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.,	:	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' OPPOSITION TO GARDEN CITY'S MOTION TO EXCLUDE PLAINTIFFS' EXPERT WITNESS PETER MARCUSE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

FEDERAL STATUTES

RULES

Plaintiffs New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc., Vic DeVita, and Francine McCray (collectively "plaintiffs") submit this memorandum in opposition to defendant Garden City's Motion to Exclude Plaintiffs' Expert.

PRELIMINARY STATEMENT

Garden City's attempt to exclude the opinion of plaintiffs' expert, Dr. Peter Marcuse, rings hollow, both in fact and in law. Dr. Marcuse's qualifications, arising from 55 years of experience in all aspects of the planning and housing fields, are unassailable. Indeed, Garden City does not even attempt to dispute those qualifications; rather, it tries to paint Dr. Marcuse as an expert for hire whose opinion merely recasts the allegations of the complaint, and is thus unsupported and unnecessary. Nothing could be further from the truth. As plaintiffs show below, Dr. Marcuse's expert opinion is fully documented and is necessary to explain the intricacies of fair housing, urban planning, and zoning that otherwise could easily prove confusing to a trier of fact.

Garden City also claims that Dr. Marcuse's opinion should be rejected because it usurps the role of the trier of fact. But it is, in fact, Garden City that is the usurper here, because its conclusions about the weight and credibility of expert testimony are properly the province of the fact finder alone, and not the appropriate subject of a *Daubert* motion.

Garden City's last-gasp effort to exclude Dr. Marcuse's expert opinion finds it in the absurd posture of attempting to cherry pick his report, including the testimony that it believes to be helpful to its position while excluding the testimony it believes to be damaging. Such an argument is so clearly untenable as to call into question Garden City's good faith in making it.

In sum, as plaintiffs show in detail below, Dr. Marcuse is more than qualified and his opinions are admissible under the *Daubert* standards. Thus, to the extent Garden City might seek to challenge Dr. Marcuse's expert opinion, cross-examination and the presentation of contrary evidence at trial are the appropriate means. Therefore, Garden City's motion to exclude the testimony of Dr. Marcuse must be rejected.

FACTUAL BACKGROUND

To avoid duplication, plaintiffs incorporate by reference the factual background set forth in their Consolidated Opposition to Defendants' Motion for Summary Judgment, dated June 15, 2009. (*See* Pls' Cons. Opp. at Section II.) The expert report at issue in this motion is Peter Marcuse's Expert Report, dated September 12, 2008.[1] Defendant Garden City moved to exclude Dr. Marcuse as an expert in 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.[2] Defendant Garden City did not proffer any expert report in response to Dr. Marcuse's report.

In his report, Dr. Marcuse opined that "actions and inactions of the Village of Garden City in regard to the Special Zoning[3] were part of a pattern and practice that supported discrimination against minority groups, foreseeably leading to increased segregation of such groups." (Marcuse Report at 1.) He based this opinion on his 55 years of experience in the field,

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[1] Hereinafter cited as "Marcuse Report at __," attached to the Declaration of Sabrina H. Cochet, dated June 15, 2009 ("Cochet Decl."), as Exhibit 1.1.

[2] Hereinafter cited as "GC Br. at __." Garden City's exhibits to its Memorandum of Law in Support of Motion for Summary Judgment to Exclude Plaintiffs' Expert and to Strike Plaintiffs' Jury Demand will be cited as "GC Ex. __." Defendant Nassau County did not move to exclude the Marcuse Report; accordingly, herein plaintiffs address only Dr. Marcuse's opinions concerning defendant Garden City.

[3] The term "Special Zoning" refers to the Village's decision to rezone the Social Services Site to the R-T (townhouse residential) zoning. (Marcuse Report at 7-8.)

his review and analysis of over one hundred documents and sources, including 70 documents produced in this case and 6 deposition transcripts, as well as scores of hours of research.[4]

ARGUMENT

A. DR. MARCUSE'S EXPERT OPINION IS ADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 702

Federal Rule of Evidence 702 provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" if such "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The testimony must be (1) "based upon sufficient facts and data," (2) "the product of reliable principles and methods," and (3) those principles and methods must have been applied reliably to the facts of the case. Fed. R. Evid. 702. The seminal case of *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), established that district courts have a "gatekeeping" responsibility to ensure that expert evidence that reaches the trier of fact is admissible, *i.e.*, that it is both relevant and reliable. *Daubert*, 509 U.S. at 589; *Humphrey v. Diamant Boart, Inc.*, 556 F. Supp. 2d 167, 174 (E.D.N.Y. 2008).

As the Supreme Court cautioned in *Daubert*, however, any assessment of an expert's opinion should be consistent with the "liberal thrust of the Federal Rules and their general approach of relaxing the traditional barriers to opinion testimony." *Daubert*, 509 U.S. at 588 (internal citations and quotations omitted). A court's duty is only to assess the admissibility of the expert testimony, *not* its credibility. "[T]he district court must focus on the principles and methodology employed by the expert, without regard to the conclusions the expert has reached or the district court's belief as to the correctness of those conclusions." *Amorgianos v. Nat'l R.R.*

[4] Peter Marcuse Expert Report: List of Sources Consulted (hereinafter "Marcuse Sources"), PM 000557-63, attached to the Cochet Decl. as Exhibit 1.2.

