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., VIC DEVITA, VERNON GHULLKIE, NATALIE GUERRIDO, LISBETT HUNTER AND FRANCINE MCCRAY, 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' OPPPOSITION TO DEFENDANTS COUNTY OF NASSAU, INCORPORATED VILLAGE OF GARDEN CITY, AND GARDEN CITY BOARD OF TRUSTEES MOTIONS TO DISMISS

February 22, 2006

HOGAN & HARTSON LLP
875 Third Avenue
New York, New York 10022
(212) 918-3000

Attorneys for the Individual Plaintiffs

- and -

LAW OFFICES OF FREDERICK K. BREWINGTON
50 Clinton Street -- Suite 501
Hempstead, NY 11550
(516) 489-6959

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, N.W. -- Suite 5000
Washington, D.C. 20005
(202) 662-8326

Attorneys for Plaintiffs
New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc. and the Individual Plaintiffs

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Plaintiffs New York Association of Community Organizations for Reform Now, New York ACORN Housing Company, Inc., Vic DeVita, Vernon Ghullkie, Natalie Guerrido, Lisbett Hunter and Francine McCray (collectively, "Plaintiffs") hereby respectfully submit this memorandum of law in opposition to defendants' County of Nassau, Incorporated Village of Garden City and Garden City Board of Trustees (collectively, "Defendants") motions to dismiss Plaintiffs' Amended Complaint for Declaratory Judgment and Injunctive Relief, dated November 30, 2005 ("Amended Complaint").[1]

I. PRELIMINARY STATEMENT

In their motions to dismiss this housing discrimination action, Defendants misapply the relevant legal principles articulated by the United States Supreme Court and the Second Circuit, improperly contest certain facts alleged in the Amended Complaint, and simply ignore other critical facts that refute their position. Contrary to Defendant's misguided arguments, Plaintiffs' allegations are more than sufficient to withstand the current motions to dismiss.

As the Amended Complaint clearly alleges, this action is about the decades-old pattern and practice of segregation in Nassau County that has prevented African-American and other Black and Hispanic persons from residing in certain predominantly white communities of Nassau County and has caused the County has become one of the most racially segregated counties in the United States. The most recent example of this discriminatory practice occurred in the Village of Garden City, when the County and the Village acted together to ensure that certain County-owned land in Garden City would be re-zoned in a manner that ensured that affordable housing – which Defendants knew would likely be inhabited predominantly by minorities –

[1] Defendants served their initial motions to dismiss Plaintiffs' initial complaint on or about October 14, 2005. Plaintiffs did not serve opposition papers, but instead filed and served the Amended Complaint on November 30, 2005.

would not be built. This "exclusionary zoning" was undertaken specifically because of racially motivated objections to a zoning proposal that would have permitted the construction of affordable housing. The racially-motivated creation of an obstacle to housing that would have brought minority citizens to live within a nearly all-white community is a clear example of actionable housing discrimination. Despite Defendants' efforts to ignore the allegations of the Amended Complaint, the facts alleged support valid claims of housing discrimination. Defendants' motions must therefore be denied.

II. STATEMENT OF FACTS

A. The Parties

This action is brought by five individual plaintiffs: Vic DeVita, Vernon Ghullkie, Natalie Guerrido, Lisbett Hunter and Francine McCray (the "Individual Plaintiffs"); and two entities, New York Association of Community Organizations for Reform Now ("New York ACORN") and New York ACORN Housing Company, Inc. ("NYAHC"). Plaintiffs Ghullkie, Guerrido, Hunter and McCray are each members of minority groups and have been searching for affordable housing in Nassau County generally, and Garden City specifically, because it is a safe community with access to public transportation, employment opportunities and better schools and parks for children. (Am. Compl. ¶¶ 5-8.) Plaintiff Vic DeVita is a white man who lives in Garden City, less than two miles from the site at issue here. (*Id.* ¶ 4.)

New York ACORN, through its Long Island chapters, is an organization that works to fight discriminatory housing conditions by organizing tenants, advocating against exclusionary governmental decisions and seeking more affordable housing for all residents of Long Island. (*Id.* ¶¶ 10-11.) NYAHC is an experienced non-profit, community-based developer of affordable housing that manages about 700 affordable housing units and has developed projects totaling

over $80 million in the New York area. NYAHC currently seeks to build mixed-income, multi-family housing in Garden City. (*Id.* ¶¶ 12-14.)

The Amended Complaint asserts claims against three defendants: the County of Nassau (the "County"), the Incorporated Village of Garden City (the "Village") and the Garden City Board of Trustees (the "Board of Trustees").[2] (*Id.* ¶¶ 15-17.)

B. The County's History of Segregation

The Amended Complaint alleges that Nassau County has a stark history of housing segregation and is one of the most racially segregated counties in the entire United States. (Am. Compl. ¶ 18.) The County is about 80% white and 17% African-American, other Black or Hispanic (hereinafter, "minority"). (*Id.* ¶¶ 18-19.) However, almost 84% of white County residents live in neighborhoods with virtually all white residents, and almost 64% of minority County residents live in neighborhoods with mostly minority residents. (*Id.* ¶ 20.)

The County has reinforced segregation within its borders for decades through a series of discriminatory policies. (*Id.* ¶ 21.) The County's minority population has a "disproportionate need for affordable housing that is not restricted to elderly persons (that is to say, 'non-age restricted' housing[3])", a fact of which the County is fully aware. (*Id.* ¶ 22.) The County has knowingly and intentionally reinforced segregation through its express policy – recently included in its 2000-2004 Nassau County Consolidated Plan – to develop affordable housing solely in predominantly minority and low income areas of Nassau, such as Roosevelt, Inwood, Hempstead Village, New Cassel and Freeport, and to exclude affordable housing from neighborhoods that are predominantly white. (*Id.* ¶¶ 22, 24.)

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[2] Unless otherwise specified, the "Village" includes both defendants Incorporated Village of Garden City and the Garden City Board of Trustees.

[3] Unless otherwise indicated, the term "affordable housing" refers to non-age restricted affordable housing.

To effectuate its discriminatory policies, the County supports and acquiesces in efforts by towns and villages in Nassau County to pass exclusionary zoning laws and ordinances that often prevent development of affordable housing. (*Id.* ¶ 23.) The County also maintains a policy to prevent developers interested in constructing affordable multi-family housing from buying County-owned properties in predominantly white communities. (*Id.* ¶ 32.) However, the County has repeatedly promoted the sale of County-owned land in predominantly minority communities to developers who intend to build affordable housing. (*Id.* ¶ 32.) Additionally, the County misuses federal funding intended for the promotion of racial integration by directing such funding to develop affordable housing only in low income, heavily minority communities, and not in predominantly white communities like Garden City. (*Id.* ¶¶ 26-28.) The County carries out these discriminatory policies with the "purpose, intent or foreseeable effect of perpetuating racial and ethnic housing segregation throughout Nassau County." (*Id.* ¶ 32.)

C. The Village's History of Segregation

Garden City is, and for decades has been, a highly segregated, nearly all-white residential enclave. (Am. Compl. ¶ 36.) In fact, the Village claims just 23 African-American households, representing only 1% of Garden City's total population. (*Id.* ¶ 37.) All told, Garden City is almost 95% white, although it remains surrounded by the Village of Hempstead, which is about 84% minority; Uniondale, which is 79% minority; and Westbury, which is 43% minority. (*Id.* ¶¶ 37-38.) The Village has "continuously acted to reject and obstruct the creation of any affordable and integrated multi-family housing opportunities by engaging in exclusionary zoning practices" for the intent or foreseeable effect of excluding minorities from Garden City. (*Id.* ¶ 39.) The Village has blocked prior efforts to construct affordable housing within the Village, and has not permitted *any* affordable housing to be developed within its borders – even while it

has permitted the development of nine-story multi-family luxury condominiums of much greater density than the housing proposal blocked in this case.[4] (*Id.* ¶¶ 40-42.)

D. The Social Services Site

The most recent example of the County's and Garden City's discriminatory housing practices involves a County-owned 25-acre parcel of land within Garden City located at 101 County Seat Drive (the "Social Services Site" or the "Site"). (Am. Compl. ¶ 45.) Currently housing a courthouse, County administration buildings, and parking facilities, the Social Services Site is comprised mostly of a 21.44-acre portion on the eastern side of County Seat Drive and a 3.03-acre portion on the western side. (*Id.* ¶¶ 45-46.) In December 2003, the County announced its Real Estate Consolidation Plan ("Consolidation Plan") to consolidate County operations and sell certain County-owned properties no longer needed for efficient running of the County. (*Id.* ¶ 44.) Among other things, the Consolidation Plan ordered a relocation of County operations at the Social Services Site in preparation to sell the Site to a private developer. (*Id.* ¶ 48.) The Social Services Site presented a unique opportunity to create an affordable housing development for a panoply of reasons, including its proximity to public transportation, shopping and employment opportunities, and location in a high-quality school district – necessities vital to residents in an affordable housing development. (*Id.* ¶ 50.)

