his deposition that he did not consider demographic data, segregation data, or affordable housing data in Garden City. Nor did he consider the validity of the residents' opposition. (*See* Cleary Dep. tr. 115:4-21; 121:14-17; 137:7-15; 182:11-13; 260:13-22.)

Moreover, Cleary's report goes on at some length about the historical significance of Garden City's zoning framework, and the importance of taking this "legacy" into account when making zoning and land use decisions. (Cleary Report at 4-5, 13-14.) This discussion, however, is *completely irrelevant* to the issues the trier of fact will be called upon to decide. To the extent that Cleary is attempting to imply through this discussion that the R-T district is more appropriate for the Social Services Site than the R-M district, this implication has no basis, as Cleary completely fails to explain why R-M threatens the historical planning legacy of Garden City while R-T would not. In fact, Cleary admitted that the creation and application of the R-T zoning to the Social Services Site represented a significant change in the land use pattern (*see* Cleary Dep. tr. 244:22-25.) He stated further: "Frankly, any redevelopment of [the Social Services Site], residential, non[-]residential, anything other than a P [government] use would result in a significant change" and "I'll concede that a 25 acre site redevelopment in the heart of [Garden City] is a significant change and that would be a change to the historical pattern that the

community enjoys" (*id.* 242:3-11). Additionally, while Clearly stresses the transitional nature of the Social Service Site in his report (*see* Cleary Report at 10), he fails to explain why the pre-existing R-M zoning would be any less effective than the R-T zoning in addressing the unique challenges posed by the Social Services Site. (Cleary Dep. tr. 217:5-221:3.)

In sum, Cleary's opinion does not "fit" the facts of this case. His opinion is too general, oblivious to the salient facts, and insufficiently connected to the specific matters to be decided. It will not assist the trier of fact in understanding the evidence or determining an issue, and should therefore be excluded. *See, e.g., Donnelly*, 80 F. Supp. 2d at 49 ("In order to determine whether the expert's testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue,' Fed. R. Evid. 702, the testimony must not only be reliable but must be relevant in that it 'fits' the facts of the case.") (quoting *Daubert*, 509 U.S. at 591-92).

C. Cleary's Opinion May Mislead the Trier of Fact

Cleary opines that Garden City's rezoning of the Social Services Site was "done appropriately," in accordance with well-established planning principles. (*See* Cleary Report at 2, 15.) This testimony should be excluded because any probative value it may have is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the fact finder. *See* Fed. R. Evid. 403. As discussed above, Cleary reached this conclusion *without* taking into account salient facts or examining the motive behind Garden City's decision to rezone the Social Services Site. In view of Cleary's broadly-worded opinion that the rezoning was "done appropriately," there is a significant risk that the trier of fact will be misled into believing that Cleary took all relevant factual elements into account and that his "expert" opinion means that all aspects of Garden City's decision were appropriate. Therefore, Cleary's opinion on this issue should be excluded on this ground, as well.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court exclude the opinions and report of Patrick Cleary in this action.

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