Passenger Corp., 303 F.3d 256, 266 (2d Cir. 2002). Accordingly, the court must exclude *only* expert opinions that are speculative, conjectural, or based on assumptions "so unrealistic and contradictory as to suggest bad faith." *Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 21 (2d Cir. 1996) (internal quotations omitted). Allegations that the expert's assumptions are unfounded go to the weight, not the admissibility, of the testimony. *Id.* Therefore, in performing the gatekeeping function, the trial court must not infringe on the fact finder's duty to make determinations as to weight of the evidence. *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) ("Disputes as to the strength of [an expert's] credentials, faults in his use of [a particular] methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."); *see also* Fed. R. Evid. 702 Advisory Committee (citing *United States v. 14.38 Acres more or less situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996) ("[T]he trial court's role as gate keeper is not intended to serve as a replacement for the adversary system")).[5]

Garden City's argument to exclude Dr. Marcuse reduces essentially to three claims: Dr. Marcuse's opinion (1) is unreliable and unsupported, (2) represents an inappropriate legal conclusion and does not assist the trier of fact; and (3) is more prejudicial than probative. All three of these claims miss the mark. Dr. Marcuse's opinion is grounded in reliable methodology and is based both on his vast experience and a wealth of evidence. Furthermore, the opinion contains Dr. Marcuse's factual, not legal, conclusions, which serve a valuable interpretive

[5] As plaintiffs concede that this action should be tried to the Court (*see* Pls' Cons. Opp. at Section VIII), it is worth noting that, in such instances, "resolving *Daubert* questions at a pretrial stage is generally less efficient than simply hearing the evidence; if [the movant's] objections are well-taken, the testimony will be disregarded in any event." *Victoria's Secret Stores Brand Management, Inc. v. Sexy Hair Concepts*, LLC, No. 07 Civ. 5804(GEL), 2009 WL 959775, at *6, n.3 (S.D.N.Y. April 8, 2009); *see also Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002) (concerns regarding expert relevance and reliability are "of lesser import in a bench trial").

function that will assist the trier of fact. Finally, Dr. Marcuse's opinion is relevant to the issue at the core of the case, and will not result in any prejudice to the fact finder.

B. DR. MARCUSE'S METHODS AND REASONING ARE RELIABLE

As a preliminary matter, Garden City does not question – because it cannot – Dr. Marcuse's qualification to offer an opinion this case. Although Garden City implies that Dr. Marcuse is nothing more than an expert for hire, whose role was limited to recasting plaintiffs' allegations as his conclusions, Garden City fails to provide the slightest shred of evidence for that claim. (*See* GC Br. at 34.)[6] Dr. Marcuse has a long and distinguished record, both academically[7] and professionally.[8] Plaintiffs submit that Dr. Marcuse is amply qualified to testify as an expert on the factors influencing defendants' actions with respect to planning and zoning at the Social Services Site. Moreover, that testimony is reliable and appropriately supported by evidence in the record and Dr. Marcuse's own experience in the field.

In order to determine whether an expert opinion is "reliable" under Rule 702, the trial court should consider whether the expert's opinion comports with the "intellectual rigor" used by

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[6] Garden City alleges that "most of the 'examples' which form the basis of Dr. Marcuse's opinions are not the result of independent study, investigation or analysis, but rather a regurgitation of allegations made in the Amended Complaint." (GC Br. at 36, n. 2.) This is false and disingenuous. Garden City disregards the fact that Dr. Marcuse has carefully studied and reviewed over one hundred books, documents and other sources in preparation for his report. (Marcuse Sources, PM 000577-63) Garden City also deliberately ignores Dr. Marcuse's careful analysis of the use of euphemisms by Garden City and its residents (Marcuse Report at 2-3, 8-10), his study of Garden City's planning documents (Marcuse Report at 3), his investigation of Garden City's past discriminatory actions (Marcuse Report at 5-6), and his analysis of certain of Garden City's zoning actions and lack of action to promote integration in the Village (Marcuse Report at 3-4, 6-8.)

[7] His academic credentials include a B.A. from Harvard College, an M.A. from the Department of Public Law and Government at Columbia University, an M.U.S. (Master of Urban Studies) from the Department of City Planning at the Yale School of Architecture, a Ph.D. from the Department of City and Regional Planning at University of California, Berkeley, and a J.D. from Yale Law School. (Marcuse Report at 1.)

[8] Since 1975, Dr. Marcuse has been a professor at Columbia University, in the Division of Urban Planning at the Graduate School of Architecture, Planning and Preservation. For almost two decades, he has been Director of Columbia University's Ph.D. program in urban planning. Over the last forty or more years, he has published over one hundred books, articles, research reports, and conference papers on various subjects related to housing and urban planning, including issues of race discrimination and segregation. Dr. Marcuse has also served as a consultant to and a member of a number of city planning committees. (Marcuse Report at 1.)

other experts in that particular field. *Kumho Tire Co. v. Carmichael*, 526 U.S.137, 152 (1999). In this endeavor, the law affords the court wide discretion as to which of the *Daubert* factors to employ, if any, in each area of expertise. *Id.* at 141-42 ("[T]he law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.") (emphasis in original).