In order to facilitate the sale of the Social Services Site to a private developer, the County sought the Village's cooperation to rezone the Site from public use to non-governmental use. (*Id.*

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[4] In addition to its zoning decisions, Village officials "have engaged in open and notorious conduct to exclude minority persons from Garden City, its public parks, public streets and public schools." (Am. Compl. ¶ 43.) In one instance in 1970 – after yet another round of vociferous objections from its residents – the Village rejected an application to open a day care center in Garden City for 35 children, most of whom would have been African-American from surrounding low-income communities. (*Id.*) The New York State Attorney General also recently found that the Village regularly asks minority non-residents to vacate its public parks without acting to exclude white non-residents. (*Id.*) And numerous African-Americans have reported being harassed by the Village police while traveling within Garden City. (*Id.*)

¶ 49.) The County repeatedly consulted with the Village, through its Board of Trustees, about the disposition of the Social Services Site during the preparation of the Consolidation Plan. (*Id.* ¶ 47.) In response to a request from the County, the Board of Trustees appointed a committee to consider re-zoning the Social Services Site, called the "P Zone Committee," and hired the consulting firm of Buckhurst Fish & Jacquemart Inc. ("BFJ") to assist in drafting proposals for the Site. (*Id.* ¶ 51.) The P Zone Committee, the County and BFJ worked on proposals throughout 2003 and held public workshops to discuss the Social Services Site's development. (*Id.* ¶¶ 52-53.)

BFJ's zoning proposal advocated a new zoning designation called "CO-5b" on the Social Services Site (the "Proposed Zoning"), presented for public hearing in January and February 2004. (*Id.* ¶¶ 54, 59.) The Proposed Zoning relied on and utilized existing residential multi-family zoning controls, referred to as "R-M" zoning, and allowed multi-family apartments as well as single-family homes and townhouses. (*Id.*) The Proposed Zoning's density and lot-size restrictions allowed for a maximum of 355 affordable housing units to be constructed on the Social Services Site. (*Id.* ¶ 55.)

BFJ's proposal expressly contemplated the construction of a 311-unit multi-family housing development on the Social Services Site ("Proposed Plan") under the Proposed Zoning – which also allowed each unit to be constructed of a sufficiently small size and of sufficiently high density so that development of affordable multi-family housing was economically feasible. (*Id.* ¶¶ 56-58.) Thus, the Proposed Plan clearly provided for zoning that would permit the

construction of affordable housing and proposed the construction of a 311-unit multi-family housing development.[5]

E. The County and Village Collaborate to Block Affordable Housing on the Social Services Site

During hearings on the Proposed Zoning on January 8 and February 5, 2004, Garden City residents "vociferously objected" to the construction of affordable multi-family housing on the Social Services Site, and sought repeated assurances from the Village and County officials who were present that no such affordable multi-family housing would be built on the Social Services Site. (Am. Compl. ¶ 60.) Upon information and belief, the public opposition was racially motivated.[6] (*Id.*) In response to the outcry by the Village residents, the County assured Garden City residents, during the public hearings and at other times, that the County would not take any action antagonistic to the Village's wishes and agreed to act with the Village to reject the Proposed Plan and to permit only luxury housing on the Social Services Site. (*Id.* ¶ 61.) The County did so knowing that luxury housing was likely to attract predominantly white residents, but rationalized that given "the character of Garden City," only such housing "would be appropriate." (*Id.*)

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[5] Plaintiffs do not claim that the Proposed Plan specifically referenced affordable housing, despite the Village's argument to the contrary. (Village Mem. at 4.) It is clear, however, that the Proposed Zoning permitted the construction of affordable housing. (Am. Compl. ¶ 58.)

[6] Plaintiffs also allege that the racially-motivated opposition to affordable housing has a long history in Nassau County. For instance, in 1974 the Eastern District of New York expressly found that opposition to affordable, integrated housing in Nassau County was racially motivated:

> It is clear from all the evidence that community opposition to this form of housing has been racially motivated. In Nassau County low-income family housing is predominantly occupied by Blacks. Proposals for the construction of this form of housing have incurred immediate and vehement opposition. 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. *Acevedo et al. v. Nassau County et al.*, 369 F. Supp. 1384, 1389 (E.D.N.Y. 1974).

(Am. Compl. ¶ 33.)

The Village rejected the Proposed Plan and Proposed Zoning prepared by its *own consultants* – and along with it, the possibility of constructing affordable housing on the Social Services Site. (*Id.* ¶ 63.) In its place, the Village adopted a brand new zoning classification, R-T, for the Social Services Site (the "Special Zoning") (*Id.*) that the Village characterizes as "consistent with the character of the surrounding neighborhood." (Village Mem. at 2.) The Special Zoning was "unique to, and expressly limited to the Social Services Site" and foreclosed the opportunity to construct affordable housing by imposing "stringent and unique limitations on multi-family housing unlike those found elsewhere in the Village's zoning regulations." (Am. Compl. ¶ 64.) In short, by imposing unique and significant lot size and density requirements, the Special Zoning ensured that "the only economically feasible development on the Social Services Site will be of luxury single-family homes and townhomes . . . likely to attract and to be inhabited by predominantly white residents."[7] (*Id.* ¶ 68.)

The Village claimed that it rejected the Proposed Zoning and adopted the Special Zoning due to concerns relating to increasing traffic and potential burdens on the Garden City schools that would arise from construction of the proposed housing on the Social Services Site. (*Id.* ¶ 70.) But analysis from the Village's own consultants show that both the Proposed Plan that was rejected and the Special Zoning adopted by the Village would have a negligible impact on both traffic and school population. (*Id.* ¶¶ 70-72.) Pretextual justifications aside, the Village's true motivation for rejecting the Proposed Zoning was its desire to block affordable housing in Garden City and further perpetuate segregation. (*Id.* ¶ 73.)

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[7] The Special Zoning permits multi-family housing on the narrow 3.03 acre plot on the western side of the Social Services Site only if special permission is obtained from the Village. (Am. Compl. ¶ 65.) As a result, the Special Zoning permits at most the possibility of about 36 affordable housing units – a fraction of the 311 affordable units that the Proposed Plan and Proposed Zoning permitted – and those may be developed only if further special permission is granted by the Village. (*Id.*) As the Village's track record makes clear, such special permission is unlikely to be granted. (*See, e.g., id.* ¶¶ 36-42.)

F. The County's RFP

With the Special Zoning in place, the County issued a Request for Proposals ("RFP") in July 2004 to develop the Social Services Site, setting the purchase price for the Social Services Site at $30 million. (Am. Compl. ¶ 76.) NYAHC and other affordable housing developers were interested in constructing multi-family affordable housing on the Social Services Site, "but did not respond to the RFP because of the restrictive Special Zoning." (*Id.* ¶ 81.) The Village's Special Zoning made development of affordable housing impossible on the Social Services Site and "[d]evelopers of affordable housing, including plaintiff NYAHC, were unable to respond to the RFP with a proposal that complied with the Special Zoning because the discriminatory Special Zoning made it economically infeasible to develop affordable housing given its limitations on permitted density." (*Id.* ¶ 77.)

Nonetheless, in response to the County's RFP, NYAHC and a chapter of New York ACORN presented "an alternative proposal for leasing the Social Services Site that would enable the County to meet its financial objectives while still providing affordable multi-family housing in Garden City." (*Id.*) Under this proposal, NYAHC would lease the Social Services Site from the County and would develop multi-family housing containing both affordable units and units at market prices, with rents for the affordable units based on the tenant's income and family size as compared to the Nassau County area median income. (*Id.* ¶ 78.) After presenting the proposal to the County, NYAHC forwarded supporting financial information to the County. (*Id.* ¶ 77.) Later, after an August 2004 meeting, NYAHC sent additional information, particularly with respect to the proposed lease payments, in response to a request from the County. (*Id.*) But the County never responded to NYAHC's proposal. (*Id.* ¶ 79.)

NYAHC also drafted an alternative proposal that sought to meet the County's proposed purchase price and still comply with the Proposed Zoning. (*Id.* ¶ 80.) These alternative

development plans provide for the construction of a multi-family housing development containing approximately 300 units, a portion of which would be affordable units for families with low and moderate incomes and others of which would be market-rate units.[8] (*Id.*)

The County ultimately selected developer Myron Nelkin to develop the Social Services Site to include only luxury, single family dwellings and townhomes, "likely to attract only or virtually only white residents, and unlikely to provide racially integrated housing opportunities", without including any affordable or integrated housing. (*Id.* ¶¶ 82-83.)

III. ARGUMENT

A. Standards on the Motion to Dismiss

A complaint may only be dismissed for failure to state a claim under Rule 12(b)(6) if it is "beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); s*ee Fair Hous. in Huntington Comm. v. Town of Huntington*, No. 02-CV-2787 (DRH) (WDW), 2005 WL 3184273, at * 3 (E.D.N.Y. Nov. 29, 2005) (FHA claims sustained "at this early stage in the litigation"). This rule "is to be applied with particular strictness when the plaintiff complains of a civil rights violation." *Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991). The same standard applies to motions to dismiss under Rule 12(b)(1) for lack of standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Fair Hous. in Huntington Comm., Inc. v. Town of Huntington*, 316 F.3d 357, 362 (2d Cir. 2003).