1. Dr. Marcuse's Methodology Is Reliable And Fully Supported By The Evidence

Garden City maintains that Dr. Marcuse's testimony is fatally unreliable. In particular, Garden City takes issue with Dr. Marcuse's review of past discriminatory acts by the Village which Garden City claims, incorrectly, is the "fulcrum of Dr. Marcuse's opinion." (GC Br. at 36.) Focusing solely on a single subdivision of Dr. Marcuse's report, Garden City attacks Dr. Marcuse's analysis of the historical context, contending that his conclusions are "devoid of any methodology or support . . . ." (GC Br. at 36.) To the contrary, Dr. Marcuse's opinion is grounded not only in his significant experience but also in a study of primary sources, such as newspaper articles and public records, discussing the relevant events. This is a well recognized and reliable method of analysis. *See e.g.*, *Prado Alvarez v. R.J. Reynolds Tobacco Co., Inc.*, 405 F.3d 36, 41-42 (1st Cir. 2005) (holding that an expert may rely on newspaper articles for historical context); *Cunningham v. Dist. of Columbia Sports and Entm't Com'n*, No. CIVA 03-839 RWR/JMF, 2005 WL 4898867, at *4 (D.D.C. Nov. 29, 2005) (same); *Waterhouse v. R.J. Reynolds Tobacco Co.*, 368 F.Supp.2d 432, 436 (D. Md. 2005) (same). In addition, Dr. Marcuse's reliance on this method of analysis is consistent with the methods used by expert witnesses examining discrimination in other contexts. *See e.g., Bowers v. Nat'l Collegial Athletic Assoc.*, 564 F.Supp.2d 322, 361 (D.N.J. 2008) (holding an expert's reliance on contextual materials, literature in the field and his own knowledge and expertise is a reliable

methodology because it is a "conventional social science approach"); *EEOC v. Beauty Enters. Inc.*, 361 F. Supp. 2d 11, 18 (D. Conn. 2005) (holding that an expert's opinion need not be based on formal scientific method as long as it is "properly grounded, well-grounded, and not speculative").

Further, to the extent that the Village cherry picks some of Dr. Marcuse's many historical examples and claims he did not read every piece of relevant information regarding these events,[9] this does not invalidate his methodology. His decision not to review particular documents goes to the *weight* of his testimony, not to the *admissibility*. *Wright v. Stern*, 450 F. Supp. 2d 335, 361 (S.D.N.Y. 2006); *see also McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995) (lack of textual authority goes to weight of testimony); *Amorgianos v. Nat'l. R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) (same).

The Village also attacks Dr. Marcuse's methodology because he was not present at public hearings to which his report refers; he never personally interviewed the speakers at the public hearings; he is "unfamiliar with the most basic facts concerning Garden City";[10] and he had never been to Garden City before issuing his report. (GC Br. at 37-39.) Not only are those

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[9] For example, in his report, Dr. Marcuse discusses an instance of discrimination involving a proposal to open a subsidized daycare center in Garden City. (Marcuse Report at 5.) Garden City appears to claim that Dr. Marcuse's opinion must be excluded because, although he relied specifically on three newspaper articles, and more generally on his experience, a New York State Supreme Court decision (not the Appellate Division) involving the daycare center did not "discuss discrimination." (GC Br. at 36; GC Ex. Y.) First, that a purportedly relevant state court decision did not discuss discrimination is certainly not proof that there was no discrimination. Second, Garden City's argument clearly goes to the weight and credibility of an expert, a decision that is for the fact finder to make, not Garden City. Garden City also criticizes Dr. Marcuse for not having read a building moratorium imposed by Garden City in the late 1980's. (GC Br. at 36.) But it is the fact of the moratorium itself that is significant not its specifics. Finally, in a shamelessly disingenuous argument, Garden City attacks Dr. Marcuse for not having reviewed an application for affordable housing denied by the Village. (GC Br. at 37.) Not only is this claim not a valid reason to exclude Dr. Marcuse's opinion, but Garden City itself claims that "the Village does not have any records and is not aware of any developer seeking to build affordable housing in the Village ever." (GC 56.1 Statement at ¶ 89.) Thus, Garden City's own allegation is that there is no application to review. (*Id.*)

[10] These "basic facts" include the number of housing units and the ratio of multi-family apartment units to single-family homes in the Village of Garden City. (GC Br. at 38.) Garden City presumably refers to Dr. Marcuse's inability to recall these figures while under examination at his deposition. (*See* Peter Marcuse Deposition transcript, dated December 11, 2008, at 173:10-19, hereinafter cited as "Marcuse Dep. tr. __," relevant excerpts of which are attached to the Cochet Decl. as Exhibit 1.3.)

claims misplaced and fail to show that Dr. Marcuse's opinions are unreliable, but they also go to the *weight and credibility*, rather than the *admissibility*, of Dr. Marcuse's testimony. *See Daubert*, 509 U.S. at 591 ("an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation"); *MacQuesten Gen. Contracting, Inc. v. HCE, Inc.*, No. 99 Civ. 8598 (JCF), 2002 WL 31388716, at *2 (S.D.N.Y. Oct. 22, 2002) ("expert analysis is often based on reported information rather than firsthand knowledge, and that is no bar to its admissibility.")

Dr. Marcuse's methodology also involved relying on a variety of academic publications. (Marcuse Sources, PM 000557-63). These are all examples of evidence "reasonably relied upon" by experts. *See e.g.*, Fed. R. Evid. 703; *Scott v. City of New York*, 591 F. Supp. 2d 554, 563 (S.D.N.Y. 2008) (basing testimony on social science literature is "typical of an academic expert"); *Disability Advocates, Inc. v. Paterson*, No. 03-CV-3209 (NGG)(MDG), 2008 WL 5378365, at * 4-5 (E.D.N.Y. Dec. 22, 2008) (the testimony of an expert psychiatrist who reviewed the depositions of adult home residents and other fact witnesses, relevant scholarly articles, and publications from OMH and the U.S. DHHS was reliable). That all these academic publications may not specifically address Garden City does not in any way "disqualify" them or render them unreliable, despite Garden City's conclusory claim to the contrary. (GC Br. at 39.) Tellingly, Garden City cannot cite a single authority to support such a brazen assertion. (*Id.*)

2. Garden City's Claim That Dr. Marcuse Ignores "The Most Basic Facts Concerning Garden City" Is Wrong

As already noted briefly above, the Village criticizes Dr. Marcuse's ignorance of "the most basic facts concerning Garden City." (GC Br. at 38.) For instance, Garden City attempts to discredit Dr. Marcuse by asserting that, during his deposition, he did not know the ratio of multi-family to single-family homes in the Village of Hempstead. (GC Br. at 38.) Nonsense. Dr.

Marcuse in fact testified that he was aware of the ratio; he was simply unable to recall it off hand. (Marcuse Dep. tr. 57:5-58:3.) Garden City also appears to argue that Dr. Marcuse should be excluded because he never went to Garden City prior to issuing his report nor had he ever spoken to any resident of Garden City. (GC Br. at 38.) Garden City, however, fails once more to explain how this is a relevant criterion. Similarly, Garden City argues that Dr. Marcuse is unfamiliar with "key facts" regarding the Social Services Site, such as "its contracted sale price," but fails to explain how such information is relevant in the context of Dr. Marcuse's expert report, let alone a "key" fact.[11] (GC Br. at 38.) In short, Garden City's claim that Dr. Marcuse is ignorant of basic facts is simply a recitation of groundless, conclusory statements, of no consequence for this motion.

Moreover, even assuming, *arguendo*, that all of the specific facts Dr. Marcuse was unable to recall off the top of his head were relevant, that he could not recall or did not know these facts goes yet again to the weight, *not* the admissibility, of his testimony. Indeed, every one of Garden City's putative attacks on Dr. Marcuse's reliability actually (and fecklessly) goes to the weight to be accorded his testimony, not the admissibility of his opinions. *Arnold v. Dow Chem. Co.*, 32 F. Supp. 2d 584 (E.D.N.Y. 1999) (holding that as long as reasoning and methodology were valid, any insufficiency in the amount of evidence goes to weight). But any issues as to the weight or sufficiency of the evidence, and the conclusions drawn therefrom, must be left to play out on the full stage of the adversary system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means

[11] Garden City also attempts to make an issue of Dr. Marcuse's deposition testimony that it was conceivable to place 2,000 units at the Social Services Site. (GC Br. at 38-39.) But, as Garden City knows very well, opining about the validity of 2,000 units project at the Site was not within Dr. Marcuse's purview as an expert in this case, and Garden City's questions here were a transparent effort to get Dr. Marcuse to speculate about a complex issue that he had not investigated. (Marcuse Dep. Tr. 165:6-167:9.) In any event, Garden City has failed to show how such a project is not "conceivable," whether or not it is desirable.

of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596; *Wright*, 450 F. Supp. 2d at 360 ("[I]n a close case the testimony should be allowed for the jury's consideration. In a close case, a court should permit the testimony to be presented at trial, where it can be tested by cross-examination and measured against the other evidence in the case") (internal citations omitted).

3. The Cases On Which Garden City Relies Are Distinguishable

Garden City purports to marshal a number of cases which support a finding that Dr. Marcuse's opinion is unreliable. Those cases, however, are all distinguishable. For example, the experts in *Metro. St. Louis Equal Hous. Opportunity Council v. Gordon A. Gundaker Real Estate,* 130 F. Supp. 2d 1074 (E.D. Mo. 2001) and *J & V Dev., Inc. v. Athens-Clarke County,* 387 F. Supp. 2d 1214 (M.D. Ga. 2005), based their opinions on unreliable statistical analysis. Dr. Marcuse, however, relies on the expert report of Nancy McArdle, plaintiffs' demographics expert, which neither defendant has questioned.