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[8] Under NYAHC's alternative plan, the affordable housing units would include one, two, and three bedroom rental apartments with an average size of 1000 square feet and average rents substantially similar to those contained in NYAHC's original proposal, with certain units available for families receiving Section 8 housing assistance. (Am. Compl. ¶ 80.) NYAHC intended to fund this alternative plan through tax-exempt bonds, the low income housing tax credit, and other subsidies, such as federal HOME funds. (*Id.*) NYAHC spent numerous hours developing its alternative proposal. (*Id.*)

Material facts alleged in the Amended Complaint must be taken as true, and all inferences arising from these facts must be drawn in Plaintiffs' favor. *See id.*; *Fair Hous. in Huntington Comm.*, 2005 WL 3184273, at * 3. While Defendants improperly dispute the factual elements of the Amended Complaint throughout their briefs, the Supreme Court has made clear that "[f]or purposes of ruling on a motion to dismiss for want of standing, [the court] must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."[9] *Warth*, 422 U.S. at 501. Thus, "to the degree that defendants challenge the factual underpinnings of the allegations made by plaintiffs in support of their standing to bring suit, the argument is premature." *Fair Hous. in Huntington Comm.*, 316 F.3d at 361. That is, so long as Plaintiffs have adequately *alleged* that they have suffered a personal injury caused by Defendants and that the relief sought here would be substantially likely to redress it, Plaintiffs have standing to bring these claims.

B. Plaintiffs Have Alleged Standing Sufficient To Maintain Their Claims

Defendants contend that Plaintiffs' claims should be dismissed because they fail to establish the elements of standing necessary to bring constitutional and statutory claims. Defendants also argue that plaintiff New York ACORN lacks standing to bring claims on behalf of its members. These arguments are without merit.

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[9] Citing to documents and other facts not mentioned in the Amended Complaint, for instance, the Village argues that Plaintiffs' allegations regarding BFJ's Proposed Plan are incorrect because the Proposed Plan was merely a preliminary proposal. (Village Mem. at 4-5.) However, on a motion to dismiss only the facts stated in the complaint or documents incorporated by reference may be considered. *See Great Atlantic & Pacific Tea Co. v. Town of East Hampton*, 997 F. Supp. 340, 346 (E.D.N.Y. 1998). Moreover, not only is consideration of additional facts improper at this stage, but the Village's proffer of facts is inaccurate. The documents submitted by the Village do not contradict the facts alleged in the Amended Complaint, but rather show that the 311-unit multi-family development proposed by BFJ was contained in all of BFJ's proposals, except for its final proposal – the proposal submitted *after* the racially-motivated objections from the Village took place, and *after* the County pledged its support to only luxury housing on the Site, and *after* the Proposed Plan was rejected and replaced by the Special Zoning. (Affidavit of James G. Ryan, sworn to on January 20, 2006, Exs. B-G.) Put simply, the "facts" proffered by the Village are simply a *non-sequitur*, focused on the period after Defendants' primary discriminatory zoning action took place.

1. Standing to Bring Constitutional Claims

In order to establish standing to assert claims under the Equal Protection Clause and Sections 1981, 1982, and 1983,[10] Plaintiffs must establish a "personal stake" in the outcome of the case so as to "justify exercise of the court's remedial powers on [their] behalf." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977). Thus, Plaintiffs must demonstrate that they have been injured and that the injury is fairly traceable to the actions or omissions of the Defendants. *Id.*

The crux of Defendants' argument on standing is that the Amended Complaint fails to allege a "substantial probability" that affordable housing would be constructed on the Social Services Site absent the actions of the Defendants. This argument misconstrues both the law and the allegations in the Amended Complaint.

The Amended Complaint clearly alleges that:

- The Proposed Plan would have permitted the construction of a 311-unit multi-family affordable housing development (Am. Compl. ¶ 58);
- Defendants knew that minorities were likely to inhabit any affordable housing units that were constructed on the Site (*Id.* ¶¶ 41-42, 62);
- The objections to the Proposed Plan were racially motivated (*Id.* ¶ 60);
- Faced with these racially motivated objections, Defendants rejected the Proposed Plan and imposed a newly created zoning structure on the Site that imposed severe restrictions and made it economically unfeasible for a developer to build anything other than luxury housing on the Site (*Id.* ¶¶ 63, 68);
- NYAHC, an experienced developer of affordable housing units, seeks to build affordable housing on the Social Services Site and has developed specific proposals to do so (*Id.* ¶¶ 12-14, 77-80); and
- The County entered into a contract to sell the property to a developer who intends to build only luxury housing (*Id.* ¶¶ 82-83).

[10] Plaintiffs' standing to assert claims under Sections 1981, 1982 and 1983 is determined utilizing the same analysis used to determine standing for constitutional violations. *See Huntington Branch, NAACP v. Town of Huntington*, 689 F.2d 391 (2d Cir. 1982) ("*Huntington I*"); *Jackson v. Okaloosa County*, 21 F.3d 1531, 1539 (11th Cir. 1994).

These allegations are clearly sufficient to establish standing, as exemplified by *Arlington Heights*, a decision that Defendants ignore. In *Arlington Heights*, the plaintiffs claimed that the Village of Arlington Heights improperly engaged in exclusionary zoning when it denied a requested zoning change to a parcel of land on which a non-profit housing developer sought to build an affordable housing project. There, as here, the Village voted against the requested zoning change after receiving racially-motivated public opposition to the change at several public hearings. 429 U.S. at 258-59. The developer and three individual plaintiffs brought claims alleging that the denial was a result of racial discrimination. *Id.* at 259. In its analysis of the plaintiffs' standing to bring claims, the Supreme Court found that the developer's interest in constructing affordable housing on the site was sufficient to establish the "personal stake" necessary to establish its standing in the controversy and that its injury was "likely to be redressed by a favorable decision." *Id.* at 262-63 (internal citations omitted). The Court noted that the standing "stem[med] not from a desire for economic gain, but rather from an interest . . . in making suitable low-income housing available in areas where such housing is scarce." *Id.* at 263. Thus, even though the remedy sought by plaintiffs would not guarantee that the project at issue would be built, the Court found that the standing requirement was satisfied because the exclusionary zoning decision was "an absolute barrier" to the construction of the housing that plaintiffs sought to build, and the injunction sought would remove that barrier. *Id.* at 261-62.

The Second Circuit has similarly granted standing to plaintiffs seeking to remove barriers imposed by exclusionary zoning practices. In *Huntington Branch I*, a developer, an advocacy group, and several individual plaintiffs challenged an exclusionary zoning ordinance of the Town of Huntington. Although the district court dismissed the case for lack of standing, the Second Circuit reversed, finding that the plaintiffs had made sufficient efforts to build housing in

Huntington to establish standing for constitutional purposes. In discussing the necessary elements of standing, the Court noted that the requirement for redressability "is not a demand for complete certainty." *Id.* at 394. Rather, the Court stated, "[a]ll that is required is a showing that such relief be reasonably designed to improve the opportunities of a plaintiff not otherwise disabled to avoid the specific injury alleged." *Id.* at 394. In particular, the Court noted that some of the certainty regarding the ability to build a particular project is naturally dependent on first obtaining the zoning changes necessary to pursue certain steps toward development. *Id.* at 394.

This view was echoed by the Eleventh Circuit in *Jackson*. In that case, the Court held that an African-American plaintiff who wished to live in a proposed housing project in a non-minority area had standing to pursue her claims because she was eligible and desired to live in the housing, and there was a substantial likelihood that if the exclusionary zoning ordinance were overturned, the housing would be built and she would move into it. *Id.* at 1537-38. As in *Huntington Branch I*, the Court noted that standing does not require a guarantee that the housing at issue will be constructed or that the plaintiff would live in it, noting that to require "absolutely certainty 'would be to close our eyes to the uncertainties which shroud human affairs.'"[11] *Id.* at 1541. As the precedents show, while Plaintiffs have not alleged that absent the Special Zoning it is an absolute certainty that affordable housing would have been developed under the Proposed Zoning, such certainty is not required – all that is necessary is that Plaintiffs sufficiently allege

[11] *See also Keith v. Volpe*, 858 F.2d 467, 477 (9th Cir. 1988) (plaintiffs had standing to challenge exclusionary zoning because they were eligible to live in proposed housing project, wished to do so, and overturning the zoning would redress the injury suffered in not being able to live in housing at issue; developer plaintiff also had standing because denial of its zoning applications was an absolute barrier to constructing the housing that it planned to build, and granting the relief requested would redress that injury); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 139 (3d Cir. 1977) (plaintiffs had standing to challenge local government decisions which obstructed construction of planned public housing development because plaintiffs sought to live in housing development, were qualified to do so if it were completed, and defendants' actions prevented it from being completed).

that Defendants took steps to absolutely preclude the possibility that affordable housing could be developed on the Site – which is clearly the case here.