In *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, plaintiffs' expert opined both on the general existence of nationwide institutional discrimination in the entertainment industry and on specific incidents of discrimination against plaintiffs. *Rowe*, No. 98 Civ. 8272 (RPP), 2003 WL 22272587, at *2-6 (S.D.N.Y. Oct. 2, 2003). The expert based his opinion on allegations in the complaint, plaintiffs' depositions, and a "limited number" of other depositions, as well as anecdotes from the entertainment industry. The expert used that limited evidence to conclude that the particular plaintiffs had been the victims of "serious racial mistreatment and discrimination." *Id.* at *6. The court excluded the expert's testimony because the opinion regarding institutional discrimination was too general and the opinion regarding specific discrimination against the plaintiffs was unsupported. *See id.* at *7-10. Nothing of the sort applies here. In contrast with the expert in *Rowe*, Dr. Marcuse's opinion focuses specifically on

the possibility of discrimination in Garden City as regards the zoning of the Social Services Site. *Compare* Dr. Marcuse's expert report at 7-10 *with Rowe Entertainment, Inc.*, 2003 WL 22272587, at *22 (finding that an expert's general opinion about institutionalized discrimination is irrelevant to a specific case of discrimination). Furthermore, unlike the expert in *Rowe*, Dr. Marcuse's conclusions are based on personal research, including a thorough review of primary sources, academic literature, and other data. Finally, while the resume of the expert in *Rowe* "[did not] show he ha[d] an academic background in either industry," *id.* at *7, Dr. Marcuse has extensive experience in the relevant subject matter. *Compare* Dr. Marcuse's expert report at 1 *with Rowe Entertainment, Inc.*, 2003 WL 22272587, at *7 (finding that the expert had not conducted any analysis in the specific field at issue and that he had no academic background in the field as well).

Dr. Marcuse, as a social scientist and urban planner, properly applied a methodology appropriate to his field, making his opinion more than sufficiently reliable to satisfy *Daubert*. 509 U.S. at 592 ("[An] expert's opinion will have a reliable basis in the knowledge and experience of his discipline").

C. DR. MARCUSE'S PROFFERED TESTIMONY WILL ASSIST THE TRIER OF FACT

As part of its threshold obligations, the court must determine whether the expert's opinion is not only reliable, but relevant. *Daubert*, 509 U.S. at 589. Fed. R. Evid. 401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (internal quotations omitted). Once evidence is found to be relevant, its utility "should be viewed within the entire context of the entire rules of evidence," with any doubts about the usefulness of the opinion resolved in favor of admissibility. *TC Sys. Inc. v.*

Town of Colonie, New York, 213 F. Supp. 2d 171, 174 (N.D.N.Y. 2002); *Marmol v. Biro Mfg. Co.*, No. 93 CV 2659 (SJ), 1997 WL 88854, at *4 (E.D.N.Y. Feb. 24, 1997).

Defendant asserts that Dr. Marcuse's testimony will not assist the trier of fact because: (1) it addresses lay matters that are not "beyond the ken" of the fact finder; and (2) Dr. Marcuse's opinion represents a legal conclusion. (GC Br. 33-36.) Both arguments demonstrate a fundamental misunderstanding of Dr. Marcuse's testimony.

1. Dr. Marcuse's Opinion Is Relevant

In cases involving allegations of discriminatory intent, the Supreme Court specifically calls for an investigation into the historical background of the challenged action or decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). Dr. Marcuse's report analyzes the history of community opposition to affordable housing within the Village and County, the significance of patterns of segregation, and the events leading up to the Village's zoning decision. (Marcuse Report at 5-6.) As such, the report is relevant to, and highly probative of, the issue of whether defendants acted with a discriminatory intent.

2. Dr. Marcuse's Opinion Does Not Address "Lay Matters"

Contrary to Garden City's claim, the trier of fact will gain important insight from Dr. Marcuse's explanation of the deliberative process the Village Board undertook when rezoning the Social Services Site. Dr. Marcuse also uses his considerable expertise in the housing discrimination field to analyze the often subtle ways in which discriminatory intent manifests itself. As the Third Circuit noted:

> "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 persists,

> violators have learned not to leave the proverbial 'smoking gun' behind."

Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996)

Dr. Marcuse's analysis can pierce the veil of racial discrimination "masked in subtle forms" by, for example, euphemisms like "high density" and "multi-family," rather than openly expressed in direct statements exhibiting racial bias. (Marcuse Report at 2-3, 8-9), *see U.S. v. Torres*, 901 F.2d 205, 236 (2d Cir. 1990) (confirming finding by district court that a narcotics expert's role was proper when he interpreted the meaning of conversations that were otherwise ambiguous, nonsensical, or laden with code words.); *see also Innovative Health Sys. v. City of White Plains*, 117 F.3d 37, 42 (2d Cir. 1997) (court finding discriminatory intent where 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) (court finding a violation of the Fair Housing Act where citizens voiced their opposition to affordable housing using racial innuendo). In doing so, Dr. Marcuse's report serves a valuable interpretive function: he explains the methods by which opponents to affordable housing might mask discriminatory motives, and helps the trier of fact to understand the dynamics of Garden City's community opposition to affordable housing. The euphemisms Dr. Marcuse identifies — *e.g.*, "urban character," "low density," "rental,"— are not obvious signals of discriminatory motive, particularly to a lay person, like a trier of fact unfamiliar with urban planning terminology.[12]

[12] Garden City's argument that Dr. Marcuse should not be permitted to interpret these statements without having personally met the speaker or having been present at the time the statements were made is ludicrous. (GC. Br. at 37-38.) First, it is entirely unreasonable, and contrary to the spirit of the Federal Rules of Evidence, to require Dr. Marcuse, or any expert for that matter, to have been present at a specific event in order to form an opinion relating to it. *See Rondout Valley Cent. Sch. Dist. v. Coneco Corp.*, 321 F. Supp. 2d 469, 479-480 (N.D.N.Y. 2004) (It is the "rare exception" that an expert has first hand knowledge, if not the expert may more properly be a fact witness.) Second, Dr. Marcuse has reviewed hundreds of pages of transcripts and documents associated with the event in question. His opinion on this point also draws upon his vast experience and his knowledge of the academic literature. (Marcuse Report at 2-3, 8-9; Marcuse Sources, PM 000577-63.) Dr. Marcuse's opinion regarding the use of euphemism is, therefore, plainly admissible, with any issues as to its credibility left for the fact-finder to decide.

Furthermore, the Advisory Committee to the Federal Rules of Evidence specifically sanctioned this type of analysis as an example of an admissible expert opinion. The Committee cited the example of an expert testifying about the code words used in drug transactions to hide the nature of the transaction. The Committee stated that "[t]he method used by the [expert] is the application of extensive experience to analyze the meaning of the conversations" and found that such a methodology is proper as long as it is applied reliably to the facts of the case. Federal Rules of Evidence Advisory Committee Notes, 2000 Amendments, Fed. R. Evid. 702.

Though courts and the Advisory Committee have definitively recognized the reliability and the value of an expert "de-coding" the hidden meaning behind certain words, Garden City claims that such testimony here is purely speculative because Dr. Marcuse allegedly stated that determining whether a term is a euphemism depends only upon the "complexities that make up a person." (GC Br. at 38) (*Id.*) This is not true. In order to perpetrate this falsehood Garden City mischaracterizes Dr. Marcuse's words and takes them out of context. Dr. Marcuse actually testified that determining whether there is a euphemism depends upon the context in which the term is used, and that one element of the context may be "the complexities that make up a person." (Marcuse Dep. tr. 116-12:117:16.) As already noted, Dr. Marcuse based his opinion about the use of euphemisms in the public hearing transcripts and other documents in this case on his review of hundreds of pages of documents and his contextual knowledge of the matter at issue. This renders the opinion intrinsically reliable as well as fundamentally helpful.[13]

[13] A number of courts have, in other discrimination contexts, found that testimony by experts is relevant when it would assist the fact-finder interpret language and behavior that appear to be benign but are alleged to be the product of invidious stereotyping and discrimination. *See, e.g., Int'l Healthcare Exch. v. Global Healthcare Exch.*, 470 F. Supp. 2d 345, 355 (S.D.N.Y. 2007) (expert testified to gender stereotyping to explain certain decisions made in the workplace); *Hurst v. F.W. Woolworth Co.*, No. 95 CIV 6584(CSH), 1997 WL 685341, at *2 (S.D.N.Y. 1997) (expert testified as to stereotyping in an age discrimination suit); *Flavel v. Svedala Indus., Inc.*, 875 F. Supp. 550, 557-8 (E.D.Wis. 1994) (expert testified that particular comments evidenced a pattern of practice of stereotyping in an age discrimination case); *Butler v. Home Depot, Inc.*, 984 F. Supp. 1257, 1264 (N.D.Ca. 1997) (expert testified

Without Dr. Marcuse's testimony about the language typically used to perpetuate discrimination, the actual motivation that might be lurking behind community members' statements at public meetings, in newspapers, in flyers, and in communications to local government, may never be recognized. *See generally Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (discrimination may manifest itself in "subtle forms"); *EEOC v. Inland Marine Indus.*, 729 F.2d 1229, 1236 (9th Cir. 1984) ("In today's world, racial discrimination sometimes wears a benign mask. Current practices, though harmless in appearance, may hide subconscious attitudes . . . .") (internal citations omitted); *Aman v. Cort Furniture Rental Corporation*, 85 F.3d at 1082.

Dr. Marcuse's testimony also provides the historical context that does not appear on the record, specifically, the pattern and practice of discrimination in Garden City. The evidence shows that Garden City rejected the opinion of its own planning expert and created a brand-new zone, contravening the Village's own planning practices. (Exhibit 1, F. Fish Dep., September 13, 2002 facsimile from BFJ to Garden City, VGC778-779,[14] #1) ("Adherence to Comprehensive Plan of Garden City is required.") Because Garden City's change of course coincided with substantial public opposition, the trier of fact must determine whether the public opposition affected the Board and the motivation behind that opposition.[15] Dr. Marcuse's report can assist the trier of fact in this enquiry.

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that particular comments and decision-making practices evidenced gender stereotyping in an employment discrimination suit).

[14] Attached to the Cochet Decl. as Exhibit 1.4.