Despite this case's strong likeness to *Arlington Heights* and *Huntington Branch I*, Defendants rely almost exclusively on *Warth*, a case distinguishable on its facts and decided five years before *Arlington Heights*. Unlike the facts here, *Warth* concerned a group of plaintiffs' general grievance with a town zoning ordinance that applied to all vacant lots within the town's boundaries and did not involve a zoning decision that foreclosed them from developing affordable housing on a specific plot of land. *Id.* at 494-95. The *Warth* holding rested upon the fact that no developer had a specific and continuing plan to build on a specific plot of land, and thus the Court determined that even if the exclusionary zoning were struck down, there was no "substantial probability" that any housing affordable for the plaintiffs would ever be built. *Id.* at 504. Here, however, Plaintiffs do allege that a specific plaintiff, NYAHC, seeks to build affordable housing on the Social Services Site and has developed specific plans to do so. NYAHC is an experienced builder of affordable housing and has been actively seeking opportunities to develop affordable housing in Nassau County, and Garden City in particular, over the past few years. (Am. Compl. ¶¶ 12-14.) NYAHC is ready, willing, and able to build affordable housing on the Social Services Site, and has developed specific plans on how it could do so under the Proposed Plan that defendants rejected for discriminatory reasons. (*Id.* ¶ 80.) NYAHC also submitted a formal bid to develop affordable housing on the Social Services Site to the County. (*Id.* ¶¶ 77-79.) Although this bid did not comply with the Special Zoning (because the Special Zoning prohibited affordable housing) and involved a proposal to lease rather than purchase the land, it is further evidence of NYAHC's ability and commitment to developing

affordable housing on the Social Services Site. No such similar allegations were at issue in *Warth*.

2. Standing Under the Fair Housing Act

Defendants also challenge Plaintiffs' standing to assert claims under the Fair Housing Act ("FHA"). Contrary to Defendants' arguments, Plaintiffs have easily satisfied the standing requirements for bringing this statutory claim.

As the Supreme Court noted in *Warth*, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" *Warth*, 422 U.S. at 500 (internal citations omitted). In the case of the FHA, Congress granted standing to any "aggrieved person" – including associations and unincorporated organizations – alleging a discriminatory housing practice.[12] 42 U.S.C. §§ 613(a)(1)(A); 3602(d). Consistent with these statutory provisions, the Supreme Court has interpreted the FHA to provide the broadest possible standing available under Article III.[13] *See Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111-15 (1979). Indeed, the Village concedes that standing under the FHA is broader than for the constitutional claims. (Village Mem. at 15.) Thus, there is no question that having satisfied the standing requirements for its constitutional claims, Plaintiffs have sufficiently alleged standing under the broad standards of the FHA.

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[12] An aggrieved person is any "person who claims to have been injured by a discriminatory housing practice; or believes that [he/she] will be injured by a discriminatory housing practice that is about to occur." 42 U.S.C. § 3602(i).

[13] The clearly-plead injuries suffered by each plaintiff as a result of Defendants' discriminatory zoning practices are sufficient to establish their standing to bring claims under the FHA because the Supreme Court has held that courts may not apply prudential standing restrictions to FHA plaintiffs. *See, e.g., Gladstone*, 441 U.S. at 103 n.9 ("the normal prudential rules do not apply" where a plaintiff suffers actual injury as a result of defendant's conduct); *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991) ("The Fair Housing Act embraces a broad concept of standing and courts lack the authority to create prudential barriers to standing in suits brought under that Act.") (citing, *inter alia*, *Gladstone* and *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 375 (1982)), *aff'd in part, rev'd in part*, 67 F.3d 412 (2d Cir. 1995).

Plaintiffs' FHA standing in this action is supported by the Second Circuit's decision in *Fair Hous. in Huntington Comm. v. Town of Huntington*, 316 F.3d 357 (2d Cir. 2003). In that case, the Second Circuit held that standing to assert claims under the FHA requires only a minimal allegation of injury in fact, such as an allegation that a defendant's conduct has violated the plaintiffs' right to live in an integrated community. 316 F.3d at 362. On that basis, the Court held that plaintiffs had standing under the FHA because their complaint asserted that the Town was and historically had been segregated, and that its plan for development of senior housing would further exacerbate the segregation. *Id.* at 363. Like the plaintiffs in *Fair Housing in Huntington*, the Plaintiffs in this case have adequately alleged their standing to bring FHA claims; housing within Nassau County is highly segregated; Garden City is and historically has been a highly segregated, nearly all-white enclave within Nassau County; Defendants' exclusionary zoning has deprived Plaintiffs of their right to equal access to housing without discrimination; Defendants' conduct deprives Plaintiffs of their rights to live in an integrated community and the accompanying benefits of interracial associations;[14] and Defendants' exclusionary zoning has deprived NYAHC of its rights to make housing available. (Am. Compl. ¶¶ 18-19, 36, 97.) Therefore, under *Fair Housing in Huntington*, Plaintiffs have adequately established their standing to challenge the exclusionary zoning under the FHA, and Defendants' motion to dismiss Plaintiffs' FHA claims for lack of standing should be denied.

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[14] Defendants improperly contend that Plaintiff DeVita's standing to bring FHA claims is derivative and a result of being "indirectly affected by injuries to others." (County Mem. at 15-16.) As a result of Defendants' exclusionary zoning, which has the purpose and effect of excluding minorities from Garden City, Plaintiff DeVita has suffered personal injury to his right under the FHA to reside in an integrated community. He thus has standing to assert claims under the FHA. *Fair Hous. in Huntington*, 316 F.3d at 362; *see also Trafficante*, 409 U.S. at 210-11 ("the proponents of the [FHA] emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered .... The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is ...the whole community."); *Gladstone*, 441 U.S. at 103 n.9; *LeBlanc-Sternberg*, 781 F. Supp. 261. Moreover, Defendants have improperly read the Amended Complaint; as is made clear in the Second and Third Causes of Action, Plaintiff DeVita does assert claims under Sections 1981 and 1982.

3. Defendants' Argument That NYAHC Does Not Have Standing Fails

Relying once again on *Warth*, Defendants argue that NYAHC lacks a sufficient personal stake in this case because it has no "property right" in the Social Services Site.[15] *Warth*, however, is inapposite. In that case, no plaintiffs were developers, and although an association of builders sought to intervene in the case, the organization was denied the right to intervene because none of its members had any specific plans or proposals to build on any specific plot of land. *Warth*, 422 U.S. at 516. This case is more like *Arlington Heights*, in which a developer-plaintiff brought claims relating to a specific proposal on a specific parcel of land. In *Arlington Heights*, the Supreme Court found that the developer had suffered the requisite personal injury to establish standing not only as a result of the dollars and hours it spent on the project, but also because of its interest in building the project at issue.[16] 429 U.S. at 263. The Court noted that the non-profit developer's desire to make "suitable low-cost housing available in areas where such housing is scarce" was injured by the exclusionary zoning decision of the Village, and that the developer's desire to make such housing available according to the specific plan at issue was not the type of "mere abstract concern" presented by the plaintiffs in *Warth*. *Id.* at 263. Thus, it is clear that NYAHC's own desire, as a non-profit developer of affordable housing, to build affordable housing available on the Social Services Site is a personal stake that has been concretely affected by Defendants' actions.[17] Contrary to Defendants' arguments, NYAHC does

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[15] The Village apparently believes that NYAHC must satisfy "organizational standing" requirements in order to assert claims under the FHA. (Village Mem. at 11-12.) However, as made clear above, NYAHC is a "person" within the definition of the FHA and as such asserts its claims in the same manner as the Individual Plaintiffs in this case.

[16] The Village apparently believes that NYAHC is a membership organization and that it is bringing claims on behalf of its members. (Village Mem. at 13-15.) NYAHC is not a membership organization and does not assert such standing.

[17] The Village argues that New York ACORN and NYAHC lack standing to assert the constitutional claims because of prudential limitations on Article III standing. (Village Mem. at 14-15.) The precedents cited by the Village are irrelevant in that they discuss third-party standing to assert claims on behalf of others. Here, NYAHC asserts claims

not need a direct "property right" in the Social Services Site to establish standing to bring its claims.[18] *See Warth*, 422 U.S. at 508 n.18 (plaintiffs challenging zoning ordinances need not have "a present contractual interest in a particular project").

4. Defendants' Argument That Individual Plaintiffs Do Not have Standing Fails

Defendants have relied on *Warth* to support their contention that the Individual Plaintiffs lack standing to assert their claims. Again, this argument misinterprets *Warth* and other applicable case law and ignores relevant precedents and the facts alleged in the Amended Complaint.

In *Warth* the Supreme Court found that the individual plaintiffs lacked standing because the complaint did not contain even "the slightest suggestion" that any of the plaintiffs could afford or intended to move into a particular housing arrangement that was being blocked by exclusionary zoning. *Warth*, 422 U.S. at 505, 506. On the other hand, in *Arlington Heights,* the Supreme Court found that an individual plaintiff had standing based on the allegation that "his quest for housing near his employment has been thwarted by official action that is racially discriminatory." 429 U.S. at 264. The Court noted that if it granted the relief sought, there would be a "substantial probability that the ... project will materialize, affording [him] the housing opportunity he desires in Arlington Heights." *Id.* Noting that the courts should not

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for its own personal injury, and New York ACORN asserts claims on behalf of its members. As discussed below, the Amended Complaint adequately alleges the elements necessary to establish standing for its members. Moreover, courts have frequently granted advocacy organizations and developers standing to challenge exclusionary zoning under Sections 1981 and 1982. *See, e.g., Village of Arlington Heights*, 429 U.S. 252 (developer as plaintiff); *Huntington Branch I,* 689 F.2d 391 (advocacy organization as plaintiff); *Keith,* 858 F.2d 467 (developer as plaintiff); *Resident Advisory Bd.*, 564 F.2d 126 (advocacy group as plaintiff).

[18] Rather, NYAHC's standing to bring fair housing claims was established at the time of the discriminatory actions taken by Defendants, *i.e.*, such as Defendants' actions to block the Proposed Zoning and substitute an exclusionary proposal. The County's argument (County Mem. at 18) that NYAHC somehow lost its standing when its initial proposal contemplated leasing, rather than buying, the Site has no precedent in fair housing jurisprudence – and the County cites none.

"engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy," the *Arlington Heights* Court found that the individual plaintiff had "adequately averred an 'actionable causal relationship' between Arlington Heights' zoning practices and his asserted injury." *Id.* at 261-62, 264.

In this action, Plaintiffs Ghullkie, Guerrido, Hunter, and McCray have clearly alleged that they could afford and would seek to move into affordable housing units of the type that NYAHC is seeking to and could construct on the Social Services Site.[19] (Am. Compl. ¶ 87.) Moreover, the Amended Complaint alleges that the racially-motivated rejection of the Proposed Zoning and the Proposed Plan deprives the Individual Plaintiffs of their rights to live in a racially integrated community, as well as the associated benefits of interracial associations that come with such housing opportunities. (*Id.* ¶¶ 90-93.) It also alleges that the rejection of the Proposed Zoning and the Proposed Plan deprives the Individual Plaintiffs of their rights to make contracts, purchase or lease property, and equal access to housing. (*Id.* ¶¶ 98-103.) Clearly, Plaintiffs have alleged personal injuries, caused by the Defendants, which would be redressed by the remedies Plaintiffs seek.[20]

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[19] The County complains that the Amended Complaint fails to define "affordable" and "luxury". (County Mem. at 2, 4, 6.) However, the County fails to cite to any precedent making these definitions relevant to the sufficiency of the claims alleged. Moreover, the Amended Complaint sufficiently defines these terms as they relate to the injury alleged. First, Plaintiffs expressly state that "luxury" housing is housing "likely to attract predominantly white residents" (Am. Compl. ¶ 61) and housing below market pricing is "affordable." (*Id.* ¶ 78.) Second, Plaintiffs have clearly identified the disparity between "affordable" and "luxury" housing based on the ability of Ghullkie, Guerrido, Hunter and McCray to reside in it. Plaintiffs specifically allege that Ghullkie, Guerrido, Hunter and McCray meet the income requirements for affordable housing under NYAHC's first proposal, and can afford to live in the affordable units NYAHC proposed to build under either of its proposals. (*Id.* ¶¶ 78, 87.) But Plaintiffs Ghullkie, Guerrido, Hunter and McCray will not be able to reside in Garden City unless more affordable housing is constructed. (*Id.* ¶ 88.)

[20] Defendants also rely on *Hope, Inc. v. County of DuPage*, 738 F.2d 797 (7th Cir. 1984) and *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086 (6th Cir. 1985). However, like *Warth*, both cases are distinguishable from the present facts on several grounds. In both cases, plaintiffs failed to allege that defendants' exclusionary zoning practices created a barrier to any particular housing development. *See Hope*, 738 F.2d at 807; *Jaimes*, 758 F.2d at 1096. Moreover, plaintiffs in both cases failed to allege that any developers or other third parties were ready, willing, and able to build affordable housing in the zoned area if the challenged ordinance were overturned. *Hope*, 738 F.2d at 807; *Jaimes*, 758 F.2d at 1096-97. Additionally, the plaintiffs never alleged that they desired or intended to live in a

5. Defendants' Argument That The New York ACORN Does Not Have Associational Standing Fails

As the Amended Complaint makes clear (and contrary to the Village's contentions[21]), New York ACORN asserts claims not on its own behalf, but solely on behalf of its members. An association may bring suit on behalf of its members when (1) the members would have standing to sue in their own right, (2) the interests that the suit seeks to protect are germane to the plaintiff's organizational purpose, and (3) neither the claim nor the relief sought require the participation of individual members of the organization. *Eastern Paralyzed Veterans Ass'n., Inc. v. Lazarus-Burman Assocs.*, 133 F. Supp. 2d 203, 210 (E.D.N.Y. 2001), citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 US 333, 334 (1977).

Here, Plaintiff New York ACORN is an advocacy organization which, among other things, seeks to improve the availability of affordable and racially-integrated housing opportunities for its members and within Long Island. (Am. Compl. ¶ 10.) The exclusionary zoning practices which New York ACORN seeks to prevent through this lawsuit are directly germane to its organizational purpose. Furthermore, the Amended Complaint lists numerous claims of New York ACORN, each of which could be brought by the organization's members in their own right.[22] For example, New York ACORN alleges that its members have been deprived of opportunities to live in integrated communities, and that they have been subject to racially discriminatory housing practices, such as the exclusionary zoning in Garden City, throughout

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proposed project or that if it were constructed there was a substantial probability that they would be able to obtain housing there. *Hope*, 738 F.2d at 807 n.3; *Jaimes*, 758 F.2d at 1096-97.

[21] The Village improperly believes that New York ACORN asserts the claims in the Amended Complaint on its own behalf. (Village Mem. at 8-11.) Because New York ACORN asserts its claims only in a representative capacity, (Am. Compl. ¶ 9), we have not responded to the arguments that the Village has made about organizational standing. As described above, New York ACORN has adequately satisfied the requirements to challenge Defendants' exclusionary zoning on behalf of its members.

[22] Contrary to the statements in the Village's brief (Village Mem. at 13-14), New York ACORN does not assert any claims under Section 1983. Thus, we have not responded to its discussion about organizational standing under Section 1983. And, as noted above, NYAHC is not a membership organization and does not assert such standing.

Nassau County. (Am. Compl. ¶ 11.) The efforts of New York ACORN members to find affordable housing in non-minority communities within Nassau County is frustrated by the exclusionary zoning in Garden City and other segregative housing practices within the County. (*Id.*) Specifically, Defendants' denial of the proposed zoning deprives ACORN members of the opportunity to find suitable affordable housing outside areas of minority concentration within Nassau County, of access to basic public services such as parks, transportation and educational facilities, and of opportunities to live in racially integrated communities and the benefits of interracial associations. (*Id.* ¶¶ 92-93.) Because of the injuries alleged and the injunctive relief sought, litigation of ACORN's claims does not require the participation of its members. Thus, New York ACORN has adequately established its standing to assert its claims on behalf of its members on a representative basis.

C. Plaintiffs Have Adequately Pleaded Claims For Which Relief Can Be Granted

1. Plaintiffs Have Adequately Pleaded Their FHA Claims

Defendants argue that Plaintiffs failed to properly assert violations of the FHA. (County Mem. at 19-22; Village Mem. at 17-21.) The FHA forbids, *inter alia*, racial discrimination in connection with the sale or rental of housing, *see Fair Hous. in Huntington Comm.*, 2005 WL 3184273, at * 2, as well as actions which "otherwise make unavailable or deny" housing on the basis of race. 42 U.S.C. § 3604(a). FHA claims may be brought under either a disparate treatment theory, which requires a showing of intentional discrimination, and/or a disparate impact theory, which does not. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933-34 (2d Cir. 1988) ("*Huntington Branch II*"); *Fair Hous. in Huntington Comm.*, 2005 WL 3184273, at * 2. Contrary to Defendants' arguments, the Amended Complaint properly alleges violations of the FHA.

(i) Plaintiffs Have Adequately Pleaded Intentional Discrimination

To plead a *prima facie* case under a disparate treatment theory, plaintiffs must show that "animus against the protected group was a significant factor in the position taken by the municipal decision-makers themselves or by those to whom the decision-makers were knowingly responsive." *LeBlanc-Sternberg*, 67 F.3d 412, 425 (2d Cir. 1995) (internal quotations and citation omitted). Once plaintiffs establish a *prima facie* case, defendants bear the burden of demonstrating that their action was taken to further "a legitimate, bona fide governmental interest and that no alternative would serve the interest with less discriminatory intent." *Huntington Branch II*, 844 F.2d at 936. In this action, Defendants argue that Plaintiffs' claims fail under an intentional discrimination theory because the Amended Complaint "lacks any inference of discriminatory animus." (County Mem. at 25; *see also* Village Mem. at 20-21.) That argument completely ignores much of the Amended Complaint.