[15] Defendant claims that because Dr. Marcuse generally agrees that "it is good to obtain community input," that "the plan should be reviewed by municipalities and discussed with planners," and that "townhouses are 'well accepted in the planning community as a housing option,'" he, therefore, supports the process undertaken by the Village (GC Br. at 35-36.) This misses the point so completely that it barely deserves comment. Dr. Marcuse *never* testified that he supported *racially motivated* community input, that the recommendations of planners should be rejected *as a result of racially motivated community input*, or that townhouses should be built when they *further racial discrimination.*

3. Dr. Marcuse's Opinion Does Not Offer a Legal Conclusion

Garden City claims Dr. Marcuse's opinion that "action and inactions of the Village of Garden City in regards to the Special Zoning were part of a pattern and practice that supported discrimination against minority groups, foreseeably leading to increased segregation of such groups" is a legal conclusion, and his opinion should therefore be excluded. (GC Br. at 33; *see id.* 34-35.) This is not so. Moreover, while it is true that an expert may not give testimony stating an ultimate legal conclusion, he or she may opine on an issue of fact within the jury's province, even if it "embrace[s] an ultimate issue to be decided by the jury. . . ." *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991); Fed. R. Evid. 704 ("testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact").

a. Decoding Racial Motivation is a Question of Fact

Whether race was a factor motivating an entity's decision or action is properly a question of fact, not law. *See Elsayed Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063 (9th Cir. 2002) (noting that an expert was permitted to opine as to the factual issue of discrimination); *Tyus v. Urban Search Management,* 102 F.3d 256, 263-264 (7th Cir. 1997) (reversing the exclusion of two experts in a racial discrimination advertising case and finding that the first expert should be permitted to testify about how an "all-White" advertising campaign affects African-Americans and that district court should reconsider whether to admit a second expert opining on the history and patterns of housing discrimination in Chicago). *Elsayed* is particularly instructive in that although the Ninth Circuit concluded that the lower court had erred in not making a finding of reliability, it did not question the trial court's determination that "testimony concerning . . . whether race was a factor in CSUH's decision to deny *Elsayed* tenure," represented "an ultimate factual issue," not a legal conclusion. *Elsayed*, 299 F.3d 1063.

b. Dr. Marcuse's Report States Conclusions of Fact

Dr. Marcuse renders no opinion on whether the Village has violated the statutes at issue. This is not a case where "the witness repeatedly tracked the exact language of the statutes and regulations which the defendant had allegedly violated and used judicially defined terms." *United States v. Duncan*, 42 F.3d 97, 101-02 (2d Cir. 1994). Instead, the Marcuse Report explains the significance and implications of the Village's zoning decision and interprets racially-charged euphemisms that have been couched in the terminology of urban planners. Dr. Marcuse's analysis is highly fact-intensive, and his exploration of the actors' motives is part of performing a comprehensive examination of the zoning process. Dr. Marcuse offers no legal analysis. He does not urge any particular legal conclusion. The fact that one of his factual conclusions resembles a legal issue in the case—whether defendant acted with "discriminatory intent"— does not render his opinion inadmissible. *See Allen v. City of New York*, 466 F. Supp. 2d 545, 549 (S.D.N.Y. 2006) (expert's opinion that defendants acted "deliberately" was factual conclusion).

Dr. Marcuse concludes that the Village's actions are "consistent with" a historical pattern of discrimination, and that the County's policies are "in keeping with" racial opposition; he did *not* conclude that the Village or County necessarily acted with a discriminatory intent in making their decision to rezone the Social Services Site. *See United States v. Simmons*, 470 F.3d 1115, 1124 (5th Cir. 2006) (testimony that evidence was "consistent with" crime not testimony as to ultimate issue of whether crime occurred). This is a critical distinction. Dr. Marcuse draws upon regional demographic patterns, historical context, and his study of housing discrimination to interpret patterns and themes within the evidence, and gives an opinion on factors that may have

influenced the defendants' decision. In doing so, he does not "attempt to substitute [his] judgment for the jury's." *U.S. v. Duncan*, 42 F.3d at 101 (2d Cir. 1994)[16]

Based on the evidence in the record, Dr. Marcuse concludes that he believes the *residents* of Garden City were motivated by racism ("Residents [of Garden City] made comments that in my opinion appeared motivated by racism"). (Marcuse Report at 8-9.) The residents of Garden City are not on trial. The ultimate question is whether the *defendants* intended to discriminate, and this may be determined through consideration of (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. Whether there is a pattern and practice of discrimination in Garden City and whether the *residents* were racially motivated does indeed touch upon the ultimate issue to be decided by the fact finder — but it is an issue of fact, not law. An expert is permitted to testify on an ultimate issue of fact: "[t]estimony in the form of an opinion of inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a). Dr. Marcuse offers a relevant opinion on the facts at the heart of this case, but the fact finder is left to decide whether Garden City intentionally discriminated against plaintiffs when the Village rezoned the Social Services Site.[17]

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[16] To the extent that an expert opinion does render an opinion on the ultimate issue of law, it bears mention that the proper remedy is to excise the violating portion not to exclude the entire report. *See, e.g., TC Sys. Inc. v. Town of Colonie, New York*, 213 F.Supp.2d 171, 182 (N.D.N.Y. 2002) (striking only those portions of the expert report that expressed legal conclusions).