Intent to discriminate may be inferred from the totality of relevant facts, including the fact that a regulation bears more heavily on one race than another. *See U.S. v. Yonkers Bd. of Ed.*, 837 F.2d 1181, 1221 (2d Cir. 1987) (internal quotations omitted). The Second Circuit has held that among the factors from which intent may be inferred are:

- the "historical background of the decision . . ., particularly if it reveals a series of official actions taken for invidious purposes";
- "[t]he specific sequence of events leading up to the challenged decision," such as zoning changes for a given site enacted upon the decisionmaker's learning of plans for the construction there included integrated housing opportunities;
- "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports";
- "[d]epartures from the normal procedural sequence"; and
- "[s]ubstantive departures . . ., particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."

Id., quoting Arlington Heights, 429 U.S. at 267-68. In addition, "[t]he foreseeability of a segregative effect, or adherence to a particular policy or practice, with full knowledge of the predictable effects of such adherence upon racial imbalance" is a factor to consider in determining intent.[23] *See U.S. v. City of Yonkers*, 96 F.3d 600, 612 (2d Cir. 1996) (citation omitted).

With regard to the "historical background" of the decision to reject the Proposed Zoning, the Amended Complaint alleges:

- "It is, and for many years has been, an express policy and practice of the [County], to develop and promote the development of non-age restricted affordable housing only in predominantly minority and low-income areas of Nassau County and to exclude such affordable housing from areas that are predominantly populated by white people." (Am. Compl. ¶ 22; *see also id.* ¶¶ 23-24, 29.)

- The County maintains a policy to direct federal funding to support development of affordable housing in communities that are predominantly populated by minorities. (*Id.* ¶¶ 27-28, 30.)

- The County has a "deliberate policy and practice of fostering the development of subsidized senior housing only or disproportionately on sites that are located in predominantly white areas of Nassau County, even though it knows that a disproportionate percentage of the residents of such housing are and will be white persons." (*Id.* ¶ 31.)

- The County maintains a policy of "disallowing County-owned properties located in predominantly white communities of Nassau County to be sold to housing developers who it knows or believes will build affordable and integrated multi-family housing opportunities . . . [and] maintains a policy and practice of affirmatively promoting the sale of County-owned property in predominantly minority communities to developers of affordable multi-family housing." (*Id.* ¶ 32.)

- The Village has rejected previous attempts to build affordable housing within its borders. (*Id.* ¶ 40, 42; *see also id.*, ¶ 39.)

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[23] The County maintains – without any legal support – that allegations of "a background of housing segregation, historical instances of discrimination and even of some instances of racial animus" cannot state a claim under the Fair Housing Act. (County Mem. at 23.) That argument is directly contrary to the Second Circuit's decision in *Yonkers Board of Education*.

- The Village has not stopped luxury multi-family housing developments that are likely to be populated by whites. (*Id.* ¶ 41.)

- The Village has engaged in other discriminatory conduct, including the exclusion of minorities from public parks and the exclusion of day care facilities likely to serve minorities. (*Id.* ¶ 43.)

Plaintiffs have further alleged facts showing that the "sequence of events" when the Village, with the County's express support, developed Proposed Zoning that could support affordable housing opportunities and then abruptly rejected it and adopted the Special Zoning when confronted with racially-motivated and pretextually-coded public opposition, support an inference of intentional discrimination:[24]

- During public hearings on zoning for the Social Services Site, "Garden City residents vociferously objected to the construction of affordable multi-family housing on the Social Services Site, and sought repeated assurances from [the Village] and County officials present that no such affordable multi-family housing would be built on the Social Services Site. Upon information and belief, the public opposition was racially motivated." (Am. Compl. ¶ 60.)

- The County "acquiesced in neighborhood and community opposition to the development of affordable housing on the Social Services Site and cooperated with, facilitated, and affirmatively supported in the Village's segregative zoning policies and practices by assuring Garden City residents, during the public hearings and at other times, that the County would not take any action antagonistic to Garden City's wishes and by agreeing to act in concert with the [Village] to reject the Proposed Plan and to permit only luxury housing to be built on the Social Services Site." (*Id.* ¶ 61; *see also id.* ¶ 34.)

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[24] As the Amended Complaint alleges, throughout the long course of planning the sale and disposition of the Social Services Site, the County and the Village "cooperated, facilitated, and coordinated their efforts." (Am. Compl. ¶ 49.) Parties acting in concert are jointly liable for actions violating the FHA. *See, e.g., Sofarelli v. Pinellas County*, 931 F.2d 718, 722 (11th Cir. 1991) (reversing dismissal of FHA claims against neighbors who were alleged to have "acted in concert with and for the same reasons" as other defendants specifically alleged to have left plaintiff threatening notes, vandalized property and shouted obscenities at plaintiff demonstrating racial intent); *United States v. Hartz Constr. Co.*, No. 97 C 8175, 1998 WL 42265, at *1 (N.D. Ill. Jan. 28, 1998) (rejecting motion to dismiss FHA claim where defendant architectural firm worked together with contractor to violate FHA); *Baltimore Neighborhoods, Inc. v. Rommel Builders, Inc.*, 3 F. Supp. 2d 661, 664 (D. Md. 1998) (denying summary judgment against defendant builder based on "design and construction" provision where Congress did not expressly limit possible defendants, thus demonstrating intent to impose liability on defendants other than developer); *Yates* v. *Hagerstown Lodge No. 212*, 878 F. Supp. 788, 797 (D. Md. 1995) (black applicant to fraternal organization asserted claim against organization's governor where he "inspired or participated" in the organization's discrimination) (internal quotations omitted).

- "In direct response to the aforementioned neighborhood and community opposition, the County Government, by its County Executive the Honorable Thomas R. Suozzi . . . gave express assurances that only luxury housing – that is to say, housing that defendant County knew or should have known was likely to attract predominantly white residents – would be allowed to be developed on the Social Services Site and gave as the reason therefor that given 'the character of Garden City,' only such housing 'would be appropriate.'" (*Id.* ¶ 62.)

Plaintiffs further alleged that the Village made "substantive departures" from its usual zoning scheme by adopting zoning unique to the Social Services Site:

- The Village rejected the Proposed Zoning in favor of the Special Zoning that "imposed stringent and unique limitations on multi-family housing, unlike those found elsewhere in the Village's zoning regulations and . . . prohibited the development of [] integrated housing on the Social Services Site." (*Id.* ¶¶ 63-64.)

- Defendants' purported concern with increased traffic and an increased burden on the Garden City schools from additional children that the Proposed Plan would cause was not the real reason that the defendants rejected Proposed Zoning and adopted the Special Zoning. Garden City's own consultants projected that the impact of the Proposed Plan on these factors would be negligible. (*Id.* ¶¶ 71-72.)

Finally, the County and Village took these actions with actual or constructive knowledge that the foreseeable effect of their actions to prevent integrated, affordable housing in Garden City would be to perpetuate segregation in Garden City. (*See, e.g., id.* ¶¶ 24, 27, 28, 31, 62.)

It is without question that Plaintiffs have alleged numerous facts from which the County's and the Village's intent to discriminate on the basis of race can be inferred under *Yonkers Board of Education*, *Arlington Heights* and *City of Yonkers*.[25]

[25] The Village's argument that Plaintiffs failed to demonstrate intent because they failed to allege facts from *each* category of factors considered under *Arlington Heights* misreads the law. (Village Mem. at 21.) Discriminatory intent may be inferred from a totality of the circumstances through a variety of indicia. *See LeBlanc-Sternberg*, 67 F.3d at 425. Furthermore, the Village's argument that Plaintiffs must allege that Plaintiffs *themselves* had interacted with Defendants concerning the Proposed Zoning or the Special Zoning (Village Mem. at 21) is not supported by any precedent.

(ii) Plaintiffs Have Adequately Pleaded Their Fair Housing Act Claims Under A Disparate Impact Theory

To demonstrate a *prima facie* case under a disparate impact theory, plaintiffs must allege facts demonstrating that the Special Zoning at issue actually or predictably results in racial discrimination, or in other words, that the Special Zoning has "a significantly adverse or disproportionate impact on minorities, or perpetuates segregation." *Fair Hous. in Huntington Comm.*, 2005 WL 3184273, at * 2; *see also Huntington Branch II,* 844 F.2d at 934 (internal quotations omitted). Zoning can have discriminatory effect if it has "adverse impact on a particular minority group" or causes "harm to the community generally by the perpetuation of segregation." *Id.* at 937. Once plaintiffs have made their *prima facie* case, the burden shifts to defendants, who "must present bona fide and legitimate justifications for its action with no less discriminatory alternatives available." *Id.* at 939.

(a) Plaintiffs Properly Allege That Defendants Have Created An Impermissible Obstacle to Integration

Defendants' argument that Plaintiffs fail to sufficiently allege a *prima facie* case under the disparate impact is based entirely on a misapplication of *Acevedo v. Nassau County*, 500 F.2d 1078 (2d Cir. 1974). According to Defendants, Plaintiffs' claims must be dismissed because *Acevedo* holds that municipalities do not have a duty to build affordable housing. (County Mem. at 19-20, Village Mem. at 17-18.) Plaintiffs do not dispute that neither the County nor the Village have a constitutional or statutory affirmative duty to provide affordable housing of any kind. *See Huntington Branch II*, 844 F.2d at 936; *Acevedo*, 500 F.2d at 1080-81. The Amended Complaint does not seek to do anything but require Defendants to meet their obligations under the Constitution and the FHA.

Instead, regarding the Social Services Site, Plaintiffs allege that Defendants are prohibited from creating obstacles to integration, as manifested in the Village's rejection of its

own consultants' Proposed Plan and the imposition of the Special Zoning with the County's support and acquiescence. The Second Circuit clearly held in *Huntington Branch II,* that where plaintiffs seek the removal of a governmentally-imposed obstacle to private development of affordable housing, FHA claims cannot be rejected. *See Huntington Branch II*, 844 F.2d at 940-41 (town liable for refusal to amend zoning to permit private developer to construct multi-family housing outside heavily minority area). Defendants' repeated attempts to improperly shoehorn Plaintiffs' allegations into *Acevedo's* framework ignores both Plaintiffs' allegations and the clear Second Circuit precedent, as articulated in *Huntington Branch II*, that is contrary to Defendants' position.[26]

The County argues that the Amended Complaint fails to state a claim because *Huntington Branch II* requires that Plaintiffs themselves must seek to build the affordable housing. (County Mem. at 21-22.) The County further argues that NYAHC's proposals are insufficient to show disparate impact because NYAHC's proposal was "admittedly non-responsive" to the RFP. (County Mem. at 21.) These arguments wholly ignore that the Amended Complaint clearly alleges that plaintiff NYAHC seeks to build affordable housing on the Social Services Site. (Am. Compl. ¶¶ 77-80.) Whether or not NYAHC's proposal complied with the County's RFP issued under the Special Zoning is irrelevant. The only issue relevant to the disparate impact analysis is whether Plaintiffs seek to have affordable housing constructed *after* the governmentally imposed obstacle has been removed. *See Huntington Branch II,* 844 F.2d at 940-41. The Amended Complaint alleges that NYAHC, among others, is ready, willing and able to build such housing

[26] Defendants' argument also fails because it concerns only the allegations in the Amended Complaint regarding the Social Services Site, and ignores all the other allegations concerning acts and policies that have caused and promoted segregation throughout the County.

once the Special Zoning is removed. (Am. Compl. ¶¶ 77-80.) That is sufficient under *Huntington Branch II.*

(b) Plaintiffs Have Adequately Stated Their Fair Housing Act Claims Under *Fair Housing in Huntington*

The recent decision in *Fair Housing in Huntington* is instructive. Huntington – exactly like the County and the Village – had an established and extensive history of segregating minorities in the "least desirable areas of Huntington" as documented in various cases in the Second Circuit. *Fair Hous. in Huntington Comm.*, 2005 WL 3184273 at *3. When a developer's proposal contained two- and three-bedroom affordable apartments at the Sanctuary, a site in a predominantly white area of Huntington, the Town of Huntington "effectively rejected" the proposal by failing to vote on it for more than a year. *Id.* (internal quotations omitted). However, after the Sanctuary developer modified its proposal to include only studio and one-bedroom affordable units, Huntington approved the modified proposal on the very next day. *See id.* Plaintiffs alleged that Huntington acted in a discriminatory fashion because Huntington knew that the multi-bedroom apartments would offer integrated housing opportunities for minorities while the smaller units in the Sanctuary development would be less likely to attract minorities. *See id.*

Having initially dismissed plaintiffs' complaint, the court denied defendants' motion to dismiss on reconsideration and rejected defendants' reliance on *Acevedo*. *See id.* at *2. Emphasizing the early stage of the litigation, the Court explained its reinstatement of plaintiffs' complaint:[27]

[27] Perhaps eager to ignore the recent holding, the Village directs the Court to the Second Circuit decision which preceded it. (Village Mem. at 19.) However, in that decision – as the District Court recently concluded – the Second Circuit *affirmed* the legal viability of exclusionary zoning claims where a municipality blocks proposed rezoning which would permit housing likely to include minorities – and stated that a viable claim (albeit a "novel application") could be stated where the municipality simply failed to include affordable housing in its zoning plans,

> [G]iven [Huntington's] alleged history of discriminatory policies, coupled with its alleged inaction with regard to the multi-family proposal, followed by its immediate action concerning the revised proposal, which allegedly will attract less minorities, the Court finds that Plaintiffs have alleged more than a duty to provide low income housing; they have alleged that Defendants' actions, policies and procedures have prevented the development of housing most likely to attract minority families.

Id. at *3.

As in *Fair Housing in Huntington*, Plaintiffs here have made adequate allegations to sustain their claims under a disparate impact theory. Both the County and the Village have an extensive history of discriminatory policies. (Am. Compl. ¶¶ 18-43; *see Fair Hous. in Huntington Comm.*, 2005 WL 3184273 at *3.) With respect to the Social Services Site specifically, the Village – with the County's cooperation and encouragement – rejected the Proposed Zoning, eliminating the ability to develop affordable housing likely to attract minorities to Garden City. Subsequently, Defendants adopted the Special Zoning, which renders economically possible only development of luxury single-family homes and townhouses – housing that is likely to be inhabited mostly by white residents. (Am. Compl. ¶ 68; *see Dews v. Town of Sunnyvale*, 109 F. Supp. 2d 526, 567-68 (N.D. Tex. 2000) (zoning mandating large lots and low density in highly segregated area constitutes obstacle that perpetuates segregation and supports finding of disparate effect).) The County supported and encouraged the Village's Special Zoning as part of its express policy to locate affordable, multi-family housing within towns that are already predominantly minority. (Am. Compl. ¶¶ 22, 74-75; *see Huntington Branch II,* 844 F.2d at 937-38 (zoning only allowing privately-built multi-family housing in

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even absent blocking an inclusionary zoning proposal. *See Fair Hous. in Huntington Comm.*, 316 F.3d at 367. The particular holding – that on the facts presented at the preliminary injunction phase, plaintiffs did not have a *factual* "likelihood of success" under that theory – in no way undermines the Second Circuit's endorsement of the viability of either theory (novel or not). *See id.* (plaintiffs may prove claim by (a) "demonstrat[ing] a disparate impact flowing from the Town's zoning approval," and (b) rebutting Town's claims that its "actions further[] ... a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect").

segregated urban renewal area perpetuated segregation and demonstrated disparate effect); *Yonkers Bd. of Ed.*, 837 F.2d at 1219 (town liable for decisions not to construct subsidized housing in virtually all-white areas; *Acevedo* distinguishable).) As in *Fair Hous. in Huntington*, an initial zoning proposal which would have permitted housing likely to include minorities was blocked; in its place, a new zoning proposal (contemplating housing that would attract predominately white residents) was adopted. (Am. Compl. ¶¶ 63, 68, 71-72; *see Fair Hous. in Huntington Comm.*, 2005 WL 3184273 at *3.) Plaintiffs' allegations state a valid disparate impact claim.

(c) Defendants' Remaining Disparate Treatment Arguments Must Be Rejected

The Village argues that Plaintiffs' allegations "lack[ed] . . . credibility" because the Special Zoning permits certain residential development and thereby increases the overall available housing in Garden City. (Village Mem. at 3.) This argument ignores the law in this Circuit, namely that "once a municipality has decided to construct housing [it may not] lawfully proceed with segregative intent and effect to confine housing for minority occupancy to areas in which minority residence is already concentrated, thereby enhancing and perpetuating racial segregation in housing patterns." *Yonkers Bd. of Ed.*, 837 F.2d at 1181 (town found liable under FHA where, *inter alia*, town located affordable housing in minority-populated neighborhoods).

The Village further attempts to justify its discriminatory acts by suggesting that Plaintiffs' so-called "expansive reading" of the FHA would prevent municipalities from controlling the "rate and character" of its development. (Village Mem. at 20.) Whether luxury homes to be constructed under the Special Zoning may be in the "character of the surrounding neighborhood" (*Id.* at 2) is inapposite if the Defendants' blocking of the Proposed Zoning and substituting the Special Zoning perpetuates segregation. *See Yonkers Bd. of Ed.*, 837 F.2d at

1192-93 (town's decision to sell property for luxury condominiums to attract "kind of people that we would like to live in the neighborhood' constituted patterns of segregative effect that was "in significant part racially motivated"); *Dews*, 109 F. Supp. 2d at 567 (town's "ban on apartments and stubborn insistence on large lot, low density zoning also perpetuate[s] racial segregation"). The Village's case in support of its argument, *Eastampton Ctr., LLC v. Twp. of Eastampton*, 155 F. Supp. 2d 102 (D.N.J. 2001), is not to the contrary. The District of New Jersey expressly distinguished its holding there from a case where a development plan and corresponding zoning "foreclose[d] future development of housing" for a protected group in a particular town. *Id.* at 118. Because the rejection of the Proposed Zoning and the adoption of the Special Zoning blocked the development of affordable housing, *Eastampton* is distinguishable. Plaintiffs have demonstrated a *prima facie* case for their claims under a disparate impact theory.