[17] Garden City also takes issue with Dr. Marcuse's interpretation of a statement in a letter from County Executive Suozzi as the most blatant example of an impermissible conclusive opinion. Garden City claims that it is "not for Dr. Marcuse to impose his own opinion as to the meaning of evidence upon the trier of fact." (GC Br. at 34.) First, Dr. Marcuse does not "impose" his opinion, he simply offers it to assist the fact-finder in interpreting evidence. More importantly however, what is the role of an expert if not to offer his or her opinion as to the meaning of complex evidence (like the unpacking of surreptitious "code" words) – by Garden City's standard nearly all expert testimony would prove improper. That cannot be the law.

4. Garden City's Arguments are Inapposite

Garden City's brief relies heavily on the case of *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272(RPP), 2003 WL 22272587 (S.D.N.Y. Oct. 2, 2003). But, as we have already seen, *Rowe* is readily distinguishable. In *Rowe*, four African American concert promoter agencies brought suit against booking agencies and other concert promoters, alleging a conspiracy to boycott and exclude them from concert promoting opportunities, in violation of 42 U.S.C. § 1981 and the Sherman Act. *Id.* at *1. The *Rowe* court excluded the opinion of the plaintiffs' expert, Professor Joe Feagin, finding that it was unreliable, irrelevant, and arrived at conclusions with respect to an ultimate issue of law.

As alluded to above, Feagin's testimony was grounded in broad-based research about nationwide, systemic, institutional discrimination throughout the national concert promotion industry. *Rowe*, 2003 WL 22272587 at *7. Feagin used research on national discrimination trends, along with a handful of anecdotes, to extrapolate that the four specific plaintiffs had received discriminatory treatment in specific instances. His research on the particular incidents at issue was limited to receiving "accounts of how black business people perceive they have been discriminated against." *Id.* at *8. In contrast, Dr. Marcuse observes regional patterns of discrimination, and draws upon his experience in urban planning to conclude that defendant's actions were consistent with those larger demonstrable trends. In other words, whereas Feagin's report considered generalized, "institutional discrimination" as support for the claims of four individuals, Dr. Marcuse's report focuses on the specific sociological milieu of Garden City and Nassau County to help explain countywide trends that affected large numbers of individuals throughout the region. Moreover, the *Rowe* court found Feagin's report unreliable because he did not perform or rely on "any original sociological research," had not performed any prior

industry-specific studies, and had no academic background in the industry. Plaintiffs have shown in detail throughout this brief that Dr. Marcuse's opinion is both relevant and reliable, and he is unassailably qualified to render an opinion in this case.

Dr. Marcuse does not purport to divine the particular thoughts or motivations of Village officials. He does not instruct the trier of fact to determine that officials were motivated by a discriminatory intent sufficient to constitute a violation of law.[18] He does properly opine on issues to be decided by the trier of fact.

E. THE PROBATIVE VALUE OF DR. MARCUSE'S OPINION IS NOT OUTWEIGHED BY ANY PREJUDICIAL EFFECT

As the argument thus far has demonstrated, Dr. Marcuse's opinion is directly relevant to the issues at the core of the case. Indeed, because the Supreme Court's decision in *Village of Arlington Heights* calls for an analysis of the historical circumstances and specific sequence of events preceding the decision at issue, Dr. Marcuse's testimony could not be more essential. In the face of this, the Village offers little more than a peremptory assertion of prejudice or confusion, which cannot serve to outweigh the highly probative value of Dr. Marcuse's opinion. (GC Br. at 39-40.)

Garden City's reliance solely on *Rowe* to support this point is misplaced. It is not surprising that the court there found that admission of the expert's testimony "would serve to confuse the issues and mislead the jury," *Rowe*, 2003 WL 22272587 at *10, given that the opinion was manifestly deficient for all the reasons detailed above. Unlike Professor Feagin's opinion in Rowe, Dr. Marcuse's opinion here does not exceed the scope of the specific issues of

[18] Even if the Court were to find that Dr. Marcuse is rendering legal conclusions, this is of little consequence in a bench trial, where the "trial judge is quite capable to discern the relevant evidence ... and readily reject an improper inference or intrusion upon its role." *Rondout Valley Cent. Sch. Dist. v. Coneco Corp.*, 321 F. Supp. 2d 469, 480-481 (N.D.N.Y. 2004) (finding that in a bench trial, concerns about whether an expert makes legal conclusion should not generate any alarm because the decision on the law is in the hand of a capable judge).

this case. The discussion of segregation within the Village and surrounding areas is limited to the context of the Village's decision to zone the Social Services Site "R-T."

CONCLUSION

Daubert should be applied only in accordance "with the liberal admissibility standards of the federal rules [as] our adversary system provides the necessary tools for challenging reliable, albeit debatable, expert testimony" at trial. *Amorgianos*, 303 F.3d at 256, 267. Dr. Marcuse's opinion offers all the hallmarks of reliability and relevance and should not be excluded. Thus, for all the foregoing reasons, Garden City's Motion to Exclude Peter Marcuse's testimony should be denied.

Dated: New York, New York
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