2. Plaintiffs Have Adequately Pleaded Their Section 1981, 1982 and 1983 Claims

Plaintiffs further assert that the County and Village have violated Sections 1981 and 1982 of the Civil Rights Act of 1866, Section 1983 of the Civil Rights Act of 1871, and the Fourteenth Amendment's Equal Protection Clause, as a result of their discriminatory patterns and practices. (Am. Compl. ¶¶ 98-103.) Defendants' main objection to Plaintiffs' Civil Rights Act claims is that Plaintiffs have failed to plead intentional discrimination. (County Mem. at 24-25; Village Mem. at 22-24.) As demonstrated in the previous section, Plaintiffs have properly alleged intent such that Plaintiffs' Section 1981, 1982 and 1983 and Equal Protection Clause claims cannot be dismissed. *See Fair Hous. in Huntington Comm.*, 2005 WL 3184273, at * 4-5 (plaintiffs' Equal Protection and Section 1982 and 1983 claims upheld where plaintiffs have demonstrated necessary intent demonstrated under analysis on FHA claims).

With respect to Plaintiffs' Section 1982 claim, the Village argues that NYAHC's plans to purchase or lease the Social Services Site were not blocked by the Village's actions. (Village Mem. at 23.) As explained above, Plaintiffs specifically allege that the Village's Special Zoning rendered development of affordable housing on the Social Services Site economically unfeasible such that NYAHC was blocked from submitting an affordable housing proposal responsive to the County's RFP that also adhered to the Special Zoning. (Am. Compl. ¶ 77.) The Amended Complaint alleges that NYAHC has developed a plan to build affordable housing that complies with the zoning in the Proposed Plan. If the Village had not blocked the Proposed Plan, NYAHC could have submitted a bid to build affordable housing that complied with both the Proposed Plan zoning and the County's RFP. (*Id.* ¶ 80.) Plaintiffs' allegations demonstrate that the County and Village acted together to perpetuate racial segregation, and must be held jointly liable. *See, e.g., Sofarelli*, 931 F.2d at 722; *Hartz Constr. Co.*, 1998 WL 42265, at *1; *Baltimore Neighborhoods*, 3 F. Supp. 2d at 664; *Yates*, 878 F. Supp. at 797. The Village cannot credibly suggest that it can evade liability because its zoning decisions were proper in a vacuum.

3. Plaintiffs Have Adequately Pleaded Their Section 3608 Claim

In their claim under Section 3608 of the FHA, Plaintiffs allege that the County used "federal funds related to housing, including funds from the federal CDBG and HOME programs" in a discriminatory fashion. (Am. Compl. ¶ 105.) Specifically, Plaintiffs have alleged that the County has breached its duty under Section 3608 "affirmatively to further" the FHA[28] by directing its CDBG and HOME funds for the development of affordable housing in communities the County knew were predominantly populated by minorities – and by excluding use of those funds to develop such housing in predominantly white areas. (*Id.* ¶¶ 22, 24-28.) Plaintiffs

[28] Section 3608 imposes "a substantive obligation to promote racial and economic integration" in administering federal housing programs. *Alschuler v. HUD*, 686 F.2d 472, 482 (7th Cir. 1982).

further allege that the County uses CDBG and HOME funding to support affordable housing development in predominantly minority communities, such as Roosevelt, Inwood, Hempstead Village, New Cassel and Freeport, instead of supporting housing development at locations such as the Social Services Site in the white enclave of Garden City.[29] (*Id.* ¶¶ 22, 24, 27.)

The County makes two arguments against the Section 3608 claim, neither of which is meritorious. First, the County, relying upon *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973), concedes that the "affirmatively to further" duty applies to municipalities that receive federal funds, but argues that "it is unclear whether [Section 3608] creates a right of action against local governments concerning administration of federal funds."[30] (County Mem. at 15.) According to the County, *Otero* is limited to instances in which plaintiffs seek to have the municipality "integrate its own public housing." (*Id.*) However, 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 municipal recipient of federal housing funds. *Otero,* 484 F.2d at 1133-34. In fact, courts have repeatedly extended Section 3608's "affirmatively to further" requirement to local recipients of federal funding for housing.[31] *See, e.g., Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 71-75 (D. Mass.

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[29] The County has also failed to comply with Section 3608's basic procedural obligations, which require funding recipients to collect data and consider the impact of its site selections on racial segregation. (Am. Compl. ¶¶ 26, 29-30.)

[30] Section 3608 requires that HUD, among others, "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(d), (e)(5).

[31] To the extent that the County is also arguing that claims based on municipal decisions regarding where to situate federally funded housing are not cognizable under Section 3608, that assertion is clearly incorrect. *See Shannon v. HUD,* 436 F.2d 809, 817-18 (3d Cir. 1970) (citations omitted) (FHA violation where agency "had no procedures for consideration of and in fact did not consider its effect on racial concentration in that neighborhood or in the [area] as a whole."); *see also Project B.A.S.I.C. v. Kemp*, 776 F. Supp. 637 (D.R.I. 1991) (cause of action stated against HUD and local housing authority under Section 3608 for conduct involving location of subsidized housing in minority concentrated area); *see also Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582, 583 (N.D. Ill. 1967) (permitting Title VI claims based on allegations that "[city housing authority] has selected sites, deliberately or otherwise, for public housing projects almost exclusively within neighborhoods the racial composition of which was all or

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); *U.S. v. Charlottesville Redevelopment & Hous. Auth.*, 718 F. Supp. 461, 464-65 (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: Law and Litigation*, § 21.1 (West 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.").

The County also argues that Plaintiffs must challenge a specific grant decision as violative of the FHA under the Second Circuit's decision in *Evans v. Lynn*, 537 F.2d 571 (2d Cir. 1975). (County Mem. at 15, 23-24.) *Evans* contains no discussion or analysis stating a requirement to allege a single, specific grant decision. The court includes the line relied upon by the County – namely that the court conferred standing to plaintiffs "as to the federal agencies to challenge the particular grants in question" – to explain that its decision to confer standing is not premised on "the basis that [plaintiffs] have a sufficient connection with the community to or for the benefit of which the grants are made." *Evans*, 537 F.2d at 579. In fact, the Second Circuit required only that the grants upon which a Section 3608 claim rests are related either to housing or urban development. *See id.* The County's argument is also belied by *Gautreaux*, *Shannon* and *Langlois*, all of which address systemic failures to comply with an agency's affirmative duties under Section 3608.

Even if the County could cite authority conferring a requirement to challenge a specific grant decision, the County ignores the fact that Plaintiffs have identified the County's specific

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substantially all Negro at the time the sites were acquired, for the purpose of, or with the result of, maintaining existing patterns of urban residential segregation by race").

and explicit plan to use certain federal funding for affordable housing only in predominantly minority communities (Am. Compl. ¶¶ 22, 24, 27), as well as a specific decision at the Social Services Site to coordinate with the Village to exclude affordable housing from the predominantly white community of Garden City. (*Id.* ¶ 62.) The County's challenge to Plaintiffs' Section 3608 claim must be rejected, as Plaintiffs have clearly set forth a legally-cognizable claim.

4. Plaintiffs Have Adequately Pleaded Their Section 2000d Claim

In their final cause of action, the Individual Plaintiffs and New York ACORN allege that the County has violated Section 2000d of the Civil Rights Act of 1964 by administering its federal programs, including the CDBG and HOME programs, in a discriminatory manner. (Am. Compl. ¶ 107.) As set forth above, numerous courts, such as *Gautreaux* and *Shannon*, have found that federal funding programs used to exacerbate segregation can be challenged through Title VI. *See Shannon*, 436 F.2d at 817-18; *Gautreaux*, 265 F. Supp. at 583. Thus, the County's citation of *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1214 (8th Cir. 1972), for the proposition that Title VI cannot be used to attack a zoning law, is simply inapposite. (County Mem. at 24.) Here, the Title VI claim, like the Section 3608 claim, is directed at the County's pattern of funding of affordable housing in a manner that perpetuates and exacerbates residential segregation in Nassau County, not simply to attack a zoning law.

* * *

IV. CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied.

Dated: New York, New York
February 22, 2006

By: _____

Paul B. Sweeney (PS 5254)
Michael Starr (MS 6851)
Jenny Rubin Robertson*
Kim F. Bridges (KB 1306)

HOGAN & HARTSON LLP
875 Third Avenue
New York, New York 10022
(212) 918-3000

Attorneys for the Individual Plaintiffs

- and -

Frederick K. Brewington (FB 5295)
Law Offices of Frederick K. Brewington
50 Clinton Street -- Suite 501
Hempstead, NY 11550
(516) 489-6959

Jonathan P. Hooks (admitted *pro hac vice*)
Nicole J. DeSario (admitted *pro hac vice*)
Lawyers' Committee for Civil Rights
Under Law
1401 New York Avenue, N.W. -- Suite 5000
Washington, D.C. 20005
(202) 662-8326

Attorneys for Plaintiffs
New York Association of Community
Organizations for Reform Now, New York
ACORN Housing Company, Inc. and
the Individual Plaintiffs

* *pro hac vice* admission to be sought